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COMPARATIVE ASSESSMENT OF MEASURES TO TACKLE THE ILLEGAL TRADE IN ENDANGERED SPECIES

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COMPARATIVE ASSESSMENT OF MEASURES TO TACKLE THE ILLEGAL TRADE IN ENDANGERED SPECIES

By

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Author's Declaration

At no time during the registration for the degree of Doctor of Philosophy has the author been registered for any other University award without prior agreement of the Doctoral College Quality Sub-Committee.

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Comparative Assessment of Measures to Tackle the Illegal Wildlife Trade in Endangered Species, by Melanie Berry

Abstract

This thesis is an assessment of measures to tackle the illegal trade in endangered species in Australia, South Africa and the UK. Utilising responses from Freedom of Information Act requests, it is shown that organisations have varying reactions when implementing domestic legislation relating to the illegal wildlife trade. Analysis extends to the offences contained within the domestic legislation; the requirements laid down in the Convention on International Trade in Endangered Species, along with other legislation aids the combating of the illegal wildlife trade. It highlights both global and national issues and the importance of tackling the illegal wildlife trade. This research helps to identify some of the strengths and weaknesses in the organisations aiming to tackle crime in each country. The findings demonstrate the importance of interrelationships between organisations, with analysis of results in relation to responses of police forces and prosecution services within the countries of study. The methodology put a legal responsibility on the organisations to provide accurate and reliable results regarding their actions, helping to reduce any risk of bias. This methodology demonstrated weaknesses within certain organisations, through the differing responses discussed. The original contribution to knowledge required for a doctoral thesis is the primary data generated through the Freedom of Information requests and the subsequent findings which demonstrate a comparison of the strengths and weaknesses between law and enforcement within each country.

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Regulation (EC) No. 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters in Community Institutions and bodies (OJ 2006, L 264/13)

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List of Abbreviations

CBD	Convention on Biological Diversity
CDPP	Commonwealth Director of Public Prosecutions
CEMA	Customs and Excise Management Act
CITES	The Convention on International Trade in Endangered Species of Wild Fauna and Flora
CJEU	Court of Justice of the European Union
CoP	Conference of Parties
COTES	Control of Trade in Endangered Species
CPS	Crown Prosecution Service
DEFRA	Department for the Environment, Food and Rural Affairs
EC	European Commission
EEC	European Economic Community
EPBC	Environmental Protection and Biodiversity Conservation
EU	European Union
EWT	Endangered Wildlife Trust
FOI	Freedom of Information
Fprint	Fingerprint
GATT	General Agreement on Tariffs and Trade
GEF	Global Environment Facility
HMCTS	Her Majesty's Courts and Tribunals Service
HMIC	Her Majesty's Inspectorate of Constabulary
ICJ	International Court of Justice
ICO	Intensive Correction Order

IFAW	International Fund for Animal Welfare
IUCN	International Union for the Conservation of Nature
IMO	International Maritime Organisation
IPPC	International Plant Protection Convention
ISPM	International Standards for Phytosanitary Measures
JNCC	Joint Nature Conservation Committee
MEA	Multilateral Environmental Agreement
MIKEs	Monitoring the Illegal Killings of Elephants
NDF	Non Detrimental Findings
NEMBA	National Environmental Biodiversity and Conservation Act
NGOs	Non-governmental organisations
NIM	National Intelligence Model
NWCU	National Wildlife Crime Unit
PACE	Police and Criminal Evidence
PAIA	Promotion of Access to Information Act
PAW	Partnership for Action Against Wildlife Crime
PCC	Police and Crime Commissioner
PNC	Police National Computer
POCA	Proceeds of Crime Act
REIO	Regional Economic Integration Organisations
RIPA	Regulation of Investigatory Powers Act 2000
ROICA	Regulation of Interception of Communications and Provision of Communications-Related Information Act
RRO	Recognizance Release Order
RSPB	Royal Society for the Protection of Birds

RSPCA	Royal Society for the Prevention of Cruelty to Animals
SPS	Sanitary and Phytosanitary
TFEU	Treaty on the Functioning of the European Union
TGBG	Good Behaviour
TIA	Telecommunications (Interception and Access)
UK	United Kingdom
UK	United Kingdom Border Force Agency
UN	United Nations
UNCAC	United Nations Convention Against Corruption
UNECE	United Nations Economic Commission for Europe
USA	United States of America
WCA	Wildlife and Countryside Act
WTO	World Trade Organisation
WWF	World Wildlife Fund

1.0 Introduction

The trade in endangered species impacts across the world's most ecologically significant areas, and is the fourth largest crime involving international trade, valued at an estimated £15 billion.[1] Despite The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) being one of the most successful international environmental treaties and the efforts of a variety of organisations, there remain global concerns that this illicit trade continues to thrive.[2] Whilst insufficient research into the frequency of this crime[3] makes it difficult to effectively quantify the extent to which wildlife trade offences occur, the research does suggest it has negative impacts not only for endangered species protection, ecosystem stability and biodiversity conservation, but is also an increasing risk to national and global security.[4] Involving the same offenders and smuggling routes, it is believed to be closely linked to other areas of international organised crime, such as trafficking in drugs, firearms and people.[5] Allied to this, there is a history of reports that

[1] WWF, 'Multi-Billion Pound Illegal Wildlife Trade is Threatening Endangered Species Across 45% of Natural World Heritage Sites', (WWF, 18 April 2017) https://www.wwf.org.uk/updates/multi-billion-pound-illegal-wildlife-trade-threatening-endangered-species-across-45-natural25 September 2018

[2] Zimmerman, M.E., 'The black market for wildlife: Combating transnational organised crime in the illegal wildlife trade' (2003) 36 Vanderbilt Journal of Transnational Law 1657

[3] Schneider, J.L., 'Reducing the Ilicit Trade in Endangered Wildlife' (2008) 24 Journal of Comtemporary Criminal Justice 274

[4] IFAW, 'Criminal Nature: The Global Security Implications of the Illegal Wildlife Trade', (IFAW, 2008) https://s3.amazonaws.com/ifaw-pantheon/sites/default/files/legacy/Criminal%20Nature%20Global%20security%20and%20wildlife%20trade%202008.pdf 25 September 2018

[5] ibid

indicate terrorist groups may be engaging in wildlife smuggling to help fund their activities.[6]

Non-governmental organisations (NGOs) continue to raise awareness of issues surrounding the illegal wildlife trade, which in turn creates increased demand for countries to act. These issues will be explored in more detail as the research considers the evolving and contemporary threats associated with the illicit trade in endangered species and the difficulties these pose for countries and organisations aiming to tackle these offences. However, these environmental and security threats demonstrate the importance in weakening the crime syndicates involved with the international illegal wildlife trade and ending all illicit trade in endangered species.

By becoming a Party to CITES, a State is formally required to uphold its principles through the implementation of domestic legislation, including strict obligations regarding the import, export and re-export of certain species. As the trade in endangered species crosses international borders, the safeguarding of species from over-exploitation requires international cooperation. This cooperation is therefore crucial to the success of the Convention, the prevention of the illegal wildlife trade and the deterrence of future offenders. In recognition of the significance of cooperation, this thesis focuses on the efforts of three countries, the United Kingdom, Australia and

[6] Wyler, S. and Sheikh, P., 'International Illegal Trade in Wildlife: Threats and U.S. Policy', (Defense Technical Information Centre, 22 August 2008) http://www.dtic.mil/dtic/tr/fulltext/u2/a486486.pdf 25 September 2018

South Africa, which are all Party to CITES, comparing and contrasting their efforts to put an end to the illegal wildlife trade.

This work is in six chapters:

- Chapter 1 offers an introduction into the research involved in this thesis;
- Chapter 2 provides an analysis of the literature, the historical development of the regulation of the illegal wildlife trade and the issues involved;
- Chapter 3 reviews the legislation governing the trade in endangered species and the issues under investigation for each country of study;
- Chapter 4 explains the research methodology adopted for the purpose of this thesis;
- Chapter 5 contains the research results and their analysis relating to the UK and Australia;
- Chapter 6 contains the research results and their analysis relating to South Africa;
- Chapter 7 offers conclusions and recommendations for enhancing the effectiveness of legislation, structures, enforcement authorities and approaches aimed at tackling the illegal wildlife trade.

The literature review provides an overview of the illegal wildlife trade and the issues arising. It reflects upon current thinking, highlighting areas of concern, and explores the limitations and effectiveness of CITES.

In exploring the mechanisms implemented by the UK, Australia and South Africa to fulfil their obligations under CITES and their efforts to tackle the illegal wildlife trade, the domestic legislation for each is investigated and compared in Chapter 3. In addition, the chapter also examines national legislation imposing stricter obligations than under CITES; and further legislation, which whilst more general in its remit, is also available to enforcers. Chapter 3 will also set out the powers available to enforcement organisations within the countries of study, and critically analyse their utilisation.

The methodology deployed to achieve the objectives of the thesis is set out in Chapter 4. The chapter also identifies the obstacles encountered whilst conducting the research and sets out how these were resolved.

Chapters 5 and 6 provide analysis the data collected from enforcement agencies in the countries of study. It offers a critical comparison of relevant structures established through legislative and policy frameworks. A comparative discussion of the responses of these agencies in their efforts to combat the illicit trade also highlights the future direction of potential research, whilst noting the limitations of this thesis consequent upon the obstacles encountered in the research. Finally, the thesis makes recommendations for the improvement of legislation, structures and enforcement authorities on the basis of identifying comparative best practice, including, but not limited to, a ban on the trade in ivory. The law and policy discussed in this thesis is correct as of 31st December 2018, however the methodology and data

collection were done in respect of the pre-2018 COTES legislation and so any reflection on the responses from each country is in respect of the version in force at the time, although changes had to be made to the thesis as the law changed just prior to submission.

2.0 Literature Review

2.1 Introduction

The illegal wildlife trade is one of the biggest threats to the survival of some of the world's most endangered species,[7] coming second only to habitat destruction as a risk of species loss and potential extinction. This is due to the fact that in addition to the taking of species protected under the auspices of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) 1973, [8] the illegal wildlife trade acts as a potential avenue for invasive species that could effectively compromise global biodiversity.[9] With the potential for the illegal wildlife trade to drive species to extinction, it is likely to result in negative impacts on ecosystems throughout the world.

Along with adverse implications for the environment, the illegal wildlife trade can also indirectly impact upon human and animal health. By way of an example, the illicit activity not only involves risk to global ecosystems, but may also pose serious risk of initiating epidemics of infectious diseases.[10] As the rate of illegal wildlife trade continues to rise, it becomes increasingly

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[7] WWF 'Illegal Wildlife Trade', (WWF, 2012) http://www.wwf.org.uk/what_we_do/safeguarding_the_natural_world/wildlife/illegal_wildlife_trade/ 03 January 2013

[8] The Convention currently applies to 183 countries. Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) 1973 (http://www.cites.org/eng/disc/text.php)

[9] Rosen, G. and Smith, K., 'Summarizing the Evidence on the International Trade in Illegal Wildlife', (2010) 7 EcoHealth 24

[10] Gómez A. and Aguirre A., 'Infectious Diseases and the Illegal Wildlife Trade', (2008) 1149 Annals of the New York Academy of Sciences 16

necessary for an interdisciplinary approach to tackle the problem; involving multi-sectorial working to mitigate the consequences. The introduction of non-native, invasive species introduction and their impact, will be explored in more detail later in this Chapter.

2.2 Destination, Supply and Transit Countries

There are a number of categories of illegal trade in fauna and flora, but it has been identified that there are five distinct groupings (by monetary value): illegal timber trade; caviar trafficking; activities related to drug trafficking; skins, furs and traditional Asian medicines; and specialist specimen collections.[11] However, illicit wildlife trade routes run parallel, not only to each other, but to illegal trade routes of other transnational crimes, such as drugs and weapons trafficking, on which analysts have commented that organised criminals target weak States.[12] The literature identifies weak States, with a focus on drug trafficking routes[13], whether this be source, transit or destination countries, as being especially attractive as they can operate with impunity.[14] Weaker states are defined by Transparency International as countries with characteristics of corruption, porous borders and poor law enforcement.[15]

[11] Schneider, J., 'Reducing the Illicit Trade in Endangered Wildlife: The Market Reduction Approach', (2008) 24 Journal of Contemporary Criminal Justice 274
[12] Home Office, *Extending our reach: A comprehensive approach to tackling serious organised crime* (July 2009) p. 2
[13] Vince, G., 'Organised gangs target wildlife trade' *New Scientist* (17 June 2002)
[14] Gooch, F., *Shoot on Sight* (2011) p. 34
[15] Transparency International, 'Corruption at Borders', (U4 Anti-Corruption Resource Centre, 28 April 2018) https://knowledgehub.transparency.org/assets/uploads/helpdesk/Corruption-at-borders-2018.pdf 12 Deccember 2018

Wildlife source and transit countries are likely to reflect these characteristics, and thus be exploited when compared to destination States.[16]

The trade in CITES species concerns the movement from range or supply States - countries or regions of natural habitat - often through transit countries, before reaching their final destination. Range States are those countries exploited by those involved in the illegal wildlife trade because their wildlife is in demand, for example South Africa and Australia; both countries have a rich fauna and flora at risk of exploitation as a result of the illegal, transnational trade in endangered species. According to CITES, the passage of a specimen across or through a country that is neither its country of origin, nor its country of destination, is a transit country. Such a country could, for example, act as a funnel for long-haul shipments where items are packed in bulk. Such intermediate destinations also provide the opportunity for modes of shipment to be switched. Transit countries may additionally offer a processing function, so that the item may be altered from its raw form to a finished product. For example, elephant tusks can be carved into a variety of smaller ivory items, or reptile skin may be fashioned into clothing, which may be more difficult for enforcement agencies to detect.

Transit countries may also act as a means to undermine the permit system, discussed more fully in Chapter 3. In short, CITES-listed species require the correct paperwork in order to enter signatory countries; therefore, transit countries may provide a way to gain this paperwork, whether legally or

[16] Vince, G., 'Organised gangs target wildlife trade' *New Scientist* (17 June 2002)

fraudulently in order to circumvent customs requirements.[17] In addition, the most favoured transit countries tend to be those with weak border controls, legislation and enforcement, allowing bulk shipments to be broken down into less conspicuous ones. Whilst South Africa is a range country, the UK is classified as both a destination and a transit country for shipments entering into the European Union (EU) and Australia is a transit country for shipments making their way to Asia and beyond.

Destination countries are where illegal wildlife shipments are offered on the market; they provide the pull generating the demand. Destination countries tend to be more economically developed than supply or transit countries, but this is not always the case. The destination market may be serving cultural demands, such as for using the illicit specimens for medicinal or religious purposes, for example China and/or Chinese communities. Alternatively, the UK and Australia, amongst others, are destination countries where individuals will pay high prices for illegal wildlife trade products with a perception of luxury.

A contemporary example, which explains the movement from range to destination State involves routes exploited during conflict. Military personnel and their affiliates have significant buying power that can influence demand for illegally traded wildlife specimens.[18] Kretser et al, have identified that in combat zones, with limited access outside their assigned base, military

[17] Halstead, B, 'Traffic in Flora and Fauna', (1992) 41 Trends and Issues in Crimes and Criminal Justice 2
[18] Kretser H., *et al*., 'Wildlife trade products available to U.S military personnel serving abroad' (2012) 21(4) *Biodiversity and Conservation* 967 at p. 967

personnel will purchase items at on-base bazaars. However, this may include items, such as souvenirs, that be, or contain, protected wildlife products. If this is the case, military personnel who import these home, for example back to the U.S. risk violating three levels of law and regulation. These include U.S. federal laws,[19] local laws of the country in which they are serving,[20] as well as military regulations.[21] Countries such as the U.S. and Afghanistan are signatories to CITES, however, there are also contemporary conflict zones that are not, for example Iraq did not become a Party to CITES until 2014. It is therefore necessary to consider the countries that the military personnel are serving in to establish the extent that legislation would be breached.

Even though military personnel could be violating considerable international legislation through the purchasing of these wildlife products, steps have not been taken to diminish the opportunity for purchasing these items. The Wildlife Conservation Society have enacted programmes to educate military personnel on the impacts created through these activities, the aim of which was to reduce the risk to the personnel from breaching international and national laws, but would also help to reduce the demand for these protected species.[22]

[19] Such as The Endangered Species Act 1973 as amended (Endangered Species Act 1973 (http://www.nmfs.noaa.gov/pr/pdfs/laws/esa.pdf))
[20] For example, Islamic Republic of Afghanistan Environment Law 2007 (Islamic Republic of Afghanistan Environment Law 2007 (http://mom.gov.af/Content/files/Environmental_Law.pdf))
[21] e.g. America's Defence Transportation Regulation 2009 (Defence Transportation Regulation 2009 (http://www.dtic.mil/dtic/tr/fulltext/u2/a348068.pdf))
[22] Wildlife Conservation Society, 'Wildlife Trade and the Military', https://wildlifetrade.wcs.org/WCS-Response/Military-WCS-Projects/What-are-Wildlife-Products.aspx 10 October 2018

Unless government officials get involved in these war zones and implement ways to reduce the opportunity for military personnel to purchase illegal wildlife products and education is put in place, the effectiveness of CITES will be reduced. Obviously, the main purpose of these military personnel is not aimed at the protection of endangered species, but the Convention and legislation should be considered across the full spectrum of activity to be fully effective.

2.3 Pre-CITES

There is a rich history relating to laws directed the potential risks and impacts of the trade in wildlife. Bowman has observed that conservationists since the 1900s have made a series of demands in respect of the international trade in wildlife with an aim of protecting species from over-exploitation and extinction.[23] Those demands attracted the attention of legislators and gave rise to the implementation of a range of national legislation and international initiatives to help combat the trade in endangered species.

One of the earliest and most significant examples of national legislation was the USA's Lacey Act 1900,[24][25] which made it unlawful to import, export, sell, acquire or purchase certain fish, wildlife or plants that are taken, possessed, transported, or sold.[26] Although it was originally directed towards national commerce, the provisions were extended to prohibit imports, exports,

[23] Bowman, M., *et al., Lyster's International Wildlife Law* (2010) p. 483
[24] Lacey Act 1900 (18USC 42-43, 16 USC 3371-3378) (http://www.fws.gov/le/pdffiles/Lacey.pdf)
[25] U.S. Fish and Wildlife Service, *18 USC 42-43 16: Lacey Act*, (1980, Text Series 18232), https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf 18 July 2014
[26] U.S. Fish and Wildlife Service, *Lacey Act*, (2004, Office of Law Enforcement) at pp. 1 - 11

transport, purchase or sales of species that would violate state, federal, tribal or foreign law.[27] The Act includes all fish and wildlife, along with their parts or products, and plants protected by State law, and has been amended[28] to include species protected by CITES and illegally logged timber.

The first international attempt to regulate the trade in wildlife was the 1900 London Convention Designed to Ensure the Conservation of Various Species of Wild Animals in Africa which are Useful to Man or Inoffensive.[29] This Convention was primarily concerned with hunting and wildlife management. It also included some trade provisions. The requirement stipulated in the text of the Convention demanding ratification by all signatory States, unfortunately did not happen and the Convention never entered into force.[30] A numerical ratification requirement represents a limitation that characterises international law, often visible in Multilateral Environmental Agreements (MEAs).[31]

Following this, the International Convention Relative to the Preservation of Fauna and Flora in Their Natural State 1936 was the next attempt at a multilateral agreement to deal with the trade in wildlife. As with its predecessor, this was concluded between the colonial European powers.

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[27] Alexander, K., *The Lacey Act: Protecting the Environment by Restricting Trade*, (2014, Congressional Research Service Report) at p. 3
[28] Lacey Act 2008, Lacey Act 2008 (18USC 42-43, 16 USC 3371-3378) (http://www.fws.gov/le/pdffiles/Lacey.pdf)
[29] London Convention Designed to Ensure the Conservation of Various Species of Wild Animals in Africa which are Useful to Man or Inoffensive 1900 (http://cites.org/sites/default/files/common/prog/economics/iucn-trademeasuresinCITES.pdf)
[30] Neme, L., *Animal Investigators: How the World's First Wildlife Forensics Lab is Solving Crimes and Saving Endangered Species* (2009) p. xviii
[31] For example the length of time taken to ratificy the United Nations Convention for the Law of the Sea; and the Kyoto Protocol to the United Nations Framework Convention on Climate Change.

However, unlike its predecessor, this Treaty did not require ratification by all signatories and so entered into force in 1936.[32] Although the primary aims of the 1936 Treaty were similar to the 1900 Treaty, in that they both focused on wildlife exploitation, the latter included provisions for export licences and import restrictions[33] for certain wildlife products.[34] With the process of decolonisation taking place across the continent of Africa, the Treaty's efforts subsequently failed.[35] Efforts to tackle this significant issue did not resurface until the implementation of the 1968 African Convention on the Conservation of Nature and Natural Resources.[36]

The provisions of the 1968 Convention aimed to protect against the trade in endangered species in a number of ways. Article VIII placed restrictions on the hunting, killing and capturing of animals. Article IX concerned measures around the trafficking of specimens and trophies.[37] Article X required all Parties to undertake research into factors responsible for the depletion of threatened animal and plant species and to adopt legislation to protect against species' extinction, including measures against trade. The Convention required Parties to take every practical measure to protect against

[32] International Convention Relative to the Preservation of Fauna and Flora in Their Natural State [with Protocol] (Treaty Series No. 27 (1936)), http://treaties.fco.gov.uk/docs/pdf/1936/TS0027.pdf 27 January 2015
[33] Contained in Article 9 of the Convention
[34] University of Oslo, 'Convention Relative to the Preservation of Fauna and Flora in their Natural State' (The Faculty of Law, 14 January1936) http://www.jus.uio.no/english/services/library/treaties/06/6-02/preservation-fauna-natural.xml 18 July 2014
[35] IUCN Environmental Law Centre, *An Introduction to the African Convention on the Conservation of Nature and Natural Resources* (2009) p. 4
[36] African Convention on the Conservation of Nature and Natural Resources 1968 (http://www.au.int/en/sites/default/files/AFRICAN_CONVENTION_CONSERVATION_NATURE_NATURAL_RESOURCES.pdf)
[37] National Council for Law Reporting (Kenya Law), *African Convention on the Conservation of Nature and Natural Resources 1968*, (2003, Treaties) at p. 22

environmental harm, including during periods of armed conflict.[38] Finally, Article XVI required the adoption of legislation and regulatory measures to ensure timely and appropriate information, public participation in decision-making on topics of significant environmental impact, and access to justice in matters related to the protection of the environment and natural resources. The same Article also created an obligation requiring each Party from which a transboundary harm originated, to ensure that any affected person in another Party had a right of access to administrative and judicial procedures equal to those afforded to nationals of the Party of origin. Even by contemporary standards this was a forward-looking international environmental agreement.

The 1968 Convention reflected the changing political climate of the early 1960's, which included increased calls for an effective multi-lateral environmental agreement (MEA) to regulate the rate of export, transit and import in threated and endangered species, their skins, trophies and products.[39] The International Union for the Conservation of Nature's (IUCN) Environmental Law Programme started to prepare a succession of drafts for a Convention to meet such requirements. Pursuant to the legislative history surrounding wildlife trade, during 1973 the U.S.A. drafted a text for consideration, based on the information provided by IUCN and alternative proposals from Kenya and other African countries, and held an authoritative conference in Washington D.C.

[38] Article XV of the 1968 Convention.
[39] CITES Secretariat, 'Official Newsletter of the Parties – Convention on International Trade in Endangered Species of Wild Fauna and Flora' (2003) Special Edition CITES World 1

2.4 CITES

2.4.1 Background to CITES

On the 3rd March 1973, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) was agreed in Washington. The Convention entered into force on the 1st July 1975 after the tenth signatory[40] had deposited[41] an instrument of ratification, as required under Article XXII.[42]

There are currently 183 Parties to CITES, which covers more than 35,000 animal and plant species.[43] By joining the Convention, each Party agrees to ensure that trade in wildlife is not detrimental to the survival of any wild species listed within CITES' Appendices.[44] The aims of the Convention are to contribute towards the protection and conservation of endangered species through the restriction and regulation of trade covering a variety of species.

A voluntary framework for signatories to adhere to, is provided through this Multilateral Environmental Agreements (MEA). Although CITES is legally

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[40] The tenth signatory of CITES was Canada which signed up on 10th April 1975.
[41] Bowman, M., *et al., Lyster's International Wildlife Law* (2010) p. 484
[42] 1. The present Convention shall enter into force 90 days after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession, with the Depositary Government.
2. For each State which ratifies, accepts or approves the present Convention or accedes thereto after the deposit of the tenth instrument of ratification, acceptance, approval or accession, the present Convention shall enter into force 90 days after the deposit by such State of its instrument of ratification, acceptance, approval or accession; 1. The present Convention shall enter into force 90 days after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession, with the Depositary Government.
[43] Bowman, M., *et al., Lyster's International Wildlife Law* (2010) p.484; https://www.cites.org
[44] Smith, M. *et al*., 'Assessing the impacts of international trade on CITES-listed species: Current practices and opportunities for scientific research' (2010) 144 Biological Conservation 83

binding on all Parties, it is not always directly applicable in national law. Thus, although a framework has been provided and should be respected by all signatories, it is necessary for domestic legislation to be implemented and enforced. This will be explored further in Chapter 3.

All species protected by CITES are listed within one of three appendices, with all the imports, exports and re-exports of the listed species subject to a licensing system. Each Party must designate at least one Management Authority to administer this licensing system, with at least one Scientific Authority to advice on the impacts on the species' status caused by trade in it.[45] The identity and the roles of the Management and Scientific Authorities for each of the countries under consideration will be explored in more detail later in this thesis. The three CITES' appendices may contain whole groups of species, but may include only subspecies or a geographically separate population of a species.[46]

The Convention has one central decision-making body, the Conference of Parties (CoP), comprising all the State signatories. Meetings of the CoP are held every two to three years with advocates from NGOs and other organisations with an interest in the illegal wildlife trade also attending. The 17th meeting of the CoP took place in Johannesburg in September 2016 with a record number of registered attendees.[47] Whilst this unprecedented number

[45] This is a requirement under Article IX of the Convention.
[46] CITES, 'The CITES Species', http://www.cites.org/eng/disc/species.php 15 July 2014
[47] Rosen, T., et al., 'Summary of the Seventeenth Meeting of the Conference of the Parties to the Convention on International Trade in Endangered Species of Wild

of participants does not necessarily reflect increased engagement with CITES issues, the CITES Secretariat[48] observed renewed interest in the Convention during both CoP16, in 2013, and CoP17, potentially and regrettably fuelled by an increase in the illicit activity CITES aims to protect against.[49]

CoP17 was the first to make decisions on corruption, cybercrime, traceability and demand reduction for illegally traded animals and plants, and legal acquisition findings, whilst also making major decisions on captive breeding. These decisions enhanced the CoP16 outcomes, and increased the measures required to bring illegal wildlife trade to an end.[50]

At the same time as these positive developments within the Treaty's management, it is apparent that some CITES signatories would like to resume trade in certain species. Known as the 'consumptive use block', examples where this is apparent include the African elephant[51] and certain shark species. In respect of the African elephant, the principle argument broadcast by the consumptive use block, is that use of the species would provide incentives to local people to conserve, as well as increase funds to improve

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Fauna and Flora' (2016) 21 (97) *Earth Negotiations Bulletin (ENB)* http://enb.iisd.org/vol21/enb2197e.html 02 January 2018

[48] The Secretariat is appointed under Article XII of the Convention.

[49] Zain, S., 'The 16th Meeting of the Conference of Parties to CITES' (2013) 25 TRAFFIC Bulletin 47

[50] Scanlon, J., 'CITES CoP17 – A CoP of "Firsts" and a Turning Point for the World's Wildlife' (2016) *IISD*, http://sdg.iisd.org/commentary/guest-articles/cites-cop17-a-cop-of-firsts-and-a-turning-point-for-the-worlds-wildlife/ 02 January 2018

[51] Fachs, C., 'Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) – Conservation Efforts Undermine the Legality Principle', in Bogdandy, A., Berstorff, R. and Goldmann, P., *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (2010) p. 478

enforcement and customs agencies.[52] In essence, it is argued that wildlife conservation attention and practices could increase if an economic value is established for the species.[53] Trade is defined under Article 1(c) of the Convention as "Export, re-export, import and reintroduction from the sea" .[54] In order for trade in certain species protected by CITES to be considered legal, it is necessary to be issued with a permit from the importing and/or the exporting country. The specific documentation necessary is dependent upon the species' place in the appendices and the national legislation of the exporting / importing countries.

As stated above, each Party must designate one or more Management Authorities. In accordance with Article IX of the Treaty, this authority is to be in charge of issuing import and export permits for CITES listed species.[55] It is essential that the Management Authority[56] consult with the Scientific

[52] Fachs, C., 'Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) – Conservation Efforts Undermine the Legality Principle', in Bogdandy, A., Berstorff, R. and Goldmann, P., *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (2010) p. 478
[53] Stanford Encyclopaedia of Philosophy, 'Biodiversity' (04 December 2007) http://plato.stanford.edu/entries/biodiversity/ 9 July 2014
[54] CITES, *Convention on International Trade in Endangered Species of Wild Fauna and Flora: Text of the Convention* (1979) p. 1
[55] Joint Nature Conservation Committee, 'Convention on Trade in Endangered Species of Wild Fauna and Flora (CITES)' (June 2013) http://jncc.defra.gov.uk/page-1367 15 July 2014
[56] Within the UK, the Management Authorities are the Department for Food and Rural Affairs (Defra) and it has an executive agency (Animal Health and Veterinary Laboratories Agency), which is responsible for the issuing of permits and certificates. South Africa's Management Authority is Department of Environmental Affairs. Australia has implemented the Department of the Environment as the Management Authority, specifically the Wildlife Trade and Biosecurity Branch and the Wildlife Trade Regulation Section.

Authority[57] when necessary to make the decisions regarding the issuing of these permits.

2.4.2 Appendix I of CITES

In accordance with the Convention, Appendix I[58] contains species that are threatened with extinction and that are, or may be, affected by trade.[59] Commercial trade in these species is strictly prohibited. Other trade, such as that involving hunting trophies or for scientific or educational purposes is tightly controlled and only permitted in exceptional circumstances.[60]

2.4.3 Appendix II of CITES

The species listed in Appendix II[61] are those not necessarily threatened with extinction, but controlling trade in them is considered necessary to ensure their survival. This Appendix offers the second most stringent protection under CITES, requiring verification that internationally traded specimens, or volumes of listed species, have been sourced legally and in a manner not detrimental to their role in those ecosystems where they naturally occur.[62]

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[57] The UK has created two Scientific Authorities, the Scientific Authority for animals is the Joint Nature Conservation Committee (JNCC) and the Scientific Authority for plants is the Royal Botanical Gardens, Kew. In South Africa the Scientific Authorities are, the Department of Environmental Affairs and South African National Biodiversity Institute (SANBI). Australia has introduced the Department of the Environment, Wildlife Trade Assessments Section as the Scientific Authority.

[58] The Regulation of Trade in Specimens of Species included in Appendix I is contained in Text of the Convention under Article III.

[59] Natural Resources Defence Council, *Polar Bears and the Criteria for Listing in CITES Appendix I* (2012, Issue Brief) at p. 1

[60] Lemieux, A. and Clarke, R., 'The International Ban on Ivory Sales and its Effects on Elephant Poaching in Africa', (2009) 49 The British Journal of Criminology 453

[61] Article IV of the Convention covers the Regulation of Trade in Specimens of Species included in Appendix II .

[62] Gorgan, J., and Barreto, P., 'Big-Leaf Mahogany on CITES Appendix II: Big Challenges, Big Opportunity' (2005) 19(3) Conservation Biology. 973

The Convention text identifies some aspects of the trade in Appendix II species as being 'non-detrimental'. This is when the species can be maintained at a level consistent with its role in its natural ecosystem by regulating/ limiting its export. This also serves as a means to maintain the species at a level which precludes it from requiring inclusion in Appendix I.[63] [64] Consequently, all international trade in taxa listed in Appendices I and II must be accompanied by an assessment of the impact of trade on wild populations. These assessments are referred to as Non Detrimental Findings (NDF).

The Management Authority is able to grant export permits for species contained in Appendices I and II where the export would not be detrimental to the species' survival and where specimens are acquired legally[65]. An export permit may not be granted by the Management Authority until the importing State's Management Authority has granted an import permit.[66]

2.4.4 Appendix III of CITES

Appendix III[67] covers species which are protected by at least one country, which has asked other CITES Parties for assistance in controlling trade in that species.[68] It also includes species which any Party has identified as being

[63] Smith, M., *et al*., 'Assessing the impacts of international trade on CITES-listed species: Current practices and opportunities for scientific research', (2010) 144 Biological Conservation 84
[64] Article IV(3) of CITES.
[65] Alam, S., *Sustainable Development and Free Trade: Institutional Approaches* (2008) 186
[66] Brown, D and Swails, E., *Comparative Case Study 3: The Convention on International Trade in Endangered Species (CITES)* (2005, Overseas Development Institute) p. 2
[67] The Regulation of Trade in Specimens of Species included in Appendix III can be found in Article V of the Convention's Text.
[68] CITES, 'How CITES works', http://www.cites.org/eng/disc/how.php 25 November 2013

subject to exploitation within its jurisdiction and where they require cooperation from other Parties to monitor the international trade in that species. This cooperation is primarily achieved by the issuance of export permits by a State that has included the species in Appendix III.[69] Appendix III is considered the least understood of the Convention's Appendices and by far the least known.[70]

The immediate question raised regarding Appendix III of CITES is why a country would seek to burden itself with the requirement of an export permit. There may be at least three reasons for this. The first is where a species may not be endangered or threated with extinction throughout its range, but it may well be threated within a particular geographical location, and whilst there may be a ban on the export from the country in question, the resourcefulness of some illegal wildlife traders means that country may require wider assistance in the form of global customs controls to help enforce its ban. This assistance comes from ensuring the correct exporting permit accompanies the species being imported from the Party that listed the species within Appendix III and inspecting the certificate of origin, which must accompany specimens being exported from range States.[71]

In cases where only the populations of a species from certain countries are included within the Appendix, the other populations of these species are

[69] David Shepherd Wildlife Foundation, 'Wildlife Trade', http://www.davidshepherd.org/education/global-conservation-issues/wildlife-trade.php 27 May 2014
[70] CITES Secretariat, 'Official Newsletter of the Parties – Convention on International Trade in Endangered Species of Wild Fauna and Flora' (2003) 11 *CITES World* 1
[71] Favre, D., *International Trade in Endangered Species: A Guide to CITES* (1989) p. 77

excluded and specimens from them are exempt from certification requirements (unless domestic law states otherwise). However, the Society for Conservation Biology suggests that confusion between species' scientific and common names can cause problems,[72] with the possibility of custom officials using names interchangeably resulting in imports of species without the correct documentation.[73] This has not only a negative impact on the effectiveness of Appendix III, but also undermines the integrity of Appendices I and II, as customs officials may not be able to distinguish between subspecies, allowing protected species to be imported without proper controls. This will be considered in more detail in Chapter 3.

The second reason is that Appendix III can act as part of a management control tool, placing restrictions on the movement of species that would otherwise be allowed. Appendix III of the Convention does not preclude trade generally; it prevents trade without an export permit if the species is listed within it for the country concerned. Favre concludes that while many countries have not made extensive use of this listing process,[74] some have, potentially as part of an overall plan to assist in the management of their natural species.[75]

The final reason Appendix III could be utilised is to raise awareness and alert other countries and organisations to a threat posed to a species. If the issue

[72] Society for Conservation Biology, 'Monitoring International Wildlife Trade with Coded Species Data' (2008) 22(1) Conservation Biology 5
[73] ibid.
[74] CITES Secretariat, 'Official Newsletter of the Parties – Convention on International Trade in Endangered Species of Wild Fauna and Flora' (2003) 11 *CITES World* 1
[75] Favre, D., *International Trade in Endangered Species: A Guide to CITES* (1989) p. 140

continues, the argument is strengthened for moving the species into Appendix II. For example, following the UK's decision in 2000 to include the basking shark in Appendix III[76], in 2003 the species was moved to Appendix II.[77]

Similarly to the other two Appendices, Appendix III permits will only be granted when the appropriate Management Authority can determine that the specimens concerned were not obtained in contravention of that country's laws, or within countries where species have been listed under Appendix III for conservation reasons.[78]

2.4.5 Implementation by Management Authorities

At CoP16, in 2013, it was noted that there had been violations of the Convention as a result of inadequate or insufficient implementation and enforcement by Management Authorities in both importing and exporting countries.[79] These violations included failures in respect of adequate surveillance, the issuance of documentation and compliance oversight with provisions regulating the trade in live and dead flora and fauna, their parts and derivatives.

Recommendations made during CoP16 were that all Parties strengthen controls on trade in wildlife in territories under their jurisdiction, particularly in respect of shipments from producing and neighbouring countries. Brown and

[76] CITES, 'History of CITES listing of sharks (Elasmobranchii) https://www.cites.org/eng/prog/shark/history.php12 December 2018
[77] CITES, 'History of CITES listing of sharks (Elasmobranchii) https://www.cites.org/eng/prog/shark/history.php12 December 2018
[78] U.S. Fish and Wildlife Service, 'CITES Permits and Certificates' (July 2003) http://www.aphis.usda.gov/regulations/vs/iregs/products/downloads/fish_wildlife_fs.pdf15 July 2014
[79] CITES, *Conf 11.3 (Rev. CoP16): Compliance and enforcement* (2013), p. 1

Swails argue that "Parties should verify authenticity of certificates relating to imports, by reference to the issuing Management Authority".[80] CoP16 reiterated this point in reference to the origin of import certificates from the Management Authorities of countries identified as having flawed processes.[81] The argument for the necessity for strict verification of the authenticity of documentation is based on combatting forgery.

However, whilst there are procedures in place for the issuing of permits, and it is a requirement that all Parties ensure these are enforced, the extent of any obligation to verify the authenticity of them is less clear. In the UK, this issue was considered in *R (on the application of Greenpeace) v Secretary of State for the Environment, Food and Rural Affairs*,[82] where it was held that HM Customs and Excise do not need to enquire into the circumstances surrounding the issuing of an export permit, unless from a "blacklist" of countries not expected to have a good/ stable administration, free from corruption. Thus, according to the Court, a Customs agency may accept a permit on face value; to go beyond this would potentially generate uncertainty in international trade. The judgment and reasoning behind this decision will be further explored in a later chapter.

Where import is from, or export/ re-export is to, a State that is not a Party to CITES, comparable documentation must be provided. CITES is also capable

[80] Brown, D and Swails, E., *Comparative Case Study 3: The Convention on International Trade in Endangered Species (CITES)* (2005, Overseas Development Institute) p. 3
[81] CITES, *Conf 11.3 (Rev. CoP16): Compliance and enforcement* (2013) p. 3
[82] [2002] EWCA Civ 1036

of placing obligations on non-Party countries to act in a particular manner when dealing with protected species and their trade with signatory countries.[83]

2.5 CITES: International and Domestic Law Implementation

This section provides an introduction into the relationship between CITES as an instrument of international law, and domestic law. Enhanced examination of the mechanics of this relationship in the countries under consideration will follow in Chapter 3. As a starting point, Public International Law is defined by Starke as "an indispensable body of rules regulating…the relations between states without which it would be virtually impossible for them to have steady and frequent intercourse" .[84] The law evolving from these relationships is primarily treaty-based. A Treaty is defined in Art.2(1)(a) of the Vienna Convention on the Law of Treaties[85] as:

> "…an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation…".[86]

Treaties may also be called 'Conventions' or 'Agreements'. Conventions may be supplemented in time by Protocols,[87] which are parasitical on the

[83] Article X of the Convention.
[84] Starke, J. G., *Introduction to International Law* (1989) p. 15
[85] Vienna Convention on the Law of Treaties 1969 (https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf)
[86] United Nations, *Vienna Convention on the law of treaties (with annex)*, (1980, Text Series 18232) at p. 333
[87] United Nations Framework Convention on Climate Change, 'Kyoto Protocol', http://unfccc.int/kyoto_protocol/items/2830.php 18 July 2014

originating instrument, for example the United Nations Framework Convention on Climate Change 1992[88] and the Kyoto Protocol 1997.[89] [90]

The key determinant in the relationship between international and domestic law is a country's constitution. The UK, for example, has a dualist constitution, whereby international law, in the form of agreements such as CITES, only becomes part of national law when Parliament ratifies it. This was considered in the case of *Maclaine Watson v Department of Trade and Industry,*[91] where it was held that Treaties are not self-executing; a Treaty is thus not part of English law unless, and until, Parliament decides to incorporate its provisions into the law by the passing of national legislation.[92] Therefore, international agreements have what might be called 'high level' effect. That is, they create obligations which bind the UK in its international relations, but cannot be a direct source of rights and duties in legal actions between individuals.[93] As a result, in the UK, international agreements cannot be used by groups or individuals as a basis for actions against the State or a public body, whereas European Union legislative instruments may be.[94] A contrasting position can be seen in Namibia[95], which follows a monist system. This means the constitution not only embraces general international law but it

[88] United Nations Framework Convention on Climate Change 1992 (http://unfccc.int/resource/docs/convkp/conveng.pdf)
[89] Kyoto Protocol 1997 (http://unfccc.int/resource/docs/convkp/kpeng.pdf)
[90] United Nations Framework Convention on Climate Change, 'Kyoto Protocol', http://unfccc.int/kyoto_protocol/items/2830.php 18 July 2014
[91] [1989] 3 All ER 523
[92] Swarbick, D., '*Maclaine Watson & Co Ltd -v- International Tin Council*; HL 2-Jan-1989' (May 2014) http://swarb.co.uk/maclaine-watson-co-ltd-v-international-tin-council-hl-2-jan-1989/ 18 July 2014
[93] Bell, S., and McGillivray, D., *Environmental Law* (2008) p. 134
[94] Bell, S., and McGillivray, D., *Environmental Law* (2008) p. 135
[95] Namibia is not a country under consideration here, it merely acts as an example of a monist system

also regulates the relationship between international law, within a national legal sphere.[96] The rules surrounding this are found in Article 144[97] of the Namibian Constitution. In summary, it is therefore necessary to consider constitutional law in order to understand how CITES is implemented into the national legislation of its signatories.

The interaction between the regime established by CITES and EU law, offers a contrasting example of the interplay between global regulatory regimes, such as CITES, and EU law in terms of national procedural standards. When CITES was first ratified and implemented, the EU was not legally competent to be a signatory and therefore could not become a Party in its own right. As one of the earlier MEAs, the Convention only foresaw signatories as national States, as opposed to blocs. However, since 1984, the EU has implemented and enforced a measure broadly equivalent to CITES by virtue of its own Regulations.[98] These Regulations (subsequently amended[99]) are applicable in all EU Member States, even those not a Party to CITES (for example, Greece acceded to the EU in 1981 and ratified CITES in 1992).

[96] Tshosa, O., 'The status of international law in Namibia national law: A critical appraisal of the constitutional strategy' (2010) 2(1) Namibia Law Journal 3
[97] unless otherwise provided by this constitution or Act of parliament, the general rules of public international law and international agreements binding upon Namibia under this constitution shall form part of the law of Namibia
[98] Council Regulation (EEC) No. 3626/82 and Commission Regulation (EEC) No. 3418 /83
[99] Council Regulation (EC) No. 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulation trade therein (OJ 1997, L 61/1) , Council Regulation (EC) No. 865/2006 of 4 May 2006 laying down detailed rules concerning the implementation of Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulation trade therein (OJ 2006, L 166/1)

Since the introduction of CITES, it has been common for other Conventions[100] to permit the membership of Regional Economic Integration Organisations (REIO),[101] such as the EU.[102] In 1983, CITES held an extraordinary meeting in Gaborone, where it considered a proposed amendment to Article XXI of the Convention to permit accession by REIO. Following amendment, the proposal was adopted, adding five new paragraphs to the Article. In accordance with Article XXII, paragraph 3,[103] the Gaborone Amendment entered into force on the 29th November 2013.[104] This amended text automatically applies to any State that becomes a Party to CITES following this date.[105] The EU was therefore able to become a Party to CITES, doing so in 2015.

Although the current EU Regulations are directly applicable in all EU Member States, domestic legislation is necessary to enact enforcement provisions for matters concerning the trade in endangered species, which remains under the sovereignty of each Member State.[106] Currently, Member States who have not provided for enforcement measures may be sanctioned under EU law, but

[100] Examples of this are the United Nations Framework on Climate Change 1997 and the United Nations Convention against Transnational Organized Crime 2003
[101] These are supranational organisations constituted by sovereign States that have been transferred part of their competencies to them
[102] CITES and European Commission, *Gaborone Amendment to the Convention*, (2007, Information Pack for Parties) at p. 1
[103] An amendment shall enter into force for the Parties which have accepted it 60 days after two-thirds of the Parties have deposited an instrument of acceptance of the amendment with the Depositary Government Thereafter, the amendment shall enter into force for any other Party 60 days after that Party deposits its instrument of acceptance of the amendment.
[104] CITES, 'Gaborone amendment to the text of the Convention', http://www.cites.org/eng/disc/gaborone.php 24 July 2014
[105] For example, Iraq who became a Party to CITES on 5 February 2014 and this entered into force on 06 May 2014.
[106] European Commission and TRAFFIC, 'Reference Guide: European Union Wildlife Trade Regulations' (2013) TRAFFIC 138

would not be in breach of the Convention, unless individually a Party. Thus EU law is more effective than the Convention at establishing practical enforcement measures, as they are aligned with the normal duties of EU membership. Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law[107] requires Member States to strengthen their laws by making them conform to certain basic requirements. To date, there has been no action against a Member State for failure to conform to the Regulations that implement CITES.

Stricter measures put in place on a national scale may be subject to challenge under the World Trade Organisation (WTO). This point is considered by Roe et al in a study on improving CITES' effectiveness. They state:

> "While the adoption of stricter domestic measures is well recognised in international law, the application of this right has led to concerns over equity and raises questions over the compatibility of CITES with the WTO."[108]

That said, the General Agreement on Tariffs and Trade (GATT) 1947 (subject to GATT 1994) permits the imposition of measures limiting trade in order to protect human, animal and plant life or health under Article XX.[109] However, the success of this justification before the WTO's Appellate Panel has been limited.[110]

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[107] OJ 2008, L 328/28
[108] Roe, D., *et al*., 'Making a killing or making a living?: Wildlife trade, trade, controls and rural livelihoods' (2002) 6 Biodiversity and Livelihoods 31
[109] World Trade Organisation, *The General Agreement on Tariffs and Trade (GATT 1947)* (1986, Legal Texts) p. 37
[110] *Tuna/Dolphin* 30 ILM 1594 (1991), *Tuna/Dolphin 2* 33 ILM 839 (1994) and *Shrimp/Turtle* 38 ILM 118 (1999)

Tuna/Dolphin[111] (1991) and *Tuna/Dolphin 2*[112] (1994) concerned a dispute between Mexico and the United States over the USA's import ban of yellow-fin tuna from Mexico and 'intermediary nations', which had been caught in a manner harmful to dolphins. The U.S.A. argued that the measures were permitted because they fell into the scope of Article XX(b)[113] and XX(g)[114] of GATT. In the 1991 case, after pointing out that Article XX should be construed narrowly and that the burden of proof should be placed on the party invoking it, the Panel decided that the scope of Article XX is limited to measures taken to conserve the environment only in the jurisdiction of the Party invoking the measures. This resulted in the Panel finding that since the measure was aimed at protecting dolphins living outside of the USA's jurisdiction, it could not be justified under Article XX.

However, in *Tuna/Dolphin 2* the Panel rejected the geographical limitation considered in the 1991 case. Instead it concluded that the USA measure was only effective when the prohibited countries changed their conservation policies. Without this, a measure could not be permitted under Article XX because otherwise "the balance of rights and obligations among contracting parties, in particular the right of access to markets, would be seriously impaired".[115] It is evident from the judgments in the 1991 and 1994 cases that both Panels interpreted Article XX narrowly, to the point that almost no environment-related trade measures violating the provisions of the GATT can

[111] 30 ILM 1594
[112] 33 ILM 839
[113] Measures "necessary to protect human, animal or plant life or health"
[114] Measures "relating to the conservation of exhaustible natural resources".
[115] Tuna/Dolphin 2 33 ILM 839 (1994), *supra* note 7, at para. 5.26

be justified under it. It has been argued that both Panels perceived the promotion of free trade as a prevailing priority and that they overlooked the importance of non-trade values, such as environmental protection.[116]

This perception changed in *Shrimp/Turtle* (1999). In this case, the Panel did pay attention to the need to balance the promotion of free trade with environmental protection whilst interpreting GATT Article XX. One justification for why the Panel discarded the approaches adopted in the *Tuna/Dolphin* cases discussed above could be change to the Preamble of the WTO Agreement[117] from that of GATT 1947. The Panel therefore interpreted Article XX(g) as able to preserve the environment and enhance the means for doing so in a manner consistent with respective need and concern at different levels of economic development. In *Shrimp/Turtle*, the Panel identified the need for three international conditions to be satisfied: the concerned resource must be shared (the community value); protective measures must be required because the conservation of the species is recognised as a desirable objective (the conservation value); and that a consensual approach is desirable (the consensus/cooperation value).[118]

Along with the conditions laid down in GATT, CITES' text also allows for signatories to implement stricter domestic measures regarding the trade in all

[116] For example, McLaughlin, R., 'Sovereignty, Utility, and Fairness: Using U.S. Takings Law to Guide the Evolving Utilitarian Balancing Approach to Global Environmental Disputes in the WTO' (1999) 78(4) Oregon Law Review 872-874.
[117] As opposed to the GATT 1947, the preamble of the WTO agreement was changed to acknowledge the importance of environmental protection.
[118] Sands, P., ''Unilateralism', Values, and International Law' (2000) 11 European Journal of International *Law* 291

species from all three Appendices,[119] at their own discretion.[120] Article XIV goes on to state that the Convention shall in no way affect the provisions of any domestic measures or the obligations of Parties deriving from any treaty, convention, or international agreement relating to other aspects of trade. It demonstrates that CITES does not override existing agreements to protect customs, public health and quarantine laws among others.

This demonstrates the relationships and considerations required to implement international law, such as CITES into domestic legislation. The management of international environmental policy and law involves extra-legal actors,[121] including the International Maritime Organisation (IMO), the International Union for Conservation of Nature (IUCN) and the Secretariats of Conventions, for example, the CITES Secretariat. These bodies help to integrate expert knowledge into the development, implementation and monitoring of environmental problems.

The input of non-governmental organisations (NGOs), for example, World Wildlife Fund (WWF), TRAFFIC, The Endangered Wildlife Trust (EWT) and the International Fund for Animal Welfare (IFAW) also help with expertise in the areas discussed above. NGOs campaign on environmental issues, raising the profile of 'problems' that are to be considered by CoPs or other

[119] Article XIV
[120] CITES, *Convention on International Trade in Endangered Species of Wild Fauna and Flora: Text of the Convention* (1979) p. 9
[121] Haas, P., *et al.*, *Improving Global Environmental Governance: Best practices for architecture and agency'* (2014) p. 13

meetings of the Parties and these organisations may provide specialist advice where appropriate.[122]

NGOs also contribute and play an important role in combating the illegal wildlife trade. Typically, they help to address gaps in national services and in terms of illegal wildlife trade this can come from environmental or animal welfare NGOs. Research provides evidence that NGOs primarily implement broad conservation strategies, such as establishing protected areas, to indirectly safeguard wildlife.[123] This compares to advocacy strategies, used by animal welfare NGOs, and collaboration methods involving education campaigns, as a way of combating the illegal wildlife trade. Analysis of these strategies has suggested that animal welfare NGOs have been more effective at raising awareness and decreasing the illegal wildlife trade in areas where they are most active.[124] Historically, environmental and animal welfare NGOs have not collaborated, but to tackle the illegal wildlife trade this may be needed to bridge their complementary strategies in coordinated efforts. Such an example has occurred in Tanzania, where WWF has linked up with 60 grassroots NGOs to tackle the illegal wildlife trade.[125]

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[122] United Nations High Commissioner for Refugees, 'Annual Consultations with NGOs', http://www.unhcr.org/pages/49f9b49f6.html 18 July 2014
[123] Daut, E., 'The role of environmental and animal-welfare non-governmental organizations in combatting illegal wildlife trade in Peru' (The Association for Tropical Biology & Conservation, 26 June 2013) https://atbc.confex.com/atbc/2013/webprogram/Paper2290.html 04 July 2014
[124] ibid.
[125] Xinhua, 'NGOs join hands in fight against illegal wildlife trade' (28 August 2013) http://www.china.org.cn/environment/2013-08/28/content_29846343.htm 04 June 2014

Public awareness is promoted by many as a key factor in reducing the demand for illegal wildlife products[126] – one example is the ivory trade[127] in North America and Europe during the 20th and 21st centuries.[128] Such awareness may be particularly crucial to current efforts to reduce the illegal wildlife trade as demand moves towards emerging markets.[129] Public awareness should work to strengthen the growing global conservation ethic, reinforcing existing, and developing new, social barriers to engaging in illegal wildlife practices.[130] Zahler, for example, contends that awareness programmes should be linked to social development plans providing alternatives to people from poorer backgrounds that currently turn to the illegal wildlife trade as a means of income and survival.[131] It is possible this public awareness is having an impact as the US banned trade in ivory products federally and the UK Ivory Act seeks to do similar.[132]

In promoting their objectives, NGOs operate with the primary goals of educating society and bringing in revenue. NGOs may therefore paint a

[126] TRAFFIC, "changing behaviour to reduce consumption of illegal wildlife products in China" (TRAFFIC, 10 April 2014 http://www.traffic.org/home/2014/4/10/changing-behaviour-to-reduce-consumption-of-illegal-wildlife.html 18 July 2014
[127] UNEP, IUCN and TRAFFIC, *Elephants in the dust – The African Elephant Crisis. A Rapid Response Assessment* (2013) http://www.cites.org/common/resources/pub/Elephants_in_the_dust.pdf 18 July 2014
[128] United Nations Environment Programme, 'Powerful Posters Bring Wildlife Protection Message to Millions on Shanghai Metro' (UNEP, 01 July 2013) http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=2723&ArticleID=9558&l=en 18 July 2014
[129] Taverner, L., 'UN posters raise awareness of wildlife protection among metro travellers in Shanghai' (African Wildlife Trust, July 2013) http://africanwildlifetrust.org/author/lindyawt/page/12/ 21 March 2014
[130] Zahler, P., *et al*., 'Illegal and Unsustainable Wildlife Hunting and Trade in Mongolia' (2004) 2(2) Mongolian Journal of Biological Sciences 29
[131] ibid.
[132] Lowther, J. 'Ivory trade: Policy and law change', (2018) 20(4) *Environmental Law Review* 225; see also http://www.legislation.gov.uk/ukpga/2018/30/contents/enacted (December 2018)

picture highlighting the worst effects of the illegal wildlife trade. This may be useful in raising awareness and in garnering public support, as well as establishing impact and inconsistency. This means that whilst useful, the picture portrayed should be approached with caution, since it may be tainted by the NGOs own objectives.

One battle that NGOs and Parties to CITES face in protecting species is that countries may have vested interests in particular issues, often as a result of perceived cultural/ historical differences. These countries often send large groups of delegates and high-ranking politicians and officials to CoPs in order to persuade other Parties to side with them on crucial votes.[133] For example, during proposals to protect collapsing stocks of Atlantic Bluefin tuna and several species of shark, Japan sent around 50 delegates to coerce island states and developing nations into supporting its opposition through a combination of cultural bias,[134] veiled threats, trade incentives and aid packages. In a particularly cynical move, sushi derived from Atlantic Bluefin tuna was served at a lavish reception for delegates the evening before the day of the vote.[135]

A particular example of an MEA subject to pressures resulting from cultural differences based on historical traditions is the International Convention for

[133] See for example Kat, P., 'Legalizing the trade in rhino horn – ongoing moves' (Lion Aid, 23 March 2013) http://www.lionaid.org/blog/category/ivory 7 July 2014
[134] Jones, M., 'Has CITES had its day?' *BBC* (06 April 2010) http://news.bbc.co.uk/1/hi/sci/tech/8606011.stm30 April 2014
[135] Bystrom, A., 'Why we failed (CITES debacle explained)' (Costa Rican Conservation Network's Blog, 25 March 2010) http://costaricanconservationnetwork.wordpress.com/2010/03/25/why-we-failed-cites-debacle-explained/ 07 July 2014

the Regulation of Whaling[136], signed in Washington DC in 1946.[137] Whale meat is a traditional food source in Japan, and on various occasions requests have been made to the International Whaling Commission to grant it small interim quotas for 'small-type coastal whaling' of Minke whales; these requests have been repeatedly rejected.[138] Japan is not alone in its objection to the IWC. In 1991 Iceland left the Commission in protest at the moratorium on commercial whaling. Japan in the meantime remains a member despite its protestations.[139]

The International Convention permits the killing of whales for the purpose of research under the Regulation of Whaling.[140] In 2014, in a case brought by Australia against Japan, the International Court of Justice (ICJ) held[141] that the publishing of research results in just two peer-reviewed papers since 2005 was not proportionate to the number of whales killed. Presiding Judge Peter Tomka of Slovakia stated, "in light of the fact the Jarpa II (research programme) has been going on since 2005, and has involved the killing of

[136] International Convention for the Regulation of Whaling 1946 (http://cil.nus.edu.sg/rp/il/pdf/1946%20IC%20for%20the%20Regulation%20of%20Whaling-pdf.pdf)
[137] International Whaling Commission, *International Convention for the Regulation of Whaling* (1946, Founding Document) at pp. 1 - 3
[138] Oberthür, S., 'The International Convention for the Regulation of Whaling: From Over-Exploitation to Total Prohibition' in Bergesen, H., Parmann, G., Thommessen, O., *Yearbook of International Cooperation on Environment and Development 1998-99* (2009) p 30
[139] Oberthür, S., 'The International Convention for the Regulation of Whaling: From Over-Exploitation to Total Prohibition' in Bergesen, H., Parmann, G., Thommessen, O., *Yearbook of International Cooperation on Environment and Development 1998-99* (2009) p 35
[140] Article VIII of the Convention.
[141] *Whaling in the Antarctic (Australia c. Japan; New Zealand Intervening)* General List No 148 [2014]

about 3600 Minke whales, the scientific output to date appears limited".[142] The ICJ subsequently ruled that Japan could not justify the killings on the basis of research, revoking any existent authorisation, permit or licence in relation to Jarpa II and calling for no further permits to be issued in pursuance of the programme.[143] This landmark case was the first to involve a country resorting to use of the ICJ to stop whaling. Japan has reported that it will comply with the ruling[144] but continues to maintain its right to conduct whaling for scientific purposes.[145]

Traditional practices are a significant driver of the illegal wildlife trade, specifically in Eastern Asia. China, for example, is the world's largest consumer of rhino horn, used for medicinal purposes for thousands of years.[146] Although this traditional practice is stable or increasing in some areas of Asia, more positively other Asian countries have seen a decrease in the use of products derived from endangered species. Practitioners in Korea, for example, cite the development of effective alternatives to traditional Asian

[142] The Huffington Post UK, 'Japan's Whaling is 'Not Scientific', UN Court Rules, Ordering Ban While Rules are Revisited' *The Huffington Post* (31 March 2014), https://www.huffingtonpost.co.uk/2014/03/31/japan-whaling-ban_n_5061568.html?guccounter=1&guce_referrer_us=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_cs=TN7gla0tkag9Bw3dBicXFg 10 August 2014
[143] International Court of Justice, *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)* (2014, Press release) at p. 2
[144] Waktsuki, Y. and Brown, S., 'Japanese whaling fleet set to sail despite recent ruling' *CNN* (25 April 2014) http://edition.cnn.com/2014/04/24/world/asia/japan-whaling/ 10 August 2014
[145] Goatcher, J., 'Whale wars part II: Japan refuses to halt whaling practices' *The Occidental Weekly* (21 April 2014)
[146] Ayling, J., 'What Sustains Wildlife Crime? Rhino Horn Trading and the Resilience of Criminal Networks' (2013) 16 Journal of International Wildlife Law & Policy 61

medicines, such as herbal substitutes, to be the reason for a decrease in the traditional use of tiger parts and rhino horn.[147]

2.6 CITES Funding

Core administrative costs are financed through the CITES Trust Fund. These include costs for the Secretariat, the CoPs and its subsidiary bodies, the Standing Committee and other permanent committees. This Fund is replenished through contributions from the Parties to the Convention based on the United Nations (UN) assessment; this takes into account the fact that not all members of the UN are Parties to CITES.[148]

Access to external funding is also possible for CITES through various avenues, including the European Commission, which provides funding for a number of important activities. One example is MIKES (Minimising the Illegal Killing of Elephants and Other Endangered Species), where the Commission provided a grant worth €12.3 million.[149] This project followed an earlier one: Monitoring the Illegal Killings of Elephants (MIKE). The overall aim of MIKE was to provide "information needed for elephant range States to make appropriate management and enforcement decisions, and to build institutional capacity within the range States for the long-term management of their

[147] Lawson, K. and Vines, A., 'Global Impacts of the Illegal Wildlife Trade: The Costs of Crime, Insecurity and Institutional Erosion' (Chatham House, February 2014) http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Africa/0214Wildlife.pdf 02 September 2014

[148] CITES, 'How is CITES financed?', http://www.cites.org/eng/disc/fund.php 05 June 2014

[149] European Commission, 'EU Consultation on wildlife trafficking' (07 February 2014) http://ec.europa.eu/unitedkingdom/press/frontpage/2014/14_10_en.htm 02 February 2015

elephant populations".[150] MIKE was set up after CoP10 and endorsed at the 41st meeting of the CITES Standing Committee in 1999. The new programme, MIKES, was approved in December 2013 and puts greater emphasis on enforcement, as well as including other endangered species in other areas around the world, including the Caribbean and Pacific regions.

Countries also finance projects, the Secretariat and conferences to help with the aims and objectives of the Convention. One example of a nationally funded project is the Darwin Initiative, which is a "UK Government grant scheme that helps protect biodiversity and the natural environment through locally based projects" across the world.[151] Darwin aims to help countries rich in biodiversity but poor in financial resources meet their objectives under biodiversity conventions, including CITES. An example of an international conference is that held in London during February 2014, which aimed to bring together global leaders to help eradicate the illegal wildlife trade and better protect against the threat of extinction for some of the world's most iconic species.[152] The outcome was the signing of the London Declaration on the illegal wildlife trade, in which the following were concluded as the way forward in helping to tackle the problem:[153]

[150] CITES, 'Monitoring the Illegal Killing of Elephants (MIKE)', http://www.cites.org/eng/prog/mike/index.php15 July 2014
[151] UK Government, 'The Darwin Initiative', https://www.gov.uk/government/groups/the-darwin-initiative02 February 2015
[152] Department for Environment, Food and Rural Affairs, *Declaration: London Conference on the Illegal Wildlife Trade* (2014, Policy Paper) at p. 1
[153] The following bullet points were paraphrased from UK Government, *London Conference on the Illegal Wildlife Trade (12 – 13 February 2014)* (2014, declaration) at p. 10 - 11

- The scale of environmental, political, social and economic implications of trade were identified as areas requiring further research;
- Improved understanding of the illegal wildlife trade;
- Resources to support action which should prevent and combat the trade, including the implementation of existing action plans and declarations;
- Recognition and appreciation for the on-going support given by the Global Environment Facility (GEF) to address the poaching crisis within Africa;
- The establishment of a 'Group of Friends' against illegal wildlife trafficking to be welcomed by the UN;
- To undertake further assessments, building on existing assessments and collaborative work, investigating the markets and dynamics of the trade, as well as the progress made in combatting it; and
- Finally it was also proposed that Botswana host another high-level conference in early 2015 to review progress. This was held on the 25th March 2015 in Kasane.[154]

The further specifics of the Declaration will be discussed in more detail later in the thesis.

[154] Department for the Environment, Food and Rural Affairs, 'Illegal Wildlife Trade: Kasane Statement' (25 March 2015) https://www.gov.uk/government/publications/illegal-wildlife-trade-kasane-statement27 March 2015

2.7 The Effectiveness of CITES

Ong argues that CITES is the most successful of all the international treaties governing the conservation of wildlife, on the basis of its basic principles and the way in which it operates. This includes the fact that signatories have been found willing to accept its basic principles; and that its enforcement appears to be better than other treaties.[155] However, the accuracy of this assessment is dependent on how the signatory country implements the Convention, and whilst it has been signed by a large majority of the globe, it seems criminals still view the illegal trade in wildlife to be a low risk activity.[156]

CITES provides for the internal review of its success. The CoPs, as well as the Secretariat, may make recommendations to improve effectiveness. In contrast, signatories possess a degree of control over the activities contained in CITES, and are able to object if they believe that the Secretariat is being too intrusive into their reports regarding infractions.

As Nijman notes, the primary motivation behind the illegal wildlife trade is economic.[157] This results in this illicit activity being carried out nationally, and on an international scale. For many of those who partake in the wildlife trade, it is seen as an opening for 'career' opportunities, through the middlemen involved with the operation. Specialist roles required include storage

[155] Ong, D., 'The Convention on International Trade in Endangered Species (Cites, 1973): Implications of Recent Developments in International and EC Environmental Law' (1998) 10 Journal of Environmental Law 292
[156] World Wildlife Fund, 'Threats: Impacts', http://www.worldwildlife.org/threats/infrastructure 14 August 2014
[157] Nijman, V., 'An overview of international wildlife trade from Southeast Asia in Biodiversity Conservation' (2010), 19 Biodiversity Conservation 1102

handlers, transport, manufacturing, industrial production, marketing and the export and retail businesses both domestically and globally. It must be understood that these positions are considered an income source as too many not able to find work through legal avenues, and therefore it is necessary to tackle employment issues across the globe to protect not only against poverty, but environmental degradation.

This economic factor is intensified through on-going globalisation, resulting in an increased volume of wildlife trade.[158] Population growth, buyer power and globalisation have led to a rise in the demand for exotic wildlife products, contributing to the illegal wildlife trade within developed, emerging and developing nations.

Wildlife traffickers, cater for this increased demand through the utilisation of modern commercial and technological advancements, such as night vision scopes, silenced weapons, darting equipment and the Internet. The Internet gives rise to parallel markets; permitting illicit sourced wildlife products to be virtually untraceable once the product has left the source country, especially if it becomes a component part in another product. This enables greater exploitation of globalisation and avoidance of legal consequences, unless very specific testing facilities are available.[159]

[158] ibid.
[159] Wasser, S., *et al*., 'Combating the Illegal Trade in African Elephant Ivory with DNA Forensics' (2008), 22(4) Conservation Biology 1066

Wasser *et al* report that wildlife traffickers are becoming much more sophisticated in their trading techniques, exploiting available technology to reach the high-paying markets of more industrialised countries.[160] These high-paying markets are fuelled by ever-changing consumer tastes. Beyond prohibiting shipments at the point of international exchange, intervention could occur by lowering demand. This could be achieved via a combination of changing consumer tastes through education; reducing supplies through increased fear of penalty; and by raising the risk of detection. For example, over recent years, sniffer dogs have been used to increase detection[161] and global introduction of dog units within Border Force teams could act as a significant deterrent. Heightened risk of detection, as well as successful prosecution, would provide invaluable incentives in helping prevent both the illegal wildlife trade and the global security threats associated with it.

Ultimately, however, the trade in endangered species will continue to thrive unless there is also activity to reduce demand, for example through educating consumers. Examples of consumer tastes that could be changed through education are the use of sea turtle shells to make sunglasses and jewellery, and big cat skins used for coats and rugs.[162] However, in the face of criticism of interference with national sovereign rights, cultural traditions, and ignorance of poverty, such efforts are unlikely to succeed, and certainly not be successful in the time needed to save many species from extinction. So,

[160] ibid.
[161] Ruggerio, S., 'Canines and Contraband: Sniffer dogs help to stop wildlife crime' (WWF, 20 August 2014) http://www.worldwildlife.org/stories/canines-and-contraband 02 February 2015
[162] IFAW, 'The Facts Wildife Trade', *Operation Charm*, http://operationcharm.org/documents/OperationCharmFactsheet.pdf 02 February 2015

while continuing with demand reduction efforts, the focus should be on controlling supply through national and international regulation, effective enforcement and significant penalties for offenders who try to obtain, ship or trade in wildlife products.

2.8 Demand for CITES protected specimens

Conservationists have argued that the demand for illegal wildlife products, such as ivory, has in fact been further stimulated by CITES itself, through it allowing one-off sales of government stocks. In 1999, for example, Japan was given permission by CITES to sell its ivory stocks. This happened again in Japan, and China, in 2008.[163] This could be argued to give weight to those CITES Parties driving towards legalising the ivory trade and raise the question of how effective CITES can really be, when its provisions apparently enable governments to participate in activities the Convention is trying to prevent.

However, over the last decade (at the time of writing), sanctioned auctions of ivory stockpiled in Botswana, Namibia, South Africa and Zimbabwe have been used to raise in excess of $15 million for elephant conservation.[164] Other countries are destroying ivory stockpiles as a demonstration to offenders of the severity of the crime and for it to act as a deterrent. Following precedents set by the USA, France and China, Tanzania is set to destroy $50 million of ivory stockpiles, a change from their original plan to sell the ivory which was

[163] Gossmann, A., 'Tusks and trinkets: An overview of illicit ivory trafficking in Africa' (2010) 18(4) African Security Review 55
[164] Fischer, C.,'Ivory Stockpiling: Will destroying them really help stop poaching?' (Common Resources, 18 February 2014) http://common-resources.org/2014/ivory-stockpiles-will-destroying-them-really-help-stop-poaching/ 19 May 2014

rejected by CITES.[165] In Hong Kong, there has been destruction of 28 tons of illegal ivory, the world's largest stockpile and more than any other country in history.[166] Hong Kong is one of the major transit points for smuggling ivory and is used as a gateway helping to fuel the demand in mainland China, the number one ivory consumer.[167] The Hong Kong Government believed destroying the stockpile would reaffirm commitment to combat the illegal wildlife trade, and discourage demand. The ivory was first crushed and then incinerated in an industrial waste facility; given its size, it took a year for the whole stockpile to be destroyed.[168]

However, countries considering the destruction of their stockpiles should perhaps consider whether the authorised sale of them may be more effective. The Experimental Economics Centre argues that basic economics suggests that by increasing supply, market prices should reduce,[169] in turn resulting in a reduction in poaching. Conversely, as argued by Moyles and Stiles, decreasing the supply of ivory products, through destruction of government

[165] Salam, A. and Salam D. E., 'Big Game Poachers', (The Economist, 08 November 2014) https://www.economist.com/middle-east-and-africa/2014/11/08/big-game-poachers 16 May 2019; Sheldrick Wildlife Trust, 'CITES Rejects Tanzanian Proposal to Sell Ivory' (22 March 2010) https://www.sheldrickwildlifetrust.org/news/updates/cites-rejects-tanzanian-proposal-to-sell-ivory 16 May 2019

[166] Ruggiero, S., 'Hong Kong set to destroy record ivory stockpile' (WWF, 15 May 2014) https://www.worldwildlife.org/stories/hong-kong-set-to-destroy-record-ivory-stockpile 19 May 2014

[167] Iaccino, L., 'Elephant poaching: 'Tanzania's Ivory 'Smuggled to China in President Xi Jinping's Plane'' *International Business Time*s (06 November 2014)

[168] Ruggerio, S., 'Hong Kong set to destroy record ivory stockpile' (15 May 2014) http://www.worldwildlife.org/stories/hong-kong-set-to-destroy-record-ivory-stockpile 02 February 2015

[169] Experimental Economics Center, 'Factors Affecting Supply', http://www.econport.org/content/handbook/supply/changeSupply.html 02 February 2015

stockpiles, may increase prices and accelerate profits.[170] Destruction of government stockpiles may therefore effectively hand control back to those responsible for the illegal trade in ivory, simultaneously accelerating demand, price and poaching. Governments should therefore evaluate the whole situation before deciding whether destruction of their ivory stockpiles will be an effective deterrent.

CITES also contains less stringent measures for 'pre-Convention' wildlife, defined as specimens acquired from the wild and possessed before the first date of listing of the species. In the case of ivory from African elephants, this may be legally traded if it pre-dates 1989; in the case of Asian elephants, trade is only legal if the ivory pre-dates 1975.[171] That being said, relevant documentation to support the date of acquisition must be provided for international shipments of such ivory. Unfortunately, the fact that this legitimate trade exists provides a means by which ivory remains visible and desirable to some consumers.[172]

The International Fund highlighted an additional complication in respect of exemptions for Animal Welfare (IFAW). In 2004 IFAW published a study of the trade in ivory, concluding that much of the ivory within Hong Kong and China was being faked as 'antique' in an attempt to deceive government officials

[170] Moyle, B. and Stiles, D., 'Destroying ivory may make illegal trade more lucrative' *South China Morning Post* (04 February 2014)
[171] Bandow, D., 'Obama Administration Treats Antique Collectors and Dealers As Criminals: New Ivory Rules Put Elephants at an Increased Risk' (Forbes, 17 February 2014) http://www.forbes.com/sites/dougbandow/2014/02/17/obama-administration-treats-antique-collectors-and-dealers-as-criminals-new-ivory-rules-put-elephants-at-increased-risk/ 23 July 2014
[172] ibid.

trying to enforce CITES measures, and consumers.[173] This antique look can be achieved through tea and tobacco staining techniques, which change colour and add cracking.[174] However, ivory can change appearance naturally with age in terms of both colour and the development of hairline cracks. At the time of IFAW's report, there was generally no testing used to identify the age of ivory, or when it was carved.[175] However, some countries have introduced domestic legislation providing for DNA testing and the use of specialists to help identify the age of an ivory specimen. These techniques are both expensive and not universally available and so are unlikely to be significant factors in stemming demand.

The work of Stiles and Martin[176] offers Thailand as an additional example of the complications surrounding the implementation and enforcement of legislation aimed at the ivory trade. Internal trade in all wild elephant products has been illegal in Thailand since 1960. However, the internal sale of raw and worked ivory from domesticated Thai elephants is legal. Stiles and Martin report[177] that if a Thai official tries to arrest a trader or shopkeeper, the latter will naturally state that the ivory came from domesticated Thai elephants. Of course, unless there are appropriate methods to verify the ivory source, the prohibition is undermined through the exploitation of a major loophole in the national law.

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[173] Leakey, R., and Isiche, J., 'Elephants on the High Street: An investigation into the ivory trade in the UK', (2004) International Fund for Animal Welfare 10
[174] ibid.
[175] Leakey, R., and Isiche, J., 'Elephants on the High Street: An investigation into the ivory trade in the UK', (2004) International Fund for Animal Welfare 11
[176] Stiles, D., and Martin, E., 'The trade in African and Asian Ivory in South East Asia', (2002) 33 Pachyderm 80
[177] ibid.

In contrast, even though CITES permits these less stringent measures, recent developments within individual countries have been positive through the adoption of stricter measures to control the trade in ivory. As of 31st December 2017, China's legal, government-sanctioned ivory trade came to a close, with all of the country's licensed ivory carving factories and retailers being closed down.[178] Along with China, the UK and the USA have set out proposals to impose a total ban on ivory sales, thereby removing the historic exemption outlined above.[179] Whilst these recent developments may help to tackle the illegal trade in ivory, a more detailed analysis of this is beyond the scope of this thesis.

2.9 Identification of species and CITES

Accurate identification of specimens can be critical for the purposes of enforcement, but can also be critical for investigation and prosecution of illegal wildlife trade cases. Identification is necessary to ascertain whether the seizure is of a native, or imported specimen as otherwise this may result in biosecurity issues to human and plant species, and also to identify whether the seizure is of a CITES listed species.

[178] Bale, R., 'China Shuts Down Its Legal Ivory Trade' *National Geographic* (30 December 2017)
[179] Department for Environment, Food and Rural Affairs, *Government sets out plans for ivory ban* (October 2017, News story), https://www.gov.uk/government/news/government-sets-out-plans-for-ivory-ban 05 January 2018

Generally, morphological examination by taxonomists or experts can be sufficient for identifying species, however, this is not always the case,[180] especially where specimens are highly processed[181] (such as those products used for medicinal purposes) or when usually distinguishing features are lacking (such as with bird eggs).[182] In the latter case, any distinguishing features may no longer be visible, for reasons such as if the perpetrator has crushed or mishandled them. Where the eggs are still viable, they can be incubated and hatched for identification purposes, but this is a time consuming process and where the eggs are exotic specimens, it is possible that hatching could create a biosecurity risk to the importing country.[183] Where there are stray feathers still attached to the eggs, it may be possible for these to assist in the identification process. However, not all countries have developed the necessary techniques or have the capacity to carry this out.[184] Within the UK, there are powers for carrying out identification under the Conservation of Habitats and Species Regulations 2017[185] and the

[180] Veijalaien, A., Broad, G., Wahlberg, N., Longino, J. and Sääksjärvi, I., 'DNA barcoding and morphology reveal two common species in one: *Pimpla molesta* stat. rev. separated from *P. croceipes* (Hymenoptera, Ichneumoniae)' (2011) 124 ZooKeys 59
[181] Wozney, K. and Wilson, P., 'Real-time PCR detection and quantification of elephantid DNA: Species identification for highly processed samples associated with ivory trade' (2011) 219 Forensic Science International 107
[182] Coghlan, M., *et al.,* 'Egg Forensics: An appraisal of DNA sequencing to assist in species identification of illegally smuggled eggs' (2011) 6(2) Forensic Science International: Genetics 269
[183] Coalition Against Wildlife Trafficking, 'Customs and Border Protection cracks egg smuggling attempt' (Coalition Against Wildlife, 09 September 2009) http://www.cawtglobal.org/home/2009/9/9/customs-and-border-protection-cracks-egg-smuggling-attempt.html 10 February 2015
[184] Dove, C., 'Quantification of microscopic feather characters used in the identification of North American plovers' (1999) 99 The Condor 47
[185] SI 2017/1012; This enforces Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (OJ 1992, L 206)

Control of Trade in Endangered Species (Enforcement) Regulations 2005[186] (COTES).

Another useful tool for species identification encompasses DNA methods, which some, such as Taylor, consider the most effective in enabling prosecution services to charge offenders for breach of national legislation implementing CITES.[187] One example of this success is an Australian case during 2007, where DNA methods were used to identify 23 bird eggs illegal imported into Sydney from Thailand.[188] The eggs were identified to be of two types of CITES Appendix II species, the African grey parrot (*Psittacus erithacus*) and the Electus parrot (*Eclectus roratus*), and one rare CITES Appendix I listed species, the Moluccan cockatoo (*Cacatua moluccensis*).[189] These birds were valued at $250,000 on the black market in Australia, and based on the DNA evidence, the defendant was convicted and sentenced to 2 years' imprisonment and a $10,000 fine.[190]

[186] (SI 2005/1694)
[187] Taylor, T., 'Detection of illegal trade in the Cape Parrot and Blue Crane using DNA' (Science in Africa, October 2006) http://www.scienceinafrica.com/biotechnology/environmental/detection-illegal-trade-cape-parrot-and-blue-crane-using-dna 03 February 2015
[188] Johnson, R., 'The use of DNA identification in prosecuting wildlife-traffickers in Australia: do the penalties fit the crime?' (2010) 6(3) Forensic Science, Medicine and Pathology 213
[189] Alacs, E. and Georges, A., 'Wildlife across our borders: a review of the illegal trade in Australia' (2008) 40(2) Australian Journal of Forensic Sciences 155
[190] Australian Customs and Border Protection Service (ACBPS), 'Two years for bird smuggler' (Canberra: Customs Media release, January 2007) http://www.customs.gov.au/site/content8431.asp 22 March 2014

Ogden, Dawney and McEwig argue that DNA methods are also useful as they can provide evidence to help identify the geographic origin of seizures.[191] Establishing this can in turn be useful for three reasons. First, as noted by Wasser *et al,* it can assist in distinguishing between commercial trades and poaching.[192] Second, it can help in identifying those areas where taxa are most vulnerable to illegal exploitation.[193] Finally, as identified in the work of Velo-Antón *et al*, it can facilitate the repatriation of seized animals and plants to their place of origin.[194]

The degree to which these techniques can increase the effectiveness of the enforcement of CITES depends primarily on the Parties and the structures they have put in place to fight illegal wildlife crime. Currently, the US Fish and Wildlife Service Forensic Laboratory, located in Ashland, Oregon, is the only laboratory in the world dedicated to crimes against wildlife. Approximately 750 federal agents used the service in 2011.[195] Although Signatories of CITES can receive support from the US Fish and Wildlife Service,[196] the main expertise and support for each individual Party resides primarily within its own borders. It is likely that technological improvements in respect of wildlife

[191] Ogden, R., Dawnay, N. and McEwig, R., 'Wildlife DNA forensics – bridging the gap between conservation genetics and law enforcement' (2009) 9 Endangered Species Research 184
[192] Wasser, S., *et al*., 'Assigning African elephant DNA to geographic region of origin: Applications to the ivory trade' (2004) 101(41) Proceedings of the National Academy of Sciences of the United States of America 14852
[193] Wasser, S., 'Using DNA to track the origin of the largest ivory seizure since the 1989 trade ban' (2007) 104(10) Proceedings of the National Academy of Sciences of the United States of America 4232
[194] Velo-Antón, G., *et al*., 'Assignment tests applied to relocate individuals of unknown origin in a threatened species, the European pond turtle (Emys orbicularis)' (2007) 28 Amphibia Reptilia 482
[195] Steoff, R., *Forensic Science Investigated: Crime Labs* (2011) p. 64
[196] Used by 170 foreign countries in 2011

identification will be shared as a result of closer working between Parties, a result of which may enable more effective enforcement.

Although DNA identification methodologies are still in their infancy in most countries, which are a Party to CITES, the procedures are becoming increasingly more widespread and are considered to be an effective way to determine whether seizures are permitted under the Convention and domestic laws, for example, captive bred species.[197] Due to this increased interest, countries are implementing provisions in legislation to allow for sampling to take place: for example, within the UK, COTES Regulations[198] have clear provisions permitting enforcement officers to take and use samples. However, the cost and capacity of constructing and implementing these identification techniques could be an issue for some Parties to the Convention. This will be considered further with respect to the countries of study later in this thesis.

2.10 The Political Context of CITES

The political context of CITES is perhaps best evidenced through exploring its voting mechanisms. In the case of the EU, for example, the 28 votes involved constitutes a powerful voice, although in practice the EU votes as one body.[199] There have, however, been cases where Member States have voted

[197] Australian Institute of Criminology, 'Illegal trade in fauna and flora and harms to biodiversity', (Australian Institue of Criminology, 3 November 2017) https://aic.gov.au/publications/rpp/rpp109/illegal-trade-fauna-and-flora-and-harms-biodiversity 09 October 2018

[198] Section 8(5)

[199] European Parliament, 'European Parliament resolution on the EU strategic objectives for the 16th meeting of the Conference of Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), to be held in Bangkok (Thailand) from 3 to 14 March 2013 (2012/2838(RSP)), (30 January

against the rest of the EU: for example, in 2010 the UK broke ranks by voting in favour of Atlantic Bluefin Tuna protection. In doing so, because CITES voting is not secret, Jones suggests that the UK subsequently incurred the wrath of its EU partners.[200]

At CoP16, in 2013, somewhat ironically, the EU and its Member States raised the importance of secret voting, arguing that its adoption would help circumvent political pressures put on Parties by other signatories.[201] However, it is possible that the regular use of secret ballot voting could also undermine the integrity of the Convention, as discussed at CoP16. There are currently a number of agreed criteria designed to guide the Parties in their implementation of the Convention, and CoP16 discussed the possibility that the use of secret ballots could make it impossible to determine whether the reasoning behind decision making appropriately considers these criteria.[202] On balance, CITES may need to develop mechanisms for the use of secret ballots/ voting on a case-by-case basis, although this would be subject to potentially subjective analysis.

Another political factor holding influence in CITES determinations, and potentially impacting on the Convention's integrity, occurs when delegates are

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2013) http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+B7-2013-0047+0+DOC+XML+V0//EN14 August 2014

[200] Jones, M., 'Has CITES had its day?' *BBC* (06 April 2010) http://news.bbc.co.uk/1/hi/sci/tech/8606011.stm30 April 2014

[201] CITES, *Proposals to improve transparency of voting during meetings of the Conference of Parties*, (2013, Sixteenth meeting of the Conference of Parties Bangkok (Thailand)) at p. 2

[202] CITES, *Proposals to improve transparency of voting during meetings of the Conference of Parties*, (2013, Sixteenth meeting of the Conference of Parties Bangkok (Thailand)) at p. 2

in favour of maintaining trade in certain threatened species based on the argument that limiting the trade would have negative consequences on the economy of poorer communities, as well as reducing the opportunity for people to obtain essential resources.[203] This brings into the arena the interplay between different ethical considerations; it has been argued, for example, that it would be unreasonable to expect human populations, specifically in poor economic regions, to neglect an available source of food or money, or to tolerate dangerous or destructive wild animals, in the name of environmental protection and conservation.[204]

This reasoning can, though, be challenged. Taking shark and Atlantic Bluefin Tuna fishing as examples, the former is generally carried out in international waters by large commercial vessels to serve the taste of an ever growing middle class in East Asia for shark fin soup, whereas the latter primarily feeds the demand for sushi, with 80% of Atlantic Bluefin Tuna ending up served as this in Japanese restaurants.[205] Another example is red and pink coral, disappearing at an unsustainable rate, but which supplies nothing more than markets with jewellery and trinkets,[206] yet they fail to gain protection.[207] Based on these examples, it would seem that the poverty of communities is

[203] CITES, *Interpretation and implementation of the Convention: Recognition of the benefits of trade in wildlife*, (1992, Eighth meeting of the Conference of Parties Kyoto (Japan)) at p. 861
[204] CITES, *Interpretation and implementation of the Convention: Recognition of the benefits of trade in wildlife*, (1992, Eighth meeting of the Conference of Parties Kyoto (Japan)) at p. 861
[205] BBC News Asia-Pacific, 'Bluefin tuna protection system 'full of holes'' *BBC* (7 November 2010)
[206] National Ocean Service, 'Does coral jewelry make a good gift?', (25 June 2018) http://oceanservice.noaa.gov/facts/coral-jewelry.html 09 October 2018
[207] Environment News Service, 'CITES Leaves Trade in Precious Corals Unrestricted', *Environment News Service*, 22 March 2010, http://www.ens-newswire.com/ens/mar2010/2010-03-22-01.html 06 October 2014

nothing more than a convenient argument delegates use to manipulate their way into being able to trade in these species. In addition, even when permitting trade in species genuinely offers protection to poor communities, it has to be balanced against the potential collapse of that species, which would naturally have devastating consequences, removing a valuable resource from being utilised for generations to come, or, in the case of extinction, for all time.

It would appear from the evidence above that CITES is most effective when dealing with species at the most significant risk from international trade, but that its effectiveness becomes difficult to ascertain when dealing with species of high commercial value.

2.11 Difficulty in establishing the effectiveness of CITES

It is difficult to establish the effectiveness of CITES for numerous reasons. For example, the Convention regulates international trade, but species may become extinct for many other reasons. Most recorded extinctions have arisen from a series of factors known as the 'Evil Quartet", which include habitat destruction and fragmentation; introduction of alien species; overkill, that may be for local use or international trade; and chains of extinction, where one species upon which another depends becomes extinct.[208] Declining status may also occur as a result of ineffective conservation policies within individual countries, as opposed to being a result of the *per se* regulation of international trade, including, for example, poor law enforcement, and low budgets devoted to a particular protected species or area.

[208] IUCN, 'Trade measures in multilateral environmental agreements', (November 2000) http://www.cites.org/common/prog/economics/iucn-trademeasuresinCITES.pdf 13 March 2014

Nonetheless, the effects of these other factors should be taken into account by CITES authorities in determining whether an export will be detrimental to the survival of a species.

As with other aspects of international law, the effectiveness of the implementation of CITES varies from country to country as it is dependent on the State's practices relating to its application.[209] Some countries have not enacted domestic legislation to implement or to conform to the principles of the Convention. Where this is the case, countries rely on the basis of general wildlife laws, customs and other international trade legislation to act as a vehicle for implementing CITES. It is often the case that these are ill adapted to the specific aims of implementing CITES, especially, as Klemm notes, where the legislation was adopted before the Convention entered into force in the country concerned.[210] Other signatories have legislation under development,[211] or have implemented legislation, which covers only parts of the Convention.

Even examples of implementing legislation generally considered as effective, may have difficulties and give rise to criticism. Forged documentation is, according to Brown and Swalis[212], a continuing and frequent problem that

[209] International Academy for Nature Conservation, 'Expert Workshop Promoting CITES-CBD Cooperation and Synergy' *Workshop Report Final Draft* (20-24 April 2004)
[210]
[211] CITES, *Interpretation and implementation of the Convention: Compliance and enforcement*, (2010), p. 3
[212] Brown, D and Swails, E., *Comparative Case Study 3: The Convention on International Trade in Endangered Species (CITES)*, (2005, Overseas Development Institute) p. 5

impacts even those countries with domestic legislation in place.[213] As noted in 2.4.5 the forgery of documentation links to corrupt practices,[214] another factor involved with the illegal wildlife trade, and one that will be discussed in more detail below.

According to the US Fish and Wildlife Service, the accuracy, frequency and format of 'annual reports' demonstrating the origin of species or the purposes of trade are not always completed, and descriptions of the type of specimen are not necessarily consistent.[215] All these factors can limit the effectiveness of the Convention for each Party individually.[216] The factors resulting in negative implications on CITES will be explored further in the upcoming chapters.

Since the scope of the Convention is limited to international trade, the data submitted to the Secretariat needs only to relate to international, as opposed to domestic, trade. Given the potential volume of intra-country trade, and occurrences of missed shipments, this data therefore does not fully represent the true level of trade. That being said, in some circumstances intra-country

[213] USA Today, 'S. Africa to return gorillas to Cameroon', *USA Today*, 14 September 2007; Klemm, C., *Guidelines for Legislation to Implement CITES*, (1993) p. 5
[214] Wyatt, T., *et al*., 'Corruption and Wildlife Trafficking: Three Case Studies Involving Asia', (2017) 13(1) Asian Journal of Criminology 11
[215] U.S. Fish and Wildlife Service, *Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition and Proposed Rule to Remove the Morelet's Crocodile from the Federal List of Endangered and Threatened Wildlife*, (2011, Federal Register: Proposed Rule), https://www.federalregister.gov/articles/2011/04/27/2011-9836/endangered-and-threatened-wildlife-and-plants-12-month-finding-on-a-petition-and-proposed-rule-to 30 July 2014
[216] Preston, B., and Hanson, C., 'The Globalisation and Harmonisation of Environmental Law: An Australian Perspective', (2013) 16(1) Asia Pacific Journal of Environmental Law 9

trade does require a CITES permit to accompany listed specimens, for example, in the UK under the Control of Trade in Endangered Species (Enforcement) Regulation 1997 (COTES) as amended. The content and effectiveness of these regulations will be examined further in Chapter 3.

It could be argued that measures requiring a true representation of all trade being carried out, along with its level, should be considered in order to fully tackle the illegal wildlife trade. If this data were fully collated, systematically and accurately, it could provide CITES and its Parties with evidence to enhance understanding of the shortfalls, weaknesses and strengths of the efforts to control the illegal wildlife trade.

For example, current data does not necessarily reflect the volume of species harvested to produce the international trade, or take into account mortality at interception. The reflection of aspects such as these in the data could help increase the effectiveness of CITES. One-way of remedying this could be to introduce animal welfare standards from the point of capture and to implement domestic legislation around this. With CITES being the only international convention to make express reference to welfare in its foundational text, animal welfare is described by Harrop as a deprived relative within the hierarchies of international law and policy.[217]

CITES seeks to offer protection of the welfare of wild animals from the point that live animals come into trade or are otherwise under human control in that

[217] Harrop, S., 'Climate Change, Conservation and the Place for Wild Animal Welfare in International Law', (2011) 23 Journal of Environmental Law 441

process.[218] Whilst the illegal wildlife trade involves the illicit procurement, transport, and distribution – internationally and domestically – of plants, animals, animal parts and derivatives thereof, in contravention of laws, treaties and regulations, CITES seeks to protect animal welfare only from the point when the species comes into trade, suggesting that its measures do not offer protection prior to transit. Perhaps, if the Convention included this in the text and ensured these standards were adhered to in cases where seizures are made, levels of mortality at this point could be reduced or even avoided.

One solution may be to interpret the word 'protect' within the CITES text to connote concepts of welfare.[219] However, animal welfare is not expressly mentioned in the provisions of CITES. Therefore, even though the Articles within the Convention allude to the preservation of animal welfare, it is questionable whether it can be said with certainty that they can be interpreted to include the aim of protecting the welfare of the species covered within the Appendices. It is hard to believe that a Convention designed to protect endangered species could not have an underlying aim to protect animal welfare, but this is just an assumption. In order to fully understand whether the principles of CITES can extend to the protection of animal welfare, it is necessary to explore national implementing legislation. This will be discussed further in Chapter 3.

[218] ibid.
[219] Lowther, J. 'Can the UK offer more protection for endangered species? An evaluation of the potential use of Article 8(2) of the EC's wildlife trade regulation and recent developments with COTES', (2005) 17 Environmental Law and Management 120

From an animal welfare standpoint, it would seem that another system needs to be put in place, either an independent one, or through CITES, to help decrease mortality, and to help corroborate information regarding the volume of harvest. This will be considered in more detail further in the thesis.

Another factor to be considered in assessing CITES effectiveness, are customs agencies' procedures for documenting activities. Different customs agencies use different units of measure, for example weight or number, which hinders the clarity of reports when the data is complied. As well as this, countries of origin may be labelled differently, so that it is not always possible to source imports and exports and crosscheck them against each other. Given the significance of the role customs agencies play in the implementation of CITES, this will be explored in further detail in Chapters 3 and 5.

Finally, but of some significance, is that not all countries are a Party to the Convention, and trade between such countries is therefore not reported. These countries can be important consumers, or act as laundering operations without this being reflected in the data on trade volumes,[220] although, as previously discussed, relevant documentation should be provided under Article X of the Convention. The problems faced through the lack of reporting on non-Party trade should, however, decrease as the number of Parties to the Convention increases.

[220] IUCN, 'Trade measures in multilateral environmental agreements', (November 2000) http://www.cites.org/common/prog/economics/iucn-trademeasuresinCITES.pdf 13 March 2014

The IUCN has described the early years of the Convention, as plagued by acute problems.[221] The key to success for any multilateral agreement is effective enforcement and compliance. Although there are relatively stringent penalties for illegal wildlife trade offences across the globe, Brooks has noted that the relatively light penalty of forfeiture of contraband has proved far more popular than fines and prison sentences.[222] This has been justified through the cost, time and staff resources, as well as sometimes impractical procedures, necessary to take the matter to prosecution, for example during the transit process. Due to the high profits that can be made from the successful shipments of these illegal products, some prosecution agencies believe that potential forfeiture of goods alone is an acceptable penalty for such an offence. If a trading entity is consistently detected, the potential for prosecution increases. However, the majority of illegal shipments do often have accompanying permits and certificates. Of significance is the fact that this documentation may be deficit in that they are counterfeit, adulterated or may not tally with the species or volumes contained in the shipment.[223] Unfortunately, prosecutions for such paperwork offences are not common since they are justified as just minor administrative breaches, rather than premeditated trafficking.

[221] ibid.
[222] Brooks, J., 'A survey of the enforcement of international wildlife trade regulation under United States Law', (1993) 17(2) William & Mary Environmental Law and Policy Review 147
[223] Oldfield, S., *The Trade in Wildlife: Regulation for Conservation*, (2013) p. xx

Where offenders do not comply with regulations, use of criminal law is the default position. Although criminal prosecution is used sparingly in illegal wildlife trade cases, some criminologists have argued that wrongful behaviour "is generally deterred more by criminal prosecution than by civil or administrative action" .[224] Prosecutions against suspects will be bought by different bodies within different countries; in England and Wales, cases can be brought by either the Crown Prosecution Service (CPS) where cases are passed on via the police, who do not have any prosecutorial powers, and via the RSPCA who bring private prosecutions against offenders. [225] Offences relating to the import, export or re-export of wild animals, predominantly under COTES, but also under the Customs and Excise Management Act 1979, may be investigated by the police or UK Border Force, prosecutions again being brought by the CPS.[226]

To prevent non-compliance, some counties devote resources to agencies and fora tasked with the detection and prosecution of offences. Within the UK, for example, there are a variety of such agencies and fora, including the National Wildlife Crime Unit (NWCU), a government-funded agency that employs the National Intelligence Model (NIM) of policing.[227] This agency does not carry out operational policing or bring prosecutions, but it does assist in the

[224] Oldfield, S., *The Trade in Wildlife: Regulation for Conservation*, (2013) p. 67
[225] RSPCA, 'As a private prosecutor', (January 2013) http://www.politicalanimal.org.uk/RSPCA/Briefing on RSPCA as a prosecutor Jan 2013.pdf 11 September 2014; This are bought under s.6(1) of the Prosecution Offences Act 1985
[226] UK Parliament, *Wildlife Crime*, March 2012, http://www.publications.parliament.uk/pa/cm201012/cmselect/cmenvaud/writev/1740/wild41.htm 11 September 2014
[227] Wellsmith, M., 'Wildlife Crime: The Problems of Enforcement', (2011) 17(2) European Journal on Criminal Policy and Research 131

prevention and detection of wildlife crime through the gathering of data and intelligence, performance of tactical and strategic analysis and co-ordination and facilitation of co-operation across other agencies and countries.[228]

In 2010, the NWCU's annual report pointed out that it was the only unit in the UK fulfilling a role as a medium between those engaged in wildlife crime enforcement. As such, it claims to have helped the UK "gain an enviable worldwide reputation for the coordinated and cohesive manner in which it combats wildlife crime" .[229] In 2009/10, the NWCU dealt with 10,000 incident reports (compared to 3,832 in 2008/09), processed 3,477 intelligence logs and was involved in investigations that led to the seizure or forfeiture of £400,000 worth of criminal gains. In comparison to the previous year, the NWCU conducted 14 times more database checks, received five times as many requests for analytical products, and increased its staffing levels.[230] Unfortunately, the NWCU has released annual reports for only 2009 and 2010 and therefore there is no up to date information on its successes in tackling the illegal wildlife trade.

An example of a UK forum is the Partnership for Action Against Wildlife Crime (PAW), which is based on a crime partnership model.[231] Through this partnership approach, agencies and organisations (other than just the police) are tasked with recognising the role they can play in reducing wildlife crime,

[228] ibid.
[229] UK National Wildlife Crime Unit, *Annual Report 2010*, (2010) p. 1
[230] Wellsmith, M., 'Wildlife Crime: The Problems of Enforcement', (2011) 17(2) European Journal on Criminal Policy and Research 132
[231] UK Government, 'Partnership for Action Against Wildlife Crime', 2013, https://www.gov.uk/government/groups/partnership-for-action-against-wildlife-crime11 September 2014

facilitating data sharing, and encouraging inter-agency working. Partnership allows the collation of resources, strengths and areas of responsibility across a range of agencies. PAW is also involved in increasing and maintaining awareness, through publicity and carrying out training.[232] The partnership consists of a steering group (involving selected government agencies, including the police), the Secretariat of the Department of Environment, Food and Rural Affairs (DEFRA) and a number of working groups.[233]

The NWCU, PAW and the RSPB include on their websites and/or in their annual reports, examples of successful prosecutions. In 2009/10 NWCU recorded 115 convictions compared to 51 in the previous year, an increase that could be a result of better recording practices. In relation to the 3,477 intelligence logs processed, as referred to above, 70% resulted in intelligence being recorded, 15% related to on-going investigations, 4% resulted in seizure by the UK Border Force and 3% resulted in convictions (this final result not including the outcome of prosecutions pending during the time the report was released).[234]

[232] Association of Chief Police Officers, *A memorandum of understanding on the prevention, investigation and enforcement of Wildlife Crime between Natural England, Countryside Council for Wales, Crown Prosecution Service and the Association of Chief Police Officers of England, Wales and Northern Ireland*, (July 2014, Memorandum of Understanding) p. 2
[233] UK Government, 'Partnership for Action Against Wildlife Crime', 2013, https://www.gov.uk/government/groups/partnership-for-action-against-wildlife-crime 11 September 2014
[234] UK National Wildlife Crime Unit, *Annual Report 2010*, (2010) p. 9

Whilst simplistic, there is a long-standing convention of assessing the effectiveness of legal regulation by reference to its enforcement.[235] In this context, there are two principles to consider: the nature of a regulatory offence, and the method by which it is made effective. It is possible that judicial systems around the globe are failing those involved in the efforts used to tackle the illegal wildlife trade. There are strong deterring penalties available, however, there is view that the courts do not seem to be using them.[236] In some countries, this may be in part explained by the fact that wildlife cases are heard in courts, where the judge may not be fully equipped and/or trained for dealing with the situation. Barry queries how a judge can apply appropriate penalties if there is little to no understanding regarding the environmental harm concerned.[237]

In the case of the UK, whilst there is a legislative framework in place that is generally supportive of the fight against wildlife crime, there is still the perception of a lack of effectiveness. Historically, there have been only limited provisions for 'joined-up' working between the principal agencies involved in bringing cases to court.[238] It is possible that this is the reason why there have been only a small number of wildlife trade cases. When criminals do end up in court, the imposition of low penalties in the majority of cases fail

[235] Alcoholism & Drug Abuse Weekly, 'Field pleased with medical management, other provisions of interim final rule', (2010) 22(6) Alcoholism & Drugs Weekly 3
[236] Brooks, J., 'A survey of the enforcement of international wildlife trade regulation under United States Law', (1993) 17(2) William & Mary Environmental Law and Policy Review 147
[237] Barry, C., 'Australia's wildlife blackmarket trade', (Australian Geographic, 16 August 2011) http://www.australiangeographic.com.au/topics/wildlife/2011/08/australias-wildlife-blackmarket-trade/ 03 January 2013
[238] Lowther, J., *et al*., 'Crime and punishment in the wildlife trade', (2002) Regional Research Institute 5

to act as a deterrent. This is significant when we consider the UK representative of a mature jurisdiction, more capable than many in having the capacity to take the necessary measures to make CITES effective.

By way of example, in February 2014, a prosecution was bought for trading in spur-thighed tortoises, classed as vulnerable in the IUCN Red List, and Hermann tortoises, classed as near threated in the IUCN Red List. Both are protected by Appendix II of CITES. Whilst the accused admitted to the prohibited sale of protected species, as well as the unlawful use of protected species for commercial gain, he received a 12-month conditional discharge and £265 in costs. This is unlikely to stop others from being attracted to the lucrative world of the illegal wildlife trade.[239] It is also ironic that this light sentencing came less than two weeks after the high profile London Declaration.

There is increasing recognition[240] of the idea that a court with special expertise in environmental matters is the best place for hearing cases concerning the illegal wildlife trade. Parties to CITES are starting to pay attention to this and are slowing establishing courts of this nature. One example of such a specialist environmental court is the Land and Environment Court of New South Wales. A full consideration of the development of such an approach is however beyond the scope of this thesis.

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[239] Heath, K., 'British courts again fail to take illegal wildlife trading seriously' *Wildlife News* (21 February 2014)

[240] See, for example, Preston, B., 'Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study', (2012) 29(2) Pace Environmental Law Review 400

To identify the direct contribution of the CITES trade measures to changes in trade patterns and conservation status of the species listed in its various Appendices requires a multivariate analysis. According to the IUCN,[241] in order to truly establish whether CITES is working, an index of success or failure needs to be available for each species listed in its Appendices. This could then be used to provide statistical analyses, establishing the important factors in explaining the effectiveness of measures regulating international trade through the Convention.

Although the IUCN has discussed whether CITES is, or can be successful, ultimately we have to first establish what 'success' means. This, for example, could be defined as halting the loss of biodiversity or endangered species, contributing to preventing environmentally degrading factors such as habitat loss, slowing the rate of extinctions, or by actually contribution to conservation, measureable by improvement in numbers of endangered species. Until we define what success is, we cannot identify measures of success, and there will continue to be no clear or logical explanation for how effective CITES is. The combination of needing to consider the effectiveness of the trade measures, and the difficult issue of achieving a measure of effectiveness for each species, makes the task of providing an independent evaluation impossible at this time.

[241] IUCN, 'Trade measures in multilateral environmental agreements', (November 2000) http://www.cites.org/common/prog/economics/iucn-trademeasuresinCITES.pdf 13 March 2014

2.12 The Contemporary Context

2.12.1 Global security threat

The continuous demand for illegal wildlife trade products brings with it threats to both animal and human populations. Wasser *et al* argue this illicit activity is perceived by organised criminals to be high profit and low risk.[242] As noted, the illegal wildlife trade has been estimated to be worth at least $15 billion per year, making it the fourth largest transnational crime after narcotics, counterfeiting and human trafficking.[243]

The United Nations defines transnational crime as "offences whose inceptions, prevention and/or direct or indirect effect involve more than one country".[244] Transnational crime appears to have increased exponentially over the past few decades, irrespective of international law enforcement efforts. Aside from the perhaps more obvious technological advances and the relative affordability of long-haul travel, it has been argued, by, for example Warchol *et al*, that this is due to the development of the European Union and the introduction of open border systems.[245] If correct, Warchol's point is deeply ironic given that the EU is one of the best co-ordinators for implementing laws

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[242] Wasser, S., *et al*., 'Combating the Illegal Trade in African Elephant Ivory with DNA Forensics', (2008) 22(4) Conservation Biology 1066

[243] TRAFFIC, 'Illegal Wildlife Threatens National Security, says WWF Report', (TRAFFIC, 12 December 2012) http://www.traffic.org/home/2012/12/12/illegal-wildlife-trade-threatens-national-security-says-wwf.html 03 January 2013

[244] United Nations, 'Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders', (A/CONF.169/15/Add.1, 04 April 1995) https://www.unodc.org/documents/congress/Previous_Congresses/9th_Congress_1995/017_ACONF.169.15.ADD.1_Interim_Report_Strengthening_the_Rule_of_Law.pdf 12 December 2018; Definition reproduced in Warchol, G., 'The Transnational Illegal Wildlife Trade', (2004) 17 Criminal Justice Studies 58

[245] Warchol, G. *et al*., 'Transnational Criminality: An Analysis of the Illegal Wildlife Market in Southern Africa', (2003) 13 International Criminal Justice Review 2

under CITES, by restricting trade in species that are most at risk and requiring that trade takes place only where it is considered sustainable.[246] Transnational criminal networks seem to have taken advantage of political instabilities and gathered incredible wealth by supplying new markets with illegal goods and services.

With the use by wildlife traffickers of smuggling routes associated with the transnational crime of drug trafficking, there has been increasing intertwining of these two transnational crimes.[247] For example, as well as the outright trade in live animals and animal parts, endangered species have now become containers for secreting illicit narcotics. This link between the illegal wildlife trade and narcotics has increasingly been the focus of news reports, as witnessed for example in the case of Kenya in 2017,[248] where investigators found evidence linking an ivory trafficker to narcotic crime syndicates.[249] More shocking are reports by the U.S. Fish and Wildlife Service to cases where

[246] European Commission, ' 'Global Biodiversity: The role of the EU in biodiversity-related international conventions and agreements', (10 June 2016) http://ec.europa.eu/environment/nature/biodiversity/international/index_en.htm 09 October 2018

[247] IFAW, 'Criminal Nature: The Global Security Implications of the Illegal Wildlife Trade', (IFAW, 2008) https://s3.amazonaws.com/ifaw-pantheon/sites/default/files/legacy/Criminal%20Nature%20Global%20security%20and%20wildlife%20trade%202008.pdf 25 September 2018

[248] The Economist, 'The Kenyan Connection: Do dope-smugglers also peddle ivory?' *The Economist* (09 February 2017) https://www.economist.com/news/middle-east-and-africa/21716651-emerging-links-between-two-nasty-trades-do-dope-smugglers-also-peddle-ivory 05 January 2018

[249] McConnell, T., ''They're like the mafia': the super gangs behind Africa's poaching crisis' *The Guardian* (19 August 2017) https://www.theguardian.com/environment/2017/aug/19/super-gangs-africa-poaching-crisis 05 January 2018

narcotics have been sewn into the stomachs of living animals and secreted in dead animal hide and bone.[250]

Warchol *et al* contend that the trade in endangered species is also linked to transnational crime by being used as payment for narcotics and arms, therefore establishing a new method of money laundering which is cashless, traceless and to seizures like bank accounts may be.[251] However, Figure 2 below suggests that the major importation of illegal wildlife trade is to areas on the opposite side of the globe to the routes used for smuggling narcotics, firearms and human trafficking.

[250] Speart, J., 'War Within', (1993) 5 Buzzworm: The Environmental Journal 38
[251] Warchol, G. *et al*., 'Transnational Criminality: An Analysis of the Illegal Wildlife Market in Southern Africa', (2003) 13 International Criminal Justice Review 4

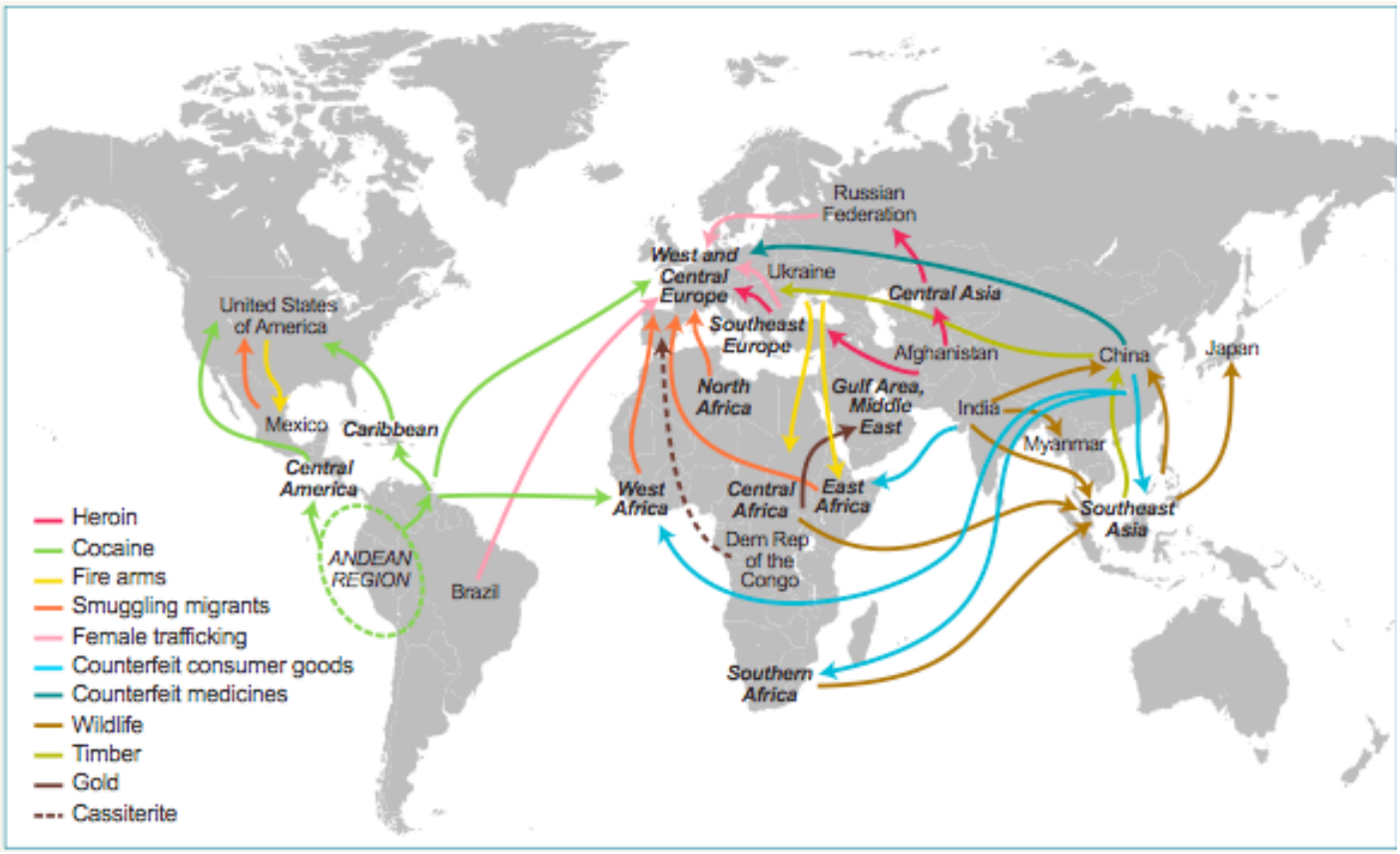

FIGURE 1: THE GLOBAL ROUTES OF TRANSNATIONAL ORGANISED CRIME[252]

The penalties and enforcement interest in controlling the drugs trade, firearms and human trafficking, are significant. However, despite the similarities in the operation of the illegal wildlife trade, it does not involve the same threats to offenders.[253] [254]

[252] World Wildlife Fund and Dalberg, 'Fighting Illicit Wildlife Trafficking – A consultation with governments', (2012) World Wildlife Fund International 13
[253] Smith, D., 'Africa is centre of a 'wildlife war' that the world is losing' *The Guardian* (21 March 2015) http://www.theguardian.com/environment/2015/mar/21/wildlife-war-lost-in-africa 22 March 2015
[254] Watson, M., 'Organised Crime and the Environment: the British Experience', (2005) 14 European Energy and Environmental Law Review 210

Lawson and Vines[255] have indicated that organised insurgency groups, and military units,[256] are among the primary actors involved in large-scale wildlife trafficking.[257] Some evidence also suggests that terrorist groups may be engaging in the illegal wildlife trade for monetary gain. That being said, this evidence is limited and often anecdotal. INTERPOL, for example, has suggested that some insurgent groups and possibly terrorist groups are reportedly engaged in illegal poaching for profit in several areas of Asia and Africa.[258] According to Kahumbu and Halliday, press reporting has made links between the illegal wildlife trade and the Lord's Resistance Army (LRA), stating investigators have evidence to demonstrate that the ivory trade is funding the activities of terrorist groups.[259] There is, however, no official evidence categorically proving this.

Figure 2, below, demonstrates regions of high biodiversity and their proximity to suspected terrorist safe havens. Although this is not conclusive proof of a relationship between terrorists and wildlife trafficking, the map highlights the potential link between terrorism and other criminal entities in regions with high

[255] Lawson, K. and Vines, A., 'Global Impacts of the Illegal Wildlife Trade: The Costs of Crime, Insecurity and Institutional Erosion', (Chatham House, February 2014) http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Africa/0214Wildlife.pdf 02 September 2014
[256] Wyler, L. and Sheikh, P., *International Illegal Wildlife Trade: Threats and U.S. Policy*, (2013, Congressional Research Service) at summary
[257] Wyler, L. and Sheikh, P., *International Illegal Wildlife Trade: Threats and U.S. Policy*, (2008, CRS Report for Congress) at p. 7
[258] Lawson, K. and Vines, A., 'Global Impacts of the Illegal Wildlife Trade: The Costs of Crime, Insecurity and Institutional Erosion', (Chatham House, February 2014) http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Africa/0214Wildlife.pdf 02 September 2014
[259] Kahumbu, P. and Halliday, A., 'Case Proven: ivory trafficking funds terrorism' *The Guardian* (30 August 2015) https://www.theguardian.com/environment/africa-wild/2015/aug/30/case-proven-ivory-trafficking-funds-terrorism 05 January 2018

biodiversity levels, where they can take advantage of porous borders, weak states and sympathisers.

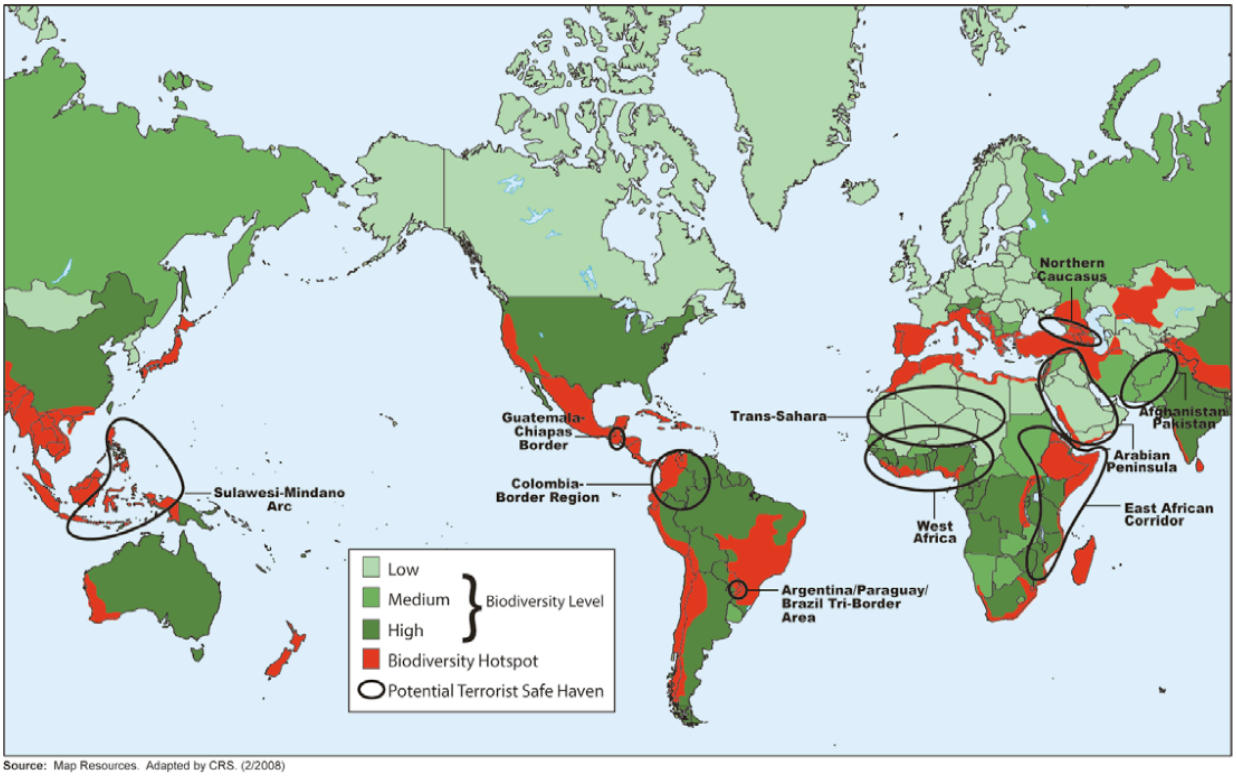

FIGURE 2: BIODIVERSITY HOTSPOTS AND SUSPECTED TERRORIST SAFE HAVENS[260]

According to reports from India, Islamic militants connected to Al-Qaida are sponsoring poaching in the Kaziranga reserve for profit.[261] Al-Shabaab[262] has also been reported to be deriving funds for its terror campaigns from elephant poaching in Kenya and elsewhere.[263] According to the Elephant Action League, the illicit ivory trade is funding up to 40% of the cost of Al-Shabaab's

[260] Wyler, L. and Sheikh, P., *International Illegal Wildlife Trade: Threats and U.S. Policy*, (2008, CRS Report for Congress) at p. 23
[261] Levy, A. and Scott-Clark, C., 'Poaching for Bin Laden' *The Guardian* (05 May 2007)
[262] The Somali Islamist group
[263] Stewart, C., 'Illegal ivory trade funds Al-Shabaab's terrorist attacks' *The Independent* (06 October 2013)

army of 5,000 people.[264] Joseph Kony's Resistance Army has also been reported to be heavily involved in the illegal wildlife trade.[265]

It is necessary to be cautious of these reports, as limited research has been carried out into the link between terrorism and the illegal wildlife trade. It is possible that interested parties are trying to identify this link, without supportive evidence, in order to attract national and international attention. It is also possible that this theory is being put out into the world to ensure funding. Nevertheless, the connection does seem documented and therefore must be considered, particularly given that the participation of such actors in wildlife trafficking can threaten the stability of countries, promote corruption and encourage the use of violence to protect the trade.[266]

Although there may not be substantive evidence to suggest global security threats through terrorism, there is a connection between the illegal wildlife trade and the use of illegal firearms. This connection is simple and straightforward: criminals, who illegally take species out of the wild, use illegal arms. Even where wildlife is captured and shipped alive, firearms are still used to kill adult animals protecting their young and for poachers to protect themselves.

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[264] ibid.
[265] Keating, J., 'Is the Illegal Ivory Trade Funding Terrorist Groups like Al-Shabaab?"' *Slate* (02 October 2013)
[266] Wyler, L. and Sheikh, P., *International Illegal Wildlife Trade: Threats and U.S. Policy*, (2008, CRS Report for Congress) at p. 18

2.12.2 Corruption

Corruption, which has been defined as "the unlawful use of public office for private gain" ,[267] is known to limit economic development and fuel poverty, but it may also hinder conservation efforts and therefore accelerate biodiversity loss. Corruption has been argued to be a critical factor enabling the illegal wildlife trade to continue, facilitating poaching, along with transactions between supply, transit and demand countries. It also offers an important means by which organised criminals may avoid detection and/or enforcement.[268] This corruption can take many forms, from bribes, to extortion, to simple patronage. The illegal wildlife trade has a tendency to thrive in places where corruption is rife; enforcement by national authorities is weak and where are few economic opportunities.[269]

Typically, organised criminals adopt the tactics of conspiracy, corruption and protection to subvert the effectiveness of national regulators and law enforcers, specifically at important trade transit points, such as border crossings.[270] Corruption and conspiracy are able to flourish where decision-making is obscure,[271] in regions where institutions are weak[272] and poverty is

[267] Smith, R. and Walpole, M., 'Should conservationists pay more attention to corruption?' (2005) 39 Oryx 251
[268] Martini, M., *Wildlife Crime and Corruption*, (2013) p. 367
[269] World Wildlife Fund and Dalberg, 'Fighting Illicit Wildlife Trafficking – A consultation with governments', (2012) World Wildlife Fund International 14
[270] Asch, E., 'The illegal wildlife trade in East Asia and the Pacific' in Lale-Demoz, A., and Lewis, G., *Transnational Organised Crime in East Asia and the Pacific: A Threat Assessment*, (2013) 81
[271] Dillion, J., *et al*., 'Corruption and The Environment: A project for: Transparency International', (April 2006), http://mpaenvironment.ei.columbia.edu/files/2014/06/Transparency-International-final-report.pdf 23 March 2015
[272] Bannon, I., 'The Fight Against Corruption: A World Bank Perspective', (Inter-American Development Bank, 25-28 May 1999)

widespread.[273] Asch identifies that the high level of corruption underpinning the illegal wildlife trade poses a serious threat to national and international governance.[274]

To help tackle the illicit trade in wildlife, it is therefore necessary to establish a strong legal network against corruption, within which special attention should be given to customs and law enforcement agencies and the judiciary, along with change to public perceptions and ethical standards across the public sector. Tackling corruption could be a helping hand in facing the problems involved with the illegal wildlife trade and demonstrate that this activity is not as high profit and low risk as currently perceived. The United Nations Convention against Corruption (UNCAC) sets a benchmark for anti-corruption laws, yet Yeater questions whether this is enough to help prevent the illegal wildlife trade.[275] In addition, whilst corruption is considered one of the main facilitators of wildlife trafficking, research suggests there are few mechanisms to tackle it. Wyatt *et al* have suggested that there are clear points along the trade chain that are targeted and where corrupt acts do occur, from bribery to forging permits, although the level and extent of this corruption is unknown.[276] It is also apparent that proceeds from the illicit wildlife trade filter into the legitimate market.

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http://www.iadb.org/regions/re2/consultative_group/groups/transparency_workshop6.htm 23 March 2015

[273] Poverty education, 'Chapter Three: Poverty Traps', http://www.povertyeducation.org/poverty-traps.html 23 March 2015

[274] Asch, E., 'The illegal wildlife trade in East Asia and the Pacific' in Lale-Demoz, A., and Lewis, G., *Transnational Organised Crime in East Asia and the Pacific: A Threat Assessment*,(2013) 77

[275] Yeater, M., *Corruption, Environment and the United Nations Convention Against Corruption*, (2012) p. 20

[276] Wyatt, T., *et al*., 'Corruption and Wildlife Trafficking: Three Case Studies Involving Asia', (2017)13(1) Asian Journal of Criminology 17

It is likely that where there is corruption, there will be the need for money laundering. This represents a further negative outcome from the illegal wildlife trade. Money laundering is defined as the use or process of taking the proceeds from criminal actions and making it appear legal. The illegal wildlife trade annually distributes a tremendous amount of 'dirty' money into the global economy. If appropriate attention is given to corruption, the causal link with money laundering means it too should be reduced. However, as with corruption, there is little information on how money laundering is taking place, and to what extent.[277]

2.13 Globalisation and its impacts on the illegal wildlife trade

Along with corruption, technological advancements through economic growth and globalisation can also have negative implications on the illegal wildlife trade. It can often be assumed that when it comes to illicit activities, everything has been done before. However, whilst criminals, smugglers and black markets have long existed, the nature of international crime has changed substantially in the past two decades. Moisés argues that this is because criminal networks have had the opportunity to expand beyond their traditional markets, taking full advantage of political and economic advancement and are now exploiting new technologies. [278]

As previously highlighted, one example of this is the Internet, which has become a tool offering traffickers easy opportunities to trade in endangered

[277] ibid.
[278] Moisés, N., 'Mafia States: Organised crime takes office', (2012) 19(3) Foreign Affairs, 100

species. As reported by Beardsley, a one-week study of the Internet demonstrated that there were over 9,000 wildlife products for sale[279]. More substantially, during 2008, the International Fund for Animal Welfare (IFAW) undertook an extensive worldwide investigation into the online trade of wildlife and wildlife containing products. Over the space of three months, six one-week surveys were conducted in various countries, the results of which can be found in Table 1. There are a number of other subsequent examples of such surveys that have adopted a similar methodology to this.[280]

[279] Beardsley, E., 'Poachers with PCs: The United States' Potential Obligations and Ability to Enforce Endangered Wildlife Trading Prohibitions against Foreign Traders Who Advertise on EBay', (2007) 25 UCLA Journal of Environmental Law and Policy 1; IFAW, 'Caught in the Web' (International Fund for Animal Welfare: London, 2005); Disrupt, 'Wildlife Cybercrime – Uncovering the Scale and Nature of Online Wildlife Trade'. http://www.ifaw.org/united-states/online-wildlife-trade-2018 02 April 2019

[280] Kitade, T., 'TRAFFIC surveys find thousands of ivory items sold weekly online in Japan', (TRAFFIC, 08 August 2017) https://www.traffic.org/publications/reports/traffic-surveys-find-thousands-of-ivory-items-sold-weekly-online-in-japan/ 16 May 2018; Sung, Y. and Fong, J., 'Assessing consumer trends and illegal activity by monitoring the online wildlife trade', (2018) 227 Biological Conservation, 220 to name a couple.

TABLE 1: RESULTS OF A THREE-MONTH INVESTIGATION INTO THE ONLINE ILLEGAL WILDLIFE TRADE CONDUCTED IN VARIOUS COUNTRIES[281]

Country	No. of websites tracked	No. of adverts	No. of adverts on eBay	No. of adverts: elephant products	No. of adverts: exotic birds	Advertised monetary value of all adverts ($)	Value of final sales recorded ($)
USA	28	5026	3690	3921	1025	1,896,827	370,365
UK	22	551	289	285	217	383,149	28,719
China	5	544	n/a	376	17	654,283	1,266
France	11	380	249	325	10	376,816	22,391
Canada	11	244	167	178	34	197,922	29,982
Germany	14	151	39	90	28	90,019	3,514
Russia	24	144	n/a	35	43	247,832	-
Australia	11	82	35	13	42	24,352	1,103
Total	**126**	**7122**	**4470**	**5223**	**1416**	**3,871,201**	**457,342**

The online trade of CITES protected species in the UK was the most extensive in Europe, and was highest compared to all other countries except the USA and Russia. This high volume may be just the tip of the iceberg given the fact that investigators limited their focus to a limited number of species. Evidence was found of a significant trade in ivory, as well as a

[281] International Fund for Animal Welfare, 'Wildlife crime', (UK Parliament: Environmental Audit, 24 February 2012) http://www.publications.parliament.uk/pa/cm201213/cmselect/cmenvaud/writev/140/wild22.htm 14 March 2014

volume of sales through eBay, despite eBay having announced in 2007 that it was banning ivory adverts involving cross-border trade. Following this investigation, in 2009, eBay announced a worldwide ban of all animal ivory on its website.

In 2011, IFAW carried out a smaller investigation of UK-based publically accessible websites.[282] A total of 61 listings of ivory were identified, with none providing clear proof that they were being sold legally – they were either posted on sites that explicitly banned the sale of ivory or other products of protected species, or the adverts contained no reference to legality.

Websites that have banned trade in endangered species are to be praised for their positive stance in attempting to tackle the illegal wildlife trade; however, it is evident that enforcement issues still arise and need tackling. Legislation regulating online trade requires significant improvement if it is to be regarded as 'fit for purpose'. Primarily, it is extremely difficult to assess whether items are being sold illegally or not. The ability for traffickers to sell and buy products easily in this way, with significantly reduced risks, poses real legal questions regarding basic principles of international law and jurisdiction. Those such as Denning, argue that as technology advances, it is essential that there is sufficient human oversight and intervention to safeguard those whom technology serves.[283] The evidence points to the fact that transnational crime is facilitated through technological advancement. As a

[282] This included Gumtree and eBay.
[283] Denning, D., 'Networks and netwars: the future of terror, crime and militancy' in Arquilla, J., and Ronfedt, D., *Network Wars: The Future of Terror, Crime and Militancy*, (2001) p. 283

result, it is necessary to develop more effective management techniques across all its facets.

2.14 Transportation improvements

Along with technological advancement, improvement in transportation methods also provides opportunities for the illegal wildlife trade. With the breaking down of international, political and economic barriers and the globalisation of businesses, freedom of movement has increased, and the international transportation of goods and services is easier.

Historically, travel options were limited and stringent border checks, made crossing national borders difficult for transnational criminals. According to the Federation of American Scientists, criminal activity has since been facilitated by the creation of improved air transportation connections and the easing of immigration and visa restrictions in many countries and regional trading blocs, primarily to promote international commerce.[284] As a result, criminals are now able to create travel routes and arrange itineraries to minimise risk, albeit that developed countries may have equipment and machinery that can disrupt these routes, along with relevant laws to permit the intercepting of telecommunications and searches.[285]

[284] Federation of American Scientists, 'Global Context of International Crime' in Federation of American Scientists, *International Crime Threat Assessment*, (2000), Ch. 1

[285] Kisswani, N., 'Telecommunications (interception and access) and its Regulation in Arab Countries', (2010) 5(4) Journal of International Commercial Law and Technology 228

Improvement and introduction of transport infrastructures, such as roads opening up forested areas, has permitted the inflow of poachers and traders to new areas where wildlife can be sourced.[286] For example, logging companies have built roads through forests in the Congo Basin that have helped to fuel the bushmeat trade within this area, and have contributed towards overexploitation of vulnerable species.[287] The developing transport infrastructure has therefore offered poachers opportunities that previously did not exist. These opportunities are being seized and with that the illegal wildlife trade is likely to increase further. In addition, many animals cover long and short distances to find food, water, mates and other resources during migration seasons. Roads, fences and other man-made infrastructures may block these wildlife corridors, and combined with the illegal trade, are pushing species towards extinction.[288]

In the post-Cold War era, many countries sought to extend privatisation in virtually every conceivable sector, creating an 'age of privatisation'.[289] Although there are benefits to privatisation, there is also evidence of exploitation by transnational criminals of this process. The former Soviet Union is a particularly notorious example of how criminal groups have developed into leading beneficiaries of privatisation. It has been argued that organised crime groups abuse the privatisation of legitimate economies by

[286] Asch, E., 'The illegal wildlife trade in East Asia and the Pacific' in Lale-Demoz, A., and Lewis, G., *Transnational Organised Crime in East Asia and the Pacific: A Threat Assessment*, (2013), p. 80
[287] World Wildlife Fund, 'Threats: Impacts', http://www.worldwildlife.org/threats/infrastructure 14 August 2014
[288] ibid.
[289] Mandel, R., 'The privatisation of security, Armed Forces & Society', (2001) 28(1) Armed Forces & Society 129

investing illicit profits in new capital ventures. This is, for example, achieved through establishing bank accounts that have little or no regulation and therefore do not question the source of the capital, allowing criminals to utilise old and new trade routes for the movement of illicit goods.[290] Andreas also reports on the conclusion reached by Columbia's economic programme, which "has stimulated and increased growth in the country's financial sector and has had the collateral effect of broadening the array of instruments available to Colombian drug traffickers to legitimise their illicit monies". [291] This suggests that whilst privatisation promotes effectiveness and efficiency, it also facilitates exploitation from transnational criminals.

The dilemma of balancing free trade and national security has captured the attention of many in the post-9/11 era. Scholars, such as Ekici and Unlu, argue that the threat posed by terrorist and other transnational crime syndicates could undercut, and potentially outweigh, the positive outcomes of economic-integration processes.[292] Specifically, traffickers can exploit the opportunities presented by free trade as the increasing numbers of international containers and travellers make it extremely difficult to devote appropriate time to security checks at borders. Beyond the risks associated with the international flow of goods, several analysts have argued that the free movement of capital also functions as a catalyst for laundering the proceeds of these crimes

[290] Andreas, P., 'Transnational crime and economic globalisation' in Berdal, M., and Serrano, M., *Transnational organised crime & international security – business as usual?* (2002) 46
[291] ibid.
[292] Ekici, B. and Unlu, A., 'Iran and Turkey: free trade and drug smuggling' *The Middle East Quarterly* (21 November 2013)

This view has been countered by those such as Froning, who identify that the benefits of the free-trade regime can possibly outweigh associated security costs[293] and others oppose strict security controls on foreign trade because they perceive free trade as an essential requirement for economic development.[294] In addition, enhancing trade relations may pave the way for greater cooperation among security agencies. Nevertheless, we can perhaps conclude that whilst governments often seek trade expansion and economic integration for the common good, trade agreements may inadvertently facilitate criminal activity through the exploitation of the free movement of goods, vehicles, and passengers.[295] Ultimately, however, there is no compelling evidence of the impact of trade openness on trans-border trafficking.

In conclusion, transnational organised crime, including that related to wildlife trade, presents a threat to national economic interests and can cause significant damage. Of concern in some developed nations, is the notion that companies are being put at a competitive disadvantage by transnational organised crime and corruption, particularly in emerging markets where there is a perception that the rule of law is less reliable.[296]

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[293] Froning, D., 'The Benefits of Free Trade: A Guide for Policymakers', (The Heritage Foundation, 25 August 2000) http://www.heritage.org/research/reports/2000/08/the-benefits-of-free-trade-a-guide-for-policymakers 23 March 2015

T[294] Ekici, B. and Unlu, A., 'Ankara's challenges: Increased Drug Trafficking from Iran', (2013) 20(4) The Middle East Quarterly 42

[295] Ekici, B. and Unlu, A., 'Iran and Turkey: free trade and drug smuggling' *The Middle East Quarterly* (21 November 2013)

[296] Royal Canadian Mounted Police, 'The evolving nature of transnational crime 75(1) *Gazette Magazine* (05 April 2013)

2.15 Effects on the environment

The illegal wildlife trade has negative implications for the environment, both directly and indirectly. It is difficult to gather evidence to demonstrate the true implications of how the illegal wildlife trade impacts the environment, however, the following are ways that have been considered.

2.15.1 The introduction of alien species

Invasive species' introduction by human activity can have some of the most dramatic effects on ecosystems, specifically isolated environments.[297] The wildlife trade facilitates the introduction of alien species, where they compete with native species resources, alter ecosystems, damage infrastructure and destroy crops.[298] Invasive species' introduction has been the cause of extinction[299] and endangers numerous native species around the world. Along with this, non-native species may also carry pests and pathogens that can be harmful to the environment. Swift *et al* argue that efforts should be made to reduce, and if possible, eliminate the illegal wildlife trade, specifically within urban areas and across international borders, to help reduce the probability of infections and epidemics emerging from this activity.[300] Subsequently, the transboundary nature of both legal and illegal trade requires cooperation on an international level in order to be effective. In order to achieve this, it is essential that the legislature, prosecution service, judiciary

[297] Convention on Biological Diversity, 'Invasive Alien Species', https://www.cbd.int/island/invasive.shtml 23 March 2015
[298] EcoHealth Alliance, 'Assessing and mitigating the impacts of wildlife trade', http://www.ecohealthalliance.org/programs/21-assessing_and_mitigating_the_impacts_of_wildlife_trade 27 May 2014
[299] WWF, 'Impact of invasive alien species', 2015, http://wwf.panda.org/about_our_earth/species/problems/invasive_species/ 23 March 2015
[300] Swift, L. *et al*., 'Wildlife Trade and the Emergence of Infectious Diseases', (2007) 4 EcoHealth 29

and wildlife organisations find ways to defeat the criminal activity of those who trade in these important and iconic species.

In reaction to the threat posed by alien invasive species, countries have enacted relevant legislation, outside the scope of CITES, to help protect against their introduction. For example, as far back as the 19th Century, the UK implemented the Destructive Insects Act 1877, to prevent the introduction and establishment of the Colorado Beetle,[301] and more contemporary measures are witnessed in the Wildlife and Countryside Act 1981[302] and the Conservation of Habitats and Species Regulations 2010.[303] Along with this legislation, the UK and EU have implemented a strategy to deal with invasive species. However, whilst efforts have been made to address a shared problem, there are clear issues with strategy, for example the reliance upon lists of species as the tool for co-ordinating regulation. [304]

Examples of countries adopting strategies to combat the threat posed by invasive alien species include Australia, which, at the time of writing, is negotiating the National Agreement on Biosecurity between federal and State governments. This attempts to ensure partnership working to improve key aspects of national biosecurity systems, including the introduction of invasive and alien species.[305] This contemporary development follows on from two

[301] Ebbels, D., *Principles of Plant Health and Quarantine*, (2003) p. 16
[302] Section 14A
[303] Regulations 52 - 54
[304] Willmore, C., 'Native good, non-native bad? Defining troublesome species', (2015) 17(2) Environmental Law Review 126
[305] Australian Government: Department of the Environmental and Energy, 'Invasive Species', http://www.environment.gov.au/biodiversity/invasive-species 18 January 2018

national strategies the problem, whilst maintaining the sustainability of Australia's primary industries and reducing the impact on the environment. These are the Australian Weeds Strategy 2017 to 2027[306] and Australian Pest Animal Strategy 2017 to 2027.[307] Finally, Australia has also enacted the Environmental Protection and Biodiversity Conservation Act 1999 (EPBC Act), which has the capability to protect against invasive species. The EPBC Act allows the federal government to develop and implement threat abatement plans and recovery plans to protect the country's environment.[308]

South Africa has also implemented legislation to help guard against the introduction of invasive or alien species. The National Environmental Management: Biodiversity Act[309] (NEMBA) "aims to provide the framework, norms and standards for the conservation, sustainable use and equitable benefit-sharing of South Africa's biological resources".[310] Along with NEMBA, South Africa has implemented the Alien and Invasive Species Regulations

[306] Australian Government: Department of Agriculture and Water Resources, 'Australian Weeds Strategy 2017 to 2027', (Australian Government: Department of Agriculture and Water Resources, 13 September 2017) http://www.agriculture.gov.au/pests-diseases-weeds/pest-animals-and-weeds/review-aus-pest-animal-weed-strategy/aus-weeds-strategy 18 January 2018
[307] Australian Government: Department of Agriculture and Water Resources, 'Australian Pest Animal Strategy 2017 to 2027', (Australian Government: Department of Agriculture and Water Resources, 13 September 2017) http://www.agriculture.gov.au/pests-diseases-weeds/pest-animals-and-weeds/review-aus-pest-animal-weed-strategy/aus-pest-animal-strategy 18 January 2017
[308] Australian Government: Department of the Environmental and Energy, 'Invasive Species', http://www.environment.gov.au/biodiversity/invasive-species 18 January 2018
[309] No. 10 of 2004
[310] Gladwin-Wood, C. and Veitch, A., 'National Environmental Management: Biodiversity Act Alien and Invasive Species Regulations', June 2017, http://www.schindlers.co.za/2017/nationalenvironmentalmanagement/ 18 January 2018

2014. Taken together, the measures aim to prevent the introduction and spread of alien and invasive species across the country.[311]

2.15.2 Sanitary and Phytosanitary Threats

With the introduction of alien, and illegally trafficked, species, comes the risk of sanitary and phytosanitary contamination through, or by, undetected pathogens. The importance of sanitary and phytosanitary (SPS) measures to address this problem has resulted in the development of enhanced controls to help protect native species, human health and food supplies. An existing international measure can be observed in around the WTO's[312] Agreement on the Application of Sanitary and Phytosanitary Measures,[313] [314] which aims to set out the basic principles for food safety and animal and plant health standards.[315] This Agreement allows countries to set their own standards, however it does state that these must be based on science and only applied to the extent necessary to protect animal, human or plant life or health. It also states that any regulations put in place should not be arbitrary or unjustifiably discriminate between countries where identical or similar conditions prevail. That being said, it has been reported that less developed countries have imposed unjustified SPS measures, which have negatively affected EU

[311] ibid.
[312] The WTO is the only global organization dealing with rules of trade between nations; it currently has 160 Members that are obligated to abide by the agreement.
[313] Agreement on the Application of Sanitary and Phytosanitary Measures 1995 (https://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm)
[314] This agreement entered into force in 1995.
[315] World Trade Organisation, *Understanding the WTO agreement on Sanitary and Phytosanitary Measures*, (1998, Understanding the Agreement), http://www.wto.org/english/tratop_e/sps_e/spsund_e.htm 28 June 2014

exports of agriculture and fishery products.[316] The Agreement encourages countries to use international standards, guidelines and recommendations, if and where they exist, but allows for the use of stricter standards if there is a scientific justification to do so. These stricter standards may also be adopted if an appropriate and consistent assessment of risks is conducted. Therefore, this WTO Agreement allows countries to use different standards and methods of inspecting products, so long as the correct procedures and processes are abided by.[317]

An example of where measures contained in the WTO Agreement have been put in place, is Council Directive 2000/29/EC.[318] This Directive contains "protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community".[319] In this respect, the EU has implemented a number of procedures for imports into Member States. These include:

- Import bans, according to Articles 3, 4 and 5 of the Directive;[320]
- The requirement for phytosanitary certificates and/or phytosanitary certificates for re-export, as discussed in Articles 7 and 8 of the Directive;[321]

[316] European Commission, *SPS: Sanitary and Phytosanitary Issues*, (2013, European Commission), http://madb.europa.eu/madb/sps_product_description_form.htm 28 June 2014
[317] World Trade Organisation, *Understanding the WTO agreement on Sanitary and Phytosanitary Measures*, (1998, Understanding the Agreement), http://www.wto.org/english/tratop_e/sps_e/spsund_e.htm 28 June 2014
[318] OJ 2000, L 169/1
[319] European Commission, *Council Directive 2000/29/EC*, (OJ, 2000, 169/1)
[320] A list of harmful organisms whose introduction into and spread within all Member States and within specific zones that have been banned can be found within Annex I and II of the Directive's text.

- The requirement for inspection and plant health checks, as laid out in Articles 13, 17, 21 and 22 of the Directive;
- An importers register, following the rules contained in Article 6; and
- Advance notice on imports, following Article 21(5) of the Directive.[322]

The Directive also establishes a variety of exemptions for each phytosanitary measures, for example, in respect of plants and plant products for trial, scientific purposes, and work on varieties selection (all of which are contained in Article 3); internal transit (discussed in Article 13); and small quantities (Article 5) that do not pose a risk of spreading harmful organisms.[323] These exemptions are generally granted for a limited period, subject to special importation conditions and to a specific licencing system.

These EU measures implement the International Plant Protection Convention[324] (IPPC)-FAO. This international plant and health agreement, was established in 1952, to protect against the introduction and spread of pests from invading cultivated and wild plants. There are currently 183

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[321] Since 1 June 1993, a plant passport shall now be issued in accordance with the provisions of the Directive, as laid out in Article 10.
[322] European Commission, *Trade Export Helpdesk*, (2011, European Commission), http://exporthelp.europa.eu/thdapp/taxes/show2Files.htm?dir=/requirements&reporterId1=EU&file1=ehir_eu12_01v001/eu/main/req_heaplant_eu_010_0612.htm&reporterLabel1=EU&reporterId2=DE&file2=ehir_de12_01v001/de/main/req_heaplant_de_010_0612.htm&reporterLabel2=Alemania&label=Plant+health+control&languageId=es&status=PROD 28 June 2014
[323] European Commission, *Trade Export Helpdesk*, (2011, European Commission), http://exporthelp.europa.eu/thdapp/taxes/show2Files.htm?dir=/requirements&reporterId1=EU&file1=ehir_eu12_01v001/eu/main/req_heaplant_eu_010_0612.htm&reporterLabel1=EU&reporterId2=DE&file2=ehir_de12_01v001/de/main/req_heaplant_de_010_0612.htm&reporterLabel2=Alemania&label=Plant+health+control&languageId=es&status=PROD 28 June 2014
[324] International Plant Protection Convention 1952 (http://sedac.ciesin.org/entri/texts/intl.plant.protection.1951.html

signatories to this Convention, including EU Member States. The Agreement also sets out the basic rules and control procedures to secure common and effective action to protect a country's agricultural and forestry resources.

In 2009, the IPPC developed an international framework for protecting and safeguarding plant resources; this includes the development of International Standards for Phytosanitary Measures (ISPMs) which in turn include standards, procedures and guidance on: surveillance and surveying of pests; regulations of imports and analysis of risks; methodologies for phytosanitary inspection and procedures for compliance; pest management; quarantine for plants post entry; control and eradication as an emergency response to exotic pest introduction; and export certification.[325]

Along with this, the IPPC provides information to its signatories regarding import and export pest analysis and regulated pest lists. It also aims to provide assistance to developing countries in order to support their contribution and efforts in implementing the Convention and ISPMs and acts as a reference organisation to the WTO SPS Agreement, discussed above.[326]

It is possible that all of the SPS measures outlined above could be linked more closely with CITES, as sanitary and phytosanitary issues are of great concern. A specific example of this relates to the illegal bushmeat trade.

[325] International Plant Protection Convention, 'What we do', https://www.ippc.int/en/what-we-do/ 09 October 2018
[326] World Trade Organisation, 'The WTO and the International Plant Protection Convention (IPPC)', http://www.wto.org/english/thewto_e/coher_e/wto_ippc_e.htm 27 January 2015

Bushmeat is a term for food products derived from wild animals, specifically in tropical areas, whether consumed locally or traded internationally.[327] The type of wild animals that can constitute bushmeat varies, the most common including duikers, rats, porcupines and monkeys.[328] It can also include any type of terrestrial wild animal, some amphibious and semi-aquatic freshwater animals, although fish are excluded.[329] Whilst the hunting and trade of wild animals for meat occurs worldwide, the centre of the contemporary bushmeat crisis is in the tropical forests of West and Central Africa.

According to the Parliamentary Office of Science and Technology, bushmeat consumption has been considered a way of life within African communities for millennia.[330] Studies have shown that bushmeat contributes to the protein consumption of those consuming it by between 30 to 80%, dependent on certain factors, for example location and animal type.[331] However, in recent years, consumption in many areas has increased beyond sustainable limits.[332] Factors, which could be to blame for this unsustainable increase include

[327] The European Parliament, *European Parliament resolution on Petition 461/2000 concerning the protection and conservation of Great Apes and other species endangered by the illegal trade in bushmeat*, (2004, INI 2003/2078), http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P5-TA-2004-0019+0+DOC+PDF+V0//EN 26 January 2015

[328] Food and Agriculture Organization of the United Nations, 'Chapter 2: Direct contribution of wildlife to food security', http://www.fao.org/docrep/w7540e/w7540e04.htm 23 March 2015

[329] Parliamentary Office of Science and Technology, *The Bushmeat Trade*, (2005, Postnote) p. 1

[330] Parliamentary Office of Science and Technology, *The Bushmeat Trade*, (2005, Postnote) p. 1

[331] Fa, J., *et al*., 'Linkages between household wealth, bushmeat and other animal protein consumption are not invariant: evidence from Rio Muni, Equatorial Guinea, (2009) 12(6) Animal Conservation 607; Fa, J., *et al*., 'Bushmeat and food security in the Congo Basin: linkages between wildlife and people's future', (2003) 30(1) Environmental Conservation 75

[332] Kümpel, N., *Incentives for sustainable hunting of bushmeat in Rio Muni, Equatorial Guinea*, (2006) Thesis (Doctor of Philosophy) Imperial College London, p. 15

population growth and uncontrolled development that is fuelled by lack of economic or nutritional alternatives. However, the rate of bushmeat consumption may have also increased as a result of factors discussed above, such as habitat loss, transport access to previously inaccessible areas, improvements in hunting technology, allowing easier exploitation of wild animals,[333] and, perhaps most significantly, increased demand from a wealthy urban, often international, elite.[334] The bushmeat trade affects the UK, by virtue of illegal bushmeat imports, and re-exports.[335]

As stated previously, the handling of bushmeat can bring a risk of transmission of new zoonosis, defined as human diseases originating from animals. Pathogens carried by the natural host, but which are undetected, can be unexpectedly passed to a new host, where they become problematic. Notably examples of zoonosis include Simian Immunodeficiency Virus (SIV) and Ebola.[336] Activities such as logging have enabled the bushmeat trade to grow, increasing the likelihood of human-wildlife contact. This, coupled with rapid advances in transportation and infrastructure and human migration increase risks of the movement of infected animals, meat and people.

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[333] Kümpel, N., *et al*., 'Determinants of Bushmeat Consumption and Trade in Continental Equatorial Guinea: an Urban-Rural Comparison', in Davies, G. and Brown, D., *Bushmeat and Livelihoods: Wildlife Management and Poverty Reduction*, (2007) p. 73

[334] Parliamentary Office of Science and Technology, *The Bushmeat Trade*, (2005, Postnote) p. 1

[335] Demonstrated by the cases bought in front of UK courts. BBC News, 'Illegal 'Bushmeat' Traders Jailed' *BBC* (15 June 2001) http://news.bbc.co.uk/1/hi/uk/1390125.stm 02 January 2018

[336] Ebola is currently being linked to fruit bats and flying foxes as the principle vector of the current strain

CITES has considered bushmeat on numerous occasions through the CoPs.[337] These discussions resulted in the creation of the Central Africa Bushmeat Working Group. Along with this, CITES has created a relationship with the Convention on Biological Diversity (CBD)[338] and both Conventions now work together closely to increase protection against the bushmeat trade.[339]

However, whilst CITES has highlighted the phytosanitary risks to humans and wildlife from bushmeat, the Convention is constrained by its principal aim of regulating trade.[340] Research on this suggests that the CoPs only considered bushmeat from a trade perspective, rather than creating obligations that reflect the risks that could be posed from the international trade in protected species. This links to the potential need for an interdisciplinary approach, and will be covered in more detail in Chapter 7.

It is questionable whether the illegal wildlife trade creates any greater impact than the legal trade in terms of the accidental or deliberate introduction of both invasive alien species and threats of a sanitary or phytosanitary nature. However, it may be supported through the fact that many countries have quarantine laws that are implemented when legal trade is carried out, such as

[337] CoP 11 (2000), CoP 13 (2004), CoP14 (2007), CoP15 (2010)
[338] Convention on Biological Diversity 1992 (https://www.cbd.int/doc/legal/cbd-en.pdf)
[339] Convention on Biological Diversity, *Organisation of Work*, (2011, Annotations to the provisional agenda) at pp. 1 - 10
[340] Convention on Biological Diversity, 'Joint Meeting of the CBD Liaison Group on Bushmeat and the CITES Central Africa Bushmeat Working Group', (Convention on Biological Diversity) 7-10 June 2011) https://www.cbd.int/doc/meetings/for/lgbushmeat-02/other/lgbushmeat-02-cites-cms-en.pdf 07 August 2014

the Australian Quarantine Act 1908.[341] Species that are illegally imported and exported, unless this is picked up during the relevant procedures, never end up in quarantine and this increases the risks across the board.

The UK is bound by numerous international agreements such as the United Nations Convention on the Law of the Sea,[342] the Convention of Migratory Species of Wild Animals[343] and the Convention on the Conservation of European Wildlife and Natural Habitat.[344] All of these agreements aim to protect biodiversity and endangered species and habitats, and include provisions requiring measures to prevent the introduction of, or control of, non-native species, especially those that threaten native and/or protected species.

It is questionable whether these international agreements do enough to protect against the introduction of alien species in terms of the illegal wildlife trade. Until this illicit activity is tackled effectively, there remains a risk of non-native species being introduced into the environment of destination countries. This, however, is similar to the terrorism point discussed above, since without

[341] Quarantine Act 1908 (http://www.comlaw.gov.au/Details/C2014C00612); Australian Government Department of Agriculture, 'Biosecurity in Australia: Quarantine in Australia', (Australian Government Department of Agriculture, 13 February 2014) http://www.daff.gov.au/biosecurity/quarantine 15 August 2014
[342] United Nations Convention on the Law of the Sea 1973 (https://treaties.un.org/doc/Publication/UNTS/Volume%201836/volume-1836-I-31364-English.pdf)
[343] Convention on the Conservation of Migratory Species of Wild Animals 1979 (http://www.cms.int/en/node/3916)
[344] Convention on the Conservation of European Wildlife & Natural Habitat 1979 (http://conventions.coe.int/Treaty/en/Treaties/Html/104.htm); Joint Nature Conservation Committee, 'Non-native Species', http://jncc.defra.gov.uk/default.aspx?page=1532 27 May 2014

conclusive evidence it is possible to argue that environment NGOs and governments are using this as a way of attracting greater attention.

In addition, whilst the illegal wildlife trade potentially contributes to the spread of alien invasive species, other mechanisms are at play in relation to the phenomena, such as, climate change. Burgiel and Muir, for example, argue that an array of anticipated climatic and biogeographic changes has significant implications for native and non-native species.[345] They contend that it is possible to identify the particular set of ecological and climatic conditions necessary for a species survival, and that consequently any shift in an environmental variable could have dramatic consequences.[346] In turn, invasive species are generally viewed as having a broader range of tolerances than natives, thereby providing them with a wider array of suitable habitats.[347] For example, a shift in temperature could have significant impacts on a native species, whilst producing only a slight impact on an introduced species.

This means that, if the illegal wildlife trade increases the risk of invasive species introduction, and the current theories surrounding the relationship between alien species introduction and climate change are correct, devastating implications could occur to native species. It has been estimated that wildlife contributes to the livelihood of one-seventh of the world's population, and plays an influential role in the economy, especially in less

[345] Burgiel, S., and Muir, A. *Invasive Species, Climate Change and Ecosystem-Based Adaptation: Addressing Multiple Drivers of Global Change*, (2010) p. 6
[346] ibid.
[347] ibid.

developed countries.[348] Tourism is a visible example of this, from the game parks of Africa to the coral reefs in Australia, healthy species and healthy ecosystems aid in local economies.[349] With invasive species' introduction and a decrease in the population of protected species, an obvious result is a destruction of the natural balance of ecosystems globally. This will have a negative impact not only on species but also on the livelihoods of the human population.

Having undertaken a review of the literature, it is possible to note the complexities and interlinking issues surrounding the illegal wildlife trade. This includes the role destination, transit and supply countries play in the market of endangered species. This chapter also shows the implication pre-CITES species can have on the illegal wildlife trade, which will be explored further in Chapters 5 and 6. This review has also explored the mechanics of CITES, from its background to Appendices I, II and III species and Management Authorities. As discussed, the effectiveness of CITES is dependent on the implementation of international and domestic legislation and this will be explored in more detail in Chapter 3, along with associated difficulties, such as species identification.

The legislation implementing CITES is there to regulate the trade in endangered species, including the ability for States to create criminal offences. However, despite the existence of CITES, there is a rising demand

[348] Parmalee, C., 'Africa: Threats of Poaching, Habitat Loss Focus of First World Wildlife Day', (All Africa, 12 March 2014) http://allafrica.com/stories/201403130043.html 02 June 2014
[349] ibid.

for illegal wildlife products. This demand is fuelled from cultural traditions and social aspects, with political agendas impacting CITES efforts. Finally, the review covers the effects associated with the illegal wildlife trade, from global security threats and corruption, globalisation and transportation, and environmental threats from alien species introduction. Now these issues have been outlined, the legislation that exists within the jurisdictions that are the focus of the thesis will be explored.

3.0 Legislation Review

3.1 Introduction

Each of the signatories to CITES agrees to implement the obligations laid down in the Convention's text. In addition, CITES also makes recommendations to signatories through its CoPs. In order to evaluate the effectiveness of CITES in the countries that are the focus of this thesis, it is necessary to assess the corresponding legislation of each jurisdiction, contrasting and comparing it with the Convention.

3.2 The United Kingdom and the European Union

Since joining the EU in 1973, the UK has agreed to comply with the laws passed by EU bodies.[350] These laws may be directly applicable, and therefore automatically take effect in the UK's legal system or, as in the case of European Council Directives, require the UK to pass national legislation to implement them. Under the Treaty on the Functioning of the European Union (TFEU),[351] the Court of Justice of the European Union (CJEU) interprets the

[350] These bodies include the European Council, the Council of Ministers, the European Commission and the European Parliament.
[351] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union – Consolidated version of the Treaty on the Functioning of the European Union – Protocols – Annexes – Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 – Table of equivalences (OJ 2012, C 326), http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012E/TXT&from=en 26 June 2015

Treaties and laws passed by the EU[352] and decides whether Member States have abided by them.[353]

Under EU law, protection of wildlife and trade issues are covered by EU Regulation No. 338/97[354] on the Protection of Species of Wild Fauna or Flora by Regulating Trade Therein, as amended,[355] most recently by Commission Regulation (EU) No. 1320/2014.[356] Regulation 338/97 replaced Council Regulation (EEC) No. 3626/82,[357] which adopted the aims of CITES. The purposes of Regulation 338/97, hereby referred to as the Principal Regulation, were determined in a case involving the interpretation of French law,[358] in which the European Court of Justice stated that it was designed to "ensure the conservation of animal [and plant] species, and hence the protection of the life and health of those species".[359]

[352] Article 267 of the Treaty on the Functioning of the European Union gives the Court jurisdiction to give rulings on questions relating to interpretation of EU law.
[353] Article 258 – 260 of the Treaty on the Functioning of the European Union
[354] Council Regulation (EC) No. 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein (OJ 1997, L 61)
[355] Official Journal of the European Communities, *Council Regulation (EC) No. 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein*, 1997 O.J. (L61) 1 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1997:061:0001:0069:EN:PDF 03 December 2014
[356] Commission Regulation (EU) No. 1320/2014 of 1 December 2014 amending Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein (OJ 2014, L 361)
[357] Council Regulation (EEC) No. 3626/82 of 3 December 1982 on the implementation in the Community of the Convention on international trade in endangered species of wild fauna and flora (OJ 1982, L 384)
[358] *Criminal Proceedings against Tridon (Federation Departementale des chasseurs de l'Isere & another)* Case C-510/99 , ECJ, 23 October 2001
[359] Para 51 of judgment; The Magistrates' Association, 'Sentencing for Wildlife Trade and Conservation Offences', (November 2002) http://www.eurocbc.org/wildlife_guidelines.pdf 09 December 2014

Whilst the UK became a Party to CITES in 1987, as previously discussed the EU did not until 2015, following the Gaborone amendment to the text of the Convention in 2013.[360] However, it fully implemented CITES in 1984[361] through the Principal Regulation.

The Principal Regulation divides protected species into four Annexes. As in the Convention it covers those classified as in demand[362] and threated with extinction but it also extends more broadly to encompass species for which it has been established that introduction could cause a threat to ecosystems.[363]

The protection of endangered species through the Principal Regulation is achieved, for the species listed in Annex I, by prohibiting the purchase, offering to purchase, keeping for sale, offering for sale and exploitation for commercial purposes through public display.[364] The Principal Regulation does, however, lay down exceptions to these rules for research, education or breeding purposes.

The most endangered species are listed in Annex A, which contains all CITES Appendix I species (except where EU Member States have entered a reservation); some Appendix II and III species; and some non-CITES species. Annex B contains species threatened by commercial trade, and is broadly equivalent to Appendix II of CITES. Appendix III CITES species are generally

[360] CITES, 'Gaborone Amendment to the text of the Convention', https://cites.org/eng/disc/gaborone.php 24 July 2014
[361] European Commission, 'EU Wildlife Trade Legislation', (26 October 2017) http://ec.europa.eu/environment/cites/legislation_en.htm 10 October 2018
[362] Throughout the EU and internationally
[363] Contained in Regulation 338/97 Article 3 para 2(d)
[364] Contained in Regulation 338/97 Article 8.

contained in Annex C of the Principal Regulation, however some can be found in Annex D, along with some non-CITES species.[365] The rationale for including non-CITES species within the Annexes is to ensure the Principal Regulation is consistent with other EU Regulations on the protection of native species, including the Habitats Directive[366] and Birds Directive.[367] In short, the Principal Regulation offers protection wider in scope that CITES through, for example, including a variety of non-CITES listed species[368] and including some Appendix II and III CITES species in Annex A, meaning that under EU Law they cannot be traded or used for commercial purposes.[369]

EU law also offers greater protection than CITES in other ways. First, the Principal Regulation establishes stricter import conditions in comparison to those laid down in CITES: import permits are not only required for species listed within Annex A, but also for those covered in Annex B, and import notifications are required for Annex C and D species.[370] Second, CITES requires suitable care and housing only for the importation of live Appendix I

[365] European Commission, 'EU Wildlife Trade Legislation', (26 October 2017) http://ec.europa.eu/environment/cites/legislation_en.htm 10 October 2018
[366] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992, L 206/7), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31992L0043&from=EN 26 June 2015
[367] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ 2010, L 20/7), http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32009L0147&from=EN 26 June 2015; European Commission, 'The European Union and Trade in Wild Fauna and Flora', 11 June 2015, http://ec.europa.eu/environment/cites/legislation_en.htm 26 June 2019
[368] European Commission, 'Species', (08 June 2016) http://ec.europa.eu/environment/cites/species_en.htm 10 October 2018
[369] European Commission, 'The Differences between EU and CITES Provisions in a Nutshell', http://ec.europa.eu/environment/cites/pdf/differences_b_eu_and_cites.pdf 26 June 2015
[370] European Commission, 'Permits, Certificates and Notifications', (08 June 2016) http://ec.europa.eu/environment/cites/info_permits_en.htm#_Toc223858308 10 October 2018

specimens, whereas under the Principal Regulation, live specimens listed in Annexes A and B can only be imported into the EU if the recipient is suitably equipped to house and care for them. Third, CITES only covers international trade, whereas the EU regulates trade within and between EU Member States, as well as trade with non-EU Member States.[371] Finally, and importantly, the Principal Regulation authorises Member States to suspend imports with regard to certain species and countries,[372] even when this trade is authorised under CITES.[373]

Council Regulation (EC) No. 865/2006[374] (hereafter the Subsidiary Regulation) establishes detailed rules to implement the Principal Regulation, as well as address practical aspects of its implementation. Numerous amendments[375] have been made to the Subsidiary Regulation, including sample collection, documentary requirements, the retrospective issue of certain documents, exceptions relating to personal and household effects, and personal ownership certificates, amongst others.[376] One example was an amendment in 2008,[377] which changed several provisions laid down in the

[371] The German Federal Agency for Nature Conservation, 'New legislation on species conservation', (24 February 2014) https://www.bfn.de/0305_regelungen+M52087573ab0.html 26 June 2015
[372] This is the case where the EU Scientific Review Groups forms a Negative Opinion and all permit applications for the species/country in question will normally get rejected until a Positive Opinion is found.
[373] European Union, *Wildlife Trade Regulations in the European Union: An Introduction to CITES and its Implementation in the European Union*, (2010) p. 13
[374] This replaced Council Regulation (EEC) No. 3418/83)
[375] Council Regulation (EC) No. 100/2008, Commission Regulation (EU) No. 791/2012 and Commission Implementing Regulation (EU) No. 792/2012
[376] European Commission, 'EU Wildlife Trade Legislation', (26 October 2017) http://ec.europa.eu/environment/cites/legislation_en.htm 10 October 2018
[377] Commission Regulation (EC) No. 100/2008 of 4 February 2008 amending, as regards sample collections and certain formalities relating to the trade in species of wild fauna and flora, Regulation (EC) No. 865/2006 laying down detailed rules for the

Subsidiary Regulation concerning formalities and procedures required before importing or exporting specimens of wild fauna and flora,[378] setting out new provisions specifying the content of permits and certificates.[379] Another example, in 2012,[380] inserted new provisions on the definition of cultivated parental stock and trophy hunting.[381] Provisions relating to export permits, re-export certificates and personal ownership certificates have also been amended.[382]

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implementation of Council Regulation (EC) No. 338/97, (OJ 2008, L 31/3), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008R0100&from=EN 26 June 2015

[378] Food and Agriculture Organization of the United Nations, 'FAOLEX – legislative database of FAO Legal Office: European Union: Commission Regulation (EC) No. 100/2008 amending, as regards sample collections and certain formalities relating to the trade in species of wild fauna and flora, Regulation (EC) No. 865/2006 laying down detailed rules for the implementation of Council Regulation (EC) No. 338/97', http://faolex.fao.org/cgi-bin/faolex.exe?rec_id=061139&database=faolex&search_type=link&table=result&lang=eng&format_name=@ERALL 26 June 2015

[379] Food and Agriculture Organization of the United Nations, 'FAOLEX – legislative database of FAO Legal Office: European Union: Commission Regulation (EC) No. 100/2008 amending, as regards sample collections and certain formalities relating to the trade in species of wild fauna and flora, Regulation (EC) No. 865/2006 laying down detailed rules for the implementation of Council Regulation (EC) No. 338/97', http://faolex.fao.org/cgi-bin/faolex.exe?rec_id=061139&database=faolex&search_type=link&table=result&lang=eng&format_name=@ERALL 26 June 2015

[380] Commission Regulation (EC) No. 791/2012 of 23 August 2012 amending, as regards certain provisions relating to the trade in species of wild fauna and flora, Regulation (EC) No. 865/2006 laying down detailed rules for the implementation of Council Regulation (EC) No. 338/97, (OJ 2012, L 242/1), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R0791&from=EN 26 June 2015

[381] Food and Agriculture Organization of the United Nations, ' FAOLEX – legislative database of FAO Legal Office: European Union: Commission Regulation (EU) No. 791/2012 amending, as regards certain provisions relating to the trade in species of wild fauna and flora, Regulation (EC) No. 865/2006 laying down detailed rules for the implementation of Council Regulation (EC) No. 338/97', http://faolex.fao.org/cgi-bin/faolex.exe?rec_id=115321&database=faolex&search_type=link&table=result&lang=eng&format_name=@ERALL 26 June 2015

[382] Food and Agriculture Organization of the United Nations, ' FAOLEX – legislative database of FAO Legal Office: European Union: Commission Regulation (EU) No. 791/2012 amending, as regards certain provisions relating to the trade in species of wild fauna and flora, Regulation (EC) No. 865/2006 laying down detailed rules for the implementation of Council Regulation (EC) No. 338/97', http://faolex.fao.org/cgi-

Although EU Regulations are directly applicable,[383] and thus automatically national law, it is still possible for Member States to fail to conform correctly to them. Greece and Germany[384] both faced enforcement action by the Commission for failure to confirm with the Principal Regulation. [385] In the case of Greece, this was for the lack of effective penalties. In 2008, the EU introduced Directive 2008/99/EC[386] to ensure environmental offences had 'effective, dissuasive and proportionate sanctions'.[387] (The UK has not formally transposed Directive 2008/99/EC into domestic legislation, instead relying on transposition through existing environmental law.)

The Principal Regulation cannot specify offences nor penalties. These are instead generated by the Member States themselves. The UK ratified CITES by passing the Endangered Species (Import and Export) Act 1976, now superseded by the Control of Trade in Endangered Species Regulation 2018/703 (COTES), as amended[388] which creates offences in relation to the

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bin/faolex.exe?rec_id=115321&database=faolex&search_type=link&table=result&lang=eng&format_name=@ERALL 26 June 2015

[383] That being they become part of national law without intervention from Parliament

[384] Germany's situation was not trade related

[385] European Commission, 'Commission acts against Germany and Greece for non-respect of nature conservation legislation', (Press Release Database, 9 October 1998) http://europa.eu/rapid/press-release_IP-98-872_en.htm 03 December 2014

[386] Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law (OJ 2008, L 328/28), http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32008L0099&from=EN 26 June 2015

[387] European Commission, 'Environmental Crime', (22 April 2015) http://ec.europa.eu/environment/legal/crime/ 26 June 2015

[388] The Control of Trade (Enforcement) Regulations (Amendment) 2005, The Control of Trade (Enforcement) Regulations (Amendment) 2007 and finally The Control of Trade (Enforcement) Regulations (Amendment) 2009.

Principal and Subsidiary Regulations and allows CITES[389] to be enforced within the UK.[390] The 2018 Regulation revoked everything prior to it, however the cases and issues remain the same. The most important aspect of the 2018 Regulation are the civil sanctions[391] which will assist organisations in bringing action against defendants. Whilst the criminal standard of proof is very high, civil sanctions operate on a balance of probabilities, therefore more easily satisfying the evidentiary burden. Along with this, failure to comply with a civil sanction is an offence, coercing a person into doing what they have to do on pain of a criminal conviction.[392] It might appear that the law is being undermined, but essentially, the two areas where it is being applied are regulatory offences that would be unlikely to be 'prosecuted', although now there is the potential that they may be more fully enforced, thereby increasing the effectiveness of the law. The civil sanctions as enforcement mechanisms are introduced in "two new circumstances; (i) the advertising for sale of Annex A specimens without display of its EC/Article 10 Permit Number[393] and ii) incorrect packaging and labelling of caviar."[394]

[389] The UK signed up to CITES in 1976 and has been implementing the Convention since.
[390] Animal and Plant Health Agency, 'Guidance - Endangered species: imports and exports and commercial use', (UK Government, 01 January 2013) https://www.gov.uk/cites-imports-and-exports 03 December 2014
[391] Schedule 2
[392] Department for Environment Food and Rural Affairs, 'Consultation on proposed changes to the Control of Trade in Endangered Species Regulations', (February 2015) https://consult.defra.gov.uk/biodiversity/changing-cotes-regulations/supporting_documents/COTES%20Review%20%20Consultation%20Document.pdf 16 May 2019
[393] Regulation 6 of COTES
[394] Regulations 64(2), 66(6) and 66(7) of the Commission Regulations 865 of 2006; UK Government, 'Endangered Species: imports and exports and commercial use' (25 April 2019) https://www.gov.uk/guidance/cites-imports-and-exports 16 May 2019

An amendment to COTES, in 2009, was introduced to close a legal loophole highlighted during a failed prosecution.[395] *R v Cao Li Zhao*[396] considered situations when the species of concern are listed in two different Annexes of the Principle Regulation, because they may involve different subspecies or are geographically separate populations.[397] The prosecution failed because in order to prove the relevant offences as provided for under COTES, it was necessary to prove which Annex the specimen was listed.[398] The amendment creates a presumption that where there is a split-listed species belonging to Annex A and B of the Principal Regulation, it will belong to Annex A for any regulatory purpose. This enables the CPS to proceed with charges under COTES Regulation 5, discussed in more detail below. This is in conformity with Article II, paragraph 2(b) of CITES which states that Appendix II shall also include other species that must be made subject to regulation, in order to bring about their effective control, otherwise known as the look-alike provision.[399]

3.3 Australia

In Australia, the primary legislation protecting against the trade of endangered species and enforcing CITES is the Environment Protection and Biodiversity

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[395] Fauchald, O. K., Hunter, D. and Xi, W., *Yearbook of International Environmental Law: Volume 20 2009*, (2011) p. 558
[396] *R v Cai Li Zhao,* Middlesex Crown Court, 20 February 2007, unreported
[397] House of Commons Environmental Audit Committee, *Wildlife Crime: Third Report of Session 2012-2013, Volume 1: Report, Together with Formal Minutes, Oral and Written Evidence, Volume 1*, (2012) p. 118
[398] Hughes, S. *Explanatory Memorandum to the Control of Trade in Endangered Species (Enforcement) (Amendment) Regulation 2009 No. 1773*, 2009 http://www.legislation.gov.uk/uksi/2009/1773/pdfs/uksiem_20091773_en.pdf 26 April 2016
[399] Food and Agricultural Organisation of the United Nations, 'Identifying Listed Species in Trade', http://www.fao.org/docrep/007/y5751e/y5751e07.htm#bm07.6 17 August 2015

Conservation Act 1999 (EPBC Act), as amended. Part 13A of the EPBC Act regulates the international movement of wildlife species listed within the Appendices of CITES. Similarly to EU legislation, the EPBC Act implements stricter measures by regulating the movement of native species, defined as "species that are indigenous to, or which periodically or occasionally visit Australia or an external territory, which includes the seabed of the coastal sea, the continental shelf and the Exclusive Economic Zone".[400] Australia has both federal and state legislation, but this research will solely explore the legislation surrounding the illegal wildlife trade at federal level.

Australia publishes a list of species under the EPBC Act, which generally mirrors the Appendices of the Convention. However, akin to the EU Principal Regulation, Australia has chosen to list some Appendix II species in Appendix I, thus imposing stricter domestic measures than laid down in the Convention. As in CITES, Australia stipulates that Appendix I specimens may not be traded for commercial purposes unless they are pre-CITES (with the relevant documentation) or subject to very strict conditions, as licenced by the CITES Secretariat.

Appendix II species require a CITES export permit, issued by the Management Authority for Australia, and may also require an import permit from the Management Authority that they are being exported to. The importation of Appendix II species into Australia will be allowed with

[400] See Miller, I. and Wood, J., 'Sanctuaries, Protected Species and Politics – How Effective is Australia at Protecting Its Marine Biodiversity under the Environment Protection and Biodiversity Conservation Act 1999', in Jeffery, M., *et al*., *Biodiversity, Conservation, Law + Livelihoods: Bridging the North-South Divide*', (2008) p. 293

permission from the CITES Management Authority in the country of export. Often, it will also require an Australian import permit granted by the Management Authority.[401] The movement of Appendix II listed specimens across Australia's borders, requires that the specimen be bred in captivity, artificially propagated or have come from a commercial import programme.[402] In addition, these specimens require the requisite documentation.

Appendix III specimens may be imported into Australia if the importer has permission from the CITES Management Authority in the exporting country. This permission consists of either a CITES export permit or a certificate of origin. If the specimens are being imported from the country listing under Appendix III, a CITES import permit, issued by the Department of the Environment, will also be required.

3.4 South Africa

The primary South African legislation implementing CITES and protecting against the trade in endangered species is the National Environmental Management Biodiversity Act 2004 (NEMBA), as amended by the National Environmental Management: Biodiversity Act and Species of Wild Fauna and Flora (CITES) Regulations No. R. 173 of 2010; No. R 575 of 2011; and No. R 323 of 2014.

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[401] Australian Government Department of the Environment, ' Internationally endangered plants and animals (CITES)', https://www.environment.gov.au/biodiversity/wildlife-trade/cites' 22 October 2015

[402] Australian Government Department of the Environment, 'Commercial trade: Approved sources for international commercial trade', https://www.environment.gov.au/biodiversity/wildlife-trade/trading/commercial 22 October 2015

Section 2 NEMBA states that its purpose is to give effect to ratified international agreements affecting biodiversity in South Africa, such as CITES. The South African authorities, like their Australian counterparts, publish a list of CITES species under Schedules I, II and III of NEMBA, following the same Appendix system as CITES.[403] Section 2(3) of the 2010 Regulation states that these Schedules are automatically amended when any amendments to CITES Appendices enter into force.

The following sections comprise a more detailed evaluation of the main legislation implementing CITES in the countries in question in order to identify the structures and provisions incorporated by them. [404]

3.5 Management Authority

Under Article IX of CITES, signatories are given the responsibility for designating at least one Management Authority, which has two principal roles: granting permits and certificates under the terms of the Convention;[405] and communicating with the CITES Secretariat and other signatories. The Management Authority is responsible for compliance with the relevant provisions of the Convention, namely:

- Articles III, IV and V, relating to permit issuance and acceptance provisions;
- Article VI, in respect of cancelling and retaining permits or re-export certificates and any corresponding import permit presented in respect of

[403] Section 2(2) of the 2010 CITES Regulation
[404] These amendments must be published in the Gazette as soon as they are available after their adoption by the CoPs, as laid down in section 2(4) of the 2010 Regulation.
[405] Through the communication with the Scientific Authority

the import of that specimen, and the marking of specimens to assist in identification where necessary and possible;

- Article VII, on assessing the applicability of exemptions, including if a specimen was acquired before the provisions of the Convention applied to that specimen;
- Article VIII, which states that responsibility for confiscated live specimens falls to the Management Authority; and
- Article IX, on communication with the Secretariat and other signatories.

3.5.1 The UK and EU

In the EU, the Management Authority is to be established pursuant to the Principal Regulation, and is defined as "a national administrative authority".[406] The Management Authority must act in accordance with Article 13(1)(a) of the Principal Regulation, with the primary responsibility of ensuring compliance with it and facilitating communication with the EU Commission. The Management Authority of the UK is the Department for Environment, Food and Rural Affairs (DEFRA).

The Principal Regulation establishes the responsibilities of the Management Authority, which are in conformity with those required by CITES. Hence, it is the responsibility of the Management Authority to issue, after completing relevant checks, import permits for the introduction of specimens into the relevant Member State,[407] or export permits for the removal of specimens.[408]

[406] Article 2(g)
[407] Article 4
[408] Article 5

The required procedures and relevant forms for the Management Authority to use are contained in the Subsidiary Regulation.

3.5.2 Australia

In Australia, under Section 303CL of the EPBC Act, the Management Authority is the Wildlife Trade and Biosecurity Branch of the Department of the Environment, known as the Minister. The Minister issues all relevant paperwork in line with CITES, as long as specific conditions are met, specifically those contained in Article VII of the Convention, these will be discussed in further detail in section 3.9.1 below.

3.5.3 South Africa

In South Africa, the Management Authority is provided for under s. 3(1) of the 2010 Regulation. In this case, it is the Department of Environmental Affairs, and like Australia, is known as the Minister in the text of NEMBA. The functions of the Minister are laid down in Part 3, s. 59 of NEMBA and s. 3(2) of the 2010 Regulation, and include*, inter alia*, monitoring compliance with s. 57 NEMBA and international agreements; preparing and submitting reports in accordance with international obligations; and consulting with the Scientific Authority on issues relating to trade.

3.6 Scientific Authority

As well as the requirement for the introduction of a Management Authority, CITES also obligates Parties, through Article IX, to designate at least one Scientific Authority. The Scientific Authority is required to advise the Management Authority of any harmful effects that may occur to the conservation status of the species in question, and no permit should be

issued if this is the case. The Scientific Authority is also required to consult on whether a specimen has been artificially propagated or bred in captivity, as this may impact on whether a permit can be issued. This is essential to the effectiveness of CITES and has resulted in changes to legislation within the countries of study, specifically the UK (this will be considered in more detail under 3.9.1).

3.6.1 The UK and EU

Article 13(2) of the Principal Regulation sets out the obligation for each Member State to have a Scientific Authority. Although relevant checks by the Management Authority will involve communication with the Scientific Authority, it is stated that the latter must be independent and hold appropriate qualifications. In the UK, there are two Scientific Authorities: the Joint Nature Conservation Committee (JNCC) for fauna and the Royal Botanical Gardens Kew (Kew) for flora. The JNCC provides scientific advice to help with the development of policy, and advises on licence applications for species regulated under the EU legislation.[409] The JNCC also participates in delegations at national, European and international meetings and assists the UK Government with the application of CITES procedures within the EU and worldwide.[410] Kew aims to provide scientific evidence to support and inform global policy decisions, specifically in respect of CITES.[411] Kew also gives independent scientific advice, undertaking research into plant groups affected, or potentially affected, by international trade, and also works with enforcement

[409] Joint Nature Conservation Committee, 'Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)', (June 2013) http://jncc.defra.gov.uk/page-1367 15 July 2014
[410] ibid.
[411] Royal Botanic Garden Kew, 'CITES', https://www.kew.org/science/who-we-are-and-what-we-do/policy-work/cites 30 January 2018

organisations on the inspection, holding and disposal of detained and seized CITES specimens.[412]

3.6.2 Australia

Under s. 303CL of the EPBC Act, Australia's Scientific Authority is the Wildlife Trade Assessments Section and the Marine Policy Development Department of the Department of the Environment, and known as the Secretary. These bodies provide scientific advice, and recommendations, to the Management Authority on a range of matters, including: biological and trade information on species proposed for listing; measures to limit export of Appendix I specimens; the suitability of recipients of live Appendix specimens to house and care for them; assessing whether a scientific institution meets registration criteria to exchange CITES-listed specimens; assessing the suitability of a facility for captive breeding or artificial propagation; and whether management programmes for commercially harvested wild species are sustainable.[413]

3.6.3 South Africa

Similar to Australia, South Africa has a Scientific Authority working through the Department of Environmental Affairs. The specific duties of the Scientific Authority are set out in s. 4(1) of the 2010 Regulation. It monitors the trade in specimens listed by virtue of s. 56 NEMBA and CITES species[414]; makes recommendations on applications for permits; and comes to non-detriment

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[412] ibid.
[413] Australian Government: Department of the Environment and Energy, 'How CITES works', http://www.environment.gov.au/biodiversity/wildlife-trade/cites/how-cites-works 30 january 2018
[414] South African National Biodiversity Institute, 'The Scientific Authority', http://www.sanbi.org/biodiversity-science/science-policyaction/scientific-authority 30 January 2018

findings on the impact trade may have on the survival of a species.[415] The Scientific Authority also advises on matters such as the registration of ranching operations, nurseries and captive breeding operations; whether a facility meets the criteria for species to be considered as bred in captivity; and amendments to the listing of species.[416] Finally, the South African Scientific Authority also assists in identifying species that have been seized and/or detained.[417]

3.7 Documentation

CITES sets out the documentation required to import, export and re-export specimens protected under the Convention and the conditions these permits must meet.

3.7.1 Export

For the export of species listed in the Appendices of the Convention, permits must be granted by the Management Authority and presented by the exporter. This export permit will only be granted, in accordance with Articles III, IV, V and VI of CITES, if specific conditions are met.[418] For Appendix I and II species, the Scientific Authority of the State of export must have advised that there will be no detrimental effect to the survival of the species concerned. For all species listed in the Appendices of the Convention, the Management Authority of the State of export must be satisfied that the specimen was obtained legally and that the specimen will be prepared and shipped with

[415] ibid.
[416] ibid.
[417] ibid.
[418] The conditions for Appendix I listed species are considered in Article III(2), for Appendix II species Article IV(2) and for Appendix III species Article V(2).

minimum risk of injury, damage to health, or cruelty. For Appendix I listed species, it is also necessary for the Management Authority of the State of export to be satisfied that an import permit has been granted for the specimen.

3.7.2 Import

For Appendix I listed species, there is a requirement for the grant and presentation of an import permit and either an export permit or re-export certificate. For an import permit to be granted, the Scientific Authority of the State of import must have advised that the import will be for purposes that are not detrimental to the survival of the species and be satisfied that the proposed recipient of a living specimen is suitably equipped to house and care for it. The Management Authority of the State of import must be satisfied, in order for a permit to be granted, that the import of the specimen is not primarily for commercial purposes.

In the case of Appendix II species, an export permit or re-export certificate has to be presented. For Appendix III species, there is a requirement for the presentation of a certificate of origin and, where the import is from a State that has included that species in Appendix III, an export permit is also required. If the specimen is a re-export, then a certificate granted by the Management Authority of the State of re-export is acceptable, but it must identify that the specimen was processed in that State.

3.7.3 Re-export

The re-export of any species listed in Appendices I[419] and II[420] of the Convention will need a certificate. This should only be granted where the Management Authority of the State of re-export is satisfied the specimen was imported into the State in accordance with the Convention; the permit was for a live specimen; and the Authority is satisfied there will be a minimum risk of injury and/or damage to health, allied to an absence of cruelty.

3.7.4 The UK and EU

The requirement for permits and certificates in the import, export and re-export of protected species is contained in Articles 4 and 5 of the Principal Regulation. Along with COTES, discussed below, persons involved in the illegal wildlife trade may be prosecuted under the Customs and Excise Management Act 1979 (CEMA). The UK Border Force Agency (UKBA) is responsible for the enforcement of CEMA. This will be explored in more detail later in this chapter.

Under COTES,[421] it is an offence to knowingly, or recklessly,[422] make false statements or provide fake or altered documentation for the purpose of obtaining the issue of an import/export/re-export permit or certificate, whether for personal use or for another. Schedule 1(2) makes it an offence to

[419] Article III(4) of the Convention
[420] Article IV(5) of the Convention
[421] Regulation 3 – contained in Schedule 1(2)
[422] Recklessly was defined in *R v Caldwell* [1982] AC 341 and *R v Lawrence* [1982] AC 510 as there is something in the circumstances that would have drawn the attention of an ordinary individual to the possibility that the action was capable of causing the outcome and therefore the offence. An act is considered reckless if before doing it, the doer fails to give any thought to the possibility of there being any such risk or having recognised there was a risk but carried on to do it anyway.

knowingly, or recklessly, make an import notification that is false in a material sense. When such offences are committed, the permit, certificate or notification becomes void. This is without prejudice to Article 11(2)(a) of the Principal Regulation, which permits a competent authority or the Commission to make documentation void, through consultation with the competent authority that issued the permit or certificate, to establish that it was issued on false premise or that the conditions for its issuance were not met.

It is also an offence, under Schedule 1(2), to knowingly falsify or alter any permit or certificate. The Schedule also makes it an offence to knowingly use a permit, certificate or notification for a different specimen than the one listed. A person knowingly making use of a specimen of a species listed in Annex A of the Principal Regulation, other than in accordance with the authorisation given at the time of issue of the permit or subsequently, will be guilty of an offence.[423]

When an import, export or re-export of a specimen takes place, an officer of the UKBA can request any person in possession of that specimen demonstrate proof that the import/export is lawful. Until such proof is established, Border Force Officers are able to detain the specimen under CEMA, as occurred in *R v Sissen.*[424] In this case an importer of macaws was convicted on four counts of knowingly evading restriction on the importation of goods contrary to s. 170(2)(b) CEMA and sentenced to 30 months' imprisonment on each count, to run concurrently, and ordered to pay £5000 in

[423] Schedule 1(2)
[424] [2001] 1 WLR 902

costs. However, on appeal, the court took into account the defendant's age, lack of prior convictions, financial position, and motives, although legally misguided, in seeking to breed the birds. The 30 months were substituted by a sentence of 18 months. The costs order of £5,000 was imposed, subject to the outcome of an application for a confiscation order.

Deliberate breach of any of the permitting or certification requirements is an offence according to Schedule 1(2) of COTES. Deliberate is defined as action by a person who knows, in light of the relevant legislation and general information available to the public, that their action will most likely lead to an offence, but who continues nevertheless to carry out that action. [425]

Where an import permit or certificate specifies an address at which a live Annex A species must be kept, an offence is committed under Schedule 1(2) of COTES, where any person transfers or keeps the specimen at a different address without authorisation from the Secretary of State. This is referential to the text of CITES, where it must be satisfied that the specimen can be housed and cared for appropriately.

A 2005 amendment bought in tougher sentencing for people found guilty of an offence under COTES. Under the amendment, they are liable, on summary conviction, to a fine not exceeding Level 5 on the standard scale,[426] or to a term of imprisonment not exceeding six months, or to both. For conviction on indictment, the offender is liable to imprisonment for a term not exceeding five

[425] Case C221/04 *Commission v Spain* [2005] ECR I-4515
[426] Currently set at £5,000

years, to a fine, or both. This increase in sentencing availability[427] was introduced so that the police would be able to utilise all of their available powers of search and seizure applicable to serious arrestable offences under the Police and Criminal Evidence Act 1984 (PACE).[428] This, in theory, should have made the legislation more effective in tackling the illegal wildlife trade. However, not long after the 2005 amendment to COTES, the Serious Organised Crime and Police Act 2005 came into force, making the definition of serious arrestable offences redundant. The change in legislation moved the criterion for arrest away from seriousness, requiring the application of an objective test as to whether the arrest is necessary.[429] This being said, the 2005 amendment ensures the UK is compliant with Directive 2008/99/EC and the increase in sentencing arguably makes the sanction for this environmental offence more dissuasive and proportionate.

3.7.5 Australia

Before issuing a permit, the Minister must publish a notice of intent on the Internet setting out the proposal to issue the permit and sufficient information to enable persons and organisations to consider it merits.[430] It also enables persons and organisations to provide the Minister with written comments, within a specified time period, which must not be less than five business days

[427] Environment Audit Committee, 'Written evidence submitted by the Metropolitan Police Wildlife Crime Unit', (UK Parliament, 30 March 2012) http://www.publications.parliament.uk/pa/cm201213/cmselect/cmenvaud/140/140we13.htm 03 August 2015

[428] Wild Singapore, 'UK wildlife law closes loophole on illegal endangered species trade', (22 July 2005) http://www.wildsingapore.com/news/20050708/050722-3.htm 03 August 2015

[429] Fortson, Rudi, 'Exercising Powers or Arrest Under SOCPA 2005 – wither discretion?' (6 February 2006) http://www.rudifortson4law.co.uk/legaltexts/ArrestPowers_CovertPolicingArticle_6thFeb_2006.pdf 10 October 2018

[430] Section 303 GB (7) EPBC Act

after the date on which the notice is published online: s. 303GB (8) EPBC Act. Any comments must be considered prior to issuing a permit.[431]

A person may apply to the Minister for a permit to be issued under s. 303DG of the EPBC Act. Where applicable, these applications must be accompanied with a fee.[432] Section 303DG authorises the permit holder to carry out specified action(s) within a permitted period,[433] without being in breach of s. 303DD. The Minister must not issue a permit authorising the import or export of a live native mammal, reptile, amphibian or bird, unless they are satisfied that the proposed movement would be for a purpose that is considered eligible in a commercial sense; or that the export is for a non-commercial purpose. Otherwise, a permit may be issued if the Minister is satisfied that the proposed export would be for an eligible non-commercial purpose or would fall within the definition of an approved aquaculture programme in accordance with s. 303FM.

A non-eligible non-commercial purpose import/export is defined in Division 5, subdivision A of the EBPC Act. The import or export of a specimen can only be classified as such if the specimen meets one of the following criteria. First, s. 303FC allows for the movement of a specimen for the purposes of scientific research. The specimen must be used for the acquisition of better understanding and/or increased knowledge of a taxon to which the specimen

[431] Section 303 GB (9)
[432] Section 303DE
[433] Permitted period is defined in Section 303DG(2A) as the period specified in the permit during which the action/s specified in the permit may be taken. The specified period must start on the date of issue of the permit, and last no longer than 3 years after that date.

belongs, the conservation of biodiversity and/or the maintenance and/or improvement of human health. Another approved purpose is for education, this includes using the specimen for training.[434] Where a specimen will be used for an exhibition, including zoos and menageries, the non-commercial purpose test will be achieved, as laid down in s. 303FE. For the purpose of a conservation breeding and propagation programme, the specimen must be a live plant or animal. It must also be for the use in a programme the objective of which is the establishment and/or maintenance of a breeding population. Section 303FG allows for the import or export of live native species as household pets, however, this does not extend to CITES listed species. A specimen can also be imported or exported as a personal item, so long as it is not a living plant or animal.[435] Finally, a non-commercial purpose extends to a travelling exhibition, under s. 303FL. For any of these purposes to be valid, they must not be primarily for commercial reasons.

So-called 'primary purpose' imports and exports of specimens can occur within Australia's borders. These are possible if any of the purposes laid down in Subdivision B are met. These include, movement from an approved captive breeding, artificial propagation, or aquaculture programme, wildlife trade operation, or wildlife trade management plan, as laid down in ss. 303FJ – 303FO respectively. The Minister must not authorise a permit if they suspect the movement of the specimen is primarily for commercial purposes outside of the scope discussed above.

[434] Section 303FD – Article VII (7) of CITES
[435] Section 303FH – Article VII (3) of CITES

Where a person attempts to import or export a CITES listed specimen without the relevant documentation, or fails to comply with the paperwork, they are guilty of an offence under ss. 303CD[436] or 303CC.[437] If this occurs, the person shall be liable for imprisonment for a term not exceeding 10 years, to a fine not exceeding 1,000 penalty units, or both. A penalty unit is defined under s. 4AA of the Crimes Act 1914 and is used to ascertain the amount payable. Fines are calculated by multiplying the value of one penalty unit by the number prescribed by the offence: one penalty unit is currently $180. [438] Compared to the possible penalties imposed by courts in the UK, Australia demonstrates a harsher stance on the import and export of CITES species without correct documentation.

Section 303DG(4) states that the Minister must not issue a permit unless satisfied the specimen was obtained legally, and that the export of the specimen will not be detrimental to, or impact, the survival of any species or ecosystem, unless conditions to protect the welfare of the specimen have been, or are likely to be, complied with.

The export of a regulated native specimen is an offence under s. 303DD(1). The penalty for this is up to 10 years imprisonment or 1,000 penalty units, or both. This is unless the export is in accordance with a permit issued by the Minister, or with an accredited wildlife trade management plan, or where the

[436] (Importing)
[437] (Exporting)
[438] Penalty units are reviewed every three years, with the next review due late 2018.

export is part of a registered, non-commercial exchange of scientific specimens between scientific organisations.

Where a person imports a regulated live specimen, they become guilty of an offence under s. 303EK and liable for up to 10 years imprisonment, or 1,000 penalty units, or both. This does not apply when the specimen is included in Part 2 of the list published by the Minister, as provided s. 303EB, or the specimen is imported in accordance with a permit issued by the Minister. There is an evidential burden on the importer to present a valid permit, when necessary to do so. The concept of an evidential burden is considered in subsection 13.3 of the Criminal Code Act 1995 to mean the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter does or does not exist.

Another offence within the EPBC Act relating to the illegal wildlife trade is contained in s. 303GF(2). This is where a permit holder, or authorised person, engages in conduct that contravenes the conditions of the permit. If found guilty, they are liable for a fine of up to 300 penalty units.

If a person has a CITES listed specimen in their possession whilst in Australian jurisdiction, they commit an offence under s. 303GN(2), the penalty for which is imprisonment for a term not exceeding five years, a fine up to 1,000 penalty units, or both. Defences apply in circumstances where the specimen was lawfully imported, or the specimen was not imported but

was offspring of a lawfully imported specimen.[439] In addition a person will not be guilty if, according to s. 303GN (4), the specimen was neither imported, nor the progeny of any other specimen that was unlawfully imported; or s. 303GN (5) they have a reasonable excuse. Under both of these provisions, the evidential burden rests on the defendant, as laid down in s. 13.3 of the Criminal Code.

Australian legislation encompasses animal welfare provisions through s. 303GP(1) of the EBPC Act. Under this provision, a person commits an offence if they import or export a live animal in a manner that subjects the animal to cruel treatment. The offence demands a mens rea element premised on whether a person knows or is reckless as to whether the movement of the specimen subjects it to cruel treatment; and that the animal is a CITES listed species. This offence will occur when a person contravenes ss. 303CC or 303CD of the EBPC Act. Where a person is found guilty they will be liable to imprisonment for up to 2 years.

Another offence linked with CITES listed species is contained in s. 303QG of the EBPC Act. This states that a person must not intentionally import a specimen if they know that it was exported from a third country and that, at the time, exportation was prohibited by that county's legislation. However, under subsection (2) a prosecution cannot be initiated unless a relevant CITES authority of the foreign country has requested either an investigation

[439] Lawfully imported is considered in section 303GY of the EPBC ACT and means that the specimen was imported without contravening the relevant legislation that was in force at the time of the importation.

into the offence or assistance in relation to a number of offences. Breach of s. 303QG can result in imprisonment for up to 5 years.

Australia has also enacted provisions on specimen marking, under s. 303ET of the EPBC Act, an approach contemplated in Article VI of the Convention. In the case of plants, it refers to the marking or labelling of the container where the plant is kept, growing, or the placement of a label/tag on the actual plant. In the case of animals, it refers to the implementation of a scannable device,[440] the placement of a band on the animal, the placement of a tag or ring on any part of the animal, or the marking or labelling of the container the animal is kept in. Where it is determined that a marking is required, the Minister will set out the documentary requirements that must be complied with. Failure to comply results in an offence under s. 303EV(1) of the EPBC Act. It is also possible for a person to commit an offence if they remove or interfere with any marking of a specimen required for the granting of a permit.[441] If convicted, a person who contravenes either of these subsections can face a maximum fine of 120 penalty units, unless an exemption under section 303EU applies, such as, for example, where marking is likely to cause undue pain and distress[442] or a risk of death to the plant or animal.[443]

Similar to the Wildlife and Countryside Act 1981 and Habitat Regulations in the UK, Australia has put legislation in place to protect specific species of fauna and flora from unlawful trade. The EPBC Act contains provisions to

[440] For example a microchip.
[441] Section 303EV(2)
[442] Subsection (4)
[443] Subsection (5)

protect species on a national level, whilst at a state level New South Wales, for example, has included provisions in the National Parks and Wildlife Act 1994.[444]

3.7.6 South Africa

The conditions on export permits in South Africa are laid down in Regulation 6 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) Regulations 2010 (as amended). [445] The export of any specimen or species included in Appendices I and II requires the prior grant and presentation of an export permit. Appendix III species require the prior grant and presentation of an export permit or a certificate of origin. Under Regulation 6(3), an export permit may only be granted if:

(a) The Management Authority is satisfied that the specimen concerned has been legally acquired;
(b) The Management Authority is satisfied that any living specimen will be prepared and shipped in accordance with the most recent edition of the Live Animals Regulations of the International Air Transport Association, regardless of the mode of transport, so as to minimise the risk of injury, damage to health, or cruel treatment;
(c) In the case of the specimen of a species listed in Appendix I or II, the Scientific Authority has made a non-detriment finding and advised the Management Authority accordingly;

[444] These can be found in Part 7 and Part 8 of the 1994 Act.
[445] Gazette Notice R173 in Government Gazette 33002

(d) In the case of specimens of species listed in Appendix I, the competent authority of the country of destination has granted an import permit.

Regulation 7 of the 2010 Regulations lays down the requirement for import permits and certificates for each of the different Appendices. The import of a specimen of any species listed in Appendix I requires the prior grant and presentation of an import permit issued by the country of destination and either an export permit or a re-export certificate issued by the country of export. An import permit may only be granted where certain conditions are met, for example, the Scientific Authority has advised the import will be for purposes that are not detrimental to the survival of the species and is satisfied the proposed recipient of a living specimen is suitably equipped to house and care for it; and the Management Authority is satisfied that the specimen concerned is not to be used primarily for commercial purposes. The import of any specimen of a species included in Appendix II requires the prior presentation of either an export permit or a re-export certificate.

Movements involving Appendix III species require the prior presentation of a certificate of origin or an export permit where the import is from a State which has included the species in Appendix III, or a certificate granted by the State of re-export that the specimen was processed or is being processed in or is being re-exported.

A re-export certificate can only be granted when the conditions laid down in Regulation 8 are met. These are that:

(a) The Management Authority is satisfied that any specimen to be re-exported was imported in accordance with the provisions of the Regulations and of CITES;

(b) The Management Authority is satisfied that any living specimen will be prepared and shipped in conformity with the most recent edition of the Live Animals Regulations of the International Air Transport Association, regardless of the mode of transport, so as to minimize the risk of injury, damage to health or cruel treatment;

(c) In the case of any living specimen of species listed in Appendix I, the Management Authority is satisfied that an import permit has been granted.

All permits and certificates have to meet the criteria laid down in Regulation 10, in order to be valid. These criteria include that they are prescribed form and with a time limited validity (6 months in respect of exports or re-exports; and 12 months for imports of Appendix I species). Any permits must be cancelled and retained by management authorities upon their use, with the burden of so ensuring this occurs placed on the permit holder on pain of an offence. Permits are non-transferrable; and the management authority has considerable discretion in approval, refusal or the imposition of conditions within a permit.

Offences and penalties relating to the illegal wildlife trade can be found in Part 7 of the 2010 Regulations, specifically Regulation 16. These include:

- Import, export or re-export of any specimen of a species listed in the Appendices without a valid permit or certificate;[446]
- Possessing, controlling, offering or exposing for sale, and displaying to the public, any specimen of a species listed in the Appendices, which was not legally acquired;[447]
- Making, or attempting to make, either an oral or written false or misleading statement in, or in connection with, an application for a permit or certificate or registration;[448]
- Altering, defacing or erasing a mark used by the Management Authority to individually and permanently identify specimens;[449]
- Obstruction or otherwise hindering an Enforcement Officer in the performance of their duties;[450]
- Withholding information relevant to a case;[451]
- Fraudulently altering, fabricating or forging any document, permit or certificate;[452]
- Using, altering or possessing altered or false documentation purporting to a permit or certificate;[453] and
- Knowingly making any false statement or report for the purpose of obtaining a permit or certificate.[454]

[446] Regulation 16(1)(a)
[447] Regulation 16(1)(b)
[448] Regulation 16(1)(c)
[449] Regulation 16(1)(d)
[450] Regulation 16(1)(e)
[451] Regulation 16(1)(f)
[452] Regulation 16(1)(g) and (h)
[453] Regulation 16(1)(i)
[454] Regulation 16(1)(j)

The penalties for contravention are significant. A person convicted in respect of any of the above offences may be fine an amount of up to five million Rand and/or a term of imprisonment for a period not exceeding five years.[455] In the case of a second or subsequent conviction, that maximum effectively doubles so that a person faces the possibility of a fine not exceeding 10 million Rand and/or imprisonment for a period not exceeding 10 years.[456] Repeat offenders may also face a ban from ever applying for a trade permit in CITES listed species.[457]

3.8 Permits: Customs Implications

3.8.1 The UK

The Customs and Excise Management Act also contains offences relating to permits and certificates: for example, s.167 establishes the offence of making an untrue declaration to Commissioners or officers. Such falsehood may result in arrest and the forfeiture of the goods that were the subject of the declaration. Under s.168 CEMA, a person who counterfeits or falsifies any document required by or under any enactment related to a specimen, for example, an import permit under COTES, will be guilty of an offence and may be arrested. Section 168 also applies to situations where a person knowingly accepts, receives or uses any document that is counterfeit or falsified, or where they alter an officially issued document.

[455] Regulation 16(2)(a) and (b)
[456] Regulation 16(2)(a) and (b)
[457] Regulation 16(2)(c)

The maximum sentence for someone found guilty, on summary conviction, of these offences is a penalty of £20,000 or imprisonment for a term not exceeding six months, or both. For a conviction on indictment, the maximum sentence is an unlimited fine, and/or imprisonment for a term not exceeding two years.

3.8.2 Australia

Where species are illegally exported from or imported into Australia, a person may face charges under the Customs Act 1901, as amended.[458] This typically takes place when trafficking is identified by Australian Customs and Border Protection Services. Customs offences are outlined in s. 234 of the Customs Act 1901, with those outlined in subsections (1)(d) and (h) the most relevant to illegal wildlife trade offences. According to s.234(1)(d), it is an offence for a person to intentionally make, or attempt to make, a statement to an officer, when they know the statement is false. A person is guilty of an offence if they intentionally exclude or attempt to exclude a fact from an officer when making a statement, knowing that without this fact, they will be misleading the officer. An offence is committed if a person intentionally gives information to another person, knowing that this is false and will be included in a statement to an officer. In addition, s. 234(1)(h) makes it an offence to sell, or offer for sale, any goods that are prohibited imports or smuggled goods. Where a person is found guilty of an offence under s. 234(1)(d) they shall be liable for a penalty not exceeding 250 penalty units. A person convicted of a sales related offence in contravention of s. 234(1)(h), however, is subject to a far lesser penalty, which is only up to a maximum of 10 penalty units.

[458] The most recent amendment took place in December 2015

3.8.3 South Africa

In South Africa, a person who attempts to import, export or re-export specimens of species protected under CITES and NEMBA 2004, may also face charges under customs legislation: in this case the Customs and Excise Act 1964, as amended.[459]

Section 80(1) of the Customs and Excise Act (CEA) creates an offences in respect of the improper use of a permit. Where a person is found guilty of an offence they are liable to a fine not exceeding twenty thousand Rand, or treble the value of the goods, whichever is greater, or to imprisonment for a period not exceeding five years, or to both. In *Lemtongthai v S* (A82/2013) [2013], discussed more fully in Chapter 6, the defendant was charged with 26 offences under NEMBA and 25 offences under the CEA. [460] The case related to a mis-description of hunting trophies, which were in effect being used as a means to launder the export to Thailand of poached Rhino horns. On being found guilty, the defendant was sentenced to 40 years imprisonment. On appeal in *Lemthongthai v S* (849/2013) [2014] the sentence was reduced to 13 years imprisonment and a one million Rand fine. [461] In respect of the sentence, Navsa ADP, who delivered the unanimous judgment stated (at paragraph 20) that:

> *"The duty resting on us to protect and conserve our biodiversity is owed to present and future generations. In so doing, we will also be redressing past neglect. Constitutional values dictate a more caring attitude towards fellow humans, animals and the environment in general. Allowing the kind of behaviour that resulted in the convictions*

[459] The most recent amendment is Customs and Excise Amendment Act, 1995 [No. 45 of 1995]
[460] ZAGPJHC 294; 2014 (1) SACR 495 (GJ) (30 August 2013)
[461] ZASCA 131; 2015 (1) SACR 353 (SCA) (25 September 2014)

in the present case to be dealt with too leniently will have the opposite effect to what was intended by the NEMBA. A non-custodial sentence will send out the wrong message. Furthermore, illegal activities such as those engaged in by the appellant are fuel to the fire of the illicit international trade in rhino horn."

Despite this view the court was of the opinion that the High court had erroneously applied certain aggravating factors; and also that the CEA gave the court scope to impose a significant fine in lieu of part of the term of imprisonment. [462]

3.9 Measures to be taken

Article VIII of CITES provides that Parties should adopt certain rules within their own legal order to further the aims and objectives of the Convention. These include "taking appropriate measures to enforce the provisions of the present Convention and prohibit trade in specimens in violation thereof". [463] Among the many requirements, signatory states must develop criminal or administrative measures penalising certain forms of trade in and/or possession of specimens of the species that are listed in the Appendices to the Convention. In respect of the countries that are the focus of this thesis, these measures are examined in the following sections.

3.9.1 The UK and EU

As noted, the UK's implementation of CITES is in part conflated with its obligation to give effect to the applicable EU law. Schedule 1(1) of COTES 2018,[464] makes it an offence to purchase, offer to purchase or sell any

[462] The court also provided that If there was failure to pay the fine, the term of imprisonment would rise to eighteen years imprisonment
[463] Article VIII(1)
[464] The Control of Trade in Endangered Species Regulations 2018 (SI 2018/703)

specimen listed in Annex A of the Principal Regulation.[465] Pre-2018 legislation stated this did not apply to anything covered in accordance with the terms of any certificate or general exemption granted pursuant to Article 8 of the Principal Regulation.[466] The exemptions listed under Article 8 are broadly similar to those laid down in Article VII of CITES and include the following:

- specimens introduced into the Community before the provisions relating to the species listed in the Convention;[467]
- worked specimens, acquired more than 50 years previously. However, many countries, including the EU and UK have implemented policies[468] for a total ban on ivory sales that overrides this exemption;[469]
- captive-born and bred specimens of an animal species or artificially propagated specimens of a plant species or parts of derivatives of such specimens;[470]
- specimens required for the advancement of science or essential biomedical purposes;[471]
- specimens intended for breeding or propagation purposes for which conservation benefits will accrue to the species concerned;[472]

[465] This also includes, acquiring for commercial purposes, displaying to the public for commercial purposes, uses for commercial gain, keeping for sale, offers for sale or transports for sale any specimen listed in Annex A of the Principal Regulation.
[466] Section 8(3)
[467] Article VII(2) of CITES
[468] The UK has announced they will be implementing legislation to prevent the sale in any ivory.
[469] Lowther, J. 'Ivory trade: Policy and law change', (2018) 20(4) *Environmental Law Review* 225
[470] Article VII (4) and (5) of CITES
[471] Article VII (6) of CITES; Pursuant to Council Direction 86/609/EEC of November 1986 on the approximation of laws, regulations and administrative provisions of the Member States regarding the protection of animals used for experimental and other scientific purposes

- specimens intended for research or education aimed at the preservation or conservation of the species; and
- specimens originating in a Member State and taken from the wild in accordance with the legislation in force in that Member State.[473]

However, the 2018 legislation now requires a valid Article 10 certificate in any and all advertising for sale, commercial purposes etc. This amended was introduced to help clarify the legality of products offered for sale in a straightforward and easy to interpret manner.[474] This is considered specifically beneficial for those specimens offered for sale via the internet, particularly given the issues raised in Chapter 2.

Schedule 1(1) of COTES 2005 makes it an offence to purchase, offer to purchase, or sell any specimen of species listed in Annex B of the Principal Regulation that has been imported[475] or acquired unlawfully.[476] As with Annex A specimens this offence is not made out in the case of material exempted under Article 8 of the Principal Regulation.

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[472] Article VII (4) and (5) of CITES
[473] *Criminal Proceedings against Tridon (Federation Departementale des chasseurs de l'Isere & another)* Case C-510/99 , ECJ, 23 October 2001
[474] Department for Environment Food and Rural Affairs, 'Consultation on proposed changes to the Control of Trade in Endangered Species Regulations', (February 2015) https://consult.defra.gov.uk/biodiversity/changing-cotes-regulations/supporting_documents/COTES%20Review%20%20Consultation%20Document.pdf 16 May 2019
[475] The interpretation of imported unlawfully is laid out in Regulation 2(1) of COTES 2009, to mean "introduced into the Community contrary to the provisions of the Principal Regulation or the Subsidiary Regulation".
[476] Acquired unlawfully is defined in Regulation 2(1) of COTES 2018 to mean "acquired contrary to the provisions of the Principal Regulation or the Subsidiary Regulation".

However, Regulation 4(4)(a) provides that there is no offence if it can be proven that appropriate enquiries were made at the time of possession to ascertain whether the specimen was imported or acquired lawfully; or, if at the time the alleged offence was committed, there was no reason to believe that the specimen was import or acquired unlawfully. Regulation 4(5) considers what constitutes 'enquiries'. These are where a person can produce to the court a statement, furnished and signed by the supplier of the specimen (or a person authorised by them), which states that enquires were made to ascertain whether the specimen was imported or acquired unlawfully when the specimen first came into their possession. This statement should also include that the supplier had no reason to believe at the time they relinquished possession of the specimen that it had been imported or acquired unlawfully. It is an offence to provide a false statement for this purpose.[477]

Under Regulation 4(4)(b) a person is not guilty of an offence if they had no reason to believe that the article was a specimen of a species listed in either Annex A or B of the Principal Regulation.

Along with the offences laid down by COTES, the Wildlife and Countryside Act 1981 (WCA) also encompasses trade offences. These surround native fauna and flora, rather than species from outside of the European Union. The WCA restricts and/or prohibits trade in birds (listed in Schedule 3),[478] other wild animals (listed in Schedule 5)[479] and wild plant species (listed in

[477] Regulation 4(5)
[478] Section 6
[479] Section 9

Schedule 6).[480] Trade of certain species native to the EU is also restricted/prohibited under the Conservation of Habitats and Species Regulations 2017 (Habitats Regulations), part 3.[481] Similarly to COTES, trade in species listed within the WCA and Habitats Regulations, can be lawful if the correct licensing is granted by the appropriate authorities.[482]

As discussed above, the 2009 amendment of COTES,[483] introduced provisions to cover the purchase, sale etc. of split-listed specimens.[484] Under Regulation 8A, it will be presumed that the species is listed in Annex A of the Principal Regulation provided that the specimen falls within the description provided of a sub-species or geographically linked population; or it is not practicable to determine the species or subspecies to which the specimen belongs.[485]

A species will fall into Regulation 8A(3) if it is a species, subspecies or included in a higher taxon than species listed in either Annex A or B of the Principal Regulation (or listed within both these Annexes). It will also fall into this category, where one or more geographical populations of that species, subspecies or higher taxon are included in one of those Annexes and all other of those Annexes.

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[480] Section 13; Gent, T. and Palmer, M., 'Wildlife and Countryside Act 1981: species protection', http://naturenet.net/law/wcagen.html 17 August 2015
[481] SI 2017/1012
[482] Joint Nature Conservation Committee, 'The Conservation of Habitats and Species Regulation 2010', (June 2010) http://jncc.defra.gov.uk/page-1379 17 August 2015
[483] The Control of Trade in Endangered Species (Enforcement) (Amendment) Regulations 2009 (SI 2009/1773)
[484] Split-listed specimen means a specimen which falls within paragraph (3), (4) or (5)
[485] Regulation 5(a) refers to specimens which fall into paragraph (3), Regulation 5(b) refers to specimens which fall into paragraph (4) and Regulation 5(c) refers to specimens which fall into paragraph (5).

A specimen will be considered under Regulation 5 where the following conditions are met: the specimen is of a species listed in either Annex A or B to the Principal Regulation, where one or more subspecies of that species are included in one of those Annexes and all the other subspecies of that species are included in the other Annexes to the Principal Regulation.[486]

Regulation 5(5) refers to specimens that are included in a higher taxon than species and that taxon is listed in either Annex A or B of the Principal Regulations. It considers whether one or more species or subspecies of that higher taxon included in that taxon are contained within either of those Annexes are where all geographical populations of these species or subspecies are included in the Annexes.

Police powers of search, seizure and forfeiture are contained in COTES 2018, Regulations 8, 9 and 10 respectively.[487] Regulation 8 covers powers of entry, and makes it legal to enter premises if there are grounds for believing that there is any unlawfully imported or acquired specimen on the premises specified in the application.[488] A police officer is also authorised to enter premises if there are reasonable grounds for believing that an offence under the Regulations has been or is being committed, and that evidence of the offence may be found on the premises. A warrant may be authorised to allow

[486] Regulation 5(3)
[487] These powers are analogous with those contained in the WCA and Habitat Regulations
[488] A specimen introduced into the EU contrary to the provisions of the Principal Regulation or the Subsidiary Regulation, as contained in Regulation 2(1)

a constable and any persons accompanying them, to enter and search the premises subject to the conditions laid down in Regulation 8(1)(b). These conditions include, that admission to the premises has been refused, refusal is expected, the case is one of urgency or that an application for admission of the premises would defeat the object of the entry. This is specifically relevant where there is the possibility that specimens may be destroyed.

Where a police officer is lawfully on the premises, under Regulation 8(5) of COTES they may, for the purposes of identification of the species or ancestry of the specimen, take samples of blood or tissues. The sample must be taken by a registered veterinary surgeon[489] and must not cause lasting harm to the specimen.

Upon producing evidence of authorisation, a person may, at any time, enter and inspect premises for the purposes of establishing whether the premises are being used for any species activities[490] contrary to Article 8 of the Principal Regulation. They may also enter to verify information supplied by a person for the purposes of obtaining a permit or certificate, to ascertain whether any live specimen is being kept at the address that has been specified in the import permit issued for that specimen, or to determine

[489] A registered veterinary surgeon is a person who is registered in the register of veterinary surgeons under section 2 of the Veterinary Surgeons Act 1966, and defined in Regulation 8(7) of COTES 2018.
[490] This activities include, purchase, offering to purchase, acquisition for commercial purposes, display to the public for commercial purposes, use for commercial gain, sale, keeping for sale, offering for sale or transporting for sale.

whether any conditions of the permit or certificate have been or are being met.[491]

In order to determine whether the specimen is in fact the same as that on the import permit, an authorised person is also legally able to take a sample of blood or tissue. This again is provided that the sample is taken by a registered veterinary surgeon and no lasting harm will be caused to the specimen. Powers to examine specimens and take samples are also contained in the WCA, s.18, and the Regulations 119-121 of the Habitats Regulations 2017.

Once more, an obstruction offence is provided in Regulation 8(6) of COTES, for a person who intentionally obstructs an authorised person with the powers provided in COTES.

A police officer who is lawfully on any premises, by virtue of Regulation 8(1), may seize anything where there is reasonable grounds for believing such seizure is necessary for the protection of the officer or person accompanying them, where it is essential in order to conserve evidence, or for the preservation of the specimen's welfare.[492]

The maximum sentence available for a summary offence is a fine and/or imprisonment not exceeding six months. For a conviction on indictment, the

[491] Regulation 9(4) of COTES 1997.
[492] Contained in Regulation 9 of COTES.

maximum sentence is imprisonment for a term not exceeding five years and/or a fine.

3.9.2 Australia

Australia's legislation, in contrast, only contemplates contravening permit conditions, as discussed above. Under s. 303GF(3) of the EPBC Act, a person commits such an offence where they participate in conduct that breaches the permit and these actions result in in the sale or disposal of a live plant or animal; the progeny of a live plant or animal; the release from captivity of a live animal or a progeny;[493] or the escape of a live plant.[494]

A person found guilty of any of these offences becomes liable to a fine of up to 600 penalty units. Unlike the UK, there is no reference made in the legislation for offences relating to purchasing or the offer to purchase. In that respect the demand side of the equation may not be as effectively deterred.

Australian authorities have made amendments to Appendix I and II species in accordance with the provisions of Conference Resolution 9.24, Annex 3 of CITES. This states that "whenever possible split listings (where different populations of a species are listed on different Appendices) should be avoided".[495] Therefore, generally when split-listing does occur, it should be on the basis of national or regional populations, not subspecies. It normally

[493] This is defined in subsection (4) as the animal has escaped from activity, and either the person allowed them to escape or they failed to take reasonable steps to prevent the animal from escaping.
[494] Defined in subsection (4A) to mean the plant has grown or propagated in the wild, or the person failed to take steps to prevent this from occurring.
[495] CITES, 'Conference 9.24 (Rev. CoP17): Criteria for amendment of Appendices I and II', https://www.cites.org/sites/default/files/document/E-Res-09-24-R17.pdf 04 August 2018

should not be permitted where it places some populations of a species in the Appendices, and the rest outside. This should be the case to avoid the enforcement problems split-listed specimens can create. Based on this, Australia has decided to make these amendments and annotated the listings to state that "the Australian population is not endangered and is included in Appendix I to eliminate potential enforcement problems caused by split listing."[496] An example of this is the Australian population of dugongs, a type of marine mammal, of on Appendix I, meaning that all dugongs are listed on Appendix I, aiming to eliminate the possibility of false permits being issued claiming to be an Appendix II species.[497]

A further difference to the position in the UK is evident in that the EPBC Act as it does not provide explicitly for police powers related to entry, search, seizure and forfeiture with regard to CITES species. Police powers in Australia are elaborated in more general terms, through the Crimes Act 1914. Section 3ZB of this legislation refers to powers of entry, and makes it legal for a constable to enter premises if they have, under a warrant, power to arrest a person for an offence, and they have reasonable grounds for believing the person is on the premises.[498] The police officer may enter the premises, using such force as is necessary and reasonable in the circumstances. Police officers do not require a warrant to gain entry to a property where they are arresting a person for s. 3W or 3WA offences, where the offence is indictable and the police office believes on reasonable grounds that the person is on the

[496] CITES, 'Consideration of Proposals for Amendment of Appendices I and II', https://cites.org/sites/default/files/eng/cop/11/prop/26.pdf 04 August 2018
[497] ibid.
[498] Section 3ZB(1)

premises.[499] However, police officers are not allowed, under subsection 3, to enter a dwelling under either of these subsections at any time during the period of 21:00 hours to 06:00 hours, unless they have reasonable grounds to believe it would not be practicable to arrest the person, either at the premises or elsewhere, at another time, or it is necessary to do so in order to prevent the concealment, loss or destruction of evidence relating to the offence. Once a police officer has legally entered a property, and arrested, or witnessed an arrest, they may seize things in plain view at those premises that they believe, on reasonable grounds, to be evidential material in relation to that or another offence. This differs from the UK as, in Australia, the officer would require a warrant to enter premises which they believe is involved with the illegal wildlife trade. This could reduce the effectiveness of tackling illegal wildlife trade offences in Australia as evidence could be removed or destroyed whilst waiting for a warrant.

Australian legislation does not make specific reference to the identifying of species or ancestry of specimens through taking samples of blood or tissue. However, it is apparent that DNA analysis issued to assist in securing prosecutions for illegal wildlife trade offences.[500] The legislation is also silent in respect of police officers entering, or inspecting premises, for the purpose of establishing whether they are used correctly in respect of any protected

[499] Section 3ZB(2)
[500] Johnson, ., 'The use of DNA identification in prosecuting wildlife-traffickers in Australia: do the penalties fit the crime?', (2010) *Forensic Science Medicine and Pathology*, 6(3) pp. 211 – 216; Ewart, K., *et al.,* 'An internationally standardised species identification test for use on suspected seized rhinoceros horns in the illegal wildlife trade', (2018) Forensic Science International: Genetics 32; Murphy, G., 'DNA analysis & wildlife crime', (Australian Museum, 04 July 2011) https://australianmuseum.net.au/media/dna-analysis-wildlife-crime 09 August 2018

species activities. This includes verification of information supplied by a person for the purposes of obtaining a permit or certification and whether any live specimen is being kept at the address that has been specified in the import permit.

3.9.3 South Africa

Section 24 of NEMBA regulates in respect of "restricted activities", including the purchase, acquisition, sale, supply, and export or otherwise trading in any such specimens covered by the legislation. There is one exemption to this offence, comprised of two requirements. First, a person may purchase, acquire, sell, supply or export any of these animals if they can provide an affidavit or other written proof indicating the purpose of the transaction; and second that the animal is not going to be used for prohibited hunting activities.[501] A person convicted of an offence under s. 24 is subject to a fine of up to 100,000 Rand and/or imprisonment up to five years.

As with the Australian legislation, NEMBA does not grant the police powers of entry, search and seizure in respect of wildlife trade offences. In this context, police powers are provided through the Criminal Procedure Act 1977. Under s. 21, a police officer can enter and search any premises identified in a warrant,[502] and they are able to seize any article found in connection with the crime specified.[503] In addition, s. 25(1)(b) permits entry to premises in connection with any offence, where there are reasonable grounds for believing an offence has been, is being, or is likely to be committed, or that

[501] Section 20 of Government Gazette Notice R 388 80.
[502] Subsection (1)
[503] Subsection (2)

preparations or arrangements for the commission of any offence are being, or are likely to be made, in relation to any premises within their area of jurisdiction. In this case, a warrant will be issued authorising police to enter the premises in question for the purpose of (i) carrying out such investigations and taking steps necessary to maintain law and order; (ii) to search the premises or any persons for articles which may be concerned with the commission of an offence. In the context of the illicit wildlife trade, this might well include a specimen suspected of breaking of the law. Finally s. 25(1)(b)(iii) provides for the seizure of any such article.

The need for a warrant may be obviated in some circumstances, however; and there are notable exceptions to the basic rules relating to entry, search a seizure. Under s. 25(3), a police office may enter without a warrant under subparagraphs, (i), (ii) and (iii) above, if they have reasonable grounds to believe that a warrant will be issued if applied for and that delay in obtaining a warrant would defeat the purpose of applying for one: for example, through the destruction or removal of evidence. Section 27(1) provides that a police officer who lawfully enters a property may use such force as necessary to overcome any resistance, so long as they first audibly demand admission to the premises and notify the purpose for such entry. However, under s. 27(2) this is not required if the police have reasonable grounds to believe that evidence may be destroyed or disposed of.

Police powers of seizure arise under s.20. Relatively broad in scope, the powers permit seizure of any item, which: (a) is concerned in or is believe to

be concerned in the commission or suspected commission of an offence (whether committed in the Republic of South Africa or elsewhere); (b) may afford evidence of the commission or suspected commission of an offence (the same territorial breadth applies here); or (c) is intended to be used or is on reasonable grounds believed to have been used in the commission of an offence. Taken at face value these provisions appear to be more robust than those provided for in the equivalent UK and Australian legislation, given the extra-territorial dimension. This could be particularly beneficial when dealing with illegal wildlife trade cases, through the interception of specimens when they may otherwise be out of reach of the investigating authorities.

In a similar manner to Australia, South Africa's legislation does not cover the legality of a police officer requesting or taking samples of blood and tissue for the purpose of species or ancestry identification. Again, however, research suggests DNA analysis is a tool being utilised to help identify and combat wildlife trade offences within South Africa.[504] [505] As with Australia, there is also no reference in NEMBA, or otherwise, to police officers entering, or inspecting premises for the purpose of establishing whether they are used correctly. This includes verification of information supplied by a person for the purposes of obtaining a permit or certification and whether any live specimen is being kept at the address specified on the import permit. As this is not

[504] Hosken, G. 'SA's portable DNA labs to help stamp out wildlife crime', (Times Live, 20 November 2017) https://www.timeslive.co.za/news/sci-tech/2017-11-20-sas-portable-dna-labs-to-help-stamp-out-wildlife-crime/ 09 August 2018
[505] Stop Illegal Fishing, 'Portable DNA analysis tool identifies species on site to help combat wildlife crime', (06 December 2017) https://stopillegalfishing.com/press-links/portable-dna-analysis-tool-identifies-species-site-help-combat-wildlife-crime/ 09 August 2018

addressed in the legislation, it is not possible to ascertain whether police officers are legally permitted to enter premises for these purposes.

3.10 Confiscation and/or Return of Specimens

Another measure to be taken by the Parties of CITES, laid down in Article VIII(1), is to provide for the confiscation and return of illegally traded specimens to the State of export. A number of issues surrounding this aspect of the Convention were considered in in Resolution 17.8 at CoP 17. As well as a general sense that justice would demand that the cost of any return to a range state would be placed upon the violating importer, other issues relating to the appropriateness of release back to the wild are included in the resolution. The position in respect of the study countries' systems is considered below.

3.10.1 The UK and EU

In the UK, where a person is convicted of an offence under the COTES Regulations, the court may order the forfeiture of any specimen, or part thereof which was the substance of the offence.[506] In addition, CEMA also enables, any imports or exports into or from the UK which are contrary to any legislation in force to be liable to forfeiture and prosecution.[507] In respect of the illegal wildlife trade, this primarily involves imports from outside the EU, of Annex A, B, C or D specimens without the relevant documentation.[508]

[506] Regulation 10(1)(a)
[507] RSPB, 'UK Border Agency', http://www.rspb.org.uk/forprofessionals/policy/wildbirdslaw/preventing/customsandexcise.aspx 13 January 2015
[508] Section 49 of CEMA

Similarly, it involves the export of Annex A, B and C specimens to outside of the EU without the relevant documentation, subject to s. 68 of CEMA.

Where a person is convicted of an offence under the COTES Regulations, the court can, under Regulation 10(b), order the forfeiture of any specimen or other thing in respect of which the offence was committed: and may order the forfeiture of any vehicle, equipment or other thing that was used to commit the offence. The term vehicle is defined in Regulation 2(1) and includes aircraft, hovercraft and boats. The forfeiture of a vehicle or other equipment may serve to act as an effective means of interrupting repeat offences by virtue of the fact that it may weaken an offender's future ability to conduct such activity.

Similarly, CEMA provides for the forfeiture of vehicles by virtue of s.141(1). Where a shipment has become liable for forfeiture under CEMA, the items able to be seized include any vehicle, animal, and container (including passengers' baggage).[509] Forfeiture is also possible for any other specimens, or items mixed, packed or found with the specimen. Section 141(2) states that "where any ship, aircraft, vehicle or animal has become liable to forfeiture under the Customs and Excise Act, whether by virtue of subsection (1) above or otherwise, all tackle, apparel or furniture thereof shall also be liable to forfeiture". Where specific vehicles become liable to forfeiture under s.141 the owner, master or commander shall be liable on summary conviction to a penalty equal to the value of the vehicle, or £20,000, whichever is less. [510]

[509] This includes any other item used to carry, handle, deposit or conceal a specimen.
[510] Section 141(3)(a) - any ship not exceeding 100 tons register, (b) any aircraft or (c) any hovercraft.

Where an offence has been committed, it is possible for goods improperly imported to be forfeited under s. 49 of CEMA. What constitutes 'improperly imported' includes mundane situations where customs duties are not paid; [511] and also focuses upon shipments prohibited by another enactment.[512] In the context of this thesis, COTES would represent such an enactment. Also covered by the provision, and with direct relevance to the illegal wildlife trade, are shipments concealed in a container holding goods of a different description,[513] or goods concealed to deceive.[514] Section 49(2) allows for the forfeiture of goods, which at the time of import are prohibited/restricted by or under any enactment, even during transit, when they are intended for export on the same ship, aircraft or vehicle or to be stored for export.

Forfeiture of goods is also contemplated under s.139 of CEMA, which makes it possible for specimens to be seized or detained by any Border Force officer, police officer or Her Majesty's armed forces or coastguard.[515] Section 139(3) states that if it is a police officer seizing or detaining the specimen, for use in connection with any proceedings to be brought, other than under CEMA, it may be retained in the custody of the police until proceedings are completed or it is decided that no proceedings are to be brought. This is, however, subject to the following restrictions under paragraph (4): notice must be given in writing of the seizure or detention and of any intention to retain the

[511] Section 49(1)(a)
[512] Section 49(1)(b)
[513] Section 49(1)(d)
[514] Section 49(1)(f)
[515] Section 139(1)

specimen in question in the custody of the police, together with the full particulars as to that specimen; and no provisions contained in the Police (Property) Act 1897 shall apply in relation to the specimen. Along with this, section 84 of the Policing and Crime Act 2017 gives Border Force officers' powers of arrest and seizure offshore. This is beneficial for the interception at sea of illegal wildlife shipments entering or leaving the UK. If any person, other than an officer, in custody of the specimen following its seizure or detention, fails to comply with the requirements laid down in s.139 of CEMA, they will be liable under summary conviction to a penalty of level 2 on the standard scale.[516]

3.10.2 Australia

In Australia, there is no specific reference to forfeiture of any specimen or part thereof involved in EPBC Act offences, however ss. 3ZQX and ZQZB of the Crimes Act 1914 allows seized items to be forfeited to the State, for the purposes of retention, destruction or disposal, although this can require an order from the magistrates court. In addition, under the Customs Act 1901, any imports and exports into Australia contrary to any legislation in force may be liable for forfeiture and prosecution.[517] With regard to the illegal wildlife trade, this primarily involves the imports[518] and exports[519] of Appendix I, II and III species, covered under the smuggling and unlawful importation and exportation offences contained in s. 233 of the Customs Act 1901.

[516] Section 139(7)
[517] Section 229
[518] Section 50 of the Customs Act 1901
[519] Section 112 of the Customs Act 1901

Unlike the UK, the EPBC Act does not determine whether the court can order forfeiture of any specimen or other thing in respect of wildlife trade offences, or whether they can order the forfeiture of any vehicle, equipment or other thing used to commit the offence. However, forfeiture of vehicles[520] is available under s. 228 of the Customs Act 1901. Under subsection (1) vehicles can be forfeited to the Crown for numerous reasons, however the most relevant to the illegal wildlife trade are:

(a) where they are used in smuggling, or knowingly used in the unlawful importation, exportation, or conveyance of any prohibited imports or prohibited exports;
(b) where goods are thrown overboard, staved or destroyed to prevent seizure by an officer of Customs;
(c) where they are found within any port or airport with cargo on board and afterwards found light or with cargo deficient and the master/pilot is unable to lawfully account for the difference; and
(d) where the vehicle is found to be constructed, adapted, altered or fitted in any manner for the purpose of concealing goods.

Along with this, under s. 230, the forfeiture of any goods can extend to the packages in which the goods are contained and all goods packed or contained in the package. Where the master of a ship or the pilot of an aircraft intentionally allows the vehicle to be used in smuggling or the importation or exportation of any goods contrary to the Customs Act 1901,

[520] This includes ships, boats and aircraft

they shall be guilty of an offence under s. 223A. This places the burden on the master/pilot to understand the contents of the vessel and for them to be confident that no smuggling is occurring. Where a person is found guilty of a smuggling offence, they shall be liable under s. 223AB(1) to a penalty not exceeding five times the amount of that duty or where the Court cannot determine the amount of that duty, a penalty not exceeding 1,000 penalty units. Where a person is found guilty of any other offence listed above, they shall be liable under s. 233AB(2) to a penalty not exceeding three times the value of those goods, or 1,000 penalty units, whichever is greater. Where the Court cannot determine the value of the goods, the penalty will not exceed 1,000 penalty units.

Along with the forfeiture of goods improperly imported, a person can be liable to 100 penalty units under s. 50 of the Customs Act 1901. This refers to imports, where someone contravenes conditions contained within documentation such as permits. Unlike the UK, the Customs Act 1901 does not cover other offences, concealment in a container holding goods of a different description. This may make it harder for Border Force officers to confiscate shipments linked to the illegal wildlife trade, through offenders deceiving customs authorities with incorrect shipments. That being said, it is also possible Border Force have other powers, which help them deal with these situations, although the precise ambit of those powers is beyond the scope of this thesis. Given the highly complex nature of the contemporary illicit trade perhaps the Australian law is ready to be consolidated or refreshed to ensure it fits its regulatory purposes.

Section 77EE of the Customs Act 1901 allows the Minister to authorise the exportation of detained goods. This may be beneficial to the illegal wildlife trade, as it allows the Minister to return seized live specimens back to the source country, thereby potentially protecting population numbers, although, as noted above, Resolution 17.8 of CoP 17 contemplates that wild release may not always be the optimal solution.

Whilst seizure powers are contained in ss. 203-203DB of the Customs Act 1901, the legislation does not cover retaining evidence for prosecuting offenders under other legislation, such as EPBC Act. It is therefore, unclear whether Border Force officers can retain evidence for proceedings under the EPBC Act. If evidence cannot be retained for this purpose, it would suggest the Customs Act 1901 and the EPBC Act cannot be used in conjunction with each other, reducing the overall effectiveness of the law. The fact that an offender will have been apprehended for evading a prohibition on import though somewhat mitigates this as the offence will potentially be made out in respect of the customs legislation.

3.10.3 South Africa

South Africa, as with Australia, makes no specific reference to forfeiture of any specimen or part of a specimen involved in NEMBA offences. However, any goods imported, exported, manufactured, warehoused, removed or otherwise dealt with contrary to the Customs and Excise Act 1964 (CEA), are liable to forfeiture under s. 87(1). This is provided to ensure forfeiture does not impact any other penalty or punishment incurred under the Act or any

other law. The primary utility here, as with the Australian situation is that there is a linkage to wildlife trade offences made out in respect of the import and/or export of Appendix I, II and III species illegally or without the correct documentation.[521]

The forfeiture of vehicles is not contemplated by NEMBA, but s. 87(2) of CEA allows the forfeiture of any vehicle used in the removal or carriage of goods, unless it is shown that it was used without the consent or knowledge of the owner or person lawfully in possession or charge. Unlike the UK and Australia, there is no mention of the penalties imposed on the owner, master or pilot of forfeited vehicles when involved with offences under CEA. This suggests weaker legislation as it is less likely to act as a deterrent to vehicle owners, pilots and masters, specifically with regard to the import and export of specimens.

Under s. 88 of CEA an officer, magistrate or member of the police force may detain any ship, vehicle, plant, material or goods at any place for evidential purposes. In addition, s. 113(8)(a) allows an officer to detain any goods while such goods are under customs control. This, as with the UK, helps to strengthen the links between the wildlife trade and customs legislation by enabling evidence to be seized and detained for the purpose of prosecution under NEMBA.

[521] Section 15 of the Customs and Excise Act 1964

3.11 Proceeds of Crime

The value in the illegal wildlife trade is not in question. As noted in Chapter 2, the risks of detection remain relatively low in comparison with other offences, and thus the calculation for organised crime groups, for example, may be that the illegal wildlife trade is low risk and high reward. In seeking to redress the balance, there has been considerable development – in many jurisdictions – in measures which target profits in respect of serious and organised crime. The following sections consider the options available within the countries of focus.

3.11.1 The UK and EU

Following conviction for an offence under COTES and/or CEMA, authorities are able to pursue the recovery of assets gained through criminal activity, by making an application under the Proceeds of Crime Act 2002 (POCA) (as amended, most recently by the Serious Crime Act 2015).

Under s. 6 of POCA, as amended, the Crown Court is able to proceed to the recovery of assets if the following two conditions are met. The first is in respect of conviction, namely: that the defendant is convicted of an offence or offences in proceedings before the Crown Court;[522] where they are committed to the Crown Court for sentencing in respect of an offence(s) under specific sections of the Sentencing Act;[523] or if they are committed to the Crown Court in respect of an offence(s) under s. 70 of POCA.[524] The second

[522] Section 6(2)(a)
[523] Section 6(2)(b)
[524] Which deals with committal with a view to a confiscation order being considered – s. 6(2)(c)

condition is dependent upon, according to s. 6(3), the prosecutor's request to the court to proceed under this Section, or, in the alternative, if the court believes that it is a case where it is appropriate to do so.

If both conditions are met, the court must then follow the procedures laid down in s. 6(4), deciding first whether the convicted person has a criminal lifestyle.[525] If this is satisfied, the court should then decide whether they have benefitted from their general criminal conduct. If they do not make that finding, the court must decide whether the convicted person benefitted from the specific criminal conduct in the case before them. Where the court decides that the convicted person has benefitted from criminal conduct, it must decide upon a recoverable amount[526] and make a confiscation order requiring the defendant to pay that amount.[527] Schedule 4 (19) of the Serious Crime Act 2015 states that paragraph (b) will only apply if, or to the extent that, it would be disproportionate to require the defendant to pay the recoverable amount.

The term 'recoverable amount' is defined in s. 7(1) of POCA 2002, to mean an amount equal to the offender's benefit from the conduct concerned.[528] Under s. 7(2), where the defendant shows that the available amount is less than the

[525] The court cannot decide this solely on the basis that the defendant has not identifiable lawful income to warrant their current lifestyle, e.g. lavish house, cars, holidays etc. However, absence of any evidence from the defendant to explain their lifestyle, or giving a false explanation, allows the court to infer that the source of income was illegal.
[526] Section 5(a) POCA
[527] Section 5(b) POCA
[528] As amended by the Social Housing Act 2013

amount benefitted, the recoverable amount will be the available amount, or a nominal amount, i.e. whatever is accessible at the time of the application.

POCA therefore can be used alongside penalties for illegal wildlife trade offences, offering useful potential in such cases. For example, in 2006, a defendant, Dr Lim, was charged with smuggling a total of 126 rare orchids into the UK. Lim pleaded guilty on 13 counts and was sentenced to four months imprisonment for 11 counts and a further three months on each of the two remaining counts, to run concurrently, with the recommendation that he serve at least two months of the sentence.[529] Following this, in 2007, a confiscation order was issued and Lim was ordered to pay £110,331 gained from the proceeds of the trade, along with £15,000 in costs, including a contribution towards the cost of research by experts at Kew Gardens.[530] This case neatly demonstrates the importance of POCA in the context of wildlife trade offences, and the potential deterrent effect it may have.

3.11.2 Australia

Similarly, the Australian Proceeds of Crime Act 2002 aims to trace, restrain and confiscate the proceeds of crime against Commonwealth law, such as the EPBC Act. The principal objectives of the Act are laid down in Chapter 1, Parts 1-2, s. 5. It is designed to deprive persons of proceeds and benefits

[529] Botanic Gardens Conservation International, 'UK Scientist Jailed For Orchid Smuggling', (17 January 2006) https://www.bgci.org/resources/news/0156/ 19 May 2015

[530] Partnership for Action Against Wildlife Crime, 'Recent Prosecutions', (National Archives, 18 November 2008) http://webarchive.nationalarchives.gov.uk/20100713180145/http://www.defra.gov.uk/paw/prosecutions/default.htm 19 May 2015

gained from offences, to act as a deterrent to offenders, prevent money laundering, and to undermine the profitability of crime syndicates.

The Act binds all courts throughout Australia, including those of the States and those of each of the self-governing territories.[531] It is also possible for an application to be made in respect of assets both within and outside of Australia,[532] in respect of crimes committed outside Australia.[533]

The confiscation element of the Proceeds of Crime Act in Australia is laid down in Chapter 2. In respect of banking, for example, s. 15A states that a freezing order can be made against an account with a financial institution if there are reasonable suspicions the account balance reflects the proceeds of or is an instrument of criminal activity; and a magistrate is satisfied that, without the order, there is a risk the balance of the account will be reduced. The steps to be undertaken when applying for a freezing order in Australia are laid down in s. 15B. These include the conditions that must be met for a magistrate to order a financial institution to not allow a withdrawal from an account.[534] The conditions need not be based on a criminal conviction and reasonable suspicion will suffice, so long as there is no evidence to the contrary.

[531] Section 12
[532] Except so far as the contrary intention appears
[533] This is irrespective of their nationality or citizenship
[534] These include an officer applies for the order in accordance with Division 2, there are reasonable grounds to suspect the balance of the account is linked with criminal activity, and the magistrate is satisfied without the order, the account balance will be reduced.

Freezing orders must be obtained following the procedures laid down in ss. 15C and D.[535] Should an officer make a false statement when making an application, they will be guilty of an offence under s. 15G of the Act. Where a person is found guilty under this Section, they shall be liable to imprisonment for two years and/or 120 penalty units.

The use of freezing orders by Australia under the Proceeds of Crime Act is a potentially useful mechanism in tackling the illegal wildlife trade in that it acts as a deterrent to offenders and helps tackle subsidiary crimes such as money laundering. The usefulness of such orders is mirrored in action taken by the UN - in 2012, for example, the UN Security Council (UNSC) adopted two Resolutions relating to the Central African Republic and Democratic Republic of Congo. Viollaz, A. and Presse have reported that the resolutions permit the UNSC to implement specific sanctions including a freeze on the assets of individuals found to be involved in trafficking illegal wildlife products.[536] Here, as discussed in Ch.2 above the measures were targeted towards organised wildlife crime as a vehicle to fund armed conflict.

Chapter 2, Part 1 of the Proceeds of Crime Act, relates to restraining orders against property. Restraining orders are made on the grounds that relate to possible forfeiture or confiscation orders relating to those offences.[537] For a restraining order against property, there is not always a requirement that a

[535] Section 15D relates to applications made by telephone or other electronic means
[536] Viollaz, A. and Presse, A., 'UN Security Council Cracking Down On Ivory Poaching and Illegal Wildlife Trade' *Business Insider* (03 February 2014)
[537] Section 16

person has been convicted of an offence. Section 17(1) states that a court[538] must order property not to be disposed of or otherwise dealt with.[539] Restraining orders are possible where a proceeds of crime authority applies for an order where a person has been convicted, charged or likely to be charged with an indictable offence, so long as an affidavit requirement has been met stating the reasonable grounds for suspicion. The property covered by restraining orders is set out in s.17(2) and includes:

(a) all or specified property of the suspect;

(aa) all or specified bankruptcy property of the suspect;

(b) all property of the suspect other than specified property;

(ba) all bankruptcy property of the suspect other than specified bankruptcy property;

(c) specified property of another person (whether or not that person's identity is known) that is subject to the effective control of the suspect; and

(d) specified property of another person (whether or not the other person's identity is known) that is proceeds of the offence of an instrument of the offence.

In Australia, forfeiture orders are contained in Chapter 2, Part 2 of the Proceeds of Crime Act. Such orders can be made if certain offences have been committed, forfeiting property to the Commonwealth.[540] The process for

[538] with proceeds jurisdiction
[539] unless stipulated in the order
[540] The suspect does not always need to be convicted

making forfeiture orders relating to serious offences is laid down in s. 47. [541] A court will make an order against the specified property if the following conditions are satisfied: (a) a responsible authority for a restraining order applies for the forfeiture order; (b) the restraining order has been in place for a minimum of 6 months; or (c) the court is satisfied that a person(s) conduct or suspected conduct formed the basis of the restraining order engaged in conduct constituting one or more serious offence.[542] The finding of the court need not be based on a guilty verdict of a particular offence, and can be based on a finding that some serious offence or other was committed.[543]

Section 47(3) states that a raising of doubt as to whether a person engaged in conduct constituting a serious offence is not of itself sufficient for the court to fail to make forfeiture orders. The court is able to refuse to make an order, under s. 47(4), where it is satisfied the property is an instrument of a serious offence other than terrorism, it is not proceeds of an offence, and if the court is satisfied that it is not in the public interest to make the order.

Forfeiture orders relating to indictable offences should be made following the conditions set out in s. 48. According to s. 48(1), a court must make an order for specified property to be forfeited to the Commonwealth if (a) a proceeds of crime authority applies for the order; (b) a person has been convicted of one

[541] These are defined in the Crimes Act 1914, section 23WA as an offence under a law of the Commonwealth, or a State offence that has a federal aspect, punishable by a maximum penalty for life imprisonment, or 5 years or more
[542] with proceeds jurisdiction
[543] Section 47(2)

or more indictable offences; and (c) the court is satisfied that the property being specified relates to one or more of the offences. [544]

Where subsection (1) does not apply, the court may make an order for specified property to be forfeited to the Commonwealth, pursuant to subsection (2). For the court to do this, (a) and (b) must still apply, however, subsection (2)(d) must be appropriate. This means, the court is satisfied that the property specified in the order is an instrument of one or more of the offences. In order for the court to make an order under s. 48(2) in respect of particular property, the court may have regard to, any hardship that may reasonably be expected to be caused to any person by the operation of the order, the use that is ordinarily made, or was intended to be made of the specified property and the gravity of the offence(s) concerned.

Forfeiture orders can help the fight against the illegal wildlife trade by acting as a deterrent, through ensuring offenders do not benefit in any way from the illegal trade in endangered species. Australia has the means of increasing their effectiveness of tackling the illegal wildlife trade through domestic legislation, such as the Proceeds of Crime Act. However, this can only be beneficial when operated and utilised correctly and efficiently alongside the EPBC Act.

3.11.3 South Africa

In South Africa, the Proceeds of Crime Act 1996 has been significantly amended since its enactment, including by the Prevention of Organised Crime

[544] with proceeds jurisdiction

Act 1998 which introduced measures to promote prosecutors combatting organised crime, money laundering and gang activity. The Protection of Constitutional Democracy against Terrorist and Related Activities Act 2004 was the most recent amendment. However, the majority of legislation relating to the proceeds of crime and property with regard to the illegal wildlife trade is contained in the Prevention of Organised Crime Act.

Chapter 3 of the 1998 Act refers to offences relating to proceeds of unlawful activities.[545] Section 4 specifically covers money laundering, where a person shall be guilty of an offence where they know or ought reasonably to have known that property is or forms part of the proceeds of unlawful activity and the following conditions are met:

(a) that person enters into an agreement, arrangement or transaction with anyone in connection with that property, whether this 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 another person.

The person will be guilty of an offence when either (a) or (b) has or is likely to have the effect:

[545] The definition of unlawful activity was inserted by section 1(c) of Act 38 of 1999 to mean any conduct that constitutes a crime or which contravenes any law whether such conduct occurred before or after the commencement of this Act and whether such conduct occurred in the Republic or elsewhere.

(i) of concealing or disguising the nature, source, location, disposition or movement of the said property, the ownership thereof, or any interest which anyone may have in respect thereof;[546] or

(ii) of enabling or assisting any person who committed or commits an offence, whether in the Republic or elsewhere, for the purposes of avoiding prosecution or to remove or diminish any property acquired directly or indirectly as a result of the commission of an offence.

Section 5 of the 1998 Act makes it an offence to assist another to benefit from proceeds of unlawful activity, also making it an offence for any person to assist another in the retention or control of the proceeds of unlawful activities, where they know or reasonably ought to have known the other person gained the proceeds through unlawful activity. It is also an offence for these proceeds from unlawful activity to be made available to said other person or to purchase property on his or her behalf.

A person may also be guilty of an offence under Chapter 3 of the 1998 Act in regard to the acquisition, possession or use of proceeds of unlawful activity. Under s. 6 a person is also guilty of an offence where that person has acquired possession of or used the property, and who knows or ought reasonably to have known that it is or forms part of the unlawful activities of another person.[547]

[546] This was substituted by section 6(b) of Act 24 of 1999
[547] Section 6 was substituted by section 8 of Act 24 of 1999

Some limited defences for a person charged with committing an offence under ss. 4, 5 or 6 of the Act can be found in s. 7A.[548] First, a person may raise the defence that they reported knowledge or suspicion in terms of s. 29 of the Finance Intelligence Centre Act 2001. Section 29(2) states that a person who is an employee of an accountable institution[549] and charged with an offence under ss. 4, 5 or 6 of the 1998 Act, may also raise a defence if they ensured relevant steps were taken. These include, (a) complying with the applicable obligations in terms of the internal rules relating to the reporting of information of the accountable institutions; or (b) reported the matter to the person in charge with the responsibility of ensuring compliance by the accountable institution; or (c) reported a suspicion to their superior. Where a person is found guilty of an offence in relation to ss. 4, 5 or 6 they shall be liable to a fine not exceeding R100 million, or to imprisonment for a period not exceeding 30 years.[550]

Part 2 of the 1998 Act is also relevant in terms of the illegal wildlife trade, as it refers to confiscation orders. Section 18 allows the court when convicting a defendant to, on the application of the public prosecutor, enquire into any benefits which the defendant may have derived from (a) that offence, (b) any offence the defendant has been convicted of at the same trial, or (c) any criminal activity which the court finds to be sufficiently related to the offences. Should the court find the defendant has benefitted in anyway, the court may in addition to any punishment it chooses to impose in respect of the offence,

[548] Section 7A was inserted by section 10 of Act 24 of 1999 and then substituted by section 79 of Act 38 of 2001
[549] This is defined in Schedule 1 of the Financial Intelligence Centre Act 2001
[550] This is laid down in section 8 of the 1998 Act.

make an order against the defendant for the payment to the State for any amount it considers appropriate. Under subsection (5) no application can be made without the written authority of the National Director. However, under subsection (2) the amount which the court orders the defendant to pay the State must not exceed the value of the defendant's proceeds from the offence or related criminal activity.[551]

An enquiry into any proceeds can be held at a later date, as long as the court indicates this when passing sentence. This is provided for pursuant to s. 18(3) of the 1998 Act, subject to the following conditions being met:

(a) it is satisfied that an enquiry will unreasonably delay the proceedings in sentencing the defendant; or
(b) the public prosecutor applies to the court to first sentence the defendant and the court is satisfied that it is reasonable and justifiable to do so in the circumstances.

Where the judicial officer who convicted the defendant is absent or for any other reason not available, any judicial officer of the same court may consider an application or hold an enquiry referred to in subsection (1). In such proceedings, they may also take steps as the judicial officer who is absent or not available could have lawfully taken.[552]

[551] As determined by the court in accordance with the provisions of this Chapter.
[552] Section 18(4) of the 1998 Act

Under these pending proceedings, the court has two options according to subsection (6). First, a court may refer to the evidence and proceedings at the trial, or hear further oral evidence. Alternatively, the court may direct the public prosecutor or defendant to tender the court a statement referred to in ss. 21(1)(a) and 21(3)(a). Further, under subsection (6)(b), the court may adjourn the proceedings to any day on such conditions, not inconsistent with a provision of the Criminal Procedure Act 1977, as deemed appropriate. Therefore, the court does not have to rely solely on the trial evidence when making a judgment on a confiscation order. This allows the prosecution, or defendant, to introduce further evidence.

Section 19(1) of the 1998 Act considers the value of the defendant's proceeds of unlawful activity to be the sum of the values of the property, services, advantages, benefits or rewards received, retained or derived by them at any time, in connection with the unlawful activity carried out by them, or a third party.[553] The court however is required to consider a number of provisions when determining the value of the defendant's proceeds of unlawful activity, laid down in subsection (2).[554]

It is also possible for the National Director to apply, by way of an *ex parte* application, to a High Court for an order prohibiting any person from dealing with any matter with any property to which the order states, subject to specific terms and conditions. This is known as a restraint order, and covered by s.

[553] This is to be the case, whether the unlawful activity was carried out before or after the commencement of this Act.
[554] Section 19(2)(a)

26 of the 1998 Act. Under subsection (8) when making a restraint order, the High Court shall also authorise the seizure of all movable property concerned by a police official. Along with this, under s. 27 a police official may also seize any property where they have reasonable grounds to believe that without such action the property may be disposed of or removed.

3.12 Investigatory Powers

3.12.1 The UK

The final piece of legislation that needs to be presented in terms of the UK, is the Regulation of Investigatory Powers Act 2000 (RIPA), as amended. This Act aims to make provisions for the interception and use of communications. As discussed in Chapter 2, IFAW has carried out studies suggesting that combatting the illegal wildlife trade is becoming more difficult due to crime syndicates using the Internet, closed on-line forums and computers that cannot be traced to advertise illicit goods.[555] In order for authorities to intercept these communications and techniques, an application needs to be made under RIPA.

Interception of communication can be lawful without an interception warrant, as long as certain conditions are met. Firstly, the interception is authorised if the person(s) sending and receiving the communication has consented to the interception.[556] Section 44 of the Investigatory Powers Act 2016 also states

[555] World Society for the Protection of Animals, 'Wildlife Crime: Written evidence submitted by the World Society for the Protection of Animals (WSPA)', (UK Parliament, 05 March 2012) http://www.publications.parliament.uk/pa/cm201012/cmselect/cmenvaud/writev/1740/wild26.htm 19 May 2015

[556] Contained in section 3(1) of RIPA 2000

that an interception can be authorised, if the one who sent the communication, or the intended recipient, has consented under Part II of the 2000 Act. There has been a complex series of amendments related to this aspect of the law. The Policing and Crime Act 2009,[557] amended RIPA, and has subsequently been amended itself by s. 47 of the Investigatory Powers Act, so that now, interception of communication sent via a public postal service is authorised. The authorisation applies if it is carried out by an HMRC officer and targeted towards conduct regulated by s.159 of CEMA 1979. In addition the interception of public postal transmission can also be authorised under s. 47(2), if done so if permitted pursuant to Schedule 7 of the Terrorism Act 2000, which relates to port and border controls, as amended by the Counter-Terrorism and Security Act 2015.[558]

Interception of wireless telegraphy communication is authorised by s. 3(4) of the Investigatory Powers Act if it takes place with the authority of a designated person under s. 48 of the Wireless Telegraphy Act 2006, which would include, for example, the Secretary of State, the Commissioners for Her Majesty's Revenue and Customs or any person designated by the Secretary of State for related purposes. This refers to the grant of a wireless telegraphy licence under the 2006 Act,[559] the prevention or detection of anything that constitutes interference with wireless telegraphy, and for the enforcement of any

[557] Part 8, c. 2, section 100(1)
[558] c. 6 Sch. 8, para. 2
[559] Substituted by the Wireless Telegraphy Act 2006, c. 36 Sch. 7 para. 22(3)(a)

provision of Part 2,[560] or Part 3 of the Wireless Act, or any enactment not falling within this provision that relates to such interference.

Should the interception not fall within the categories set out above, the Secretary of State may issue a warrant authorising the 'interceptor' to secure the interception in the course of its transmission by means of a postal service or telecommunication system, for the communications described in the warrant, the making of a request for the provision of such assistance in connection with an international mutual assistance agreement, and/or for disclosure, as laid down in s. 5(1). The Secretary of State will not be able to issue an interception warrant unless satisfied that the warrant is necessary on grounds falling within s. 5(3) and that the conduct authorised by the warrant is proportionate to what is sought to be achieved by that conduct. Subsection (3) refers to interests of national security, for the purpose of preventing or detecting serious crime,[561] for the purpose of safeguarding the economic wellbeing of the UK,[562] or for the purposes of any international mutual assistance agreement. Finally, matters to be taken into account when the Secretary of State decides whether or not to issue the interception warrant, include whether the requirements could reasonably be obtained by any other means, as set down in s. 5 (4). Where a warrant is issued, it must identify at

[560] With the exception of Chapter 2 and sections 27 to 31.
[561] Serious offences are defined in Part 1 of Schedule 1 of the Serious Crime Act 2007, and includes environmental crimes with specific mention to regulation 8 of COTES 1997
[562] These words were introduced by the Data Retention & Investigatory Powers Act 2014 c.27 s.3(2)

least one person as the interception subject, or a single set of premises where the interception will occur.[563]

Where information is obtained without following the guidelines outlined above, it becomes unlawfully apprehended and therefore inadmissible in court proceedings.

3.12.2 Australia

The ability to obtain telecommunications data acts as a key investigative tool for Australia's law enforcement agencies, specifically around issues relating to anti-corruption, national security and, according to press reports, animal cruelty.[564] With the increasing use of encryption tools, access to telecommunications data is becoming more significant to law enforcement and national security agents, including those within Australia.[565] These activities are covered under Australian legislation by the Telecommunications (Interception and Access) Act 1979 (TIA Act), as amended, including by the Telecommunications (Interception) Amendment Act 2006, and, most recently, by the Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015. This amendment introduced the requirement for service providers to retain metadata for a minimum of two years.[566]

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[563] Section 8 of the 2000 Act
[564] Moss, D., 'RSPCA, Australia Post tapping your metadata' *The New Daily* (23 June 2015) http://thenewdaily.com.au/news/2015/06/23/ausposts-phone-tapping-exposed/ 05 November 2015
[565] Kisswani, N., 'Telecommunications (interception and access) and its Regulation in Arab Countries', (2010) 5(4) Journal of International Commerical Law and Technology 228
[566] Alderman, P., 'The new data retention laws – what should you be aware of?', (Lexology, 11 May 2015) http://www.lexology.com/library/detail.aspx?g=7ff1e33f-037d-43ae-8f60-20325672e20c 05 November 2015

The primary objective of the TIA Act is to protect the privacy of individuals using the Australian telecommunications system, whilst specifying the circumstances in which it is lawful for interception, or access to communications, to take place. If a person intercepts, authorises or permits another to intercept, or carries out an act which enables them or another to intercept a communication passing over a telecommunication system, they shall be guilty of an offence under s. 7(1) of the amended TIA Act of 2006. However, s. 7 of the 2006 Act also outlines exceptions to this rule. For example, police are able to intercept communications in specified urgent situations, and carrier employees are also exempt when there is an emergency request by police to intercept a communication. Emergencies include, risk to loss of list or infliction of serious personal injury, threats to kill or seriously injure another person, or to cause damage to property. If a person commits a s. 7 offence, without a defence, they can be sentenced to a maximum of two years imprisonment, pursuant to s. 105 of the TIA Act.

Interception and access to telecommunication will also be legal when an interception warrant is granted. These may be granted for two purposes: national security and law enforcement. Interception provisions relate to communications passing through a telecommunication system, defined as live or real-time communications, such as telephone conversations or communications in transit over the Internet. The TIA also makes provision for stored communications, for example, email, SMS and voicemail messages that have not commenced, or have been completed, passing over a telecommunications system and stored on equipment. It is probable that in

the context of the illegal wildlife trade, either of these would be issued for the purposed of law enforcement, and so they will be considered in more detail.

Interception warrants may be issued under the regime laid down in Chapter 2 Part 2 – 5 of the TIA Act to specified law enforcement agencies for the purpose of investigating specified "serious crimes".[567] Two types of interception warrants can be issued. First, a 'telecommunications service' warrant may be issued under s. 46. In this case, the authorisation is for the interception of only one service at a time. Prior to amendment by the Telecommunications (Interception) Amendment Act 2006, these warrants could only be authorised for the interception of a service being used, or likely to be used, by a suspect. Perhaps as a response to perceived weakness in the legislative provisions, the 2006 Act introduced amendment to permit the interception of a service likely to be used by another to communicate with the suspect (referred to as 'B-Party interception').

The second option for interception warrants available to law enforcement agencies is a 'named person' warrant, as set out in s. 46A TIA. This authorises the interception of more than one telecommunications service used or likely to be used by the subject of the warrant, permitting the interception of one or more telephone service and/or one or more email service. These warrants originally only permitted interception of communications made to/from telecommunications services, but the 2006 Act amended this via the insertion of a provision relating to equipment-based interception. Equipment-

[567] Defined in section 5D of the TIA

based interceptions of communications are made by means of a particular telecommunication device that a person is using, or is likely to use. The power is subject to criticism on its breadth, as it permits the interception of communications of persons who are not suspects or named on a warrant.

As previously stated, the TIA Act also allows access to stored communications, for the purposes laid down in s. 6AA, such as listening to, reading or recording such a communication, by means of equipment operated by a carrier, without the knowledge of the intended recipient of the communication. A person commits an offence, under s. 108, if they access a stored communication; authorise, or permit another person to access a stored communication; or does any act that will enable the person or another person to access a stored communication. The offence is made out where the person does not know who the intended recipient of the stored communication is, or the person who sent the stored communication.[568] Where these conditions are fulfilled, a person will be guilty of an offence and potentially liable to imprisonment for two years and/or 120 penalty units.

Exceptions to this offence are laid down in s.108(2) of the Act, and include exceptions applicable to enforcement agencies, where the access is issued under a computer access warrant through s. 25A of the Australian Security Intelligence Organisation 1979, and those applicable to carriers and carriers' employees.

[568] Knowledge is classed as written notice of an intention to do the act given to the person.

Warrants for access to stored communications can be made under Chapter 3 of the TIA to enforcement agencies for the purpose of investigating serious offence or serious contraventions. These warrants are similar to the named person warrant discussed above, in that they are in respect of one person, thus allowing access to stored communications sent or received via more than one telecommunication service.[569] Unlike interception warrants, stored communication warrants can be issued to all enforcement agencies, as defined in s. 282 of the Telecommunications Act 1997. Thus, stored communication warrants extend to, but are not limited to, the Australian Customs Service, thus allowing it to investigate breaches of criminal law through such warrants.

3.12.3 South Africa

In common with the other jurisdictions, South Africa has also implemented legislation to facilitate the investigation of crime through telecommunications, through the Regulation of Interception of Communications and Provision of Communications-Related Information Act 2002 (ROICA), as amended, most recently by the Regulation of Interception of Communications and Provisions of Communications-Related Information Amendment Act 2008. The 2008 Act applies to information in respect of mobile phones and sim-cards, and creates further offences in respect of them.

ROICA evolved from the Interception and Monitoring Prohibition Act 127 of 1992 (IM), introduced due to an increase in usage of advanced telecommunications technologies. The shift in legislation from the IM Act to

[569] Section 117

RIOCA was initiated so law-enforcement officers were better equipped in their battle against types of crime that involve sophisticated technological advancements, which help anonymise those involved.

The IM Act dealt separately with interception and monitoring and ROICA follows the same layout. Section 1 of ROICA defines interception as the "aural or other acquisition of the contents of any communication through the use of any means, including an interception device, so as to make some or all of the contents of communication available to a person other than the sender or recipient or intended recipient of that communication". This includes any of the following:

- Monitoring of any such communication by means of a monitoring device;
- Viewing, examination or inspection of the contents of any indirect communication; and
- Diversion of any indirect communication from its intended destination to any other destination.

This definition of interception also extends to the definition of monitoring under s. 1 of ROICA. However, it also encompasses the definition found under s.1 of the IM Act to include the listening to, or recording of communications by means of a monitoring device.[570]

[570] However, ROICA widens the definition of a monitoring device, to include any electronic, mechanical, or other instrument, device, equipment or apparatus, to listen to or record any communication.

Section 2 of ROICA provides that no person may intentionally intercept,[571] or attempt to do so, at any place in South Africa, any communication in the course of its occurrence or transmission. Any interception contrary to this Section, may constitute a criminal offence, which carries a maximum fine of two million Rands, or a maximum imprisonment of ten years.[572] This is the case unless the interception is considered lawful under South African legislation. Section 3(a) of ROICA allows authorised persons to intercept any communication, so long as it is done so in accordance with the directions issued by a judge. Other exceptions are laid out throughout the text of ROICA, and include unintentional interception,[573] interception by a party of the communication,[574] where there is written consent from a party,[575] interception of indirect communication in the carrying out of business,[576] amongst others.

As stated, a designated judge should write the interception direction for any interception executed by law-enforcement officers.[577] Section 16(6)(c) states an interception direction may specify conditions or restrictions. There are four types of direction that can be issued pursuant to ROICA: the interception of communications; the provision of communication-related information as soon as it becomes available;[578] the provision of communication-related information

[571] Attempt to intercept, or authorise the interception of
[572]ROICA Section 49(1)
[573]ibid, section 2
[574]ibid, section 4
[575]ibid, section 5
[576]ibid, section 6
[577]Section 1 read with section 16(1) of ROICA
[578]For example, real-time communciation-related information

stored by telecommunication providers (TSPs)[579]; and decryption key holders (DKHs) to disclose decryption keys or to provide decryption assistance in respect of encrypted information.

Sections 1 and 16(3) provide that law-enforcement officers, from the police service, the defence force and intelligence services, as well as the Directorate of Special Operations, may apply for directions. However, discretion for issuing an interception direction lies solely with the designated judge.[580] There are strict criteria to be applied, and the judge may only issue an interception direction if they are satisfied, on the facts laid down in the application, and where there are reasonable grounds to believe the matter involves the commission of a serious offence.[581]

It is worth noting that s.16(5)(a)(i) of ROICA allows for the interception of communication relating to serious offences that may be committed in the future. However, this provision may not withstand constitutional scrutiny on the basis that it speculates on future acts that have not yet occurred. In *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO (Hyundai) 2001*[582], the Constitutional Court decided that a search and seizure, for purposes of a preparatory investigation, would not be constitutionally

[579]Archived communication-related information
[580]ROICA Section 16(4)
[581]ROICA section 16(5)(a)(i). A 'serious offence' would include organised crime, conspiracies or offences that are financially lucrative for those committing them, as well as the 14 offences listed in the Schedule of ROICA. They include offences for which the sentence may be imprisonment for at least five years without an option of a fine.
[582](1) SA 545 (CC)

justifiable in the absence of a reasonable suspicion that an offence had been committed. Search and seizures would be parallel to interception and monitoring of communication and the decision of the Court in respect of search and seizures could be equally applied. Therefore, without reasonable suspicion of an offence, monitoring of communication for the purpose of a preparatory investigation may not be lawful.

Where a direction is being sought, a judge must also be satisfied that other investigative procedures have been applied and failed to produce the required evidence, or reasonably appear to be unlikely to succeed if used, or are likely to be too dangerous to use in order to obtain the required evidence.[583] Under s. 16(5)(c) there must also be reasonable grounds to believe that the offence cannot be adequately investigated or information cannot adequately be obtained in another appropriate manner, although, this does not apply to serious offences involving organised crime or property used as an instrument of a serious offence and which could be the proceeds of unlawful activities.

The applications for an interception direction, considered under s. 16(2) of ROICA, should follow specific conditions laid down in s. 16(2)(a) to be read with s. 16(6).[584] The applicant may also apply for an entry warrant at the same time as the application for the interception direction, or at any stage after the

[583]ROICA s. 16(5)(c) of ROICA

[584] They must be in writing, save where ROICA allows for oral applications; indicate the identity of the applicant; contain the identity of the law-enforcement officer who will execute the interception direction, if known and appropriate; contain the identity of the person or customer, if known, whose communication is to be intercepted; and contain the identity of the TSP to whom the direction is to be addressed if applicable.

issuing of the direction, so long as it is before the direction's expiry date.[585] It is essential that all details of the alleged facts and circumstances of the offence are included in the interception direction request. These details are listed under ss. 16(2)(b) – (d) as:

- a description of the nature and location and facilities from which, or the place where, the communication is to be intercepted, if known;
- the type of communication required to be intercepted;
- the basis for believing that the evidence relating to the grounds on which the application is made will be obtained through the interception; and
- the period for which the direction is required, and whether there has been any previous application made for the alleged offender.[586]

The application must also comply with any supplementary directives relating to applications for interception directions that may be issued under s. 58 of ROICA.[587]

Although s. 23(5) of ROICA states that all applications, directions and requests for interception and entry warrants must be given in writing, there are

[585] Section 22(1) of ROICA
[586] If there are any previous application, the current status of this needs to be indicated on the direction request. An application may be issued for a maximum period of three months, although the application can be extended for a further period not exceeding three months.
[587] This section provides that a designated judge or, if there are more than one designated judge, all the designated judges jointly, may, after consultation with the respective Judge-Presidents of the High Courts, issue directives to supplement the procedure for making applications for the issuing of directives or entry warrants in terms of ROICA.

also provisions that allow these to be made via an oral application. An oral application may only be made where the requestor is of the opinion that it is not reasonably practicable, having regard to the urgency of the case or the existence of exceptional circumstances, to make a written application.[588] An oral application must contain the same information required for a written application, listed above, indicating the urgency or exceptional circumstances preventing the application from being made in writing and comply with any supplementary directives relating to the oral application under s. 58.[589]

The decision to grant an oral application is solely at the discretion of the designated judge, and can only be done if they are satisfied, on the facts alleged in the oral application, that there are reasonable grounds to believe that the direction or entry warrant applied for could be issued, that it is immediately necessary on any of the grounds referred to in ROICA and that it is not reasonably practicable for the application to be made in writing.[590]

Whilst an oral application may be granted to the applicant, they must submit a written application to the designated judge concerned within 48 hours of the oral direction or entry warrant being issued.[591] Where a judge issues an oral direction, they must inform the applicant orally and, where applicable the TSP to whom it is addressed, of the direction, including the contents and the period

[588] Section 23(1)
[589] Section 23(2)
[590] Section 23(4)
[591] section 23(4)(b)

for which it is issued. This must also be confirmed in writing within 12 hours of the direction being issued.[592]

As previously stated, ROICA also provides specific provisions and procedures for applying and issuing directions for real-time, communication-related information,[593] a combination-type application,[594] archived communication-related directions,[595] and decryption directions.[596] The procedures and requirements are virtually the same as those outlined above. Decryption directions are slightly different, in that the direction would be for the person directed to give the decryption key or to provide decryption assistance in respect of encrypted information. An applicant can apply for an entry warrant at the same time, or any stage after the issuing of a direction warrant, so long as the application is made prior to expiry of the direction. Entry warrants must be made in writing, unless done under the circumstances above regarding oral applications.[597] The application must include the identity of the applicant, the premises relating to the entry warrant and the specific purpose for the application.

If the entry warrant is applied for after the interception direction has been issued, proof of the direction must be given. This should be done by way of an affidavit setting forth the results gained through the interception direction from the date of its issue up to the entry warrant application date.

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[592] Section 23(10) read with section 23(7) and (8) of ROICA
[593] Contained in section 17 of ROICA
[594] Section 18 of ROICA – there was no similar provision in the previous IM Act
[595] Section 19 of ROICA
[596] Section 21 of ROICA
[597] Section 22(1)

Alternatively, a reasonable explanation for the failure to collect results from the direction warrant must be provided.[598] The applicant must also state whether any previous applications for entry warrants have been made for the same purpose or premises, and the status thereof. Similarly to interception directions, the applicant must also comply with any supplementary directives relating to applicants for entry warrants that may have been issued.[599]

A designated judge has discretion whether to issue an entry warrant, and will only do so where they are satisfied, on the facts alleged in the application, that entry onto the specified premises is necessary for the purpose of intercepting a postal article or a communication, or for the purpose of installing, maintaining or removing an interception device on, or from, any premises. The judge must also be satisfied that there are reasonable grounds to believe that it would be impracticable to intercept a communication solely under the interception direction concerned other than by the use of an interception device installed on the premises.[600]

When an interception direction or entry warrant is issued, they must only be executed by law enforcement officers and must be done so in circumstances prescribed by ROICA. According to s. 26(2) an applicant for a direction may authorise any of authorised persons deemed necessary to assist with the execution of the direction. The direction may be executed at any place in South Africa and in respect of any communication in the course of its

[598] section 22(2)(b)(ii)
[599] section 22(2) of ROICA
[600] section 22(3) and (4) of ROICA

occurrence or transmission to which the direction applies.[601] If the law enforcement officer or authorised person fail to follow the interception direction, they may face criminal charges.

3.13 Conclusion

Unsurprisingly, each country of study has its own legislation to implement CITES and thereby attempt to tackle wildlife trafficking and trade offences within their borders. Although the broad legislative aims of each, to implement CITES and disrupt the illegal wildlife trade, are similar, each country has adopted different measures. In addition, customs legislation also differs within each country, providing a variety of mechanisms to help achieve these aims. Police and other authorities' and investigative powers have been explained so as to enable the officer the instruments available them. In addition, proceeds of crime legislation in the respective jurisdictions has been presented to highlight further mechanisms countries can take to punish offenders and help deter involvement in wildlife trade offences.

Whilst it has been identified that there is extensive legislation in place within the countries of concern to help effectively implement CITES and therefore tackle the illegal wildlife trade, it is not clear whether these jurisdictions are utilising these in an effective manner. It is necessary, therefore, to explore the performance of the countries in their efforts to tackle the illicit trade in endangered species to understand how effective this legislation is in helping to combat the trade. Practice in both wildlife trade and customs legislation will

[601] section 26(3)

be analysed to analyse how each country utilises these mechanisms to secure prosecutions and thereby tackle the trade.

As discussed in Chapter 2, governments are under increasing pressure to act in respect of wildlife trade offences. Due to this pressure, countries are enhancing their legislation in an attempt to reduce the activity and increase areas and species covered, including removing exemptions that were previously in place. An example of this is the UK Ivory Bill that demonstrates the area is not standing still and more is being done, this time in terms of market restriction, to help tackle the illegal wildlife trade. This thesis has not gone into detail regarding the Ivory Bill since as at the time of writing, it was not enacted.[602]

Further, this Chapter makes it apparent that the UK has a more coherent suite of legislation to help tackle this illicit activity. The presence of police powers within the legislation, along with explicitly mentioning testing of specimens, highlights the mechanisms in place to assist organisations in their efforts to combat trade in endangered species. The UK is also the only country of the three whose legislation makes specific reference to seizures of specimens. Along with this, it has been observed that the UK and Australia have enacted stricter measures, compared to those laid down in CITES, which may increase their effectiveness and deter offenders. Finally, all three countries address the supply and demand of protected species, however, the extent to

[602] Lowther, J. 'Ivory trade: Policy and law change', (2018) 20(4) *Environmental Law Review* 225

which each country considers the severity of these offences differs. This will be explored in more detail in Chapters 5 and 6.

4.0 Methodology

4.1 Introduction

The core research aims and objectives of this PhD helped to form the basis of the research design and provided a framework upon which the thesis is constructed. Rees (1997) outlines the centrality of the research objectives to the whole process by suggesting that "research consists of extending knowledge and understanding through a carefully structured systematic process of collecting information which answers a specific question in a way that is as objective and accurate as possible".[603] Therefore, the overall purpose of this thesis is to find attempt to address the research questions that were set at the start of the study.[604] An appropriately designed and well-executed methodology ensures this is done in the most rigorous and effective way possible.

This chapter aims to chart the range of methodologies utilised within this thesis and assess their effectiveness in addressing the research aims and objectives. It will also critically assess the experiences drawn from the adoption of these methodologies and reflections are made in respect of their future use in research of this nature.

[603] Rees, C., *An Introduction to Research for Midwives*, (1997) p. 8
[604] Parahoo, K., *Nursing Research: Principles, Process and Issues,* (1997) p. 396

As a comparative approach[605] has been adopted for this thesis,[606] it is crucial to look at the relevant legal principles within the selected jurisdictions to see how they are managed; this has been carried out, initially, through the use of a black-letter law analysis.[607] [608] This is followed by a more socio-legal approach[609] through the use of qualitative and quantitative methods. These approaches and their merits, success or otherwise will now be explored in more detail.

4.2 Research Aims and Objectives

The basis of the research is set out into a primary aim with a series of objectives. The aim of the research is to analyse the effectiveness of the structures in place for tackling the illegal wildlife trade in Australia, South Africa and the UK. Along with identifying the threats associated with this activity and to make recommendations for improvement throughout the legal procedures on the basis of establishing comparative best practices'. The objectives are as follows:

4.2.1 Objectives:

1. To identify the evolving and contemporary threats associated with the illicit trade in endangered species and the difficulties these pose for

[605] Kahn-Freud, O., *Comparative Law as an Academic Subject,* (1965), p. 29
[606] Samuel, G., 'Comparative law and its methodology', In: Watkins, D. and Burton, M., *Research Methods in Law* (2013) p. 100
[607] Hofheinz, W., 'Legal Analysis', (1997) https://www.hofheinzlaw.com/LANLSYS.php 23 March 2018
[608] Hutchinson, T., 'Doctrinal research', In: Watkins, D. and Burton, M., *Research Methods in Law*, (2013) p. 14
[609] Black, J., 'New Institutionalism and Naturalism in Socio-Legal Analysis: Institutionalist Approaches to Regulatory Decision Making', (1997) 19(1) Law & Policy 51

those tasked with their interruption and enforcement the structures, as they are currently constituted.

2. To analyse the legislation and policy which implements the Convention on International Trade in Endangered Species of Wild Fauna and Flora in the countries of study.
3. To identify and critically assess the effectiveness of the relevant structures established pursuant to the legislative and policy frameworks each country has in place to tackle the illegal wildlife trade.
4. To provide recommendations for the improvement of the legislation, policies and structures that aim to tackle the illegal wildlife trade, including the extension of a complete ivory ban being implemented in certain countries.

4.3 Black-Letter Analysis

The underlying research of this thesis is centred on the most traditional of all legal methodologies, a 'black-letter' analysis.[610] This methodology concerns the formulation of legal 'doctrines' by analysing legal rules. These legal rules can be found in legislation or statutes and case law,[611] however, alone, these do not give a complete understanding of the law. If the research solely relied on a black letter law analysis, it would concentrate on narrow statements of the law, and not extra-doctrinal considerations, such as policy or context.[612] Due to the need for an underlying legal understanding, a black-letter law analysis will be found in all forms of legal research to some degree or

[610] Morris, R., *The "New Contribution to Knowledge": A Guide for Research Postgraduate Students of Law*, (2011) p. 23
[611] Genn, H. *Common Law Reasoning and Institutions*, (2015) p. 15
[612] Hutchinson, A. 'Beyond black-letterism: Ethics in Law and legal education', (2010) 33(3) The Law Teacher 302

another.[613] Whilst a black letter law analysis is concerned with discovering and developing legal doctrines and utilised to answer research questions,[614] a more in-depth investigation is required into extra-doctrinal considerations. In the context of this thesis the evaluative component of the law's effectiveness within the selected jurisdictions therefore requires an additional, complementary approach.

The aim of this initial methodology is to collate and organise the legal principles into one section of the thesis, which can then be used to justify, support or contradict the results collected during the data collection stage. Black letter law analysis can also offer commentary on issues on authoritative legal sources where legal rules are considered, specifically in respect of case law, in order to improve an understanding of the underlying systems.[615]

The black letter law analysis involves a purely desk-based evaluation of available legal materials, the results of which were presented in Chapter 3. The doctrinal approach demonstrates the key differences in legislation between the countries of study, providing the areas of most relevance to the thesis. The black letter law approach has been adopted as part of the thesis in order to set out the rules within each jurisdiction, permitting assessment to be undertaken so as to determine their respective abilities to deliver favourable outcomes in protecting against or targeting the illegal wildlife trade.

[613] Chynoweth, P., 'Legal Research' in Knight, A. and Ruddock, L., *Advanced Research Methods in the Built Environment*, (2008) p. 31
[614] Chynoweth, P., 'Legal Research' in Knight, A. and Ruddock, L., *Advanced Research Methods in the Built Environment*, (2008) p. 30
[615] LawTeacher, 'Writing a Law Dissertation Methodology', http://www.lawteacher.net/law-help/dissertation/writing-law-dissertation-methodology.php 19 October 2016

Following the black letter law analysis, the thesis originally adopted a combined methodological approach: through qualitative and quantitative data collection. Mixed methods were chosen to be able to successfully meet the aims and objectives of the thesis, which are outlined above. Both open-ended and closed questions were devised for distribution to selected stakeholders. A selection of these stakeholders would then be asked to participate in a follow up semi-structured interview. In order to carry out these data collection techniques, ethical approval was requested from the Faculty Research Ethics Committee and was granted on first submission.[616]

Gaining ethical approval and adhering to ethical norms is an important part of the research process for numerous reasons. Adhering to ethical norms promote the aims of research, from knowledge and truth, through to preventing errors.[617] This includes prohibitions against fabricating, falsifying or misrepresenting research data, promoting truth and minimising error. This was considered within s. 10(b) of the submitted Ethics Forms,[618] this highlighted that once the results were published in the thesis, relevant materials would be made available (upon request) to all participants of the study.

Ethical approval was also important for this thesis as ethical standards promote essential values for collaborative work. This is relevant as the

[616] The Ethics submission and approval can be seen in Appendix I
[617] Masic, I., 'Ethics in research and publication of research articles', (2014) Volume II South Eastern European Journal of Public Health 3
[618] See Appendix I

research methods adopted required cooperation and coordination from different people and organisations.[619] These standards included trust, accountability, mutual respect and fairness. An example of this is confidentiality, due to the subject matter of this thesis and the people involved it was necessary to consider confidentiality issues to ensure cooperation from the people and organisations involved in combatting the illegal wildlife trade.[620]

Following ethical approval, a questionnaire was designed with the aim to explore the experiences of the participants who have been involved with the structures, legislation and threats associated with the illegal wildlife trade.[621] These questionnaires were then disseminated through the use of e-mail. This method was chosen, as it allowed the researcher to receive acknowledgements when the questionnaire was received and notifications where they failed to deliver. Along with the questionnaire, a consent form was also distributed to allow participants to agree to follow up interviews.

The participants were selected by reference to their role in tackling the illegal wildlife trade and therefore was designed to include individuals from NGO's, government and policy makers, customs and prosecution services and the police, as those organisations have first-hand experience in the strengths and weaknesses of the legislation and structures that would have helped to achieve the research objectives. By approaching various organisations that

[619] Friis, R. *Epidemiology 101*, (2010) p. 19
[620] These can be seen in section 10(f) of Appendix I
[621] This can be seen in Appendix II

work at a variety of levels with different functions in tackling the illegal wildlife trade, the data collected is more likely to be reliable and credible, whilst allowing for the comparisons and analysis that are central to this thesis. This dissemination also ensured that the results were not corrupted by biases from specific organisations that may have a different view from others or the researcher.

Ensuring there is no bias integrated in the research links to ensuring a representative sample of the population is used. It is crucial to consider the sample size to achieve statistically significant and reliable results. A small sample can mean inconclusive, statistically insignificant or influenced results. As a result, generally a larger sample can reduce this and lead to an increase in precision, statistical power and reduced bias.[622]

Bias can be caused by the manner in which study subjects are chosen, the attitudes or preferences of an investigator or the lack of control of confounding variables.[623] Whilst some bias in research arises from experimental error, it usually arises when researchers select subjects purposefully, or analyse data to generate desired results.[624] Selection bias occurs when certain groups of people are omitted purposely from a sample, or when samples are chosen to meet a specific personal aim,[625] this was a concern with the thesis data

[622] Nayak, B., 'Understanding the relevance of sample size calculation', (2010) 58(6) Indian Journal of Opthalmology 470
[623] Sica, G., 'Bias in Research Studies', (2006) 238(3) Radiology 781
[624] Unite for Sight, 'Validity for Research', http://www.uniteforsight.org/global-health-university/research-validity - _ftnref8 4 November 2016
[625] ibid.

collection, which is why every effort was made to include all perspectives from the people and organisations involved with tackling the illegal wildlife trade.

For the participants who consented to interviews, it was planned that where possible these were to be conducted face-to-face, with the use of audio, video or manual note-taking depending on the consent of the respondent. Where it was not possible, the interviews would have been carried out over the Internet, for example through Skype. Face-to-face interviews were the preferred option as they are considered the most reliable option as this communication offers maximum amount of cues, specifically in comparison to mediated communication, which decreases the amount of cues and therefore the quality of interaction.[626]

A total of 880 questionnaires were distributed to organisations and individuals from the list above. Unfortunately, only 4 questionnaires were returned completed. Other individuals did respond to the questionnaire request, with various comments ranging from, "unable to complete", "in my 14 years' experience there have been no illegal wildlife trade cases" and "committed to the cause but unable to fill the form in". Due to the low response rate, the research methods for this thesis were revisited and a changed basis worked through and adopted.

[626] Lewandowski, J. *et al*., (2009) 'The effect of informal social support: Face-to-face versus computer-mediated communication', (2009) 27(5) Computers in Human Behaviour 1807

4.4 Revised methodology

A revised methodology was developed to take advantage of the move towards greater accountability for bodies exercising a public function that has become a feature of modern 'western-democratic' countries. By using what is loosely termed freedom of information legislation, it was hoped that certain classes of information, which would permit the necessary analysis for the thesis, would be more readily available. Whilst the interviews and questionnaires would have been useful to identify shortfalls from the perspectives of those working to tackle the illegal wildlife trade, the information gained through this new methodology will be mainly quantitative and potentially more objective. As the previous method collated the views of an individual in an organisation, this may have been less representative as it was subjective to the person responding to the thesis request.

The new research method utilised the Freedom of Information Act 2000, or equivalent, in each country of study, and is discussed further below. [627] The amended approach involved another ethics request, on the basis that the information gathering approach had altered, which again was submitted and approved at the first attempt.[628]

4.5 Introduction to Freedom of Information Legislation

The purpose of Freedom of Information legislation is to provide the public with a right to access the information and activities of public authorities and

[627] The legislation in each country is as follows, The Freedom of Information Act 2000 in the UK, the Freedom of Information Act 1982 in Australia and the Promotion of Access to Information Act 2000 in South Africa.
[628] See Appendix III

obligates the authorities to pass on this information, unless there is a justification (under the relevant legislation) not to. This could be described as a presumption or assumption in favour of disclosure.[629] As any member of the public can request any information (within reason) under the relevant legislation, it is purpose and applicant blind.

Therefore, the main objectives of Freedom of Information (FOI) legislation are to provide transparency and accountability within government and public authorities; to enable better decision-making processes within government, whilst promoting public participation in government and a representative democracy.[630] The relevant legislation was also implemented to increase public understanding, improve the quality of decision-making, improve public participation and increase the public's trust in the government.[631]

Whilst the main objectives of the legislation are clear and seem sensible, it is questionable whether governments are convinced by the importance of this legislation in a democratic society. For example, Tony Blair considered the Freedom of Information Act to be the biggest mistake of his tenure as Prime Minister. When the relevant Act came into force in the UK in 2005, with much softer obligations than previously proposed, Blair considered the legislation to be an effective way to reach the aims discussed above. By the time he

[629] Information Commissioner's Office, 'The Guide to Freedom of Information', https://ico.org.uk/for-organisations/guide-to-freedom-of-information/ 31 March 2017
[630] Neilsen, M., 'Public sector accountability and transparency', (Parliament of Australia, 12 October 2010), http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook43p/publicsectoraccountability 31 March 2017
[631] House of Commons Justice Committee, *Post-legislative scrutiny of the Freedom of Information Act 2000*, (2012, First Report of Session 2012-2013: Volume 1) at p. 8

published his memoirs, it is suggested that Blair's objections to FOI were that it undermined candid discussions in government.[632] It is also apparent that scandals happen and Blair regretted giving the public a legal right to probe the government's shortcomings.[633] Nevertheless, Freedom of Information legislation is adopted across the globe and generally operates in a way to meet the objectives discussed above. That being said, as with all legislation there are limitations to the relevant legislation that are worthy of examination and in some jurisdictions, complementary mechanisms are available.

Alongside the Freedom of Information Act, the United Nations Economic Commission for Europe's (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, usually referred to as the Aarhus Convention, was adopted in 1998.[634] Similar to FOI legislation, the Aarhus Convention is also about Government's accountability, transparency and responsiveness. The Aarhus Convention grants certain qualified rights to the public and consists of three pillars:

1. Access to environmental information
2. Participation in environmental decision-making
3. Access to environmental justice.

[632] Frankel, M. 'The root of Blair's hostility to Freedom of Information' *Open Democracy UK* (7 September 2010)
[633] ibid.
[634] United Nations Economic Commission for Europe, 'Introduction', https://www.unece.org/env/pp/introduction.html 24 February 2017

Whilst all three pillars are relevant to this thesis in their own right, the first pillar is of interest in respect of the methodology. The UK is a Party to the Aarhus Convention in its own right and through its membership with the EU. Australia attended the third Aarhus Convention in 1995, where it is considered the proposed UNECE Guidelines. Although Australia expressed interest in becoming a Party to the Convention, it has not yet done so.[635] Similarly, South Africa is not a Party to the Convention, however, the Department for Environmental Affairs and Tourism has discussed the importance of the Aarhus Convention and stated, "various Acts have been promulgated and programmes incorporated, which give effect to the requirements for environmental assessment contained in various international agreements".[636] Certain jurisdictions would not consider the information requested in this thesis as environmental information, instead it would be classified as generic 'criminal' and therefore the Aarhus Convention would not apply.

However, this is not the case in the UK and therefore as a Party to the Aarhus Convention it is an additional tool to be used in this thesis. As a result, it is necessary to look at how this has been implemented into both the EU and the subsequent UK regulations.

[635] Tranter, K, 'Australia's illusory participation' *ABC News* (05 October 2010)
[636] Department for Environmental Affairs and Tourism, 'Integrated Environmental Management Series: Environmental Assessment for International Agreements', (2005) https://www.environment.gov.za/sites/default/files/docs/series19_assessmentof_international_agreements.pdf 22 March 2017

In 2003 two Directives were adopted by the EU to implement the first two pillars of the Aarhus Convention; Directive 2003/4/EC[637] and Directive 2003/35/EC. [638] The third pillar, access to justice in environmental matters, was adopted through the implementation of Regulation (EC) 1367/2006.[639]

Directive 2003/4/EC, which covers the first pillar of the Aarhus Convention – access to environmental information – has been implemented into the UK by the Environmental Information Regulations 2004.[640] The public participation in environmental decision-making process – the second pillar of the Aarhus Convention – has been implemented through a number of different mechanisms. For example, with reference to Environmental Impact Assessments (EIA), it was considered in the case of *Jedwell v Denbighshire County Council & Others* [2015].[641] The fundamental issue was the scope of the obligation on local planning authorities to give reasons when adopting EIA screening opinions, whether positive or negative.[642] A further case relating to the Aarhus Convention, and demonstrating its broad interpretation by the

[637] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (Official Journal L 041, 14/02/2003 P. 0026 – 0032)
[638] Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC – Statement by the Commission (Official Journal L 156, 25/06/2003 P. 0017 – 0025)
[639] Regulation (EC) No. 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters in Community Institutions and bodies; (OJ L 264, 25.9.2006, p.13).
[640] SI 2004/3391
[641] EWCA Civ 1232
[642] Ward, L., 'Case Comment: EIA Screening Decisions – The duty to give reasons', (Ashfords LLP, 04 December 2015) https://www.ashfords.co.uk/article/case-comment-eia-screening-decisions-the-duty-to-give-reasons 03 April 2018

courts is *R (McMorn) v Natural England and DEFRA* [2015][643] where the High Court quashed Natural England's refusal to grant the applicant a licence to control buzzards, with the judge stating it was an Aarhus claim for both costs purposes and the intensity of review. [644]

There have been several warnings issued to the UK from the European Commission for its failure properly to implement the Aarhus Convention in respect of costs of bringing proceedings challenging environmental decisions. This failure to implement the Aarhus Convention properly also attracted the attention of the Aarhus Compliance Committee that in 2010, considered three sets of compliance communications against the UK. [645] Along with this, the application of the Aarhus Convention has been considered by in UK courts, with a particular focus on the costs of environmental proceedings.[646] While these cases do not have a specific connection to the methodology adopted here *per se*, they have been included as demonstrative examples of the seriousness with which the courts have engaged with the imperatives contained in the information rules and the breadth of their application.

As the UK is the only country of study that signed up to the Aarhus

[643] EWHC 3297
[644] Peters, C., 'High Court overrules Natural England in gamekeeper buzzard licence battle' *Shooting UK* (13 November 2015) http://www.shootinguk.co.uk/news/gamekeeper-finally-wins-licence-for-buzzard-control-as-high-court-overrules-natural-england-refusal-49505 03 April 2018
[645] ClientEarth case, Hinton Organics case and Belfast City Airport Case
[646] In a number of cases, including *Austin v Miller Argent (South Wales) Ltd* [2014] EWCA Civ 1012, *R (Edwards and another) v Environment Agency and others [*2010] UKSC 57, *R (Garner) v Elmbridge Borough Council and others* [2010] EWCA Civ 1006, *Morgan and Baker v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107 and *The Secretary of State for Communities and Local Government v Venn* [2014] EWCA Civ 1539

Convention it was necessary to request the data through the relevant Freedom of Information legislation, as this was applicable in all three countries. In addition, whilst the crimes committed are technically environmental, some of the information requested also related to customs offences.

4.6 Limitations of Legislation

The relevant legislation implementing freedom of information into each of the countries of study is subject to jurisdiction-specific exemptions that will be discussed in more detail later in this chapter.

The first limitation that should be considered is that the relevant legislation only applies to public authorities and therefore non-government organisations do not have a legal obligation to provide information under the relevant legislation. Although there is no legal obligation for them to do so, people are entitled to ask non-government organisations for information and they have the discretion to respond. Whilst private organisations are not legally required to respond to FOI requests, recent proposals for changes to legislation would impact this in certain circumstances.[647] Private companies delivering public services, or in receipt of public funds should come under FOI legislation to

[647] Dale, S., 'Govt extends Freedom of Information rules to more private firms' *Money Marketing* (8 March 2014) https://www.moneymarketing.co.uk/govt-extends-freedom-of-information-rules-to-more-private-firms/ 02 July 2018 and Stone, J., 'Private companies spending public money should be subject to Freedom of Information law, watchdog says' *The Independent* (02 September 2016) https://www.independent.co.uk/news/uk/politics/private-companies-spending-public-money-should-be-subject-to-freedom-of-information-law-watchdog-a7222641.html 03 April 2018

help increase transparency and meet the aims of the Act.[648] This was considered in *Fish Legal v Information Commissioner & Others*[649] where it was determined a private water company is 'public' within the meaning of Article 2(2)(b) of Directive 2003/4/EC and Regulation 2(2)(c) of the Environmental Information Regulations 2004.[650] The decision was reached, inter alia, on the basis that a private water company provides public administrative functions under national law and therefore has a duty to provide information upon request. However, public authorities are able withhold information so long as it is within the exemptions stated within the legislation. In *Office of Communications v Information Commissioner*[651] the court stated "that Article 4(2) of Directive 2003/4 must be interpreted as meaning that, where a public authority holds environmental information or such information is held on its behalf, it may, when weighing the public interests served by disclosure against the interests served by refusal to disclose, in order to assess a request for that information to be made available to a natural or legal person, take into account cumulatively a number of the grounds for refusal set out in that provision".[652] There will be more discussion around exemptions later in this Chapter.

[648] ibid.
[649] [2015] UKUT 52
[650] Lean, J., 'Environmental Law Blog: *Fish Legal v Information Commissioner* [2015] UKUT 0052 (AAC)', (Landmark Chambers, 02 March 2015) http://www.landmarkchambers.co.uk/celblog.aspx?id=134 03 July 2018
[651] C 71/10, REFERENCE for a preliminary ruling under Article 267 TFEU from the Supreme Court of the United Kingdom (United Kingdom), made by decision of 27 January 2010, received at the Court on 8 February 2010, in the proceedings
[652] Paragraph 32 of the judgment

4.7 Reason Chosen

As previously mentioned, the original methodology for this thesis adopted the use of questionnaires, with follow-up interviews where necessary. Unfortunately, there was little response from the people and organisations approached and therefore the data did not give any answers to the thesis questions. Therefore, the Freedom of Information approach was adopted as public authorities have a legal obligation to respond to such requests, thereby ensuring the data would be received, unless any exemptions applied. This meant authorities were under an obligation to provide the data, thereby allowing for more effective analysis.

This meant that information would be received by the authorities aiming to tackle the illegal wildlife trade by implementing the legislation and sentencing discussed in Chapter 3.0 were under an obligation to provide the data to allow for effective analysis.

The data obtained under this legislation should enable an appreciation of the strengths and weaknesses of the responses of authorities that aim to tackle the illegal wildlife trade; and permit recommendations in respect of potential improvements that could be implemented.

4.8 Basic Provisions

As the Freedom of Information legislation differs in each of the countries of study, it is necessary to explore the basic provisions of each piece of

legislation within the relevant jurisdictions. In that connection each is set out in the following sections.

4.8.1 UK

The Freedom of Information Act 2000 in the UK provides public access to information held by public authorities. Public authorities are obliged to publish certain information about their activities. In addition members of the public are entitled to request information from public authorities, this latter opportunity being most relevant to this thesis.

The relevant legislation in the UK covers all recorded information held by a public authority. It is not limited to official documents and it covers, for example, drafts, email, notes, and recordings of telephone conversations and CCTV recordings. A dataset is the collection of factual, raw data that is gathered as a part of providing services and delivering the functions of a public authority. This is relevant to this thesis as requests are being made for datasets relating to crime and prosecution statistics relating to the illegal wildlife trade.

In the UK a public authority must respond to FOI request promptly, and in any event no later than the twentieth working day following the date of receipt.[653]

[653] Section 10 – Government Legislation, 'Freedom of Information Act: Section 10', (2000)

4.8.2 Australia

Similarly, in Australia, the Freedom of Information Act 1982, as amended,[654] gives members of the public legal rights of access to official documents of the Government of the Commonwealth and of its agencies.

In Australia, the timescales for dealing with FOI requests are laid down in s. 15(5) of the Act. This states that on receiving a request, an organisation must as soon as practicable but in any case, no later than 14 days after the date received, notify the requestor of this. It goes on to state in subsection (a) that, all reasonable steps must have been taken to provide a decision relating to the request, as soon as practicable but no later than 30 days after the date it was received.

Section 29 of the Australian Act states that where an agency or Minister decides than an applicant is liable to pay a charge in respect of a request for access to a document, or the provision of access to a document, the agency or Minister must give a written notice to the applicant following the conditions laid down in the subsections. Where there is a request for a fee to be paid, the information does not need to be provided until this charge is remitted. This can affect the timescale for responding to a FOI request and a researcher may need to bear this in mind if considering using this approach.

4.8.3 South Africa

The constitutional right to access information in South Africa can be found under the Promotion of Access to Information Act 2000 (PAIA). Requests

[654] The most recent amendment took place in 2015 and commenced in 2016.

under PAIA must be made following the procedure laid down in s. 18 of the Act. The access to information must be made using the prescribed form to the information officer at the correct address[655]. These forms must contain all the information laid down in subsection (2):

(a) to provide sufficient particulars to enable an official of the public body concerned to identify –

(i) the record or records requested; and

(ii) the requestor;

(b) to indicate which applicable form of access referred to in s. 29(2) is required;[656]

(c) to state whether the record concerned is preferred in a particular language; and

(d) to specify a postal address in the Republic – this requirement appeared as an initial concern or potential obstacle for this thesis as the researcher does not have a postal address in South Africa. However, in the preamble of the Act that everyone has a right to access information.

In South Africa, the requestor must be notified of a decision as soon as possible, but no later than 30 days after receipt of the request.[657] As with Australia, the South African authorities have conditions relating to fees for

[655] This can be a postal or electronic address.
[656] Section 29(2) refers to the access of materials, so it is necessary to include the method of receiving the data, for example whether viewing or listening to evidence or electronic datasets.
[657] Section 56 of PAIA

requests made under the PAIA can be found in s. 54 of the Act. This establishes when fees can be requested and the conditions surrounding such requests, for example that fees must be repaid if the information cannot be provided. Again, the timescale of requests can be affected by the charges, as these need to be received before the information is given to the requestor.

4.9 Differences and Similarities

The main principle behind FOI legislation in both the UK and Australia, as well as the PAIA, is that people have a right to know about the activities of public authorities, unless there is a, determined, good reason for them not to. Due to this, everybody has a right to access official information unless there is a reason permitted by the relevant legislation, where this is the case, the justification must be communicated back to the requestor. The exemption element will be discussed in more detail later in the chapter. There is no need for the applicant to give justification for wanting the information. All requests must be treated equally, and the giving of the information should not be affected on the basis of the identity of the person requesting that information. Both the FOI Acts and PAIA can work alongside other legislation; this is most relevant when exploring the exemptions that allow public authorities to withhold information from the person making the request.

When making a request under both FOI Acts certain procedural requirements are specified.[658] These are, first, that, all applications must be in writing, must state the name of the applicant, address for correspondence and a description

[658] The procedure for requests for information are contained in section 8 of the UK Act and section 15 for Australia's FOI.

of the information required. For the purposes of this thesis, all information was requested via e-mail or online request forms from the organisation, and all relevant information was provided.

In the UK, the following organisations were contacted for data in respect of the illegal wildlife trade:

- 45 Police forces
- 1 Prosecution authority which provided data for all prosecution services within the UK
- 1 Border Force organisation

In Australia, fewer requests were made. One police organisation was contacted as they deal with requests in respect of Commonwealth legislation, which covers the legislation being examined in this thesis. [659] One prosecution authority was contacted as they provided information for all of Australia. [660] Finally, one customs organisation accepts all 'foreign' requests for information under the relevant legislation and so they were contacted in respect of this thesis. [661]

Similar to the Australian arrangements, South Africa has dedicated teams to deal with all 'foreign' requests under the PAIA and therefore contact was

[659] Department of the Environment and Energy
[660] The Commonwealth Director of Public Prosecutions
[661] Department of Immigration and Border Protection

made with one police organisation[662], one prosecution organisation[663] and one customs organisation.[664]

4.10 General Exemptions

Whilst Freedom of Information legislation provides the public with access to a wide range of government information, the measures also contain provisions that provide organisations with exemptions for the disclosure of certain types of information. These appear under two headings in each of the instruments of Freedom of Information legislation being examined: first, "mandatory" or "absolute"; and second "qualified" or "discretionary". Absolute exemptions are not subject to any public interest assessments, and organisations must refuse disclosure of these requests. The "absolute" exemptions differ under the different legislation.

Where a request for information falls under the categories outlined above, the organisation must refuse disclosure. However, a "qualified" exemption must follow a public interest test, this balances the public interest in maintaining the exemption against the public interest in disclosing the information. These, again, vary depending on the overarching Freedom of Information legislation. The exemptions relating to this thesis will now be presented for each of the countries being examined. Case law provides examples of the extent of these exemptions although the subject matter is not specifically relevant to this research.

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[662] South African Police Service
[663] National Prosecuting Authority
[664] South Africa's Revenue Service: Custom Division

4.10.1 Absolute Exemptions – UK

The absolute exemptions covered by the FOI legislation in the UK include the following:

- Information that is accessible by other means (s.21),[665] this includes information in the public domain however organisation can be required to direct the requestor to the information;[666]
- Information relating to or dealing with security matters (s.23)[667], the organisation have to believe a security body would be involved with the issue relating to the request;[668]
- Information contained in court records (s.32);[669] this is because courts are not subject to the FOI Act.[670] This is relevant as one police organisation suggested contacting the court for outcome of prosecutions, however they would have been unable to provide the information requested.

[665] *Wise v Information Commissioner* [2009] UKFTT EA_2009_0073 (GRC)
[666] Information Commissioner's Office, 'Information reasonably accessible to the applicant by other means (section 21), (15 May 2013) https://ico.org.uk/media/for-organisations/documents/1203/information-reasonably-accessible-to-the-applicant-by-other-means-sec21.pdf 11 August 2018
[667] *Home Office v Information Commissioner and Cobain (Final Decision)* [2015] UKUT 27 (AAC)
[668] Information Commissioner's Office, 'Security bodies (section 23)', (26 February 2013) https://ico.org.uk/media/for-organisations/documents/1182/security_bodies_section_23_foi.pdf 11 August 2018
[669] *Edem v (1) The Information Commissioner, (2) Ministry of Justice* [2015] UKUT 210 (AAC)
[670] Information Commissioner's Office, 'Court, inquiry or arbitration records (section 32)', (12 June 2017) https://ico.org.uk/media/for-organisations/documents/2014222/section-32-court-inquiry-arbitration-records.pdf 11 August 2018

- Where disclosure of the information would infringe parliamentary privilege (s.34),[671] this protects members of Parliament from prosecution as a result of something said during parliamentary proceedings;[672]
- Information held by the House of Commons or the House of Lords, where disclosure would prejudice the effective conduct of public affairs (s.36). (Information that is not held by the Commons or Lords falling under s.36 is subject to the public interest test);[673]
- Information which (a) the applicant could obtain under the Data Protection Act 1998; or (b) where release would breach the data protection principles. (s.40);[674]
- Information provided in confidence (s.41),[675] for example medical notes or verbal testimony at an internal disciplinary hearing.[676]

4.10.2 Absolute Exemptions - Australia

The absolute exemptions covered by the Australian FOI legislation have some similarities as those listed in section 4.10.1, these similarities and differences are as follows:

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[671] *Toms v The Information Commissioner* [2006] UKIT EA_2005_0027
[672] Information Commissioner's Office, 'Parliamentary privilege (section 34), (14 February 2013), https://ico.org.uk/media/for-organisations/documents/1161/section_34_parliamentary_privilege.pdf 11 August 2018
[673] *Dedalus Limited v IC (Freedom of Information Act 2000)* [2010] UKFTT EA_2010_0001 (GRC)
[674] *Goldsmith International Business School v the Information Commissioner and The Home Office* [2014] UKUT 563 (AAC)
[675] *RB v The Information Commissioner* [2015] UKUT 614 (AAC)
[676] Information Commissioner's Office, 'Information Provided in Confidence (section 41)', (17 August 2017) https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf 11 August 2018

- Documents affecting national security, defence or international relations (s.33),[677] including information that could damage the Commonwealth's security, defence or international relations and confidential information divulged by a foreign government;[678]
- Cabinet documents (s.34),[679] this is to ensure ministerial responsibility is not undermined;[680]
- Documents affecting enforcement of law and protection of public safety (s.37),[681] this includes but is not limited to protect against prejudicing investigations for breaching law and protecting confidential sources of information relating to crime;[682]
- Documents to which secrecy provisions in other legislation apply (s.38),[683] this includes any legislation covered under Schedule 3 of the Act;[684]

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[677] *Commonwealth of Australia v Hittich* [1994] FCA 862; 35 ALD 717
[678] Office of the Australian Information Commissioner, 'FOI guidelines: Part 5 – Exemptions', (Australian Government, December 2016), https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-5-exemptions 11 August 2018
[679] *Re Toomer and Department of Agriculture, Fisheries and Forestry* (2003) 78 ALD 645
[680] Office of the Australian Information Commissioner, 'FOI guidelines: Part 5 – Exemptions', (Australian Government, December 2016), https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-5-exemptions 11 August 2018
[681] *Re Gold and Australian Federal Police and National Crime Authority* [1994] AATA 382
[682] Office of the Australian Information Commissioner, 'FOI guidelines: Part 5 – Exemptions', (Australian Government, December 2016), https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-5-exemptions 11 August 2018
[683] *Illawarra Retirement Trust v Secretary, Department of Health and Ageing* [2005] FCA 170; 143 FCR 461; 218 ALR 384; 85 ALD 24
[684] Office of the Australian Information Commissioner, 'FOI guidelines: Part 5 – Exemptions', (Australian Government, December 2016), https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-5-exemptions 11 August 2018

- Documents subject to legal professional privilege (s.42);[685]
- Documents containing material obtained in confidence (s.45),[686] this is similar to those contained in the UK legislation;
- Documents whose disclosure would be in contempt of Parliament or in contempt of court (s.46),[687] this is similar to those contained in the UK legislation;
- Documents disclosing trade secrets or commercially valuable information (s.47).[688]

4.10.3 Absolute Exemptions – South Africa

The absolute exemptions contained within the PAIA have fewer similarities to the UK and Australia, these include:

- Protection of the privacy of a third party (s.34)[689], this includes releasing the names of people involved in criminal cases or those who reported these cases;[690]
- Protection of commercial information of a third party (s.36);[691]
- Protection of confidential information (s.37),[692] this is similar to those contained in UK and Australia legislation;

[685] *Bennett v. Chief Executive Officer of the Australian Customs Service* [2004] FCAFC 237; 140 FCR 101; 210 ALR 220; 40 AAR 118; 80 ALD 247; 57 ATR 52
[686] *Corrs Pavey Whiting & Byrne v. Collector of Customs for Victoria* [1987] FCA 433
[687] *B v. Brisbane North Regional Health Authority* (1994) 1 Q.A.R. 279
[688] *John Mullen v. Australian Aged Care Quality Agency* [2017] AICmr 11
[689] Centre for Social Accountability v The Secretary of Parliament and others [2011] ZAECGHC 33
[690] O'Connor, T., 'PAIA Unpacked: A Resource of Lawyers and Paralegals', (Freedom of Information Programme at the South African History Archive, 2012) http://foip.saha.org.za/uploads/images/PAIA_UNPACKED.pdf 11 August 2018
[691] *Van der Merwe and Another v. National Lotteries Board* (38293/2012) [2014] ZAGPPHC 240

- Protection of the safety of individuals and property (s.38),[693] this is where the release of information could reasonably be expected to endanger the life or physical safety of an individual;[694]
- Protection of information in legal proceedings (s.40).[695]
- Protection of Research Information (s.43), in this respect research is considered word involving a significant investment of time and resources which people are unlikely to invest if premature release of information may damage this.

As shown, there are some similarities between the exemptions given by each country. However, generally, the majority of similarities are between the UK and Australia; for example, information relating to security matters, parliamentary privilege and public affairs. This demonstrates that while there are similarities, each country has chosen to adopt its FOI legislation differently and therefore provide diverse exemptions.

4.11 FOI in Practice

Although there is a statutory requirement for the organisations to return the requested information, within a time period laid down in the text of the legislation, some police organisations in the UK did not do so, Greater Manchester Police being one example. Whilst it was necessary to send

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[692] *Transnet Ltd and Another v. SA Metal Machinery Company (Pty) Ltd* (147/2005) [2005] ZASCA 113; [2006] 1 All SA 352 (SCA); 2006 (4) BCLR 473
[693] *Mandag Centre for Investigative Journalism and Another v. Minister of Public Works and Another* (67574/12) [2014] ZAGPPHC 226
[694] O'connor, T., 'PAIA Unpacked: A Resource of Lawyers and Paralegals', (Freedom of Information Programme at the South African History Archive, 2012) http://foip.saha.org.za/uploads/images/PAIA_UNPACKED.pdf 11 August 2018
[695] *Tsatsi v. Virgin Active and Others* (2014/37055) [2017] ZAGPJHC 25

reminders to the Forces in question, the information was eventually provided. If the information had not been provided, it would have been possible to make complaints to the Information Commissioner's Office which investigates when members of the public believe that an authority fail to respond correctly to a request for information.[696] This obviously makes the procedure more time consuming and potentially costly. It has been evidenced through this process that organisations are not consistent with their approach to responding to these requests.

None of the FOI requests within the UK incurred any fees, although there is the power, under s. 13 of the Act, for reasonable charges to be made to cover administration, copying (etc.).[697] As previously mentioned, Australia has the ability to charge for data collected under the relevant legislation, however, no fees were incurred when requesting information for this thesis. The data collection for this thesis incurred £15.13 of fees for information requested under the relevant legislation in South Africa. Although the costs are not prohibitive, potential cost is something for researchers to consider when requesting information through the PAIA, and particularly given the quality of the response.

[696] The process for complainants can be found here: https://ico.org.uk/for-organisations/guide-to-freedom-of-information/complaints/ (Information Commissioner's Office, 'What happens when someone complains', 26 March 2018)
[697] The ICO were contacted to identify the average fee for an FOI request in the UK and how much was paid in fees during both the financial period for 2015 – 2016 and the calendar year of 2016. The response was as follows: "We do not hold any figures regarding the average fee paid to public authorities for responding to FOIA requests so we are unfortunately unable to answer this query… I can confirm that the ICO as a public authority has not charged any fees for responding to FOIA requests we have received during either the 2015/16 financial year or the 2016 calendar year".

The use of this methodology has highlighted inconsistencies with the use of exemptions under the Freedom of Information Act in the UK. It is apparent from the results, which can be seen in Chapters 5 and 6 that each organisation perceived the exceptions contained in the legislation differently. One exemption, which was used by more than one organisation, is contained in se. 12(1) of the FOI Act. This states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of compliance would exceed the appropriate limit.[698] Another exemption that has been relied upon by a UK organisation was s. 40(1) of the FOI Act, requests for information related to personal data. This was particularly unexpected, as it was explicit within the request to remove all personal data from the responses. Also, the response would have been providing quantitative data, which if researched further would only provide information already in the public domain. This demonstrates inconsistencies in the implementation of the FOI Act within organisations, and this should be considered when exploring the results.

Unlike the UK, Australia provided all the information requested without recourse to adopting any of the exemptions listed in the relevant piece of legislation. Along with this, Australia provided a significantly more rich level of detail when giving out the information demonstrating a higher level of transparency than that of the UK.

[698] The maximum cost of a FOI request in the UK at the time of data collection was £450 this equates to 18 hours work.

The South Africa authorities contacted did not fully adopt the exemptions provided to them under PAIA, however they did fail to provide the exact information requested. Instead, they provided reference to the websites in which some of the information is published. Whilst this was still able to provide insight as to the strengths and weaknesses of tackling the illegal wildlife trade, it made the comparison element slightly harder. The time periods on the websites differed to that requested, thereby making absolutely effective and direct comparison difficult. Along with this, authorities did not return the fees paid for failure to fully comply with the request. Despite repeated requests for a response, none were forthcoming and that once more is something to reflect upon given this methodology. The outcome of this necessitated a further change to the approach adopted for the thesis. The information provided by the South African authorities was useful but could not be deployed in the thesis as anticipated. In the alternative, in its collated form it provides an insight into the development of the authorities' responses.

4.12 Data Analysis

Having collected the raw data as described above, they were entered into Microsoft Excel to allow for the storing and analysis of results. As the data collected is relatively self-explanatory, little application of statistical analysis techniques was required. Microsoft Excel provided a tool for data visualisation, allowing for the presentation of both qualitative and quantitative

data. This visualisation acts as a way to make sense of the results, specifically with regard to the large data sets collected in this research.[699]

Tables and graphs were created to identify relationships between the data and the information collected through the black-letter law analysis. This approach was adopted so as to help to understand whether the organisations are effectively utilising all the powers available to them pursuant to the legislation, and to what extent. Along with this, the visualisation tool provided by Microsoft Excel offers the ability to determine patterns and trends for number of arrests, seizures etc. in respect of the illegal wildlife trade, whilst enabling the prediction of future trends.

Generally, the results provided under the FOI methodology discussed above, have produced quantitative data. Microsoft Excel allowed for this information to be portrayed in an effective manner, whilst also being explored in more detail through the qualitative results collected through black-letter law analysis and secondary research methods, for example news article reports.

Due to the nature of the research, statistical analysis would provide little benefit when taking into account the data collected. Crimes can only be recorded when brought to the authorities' attention and/or detected by the relevant bodies; therefore on its own such data cannot provide a reliable

[699] Smith, S. 'What is the Advantage of Using the Chart Function in Excel?' *Small Business* https://smallbusiness.chron.com/advantage-using-chart-function-excel-64425.html 11 August 2018

measure of levels or trends.[700] However, the results collected can be a useful tool for understanding the general picture of illegal wildlife trade crimes and any relationships between the legislation and crime. It is due to the fact that police can only record crimes reported, or detected, that this thesis follows data visualisation measures rather than specific statistical analysis methods.

4.13 Methodology Analysis

It is important to explore whether the methodology chosen has been effective at answering the research questions, aims and objectives. In order to ascertain the effectiveness, it is necessary to explore the reliability and validity of the methodology. This demonstrates the rigour of the research process and the trustworthiness of the findings.[701]

Reliability demonstrates the ability to reproduce results with repeated trials and reflects any internal consistency of the methodology.[702] Given that the methodology utilised the statutory obligations of public organisations by adopting FOI legislation, the reliability of results should be undeniable. There are obviously the limitations of the legislation, as discussed above. However, there also appear to be inconsistencies in the application of FOI legislation within some organisations as will be seen in Chapters 5 and 6. Whilst the results produced in this research can be considered as an accurate portrayal

[700] Flatley, J., *Crime in England and Wales: year ending September 2017*, (2018, Office for National Statistics) https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/yearendingseptember2017 12 April 2018
[701] Roberts, P., *et al.,* 'Reliability and validity in research', (2006) 20(44) Nursing Standard 41
[702] Karras, D. 'Statistical Methodology: II. Reliability and Validity Assessment in Study Design, Part B' (1997) 4(2) Academic Emergency Medicine 144

of the crime statistics as they are available, there remain areas for further consideration: these will be discussed further in Chapters 5 and 6 below.

Validity refers to the accuracy of measuring what the research sets out to do. This research aims to identify the effectiveness, or otherwise, of organisations involved with combatting the illegal wildlife trade. The methodology adopted made use of data, provided by these organisations, to understand the extent of their efforts in detecting and preventing this crime and consequently should be considered valid. Due to the nature of the topic being explored, it has been essential to follow more than one methodological approach. Failure to implement both of these approaches would potentially compromise the validity of the research. As referred to above, it is difficult to identify patterns with crime statistics, and therefore such an enterprise does not underpin this thesis. Instead, it explores the relationship between legislation and statistics, offering suggestions in order to explain the results. The results could have been improved had there been some qualitative content, specifically into justifications for the results, for example if there were discovered issues with reporting or specific priorities within the organisations.

4.14 Conclusion

This thesis includes a black-letter law analysis and data collection techniques to provide qualitative and quantitative results. The original methodology adopted a social science approach through the use of questionnaires and interviews to gain an insight into experiences and opinions of people involved with the combating of the illegal wildlife trade. Unfortunately, this method received a very low response rate and therefore an adapted approach was

devised to increase the impact of this research. FOI requests were made to organisations from each of the countries of study, to identify the extent crimes are detected and the sanctions imposed. This put a statutory obligation on the countries' authorities to respond to the requests for information, ensuring results were collected to help identify the effectiveness of those authorities implementing and enforcing wildlife trade legislation. The research has demonstrated an inconsistency in the use of exemptions of the FOI legislation, specifically in the UK. Australia seemed to be the most forthcoming with information, as will be seen in Chapter 5, whereas the UK applied different exemptions to prevent the distributing of results. One organisation in South Africa provided a response through the FOI request; however, it did not completely answer the questions given to the organisations, whilst other organisations failed to respond altogether. As a result, the South African situation has been separated out from the UK and Australia. This demonstrates that whilst the FOI legislation should have placed a statutory obligation to respond, there were avenues available to organisations to avoid providing the requested information. Following the FOI responses, data visualisation techniques were implemented through the use of Microsoft Excel to identify any relationships, when looking at the black-letter law analysis, and whether organisations are applying all of the powers available to them. These tools aim to establish the effectiveness of domestic legislation whilst providing a comparison between countries' efforts in the combating of the illegal wildlife trade.

5.0 Results and Discussion – UK and Australia

5.1 Introduction

The results presented in this chapter offer an insight into the success, or otherwise, of public authorities in the UK and Australia in trying to combat the illegal wildlife trade. This chapter will chart arrests, charges and prosecutions, where that data was available, by way of the methods discussed in Chapter 4, for each of the countries of study. It also aims to draw upon the results to suggest justifications for any differences and to assess whether the form and scope of the legislation set out in Chapter 3 suggests any possible reasons for this. From this assessment, recommendations for enhancement can be offered to ensure each country is effectively utilising its legislative powers to combat the illicit trade in wildlife. Finally, this chapter any areas where the data collated may need to be approached with caution and highlight any caveats.

Overall, the results demonstrate that whilst each country has its own strengths and weaknesses in tackling the illegal wildlife trade, the UK had the highest number of prosecutions within a 10-year period.

Before offering a more detailed examination of the results, it is necessary to highlight that they can only be considered on face value, necessitating speculation in an attempt to justify the results. For some criminal offences, it is possible to identify and assess the effectiveness of the response of

enforcement bodies. For example, when considering theft, statistics in relation to offences that are reported represent one indicator, whereas the ratio to 'clear-up' is a more true measure of any assessment of the effectiveness of the enforcement response. The illegal wildlife trade does not bear easy comparison. This is because, although both theft and wildlife offences are both demonstrably 'crimes', it is probably reasonable to speculate that the vast majority of the latter are not detected or reported. It also may not be something prioritised in the same way as more traditional crime. This could mean that there is no precise way of identifying the level of this crime generally and no definitive proof as to the extent to which the illegal wildlife trade is occurring in each country, whether through imports, exports or sales. Therefore, the results will look at organisational responses, but will not be able to analyse this in comparison to the rate the crime is occurring, although it may be possible to speculate upon the rate of loss of species in range States, thereby providing an estimate as to the extent of wildlife crime. The remainder of this chapter will assess organisational responses and present the findings form the materials made available, or discovered.

5.2 UK Arrests – Police Statistics

First, it is worth noting that a caveat was put on all responses from UK police forces, which restricts the comparison of data between the individual organisations. Police forces in the UK are required to provide crime statistics to government bodies, with the recording criteria being set nationally. However, neither the systems for recording or procedures used to capture crime data are generic across police forces. Consequently, police forces have noted that the "response to your request is unique and should not be

used as a comparison with any other force response you receive."[703] The responses from police forces suggest that inconsistencies in recording crime statistics could be generating a negative impact on combatting wildlife trade offences.

Each police force was asked to provide the annual number of arrests for wildlife trade offences over the 10-year period between 2005 and 2015. The number of arrests within the UK by police forces for any illegal wildlife trade offences over this period is shown in Figure 3. The zero result for 2005 is unlikely to be accurate and as such cannot be completely reliable. This inaccuracy has been identified through researching Operation Charm,[704] which was launched in 1995. Since its launch, Operation Charm has seized more than 40,000 items deriving from endangered species within London, demonstrating the unreliability of this result. [705] The 0 result could be explained as a result of a number of police forces changing their crime recording systems in around 2005 and thus they were unable to access the requested data. Additionally, some police forces changed their systems after 2005 and were unable to provide data for the period prior to the current systems. It is also possible that arrests were made for wildlife trade offences in 2005 but that the statistics were not provided upon request. Thus, the

[703] Cleveland Police Force, *pers. comm* 6th November 2015
[704] Operation Charm is a partnership between the Metropolitan Police, the Greater London Authority and international non-government organisations, for example, WildAid, IFAW, WWF and the David Shepherd Wildlife Foundation aiming to stop the trade in endangered species in relation to Traditional Asian Medicines.
[705] WWF, 'Endangered Species Law Gets More Bite', (11 August 2009) https://www.wwf.org.uk/updates/endangered-species-law-gets-more-bite-0 02 May 2018

results do not portray a completely accurate response and the number of arrests may indeed be greater than those shown in Figure 3

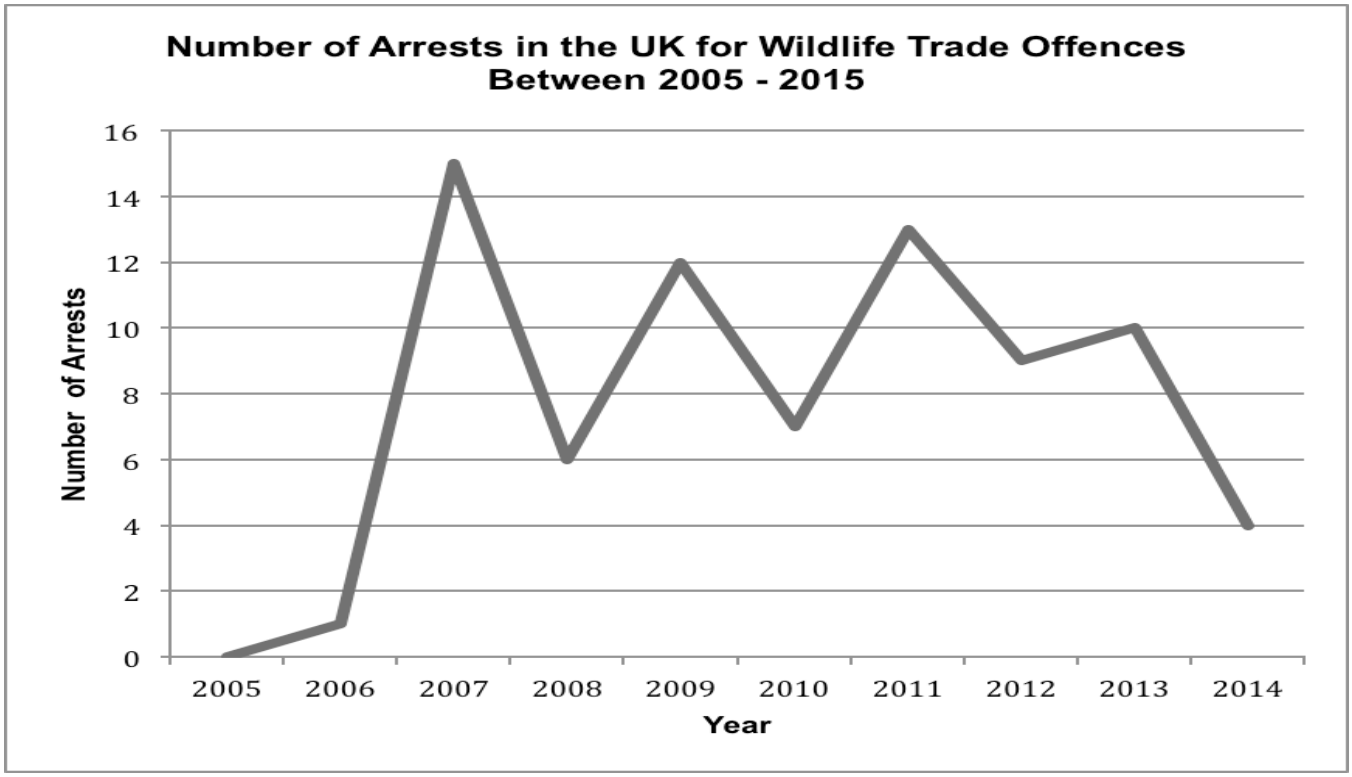

FIGURE 3: THE NUMBER OF ARRESTS BY ALL ENGLAND AND WALES POLICE FORCES FOR WILDLIFE TRADE OFFENCES BETWEEN 2005 AND 2015

An increase in arrests during 2007 and 2009 is portrayed in Figure 3. As observed in Chapter 3, amendments were made to the Control of Trade in Endangered Species Regulations in both 2007[706] and 2009[707]. The results shown in Figure 3 suggests these amendments may have heightened police efforts to tackle the illegal wildlife trade in the UK and subsequently prompted an increase in arrests. It is also possible the changes in legislation sent a

[706] The Control of Trade in Endangered Species (Enforcement) (Amendment) Regulations 2007 (SI 2007/2952)
[707] The Control of Trade in Endangered Species (Enforcement) (Amendment) Regulations 2009 (SI 2009/1773)

strong message to those involved with the illegal wildlife trade that the UK was/is imposing more stringent penalties, resulting in crime levels falling in subsequent years. The former, increased police efforts and arrests, seems more probable due to the peaks on the graph at the same time as the changes in legislation came into force. Although a positive indication of amplified police efforts tackling the illegal wildlife trade, it is unfortunate these results indicate a lack of motivation after the first year of the legislation changes. The government is unable to change the legislation every year to keep police forces motivated, so it will be important for those involved in combatting the illegal wildlife trade to come up with innovative ideas to keep them motivated and tackling this category of crime. Another influential factor that may account for increases in arrest rates, is the setting of priorities by a Police and Crime Commissioner (PCC),[708] examples of which include, but are not limited to, knife crime, hate crime, child abuse and terrorism. Put simply, if a PCC includes wildlife crime within their priorities, police officers may be more inclined to investigate, arrest and charge offenders.

Although Figure 3 displays the number of arrests for wildlife trade offences over the requested period, some police forces did not supply the requested information, identified in Figure 4 below, as they believed it was exempt under different sections of the Freedom of Information Act. First, two police forces identified an additional eight arrests for wildlife trade offences that are not included in Figure 3 as the annual figures were not provided and therefore

[708] May, T., 'Putting people in charge: future of Police & Crime Commissioners' *Home Office* (04 February 2016) https://www.gov.uk/government/speeches/putting-people-in-charge-future-of-police-crime-commissioners 02 May 2018

could not be included in the graph above. In addition, police forces that did not provide the annual arrest statistics relied on the personal information exemption under s. 40 of the Freedom of Information Act. It is certainly questionable how annual crime statistics constitute personal information, particularly since the request for the data asked for all personal information to be removed from the response. Five police forces did not provide the data requested and justified this by using s. 12(1) of the FOI Act, which allows a public authority to refuse to comply with a request for information where the cost of doing so is estimated to exceed a set limit.[709] The main reason given for the use of s. 12(1) was due to the way police forces record their crime statistics, or not, as the case may be. One police force that relied on s. 12(1) of the FOI Act to justify not providing data on the number of arrests, did however provide statistics for the number of people charged with wildlife trade offences.

Consequently, it is challenging to provide critique through analysis of the data when police forces fail to both provide the data and appear to be adopting different approaches to recording their crime statistics. This should be considered when exploring the results presented in this research. One immediate question is how the government, or police forces themselves, are able to identify areas of strength and weakness if different methods to record crime are being used. This is even more surprising given that Her Majesty's Inspectorate of Constabulary (HMIC) has undertaken regular audits over the last 160 years to independently assess and report on police force efficiency

[709] The set limit in the UK is currently £450 which equates to 18 hours work

and effectiveness and policing within the public interest,[710] it is surprising these inspections can be accurate as police forces are using different procedures to report their crime rates. However, while being identified as a factor, the organisation of the various forces' recording standards, is beyond the scope of this thesis.

The police forces that failed to provide any data, in general, stated that wildlife trade offences are recorded under "miscellaneous" offences. This implies that the crime rate in these police areas are low for wildlife trade offences and therefore there has been no necessity to set up an individual category title for them. Another possibility is that the forces in question do not deal with wildlife and environmental offences in an analogous way to other crimes. Whilst this is admittedly speculative without further evidence, it is apparent that wildlife trade offences are not processed by certain police forces in the same manner as more 'familiar' and 'victim-based' crimes such as murder and theft. Whilst Figure 3 demonstrates the annual number of arrests across the UK for wildlife trade offences, Figure 4 below depicts the geographically breakdown of the arrests over a 10 year period. This breakdown helps to identify whether there is a relationship between police area and crime statistics.

[710] Her Majesty's Inspectorate of Constabulary and Fire and Rescue Services, 'About Us', (05 June 2018) http://www.justiceinspectorates.gov.uk/hmicfrs/about-us/ 10 October 2018

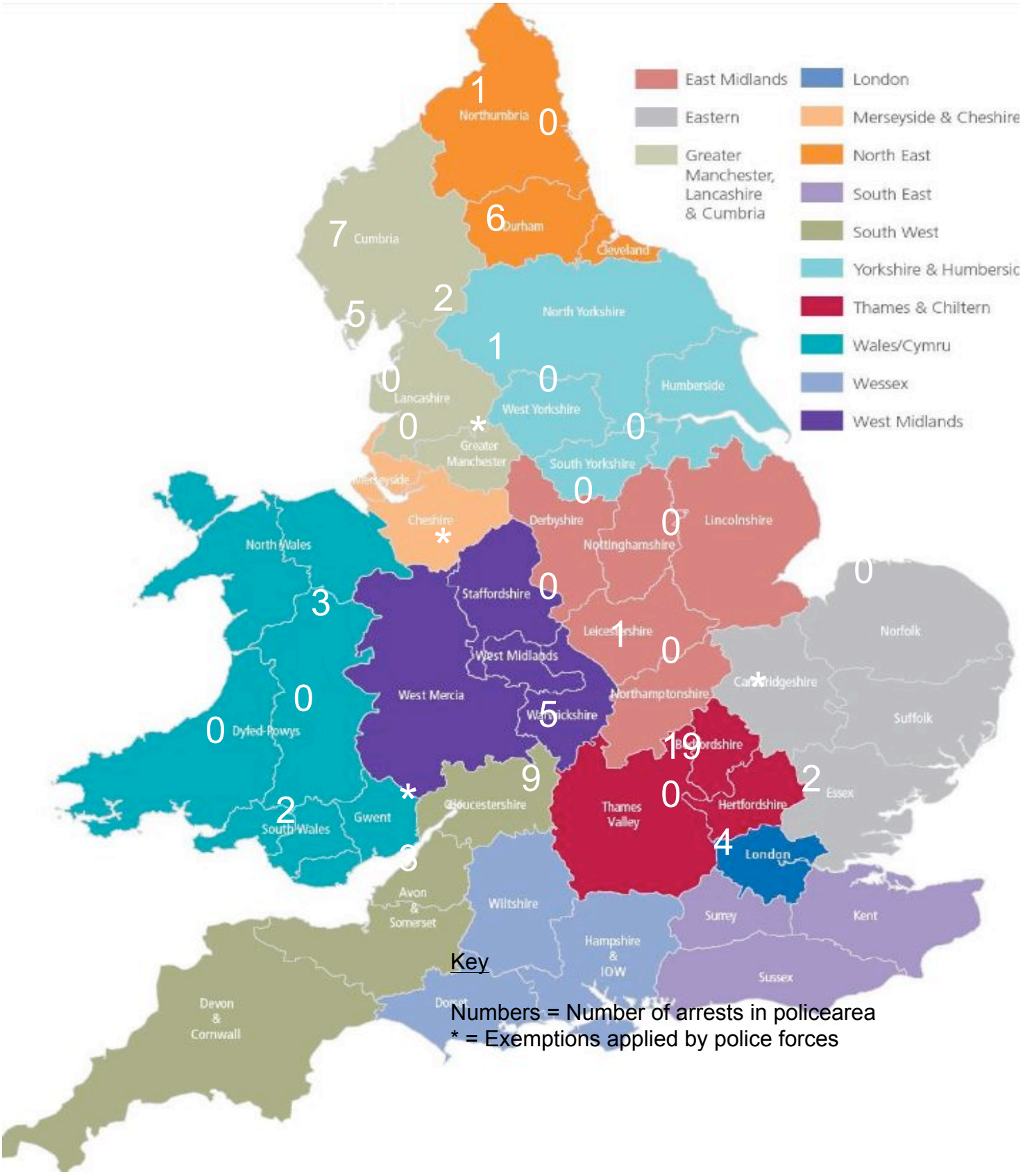

FIGURE 4: MAP OF UK POLICE FORCES IN ENGLAND AND WALES SHOWING THE GEOGRAPHICAL BREAKDOWN OF ILLEGAL WILDLIFE TRADE ARRESTS FOR THE PERIOD 2005 - 2015

Figure 4 permits a number of conclusions to be identified in respect of wildlife trade offences and police force area. First, certain police forces, i.e. the Metropolitan Police and Hampshire Police, have a higher rate of arrests for such offences. This may possibly be due to a number of factors, including, for example, that both forces are home to large commercial ports and airports, potentially resulting in more wildlife trade offences particularly in respect of imports or exports within the area and/or that these forces assign more resource and effort into tackling the illegal wildlife trade. Conversely, it could be that certain police areas of the UK do have equivalent rates but that these go undetected, and/or the data has not been reported/ provided. However, it is likely that certain areas of the UK do have higher rates of illegal wildlife trade in comparison to others given the simple variance in population size and potentially also on the basis of the diversity of countries which could drive specific markets, which is discussed further below.

In the UK, police budget cuts have significantly impacted the policing environment, through reduction of resources, making it tougher for police forces to respond effectively to all crimes within their areas. This compels police officers to prioritise workload and potentially to react to crime as and when it occurs. The fact the illegal wildlife trade is generally portrayed as a victimless crime,[711] may explain why police forces put more resource into

[711] *R v Sissen* [2000] EWCA Crim 67 & *R (Natural England) v Day* [2014] EWCA Crim 2683 and Environmental Investigation Agency, 'Environmental Crime: A threat to our future', (October 2008) http://globalinitiative.net/wp-content/uploads/2017/12/EIA-Environmental-Crime-A-Threat-to-Our-Future.pdf 22 August 2018

criminal activities involving easily identified victims. This is, however, a view not necessarily supported by the courts. For example, in *R v Sissen*[712] Mr Justice Ouseley stated: "The law is clear as to where the interests of conservation lie. These are serious offences. An immediate custodial sentence is usually appropriate to mark their gravity and the need for deterrence".[713] Nevertheless, it has been highlighted that resources for enforcing wildlife crime are scarce with such offences often treated as less important than other types of crime.[714] In 2004, the House of Commons reported that wildlife crime should be treated with increasing importance at the "institutional level", with education provided for those involved in the process, including the judiciary, police and other enforcement bodies, in order to ensure a greater understanding of the issues involved.[715] Although the 2004 report suggested educating police and enforcement bodies, further research suggests that if organisations were presented with more information on the impact of wildlife trade offences,[716] a more robust stance may be adopted.[717] However, there may be a number of more complex reasons for the higher volume of wildlife trade offences in certain parts of the UK.

One reason, is the nature of the illegal wildlife trade that varies as to purpose/market, for example, the use in traditional medicines, for pets,

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[712] [2000] EWCA Crim 67
[713] Paragraph 51
[714] House of Commons: Environmental Audit Committee, *Environmental Crime: Wildlife Crime*, (September 2004, Twelve Report of 2003 – 2004) p. 68 - 69
[715] House of Commons: Environmental Audit Committee, *Environmental Crime: Wildlife Crime*, (September 2004, Twelve Report of 2003 – 2004) p. 68 - 69
[716] This could include the conservation impact, or the links with other organised crime as discussed in Chapter 2.
[717] St John, F., *et al.*, 'Opinions of the public, conservationists and magistrates on sentencing wildlife crimes in the UK', (2012) 39(2) Environmental Conservation 159

bushmeat trade and for decorative purposes. Certain areas may consequently have a higher volume of wildlife trade offences due to the diversity of communities found within specific police areas. , Thus London's Metropolitan Police area's high number of arrests,[718] may arguably be due to its unique composition of communities and cultures. As pointed out in Chapter 2, one major use of illegal wildlife trade products is in traditional Chinese medicines, again linking to Operation Charm discussed above.[719] Hence, London may have a higher arrest rate due to the traditional concentration of authentic Chinese products within its area. Similarly areas may specialise in the bushmeat trade, for communities that do not see importation or consumption as an illegal activity but a norm based on cultural practices. Finally, areas of a high economic demographic, may see an increase in demand and consequently arrest rates due to citizens of these areas having the financial means to purchase high value products often associated with the illegal wildlife trade, whether that be animal skins, caviar, the pet trade or fashion accessories.

Finally, the geographic distribution of arrest numbers presented in Figure 4**,** could be a result of the logistical dimension of the illegal wildlife trade. Distribution is key to any form of trade and thus arrests may be more likely to occur in areas with key transit facilities, such as those with major airports and ports. However, without more granular data it is difficult to ascertain the

[718] Although this is the case in respect of the research carried out, it is not necessarily the case if looking at head of population. This would be an interesting topic for future research, however falls out of the scope of this thesis.
[719] WWF, 'Endangered Species Law Gets More Bite', (11 August 2009) https://www.wwf.org.uk/updates/endangered-species-law-gets-more-bite-0 02 May 2018

reliability of this speculation based solely on an assessment of the arrest data presented in Figure 4. Therefore greater is needed in respect of the arrest information to enable an accurate justification for the results.

As explained in Chapter 4, the original methodology employed in this thesis was the use of questionnaires and interviews. If the response rate had been higher, and individuals/organisations more willing to participate, the level of speculation to rationalise particular data may have been reduced with greater confidence in the identification of shortcomings in enforcement practice possible. Undertaking more extensive data collection may therefore be a valuable basis for future research.

5.3 Australia Arrests

As with the UK, a request was made to Australian authorities for the number of arrests, for wildlife trade offences under the EPBC Act 1999 during the period between 2005 and 2015. However, the final response was a negative one. The response highlighted that whilst the Department of the Environment is responsible for administering the EPBC Act, it is restricted to an investigatory role with respect to alleged breaches of the legislation. Subsequently only certain information is collected and saved in a particular format by the Department. The FOI request identified that the Department assesses an alleged breach of the EPBC Act to determine its validity. Where an alleged breach is considered reliable, and of a serious nature it is referred to the Commonwealth Director of Public Prosecutions (CDPP), who considers issuing charges against the offender. The Australian Federal Police would

conduct any arrests based on referral from the CDPP, with the outcome of each charge being an order of the court.

The CDPP reports any charges issued and their outcomes to the Department, but these are recorded on the file associated with the alleged breach, rather than a central repository of charges and outcomes. In order to respond to the request the Department would need to manually explore 247 files to identify whether it concerns a matter that was referred to the CDPP, whether any charges were brought and the outcome of that charge. As such the Department decided this would amount to an unreasonable diversion of resources, as laid down in s. 17(2) of the Freedom of Information Act 1982. In response to this initial setback, a request was made to the CDPP to obtain statistics in respect of prosecutions for wildlife trade offences in Australia, which is discussed in section 5.5 below.

5.4 UK Charges and Prosecutions

5.4.1 The Police

Alongside arrest data, a FOI request was submitted to the police forces in the UK for data in relation to charges brought for wildlife trade offences. The aim of this request was to establish how many offenders arrested were subsequently charged. The results can be seen in Figure 5.

Similar to the responses in respect of arrests, some police forces provided the data whilst others applied the exemptions discussed in Chapter 4. Once again, two of the respondents only provided a total figure of charges for the 10-year period. Therefore, it is necessary to highlight that another 14 charges were made for wildlife trade offences within the 10 year period, but it cannot be ascertained in which years these occurred. In addition, Cumbria Police indicated that they had an on-going "wildlife trade" investigation at the time of responding to the FOI request and as such could not provide information as to the charges the offender was facing.

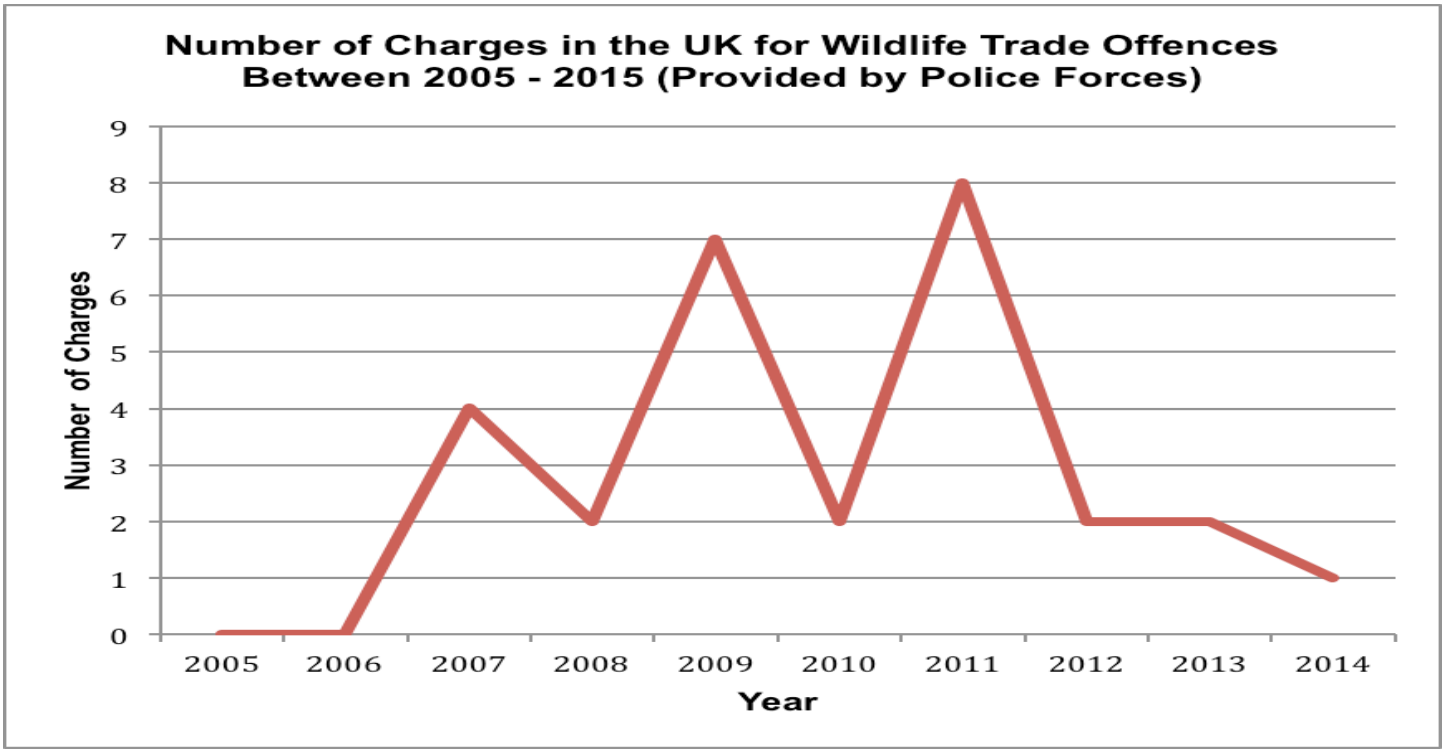

FIGURE 5: THE NUMBER OF CHARGES PROVIDED BY UK POLICE FORCES FOR WILDLIFE TRADE OFFENCES BETWEEN 2005 AND 2015

Figure 6 compares the rate of arrests with that of charges over the 10-year period, identifying that the former exceeds the latter. It is surmised that there

are two principal reasons for this. First, the decision must be made as to whether or not there is enough evidence against the defendant for a realistic prospect of conviction. Where it is concluded that this is not the case, charges will not be brought, no matter the severity of the crime.[720] As discussed in Chapters 2 and 3, in the case of wildlife trade offences, complexities related to the identification of species can make it difficult for there to be a realistic prospect of success. Additionally, evidence, including the specimen itself, may be destroyed before or subsequent to arrest, this has been identified particularly with regard to bird eggs,[721] this could explain why there have been less charges for offences in the UK in comparison to arrests.

[720] The Crown Prosecution Service, 'The decision to charge', https://www.cps.gov.uk/cps-page/decision-charge 02 January 2019
[721] Alacs, E. and Georges, A., 'Wildlife across our borders: a review of the illegal trade in Australia' (2008) 40(2) Australian Journal of Forensic Sciences 155

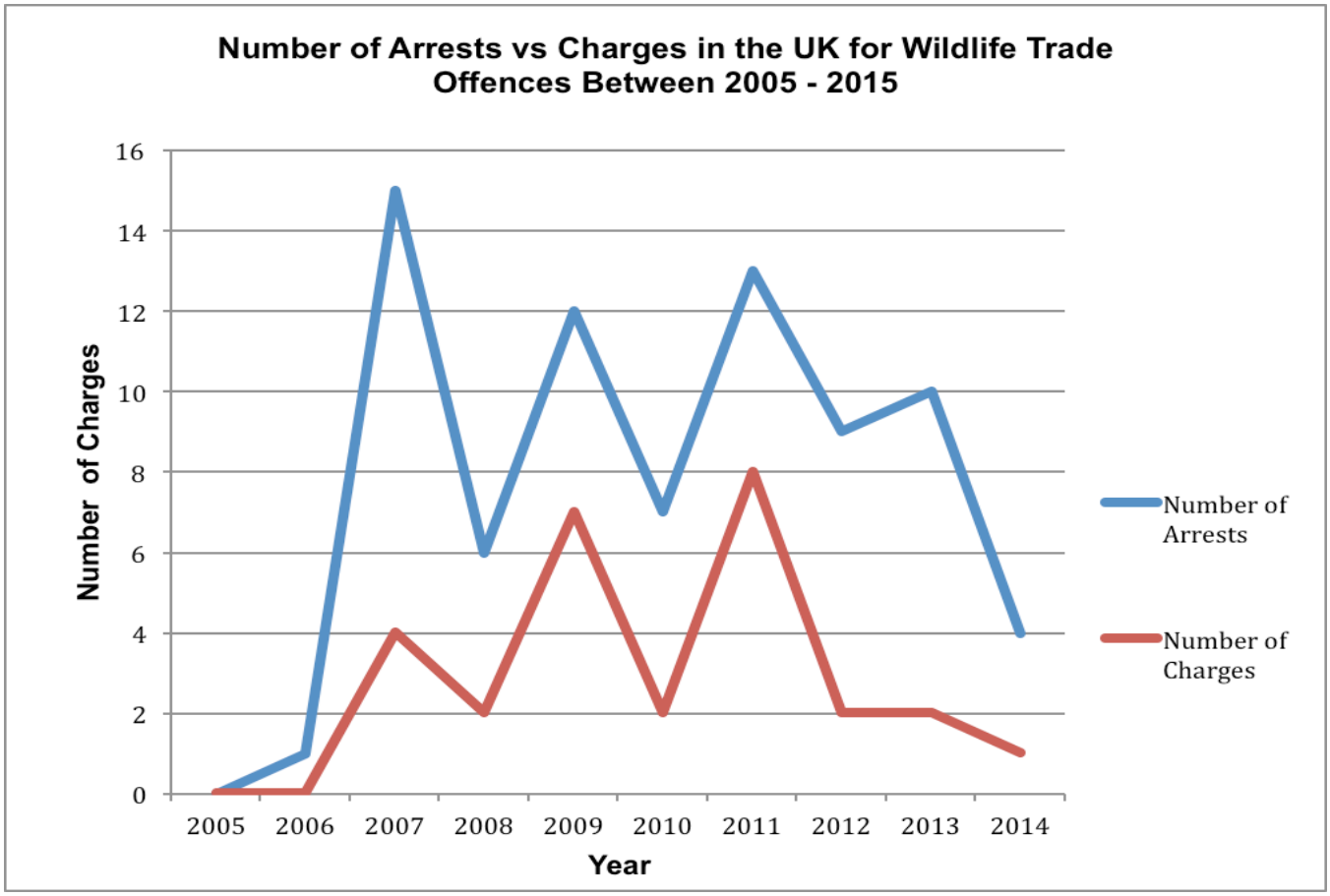

FIGURE 6: THE NUMBER OF ARRESTS VS CHARGES PROVIDED BY UK POLICE FORCES FOR WILDLIFE TRADE OFFENCES BETWEEN 2005 AND 2015

Where there is evidence allowing a real prospect of conviction, it must be decided whether it is in the public interest to prosecute the defendant.[722] The public interest test takes into account the severity of the alleged offence, along with the interests of the victims. In *R v Sissen*[723] it was concluded that protection of nature and wildlife are in the public interest and consequently override private interests. Moreover, the South African courts have adopted

[722] The Crown Prosecution Service, 'The decision to charge', https://www.cps.gov.uk/cps-page/decision-charge 02 January 2019
[723] [2000] EWCA Crim 67

an anthropogenic approach, discussed below in Chapter 6, when deliberating in *Kruger v Minister of Water and Environmental Affairs*[724] as opposed to a more ecocentric approach.[725] The FOI results, shown in Figures 5 and 6, confirm that charges are made for some wildlife trade offences, and therefore the public interest test must have been met.

As previously mentioned, the illegal wildlife trade is often perceived as "victimless".[726] This perception could be offered as a reason for deciding that it is not in the public interest to prosecute, resulting in fewer charges as compared to arrests. CITES identifies that wildlife crime remains outside 'mainstream' crime,[727] potentially justifying why the legal system may treat wildlife trade offences as victimless. However, more recent commentary is attempting to alter people's perceptions to demonstrate the extent to which this 'victimless' ideology is incorrect, using aspects such as: fraud, money-laundering, violence,[728] asset loss, threats to natural resources and the spread of diseases,[729] amongst others.[730]

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[724] [2016] 1 All SA 565 (GP). This case will be considered in more detail later.
[725] Mucott, M., 'Transformative Environmental Constitutionalism's Response to the Setting Aside of South Africa's Moratorium on Rhino Horn Trade', (2017) 6(4) Humanities for the Environment 97
[726] WWF and TRAFFIC, 'Strategies for fighting corruption in wildlife conservation: Primer', (2015) http://www.traffic.org/general-reports/wci_strategies_for_fighting_corruption_wildlife_conservation.pdf 24 May 2018
[727] CITES, 'What is wildlife crime?', https://cites.org/prog/iccwc.php/Wildlife-Crime 24 May 2018
[728] ITV News, 'Prince says illegal wildlife trade is funding terror' *ITV News* (08 December 2014) http://www.itv.com/news/2014-12-08/prince-reveals-illegal-wildlife-trade-is-funding-terror/ 24 May 2018
[729] Europol, 'Environmental Crime', https://www.europol.europa.eu/crime-areas-and-trends/crime-areas/environmental-crime 24 May 2018
[730] CITES, 'What is wildlife crime?' https://cites.org/prog/iccwc.php/Wildlife-Crime 24 May 2018

As the number of charges is almost a third of that of arrests, and includes those offenders with multiple charges, it is questionable if the UK's practices can be considered as effective as they might be at tackling the illegal wildlife trade. Of course, the police forces and Crown Prosecution Service (CPS) cannot be expected to charge people with offences if they are not confident that they are guilty of the crime, however, it seems there may be some failings in efforts to tackle these activities if so few arrests result in charges.

5.4.2 The Crown Prosecution Service

Although the results for police charges demonstrate potential failings in the tackling of wildlife trade offences, Figure 7 is more encouraging. It shows the number of offenders charged with offences contrary to the Control of Trade in Endangered Species (Enforcement) Regulations 1997 (as amended) that reached a first hearing before the courts. The results provided by the CPS are more comprehensive than those from the police forces and there are potential explanations for the differences in the data, these can be seen below.

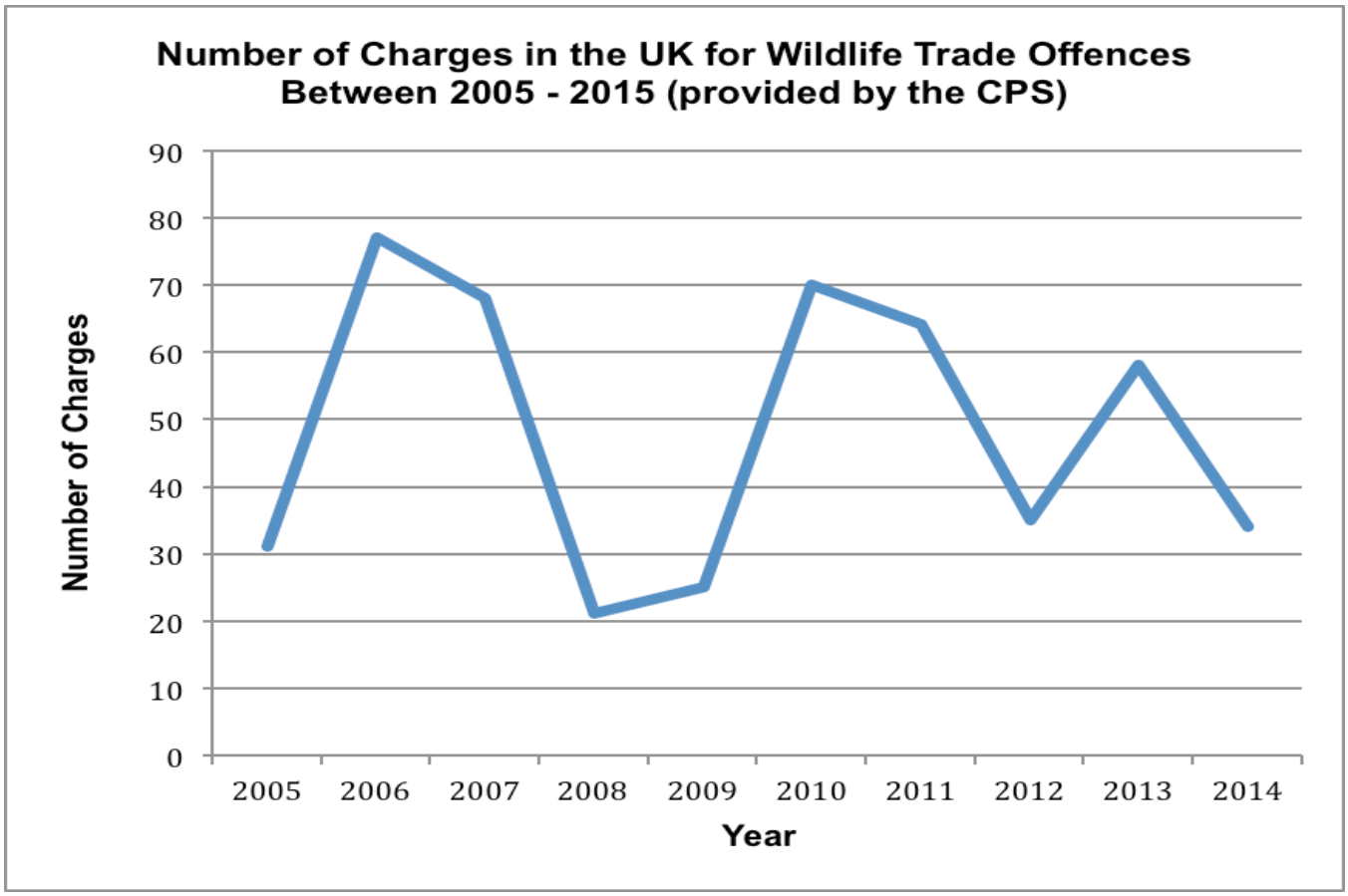

FIGURE 7: THE NUMBER OF CHARGES BROUGHT BY THE CROWN PROSECUTION SERVICE FOR WILDLIFE TRADE OFFENCES BETWEEN 2005 AND 2015

Similar to the experience collating arrest data, some police forces used exemptions to prevent the release of information in relation to charges. Most of these did so through the s. 12(1) cost exemption, whilst one force did not provide the information as it claimed it would provide personal information and was therefore exempt from doing so. This, again, shows inconsistency with other police forces' practice on providing the requested information as they did not consider providing the number of people charges with wildlife trade offences to involve personal information. As previously mentioned, the information request specifically requested that any personal information be

removed from a response. The only way personal information could have been extracted from this information is through searching media sources for charges in specific areas for the time period. However, as this information is already in the public domain through newspaper articles and the like, there would be no breach of any data protection legislation. These results once more highlight the differences in how organisations adopt and implement rationales for FOI requests. It suggests that FOI legislation in the UK is perhaps a subjective tool open to interpretation and responses will depend on how the receiving person perceives the questions. Secondary research indicates gaps in the literature around these issues and as such, it would be useful to explore further, however it is beyond the scope of this research.

The data shows that the number of offenders charged, and making it to a first hearing, is considerably higher than the number of arrests disclosed from the police forces. It is possible the discrepancy in results is due to the exemptions used and therefore may be an indicative picture of the actual number of arrests and charges in the UK. However, arrestees may be charged with more than one offence, for example, Lancashire Police reported that one offender was charged with 10 offences. Therefore, this may help to explain the discrepancies in the results portrayed in this thesis.

As observed above, it is difficult to understand how police forces can be assessed to be working effectively when using different systems to record crime. These different systems could cause discrepancies between the results provided for charges by the police and CPS, as there may be a failure

to record data correctly. One suggestion is the use of a centralised register to record all wildlife trade offences. This register could utilise the National Wildlife Crime Unit to be the central record handlers for all wildlife crime. In 2017, it was observed that more than 40,000 reported crimes were not recorded by three police forces. In turn, this meant they were rated as inadequate and requiring improvement by the HMIC.[731] Despite the oversight by the HMIC in identifying and highlighting these problems, there are concerns. It seems difficult to accurately assess the effectiveness of police forces in the UK and their efforts in tackling the illegal wildlife trade, when there are inconsistencies with administrative tasks that would help to make these assessments. The use of the central register would help to limit the discrepancies and provide a clearer picture of the extent wildlife trade offences are occurring within the UK. This central registry would include all wildlife trade offences and therefore would not just be limited to those encompassing COTES and CITES.[732] These additional legislative approaches do not form a basis to this research, however they are relevant when looking at ways to improve data collection in relation to wildlife trade offences.

[731] Her Majesty's Inspectorate of Constabulary and Fire and Rescue Services, 2018, 'Reports - Rolling programme of crime data integrity inspections', 2018, https://www.justiceinspectorates.gov.uk/hmicfrs/our-work/article/crime-data-integrity/reports-rolling-programme-crime-data-integrity/ 16 May 2018. See also Wainwright, D. 'Police rated 'inadequate' over crime recording failures' *BBC* (12 September 2017)

[732] For example, the Habitats Regulations (Regulations 43) and the Wildlife Countryside Act 1981 (section 14ZA) which also contain provisions as to the offer for sale of species listed within the annexes.

5.4.3 UK Additional Measures

As discussed in Chapter 3, police forces and the CPS have additional means in their toolkits to help deter those involved in the illegal wildlife trade. Given the existence of these additional measures, police forces were asked what, if any, subsidiary charges and/or measures were applied when offenders were charged with wildlife trade offences. Of the 43 police forces approached, only 3 identified any other measures being implemented by their officers and/or the CPS. The forces that provided positive responses identified a total of 30 occasions where offenders had been charged with subsidiary offences. As before, this may be one offender with multiple charges brought against them. The subsidiary charge details given were as follows:

1. Acquiring/ using/ possessing criminal property
2. Concealing / disguising / converting / transferring / removing criminal property
3. Fraud by false representation – Fraud Act 2006
4. Fraudulently evading a prohibition / restriction on the export of goods – other than a controlled drug[733]
5. Fraudulently evading any duty/ prohibition/ restriction/ provision[734]
6. Possession of extreme pornographic image portraying an act of intercourse / oral sex with a dead / alive animal

[733] Customs and Excise Management Act
[734] Although 4 and 5 were given as examples by police forces, these are actually Customs/Border Force matters.

The courts in the UK can also consider aggravating factors listed within the Environmental Sentencing Guidelines, including:

- "Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction[735]
- Repeated incidents of offending or offending over an extended period of time, where not charged separately
- Deliberate concealment of illegal nature of activity
- Established evidence of wider/community impact
- Breach of any order
- Offence committed for financial gain
- Obstruction of justice".[736]

The Sentencing Guidelines apply narrowly, and mainly to Environmental Penalty Regulations. They are, though, applied analogously to other 'environmental' offences, which is examined in more detail below. Although these have been considered as separate offences to those targeted towards wildlife trade offences, some of them are similar to those listed in the COTES Regulations, as discussed in Chapter 3. As such, it is questionable whether all of these should be considered subsidiary charges or whether they should be listed with the other offences contained in Figures 3 and 5 above

[735] Statutory aggravating factor
[736] Sentencing Council, 'Environmental Offences: Definitive Guideline', July 2014, https://www.sentencingcouncil.org.uk/wp-content/uploads/Final_Environmental_Offences_Definitive_Guideline_web1.pdf 22 May 2018

The main objective behind this request for information, was to identify whether any seizures were made pursuant to the Proceeds of Crime Act 2002 (POCA) by police forces for offenders guilty of wildlife trade offences. The results provided establish that no such seizures were made. This might represent a failing by police forces in their response to wildlife trade offenders, and a failure to deter others from committing these crimes. It retains the 'high value – low risk' observations that have characterised commentary on the illegal wildlife trade. The basic principles of POCA are noted in Chapter 3 but to summarise, it allows the seizure of any proceeds made from criminal activity. If POCA is not being utilised in respect of these sorts of crimes, criminals are potentially benefitting financially from the illegal wildlife trade and subsequently, it is questionable whether they would be deterred from being involved with the violation of wildlife trade legislation. In order to act as a deterrent, the risks to the offender need to outweigh the rewards of trading in illegal wildlife. Thus, sentencing should be consistent, with certainty of punishment and penalties being sufficiently harsh enough that the risks to the offenders are greater than the rewards they would gain from participating in the illegal wildlife trade.[737]

[737] WWF, 'Sentencing Wildlife Trade Offences in England and Wales: Consistency, Appropriateness and the Role of Sentencing Guidelines', (September 2016) https://www.wwf.org.uk/sites/default/files/2017-01/WWF-UK%20Report%20-Sentencing%20wildlife%20trade%20offences%20in%20England%20and%20Wales.pdf 23 May 2018

Research presented by NGO's has suggested that UK courts are lenient[738] and inconsistent[739] in their sentencing of wildlife trade offences.[740] In particular, they raise concerns over particularly with reference to the lack of proportionality in sentencing, given the large profits available and the serious consequences of the uncontrolled trade in CITES listed species.[741] In 2013, the UK Government rejected recommendations to review existing penalties and implement sentencing guidelines for offences associated with wildlife trade, in favour of continuing with a 'case-by-case' approach to determine harm and culpability.[742] This rejection was, in part, a reflection of the view "that there is a lack of evidence to show that more severe punishments have a greater deterrent effect".[743] However, in 2014 the Sentencing Council's

[738] WWF, 'Sentencing Wildlife Trade Offences in England and Wales', (30 January 2017) https://www.wwf.org.uk/updates/sentencing-wildlife-trade-offences-england-and-wales 29 August 2018
[739] Rust, N., 'Penalties for wildlife criminals sentenced in England and Wales and 'low and inconsistent' *The Independent* (05 June 2017) https://www.independent.co.uk/voices/campaigns/elephant-campaign/penalties-for-wildlife-criminals-sentenced-in-england-and-wales-are-low-and-inconsistent-a7774396.html 29 August 2018
[740] House of Commons: Environmental Audit Committee, 'Wildlife Crime: Third Report of Session 2012 – 2013, Volume I', (12 September 2012) https://publications.parliament.uk/pa/cm201213/cmselect/cmenvaud/140/140.pdf 23 May 2018
[741] ibid.
[742] House of Commons: Environmental Audit Committee, 'Wildlife Crime: Government Response to the Committee's Third Report of Session 2012-2013, Fourth Special Report of Session 2012 – 2013', (12 March 2013) http://www.nwcu.police.uk/wp-content/uploads/2013/04/House-of-Commons-EAC-Wildlife-Crime-Govt-Response-to-Committees-3rd-report-of-sessions-2012-13.pdf 23 May 2018
[743] WWF, 'Sentencing Wildlife Trade Offences in England and Wales: Consistency, Appropriateness and the Role of Sentencing Guidelines', (September 2016) https://www.wwf.org.uk/sites/default/files/2017-01/WWF-UK%20Report%20-Sentencing%20wildlife%20trade%20offences%20in%20England%20and%20Wales.pdf 23 May 2018

guidelines[744] for environmental offences introduced arguably greater proportionality for sentencing outcomes for some environmental offences.

Although, as noted above, the environmental sentencing guidelines do not apply directly to nature offences, the principles and rationale of those guidelines have been applied in a conservation case, *R (Natural England) v Day*.[745] In addition, s. 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 came into force in 2015, removing the limits to fines that Magistrates' Courts can impose for serious offences. Consequently, for certain 'serious'[746] offences committed on or after 12 March 2015, the Magistrates Court can now impose fines without a limit. These changes in 2014 and 2015 could be perceived as an increase in the courts ability to deter potential offenders from committing wildlife trade offences, however, it is necessary to explore the courts' determinations in order to understand the true impact on deterrence of these crimes. Therefore, the further research discussed previously would be a benefit to establish whether offenders are being deterred by the courts though the sentencing of crimes.

5.4.4 Outcomes

The final element of the FOI request made to police forces in England and Wales was the outcome of charges for wildlife trade offences. Very few

[744] Sentencing Council, 'Environmental Offences: Definitive Guideline', July 2014, https://www.sentencingcouncil.org.uk/wp-content/uploads/Final_Environmental_Offences_Definitive_Guideline_web1.pdf 22 May 2018
[745] [2014] EWCA Crim 2683
[746] Serious means any offence that was previously punishable in the Magistrates' Court with a fine of £5,000 or above. UK Government, 'Unlimited fines for serious offences' (12 March 2015) https://www.gov.uk/government/news/unlimited-fines-for-serious-offences 16 May 2019

positive responses were provided, for a variety of reasons. As with the previous request to UK police forces, some stated they were exempt from providing this information under s. 12(1) of the FOIA by way of the personal information exemption. Another reason was that records of the outcome of these charges are not maintained.

Outcome data, for individual crimes and the actions taken by the police following crimes being reported, is published on *police.uk*, in addition to whether a suspect was charged in relation to that crime and the outcome reached at the subsequent court hearing.[747] It is questionable how police forces are able to publish these outcomes if they do not keep a record, thereby suggesting inconsistencies with the responses. Additionally, the Victim Information Service also notifies the public that the investigating officer is able to inform victims of the outcome of any trials within one working day,[748] again contradicting the response received from some of the police forces approached.

The response in this case could be indicative of the perceived victimless nature of wildlife crime. However, the lack of maintaining a record of the outcome of charges, raises the question of how effectiveness can be assessed. Such a record would help each police force understand their ability to successfully detect and prevent crime by analysing the outcomes of their

[747] Ministry of Justice, 'Understanding the Justice Outcome Data on the police.uk website', (July 2012) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/217421/police-uk-statistics.pdf 22 May 2018

[748] Victims Information Service, 'What happens after a crime – Going to court', https://www.victimsinformationservice.org.uk/the-justice-process/going-court/ 22 May 2018

investigations. It is also a surprising response, given most police forces in the UK use the Police National Computer (PNC) that holds indefinite records of a person's convictions and cautions. This implies that police forces should be able to access the information. However, the author recognises the potential for this to be a time consuming exercise, which may explain why some forces justified their decision not to respond under the time limit set out under the FOI Act.

The police forces that did provide information relating to the outcome of charges, have their responses reflected in Figure 8 below. The chart demonstrates that the most consistent outcome for wildlife trade offences seems to be to caution the offender, reflecting the lenient outcomes discussed above. Cautioning is followed closely by summons to court, although the outcome was not provided. On the basis of these results, it is necessary to consider, again, the perceived seriousness, or otherwise, of illegal wildlife trade activities. Results show few wildlife trade offences reach the courts and therefore it is difficult to analyse the effectiveness of sentencing in this respect. The lack of cases reaching the court clearly does not reduce the seriousness of wildlife trade crimes, or environmental offences in general. Instead, these results demonstrate failings in their enforcement, potentially through organisations not considering these crimes as serious, along with prosecutorial discretion to only pursue criminal liability in certain circumstances.[749]

[749] Shelley, T. *et al*., 'What about the environment? Assessing the perceived seriousness of environmental crime', (2011) 35(4) International Journal of Comparative and Applied Criminal Justice 308

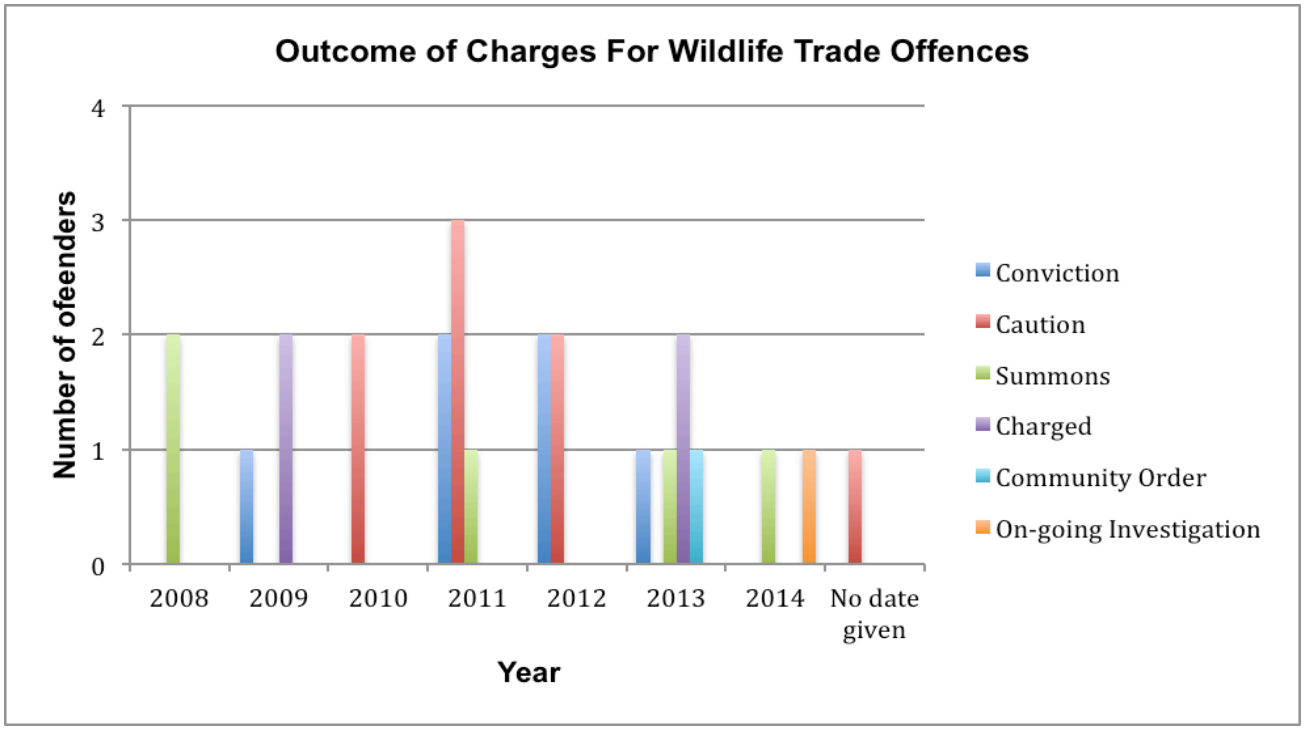

FIGURE 8: THE OUTCOME FOLLOWING CHARGES MADE AGAINST OFFENDERS IN RELATION TO WILDLIFE TRADE OFFENCES

For those cases resulting in convictions, research has been carried out to identify the sentence handed down. Whilst media reports for some of these cases were located, they do not cover all the convictions shown in Figure 8. It would possibly, therefore, have been useful to contact Her Majesty's Courts and Tribunals Service to identify the sentencing for all convictions relating to wildlife trade offences, however there is no right to access to information contained in court records under s. 32 of the FOI Act [750] and consequently it is at best questionable whether this information would have been provided. Nevertheless, as this request was not made, it is an acknowledged limitation

[750] Courts and Tribunal Judiciary, 'Freedom of Information', https://www.judiciary.uk/foi/ 30 August 2018

in this thesis. To do so could form the basis of further research to determine an in-depth understanding of sentencing for wildlife trade offences.

As stated, police forces were generally unable to provide details of the sentences given, and as such, research was conducted using legal and media databases for details of the offences and sentences handed down. A series of illustrative examples follow, both as to the breadth of methods adopted and in relation to the remedies applied and/or outcomes achieved. It should be stressed, these provide illustrative examples of sentences, where legal or media databases have recorded them, indicating the extent to which all available punishments are utilised.

In 2011, a case prosecuted by the National Wildlife Crime Unit (NWCU) – discussed in more detail later in this chapter – and supported by Avon and Somerset Constabulary, found a man guilty of illegal bird trading, in contravention of COTES 1997. The individual pleaded guilty to six counts of prohibited display, not guilty for selling an eagle owl and changed their plea to guilty for the sale of another eagle owl. The Magistrates Court found this individual guilty of illegally displaying birds and illegally selling a tawny owl. The individual was sentenced to a £7,000 fine, ordered to pay £620 in court charges and to forfeit his birds of prey.[751]

[751] Parker, B., 'Banwell falconer found guilty of illegal bird-selling' *Weston, Worle and Somerset Mercury* (03 July 2013) http://www.thewestonmercury.co.uk/news/court/banwell-falconer-found-guilty-of-illegal-bird-selling-1-2262578 17 May 2018

One case, which was an on-going investigation at the time of the results being provided under the FOI Act resulted from an investigation by the NWCU and Cumbria Police wildlife officers. In 2015, officers noticed a number of adverts for 'cow-bone carvings' on EBay, but accompanying photographs of the items appeared to indicate that they were made from elephant ivory.[752] As discussed in Chapter 2, EBay had imposed a global ban on the sale of elephant ivory on their website, although intelligence suggests that some traders were advertising ivory as 'ox-bone' or 'cow-bone' to bypass filters.[753] The individual in this particular case, also stated that their grandmother had been to Africa and brought the carvings back to the UK in 1947, which would bring them within the 'historic exemption', discussed in Chapter 2. With the help of EBay, officers were able to identify the individual, who over a four-week period, had posted 22 adverts of carvings, all advertised with a pre-1947 provenance.

The 'historic' exemption creates potential problems, although COTES does permit for DNA testing of samples in order to avoid this difficult.[754] Furthermore, in 2018 the UK announced, a proposal for statute implementing a complete ban on ivory sales of any age, with only a few exemptions[755]

[752] Cumbria Constabulary, 'Workington man handed suspended sentence for illegal ivory trading', (14 September 2016) https://www.cumbria.police.uk/News/News-Articles/2016/September/Workington-man-handed-suspended-sentence-for-illegal-ivory-trading.aspx 17 May 2018

[753] For further information on the use of online platforms and the impact on the illegal wildlife trade see the joint collaboration between WWF and IFAW at: IFAW, 'Leading tech companies unite to stop online wildlife traffickers', (07 March 2018) https://www.ifaw.org/international/news/leading-tech-companies-unite-stop-online-wildlife-traffickers 17 May 2018

[754] Section 8(5) of The Control of Trade in Endangered Species Regulations 2018

[755] Items containing less than 10% ivory, musical instruments containing less than 20% ivory and culturally important pieces which can be considered as the rarest and

provided for.[756] This Bill passed into legislation in December 2018 – although it is not yet in force - with anyone caught breaching the ban facing an unlimited ban or up to five years in prison. [757]

When executing a search warrant at the individual's home address, officers seized the carvings, when interviewed, the individual acknowledged the carvings were ivory but maintained they had been inherited. Samples were sent for radio carbon dating, which established the carvings were from elephants that could not have been living prior to 1947 and therefore were in contravention of COTES. When re-interviewed, the individual refused to provide any additional origin for the ivory and was subsequently charged with prohibited keeping for sale, and prohibited offering for sale. Originally, the individual pleaded not guilty, however eventually changed this to guilty. At Court, the individual was told that inventing the origin of the ivory as pre-1947 was intended to deceive and thus an aggravating factor in the offence. The defendant was ordered to attend a rehabilitation course and pay £1,134.[758] Given the individual was considered to have "significant" mental health issues, the court gave a seven-month prison sentence that was suspended for 18

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most important items of their type that must be at least 100 years old and for the use in museums.

[756] Department for Environment, Food and Rural Affairs, 'Government confirms UK ban on ivory sales', *Government Press Release*, 3 April 2018, https://www.gov.uk/government/news/government-confirms-uk-ban-on-ivory-sales 16 May 2018

[757] Department for Environment, Food and Rural Affairs, 'Government confirms UK ban on ivory sales', *Government Press Release*, 3 April 2018, https://www.gov.uk/government/news/government-confirms-uk-ban-on-ivory-sales 16 May 2018

[758] The cost of the radio carbon dating analysis and was to be paid to the Wildlife Crime Forensic Analysis Fund, which funded the tests.

months.[759]. The Ivory Act, when it is finally in force, will remove any ambiguity in respect of sale in such circumstances.

In 2011, five stuffed birds of prey were seized by police in Lancashire as part of an investigation into illegal taxidermy. All of the birds, which required a permit to be sold legally, were found at one house in Lancashire. Following an investigation by the force's wildlife unit into the online sale of illegal taxidermy, an individual was arrested, cautioned for offering to sell the stuffed birds and had their collection confiscated.[760] The case offers an illustration of the proportionality concept discussed above. In short, EU law requires the UK to provide effective, proportionate and dissuasive criminal sanctions for wildlife trade offences, however, the literature demonstrates a varying and often insufficient level of sanction for these offences[761] and that the UK has shortcomings in this regard.[762] In this case, for example, following the caution, the NWCU received a tip-off that the individual was continuing to trade in rare breeds and a further investigation was launched. The same house was searched and a number of specimens recovered. Four samples were found to have been acquired illegally – three sperm whale's teeth, a dolphin skull, a cougar skull and a snowy owl. The individual pleaded guilty to three offences of purchasing an endangered species contrary to the EU

[759] ITV News, 'Illegal ivory trader given suspended jail term' *ITV* News (13 September 2016) http://www.itv.com/news/border/update/2016-09-13/illegal-ivory-trader-given-suspended-jail-term/ 17 May 2018
[760] BBC News, 'Officers seize illegal taxidermy in Burnley' *BBC* (22 Februry 2011) http://www.bbc.co.uk/news/uk-england-lancashire-12534353 16 May 2018
[761] European Parliament, 'Wildlife Crime', (March 2016) http://www.europarl.europa.eu/RegData/etudes/STUD/2016/570008/IPOL_STU%282016%29570008_EN.pdf 24 May 2018
[762] ibid.

Wildlife Trade Regulation, and one charge of offering the snowy owl for sale. In 2015, the individual was sentenced to 24 weeks imprisonment.[763]

In 2013, an individual pleaded guilty to two charges of offering prohibited rhino horn for sale. Whilst the rhino horn had a value of approximately £15,000, the individual was offering to sell them for less than £1,000.[764] The offender was sentenced to a 3-month curfew, 240 hours unpaid work and £145 costs.[765] In this case, the NWCU assisted by helping with the arrest, interviews and liaising with the CPS to ensure the case succeeded.[766]

As noted, these cases represent just a few illustrative examples demonstrating the type of sentences given out by UK Courts, along with other enforcement outcomes, in relation to wildlife trade offences. When comparing the sentences available to UK Courts, discussed in Chapter 3, with those actually imposed as shown in this section, it is questionable whether the courts, and other bodies, are using the full range of sentencing and related options available when dealing with these types of crime. As some police forces gave a negative response, and secondary research established the

[763] Lancashire Telepgraph, 'JAILED: Trader caught dealing in rare and endangered species – including dolphin and cougar skulls' *Lancashire Telegraph* (08 December 2015) http://www.lancashiretelegraph.co.uk/news/14129884.JAILED__Trader_caught_dealing_in_rare_and_endangered_species___including_dolphin_and_cougar_skulls/?ref=rss 17 May 2018

[764] Rush, J., 'Man tried to sell £15,000 black rhino horns because he was struggling to pay his mortgage after his relationship broke down' *Daily Mail Online* (12 August 2013) http://www.dailymail.co.uk/news/article-2389871/Man-tried-sell-15-000-black-rhino-horns-struggling-pay-mortgage-relationship-broke-down.html 17 May 2018

[765] National Wildlife Crime Unit, 'National Wildlife Crime Unit Funding Secured for 2 Years', (06 February 2014) http://www.nwcu.police.uk/news/nwcu-police-press-releases/national-wildlife-crime-unit-funding-secured-for-2-years/ 17 May 2018

[766] ibid.

importance of the NWCU in the successful investigations, the unit was approached for data relating to arrests and prosecutions for wildlife trade offences.

5.4.5 National Wildlife Crime Unit

In addition to the individual UK police forces, the NWCU was approached for figures relating to arrests and prosecutions for wildlife trade offences. The NWCU is a specialised police unit tackling wildlife crime, joining police forces and border force agencies in investigating, collating and analysing wildlife crime intelligence across the UK.[767] The NWCU's main purpose is to assist in the prevention and detection of wildlife crime, through obtaining and disseminating information from a range of organisations.[768] As observed, all the cases discussed above, had the assistance of the NWCU.

Since April 2015, more than 400 items relating to the illegal wildlife trade have been seized in the UK, often following the provision of intelligence by the NWCU.[769] Its role is so significant in investigating and prosecuting, that it has been suggested the UK would struggle to meet national and international commitments to combat wildlife crime should it be disbanded, as so many investigations and successful prosecutions are reliant upon the unit.[770] Due to the importance of the unit, a FOI request was sent, looking for the same data

[767] Wildlife and Countryside Link, 'National Wildlife Crime Unit Threatened with Extinction', (December 2015) https://www.wcl.org.uk/national-wildlife-crime-unit-threatened-with-extinction.asp 24 May 2018
[768] National Wildlife Crime Unit, 'About', http://www.nwcu.police.uk/about/ 17 May 2018
[769] Wildlife and Countryside Link, 'National Wildlife Crime Unit Threatened with Extinction', (December 2015) https://www.wcl.org.uk/national-wildlife-crime-unit-threatened-with-extinction.asp 24 May 2018
[770] ibid.

that was requested from the individual police forces i.e. number of arrests, charges, additional measures and outcomes of cases over a 10 year period. The response received from the National Police Chiefs' Council was as follows:

> *"I have consulted with both the Wildlife and Rural Crime Portfolio and the National Wildlife Crime Unit (NWCU) who both confirm that they do not hold information relevant to the request. The NWCU do not have the remit to collate and record data for charges or arrests."*

It is surprising that the department whose main purpose is to assist in wildlife crime investigations does not hold this information in respect of the outcomes. It is interesting that the NWCU is denied the opportunity to collate statistics which would demonstrate its success, or otherwise. There is no doubt that the NWCU assists police forces to successfully prosecute wildlife trade offences – the evidence is clear – but the overall success cannot easily be demonstrated without these statistics. This, again, expresses a shortfall in UK organisations in the storing of data that would help establish their effectiveness, or otherwise, in the UK's efforts at tackling the illegal wildlife trade.

5.5 Australia: Prosecutions

Similarly, a FOI request was made for prosecution data in Australia; the CDPP was asked to provide statistics relating to both the EPBC Act 1999 and the Customs Act 1901. The CDPP responded to the FOI request providing relevant information extracted from the Commonwealth prosecutions database. This response was issued with a caveat: while it was possible to extract all prosecutions pursuant to the EPBC Act 1999, it was not possible to

accurately identify those matters solely involving illegal wildlife trade. However, the CDPP did provide the sections of the EPBC Act under which individuals were prosecuted and therefore any involving those discussed in Chapter 3 have been included in the results below. The CDPP stated no prosecutions were identified involving the illegal wildlife trade pursuant to the Customs Act and that no seizures were made under the Proceeds of Crime Act. Hence, all the information found in this section relates to the EPBC Act and wildlife trade offences.

Figure 9 demonstrates the annual number of prosecutions brought by the CDPP between 1st September 2005 and 1st September 2015. There is an obvious fluctuation between the numbers of prosecutions, as would be expected, with the lowest being in 2014/15 with just 6 cases, compared to the highest in 2011/12 with 20 prosecutions. As with the UK, this fluctuation could be for a variety of different reasons, such as change in demand for illegal wildlife trade products, or change in human interaction such as the priorities of both police and prosecutors.

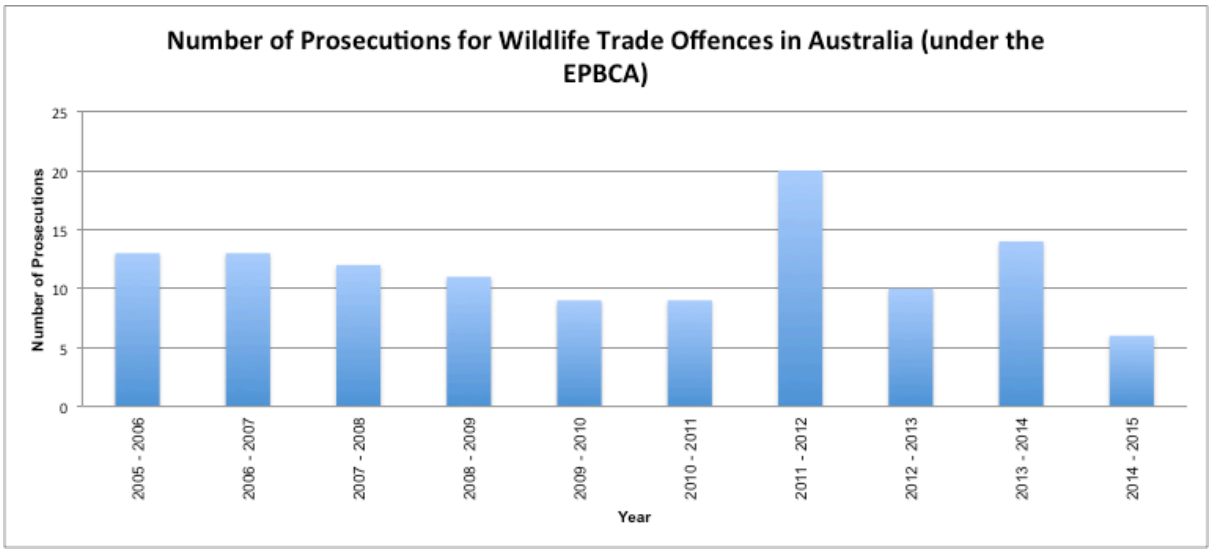

FIGURE 9: NUMBER OF PROSECUTIONS FOR WILDLIFE TRADE OFFENCES UNDER THE EPBCA FROM 1ST SEPTEMBER 2005 – 1ST SEPTEMBER 2015

The total number of prosecutions bought by the CDPP during this 10-year period was 117, substantially lower than the prosecutions undertaken by the UK's CPS, which had 482 prosecutions over the same time period. The explanation for this lower figure is not certain, but it is necessary to remember that Australia has a lower population than the UK. In addition, Australia may be prosecuting wildlife trade offences under State legislation rather the EPBC Act and therefore the number of prosecutions may be higher than that recorded here. A further area of research may consequently be to explore State legislation and prosecution rates to determine a more accurate and representative picture for Australia.

When comparing the FOI responses from Australia and the UK, it would appear Australia has less prosecutions. That being said, without the number of arrests, it is difficult to accurately compare as Australia may be prosecuting all individuals caught committing wildlife trade offences, unlike the UK. This would result in an increase in the deterrent element discussed previously and would suggest Australia is more effective at discouraging individuals from committing these types of crimes.

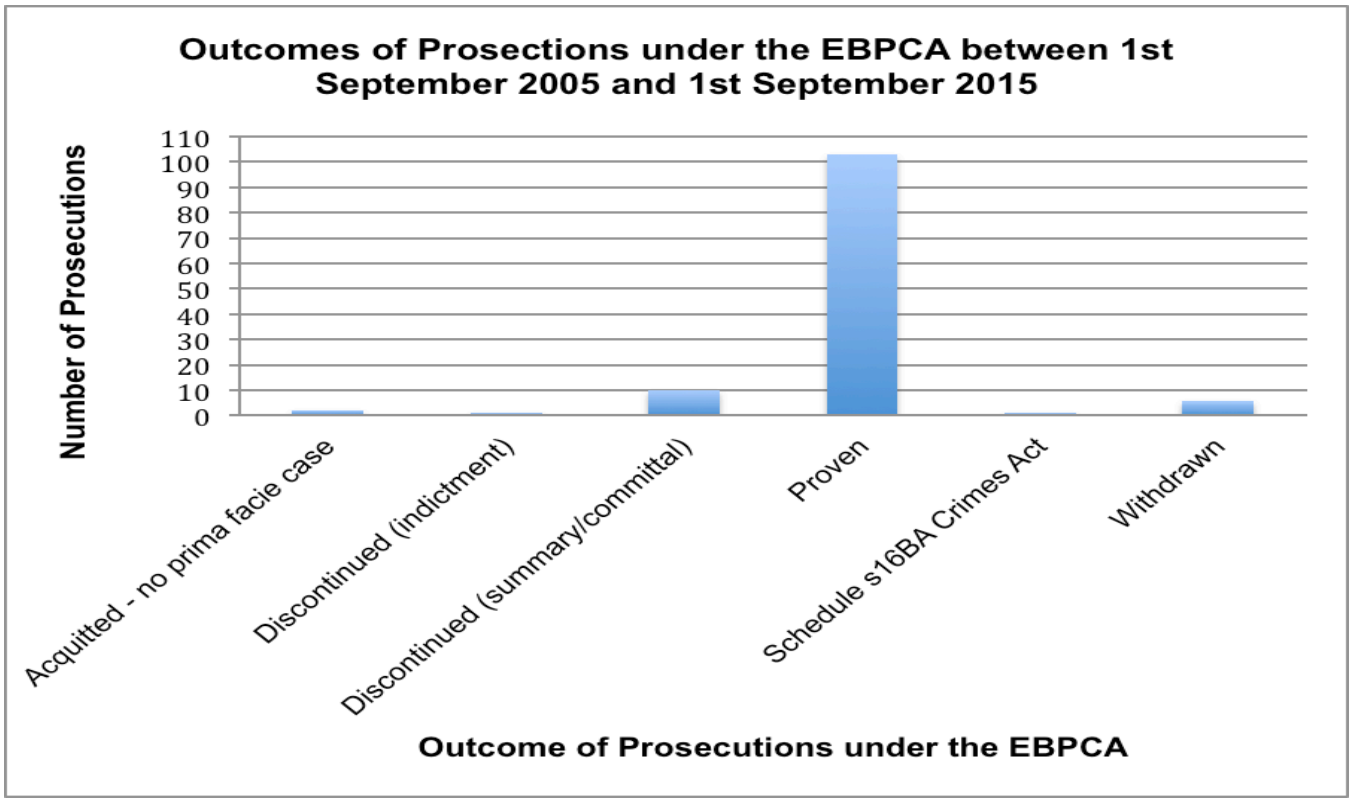

FIGURE 10: OUTCOME OF THE PROSECUTIONS FOR WILDLIFE TRADE OFFENCES UNDER THE EPBCA FROM 1ST SEPTEMBER 2005 – 1ST SEPTEMBER 2015

Figure 10 shows the outcomes for all prosecutions bought by the CPDD for wildlife trade offences under the EPBC Act during the 10-year period being explored. There are 123 outcomes portrayed in Figure 10, a number larger

than that shown in Figure 9 as some individuals may have been charged with more than one offence and have a different outcome under each of the different charges. Of these 123 prosecutions, only two resulted in acquittals with no case to answer, thereby establishing that prosecutions undertaken by the CPDD have an extremely high success rate. The CDPP did decide to discontinue one indictment case and ten summary cases. Whilst the FOI response did not outline the reasons for these discontinuance, it is likely they did not have the evidence required to take the case to court, or did not meet the public interest requirement, as discussed in the UK section above. In addition, six cases were withdrawn, with no explanation offered however, it could be for the same reasons as those cases discussed above.

One prosecution involved the use of Schedule s16BA of the Crimes Act 1914. Section 16BA was considered in *Putland v. The Queen* [2004][771], where it was stated it "provides a procedure whereby in certain circumstances in passing sentence for convictions the court may take into account offences in respect of which guilt is admitted but there has been no trial".[772] This means that the prosecution was still successful, however the individual entered a guilty plea guilty without the requirement of a trial. When taking into account the s16BA result, along with those proven by the CPDD, Australia has an 84.55%[773] overall success rate for wildlife trade prosecutions under the EPBC Act. Where the withdrawn and discontinued cases are not considered, the

[771] HCA 8
[772] National Judicial College of Australia, 'Taking Into Account Other Offences', (24 April 2018) https://csd.njca.com.au/principles-practice/general_sentencing_principles/section_16ba/ 11 June 2018
[773] Rounded to 2 decimal places. Actual figure is 84.5528455284553%

CPDD has a 98.11%[774] success rate for wildlife trade prosecutions under the EPBCA. Whichever percentage is utilised, it is clear the CDPP is extremely successful at prosecuting wildlife trade offences under the EPBC Act. Whilst this success is apparent, this result and understanding Australia's effectiveness at tackling the illegal wildlife trade would be strengthened if it had been possible to access the arrest figures to give a more inclusive account. That being said, it is still a positive sign that Australia's authorities arguably succeeding in combating the illegal wildlife trade when looking at prosecutions by the CDPP. It is also worth looking at which offences are most commonly detected and subsequently prosecuted.

[774] Rounded to 2 decimal places. Actual figure is 98.11320754716981%

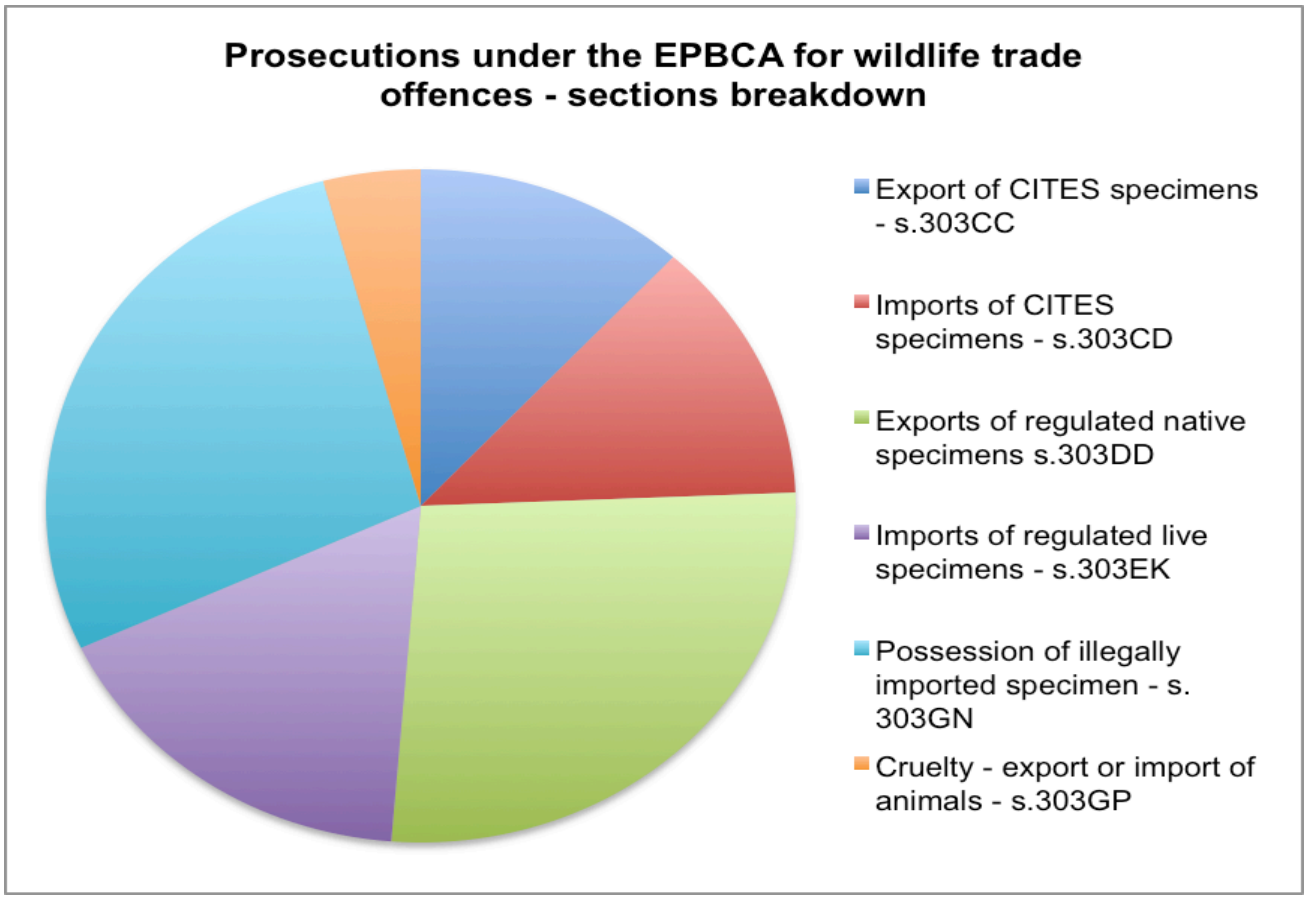

FIGURE 11: A BREAKDOWN OF THE SECTIONS PROSECUTED AGAINST FOR WILDLIFE TRADE OFFENCES UNDER THE EPBCA FROM 1ST SEPTEMBER 2005 – 1ST SEPTEMBER 2015

It is apparent that the CDPP has prosecuted for various wildlife trade offences under the EPBC Act over the 10-year period, indicating that the police, customs and the CDPP are utilising their powers. The most common prosecutions come under ss. 303DD and 303GN, demonstrating that the CDPP is prosecuting for import and export offences for both native and CITES specimens. This is indicative of the Australian authorities' concern for the international trade in protected species, not just that occurring within its borders.

Figure 11 substantiates an issue raised in Chapter 2 relating to the cruel treatment of animals involved in the illegal wildlife trade. Australian authorities prosecuted five such cases relating to cruelty in respect of the export or import of animals under s.303GP of the EPBC Act between 1st September 2005 and 1st September 2015.

Ancillary to the above information, the CDPP provided the penalties arising from successful prosecutions, something the UK authorities were unable to do. This assists in understanding the extent to which the courts are adopting the full range of penalties available to them for wildlife trade offences and therefore whether Australian authorities are effectively applying the legislation discussed in Chapter 3. As evidenced below, the Australian courts passed down 21 different penalties for wildlife trade offences. These penalties are shown in Figure 12, with the definition for each offence as follows:

- Fine (NTSA s. 26(2)) - court may order imprisonment in default of fine - Sentencing Act (NT) 1995 – s. 26(2);
- TBGB - Recognizance Release Order (RRO) condition – period required to be of good behaviour;
- Self - RRO condition – confirming that security was entered into;
- Bond S201A - Convicted and released on a RRO without passing sentence – s. 20(1)(a) Crimes Act 1914 (Cth);
- Fine;
- Jail;

- Bond s. 201B - Conditional release order – s. 20(1)(b) Crimes Act 1914 (Cth);
- Disburse - This is a third party expense, generally the process server's fee for serving court papers such as summons;
- Profession - Time and materials costs of the Crown prosecutor. The DPP may seek costs in summary matters where local law and practice permits but will generally not seek costs when successful in indictable proceedings or appeals emanating from trials;
- ICO - Intensive Correction Order – s. 20AB Crimes Act 1914 (Cth);
- Bond s19B - Discharge without conviction – s. 19B(1)(d) Crimes Act 1914 (Cth);
- Court - costs charged by the court, usually only the initial filing fee but can include other costs;
- Costs - general order for costs;
- Surety - RRO condition – where a person is convicted of a federal offence the court may order the offender's release upon the giving of security, with or without sureties, by recognizance or otherwise on condition that the person is of good behaviour for a period not exceeding 5 years - s. 20 Crimes Act 1914 (Cth);
- Fprint - Order for fingerprint under s3ZL Crimes Act 1914 (Cth);
- Bond Prob - RRO condition – probation;
- Periodic - Periodic detention – s. 20AB Crimes Act 1914 (Cth);
- Bond Pecun - A pecuniary penalty imposed by the court as a condition of a RRO – s. 20 Crimes Act 1914 (Cth);
- Dismiss;

- S16BA – guilt admitted but no trial;
- Other – no definition has been given for what ‘other’ constitutes but has been included for completeness.

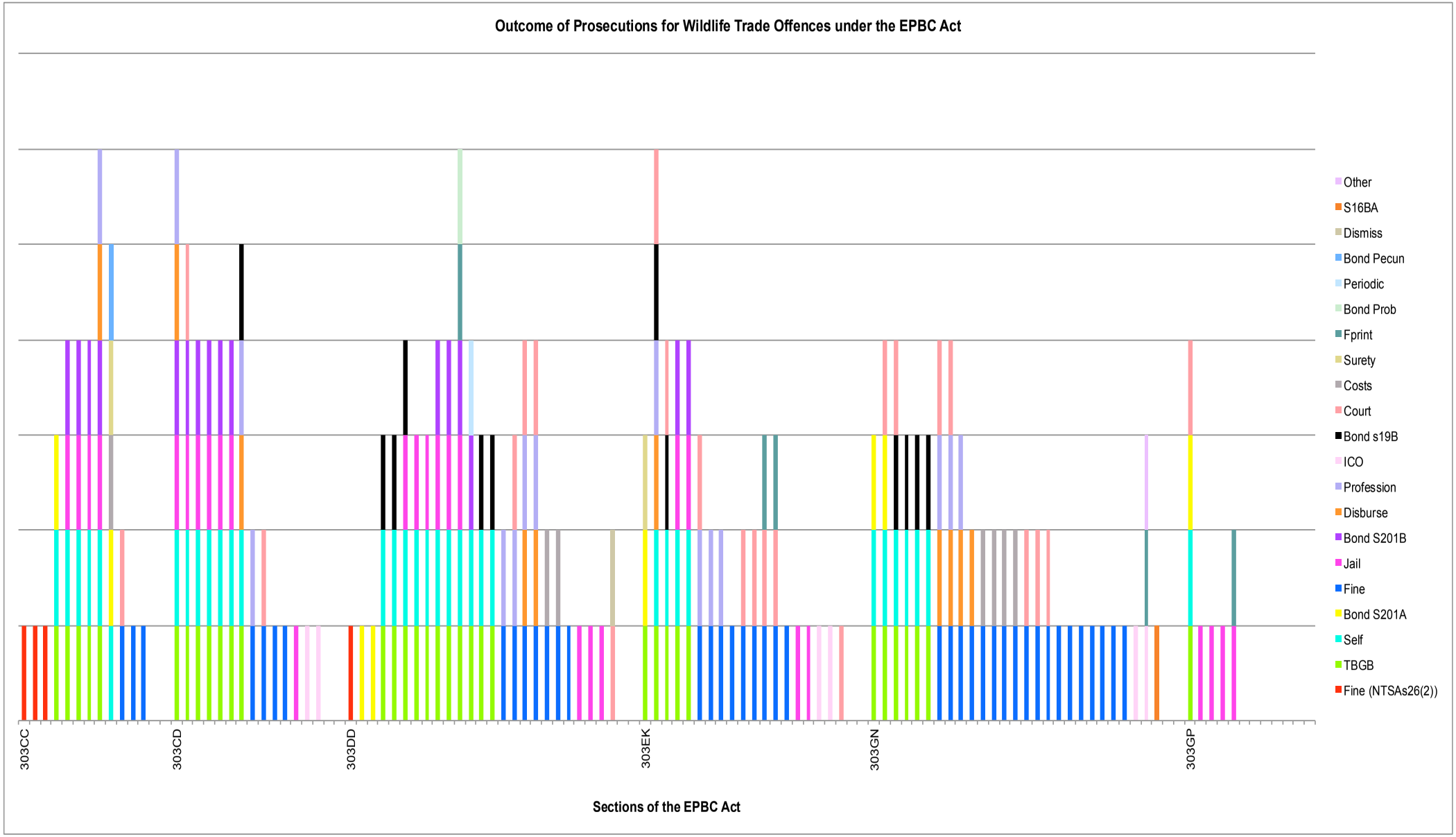

FIGURE 12: OUTCOME OF PROSECUTIONS FOR WILDLIFE TRADE OFFENCES UNDER THE EPBC ACT BY SECTION

As stated, Figure 12 shows a breakdown of the penalties for each of the prosecutions successfully bought by the CDPP for the sections of the EPBC Act shown previously in Figure 11. Some patterns in the sentencing of each offence can be observed and therefore Figure 12 establishes some consistencies, however some fluctuation with the sentencing is also evidenced. Whilst the facts of each case were not provided, this is likely to be due to their differences, for example more severe cases attracted higher penalties, or the individual may have had previous convictions for similar crimes. Further research to explore this correlation was beyond the scope of this thesis but would be useful to confirm any patterns in sentencing and possible inconsistencies.

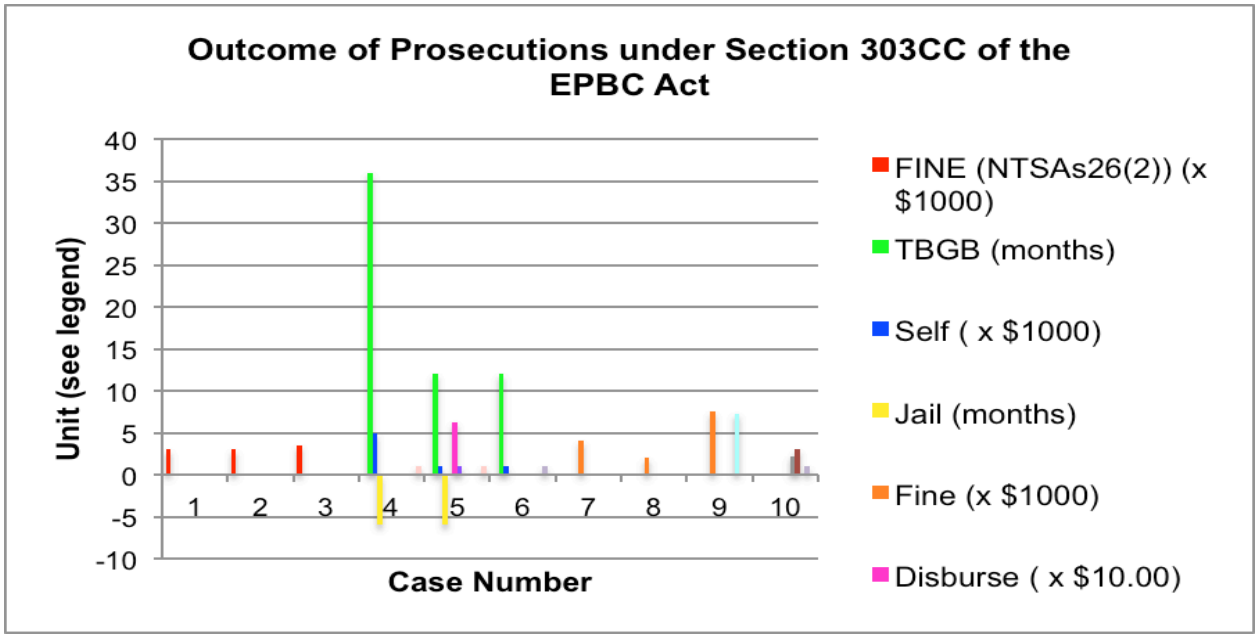

FIGURE 13: OUTCOME OF PROSECUTIONS UNDER SECTION 303CC (EXPORT OF CITES SPECIMENS) OF THE EPBC ACT

Figure 13 shows the outcome for the successful prosecutions bought by the CDPP under section 303CC of the EPBC Act. Cases 1 – 3 demonstrate consistency, where the penalty imposed is a fine and the court may order

imprisonment in default of payment. In these cases, the fine imposed was between $3,000 and $3,500, with the default imprisonment set at 28 days.

Of the cases involving good behaviour (TBGB), it is likely the courts considered Case 4 more severe. The offender in Case 4 received a conditional release order under s. 20(1)(b) of the Crime Act 1914, which included 36 months of good behaviour, $5,000 self-security and 6-months imprisonment. However, the offender in this case was released forthwith - as this could not be shown on the graph, it has been represented as a negative figure to evidence that no time was served. Being released forthwith is defined as, where a defendant has been jailed for a period that is fully suspended after entering a good behaviour bond of a specified time, and then released.[775]

The defendant in Case 5 also received a conditional release order under section 20(1)(b) of the Crime Act 1914. However, the offender was sentenced to 6-months imprisonment, but released forthwith, with a 12-month good behaviour order, $1,000 self-security, $62.80 disbursement fees and $100 profession costs. Similarly, the defendant in Case 6 received a 12-month good behaviour order and a self-security of $1,000, however was convicted and released on a RRO without passing sentence, under s. 20(1)(a) of the Crime Act 1914. Both the sentences passed down in Cases 5 and 6 were substantially lower than the comparator of Case 4, however the courts chose to utilise different sections of the Crime Act when sentencing. As previously

[775] Commonwealth Director of Public Prosecutions, *pers. comm* 22nd June 2016

mentioned, without the facts of the case, it is not possible to understand why the courts gave a more severe penalty in Case 4, however it is suspected this was a more valuable/larger export of CITES specimens and therefore attracted a higher sentence. It would be interesting to understand what differentiates between Cases 4, 5 and 6, as they had similar elements of sentencing, however length of time and monetary value differ.

The three cases solely involving fines, Cases 7-9, demonstrate variety in the monetary value from $2,000 to $7,500. This is a substantial difference, which again could be justified by the severity of the offence. The offender in Case 9, representing the highest of the fines passed down, also received a court fee of $73. The final example of the offences under s. 303CC, Case 10, received a monetary penalty of $3,000 and costs of $224.10.[776]

Figure 13 indicates some consistency in the length of time and monetary value of the penalties issued and the utilisation of different sanctions under s. 303CC of the EPBC Act by the Courts. As discussed in Chapter 3, s. 303CC attracts a maximum penalty of 10 years imprisonment or 1000 penalty units (totalling approximately $180,000) or both.[777] When comparing the maximum penalty available for this offence with the sanctions imposed, the evidence suggests the courts are not applying the highest sentences available to them – although this is not unusual in any legal system. Nonetheless, Figure 13 does demonstrate a few occasions where the courts have issued

[776] Commonwealth Director of Public Prosecutions, *pers. comm* 19th April 2016 (Freedom of Information Act response)
[777] Penalty units can change each year but up until 1 July 2017 were set at $180 for Commonwealth offences.

strict sentences to offenders under s. 303CC of the EPBC Act. However, without more information relating to the facts of each case, it is not possible to determine any possible explanation(s) for the generally low sanctions for these offences. It is possible the courts do not consider the crimes committed to be deserving of, or severe enough, for the maximum sentencing available, although more research is required to substantiate this.

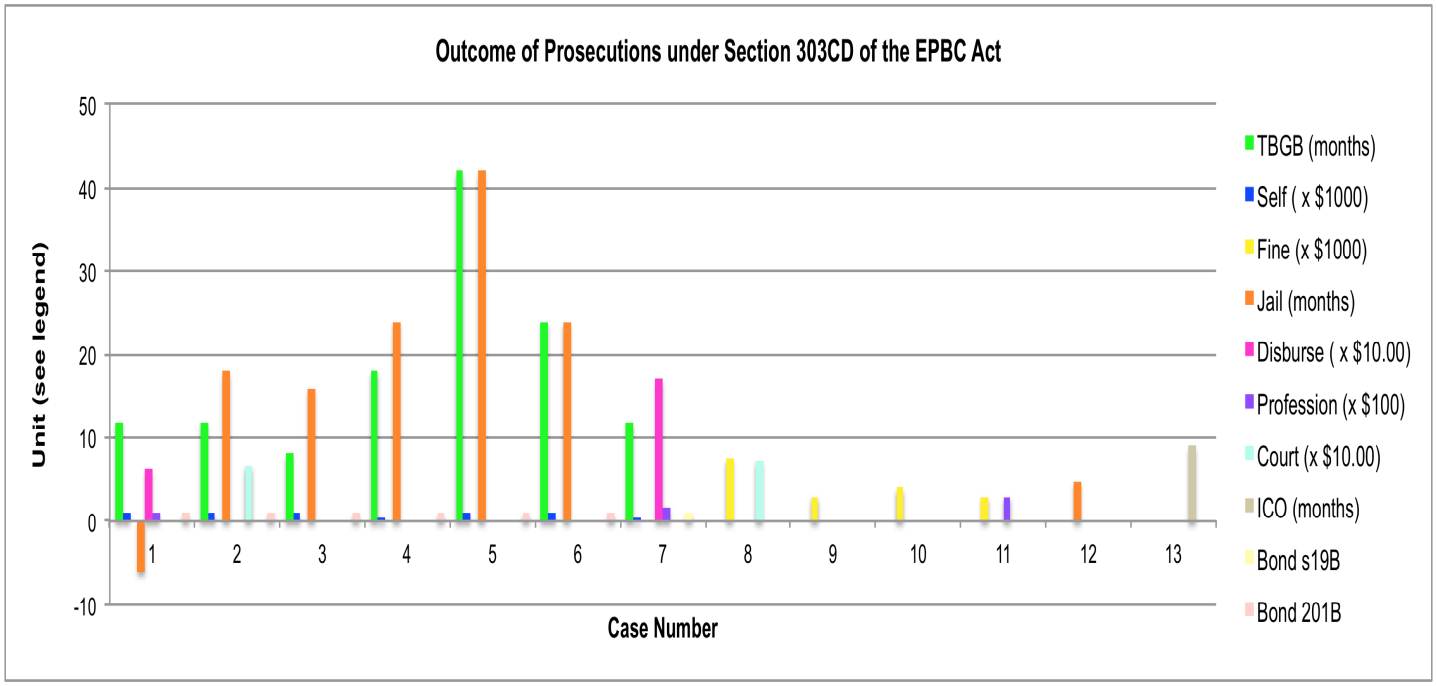

FIGURE 14: OUTCOME OF PROSECUTIONS UNDER SECTION 303CD (IMPORTS OF CITES SPECIMENS) OF THE EPBC ACT

Compared with s. 303CC offences, there has been more variation in the sentences imposed for offences under s. 303CD of the EPBC Act, as shown in Figure 14. Yet, the majority of these cases did impose a period of time for good behaviour and over half the offenders received a custodial sentence. This would suggest that either the courts are more inclined to utilise the

powers available to them, or the cases involving s. 303CD offences are considered more severe.

However, with regard to terms of imprisonment, all of those given good behaviour orders were not required to serve their whole sentence as the court permitted a conditional release order under s. 20(1)(b) of the Crimes Act 1914. For example, the offender in Case 1 was sentenced to 6-months imprisonment, but was released on a suspended sentenced with a 12-month good behaviour order[778] and $1000 self-security fee. In Case 2, the offender was given a partially suspended sentence; of the 18-month sentence given, they were required to serve a minimum of 6 months. Similarly, the offender in Case 3 was also given a partially suspended sentence, having to serve a minimum of 8 months of the 16-month sentence. The offender in Case 4 had to serve a minimum of 18 months of their two-year sentence, compared to Case 6 where the offender only had to serve a minimum of 7 months of their two-year sentence. Finally, in Case 5, the offender had to serve a minimum of 14 months of their 42- month sentence. Therefore, offenders generally only serve a half to a third of their prison term. These cases indicate that whilst the courts are handing down tougher penalties for section 303CD offences[779], these are often weakened by the good behaviour element, through following a typical “parole” type situation.

[778] This is again shown as a negative figure as the offender did not serve any time in prison
[779] When compared to section 303CC offences

Due to the fluctuation in period of time for good behaviour a mean has been calculated to determine an average length of time for this sanction. The overall mean for good behaviour imposed for s. 303CD offences is 18.23 months. Figure 14 shows two cases with higher than the average for good behaviour orders, of 42 and 24 months, one with 18 months and four with lower sentences than the mean. Based on the nature of good behaviour orders, the courts have also sentenced the offender to an amount of self-security. Generally, this is for $1,000, however two of the cases involved the lesser amounts of $250 and $500. It is not certain why this security is less, as the period of good behaviour is equal to, or more than other cases. If the courts were consistently following a pattern, it would be predicted the self-securities would be the same amount, or reflect the good behaviour periods, and subsequently the facts of the case. Both Cases 1[780] and 7[781] also show a disbursement and profession fee, suggesting a third party was involved in the commencement of the offence and that the case was heard in a local court, which permits time and material costs of the Crown prosecutor to be awarded. Along with this, Case 7 saw the court invoke s.19B of the Crimes Act 1914 and therefore the offender was discharged without conviction, unfortunately no further details to explain this were provided under the FOI request.

As with the s. 303CC offences above, some offenders prosecuted under s. 303CD also had fines imposed; these again varied depending on the case. The fines were on a scale including amounts of, $7,500, $4,000 and two

[780] $62.80 and $100
[781] $170 and $180

cases with $3,000, as such it may be reasonable to speculate this is linked to the severity of the crime. One of the offenders sentenced to a fine also received a $73 court cost, something that did not happen in the other cases. Similarly, one of the offenders sentenced to a $3,000 fine, also received a $300 profession fee, which would suggest it was heard in a different court.

The offender in Case 12 was sentenced to 4 months and 25 days imprisonment, a period lower than any of the other imprisonment terms shown in Figure 14. Unlike all the other cases, this offender did not receive a period of good behaviour. It is likely this offender had to serve the whole prison sentence, since on responding to the FOI request there was no information to the contrary, as with other cases. It is difficult to understand why the courts decided to implement a full prison term, rather than a partial one and good behaviour order as seen in the previous s. 303CD cases. In order to understand this, more information would be required around the facts of the case.

Finally, a 9-month Intensive Correction Order (ICO) was imposed in Case 13. This was the only case involving this type of sentencing. An ICO is "an alternative to a sentence of imprisonment that can be made when a court is satisfied that no sentence other than full time imprisonment is appropriate for an offender, and that the sentence is likely to be for a period of 2 years or less."[782] There are two major components of an ICO: first, supervision by a

[782] State of New South Wales (Department of Justice), 'Intensive Correction Orders', (03 October 2018) https://www.correctiveservices.justice.nsw.gov.au/Pages/CorrectiveServices/Commu

Community Corrections Officer, or equivalent dependent on the State, whereby the offender's behaviour is monitored and their rehabilitative needs are addressed; and, second, community service work, whereby the offender undertakes 32 hours of unpaid work in the community each month.[783]

As discussed in Chapter 3, the maximum sentence for offences under s. 303CD is 10 years imprisonment or 1000 penalty units, or both. Figure 14 shows the sentences passed down by the courts for these offences are much lower than those available.

nity%20Corrections/offender-management-in-the-community/intensive-correction-order.aspx 10 October 2018

[783] ibid.

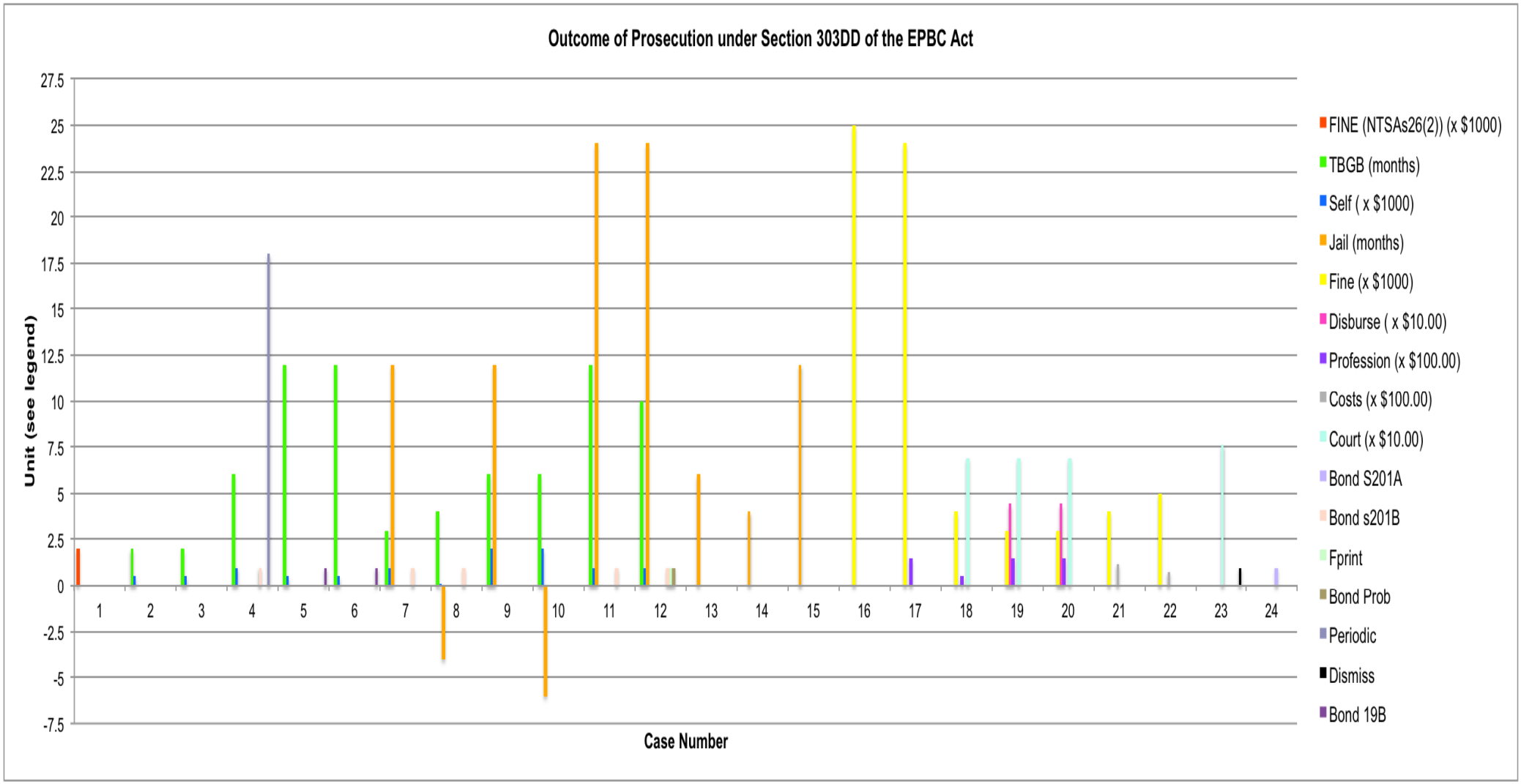

FIGURE 15: OUTCOME OF PROSECUTIONS UNDER SECTION 303DD (EXPORTS OF REGULATED NATIVE SPECIMENS) OF THE EPBC ACT

The outcome of prosecutions under s. 303DD of the EPBC Act, exports of regulated native specimens, is shown in Figure 15, demonstrating the diversity of sentencing outcomes used by the courts for these cases. Case 1 demonstrates the use of a fine where the court may order imprisonment in default of payment. The fine imposed here is $2,000; with the default imprisonment set to 28 days, as expected when comparing with s. 303CC offences above. In the following 11 cases, the courts ordered a period of good behaviour, but this again differs between the cases. For example, Cases 2 and 3 received the same sentencing, 2 months for good behaviour and a $500 self-security fee, implying similar facts and perception of severity by the courts. However, in Case 4 the offender was sentenced to 18 months' imprisonment, with a minimum term of 12 months, with the courts implementing s. 20(1)(b). The offender was also subjected to a 6-month good behaviour order and a $1,000 self-security fee.[784]

In Cases 5 and 6, the offenders were subjected to a good behaviour period of 12 months, and $500 self-security fee, however the courts utilised s. 19B of the Crimes Act 1914 in both these cases. This section empowers the court to either dismiss any charge without recording a conviction[785] or conditionally discharge a person without recording a conviction.[786] Whilst the FOI response highlighted that s. 19B had been applied, it is not certain which of the subsections were applied. It is also not possible to ascertain, without

[784] Commonwealth Director of Public Prosecutions, *pers. comm* 19th April 2016 (Freedom of Information Act response)
[785] Section 19B(1)(c)
[786] Section 19B(1)(d)

knowledge of the precise circumstances of the case why the courts chose not to record a conviction in either of these cases.

Cases 7 and 8 have the same sanction imposed, however the period of time and monetary values vary. The offender in Case 7 received a 12-month partially suspended sentence (s. 20(1)(b) of the Crimes Act 1914 was utilised) with a minimum of 9 months to serve, a 3-month good behaviour order and a $1,000 self-security fee. This compares to the offender in Case 8 who received a 4-month fully suspended sentence (again s. 20(1)(b) was instigated), and was subsequently released forthwith, a 4-month good behaviour order was imposed along with a $100 self-security fee. Cases 9 and 10 had similar sentences applied; however the courts did not use s. 20(1)(b). The offender in Case 9 received 12-months imprisonment, serving a minimum of 7 months, a 6-month good behaviour order and $2,000 self-security fee. In comparison, the offender in Case 10 received 6-months imprisonment fully suspended, resulting in the defendant being released forthwith, a 6-month good behaviour order and $2,000 self-security fee. It is likely the courts considered Case 9 to be more serious when exploring the facts, however the good behaviour order and self-security fees are the same in both cases, so it would be interesting to understand why a higher imprisonment term was imposed in one of these cases. It could be the case that where a ‘more serious’ offence has occurred, there is a higher penalty and subsequently a greater willingness of the court to give a tougher custodial sentence. These comparators also raise the question of why a good

behaviour order is the same length of time, when the length of imprisonment is half.

Cases 11 and 12 see further suspended sentences being applied by the courts; however they also highlight further inconsistencies with the sentencing of s. 303DD offences. In Case 11, the defendant received a 2-year partially suspended sentence, serving a minimum of 14 months, a 12-month good behaviour order and a $1,000 self-security fee. The offender in Case 12 received a 2-year partially suspended sentence, serving a minimum of 14 months, a 10-month good behaviour order, a $1,0000 self-security fee, an order for fingerprints under s. 3ZL of the Crimes Act 1914 and a probation RRO. Again, more information is required to understand why the courts imposed further sanctions on Case 12, but a smaller period of good behaviour when compared to Case 11.

Cases 13 – 15 received jail time only, with no other penalties imposed. It would appear the courts considered these cases based on the seriousness of the crime and sentenced the offender accordingly, explaining why the imprisonment period is different. It is not currently understood why the courts chose not to include a fine and/or a suspended sentence in these cases, or why they differ from the other cases involving imprisonment.

Cases 16 – 22 all received sentencing in the form of fines, with the majority also receiving other monetary penalties. These financial amounts differ substantially, from $3,000 - $25,000, suggestive of a differential in the

seriousness of the crimes involved. However, two cases involving fines of $25,000 and $24,000 could be indicative of the courts imposing more severe penalties for s. 303DD offences, when compared to other wildlife trade offences above.

That being said, the final two cases received little to no sentence at all. Case 23 saw merely a court fee of $76 and a dismissal. Case 24 saw the implementation of s. 20(1)(a), where the court can release a person without passing a sentence. These two particular cases are in contrast to the sentences previously discussed, although in the absence of specific detail it is impossible to draw any firm conclusion.

The maximum penalties for s. 303DD offences are 10 years imprisonment or 1000 penalty units, or both, as discussed in Chapter 3. The evidence in this section suggests the courts are not utilising their full powers with regard to the sentencing these offences. Particularly, the Australian courts have been imposing suspended jail times, whether full or partial, when sentencing offenders to lengths of imprisonment. Whilst the courts will have justifications for this, it is may undermine the deterrent impact in respect of future wildlife trade offenders.

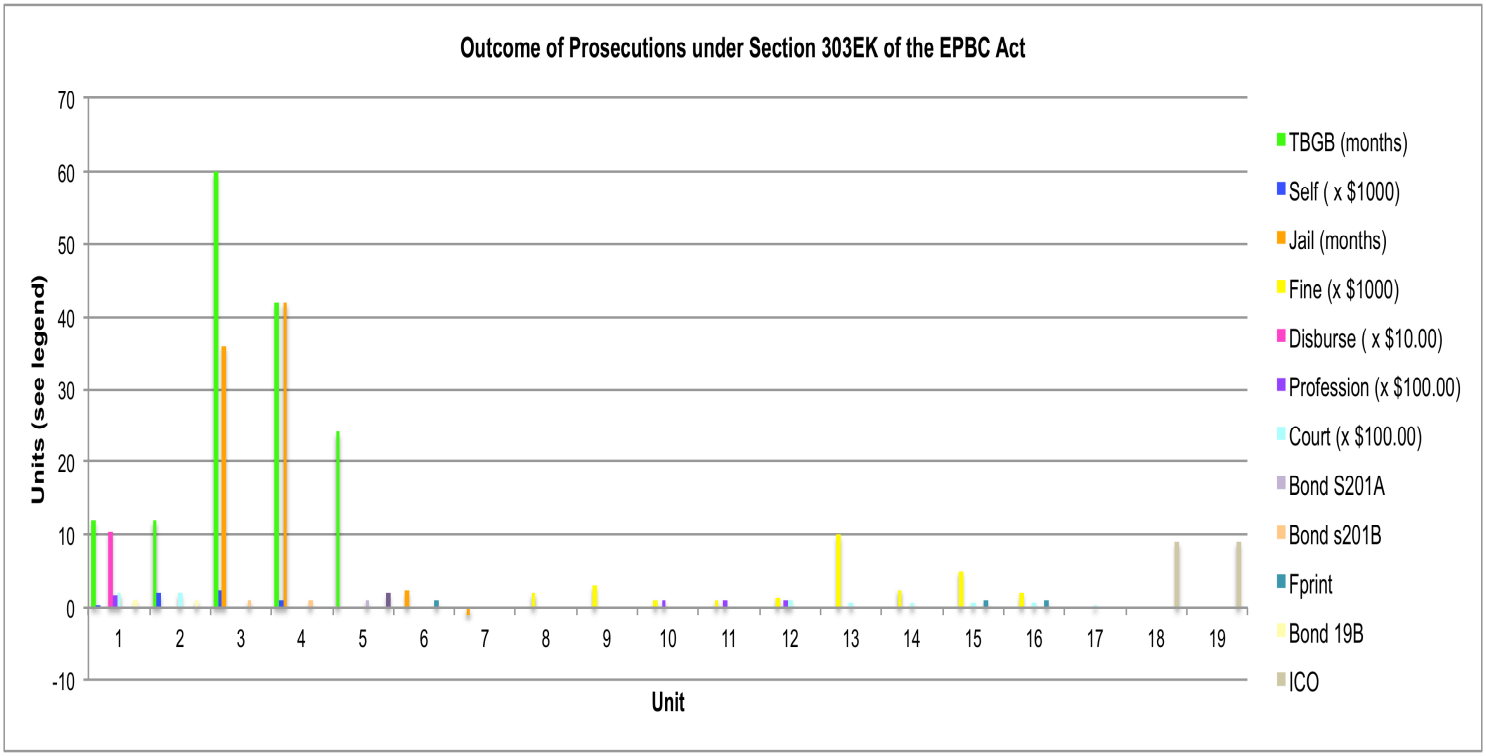

FIGURE 16: OUTCOME OF PROSECUTIONS UNDER SECTION 303EK (IMPORTS OF REGULATED NATIVE SPECIMENS) OF THE EPBC ACT

As with the offences discussed previously, prosecutions under s. 303EK of the EPBC Act have resulted in various sentencing outcomes, as shown in Figure 16. The offenders in Cases 1 and 2 were both discharged without conviction under s. 19B of the Crimes Act 1914, however each received different sentencing. The offender in Case 1 received a 12-month good behaviour order, a $400 self-security fee, $105.50 disbursement costs, $180 profession fees and $200 court fees. However, in Case 2 the offender received a 12-month good behaviour order, $2,000 self-security fee and $200 court fee. The offender in Case 3 was sentenced to 36-months imprisonment, but was given a conditional release order under s. 20(1)(b). The conditions of this order were, serving a minimum of 89 days, a self-security of $2,500 and a good behaviour order of 60 months. Similarly, in Case 4 the offender

received 42-months imprisonment, but was again given a conditional release order under s. 20(1)(b). In this case, the conditional order included serving a minimum of 14-months imprisonment, a 42-month good behaviour order and $1,000 self-security fee. Given the length of imprisonment the offenders in Cases 4 and 5 were sentenced to, it is surprising how small the minimum length of service is, specifically in Case 4. This may be as criminal courts can aggregate the cases, and therefore the outcomes to reduce the number of hearings required to deal with a particular defendant.[787]

In Case 6, the offender was sentenced to 2 months and 10 days imprisonment and to a fingerprints order. Unlike the other cases involving a custodial sentence, the offender in this case had to serve the whole sentence. The offender in Case 7 was sentenced to a period of imprisonment; however on the extract received through the FOI request it only showed a released forthwith with no further information provided and did. The defendants in Cases 8 and 9 were both sentenced to fines of $2,000 and $3,000, respectively. In Cases 10 and 11, the offenders were both sentenced to a $1,000 fine and $100 profession fees. In Case 12, the offender was sentenced to a $1,500 fine, $100 profession fee and $105.70 court costs. Cases 13 and 14 both received a fine, the value of which varied substantially, and profession fees of $76. In case 13, the fine was $10,000, however in Case 14, the fine was for $2,500.

[787] National Judicial College of Australia, 'Multiple or Continuing Offences' (29 November 2017) https://csd.njca.com.au/principles-practice/general_sentencing_principles/multiple_continuing/ 16 May 2019

The defendants in Cases 15 and 16 received similar sentences, however the value varied. In Case 15, the offender was given a fine of $5000, court costs of $81 and an order for fingerprints. In Case 16, the offender received a fine of $2000, court costs of $76 and an order for fingerprints. Without knowledge of the facts, no direct comparison can be made although the suggestion is that Case 15 was considered to be more serious than case 16, shown through the harsher sentencing.

The offender in Case 17 only received a court fee of $41.25; this is substantially lower than all of the other sentencing for s. 303EK offences It is not certain why the courts determined this to be the most appropriate penalty, it may be that they did not consider the crime to be serious in nature or there may be other factors they took into consideration, however without the case details it is not possible to determine. The final two cases resulted in a 9-month intensive correction order.

As seen in Chapter 3, the maximum penalty for s.303EK offences is 10 years imprisonment or 1000 penalty units or both. Figure 16 demonstrates that there is little evidence to suggest the courts are routinely using the higher ranges of the penalties available. Even when the courts are passing out strong sentences, they are reducing the sentences by using s. 20(1)(b) of the Crimes Act 1914.

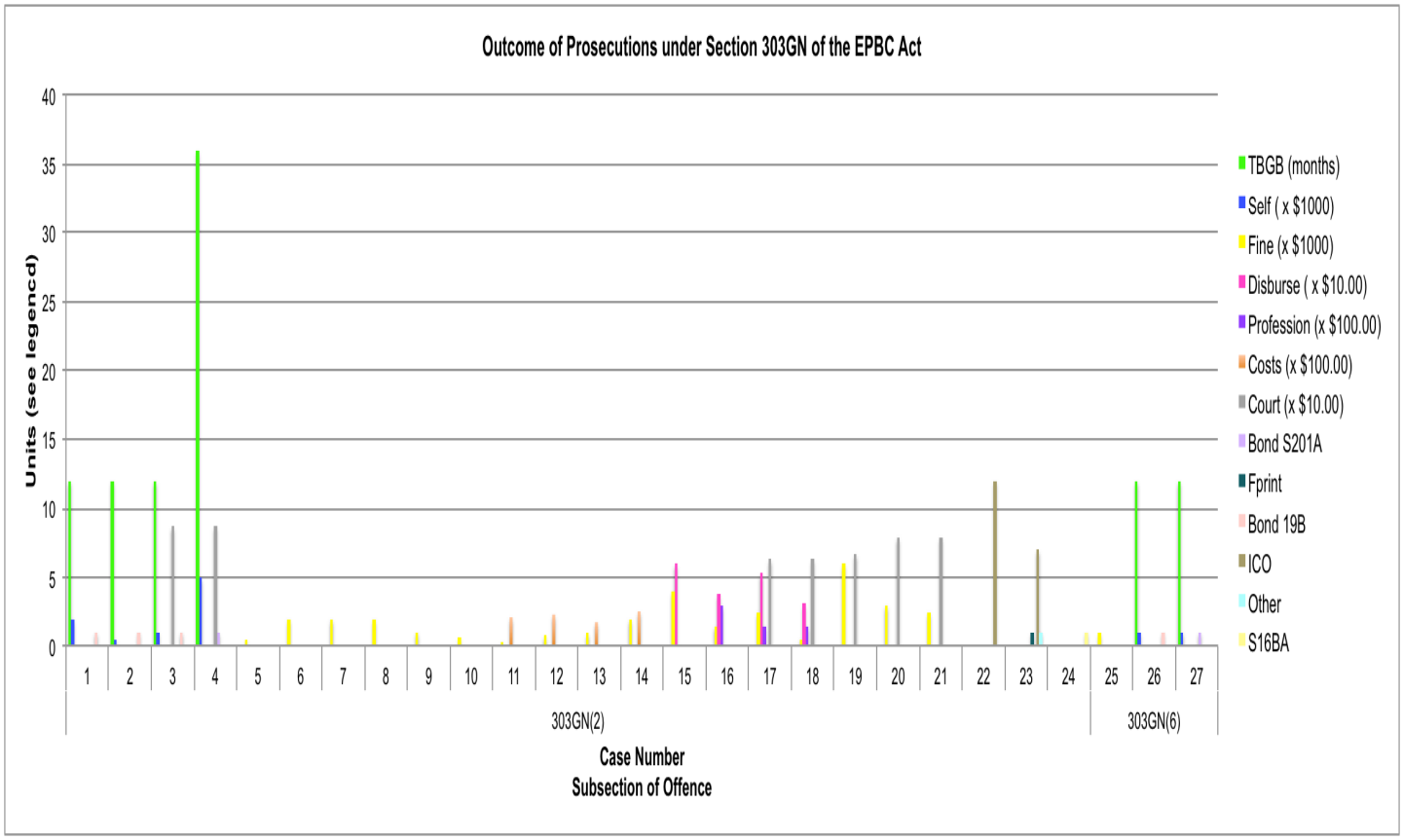

FIGURE 17: OUTCOME OF PROSECUTIONS UNDER SECTION 303GN (POSSESSION OF ILLEGALLY IMPORTED SPECIMEN) OF THE EPBC ACT

Unlike the other prosecutions under the EPBC Act, none of those under s.303GN have resulted in imprisonment of any kind. Of the cases involving this section of the EPBC Act, four resulted in good behaviour periods. Case 1 originally saw the imposition of a 12-month good behaviour order, and a $2,000 self-security fee, however the court consequently utilised s.19B of the Crimes Act 1914.[788] Case 2 saw a 12-month good behaviour order, a $500 self-security fee and the court utilised s.19B of the Court Act 1914. Similarly, Case 3 saw a 12-month good behaviour order, a $1,000 self-security fee and

[788] See previous discussion at page 313.

the court utilised s. 19B of the Court Act 1914, however the offender was also given a $87 court fee. Case 4 utilised s. 20(1)(a) and the court decided to conditionally release the offender without passing a sentence, however they were given a 36-month good behaviour order, a $5,000 self-security fee and a $87 court fine.

The majority of s. 303GN(2) offences saw fines being passed down as the sentence, however the amount and any additional sentences varies. Six of the prosecutions resulted solely in fines, varying from $400 to $2,000, suggesting a differing degree of seriousness when looking at the facts of the case. Four of the prosecutions resulted in a fine, varying from $250 to $2,000, and a costs order, varying from $176.15 to $254.80. Whilst the offenders in these cases received both a fine and costs order, generally the amounts are less than those that just received fines so would suggest they are considered less serious, although more research would be required to confirm this. In Case 15, the offender received a $4,000 fine and a $59.80 disbursement fee, given the amount is more than the previous cases involving fines, it is assumed this was a more serious case. The offender in Case 16 was sentenced to a $1,500 fine, $37.80 disbursement fee and $300 profession fee. Again, whilst the court used more sentencing options in this case, the overall amount is less than that used in Case 15 and therefore was likely to be a less serious case in nature. Cases 17 and 18 received the highest number of sentencing options. In both these cases, the offenders received a fine,[789] disbursement costs,[790] profession costs,[791] and court

[789] Case 17 = $2500 & Case 18 = $500

costs.[792] When comparing the sentencing of both these cases, it appears that the courts considered Case 17 more serious, however the sentencing was less than some of the other cases previously discussed. In the final three cases involving fines, varying from $2500 to $6000, the offenders were also given an order for court costs, varying from $67 to $79.

Figure 17 demonstrates the differing sentencing abilities of the courts in relation to s. 303GN(2) offences and monetary fines. When looking at the sentences passed down, Case 19 received the highest fine ($6000) and therefore seems to have been deemed the most serious by the courts. Generally, the responses in terms of sentences seem grouped within high, medium and low judgements. For s. 303GN(2) offences, there is apparent coherence in the sentencing, however these are commonly in the medium-low group in comparison to offences discussed above.

The offenders in Cases 23 and 24 received intensive correction orders, although the length of time varied. Case 23 was sentenced solely to a 12-month ICO, compared to Case 24, which saw a 7-month ICO imposed. Case 24 also received a fingerprints order and 'other' sentence, although no more information was provided under the FOI request. Finally, Case 25 saw s. 16BA utilised, where guilt was admitted but there was no trial and therefore no sentence passed down.

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[790] Case 17 = $52.80 & Case 18 = $30.80
[791] Case 17 = $150 & Case 18 = $149
[792] Case 17 & 18 = $63.20

Figure 17 also shows the outcome of prosecutions under s. 303GN(6) of the EPBC Act. In one of these cases, the offender received a $900 fine. In the other two cases, the offenders received a 12-month good behaviour order and a $1000 self-security fee. However, in one of these cases s. 19B was invoked, and in the other the court invoked s. 20(1)(a). It is difficult to understand whether there is a pattern for s. 303GN(6) offences as the sample is too small.

As explained in Chapter 3, the maximum sentence for s. 303GN offences is 5 years' imprisonment or 1000 penalty units or both. This section of the thesis suggests that the courts are not utilising their powers and sentencing options for s. 303GN. It is possible the courts do not consider these offences as serious as the others discussed, or in comparison to other crimes, and that is why the sentencing seems more lenient. Otherwise, the facts of the case have been considered and there are justifications for the sentencing, although without more information it is not possible to confirm this.

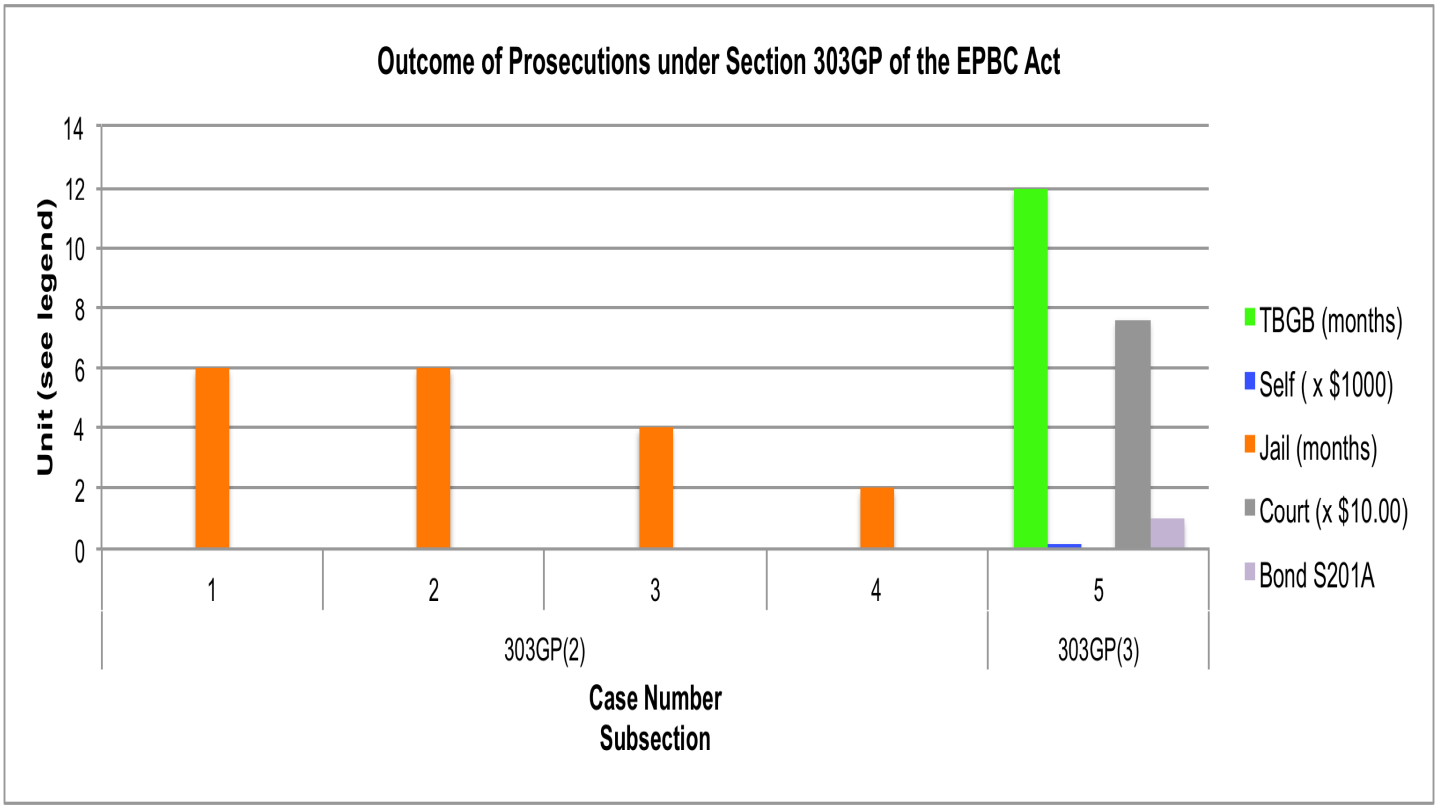

FIGURE 18: OUTCOME OF PROSECUTIONS UNDER SECTION 303GP (CRUELTY – EXPORT OR IMPORT OF ANIMALS) OF THE EPBC ACT

Compared with other prosecutions under the EPBC Act, Figure 18 shows the courts are utilising less sentencing options for s. 303GP offences. This is due to the penalties provided by the EPBC Act, the maximum for this offence is 2 years' imprisonment, as discussed in Chapter 3. Cases prosecuted under section 303GP(2) were all given jail terms, varying from 2 months to 6 months. Given the maximum penalties for this offence, it is apparent the courts are not considering these cases serious in respect of the sentencing.

The case prosecuted under s. 303GN(3) was given a 12-month good behaviour order, $200 self-security fee, $76 court fee, and the court invoked s. 20(1)(a). Based on the maximum penalty for this offence, it is likely the

courts considered Case 5 a moderately serious crime: despite the imposition of a good behaviour order instead of a jail term

Whilst it is apparent that the CDPP is prosecuting wildlife trade offenders under s. 303 of the EPBC Act, it is questionable whether the outcome of these prosecutions are is enough to serve the twin onus of punishment and deterrence. Once more it highlights the findings that, perhaps, the courts are not utilising the full extent of the penalties made available for these offences.

Generally, it has been shown that the Australian courts have instances of imposition of robust penalties for wildlife trade offences, however it is common for these to be weakened by a reduction in sentences. It is possible the courts have given weight to certain facts when sentencing, although further research would be required to substantiate this. It is also possible the courts do not consider the crimes committed to be serious enough to warrant imposing the maximum penalties. This perhaps refers back to judicial appreciation of the implications of the illegal wildlife trade and its wider consequences as discussed in Chapter 2.

It is difficult to compare the results of prosecutions provided by Australia with the research carried out of the UK as there is an incomplete picture and therefore would be unreliable. However, on face value, it appears that the Australian authorities are implementing stricter penalties, although there is requirement for improvement in both countries to help tackle the illegal wildlife trade.

5.6 UK Border Force

Along with UK police forces and the CPS, the UK Border Force Agency was also approached to provide statistics under the FOI Act. As with some police forces, Border Force stated the excess fees exemptions and did not provide the information requested. Nevertheless, research identified some statistics on the number of seizures made by the UK Border Force Agency. As the results were produced through secondary research rather than from FOI responses, there are discrepancies between the dates involved compared with the police and CPS' results above. Consequently, the results shown in this section, up to and including 2013-2014, are the most recently available through a search of databases and thus demonstrate an indicative but incomplete statistical picture for the UK. This may be due to limited resources, human or otherwise, reorganisations or altered enforcement priorities. The following results provide as much insight into Border Force's actions in combatting the illegal wildlife trade as possible at the moment. In an ideal situation, a whole picture would be shown in regard to this information, thus it is recommended this forms the basis of further research.

TABLE 2: UK BORDER FORCE CITES SEIZURES FROM 1 APRIL 2008 – 31 MARCH 2011[793]

2008/9	**Number of seizures**	**Number of items seized**	**Weight of items seized (kg)**
Live animals and birds	37	1,212	n/a
Parts and derivatives of endangered species	109	1,536	54,3
Ivory	13	24	2.2
Plants	53	2,100	1,124.2
Other CITES listed species	49	600	78.9
Preparations of traditional medicines that include parts or derivatives of endangered species	63	4,435	309.3
2009/10	**Number of seizures**	**Number of items seized**	**Weight of items seized (kg)**

[793] Home Office, 'Wildlife Crime: Session 2010-12', (UK Parliament, 08 March 2012) https://publications.parliament.uk/pa/cm201012/cmselect/cmenvaud/writev/1740/wild41.htm 17 May 2018

Live animals and birds	21	563	n/a
Parts and derivatives of animals or birds	99	509	20,002.8
Parts and derivatives of plants and live plants	38	36,393	23,109.3
Ivory	18	431	2.27
Timber or wood products	21	2,283	2,441
Coral, Caviar, other CITES not listed (includes live coral)	52	845	2,301.6
Preparations of traditional medicines that include parts or derivatives of endangered species	119	812,117	1,141
2010/11	**Number of seizures**	**Number of items seized**	**Weight of items seized (kg)**
Live animals and birds	8	1,620	nia
Caviar	16	n/a	18.07

Parts and derivatives of animals or birds	94	2,634	6.1
Parts and derivatives of plants and live plants	28	4,921	19,457
Ivory	15	44	3.3
Timber or wood products	32	835	10,867,7
Coral and other CITES listed species	20	160	27
Preparations of traditional medicines that include parts or derivatives of endangered species	173	32,239	519.3

Table 2 reveals the number of CITES seizures made by UK Border Force between 1 April 2008 and 31 March 2011. Firstly, it is worth noting that the headings covered changed over the years, which could be due to a change in demand for illegal wildlife specimens, or due to the information required by CITES and other officials from each country when reporting their statistics. The results in Table 2 could be indicative of trends related to the demands for certain specimens protected under CITES and the UK's implementing legislation. For example, the number of seizures relating to "preparations of traditional medicines that include parts or derivatives of endangered species" increase from 63 to 2008/9 to 119 in 2009/10. Whilst this may indicate the

effectiveness of Border Force at intercepting the import/export of these products, it is necessary to explore the data set out in columns 3 and 4 of Table 2. In 2008/9, 4,435 specimens were seized, totalling 309.3kg under the 'traditional medicines' heading. This compares to 812,117 items and 1,141kg for the same type of CITES specimen in 2009/10. The increase in the number of items and weight of seizures could suggest that not only is Border Force intercepting more, but the demand for these products is increasing; or it may indicate a stable market with far better enforcement of it.

In simple terms, this shows the following information:

TABLE 3: THE STATISTICS OF TABLE 2 SHOWN IN SIMPLE TERMS BETWEEN 2008-2011:

	Number of seizures	**Number of items seized**	**Weight of items seized (kg)**
2008/9	324	9907	1566.7
2009/10	368	853141	48997.97
2010/11	386	42453	30898.47

Whilst the number of seizures only increased by 62 over a three-year period, this might still be considered successful in relation to the interception of illegal wildlife products. However, as stated, it is difficult to say with certainty how effective Border Force is at intercepting, as it is impossible, given the nature of the trade, to determine how many "successful", undetected imports/exports

have been made by offenders involved in the illegal wildlife trade both within and across UK borders.

The number of items seized has fluctuated over the three-year period discussed in Tables 2 and 3. As the number of seizures has only increased by 44 between 2008/9 to 2009/10, it is apparent that the shipments being intercepted are much larger than those in 2008 and 2010. This again, could be due to the demand element of trade highlighted previously in this chapter and in Chapter 2. This also coincides with the weight of items seized column that shows a similar fluctuation to that of the number of items seized.

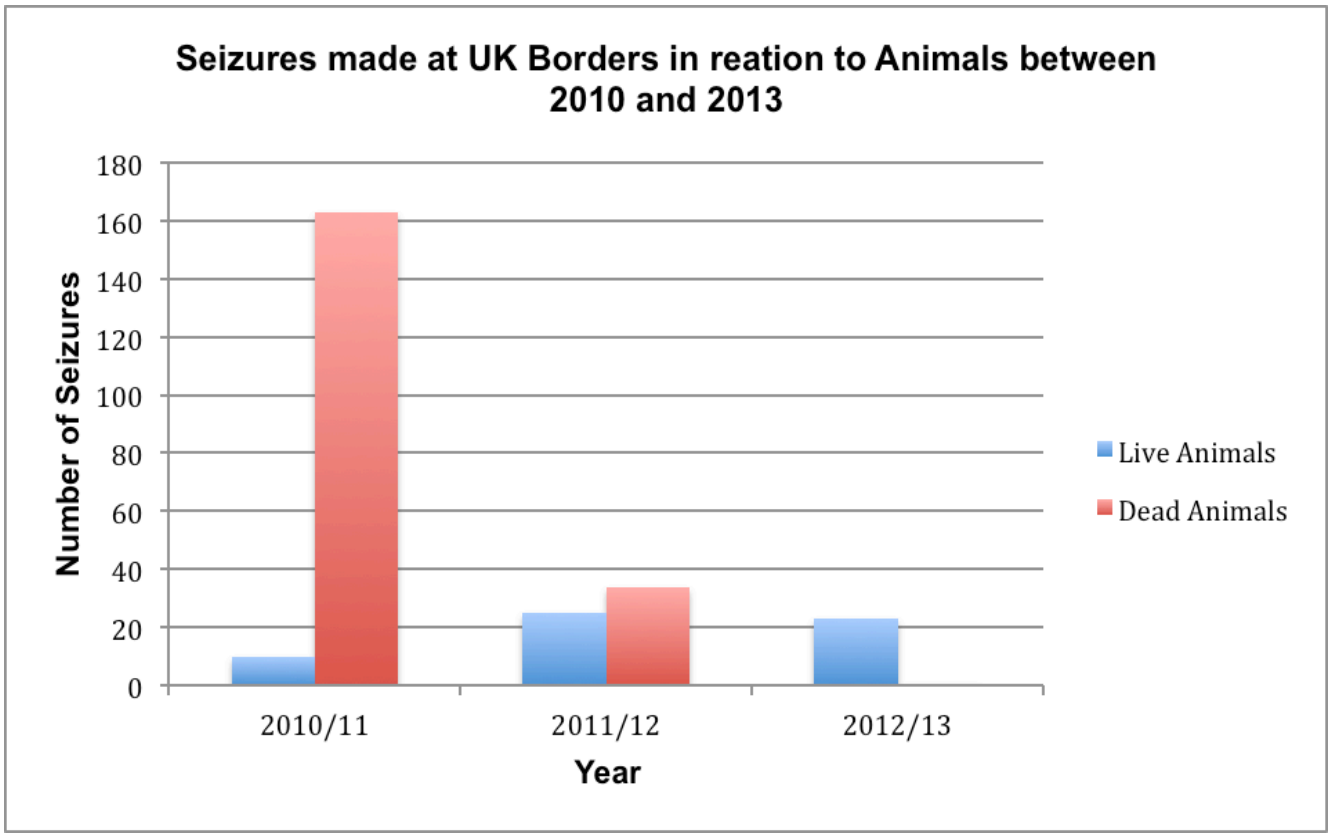

FIGURE 19: NUMBER OF SEIZURES MADE AT UK BORDERS IN RELATION TO ANIMALS BETWEEN 2010 AND 2013[794]

Figure 19 determines the number of live and dead animals varies significantly. It should be noted that the live animal figures only refer to those seized under CITES, whereas the dead animal figures concern the number of seizures where dead animals were found alongside live animals in the same consignment. Figure 19 demonstrates an upward trend in the number of live animal seizures at UK Borders from 2010/11 – 2011/12. This increases from 10 seizures to 25, an increase of 250%, potentially indicative of a growth in illegal activities of offenders attempting to bring illegal wildlife into the UK.

[794] Border Force, 'FOI release: Seizures made at UK borders between 2010 and 2014', (02 July 2014) https://www.gov.uk/government/publications/seizures-made-at-uk-borders-between-2010-and-2014/seizures-made-at-uk-borders-between-2010-and-2014 17 May 2018

However, it could also be due to the UK Border Force being more effective at identifying wildlife cargo through an intelligence-led approach. The number of live specimens then slightly decreases in 2012/13 to 23 seizures at UK Borders. There is no absolute way of knowing what reason is behind the increase, or decrease, in live or deceased animals. Regardless, Border Force's effectiveness at tackling the illegal wildlife trade is shown through the increase of seizures and intercepting the individuals attempting to bring these specimens into/out of the UK. Further, the results indicate the continuation of a set of significant market drivers manifested in the demand aspect of the trade.

Figure 19 also shows the decrease in dead animals found within the live seizures discussed above. In 2010/11 the number of dead animals was 163, decreasing to 34 and then 0 in the subsequent years. This could be due to traffickers taking better care of animal welfare to ensure survival during transit. As traffickers' motivations are primarily financial, it is in their best interest to keep animals alive. That being said, where the initial cost of the specimen is low, for example in range states, and it is traded in a high demand market, Wyatt et al, suggested that only a small survival rate is required for it to become highly profitable to the offender.[795] It is also possible, and probable, that the animals are being intercepted before the deaths can occur. So, the speed of interception by the UK Border Force is helping to maintain animals' lives and subsequently the species' numbers, if they are able to be returned and/or reintroduced into their native country. For

[795] Wyatt, T., *et al*., 'Corruption and Wildlife Trafficking: Three Case Studies Involving Asida', (2017) 13(1) Asian Criminology 35 - 55

2010/11, the number of live animals seized does not tally exactly in Figure 19 and Table 2, therefore these results should be examined with caution, although the information has been taken from reliable sources.

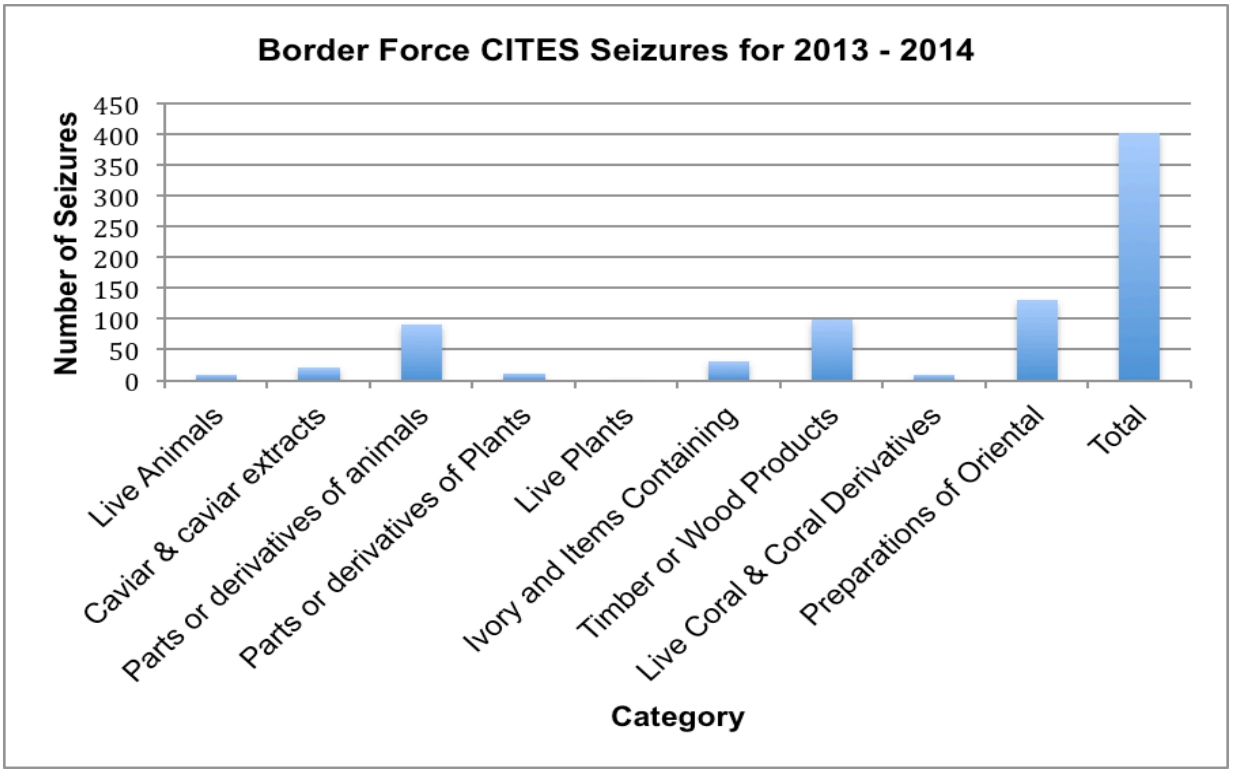

FIGURE 20: NUMBER OF BORDER FORCE SEIZURES IN THE UK FROM 2013 – 2014 BY CATEGORY AND TOTAL[796]

Figure 20 looks at the number of seizures made by the UK Border Force Agency between 2013 – 14 in relation to specific categories, whilst also providing a total figure for the year. The graph helps show any category that may be in higher demand during this period, for example, parts or derivatives of animals, timber or wood products and preparations of oriental medicine have the highest seizure rates during this period.

[796] UK Government, 'Border Force CITES Seizures and Volumes', https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/294435/Border_Force_CITES_Seizures_and_Volumes.pdf 17 May 2018

Overall, the results in this section demonstrate that the number of seizures made by the UK Border Force Agency increased exponentially over the period between 2008 and 2014. These results suggest Border Force's effectiveness at intercepting illegal wildlife trade specimens and ensuring they do not reach destination markets thus removing a financial reward for traffickers. Nevertheless, it cannot be said conclusively that this is not related to factors discussed previously. It also may be that the number of seizures made has increased because the trade itself has grown, and thus there are more shipments to intercept than in previous years. A change in domestic situations may impact upon this, by prioritising enforcement and the use of additional powers to ensure interception of wildlife trade shipments.

Unfortunately, it has not been possible to identify how many arrests were made in relation to the seizures discussed in this section, and therefore it has not been possible to explore the sentencing in relation to these offences. It is recommended that this is explored separately, if possible, to determine whether the sanctions laid down for Customs offences, as discussed in Chapter 3, utilise the powers available to the Courts for these crimes.

5.7 Australian Customs Act

The FOI request to the CDPP also asked for the number of prosecutions in respect of the illegal wildlife trade under the Customs Act. The response was as follows:

> "There appear to be no prosecutions that may relate to the illegal wildlife trade in the Customs Act and no relevant provisions were identified in the Customs Act. All prosecutions were extracted from the

> Commonwealth DPP database and are provided for your information. There appear not to be any seizures under the Environment Protection & Biodiversity Conservation Act or the Customs Act."

However, the extract provided shows two cases involving animal imports[797] and one involving plant imports.[798] These cases were prosecuted under section 234(1)(d)(i) of the Customs Act. As such, the offenders were prosecuted of intentionally making or causing a false or misleading statement to an officer. Unfortunately, no other information was provided by the CDPP and therefore they are unable to be explored further.

5.7.1 Border Force

Based on the response from the CDPP, a FOI Act request was also sent to the Department of Immigration and Border Protection within Australia for statistics relating to seizures and detention under the Customs Act and EPBC Act. Whilst a response was given in respect of this FOI Act request, it should be noted that the results are for wildlife offences and not necessarily indicative of the extent of illegal wildlife trade detection within the Australian Border Force.

Firstly, it was highlighted that the Regulated Goods Policy Section within the Department of Immigration and Border Protection are responsible for developing policy in regard to the wildlife provision of the EPBC Act. However, the FOI Act request demonstrated that this Section does not hold any updated statistics for the seizure of illegally traded wildlife and wildlife

[797] In 2008 and 2011
[798] In 2013

products at the border, nor any updated data regarding subsequent prosecutions. It seems questionable how the Regulated Goods Policy Section can effectively develop policy without any statistical data relating to the subject matter at hand. That being said, it is possible it has access to the statistical information requested but do not hold it on file. This would enable the authority to develop policy but would provide also provide the negative response gained through this FOI request. The aggregation of wildlife offences makes it difficult for interested parties to know what is happening in respect of specific offences.

Whilst the section above could not provide any statistics, the Corporate Performance Reporting team identified two Annual Reports that contained data relating to the detection/seizure of wildlife. These two Annual Reports provided data for the years 2005/06 and 2006/07. The Department has not reported on detections of wildlife and CITES either corporately or operationally since the 2006/07 Annual Report, and as such, no further documentation exists which falls within the scope of this FOI. The Department still publishes annual reports,[799] stating they retain a focus on serious and organised crime, however they do not list wildlife as one of the indicative types.

The information for the UK started on the 1st September for each given year, whereas the date range for this data is 30th June for each given year and

[799] Department of Home Affairs, 'Annual Report 2017-18' (May 2017) https://www.homeaffairs.gov.au/reports-and-pubs/Annualreports/2017-18/01-annual-report-2017-18.pdf 16 May 2019

therefore it is not a completely comparable dataset. When looking at the datasets below, major offences refer to an incident where a record of interview is conducted or prosecution action commenced, whereas a minor offence refers to an incident where a record of interview is not conducted or prosecution action not commenced.

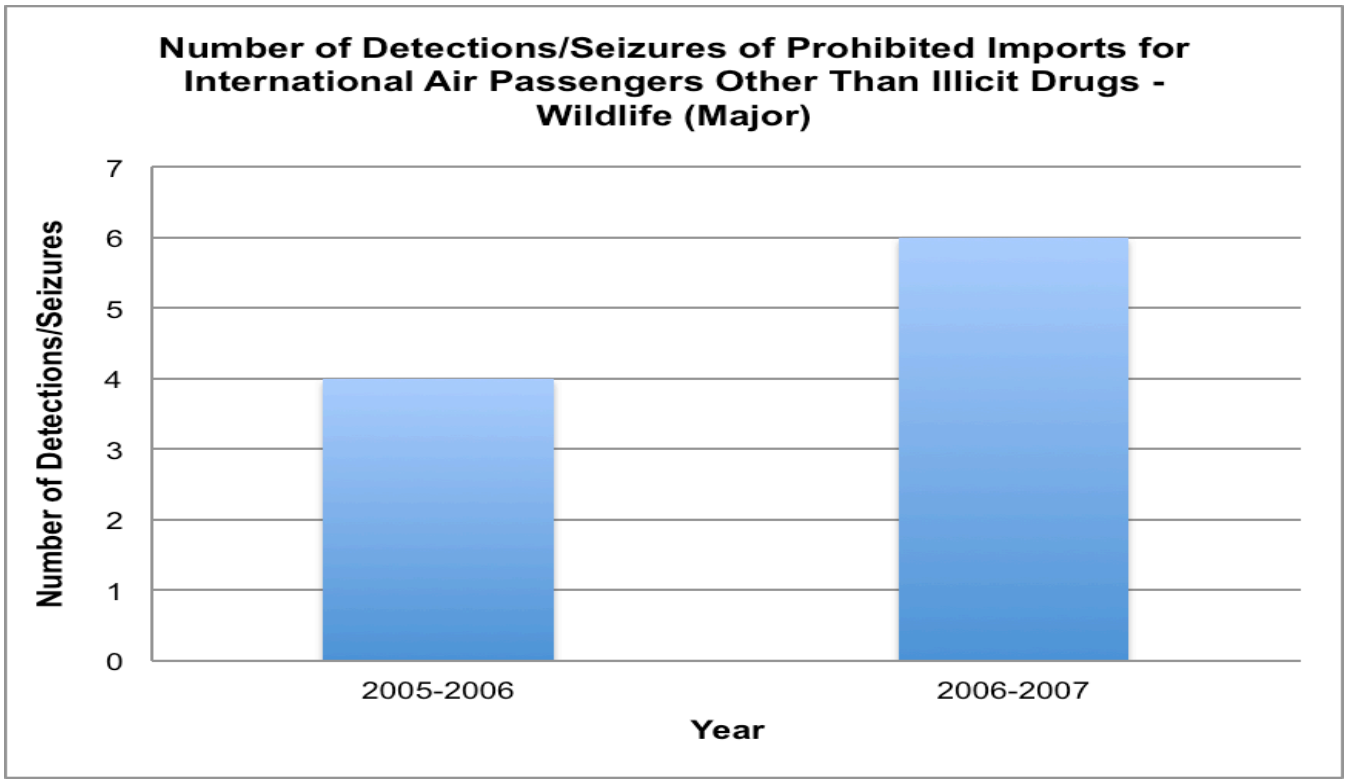

FIGURE 21: NUMBER OF DETECTIONS/SEIZURES OF WILDLIFE SPECIMENS - MAJOR OFFENCES[800]

Figure 21 demonstrates an increase in the detection/seizure of wildlife products by the Australian Border Force over a two-year period. This

[800] Australian Customs Service, 'Annual Report 2005-06', (13 October 2006) https://www.homeaffairs.gov.au/ReportsandPublications/Documents/annual-reports/ACBPS_AR_2005-06.pdf 04 June 2018; Australian Customs Service, 'Annual Report 2006-07', (09 October 2007) https://www.homeaffairs.gov.au/ReportsandPublications/Documents/annual-reports/ACBPS_AR_2006-07.pdf 04 June 2018

increase could be due to more illicit activity or to changes in priorities etc. within the organisation. However, it is difficult to understand the reasoning behind this increase when it is over such a short time period. Consequently, whilst the data demonstrates an increase in detection of wildlife trade offences, without more statistics to illuminate this, it is difficult to ascertain the extent to which Australian Border Force are helping to combat this illicit activity.

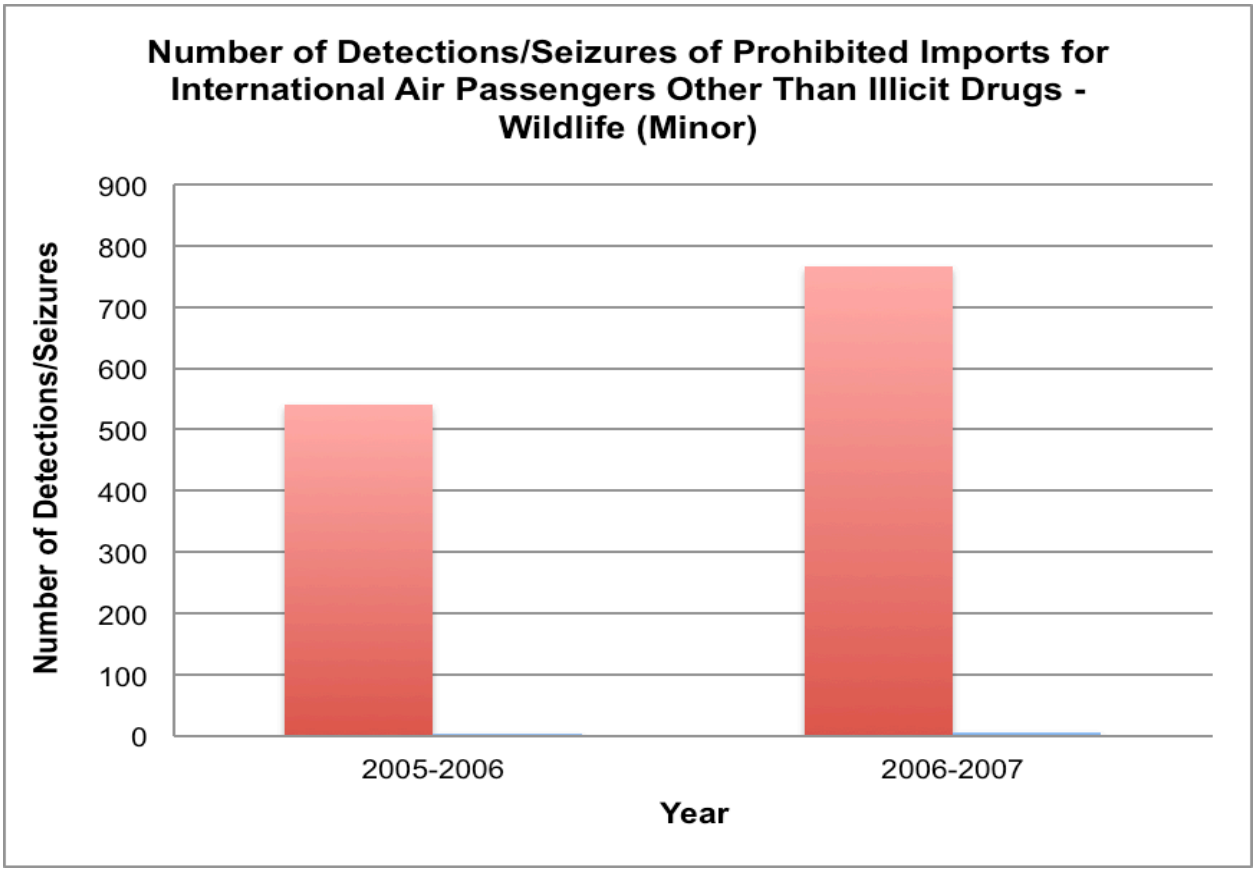

FIGURE 22: NUMBER OF DETECTIONS/SEIZURES OF WILDLIFE SPECIMENS - MINOR OFFENCES

Figure 22, shows an increase in the detection/seizure of wildlife specimens over the two-year period, but again it is difficult to identify the reason for this

increase when it is over a short time frame. However, when comparing the data shown in Figures 21 and 22, it is apparent that the Australian Border Force has dealt with more 'minor' offences relating to wildlife trade: with over 500 more detections in 2005/06 and 700 in 2006/07, minor offences far exceed major within the two year period. Whilst it is understood that minor offences refer to those that did not face interview and/or prosecution, it is not understood why this is the case. Without understanding the justifications for the determining the offences 'minor', and therefore why no interview or prosecution was necessary, it is hard to analyse how effective it been at tackling the illegal wildlife trade. As it is not possible to determine that question through this research, it is recommended further investigation take place into what constitutes a minor wildlife trade offence according to Australia's Border Force to establish how effective it has been at detecting wildlife trade offences.

Along with the data above, the FOI response included consultation with the Investigations Division for any relevant data it held in relation to the request. The Investigations Division only held data from 2009 and therefore only provides a partial picture. The Investigations Division relating to wildlife holds a total of 369 separate records, although it was not specified if this was wildlife trade offences, or all wildlife crime. These records relate to cases, offences, prosecution plans and referrals. These cases may be linked to one or more referrals, and the same offences may be used in many prosecution plans. Consequently, the total number of records identified within the recording systems do not accurately identify either the number of arrests,

charges, subsidiary charges, seizures or the outcome of these offences. In order to ascertain the exact data, each of the individual cases would need to be opened, assessed and any relevant information extracted. This would then need to be collated in order to provide a response to the FOI request. As there is no report available from the systems that would enable the retrieval or collating of information into a discrete document, the information was unable to be released under the provisions of the FOI Act. Based on this, the Department was able to provide a negative response to this section of the request as compliance would substantially and unreasonably divert the resources of the Department from its other operations.[801]

On a superficial view of the data presented, the UK's Border Force would appear to outperform its Australian counterpart with regard to wildlife detection and seizures between 2009 and 2015. Obviously though, as noted there are a number of reasons why any such conclusion should be treated with caution. First, there are incomplete datasets on which to base an analysis. Second, there may well be significant differences in the volume of illegal wildlife trade products being imported and/or exported through the UK, so that, in fact, a proportional rate of detection might show a different picture. Otherwise it may be due to factors such as institutional priorities: it is clear that these have shifted over time and both services now refer more extensively to immigration detection; and also wildlife offences may be seen as a component of wider serious and organised crime responses. However, as this research has only looked at federal law within Australia, it could be that

[801] Section 17(2) of the Freedom of Information Act refers

the detections and seizures are being made through State legislation and therefore has not been covered within the FOI responses. State legislation is precluded from the research in this thesis on grounds of space, but it would certainly be an area worthy of more extensive investigation. Such an investigation would enable the development of a clearer appreciation of into the effectiveness of the Australian Border Force.

In the same way, the UK is shown to be more effective at detecting/seizing illegal wildlife trade products, although market sizes on the basis of population are very different and so proportionally there are likely to be more offences committed (and detected) in the UK. However, without more information into the sentencing of these offences, it is difficult to ascertain precisely which country can be considered more effective in responding to the illegal wildlife trade. In addition, there is no comparative information on which to identify how seriously the UK authorities consider wildlife trade offences. Therefore, whilst it is apparent the Australian Border Force is playing a role in the detection and deterrence of wildlife trade offences, more information is required to identify how effective they are at doing so.

5.8 Conclusion

The results provided under the FOI responses from each country have demonstrated varying approaches and, ultimately, degrees of effectiveness in their implementation of wildlife trade legislation within their legal system. The UK had a relatively high response rate to the FOI requests; however there appeared to be inconsistencies in the use of exemptions by certain organisations. The results demonstrated an increase in the number of arrests

in areas with more communities and cultures, and in places with ports and airports, as would be expected. There were inconsistencies between data relating to charges from the police and prosecution service, however this can be justified through the use of exemptions by organisations. It is difficult to assess the effectiveness of the UK authorities' responses as the outcome of the prosecutions were not provided and the only information was supplied through further research of media and legal databases. Nevertheless, it has been shown, that the UK has the highest prosecution rates for wildlife trade offences, demonstrating the basic effectiveness of the authorities in addressing this this illicit trade. The determining factor, which requires further research, to consider the UK as completely effective at enforcing wildlife trade legislation is information around the sentencing of these offences. The results found in media reports and legal database searches suggest the UK courts are not imposing sentences at the higher ranges which are available in the legislation, for wildlife trade offences, however this does not provide a complete representation of case law. It is therefore recommended further research is carried out to identify UK's strengths, or otherwise, with regard to the outcome of wildlife trade convictions.

The Australian authorities provided the most in-depth response to the FOIA requests, providing all the information requested. Whilst Australia has not prosecuted as many cases under the EPBC Act, it is possible organisations are charging offenders under State legislation and therefore has not formed the basis of this research. It is also worth noting that Australia has a lower population, in comparison to the UK. The results do confirm that Australia's

courts are imposing sentences for wildlife trade offences, although they are not utilising the full powers provided to them under the EPBC Act. Therefore, it is arguable whether Australia's sentencing for these crimes is acting as a deterrent to future offenders, when more can be done to prevent individuals participating in this illicit activity.

The results also show that the UK and Australian authorities are not exploiting other mechanisms available to increase the sentencing of offenders and deter others from committing these offences. The FOI request asked for any subsidiary charges brought against defendants and the Proceed of Crime Act had been used in any of the cases, however both countries gave a negative response in this respect.

6.0 South Africa Results and Discussion

As described in Chapter 4, a FOI request was sent to South Africa's police, prosecution and border force authorities, in the same way as it was for their UK and Australian counterparts, to obtain their data on wildlife trade offences. The request was made according to the procedures that their relevant authority published online.[802] Upon receipt of the request there seemed to be confusion among the departments as to the process for requesting the information.[803] Finally, the request was referred to the Directorate at the national Department of Environmental Affairs, the body responsible for compiling the National Environmental Compliance and Enforcement Report. This report is an annual summary of the compliance and enforcement activities undertaken by environmental offices within a specific reporting period. These reports are compiled on the basis of specific compliance and enforcement indicators that are requested from South Africa's provincial parks and environmental authorities. Some of the information requested was contained in the contents of these reports, however the reports only include criminal enforcement activities undertaken by environmental authorities and not those that have been executed by the police service.

Therefore, South Africa effectively failed properly to respond to the FOI request, as no positive or useful response was received from the police, prosecution service or border force agency. To compound the limitation, the

[802] South African Government, 'Make a freedom of information request' (24 October 2018) https://www.sa.gov.au/topics/about-sa/government/FOI-application 16 May 2019
[803] See Appendix IV

National Environmental Compliance and Enforcement Reports only date back as far as financial year 2009-10. In this sense, then, the reports do not map precisely onto the time periods for those requested from and provided by the UK and Australia. As a result, the data that these reports do provide – extremely valuable and illuminating as it is - cannot be used to provide a reliable comparison with Australia and the UK. Nevertheless the reports are able to provide a rich set of data. In the context of this thesis the data serves to offer insight, by way of illustrative examples in respect of the efforts of the South African authorities are undertaking to curb wildlife trade offences. Overall, South African organisations appear to be imposing tougher sentences for wildlife trade offences, compared with the UK and Australia. In addition, South African organisations are utilising a range of mechanisms, such as proceeds of crime legislation, in a deterrent capacity, something that was not seen in Chapter 5.

The National Environmental Compliance and Enforcement Reports make reference, in certain circumstances, to the illegal wildlife trade. When discussing NEMBA, however, the offences are not always separated out. Therefore, caution is required when considering the results involving this legislation.

6.1 2009-2010

The first reference to wildlife trade offences in the National Environmental Compliance and Enforcement Report for this period comes under the Summary of Outstanding Performance. In this section, the report highlighted that a case involving the illegal possession of four rhino horns, eight rhino feet

and one rhino received the highest sentence period of direct imprisonment with option of a fine for environmental offences. The defendant was sentenced to R250,000 or 5 years imprisonment with R220,000 fine or 2 years imprisonment suspended for 5 years.[804] Under section 102(1) of NEMBA, a person found guilty of an offence is liable to a fine not exceeding R10million and/or imprisonment not exceeding 10 years. Research suggests prosecutors are attempting to secure lengthy sentences for wildlife trade offences, specifically those involving rhinos, and in some circumstances are utilising other legislation relevant to the crime to help increase the sentencing.[805] In this particular case, it is not apparent whether prosecutors applied other legislation, however it does demonstrate that the courts did not apply their full powers given the sentence was half that available.

Under the compliance monitoring section of the report, there is reference to NEMBA although it does not distinguish between offences. During the reporting period, 2009-10, there were 50 cases of reported contraventions for all NEMBA offences. The average compliance monitoring for environmental offences during this period was 134.26,[806] demonstrating NEMBA offences were sufficiently lower. It is not clear how many of these NEMBA offences involved the illegal wildlife trade; as such it is likely this number would be significantly reduced.

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[804] Department: Environmental Affairs, 'National Environmental Compliance & Enforcement Report: 2009-10', https://www.environment.gov.za/sites/default/files/docs/necer2009_10report.pdf 28 June 2018

[805] Law Society of South Africa, 'Legislative Framework in Respect of Rhino Poaching in South Africa', http://www.lssa.org.za/upload/SADCLA%202016%20Rudi%20Aucamp%2018%20August%202016.pd f 28 June 2018

[806] Rounded to 2 decimal places

There is no other statistical information provided in relation to wildlife trade offences in South Africa during the 2009-10 period. However, the report does discuss issues and solutions in respect of biodiversity enforcement and compliance; it states that improvements should be made through the appointment of a new Directorate with the Biodiversity and Conservation branch. It states that a forum was created or all biodiversity-related law enforcement to be collated, accessed, distributed and tasked to specific subgroups. Investigators and police officers have access to this forum to discuss, share and exchange information on wildlife related law enforcement and organised crime incidents. Given the existence of this forum, it is surprising that the department's contact struggled to answer the FOI request, as all information should be accessible from one location. Either the departments are not utilising the forum correctly, or the FOI departments have not been given access.

The report continues to discuss how legislative changes help compliance, for example through the publication of the national CITES Regulations in 2010[807]. Following this, the report highlights cases involving other national wildlife regulations; and those involving State legislation, which for reasons of access and space fall outside the scope of this research. It is notable that there was an on-going case mentioned relating to the illegal wildlife trade and therefore this will be considered further in the 2010-11 report discussed below.

[807] National Environmental Management: Biodiversity Act 2004 (Act No. 10 of 2004) Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) Regulations No R. 173

Finally, this 2009-10 report discusses the links between South Africa and INTERPOL and how this cooperation has helped to tackle wildlife crime. Operations that were undertaken include Operations Tram and Mogatle, both of which focused on the illegal wildlife trade. Whilst this report does not go into detail, there is further information discussed in the 2010-11 edition below. Additional research into these operations provides little information about South Africa's specific involvement and success of these operations within its borders.

The 2009-10 report establishes that South Africa was making some effort to tackle wildlife trade offences, however during this period the work by organisations to combat the trade in endangered species appears to be underdeveloped: at least in terms of later outcomes. South Africa has since implemented mechanisms to help improve its effectiveness at combatting the illegal wildlife trade, and results in subsequent reports should evidence whether these have assisted the organisations involved.

6.2 2010-2011

In the 2010-11 issue of the National Environmental Compliance and Enforcement report,[808] there were examples of court sentences obtained in respect of NEMBA offences, specifically s. 57.[809] One offender received a

[808] Department: Environmental Affairs, 'National Environmental Compliance & Enforcement Report: 2010-11', https://www.environment.gov.za/sites/default/files/docs/necer2010_11report.pdf 30 June 2018

[809] Department: Environmental Affairs, 'National Environmental Compliance & Enforcement Report: 2010-11',

R130,000 fine or 5 years imprisonment for the illegal sale of rhino horn. Under s. 57(1), another defendant was sentenced to a R30,000 fine and/or 3 years imprisonment, suspended for 5 years for the illegal possession of threatened or protected species. Another offender was sentenced to a R20,000 fine and/or 3 years imprisonment, suspended for 3 years under the same legislation. One defendant was fined R5,000 under s. 57(1) of NEMBA for keeping three cheetahs without a permit. The final case of relevance involved a defendant being sentenced under s. 57(2)(b) of NEMBA to a R5,000 fine and to pay a storage fee of R45,000 for the illegal import of 42 wildebeest. Thus a range of outcomes are revealed which possibly reflects certain conservation priorities and/or the nature of the offence: offences may be differently perceived as being purely administrative in nature (permitting), or more significant in the content of the threat to the species concerned (sale of products). The cases demonstrate that whilst cases result in convictions, the courts utilise a range of penalties and in none of the cases were the penalties approaching the maximum available to them. Whilst there is evidence of prosecutions under NEMBA, the report also highlights cases brought under state legislation. While this might be indicative of additional effort by South African authorities, it falls outside the scope of the research, although it could be helpful to establish how prosecutions under state legislation contribute towards South Africa's effectiveness at tackling wildlife trade offences.

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https://www.environment.gov.za/sites/default/files/docs/necer2010_11report.pdf
section 4.1.3, page 12 - 13

As with its predecessor, the 2010-11 report highlights the reported legislative contraventions for all NEMBA offences. Again, these are not separated out based on the offences committed and therefore the aggregated figure should be treated with caution. During the 2010-11 financial year, 110 offences were reported; more than double the previous year.[810] In the 2009-10 edition, there was discussion suggestive an increased focus on biodiversity and conservation issues, evidenced by an increase in reported legislative contravention. Therefore, this might suggest either an increase in NEMBA offences, or, perhaps more likely, a shift in focus in the enforcement priorities of the environmental organisations included in these reports. This potential shift in focus could have resulted in increased detection of wildlife offences, and therefore be a suggestion that South Africa's organisation are prioritising their efforts, however further evidence would be required to demonstrate this and so it is worth looking at other reports to see if there is any cooperating evidence.

The 2010-11 report continues by discussing environmental judicial decisions, which took place in South Africa during this period. One case involved the defendant being accused of chopping up the carcass of a mature female Loggerhead Turtle. The defendant was convicted under s. 57(1)[811], read with ss. 1, 56(1)[812], 101(1)(a), 102 and Chapter 7 of NEMBA.[813] In this case, the

[810] Department: Environmental Affairs, 'National Environmental Compliance & Enforcement Report: 2010-11', https://www.environment.gov.za/sites/default/files/docs/necer2010_11report.pdf 30 June 2018 Section 4.3, page 18
[811] Carrying out a restricted activity involving a specimen of a listed threatened or protected species without a permit
[812] See section 3.6.3

defendant was sentenced to 5 years' imprisonment, a sentence that enables conversion of a portion of it into correctional supervision. The State Advocate who worked in the specialised environmental crime section of the DPP, argued that the offence committed was extremely serious and this case should be used to deter others from wanting to destroy protected animals, specifically with a high biodiversity and tourism value.[814] When sentencing the individual, the Magistrate in this case highlighted the maximum penalties available, agreed this was an extremely serious offence and that a strong message must be sent to those people wanting to poach and destroy South Africa's endangered species.[815]

However, even though the Magistrate highlighted the severity of the case, the defendant was only given half the maximum sentence. Whilst 5 years represents a significant penalty for this offence, it was open to the court to have gone further. In such cases however, the proportionality of the sentence should always be a factor, and a range may take account of a variety of case-specific mitigating or aggravating factors. The unreported nature of the majority of these cases renders it a challenge to determine them. Further research on this specific area could assist in ascertaining these relationships and their impact on the outcomes of cases. As with other areas of law the extension of sentencing guidelines for environmental offences, with specific reference to the illegal wildlife trade, would prevent uncertainty and help the

[813] Along with The Threatened or Protected Species Regulations and Section 250 of the Criminal Procedure Act.
[814] Department: Environmental Affairs, 'National Environmental Compliance & Enforcement Report: 2010-11', https://www.environment.gov.za/sites/default/files/docs/necer2010_11report.pdf 30 June 2018 Section 6, page 32 - 33
[815] ibid.

courts reach appropriate sentencing decisions, see section 5.4.3 regarding the UK sentencing guidance.

Unlike the previous report, a section is dedicated to the presentation of a summary of the convictions consequent upon the illegal hunting of rhinos and dealing or possessing of rhino horn. This reflects a change in the South African authorities' priorities to help tackle the illegal wildlife trade. It also suggests the main focus for this country is the rhino horn, possibly as an intended response to an emergent threat, which is prioritised over the generic trade of all endangered species of wild fauna and flora. Poaching and hunting legislation was not included in the Legislation Review Chapter, however, since receiving the FOI response, it is now considered relevant and therefore the results will be discussed. The additional focus on rhinos, is perhaps indicative of a shift in enforcement response; targeting resources and bringing visible outcomes to act as a deterrent to others. Not all wildlife species, as contemplated by the CITES Appendices, are facing the same threats from trade, legal or illegal. Those which become critically endangered may do as a result of a number of factors examined in Chapter 2, and so offering effective protection to the most threatened – or most iconic – may demand targeted action from the authorities.

In the first case presented, a number of co-defendants were found guilty on charges including illegal hunting of rhino and possession of unlicensed firearms and ammunition. Accused 1 and 3 were sentenced to 9 years imprisonment without the option of a fine. Accused 2 was sentenced to 5

years imprisonment without the option of a fine. In another case, the defendant was arrested at an airport in possession of a rhino horn,[816] claiming it had been purchased for medical purposes. Following a guilty plea, the defendant was sentenced to a fine of R300,000 or 5 years' imprisonment, which was suspended for 5 years. This sentence seems low, considering its suspended nature, when set against the maximum available given the weight of rhino horn and the fact that the offender was attempting to smuggle it out of the country. In the next case detailed in the report, the defendant pleaded guilty to the dealing and transportation of two rhino horns. The defendant was the legal owner of a rhino that had died; and was apparently attempting to recover the difference between the insurance pay out and what the rhino was actually worth. By the time of sale, however, the moratorium prohibiting the sale of horns had come into effect. The defendant in this case was sentenced to R130,000 or 5 years' imprisonment.[817] When compared with the previous case, this seems a more robust penalty – given the known provenance of the horn - although other features, such as a focus on the purpose of the moratorium may have been at play. In the absence of a transcript of the judgment, this however can only be speculative.

Another successful reported prosecution brought pursuant to s. 57(1) of NEMBA, resulted in a number of defendants being convicted for a variety of counts.[818] These included, dehorning five rhinos, the possession and

[816] Weighing 4kg
[817] Department: Environmental Affairs, 'National Environmental Compliance & Enforcement Report: 2010-11', https://www.environment.gov.za/sites/default/files/docs/necer2010_11report.pdf 30 June 2018 Section 6, page 37
[818] ibid, *S v Venter & Nel* – page 37

unlawful sale of eight rhino horn, and the unlawful sale of a further three rhino horns. The defendants in this case came to a plea and sentence agreement which involved 6 years' imprisonment, suspended for 5 years on certain conditions. These conditions included testifying about information supplied to the investigation officer. The existence of the plea-bargain was presumably of significance in the outcome, as it otherwise would appear to be out of step with the cases noted otherwise in the report. This case involved significant criminality. Possibly in that connection, and as part of the means to ensure that the offenders gained no benefit, a confiscation order was also granted, in the amount of R660,000. This latter aspect demonstrates the use of the Prevention of Organised Crime Act 1979 to confiscate funds gained through illicit activity and represents an additional tool for the authorities to use by way of deterrence.

Cases involving the direct hunting of rhino though seem, in the main, to attract an immediate custodial sentence. The illegal use of firearms in the first two of the cases presented compounds the offence in terms of its perceived seriousness. The first of these cases involved a number of defendants who were convicted on charges of the illegal hunting of a rhino and the illegal possession of firearms.[819] The first defendant was sentenced to 6 years' imprisonment; with the accomplices both receiving 3-year terms. A subsequent reported case resulted in a defendant convicted of the illegal hunting of a rhino and illegal possession of a firearm, being sentenced to 10

[819] Firearms Control Act 2000

years' imprisonment, of which 3 years were suspended for 5 years.[820] The apparent similarity between the cases suggests that a higher tariff applies in respect of the hunting, as opposed to trading. It certainly would appear to reflect a more robust sentencing pattern.

However, in another reported case, a different offender was convicted on a charge of illegal hunting of a rhino, receiving a sentence of R50,000 or 2 years' imprisonment of which R30,000 / 2 years was suspended for 5 years.[821] The outcome again appears at odds with the predecessor cases and the general sense that a hunting offence brings with it increased scrutiny. There was no charge of an illegal firearms offence however and this might have been significant. The apparent leniency of the sentence seems at odds with the available remedies in the legislation discussed in Chapter 3. Finally, two defendants were convicted under s. 57(1) of NEMBA for the illegal hunting of a rhino, possession of rhino horn and contraventions of the Firearms Control Act 2000.[822] In this case, the defendants were arrested after a shoot-out with game rangers where they were found in possession of firearms and rhino horn. The rangers found the carcass of a rhino, and the state proved, by means of DNA, that the rhino horns found were from the carcass. The state provided evidence to help secure a high sentence in this case. Both defendants were sentenced to an effective 20 years' imprisonment. It is not difficult to appreciate the reasoning involved in the

[820] Department: Environmental Affairs, 'National Environmental Compliance & Enforcement Report: 2010-11', https://www.environment.gov.za/sites/default/files/docs/necer2010_11report.pdf 30 June 2018, *S v Xaba* – page 38
[821] ibid – *S v Gumede*
[822] Act No. 60 of 2000

leap here to the significant sentencing outcome. As well as a metaphorical 'smoking gun' in terms of the horn and carcass, there was a literal one. Compounding, or aggravating factors such as resisting arrest and potentially attempted murder would serve to increase sentence in any jurisdiction. In this case in particular serves to reinforce the particular, and dangerously violent, challenges faced by enforcement authorities in range states, which are not so acutely obvious in destination markets.

As with the previous report, the 2010-11 document also provided some discussion around Biodiversity Enforcement and Compliance. It found that during the 2010-11 financial year, 389 rhinos were illegally hunted in South Africa. During the same period, 214 suspected rhino poachers were arrested, revealing a moderate reaction rate from South Africa, however given the number of hunted rhino more is necessary to combat this crime to prevent the hunting from occurring. A total of 16 suspected rhino poachers were killed in armed conflict with park officials during the same period. Along with the cases discussed above, 3 defendants were arrested in Kruger National Park (KNP) suspected of rhino poaching, when found guilty they were sentenced to imprisonment ranging from 5 to 9 years each. It is possible this sentence was enhanced due to the fact they were in the national park at the time of arrest. Another defendant was found guilty of possession a rhino horn at an airport and was sentenced to a fine of R300,00 or 5 years' imprisonment. It has been observed in this edition, that the courts in South Africa are considering offences relating to rhinos as particularly serious and trying to sentence accordingly.

The discussion section continues to outline other mechanisms South African authorities will apply in order to help strength their compliance and enforcement of biodiversity enforcement and compliance.[823] These mechanisms are aimed, primarily, at tackling poaching offences to help conserve the rhino population within South Africa. Mechanisms to become available to enforcers include (but are not limited to), increased deployment of rangers, increased operational equipment[824] and acquisition of a new intelligence management system. Whilst these mechanisms will strength South African organisation's reaction to wildlife trade offences, they will also become part of a the wider toolkit available to enforcers. Additionally, and as noted above, the South African authorities have taken part in a number of coordinated operations with INTERPOL. The detail of three of these were set out in this report and provides insight into the challenges faced by the authorities, as well as the amounts of illegally taken material and the monetary worth incentivising the criminals.

Operation Mogatle, for example, was a transnational operation targeting wildlife crime across southern Africa, resulting in "the location and closure of an illegal ivory factory, the seizure of nearly 200 kilos of ivory and rhino horn with a market value of more than one million dollars, as well as the arrest of

[823] Department: Environmental Affairs, 'National Environmental Compliance & Enforcement Report: 2010-11', https://www.environment.gov.za/sites/default/files/docs/necer2010_11report.pdf 30 June 2018, section 9, page 57

[824] Radio communications, motorbikes, night vision equipment and purchase of aircraft

41 people."[825] Six countries were involved in this two-day operation, with nearly 200 officers from police, national wildlife, customs and national intelligence agencies, carrying out inspections and raids on markets and shops.[826] Checks were also made on suspect vehicles at check points at borders, utilising sniffer dogs,[827] for the first time during a wildlife crime operation, provided by South African and Swaziland police. It has been stated "the success of Operation Mogatle is not only in relation to the seizures and arrests…but is a demonstration of the commitment of national and international law enforcement and other involved agencies to working together to combat wildlife crime."[828] INTERPOL also indicated that this was just the first step, claiming the information gathered as part of the operation will assist law enforcement globally, to identify smuggling routes and eventually make further arrests.

Operation Tram was a collaborative effort involving police, customs, wildlife law enforcement agencies and specialised units from 18 participating countries[829] aiming to combat the illegal trade in endangered species, with specific attention made to traditional medicines.[830] This operation resulted in the seizure of products valued at over €10milliion, the arrest and prosecution

[825] INTERPOL, 'Illegal ivory and rhino horn trade target of INTERPOL co-ordinated operation across southern Africa', (18 May 2010) https://www.INTERPOL.int/News-and-media/News/2010/PR036 30 June 2018
[826] ibid.
[827] As discussed in section 2.7
[828] INTERPOL, 'Illegal ivory and rhino horn trade target of INTERPOL co-ordinated operation across southern Africa', (18 May 2010) https://www.INTERPOL.int/News-and-media/News/2010/PR036 30 June 2018
[829] This included (but is not limited to) Australia, Canada, Italy, New Zealand and the UK
[830] INTERPOL, 'INTERPOL co-ordinated operation targets illegal trade in wildlife medical products', (05 March 2010) https://www.INTERPOL.int/News-and-media/News/2010/PR014 30 June 2018

of numerous criminals and the exchange of over 150 intelligence reports.[831] It is considered that this operation demonstrated the commitment of INTERPOL and its member countries in combatting the illegal trade in endangered species. Operation TRAM established that environmental criminals cross borders and display high levels of organisation, international law enforcement organisations share these characteristics in their efforts to apprehend those criminals.[832]

Operation Ramp was also included in the 2010-11 report, which followed from the success of Operation Tram, to combat against the illegal trade of reptiles and amphibians. It was a worldwide operation involving 51 countries which resulted in arrests, seizure of thousands of animals as well as products valuing more than €25million.[833] International cooperation is an essential means by which to confront globalised criminal networks and South Africa's participation as a key range state underscores the breadth of its enforcement response. Similar to the other operations, INTERPOL emphasised the importance of international cooperation, collaboration and dedication of law enforcement organisations to help tackle the illegal wildlife trade.

While these high profile operations make a significant contribution to the disruption of transboundary crime groups, the enforcement pull in range

[831] INTERPOL, 'Operations', https://www.INTERPOL.int/Crime-areas/Environmental-crime/Operation 30 June 2018
[832] NTERPOL, 'INTERPOL co-ordinated operation targets illegal trade in wildlife medical products', (05 March 2010) https://www.INTERPOL.int/News-and-media/News/2010/PR014 30 June 2018
[833] INTERPOL, 'INTERPOL co-ordinated operation targeting illegal trade in endangered reptiles leads to arrests and seizures worldwide', (02 November 2010) https://www.INTERPOL.int/News-and-media/News/2010/PR089 30 June 2018

States will also necessitate a more persistent and long-term focus. Effective sentences for domestic offenders therefore have a continuing importance, and the 2010/2011 report was arguably demonstrative of the courts' willingness to support the policy position taken by the relevant authorities.

6.3 2011-2012

The first reference to NEMBA in the 2011-12 National Environmental Compliance and Enforcement Report is under a summary of outstanding performance.[834] In the context of the report this *outstanding performance* related to a conviction obtained under s.57 of NEMBA[835] where the offender received a sentence of 12 years' direct imprisonment without the option of a fine, however details of the crime were not provided. This was considered an example of the highest sentence of direct imprisonment without a fine option for an environmental offence during the financial period 2011-12. It is substantially higher than that reported in the summary of outstanding performance highlighted in the 2009-10 report and is indicative of a progressive hardening of the judicial attitude to such offences. Whether that is driven by prosecution authorities' efforts or a wider appreciation of the impact of biodiversity loss more generally is not clear, and is worthy of further study, as a number of factors and influences which are beyond the scope of this thesis may be at play – such as the impact of, say, international cooperative enforcement.

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[834] Department: Environmental Affairs, 'National Environmental Compliance & Enforcement Report: 2011-12', https://www.environment.gov.za/sites/default/files/docs/necer2011_12.pdf 01 July 2018

[835] Carrying out a restricted activity involving a specimen of a listed threatened or protected species without a permit

In a similar vein to its predecessor, the 2011-2012 report showcases examples of sentences in respect of convictions for offences under s. 57 NEMBA offences. Two cases in particular are worthy of note. In the first, the offender was sentenced to R1,000,000 fine or 4 years' imprisonment, with a further 4 years suspended for 5 years for the illegal possession of threatened or protected species.[836] In the other case, the defendant was convicted for the illegal possession of rhino horns and was sentenced to 10 years' direct imprisonment without the option of the fine, the courts utilising the full imprisonment term available to them. In all three of these cases, the sentences are substantially higher than those applied in similar cases in previous years. It is possible that, when exploring the facts of the cases, the court has considered those discussed in the 2011-12 report more serious. However, it is also possible the courts were considering wildlife offences in general to be more serious through greater understanding of the consequences and therefore opting for higher penalties when sentencing offenders.

There were 100 reported legislative contraventions in respect of NEMBA offences during the 2011-12 financial period, slightly lower than the previous year. Obviously, the possibilities here range from a lower rate of offences being committed, perhaps due to the disruption of networks, though to a lack of efficacy on the part of the enforcement authorities. Given the observable

[836] Department: Environmental Affairs, 'National Environmental Compliance & Enforcement Report: 2011-12', https://www.environment.gov.za/sites/default/files/docs/necer2011_12.pdf 01 July 2018, section 4.1.3, page 3

change in priorities towards key species and respect of the sentencing of offences, it is unlikely that enforcement authority prioritisation of certain offences was any less. Nevertheless, fewer offences linked to the illegal wildlife trade were mentioned. Given the previous reports discussed various improvements and the introduction of new mechanisms, it is possibly reasonably to expect an increase in wildlife trade enforcement, so far this is not evidenced, or that the procedures they have implemented have had a deterrent or "displacing" effect. That said, the effectiveness of enforcement measures is not only measured by numbers progressing through the criminal justice system, but also by the fact that there are less opportunities to offend. Proactive contemporary conservation and enforcement methods, as discussed in Chapter 2 may well be impactful as well.

The next section of the 2011-12 report relevant to the illegal wildlife trade shows a summary of convictions in relation to the illegal hunting of rhinos and the dealing in and possession of rhino horn. The first case discussed was that which was included in the 2010-11 section as on going and is therefore not part of Figure 23 below. The defendants in these cases were convicted pursuant to NEMBA, state legislation and for ancillary offences, which were rolled-up in the prosecutions so as to facilitate the imposition of more rigorous penalties. Again, whilst some of this more general, criminal, legislation was not included in the explanation of applicable measures in Chapter 3, it is relevant here to demonstrate the South African authorities' effectiveness in response to combatting the trade in endangered species. As is shown in Figure 23, the sentencing fluctuates, as would be expected, depending on the

facts of the case, however, the courts do seem to be imposing higher sentences when there is an additional, compounding features as has been suggested above.

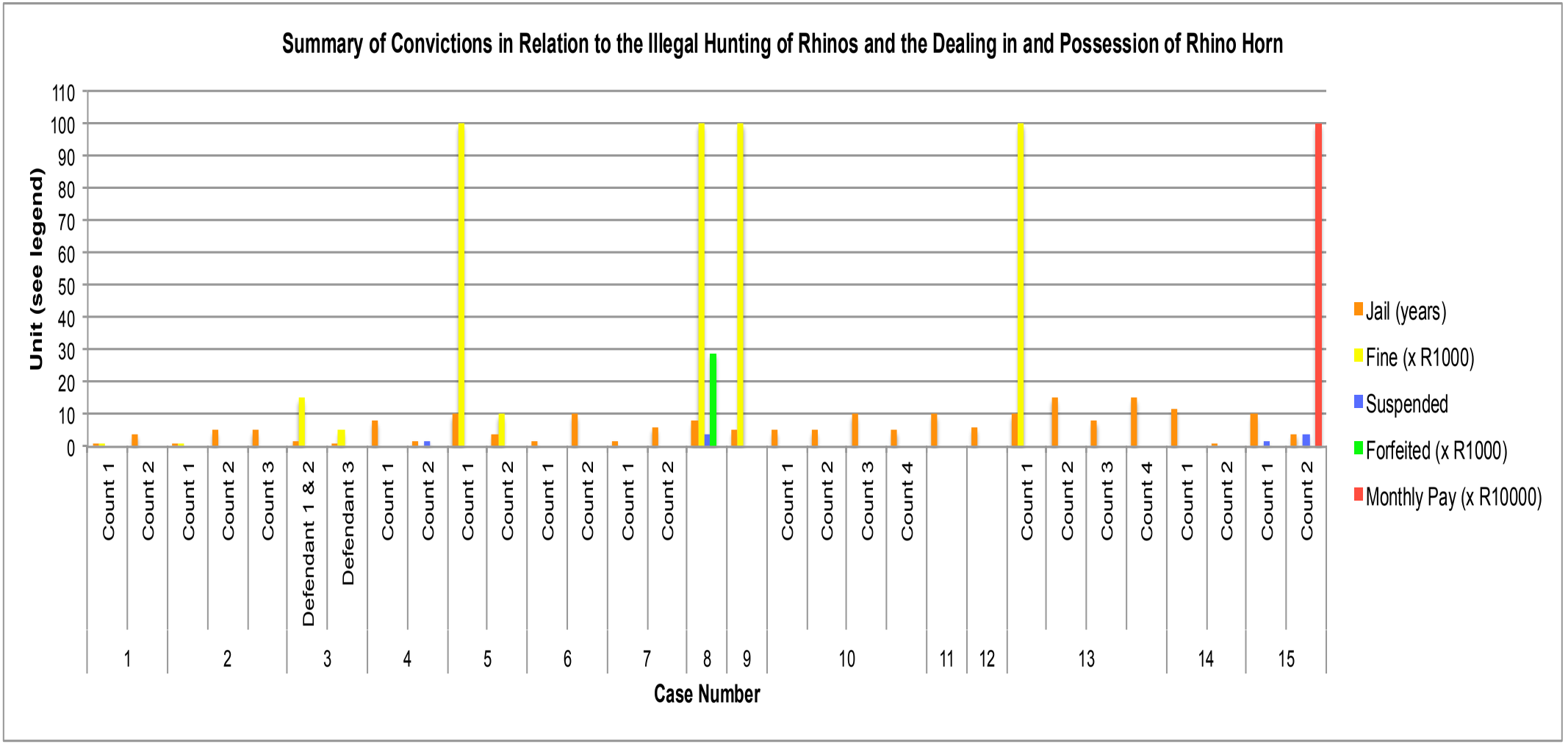

FIGURE 23: OUTCOMES FOR OFFENCES INVOLVING THE ILLEGAL HUNTING OF RHINOS AND THE DEALING IN AND POSSESSION OF RHINO HORNS IN SOUTH AFRICA

The cases have been examined in respect of their facts and outcomes. In Case 1, the defendant and two others were following the track of a rhino in the KNP; no rhino was hunted or wounded and no firearms were found when the defendant was arrested.[837] Charged with trespassing and illegal hunting in terms of the Protected Areas Act 2003 the defendant entered a guilty plea and was sentenced to 1 year imprisonment or R1,000 fine on count one and 4 years' imprisonment on count two. The defendant in Case 2 was also arrested in KNP, however was in possession of a freshly removed set of rhino horns and a firearm.[838] The state used DNA evidence to prove that the horns came from a found carcass. The defendant, again, pleaded guilty to trespassing, illegal hunting in terms of the Protected Areas Act, as well as the illegal possession of a firearm and ammunition. The court sentenced the offender to R1,000 or 1 years' imprisonment for count one, 5 years' imprisonment for count two and 5 years' imprisonment for counts three/four, amounting to a sentence of 11 years' imprisonment. Unlike Case 2, the defendants in Case 3[839] tried to sell a rhino horn they acquired following a death from natural causes. All three defendants pleaded guilty to unlawfully carrying out a restricted activity under NEMBA. The first two defendants were sentenced to a R15,000 fine or 24 months imprisonment while the third received a R5,000 fine or 12 months' imprisonment. Cases 2 and 3 further demonstrate the significance of compounding offences and aggravating factors in determining the sentencing.

[837] ibid – *S v S Makhabo* (page 32)
[838] ibid – *S v F Makamu* (page 32)
[839] ibid - *S v Sibusiso Ncube, Siyabonga Ndlela and Senzo Sikhakhane* (page 32)

In Case 4,[840] the defendant was arrested for illegally hunting a rhino[841] and the illegal possession of ammunition. The court imposed 8 years' imprisonment for count one, and two years' imprisonment, suspended for 5 years, on count two. The defendants in Case 5[842] were convicted of the illegal hunting of rhino/being in possession of horns and the possession of a firearm and ammunition. Information was received that the defendants wanted to sell the horns and a trap was set under s. 252A of the Criminal Procedure Act 1977, which helped to secure the conviction. Controversial in nature, Subrmanien and Whitear-Nel note that "Section 252A regulates the admissibility of evidence obtained through entrapment, undercover operations and related matters."[843] This tactic would be useful in uncovering evidence for future wildlife trade offences, specifically with the advancement of technologies involvement with the committing of these offences. In this particular case, the offenders were sentenced to 10 years' imprisonment or a R100,000 fine for count one, and 4 years' imprisonment or a R10,000 fine on count two. The steady rise in sentencing tariff for rhino-related offences may be indicative of a shift in the commonly held view, discussed above, that environmental crime has often been hamstrung by the perception that it is victimless. It might also imply the courts' understanding of the severity of the illegal hunting of rhino in South Africa.

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[840] ibid – *S v Robert Ndou* (page 33)
[841] Under the Limpopo Environmental Management Act 2003 (Act No. 7 of 2003)
[842] Department: Environmental Affairs, 'National Environmental Compliance & Enforcement Report: 2011-12', https://www.environment.gov.za/sites/default/files/docs/necer2011_12.pdf 01 July 2018, *S v Joseph Mlambo, Dawid Mawelela and George Sibatane* (page 33)
[843] Subrmanien, D. and Whitear-Nel, N., *'The Exclusion of Evidence Obtained By Entrapment: An Update'*, (2011) 32 Obiter 635 - 636

In Cases 6 – 9, all defendants were arrested at airports with rhino products in their possession. In Case 6,[844] the defendant had 12 rhino horns in his luggage, destined for Hong Kong and was convicted in contravention of the Customs and Excise Act, and s. 57(1) of NEMBA. The defendant was sentenced to 2 years' imprisonment on count one and a further 10 years' imprisonment on count two, amounting to 12 years' imprisonment with no option of a fine. Similarly, in Case 7, the defendant was arrested in possession of six rhino horns, also destined for the Special Administrative Region. Convicted on similar counts to Case 6, the defendant was sentenced to 2 years' imprisonment on count one and 6 years' imprisonment for count two. In Case 7,[845] the defendant was in possession of two rhino horns and 184 ivory bracelets while in transit, to Vietnam. Convicted under s. 57(1) of NEMBA and for fraud, the courts considered both counts together and sentenced the offender to a R1,000,000 fine or 4 years' imprisonment, with another 4 years' imprisonment suspended for 5 years, with certain conditions, although these were not specified in the report. Along with this, the defendant was in possession of $29,000 (USD) at the time of their arrest and this was forfeited to the Klaserie Game Reserve, demonstrating the courts' utilisation of the Prevention of Organised Crime Act 1998. Finally, in Case 9[846] the defendant was arrested in possession of two rhino horns and convicted under s. 57(1) of NEMBA, the result of which was that he was sentenced to a fine of R100,000 or 5 years' imprisonment.

[844] ibid - *S v Duc Manh Chu* (page 33)
[845] ibid - *S v Hung Tai Tran* (page 33)
[846] ibid - *S v Tiong Lim Kuok* (page 33)

Case 10[847] involved charges for illegal hunting in a protected area, possession of a rifle and ammunition and trespassing. The defendant was sentenced to 5 years' imprisonment for count one, a further 5 years for count two, 10 years for count three and another 5 years' imprisonment for count four. The courts ordered that the sentences should not run concurrently and the defendant was effectively sentenced to 20 years' imprisonment. In Case 11,[848] the defendant was arrested, charged and convicted for killing a rhino and removing the horns under the Game Theft Act 1991,[849] as well as hunting of protected animals under the Limpopo Environmental Management Act 2003, being sentenced to 10 years' direct imprisonment. In Case 12,[850] the defendant was acting as an interpreter for a sale and arrested in possession of two rhino horns. It was not possible to determine where the horns had emanated from but the defendant was charged under s. 57(1) of NEMBA and sentenced to 6 years' imprisonment. In the next case,[851] four people were arrested and had in their possession rhino horns, two rifles, ammunition and two axes after game rangers found a freshly dehorned rhino carcass and tracked footprints. One of those arrested later died, while the other three pleaded guilty on all four counts: hunting a rhino, possession of a prohibited firearm,[852] and possession of a rifle and possession of ammunition. All defendants in this case were given a 10 year custodial sentence or R100,000 fine for count one, 15 years' imprisonment on count two, 8 years'

[847] ibid - *S v Anniba Mashaba* (page 33)
[848] ibid - *S v Jonas Tibane* (page 33)
[849] 105/1991
[850] Department: Environmental Affairs, 'National Environmental Compliance & Enforcement Report: 2011-12', https://www.environment.gov.za/sites/default/files/docs/necer2011_12.pdf 01 July 2018, *S v Hsien-Lung Hsu* (page 33)
[851] ibid - *S v I Maluleke and two others* (page 33)
[852] In this caseidentified as an AK47 Assualt Rifle.

imprisonment on count three and 15 years' imprisonment on count four, with counts two and four to run concurrently. In Case 13,[853] DNA analysis and a tracker were used to help convict the defendant under the Limpopo Environmental Management Act 2003 for illegal hunting of a rhino and trespassing. The defendant was sentenced to 12 years' imprisonment on count one and 1-year imprisonment on count two, with both to run concurrently. In the final case,[854] the defendant pleaded guilty to the illegal buying, possession and conveyance of 30 rhino horns, and also dehorning 8 of his own rhino. The defendant was sentenced to 10 years' imprisonment, for count one, and 4 years' imprisonment, fully suspended for count two. The defendant was also ordered to pay R100,000 per month over a ten-month period to the National Wildlife Crime Reaction Unit to assist in rhino research, revealing the innovative use of additional mechanisms to help deter future offenders.

Of the cases discussed above, 9 involved convicted offenders that were not South African nationals. A number of countries' nationals were involved including 5 from other African countries and 4 from mainly South East Asia including, Malaysia and Vietnam amongst others. This certainly helps to contextualise the international cooperative enforcement efforts that South Africa has been a part of.

[853] Department: Environmental Affairs, 'National Environmental Compliance & Enforcement Report: 2011-12', https://www.environment.gov.za/sites/default/files/docs/necer2011_12.pdf 01 July 2018, *S v ES Sigauque* - (page 34)
[854] ibid - *S v Els* (page 34)

The 2011-12 Report therefore revealed an increase in cases relating to the illegal hunting of rhino and dealing in or possessing rhino horns in comparison to the previous report period. Generally, the sanctions imposed by the South African courts far exceeded penalties passed down in the UK and Australia for illegal wildlife trade offences. However, although there is evidence substantiating the courts sentencing in South Africa for offences relating to rhinos, there is limited or no equivalent evidence to demonstrate the penalties handed down for other illegal wildlife trade offences. Without this information, it is difficult to compare the UK, Australia and South Africa's courts' efforts in tackle the illegal wildlife trade in its broadest sense as the contemporary focus seems to have been, perhaps understandably, on disrupting the criminal networks which target rhino. It is possible, the South African authorities are seeking and securing stricter sentences due to its position as a range state and thus effecting change in the supply side of the trade for export, and may be less likely to do so in respect of import offences, although further research is required to substantiate this.

As with the previous reports, the 2011-12 edition discussed work carried out in collaboration with INTERPOL. Operation Worthy lasted three months, involving more than 320 officers from police, customs, environmental protection agencies, veterinary services, tourism and prosecution services from 14 countries across Eastern, Southern and Western Africa. It resulted "in the recovery of more than 20 kilos of rhino horn, in addition to lion, leopard

and cheetah pelts, crocodile and python skins, live tropical birds, turtles, and other protected species destined to be illegally trafficked around the world."[855]

South Africa also attended INTERPOL's 23rd Wildlife Crime Working Group where issues of contemporary concern were the focus. These included, but were not limited to, the illegal wildlife trade over the Internet and the use of forensics in wildlife trade cases. The 2011-12 report also emphasised the risk of South Africa losing its cycads species due to illegal trade; and recommendations to address this crisis have been considered; again a supply issue. The 2012-13 report identified the need for a strategy to be created to help address this issue and the expectation is that it should be discussed further in future reports.[856]

The 2011-12 report helps to portray one dimension of the South African authorities' effectiveness at combating the illegal wildlife trade in indicating the stronger penalties being imposed by the courts in relation to these offences. It is apparent the courts are trying to deter future offenders by handing down high sentences and the additional mechanisms used to meet this desired aim. However, as previously mentioned, these cases have all involved rhinos, or their products; it is recommended further research is carried out into other

[855] INTERPOL, 'INTERPOL's largest operation combatting illegal ivory trafficking targets criminal syndicates', (19 June 2012) https://www.interpol.int/News-and-media/News/2012/PR049 01 July 2018; Department: Environmental Affairs, 'National Environmental Compliance & Enforcement Report: 2011-12', https://www.environment.gov.za/sites/default/files/docs/necer2011_12.pdf 01 July 2018, section 9.1, page 55

[856] Department: Environmental Affairs, 'National Environmental Compliance & Enforcement Report: 2011-12', https://www.environment.gov.za/sites/default/files/docs/necer2011_12.pdf 01 July 2018, section 9.5, page 56

wildlife trade offences to understand whether the penalties given by the courts are as effective. Without this information, or a ready means to obtain it, it is difficult to ascertain how effective South Africa is at tackling the illegal wildlife trade in general terms. But, even if it is only one species, the increase in penalties over time is noteworthy.

6.4 2012-2013

The annual compliance and enforcement report for the 2012-13[857] period once again makes reference offences under s. 57(1) of NEMBA. The resulting case provided the, to date, highest sentence of direct imprisonment without a fine option. In this case, the defendant was sentenced to 40 years direct imprisonment under s. 80(1)(i) of the Customs and Excise Act and s. 57(1) of NEMBA. No other information is given about this case in the report. Because the case went before the appellate courts, and was thus reported it was possible to access the specific details. This case, *Lemthongthai v S*[858] reached the Supreme Court of Appeal of South Africa and involved 26 contraventions of s. 57(1) of NEMBA and s. 80(1)(i) of the Customs and Excise Act. The defendant fraudulently procured permits to shoot and kill rhino, claiming it was for trophy hunting, when instead it was always intended to trade in rhino horn. The regional court sentenced the defendant to 40 years, however this was reduced to 30 years' imprisonment on appeal to the high court. Whilst the Supreme Court believed it was the constitutional rights of citizens to have the environment protected for present and future

[857] Department: Environmental Affairs, 'National Environmental Compliance & Enforcement Report: 2012-13', https://www.environment.gov.za/sites/default/files/docs/necer_report2012_13.pdf 01 July 2018

[858] (849/2013) [2014[ZASCA 131

generations, it was decided the 30 years' imprisonment was too severe. As the defendant had spent 16 months in custody awaiting the trial, the sentence was reduced to 13 years' imprisonment and a fine of R1million imposed.

Whilst the final sentence imposed was not as severe as the one laid down in the Regional Court, it is the highest sentence currently covered within the reports for wildlife trade offences in all the countries of research and highlights the South African authorities efforts in tackling these offences. It is also the highest penalty imposed when comparing to the UK and Australia, this may be due to the supply element and South Africa wanting to preserve the country's iconic species, however it might also be the courts understanding the severity of these crimes. In this particular case, the court decided the 30 years' imprisonment was too severe and disproportionate when compared to the minimum sentences statutorily prescribed for other serious offences. The judge considered the fact "that the killing of the 26 rhinos occurred during one operation, a sentence of imprisonment of six months in respect of each of counts 27 to 52 is an appropriate sentence."[859] When passing the judgment, the court also considered how a fine would not only impact on the appellant, but also on the directing minds behind the offences in question, noting that the R1 million that was imposed was treble the value of the goods.[860]

As well as this case, during the financial period of 2012-13, there were 215 cases involving the contravention of NEMBA. Again, it is not possible to determine how many of these specifically relate to all wildlife trade offences,

[859] Para 21 of judgment
[860] Para 22 of judgment

however these will be included in this figure and is the highest seen so far in these reports. This again promotes the efforts the South African authorities are making in tackling the illegal wildlife trade, however further research is required to fully understand this number.

Following on from the previous report, the South African authorities were to place focus on the trade in protected cycads. This has in fact occurred, as the 2012-13 report presented a case involving a criminal cycad syndicate. In this case, the Department of Economic Affairs Environment & Tourism (Eastern Cape) received information regarding a syndicate poaching cycads. Based on this information, an investigation began and two suspects were arrested in possession of 35 cycads, valued at R150,000 following a surveillance operation. Further information began another investigation and a further three people from the syndicate were arrested after being found in possession of 43 cycads. The defendants in the first case were found guilty and sentenced to R3000 or 3 months imprisonments, fully suspended for 5 year. The first defendant of the second case was sentenced to 6 years imprisonment of which 3 years were suspended for 5 years and property forfeited to the state.[861] The remaining defendants in the second case were sentenced to R12,000 or 3 years' imprisonment, fully suspended for 5 years. Another case involving others allegedly involved in this syndicate was still pending at the time this report was published and therefore is likely to be considered in the 2013-14 report. This case suggests the courts take offences against rhinos to be more serious than those involving cycads, as the sentences are more

[861] Again highlighting South Africa's use of additional measures to help tackle the illegal wildlife trade through deterrence

lenient, perhaps on reflection of the greater perception of the threat to iconic species. Further cases in cycads will be discussed later in this section and will help to determine whether this is an accurate reflection of the courts' approach. In that connection, it is worth noting that it took a few years for the courts to appreciate the severity of crimes against rhinos and therefore it is possible these penalties will increase as the courts become more aware of the implications of the trade in cycads. Targeting resources at certain key sectors and building capacity around it as a response seemingly direct enforcement practice.

The 2012–13 report changed the format of significant cases for biodiversity enforcement and compliance and provided figures for different species. The first species considered are rhinos, and figures are provided for the number of prosecutions from April 2012 – April 2013. Fifty prosecutions were concluded[862] and there were 95 defendants involved in the finalised cases. Of these 95, 69 were convicted, 2 acquitted, 23 had their cases withdrawn and one died after conviction but before sentencing. The figures relating to court outcomes were also supplied; however although there is a range of outcomes there seems to be some inconsistency. Of the defendants convicted, 20 were sentenced to a fine and 36 were sentenced to direct imprisonment without the option of a fine. The outcomes for the remaining 13 defendants were not included within the report. Without explicit details of these cases, however, it is impossible to reach a firm conclusion. The report continues to include a summary of the outcomes of significant cases relating

[862] This includes cases resulting in conviction and sentencing, acquittals, withdrawals and those struck off

to rhinos. The first case discussed, *Lemthongthai v S* was discussed above so has not been included here, and the remainder can be seen in Figure 24.

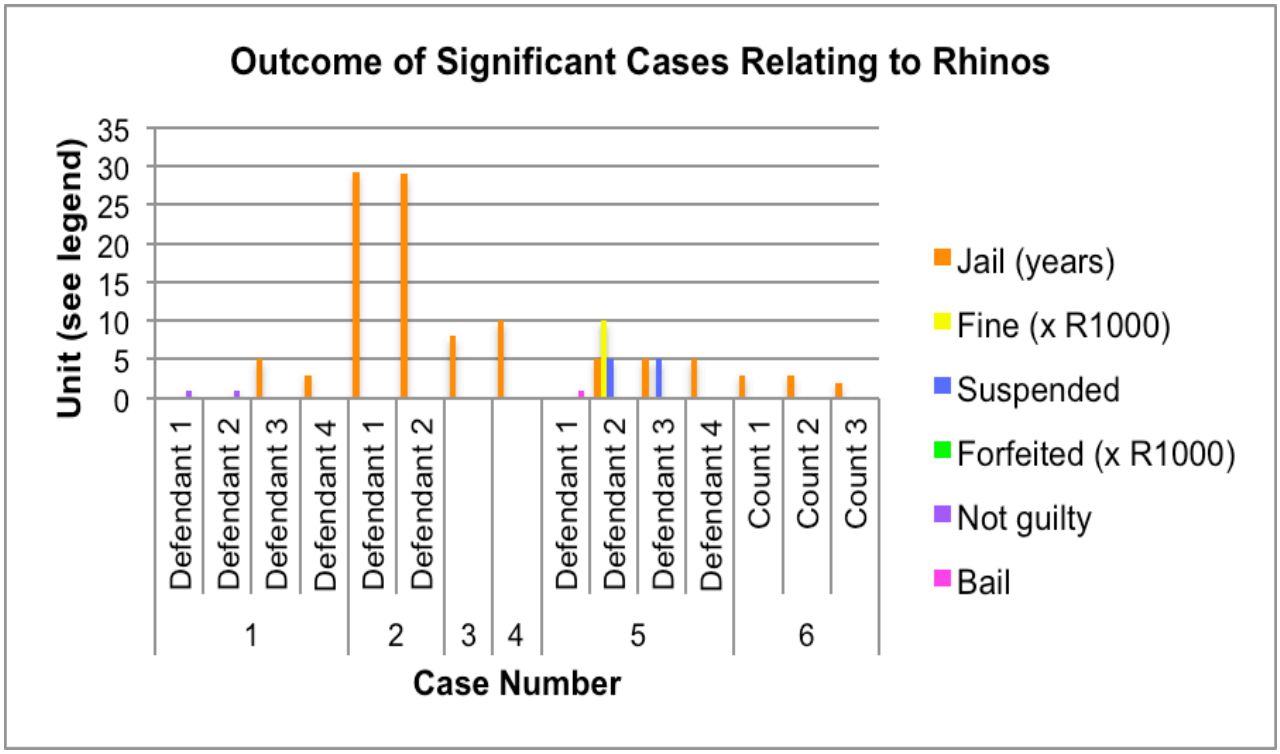

FIGURE 24: OUTCOMES OF SIGNIFICANT CASES INVOLVING RHINOS IN SOUTH AFRICA DURING THE FINANCIAL PERIOD OF 2012-2013

In case 1 of Figure 24, the defendants were charged with the illegal hunting of rhinos, however defendant 1 and 2 were both found not guilty. In this case, no rhino was killed and the accused were arrested on the property before they could find a rhino. Defendant 3 was found guilty under s. 57(1) of NEMBA, as well as the unlawful possession of a firearm and ammunition and was sentenced to 5 years' imprisonment. Defendant 4 was only found guilty of a s. 57(1) offence and sentenced to 3 years' imprisonment. Along with this, all exhibits seized were forfeited to the state, with the exception of a car registered to defendant 1 and therefore returned. This case demonstrates the

courts utilising penalties even when the crime has not been fully executed, helping to cement the perceived severity of these offences by noting the defendants' intent. In addition, the courts have applied a further mechanism, seen in the forfeiture of property to the state, again attempting to prove the severity of these crimes and to deter other offenders.

In case 2, both defendants were charged with 7 different counts and the results were as follows:

1. Being illegally in RSA (defendant 1: guilty, defendant 2: acquitted)
2. Trespass in KNP without a permit (both guilty)
3. Illegally hunting a rhino cow (both guilty)
4. Illegally hunting a rhino calf (both guilty)
5. Theft of rhino horns (both acquitted due to duplication of charges)
6. Unlawful possession of hunting rifle (both guilty)
7. Unlawful possession of ammunition (both guilty)

In this case, the court sentenced defendant 1 to 29 years and 3 months' imprisonment and defendant 2 to 29 years' imprisonment. Once more the courts are imposing robust penalties in respect of wildlife offences involving rhinos. As a deterrent sentence, a term of 29 years should certainly act as a means to influence other potential offenders. Of course, as noted previously, sentencing is only one part. Knowledge of likelihood of discovery and prosecution has and equal if not greater deterrent value.

In case 3, the defendant was charged with the illegal hunting of two rhino, but was only convicted of the hunting for one rhino however and was sentenced to 8 years' imprisonment. In case 4, the defendants were charged and convicted of trespassing, illegal possession of firearms and ammunition and offences under the Immigration Act 2002, being sentenced to 10 years' imprisonment. Case 5 saw 4 defendants being charged for the unlawful hunting of rhino and/or dealing in rhino horn. Defendant 1 had a warrant for arrest and defendant 2 pleaded guilty to dealing in rhino horn and was sentenced to R10,000 and a further 5 years' imprisonment that was fully suspended. Both defendant 3 received 5 years' imprisonment, fully suspended, whilst defendant 4 was sentenced to 5 years' imprisonment. The Magistrate imposed these sentences after considering the lengthy time the defendants spent in custody on remand after numerous court postponements that were beyond their control. Finally, in case 7, the defendant was convicted of the illegal possession of two rhino horns (sold to the defendant in an undercover operation), three pieces of elephant ivory and two leopard skins. The court sentenced the defendant in this case to 3 years' imprisonment for count one, 3 years' imprisonment on count two and two years' imprisonment for count 3, totalling 8 years' imprisonment.[863]

[863] Department: Environmental Affairs, 'National Environmental Compliance & Enforcement Report: 2012-13', https://www.environment.gov.za/sites/default/files/docs/necer_report2012_13.pdf 01 July 2018 page 58 - 60

Once more the cases are reflective of the efforts the courts are taking in tackling crimes against rhinos within South Africa, within the constraints of their individual facts. They also help to demonstrate how prosecutors are utilising other mechanisms to increase the proportionality of the sentencing to send a message as to the severity of these crimes. Again, it shows how contemporary law enforcement in South Africa is focussed on rhino poaching and subsequent offences; however this report also demonstrates the on-going threat to other species, such as elephant, helping to establish South African authorities' effectiveness in other aspects of the illegal wildlife trade.

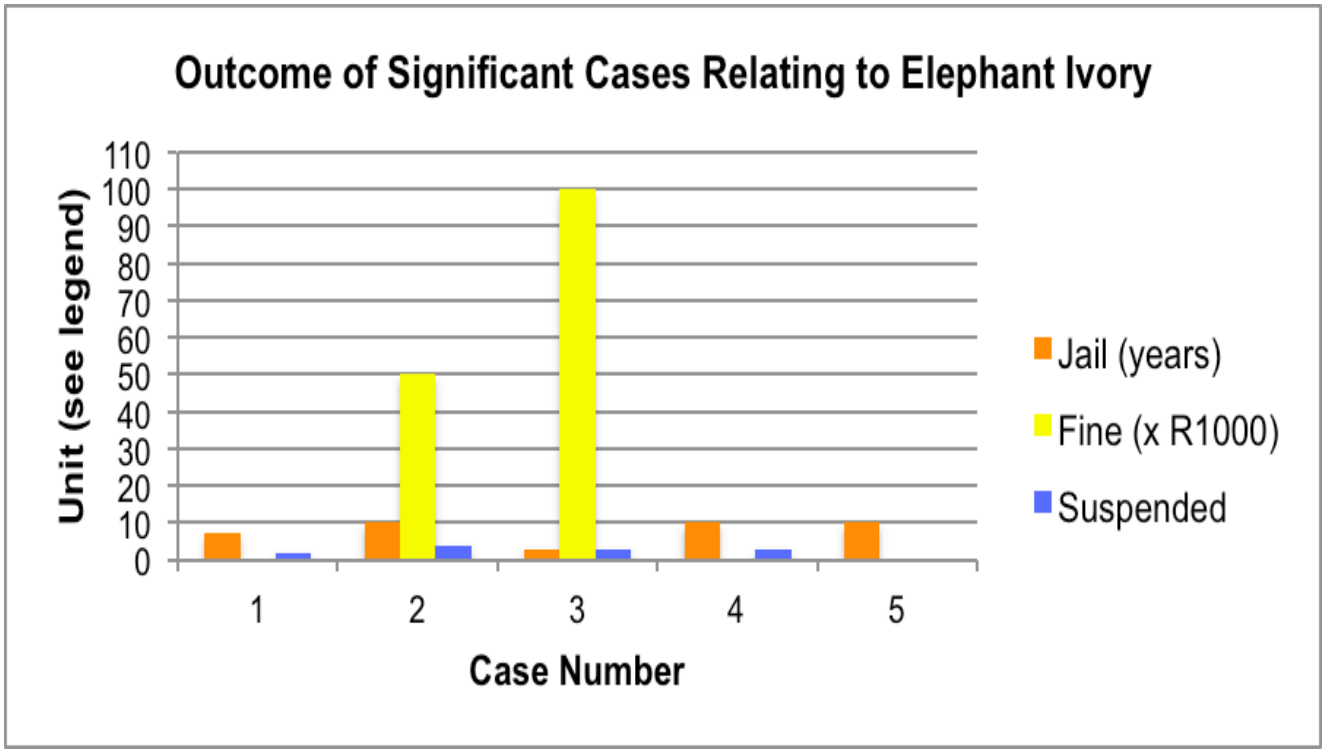

FIGURE 25: OUTCOMES OF SIGNIFICANT CASES INVOLVING ELEPHANT IVORY IN SOUTH AFRICA DURING THE FINANCIAL PERIOD OF 2012-2013

Figure 25 illustrates the outcomes of significant cases involving elephant ivory in South Africa during the financial period of 2012-13. In case 1, the

defendant was convicted of the illegal possession and sale of 44,284 elephant ivory items, totalling ~1500kg and received a custodial sentence of 7 years with two years suspended for five years. In case 2, the defendant was once again sentenced to imprisonment: this time for 10 years, with four years suspended for 5 years, and a fine of R50,000 for the illegal possession of 211.021kg of elephant ivory. In case 3, the defendant was found in possession of seven elephant tusks, totalling 98.53kg, and sentenced to three years' imprisonment fully suspended for five years, and a find of R100,000. In the next case, the defendant was sentenced to 10 years' imprisonment with three years of this suspended for five years for the illegal possession of 21 elephant tusks, totalling 312.72kg. In the final case, the defendant was convicted of the illegal possession of two pieces of elephant ivory tusk, totalling 4.48kg and 79cm in length, and was sentenced to 10 years imprisonment. These cases demonstrate inconsistency by the courts in sentencing for these offences, as defendants with more ivory, totalling a higher volume, have received lower sentences than those with less ivory in both quantity and weight although, again, without more details of the specific cases, this provides only a limited perspective. Along with this, the sentences passed down for wildlife trade offences relating to elephant ivory seem to be lower than the same crimes relating to rhino. This is likely to be because of the priorities of law enforcement bodies within South Africa to tackle the trade and poaching of rhinos and their products, as elephant are not as endangered. However, in order to completely act as a deterrent to offenders, it is necessary for the courts in South Africa to be consistent in the sentencing of wildlife trade offences. Whilst also maintaining a proportionality in respect

of the most critically threatened species. Therefore, whilst evidence suggests the South African authorities are likely to be considered effective at enforcement in relation to the illegal rhino trade, when considering the data shown in Figure 22, more is required to be effective in regard to all wildlife trade offences. As mentioned tackling the trade in cycads became a priority in South Africa during the 2011-12 financial period and Figure 26 helps to identify their authorities' effectiveness at combating these offences.

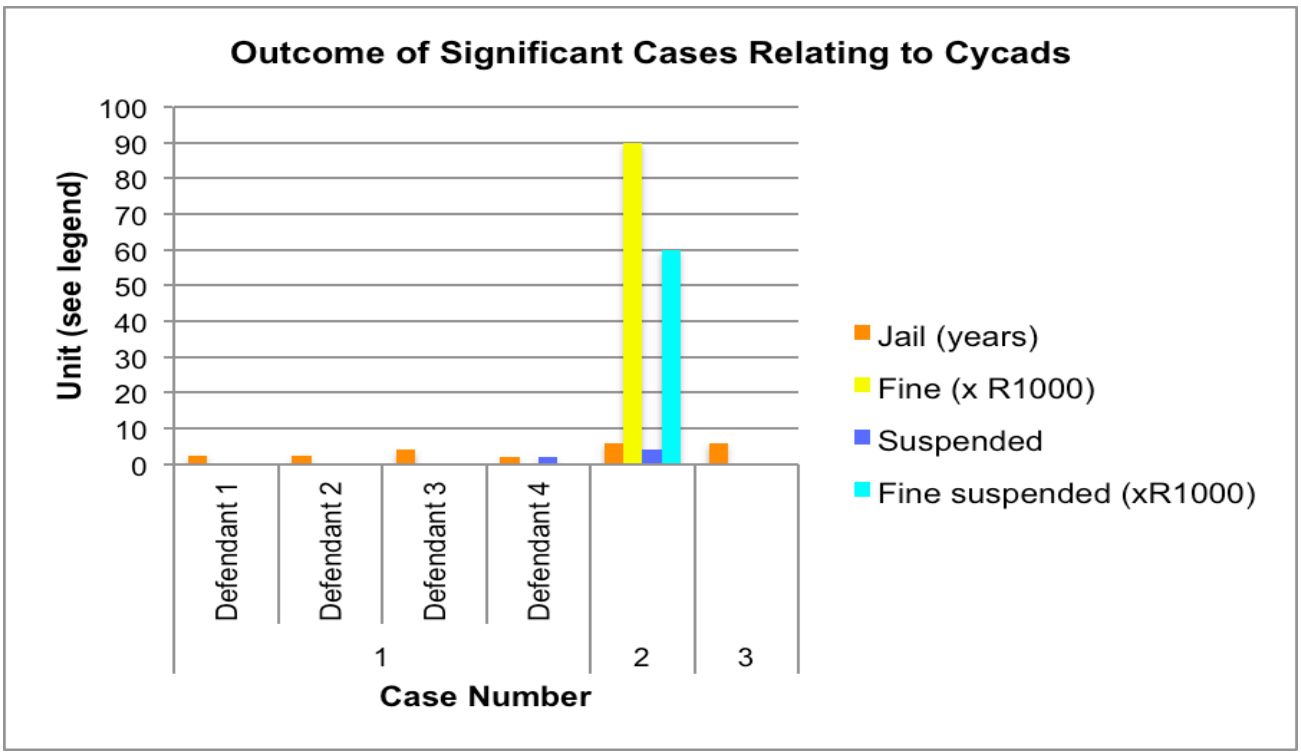

FIGURE 26: OUTCOMES OF SIGNIFICANT CASES INVOLVING CYCADS IN SOUTH AFRICA DURING THE FINANCIAL PERIOD OF 2012-2013

Following from its predecessor, the 2012-13 report further maintains the South African authorities' efforts in tackling the trade in cycads. In case 1, the defendants were convicted of illegal activities in relation to two cycads with the value of R18,250, however the defendants received differing sentences,

suggesting the courts took into account the facts of the case. Defendants 1 and 3 both received 30 months' imprisonment, defendant 2 was sentenced to 4 years' imprisonment, while defendant 4 received two years' imprisonment fully suspended for five years conditionally not convicted of NEMBA and Limpopo Environmental Management Act. In case 2, the defendant was convicted of the illegal gathering of 95 cycads, and was subsequently sentenced to R90,000 or six years' imprisonment of which R60,000 or four years imprisonment was suspended for five years. Alongside this penalty, the court ordered that any licence or permit issued must be cancelled and made the defendant ineligible for obtaining any such documentation for a period of three years. Finally, in case 3, the defendants were sentenced to six years' imprisonment without the option of a fine for the illegal gathering of four cycads, valued at R65,520.

Again, whilst the courts are handing down sentences to offenders of cycad offences, these seem to be weaker than similar offences relating to rhinos. This may be due to courts considering offences relating to rhinos as being more serious, or it may be law enforcement priorities as previously stated both of which are essentially two-sides of the same coin. As with the ivory statistics, Figure 24 makes plain that the courts in South Africa are imposing weaker sentencing in relation to certain wildlife trade offences and therefore are not consistently effective for these crimes although it might be that prioritisation should be expected in respect of the proportionality relationship to the perceived harm. Unlike the other reports, the 2012-13 report does not include discussion around other enforcement and compliance operations or

priorities, suggesting rhino offences will continue to be the main focus for combating the illegal wildlife trade in the next financial year.

6.5 2013-2014

Similar to the previous report, the first reference to NEMBA offences in the National Environmental Compliance and Enforcement Report 2013-14[864] is in the annual enforcement and compliance highlights, once again referring to the highest sentence of direct imprisonment with a fine option for environmental offences. In the first case the defendant was convicted of murder, illegal hunting of a rhino (under NEMBA)[865] and trespassing and was sentenced to 15 years for count 1, 9 years for count 2 and 1 year for count 3. Therefore, whilst the defendant received a high sentence for the NEMBA offence, the main reason for the high penalty was due to the murder charge against this defendant.

Offences under NEMBA, with specific reference to CITES have also been listed under most prevalent crimes reported during this financial period; these are set out in Table 4. It is evident from the data that, a high number of incidents were reported in relation to these offences, however without access to this information for other years, it is difficult to determine how these figures impact the South African authorities' effectiveness at tackling the illegal wildlife trade.

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[864] Department: Environmental Affairs, 'National Environmental Compliance & Enforcement Report: 2013-14', https://www.environment.gov.za/sites/default/files/docs/nationalenvironmental_complianceandenforcement_report2013_14.pdf 01 July 2018

[865] United Nations Office on Drugs and Crime, 'Wawito Mawala v S', (01 January 2012) https://www.unodc.org/cld/case-law-doc/wildlifecrimetype/zaf/2012/wawito_mawala_v_s.html 01 July 2018

TABLE 4: MOST PREVALENT CRIMES REPORTED IN RELATION TO NEMBA AND STATE LEGISLATION RELATING TO THE ILLEGAL WILDLIFE TRADE AND NUMBER OF INCIDENTS

Prevalent Crimes	Number of Incidents Reported
Illegal hunting of rhino	565
Illegal entry / poaching	1219
Illegal hunting and snaring	10
Import hunting trophies (CITES)	392
Illegal possession of wild animals and import (NEMBA, threatened and protected species and CITES)	34

That being said, the 2013-14 report also highlights the contravention of NEMBA, however, it is the first time that CITES and threatened and protected species have specifically been referenced in the publication. During the 2013-14 period, there were 1,456 contraventions of NEMBA. Once again it is not possible to determine how many of these specially relate to wildlife trade offences, however the number is substantially higher than previous years. This supports the evidence of the South African authorities being effective in its efforts to tackle the illegal wildlife trade, but does not determine why the number has increased, whether due to a change in priorities or an increase in criminal activity.

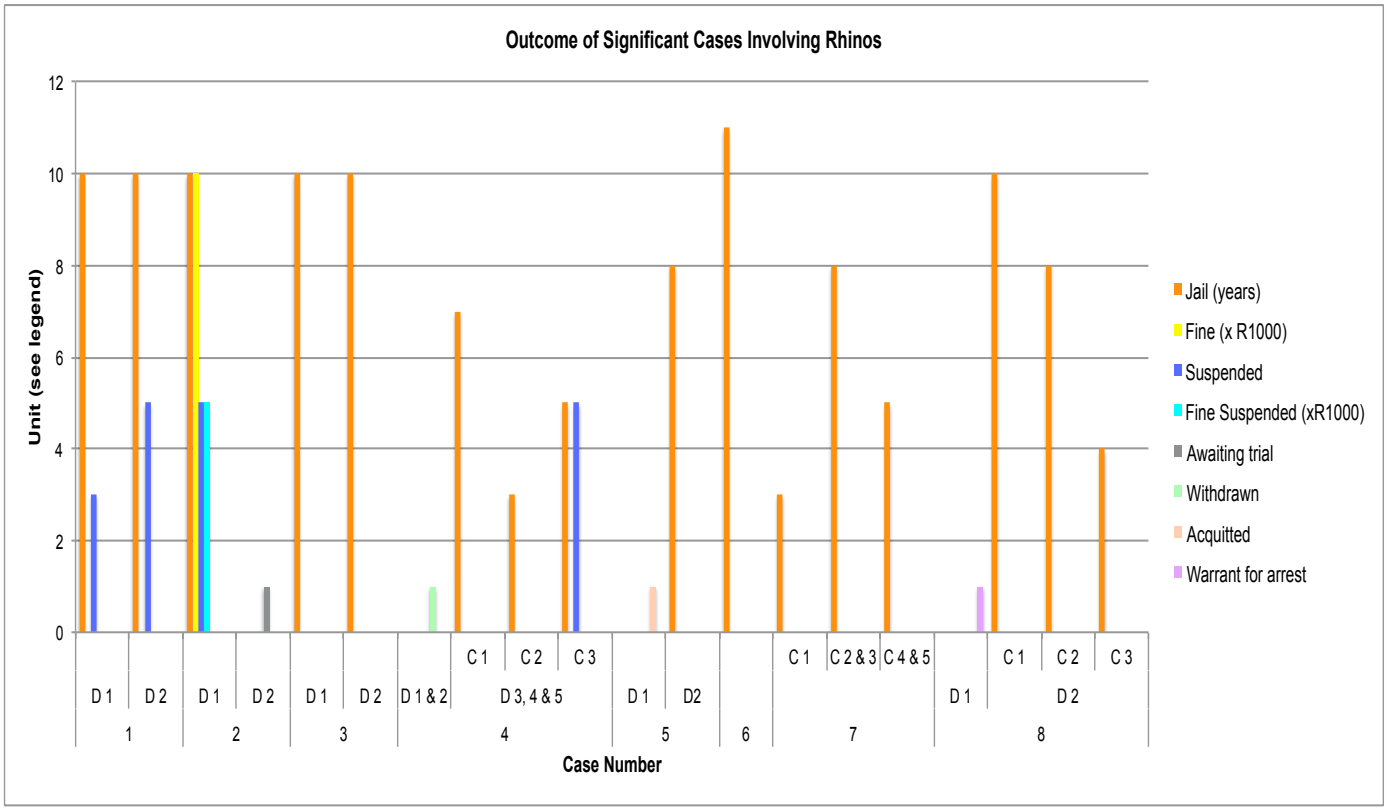

FIGURE 27: OUTCOMES OF SIGNIFICANT CASES INVOLVING RHINOS IN SOUTH AFRICA DURING THE FINANCIAL PERIOD OF 2013-2014

Again, the main focus for the biodiversity enforcement and compliance section is crime relating to rhinos, however, like the previous report, elephant ivory and offences in respect of other species have been considered. The first cases explored here are those involving rhinos. In case 1, the defendants were charged with possession of 12 complete rhino horns and 2 pieces of rhino horn, weighing 38.14kg. Both defendants pleaded guilty and received a 10-year custodial sentence. However, defendant one had three years of their sentence suspended for 5 years, even though they already had a previous conviction for a related offence. Defendant two had 5 years of the sentence suspended for 5 years, but it was noted the offender was previously convicted on the same charge and deported. The court also ordered deportation for both defendants on completion of the respective sentences. In case 2, the

defendants were charged with the illegal hunting of a rhino, illegal possession of firearms and trespassing in a game reserve. Defendant 1 pleaded guilty to being an accomplice in the attempted hunting of a rhino, under s. 57(1) of NEMBA and was sentenced to a R10,000 fine or imprisonment totalling 10 years, with half suspended subjected to conditions, including testifying in defendants 2 trial. At the time of the reports publication, defendant 2 was still awaiting trial. In case 3, the defendants were charged with the illegal killing of a black rhino, possession of 2 rhino horns, and possession of firearms, specifically AK47 assault rifles, and ammunition. Defendant 1 was convicted of illegal possession of an AK47 assault rifle and once again was sentenced to imprisonment for 10 years, whilst defendant 2 was convicted of illegal hunting of rhino and again sentenced to the same length of imprisonment. When arrested, the offenders were in possession of the rhino horn and the South Africa Police Service seized it.[866]

In case 4, the defendants were charged with the illegal possession of rhino horn and leg, possession of automatic firearms and ammunition and trespassing. The case was withdrawn again defendants 1 and 2, however the others pleaded guilty to picking up and removing rhino horn, possession of firearms and trespassing. The courts sentenced them to 7 years' imprisonment for count 1, 3 years' imprisonment for count 2 and 5 years' imprisonment for count 3 suspended for 3 years but to run concurrently. In case 5, the defendants were charged with possession of four rhino horns,

[866] Department: Environmental Affairs, 'National Environmental Compliance & Enforcement Report: 2013-14', https://www.environment.gov.za/sites/default/files/docs/nationalenvironmental_complianceandenforcement_report2013_14.pdf 01 July 2018 page 57 - 59

however defendant one was acquitted under s. 174 of the Criminal Procedure Act 1977. Defendant two was convicted under s. 57(1) of NEMBA and was sentenced to 8 years' imprisonment. Case 6 saw the defendant charged with illegal hunting of a rhino, possession a rhino horn, theft, malicious injury to property and trespassing. Convicted of illegal hunting and trespassing, the defendant was received a custodial sentence of 11 years, as the defendant lost a leg in the incident and the court took this into account during sentencing. However, the court also dismissed an application to appeal. Along with this, R50,000 was seized, as well as a firearm that was awaiting forensic investigation, at the time the report was published, linking it with the crime scene. In the next case, the defendants pleaded guilty to trespassing, illegal hunting (two counts), illegal possession of firearm and illegal possession of ammunition. The court sentenced the defendants to 3 years' imprisonment for count one, 8 years' imprisonment for count two and three and 5 years' imprisonment for count 4 and 5, making a total sentence of 16 years. Case 7, therefore, demonstrates a situation where the courts are aggregating offences for sentencing the defendants. In the final case, the defendants were charged with possession of firearm and ammunition, trespassing and possession of 3 rhino horns. The first defendant was out on bail and did not return to court, a warrant for arrest had been issued. Defendant two pleaded guilty and was subsequently convicted on 2 counts of killed rhino (cow and calf) and trespassing. The court sentenced the offender to imprisonment, totalling 14 years' imprisonment. The sentence handed down included 10 years for killing of the cow, 8 years for killing the calf, and 4 years for trespassing, with the 10 and 8-year sentences to be served

concurrently. In the end, defendant two was not charged with the possession of a firearm as they stated that defendant one had it in their possession and the State witnesses could not argue otherwise.[867]

As with previous reports, it is apparent law enforcement agencies in South Africa are ensuring punishment for offences involving rhinos, with prosecutors including other offences where necessary to increase the sentencing. The courts are utilising their powers under NEMBA, or alternative legislation, to convict defendants and pass down robust deterrent penalties for these offences. Based on the evidence shown, the South African courts appear more willing to hand down more robust sentences, when compared to the UK and Australia: they are, though at the front line of the sourcing of some of the most valuable of the illegally traded commodities. Whilst the courts in South Africa are still implementing penalties in relation to other wildlife trade offences, the sentences imposed seem far weaker when compared to cases involving rhinos, as shown when comparing Figure 28 and 29.

[867] ibid.

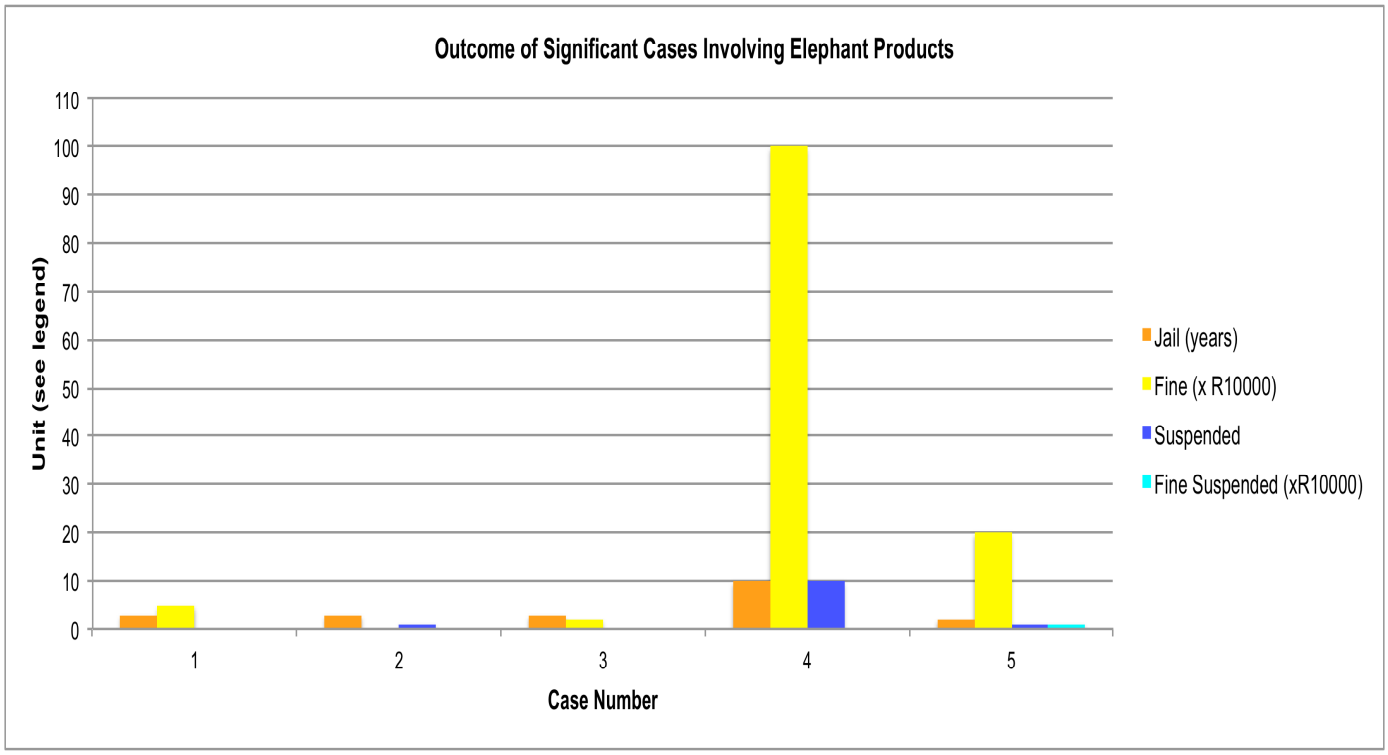

FIGURE 28: OUTCOMES OF SIGNIFICANT CASES INVOLVING ELEPHANT PRODUCTS IN SOUTH AFRICA DURING THE FINANCIAL PERIOD OF 2013-2014

The cases involving elephant products are outlined in Figure 28. In case one, the defendants were charged and convicted of intending to import endangered species or derivatives without the necessary permits, under section 57(1)(a) of NEMBA. This was the first time a prosecution was conducted in respect of amendments to this offence, allowing prosecutions where the defendants were still in transit with endangered species or derivatives without the necessary permits, and have not entered South Africa. The defendants in this case were importing ivory, with the approximate value of R1.3million and weighing 147.71kg, from Angola to the East. In this case both defendants were sentenced to a R50,000 fine or 3 years' imprisonment.

This sentence seems substantially lower to similar case involving rhino horn discussed previously. The defendant in case 2 again received a 3 year custodial sentence, with one year suspended for 5 years on certain conditions[868] for contravening s. 57(1) of NEMBA. Similarly, the defendant in case 3 was also convicted on contravening s. 57(1) of NEMBA, but was sentenced to a lower fine of R20,000 or 3 years' imprisonment. In case 4, the offender was charged and convicted of illegally possessing and selling 10,056 elephant items, with a total weight of 708kg. The court sentenced the defendant in this case to a fine of R1 million or 10 years' imprisonment, a sentence similar to those involving rhino, however the 10 years in this case was suspended for 5 years. In the final case, the defendant was sentenced to a R200,000 fine or 2 years' imprisonment, with half the fine and jail term suspended for five years, for the legal possession of 342 elephant ivory items, totalling 10kg in weight. It has been evidenced that when sentencing, the courts in South Africa, are imposing much harsher sentences for rhino offences, in comparison to similar cases where the products are derivatives from elephants. It has already been highlighted that law enforcement priorities are linked to the combatting of crime in regard to rhinos in South Africa, however, it should also be crucial to the courts to deter and punish offenders with all wildlife trade offences. Along with this, it appears prosecutors are more prone to including other offences for rhino offences, in comparison to those involving elephants. Whilst it appears on face value that the South African authorities are imposing stronger penalties for rhino

[868] The details of these conditions were not supplied

offences, it may be that the sentencing for elephant products are still reaching peak levels, as was noticed with cases involving rhinos.[869]

For example, in two cases both defendants were sentenced to 3 years imprisonment under s. 196 and 200 of the Natal Nature Conservation Ordinance. The defendants sold 134 cycads to an undercover police agent, valuing R100,000. As the cycads are not listed under the threatened or protected species regulations, they were prosecuted for contravention of the Ordinance. The other case saw two defendants charged and convicted for the theft of 22 cycads, trespassing, illegal picking/transporting/possessing and illegally exporting cycads. Defendant one received 5 years imprisonment with two years suspended for five years. Defendant two had similar previous convictions, with 3 years' imprisonment also imposed, but received 7 years imprisonment with 2 years' suspended for 5 years. However, both defendants were also involved in a pending matter at another court.[870]

The 2013-14 also included cases for other species, not covered by previous reports, for NEMBA offences. A defendant was charged with the illegal hunting of a brown hyena under s. 57(1) of NEMBA. The court sentenced the defendant to a R10,000 fine or 2 years' imprisonment, suspended for 5 years. In the final case, the defendants were charged in contravention of s. 57(1) of NEMBA for the illegal hunting of two cheetahs. Defendant 1 pleaded guilty

[869] Department: Environmental Affairs, 'National Environmental Compliance & Enforcement Report: 2013-14', https://www.environment.gov.za/sites/default/files/docs/nationalenvironmental_complianceandenforcement_report2013_14.pdf 01 July 2018 page 60 - 63
[870] ibid.

and was sentenced to 5 years' imprisonment, whereas defendant 2 only assisted defendant 1 and therefore was sentenced to a fine of R4000 or 12 months' imprisonment. Whilst these cases demonstrate that law enforcement authorities are enforcing other offences linked to wildlife trade, they again highlight the fact the courts are implementing weaker sentences when rhinos are not involved.

This report also identified new mechanisms to be carried out by law enforcement agencies in South Africa to help prevent against the illegal wildlife trade. These included the verification of private rhino horn stockpiles, an off-road vehicle task team, CITES awareness courses for customs detector dog units and biodiversity training courses. As well as discussing South Africa's role in Operation Cobra II, which resulted in the seizure of 36 rhino horns, over 3 metric tons of elephant ivory and more than: 10,000 turtles, 1,000 skins of protected species, 10,000 European Eels and 200 metric tons of rosewood logs.[871] The operation also saw more than 400 criminals being arrested, including leaders of crime syndicates.

6.6 2014-2015

The numbers of NEMBA contraventions, including those involving CITES-listed and other threatened and protected species, were reduced in the financial period of 2014-15 to 186. It is not clear from the documentation provided why this number dropped. For instance whether it was because of a

[871] CITES, 'Operation Cobra II Press Release – 10th February 2014', (10 February 2014) https://cites.org/sites/default/files/eng/news/sundry/2014/operation_cobra_ii_pr.pdf 01 July 2018

change in prioritisation or a reduction in crime relating to NEMBA offences, but it is apparent that the total number of environmental legislation contraventions has also dropped.

The next section in the 2014-15 National Environmental Compliance and Enforcement report[872] relating to wildlife trade offences comes under environmental judicial decision. The first relevant case to be discussed involved a poacher being found guilty of the murder of their accomplice who was shot and killed by a park ranger. The primary issue to be determined was whether the defendant could be liable for the death of the accomplice, as there had to be intention for the deceased to be killed. The court, in this case, decided that "*this form of intention would be present where, subjectively, the accused foresaw the possibility of his actions resulting in the death of the deceased (even if only remote) and that he reconciled himself to this possibility and proceeded anyway*".[873] This case puts a greater responsibility on poachers for crimes that may occur due to their actions. It should prove a positive step in law enforcement to help deter others from committing crimes due to the high sentences available for murder, which defendants would face on top of the poaching charges. The appellant has since appealed[874] the conviction in this case. During this appeal, the court found that *"the appellant*

[872] Department: Environmental Affairs, 'National Environmental Compliance & Enforcement Report: 2014-15', https://www.environment.gov.za/sites/default/files/reports/201415_necer_report.pdf 02 July 2018
[873] *Wawito Mawala v* S ZAFx011; Wildlex, 'Database of Wildlife Related Law', https://www.wildlex.org/search?field_court_jurisdiction=2973&sort=field_date_of_text&sortOrder=asc&page=4 02 July 2018
[874] *Mawala v S* (AR267/16) [2018] ZAKZPHC 52

did not receive a fair trial on count 1[875] *and count 3*[876]*. In those respects the appeal against the convictions and the accompanying sentences must be upheld and those convictions and sentences must be set aside."*[877]

Therefore, in this particular case the defendant's sentence was 9 years for the hunting of rhino, without having a valid permit. Whilst law enforcement are attempting to utilise other crimes to ensure strict punishment for offenders, it is still necessary they follow the correct procedures and ensure a fair trial, which did not happen in this particular case.

The next case to be covered under environmental jurisprudence is *Ndwambi v The State*[878]*,* another wildlife trade case to reach The Supreme Court of Appeal of South Africa and thus available to examine in more detail. The defendant in this case was found to be complicit in trying to sell a fake rhino horn in an undercover police operation for R350,000, and therefore was convicted for fraud and sentenced to 6 years' imprisonment. The defendant appealed the decision of both the conviction and the sentence, however the Supreme Court upheld it as it was decided the offender could not be convicted of the crime relating to the trade in rhino horn.[879] This case demonstrates how South Africa is perceiving wildlife trade offences, and subsequent crimes. When researching court cases within the UK, there was little case law published, demonstrating the difference between both countries. Upon reaching the Supreme Court, one judge commented that:

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[875] murder
[876] trespassing while carrying a weapon
[877] Para 56
[878] 611/2013 [2015] ZASCA 59
[879] Gunn Attorneys, 'Newletter – July 2016', (July 2016) http://www.gunnattorneys.co.za/newsletter/July 2016.pdf 02 July 2018

> "*the correct conviction of the appellant should be one of attempt to commit the statutory offence of dealing in rhino horn …Obviously, the different conviction would result in a different sentence but as I am in the minority, no useful purpose would be served by setting out what I should consider an appropriate sentence…I should have upheld the appeal against both conviction and sentence."*[880]

Whilst judges in this case had differing opinions on the correct charge and sentence for this offence, it helps demonstrates how prosecutors and law enforcement are utilising other means to secure convictions for offenders involved in the illegal wildlife trade.

As with the previous reports, a summary is given for some of the cases decided by the court in relation to offences involving rhinos, over the financial period of 2014-2015, the outcome of which are shown in Figure 29. In the first case, the defendant was convicted of murder, 3 counts of illegal hunting, theft of rhino horns, possession of firearms, possession of ammunition and trespassing. The court sentenced the defendant to 15 years' imprisonment on count one, 10 years' imprisonment per count for 2-4, 8 years imprisonment' for count 5, 15 years' imprisonment for count 6, 7 years imprisonment' for count 7 and 2 years' imprisonment for count 8. This would have given the defendant a total prison term of 77 years, however, the court ordered that the theft was to run concurrently with the 3 counts of illegal hunting, and the possession of firearm and ammunition to run concurrently with the sentence for murder, therefore giving a total imprisonment term of 47 years. This case demonstrates the leniency the courts will show by allowing sentencing to be

[880] Para 54 of judgment

served concurrently, however, the total sentence is this case is still tough when comparing it to sentences imposed by courts in the UK and Australia. None of the cases in Australia and the UK were known to involve murder, but even when considering the three counts of illegal hunting, the courts in South Africa seem to be imposing tougher sentences to defendants for wildlife trade offences. However, as noted, Australia and the UK are not range states in the same degree that South Africa is and so less likely to involve crimes such as murder.[881]

In case 2, the defendant was charged and convicted of illegal possession of a firearm, illegal possession of ammunition, trespassing and illegally hunting of a black rhino. The court sentenced the defendant to a prison term totalling, 6 years for count one, 18 months for count 2, 4 years for count 3 and 10 years on count 4. However, the court ordered this sentence to be served concurrently, resulting in an imprisonment term totalling 10 years' imprisonment. The defendants in case 3 were convicted, however were sentenced differently. Defendants 1, 2 and 3 were sentenced to 6 years' imprisonment for illegal hunting. However, defendant 3 was also convicted of illegal possessing a firearm and sentenced to 4 years in custody, with the sentences to run concurrently. This outcome is surprising as it effectively results in the three defendants serving the same sentence, when the charges against defendant 3 could be perceived as more severe. Defendants 4 – 8 in

[881] Department: Environmental Affairs, 'National Environmental Compliance & Enforcement Report: 2014-15', https://www.environment.gov.za/sites/default/files/reports/201415_necer_report.pdf 02 July 2018 page 57

this case were all found guilty of conspiracy to hunt rhino and sentenced to a fine of R10,000 or 5 years' imprisonment, with half suspended for five years. Defendants 4 -8 were all found guilty of conspiracy to hunt rhino and sentenced to a fine of R10,000 or 5 years' imprisonment, with half suspended for 5 years.[882]

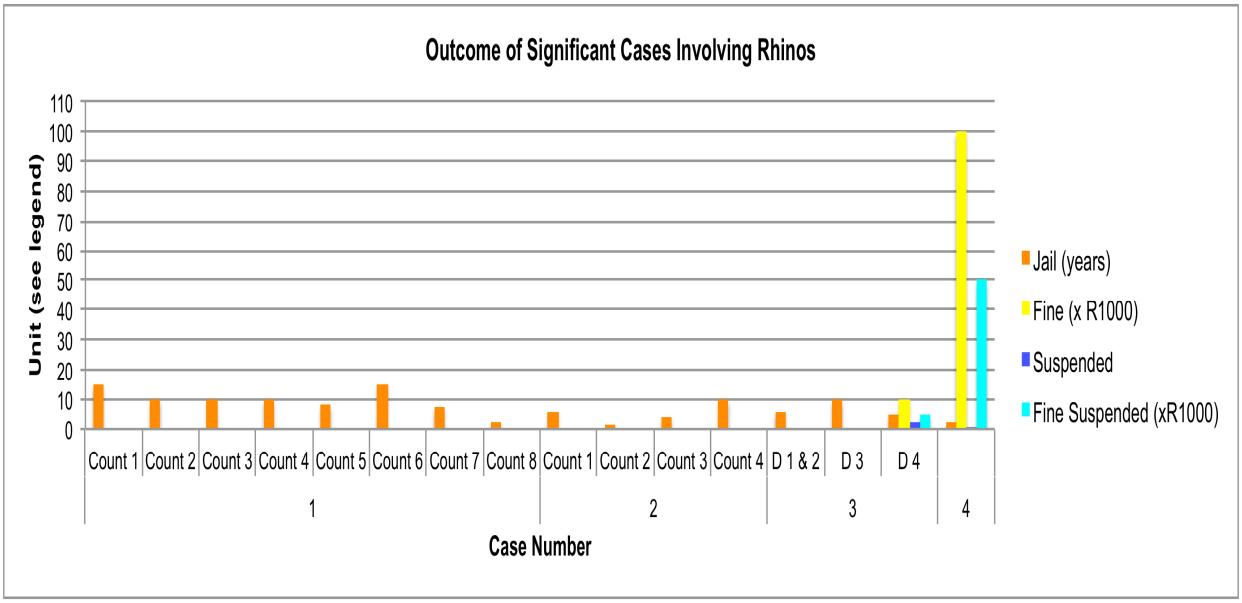

FIGURE 29: OUTCOMES OF SIGNIFICANT CASES INVOLVING RHINOS IN SOUTH AFRICA DURING THE FINANCIAL PERIOD OF 2014-2015

In the final case, the defendant was found in possession of 8 pieces of rhino horn with a mass of 10 grams. The court sentenced the defendant to a fine of R100,000 or 2 years' imprisonment of which half was suspended for 5 years, on the condition that no legislation relating to rhinos were contravened during the time of suspension. These cases, again evidence the mechanisms prosecutors in South Africa are using to ensure offenders are receiving lengthy prison sentences. However, the cases discussed above and in the

[882] ibid - *S v Andre Manuel Chauque and Others (Rankin Pass CAS 17/8/14)* (page 57)

2014-15 report seem to be more lenient than those in previous years. That being said, some defendants are still receiving high sentences for offences relation to rhinos and the cases provided here are only a few that reached the courts.

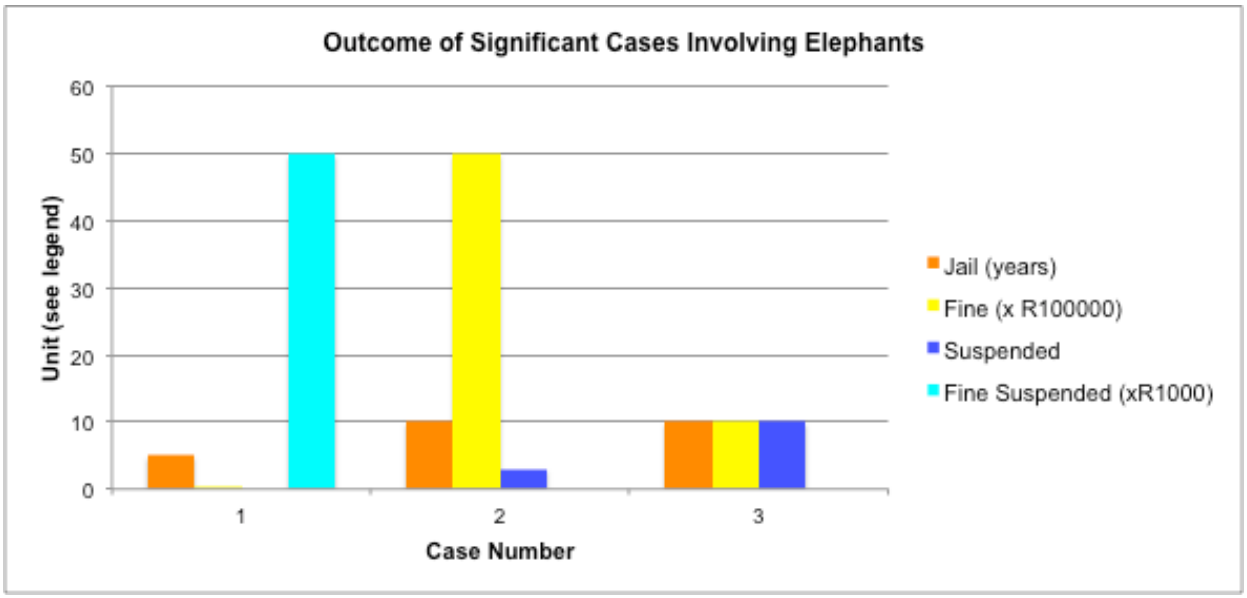

FIGURE 30: OUTCOMES OF SIGNIFICANT CASES INVOLVING ELEPHANTS IN SOUTH AFRICA DURING THE FINANCIAL PERIOD OF 2014-2015

In previous reports, it has been shown that the courts are more lenient on offenders involved with the illegal wildlife trade, unless the species in question is a rhino. The three cases shown in Figure 30 show that during the financial period of 2014-15, this may not be the case. The defendant in case 1, was convicted of possessing 27 pieces of elephant tusk with a mass of 100.1kg. The court sentenced the offender to a fine of R100,000 or 5 years' imprisonment, of which R50,000 was suspended for 5 years, and a further sentence of 8 years' imprisonment suspended for 5 years. When comparing

this case to those involving rhinos, this sentence here seems more lenient than those with a similar charge discussed above. However, in case 2, the defendant was sentenced to 10 years' direct imprisonment of which 3 years is suspended, as long as a fine of R5million was paid within 12 months for possessing 3427 ivory items, totalling 1002kg, with a street value of ~R21million. Whilst it is possible this is still a more lenient sentence than cases involving rhinos, the penalties imposed are far tougher in comparison to the cases discussed in the 2013-14 section above and are more likely to act as a deterrent to future offenders. Based on this, it is possible to chart progression so, the authorities and the courts may be applying more significant sentences as outcomes. Similarly, the defendant in case 3 was found in possession of 48 elephant tusks, weighing 763kg and with a street value of ~ R14million. The court sentenced the offender to 10 years' imprisonment or a fine of R1million. In this case, the fine was paid and the 10 years' imprisonment was suspended for 5 years so long as no other offence is committed against elephants in this time. Again, whilst the sentence may not be as severe as those involving rhinos, the courts have made progress by increasing the penalties passed down to offenders in cases involving elephants.

The 2014-15 report also considered offences relating to cycads and other species, however the cases do not have relevance to the illegal wildlife trade and therefore have not been included here. The report does continue to discuss mechanisms that will be put in place to ensure compliance and enforcement of NEMBA, with specific reference to CITES. For example,

South Africa planned to endorse all export and re-export permits after physical inspection of consignments and cancel all CITES import permits after use. A team will also make sure all non-compliance of NEMBA are met with enforcement action, suggesting higher numbers will be seen in the next National Environmental Compliance and Enforcement report.

6.7 2015-2016

As expected, the number of NEMBA contraventions, including CITES, has increased compared to the previous year, to 531 for the 2015-16 financial period.[883] Again, it is not possible to determine which of these contraventions specifically relation to wildlife trade offences. This may be due to an increase in criminal activity relation to NEMBA, however, it is also likely to be due to the mechanisms and increased attention provided by South African officials, as discussed in the previous section.

In the 2015-16 report, the main environmental jurisprudence case of concern is that of *Johan Kruger & John Hume v The Minister of Environmental Affairs & others*[884] which involved a review and setting aside of the moratorium on the domestic trade in rhino horn. Thereby repealing the 2009 moratorium and reinstating the domestic trade in rhino horn, although relevant permits are still required under NEMBA and this does not affect the international trade.[885] It is

[883] Department: Environmental Affairs, 'National Environmental Compliance & Enforcement Report: 2015-16', https://www.environment.gov.za/sites/default/files/reports/necer2016.pdf 02 July 2018
[884] (57221/2012) [2015] ZAGPPHC 1018; [2016] 1 All SA 565
[885] Department: Environmental Affairs, 'Minister Edna Molewa notes the Constitutional Court decision on the moratorium on the domestic trade in rhino horn' (06 April 2017)

not certain whether this change in South Africa will result in fewer charges and convictions in relation to rhinos as this has now been legalised or whether criminals will attempt to use this as a loophole when trading in rhino derivatives.

In this case, the court sought clarification as to what role the moratorium could have played in the surge of poaching, with 30% of rhino experts[886] believing the moratorium had influenced the poaching spike, 49% believing it had not and 21% were unsure.[887] In a report filed by the Minister, it found the number of rhinos poached in 2008 was just below 100, in 2009 between 100 and 200, in 2010 just below 400 and in 2011 just below 500. However, Hume stated the number of rhinos poached in 2012 was just above 600, in 2013 about 1,000 and about 1,200 in 2014.[888] The court stated that:

"The exact percentage attributable to the moratorium is not known, but clearly, its role in adding to the surge in poaching cannot be excluded. Furthermore, the extent of smuggling or illegal export of rhino horns due to lack of implementation of the applicable measures is not known. The next question is, on what basis should this court suspend the setting aside of the moratorium? Put differently, what disastrous implications would be brought about by the immediate lifting of the moratorium? I cannot think of any. The solution appears to lie in the effective implementation of applicable and envisaged measures."[889]

Consequently, the courts could not determine whether a complete ban on the sale of rhino horn was facilitating the trade in rhino horn, and as such decided to overturn the moratorium. The court also decided that effective

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https://www.environment.gov.za/mediarelease/molewa_notes_constitutionalcourtdecision 02 July 2018

[886] Out of 63 rhino expert participants

[887] Para 88.4 of judgment

[888] Para 88.5 of judgment

[889] Para 89 of judgment

implementation of applicable and envisaged measures are what are required to diminish the trade in rhino horn.

One way of identifying how the changes to the domestic trade may impact crime rates is to look at the summary of cases involving rhinos within the 2015-16 report. However, it is also possible that the impact of these changes will not be noticeable for a few years and therefore, it is necessary for continued research in this area. Figure 29 shows the outcome of the significant cases involving rhinos during the 2015-16 financial period. Whilst all of these cases involving offences linked to the illegal wildlife trade, only those with specific reference to this will be discussed in further detail. This is different to the previous approach as earlier cases did not reference the trade in rhino horn and therefore the sections were examining criminal activity associated with the illegal wildlife trade, rather than directly applicable.

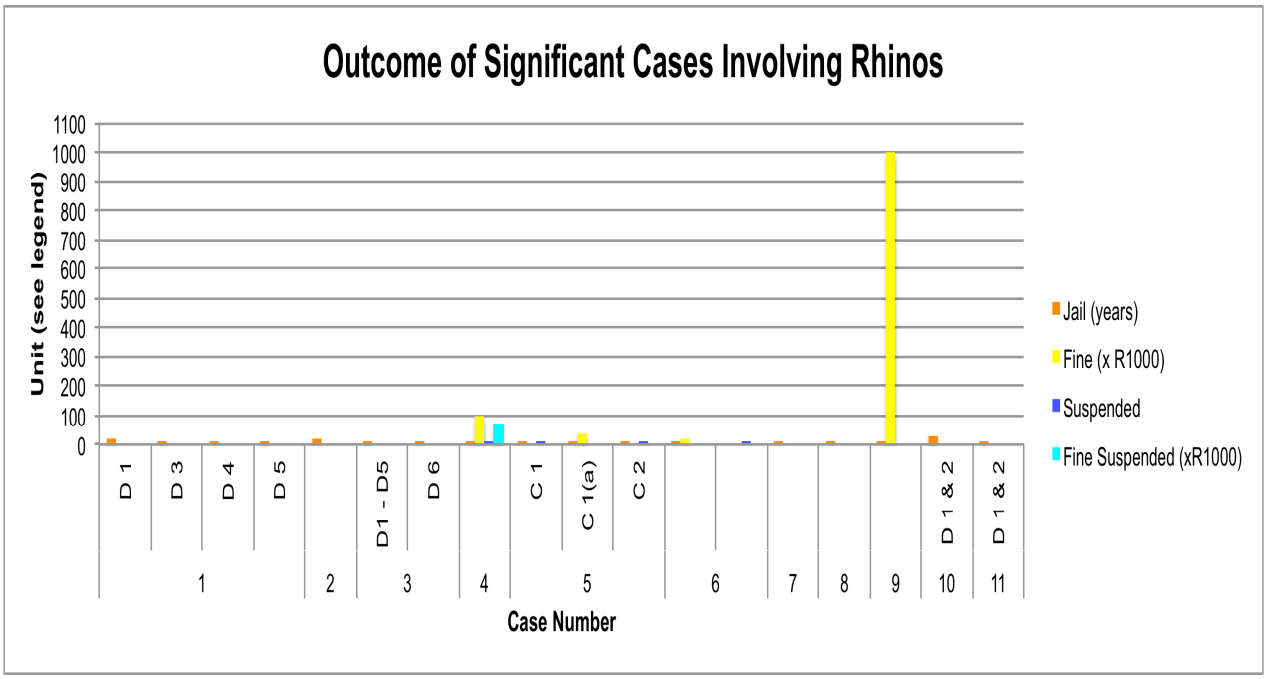

FIGURE 31: OUTCOMES OF SIGNIFICANT CASES INVOLVING RHINOS IN SOUTH AFRICA DURING THE FINANCIAL PERIOD OF 2015-2016

The significant cases involving rhinos were, once again, considered in the 2015-16 report; these will now be considered in more detail, with reference to Figure 31. In case one, each of the defendants were charged, convicted and sentenced differently. Defendant one was convicted of the illegal hunting of rhinos, the illegal possession of a firearm and use and possession of the proceeds of crime and sentenced to 20 years' imprisonment. Defendant two was not discussed within the report and therefore, it is likely they were acquitted or the case against them withdrawn, although this has not been confirmed. Defendant three was convicted of the illegal selling and trading in rhino horns and use and possession of the proceeds of crime and sentenced to 12 years' imprisonment. Defendant four was convicted of the use and possession of the proceeds of crime and sentenced to 6 years' imprisonment. While defendant five was convicted of the illegal possession of a firearm,

illegally selling and trading in rhino horns and the use and possession of the proceeds of crime and was sentenced to 14 years' imprisonment. Case one increases the understanding of how South Africa's courts sentence for trade offences, without other contraventions being included. It is shown that the courts are imposing similar penalties for solely trade related offences of both rhinos and elephant products, something that was not completely clear previously. The courts have also considered the proceeds of crime in this case, something which has not been noticed in UK and Australian cases relating to the illegal wildlife trade with any regularity. Once again, this strengthens the effectiveness of the South African authorities' efforts in combatting the illegal wildlife trade, whilst also deterring future offenders.

In case 3, an undercover operation was used[890] to convict defendants 1 – 5 of the illegal hunting of rhinos and defendant 6 of the illegal selling of and trading in rhino. The courts sentenced defendants 1-5 to 15 years imprisonment each, and defendant 6 to 10 years' imprisonment. This case helps to reiterate police powers and mechanisms to help with the investigation of wildlife trade offences, as discussed in Chapter 3. It also demonstrates that whilst the courts are handing down harsher penalties for hunting offences, they are imposing strong sentences in relation to trade offences, especially as 10 years' imprisonment is the maximum sentence available through NEMBA. In case 6, the offender was convicted under s. 57(1) of NEMBA for illegally possessing a rhino horn with a mass of 21 grams. The court sentenced the defendant to a fine of R20,000 or 2 years' imprisonment, with an additional 3

[890] Under section 252A of the Criminal Procedure Act

years' imprisonment suspended for 5 years under certain conditions, although the details of these were not supplied. The defendant in case 9, was sentenced to a fine of R1million or 6 years' imprisonment for illegally dealing in rhino horn. Whereas, the defendants in case 11 were sentenced to 8 years' imprisonment for offences relating to s. 57 of NEMBA. The sentences laid down in this section establish the courts positioning on the trade in rhinos in South Africa, showing they are utilising strong penalties to punish offenders and deter others from committing these crimes. However, it has also been evidenced throughout that the courts are more likely to pass down tougher sentences to those involved with the hunting of rhinos, especially as this generally allows prosecutors to include other charges.

The only case involving elephants relevant to this research involved a defendant convicted[891] of illegally possessing 6 pieces of ivory with a total mass of 11.32kg. The defendant received a sentence of 3 years' imprisonment; this is similar to the penalties given out in the cases involving rhinos discussed above. However, this sentence is more lenient than those demonstrated in previous reports for cases relating to elephant derivatives, and far more lenient than the penalties available under the Act.[892] Similarly, under 'other' species, the 2015-16 report summaries a case where the defendant was convicted under s. 57[893] of NEMBA for attempting to export 80 Giant Bullfrog without the necessary permits. The court sentenced the

[891] Under section 42(1) of the Nature Conservation Ordinance 19 of 1974
[892] R100,000 or 10 years imprisonment or both, under section 86(b) of the Nature Conservation Ordinance 19 of 1974
[893] Read with 101(1) of NEMBA and the Threatened or Protected Species Regulation, GN 152 of 23 February 2007

defendant to a fine of R40,000 or 12 months' imprisonment, of which R20,000 was suspended for three years. The R20,000 fine was paid to the Department of Environmental Affairs to be used for training and enforcement purposes and the Bullfrogs were forfeited to the State. This is another example of more lenient sentences being imposed by the courts, when compared to the penalties available through legislation.

Statistics regarding the Environmental Crimes and Incidents Hotline were reported within the 2015-16 report. These include environmental complaints received through the Hotline, from the Minister and Director-General's office, and direct and referred complaints from other organs of state and the public. The 2015-16 report is the first edition to show the number of incidents in relation to the import and export of species during the financial period of 2015-16. During this period, there were 17 incidents reported although without a comparator, it is difficult to understand the extent this helps with the tackling of offences. Additionally, the 2015-16 report covers Operation Cobra III's role in tackling the illegal wildlife trade and South Africa's efforts in this. This operation resulted in 139 arrest, an 18% decline from Cobra II, and more than 247 seizures of illegal wildlife trade products.[894] The UK was in the top three reporting countries by case numbers, whilst the UK and South Africa were in the top three participating counties by seizure of pieces. Given these results,

[894] United Nations Office on Drugs and Crime & CITES, 'Successful operation highlights growing international cooperation to combat wildlife crime', (18 June 2015) https://www.unodc.org/unodc/en/frontpage/2015/June/successful-operation-highlights-growing-international-cooperation-to-combat-wildlife-crime.html 02 July 2018

it is surprising that both countries did not have more information available regarding the statistics requested under the FOI Act.

Whilst a 2016-17 National Environmental Compliance and Enforcement report has been published, it is not possible to distinguish which figures relate offences pre-September 2017[895] and therefore it would be imbalanced to use these results in this research.

6.8 Conclusions

Although the South African authorities did not completely answer the FOI request, but rather provided their National Environmental Compliance and Enforcement reports for part of the time period being explored, this did give an insight into the countries efforts in tackling the illegal wildlife trade. It has been evidenced that South Africa's main priority is cases involving rhinos, however the authorities are convicting offenders for other wildlife trade offences. When analysing the reports, it was highlighted the importance of legislation and criminal activity not covered in previous chapters, for example illegal hunting. Prosecutors are utilising other crimes, such as these, to increase sentencing and to help ensure effective outcomes of all cases. The reports highlighted that South Africa are imposing the highest sentences for these crimes, compared to the UK and Australia. Although the highest sentences are generally imposed for the crimes being carried out before specimens enter the trade routes, for example illegal hunting and possession of firearms. Along with this, the reports demonstrate police powers for investigating these offences, including but not limited to, undercover

[895] The cut off figures from the UK and Australia

operations and DNA analysis. Finally, case law shows how South Africa's courts are considering the proceeds of crime when sentencing offenders in relation to these crimes.

Overall, it has been observed that the number of prosecutions within Australia and South Africa is substantially lower when compared to those made by the CPS in the UK. However, this is not necessarily proportionate when looking at the size of the country. Along with this, it is possible that both Australia and South Africa could be prosecuting wildlife trade offences under State legislation rather than federal law discussed in this thesis. Therefore, in order to accurately understand the extent of prosecutions for wildlife trade offences and thus the countries effectiveness, these explorations would be beneficial. However, due to the scope of this research, it was not possible to look at State legislation in this thesis.

Whilst each country have their own strengths and weaknesses when enforcing wildlife trade legislation, it is shown that South Africa is imposing the toughest sentences and utilising other legislation to increase their effectiveness. However, in order to fully establish which country is the most effective, further research is required as previously stated.

7.0 Conclusion

The premise is clear, CITES aims to protect endangered species from the illegal trade of specimens and is considered one of the most successful environmental treaties. The Convention imposes obligations on the Parties to ensure import, export and re-export permits are used for the movement of endangered species covered by its Annexes. In addition, each Party assumes duties and responsibilities pursuant to the text of the Convention and must uphold these; for example, the appointment of a national Management Authority and Scientific Authority. The thesis has observed that there are a number of political dimensions to the operation of CITES and the illegal wildlife trade. Processes around CITES' CoPs and questions regarding the transparency of voting mechanisms provides just one example, however it is recommended these, and any subsequent, issues are resolved to help augment the Convention's success and further help tackle the illegal wildlife trade.

The trade in CITES species concerns the flow from supply countries, often through transit states, before reaching their ultimate destination within the demand states. The evidence suggests that the illegal wildlife trade has become intertwined with other transnational illegal trades, including drugs and weapons; and similar transit routes are used. Commentators have observed that these organised criminal groups are targeting weaker states: those known for corruption, with porous borders and poor law enforcement, as they are able to take advantage of these phenomena to avoid detection. With

regard to the illegal wildlife trade, this is more common for the supply/range states and transit countries. Therefore, it is necessary for countries to tackle their own internal affairs, through combating corruption, strengthening borders and increasing law enforcement, in order to be successful at tackling the illegal wildlife trade. The law enforcement element is the primary focus of this research, although it does not consider legal responses to corruption in weaker states.

NGOs play an important role in combating the illegal wildlife trade: through researching the impacts of the illicit activity, educating communities and challenging governments to enact effective legislation. This research has highlighted ivory and the demand for it, along with legal responses such as the destruction of stockpiles. It is questionable how effective this destruction will be. While countries are attempting to send a strong message to wildlife traffickers, it is also possible they are driving up the value of ivory and could be further incentivising criminals, although reducing its availability undermines parallel markets in faked antiquities. NGO's are working hard to educate societies of the effects the illegal wildlife trade, and the use of endangered species and their derivatives in order to reduce demand. Whilst some evidence suggests a change in the demand for products, more effort is required to discourage the consumers of illegal wildlife trade commodities.

This research has indicated that if law enforcement agencies had a more comprehensive understanding of the impacts and additional criminal activity the illicit wildlife trade is linked to, it could further inform the efforts of these

organisations and make their responses targeted, proportionate and dissuasive. Environmental impacts, such as alien species introduction and species extinction, do not seem to be sufficient to increase the perceived severity of this activity. However, as observed, these activities arguably generate a global security threat, manifested in terrorism and the undermining of civic society as discussed in Chapter 2.

Whilst there are clear, identified difficulties in assessing the effectiveness of each country in tackling the illegal wildlife trade, a number of similarities as well as differences in approach are identified and considered. Areas of weakness have been discovered and recommendations are offered in respect of these, so as to potentially strengthen the enforcement efforts of each country. In order to assess effectiveness, it was first necessary to explore the domestic legislation for each of the countries being investigated in this research. The domestic legislation explains how CITES has been implemented into each country, through each country's appointment of particular bodies, their permit requirements and the species listings.

Firstly, EU and UK legislation was presented to identify the mechanisms in place for law enforcement agencies and the COTES Regulations were recognised as the most coherent piece of legislation. Of the three countries of comparison, the UK was the only country covered to include police powers within their illegal wildlife trade legislation. A defined role adds strength to the legislation as it enables the police, and offenders, to understand the powers available to them to ensure successful investigations resulting in subsequent

prosecutions. Whilst South Africa and Australia have legislation to cover police powers, it is beneficial to include these powers in the law governing specifically the illegal wildlife trade as there are differences between these and other areas of crime. For example, the UK specifically covers police powers in respect of sampling specimens to identify which Appendix (if any) they fit into as this also determines the permit requirements and any subsequent charges the individual may face. Although it has been demonstrated that Australia and South Africa allow for samples to be taken, this would be strengthened if it was included within the legislation as an intrinsic process. Similarly, the UK is the only country studied that includes a provision relating to the purchase or offer to purchase of CITES listed species. As such, it is initially unclear if it is an offence to purchase or offer to purchase these species within Australia and South Africa. It is believed this offence helps to strengthen the legislation as it also places a focus on purchasers to ensure they are not becoming involved with the trade in endangered species. If individuals are not purchasing the species involved with this illicit activity, the trade would diminish.

Furthermore, Australia and South Africa's legislation makes no reference to the seizure of specimens, which presumably takes place under other legislation. Whilst it is likely this does occur, the effectiveness of the legislation would increase if this was explicit as, arguably, aligning powers by reference to the measure, as opposed to a more general power, possibly results in greater internal coherence. Educating, and perhaps deterring, potential offenders would be improved if it was possible, easily, to identify all

the powers available to law enforcement agencies. Additionally, seizure of specimens can help to prevent the environmental impacts previously discussed. If specimens are seized, the agencies can reduce the risk of alien species introduction through the use of quarantines. Likewise, if the specimen is seized, it can be possible to return these back to the originating country, thereby helping to reduce the risk of species extinction. This is in line with Article VIII of CITES, which requires Parties to take appropriate measures to ensure confiscated live specimens are returned to the State of export or placed in a designated rescue centre. Therefore, one recommendation of this thesis would be for the countries to re-evaluate their legislation and reduce ambiguity through the addition of police powers and additional offences within their respective pieces of legislation.

Whilst it is apparent Australia and South Africa could perhaps increase the efficacy of their wildlife trade legislation in some respects, there are clear areas of success. CITES allows Parties to implement more stringent measures where they see fit. Australia and the UK have uprated certain species within the Annexes to help protect against extinction but also to help with sub-species difficulties. Further, the general imprisonment term with Australia and South Africa, 10 years for both, exceeds that of the UK, currently at 5 years. Whilst the fine element of the sentencing is higher in the UK, it is questionable if a fine would act as a deterrent in comparison to a prison term, although given that it is often, although not always, driven by a profit motive, proportionate fines, reflecting the value of the transaction, could be effective. Therefore, in respect of sentencing, Australia and South Africa

are stricter, and subsequently could be considered on one measure more effective. However, this would also depend on how the judicial system is applying the legislation to offenders and whether the maximum term is being used within each country.

Following the legislation analysis, this research explored the proceeds of crime legislation for each country. This aim of this type of legislation is to ensure any money or the offenders do not gain asset gained during the course of criminal activity; thereby making sure the crime does not pay. This legislation could act as an effective mechanism to all three countries to help deter offenders from committing these crimes. Nevertheless, as is noted later in the conclusion, some countries are not utilising this legislation effectively and thereby neglecting an opportunity to help deter offenders and subsequently tackle problem. As previously discussed, it is possible that proportionate fines are sufficient to deter offenders, although some countries are not implementing these.

Finally, the legislation analysis studied the investigatory powers for the UK, Australia and South Africa. This section helped to identify ways investigations within each country are undertaken and the powers available to those involved, although they are not contained specifically within wildlife legislation. Whilst this provides an important basis for this research, these powers did not get explored any further during this study; it would be interesting to explore further the extent to which the countries involved in this research make use of the powers covered within this section for illegal wildlife trade investigations.

This additional research would help to assess the level of resources applied to illegal wildlife trade investigations and identify the perceived severity of these crimes by the organisations adopting the powers in question.

It is noted that the COTES Regulation were amended in 2018, and whilst this was considered in the legislation chapter, any results were received prior to the enactment of this legislation. The 2018 Regulation brought into effect civil sanctions to assist organisations, through the reduced standard of proof, allowing for easier satisfaction of the evidentiary burden. Whilst also making it an offence for failure to comply with a civil sanction. It is probable that the changes to COTES will enhance the UK's response to wildlife trade offences, by allowing regulatory offences to be more fully enforced. However, further analysis will be required when action is brought under COTES 2018.

It might appear that the law is being undermined, but essentially, the two areas where it is being applied are regulatory offences that would be unlikely to be 'prosecuted', although now there's the potential that they may be more fully enforced, thereby increasing the effectiveness of the law.

This black letter law analysis provided a framework for the research and helped shape the subsequent investigations that took place. The first methodology, involving questionnaires and interviews, had to be altered due to a lack of involvement from the participants. Therefore, the black letter law analysis helped to identify questions for the organisations approached through the use of the FOI Act (or equivalent). Whilst the FOI approach provides a

legal obligation on public organisations to respond to requests for information, this research highlights varying degrees of compliance: not only in response rate but also the use of exemptions. Generally, the UK's response rate for FOI requests were good, however there was inconsistency in the adoption of exemptions, discussed in more detail later. Australia had the best response rate for the FOI requests as it provided all of the information requested, or identified where this was not possible. Although their communication and response did not always align, this may be due to the use of precedents in their letters and failure to understand the information correctly. South Africa delivered the worst response to the FOI request as it did not provide the requested information but merely pointed to publicly available reports that contained some of the required information.

Whilst Australia provided the most accurate datasets in response to the FOI requests, the overall results demonstrated varying responses to the combatting of wildlife trade offences. The UK had the highest number of prosecutions within the specified time period, this demonstrates organisations adopting the relevant legislation, however the UK is also three times the size of Australia in population and this may justify the increased prosecutions. However, the lack of data in relation to the outcome of these prosecutions makes it difficult to assess the UK's effectiveness. Although Australia did not have the highest number of prosecutions or arrests, the success rate for prosecutions was extremely high. This potentially demonstrates the Australian authorities' effectiveness at implementing the legislation. In respect of South Africa, the results establish that their courts impose the

toughest sentences for illegal wildlife trade offences, although generally this has been where the crime relates to rhinos; or that other aggravating or inchoate offences have also featured. Additionally, the South African experience presented examples where other mechanisms, particularly proceeds of crime legislation, were adopted. In aggregate, these helped to increase the effectiveness of their efforts at tackling the illegal wildlife trade. Finally, the results highlighted how difficult it is to detect true crime levels; due to the nature of the research topic, it is impossible to identify the level of crime going undetected. The results will now be explored in more detail to provide conclusions and recommendations from each dataset.

First, with regard to the UK, the change in computer systems within the specified time period resulted in negative responses being given. Though research evidenced arrests, charges and prosecutions being made within this time frame, as such it was concluded that these figures do not represent an accurate response. It is surprising that this information is lost when police computer systems change, as it seems necessary to keep a record of all offences in one place. However, it may just be that the time limit for FOI responses would have been increased if the organisations had investigated these numbers further. This leads to another problem identified with the UK: the inconsistency in providing FOI responses. The same request was sent to all police forces in the UK but forces used different exemptions when no information was provided. It seems contradictory for forces to use different exemptions on the same data sets, as discussed in Chapter 4. This is a key finding of this thesis and undermines the objectives of the FOI legislation in

the UK. This is a particular disadvantage when attempting to establish the effectiveness of authorities aiming to combat the illegal wildlife trade as it cannot be shown the total crime statistics for these offences. With specific reference to the organisations, which record crimes as 'miscellaneous', the possibility for organisations to understand their contributions to tackling all crimes, which are recorded as such, seems reduced. This also minimises the analysis of the overall national responses to crime. Therefore, it is recommended the government and Information Commissioner provide guidance to these organisations to ensure they understand the exemptions correctly. Additionally, forces should communicate within their departments and across forces to ensure they are compliant with the legislation and using exemptions correctly.

The police forces that did provide figures in respect of wildlife trade offences highlighted areas for improvement. The results revealed an increase in arrests and charges at the same time the COTES Regulations were amended, 2007 and 2009. This demonstrates a potential increase in efforts when new legislation comes into effect. There is a positive element to this as the police embrace new powers of arrest leading to increased charges for offences. However, it is negative in that without novelty, it appears that forces have lacked motivation. It has been noted that police budget cuts have resulted in forces having to prioritise, however, more is required to ensure arrests and charges are occurring at all times, not just when legislation is amendment and comes to the forefront again. The UK police forces have dedicated wildlife officers, but they are required to respond firstly to more traditionally defined

victim-based crimes, happening at that point in time, so are not able to dedicate the whole of their time to tackling wildlife issues. Therefore, it is crucial police forces are ensuring officers are trained to identify wildlife trade offences and that they have the time and resource to act accordingly to ensure this illicit trade does not go undetected and unpunished.

Second, the process for recording crime statistics varies throughout the different police forces. The results here show a diversity in the responses provided and this leads back to the way crime statistics are recorded. For example, one police force discussed wildlife trade offences being recorded as "miscellaneous offences", this suggests either a low number of offences or them being treated different to other crimes, perhaps due to the notion of it being a 'victimless' crime. Regardless of the reason, it is questionable how police forces can assess their effectiveness and expect consistencies throughout the judicial system if they record their crime statistics differently. The sentencing of crimes originate from police investigations and therefore it is believed there should be consistency across each police force. Whilst it is appreciated these organisations and separate from each other and operate independently, there is a requirement for data sharing to ensure the law is upheld, to prevent crime and to initiate justice to offenders. Consequently, one major recommendation derived from this research is the requirement for police forces in the UK to align the recording of crime to help data sharing and improve the law enforcement within its borders. This would help understand the crime rates, both nationally and regionally, whilst also assisting in the alignment of investigations for similar crimes.

Although this is an obvious weakness within the UK, there have been successes over the time period being explored. Arrests, charges and prosecutions have occurred for wildlife trade offences, with certain police forces having higher numbers in comparison to other areas. This increase in numbers may be due to more resources, the proximity to ports/airports or better adoption of resources. The justification for this falls outside the scope of this research but further exploration would help to determine why the numbers are higher and potential provide further recommendations to increase the effectiveness of wildlife trade legislation in the UK. Moreover, the UK have made limited use of additional measures and have provided no evidence for the systematic use of POCA in respect of wildlife trade offences. This indicates a significant weakness in respect of the deterrence of future offences as this helps to undermine the stance countries are attempting to present to wildlife criminals. Subsequently, another major recommendation from this research is for organisations to utilise the proceeds of crime legislation more systematically for all wildlife trade offences to promote more effective deterrence.

However, whilst no evidence was provided to show UK organisations utilising POCA in their cases, the police forces did not provide the outcome for these offences and therefore it is possible POCA applications were made but not recorded by the FOI responders. It is again difficult to understand how police forces can assess their effectiveness at responding to crimes without recording the outcome of arrests. There is also evidence to contradict this, as

police forces update victims of the outcome of their cases. As such, it is a further recommendation that police forces keep a record of the outcome of all cases that result in court proceedings as this will help strengthen their investigations and efforts in combatting crime of all natures. A further FOI request to HMCTS might have provided the outcome for all the cases that resulted in court proceedings, this was not carried out as part of this study but could form the basis of future research.

As no outcomes were provided for UK prosecutions, research was carried out on legal databases and newspapers to identify sentencing for wildlife trade offences. This research showed offenders implementing the pre-CITES exemption to prevent detection and punishment. Whilst the case evidenced offenders still being detected and punished, it is obvious the pre-CITES exemption acts as an ineffective element when exploring the effectiveness of countries tackling the illegal wildlife trade. The UK government has enacted the Ivory Act which will remove the pre-CITES exemption for most ivory products, and should represent a significant market reduction measure, although this will not be seen until the Act comes into effect later in 2019. It is recommended all countries remove the Pre-CITES element as it can be seen as undermining the Convention and subsequently the efforts of organisations attempting to tackle the trade. The research also identified that the UK is implementing relatively weak sentencing for these offences in comparison to the maximum allowed through legislation. It is apparent more needs to be done in respect of the sentencing of these offences within the UK. Educating judges and law enforcement bodies may help increase the sentencing of

these offences, but at present those sentencing offenders are not adopting the legislation effectively.

Similarly, the NWCU were approached for data in respect of wildlife trade offences but stated they did not hold the information. It is questionable how, the unit designed to help combat this activity can operate successfully without access to the information. It is recommended that the NWCU begin a central registry for all wildlife trade offences. All the results show the importance of the NWCU involvement with wildlife trade cases, but it is difficult to establish the success of the unit without such a registry. The registry would help identify locations with increased activity; recurring offenders; the level of detection and outcome of prosecutions. Furthermore, the information contained in the registry could help impact the sentencing of offenders and help justify the existence of the unit.

As with the UK, detailed study of the position in Australia identified areas that might improve the enforcement efficacy for wildlife trade offences; specifically in respect of recording issues. The Department of Environment administers the legislation, however it is in an investigatory capacity only and it holds limited information. It is questionable how the Department can effectively administer the legislation if it does not hold information that impacts upon it. As with the UK, it is therefore recommended better management of information relating to illegal wildlife trade offences.

Regardless, Australia provided a response for the information requested under the FOI Act. Unfortunately, Australia did not provide the number of arrests for wildlife trade offences and as such this cannot be meaningfully compared to the UK. The response demonstrates a lower number of prosecutions than the UK, however it has been highlighted that individual state legislation has not been explored by this research. Therefore, states may be prosecuting offenders under state legislation, rather than the EPBC Act. Consequently, the results may differ and Australia may, at least proportionately, exceed the UK for prosecutions for wildlife trade offences. The state legislation would exceed this research and therefore was not explored; however future into this would help identify the whole level of effectiveness regarding Australia's efforts in tackling the illegal wildlife trade. Whilst state legislation has not been included, the results for EPBC Act demonstrate an extremely high success rate for prosecutions; validating Australian authorities are effective at certain aspects of fighting the illegal wildlife trade.

Concurrently, the results provided by Australian authorities' evidenced prosecutions for both native and import/export cases and animal welfare offences. This establishes their efforts in the global fight discussed above. Australia is the only country that included issues relating to animal welfare in the responses they provided, as such it is recommended countries for wildlife trade offences explore an interdisciplinary approach. If animal welfare aspects are considered alongside the trade issues, it is possible the mortality

rate would increase, increasing re-introduction rates and decreasing the risk of extinction.

Finally, unlike the UK, the Australian authorities provided the sentences imposed for wildlife trade offences. Whilst there are some inconsistencies in the sentences passed down, it is evident that Australia uses severity-based sentencing. As in other jurisdictions it is likely the courts do not consider these offences are severe as 'victim-based crimes', although more research is required to prove this. Also, there are instances where strict sentences are imposed, although these are generally made more lenient by the use of good behaviour orders: although they may not appear to punish, they may have a future, deterrent effect. In addition, the authorities in Australia (like the UK), provided no evidence for the use of proceeds of crime legislation, which could indicate another shortfall in the approach of the organisations aiming to protect against criminal activities. Hence, the thesis has demonstrated that the authorities in Australia can demonstrate success in some areas where it is effectively implementing legislation to tackle the illegal wildlife trade, but it is apparent that there is scope to more. An example here might be for better judicial training, or sentencing guidance for wildlife offences; more effective use of proceeds of crime legislation to help punish offenders and deter others.

A further aspect of this research was to explore the effectiveness of Border Force Agencies in their enforcement capacity. In the UK, there was an incomplete data set, but the results show an increase in the number of detections/seizures for these offences. As such, on face value it would

appear the UKBFA are successful at infiltrating wildlife trade shipments, although based on the type of crime there is no comparator to be certain of this. Also, there are no arrest or prosecution figures to fully assess effectiveness. Therefore, it is recommended further research is carried out to accurately identify the effectiveness of UKBFA at tackling the illegal wildlife trade.

As the UK moves closer towards Brexit, it is difficult to understand the implications this will have on the illegal wildlife trade within its borders. It is possible Brexit could provide an increased opportunity for Border Force to intervene and disrupt imports into the UK. However, this will depend on the approach in which the UK leaves the EU and what deal, if any, is in place upon the country's exit. However, Brexit may also have a negative impact on combating the illegal wildlife trade due to the loss of the EU Regulation discussed in Chapter 3.

Similar to the UK, Australia's Customs Agency did not provide a full data set and therefore the results are shown over a small time frame. The results show an increase in detection, with minor crime far exceeds major crimes. Based on the results provided, it is difficult to ascertain accurately the effectiveness of the organisation in their efforts to combat the illegal wildlife trade, but on face value they seem effective as the number is increasing. Again, it is difficult to fully evaluate as no arrest or prosecution figures were given to present all the information required to assess the implementation of legislation. Also, the Regulated Goods Policy Section develop the policies

around this, yet they do not hold data. This, as with the discussions above, demonstrates a weakness for the organisations involved. As previously mentioned, these organisations should have access to the information and utilise it to make legislation and law enforcement more effective.

Again, when comparing the two countries, the UK has reported more detection and/or seizures than Australia in respect of their custom agencies. However, again Australia state legislation has not been included in this research and this may change things. Consequently, gaining the data in relation to state legislation would help provide a more accurate picture of Australian authorities' effectiveness and a better comparator when looking at different countries. Based on this information provided, it would suggest the UK authorities are more effective than Australia at implementing and enforcing wildlife trade legislation. However, there are numerous recommendations for the UK authorities to improve effectiveness, as with Australia and more information is required to accurately compare the two countries.

As mentioned, it was not possible to compare South Africa's results with the UK and Australia. South Africa failed properly to respond to the FOI request and the response given provided results in a different time period, as such it would be inaccurate to compare the three countries. South Africa did not provide arrest, charges or prosecution figures for the period requested, rather gave access to information around the overall response from organisations between 2009 and 2016.

The main observation, in Chapter 6, around South African authorities' response was that the sentencing for wildlife trade offences far exceeded those in the UK and Australia. The stricter penalties were most obvious in respect of cases involving rhino, or the derivatives. It has also been evidenced that the prosecution service in South Africa link these offences to other crimes to aid the sentencing and impose tougher penalties. These other offences differ greatly, from trespassing, firearms offences, and murder. It may not always be possible to link these offences with other crimes, it is definitely something the UK and Australia should be exploring. Although in this connection, the fact that South African authorities are responding to their situation as a range State and dealing with a level of violence not experienced in respect of trade offences, which is not necessarily required in the UK and Australia. Linking back to the interdisciplinary approach discussed above, if prosecutors connect wildlife trade offences with others, it may help to increase the sentences passed down and subsequently deter others from committing these crimes. If criminals do not see the sentences for trade in endangered species as weak, and the punishment outweighs the reward, it would help deter individuals from becoming involved. As such, more awareness should be provided, not just to judges for the sentencing, but to potential criminals to prevent their involvement from the outset.

The results shown represent stronger sentences than the UK and Australia, however all of the cases discussed involved native species, thereby from the supply element of the CITES process discussed above. It is possible

sentencing would be more lenient if the offender was involved with the transit or destination element of the offence, as noted above, as the species would not likely to be from South Africa. This is currently speculation so further research would be beneficial to prove, or refute this idea. If this was proven, it would suggest South African authorities are effective at tackling the wildlife trade within its borders, but more assistance would be required for the global concern.

Irrespective, of this speculation, the results highlight South Africa is the only country explored in this research taking advantage of the additional mechanisms discussed in Chapter 3. South Africa's results illustrate the court's utilising confiscation powers, of both money and assets linked with the criminal activity. This means, not only is South Africa imposing stronger sentences, the authorities are also deterring future offenders by adopting additional measures to ensure the punishment is robust in the context of the crime. This is an area the UK and Australia could perhaps improve upon to help tackle the illegal wildlife trade.

Based on the discussions throughout this thesis, a number of recommendations and areas for further research have been discussed. Specifically, better use of computer systems to help increase the effectiveness of legislation and law enforcement. Cross-organisation and country interaction would assist the efforts laid down in CITES and by domestic legislation. A central registry has been discussed, in respect of the NWCU, however, it may be beneficial for all countries, to be able to identify

various aspect of the illegal wildlife trade thereby increasing the ability to protect against the activities. The results, specifically from the UK, demonstrated difficulties in the reporting of CITES cases, consequently it is recommended that a standardised reporting system be developed. This would allow law enforcement agencies to effectively evaluate their responses to wildlife trade offences, and adjust their reactions accordingly.

Education has been, and remains an important part of this fight. It has been highlighted that, generally, countries are imposing weak or lenient penalties for these offences, educating governments, law enforcement and the judiciary of the impacts and links may strength the sentences, thus decreasing the extent to which the activities occur. Changing the perception of the illegal wildlife trade as being victimless, and addressing conditions of corruption will also protect endangered species from unsustainable trade. Finally, as evidenced with South Africa, adopting an interdisciplinary approach would improve the efforts of those tackling the illegal wildlife trade.

Whilst it is not possible to offer a complete comparison across all of the mechanisms and approaches of the three countries, as a result of the incomplete datasets, the results provided in this research demonstrate certain strengths and weaknesses for each country. Taking account of those has enabled a view, which leads to certain recommendations, as set out above, to help improve the regulatory response targeted towards the illicit trade in endangered species.

Appendix I

Ethics Form

RESEARCH WITH PLYMOUTH UNIVERSITY	**Faculty of Business Academic Partnerships** **Faculty Research Ethics Committee** **APPLICATION FOR ETHICAL APPROVAL OF RESEARCH**	(For FREC use only) Application No:	
		Chairs action (expedited)	Yes/ No
		Risk level -if high refer to UREC chair immediately Cont. Review Date	High/ low / /
		Outcome (delete)	Approved/ Declined / Amend/ Withdrawn

1.	**Investigator/student** **Note:1* Melanie Berry Director of Studies – Jason Lowther	Student - *please name your Director of Studies or Project Advisor*: and Course/Programme:
	Contact Address: Room 001, 19 Portland Villas, University of Plymouth, Plymouth, PL4 8AA	
	Tel: 07880498991	Email: melanie.berry@students.plymouth.ac.uk
2.	**Title of Research:** Comparative assessment of measures to tackle the illegal trade in endangered species	
3.	**Nature of approval sought** (Please tick relevant boxes) **Note:2* a) PROJECT: [x] b) PROGRAMME [ ] (max 3 years) *If a) then please indicate which category:*	
	Funded/unfunded Research (*staff)* [ ] MPhil/PhD, ResM, BClin Sci [x] Masters [ ]	Undergraduate [ ] Or Other *(please state)* [ ]
4.	**Funding:** N/A (self funded) a) Funding body (if any): b) If funded, please state any ethical implications of the source of funding, including any reputational risks for the university and how they have been addressed. **Note: 3*	

5.	a) Duration of project/programme: *Note: 4 3 years b) Dates: October 2013 – October 2016
6.	Has this project received ethical approval from another Ethics Committee? N a) Please write committee name: b) Are you therefore only applying for Chair's action now? Yes / No
7.	**Attachments** (if required) a) Application/Clearance Form Yes b) Information sheets for participants Yes c) Consent forms Yes d) Continuing review approval (if requested) No e) Other, please state:

**1. Principal Investigators are responsible for ensuring that all staff employed on projects (including research assistants, technicians and clerical staff) act in accordance with the University's ethical principles, the design of the research described in this proposal and any conditions attached to its approval.*

**2. In most cases, approval should be sought individually for each project. Programme approval is granted for research which comprises an ongoing set of studies or investigations utilising the same methods and methodology and where the precise number and timing of such studies cannot be specified in advance. Such approval is normally appropriate only for ongoing, and typically unfunded, scholarly research activity.*

**3. If there is a difference in ethical standards between the University's policy and those of the relevant professional body or research sponsor, Committees shall apply whichever is considered the highest standard of ethical practice.*

**4. Approval is granted for the duration of projects or for a maximum of three years in the case of programmes. Further approval is necessary for any extension of programmes.*

8.	**Aims and Objectives of Research Project/Programme:** Aim: To analyse the effectiveness of the structures in place for tackling the illegal wildlife trade in Australia, South Africa and the UK. To identify the threats associated with this illicit activity and make recommendations for improvement throughout the legal procedures on the basis of establishing comparative best practices. Objectives: 1. To analyse the legislation and policy which implements the Convention on International Trade in Endangered Species of Wild Fauna and Flora in the countries of study. 2. To identify and critically assess the effectiveness of the relevant strucutres established pursuant to the legislative and policy frameworks each country has in place to tackle the illegal wildlife trade. 3. To identify the evolving and contemporary threats associated with the illicit trade in endangered species and the difficulties these pose for the structures as they are currently constituted. **4.** To provide recommendations for the improvement of the legislation, policies and structures which aim to tackle the illegal wildlife trade.
9.	**Brief Description of Research Methods and Procedures:** This research will adopt a mixed methods approach. Primarily a desk-based evaluation of available legal materials supplemented by a questionnaire, which will be distributed via email and post. Follow up interviews will be take place with any participants who consent. The participants will primarily be selected by their role in tackling the illegal wildlife trade; this will include NGO's, government and policy makers, customs and prosecution services, as they will have experiences in the strengths and weaknesses of the legislation and structures that will help the researcher to achieve the objectives. By approaching a variety of organisations that work throughout the

	process of dealing with the illegal wildlife trade it will demonstrate more reliable and credible results, as well as enabling comparisons that are central to the thesis[896]. It will also help to ensure that the results are not corrupted by biases from specific organisations that may have a different view from others. The questionnaire will aim to explore the experiences of the organisations and individuals who have been involved with the structures, legislation and threats associated with the illegal wildlife trade. For those participants who consent to interviews, these will be done face-to-face where possible, with the use of audio, video or manual note taking depending on the consent of the respondent. Where it is not possible to do face-to-face interviews, they will be carried out over the internet, for example through Skype. *Specify subject populations and recruitment method. Please indicate also any ethically sensitive aspects of the methods. Continue on attached sheets if required.*
10.	**Ethical Protocol:** Please indicate how you will ensure this research conforms with each clause of the University of Plymouth's *Principles for Research Involving Human Participants.* Please attach a statement which addresses each of the ethical principles set out below.
	(a) Informed Consent: To ensure voluntary participation, all respondents will be sent a pre-notification via emails and letters explaining the purpose of the project. This explanatory statement will allow them to understand the outline of the research, along with the aims and objectives, all potential participants will be able to keep this for their own records. A consent form will also be sent with this explanation, allowing the potential respondents to consent or to turn down the opportunity to participate in the study. If the potential participant does not wish to be included in the research then they will be removed from all further communications. However, if a sign consent form is returned then the questionnaire will be sent out for them to participate in. The consent form will also include the opportunity for the participant to be included in interviews if necessary. It will allow them to consent to audio or video recording, if they consent to either then these methods will be undertaken. However, if they do not wish to be recorded then the researcher will use manual note-taking instead. The informed consent form will inform participants of their right to withdraw at any time and that the identity will be protected and not personally identified. However, the consent form will also give the participant the opportunity for their organisation to be quoted during the interview process, if they consent this is what will be adopted, however, if they do not consent then all identities will be protected throughout the data collection and analysis. Finally the consent form will include the provision that all data collected will be used for the researchers thesis, along with being stored on a password protected computer for future use if necessary. All participants will be given the opportunity to refuse consent and to withdraw at any time.
	(b) Openness and Honesty: To ensure openness and honesty, the researcher will: • Refrain from plagiarism and fabrication of results • Acknowledge the participants in the study, while keeping their identities confidential if this is the route chosen by the individuals • Acknowledge the limitation and restrictions of the research to enable the readers to know how much credibility the study should be provided

[896] Podsakoff, P., MacKenzie, S., and Podsakoff, N., 'Sources of Method Bias in Social Science Research and Recommendations on How to Control It', (2012) 63 *Annual Review of Psychology* 539 at p. 563

There will be no deception involved in this research project.

Once the results have published in the researchers thesis, relevant materials will be made available upon request to the participants of the study.

In order to ensure the process is as open and honest as possible and avoid deception, the participants will be given the opportunity to ask any questions regarding the research process. These questions will be considered and answered by the researcher.

Note that deception is permissible only where it can be shown that all three conditions specified in Section 2 of the University of Plymouth's Ethical Principles have been made in full. Proposers are required to provide a detailed justification and to supply the names of two independent assessors whom the Sub-Committee can approach for advice.

(c) Right to Withdraw:

As stated above, the consent form will allow all participants to withdraw from the study. If participants decide to withdraw, any data collected will be destroyed and the participant will be removed from all further communication regarding the research. If the participants have consented for the storage of data for further analysis and publications then all information will be stored securely until no longer needed. However, if they do not wish for the data to be stored and used for further publications, then the results will be destroyed no more than 6 months after the PhD viva.

Note that this section should also clarify that participant's data will be destroyed should they withdraw, in accordance with best practice.

(d) Protection From Harm:

The researcher aims to protect all participants from any physical or psychological harm at all times during the study. The researcher will ensure no pressure is put on the respondents during the investigation, this is to help protect their security and to protect them from any harm they may sustain from the study. It is also to help ensure the validity and credibility of data, as coercion and pressure could adjust the effectiveness of the results.

The researcher will make sure to avoid any kind of embarrassment, discomfort or harm that can be caused during the collection of the data or the reporting phase. However, if the researcher believes the respondent may have suffered from the research process, the participant will be advised of where to go to seek advice or counselling.

Along with this, the obligations to subjects as listed by the Social Research Association will also be met by ensuring all groups relevant to the study will be included, so long as they consent to inclusion. Therefore, no group will be disadvantaged by routinely being excluded from consideration.

The researcher's safety is also relevant to this investigation, therefore during the data collection; both supervisors will know the location of the interviews, as well as time and how long the researcher anticipates them to last. The researcher will then contact the supervisors once the data collection is over.

(e) Debriefing:

When first contacting potential participants they will be provided with a clear and detailed guide of the research process and the aims and objectives of the research. All information regarding the survey will be explicit and no information will be hidden. If there are any additional questions during the survey or after completion, these will be fully considered and answered where possible by the researcher.

(f) Confidentiality:

In order to protect confidentiality and privacy of the respondents, the researcher will apply full anonymity for the participants and confidentiality for the supplied information, unless the participant has given consent for the identity to be used within quotes, which will be provided by

	the consent form. If the participants do not consent to the use of their identity, all identifying information about the participant will be removed from records and reports. The researcher will ensure all responses collected will be anonymous unless the consent form allows the identity of him/herself or organisation to be expressed in any publications resulting from the data collection. Being stored on a password-protected in the researchers own home, where no one else can access the information, will protect the data collected. It will also be stored on a password-protected computer in Room 001 19 Portland Villas, this is a room dedicated to PhD students and lecturers, which is locked when not in use.
	(g) Professional Bodies Whose Ethical Policies Apply to this Research: Conforms with the guidelines regarding research ethics by PBS and the Social Research Association *The committee strongly recommends that prior to application, applicants consult an appropriate professional code of ethics regardless of whether or not they are members of that body (for example, Social Research Association . http://www.the-sra.org.uk/ethical.htm Market Research Society http://www.mrs.org.uk/standards/codeconduct.htm British Sociological Association http://www.britsoc.co.uk/equality/). Applicants **MAY** choose to write "not applicable" in the "Relevant Professional Bodies" section of the Ethical Application Form. However, it is very rare that there would be no professional/academic code of ethics relevant to a given research project. If based on the information written in other sections of the form, FREC considers a particular professional code to be of relevance, then the Committee may make its consultation and adherence a condition of acceptance.*
11.	**Declaration*:** To the best of our knowledge and belief, this research conforms to the ethical principles laid down by Plymouth University and by the professional body specified in 6 (g).

	Name	**E-mail (s)**	**Date**
Principal Investigator:	Melanie Berry	melanie.berry@students.plymouth.ac.uk	22/02/2015
Other Staff Investigators:			
Director of Studies (only where Principal Investigator is a postgraduate student):	Jason Lowther	jason.lowther@plymouth.ac.uk	22/02/2015

*You will be notified by the Research Ethics Committee once your application is approved.

This process normally takes around 3-4 weeks.

Please Answer Either YES or NO to ALL Questions Below.

If you answer YES, please provide further details.

Do You Plan To Do:

■ Research involving vulnerable groups – for example, children and young people, those with a learning disability or cognitive impairment, or individuals in a dependent or unequal relationship

Answer: No

■ Research involving sensitive topics – for example participants' sexual behaviour, their illegal or political behaviour, their experience of violence, their abuse or exploitation, their mental health, or their gender or ethnic status

Answer: No

■ Research involving groups where permission of a gatekeeper is normally required for initial access to members – for example, ethnic or cultural groups, native peoples or indigenous communities

Answer: No

■ Research involving deception or which is conducted without participants' full and informed consent at the time the study is carried out

Answer: No

■ Research involving access to records of personal or confidential information, including genetic or other biological information, concerning identifiable individuals

Answer: No

■ Research which would induce psychological stress, anxiety or humiliation or cause more than minimal pain

Answer: No

■ Research involving intrusive interventions – for example, the administration of drugs or other substances, vigorous physical exercise, or techniques such as hypnotherapy. Participants would not encounter such interventions, which may cause them to reveal information which causes concern, in the course of their everyday life.

Answer: No

Completed Forms should be forwarded BY E-MAIL to Cher Cressey, Secretary of the FREAC at: ccressey@plymouth.ac.uk

Please forward any questions/comments or complaints to:

Cher Cressey, Faculty Research Administrator

Room 311, Cookworthy, University of Plymouth, Drake Circus, Plymouth, PL4 8AA Tel: 01752 585540

References

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Ethical Approval

RESEARCH WITH PLYMOUTH UNIVERSITY

Melanie Berry
PGR Student
Faculty of Business

Ref: FoB/UPC/FREC/FREC1415.26/clc
Date: 19 March, 2015

Dear Melanie

Ethical Approval Application No: FREC1415.26
Title: Comparative assessment of measures to tackle the illegal trade in endangered species

Members of the Faculty Research Ethics Committee are agreement of a very well presented application with clear and concisely stated aim and research objectives, and well-defined and critically discussed methodological approach. All potential ethical issues were also carefully identified and critically discussed to the extent to which they would be managed.

We however have two minor suggestions for your consideration. The first is with regards to 'Section 10(c) Right to Withdraw'. Three main groups could be inferred from this section; (i) respondents who do not sign the consent form; (ii) respondents who provide data for the research; (iii) respondents who provide data for the analysis but do not wish for their data to be stored.

Very clear provisions have been made for the first and last groups to withdraw from the study or their data, but no such provisions for the second group. We will suggest the second group be given a right to withdraw their data up on until the commencement of the data analysis.

The second relates to a phrase in the information sheet for participants, paragraph 1 lines 3 – 4, *"Due to your involvement with the illegal wildlife trade . . . ."* This phrase seems to imply potential respondents are participants in the illegal wildlife trade rather than helping to deal with the problem. We will suggest the phrase be revised as, *"Due to your involvement* ***in the efforts to curtail (or tackle or stop)*** *the illegal wildlife trade . . . ."*

Approval is for the duration of the project. However, please resubmit your application to the committee if the information provided in the form alters or is likely to alter significantly.

Faculty of Business
University of Plymouth
Drake Circus
Plymouth
Devon PL4 8AA United Kingdom

T +44 (0) 1752 585540
F +44 (0) 1752 585715
W www.plymouth.ac.uk

We would like to wish you good luck with your research project.

Yours sincerely

(Sent as email attachment)

Dr James Benhin
Chair
Faculty Research Ethics Committee
Faculty of Business

Appendix II

Questionnaire

Comparative assessment of measures to tackle the illegal trade in endangered species

Date

Dear Sir/Madam:

My name is Melanie Berry and I am a PhD student at Plymouth University. For my thesis I am aiming to explore the measures used to tackle the illegal trade in endangered species and their effectiveness. Due to your involvement in the efforts to curtail the illegal wildlife trade, I am inviting you to participate in this research study by completing the attached questionnaire.

The following questionnaire will take approximately **<insert time amount>** to complete. There is no compensation for responding, nor is there any known risk. All personal information will be kept confidential, on a password-protected computer and within a locked cabinet. The thesis will be published through Plymouth University; however, all identities will be kept anonymous unless permission has been given on the consent form. If you choose to participate in the project, please fill in the attached consent form, and answer

questions as honestly as possible. Once completed, please return the consent form and the questionnaire to the email or postal address listed below. Participation is strictly voluntary, you may refuse to answer any questions, or refuse participation at any time. Following your participation, if you are to change your mind, please inform me by <insert date>, after this time I will have started data analysis and be unable to remove your responses.

Thank you for taking your time to assist my thesis and me. The data collected will provide useful information regarding the effectiveness of measures used to tackle the illegal trade in endangered species. If you would like a summary copy of the results collected through this project, please let me know.

If you require any additional information or have any questions, please do not hesitate to contact me.

If you are not satisfied with the manner in which this study is being conducted, you may report (anonymously if you so wish) any complaints to **<insert where>**.

Yours sincerely,

Melanie Berry

PhD student

Plymouth Law School, Plymouth University, Drake Circus, Plymouth, PL4 8AA

CONSENT FORM

Comparative assessment of measures to tackle the illegal wildlife trade in endangered species

		Please initial box
1.	I confirm that I have read and understood the information provided for the above study, I have had the opportunity to consider the information, ask questions and had them answered appropriately	
2.	I understand that my participation is voluntary and I may withdraw at any time, without giving a reason	
3.	I understand that any personal information collected during the study will be kept anonymous and confidential	
4.	I agree to take part in the above study	

Participants may be needed from various organisations to explore some of the issues in more depth. Would you be willing to be interviewed as part of this project?

Yes		No	

Please

	initial box	
	Yes	No
I agree to the interview being audio recorded		
I agree to the interview being video recorded		
I agree to the use of anonymous quotes being used in publications		
I agree that the data gathered in this study may be stored (after it has been anonymised) in a specialist data centre and may be used for future research		

Name of Participant	Date	Signature
Name of Researcher	Date	Signature

	Yes	No
I would like to receive a summary of results collected from this research		

No.		(please

		tick box)
1.	**What jurisdiction do you have responsibility in?**	
	Australia	
	South Africa	
	UK	

2.	**What type of organisation do you work for?**	
	NGO / other voluntary sector Which one……	
	Government department Which one……	
	National Management Authorities Which one……	
	Police Which one……	
	Policy maker Which one……	
	Prosecution services Which one……	
	Courts Which one……	
	Customs Which one……	
	Other (please specify)……	

3.	**Why do you think it is necessary to protect against the illegal wildlife trade?** ……

4.	**What do you consider to be the primary aims of CITES?**	Please tick all that apply
	Animal welfare	
	Conservation	
	Enforcement	
	Environmental protection	
	Sustainability	
	Trade provision	
	Other (please list)	

5a.	**How far do you believe the aims of CITES have extended over recent years?** (please circle) 0 1 2 3 4 5 Not at all Considerably
5b.	**Please add anything you wish to add below**……..... …….....

6a.	**Is there a case for CITES to incorporate more effective animal welfare protection?** (delete as appropriate)	Yes/no
6b.	**Please elaborate**…… ……	

7a.	**How effective do you consider the CITES implementing legislation in the jurisdiction you operate?** (please circle) 0 1 2 3 4 5 Very poor Very good
7b.	**What is the reasoning for this rating?** ....
7c.	**Are there any measures that would enhance effectiveness?** …….....

8a.	**Do you think the responses from customs agencies' in tackling the illegal wildlife trade are:** (please circle) 0 1 2 3 4 5 Very poor Very good
8b.	**What is your reasoning for this rating?** …….....
8c.	**What do you consider to be custom agencies' strengths and weaknesses?** (please answer depending on your organisation)
	I work for a customs agency ……

	……
	I do not work for a customs agency …… ……

9a.	**Do you think the responses from police in tackling the illegal wildlife trade are:** (please circle) 0 1 2 3 4 5 Very poor Very good
9b.	**What is your reasoning for this rating?** ..... …….....
9c.	**What do you consider to be police strengths and weaknesses?** (please answer depending on your organisation)
	I work for the police……..…….. ……
	I do not work for the police ……..…….…… ……

10a.	**Do you think the responses from prosecution services in tackling the illegal wildlife trade are:** (please circle) 0 1 2 3 4 5 Very poor Very good
10b.	**What is your reasoning for this rating?** ..... …….....

10c.	**What do you consider to be prosecution services strengths and weaknesses?** (please answer depending on your organisation)
	I work for the prosecution services…….. ……
	I do not work for the prosecution services……... ……

11a.	**Do you think the responses from NGOs/other voluntary sector in tackling the illegal wildlife trade are:** (please circle) 0 1 2 3 4 5 Very poor Very good
11b.	**What is your reasoning for this rating?** ..... …….....
11c.	**What do you consider to be NGOs/other voluntary sectors strengths and weaknesses?** (please answer depending on your organisation)
	I work for an NGO/other voluntary sector……..…….. ……
	I do not work for an NGO/other voluntary sector…..……... ……

12a.	**Assess the range of sentencing options available to the courts in your jurisdiction** 0 1 2 3 4 5

	Very poor Very good
12b.	**What is your reasoning for this rating?** ..... …….....
12c.	**Do sentencing guidelines for environmental/wildlife offences offer assistance?** (please answer depending on your organisation)
	I work for the courts……..…….. ……
	I do not work for the courts……..……... ……

13a.	**What do you understand the precautionary principle to mean?** ……. ……
13b.	**To what extent do you think the precautionary principle helps with legislation surrounding the illegal wildlife trade?** 0 1 2 3 4 5 None Considerably

14.	**Why do you think the illegal wildlife trade is mainly advertised as the big five?** …… ……

15a.	**What do you consider to be the significant contemporary**	(tick all

	threats associated with the illegal wildlife trade?	that apply)
	Alien invasive species	
	Animal welfare	
	Distortion to trade	
	Economic concerns	
	Loss of species	
	Phytosanitary issues	
	Sustainability	
	Terrorism	
	Threats to biodiversity	
	Transnational organised crime	
15b.	**Which of these do you consider to be the most significant threat?** ……..… ……	

16.	**Other than for financial gain, can you identify key drivers involved in the illegal wildlife trade?** …… ……

17.	**In your view, what would be the most effective deterrent against committing illegal wildlife trade offences?** ..... ……

18a.	**Do you agree that the identification of particular species is a significant challenge in tackling the illegal wildlife trade?** 0 1 2 3 4 5 Strongly disagree Strongly agree	
18b.	**Do you have any experience where this has been an issue?** ..... ……	
18c.	**Is this a particular problem for lookalike species?** (delete as appropriate)	yes/no

19a.	**How strong do you understand the links between CITES and the Convention on Biological Diversity are?** 0 1 2 3 4 5 Weak Strong	
19b.	**Do you think aims of both these Conventions cross over?** (delete as appropriate)	yes/no
19c.	**Do you think there should be stronger links between the two Conventions?** (delete as appropriate)	yes/no
	Please explain your answer …….. ……	

20a.	**To what extent should there by greater emphasis on targeting illegal markets** (please circle) 0 1 2 3 4 5

	Lesser Greater
20b.	**To what extent should there by greater emphasis on targeting illegal poaching** 0 1 2 3 4 5 Lesser Greater
20c.	**In your view, how effectively are wildlife trade markets policed in your jurisdiction?**
	0 1 2 3 4 5 Weak Strong
20d.	**Can you give any examples?** ……..…….. ……

21.	**What would be the one thing that would improve your organisations ability to contribute more effectively to disrupting the illegal wildlife trade?** ……..…… ……

Appendix III

Second Ethics Form

<table>
<tr><td colspan="2" rowspan="4">RESEARCH WITH PLYMOUTH UNIVERSITY

Faculty of Business

Academic Partnerships

Faculty Research Ethics

Committee

APPLICATION FOR

ETHICAL APPROVAL OF

RESEARCH</td><td colspan="2">(For FREC use only)
Application No:</td></tr>
<tr><td>Chairs action (expedited)</td><td>Yes/ No</td></tr>
<tr><td>Risk level
-if high refer to UREC chair immediately
Cont. Review Date</td><td>High/ low

/ /</td></tr>
<tr><td>Outcome (delete)</td><td>Approved/
Declined/ Amend/
Withdrawn</td></tr>
<tr><td>1.</td><td colspan="2">Investigator/student *Note:1

Melanie Berry</td><td>Student - please name your Director of Studies or

Project Advisor: Jason Lowther

and Course/Programme: PhD Law</td></tr>
<tr><td></td><td colspan="3">Contact Address: Room 001, 19 Portland Villas, University of Plymouth, Plymouth, PL4 8AA</td></tr>
<tr><td></td><td>Tel: 07880498991</td><td colspan="2">Email: melanie.berry@students.plymouth.ac.uk</td></tr>
<tr><td>2.</td><td colspan="3">Title of Research:

Comparative assessment of measures to tackle the illegal trade in endangered species</td></tr>
</table>

3.	**Nature of approval sought** (Please tick relevant boxes) **Note:2*

c) PROJECT: [x] d) PROGRAMME [ ] (max 3 years)

If a) then please indicate which category:

Funded/unfunded Research (*staff)*		Undergraduate	
MPhil/PhD, ResM, BClin Sci	x	Or Other *(please state)*	
Masters			

4.	**Funding:** N/A (self funded) a) Funding body (if any): b) If funded, please state any ethical implications of the source of funding, including any reputational risks for the university and how they have been addressed. **Note: 3*
5.	a) Duration of project/programme: **Note:* 4 3 years b) Dates: October 2013 – October 2016
6.	Has this project received ethical approval from another Ethics Committee? Yes Please write committee name: Faculty Research Ethics Committee - Faculty of Business c) Are you therefore only applying for Chair's action now? Yes
7.	**Attachments** (if required) f) Application/Clearance Form Yes g) Information sheets for participants No h) Consent forms No

	i) Continuing review approval (if requested)	No
	j) Other, please state:	

**1. Principal Investigators are responsible for ensuring that all staff employed on projects (including research assistants, technicians and clerical staff) act in accordance with the University's ethical principles, the design of the research described in this proposal and any conditions attached to its approval.*

**2. In most cases, approval should be sought individually for each project. Programme approval is granted for research which comprises an ongoing set of studies or investigations utilising the same methods and methodology and where the precise number and timing of such studies cannot be specified in advance. Such approval is normally appropriate only for ongoing, and typically unfunded, scholarly research activity.*

**3. If there is a difference in ethical standards between the University's policy and those of the relevant professional body or research sponsor, Committees shall apply whichever is considered the highest standard of ethical practice.*

**4. Approval is granted for the duration of projects or for a maximum of three years in the case of programmes. Further approval is necessary for any extension of programmes.*

8.	**Aims and Objectives of Research Project/Programme:** 5.
9.	**Brief Description of Research Methods and Procedures:** Research will be collected through the Freedom of Information legislation in each country of study. Letters/emails will be sent to the Police, Prosecution Services and Border Force teams within the UK, Australia and South Africa. The purpose of this is to identify the number of seizures, arrests and prosecutions for illegal wildlife trade offences. As well as, identifying the penalties given to offenders under the relevant legislation. These letters/emails will be written in accordance with the Freedom of Information legislation. *Specify subject populations and recruitment method. Please indicate also any ethically sensitive aspects of the methods. Continue on attached sheets if required*.
10.	**Ethical Protocol:** Please indicate how you will ensure this research conforms with each clause of the University of Plymouth's *Principles for Research Involving Human Participants.* Please attach a statement which addresses each of the ethical principles set out below.
	(h) Informed Consent: Consent is given through the relevant legislation, which states that requests may be made. Each organisation is able to refuse to provide the information requested, and reasons for this will be given. Therefore, consent is automatically given for the request, under the relevant pieces of legislation and will be revoked if an organisation considers it necessary.
	(i) Openness and Honesty: To ensure openness and honesty, the researcher will: • Refrain from plagiarism and fabrication of results • Acknowledge the organisations in the study

- Acknowledge the limitation and restrictions of the research to enable the readers to know how much credibility the study should be provided

There will be no deception involved in this research project.

Once the results have published in the researchers thesis, relevant materials will be made available upon request to the organisations involved in the study.

In order to ensure the process is as open and honest as possible and avoid deception, the organisations will be given the opportunity to ask any questions regarding the research process. These questions will be considered and answered by the researcher.

Note that deception is permissible only where it can be shown that all three conditions specified in Section 2 of the University of Plymouth's Ethical Principles have been made in full. Proposers are required to provide a detailed justification and to supply the names of two independent assessors whom the Sub-Committee can approach for advice.

(j) Right to Withdraw:

As the research shall be collected using legislation, there should be no reason for the organisations to withdraw. However, should an organisation need to, the data collected will be destroyed and the participant will be removed from all further communication regarding the research. If the participants have consented for the storage of data for further analysis and publications then all information will be stored securely until no longer needed. However, if they do not wish for the data to be stored and used for further publications, then the results will be destroyed no more than 6 months after the PhD viva.

Note that this section should also clarify that participant's data will be destroyed should they withdraw, in accordance with best practice.

(k) Protection From Harm:

As the researcher will be following the guidelines of legislation, there should be no physical or

	psychological harm to those collating the information requested under the Freedom of Information Acts. However, if the researcher believes the respondent may have suffered from the research process, the participant will be advised of where to go to seek advice or counselling. Along with this, the obligations to subjects as listed by the Social Research Association will also be met by ensuring all groups relevant to the study will be included. Therefore, no group will be disadvantaged by routinely being excluded from consideration.
	(l) Debriefing: All information regarding the information request will be explicit and no information will be hidden. If there are any additional questions during the data collection or after completion, these will be fully considered and answered where possible by the researcher.
	(m) Confidentiality: As the data collection will involve the Freedom of Information, the organisations may be identified, if necessary. However, the researcher will apply full anonymity for the employees of the organisation and confidentiality for the supplied information, unless consent has otherwise been given.
	(n) Professional Bodies Whose Ethical Policies Apply to this Research: Conforms with the guidelines regarding research ethics by PBS and the guidelines stated in the Freedom of Information Act 2000, the Freedom of Information Act 1982 and the Promotion of Access to Information Act 2000. *The committee strongly recommends that prior to application, applicants consult an appropriate professional code of ethics regardless of whether or not they are members of that body (for example, Social Research Association . http://www.the-sra.org.uk/ethical.htm Market Research Society http://www.mrs.org.uk/standards/codeconduct.htm*

	*British Sociological Association http://www.britsoc.co.uk/equality/). Applicants **MAY** choose to write "not applicable" in the "Relevant Professional Bodies" section of the Ethical Application Form. However, it is very rare that there would be no professional/academic code of ethics relevant to a given research project. If based on the information written in other sections of the form, FREC considers a particular professional code to be of relevance, then the Committee may make its consultation and adherence a condition of acceptance.*
11.	**Declaration*:** To the best of our knowledge and belief, this research conforms to the ethical principles laid down by Plymouth University and by the professional body specified in 6 (g).

	Name	**E-mail (s)**	**Date**
Principal Investigator:	Melanie Berry	melanie.berry@students.plymouth.ac.uk	24/08/15
Other Staff Investigators:			
Director of Studies (only where Principal Investigator is a postgraduate student):	Jason Lowther	jason.lowther@plymouth.ac.uk	28/08/15

*You will be notified by the Research Ethical Approval Committee once your application is approved.

This process normally takes around 3-4 weeks.

RESEARCH WITH PLYMOUTH UNIVERSITY

Please Answer Either YES or NO to ALL Questions Below.

If you answer YES, please provide further details.

Do You Plan To Do:

■ Research involving vulnerable groups – for example, children and young people, those with a learning disability or cognitive impairment, or individuals in a dependent or unequal relationship

Answer: **No**

■ Research involving sensitive topics – for example participants' sexual behaviour, their illegal or political behaviour, their experience of violence, their abuse or exploitation, their mental health, or their gender or ethnic status

Answer: **No**

■ Research involving groups where permission of a gatekeeper is normally required for initial access to members – for example, ethnic or cultural groups, native peoples or indigenous communities

Answer: No

■ Research involving deception or which is conducted without participants' full and informed consent at the time the study is carried out

Answer: No

■ Research involving access to records of personal or confidential information, including genetic or other biological information, concerning identifiable individuals

Answer: No

■ Research which would induce psychological stress, anxiety or humiliation or cause more than minimal pain

Answer: No

■ Research involving intrusive interventions – for example, the administration of drugs or other substances, vigorous physical exercise, or techniques such as hypnotherapy. Participants would not encounter such interventions, which may

cause them to reveal information which causes concern, in the course of their everyday life.

Answer: No

Completed Forms should be forwarded BY E-MAIL to Cher Cressey, Secretary of the FREC at: ccressey@plymouth.ac.uk

Please forward any questions/comments or complaints to:

Cher Cressey, DTC Administrator

Graduate School (Link Building), Plymouth University, Drake Circus, Plymouth, PL4 8AA

Tel: 01752 585540

Updated: 03/07/14

Second Ethical Approval

RESEARCH WITH PLYMOUTH UNIVERSITY

Melanie Berry
PGR Student
Faculty of Business

Ref: FoB/UPC/FREC/FREC1415.68/clc
Date: 18 September, 2015

Dear Melanie

Ethical Approval Application No: FREC1415.68
Title: Comparative Assessment of Measures to Tackle the Illegal Trade in Endangered Species

The Faculty Research Ethics Committee has considered the ethical approval form and is fully satisfied that the project complies with Plymouth University's ethical standards for research involving human participants.

Approval is for the duration of the project. However, please resubmit your application to the committee if the information provided in the form alters or is likely to alter significantly.

We would like to wish you good luck with your research project.

Yours sincerely

(Sent as email attachment)

Dr James Benhin
Chair
Faculty Research Ethics Committee
Faculty of Business

Faculty of Business
University of Plymouth
Drake Circus
Plymouth
Devon PL4 8AA United Kingdom

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F +44 (0) 1752 585715
W www.plymouth.ac.uk

Appendix IV

Responses from South Africa

Dear Ms Berry

Please complete the attached request form and submit the signed form back to our office (via fax, or email). The form need not be certified.

Kind regards

[redacted]

NATIONAL DEPUTY INFORMATION OFFICER
231 Pretorius Street, Thibault Building, PRETORIA, 0001

Private Bag X94, PRETORIA, 0001
Tel:
Fax:
E-Mail: [redacted]
Site: www.saps.gov.za

SOUTH AFRICAN POLICE SERVICE

Dear Ms Berry

I refer to your previous e-mail correspondence of 21 April 2016 to Col. Amelda Crooks of the South African Police Service requesting information related to criminal enforcement actions in the Illegal Wildlife Trade (see below). This query has been referred to my Directorate at the national Department of Environmental Affairs as we are responsible for compiling the National Environmental Compliance and Enforcement Report, which is an annual summary of the compliance and enforcement activities undertaken by environmental officials within a specific reporting period. We have compiled approximately 8 such reports which you can find on the Department of Environmental Affairs website at https://www.environment.gov.za/projectsprogrammes/emi . I attach a copy of the 2014/15 report as an example, while similar reports from preceding years are uploaded on our website as indicated above.

I believe that some of the information that you have requested may be contained in the contents of these reports, which is compiled on the basis of specific compliance and enforcement indicators that we request from our provincial parks and environmental authorities. Note that the report would only include criminal enforcement activities undertaken by environmental authorities and not those that have been executed by the SAPS.

I hope that this is of some assistance to you.

Regards

[redacted]

Director: Environmental Management Inspectorate Capacity Development & Support
Department of Environmental Affairs
473 c/o Steve Biko and Soutpansberg Streets,
Pretoria
[redacted]

To report contraventions of environmental law, call the Environmental Crimes and Incidents Hotline on 0800 205 005

Good Morning Melanie Berry

We acknowledge receipt of your request, but unfortunately you must obtain permission from our Police Head Office, Communication Services first.

You may send your request to the following email addresses:

1. Major General MJ Ngobeni – Communication and Liaison Services – ngobenim@saps.org.za
2. Brigadier SE Van Den Berg – Section Head for Planning, research and marketing – Vandenberg@saps.org.za

Kind Regards

[redacted]
South African Police Service
Gauteng

[redacted]

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