

The *Prevention of Organised Crime Act* 1998: The Need for Extraterritorial Jurisdiction to Prosecute the Higher Echelons of Those Involved in Rhino Poaching

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Abstract

The continuous rising levels of rhino poaching in South Africa require smart strategies that move beyond prosecuting the actual poachers to engaging the transnational criminals who deal with the rhino horn after it leaves the country. In this regard, South Africa has a number of laws that deal with the poaching of rhino horns. The *Prevention of Organised Crime Act* 121 of 1998 (POCA) does not provide for the adequate prosecution of offenders outside South Africa. It is argued that the POCA has to be amended to provide for extraterritorial jurisdiction to deal with the prosecution of the higher echelons of those involved in rhino poaching. While the POCA provides for extraterritorial jurisdiction in some respects, the application of these provisions still presents challenges in their implementation. To substantiate this claim, this article first discusses the international networks that support the trade in rhino horn. A critique of the available statistics on rhino poaching follows, as does a suggestion that attention must be paid to the details in the statistical records to understand how desperate the situation is. Thereafter, an evaluation of South Africa's legislative framework and other interlinking factors that affect rhino poaching is performed. This demonstrates the need for extraterritorial jurisdiction with regard to rhino poaching.

Keywords

Extraterritorial jurisdiction; higher echelons; National Strategy; *Prevention of Organised Crime Act*; prosecution; rhino poaching.

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1 Introduction

South Africa has placed a lot of emphasis on the prosecution of rhino poaching, using the various strategies at its disposal. These include the use of preventive measures like the training of officers to detect smuggling at the ports of entry, the specialised training of game rangers to aid the execution of body/vehicle searches, arrests, and the handling of seized items across South Africa.¹ Statistics have been compiled that indicate a high degree of success in the prosecution and conviction of these criminals. However, at the core of these statistics are disturbing details pertaining to the conviction rate. This is defined as the percentage of the convictions divided by the number of cases finalised with a verdict. As will be shown, the conviction rate is not a good yardstick to measure success.

In addition, the conviction rate is not explained in the light of the classification of the rhino poaching syndicates. While the classification reflects the three stages of collection, transportation, and distribution,² the reconciliation with the persons who are convicted is limited to those arrested and prosecuted in South Africa. These individuals are usually involved in the collection and transportation stages. This limitation does not adequately deal with the accused who are arrested outside South Africa. It is argued that an informed conclusion can be arrived at only after an evaluation of South Africa's legislation, the principles of criminal law, and other interlinking factors in the prosecution the higher echelons.

1.1 *Classification of organised crime networks*

Hendricke and Daffue classify the organised rhino crime network as a complex system that consists of three stages: collection, transportation, and distribution.³ At the collection stage are local gangs that include scouts, drivers, shooters, cutters and leaders, who go to the national parks and harvest the rhino horn.⁴ The leaders, who usually have direct links to Mozambique, act as the conduit to the transportation stage, where they take

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¹ Molewa 2016 https://www.environment.gov.za/mediarelease/molewa_highlights_progress_onrhinopoaching2016.

² Hübschle *Game of Horns* 37. Also see Nanima 2016 *Afr J Leg Stud* 225.

³ Hübschle *Game of Horns* 37. Also see Nanima 2016 *Afr J Leg Stud* 225.

⁴ Hübschle *Game of Horns* 37; Nanima 2016 *Afr J Leg Stud* 225.

the rhino horn either to national exporters or to international receivers.⁵ The latter individuals then transfer the rhino horn to the kingpins. The kingpins act as the last link in the transportation chain and may have the horns processed for the distribution stages.⁶ The kingpins also act as the links between the transportation stage and the distribution stage. They transmit the horns to the first distributors, who deliver them to the second distributors. At this point, the horn reaches the final consumer.⁷

This structure is similar to that of the criminal chain proposed by the Global Initiative against Transnational Organised Crime (The Global Initiative).⁸ Transnational organised crime includes three groups: the source, transit, and the destination market.⁹ At the source, the poachers or the collectors carry out the act of poaching, extraction and collection of the resources.¹⁰ The collection stage is closely related to Hendricke and Daffue's model. The second stage, including transit, involves various players such as brokers and smugglers, who perform various acts, including bribing the relevant officers and smuggling, to ensure that the merchandise is taken out of the first jurisdiction.¹¹ It is at this point that the national exporters and international receivers come in handy in ensuring that the rhino horn is brought to the markets, once it has been smuggled out of South Africa. The Global Initiative presents the final stage as the destination market, which engages with players such as market controllers, vendors, traditional medicine practitioners, wildlife restaurant owners, and consumers.¹² These five players ensure that the poached product is ready for purchase and consumption.

While Hendricke and Daffue's classification present the three stages of collection, transportation and distribution,¹³ the Global Initiative, too, presents the three stages of source, transit and market. As points of intersection, the stages of source and collection, followed by transportation

⁵ Nanima 2016 *Afr J Leg Stud* 225.

⁶ Nanima 2016 *Afr J Leg Stud* 225.

⁷ Nanima 2016 *Afr J Leg Stud* 225.

⁸ Global Initiative against Transnational Organized Crime 2014 <http://www.globalinitiative.net/knowledge-bank/publications/>.

⁹ Global Initiative against Transnational Organized Crime 2014 <http://www.globalinitiative.net/knowledge-bank/publications/> 20.

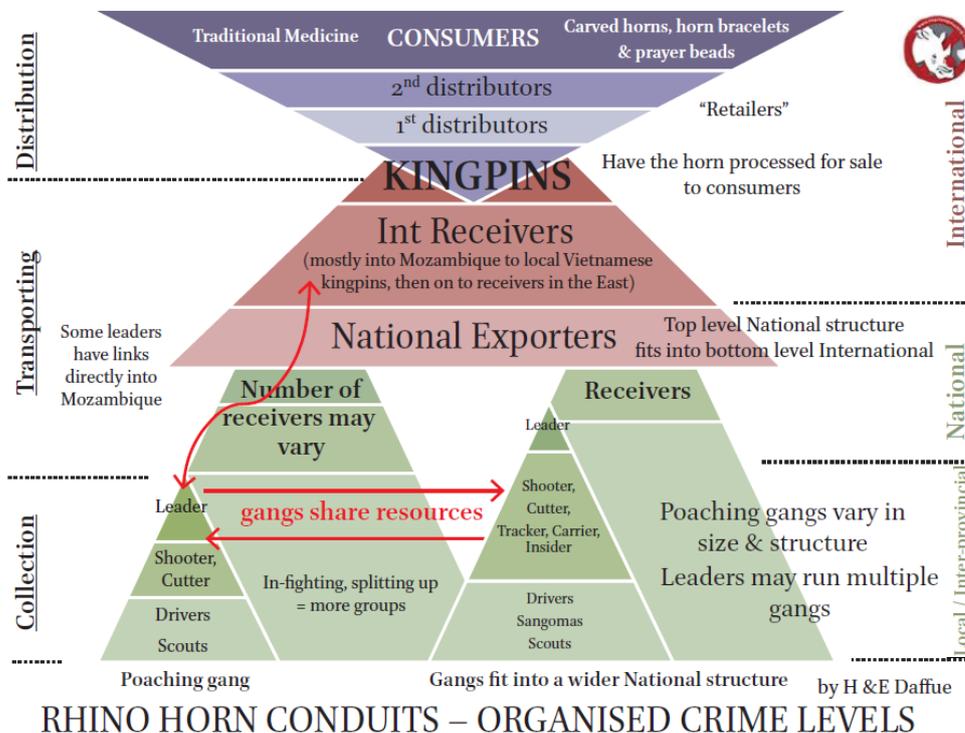
¹⁰ Global Initiative against Transnational Organized Crime 2014 <http://www.globalinitiative.net/knowledge-bank/publications/> 20.

¹¹ Global Initiative against Transnational Organized Crime 2014 <http://www.globalinitiative.net/knowledge-bank/publications/> 20.

¹² Global Initiative against Transnational Organized Crime 2014 <http://www.globalinitiative.net/knowledge-bank/publications/> 20.

¹³ Nanima 2016 *Afr J Leg Stud* 225.

and transit, culminate in the distribution or destination market. Both these models present three levels in rhino horn poaching. For the purposes of this article, the author uses the model of Hendricke and Daffue, as illustrated below:¹⁴



The framework of the networks (as illustrated above) aids in the argument that prosecution is to a major extent targeted at the players in the collection stage. There is inadequate prosecution of the players at the transportation and the distribution stages.

1.2 Unpacking the emphasis on rhino poaching

Before delving into the body of the article, it may be prudent to explain the author's emphasis on the need to prosecute rhino poaching in particular rather than poaching of other kinds of wildlife, or other complex transnational crimes with a similar organisational structure that are not yet adequately dealt with in legislation.

First, the rhino is the species closest to extinction after the group of the pangolins, vultures, and riverine rabbits.¹⁵ Poaching has greatly affected the

¹⁴ Hendricke & Daffue (2013) in Hübschle *Game of Horns* 37.

¹⁵ Ras 2018 <https://www.wildcard.co.za/endangered-species-day-insight-experts/>.

black rhino population, followed by the white rhino.¹⁶ An attempt to extend the emphasis of this article to other endangered species that are affected by poaching would affect the quality of the evaluation and compromise the arguments made in this contribution. Secondly, other kinds of transnational organised crime present similar organisational structures,¹⁷ yet the gaps in the current legislation affect effective prosecution.¹⁸ Notable examples include human trafficking, terrorism and related offences, corruption, the smuggling of persons, dealing in drugs, dealing in arms, and illicit trading. The point of departure is that there are international or regional treaties that are specific to the prosecution of these crimes as international crimes.¹⁹ The possibility of using universal jurisdiction to prosecute them makes the prosecution easier.²⁰ As will be shown, the lack of interlinking factors such as the codification of the *aut dedere aut judicare principle* in South Africa's laws, the lack of universal jurisdiction to prosecute rhino poaching, and the lack of specific extradition treaties are factors that support the argument made here.²¹

1.3 An evaluation of the National Integrated Strategy to Combat Wildlife Trafficking

The DEA has adopted a National Integrated Strategy to Combat Wildlife Trafficking (NISCWT).²² The NISCWT defines poaching to include the activity of the illegal capturing or hunting of wildlife, with the intention of possession, transportation, consumption, exportation or the selling and use of its body parts.²³ Poachers are defined as individuals or a group of

¹⁶ Slabbert 2018 <https://www.rnews.co.za/article/15604/the-10-most-endangered-animals-in-south-africa>.

¹⁷ For abalone poaching, see the structure in De Greef *Booming Illegal Abalone Fishery* 56. For a general overview on the general structure from the poachers or harvesters, through middlemen, to wholesalers, exporters, processors and retailers, see generally Global Financial Integrity *Transnational Crime in the Developing World*, Liddick *Crimes against Nature* generally, and Van Uhm 2012 *CIROC Newsletter* 4.

¹⁸ See the discussion of the evaluation of the current legislative scope under section 3 below.

¹⁹ The UNODC has provided for universal jurisdiction for its offences under any of these treaties: the *United Nations Convention against Transnational Organised Crime (2000)*, the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000)* and the *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition (2001)*. See section 3 on an evaluation of the current legislation.

²⁰ Such cases include terrorism, torture and theft. See Mujuzi 2015 *AYIHL* generally.

²¹ See section 3.2 on an evaluation of the modes of criminal liability and the use of the *aut dedere aut judicare* in prosecution.

²² RSA 2017 <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/170530/NISCWT.pdf> (hereafter the NISCWT 2017).

²³ NISCWT 2017 9.

individuals involved in the collection, transportation, consumption, exportation and the sale of the body parts. These two definitions recognise the categorisation of the stages in rhino poaching,²⁴ and the trafficking syndicates as key players in rhino poaching in South Africa.²⁵ The efficacy of the NISCWT should be with regard to the measures that should be used to deal with individuals who are involved in the transportation, consumption, exportation and sale of the rhino horn outside South Africa. This is because the current legislative framework deals to a great extent with the poachers at the collection stage in South Africa, who are usually arrested and prosecuted.²⁶

In this regard, the NISCWT is guided by three objectives:

[To improve] law enforcement, supported by the whole of government and society, to effectively investigate, prosecute and adjudicate wildlife trafficking as a form of transnational organised crime.

[To increase] the government's ability to detect, prevent and combat wildlife trafficking in South Africa and beyond.

[To increase] national, regional and international law enforcement collaboration and cooperation on combating wildlife trafficking.²⁷

An adequate evaluation of all these three objectives of the NISCWT is beyond the scope of this article. This article evaluates specific aspects of the NISCWT with regard to how higher echelons, as part of the wider definition of poachers, can be effectively prosecuted in South Africa. The second objective that requires the Republic to detect, prevent and combat wildlife trafficking within and beyond South Africa is evaluated.

The second objective emphasises the need to ensure that ports of entry are not used for wildlife trafficking.²⁸ The government is expected to detect, prevent and combat wildlife trafficking within and beyond the Republic, reduce corruption, increase its resources to improve security at the border points, and enhance crime preventive strategies around poaching hotspots.²⁹ These obligations are not enforced beyond South Africa's borders because of the lack of extraterritorial jurisdiction and mutual cooperation with other States.³⁰ The key question is how the government

²⁴ NISCWT 2017 9.

²⁵ NISCWT 2017 10.

²⁶ See section 1.1 above.

²⁷ NISCWT 2017 20.

²⁸ NISCWT 2017 26-28.

²⁹ NISCWT 2017 26-28.

³⁰ NISCWT 2017 29, 57. This success extends to the third objective.

can perform the three obligations outside South Africa. The answers are in the interrogation of the current statistics on poaching, the legislative provisions, the modes of criminal liability, and the doctrine of *aut dedere aut judicare* with regard to the prosecution of higher echelons.

2 Current statistics: a danger in the detail?

The reported statistics are not uniform, which requires that they be approached with caution. The official statistics published by the Department of Environmental Affairs show a significant increase in the number of poachers arrested in 2016 and a decline in rhino poaching to 24 per cent.³¹ This is based on the arrest of 414 poachers in South Africa, in contrast to the 557 arrests in 2015. The Government reiterates that it has undertaken preventive measures which include the training of officers to detect smuggling at the ports of entry, and the specialised training of over 1000 game rangers to aid the execution of body and vehicle searches, arrests, and the handling of seized items across South Africa.³²

On the other hand, other scholars who follow rhino poaching closely offer a different interpretation.³³ It is reported that 1028 rhinos were poached from January to December 2017, which reflects a minimal decline of 2.4 per cent in comparison to the 1002 rhinos poached in 2016.³⁴ The statistics are different because of the different definition accorded to the "conviction rate" by the NPA. It is defined as the percentage of cases with a guilty verdict divided by the number of cases finalised with a verdict.³⁵ This definition does not include cases that are not brought to court for prosecution or where arrests made but without consequent prosecution. Such a definition leads to different statistics depending on whether the percentage of cases with a guilty verdict is related to cases with a verdict or cases where arrests have been effected.

Something is evident in the statistics that adds value to this study. The persons who are arrested during the collection stage are those individuals who do the actual poaching, such as the 414 poachers who were arrested

³¹ Molewa 2016 https://www.environment.gov.za/mediarelease/molewa_highlightsprogress_onrhinopoaching2016.

³² Molewa 2016 https://www.environment.gov.za/mediarelease/molewa_highlightsprogress_onrhinopoaching2016.

³³ Verwoerd 2016 <https://conservationaction.co.za/media-articles/south-africa-conviction-rate-pitiful-rhino-crimes/>.

³⁴ Verwoerd 2016 <https://conservationaction.co.za/media-articles/south-africa-conviction-rate-pitiful-rhino-crimes/>.

³⁵ Verwoerd 2016 <https://conservationaction.co.za/media-articles/south-africa-conviction-rate-pitiful-rhino-crimes/>.

in South Africa. There is little reference to arrests outside South Africa of other players, like international receivers, kingpins and distributors in other jurisdictions like Mozambique and the far east. The references to the preventive measures taken, such as the detection and prevention of the movement of rhino horn beyond South Africa's major ports of entry, are to those effected inside rather than outside the Republic.³⁶ The statistics are silent on the legal countermeasures to deal with the detection, arrest and prosecution of individuals engaged in the transportation and distribution of the rhino horn.

Other government organs that are engaged in the prosecution of the persons involved in rhino poaching include the South African Police Service (SAPS) and the National Directorate of Public Prosecutions (NDPP). A look at the NDPP Annual Report for 2016 indicates that there was a high conviction rate of 88.9% (359 convictions as at 31 May 2016).³⁷ While this resonates with the conviction rate of 88.8% alluded to by the DEA, a contradiction is evident where the NDPP Annual Report for 2016 shows that the 46 convictions for the year involved 15 Mozambiqans. However, if this contradiction is to be tested against the results for a different year, perhaps for 2015, for instance, one finds disturbing detail in the rhino poaching statistics. The killing of 1175 rhinos that led to 317 arrests resulted in the conviction of only 48 accused out of the 54 (17 per cent of the arrests) who were prosecuted.³⁸ It is absurd to conclude on the basis of the prosecution of 17 per cent of the arrested persons that there is a conviction rate of 88 per cent. This mode of calculation of the conviction rates does not offer a useful approach to dealing with all the challenges in rhino poaching.

These contradictory reports are silent regarding any successes beyond the borders of South Africa with regard to transportation and distribution. The need for caution has to be emphasised.

3 An evaluation of the current legislative framework

This section looks at the legislative framework before the enactment of the POCA, the position of the POCA in the light of other principles of criminal law, and other interlinking factors.

³⁶ Molewa 2016 https://www.environment.gov.za/mediarelease/molewa_highlights_progress_onrhinopoaching2016.

³⁷ NDPP 2016 <https://www.npa.gov.za/sites/default/files/annual-reports/NPA%20Annual%20Report%201516.pdf>.

³⁸ DEA 2016 https://www.environment.gov.za/sites/default/files/docs/rhino_matters_april2015_march2016.pdf.

3.1 *Legislative framework*

A look at other laws that deal with environmental crimes is instructive in presenting a contextual background that justifies the argument that the provisions of the POCA should be amended.

3.1.1 *National Environmental Management Act 107 of 1998*

The *National Environmental Management Act 107 of 1998* (NEMA) deals with issues of corporate governance, integrated environmental management, and issues of international obligations and duties.³⁹ Furthermore, the NEMA provides a framework within which to carry out activities that are sanctioned by the Minister and accords powers to the latter to create offences for the contravention of the Act.⁴⁰

With regard to offences, it prohibits individuals from engaging in listed activities without the permission of the Minister.⁴¹ Particular regard is placed on section 25, which creates guidance on the creation of offences. The relevant provision provides that:

The Minister may introduce legislation in Parliament or make such regulations as may be necessary for giving effect to an international environmental instrument to which the Republic is a party, and such legislation and regulations may deal with inter alia the following-

...implementation of and compliance with the provisions of the instrument, including the creation of offences and the prescription of penalties where applicable;...⁴²

This subsection requires the enactment of legislation for the implementation of and compliance with an international instrument and criminalises prohibited conduct. There is no guidance on how to deal with cases involving suspects who are beyond South Africa's borders.⁴³ It is correct to state that the NEMA fails to address issues of organised crime, extraterritorial jurisdiction, and wildlife crimes with regard to higher echelons outside the jurisdiction of South Africa.

On a positive note, it is worth noting that some provinces in the Republic have enacted legislation that can be used to prosecute the various players

³⁹ The long title to the *National Environmental Management Act 107 of 1998* (hereafter NEMA).

⁴⁰ Section 24 of NEMA.

⁴¹ Sections 25(3)(g), 34G(1), 44(3) and 49A of NEMA.

⁴² Section 25(3)(g) of NEMA.

⁴³ The NEMA does not engage with the prosecution of those who deal in rhino horn after it has been poached.

in rhino horn poaching. For instance, Limpopo Province enacted the *Limpopo Environmental Management Act* (LEMA),⁴⁴ which consolidates and amends the environmental management legislation and incidental matters in Limpopo Province.⁴⁵ The LEMA has been put to the test and applied in a number of cases.⁴⁶

3.1.2 *National Environmental Management: Biodiversity Act 10 of 2004*

The *National Environmental Management: Biodiversity Act 10 of 2004* (NEMBA) provides a statutory framework for the management and conservation of the Republic's biodiversity as dealt with in the NEMA.⁴⁷ Against this background, the NEMBA offers two plausible steps with regard to the prosecution of rhino poachers. First, it restricts dealings in endangered species.⁴⁸ Secondly, it empowers the Minister to prepare a list of endangered species.⁴⁹ Just like the NEMA, the NEMBA does not deal with incidents that occur outside the borders of the Republic.⁵⁰ However, the NEMBA still fails to address issues of the prosecution of persons who are higher echelons involved in organised crime, and/or in extraterritorial spaces. An example of this shortfall is illustrated below:

A person may not carry out a restricted activity involving a specimen of a listed protected species without a permit issued in terms of Chapter 7.⁵¹

The wording of the section indicates a criminalisation of particular activities within South Africa's borders. It fails to capture instances where the person involved in the poaching is outside the borders of the Republic. The lack of guidance on extraterritorial jurisdiction with regard to the prosecution of higher echelons is a great limitation in the fight against rhino poaching. Closely linked to the NEMA and the NEMBA is the *National Environmental*

⁴⁴ The *Limpopo Environmental Management Act 7 of 2003* (hereafter LEMA).

⁴⁵ Long title. s 31(1)(a) of the LEMA prohibits the unlawful, wrongful and intentional hunting of a specially protected wild animal without a valid permit, while ss 41(1)(a), 1 and 17(1)(a)(i) deals with the unlawful purchasing, possessing and conveying of a specially protected wild animal without a valid permit.

⁴⁶ *Els v S* 2017 2 SACR 622 (SCA) paras 17-21. Also see *S v Lemthongthai* 2015 1 SACR 353 (SCA) generally.

⁴⁷ Long title to the *National Environmental Management: Biodiversity Act 10 of 2004* (hereafter NEMBA).

⁴⁸ Sections 57(1), (2) and (3), and 87(a)(i) of NEMBA.

⁴⁹ Sections 56(1)(a) (d) of NEMBA.

⁵⁰ See cases that show that the prosecution in the application of the NEMBA was confined to activities within the Republic: *Mkhabela v S* 2016 ZAGPPHC 936 (8 November 2016) para 4; *Kruger v Minister of Water and Environmental Affairs* 2016 1 All SA 565 (GP) paras 3, 10 and 11.

⁵¹ Section 57(1) of NEMBA

Management: Protected Areas Act (NEMAPAA),⁵² which provides for the management and governance of protected areas and their usage.⁵³ The key consolidating feature lies in the emphasis on poaching within South Africa's borders.

3.1.3 *Criminal Procedure Act 55 of 1977*

The *Criminal Procedure Act* has safeguards that ensure the effective prosecution of serious offences that are listed in schedule 5. The Director of Public Prosecutions (DPP) has to consent to the prosecution of these offences, and exceptional circumstances have to be proved by an accused before he or she is granted bail. The list of serious offences includes rape, murder, particular kinds of organised crime such as trafficking by commercial carriers, drug trafficking, and the smuggling of ammunition. However, dealing in endangered species such as poaching is not recognised as among the schedule 5 offences.⁵⁴ This is an indication that the safeguards accorded to serious crimes do not extend to dealing in endangered species or the offences under the POCA. In addition, the safeguards under the *Criminal Procedure Act* ensure that there is a streamlined process that governs the institution, process and final determination of offences, where the accused is in South Africa. There is no reference to bringing the higher echelons to South Africa or any other foreign court for trial in instances of rhino poaching in the Republic. While the implications of listing the offence of dealing in endangered species as a schedule 5 offence aid effective prosecution, a higher echelon from another jurisdiction cannot be subjected to these safeguards.

3.1.4 *International Cooperation in Criminal Matters Act 75 of 1996*

The *International Cooperation in Criminal Matters Act* (ICCMA) deals with facilitating the provision of evidence, the execution of sentences in criminal matters, and the confiscations and transfer of the proceeds of crime between South Africa and foreign States.⁵⁵ Its objectives are:

⁵² *National Environmental Management: Protected Areas Act* 57 of 2003 (hereafter NEMAPAA).

⁵³ The objects clause in s 2 of NEMAPAA. Also see *Mkhabela v S* 2016 ZAGPPHC 936 (8 November 2016) para 4.

⁵⁴ Sections 58, 60(11) and (11A), and Schedule 5 of the *Criminal Procedure Act* 55 of 1977.

⁵⁵ *International Cooperation in Criminal Matters Act* 75 of 1996 (hereafter ICCMA). For an engagement with this Act and issues of evidence see Mujuzi 2015 *De Jure* 351-387. Also see Watney 2012 *PELJ* 294.

To facilitate the provision of evidence and the execution of sentences in criminal cases and the confiscation and transfer of the proceeds of crime between the Republic and foreign States, and to provide for matters connected therewith.⁵⁶

The cumulative effect of the scope of the ICCMA does not go beyond the three aspects of the provision of evidence, the execution of sentences and the transfer of the proceeds of crime. This is an indication that instances of the commission or aiding and abetting of a crime by an individual who is outside the Republic cannot be prosecuted with the aid of the ICCMA.⁵⁷

In addition, this Act deals with the procedures related to the admission of evidence, and with other subsequent court matters. It should be stated that it offers support in instances where rhino poaching has occurred at the three levels and the evidence that needs to be used has to be obtained from outside of the jurisdiction. The shortcoming of the ICCMA lies in its failure to deal with an offence that starts in the Republic and continues beyond South Africa's borders. The advantage that the ICCMA provides is its ability to ensure that orders made by foreign states in the course of criminal prosecution may be registered and enforced in South Africa.⁵⁸ As such, it is argued that the ICCMA then may aid only the admission of evidence from outside the Republic and the enforcement of foreign judgments where the culprits have been prosecuted and convicted abroad.⁵⁹ It is at this point that a law that offers extraterritorial jurisdiction may come in handy.⁶⁰

It is worth noting that the POCA amends the ICCMA by providing new definitions of a confiscation order and a restraint order.⁶¹ In addition, the POCA repealed the *Proceeds of Crime Act 76 of 1996*.⁶² Before the repeal was effected, the *Proceeds of Crime Act* was limited to the recovery of the proceeds of crime and the prohibition of money laundering⁶³ through the

⁵⁶ The long title to the ICCMA.

⁵⁷ See the discussion on common purpose below.

⁵⁸ *Falk v National Director of Public Prosecutions* 2012 1 SACR 265 (CC) paras 2-3.

⁵⁹ The structure of the ICCMA covers instances of definitions (s 1), the mutual provision of evidence (ss 2-12), the mutual execution of sentences and compulsory orders (ss 13-18), the confiscation and transfer of the proceeds of crime (ss 19-26), and other miscellaneous matters (ss 27-37). The plausible prosecution under the Act is with regard to witnesses who fail to adhere to subpoena within the meaning of s 10 of the ICCMA.

⁶⁰ The *Prevention of Organised Crime Act 121 of 1998* (hereafter POCA) provides for extraterritorial jurisdiction. It is not adequate to deal with the prosecution of echelons of the rhino horn poaching syndicates as articulated below, however.

⁶¹ Section 79(a) and Schedule 2 of POCA. The amendments are introduced in the ICCMA in ss 1(a)-(b). This amendment does speak to the actual prosecution of persons involved in organised crime, who are outside the Republic.

⁶² The long title to, and s 79(c) of POCA.

⁶³ The long title, ch 5 and ss 28-33 of the *Proceeds of Crime Act 76 of 1996*.

provision of confiscation orders⁶⁴ and restraint orders,⁶⁵ and the realisation of property.⁶⁶ The effect of the amendments introduced by the POCA extended the initial application of the *Proceeds of Crime Act* by providing for offences relating to organised crime, racketeering activities, the proceeds of unlawful activities, and criminal gang activities.⁶⁷ Usually, the poaching of rhinos is an organised crime that includes various players, right from the collection stage, through the transportation stage, to the distribution stage.⁶⁸ As such, while the amendments by the POCA aid its effectiveness in the prosecution of wildlife crimes, they still offer no concrete guidance on how to deal with the prosecution of higher echelons.

3.1.5 South African Police Service Act 68 of 1995

The *South Africa Police Service Act* (SAPSA)⁶⁹ has a list of activities that indicate the recognition of organised crime. It states that the recognition as such of activities

by a person, group of persons or syndicate acting in –

- (i) an organised fashion; or
- (ii) a manner which could result in substantial financial gain for the person, group of persons or syndicate involved⁷⁰

in respect of the hunting, importation, exportation, possession, buying and selling of endangered species or any products thereof as may be prescribed;⁷¹

in more than one province or outside the borders of the Republic by the same perpetrator or perpetrators, and in respect of which the prevention or investigation at national level would be in the national interest.⁷²

The above circumstances acknowledge that organised crime networks have an existing organised structure that functions for financial benefit. In addition, the benefits in this context result from dealing with endangered species, and there is a need for transnational cooperation in conducting investigations. In addition, the SAPSA elaborates on the notion of an "organised fashion" as the ongoing, continuous or repeated participation in

⁶⁴ Chapter 2 and ss 8-14 of the *Proceeds of Crime Act* 76 of 1996.

⁶⁵ Chapter 3 and ss 15-19 of the *Proceeds of Crime Act* 76 of 1996.

⁶⁶ Chapter 4 and ss 20-27 of the *Proceeds of Crime Act* 76 of 1996.

⁶⁷ Chapters 2, 3, 4 and 5 of POCA.

⁶⁸ See the discussion in the introduction above.

⁶⁹ The *South African Police Service Act* 68 of 1995.

⁷⁰ Section 16(1)(a) of the *South African Police Service Act* 68 of 1995.

⁷¹ Section 16(1)(e) of the *South African Police Service Act* 68 of 1995.

⁷² Sections 16(1)(a), (e), (f) of the *South African Police Service Act* 68 of 1995.

at least two incidents of criminal activity.⁷³ It would appear that this qualification is for the purpose of qualifying a crime as organised crime rather than for the purpose of the prosecution of the culprits.

A comparison of the list in the SAPSA with the definition of a criminal gang in the POCA indicates that this organised structure may be either informal or formal. Secondly, the members engage individually or collectively in criminal activities. The point of contention is the existence of either a name or an identifying symbol. While the SAPSA provides this definition, it does not criminalise the activities that would form organised crime, requiring extraterritorial jurisdiction. This informs the decision to evaluate the POCA as the law that deals with organised crime.

3.1.6 *Extradition Act 67 of 2002*

In addition, the *Extradition Act* allows for *ad hoc* arrangements in the absence of an extradition agreement, where there is a request for the surrender of a person.⁷⁴ The purpose of extradition is to ensure that persons who have committed a crime in country A and are within the jurisdiction of country B may, upon a request by A, be moved from country B to country A to be prosecuted. The author is not aware of any extradition agreements between South Africa and the Asian States of Vietnam or China. This poses great challenges with regard to the prosecution of the higher echelons of those involved in rhino poaching. Nonetheless, an examination of the position with regard to extradition in the three countries is instructive in placing the study in context. There is a need to establish whether an *ad hoc* arrangement is an international agreement.

The South African *Constitution* allows the President of South Africa to enter into international agreements on behalf of the Republic,⁷⁵ such as extradition agreements.⁷⁶ The international agreements, however, have to be domesticated through an approval by resolution of the National Council of Provinces and the National Assembly.⁷⁷ The failure to obtain this approval renders any application of the agreement void.

⁷³ Section 16(1)(a) of the *South African Police Service Act* 68 of 1995.

⁷⁴ Section 3(2) of the *South African Extradition Act* 67 of 2002. Also see *Moti v President of the Republic of South Africa* 2017 ZAGPPHC 501 (18 August 2017) (hereafter *Moti*) para 14.

⁷⁵ Section 231 of the *Constitution of the Republic of South Africa*, 1996.

⁷⁶ *Katz* 2003 SACJ 319.

⁷⁷ *President of the Republic of South Africa v Quagliani*; *President of the Republic of South Africa v Van Rooyen*; *Goodwin v Director-General, Department of Justice and Constitutional Development* 2009 8 BCLR 785 (CC) para 42; *Botha* 2009 SAYIL 262.

Before the question of whether an *ad hoc* arrangement is an international agreement is answered, it should be noted that there are international law principles that may be used to ensure the prosecution of a citizen of one State in another. One of these principles is comity, which is described as:

... a set of reciprocal norms among nations that call for one state to recognise, and sometimes defer to, the laws, judgments, or interests of another. Comity is a regime of intergovernmental courtesy.⁷⁸

Flowing from this definition, it is envisioned that South Africa, Mozambique, and Far East countries such as Vietnam recognise the interests that each country has with regard to rhino poaching. The concluded Memorandums of Understanding with some States such as Vietnam lack the required guidance with regard to the prosecution of persons outside South Africa's borders.⁷⁹

As earlier stated, the *ad hoc* arrangements in the absence of an extradition agreement may be used where there is a request for the surrender of a person.⁸⁰ While the process is subject to the same rules that apply to an extradition treaty, it is required that the President considers the request for the surrender and offers his written consent.⁸¹ This occurred in *Harksen v President of the Republic of South Africa*, where in the absence of an extradition agreement the President consented to the extradition of Harksen, a German national, to Germany to face trial.⁸² In the *Harksen* case the Constitutional Court stated that the *ad hoc* arrangement by South Africa to extradite Harksen to Germany was not unconstitutional as far as it was not an international agreement that required ratification by Parliament.⁸³ It should be stated that while the President may conclude *ad hoc* extradition treaties, these remain to be domestic engagements that do not require parliamentary approval. This position solves the silence of the *Constitution* on domestication, and indicates that *ad hoc* agreements are domestic engagements rather than international agreements.

For a general engagement with the issues on extradition law in South Africa, see Hartnick *South Africa's Human Rights Centred Approach to Extradition* generally.

⁷⁸ Seinfeld 2015 *Notre Dame L Rev* 1309.

⁷⁹ See the discussion of some of the MoUs under section 4 below.

⁸⁰ Section 3(2) of the South African *Extradition Act* 67 of 2002. See also *Moti v President of the Republic of South Africa* 2017 ZAGPPHC 501 (18 August 2017) para 14.

⁸¹ *Moti* para 14.

⁸² *Harksen v President of the Republic of South Africa* 2000 2 SA 825 (CC) (hereafter *Harksen*).

⁸³ *Harksen* paras 24 and 28.

It is prudent to examine the use of *ad hoc* agreements where associated States are involved. According to the *Extradition Act*, four principles govern engagements with associated States. First, there should be an existing extradition agreement that provides for the endorsement for execution of warrants of arrest on a reciprocal basis.⁸⁴ Secondly, a magistrate in the associated State before whom a warrant is issued for the arrest of any person to be surrendered to the associated State is required to endorse the warrant for execution.⁸⁵ Thirdly, the warrant is endorsed regardless of the whereabouts or suspected whereabouts of the person to be arrested.⁸⁶ Fourthly, the Magistrate has to be satisfied that the warrant was lawfully issued.⁸⁷

These principles should be reflected in the laws of extradition of the associated States. If this is asserted in the affirmative, then the first requirement of a subsisting extradition agreement is solved. Although the author is not aware of any subsisting agreement between South Africa and Mozambique,⁸⁸ it is argued that this lack is solved by the application of the *Extradition Act* to *ad hoc* arrangements.⁸⁹ The reading of sections 6, 5 and 11(b) points to a person to be extradited to South Africa, other than from associated States to the Republic. The application of the remaining principles requires that there should be similar provisions in the extradition laws of associated States and the willingness to enforce them.⁹⁰ The current law of extradition in Mozambique lacks similar provisions.⁹¹

3.1.7 CITES and UN Resolutions

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) offers international resolutions that require a legal framework that embraces the prosecution of organised crime. The importance of these resolutions lies in the call for States Parties to embrace international cooperation with regard to illicit trafficking in wildlife and corruption. States Parties to CITES recognise that corruption plays a

⁸⁴ Section 6 of the *Extradition Act* 67 of 2002.

⁸⁵ Section 6 of the *Extradition Act* 67 of 2002.

⁸⁶ Section 6 of the *Extradition Act* 67 of 2002.

⁸⁷ Section 6 of the *Extradition Act* 67 of 2002.

⁸⁸ DOJ & CD 2019 <http://www.justice.gov.za/ilr/mla.html>.

⁸⁹ Section 3(2) of the *Extradition Act* 67 of 2002. See also *Moti* para 14.

⁹⁰ This reciprocity depends on the commitment of the Executive in the associated State to ensure the arrest and surrender of the person to South Africa's authorities.

⁹¹ Republic of Mozambique 2011 <https://dre.pt/pesquisa/-/search/287075/details/maximized>.

significant role in facilitating wildlife crime⁹² with the close involvement of organised crime groups.⁹³ It is on this basis that the States Parties stress the need to undertake measures that ensure the effective implementation of the Convention,⁹⁴ through administration, regulation, implementation or enforcement through the use of adequate penalties under domestic legislation.⁹⁵

This resolution notes that the three main chains in illicit wildlife trafficking involve the source, transit and market countries, which are facilitated by corruption at all these levels. An emphasis on dealing with corruption is not an end in itself as far as there are other aspects that contribute to the continued trafficking of wildlife like the lack of a law that adequately deals with extraterritorial jurisdiction. Despite this position, it is worth noting that the resolution encourages the use of national enforcement agencies that have a cross-border effect like the United Nations Office on Drugs and Crime (UNODC).⁹⁶ The weight is still on the State Party to embrace such initiatives and convert them into an enabling law that leads to the prosecution of the higher echelons.

A recent UN resolution on tackling illicit trafficking in wildlife calls on the Member States to take decisive steps at the national level to prevent, combat and eradicate illegal trade from both the supply and demand sides.⁹⁷ This requires the recognition that while the supply might be from the Republic, the demand is beyond its borders. This creates complications with regard to the prosecution of the perpetrators at the source of the supply and at the end of the demand chain. It is on this basis that the resolution calls for the strengthening of legislation that deals with the prevention, investigation, prosecution of perpetrators and the increased sharing of

⁹² CITES 2017 <https://www.cites.org/sites/default/files/document/E-Res-17-06.pdf> preambular para 1.

⁹³ CITES 2017 <https://www.cites.org/sites/default/files/document/E-Res-17-06.pdf> preambular para 2.

⁹⁴ CITES 2017 <https://www.cites.org/sites/default/files/document/E-Res-17-06.pdf> para 1.

⁹⁵ CITES 2017 <https://www.cites.org/sites/default/files/document/E-Res-17-06.pdf> para 2.

⁹⁶ CITES 2017 <https://www.cites.org/sites/default/files/document/E-Res-17-06.pdf> para 6. The importance of these two entities cannot be understated. They are recognised by the UN in *United Nations Resolution on Tackling Illicit Trafficking in Wildlife* GA Res A/RES/69/314 (2015) adopted on 19 August 2015 at the 69th session, Agenda item 13, Preambular para 6, at 2.

⁹⁷ *United Nations Draft Resolution: Tackling Illicit Trafficking in Wildlife* UN Doc A/71/L.88 (2017) presented on 5 September 2017 at the 71th session, agenda item 13, para 4.

information and knowledge among national and international authorities.⁹⁸ This resolution fails, however, to tackle the challenge that wildlife-related offences are largely transnational crimes that require cooperation from various State Parties to bring the higher echelons to justice.

3.2 An evaluation of the POCA

A good criminal law should clearly identify the prohibited conduct and describe the punishment for it. This is based on the principles of *nullum crimen sine lege* and *nulla poena sine lege*.⁹⁹ Against this background, where a law fails to prescribe the prohibited conduct, it becomes a challenge to punish those who commit it.¹⁰⁰ The failure by a law to deal with such conduct is a challenge, especially where it is the result of jurisdictional challenges. These challenges include the situation where an individual in another jurisdiction aids and abets the commission of an offence by an individual in the local jurisdiction, such as the Republic of South Africa. This presents procedural problems, such as drafting the charges, which are expected to indicate the place and time where the offence was committed. This situation is exacerbated where it is necessary to prosecute an individual who was outside South Africa's geographical borders at the time of the commission of the offence.

3.2.1 Challenges to the application of the POCA

The POCA was enacted at a time when the various criminal laws that deal with recovery and forfeiture were inadequate to effectively deal with organised crime, money laundering and the activities of criminal gangs.¹⁰¹ Thus, while the POCA set out to provide a statutory framework to deal with this loophole, it is yet to be seen how it adequately deals with organised crime. The POCA presents two challenges in its application. First, it is used to aid the addition of charges where transnational organised crime is

⁹⁸ *United Nations Draft Resolution: Tackling Illicit Trafficking in Wildlife* UN Doc A/71/L.88 (2017) presented on 5 September 2017 at the 71th session, agenda item 13, para 4. Pursuant to this is the recognition that illicit wildlife trafficking is transnational in nature, involves organised groups, and requires effective international cooperation to combat it.

⁹⁹ Nanima 2017 *Stat LR* 227; Morktar 2005 *Stat LR* 47; Ashworth *Principles of Criminal Law* 71.

¹⁰⁰ While there are exceptions to the principle, such as traffic offences, the courts have been keen to strike them down.

¹⁰¹ Preamble para 8 of POCA; also see the long title.

involved. For instance, where one is charged with fraud¹⁰² and forgery;¹⁰³ counts of money laundering may be placed as additional charges.¹⁰⁴

The drawback in implementing this approach lies in the way organised crime works:

...it is usually very difficult to prove the direct involvement of organised crime leaders in particular cases, because they do not perform the actual criminal activities themselves, it is necessary to criminalise the management of, and related conduct in connection with enterprises which are involved in a pattern of racketeering activity:¹⁰⁵

While this recognition is instructive, the success of the POCA depends on how it deals with the higher echelons of those involved in rhino poaching who are beyond the borders of the Republic.

The reasons for enacting the POCA, therefore, resonated with the need to reduce organised crime by creating a framework that would ensure that the proceeds of such crime would be dealt with.¹⁰⁶ The drafting group of the Prevention of Organised Crime Bill indicated that South Africa's laws before 1998 emphasised the arrest of users, sellers, and key leaders of organised crime.¹⁰⁷ Drawing on trends in the United States, the drafting group suggested that repo-legislation be introduced to ensure that the proceeds of organised crime be forfeited.¹⁰⁸ This position formed the basis of the enactment of the POCA and limited its application to the proceeds of crime, without engaging the prosecution of those involved in organised crime, such as rhino poaching.¹⁰⁹

On the foregoing basis, it is in order to argue that the POCA is used by the prosecution as a tool to include other charges, especially where transnational organised crime is involved. The effectiveness of the POCA in dealing with rhino poaching as a form of transnational organised crime has to be evaluated against the offences that it provides, and their effectiveness

¹⁰² Contrary to s 51(2)(a) of the *Criminal Law Amendment Act* 105 of 1997, s 59(1)(d) of the *Value Added Tax Act* 89 of 1991.

¹⁰³ Contrary to s 51(2)(a) of the *Criminal Law Amendment Act* 105 of 1997.

¹⁰⁴ Contrary to ss 1 and 8 of POCA. These charges were used in *S v Meyer* 2017 ZAGPJHC 286 (4 August 2017). See similar charges in *S v Van Der Linde* 2016 2 SACR 377 (GJ).

¹⁰⁵ Preambular para 9 and the long title of POCA.

¹⁰⁶ The *Proceeds of Crime Act* 76 of 1996. See NDPP 2016 <https://www.npa.gov.za/sites/default/files/annual-reports/NPA%20Annual%20Report%201516.pdf> 16.

¹⁰⁷ Gustrow 1998 <https://pmg.org.za/committee-meeting/6000/>.

¹⁰⁸ Gustrow 1998 <https://pmg.org.za/committee-meeting/6000/>.

¹⁰⁹ See the discussion from notes 38-79.

in dealing with offences related to rhino poaching. The POCA deals with three kinds of offences: offences related to racketeering,¹¹⁰ the proceeds of unlawful activities,¹¹¹ and criminal gang activities.¹¹² The main question that follows from the framework of the POCA is whether rhino poaching falls under one of these categories. As noted earlier, rhino poaching involves the collection, transportation and distribution of rhino horn. It follows that the law that regulates organised crime is expected to deal with these three activities, regardless of their geographical location.¹¹³

Before undertaking a discussion of the three activities, it should be noted that the POCA does not define organised crime. A look at its drafting history reveals that this is by design, as the drafting group indicated that since there was no universal definition of organised crime, it would be difficult for South Africa to have one.¹¹⁴ The closest definition of organised crime relates to a criminal gang. The POCA states that a criminal gang includes

... any formal or informal ongoing organisation, association, or group of three or more persons, which has as one of its activities the commission of one or more criminal offences, which has an identifiable name or identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.¹¹⁵

This definition stipulates the four ingredients that inform the existence of a criminal gang: a formal or informal organisation, involved in the commission of offences, with an identifiable name or symbol, and whose members are either individually or collectively involved in the criminal activities.

While the POCA provides for offences related to racketeering,¹¹⁶ It does not define the concept. In the first schedule to the POCA¹¹⁷ it describes the pattern of racketeering activity as the planned, on-going, continuous or repeated participation in an offence. The first schedule provides for dealing in or being in possession of or conveying endangered game in contravention of a statute or provincial legislation.¹¹⁸ In addition, the POCA criminalises

¹¹⁰ Chapter 2, ss 2-3 of POCA.

¹¹¹ Chapter 3, ss 4-3, and ch 5, ss 12 62 of POCA.

¹¹² Chapter 4, ss 9-11 of POCA.

¹¹³ Insights on extraterritorial jurisdiction can be obtained from the *Prevention and Combating of Corrupt Activities Act* 12 of 2004 (long title, ss 35(1), (2) and (3) thereof). Also see ss 6(1) and 2 of the *Prevention of Combating and Torture of Persons Act* 13 of 2013.

¹¹⁴ Gustrow 1998 <https://pmg.org.za/committee-meeting/6000/>.

¹¹⁵ Section 1(i)(iv) of POCA.

¹¹⁶ Chapter 2 of POCA.

¹¹⁷ Section 2 of POCA.

¹¹⁸ Schedule 1, item 25 of POCA.

the engagement in racketeering activities within and outside South Africa.¹¹⁹ It would be expected that the provisions in the first schedule to the POCA and the provision of extraterritorial jurisdiction for racketeering activities would place rhino poaching within the bounds of the Act. The offences related to racketeering are not complete unless the person receiving the property uses it to advance illegal activities.¹²⁰ It would appear that a once-off criminal activity that does not involve the use of its proceeds to further illegal activities is not an offence. It follows that extraterritorial jurisdiction for racketeering activities does not include jurisdiction over rhino poaching unless it has realised proceeds that may be intercepted by the operation of the POCA. Some of the instances of racketeering activity that may be ongoing or continuous include running Ponzi schemes¹²¹ or engaging in various criminal activities in an organised manner.¹²²

The POCA provides for a mode of dealing with the proceeds of unlawful activities as defined in section 1.¹²³ The offences include money laundering,¹²⁴ aiding an individual to benefit from the proceeds of illegal activities,¹²⁵ the acquisition, possession and use of the proceeds of unlawful activities,¹²⁶ and the failure to report suspicions regarding the proceeds of unlawful activities.¹²⁷ Just like racketeering, the POCA provides under chapter 3 for extraterritorial jurisdiction to assist the prosecution. It is also intent on dealing with the proceeds of illegal activities, other than the illegal activities themselves. This in effect defeats the purpose of reducing the incidence of rhino poaching, if the law requires that there should be proceeds of illegal activities as a condition that precedes prosecution.

With regard to criminal gang activities,¹²⁸ the POCA offers clarity on what they entail. These include the illegal actions or omissions by members of the gang on third parties, by means of actual violence or threats.¹²⁹ In addition, the continued existence of the gang should be evident from its criminal activities or the conscription of persons to join it.¹³⁰ While a literal interpretation shows that the section seeks to deal with the existence of the

¹¹⁹ Section 2(1) of POCA.

¹²⁰ Sections 2(1)(a)(i)-(iii) of POCA.

¹²¹ *Prinsloo v S* 2016 1 All SA 390 (SCA).

¹²² *S v De Vries* 2008 1 SACR 580 (C).

¹²³ Chapter 3 of POCA.

¹²⁴ Section 4 of POCA.

¹²⁵ Section 5 of POCA; *S v De Vries* 2008 1 SACR 580 (C).

¹²⁶ Section 6 of POCA.

¹²⁷ Section 7 of POCA.

¹²⁸ Chapter 4 of POCA.

¹²⁹ Section 9(1)(a)-(c) of POCA.

¹³⁰ Section 9(2)(a)-(c) of POCA.

gang, it does not mean that the other activities of the gang, like rhino poaching, are not dealt with. An individual's participation in the activities of a gang is an offence under the POCA.

In the interim, the POCA has the following shortcomings. First, the offences of racketeering activities and the proceeds of unlawful activities as defined in s 1 pertain to the benefits that accrue from illegal activities and their use to advance illegal activities. This is an indication that unless the State proves to the court that a higher echelon involved at the transportation or distribution levels uses proceeds to enable the criminal gangs in the collection level to acquire more rhino horn, he or she may not be prosecuted under the POCA. Secondly, the extraterritorial jurisdiction for offences in the two categories is with regard to the proceeds obtained, and how appropriate orders may be applied to deal with them.¹³¹ Other than the proceeds obtained, the POCA cannot be used to deal with activities related to rhino poaching outside the Republic.

3.2.2 *Modes of criminal liability as an alternative?*

While the POCA sought to amend particular acts, these amendments have suffered practical limitations in enforcing the criminal liability of all the key players in rhino poaching.¹³² There are various principles of criminal law in relation to modes of liability such as aiding and abetting, conspiracy to commit an offence, common purpose and accessorial liability which need to be interrogated.¹³³ It is argued that unless these principles are developed to have extraterritorial application, they cannot be applied to rhino poaching or wildlife offences in general. To substantiate this, the author interrogates the use of common purpose in prosecuting the higher echelons.

In South Africa persons may be taken to participate in the commission of an offence where it is shown that they formed a purpose to commit the offence, directly or indirectly. According to the common purpose doctrine, the prosecution has to prove beyond reasonable doubt that each accused had the requisite intention with respect to the unlawful outcome at the time of the commission of the offence.¹³⁴ This is an indication that the higher echelon should have intended the criminal act of poaching the rhino as the

¹³¹ Chapters 5 and 6 of POCA.

¹³² The *Drugs and Drug Trafficking Act* 140 of 1992 and ICCMA.

¹³³ Such principles have been used in the POCA, but the defining feature is that the culprits are arrested within the bound of South Africa's jurisdiction. For aiding and abetting under the POCA, see *De Vries v The State* 2012 1 SACR 186 (SCA). Burchell *Principles of Criminal Law* Section G.

¹³⁴ *Dewnath v S* 2014 ZASCA 57 (17 April 2014) para 12.

intended criminal result of their facilitation of the process through the provision of logistics for this purpose. This position rhymes with the definition that where "two or more persons agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within their common design."¹³⁵

One may ask the question, what informs the common purpose. This is pretty straight forward - a prior express or implied agreement before the commission of the offence.¹³⁶ The limits of its application are in relation to extraterritoriality, where an individual participates in a location where the court does not have jurisdiction. While the common purpose doctrine would be instructive, its extraterritorial application is limited. A good example is where a person commits the offence of theft outside South Africa and then maintains the possession of the property herein.¹³⁷ The lack of extraterritorial jurisdiction in the wording affects the use of common purpose in prosecuting higher echelons. This is exacerbated by the limited nature of the extraterritorial jurisdiction that is provided for under the POCA.¹³⁸ As such, the doctrine of common purpose can be used only where the penal laws of the States that harbour higher echelons enable the prosecution of offences where their participation starts in another jurisdiction (like South Africa) and continues to that jurisdiction (like Vietnam).¹³⁹

Furthermore, the challenge to combatting rhino poaching lies in its nature as a transnational other than an international crime. The prosecution of the higher echelons in an international crime is accomplished by the use of universal jurisdiction, regardless of where the criminals are located.¹⁴⁰ Conversely, the prosecution of transnational crime requires interstate cooperation.¹⁴¹ The existence of limited cooperation affects the already

¹³⁵ Burchell *Principles of Criminal Law* 467.

¹³⁶ *S v Mgedezi* 1989 1 SA 687 (A) 705-706.

¹³⁷ In *S v Kruger* 1989 1 SA 785 (A) the court held where in terms of South African law, one commits theft in a foreign country, one could be tried in South Africa because of the continued act of appropriation, with the necessary intent, in South Africa. See Mujuzi 2015 *AYIHL* generally. Other laws that have similar provisions that allow the prosecution of acts committed in other countries, that may ably use the common purpose principle include *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007 s 61; the *Nuclear Energy Act* 32 of 1998 s 56A; *Prevention and Combating of Trafficking in Persons Act* 7 of 2013 s 12.

¹³⁸ See discussion following section 3.2.1 above.

¹³⁹ Mujuzi 2015 *AYIHL* generally.

¹⁴⁰ Boister 2003 *EJIL* 953-976; Boister *Introduction to Transnational Criminal Law* generally.

¹⁴¹ Boister 2003 *EJIL* 953.

limited extraterritorial jurisdiction.¹⁴² Furthermore, where there are limited interstate transnational values, the emphasis attached to the prosecution of rhino poaching is not the same in other States.¹⁴³

3.2.3 *Use of the aut dedere aut judicare principle: an alternative?*

Another possible alternative is the use of the *aut dedere aut judicare* doctrine. Although this principle is used by the International Criminal Court in the context of war crimes, it is instructive in contextualising the need for extraterritorial jurisdiction.¹⁴⁴ This principle requires that a State with the custody of an international offender has a duty to either prosecute or to extradite him or her to another State to face trial. This principle draws legitimacy from international treaties that are signed to secure the prosecution of war crimes¹⁴⁵ and crimes against humanity.¹⁴⁶

It should be noted that the principle may be applied outside the scope of crimes against humanity and war crimes on the basis of the relationship between the principle of *aut dedere aut judicare* and human rights. First, the enforcement of human rights requires that the protection of the impugned rights be subjected to the prosecution of perpetrators.¹⁴⁷ Secondly, where national crimes attract a level of international concern, the obligation to use the principle should suffice.¹⁴⁸ In this regard, where the crime that is transnational in nature affects the social, economic, cultural and other interests of all or a substantial number of States and involves private individuals or group conduct, the *aut dedere aut judicare* principle may be

¹⁴² Boister 2003 *EJIL* 953.

¹⁴³ Boister 2003 *EJIL* 953. See Emslie *et al* 2016 http://www.rhinoresourcecenter.com/pdf_files/147/1470753643.pdf 6.

¹⁴⁴ Ferreira *et al* 2017 *UFRGSMUN* 213-215.

¹⁴⁵ These refer to serious infringements of customary or treaty rules of international humanitarian law protecting important values occasioned during internal and international armed conflicts. See *Prosecutor v Dusko Tadic* (Appeal Judgement), IT-94-1-A (International Criminal Tribunal for the former Yugoslavia) (15 July 1999).

¹⁴⁶ These crimes are serious attacks on human dignity, grave humiliation as part of a widespread or systematic practice of committing atrocities which are tolerated by government policy or are part of a large attack on civilians or persons not involved in the hostilities or enemy combatants both in times of war and peace. Cassese *International Criminal Law*.

¹⁴⁷ Ferreira *et al* 2017 *UFRGSMUN* 214.

¹⁴⁸ Boister 2003 *EJIL* 966. See Art 3 of the *United Nations Convention against Transnational Organised Crime* (2000), which refers to such crime as being "transnational in nature": where the crime is "(a) committed in more than one State; (b) it is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) it is committed in one State but involves an organised criminal group that engages in criminal activities in more than one State; or (d) it is committed in one State but has substantial effects in another State".

used.¹⁴⁹ In this regard, the international criminalisation of poaching in endangered species by CITES should be viewed as an international concern with rhino poaching as a national crime.¹⁵⁰

One may argue that the challenges to the application of the principle in the national sphere lie in a State's discretion to balance its sovereignty on the one hand and extradition on the other;¹⁵¹ or where its punishment for the criminal conduct amounts to torture or cruel, inhuman and degrading treatment.¹⁵² These challenges are solved by the level of international concern that the crime attracts.¹⁵³ The South African Constitutional Court has pronounced its support for the non-imposition of punishments that amounts to torture or cruel, inhuman and degrading treatment.¹⁵⁴ The issue of the severity of the punishment in the context of cruel, inhuman or degrading treatment, therefore, does not arise.

Despite the likelihood of overcoming the challenges to the application of the *aut dedere aut judicare* principle, South Africa's position in the fight against rhino poaching needs to be contextualised. Where the higher echelon is in a country other than South Africa, his or her successful prosecution lies with the prosecutorial authorities in that State. South Africa cannot seek to prosecute the perpetrator beyond its borders. Prosecution can take place only where the interests of South Africa and the other State converge. In addition, at its core this principle requires that the State in control of the person to be investigated surrenders or delivers him or her to be prosecuted in the State seeking extradition. This requirement should be in its domestic law or in an international treaty to which both the requesting State and the State in custody of the perpetrator are parties.¹⁵⁵

¹⁴⁹ Some of the crimes that have been recognised by the United Nations include drug trafficking, corruption, and the financing of terrorism. See Panov *Obligation aut Dedere aut Judicare* 99.

¹⁵⁰ See the discussion under section 3.3 below.

¹⁵¹ Kemp 2003 SACJ 373.

¹⁵² *Chitat Ng v Canada* Communication No 469/1991 para 10.5. Also see *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty* ECOSOC Res 1984/50 (1984).

¹⁵³ See the preceding paragraph.

¹⁵⁴ *Mohamed v President of the Republic of South Africa* 2001 3 SA 893 (CC) paras 61-67.

¹⁵⁵ For instance, the *International Convention for the Protection of All Persons from Enforced Disappearance* (2006) expressly provides in Art 11 that: "The State Party in the territory under whose jurisdiction a person alleged to have committed an offence of enforced disappearance is found shall, if it does not extradite that person or surrender him or her to another State in accordance with its international obligations or surrender him or her to an international criminal tribunal whose jurisdiction it has recognised, submit the case to its competent authorities for the

Some scholars argue that this obligation does not necessarily refer to investigations. It is suggested that investigations should be done where there is adequate evidence to prosecute the offence before it can be prosecuted in the State where the accused is located. Where the offence in the State that is holding the higher echelon is radically different, it is necessary to extradite the person to the other State, where he or she will be prosecuted.¹⁵⁶ This brings one back to the position that the lack of an extradition agreement on rhino poaching with either Mozambique or Vietnam negates the chances of the possible prosecution of an accused in South Africa.

The lack of treaties that codify the criminalisation of particular conduct denies the State in need of this treaty the legal effect of such codification, and as such there is no binding engagement with the State that harbours the perpetrators.¹⁵⁷ It is rather unfortunate that while the origin of a transnational criminal law norm is international, its penal proscription is limited to national jurisdiction, making its application an uphill task.¹⁵⁸

3.3 Steps by CITES

Recent decisions taken at the 17 Conference of the Parties to the CITES are important to this conversation. They offer guidance to States Parties, the CITES Secretariat, range Parties, Mozambique and Vietnam.¹⁵⁹ The Secretariat requires all parties to review their implementation and strategies related to the effectiveness of the law-enforcement response to rhino poaching and trafficking.¹⁶⁰ While this is a welcome development, it requires a concerted effort to have the effects of the review felt across the board. This is especially true where the level of emphasis on a particular wildlife species in one State is not commensurate to the level of emphasis in others.

Secondly, all rhino range States have a duty to always review poaching and trafficking trends, such that the preventive and combating measures are

purpose of prosecution". Therefore, where Mozambique or Vietnam does not have a similar position in their laws, it can neither prosecute nor extradite. The author is not aware of any law in South Africa, Vietnam or Mozambique that provides for the application of the *aut dedere aut judicare* principle.

¹⁵⁶ Henzlin *Le Principe de l'Universalité en Droit Pénal International* generally.

¹⁵⁷ Panov *Obligation aut Dedere aut Judicare* 98.

¹⁵⁸ Boister 2003 *EJIL* 953.

¹⁵⁹ CITES 2017 <https://cites.org/sites/default/files/eng/com/sc/69/E-SC69-60.pdf> / <https://cites.org/eng/com/sc/69/index.php>.

¹⁶⁰ CITES 2017 <https://cites.org/sites/default/files/eng/com/sc/69/E-SC69-60.pdf> / <https://cites.org/eng/com/sc/69/index.php> paras 1 (a)-(b). Minutes of the 69th meeting of the Standing Committee in Geneva (Switzerland), 27 November – 1 December 2017, SC69 Doc 60, Decision 17.133.

effective, adaptive and responsive to new trends.¹⁶¹ This speaks to the need for vigilance in prosecution,¹⁶² mutual cooperation and enforcement through various measures such as extradition,¹⁶³ and the use of strategies that counter the killing and trafficking of rhinos.¹⁶⁴ The duties placed on range States reflect the key concepts informing this contribution, namely effective prosecution, mutual cooperation and extradition. These duties require that the range States either prosecute the higher echelons on the basis of their violations of South Africa's environmental penal law, or extradite the offenders to the Republic. Secondly, they ought as far as possible to attach the same emphasis that South Africa and the States Parties to CITES attach to the prohibition of rhino poaching. This is evident in the Secretariat's duty to conduct visits to Mozambique and Vietnam to review arrests, seizures, prosecutions, and convictions.¹⁶⁵ This approach suggests the need to appreciate the socioeconomic constructions that the two countries attach to rhino horn. While the Mozambican perpetrators benefit financially from illegal transportation, Vietnamese society believes in the medicinal benefits that rhino horn accords it. This has to be contextualised in the move to ensure effective prosecution, mutual cooperation, and extradition. These steps have shown that the question of the effectiveness of the current legal regimes of the States Parties to ensure that a higher echelon resident in a range State can be tried is lacking.

4 Use of extraterritorial jurisdiction

In view of the challenges described above as being evident in the operation of the POCA with regard to the prosecution of culprits with regard to endangered species, it is prudent to contextualise extraterritorial jurisdiction and indicate how it may be used.¹⁶⁶ This is premised on the fact that China,

¹⁶¹ CITES 2017 <https://cites.org/sites/default/files/eng/com/sc/69/E-SC69-60.pdf> / <https://cites.org/eng/com/sc/69/index.php> paras 2(c), (d), and (e)(i)-(iii). Minutes of the 69th meeting of the Standing Committee in Geneva (Switzerland), 27 November – 1 December 2017, SC69 Doc 60, Decision 17.134.

¹⁶² CITES 2017 <https://cites.org/sites/default/files/eng/com/sc/69/E-SC69-60.pdf> / <https://cites.org/eng/com/sc/69/index.php> para 2(c).

¹⁶³ CITES 2017 <https://cites.org/sites/default/files/eng/com/sc/69/E-SC69-60.pdf> / <https://cites.org/eng/com/sc/69/index.php> para 2(d).

¹⁶⁴ CITES 2017 <https://cites.org/sites/default/files/eng/com/sc/69/E-SC69-60.pdf> / <https://cites.org/eng/com/sc/69/index.php> paras 2(e)(i)-(iii).

¹⁶⁵ CITES 2017 <https://cites.org/sites/default/files/eng/com/sc/69/E-SC69-60.pdf> / <https://cites.org/eng/com/sc/69/index.php>, Standing Committee in Geneva (Switzerland), 27 November – 1 December 2017, SC69 Doc 60, Decisions 17.137, 17.138, and 17.139.

¹⁶⁶ See the critique of POCA in section 3.2 above.

Vietnam, Mozambique and South Africa are all signatories to CITES.¹⁶⁷ In addition, there is an MoU between South Africa and Vietnam where the two countries identify illegal wildlife trafficking as a global challenge that requires cooperation in the enforcement of and in compliance with CITES.¹⁶⁸ Other than agreeing on the need for compliance with CITES, the two countries do not agree on the prosecution of cases beyond their borders.¹⁶⁹ It is important to note that the forms of cooperation do not specifically include the prosecution of persons engaged at the three levels of rhino horn poaching as indicated above.¹⁷⁰ It should be noted, however, that the two States agree that other forms of co-operation may be mutually agreed upon by them, subject to their domestic legislation. The relevant Article provides for other forms of cooperation as shall be mutually agreed upon by the Parties subject to the Parties domestic legislation and available funding.¹⁷¹ While this provision is a welcome development, it poses two challenges. First, it does not specifically speak to wildlife offences like rhino horn poaching. Secondly, the author is not aware of any provision in the POCA that may be used to prosecute such individuals under this MoU.¹⁷² On a lighter note, the decisions by the CITES Conference of Parties and the recent adoption of new environmental penal laws in Vietnam are steps in the right direction. This aids the pursuit of logical avenues to prosecute trafficking in rhino horn as a challenging transnational crime.

There is a need to pursue the possible prosecution of all the players in the rhino horn syndicates. There are examples of States that have used extraterritorial jurisdiction to deal with instances of environmental crime. For instance, the United States (US) *Lacey Act Amendments* of 1981 provided

¹⁶⁷ South Africa ratified the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (1973) (CITES) on 15 July 1975, entered into force 13 October 1975. Mozambique acceded to it on 25 March 1981, entered into force on 23 June 1981, while Vietnam acceded to the same on 20 January 1994, entered into force 20 April 1994 (CITES 2019 <https://cites.org/eng/disc/parties/chronolo.php>).

¹⁶⁸ Preambular paras 4-7 of the *Memorandum of Understanding (MoU) between the Government of the Socialist Republic of Viet Nam and the Government of the Republic of South Africa on Cooperation on Biodiversity Conservation and Protection* (2012).

¹⁶⁹ Articles 2(a)-(g) of the *Memorandum of Understanding (MoU) between the Government of the Socialist Republic of Viet Nam and the Government of the Republic of South Africa on Cooperation on Biodiversity Conservation and Protection* (2012).

¹⁷⁰ The contents of the MoUs inadvertently fail to link the three levels in rhino poaching with the need to find ways of combating the vice through the execution of these agreements

¹⁷¹ Article 3(e) of the *Memorandum of Understanding (MoU) between the Government of the Socialist Republic of Viet Nam and the Government of the Republic of South Africa on Cooperation on Biodiversity Conservation and Protection* (2012).

¹⁷² See the critique of POCA in section 3.2 above.

for measures that made it unlawful to import, export, sell, acquire, or purchase fish, wildlife or plants taken, possessed or sold in violation of a State or foreign law.¹⁷³ Thus, it provided for extra-territorial action. Instead of creating an offence to violate US national law elsewhere, the Act prohibited the violation of the laws elsewhere, to be prosecuted in the US.¹⁷⁴ In addition, in March 1998 Norway required all Norwegian registered companies or vessels conducting business outside its territorial waters to register for a period of one year.¹⁷⁵ In the event that a vessel was removed from the register for the contravention of conservation or management measures laid down by regional or sub-regional agreements, it lost access to all quotas it stood to benefit from in the domestic and cooperative fisheries.¹⁷⁶

These historical successes indicate that South Africa and the range states can use extraterritorial jurisdiction to prosecute offenders who are arrested outside its jurisdiction. An arrangement on extraterritorial jurisdiction that goes beyond recovering the proceeds of organised crime is instructive. In addition, to effectively utilise extraterritorial jurisdiction, one has to establish the nature thereof that is needed by South Africa to ensure that there is optimal prosecution of the higher echelons of those involved in rhino poaching. The question is how this extraterritorial jurisdiction may be applied. The answer lies in a brief unpacking of the concept of jurisprudence. Jurisdiction may be of a prescriptive, adjudicative or enforcement nature.¹⁷⁷ With regard to the enquiry being undertaken in this article, adjudicative jurisdiction is instructive insofar as it involves the power to subject persons or things to a judicial process.¹⁷⁸ In this regard, there is a need to subject the higher echelons of those involved in rhino poaching to

¹⁷³ Hayman and Brack 2002 http://ec.europa.eu/environment/legal/crime/pdf/env_crime_workshop.pdf.

¹⁷⁴ Hayman and Brack 2002 http://ec.europa.eu/environment/legal/crime/pdf/env_crime_workshop.pdf.

¹⁷⁵ Hayman and Brack 2002 http://ec.europa.eu/environment/legal/crime/pdf/env_crime_workshop.pdf.

¹⁷⁶ Hayman and Brack 2002 http://ec.europa.eu/environment/legal/crime/pdf/env_crime_workshop.pdf.

¹⁷⁷ For an extensive discussion on jurisdiction, see Colangelo 2014 *Cornell L Rev* 1311; Podgor 2002 *Ga.J Int'l & Comp L* 5-9; Curley and Stanley 2016 *Bond L Rev* 169-197 from the perspective of offences against children.

¹⁷⁸ *Hartford Fire Ins Co v California* 509 US 764 (1993) 813; *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* 2015 1 SA 315 (CC) paras 26-28. Some international law scholars suggest that adjudicative and enforcement jurisdiction can be read together; O'Keefe 2004 *JICJ* 735-737; and Brownlie *Principles of Public International Law* 301.

prosecution both in respect of their personal involvement and/or the rhino horn as the subject of their activities.

In addition to the above, with regard to extraterritorial jurisdiction, international law has developed principles on territoriality. First, any one State may not exercise its power in any form in the territory of another State, unless there is a rule making that possible; and secondly, States have a wide discretion to exercise jurisdiction within their own territory in instances where there are acts or omissions that have been committed outside their borders.¹⁷⁹ With regard to the first principle, the then Permanent Court of International Justice stated:

Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.¹⁸⁰

This indicates that in international law the existence of a permissive rule allows a State to exercise its jurisdiction over an act that occurs in another State. The question that follows with regard to the scope of the permissive rule is whether a State's enforcement of jurisdiction in respect of acts committed in another State is based on the existence of the permissive rule or the lack of a prohibitive rule. This question resonates with the presumption that what is not prohibited under international law is permitted.¹⁸¹ It follows that there is a lack of clarity with regard to the application of the permissive rule due to changing strands of either sovereignty or interdependence. While it may be argued that the *SS Lotus* case of *France v Turkey* (the *Lotus case*) postulates a position that international law is either a system of permissive or prohibitive rules,¹⁸² this conclusion does not reflect the majority opinion, leading to the development of the *Lotus* principle. The majority opinion presented States as independent communities that need to ensure co-existence by recognising equal sovereignty as the basis for any restriction on the exercise of their sovereignty.¹⁸³ As a result, the principle that permissiveness should be based on a State's discretion to consent to an act of extraterritorial

¹⁷⁹ The case of the *SS Lotus (France v Turkey)* (1927) PCIJ Series A, No 10 (hereafter the *Lotus case*) 18-19.

¹⁸⁰ The *Lotus case* para 45.

¹⁸¹ Hertogen 2015 *EJIL* 902; Roth 2004 *Fla L Rev* 1029; Weil 1998 *Colum J Transnat'l L* 112; Handeyside 2007-2008 *Mich J Int'l L* 72.

¹⁸² Hertogen 2015 *EJIL* 904.

¹⁸³ The *Lotus case* para 18; Lowe and Staker "Jurisdiction" 319-320; Ferreira-Snyman 2006 *Fundamina* 17-18; Perrez *Cooperative Sovereignty* 395.

jurisdiction in exercise of its sovereignty indubitably has to be linked to its interdependence.¹⁸⁴ Therefore, international law is not a system of permissive or prohibitive rules as the *Lotus* principle suggests, but rather a collection of independent States that co-exist.¹⁸⁵ It follows that this co-existence assists in the balancing of rights and interests between States in the sphere of international law.

The application of extraterritorial sovereignty by South Africa with regard to acts committed by the higher echelons of those involved in organised crime should not be seen as an act that undermines the sovereignty of other States, such as Mozambique and Vietnam, but rather as an act that requires the interdependence of sovereign States affected by rhino poaching. There is a lot of scholarly literature that calls for co-existence and interdependence in fighting environmental crime, which is instructive in creating a basis for extraterritorial jurisdiction to fight it.¹⁸⁶

In addition to the discussion on the permissive rule, consider this hypothetical situation that illuminates the concept of extraterritoriality. Poacher A poaches rhino horn and transmits it to a receiver B. This receiver then transports the horn beyond South Africa's jurisdiction to an international receiver C. The international receiver transmits the rhino to a kingpin D, who then uses the distributor E to transfer the product to the consumer F. This hypothetical scenario indicates that while poacher A and the receiver B are within South Africa's borders, the international receiver C, distributor E and consumer F are beyond South Africa's borders. A localisation of a particular transaction informs the choice of jurisdiction. If one places emphasis on where the transaction started, then A and B are prosecuted in South Africa due to South Africa's prescriptive jurisdiction as a result of its national laws.¹⁸⁷ With regard to the transaction that forms the effect of the crime, that is the transmission of the rhino horn to the persons C, D or the distribution to E and F, their prosecution may be undertaken in the respective countries without any need for extraterritorial jurisdiction.¹⁸⁸ The question that needs to be answered is why C and D should not be prosecuted in the Republic.

¹⁸⁴ Hertogen 2015 *EJIL* 4.

¹⁸⁵ This is based on the fact that while States elect to be bound by signing international treaties, the use of generally accepted principles to regulate relations among States, indicates that some restrictions balance the sovereignty and co-existence of States.

¹⁸⁶ See the discussion at notes 182 to 183 above.

¹⁸⁷ Colangelo 2014 *Cornell L Rev* 1313.

¹⁸⁸ Colangelo 2014 *Cornell L Rev* 1313.

Before one engages with the possible prosecution of C and D in the Republic, this hypothetical situation poses a plethora of challenges. First, other countries may not criminalise the conduct of C and D. For instance, Mozambique and Vietnam do not have laws that deal with Organised Crime Groups with regard to international receivers, kingpins and distributors of rhino horn.¹⁸⁹ However, Vietnam's Penal Code provides for offences against regulations on the management and protection of endangered and rare animals within its jurisdiction. The Section states:

1. Any person who violates regulations on management and protection of animals on the List of endangered and rare species; endangered, rare animals of Group IB or in Appendix I of CITES in any of the following cases shall be liable to a fine of from VND 500,000,000 to VND 2,000,000,000 or face a penalty of 01 -05 [sic] years' imprisonment:
 - a) Illegally hunting, killing, imparking, [sic] transporting, trading animals on the List of endangered and rare species;
 - b) Illegally storing, transporting, trading animals specified in Point a of this Clause or body parts thereof; from 02 kg to under 20 kg of elephant tusks; from 0.05 kg to under 01 kg of rhino horns.¹⁹⁰

The section is silent on dealings in an endangered animal or animal products from outside the country's jurisdiction. One may argue that the problem that South Africa is dealing with in regard to the higher echelons of those involved in such conduct is not adequately dealt with under Vietnam's Penal Code either.

Secondly, and as noted earlier, the States in issue may not attach similar emphasis to rhino horn poaching as South Africa does. While South Africa has taken various initiatives to curb rhino poaching, such as the establishment of an environmental investigative task force, the monitoring of rhino populations, the prosecution of alleged offenders, and the forfeiture of assets that arise from the trade, other countries have not taken such initiatives.¹⁹¹ In this regard, a look at Mozambique's position on environmental crime is instructive due to the challenges that arise from its

¹⁸⁹ Mozambique's *Conservation Law* 16 of 2014 does not provide for the prosecution of higher operatives in the business of rhino horn poaching. The author is not aware of any legislation in Mozambique or Vietnam that deals with the prosecution of international receivers or kingpins. Vietnam was in the process of revising its penal code to enhance the penalties for wildlife crime and improve the prosecution of persons dealing in illegal wildlife products. See Vallianos 2017 https://www.awf.org/sites/default/files/public%3A//media/Resources_0/Facts%20%26amp%3B%20Brochures/Rhino%20Horn%20Demand_Vietnam%202017%20report.pdf.

¹⁹⁰ Sections 244(1)(a)-(b) of the *Vietnam Penal Code* Law No 100/2015/QH13.

¹⁹¹ See section 1.3 above.

limited initiatives in comparison with South Africa. Mozambique's *Conservation Law* provides for a maximum prison sentence of 12 years for poaching protected species.¹⁹² However, this harsher sentence does not appear to apply to wildlife trafficking cases. In addition, the *Conservation Law* does not define the protected species.¹⁹³ Research indicates that the limitations implicit in these initiatives have dire effects on dealing with rhino horn poaching. While 539 alleged poachers were arrested between 2012–2014, the convictions led to the imposition of 17 fines and no custodial sentences.¹⁹⁴ While a Report by the International Union for the Conservation of Nature (IUCN) Rhino Specialist Groups and Trade Records Analysis of Flora and Fauna in Commerce (TRAFFIC) to CITES' 17th Conference of the Parties (CoP17) showed that high-ranking law enforcement officers were arrested for armed robbery and trafficking in rhino horn, they were released on bail.¹⁹⁵ In addition, a Vietnamese citizen who had initially been arrested at Maputo Airport going to Kenya with seven rhino horns in May 2012 was later detected a week later at Bangkok's international airport in transit from Kenya to Hanoi with the horns.¹⁹⁶ As a result, the different initiatives in Mozambique, Vietnam and South Africa justify the need for the Republic's adoption of another approach in the direction of extraterritorial jurisdiction. South Africa has to engage other countries through the strategic use of extraterritorial jurisdiction to deal with the international receivers, kingpins and distributors.

As such, a treaty or extradition arrangement offers the platform of extraterritorial jurisdiction to deal with rhino poaching. At their core is the prosecution in South African courts of the higher echelons arrested in the range States. This would aid the effective use of modes of criminal liability such as common purpose. The use of extraterritorial jurisdiction embraces the definition of poaching and poachers by the NISCWT with regard to the individuals who are involved in the collection, transportation and distribution of rhino horn. It offers an opportunity to enhance the second and third objectives of the NISCWT, which require that a lot of the prevention and promotion be done outside the borders of South Africa.

¹⁹² Article 55(b) and 62 of the *Conservation Law* 16 of 2014 (the Portuguese version is authentic and the author obtained an English version for purposes of this study).

¹⁹³ See the glossary of terms in the *Conservation Law* 16 of 2014.

¹⁹⁴ EIA 2014 https://eia-international.org/wp-content/uploads/eia_iwtp-report-mozambique.pdf.

¹⁹⁵ Emslie *et al* 2016 http://www.rhinoresourcecenter.com/pdf_files/147/1470753643.pdf 6.

¹⁹⁶ Emslie *et al* 2016 http://www.rhinoresourcecenter.com/pdf_files/147/1470753643.pdf 6.

5 Conclusion and recommendations

An evaluation of the current legislation shows that all the provisions deal with the prosecution of rhino poachers who are inside South Africa. This conclusion is buttressed by the evaluation of the use of common purpose as a mode of criminal liability, which still requires the accused to be within South Africa for it to be effected. Furthermore, other principles like the use of *aut dedere aut judicare* are not effective in so far as they are not entrenched in the legislation that provides for offences that aid rhino poaching. It seems clear that there is a need for *ad hoc* arrangements or other modes of mutual assistance to ensure that the accused is either brought to South Africa for prosecution or tried in the range States for his role in the poaching.

In addition, the recent recommendation by the DEA on compliance and the enforcement of wildlife offences still falls short of leading to the effective prosecution of higher echelons.¹⁹⁷ As stated earlier, the addition of offences in the POCA to schedule 5 of the *Criminal Procedure Act* simply makes the trial process more effective with regard to the accused who are in South Africa.¹⁹⁸ The higher echelons are still effectively not prosecuted due to a lack of extraterritorial jurisdiction.

The achievement of logical solutions to rhino horn poaching has to take place through the use of both long-term and short-term engagements that speak to the prosecution of all the players in the poaching nexus. The first logical step is to use the multinational or bilateral treaties that provide for judicial or quasi-judicial jurisdiction. In this context it is desirable that any MoU clearly provides for the investigation and prosecution of the players in the rhino horn nexus from the first to the second and third hierarchies. While the bilateral agreement may be achieved through MoUs, extradition treaties, or further engagements with CITES, a provision that provides for the prosecution of the higher echelons of those involved in rhino poaching for their involvement *per se* rather than for their use the proceeds of their crimes is the preferred and most effective course of action to pursue.

In addition, the establishment of *ad hoc* extradition arrangements between South Africa and other affected countries should be encouraged through the diplomatic channels to enable the prosecution of the higher echelons. This

¹⁹⁷ This is true where higher echelons do not feature in the ongoing prosecutions of rhino poachers. There is emphasis on the prosecution of the persons who are arrested while poaching.

¹⁹⁸ Section 3.2.1 on the evaluation of the POCA.

will create subsidiary universality, which will enable the prosecution of these people once they are apprehended in territories other than South Africa.¹⁹⁹

The existence of these treaties is affected by their failure to deal with the prosecution of the higher echelons of rhino poaching. This failure highlights the need to have this law. Therefore, an amendment to the POCA that provides for the domestication of the multilateral or bilateral treaties should be adopted to ensure that extraterritorial jurisdiction is achieved. This will ensure their prosecution, which will be fortified by the treaties that allow for the extraterritorial jurisdiction. A few initiatives need to be undertaken in order to make it possible to deal with the limitations on the POCA through the use of extraterritorial jurisdiction. First, the offences related to racketeering activities and the proceeds from illegal activities should be extended beyond their current application to the benefits that accrue from illegal activities and their use to advance illegal activities to the actual illegal activities that involve players beyond South Africa's borders. This would enable the prosecution of the international players in the rhino poaching syndicates where the State can prove that a person has transported or distributed endangered species or their products, like rhino horn. In addition, there should be an extension of extraterritorial jurisdiction for offences with regard to the proceeds obtained and the subsequent application of appropriate orders to deal with them to enable the Republic to deal with the offences themselves rather than with the proceeds obtained from the offences.²⁰⁰ The activities (that do not include the application of the proceeds of rhino poaching) of the higher rhino poaching echelons outside South Africa that emerge from the rhino poaching within the Republic would then be adequately dealt with in the POCA. These activities would include the transportation, processing and distribution of rhino horn products. Thus, the activities of the higher echelons that are not expressly subjected to extraterritorial jurisdiction, such as the transportation and distribution of rhino horn, would be provided for. It is thus proposed that the South African Law Commission should undertake a due diligence study of chapters 5 and 6 of the POCA with a view to the provision of extraterritorial jurisdiction for the prosecution of the higher echelons of those involved in rhino horn poaching.

The argument that an amendment to the POCA is flawed. First, the current provisions deal only with the proceeds arising from the crimes instead of with the crimes themselves, which limits the application of the POCA. As a

¹⁹⁹ Boister 2003 *EJIL* 964.

²⁰⁰ Chapters 5 and 6 of POCA.

tool, the POCA will be better utilised when the amendment is introduced. The cost of the investigation would greatly be reduced if there were cooperation with other investigative agencies, including sharing evidence and information on the activities that arise from the action of rhino poaching in the Republic.²⁰¹ In addition, though there are clear instances of political will in Vietnam and South Africa, as shown in the recently signed MoU to cooperate in criminal matters, and to control the sale of the rhino horn in the two countries; a lot more needs to be done.²⁰² This is also evident in the recent step taken by Vietnam to join other countries in signing the London Declaration on the illegal wildlife trade and the introduction of a penal law that prohibits the poaching of the rhino horn.²⁰³ This gesture of political will would be self-defeating if Vietnam were not to take practical steps to prosecute these echelons or enter *ad hoc* engagements to extradite the perpetrators to South Africa to face trial.²⁰⁴

The long-term strategies include engaging with CITES and INTERPOL to remind State Parties to perform their obligations under the treaties, and should be adequately expressed in any extradition treaties or MoUs between South Africa and other countries that deal with the scourge of rhino poaching.

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²⁰¹ The ICCMA comes in handy in offering provisions that enable the sharing of evidence, the execution of sentences, the confiscation of the proceeds of crime and other matters.

²⁰² *Memorandum of Understanding (MoU) between the Government of the Socialist Republic of Viet Nam and the Government of the Republic of South Africa on Cooperation on Biodiversity Conservation and Protection* (2012).

²⁰³ Dixon 2016 <https://www.latimes.com/world/africa/la-fg-vietnam-rhino-trafficking-20160926-snap-story.html>.

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List of Abbreviations

Afr J Leg Stud	African Journal of Legal Studies
AYIHL	African Yearbook on International Humanitarian Law
Bond L Rev	Bond Law Review
CIROC Newsletter	Centre for Information and Research on Organised Crime Newsletter
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
Colum J Transnat'l L	Columbia Journal of Transnational Law
CoP17	17 th Conference of Parties
Cornell L Rev	Cornell Law Review
DEA	Department of Environmental Affairs
DOJ & CD	Department of Justice and Constitutional Development
EIA	Environmental Investment Agency
EJIL	European Journal of International Law
Fla L Rev	Florida Law Review
Ga.J Int'l & Comp L	Georgia Journal of International and Comparative Law
ICCMA	<i>International Cooperation in Criminal Matters Act 75 of 1996</i>
IUCN	International Union for Conservation of Nature Rhino Specialist Groups
JICJ	Journal of International Criminal Justice
LEMA	<i> Limpopo Environmental Management Act 7 of 2003</i>
Mich J Int'l L	Michigan Journal of International Law
MoU	Memorandum of Understanding
NDPP / DPP	National Director of Public Prosecutions
NEMA	<i>National Environmental Management Act 107 of 1998</i>
NEMAPAA	<i>National Environmental Management: Protected Areas Act 57 of 2003</i>

NEMBA	<i>National Environmental Management: Biodiversity Act 10 of 2004</i>
NISCWT	National Integrated Strategy to Combat Wildlife Trafficking
Notre Dame L Rev	Notre Dame Law Review
NPA	National Prosecuting Authority
PELJ	Potchefstroom Electronic Law Journal
POCA	<i>Prevention of Organised Crime Act 121 of 1998</i>
RSA	Republic of South Africa
SACJ	South African Journal of Criminal Justice
SAPS	South African Police Service
SAPSA	<i>South African Police Services Act 68 of 1995</i>
SAYIL	South Africa Yearbook of International Law
Stat LR	Statute Law Review
TRAFFIC	Trade Records Analysis of Flora and Fauna in Commerce
UFRGSMUN	UFRGS Model United Nations Journal
UNODC	United Nations Office on Drugs and Crime
UN	United Nations
US	Unites States of America