

The Future of Conservation in Namibia: Making the Case for an Environmental Court and Legislative Reforms to Improve Enforcement of Wildlife Crimes

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I. INTRODUCTION	50
II. THE NAMIBIAN CONSTITUTION SUPPORTS THE CREATION OF AN ENVIRONMENTAL COURT AND SPECIAL PROSECUTORS FOR WILDLIFE CRIMES	55
III. NAMIBIA’S INTERNATIONAL OBLIGATIONS SUPPORT CREATING AN ENVIRONMENTAL COURT AND SPECIAL PROSECUTORS FOR WILDLIFE CRIMES.....	56
IV. THE MINERALS POLICY OF NAMIBIA SUPPORTS CREATING AN ENVIRONMENTAL COURT TO ENSURE THE SUSTAINABLE UTILIZATION OF MINERALS AND NATURAL RESOURCES.....	59
V. ENVIRONMENTAL COURTS ELSEWHERE IN AFRICA HAVE DEMONSTRATED THEIR EFFECTIVENESS	61
A. <i>South Africa</i>	62
B. <i>Kenya</i>	62
VI. SYSTEMIC ADVANTAGES OF ENVIRONMENTAL COURTS	64
VII. FOLLOW-UP ISSUES FOR IMPLEMENTING AN ENVIRONMENTAL COURT.....	65
A. <i>Mobile Courts</i>	66
1. Sustainability and Funding	66
2. Logistical and Planning Issues.....	67
3. Lack of Awareness of Legal Process.....	68
B. <i>Establishing an Environmental Court Would Benefit the People and Environment of Namibia</i>	69
VIII. OVERVIEW OF NAMIBIA’S LEGISLATIVE FRAMEWORK FOR WILDLIFE CRIMES	69
A. <i>The Nature Conservation Ordinance (NCO)</i>	70

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B.	<i>Game Products Trust Fund Act 7 of 1997</i>	75
C.	<i>The Controlled Wildlife Products Trade Act 9 of 2008 (CWPTA)</i>	76
D.	<i>Draft Protected Areas and Wildlife Management Bill (as of July 17, 2017)</i>	77
E.	<i>The Legislative Framework Must Be Expanded to Include Investigation and Prosecution of Aiders, Abettors, and Corruption Crimes Related to Wildlife Crimes</i>	80
G.	<i>Greater Coordination in the Prosecution of Wildlife Crimes Is Needed</i>	81
H.	<i>Judicial Reforms Are Needed to Enable Prosecutors to More Diligently Prosecute Wildlife Crimes</i>	83
I.	<i>Communal Property Areas Need Improved Management</i>	84
J.	<i>Beyond the Poacher: Prosecuting Criminals Higher Up the Chain</i>	85
K.	<i>Improving Coordination and Effectiveness of Prosecution of Wildlife Crimes</i>	90
IX.	CONCLUSION	91

I. INTRODUCTION

The vast deserts and open spaces of Namibia are world-renowned for their diverse wildlife populations, bringing hundreds of thousands of visitors a year to the country in search of Africa's most famous, as well as elusive, species. Namibia is proud to have approximately forty percent of the global cheetah population, as well as black rhino, zebra, leopard, pangolin, and even a specially adapted desert elephant found nowhere else in the world.¹ Its rich biodiversity and unparalleled landscapes are a core part of Namibia's identity and puts the country on the global map for tourism. Without high-quality wildlife resources, not only would the spirit of Namibia suffer, but also its economy, people, and environment.

Yet in recent years, Namibia's wildlife populations have faced a severe threat. Released in September 2016, the Great Elephant Census recorded elephant populations observable by air (namely, savannah elephants, which are not hidden by foliage like their jungle elephant

1. Laurie Marker, *Cheetah Populations Continue to Decline Across Africa*, HUFFINGTON POST (Jan. 8, 2018), https://www.huffingtonpost.com/entry/cheetah-populations-continue-to-decline-across-africa_us_5873baa1e4b0eb9e49bfb93.

counterparts) and found that the African elephant populations have dropped by thirty percent since 2007, largely due to an increase in poaching.² While reports indicate that just two elephants died in Namibia due to poaching between 2005 and 2011,³ there were forty-nine elephant poaching-related elephant deaths in 2015 and an additional thirty-one in the first eight months of 2016.⁴ These statistics, however, are in dispute, as Namibia declined to join the Great Elephant Census to verify elephant population levels in the country.⁵

Additionally, the extremely endangered black rhino could be extirpated from Namibia within ten years due to poaching,⁶ with reports indicating that the population has been reduced by 97.6% since 1960.⁷ A report compiled by IUCN's Species Survival Commission reveals that, while there were only four reported rhinoceros poaching mortalities in Namibia in 2013, this increased to thirty in 2014 and ninety in 2015.⁸ Again, these numbers are in dispute, with the Minister of Environment and Tourism alternately reporting 125 killed rhinos in 2015, while the official Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) report submitted by Namibia listed only ninety.⁹ At least 201 rhinos have been killed there since 2011, largely for their extremely valuable horn, which fetches vast sums in China and Southeast

2. Niraj Chokshi & Jeffrey Gettleman, *African Elephant Population Dropped 30 Percent in 7 Years*, N.Y. TIMES (Sept. 1, 2016), <https://www.nytimes.com/2016/09/02/world/africa/african-elephant-population-dropped-30-percent-in-7-years.html>.

3. *Elephant, Rhino Poaching Up in Namibia*, NEWS24 (May 13, 2014), <https://www.news24.com/Green/News/Elephant-rhino-poaching-up-in-Namibia-20140513>.

4. Alberta Nakale, *About 125 Rhinos Poached Over Past Year*, NEW ERA (Aug. 4, 2016), <https://neweralive.na/posts/125-rhinos-poached-year>.

5. Christian Baakes & Marcia Fagnoli, *Migration to Extinction*, EARTH ORG. NAMIB. (Sept. 29, 2016), <http://earthorganizationnamibia.blogspot.com/2016/09/migration-to-extinction.html>.

6. Levi Winchester, *Rhinos 'Could Become Extinct in Just Over 10 Years' if Poaching Continues*, DAILY EXPRESS (Jan. 15, 2015), <https://www.express.co.uk/news/nature/552490/Save-The-Rhino-says-rhinos-could-become-extinct-in-just-over-10-years-time>.

7. Sandra Garcia, *Black Rhinos Roam Chad for the First Time in 46 Years*, N.Y. TIMES (May 11, 2018), <https://www.nytimes.com/2018/05/11/science/rhinos-africa-extinction.html>.

8. RICHARD H. EMSLIE ET AL., *AFRICAN AND ASIAN RHINOCEROSSES—STATUS, CONSERVATION AND TRADE 2* (2016). This report was compiled in preparation for the 17th meeting of the Convention on International Trade in Endangered Species' (CITES) Conference of the Parties (CoP17). CITES is an international agreement among almost 200 parties that aims to regulate the international trade of endangered species, in order to ensure their continued survival. The parties to CITES meet every three years to discuss the future direction of the Convention and proposals to add or amend species regulated under CITES. The CITES CoP17 Conference took place in Johannesburg, South Africa, from September 24 to October 5, 2016.

9. Nakale, *supra* note 4.

Asia.¹⁰ These numbers are even more startling in the context of the entire black rhino population: it is estimated that a mere 5000 remain in the wild, approximately 28% of which live in Namibia.¹¹ Besides these high-profile species, other animals in Namibia face great risks, as seen in the complete ban of pangolin trading under CITES, resulting from a Conference of Parties meeting in Johannesburg, South Africa, in September and October 2016.¹² Shockingly, the Namibian government was the only CITES member to oppose the ban on pangolin trade across the globe, claiming that a decline in the species could not be verified and was insufficiently documented.¹³ Despite Namibia's documented failure to advocate on behalf of wildlife conservation, clearly there is a significant problem with poaching and illegal trade of animals and animal products, which is increasingly acknowledged across the world and gravely threatens Namibia.

Even with the stark rise in poaching in Namibia in recent years, prosecution and enforcement of environmental laws and international environmental treaties in Namibia remain insufficient to prevent wildlife losses. Not until September 2016 was a major prosecution announced, when four convicted poachers received a sentence of fourteen years each—twice the jail time that any poacher had previously received.¹⁴ Even if this conviction sent a strong message, the bottom line is that most

10. Werner Menges, *Poaching Could Wipe Out Rhino Population*, NAMIBIAN (Sept. 27, 2016), <https://www.namibian.com.na/156115/archive-read/Poaching-could-wipe-out-rhino-population>.

11. FIN. INTELLIGENCE CTR., REPUBLIC OF NAMIB., RHINO AND ELEPHANT POACHING, ILLEGAL TRADE IN RELATED WILDLIFE PRODUCTS AND ASSOCIATED MONEY LAUNDERING IN NAMIBIA 19 (2017), <https://www.fic.na/uploads/TrendsandTypologies/FICTrendsandTypologyReports/Namibias%20Wildlife%20Poaching%20and%20related%20Money%20Laundering%20Typology%20Report.pdf>.

12. Rachel Nuwer, *Trade Ban to Protect Pangolins: Enough to Save Them?*, N.Y. TIMES (Sept. 29, 2016), <https://www.nytimes.com/2016/09/30/science/endangered-pangolins-trade-ban.html>.

13. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Conference of Parties 17, Proposal 12, at 21, Sept. 24—Oct. 5, 2016, 27 U.S.T. 1087. The official position of Namibia against increased protections for pangolins stated:

No: do not support CoP17 transfer to Appendix I because: 1) the local and regional wild population of this species is not well researched and documented; 2) there is no verifiable literature and data as evidence of the decline of the wild population of the species locally or regionally; 3) except for an average of three skins per year seized by the PRU within the Namibian territory, there is inadequate verifiable recorded hunting and trade cases of the species.

14. Werner Menges, *Rhino Horn Smugglers Get 14 Years in Prison*, NAMIBIAN (Sept. 30, 2016), <https://www.namibian.com.na/156302/archive-read/Rhino-horn-smugglers-get-14-years-in-prison>.

criminals involved in poaching have not been convicted, let alone arrested, and rhinos and many other at-risk species are nearing extinction in Namibia.

To address this severe problem, and to effectively and comprehensively deal with wildlife crimes, the author traveled to Namibia in 2016 and 2017 with an international team of lawyers from the United Kingdom, United States, and Namibia.¹⁵ In July 2017, we arrived to conduct a first-of-its-kind workshop in Namibia with government officials, including the Minister of Environment and Tourism, representatives from the Anti-Corruption Commission, the Prosecutor General's Office, the Office of the Ombudsman, and other officials, as well as many wildlife and nonprofit conservation organizations that have been working on wildlife protection for decades. Access to these officials was achieved through the efforts of the public interest law group in Namibia for whom we had done our preliminary research, following an extensive series of interviews and information-gathering from the initial voyage in September 2016. Thus, we arrived for the workshop prepared with recommendations to reform existing law, including the establishment of an environmental court, to stop the loss of wildlife in the face of new, sophisticated networks of organized crime, which have pervaded many African nations in recent years. This Article will outline the critical problems facing Namibia's anti-poaching efforts that were identified through in-person meetings and interviews with government officials, prosecutors, and law enforcement officials and discuss the recent changes that have been implemented, along with the results of our workshop and a path forward for reform efforts. Will wildlife survive the influx of organized crime in Namibia?

Through in-person meetings and interviews with government officials, prosecutors, and law enforcement officials in Namibia in September 2016, we identified the following court system limitations, which hinder effective enforcement and prosecution of wildlife crimes: (1) cases are not processed quickly enough and often become bottled up in magistrate courts, which are overburdened and prioritize other criminal

15. The team was tasked with researching and developing a legislative reform report to prevent wildlife crimes in Namibia, as commissioned by the Legal Assistance Centre (LAC)—Namibia's only public interest legal organization. Making the voyage and representing the American Bar Association Section of State and Local Government Law was the author, Jordan Lesser, and Sorell Negro, formerly of Robinson & Cole (R&C). R&C partnered with DLA Piper in the United Kingdom to assist this project as a pro bono exercise. We developed, with critical support from LAC staff, a legislative recommendation report; this is the "we" referred to in this Article.

cases; (2) there is often insufficient training and knowledge among judges and prosecutors regarding wildlife crimes, including effective prosecution, how these crimes relate to corruption and organized crime, and appreciation of their severity; (3) the public has little to no knowledge of the outcomes of wildlife-crime cases and sentencing of these criminals because decisions of the magistrate courts are not publicly available; and (4) there is insufficient coordination between prosecution of individual offenses and follow-up investigations into broader misconduct, including related criminal syndicate activity.

Namibia's cultural and legal history make it uniquely suited to take a bold and promising step by creating a specialized environmental court to specifically address wildlife crimes. This would alleviate the burden on magistrate courts by relieving them of cases pertaining to wildlife crimes and would ensure that there are sufficient judicial resources available to efficiently adjudicate these cases. In addition, under this approach, wildlife-crime training could comprise the judges who would sit on the environmental court and special wildlife crimes prosecutors, ultimately requiring fewer resources. Further, by requiring electronic and print publication of decisions by the environmental court, the public's awareness of prosecutions related to wildlife crimes would be greatly enhanced, which may have a deterrent effect.

An environmental court in Namibia could have jurisdiction over any case or controversy related to an environmental matter, beyond wildlife crimes. One prominent example of an environmental case, from 2018, surrounded the improper issuance of a seabed phosphate mining permit under Namibia's Environmental Management Act of 2007, resulting in a lawsuit against the government and various relevant officials.¹⁶ For cases such as this, an environmental court could provide an expert venue to address environmental law procedures and ensure these decisions were being made in the public interest, as required by law. As discussed later, soil and water degradation from mining operations pose a significant risk to the health and welfare of the people, wildlife, and lands of Namibia.

16. See *Namib. Marine Phosphate (Proprietary) Ltd. v. Minister of Env't & Tourism*, (2018) NAHCMD 122 (Namib.); Andreas Thomas, *Namibia: Marine Phosphate Mining: The Tug-of-War Continues*, PAN AFRICAN VISIONS (June 24, 2018), <https://www.panafricanvisions.com/2018/namibiamarine-phosphate-mining-tug-war-continues/>.

II. THE NAMIBIAN CONSTITUTION SUPPORTS THE CREATION OF AN ENVIRONMENTAL COURT AND SPECIAL PROSECUTORS FOR WILDLIFE CRIMES

Since its independence on March 21, 1990, Namibia has recognized the value of environmental protection within the context of its legal and constitutional framework. In fact, it was the first nation to expressly enshrine environmental protections in its constitution.¹⁷ The Constitution of the Republic of Namibia, Article 95, Promotion of the Welfare of the People, mandates:

The State shall actively promote and maintain the welfare of the people by adopting, *inter alia*, policies aimed at the following: (l) maintenance of ecosystems, essential ecological processes, and biological diversity of Namibia and utilization of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future; in particular, the Government shall provide measures against the dumping or recycling of foreign nuclear and toxic waste on Namibian territory.¹⁸

This provision supports the creation of an environmental court in two ways. First, it establishes an affirmative duty that the state preserve ecosystems and, critically for anti-poaching purposes, biological diversity. It requires the state to adopt policies that meet these obligations. Second, the state is required to manage these living natural resources sustainably, for all future generations in perpetuity. By tying the ecological value of Namibia's wildlife resources to the rights of the public in Article 95, the Constitution affirms that environmental degradation is a human rights issue, as well as an environmental and sustainability issue, that necessitates redress through Namibia's statutory framework.

Given the grave and undeniable increase in poaching across Namibia, it is an open question if the government is meeting its constitutional duties under Article 95, and if the current judicial and legislative framework is sufficient to tackle this significant and growing threat. Article 95 obligates the government to take action to address this catastrophic problem. Creating an environmental court and special wildlife crimes prosecutors will help the government fulfill these duties by effectively prosecuting those involved in poaching and related activities, ideally acting as a deterrent and protecting wildlife from future crimes.

17. CIA, *THE WORLD FACTBOOK ON NAMIBIA* (Aug. 1, 2018), <https://www.cia.gov/library/publications/the-world-factbook/geos/wa.html>.

18. CONSTITUTION art. 95 (1990) (Namib.).

Additionally, the office of the Ombudsman is empowered under Article 91(c) of the Constitution with “the duty to investigate complaints concerning the over-utilization of living natural resources, the irrational exploitation of non-renewable resources, the degradation and destruction of ecosystems and failure to protect the beauty and character of Namibia.”¹⁹ While this is a progressive step toward recognition of environmental protection as an important human rights cause for all Namibians, the investigatory duties prescribed can vary wildly in scope, subject to individual discretion. There are also limitations. The Ombudsman can only investigate a specific claim brought forth by an aggrieved citizen, culminating with a recommended action for other branches of government to pursue a remedy. In isolation, this is insufficient to prevent widespread poaching because such claims are rarely brought. However, if an Ombudsman could fulfill his or her constitutional duty to investigate natural resources complaints by issuing a recommendation for action within a prosecutorial structure, it would allow for more direct environmental enforcement capabilities. An environmental court system to resolve investigations is also consistent with the State fulfilling its duty under Article 95.

III. NAMIBIA’S INTERNATIONAL OBLIGATIONS SUPPORT CREATING AN ENVIRONMENTAL COURT AND SPECIAL PROSECUTORS FOR WILDLIFE CRIMES

In addition to the obligations under its own Constitution, Namibia also has sustainable environmental management obligations under international agreements. Article 144 of the Constitution affirms that international laws and the international agreements to which Namibia is a party are automatically incorporated into domestic law.²⁰ Many of these international agreements compel the promulgation and enactment of national laws to fulfill the basic requirements of implementation.

Several multilateral environmental agreements (MEAs), now part of the “law of the land” in Namibia, support the creation of an environmental court system. Specifically, Principle 10 of the Rio Declaration of the 1992 U.N. Conference on Environment and Development, which was signed by Namibia in 1992 and ratified in 1995, states:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall

19. *Id.* art. 91(c).

20. *Id.* art. 144.

have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. *Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.*²¹

Wildlife poaching is a crime against the country and, according to the Rio Declaration, the Namibian public “shall” have effective access, redress, and remedy through the judiciary.²² Providing access to environmental justice through the judiciary has become a customary international norm, as restated in the Rio Declaration and oft demanded by the public, who recognize increasing environmental decline and degradation.²³ Under Namibia’s current court system, the vast majority of wildlife cases are heard in the regional magistrate courts. However, there is no public reporting of these cases and no data to determine if wildlife-crime laws are being applied consistently across jurisdictions. With uneven enforcement of the law or the outright failure to bring prosecutions by overburdened magistrate courts, and perhaps a lack of specialized training, the citizenry of Namibia requires a specialized court to deal with environmental issues.

Establishing special environmental prosecutors is also a key procedural reform to ensure compliance through access to environmental justice and redress. They could ensure that wildlife crimes are treated seriously and effectively and also build critical relationships between law enforcement and legal counsel. Based on interviews conducted while in Namibia, it was clear that communication breakdowns between law enforcement, prosecutors, and investigators were commonplace and often led to a failure to prosecute wildlife crimes. Special prosecutors would be more likely to overcome those barriers and reduce the burden on other prosecutors, leading to more effective handling of environmental crimes.

While Namibia was not an original signatory, it joined CITES in December 1990 through accession, with the relevant national legislation incorporating CITES coming into force in March 1991.²⁴ CITES is

21. *Rio Declaration on Environment and Development, Principle 10*, U.N. Doc. A/CONF. 151/26/Rev.1 (vol. 1) (Jan. 1993) (emphasis added).

22. *Id.*

23. Nicholas Robinson, *Ensuring Access to Justice Through Environmental Courts*, 29 PACE ENVTL. L. REV. 363, 365 (2012).

24. Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), List of Contracting Parties, July 1, 1975, 27 U.S.T. 1087.

implemented in Namibia through the Controlled Wildlife Products and Trade Act (WTA), enacted on December 14, 2008,²⁵ with the entire text of CITES and its appendices being replicated in Schedules 2 and 3 of the WTA.²⁶ Under the terms of CITES, article VIII provides that the parties to the Convention shall “take appropriate measures” to enforce its provisions, including the penalization of trade and confiscation of specimens.²⁷ Thus, Namibia is also expressly obligated under CITES to ensure adequate prosecution and enforcement of wildlife crimes, however, “Implementation of CITES . . . is impossible without a firm legislative basis covering, at a minimum, the granting of permits, the control of the validity of foreign permits, and the imposition of penalties, including the confiscation of unlawfully traded specimens.”²⁸

Namibia meets these basic requirements and is considered a “Category One” country under CITES, for having adequate domestic legislation that meets the following criteria: (1) designation of national CITES authorities; (2) prohibition of trade in violation of the Convention; (3) penalization of illegal trade; and (4) authorization to confiscate illegally traded or possessed specimens.²⁹ However, a Category One country with little enforcement and few prosecutions of those who commit wildlife crimes leaves the country’s natural resources open to exploitation, particularly with the increase in sophisticated organized crime syndicates—a new situation requires new solutions. The existing domestic legal framework will be reviewed below, as well as proposed improvements.

Additionally, Namibia signed the U.N. Convention on Biological Diversity in 1992 and ratified it in 1997, agreeing to the three core principles of the Convention: (1) the conservation of biological diversity, (2) the sustainable use of the components of biological diversity, and (3) the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.³⁰ Each party to the Convention is required

25. Controlled Wildlife Products and Trade Act (Dec. 14, 2008) GOV’T GAZETTE OF THE REPUBLIC OF NAMIB.

26. *Id.*

27. Convention on International Trade in Endangered Species of Wild Fauna and Flora, art. VIII(1), July 1, 1975, 27 U.S.T. 1087.

28. CYRILLE DE KLEMM, GUIDELINES FOR LEGISLATION TO IMPLEMENT CITES, 26 IUCN ENVTL. POL’Y & L. PAPER 10 (1993), <https://portals.iucn.org/library/efiles/documents/EPLP-026.pdf>.

29. CITES Conference of the Parties, Resolution Conf. 8.4 (Rev. CoP15), National Laws for Implementation of the Convention (1992, 2010), para. (a).

30. U.N. Convention on Biological Diversity (June 5, 1992).

to establish a National Biodiversity Strategy and Action Plan (NBSAP).³¹ Namibia's Second NBSAP was adopted in 2013, establishing a vision for "Namibia's biodiversity to be healthy and resilient to threats, and for the conservation and sustainable use of biodiversity to be key drivers of poverty alleviation and equitable economic growth, particularly in rural areas."³² Despite a detailed plan of over sixty pages, setting the nation's strategy through the year 2022, the document lacked any mention of poaching, and only referred to hunting in the context of revenue gained through trophy-hunting permit sales.³³ Unless the biological diversity management plan addresses steep losses in wildlife due to illegal poaching, then it is inadequate to ensure the conservation of biological diversity, in contravention of the U.N. Convention and Article 95 of the Constitution.

IV. THE MINERALS POLICY OF NAMIBIA SUPPORTS CREATING AN ENVIRONMENTAL COURT TO ENSURE THE SUSTAINABLE UTILIZATION OF MINERALS AND NATURAL RESOURCES

Beyond the scope of wildlife crimes, an environmental court would benefit Namibians by providing a forum to address disputes over minerals and other natural resources. The need for enhanced efforts in preventing environmental harm from intensive, industrialized mining operations is described in foundational state mining policy and was recently exemplified by a 2016 lawsuit over an improperly granted phosphate mining license, described below.

In the 2002 Minerals Policy for Namibia (Minerals Policy), the Ministry of Minerals and Energy described its mission as follows: "[A]s the custodian of Namibia's rich endowment of mineral and energy resources, [the Ministry] facilitates and regulates the responsible development and *sustainable utilization* of these resources for the benefit of all Namibians."³⁴ By affirming an express duty to manage these resources sustainably, the Ministry clarified the basic principles upon which mining operations in Namibia are to be conducted. The Minerals Policy also recognized difficulties in fostering a robust mining sector while also ensuring a clean environment, stating that "[w]hile mining

31. *Id.* art. 6.

32. MINISTRY OF ENV'T & TOURISM, NAMIBIA'S SECOND NATIONAL BIODIVERSITY STRATEGY AND ACTION PLAN 2013-2022, at 11 (2014).

33. *Id.* at 4-5.

34. MINISTRY OF MINERALS & ENERGY, MINERALS POLICY OF NAMIBIA 4 (2002) (emphasis added).

forms a very important part of the Namibian economy, it also has contributed to *major environmental degradation*. At present, there are over 240 abandoned mine sites where the responsibility for rehabilitation now rests with the State.”³⁵ Following the admission that mining poses a major risk to the environment of Namibia, the Minerals Policy declared that the “Government will ensure that the development of Namibia’s mining industry proceeds on an environmentally sustainable basis.”³⁶ Mining permits are currently granted under the Environmental Management Act of 2012.

Nonetheless, a controversy in the spring of 2016 arose due to allegations of improper issuance of a permit allowing widespread seabed phosphate mining. The granting of this permit led to a lawsuit by the aggrieved fishing industry and environmental groups against several high-ranking officials of the Ministry of the Environment and the Ministry of Minerals and Energy, and against the Ministers themselves.³⁷ The Minister of Environment and Tourism rescinded the certificate two months after issuance due to an unprecedented public outcry and allegations of secrecy and failure to follow statutory procedure.³⁸ A watershed moment in public engagement with environmental policy led to the blockage of this permit, sparing the fishing industry and preventing massive degradation of the marine environment, but the “soft” remedy of political pressure cannot be exclusively relied upon to protect Namibia in the future. Under the Namibian Constitution, Article 95(1), the state bears the duty for:

35. *Id.* at 24 (emphasis added).

36. *Id.*

37. *See* Namib. Marine Phosphate (Proprietary) Ltd. v. Minister of Env’t & Tourism, (2018) NAHCMD 122 (Namib). In this case, decided on appeal on May 11, 2018, the High Court of Namibia set aside the decision of the Minister of Environment and Tourism to revoke an environmental clearance certificate allowing for deep ocean phosphate mining for a period of twenty years, which had been previously granted by the Environmental Commissioner. Several fishery associations filed suit, arguing that the certificate had been improperly granted, amidst an unprecedented public outcry over environmental concerns, and the Minister revoked it on November 2, 2016, citing failure to comply with the public consultation provisions of the Environmental Management Act of 2007. Namibian Marine Phosphate, however, appealed the withdrawal of the certificate and received a favorable ruling in May 2018. That victory was short-lived, however, as the Minister announced a rehearing for the environmental clearance certificate in June 2018, which could take up to six months and will undoubtedly receive testimony from fishing associations and environmentalists. *See* Thomas, *supra* note 16.

38. *Shifeta Sets Aside NMP Environmental Clearance Certificate*, LELA MOBILE ONLINE (Nov. 2, 2016), <http://www.leramobile.com/content/65374/Shifeta-sets-aside-NMP-environmental-clearance-certificate/>.

[M]aintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilization of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future; in particular, the Government shall provide measures against the dumping or recycling of foreign nuclear and toxic waste on Namibian territory.³⁹

This basic principle—to establish environmental policies in the public interest—applies to actions taken under the Environmental Management Act, including the issuance of mining permits.⁴⁰

An environmental court in Namibia would be ideally suited to deal with the marine phosphate case, as well as other cases that could arise from complex permitting and monitoring of mining operations. With the potential for severe environmental degradation at every mine and a legacy of hundreds of abandoned sites,⁴¹ having an effective and specialized court could assist with the adjudication of these controversies and thereby improve environmental management of these high-risk mines.

Due to concerns with proper implementation of the Environmental Management Act throughout this phosphate mining incident, this report includes draft amendments to the Act to clarify the independent role of the Environmental Commissioner from the Minister of the Environment and provide additional strengthened elements to the law. Combining public participation and engagement, as seen in the phosphate mining dispute, with effective legal recourse through the proposed environmental court and legislative reforms would greatly strengthen the ability for Namibia to protect its environment in the public interest.

V. ENVIRONMENTAL COURTS ELSEWHERE IN AFRICA HAVE DEMONSTRATED THEIR EFFECTIVENESS

Implementation of environmental courts elsewhere in Africa support the creation of an environmental court as an effective mechanism for combatting wildlife crimes. Specifically, environmental courts created in South Africa and Kenya are discussed below.

39. CONSTITUTION art. 95 (1990) (Namib.).

40. *Lameck v. President of the Republic of Namib.* (2012) (1) NR 255 (HC) (Namib.). In fact, in the phosphate mining case referenced above, the Minister of Environment and Tourism invoked Article 95 of the Constitution when ordering a rehearing for the contested mining permit, saying: “Article 95 (1) of the Namibian Constitution evidently underlines the importance of environmental protection. Our founders of the Constitution intended for Namibian citizens and residents to have the regard to the issues of environmental protection.” Thomas, *supra* note 16.

41. See MINISTRY OF MINERALS & ENERGY, MINERALS POLICY OF NAMIBIA 24 (2002).

A. *South Africa*

In 2003, an environmental court (SAEC) was established in the Western Cape Province in South Africa. Namibia and South Africa share the same background of Roman-Dutch law, English common law, and African customary law, and due to decades of occupation integrating Namibia as a territory within the South African judicial system, South African jurisprudence can be influential in Namibia as well.⁴²

The SAEC was originally established in South Africa to provide a forum to prosecute abalone poachers who were damaging coastal marine parks.⁴³ Tellingly, the Minister of the Environment called the establishment of the SAEC part of a “war on poaching syndicates” and stated that the Government was “determined to break these syndicates destroying our country’s valuable resources.”⁴⁴ With a first-year conviction rate of seventy percent, up from ten percent prior to the establishment of the SAEC, this was demonstrably a successful method of prosecuting poaching crime syndicates in South Africa.⁴⁵

Unfortunately, however, the SAEC (including a second court established in 2007) was subsequently shut down due to the lack of a legislative mandate for its establishment and an unwillingness of the court administration to provide funding and facilities.⁴⁶ Notwithstanding this, Namibia can learn from the success rate of these courts, especially in tackling poaching syndicates. The South African example also demonstrates that domestic law authorizing the environmental court is important to ensure the court’s existence. Formalizing the courts via statute, as compelled by Article 95 of the Constitution through its duty to enact state policy that provides environmental protections, could also avoid the inopportune closure seen in South Africa.

B. *Kenya*

In 2010, Kenya finalized a new constitution, which established an Environment and Land Court (Kenya ELC).⁴⁷ The Kenya ELC was

42. MICHAEL FAURE & WILLEMEN DU PLESSIS, *THE BALANCING OF INTERESTS IN ENVIRONMENTAL LAW IN AFRICA* 424 (2011).

43. *South Africa Sets Up New Environmental Court*, AFROL NEWS (Feb. 24, 2004), <http://www.afrol.com/articles/11360>.

44. *Id.*

45. *Id.*

46. See FAURE & DU PLESSIS, *supra* note 42, at 424.

47. CONSTITUTION art. 162 § 2(b) (2010) (Kenya).

authorized by an organic statute that placed several progressive environmental principles at the core of its regulatory framework:

In exercise of its jurisdiction under this Act, the Court shall be guided by the following principles—

- (a) the principles of sustainable development, including;
 - (i) the principle of public participation in the development of policies, plans, and processes for the management of the environment and land;
 - (ii) the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources insofar as the same are relevant and not inconsistent with any written law;
 - (iii) the principle of international cooperation in the management of environmental resources shared by two or more states; (iv) the principles of intergenerational and intra-generational equity;
 - (v) the polluter-pays principle; and (vi) the precautionary principle⁴⁸

By creating the specialized Kenya ELC, Kenya recognized the role of the judiciary in protecting and advancing human and environmental rights.⁴⁹ An independent judiciary plays a critical role in enforcing domestic environmental laws as well as integrating the human rights and environmental provisions of international agreements.⁵⁰ Indeed, the Kenyan court has taken steps to affirm the environmental rule of law and promote environmental justice, particularly in a 2012 case establishing a positive duty for the state to provide access to all relevant information during environmental proceedings, in order to foster public participation.⁵¹ The ability of an environmental court to compel sustainable management of natural resources for future generations would enhance the Article 95 provisions in the Namibian Constitution. A Namibian environmental court with the principles of sustainable development in its authorizing statute would help to satisfy the sustainability mandate of that article of the Constitution.

48. Environment and Land Court Act (2011) Cap. 12A 19 § 18 (Kenya).

49. Joel Kimutai Bosek, *Environmental Rights in Kenya's New Constitutional Order*, 2 AFR. HUM. RTS. L.J. 489, 500 (2014).

50. *Id.*

51. Joyce Lutomia, *Kenya CJ Highlights Need to Protect Environment*, KENYA NEWS AGENCY (June 25, 2014), <http://kenyanewsagency.go.ke/en/?p=27531>.

VI. SYSTEMIC ADVANTAGES OF ENVIRONMENTAL COURTS

By creating a new environmental court system, Namibia could, in its enabling legislation, enhance the strengths inherent in a dedicated court. Several definitive studies based on national examples of environmental courts and tribunals, as well as a review of best practices, have underscored the potential of such a judiciary. Specifically, a dedicated environmental court could be expected to provide the following systemic advantages: (1) expertise via specialized training and exclusive jurisdiction for expert environmental courts; (2) efficiency; (3) visibility (of environmental crimes and judgments); (4) reduced cost (rules and procedures could be adapted to lower costs); (5) greater uniformity in the application of laws and precedent; (6) standing could be more broadly defined to enhance access; (7) commitment to environmental justice; (8) government accountability (the court could provide oversight of executive and ministry policy); (9) prioritization; (10) creativity by using flexible rules of procedure and/or evidence; (11) alternative dispute resolution could be implemented; (12) issue integration (with respect to wildlife poaching and organized crime, many laws may be required for effective prosecution, outside the scope of traditional environmental management); (13) remedy integration; (14) public participation, with enhanced Internet-based information for reporting; (15) public confidence (the public could be more confident that wildlife crimes were being dealt with adequately); (16) problem-solving (a dedicated court could look at the issue of wildlife poaching broadly, to solve the problem through all appropriate legal means); and (17) effective judicial interpretation (through interpretation and rulings a dedicated court could give teeth to Namibia's environmental laws and constitutional environmental provisions).⁵²

Further, a mobile environmental court, as detailed in the draft legislation below, would allow the courts to function in the locations where environmental issues arise, including where wildlife poaching cases are most prevalent. Mobility could be a critical piece of the successful

52. See GEORGE PRING & KATHERINE PRING, U.N. ENV'T PROGRAMME, ENVIRONMENTAL COURTS AND TRIBUNALS: A GUIDE FOR POLICY MAKERS 13-14 (2016); GEORGE PRING & KATHERINE PRING, GREENING JUSTICE: CREATING AND IMPROVING ENVIRONMENTAL COURTS AND TRIBUNALS 14-16 (2009); MALCOM GRANT, REPORT TO THE DEPARTMENT OF ENVIRONMENT, TRANSPORT AND THE REGIONS 2-3 (2000); U.N. ENV'T PROGRAMME, UNEP GLOB. JUDGES PROGRAMME, APPLICATION OF ENVIRONMENTAL LAW BY NATIONAL COURTS AND TRIBUNALS: PRESENTATION 9: REMEDIES IN ENVIRONMENTAL CASES, <https://wedocs.unep.org/bitstream/handle/20.500.11822/20277/Remedies-Environmental-Cases.pdf?sequence=1&isAllowed=y> (last visited Nov. 18, 2018).

operation of a court that deals with issues of land degradation and wildlife crime issues at far-flung locations across the country.

VII. FOLLOW-UP ISSUES FOR IMPLEMENTING AN ENVIRONMENTAL COURT

One of the key implementation issues is where an environmental court would fit into the judicial system and where appeals would be heard. Several options could be utilized, including (1) the environmental court sitting as a high court and having appeals heard by a tribunal; (2) the environmental court sitting as a high court and having appeals heard by the Supreme Court; and (3) the environmental court sitting at the regional magistrate courts and being appealed to a high court.

We recommended the second option during my presentation at a stakeholders and government officials' workshop in Windhoek, Namibia, in July 2017. It is important to have appeals from an environmental court heard by a court, rather than a tribunal, to avoid having the outcome of cases swayed by political appointees who may be more susceptible to political pressures or, at worst, corruption outside of the independent judiciary. Also, having appeals heard and decided by judges would help to ensure consistency and better-reasoned environmental law precedent, which is very important for effective enforcement of the legislative framework. Establishing strong precedent through the court system on these critical environmental-constitutional issues also factors into the recommendation to favor courts over a tribunal.

To improve the public visibility of wildlife crimes, it is ideal that the environmental court have the same authority as a high court in order to impress upon the judiciary and society the significance of wildlife offenses and adjudication of these cases. Societal perception creates a risk that, if the environmental court were considered a magistrate court, it would be considered inferior and less effective. Although it is recommended that a mobile environmental court sit in the magistrate courts, this is only for logistical purposes and not because the environmental court would be equivalent to a magistrate court. In addition, because the judges of the environmental court would undergo specialized training and would deal only with environmental and land-use cases, they would be sufficiently knowledgeable about these matters and more likely to provide well-reasoned opinions. Therefore, having just one level of appeal to the Supreme Court would likely be an adequate appellate framework.

A. *Mobile Courts*

Certain logistical issues arise with a mobile court that would need to be addressed. These issues include the schedule of the court, managing case flow, and organizing matters so that they are heard in a timely manner, but with geographic rotation. These are important considerations to ensure that a mobile court is effective and cases are processed in a timely manner. They are not, however, reasons to avoid implementing mobile courts. Indeed, mobile courts already exist in many countries and have had a substantial amount of success.

According to an evaluation of the support provided by the United Nations Development Programme (UNDP) to mobile courts in Sierra Leone, Democratic Republic of the Congo (DRC), and Somalia, along with pre-crisis courts in the Central African Republic, a number of successes have arisen as a result of the implementation of mobile courts.⁵³ These successes include increased access to justice for remote communities, reducing the backlog of cases in the lower courts, and strengthening the role of the formal justice system in areas where traditional justice mechanisms are prevalent.⁵⁴ In the DRC, the mobile courts have also served justice on defendants who thought that they were untouchable in the remote areas where they were carrying out their crimes.⁵⁵ These successes have not come without challenges, however, and the report cites similar core challenges across all three African countries: (1) sustainability and funding, (2) planning and logistical issues, and (3) lack of awareness of the legal process by users.⁵⁶ We discuss each of these challenges below and how they can be effectively addressed.

1. Sustainability and Funding

Funding and sustainability directly impact long-term viability. The mobile courts examined were all, to varying degrees, funded by

53. See MONICA RISPO, U.N. DEV. PROGRAMME, EVALUATION OF UNDP'S SUPPORT TO MOBILE COURTS IN SIERRA LEONE, DEMOCRATIC REPUBLIC OF THE CONGO AND SOMALIA 6-7, 10-14, 16-17 (May 2014), <http://www.undp.org/content/undp/en/home/librarypage/crisis-prevention-and-recovery/evaluation-of-undp-s-support-to-mobile-courts-in-drc--sierra-leo.html>.

54. *Id.*

55. MICHAEL MAYA, AM. BAR ASS'N RULE OF LAW INITIATIVE, MOBILE COURTS IN THE DEMOCRATIC REPUBLIC OF CONGO: COMPLEMENTARITY IN ACTION? (Dec. 2012), https://worldjusticeproject.org/sites/default/files/mobile_courts_in_the_democratic_republic_of_congo_maya.pdf.

56. See RISPO, *supra* note 53, at 7, 11, 14-15, 18-21.

international organizations rather than the government.⁵⁷ Where high levels of funding were provided, donors often directed the courts to prioritize certain cases and the mobile courts were seen as unsustainable due to lack of funding certainty.⁵⁸ The courts seen as most sustainable were those where the government provided a separate budget to operate the courts, perhaps supported by a smaller amount of international donor funds.⁵⁹

While it would be highly appropriate and desirable for international funds to contribute to establishing a Namibian environmental court and, specifically, to training the judges and special wildlife crimes prosecutors, it would be ideal for the Namibian government to allocate annual funds to the operations of the court in the same manner in which Namibia's other courts are funded. Also, it should be made clear to donors that they do not have the authority to direct the court to prioritize certain cases or otherwise affect the operations of the court. This is important in order to maintain the independence of the judiciary and for long-term efficacy of the court.

2. Logistical and Planning Issues

The mobile courts reviewed in the UNDP report fell into one of two categories in terms of planning: (1) ad hoc court sessions where a court session could be requested by the parties or when the judiciary deemed it was needed; or (2) planned, timetabled sessions.⁶⁰ Although the ad hoc sessions, particularly in the DRC, proved useful in reducing the backlog of cases where they were most needed, they also tended to be costly and, ultimately, somewhat inefficient.⁶¹ In addition, some defendants suffered from prolonged detention due to delays in the arrival of the mobile courts.⁶²

Courts that followed the second approach and scheduled a mobile sitting in advance had more success.⁶³ There are various ways to accomplish this logistically. For example, every year, Sierra Leone's Chief Justice issued an order that specifies the locations and the schedule

57. See *id.* at 6, 10, 16, 20; see also MAYA, *supra* note 55, at 34-36 (with endnote #4 delineating the major international foundations and governments that had helped fund mobile courts in the DRC).

58. See RISPO, *supra* note 53, at 6, 19-20, 27-28.

59. See *id.*

60. *Id.* at 24-25.

61. See *id.* at 11, 20.

62. *Id.*

63. *Id.* at 24-25.

for the mobile high court.⁶⁴ Also in Sierra Leone, the mobile magistrate courts had more flexibility in selecting their locations and schedule to cover eight stations.⁶⁵ This method provided more certainty to the circuit tour than in the other countries examined.⁶⁶ A mobile court's schedule could be set annually, biannually, or even quarterly. In Namibia, there could also be an option for a regional matter to be expedited in Windhoek or another particular regional center by petition if the issue were especially time-sensitive; we included a provision to this effect in the draft legislation.

3. Lack of Awareness of Legal Process

A third major issue identified in the three African countries described in the UNDP report was a lack of awareness of the legal process, which affected the efficacy of the courts.⁶⁷ In Sierra Leone, the absence of witnesses in court produced high levels of adjournment rates.⁶⁸ It was reported that the courts often drew a large number of individuals who were interested in learning about the process but, in some areas, more work was needed to actually raise the level of legal education.⁶⁹ The same issue was found in Timor Leste, but there, efforts were made to run legal awareness initiatives simultaneously with the mobile court hearings.⁷⁰ Running the sessions simultaneously proved to be "exceptionally challenging," and eventually a separate project was set up for the legal awareness sessions.⁷¹

A lack of awareness of the legal process, however, is not a problem that is unique to mobile courts but rather can adversely impact the judicial system as a whole. The specialized training that should be cultivated for an environmental court and special wildlife-crime prosecutors would help ensure that judges and prosecutors are adequately trained in such issues. Namibia may also consider a legal awareness initiative, particularly in the communities that have seen a significant amount of poaching and in which the mobile courts would sit, to educate the public about these new courts and how they would work. Such educational outreach could be in connection with educating Namibians about any new changes to the wildlife-crime and environmental legislation that may be adopted,

64. *Id.* at 6.

65. *Id.*

66. *See id.* at 6-7, 11, 13.

67. *See id.* at 7, 11, 14, 19, 21, 25.

68. *Id.* at 7.

69. *Id.* at 21.

70. *Id.* at 17.

71. *Id.*

including stricter penalties, and could also have the effect of deterring wildlife crimes.

B. Establishing an Environmental Court Would Benefit the People and Environment of Namibia

As this Article details, creating an environmental court in Namibia would fulfill the country's duty under Article 95 of the Constitution to "actively promote and maintain the welfare of the people," with respect to "maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilization of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future."⁷² Faced with the very real potential of losing all of the high-value wildlife in Namibia in the near future, particularly the possible extinction of the black rhino, Namibians need to have their wildlife laws strengthened and effectively adjudicated before such a court in accordance with this constitutional principle.

Additionally, impartial and above-board use of the nation's environmental laws, particularly the Environmental Management Act, has recently come under question with the improper granting of a seabed phosphate mining license, as described above.⁷³ The public demanded remedy with demonstrations and activism at a level never seen before in Namibia.

VIII. OVERVIEW OF NAMIBIA'S LEGISLATIVE FRAMEWORK FOR WILDLIFE CRIMES

Namibia, as discussed, was the first, and remains one of the few, countries in the world with an express provision within its Constitution establishing conservation and ecological principles.⁷⁴ While this constitutional provision is not enforceable in court, it allows for a robust national framework of conservation laws, including (1) the Nature Conservation Ordinance 4 of 1975 (NCO),⁷⁵ which, *inter alia*, outlines hunting regulations;⁷⁶ (2) the Nature Conservation Amendment Act 5 of

72. See CONSTITUTION art. 95 (1990) (Namib.).

73. See *supra* note 37.

74. See CONSTITUTION art. 95 (1990) (Namib.).

75. See Nature Conservation Ordinance 4 of 1975 (Namib.).

76. In 2008, the draft Protected Areas and Wildlife Management Bill was under consideration by the Ministry of Environment and Tourism, but this bill has not been passed by Parliament, although, since 2017, an amended version of the bill has also been considered. See BRIAN T.B. JONES, LEGISLATION AND POLICIES RELATING TO PROTECTED AREAS, WILDLIFE, CONSERVATION, AND COMMUNITY RIGHTS TO NATURAL RESOURCES IN COUNTRIES BEING PARTNER

1996,⁷⁷ which amended the NCO and created a “conservancy” system of community-owned land with financial benefits of conservation accruing to local populations; (3) the Game Products Trust Fund Act 7 of 1997,⁷⁸ which established a government fund supporting the conservancies, wildlife councils, and other projects concerning wildlife conservation and resource management; (4) Government Notice 240/1976, Regulations Relating to Nature Conservation (August 25, 1976);⁷⁹ and (5) the Controlled Wildlife Products and Trade Act 9 of 2008 (CWPTA), which deals with the possession, trade, import, and export of wildlife products.⁸⁰ Namibia’s Ministry of Environment and Tourism (MET) oversees the implementation of this regulatory framework. MET also controls the issuing of hunting permits and generally formulates policies and guidance in relation to human-wildlife management and species-specific management plans.⁸¹

A. *The Nature Conservation Ordinance (NCO)*

The Nature Conservation Ordinance (NCO) is the primary Namibian legislation governing the prevention of wildlife crime and sustainable conservation. It prohibits the hunting of any animal in any national park or any nature reserve without the written permission of the state.⁸² In relation to private game parks, the owner of the land may not hunt game, wild bird, and animals (except Protected and Specially Protected Game, as defined below) without the written permission of the state.⁸³

The NCO divides animal species into three protective categories: (1) Specially Protected Game,⁸⁴ which includes elephants, rhinoceros, and giraffes; (2) Protected Game, such as leopards, lions, cheetahs, and many more;⁸⁵ and (3) Huntible Game, such as buffalo and springboks.⁸⁶ Under

IN THE KAVANGO ZAMBEZI TRANSFRONTIER CONSERVATION AREA (Aug. 2008). The draft bill has been amended as of 2017 and has received public comment but has not yet been introduced in final form. If it becomes law, however, it promises to completely overhaul the mechanisms for land and wildlife management in Namibia.

77. Nature Conservation Act of 1996 (Namib.).

78. Game Products Trust Fund Act 7 of 1997 (Namib.).

79. Gov’t Notice No. 240 (Aug. 25, 1976) OFFICIAL GAZETTE EXTRAORDINARY OF SW. AFRICA, No. 3556, <http://www.lac.org.na/laws/1976/og3556.pdf>.

80. Controlled Wildlife Products and Trade Act 9 of 2008 (Namib.).

81. See REPUBLIC OF NAMIB.: MINISTRY OF ENV’T & TOURISM, <http://www.met.gov.na/> (last visited Nov. 18, 2018).

82. Nature Conservation Ordinance 4 of 1975, at 20 (Namib.).

83. *Id.*

84. *Id.* at 75.

85. *Id.* at 75-76.

86. *Id.* at 76.

sections 26, 27, and 30 of the NCO, Specially Protected Game and Protected Game can be hunted on both state-owned and private land if an individual possesses a permit granted by the MET. It is important to note that all black rhinos are property of the state and thus cannot be hunted on private property in lieu of a permit.⁸⁷ Affirmative defenses to killing any animal with protected status without a permit exist in statute if this is done (1) in defense of human life or (2) to prevent harm to livestock, poultry, or other domestic animals.⁸⁸ Permits are granted subject to conditions imposed in relation to the number and species of Specially Protected Game and the location in which the hunting may occur. For example, a permit may relate to one adult bull elephant in a particular area of Caprivi Strip. However, the NCO does not set out any conditions or criteria for the issuance of a permit. Permits can therefore be issued to hunt Specially Protected Game and Protected Game for purely commercial purposes.

The severity of the punishment for an infringement of the NCO depends upon the protected status of the species that is the subject of the crime. Penalties under the NCO generally operate on a sliding scale of severity according to the following categories of animal. From most severe to least, the penalties relate to (1) elephants and rhinoceroses; (2) other Specially Protected Game; and (3) Protected Game. Although elephants and rhinoceroses are included within the category of Specially Protected Game, the NCO generally provides for additional enhanced penalties to apply in respect of offenses involving elephants and rhinos, in addition to the penalties that otherwise apply to offenses involving all Specially Protected Animals.⁸⁹

The NCO, as amended in 1996, provides for community conservation units on communal land,⁹⁰ known as conservancies, in recognition of the necessity for proactive wildlife management. Conservancies are essentially locally managed areas in which communities possess rights over wildlife and tourism similar to those of freehold farmers. However, there are notable differences as conservancies have use-rights over wildlife but not ownership, whereas freehold farmers have both rights. Under the conservancy system, communities are

87. FIN. INTELLIGENCE CTR., *supra* note 11, at 7; *Private Ownership of Black Rhinos Rejected*, NEW ERA (Aug. 14, 2015), <https://neweralive.na/posts/private-ownership-black-rhinos-rejected>.

88. Nature Conservation Ordinance 4 of 1975, at 18, 25 (Namib.).

89. *See id.* at 71.

90. Nature Conservation Act of 1996 (Namib.). The Communal Land Reform Act 5 of 2002 defines areas of communal land as tribal land, ownership of which is vested in the State on behalf of traditional communities. *See generally* Communal Land Reform Act 5 of 2002 (Namib.).

motivated to take responsibility for the conservation and management of their own local natural resources. Nongovernmental organizations (NGOs) have identified conservancies as crucial in mitigating the impact of human-wildlife conflicts.

There are currently eighty-two registered conservancies in Namibia, covering an approximate area of 162,000 square kilometers and involving approximately 189,000 local community members.⁹¹ Initially, the creation of conservancies led to successful natural resources-based management of these areas and the conservation of wildlife.⁹² It has been reported that, within these conservancies, wildlife was considered a valued livelihood asset, with populations of lions, cheetahs, black rhinos, zebras, and other native species restored.⁹³ However, in recent years, poaching in the conservancies has increased significantly, indicating that additional measures are needed to effectively prevent wildlife crime.

On June 28, 2017, the Nature Conservation Amendment Act was passed, which significantly increased poaching penalties as follows: (1) in the case of elephants and rhinoceros—a fine not exceeding N\$25,000,000 or up to twenty-five years imprisonment, or both;⁹⁴ (2) in the case of other Specially Protected Game—a fine not exceeding N\$10,000,000 or up to ten years imprisonment, or both;⁹⁵ or (3) in the case of Protected Game—a fine not exceeding N\$500,000 or up to five years imprisonment, or both.⁹⁶ In addition, the amendment states that, if a person has previously been convicted of an offense under (1) or (2), he or she is liable for a fine not exceeding N\$50,000,000 or imprisonment for up to forty years, or both.⁹⁷ If a person referred to in subsection (3) above has previously been

91. *Conservancies*, REPUBLIC OF NAMIB.: MINISTRY OF ENV'T & TOURISM, <http://www.met.gov.na/services/conservancies/193/> (last visited Nov. 9, 2018).

92. *See, e.g., id.*; *Morning Edition: Inside Namibia's Rural Communal Conservancies*, NAT'L PUB. RADIO (Oct. 11, 2011), <https://www.npr.org/templates/transcript/transcript.php?storyId=141227453>; Richard Conniff, *An African Success: In Namibia, the People and Wildlife Coexist*, YALE ENV'T 360 (May 12, 2011), https://e360.yale.edu/features/an_african_success_in_namibia_the_people_and_wildlife_coexist; *Namibia: How Communities Led a Conservation Success Story*, WORLD WILDLIFE FOUND. (Apr. 12, 2011), <http://wwf.panda.org/?200002/Namibia-how-communities-led-a-conservation-success-story> (pertaining specifically to conservation areas).

93. *See, e.g., Conniff, supra* note 92 (“It has worked so well that the Ministry of Environment and Tourism now often translocates animals—including critically endangered black rhinos—out of overcrowded national parks onto unfenced conservancy land, where they have room to recover to their former numbers.”).

94. Nature Conservation Amendment Act (June 28, 2017) GOV'T GAZETTE OF THE REPUBLIC OF NAMIB. 5, <http://www.lac.org.na/laws/2017/6344.pdf>.

95. *Id.*

96. *Id.* at 6.

97. *Id.* at 5.

convicted of an offense referred to in that subsection, he or she is liable for a fine of up to N\$1,000,000 or to imprisonment for up to ten years, or both.⁹⁸

There is still significant differentiation between penalties for possession offenses and hunting offenses, with possession offenses carrying disproportionately lower fines—however, the low penalties are under review for increase via legislative amendment.⁹⁹ Anecdotally, the act of poaching or hunting can be difficult to prove, as there are currently not robust field patrol systems in place and, as the hunter is usually at the bottom of the chain, he receives less compensation for his efforts. In addition, it is often the case that the person who commits the illegal act of poaching (the hunter) is not the same person who is found to be in possession of the illegally obtained wildlife products. The person found to be in possession of the illegally obtained wildlife products is likely to be higher up the chain of the syndicate network and is likely to receive more for his efforts than the hunter. This differentiation between penalties for possession offenses and hunting offenses suggests that the existing regulatory framework is predicated upon penalization of offenses already committed, as opposed to offense *prevention*. An approach that considers the realities behind these criminal actions and seeks to prevent the offense before it is committed, when combined with the implementation of higher penalties for both hunting and possession, would be a more effective deterrent.

Black rhinos and elephants are at particularly high risk because poaching rates of these animals have increased dramatically over the past several years, a disturbing trend that is only exacerbated by the naturally low birth rates of these animals.¹⁰⁰ However, many other species are also highly sought after and need to be protected by higher penalties as well. For example, lion bones and giraffe bones are being sold in the illegal wildlife trade to replace the demand for tiger bones in Southeast Asia.¹⁰¹

98. *Id.*

99. See Nat'l Assembly, Republic of Namib., Draft Controlled Wildlife Products and Trade Amendment Bill, 2017, <http://ippr.org.na/wp-content/uploads/2017/06/Controlled-wildlife-products-and-trade-amendment-Bill-B.6-2017.pdf>.

100. See, e.g., *Recorded Numbers of Rhinos Poached in South Africa*, SAVE RHINO TR., <https://www.savetherhino.org/rhino-info/poaching-stats/> (last visited Nov. 9, 2018); RICHARD EMSILE ET AL., IUCN SPECIES SURVIVAL GRP., AFRICAN AND ASIAN RHINOCEROSSES—STATUS, CONSERVATION AND TRADE 2 (2016), <https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-68-A5.pdf>.

101. See LEGAL ASSISTANCE CTR., WILDLIFE CRIME PROJECT: COMBATING POACHING AND ILLICIT WILDLIFE TRADING IN NAMIBIA THROUGH THE STRENGTHENING OF THE LAW ENFORCEMENT FRAMEWORK 14 (June 2016); Chris Macsween, *Namibia Enters the Lion Bone Trade to Asia*, LION

In addition, firsthand reports obtained by the Legal Assistance Centre (LAC) in Namibia, and observation of game conducted by the LAC, indicated that the illegal hunting of Hutable species was on the rise, resulting in fewer of these species in many conservancies. Thus, stronger penalties across all categories of animals have been needed to protect various species under threat, and such penalties may need to be further increased depending on their efficacy.¹⁰²

Another worthwhile critique of the NCO is that it allows judicial discretion to impose either a fine or custodial sentence. Because of this, in combination with a general lack of transparency surrounding wildlife-crime prosecution, it is not clear what types of penalties are typically imposed on perpetrators of wildlife crimes. For example, a Namibian ivory trafficker was sentenced in 2014 to either a fine of N\$20,000 or three-year imprisonment, and it was unclear from the press report which penalty was ultimately imposed.¹⁰³ Such discretion and dearth of transparency creates a lack of consistency, confusion, and undermining of possible deterrent effects.

The penalties for illegal possession and dealing of wildlife products under the Controlled Wildlife Products and Trade Act 9 of 2008 were amended on September 27, 2017, reflecting a need to update the penalties to meet the high value of wildlife products.¹⁰⁴ These amendments apply to wildlife products listed under Schedule 1 of the 2008 Act, including ivory and rhino horn.¹⁰⁵ The penalty for illegal possession of wildlife products was radically increased from a previous maximum fine of N\$20,000 to a current maximum of N\$15,000,000, which can be coupled with a maximum prison sentence of fifteen years.¹⁰⁶ Illegal dealing of wildlife products increased from a previous maximum fine of N\$200,000 to a current maximum of N\$25,000,000, with potential imprisonment of

AID (Oct. 31, 2016), <https://lionaid.org/news/2016/10/namibia-enters-the-lion-bone-trade-to-asia.htm>.

102. See Legal Assistance Ctr., *Penalties for Poaching*, NAMIBIAN: PRO BONO (Aug. 31, 2017), <https://www.namibian.com.na/168715/archive-read/Penalties-For-Poaching> (noting that penalties for hutable game, such as buffalo, oryx, kudu, springbok, and warthog, had also been increased).

103. See Werner Menges, *Ivory Trafficker Sentenced After Admitting Guilt*, NAMIBIAN (Oct. 20, 2014), <https://www.namibian.com.na/index.php?id=129424&page=archive-read>.

104. See Office of the Prime Minister, Republic of Namib., *Controlled Wildlife Products and Trade Amendment Bill, 2017 (CWPTA 2017)* (Sept. 27, 2017) GOV'T GAZETTE OF THE REPUBLIC OF NAMIB., <http://www.lac.org.na/laws/2017/6421.pdf>; see also FIN. INTELLIGENCE CTR., *supra* note 11, at 41 (indicating prices as high as US\$66,139 per kilogram of rhino horn on the Chinese black market).

105. CWPTA 2017, at 4.

106. *Id.* at 2.

up to twenty-five years.¹⁰⁷ Notably, the Act also provided a definition of “support,” with regard to such wildlife crimes, that included “aiding, abetting, inciting, inducing, instigating, instructing, or commanding any other person to commit” such an offense.¹⁰⁸

B. Game Products Trust Fund Act 7 of 1997

The Game Products Trust Fund Act 7 of 1997 established a government fund that has the objectives of, *inter alia*, (1) making grants to emerging conservancies and wildlife councils; (2) supporting measures aimed at improving the relationship between wildlife and people; and (3) allocating funds to conservancies, wildlife councils, and protected areas for programs and projects concerning wildlife conservation and resource management.¹⁰⁹ Under this Act, any income generated from game products (whether from the sale of permits for trophy hunting, park entry fees, or the legal sale of ivory if permitted by CITES) is returned to the conservancies and used towards promoting rural development.¹¹⁰ This dedicated fund provides incentive for local communities to establish conservancies. According to a local Namibian (unverified) news source, an example of where the Game Products Trust Fund Act has proved successful is in the ≠Khoadi-//Hôas conservancy in the Kunene region, whereby proceeds from the fund were used to construct designated water points for elephants.

The Game Products Trust Fund Act also allows the government fund to receive income from the restricted export of ivory by CITES-approved auctions of ivory from stockpiled animals that died of natural causes, ensuring that the proceeds of such sales are used exclusively for elephant conservation, community conservation, and development programs. However, research and investigations suggest that exporting stockpiled ivory has been unhelpful in curtailing poaching and indicate that any ivory entering the market fuels demand.¹¹¹

107. *Id.*

108. *Id.*

109. Game Products Trust Fund Act 7 of 1997, at 3 (Namib.), <http://www.lac.org.na/laws/annoSTAT/Game%20Products%20Trust%20Fund%20Act%207%20of%201997.pdf>.

110. *See id.* at 3, 8-9.

111. *See* Laura Neme, *How the World's Largest Legal Ivory Market Fuels Demand for Illegal Ivory*, NAT'L GEOGRAPHIC (Oct. 22, 2015), <https://news.nationalgeographic.com/2015/10/legal-loopholes-fuel-ivory-smuggling-in-hong-kong/>; Paula Kahumbu & Andrew Halliday, *Why It Makes Sense to Burn Ivory Stockpiles*, GUARDIAN (Apr. 23, 2016), <https://www.theguardian.com/environment/africa-wild/2016/apr/23/why-it-makes-sense-to-burn-ivory-stockpiles>; GRACE G. GABRIEL, NING HUA & JUAN WANG, MAKING A KILLING: A 2011 SURVEY OF IVORY MARKETS IN CHINA 3 (2012), <http://www.ifaw.org/sites/default/files/Making%20a%20Killing.pdf> (“The sale

C. *The Controlled Wildlife Products Trade Act 9 of 2008 (CWPTA)*

The CWPTA, enacted on December 14, 2008, and brought into force on February 15, 2012,¹¹² repealed the Controlled Game Products Proclamation (AG. 42 of 1980) and provided for the implementation of CITES within Namibia.¹¹³ The CWPTA addresses the possession, trade, import, and export of wildlife products but does not regulate the hunting or capturing of wildlife.¹¹⁴ The CWPTA principally regulates the possession and manufacture of “controlled wildlife products” and the import and export of species listed in the CITES Appendices.¹¹⁵ A “controlled wildlife product” is defined as “any animal or plant (or any portion thereof),” as well as any product or substance derived from any plant or animal, as set out in Schedule 1 of the CWPTA.¹¹⁶

One key problem with the replacement of the Controlled Game Products Proclamation was that the penalty for possession of controlled wildlife products was, inexplicably, massively reduced. The major issue here is that it is often difficult to prove that an individual caught in possession of wildlife parts has been or is involved in hunting or trading the parts, but possession is easily proven. Schedule 1 of the CWPTA provides that no person may possess, manufacture any object from, deal in, import into, or export from Namibia any tusk, horn, head, ear, trunk, skin, tail, or foot or any part thereof, of any elephant or rhinoceroses, or any part of any species mentioned in CITES Appendix I, unless the action in question is authorized by a permit and the person holding the permit complies with the conditions specified therein.¹¹⁷ The powers that an inspector has in relation to the implementation of the CWPTA are also set out therein.¹¹⁸ These powers are quite wide-ranging and, importantly, include the ability to seize anything that is used in the commission of an

approved by CITES in 2008 spurred production and trade of ivory products in China and stimulated the demand for ivory from a growing class of wealthy consumers that covets ivory products as collectibles and investment vehicles.”)

112. Ministry of Env't & Tourism, Republic of Namib., Determination of Date of Commencement of Controlled Wildlife Products and Trade Act, 2008 (Feb. 15, 2012) GOV'T GAZETTE OF THE REPUBLIC OF NAMIB., <http://www.lac.org.na/laws/2012/4883.pdf>.

113. Controlled Wildlife Products Trade Act 9 of 2008 (CWPTA), at 1, 10, 12 (Namib.).

114. *See, e.g., id.* at 5.

115. *See, e.g., id.* at 2, 4, 29-73.

116. *Id.* at 2.

117. *See id.* at 11. Schedule 1 provides exceptions for the possession of up to five items of worked ivory with a total weight of less than 1 kg—for personal use only—and for *omakipa* or other ivory carvings that are possessed or transferred in accordance with the customary law or the long-standing customs of any group of people indigenous to Namibia.

118. *Id.* at 6-7.

offense under the CWPTA (such as a vehicle or firearm), as well as examine any paperwork or computer systems as the inspector deems appropriate.¹¹⁹

D. Draft Protected Areas and Wildlife Management Bill (as of July 17, 2017)

The Namibian government is currently considering a draft Protected Areas and Wildlife Management bill (PAWM), which would replace and repeal the NCO.¹²⁰ At present, there is no indication that this bill would also repeal the EMA.¹²¹ If the EMA were not repealed by the bill, it is essential that the provisions of the Protected Areas and Wildlife bill not undercut any EMA provisions; a coordinated approach to tackling the issue of wildlife crime and promoting biodiversity must be maintained.

The PAWM proposes consolidation and reform of the existing legislation on the protection and conservation of wildlife and retains the familiar three categories of wildlife: (1) Specially Protected Species; (2) Protected Species; and (3) Hunttable Species.¹²² As of the date of this Article, these categories are not defined in the bill but would instead be defined subject to the discretion of the Minister upon enactment, per Section 41:

- (1) The Minister shall by regulation promulgated in accordance with subsection (2), determine criteria for the classification of species that are critically endangered, endangered, or vulnerable.
- (2) The Minister may, by notice in the Official Gazette, publish a list of:
 - (a) Specially Protected Species, being those indigenous species that are:
 - (i) critically endangered or vulnerable; and
 - (ii) endemic or near endemic to Namibia. []
 - (b) Protected Species, being species that may only be used in terms of the provisions of this Act.
 - (c) Hunttable Species, being species that may be used in terms of provisions of this Act.¹²³

119. *Id.*

120. Draft Protected Areas and Wildlife Management Bill (PAWM), at 2 (July 17, 2017) (Namib.) (to be presented to the Minister of Env't & Tourism).

121. *See id.*

122. *Id.* at 12, 15-16.

123. *Id.* at 67-68.

The draft bill proposes that penalties for hunting Specially Protected Species without a permit, or in violation of any condition, requirement, or restriction of a permit, be repealed and replaced with the following, as set out in Section 43(3):

[Any person who violates the provision] shall be guilty of an offense and liable on conviction—(a) to a fine not exceeding N\$25,000,000 or to imprisonment for a period not exceeding twenty-five years, or to both such fine and such imprisonment if such offense relates to the hunting of any elephant or rhinoceros; (b) to a fine not exceeding N\$10,000,000 or to imprisonment for a period not exceeding ten years, or to both such fine and such imprisonment if such offense relates to the hunting of any other specially protected species but if such person has been previously convicted of an offense referred to in paragraph (a) or (b), he or she is liable for a fine not exceeding N\$50,000,000 or to imprisonment for a period not exceeding forty years, or to both such fine and such imprisonment.¹²⁴

The draft maintains the human-wildlife conflict provisions, allowing for the killing of any species to prevent loss of life or injury to humans or their property (including livestock, a loophole that has often been exploited by criminal syndicates to their benefit).¹²⁵ However, a human-wildlife conflict management and mitigation plan would need to be a part of a conservancy's plan, potentially leading to better practices to eliminate these encounters that can lead to the death of a Protected or Specially Protected Species.¹²⁶

Recommendations to improve the PAWM include improving definitions of Specially Protected and Protected Species. Specifically, the criteria for classifying species, as determined by the International Union for Conservation of Nature (IUCN),¹²⁷ would ideally be incorporated into the PAWM to ensure consistency in listing procedure and adherence to the latest science and methodologies.¹²⁸ If a species being monitored fulfills

124. *Id.* at 69-70.

125. *Id.* at 70.

126. *See id.* at 63.

127. *See The IUCN Red List of Threatened Species*, INT'L UNION FOR CONSERVATION NATURE, <https://www.iucnredlist.org> (last visited Nov. 18, 2018).

128. IUCN provides the following guidelines:

There are five quantitative criteria which are used to determine whether a taxon is threatened or not, and if threatened, which category of threat it belongs in (Critically Endangered, Endangered, or Vulnerable). These criteria are based around the biological indicators of populations that are threatened with extinction, such as rapid population decline or very small population size.

IUCN RED LIST, GUIDELINES FOR USING THE IUCN RED LIST CATEGORIES AND CRITERIA, VERSION 13 (Mar. 2017), <https://cmsdocs.s3.amazonaws.com/RedListGuidelines.pdf>.

the criteria to be listed as Critically Endangered, Endangered, or Vulnerable, they would become entitled to protected status. This would ensure that species that have not previously been listed can readily become protected, as data becomes available. It would also be to ensure that such methodology is statutorily provided for, to ensure transparency in designating, relisting, or delisting species.

In addition, although there are valid reasons for not allowing research on wildlife without a permit from MET, it is also important that applications for research permits not be unduly denied in order to keep important information regarding wildlife and poaching rates from the public.¹²⁹ The requirement for the permit should exist in order to ensure that research efforts would be consistent with the objects of the PAWM and other laws, not to restrict information available to the public about wildlife. To this end, changes to part III, section 12(10), are recommended to make clear that the bill does not intend to deter or limit research on wildlife that does not cause any adverse impacts on wildlife or the environment, and to state that the Minister shall authorize research into the investigation of wildlife crimes and poaching rates unless they make an express finding based on substantial evidence that the proposed research methodology would have a significant adverse effect on wildlife.

Further, with regard to the list of purposes of managing protected areas, deleting “economic growth” would ensure that preservation values remain core to the mission of a protected area.¹³⁰ Conservation management and economic development too often pose an inherent conflict that may easily be abused and could lead to circumstances that frustrate the other stated purposes, including habitat destruction and excess hunting.

Next, improving management of protected areas and restricting permissible activities in protected areas, including hunting, mining, recreational access, and unnecessary privileges for MET officers, would serve to limit unnecessary risks to wildlife.¹³¹ Additionally, prohibiting the hunting of Specially Protected Species would prevent the state-sanctioned killing of high-value wildlife. Hunters, and even some conservationists, support this practice (or the revenue generated by it), yet eliminating permitted hunting of these species would create an incentive to protect them so that they increase in numbers sufficient to no longer be listed as specially protected. The precautionary principle also suggests

129. See PAWM, at 31-33 (Namib.).

130. See *id.* at 36.

131. See, e.g., *id.* at 43, 46, 48.

strengthening the provisions allowing for the hunting of other species—until it is proven that populations are stable, hunting should be minimized.

The author also recommends eliminating provisions in the PAWM bill allowing for authorization of trophy hunting by any person, from any country, for any Specially Protected Species.¹³² Such provisions are too broad and unduly threaten the most critically endangered species. There is an alarming lack of transparency in the numbers of Specially Protected Species that MET permits to be hunted, which is inconsistent with Article 95 of the Namibian Constitution and national policy to preserve wildlife for all Namibians and future generations.¹³³ If trophy hunting is desirable, it will be an incentive to protect the Specially Protected Species to increase their numbers so that they could be eligible for trophy hunting in the future.

E. The Legislative Framework Must Be Expanded to Include Investigation and Prosecution of Aiders, Abettors, and Corruption Crimes Related to Wildlife Crimes

Various organizations have identified corruption as an issue that is hindering the effective implementation of Namibian legislation.¹³⁴ Namibia has been ranked number fifty-three on a list of 180 countries tiered from least to most corrupt by Transparency International, a global NGO that combats corruption.¹³⁵ Whilst Namibia has numerous anti-corruption laws in place, gaps still remain, as do issues with lack of funding, resources, and staff dedicated to this area.

Anecdotally, law enforcement and prosecutors often only pursue the individuals responsible for the actual poaching, as opposed to pursuing lines of inquiry to take down organized crime syndicates that sponsor and fund the illegal enterprises. One challenge with such investigations is that the syndicates do not use traditional financial channels that can be tracked, such as bank accounts, choosing instead to deal with cash or barter, which cannot be easily monitored or tracked. Enhanced financial investigations

132. See, e.g., *id.* at 66, 71-74, 86-87.

133. See CONSTITUTION art. 95 (1990) (Namib.).

134. See, e.g., John Grobler, *Namibia Slipping into Endemic Corruption*, AL JAZEERA (Sept. 2, 2014), <https://www.aljazeera.com/news/africa/2014/09/namibia-slipping-into-endemic-corruption-201492131519733850.html>; *Namibia Corruption Report*, GAN BUS. ANTI-CORRUPTION PORTAL, <https://www.business-anti-corruption.com/country-profiles/namibia/> (last visited Nov. 10, 2018) (“The legal framework for curbing corruption in Namibia is strong, but enforcement is inconsistent.”).

135. *Namibia*, TRANSPARENCY INT’L, <https://www.transparency.org/country/NAM> (last visited Nov. 9, 2018).

are critical to implicate the broader criminal network and not just a low-level “fall guy” who is typically the only actor, if anyone, brought to justice.¹³⁶

Another challenge with investigating the syndicates, which, based on convictions and investigations in southern Africa recently, often appear to be run by Chinese or Southeast Asian crime organizations, is that the Chinese also create, fund, and control major infrastructure projects throughout Namibia.¹³⁷ Through such activities, these individuals and groups reap benefits from the government and obtain favorable immigration treatment, together with control over transportation in certain areas to facilitate these projects.¹³⁸ This system is likely to aid the smuggling of rhinoceros horns and other wildlife trophies. For example, the Chinese are engaging in significant uranium mining operations near areas where poaching is occurring and, according to interviews conducted in Namibia in September 2016, security at the check points was reported to be lacking. The Chinese are also redeveloping the port of Walvis Bay,¹³⁹ Namibia’s largest port and an area where significant smuggling has occurred.¹⁴⁰

G. *Greater Coordination in the Prosecution of Wildlife Crimes Is Needed*

There is an evident, substantial lack of cohesion between the various authorities charged with investigating and prosecuting wildlife crime. Often, this seems due to distrust and a lack of cooperation between prosecutors and law enforcement, various government agencies, and even between these entities and NGOs. By way of illustration, Etosha National Park has been highlighted as an area of highest concern, with an alarming rate of poaching.¹⁴¹ Yet it is difficult to obtain information about wildlife

136. See FIN. INTELLIGENCE CTR., *supra* note 11, at 38.

137. See, e.g., John Grobler, *Caught in the Crossfire: How Cattle and Chinese Mining Interests Are Killing Off Namibia’s Black Rhinos*, OXPECKERS (July 17, 2015), <http://oxpeckers.org/2015/07/caught-in-the-crossfire-how-cattle-and-chinese-mining-interests-are-killing-off-namibias-black-rhinos/>.

138. See, e.g., *id.*

139. Chamwe Kaira, *Rough Seabed Conditions Delay N\$4b Port Expansion*, NAMIBIAN, (July 11, 2016), [https://www.namibian.com.na/152994/archive-read/Rough-seabed-conditions-delay-N\\$4b-port-expansion](https://www.namibian.com.na/152994/archive-read/Rough-seabed-conditions-delay-N$4b-port-expansion).

140. See, e.g., Adam Hartman, *New Police Station in Walvis Bay Harbor*, NAMIBIAN (June 25, 2012), <https://www.namibian.com.na/index.php?id=96726&page=archive-read>.

141. See, e.g., Jess Fogarty, *Scorpion Hill Puts a Sting in Etosha’s Poaching Pandemic*, ETOSHA NAT’L PARK (Feb. 27, 2018), <https://www.etoshanationalpark.org/news/scorpion-hill-puts-a-sting-in-etoshas-poaching-pandemic>.

crimes in Etosha or to patrol this area because, as a national park, access is restricted. The LAC reports that there is significant distrust between the police in Etosha and MET officers patrolling it, to such an extent that the police will not allow MET to patrol the park unless accompanied by the police. Whether true or not, there have been rumors that individuals in MET and local law enforcement have been corrupted by the criminal syndicates that sponsor poaching, and this has led to distrust between law enforcement groups that should be collaborating. In addition, the national special investigatory unit for wildlife crimes, the Protected Resources Division (PRD) (formerly, Protected Resources Unit or PRU) is very secretive and often unwilling to share information with others, including the LAC, making it difficult to know where they are focusing their efforts. Although concerns about corruption may justify some secrecy, improving the dialogue and working relationships between these groups could assist in the prosecution of wildlife crimes in Namibia.

To further complicate matters, there has also been a lack of cooperation and agreement between various conservancies in Namibia. One of the reasons why adoption of the PAWM bill has been stalled for so long is disagreement among the eighty-two conservancies over the legislation. These conservancies have competing interests in land and how best to manage natural resources. This lack of consensus has contributed to the current unsatisfactory status quo preventing progress and change.

Moreover, Namibia has no central record of prosecutions of crimes, including wildlife crimes, and there appears to be little publicity of cases of prosecutions of wildlife crimes. Although statistical information on criminal cases for specific crimes is available from the Namibian Police Force (Nampol) upon written request, the absence of an electronic, publicly available database of criminal offenses or prosecutions means that the decisions of the magistrate courts are unreported and difficult to access. This lack of a readily available database of criminal offenses or prosecutions makes it difficult to compile information to assess the level of corruption within the criminal justice system, as well as the overall implementation, effectiveness, and consistency of decision-making in dealing with the poaching epidemic. This lack of ease in accessing information regarding criminal offenses or prosecutions also results in limited public awareness of prosecutions, which is a lost opportunity to present a valuable deterrent against crime and increase public confidence in the prosecution of offenders.

H. Judicial Reforms Are Needed to Enable Prosecutors to More Diligently Prosecute Wildlife Crimes

Other significant challenges faced by prosecutors in Namibia include the chronic backlog of criminal cases caused by a lack of capacity, including an insufficient number of magistrates and lack of specialization by magistrates at the lower levels of the court system;¹⁴² economic and geographic barriers due to the areas that are especially vulnerable to wildlife offenses often being located great distances from Namibia's administrative centers;¹⁴³ and a shortage of legal aid lawyers.¹⁴⁴ This creates a slow and ineffective system for prosecuting wildlife crimes.

There are two primary challenges relating to magistracy and judicial capacity: (1) issues concerning corruption and independence of the judiciary and prosecutor-general; and (2) lack of resources. Despite the internationally recognized comparative independence of the Namibian judiciary, it seems as though a number of Namibian citizens perceive judges and magistrates to possibly be involved in corruption at some level, even if that perception is inaccurate.¹⁴⁵ Unverified reports in the Namibian press have stated that the majority of Namibians do not believe that a decline in the number of reports of alleged corruption reflects reality.¹⁴⁶ The Anti-Corruption Commission (ACC), mandated to combat and prevent corruption in Namibia, has previously been criticized in the Namibian press as being "largely toothless"¹⁴⁷ and having "hopelessly failed to deal with high-profile cases."¹⁴⁸ This illustrates a lack of public

142. See J. NAKUTA & F. CHIPEPERA, THE JUSTICE SECTOR AND THE RULE OF LAW IN NAMIBIA: THE CRIMINAL JUSTICE SYSTEM 19-21 (2010), https://www.nid.org.na/images/pdf/democracy/Criminal_Justice_System_Namibia.pdf.

143. See BRIAN T.B. JONES, SCANDINAVIAN SEMINAR COLL'S. AFR. PROJECT, COMMUNITY MANAGEMENT OF NATURAL RESOURCES IN NAMIBIA (1999), <http://pubs.iied.org/pdfs/7415IIED.pdf>.

144. See *Access to Justice and Legal Representation*, NAMIB. SUPERIOR CTS., <http://www.ejustice.moj.na/ABOUT%20US/Pages/AccessToJusticeandLegalRepresentation.aspx> (last visited Nov. 10, 2018) (noting limited access to legal aid and unavailability of *pro se* representation).

145. See *Namibia Corruption Report*, *supra* note 134.

146. See Da'oud Vries, *Namibia Slips on Corruption Index*, NAMIBIAN (Sept. 25, 2008), <https://www.namibian.com.na/index.php?id=49587&page=archive-read> ("The report [by Transparency International in 2008] further said that the CPI scores of most African countries, including Namibia, show that the continent is 'dangerously lagging' in meeting the 2010 deadline for the full implementation of the 2005 Paris Declaration, which lays down principles of making aid more effective.").

147. Gwen Lister, Opinion, *Political Perspective*, NAMIBIAN, Dec. 12, 2014, <https://www.namibian.com.na/print.php?id=131605&type=2>.

148. Alexactus Kaure, Opinion, *Corruption in Namibia—What Corruption?*, NAMIBIAN (May 6, 2016), <https://allafrica.com/stories/201605061315.html>.

confidence in the process of combating corruption and fails to deter individuals from committing wildlife crimes.

I. Communal Property Areas Need Improved Management

Namibia's communal property areas, referred to as "communal conservancies," are self-governing, democratic entities managed under committees that are elected by their members.¹⁴⁹ Communal conservancies are areas that have fixed borders, governance, and management structures outside of parks.¹⁵⁰ A portion of the common land held by residents of the conservancies is set aside exclusively for wildlife. MET recognizes conservancies and has powers to de-register a conservancy if the conservancy fails to comply with conservation regulation.¹⁵¹ Communal conservancies are required to conduct annual and general meetings, prepare financial reports, and have wildlife management or wildlife utilization plans.¹⁵²

Wildlife management plans incorporate consumptive uses of wildlife, such as trophy hunting and meat harvesting, with nonconsumptive uses of wildlife, like tourism.¹⁵³ Trophy hunting and tourism provide important revenue streams to communal conservancies.¹⁵⁴ Hunting on conservancy land is governed by quotas set by MET on the basis of annual game counts conducted by MET, conservancies, and other groups.¹⁵⁵ Since 1998, Namibia has created eighty-two communal conservancies, which cover approximately 19.6% of the country.¹⁵⁶ Communal conservancies are widely recognized as a conservation success story, as increased community recognition of the value of wildlife and wildlife management practices have led to growth in wildlife numbers.¹⁵⁷ Although communal conservancies have resulted in the recovery of the numbers of wildlife, recent increases in poaching incidents have indicated that there are opportunities to improve

149. *Conservancies*, *supra* note 91.

150. *Conserving Wildlife and Enabling Communities in Namibia*, WORLD WILDLIFE FUND, <https://www.worldwildlife.org/projects/conserving-wildlife-and-enabling-communities-in-namibia> (last visited Nov. 10, 2018).

151. *Conservancies*, *supra* note 91.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. See, e.g., *Namibia: How Communities Led a Conservation Success Story*, *supra* note 92.

management of conservancies in order to ensure that the system of sustainable use of wildlife continues.

To begin, many conservancies have weak central authorities with very limited oversight. In many conservancies, hunting and poaching laws are not enforced, permitting individual areas to devolve into a “free for all.” Often, much of the money that is earned by the conservancy, usually through tourism or hunting permits, does not go back into the community, and many residents of conservancies are poor and struggling. Trophy hunting, which is often cited as a critical revenue stream for conservancies, is ultimately dependent upon successful community implementation of wildlife management plans that are carefully managed and policed to ensure that sustainable numbers of wildlife continue to be present in communal conservancies.¹⁵⁸ Although trophy hunting is often cited as an important source of income for conservancies, permitting trophy hunting can send mixed signals to the local community about the sanctity of wildlife and who is allowed to kill protected species. For example, if community members do not believe that the income generated by trophy hunting benefits them, then there is no incentive for them to be part of a system in which they look out for wildlife.

The difficulty of policing poaching, and the promise of payment from syndicates to residents in excess of what they may receive through community-ownership and management, creates an incentive for individuals to provide information on the whereabouts of game animals and to poach game animals themselves. It is critical that wildlife management and protection within conservancies be strengthened in order to ensure a sustainable system of wildlife utilization. If wildlife in conservancies is not sustainably managed and protected, and poaching of wildlife continues to go unpunished in most cases, then the conservancies risk losing the resource of wildlife that not only provides them with income from trophy hunting, but also the income from tourism.

J. Beyond the Poacher: Prosecuting Criminals Higher Up the Chain

To address the need to systematically eliminate the organized criminal syndicates behind wildlife poaching, it is recommended that the draft PAWM, the existing Anti-Corruption Act (ACA), and the Prevention of Organized Crime Act (POCA) be revised. Currently, the NCO and the PAWM bill allow for a significant loophole that has been exploited to

158. See *Conservation and Hunting*, NAMIB. ASS’N CBNRM SUPPORT ORGANIZATIONS, <http://www.nacso.org.na/conservation-and-hunting> (last visited Nov. 10, 2018).

justify killing threatened and endangered species, including elephants and rhinos. The provision allows a person to kill an animal even in a protected area if in defense of a person or livestock, an exception that is all too easily gamed.¹⁵⁹ The author recommends narrowing when such a defense may be used as follows:

No person shall, without the written authorization of the Minister, collect any wild species or hunt any wild animal in any State protected area, provided that a dangerous animal may be killed in defense of a human life or to prevent a human being from imminent bodily injury provided that:

(a) the killing of such animal is necessary for one of these express purposes;

(b) the threat is imminent;

(c) the killing is reported to a conservation officer and the PRD within twenty-four hours of such killing; and

(d) the entire animal is turned over to a conservation officer or the PRD within twenty-four hours of such killing.

(e) Each such incident must be investigated by the PRD within forty-eight hours and a report provided by the PRD to the Prosecutor General's Office and MET within seven days setting forth the circumstances of the killing and a finding of whether or not §25 was complied with.

Under this recommendation, such a killing may only be done to protect a human from imminent death or bodily injury and not to protect against the killing of livestock (although it is also recommended to allow an anti-poaching fund to provide compensation to farmers when their livestock is killed). In addition, specific reporting requirements, including notifying authorities within twenty-four hours and mandating that the entire animal be turned over to the state, would provide additional safeguards.

The ACA is an important tool in the prevention of corruption in Namibia. The ACA seeks to stem corruption in two primary ways: (1) it establishes the Anti-Corruption Commission (Commission), an "independent and impartial" body with wide-ranging functions, including the initiation of investigations into corrupt practices; and (2) it provides a series of varying corruption offenses, including the corrupt giving/acceptance of gratification, bribery of public officials, and fraudulent concealment of offenses.¹⁶⁰ Nonetheless, the author's research has identified a range of issues with the ACA legislation in practice. First,

159. See Nature Conservation Ordinance 4 of 1975, §§ 26(4)(a), 27(5)(a) (Namib.); PAWM, at 70 (July 17, 2017) (Namib.).

160. See Anti-Corruption Act 8 of 2003 (Namib.), <http://www.lac.org.na/laws/annoSTAT/Anti-Corruption%20Act%208%20of%202003.pdf>.

individuals often fear retaliation and therefore do not report cases although they are aware of corrupt behavior. According to the Namibia National Urban Corruption Perception Survey, undertaken by the Commission in 2011, 67.5% of respondents were aware of corrupt acts but did not report these.¹⁶¹ When asked why, the most common response was fear of victimization (42.8%), with 15.9% stating that they did not know to whom to report the matter.¹⁶² Where cases are brought, they are often hampered by a lack of resources and evidence. Out of 262 cases brought by the Commission to the Prosecutor General, thirty-six were not advanced due to a lack of evidence.¹⁶³ Enacting whistleblower protections, discussed further below, could be critical in this regard.

Courts in Namibia recently struck down as unconstitutional the definition of “corruptly” in the ACA because it was “unduly vague.”¹⁶⁴ Replacing the current definition with the definition of “corruptly” from the U.S. Code as used in the context of the obstruction of justice could provide a workable and justiciable solution.¹⁶⁵ “Corruptly” is defined therein as “acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.”¹⁶⁶ The author also recommends adding, based on the U.S. Foreign Corrupt Practices Act: “This [acting “corruptly”] also includes an offer, payment, promise, gift, or authorization of giving anything of value with the intention to induce the recipient to misuse his official position.”¹⁶⁷

The ACA could be amended to increase its efficacy. For example, the ACA could contain a system for cataloging facilitation payments and declaring assets received by public officials, together with provisions concerning compulsory training of the Commission and clear avenues of complaint, should members of the public wish to voice complaints about the Commission. Requiring annual training of the members of the Commission and its staff, including the Deputy Director, to ensure that they sufficiently understand their duties could allow for improved

161. ANTI-CORRUPTION COMM’N NAMIB., NAMIBIA NATIONAL URBAN CORRUPTION PERCEPTION SURVEY REPORT 35 (2016), <https://www.accnamibia.org/wp-content/uploads/2017/01/National-Corruption-Perception-Survey-Report-2016-Part-01.pdf>.

162. *Id.*

163. ELLISON TJIRERA & GRAHAM HOPWOOD, INST. FOR PUB. POLICY RESEARCH, THE ACC IN ACTION: WHAT DOES THE TRACK RECORD SAY? 1 (Nov. 2011), https://ippr.org.na/wp-content/uploads/2011/11/ACCinAction_Paper6.pdf.

164. *Lameck v. President of the Republic of Namib.*, 2012 (1) NR 255 (HC) (Namib.).

165. *See* 18 U.S.C. § 1515(b) (2018).

166. *Id.*

167. *See* 15 U.S.C. § 78dd-1(a), -2(a), -3(a).

functioning of the organization and its authorizing legislation as well. Importantly to the matter at hand, such training should include training on wildlife crimes. Harmonization needs to occur between anti-corruption legislation and wildlife crime penalties, such that these act as sufficient deterrents and adequately punish perpetrators of corrupt activities and wildlife crimes. Our report offered draft legislation that imposed stricter penalties for wildlife crimes, which increased if a person had also engaged in corruption or organized crime. Strengthening the Commission, while seeking to foster its complete political independence, including budgetary independence, should enhance its efficacy.

Our research has also led to recommendations to strengthen the POCA through a new provision providing that, where a confiscation is made in relation to a wildlife crime, all money confiscated should be given to an anti-poaching trust fund that would be maintained by the Prosecutor General's office, to be used pursuant to the purposes set forth in the legislation imposing harsher penalties for wildlife crimes. The fund would be used to make payments to informants under the CWPTA, to reimburse law enforcement officials, including the Protected Resources Division for investigative costs related to wildlife crimes enforcement, and to provide financial assistance to law enforcement agencies working to investigate and prevent the commission of wildlife offenses. It could also be used to compensate farmers for the killing of livestock by wildlife at the discretion of the MET or court. We also added a catch-all wildlife crimes provision in relation to the preservation of property or forfeiture of property. Further, the model legislation also recommended including wildlife crimes within Schedule 1 of the POCA as a separate and express offense within the legislation.

Importantly, Namibia passed the Whistleblower Protection Act (WPA) on October 9, 2017.¹⁶⁸ Whistleblower protections are urgently needed in order to provide security to those who offer information about corrupt practices and other criminal activities, including those related to wildlife crimes. Research from our interviews in Namibia revealed that people are afraid to speak out because there are no such protections under the current legislative framework. While it is undeniably beneficial to have this law enacted, a review of the WPA still invited several recommendations to make it more effective. For example, the addition of language that would protect whistleblowers from the threat of harm to

168. Whistleblower Protection Act 10 of 2017 (Namib.), <http://www.lac.org.na/laws/annoSTAT/Whistleblower%20Protection%20Act%2010%20of%202017.pdf>.

person or property, not just actual harm to person or property, was recommended.

The WPA contains broad provisions regarding who may make disclosures and the type of behaviors that may be disclosed. The Act, under § 35, also permits anonymous disclosures,¹⁶⁹ which are especially important in countries, such as Namibia, where corruption may serve as a continual barrier to the effective implementation of legislation. There is also the potential for financial rewards to be given to whistleblowers under §§ 74 and 75 where their disclosure leads to successful conviction and/or the recovery of money, which may further encourage disclosure.¹⁷⁰ Yet, offering such rewards at the discretion of the Commissioner of Whistleblower Protection (CWP) (as appointed by the President with approval of the National Assembly under § 8 of the Act)¹⁷¹ raises a potential concern regarding the lack of independence of the CWP, and indeed the entire Whistleblower Protection Office.¹⁷² Requiring an independent panel to appoint the CWP, with an express declaration of agency independence within the law, could buttress the validity of the Whistleblower Protection Office in the face of actual or perceived conflict of interest.¹⁷³

The WPA potentially provides extensive protection to whistleblowers, including employees in both the public and private sector, and also to “any person in respect of another person or a public or private body or institution.”¹⁷⁴ Although there is no express protection for people who have made applications for employment, contracts, or funding, or those who were formerly employed by a public or private body, the language including “any person” suggests that they may qualify for protection.¹⁷⁵ However, the legislation would be enhanced by inserting an express provision to protect former employees as well.

The WPA protects the disclosure of “improper conduct,” as defined in § 2.¹⁷⁶ This covers a broad range of behavior (including the likelihood of such behavior taking place), such as criminal offenses, noncompliance

169. *Id.* at 25.

170. *Id.* at 46.

171. *Id.* at 10.

172. *See Comment—Whistleblower Protection Bill*, INST. FOR PUB. POL’Y RES. 2-3 (Feb. 22, 2017), http://ippr.org.na/wp-content/uploads/2017/02/IPPR_Comment_Whistleblower_Protection_Bill.pdf.

173. *Id.*

174. Whistleblower Protection Act 10 of 2017, at 21 (Namib.).

175. *See id.*

176. *Id.* at 6.

with laws, disciplinary offenses, and acts endangering the environment or the health or safety of an individual or a community.¹⁷⁷ There is no express provision for the endangering of wildlife, however, so including “fauna and flora wildlife resources” to the language would make it clear to the public that wildlife-crime whistleblowing is protected under the Act.

Further, our report made additional recommendations regarding provisions in the draft legislation establishing the environmental court and special wildlife crimes prosecutors that would expressly encourage plea bargaining. These provisions stated that an admission of guilt would be sufficient to convict a defendant without the need for a trial, which is consistent with current practice. The prosecutor could recommend a reduced sentence in exchange for cooperation, and the scope of the reduction should be proportionate to the degree to which the defendant has cooperated with authorities and has provided information or other evidence that may lead to other arrests. The main purposes of plea bargaining are to encourage defendants to cooperate and provide information that will lead to additional arrests and prosecutions.¹⁷⁸ This could increase enforcement of wildlife crimes and lead to more convictions and would likely also therethrough increase deterrence.¹⁷⁹ In addition, plea bargaining would reduce the strain on judicial resources as a result of increased wildlife crimes arrests and prosecutions.

K. Improving Coordination and Effectiveness of Prosecution of Wildlife Crimes

To improve the efficacy of prosecuting wildlife crimes, our report made several recommendations pertaining to Namibia’s criminal procedures, specifically provisions related to bail, and to searches and seizures. Regarding reforms for bail related to wildlife offenses, amending the law to require conditions, including not being allowed to possess a firearm or communicate with people whom the court determines may be

177. *Id.*

178. See, e.g., New Era Staff Reporter, *Introduce Plea Bargaining as a Means to Combat Poaching Within the Rule of Law*, NEW ERA WEEKEND (Jan. 20, 2017), <https://weekend.newera.com.na/2017/01/20/introduce-plea-bargaining-as-a-means-to-combat-poaching-within-the-rule-of-law/> (“Plea-bargaining arrangements are made in the realization that it is next to impossible for a successful prosecution of the rhino horn dealer [for example] to be undertaken due to the inevitable insufficiency of evidence and that there is a greater benefit in convicting the big fish pulling the strings and sustaining poaching, rather than their low-level proxies.”).

179. *Id.* (“[L]egislative reform towards the introduction of a plea-bargaining regime could lead to deterrence or conviction of the organized poaching syndicates that are in operation within Namibia and beyond.”).

connected to wildlife crimes, would likely prevent repeat offenses and perhaps limit the reach of organized poaching networks.

We found that communication between enforcement agencies was often lacking, and more open exchange of information by authorities would streamline investigations into wildlife crime activities. For example, in the event of a seizure of wildlife products by a police officer, requiring that the wildlife product be reported to the Protected Resources Division and Prosecutor General within forty-eight hours, and logged within forty-eight hours, would establish a procedural information-sharing network. The same requirement should apply to any wildlife product seized by the state if the wildlife product related to a wildlife offense or were a wildlife product relating to a Specially Protected or Protected species. Because wildlife does not follow political boundaries, Namibia's conservation efforts could greatly benefit by increasing international cooperation with other countries, particularly with other countries in southern Africa on enforcement of wildlife crimes, trafficking, and smuggling, and with countries importing poached animals, rhinoceros horns, and ivory.

IX. CONCLUSION

Namibia has long supported the principles of environmental protection and sustainable development and has undertaken both domestic and international obligations in recognition of these principles. In the past few years, however, there has been a startling increase in the prevalence of poaching in Namibia. Despite this increase in poaching incidents, prosecution of wildlife crimes has not significantly increased. This is due, in part, to holes in Namibia's current legislative and enforcement framework, an overburdened judiciary, and ineffective management of communal property areas. This Article's specific recommendations aim to repair these holes so that Namibia may more effectively protect the wildlife that it has so long cherished. With such a dramatic reduction in every species on the continent, the iconic wildlife of Africa is at great risk of extinction, yet Namibia remains in a prime position, through legislative reform and, ideally, establishment of an environmental court, to stop widespread poaching of its wildlife resources. Over-exploitation is occurring across the globe, and the time is now to preserve sanctity, at least in this one remote corner of Africa.