

# Chapter 11: Namibia's Wildlife Crime Legislation

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## 1 Introduction

Namibia has a long history of protecting its environment and its wildlife. It is one of just a few nations in the world that expressly includes principles of conservation in its Constitution, requiring the adoption of policies aimed at maintaining biological diversity and utilising “natural resources on a sustainable basis for the benefit of all Namibians, both present and future.”<sup>1</sup> Namibia's Nature Conservation Ordinance (NCO), one of the nation's principal legislation regarding environmental conservation and wildlife crime prevention, has been in force for over 40 years.<sup>2</sup> After Namibia's poaching problem of the 1970s and 1980s, the population rates for the nation's two most vulnerable species, the Black Rhinoceros<sup>3</sup> and the African Elephant,<sup>4</sup> largely recovered during the 1990s and 2000s.<sup>5</sup> However, the number of poaching incidents in Namibia has increased at a staggering rate in the past 6 years.<sup>6</sup> In the context of the entire black rhino population, these numbers are even more alarming – it is estimated that a mere 5,000 remain in the wild, approximately 1,850 of which live in Namibia.<sup>7</sup>

Elephants and rhinoceroses are especially at risk of poaching due to the value of their tusks and horns, but other animals are increasingly in danger as well. For example, lion and giraffe bones are also being used in illegal wildlife trade.<sup>8</sup> Pangolins –

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1 Article 95(l) Constitution of the Republic of Namibia.

2 Nature Conservation Ordinance No. 4 of 1975. The NCO has been amended several times over the years. Perhaps the most notable amendment is the Nature Conservation Amendment Act No. 5 of 1996 which provides for an “economically based system of sustainable management and utilisation of game in communal areas”.

3 The International Union for Conservation of Nature's (IUCN) Red List classifies the Black Rhinoceros as “critically endangered” meaning the species faces an “extremely high risk of extinction in the wild.” See IUCN Red List of Threatened Species, *Diceros bicornis*, at <http://www.iucnredlist.org/details/6557/0>, accessed 10 June 2021; IUCN (2012), hereinafter “Red List Categories”.

4 The IUCN Red List classifies the African Elephant as “vulnerable,” meaning the species faces a “high risk of extinction in the wild.” See IUCN Red List of Threatened Species, *Loxodonta africana* at <http://www.iucnredlist.org/details/12392/0>, accessed 10 June 2021; IUCN (2012:15).

5 ESAAMLG (2016).

6 MEFT (2021:34 and 38) estimates that a total of 329 elephants were poached from 2014-2020, the highest yearly number being 101 in 2016. A total of 447 rhinos (both black and white) were poached over the period 2013 to 2020, the highest yearly number being 97 in 2015.

7 Financial Intelligence Centre (2017:19).

8 LAC (2014:14); Lionaid (2016) “CITES records show that Namibia sent 13 lion skeletons to Vietnam in 2013 and then 23 skeletons to Vietnam in 2014. The source code indicates these were skeletons from wild lions”.

mammals that are often called “scaly anteaters” and that also live in Namibia – are also being increasingly trafficked for their scales and meat, and for use in Chinese medicinal products. Indeed, the pangolin is the most trafficked mammal in the world.<sup>9</sup>

But, despite this increase in poaching in Namibia, the increase in the prosecution of these crimes remain relatively low. In September 2016, four accused were convicted in the Windhoek Regional Magistrates’ Court of trafficking 14 rhino horns and a leopard skin which were discovered in their luggage when they were attempting to leave Namibia via Hosea Kutako Airport. Subsequently, they were all sentenced to 14 years imprisonment in the court *a quo*. The matter was then brought by the accused persons on appeal before the High Court of Namibia, which, in its judgment found the prosecution had proven its case against them, but also found the trial court should have convicted the accused of money laundering in terms of the Prevention of Organised Crime Act No. 29 of 2004 (POCA) and increased their sentences to 20 years imprisonment.<sup>10</sup> Unfortunately, this sort of prosecution is a rare exception. Even when poachers are brought to justice, often the network of criminals that aided and conspired to commit the crime goes undetected and unpunished, which allows for crimes against wildlife to continue without repercussion or penalty. Namibia’s need to increase efforts to combat wildlife crime has not gone unrecognised. The Financial Intelligence Centre (FIC) recognises the need to “revis[e] the local wildlife protection laws” and increase “[t]raining and technical assistance to the Namibian FIC on how to deal with wildlife crime cases.”<sup>11</sup>

While the Namibian legislature has introduced increases in wildlife crime penalties in recent years (as will be discussed in more detail below), this chapter primarily aims to address some of the key shortcomings with Namibia’s current legislative framework and to provide specific recommendations for how the legislation dealing with wildlife crimes can be reformed to more effectively address those issues, in the hope of empowering the State to stem the alarming rise in wildlife crimes.

## 2 The Duty of the Namibian Government to Act

In terms of the Namibian Constitution, national law, national policies and duties under international agreements, the government of Namibia is obligated to take action to address the poaching crisis. These directives provide the basis for this chapter’s recommendations for legislative reform in order to more effectively prosecute and deter

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9 Hall (2016). MEFT statistics records show that in the period from 2015 to 2020, 109 live pangolins have been seized with the highest number in 2019 (52) and 272 dead pangolins have been seized with the highest number in 2019 (77), see MEFT (2021:41).

10 For more details on this case, see *Xiaoling and 3 Others v S (CA 18/2017) [2019] NAHCMD 94*.

11 Financial Intelligence Centre (2017:56-57).

poaching and other wildlife crimes and to protect and conserve wildlife, including, most importantly, threatened and endangered species.

## 2.1 Article 95 of Namibia's Constitution

Under Article 95 of Namibia's Constitution, the State is duty bound to promote and maintain biological diversity and sustainable development. Since obtaining Independence on 21 March 1990, Namibia has recognised the value of environmental protection within the context of its legislative and constitutional framework.

Article 95 of the Namibian Constitution requires the State to

actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at the following:

(...) maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilisation of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future;

Failing to take steps to adequately address the grave and undeniable increase in poaching across Namibia would violate the government's constitutional duties under Article 95. Thus, the significant increase in poaching obligates government action pursuant to Article 95 in order to maintain Namibia's ecosystems and biodiversity. The number of deaths of endangered and threatened animals, which undeniably constitute Namibia's living natural resources, is not sustainable. Article 95 of the Constitution necessitates reform of the current system to preserve biodiversity and living natural resources for present and future Namibians.

## 2.2 The Environmental Management Act No. 7 of 2007

The Environmental Management Act No. 7 of 2007 ("EMA") implements the principle established in Article 95 of the Constitution. The objective of the EMA is to promote the sustainable management of the environment and the use of natural resources by creating central norms for decision making on matters affecting the environment. The EMA is also designed to provide for assessment and control of activities that may significantly impact the environment. More specifically, the EMA aims to ensure that (a) the significant adverse effects of activities on the environment are considered carefully and in a timely manner; (b) there are opportunities for the timely participation of interested and effected parties throughout the assessment process, and (c) the findings of an assessment are taken into account before any decision is made in respect of activities.<sup>12</sup> The EMA defines "activity" broadly to mean "a physical work that a

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12 Section 2.

proponent proposes to construct, operate, modify, decommission or abandon or an activity that a proponent proposes to undertake.”<sup>13</sup>

The EMA expressly states that “Namibia’s cultural and natural heritage including its biological diversity must be protected and respected for the benefit of present and future generations.”<sup>14</sup> The Act also makes clear that “where there is sufficient evidence which establishes that there are threats of serious or irreversible damage to the environment, lack of full scientific certainty may not be used as a reason for postponing cost-effective measures to prevent environmental degradation,” and “damage to the environment must be prevented and activities which cause such damage must be reduced, limited or controlled.”<sup>15</sup>

The EMA utilises various mechanisms to achieve its objectives including the requirement for the production of environmental plans<sup>16</sup> and environmental clearance certificates<sup>17</sup> in order to carry out activities. Environmental plans under the EMA seek to harmonise environmental policies, plans, programmes, and decisions,<sup>18</sup> and enable MET to monitor the growth and protection of a sustainable environment.<sup>19</sup> Regulated departments of the State that perform functions that may affect the environment are obliged to produce environmental plans<sup>20</sup> and to report annually to MET on their success in implementing and complying with adopted environmental plans.<sup>21</sup>

There are a number of prescribed activities set out in Section 27 of the EMA that may not be undertaken without first obtaining an environmental clearance certificate. Such activities include, *inter alia*, resource removal (“including natural living resources”), agricultural processes, recreation, and any other area that MET considers necessary.<sup>22</sup>

### 2.3 Namibia’s National Biodiversity Strategy and Action Plan

In addition to Article 95 of the Constitution and the EMA, Namibia’s national policy establishes conservation of the environment and the nation’s biodiversity as national priorities. Namibia’s Second National Biodiversity Strategy and Action Plan (2013-

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13 Section 1.

14 Section 3(g) (emphasis added).

15 Section 3(k)-(l).

16 Section 23.

17 Section 32.

18 Section 23(a).

19 Section 23(b).

20 Section 24(1)-(2).

21 Section 26(1).

22 Section 27(2). Please note that the Ministry of Environment and Tourism has become the Ministry of Environment, Forestry and Tourism as of March 2020.

2022)<sup>23</sup> (“NBSAP2”) establishes nine key priorities, including addressing critical threats to biodiversity, which are supported by a number of strategic goals. The NBSAP2 recognises that a coordinated approach to preserving biodiversity is required and that there is a correlation between threats to biodiversity and the economic and social development of the country. On this basis, NBSAP2 seeks to address such threats in a holistic manner by using a number of mechanisms and measures.<sup>24</sup>

Specifically, Strategic Goal C of the NBSAP2 focuses on improving the status of biodiversity by safeguarding ecosystems, species and genetic diversity by setting a number of national targets, including:<sup>25</sup>

By 2018, existing terrestrial protected areas (national parks) are conserved, effectively and equitably managed, within an ecologically representative and well-connected system, and by 2020 coastal and marine areas, of particular importance to biodiversity and ecosystem services, are identified and measures for their protection initiated.

The success of implementing these targets will be assessed and measured against a number of key performance indicators including: (1) addressing human wildlife conflict by engaging and educating local communities and consolidating integrated park management;<sup>26</sup> (2) periodically reviewing species lists and implementing species management plans;<sup>27</sup> and (3) strengthening the framework for law enforcement and improving aspects of surveillance, interception, and prosecution.<sup>28</sup>

## 2.4 Obligations under International Agreements

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

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23 GRN (2014e), hereinafter “NBSAP2”.

24 GRN (2014e:14) states that “NBSAP2 is geared towards tackling the critical threats to biodiversity that Namibia is facing. These threats can undermine the economic and social development of the country. It is a strategic priority of NBSAP2 to address these threats in a holistic manner through a range of measures and mechanisms.

25 Ibid:24. It also sets the following goal to be achieved: “By 2016, threatened and vulnerable species lists are updated, and measures implemented by 2019 to improve their conservation status.”

26 Ibid:42.

27 Ibid:43.

28 Ibid.

### 2.4.1 Obligations under the Rio Declaration

In 1992, Namibia became one of the now over 170 signatory countries to the Rio Declaration on Environment and Development (“Rio Declaration”) during the United Nations Conference on Environment and Development. The Rio Declaration consists of principles intended to guide countries through sustainable development in the future. In 1995, Namibia ratified the Rio Declaration, affirming its responsibility to safeguard the common environment. For instance, Principles 3 and 4 of the Rio Declaration state:<sup>29</sup>

Principle 3

The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

Principle 4

In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

### 2.4.2 Obligations under CITES

Further, while not an original signatory, Namibia joined the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”) in December 1990 through accession,<sup>30</sup> and the relevant national legislation incorporating CITES came into force in March 1991. CITES is implemented in Namibia through the Controlled Wildlife Products and Trade Act No. 9 of 2008 (“Wildlife Trade Act”), which replicates the entire text of CITES and its Appendices in Schedules 2 and 3. Under the terms of CITES, Article VIII provides that the parties to the Convention shall “take appropriate measures” to enforce its provisions, including the penalisation of illegal import or export of wildlife products and confiscation of illegally obtained specimens. Thus, Namibia is also expressly obligated under CITES to ensure adequate prosecution and enforcement of wildlife crimes.

Additionally, Namibia is considered a “Category 1” country under CITES, which indicates that its domestic legislation meets the following criteria:

- Designation of national CITES authorities;
- prohibition of trade in violation of the Convention;
- penalisation of illegal trade; and
- authorisation to confiscate illegally traded or possessed specimens.

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29 Rio Declaration on Environment and Development, at <http://www.unep.org/documents.multilingual/default.asp?documentid=78&articleid=1163>, accessed 12 June 2021.

30 Convention on International Trade in Endangered Species of Wild Fauna and Flora, List of Contacting Parties, at <https://cites.org/eng/disc/parties/chronolo.php>, accessed 12 June 2021.

However, a “Category 1” country with little enforcement and few prosecutions of those who commit wildlife crimes leaves the country’s natural resources vulnerable to exploitation, particularly with the increase in sophisticated organised crime syndicates that traffic in the illegal wildlife trade.

### 2.4.3 Obligations under the UN Convention on Biological Diversity

Moreover, Namibia signed the UN 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 utilisation of genetic resources.<sup>31</sup> Under the Convention, Namibia is obligated to “[i]ntegrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies.”<sup>32</sup> Namibia is also obligated to, *inter alia*:<sup>33</sup>

- Regulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use;
- promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings; and
- develop or maintain necessary legislation and/or regulatory provisions for the protection of threatened species and populations.

Each party to the Convention is required to establish a National Biodiversity Strategy and Action Plan (“NBSAP”).<sup>34</sup> As discussed above, Namibia’s NBSAP2 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.”<sup>35</sup> Despite establishing key priorities, this document, which is over 60 pages, does not make reference to poaching and only refers to hunting in the context of revenue gained through trophy hunting permit sales. The plan’s failure to address the steep losses in wildlife due to illegal poaching renders it inadequate to ensure the conservation of biological diversity, in contravention of the UN Convention and other international obligations, and Article 95 of the Constitution.

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31 United Nations Convention on Biological Diversity, <https://www.cbd.int/doc/legal/cbd-en.pdf>, accessed 12 June 2021.

32 Article 6(b).

33 Article 8(c), (d), (k).

34 Article 6.

35 GRN (2014e:v).

### 3 Overview of Namibia's Legislative Framework

#### 3.1 For Wildlife Crimes

As indicated above, Namibia is one of the few countries in the world that addresses sustainability and conservation directly within its Constitution, laying the foundation for a comprehensive national legal framework. Key pieces of domestic national wildlife protection legislation, which are discussed more fully below, include:

- The Nature Conservation Ordinance No. 4 of 1975 (“NCO”), which outlines hunting regulations;
- the Nature Conservation Amendment Act No. 5 of 1996 (“Conservancies Amendment Act”), which amended the NCO by introducing a community-led system of “conservancies”;
- the Game Products Trust Fund Act No. 7 of 1997 (“Trust Fund Act”), which establishes a government fund that supports the conservancies, wildlife councils, and other projects concerning wildlife conservation and resource management;
- Government Notice 240, Regulation of Game Parks (25 August 1976); and
- the Controlled Wildlife Products and Trade Act No. 9 of 2008 (“Wildlife Trade Act”), which deals with the possession, trade, import and export of wildlife products.

Namibia's MEFT oversees the implementation of this regulatory framework. MEFT also controls the issuing of hunting permits and generally formulates policies and guidance in relation to human-wildlife management and species-specific management plans.

#### 3.2 The Nature Conservation Ordinance No. 4 of 1975

The Nature Conservation Ordinance No. 4 of 1975 (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 game park or any nature reserve without the written permission of the State.<sup>36</sup> In relation to private game parks, the owner of the land may hunt game, wild bird, and animals (except Protected and Specially Protected Game, as defined below) without the written permission of the State.<sup>37</sup>

The NCO divides animal species into three protective categories: (i) specially protected game,<sup>38</sup> which includes elephant and rhinoceroses; (ii) protected game, such as

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36 Section 20.

37 Section 23.

38 Schedule 3.



leopards;<sup>39</sup> and (iii) huntable game, such as buffalo and springbok.<sup>40</sup> the following animals are classified as specially protected game,<sup>41</sup> protected game<sup>42</sup> and huntable game and are afforded additional protections under the NCO:

Table 1: Protective Categories of Animal Species under the Nature Conservation Ordinance

Specially Protected Game	
Mountain Zebra	Impala
Giraffe	Hippopotamus
Klipspringer	Black-faced Impala
Black Rhinoceros	Zebra
White Rhinoceros	Elephant
Protected Game <sup>43</sup>	
Aardwolf	Steenbok
Dikdik	Roan Antelope
Blue Wildebeest	Cheetah
Leopard	Silver Jackal
Sable Antelope	Crocodile
Huntable Game	
Bushpig	Buffalo
Eland	Oryx
Kudu	Springbok

Source: Table compiled by the author.

Although the NCO uses the term ‘huntable game’ for the third category of animals, the NCO also permits hunting of Specially Protected Game and Protected Game in certain defined circumstances. Under 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. There is also a general defence to killing any animal with protected status under the NCO without a permit if this is done (1) in defence of human life or (2) to prevent harm to livestock, poultry, or other domestic animals.<sup>44</sup>

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, the permit may relate to an adult bull elephant in the Bwabwata National

39 Schedule 4.

40 Schedule 5.

41 Schedule 3.

42 Schedule 4.

43 An additional 23 species, not included here, are categorised as Protected Game under the NCO.

44 Nature Conservation Ordinance No. 4 of 1975 (as amended), Sections 26(4)(a) and 27(5)(a).

Park. However, the NCO does not set out any conditions or criteria for the issuance of a permit. Permits presumably could 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 elephants and rhinoceroses, other specially protected game and 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 offences involving elephants and rhinoceroses, in addition to the penalties that otherwise apply to offences involving all Specially Protected Animals. The penalty increases as per Government Gazette 6344, 28 June 2017 are as follows:

- Section 26(3)(a) the poaching of a rhino or an elephant is punishable by a fine of up to N\$ 25,000,000 or 25 years in prison, whereas the penalty until 2017 was merely a fine up to N\$ 200,000 or twenty years imprisonment.
- Section 26(3)(b) the penalties for illegal hunting of any other specially protected game have been increased from a maximum fine of N\$ 20,000 to a maximum fine of N\$ 10,000,000, with the maximum potential imprisonment being raised from five years to ten years.
- These penalties apply only for first convictions. In the case of subsequent convictions for hunting elephant, rhino or other specially protected game, the maximum fine goes up to N\$ 50,000,000 and can be combined with imprisonment for up to 40 years.
- Section 27(4) penalties for illegal hunting of protected game have also been increased, from N\$ 4,000 or four years imprisonment to N\$ 500,000 or five years imprisonment. In the event of a previous conviction the fine may be increased to N\$ 1,000,000 or ten years imprisonment.
- Section 30(1)(c) penalties for illegal hunting of huntable game under owner's authority without a permit have been increased from N\$ 2,000 to N\$ 50,000 and from two years to five years imprisonment. In the event of a previous conviction of an offence under this paragraph, a fine not exceeding N\$ 1,000,000 or imprisonment for a period not exceeding 10 years, or both may be imposed.
- The general penalty under Section 87 for any offence in terms of the Ordinance for which no penalty is expressly provided, shall be liable on conviction to a fine not exceeding N\$ 6,000. The previous penalty was N\$ 250 or imprisonment for a period not exceeding six months, previous penalty was three months, or to both. In the case of a previous conviction, the penalty should not exceed N\$12,000 of which the previous penalty was N\$ 500 and/or 12 months, the previous penalty was six months in prison.

- Increased penalties have also been set for illegal hunting at night.
- Another important new provision provides that a foreign national convicted of any offence under the NCO will be automatically declared a prohibited immigrant and deported.

The NCO, as amended in 1996, provides for community conservation units on communal land,<sup>45</sup> known as conservancies, in recognition of the necessity for proactive wildlife management. Conservancies are essentially communally-managed areas in which communities possess the same rights over wildlife and tourism as freehold farmers. Under the conservancy system, communities are motivated to take responsibility for the conservation and management of their own local natural resources. Non-governmental organisations have identified conservancies as crucial in mitigating the impact of human-wildlife conflicts.

There are currently 86 registered conservancies in Namibia, covering an area of 166,045 square kilometers and involving approximately 227,941 local community members.<sup>46</sup> Initially the creation of conservancies led to successful natural resources-based management of these areas and the conservation of wildlife. Wildlife is considered a valued livelihood asset in communal conservancies, with populations of lions, cheetahs, black rhinos, zebras and other native species restored in some of the conservancies after Independence. However, in recent years, poaching in the conservancies has increased significantly, indicating that additional measures are needed to effectively prevent wildlife crime.

### 3.3 The Game Products Trust Fund Act No. 7 of 1997

The Game Products Trust Fund Act No. 7 of 1997 establishes a government fund that has the objectives of, *inter alia*: (a) making grants to emerging conservancies and wildlife councils; (b) supporting measures aimed at improving the relationship between wildlife and people; and (c) allocating funds to conservancies, wildlife council, and protected areas for programmes and projects concerning wildlife conservation and resource management.

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. This dedicated fund provides incentive for local communities to establish

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45 Communal land is vested in the State on behalf of traditional communities. The Communal Land Reform Act 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 No. 5 of 2002.

46 NACSO, "Registered Communal Conservancies", at <http://www.nacso.org.na/conservancies#statistics>, accessed 10 June 2021.

conservancies. An example of where the 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 programmes. Research and investigations show that exporting stockpiled ivory has been unhelpful to curtailing poaching and indicate that any ivory entering the market fuels demand.<sup>47</sup>

### 3.4 The Controlled Wildlife Products and Trade Act No. 9 of 2008

The Controlled Wildlife Products and Trade Act No. 9 of 2008, repealed the Controlled Game Products Proclamation of 1980 and provides for the implementation of CITES within Namibia. The Act addresses the possession, trade, import, and export of wildlife products, but does not regulate the hunting or capturing of wildlife. It principally regulates:

- The possession and manufacture of controlled wildlife products; and
- the import and export of species listed in the CITES Appendices.

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 to the Act.

Schedule 1 to the Act 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 authorised by a permit and the person holding the permit complies with the conditions specified therein.<sup>48</sup> The powers that an inspector has in relation to the implementation of the Act are also set out therein. These powers are quite wide ranging and, importantly, include the ability to seize anything that is used in the commission of an offence under the Act

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47 Neme (2015); Kahumbu / Halliday (2016); Gabriel *et al.* (2011:3) “The sale 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 collectables and investment vehicles.”

48 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.

(such as a vehicle or firearm) as well as examine any paperwork or computer systems as the inspector deems appropriate.

Penalties for offences under the Act, as was the case with under the NCO, also increased as per Government Gazette 6421, 27 September 2017:

- In terms of Section 4(2)(a) the penalty for possession of controlled wildlife products increased from N\$ 20,000 to N\$ 15,000 000 and from five years to fifteen years imprisonment.
- In terms of Section 4(2)(b) relating to dealing, importing or exporting, a penalty of a fine up to N\$ 25,000,000, the previous penalty was N\$ 200,000 and/or 25 years in prison, the previous penalty being twenty years. In the event of a previous conviction of an offence referred to Section 4(2)(a)(b), a fine not exceeding N\$ 50,000,000 or imprisonment for a period not exceeding 40 years, or to both. These penalties are applicable to all the controlled wildlife products.

### 3.5 The Protected Areas and Wildlife Management Bill (2017)

The draft Protected Areas and Wildlife Management Bill, which would, if once enacted, replace and repeal the NCO is currently under consideration by the Namibian government. In terms of the Bill's Preamble, it is also to give effect to Article 95(1) of the Namibian Constitution by establishing a legal framework to provide for and promote the maintenance of ecosystems, essential ecological processes and the biological diversity of Namibia, and the utilisation of living natural resources on a sustainable basis for the benefit of Namibians, both present and future, and to promote the mutually beneficial co-existence of humans with wildlife and to give effect to Namibia's obligations under relevant international legal instruments. In essence, the Bill proposes the consolidation and reform of the existing legislation on the protection and conservation of wildlife.<sup>49</sup> Given the uncertainty of when this legislation will eventually be enforced, the Bill will not form part of the deliberations of this chapter.

## 4 Key Issues with Namibia's Existing Legislative Framework

While the increase in penalty fines in the NCO and Controlled Wildlife Products and Trade Act No. 9 of 2008, as described above, are welcomed, certain shortcomings in the current Namibian legislative framework for wildlife crimes still exist. The most

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<sup>49</sup> The most recent draft that we were able to obtain is dated 2017. As of the date of this report, it remains unclear as to when the Protected Areas and Management Bill will be enacted.

significant issues with the legislative framework, as discussed in more detail below, include:

- **Limit of reach.** The framework does not effectively enable the prosecution of those involved with wildlife crimes beyond just the actual poacher;
- **Lack of monetary incentives for information and cooperation.** There are no effective monetary incentives to provide information to authorities;
- **Lack of coordination in enforcement.** There is a distinct lack of coordination amongst governmental authorities in the prosecution of wildlife crimes;
- **Judicial inefficiencies.** Judicial reforms are needed to increase prosecution and adjudication of wildlife crimes; and
- **Improving land management.** Communal property areas need more effective management mechanisms for wildlife in those areas.

Unfortunately, it is uncommon for wildlife crimes cases to be thoroughly investigated in Namibia, and cases are often ignored. When a poacher is caught, it appears that there is typically no further investigation into who else may have been involved in the crime. Furthermore, even for the few poachers that have been apprehended, the penalties remain relatively minimal despite the recent increases in penalties. The majority of poachers are released on bail and simply pay a minimal fine, and then possibly go on to repeat their crimes. Multiple shortcomings in law enforcement appear to contribute to the low rate of arrests and convictions, including:

- A lack of communication and cooperation between enforcement agencies;
- a lack of appreciation of the severity of wildlife crimes throughout the criminal justice system, by judges, prosecutors, and law enforcement officials, who typically are forced to prioritise what are seen as more important cases; and
- a lack of sophistication among law enforcement officials on how to properly investigate and handle evidence pertaining to wildlife crimes.

Moreover, the current legislation, including the revised penalties set forth in the law and imposed by the courts, is not objectively punishing or deterring poaching and other wildlife crimes.

#### 4.1 Expansion of the Legislative Framework

One of the issues that should be addressed to prevent wildlife crime is that the legislative framework needs to be expanded to include investigation and prosecution of aiders, abettors, and corruption crimes related to wildlife crimes. Namibia is ranked number 57 on a list of 180 countries ranked from least to most corrupt by Transparency

International, a global non-governmental organisation that combats corruption.<sup>50</sup> Corruption could be hindering the effective implementation of much of Namibia's legislation, such as by bribery of customs officials, falsification of documentation, and other means. Whilst Namibia has numerous anti-corruption laws in place, gaps still remain as well as issues with lack of funding, resources, and staff dedicated to this area.

Often, law enforcement and prosecutors only pursue the individuals responsible for the actual poaching, as opposed to pursuing lines of inquiry to take down organised 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 are critical to implicate the broader criminal network and not just a low-level poacher who is typically the only actor, if anyone, who is brought to justice.

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 organisations, is that the Chinese also create, fund and control major infrastructure projects throughout Namibia. Through such activities, these individuals and groups reap benefits from the government and obtain favourable immigration treatment, together with control over transportation in certain areas to facilitate these projects. 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,<sup>51</sup> and security at check points are often lacking effective searches. The Chinese are also re-developing the port of Walvis Bay,<sup>52</sup> Namibia's largest port and an area where significant smuggling is occurring.<sup>53</sup>

#### 4.2 The Whistleblower Protection Act and Monetary Incentives for Information and Cooperation

The Whistleblower Protection Act No. 10 of 2017 was passed in 2017 but has not been enacted yet. The Act is aimed at the protection of persons who report information to officials on improper conduct, which includes amongst other things: criminal activities; violation of the fundamental rights and freedoms protected by the Namibian Constitution; failure to comply with any law; waste, misappropriation or mismanagement of resources which affects the public interest; environmental degradation; endangerment of the health and safety of an individual or community; or the deliberate

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50 See <https://www.transparency.org/en/countries/namibia>, accessed 12 June 2021.

51 OxPeckers (2015).

52 Kaira (2016).

53 See e.g. Hartman (2012).

concealment of such matters. The Act establishes a Whistleblower Protection Office to investigate whistleblower disclosures and complaints of detrimental action taken against the whistleblower or someone related to or associated with the whistleblower. It also provides for a Whistleblower Protection Review Tribunal which reviews decisions of the Whistleblower Protection Office and is empowered to make determinations on whether detrimental action has been taken against a whistleblower and if so, to provide appropriate remedies.<sup>54</sup>

The necessity for the protection of whistleblowers is clear. People are often afraid to provide information to aid law enforcement because they fear retaliation in their communities or from their employers. Individuals might feel victimised when they assist law enforcement and are scared to provide information to the police, particularly given the difficulty of the police hiding or protecting individuals in small, interconnected villages. Legislative whistleblower protections would safeguard individuals who come forward with information regarding illegal conduct of their employers that would assist authorities in their investigation and prosecution efforts.

Whistleblower protection would prevent an employer from retaliating against an employee for coming forward with information relating to past, ongoing, or future criminal acts of the employer. This would help alleviate the fear of an individual from losing his or her employment or being treated negatively for coming forward with such information. Since the illegal poaching and export of animals is significantly run by Chinese and South Asian criminal organisations, and the Chinese currently have ongoing development contracts in Namibia, whistleblower protection would be a valuable tool for employees involved in these developments who may have first-hand knowledge of wildlife crimes.

A formalised process for handling and protecting informants, whistleblowers, and sensitive investigations would be beneficial, in part, to prevent inconsistencies with evidence gathering and prosecutions. When informants and whistleblowers do come forward, the courts typically take steps to protect them (as part of a sealed affidavit) and the police are careful with informants' identities. However, prosecutors sometimes must elect to forego investigations in order to avoid divulging an informant's identity. To assist in the protection of informants and whistleblowers, making it a separate crime to harm or threaten to cause harm to an informant or whistleblower would provide an additional level of security for these individuals and deterrence for potential retaliation.

In addition to protecting the identity of informants and whistleblowers, most statutory whistleblower laws and informant protection laws also provide for monetary awards payable to those who provide useful information that lead to the arrest, prosecution, and conviction of an individual or legal entity of a crime. Cash awards for those who provide useful information would provide a powerful incentive for individuals to come forward and continue to cooperate with the authorities throughout the

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54 See also <https://www.lac.org.na/namlex/Criminal.pdf>, accessed 12 June 2021.



investigation and prosecution of these crimes. The amount of the reward should increase depending on the severity of the crime and whether the alleged criminal was arrested or convicted. The funds typically are drawn from the amount of the criminal penalty.

### 4.3 Greater Coordination in the Prosecution of Wildlife Crimes Is Needed

There is a substantial lack of cohesion between the various authorities charged with investigating and prosecuting wildlife crime. Often this is 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. Yet, it is difficult to obtain information about wildlife crimes in Etosha or to patrol this area because, as a national park, access is restricted.

In addition, there is also a lack of cooperation and agreement between various conservancies in Namibia. One of the reasons why adoption of the Protected Areas and Wildlife Management Bill has been stalled for so long is disagreement among the 86 conservancies and those residing in it over the legislation. These conservancies and their residents often 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 so far had no central record of wildlife crimes prosecutions, and there still appears to be little publicity of these cases. The absence of a publicly available database of criminal offences or prosecutions means that the decisions of the Magistrates' Court are difficult to access. This lack of transparency makes it difficult to assess the levels 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 transparency also obviously limits 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. Thus, the development of a national integrated database of wildlife crime in Namibia (Integrated Database of Wildlife Crime in Namibia, ID-WCN) began in 2019 with first outputs reflected in the Annual Report on Combatting Wildlife Crime in Namibia<sup>55</sup> and in the Revised National Strategy on Wildlife Protection and Law Enforcement.<sup>56</sup> The database includes data on registered wildlife crime cases, wildlife mortalities caused by poaching, seized wildlife products, seized firearms, impounded vehicles, arrests,

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55 MEFT (2021).

56 GRN (2020b).

nationality of suspects, relevant charges, targeted species, areas of crime prevalence, status of registered court cases, and the legal status of suspects.<sup>57</sup>

#### 4.4 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 at the lower levels of the court system;<sup>58</sup> economic and geographic barriers, due to the areas which are vulnerable to wildlife offences often being located great distances from Namibia's administrative centres;<sup>59</sup> and a shortage of public prosecutors.<sup>60</sup> This creates a slow and ineffective system for prosecuting wildlife crimes.

There are two key challenges relating to judicial capacity: Firstly, there are issues concerning corruption/independence of the judiciary/prosecutor-general; and secondly, a lack of resources. Despite the internationally-recognised comparative independence of the Namibian judiciary, it seems as though Namibian citizens still perceive judges and magistrates to be involved in corruption at some level.<sup>61</sup> Reports (unverified) 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.<sup>62</sup> The Anti-Corruption Commission ("ACC"), mandated to combat and prevent corruption in Namibia, has previously been criticised in the Namibian press as being "largely toothless,"<sup>63</sup> and having "hopelessly failed to deal with high profile cases."<sup>64</sup> This illustrates a lack of public confidence in the judicial process and does nothing to assist with deterring individuals from committing wildlife crimes.

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57 MEFT (2021:6).

58 Nakuta / Chipepera (2014).

59 Jones (1999).

60 Heritage Foundation, 2016 Index of Economic Freedom, <http://heritage.org/index/country/namibia>.

61 See the GAN Business Anti-Corruption Portal, Namibia Corruption Report, at <https://www.gan-integrity.com/portal/country-profiles/namibia/>, accessed 12 June 2021.

62 See Vries (2008). "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".

63 See <https://www.namibiansun.com/news/unshackling-the-toothless-acc2019-11-15>, accessed 12 June 2021.

64 Kaure (2016).

#### 4.5 Communal Property Areas Need Improved Management

There are many issues with how Namibia's communal conservancies are managed. 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.' Most of the money that is earned by the conservancy, such as through tourism or hunting permits, does not go back into the community, leaving residents poor and struggling. Furthermore, trophy hunting, which is often cited as a critical revenue stream for conservancies, sends mixed signals about the sanctity of wildlife and who is allowed to kill protected species. As such, the conservancies have had fewer poaching incidents lately due to the tragic reason that much of the wildlife within them has already been killed. 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 willing partners to provide information on the whereabouts of game animals or even pull the trigger themselves.

### 5 Recommendations for Reforming the Legislative Framework

Recommendations for how to reform Namibia's legislative framework to address the key issues identified in Section 4 above and to effectively combat wildlife crimes are explained below.

#### 5.1 Beyond the Poacher: Prosecuting Criminals Higher Up the Chain

The NCO allows for a significant loophole that is being exploited to justify killing threatened and endangered species including elephants and rhinoceros. The provision allows a person to kill an animal even in a protected area if in defence of a person or livestock, an exception that is all too easily exploited. It is recommended that the defence may be used as follows:

No person shall, without the written authorisation 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 defence 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 24 hours of such killing, and
- (d) the entire animal is turned over to a conservation officer or the PRD within 24 hours of such killing.

(e) Each such incident must be investigated by the PRD within 48 hours and a report provided by the PRD to the Prosecutor General's Office and MET within seven (7) days setting forth the circumstances of the killing.

Under the above recommendation, the killing may only be done to protect a human from imminent death or bodily injury, and not to protect against the killing of livestock. In addition, specific reporting requirements, including notifying authorities within 24 hours, and that the entire animal be turned over to the State should be put in place.

The Anti Corruption Act No. 8 of 2003 (ACA) is also an important tool in the prevention of corruption in Namibia. The ACA seeks to achieve this in two ways: (1) it establishes the Anti-Corruption Commission, an "independent and impartial" body with wide ranging functions including to receive, investigate, and initiate investigations into corrupt practices; and (2) it provides a series of different corruption offences, including the corrupt giving/acceptance of gratification, bribery of public officials and fraudulent concealment of offences.

A number of issues remain with the ACA legislation. Often individuals fear victimisation and therefore do not report cases although they are aware of corrupt behaviour. According to the Namibia National Urban Corruption Perception Survey, undertaken by the ACC in 2011, 67.5% of respondents were aware of corrupt acts but did not report these.<sup>65</sup> When asked why, the most common response was for fear of victimisation (42.8%), with 15.9% stating that they did not know to whom to report the matter.<sup>66</sup> Where cases are brought, often these are hampered by a lack of resources and evidence. Out of 262 cases brought by the ACC to the Office of the Prosecutor General, 36 were not advanced due to a lack of evidence.<sup>67</sup> Making whistleblower protection legislation operational is critical.

Courts in Namibia recently criticised the definition of "corruptly" in the ACA as being "unduly vague." It is recommended that by replacing the current definition with the definition of "corruptly" from the United States Code as used in the context of the obstruction of justice. "Corruptly" is defined there 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."<sup>68</sup> Also useful is the United States Foreign Corrupt Practices Act which stipulates: "This also includes making an offer, payment, promise, or gift with the intention to induce the recipient to misuse his official position."

The ACA also omits key elements which, if included, would bolster its effectiveness. These include provisions concerning the confiscation of proceeds from corruption and the holding of unexplained assets. The ACA could also contain a system for cataloguing facilitation payments and declaring assets received by public officials,

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65 ACC (2011:35).

66 Ibid.

67 Tjirera / Hopwood (2011).

68 18 U.S.C. § 1515(b).

together with provisions concerning compulsory training of the ACC and clear avenues of complaint, should members of the public wish to voice complaints about the ACC.

In addition, harmonisation 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/wildlife crimes. This could be achieved through draft legislation that imposes stricter penalties for wildlife crimes, which increases penalties if a person has also engaged in corruption or organised crime.

With regard to recommendations to strengthen POCA, 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 is 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 Wildlife Trade Act, 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 offences. It may also be used to compensate farmers for the killing of livestock by wildlife at the discretion of the Ministry or the Court.

Further, the Namibian prosecution should consider the possibility of introducing plea bargaining into its criminal judicial system. These provisions state that an admission of guilt is sufficient to convict a defendant without the need for a trial. The prosecutor may 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. This will increase enforcement of wildlife crimes and lead to more convictions, and it will also thereby increase deterrence. In addition, plea bargaining will reduce the strain on judicial resources as a result of increased wildlife crimes arrests and prosecutions. Allowing defendants to plead guilty in lieu of a trial will save a significant amount of time and resources.

## 5.2 Improving Coordination in, and Effectiveness of, the Prosecution of Wildlife Crimes

To improve the efficacy of prosecuting wildlife crimes, it is recommended that some amendments to Namibia's Criminal Procedure Act are needed, specifically the provisions related to bail and to searches and seizures. Regarding bail for wildlife offences, amending the law to state that the accused should be detained and denied bail until he

has either been charged with the offence in question or the charges against him have been dropped. If the accused is nonetheless granted bail, provisions stating that conditions should be placed on the grant of bail, including not being allowed to possess a firearm or communicate with people whom the court determines may be connected to wildlife crimes. It is recommended that a provision prohibiting the posting of bail by someone who is believed to be involved in wildlife crimes be put in place.

With regard to seizure of wildlife products by a police officer, a provision stating that the wildlife product must be reported to the Protected Resources Division and Office of the Prosecutor General within 48 hours, and the item must be properly logged within 48 hours is recommended. The same requirement applies to any wildlife product seized by the State if the wildlife product relates to a wildlife offence or is a wildlife product relating to a specially protected species or protected species.

Namibia could consider establishing an environmental court and special wildlife crimes prosecutors. Namibia's cultural and legal history make it uniquely suited to take this bold and promising step to create a specialised court to specifically address wildlife crime cases. This would alleviate the burden on Magistrates' Court 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 a timely manner. In addition, under this approach, wildlife crimes training can focus on the judges who will sit on the environmental court and special wildlife crimes prosecutors, ultimately requiring fewer resources. Further, by requiring electronic and print publication of decisions by an environmental court, the public's awareness of prosecutions related to wildlife crimes will be greatly enhanced, which may increase the deterrent effect. Establishing special environmental prosecutors is also a key procedural reform to ensure compliance with access to environmental justice and redress. They could ensure that wildlife crimes are treated seriously and effectively, and also build critical relationships with law enforcement and legal counsel.

Lastly, Namibia should increase its 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 elephant ivory. Improving these international efforts is extremely important and highly recommended to better prosecute and deter wildlife crimes.

## 6 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 years, however, there has been a startling increase in the prevalence of poaching in Namibia. Despite this increase in poaching incidents, prosecution of these wildlife crimes has not significantly increased. This is due, in part,

to gaps in Namibia's current legislative and enforcement framework, an overburdening of the judiciary, and ineffective management of communal property areas. This chapter's specific recommendations aim to repair these gaps so that Namibia may more effectively protect the wildlife that it has so long cherished.

