

**Unearthing the Underlying Factors that limit the Enforcement of the Legal Framework  
relating to the Protection of Wildlife Resources in Kenya**

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## DECLARATION

I, **VALERIE KARUWA WABUNGO**, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....  
Date: 27/03/17 .....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: .....  
Jerusha Owino Asin

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## **DEDICATION**

To God, for His grace and love, and to my parents and siblings for their support and inspiration during this journey.

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## **LIST OF ABBREVIATIONS**

1. CITES - Convention on International Trade in Endangered Species of Wild Fauna and Flora.
2. ETIS - Elephant Trade Information System.
3. IFAW - International Fund for Animal Welfare.
4. INTERPOL - International Criminal Police Organization.
5. IPZ - Intensive Protection Zone.
6. KWS - Kenya Wildlife Services.
7. NIAPs - National Ivory Action Plans.
8. ODPP - Office of the Director of Public Prosecution.
9. SCP - Situational Crime Prevention.
10. WCPU - Wildlife Crime Prosecution Unit.

## LIST OF CASES

1. *Republic v Henry Thurairara Mabraki (2014)* CM. Cr. C. No. 701.
2. *Republic v Feisal Mohamed Ali in (2014)* CM. Cr. C. No. 1098

## **LIST OF STATUTES, POLICY DOCUMENTS AND INTERNATIONAL INSTRUMENTS**

1. 2011–2020 Strategy for Conservation and Management of the Elephant.
2. 2011–2020 Strategy for Conservation and Management of the Elephant, 2011.
3. Conservation and Management Strategy for the Black Rhino in Kenya, 5 ed., 2012.
4. Constitution of Kenya, 2010.
5. Proceeds of Crime and Anti-Money Laundering Act No. 9 of 200.
6. Sessional Paper No. 3 of 1975: Statement on Future Wildlife Management Policy in Kenya.
7. The Prevention of Organized Crimes Act of 2010.
8. United Nations Convention against Transnational Organized Crime, 15 November 2000, A/RES/55/25.
9. Wildlife (Conservation and Management) Act of 1976.
10. Wildlife (Conservation and Management) Act of 1989.

## **ABSTRACT**

Wildlife resources in Kenya contribute a large percentage of the country's economy and are considered a sense of pride for many African countries, including Kenya. However, our wildlife resources are under threat following rampant poaching activities that are depleting these resources. Kenya is subject to being a transit country for the illegal transportation and subsequent exportation of the illegal products that result from poaching. Despite the advancements made in improving the legal framework relating to the protection of wildlife resources, Kenya is still considered to be a threat to the conservation and management of these resources.

This research seeks to analyze why the implementation of the Wildlife (Conservation and Management) Act of 2013 is limited. This involves investigating on any underlying factors that surround wildlife related crimes, particularly in relation to the enforcement of current laws relating to the protection of Kenya's wildlife resources. It shall seek to provide plausible recommendations that can improve the manner in which the existing legal framework may be improved in a bid to effectively combat and deter corruption from contributing to the erosion of our wildlife resources.

## CHAPTER 1: RESEARCH PROPOSAL

### 1.1. Background

Africa's wildlife population, is part of what makes the continent unique. One of the major foreign exchange earners in Kenya is the tourism sector, due to her diverse flora and fauna that attracts a vast number of tourists.<sup>1</sup> Moreover, like any other African country, Kenya largely relies on her natural resources as a source of livelihood.<sup>2</sup> It is the basis for a tourist trade that comprises of a key part of many national economies.<sup>3</sup> However, deteriorating living conditions and unregulated human activities have threatened the peaceful existence of particular flora and fauna.<sup>4</sup> They consequently have far reaching effects not only nationally but also internationally.

Historically, wildlife crimes have generally been treated as petty offences carried out by subsistence farmers and occasionally small players in search of subsequent incomes.<sup>5</sup> Over the past recent years, wildlife crimes have been on a steady rise.<sup>6</sup> Various studies have shown that the poaching and trafficking of wildlife and their trophies respectively is fueled predominantly by corruption.<sup>7</sup> Corruption is not only an enabler of the illicit trafficking of wildlife trophies, but also a facilitator of poaching as well as a tool in which transactions between the supply, transit and demand of the illegal products is furthered.<sup>8</sup>

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<sup>1</sup> Magical Kenya, the official website of the Kenya Tourism Board, recognizes wildlife as one of Kenya's top tourist attractions. See more here: <<http://www.magicalkenya.com/what-to-see/>> last accessed on 11<sup>th</sup> November 2016.

<sup>2</sup> David K, 'The Role of the Kenya Wildlife Service in Protecting Kenya's Wildlife' *The George Wright Forum* (2012), 74.

<sup>3</sup> Lucy E, *The Economics of Tourism, and Wildlife Conservation in Africa*, African Wildlife Foundation Discussion Paper No. 4 (ACE-DP-4), 1997, 1.

<sup>4</sup> *Impact of Tourism on Wildlife Conservation*, INTOSAI Working Group on Environmental Auditing, July 2003 at 6.

<sup>5</sup> Akella S A, Crawford A, *Dismantling Wildlife Crime: Executive Summary*, TRAFFIC, 2012, 2.

<sup>6</sup> Martini M, *Wildlife Crime and Corruption*, U4 Anti-corruption Resource Center, 15 February 2013, 2.

<sup>7</sup> *World Wildlife Crime Report, Trafficking in Protected Species*, United Nations Office on Drugs and Crime, 2016, 20.

<sup>8</sup> Martini M, *Wildlife Crime and Corruption - U4 Expert Answers*, Anti-Corruption Resource Centre and Transparency International, No. 367, 2013, 2.

The porosity of the ports in Mombasa have seen large amounts of illegal raw ivory tusks being seized every year.<sup>9</sup> Following the high demand of Ivory, which is traditionally recognized as a precious commodity and a luxury good used to display one's prestige,<sup>10</sup> the major importers of illegally obtained ivory tusks are countries in Asia such as Malaysia and China.<sup>11</sup> These exports are further promoted due to the existing corruption that thrives at this border point.

Over and above the decaying state of officials and agencies tasked with the mandate of ensuring ivory trafficking is at a low, if not non-existent, the evident inconsistencies surrounding investigations, prosecutions and subsequent sentencing of matters relating to wildlife related crimes, also contribute to the lack of proper enforcement of wildlife related crimes in Kenya. Inconclusive investigations, missing or incomplete case files, missing evidence and failure of the prosecution to prove a tangible case as well as poor case management are some of the challenges that investigators and prosecutors are faced with.<sup>12</sup>

It is the mandate of the magistrate courts to hear and determine cases in relation to wildlife crimes. These courts are subject to certain factors such as their proximity to the key conservation areas and ports in which the trafficking of these trophies occur.<sup>13</sup> Statistics on cases relating to wildlife crimes from the Judiciary in Kenya, provide alarming information on the manner in which these cases are dealt with.

The Wildlife Conservation and Management Act gives the Kenya Wildlife Services (KWS) the mandate of protecting wildlife and its habitat.<sup>14</sup> This includes the power to not only investigate but also to enforce the wildlife laws and regulations provided in the Act.<sup>15</sup> However, the advancement in which these crimes are committed prove to be too big of a task

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<sup>9</sup> United Nations Office on Drugs and Crime, *World Wildlife Crime Report, Trafficking in Protected Species*, 2016, 44.

<sup>10</sup> United Nations Office on Drugs and Crime, *World Wildlife Crime Report, Trafficking in Protected Species*, 2016, 41. The ivory may be fashioned into jewelry, décor items, or objects of art, with the craftsmanship serving as the vehicle for the precious goods to be conspicuously displayed.

<sup>11</sup> United Nations Office on Drugs and Crime, *World Wildlife Crime Report, Trafficking in Protected Species*, 2016, 44.

<sup>12</sup> Kahumbu P. Levi Byamukama Mbuthia J. Drori O, *Scoping study on the prosecution of wildlife related crimes in Kenyan courts*, Wildlife Direct, 2014, 13.

<sup>13</sup> Kahumbu P. Levi Byamukama Mbuthia J. Drori O, *Scoping study on the prosecution of wildlife related crimes in Kenyan courts*, 5.

<sup>14</sup> Section 7 (a) (b), Wildlife Conservation and Management Act (2013).

<sup>15</sup> Section 67 & 110, Wildlife Conservation and Management Act (2013).

for Kenya Wildlife Service to handle. They lack the capacity and skill to not only investigate on wildlife crimes but also to prosecute on them, despite the efforts to have them officers of the service trained.<sup>16</sup>

There have been progressive but slow movements by the Judiciary to improve on this situation due to the establishment of the Office of the Director of Public Prosecution (ODPP) as per the new Constitution.<sup>17</sup> This office recently established a Wildlife Crimes Unit,<sup>18</sup> which enables the ODPP to prosecute offenders related to wildlife crimes under a wider scope of legislation such as the Prevention of Organized Crimes Act, Proceeds of Crime and<sup>19</sup> The Prevention of Terrorism Act.<sup>20</sup>

## **1.2.Statement of problem**

The recently amended Wildlife (Conservation and Management) Act of 2013 provides for a wide and comprehensive protection of our wildlife resources from illegal activities such as poaching. The implementation of these provisions, however, has been difficult due to underlying factors that limit their realization. These underlying factors are systematic as they relate to the related policies and regulations required to fully realize the provisions of this Act. A sound policy framework and the strengthening of the related laws is necessary to adequately ensure that the provisions of the Wildlife (Conservation and Management) Act is realized.

## **1.3.Justification of the study**

The national reserves that house Kenya's wildlife resources contribute to her tourism revenue which totals to 15% of Kenya's GDP in 2009,<sup>21</sup> with tourism revenue totaling to Kenya shillings 73.68 billion.<sup>22</sup> This major revenue earner, if not properly protected, may be under danger due to illegal activities such as poaching. The main legislation that offers such

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<sup>16</sup> The Judiciary of Kenya, *State of the Judiciary and the Administration of Justice*, 2012 – 2013, 89.

<sup>17</sup> *Article 157*, Constitution of Kenya (2010).

<sup>18</sup> <<http://www.odpp.go.ke/index.php/mediacentre/news/78-new-act-leads-to-reduction-in-wildlife-crimes.html>> last accessed 20<sup>th</sup> February, 2016.

<sup>19</sup> No. 9 of 2009.

<sup>20</sup> No. 30 of 2012.

<sup>21</sup> Ikiara M and Okech C, 'Impact of Tourism on Environment in Kenya: Status and Policy,' Kenya Institute for Public Policy Research and Analysis, Discussion Paper Number 19, 2002, 4.

<sup>22</sup> Republic of Kenya Ministry of Tourism and Wildlife, 'Tourism Performance Overview 2010, 2011' [http://www.tourism.go.ke/ministry.nsf/pages/facts\\_figures](http://www.tourism.go.ke/ministry.nsf/pages/facts_figures) last accessed on 3rd January 2017.

protections should also be accompanied with sufficient regulations and laws that assist in its implementation, in order to effectively deal with any underlying issues that may be hiding under the cracks. A risk that may arise due to inadequate laws and regulations that relate to the protection of wildlife resources could be corruption.

The failure to secure the implementation of the Wildlife Conservation and Management Act shall result to having a law that is working hard to protect something that is being eaten up and further affected by the inadequacy of other laws that are meant to contribute to the protection of our wildlife. There is therefore a need to investigate whether there are any underlying laws and regulations that affect the implementation of the Wildlife Conservation and Management Act, and therefore provide the necessary solutions to deal with them accordingly.

#### **1.4. Research objective**

The research shall investigate the legal framework in relation to wildlife crimes in Kenya, following the shift of dynamics on wildlife crimes and the consequences of that shift. It shall seek to identify any underlying issues that may be playing an active role in limiting the implementation of the legal framework effectively. It shall therefore seek to propose recommendations to help mitigate these underlying issues accordingly.

#### **1.5. Research questions**

The research shall seek to answer the following:

1. What are the emerging trends surrounding wildlife crimes in Kenya today?
2. Are there any underlying issues that contribute to the increase of wildlife related crimes, particularly in Eastern African and Kenya?
3. How can you effectively deal with these underlying issues in order to ensure the effectiveness of the current laws relating to wildlife crimes?

#### **1.6. Literature review**

There are various scholarly works and reports from internationally recognised organizations regarding wildlife crimes. They range from a review on the seriousness and impact of wildlife crimes to the judicial and legislative approaches that various countries that have taken in the fight against wildlife crimes. The literature review that shall guide this research shall take this

range in to account. Moreover, it shall be guided by the various scholars that critically analyze the rational choice theory in relation to criminology, with a focus on its assumptions and possible challenges.

Paula Kahumbu et al provides an insight on the prosecution of wildlife related crimes in Kenyan courts. Following their extensive research on a number of Kenyan cases on wildlife related crimes, they established that various underlying factors have contributed to the lack of proper investigation and prosecution of wildlife crimes in Kenya. Their research indicates an inconsistency in the judgements and subsequent penalties ordered by magistrates when hearing and determining wildlife related crimes. Moreover, following that only 4% of the cases their reviewed were convictions that resulted to a prison sentence, they concluded that there magistrates are not fully implementing the full force of the law that they are provided with.<sup>23</sup>

The lack of resources such as literature on this particular crime hinders the knowledge available to magistrates in relation to the powers and insight to the gravity of the situation on the ground.<sup>24</sup> To add on to that, there is also leniency with regards to the penalties issued by magistrates on wildlife related crimes that are presented before them.<sup>25</sup> As a result, this encourages the offenders to plead guilty at first appearance, before or during the trial, since the value of the business that they are engaged in trumps the petty penalties that they are given in the courts. Moreover, poor tracking of these penalties adds salt on to the wound since it becomes difficult to point out repeat offenders.<sup>26</sup> This research shall seek to delve in further on the rationale that judges' use in determining these cases, and more so on that relating to the penalties that they provide.

An in-depth assessment of the situation on the ground paints a picture of the underlying factors that hide in the shadows, silently contributing to the continuance of wildlife crimes. Various

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<sup>23</sup> Kahumbu P. Levi Byamukama Mbuthia J. Drori O, *Scoping study on the prosecution of wildlife related crimes in Kenyan courts* 16.

<sup>24</sup> Kahumbu P. Levi Byamukama Mbuthia J. Drori O, *Scoping study on the prosecution of wildlife related crimes in Kenyan courts*, 17.

<sup>25</sup> Kahumbu P. Levi Byamukama Mbuthia J. Drori O, *Scoping study on the prosecution of wildlife related crimes in Kenyan courts*, 16.

<sup>26</sup> Kahumbu P. Levi Byamukama Mbuthia J. Drori O, *Scoping study on the prosecution of wildlife related crimes in Kenyan courts*, Wildlife Direct, 2014.

authors have provided literature on the current state of wildlife related crimes in Kenya, and the subsequent effects of the same on the economy and security of a country.

Anita Sundari Akella and Crawford Allan have written on the global crisis relating to wildlife crimes and the changing face of this particular crime. They provide an in depth analysis of how wildlife related crimes have shifted from low level offences to transnational organized crimes and corruption.<sup>27</sup> As a result, various collateral threats are posed. They include extinction of species such as the white rhino, security threats both on a national and international level.<sup>28</sup>

They also bring in the issue of the effectiveness of enforcement efforts in relation to wildlife crimes. They provide persistent challenges that undermine the effectiveness of this enforcement such as lack of political will and interest in the matter, lack of resources necessary to equip the necessary enforcement systems to function effectively, lack of capacity in relation to investigators, prosecutors and magistrates as well as lack of transparency as a result of the corrupt dealings surrounding the enforcement of wildlife related crimes and finally lack of performance training<sup>29</sup> as provided for in Paula Kahumbu's study.<sup>30</sup> This research therefore seeks to further emphasize on the points brought out in this article, particularly on the shift of dynamics on wildlife related crimes and the consequences of that shift.

A report by the International Fund for Animal Welfare (IFAW) provides further insight on the gravity of the situation surrounding and relating to wildlife related crimes with an effort to fully understand the true nature of wildlife crimes around the world. The research shall seek to further relate this article to the situation in Kenya, particularly on the aspect of wildlife crimes being a low risk business for the criminals involved in it.<sup>31</sup>

The UNODC<sup>32</sup> provides a threat assessment of transnational organized crimes in a global context. This report provides an analysis of the nature of the market and how the trafficking of

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<sup>27</sup> Akella S A. Crawford A, *Dismantling Wildlife Crime: Executive Summary*, 2.

<sup>28</sup> Akella S A. Crawford A, *Dismantling Wildlife Crime: Executive Summary*, 4.

<sup>29</sup> Akella S A. Crawford A, *Dismantling Wildlife Crime: Executive Summary*, 8.

<sup>30</sup> Kahumbu P. Levi Byamukama Mbuthia J. Drori O, *Scoping study on the prosecution of wildlife related crimes in Kenyan courts*, 16.

<sup>31</sup> Marina R, Beth A, Paul T, 'Criminal Nature: The Global Security Implications of the Illegal Wildlife Trade,' 16.

<sup>32</sup> United Nations Office on Drugs and Crime.

wildlife trophies occur. Moreover, it provides empirical data as to the extent in which the poaching and trafficking occurs.

### **1.7. Theoretical framework**

This research paper shall be guided by the criminology theory known as the rational choice theory, which was advanced by Cornish and Clarke in 1986, which provides the rationale that offenders are rational beings that decide to commit an offence based on the assessment of the perceived risks, efforts and rewards of doing so.<sup>33</sup> This theory is further linked with the routine activities approach which assumes that for a criminal to commit an offence, the presence of the following factors is necessary; a motivated offender, the absence of a capable guardian and the existence of a suitable target.<sup>34</sup>

### **1.8. Hypothesis**

There are certain underlying issues that prohibit the effective enforcement of the current legal framework put in place to fight wildlife related crimes in Kenya.

### **1.9. Research methodology**

The method to be used to gather information for this paper will be through library resources, internet searches and report reviews. They will seek to analyse the seriousness of wildlife crimes and its effects in Kenya, as well as provide a platform to investigate the situation on the ground in relation to wildlife crimes.

### **1.10. Limitations**

The research will focus specifically on the elephant and rhino species due to the readily available data on them, however the overall conclusions shall reflect broadly in relation all endangered species that are vulnerable to wildlife crimes.

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<sup>33</sup> White R D, *Global Environmental Harm: Criminological Perspectives*, Cullompton, Devon: Willan Publishing 2010, 139.

<sup>34</sup> Grote U and Neubacher F, *Rural Crime in Developing Countries: Theoretical Framework, Empirical Findings, Research Needs*, ZEF Working Paper Series, ISSN 1864-6638, 2016, 9.

## **1.11. Chapter breakdown**

*Chapter 1* - This chapter consists of the research proposal. It outlines the objectives for the research as well as the research questions that the research seeks to answer. It also consists of the hypothesis that will guide the research.

*Chapter 2* – This chapter focuses on understanding and elaborating on the theoretical framework that will guide this research, which includes the Rational Choice theory and the Routine Activity approach.

*Chapter 3* - This chapter shall provide an in depth study on the history and current legislative framework that relate to wildlife crimes.

*Chapter 4* – This chapter shall analyze the underlying factors that contribute to the increase of wildlife related crimes and seek to investigate whether the existing legislations and policies put in place not only provide for mechanisms that relate specifically to the wildlife crimes, but also seek to tackle for the underlying factors that contribute to the proliferation of these crimes, either directly or indirectly.

*Chapter 5* – This final chapter shall provide an analysis of the findings from the research as well as the proposed recommendations.

## CHAPTER 2: THEORETICAL FRAMEWORK

### 2.1. Introduction

The starting point of the rational choice theory works on the assumption that offenders seek to benefit themselves by their criminal behavior, through the choices and decisions that they make, which are arrived at through the exercise of their rationality despite constraints such as those in time and ability as well as availability of relevant information.<sup>35</sup> This chapter seeks to further analyze this theory and by looking at its proponents and its opponents, as well as its key elements, it shall seek to understand whether a criminology approach to solving a social issue is a viable channel when dealing with the underlying issues surrounding wildlife crimes. This theory shall also be linked with the routine activities theory which assumes that for a criminal to commit an offence, the presence of the following factors is necessary; a motivated offender, the absence of a capable guardian and the existence of a suitable target.<sup>36</sup>

### 2.2. The rational choice theory

Initially a theory used to understand human behavior in the realm of economics and political science,<sup>37</sup> this theory has in the recent decades been used widely in other disciplines such as criminology. Derek Cornish and Ronald Clarke describe it as the influence of an offender's environment on their behavior, that is their lifestyles and motives, needs and inducements and the environment of instrumental action to achieve a particular goal, which is criminal in nature.<sup>38</sup>

The theory asserts that criminal behavior is purposive, whereby ones needs and desires drive them to take the necessary actions to achieve them, with the intention to benefit the doer of the actions.<sup>39</sup> In criminology, the offender partakes in particular actions with the intentions to benefit them, which are in line with their desires and needs. These desires to offend include,

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<sup>35</sup> Cornish D and Clarke R, *The Reasoning Criminal: Rational Choice Perspectives on Offending*, Transaction Publishers, 2014, 1.

<sup>36</sup> Grote U and Neubacher F, *Rural Crime in Developing Countries: Theoretical Framework, Empirical Findings, Research Needs*, ZEF Working Paper Series, ISSN 1864-6638, 2016, 9.

<sup>37</sup> Scott J, *Rational Choice Theory*, from Browning G, Halcli A, and Webster F, *Understanding Contemporary Society: Theories of The Present*, Sage Publications, 2000, 1.

<sup>38</sup> Cornish D and Clarke R, 'The Rational Choice Perspective' in Wortley R and Mazerolle G R, *Environmental Criminology and Crime Analysis*, Willan Publishers, London, 2008, 24.

<sup>39</sup> Cornish D and Clarke R, 'The Rational Choice Perspective', 25.

but are not limited to excitement, revenge, control, material goods, and sexual gratification among others. The economic opportunity that comes from wildlife crimes can trigger one's desires to partake in the illegal activities associated with wildlife crimes. This is due to the demand of the products that result from the poaching of wildlife such as ivory from elephants.<sup>40</sup>

Moreover, the theory advanced by Clarke and Cornish argue that criminal behavior is rational, whereby an offender will select the best available means to achieve their desired goals or desires. Indeed, the presumption of rationality in the decision making process is one of the underpinning explanations of human action, which is further echoed by Herrnstein who commented that "it comes close to serving as the fundamental principle of the behavioral sciences. No other well-articulated theory of behavior commands so large a following in so wide a range of disciplines."<sup>41</sup>

However, this presumption of rationality should not be confused with perfect rationality, whereby in criminology, the rationality is more limited and bounded.<sup>42</sup> The play of one's rationality is not usually in perfect circumstances, more so in relation to offenders who operate in very risky businesses, and whereby the potential costs and benefits are difficult to estimate in advance.<sup>43</sup> This is further topped by the different skills and experiences on the offender as well as time pressures. As a result, decisions that are taken in such situations end up being more satisfying rather than optimal, in that they are satisfactory and sufficient, but not perfect.<sup>44</sup> Persons who commit wildlife crimes, have over the years, become more sophisticated in their poaching activities<sup>45</sup> despite the high risks involved in the commission of these illegal acts, as per the new Wildlife Conservation and Management Act of 2013.

Decision making in relation to criminals is also crime specific. This asserts that specific offences bring particular to offenders and are consequently committed with specific motives

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<sup>40</sup> UN Chronicle, *Fighting Wildlife Trade in Kenya*, September 2014 <https://unchronicle.un.org/article/fighting-wildlife-trade-kenya> last accessed on 4th January 2017.

<sup>41</sup> Herrnstein R J, *Rational Choice Theory: Necessary but Not Sufficient*, American Psychologist, 356.

<sup>42</sup> This theory on rationality was advanced by Herbert Simon in his article: *A Behavioral Model of Rational Choice*, The Quarterly Journal of Economics, Vol. 69, MIT Press, 1955, 99-118.

<sup>43</sup> Cornish D and Clarke R, 'The Rational Choice Perspective', 25.

<sup>44</sup> Cornish D and Clarke R, 'The Rational Choice Perspective', 26.

<sup>45</sup> TRAFFIC, *Wildlife Protection and Trafficking Assessment in Kenya*, 13.

in mind.<sup>46</sup> Therefore, due to the different nature of various offences, “the factors weighed by the offenders and the variables that influence their decision will differ greatly with the nature of the offence.”<sup>47</sup> This is because the situational context of decision making and the information available varies greatly among different offences.<sup>48</sup>

The rational choice theory asserts the need to distinguish between the involvement in criminal activity and criminal events. These two situations refer to the two broad categories in which the potential offenders go through when making a decision.<sup>49</sup> Criminal involvement refers to the process through which individuals choose to become initially involved in a particular form of crime, to continue and to desist.<sup>50</sup> As a result, the process of arriving at a decision in each of these stages will differ as they are influenced by a different set of factors. Criminal events in this case refers to commission of a specific crime whereby it is concerned with the decisions made when preparing for, carrying out and concluding the commission of a particular type of crime.<sup>51</sup>

The distinction between the two categories of decisions is that involvement decisions extend over substantial periods of time and it requires a larger pool of information which may not all directly be related to the crime, whereas even decisions involve a much shorter process thus utilizing more narrow information which largely relate to immediate circumstances and situations.<sup>52</sup> Therefore there is a need to emphasize on the incentives of the rewards and punishments to the commission of a particular crime.

Following the emergence of this theory resulted to the development of a new form of crime prevention practice known as the Situational Crime Prevention (SCP).<sup>53</sup> This new practice focused on the situation of the crime as opposed to the circumstances. It is “the use of measures directed at highly specific forms of crime which involve the management, design or

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<sup>46</sup> Cornish D and Clarke R, ‘The Rational Choice Perspective’, 26.

<sup>47</sup> Cornish D and Clarke R, ‘The Rational Choice Perspective’, 27.

<sup>48</sup> Cornish D and Clarke R, *The Reasoning Criminal: Rational Choice Perspectives on Offending*, 2.

<sup>49</sup> Cornish D and Clarke R, ‘The Rational Choice Perspective’, 27.

<sup>50</sup> Cornish D and Clarke R, *The Reasoning Criminal: Rational Choice Perspectives on Offending*, 2.

<sup>51</sup> Cornish D and Clarke R, ‘The Rational Choice Perspective’, 27.

<sup>52</sup> Cornish D and Clarke R, *The Reasoning Criminal: Rational Choice Perspectives on Offending*, 3.

<sup>53</sup> Cornish D and Clarke R, ‘The Rational Choice Perspective’ 37.

manipulation of the immediate environment in which these crimes occur . . . so as to reduce the opportunities for these crimes.”<sup>54</sup>

It emphasized on immediate short-term, crime prevention strategies, rather than expensive, macro-level socio-political intervention.<sup>55</sup> SCP sought to reduce the risk of occurrence and the potential seriousness of criminal events’ by intervening in ‘those causes which the offender encounters, or seeks out, in the immediate circumstances of the criminal event.’<sup>56</sup> Therefore, SCP advocates sought to promote a more ‘crime-specific’ approach which created a greater emphasis on the situational factors which are held to be the most gullible to manipulation in a way that might reduce the occurrence of particular crime.<sup>57</sup>

### *Critique of the theory*

Critics argue that even though all assume that crime is the outcome of choice, they differ in their concept of what constitutes a “rational” choice, whereby extra emotional or irrational factors are ‘sometimes so powerful they seem to make traditional modes of rational decision making inconceivable.’<sup>58</sup> Therefore there are some decisions in relation to crimes that are arrived at irrationally, thus limiting the credibility of the theory. It is therefore necessary to include the role of emotions when expanding the rational choice perspective as they more often than not impact the perceived consequences of a violent criminal act.<sup>59</sup> Moreover, even when the decision maker rationally thinks of his options, some crimes are not rational.<sup>60</sup> Therefore, some crimes may be fueled by other functions such as emotions or by the lack of or blurriness of their rationality such as when in an intoxicated state. The rational choice theory, is said to

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<sup>54</sup> Hough J M, Clarke R and Mayhew P, *Introduction* from Clarke R and Mayhew P, *Designing Out Crime*, Her Majesty’s Stationery Office, London, 1980, 1.

<sup>55</sup> Hayward K, “Situational Crime Prevention and its Discontents: Rational Choice Theory versus the ‘Culture of Now’”, *Social Policy and Administration*, Kent University, 235.

<sup>56</sup> Ekblom P, *Situational crime prevention* from McLaughlin E and Muncie J, *The Sage Dictionary of Criminology*, Sage Publishers, London, 2006, 383.

<sup>57</sup> Hayward K, “Situational Crime Prevention and its Discontents: Rational Choice Theory versus the ‘Culture of Now’”, 235.

<sup>58</sup> Hayward K, “Situational Crime Prevention and its Discontents: Rational Choice Theory versus the ‘Culture of Now’”, 237.

<sup>59</sup> Ferrell, J, ‘Cultural criminology’, *Annual Review of Sociology*, 1999, 399.

<sup>60</sup> Cornish D and Clarke R, ‘The Rational Choice Perspective’, 41.

be necessary but not sufficient in that it fails as a description of actual behavior, “it tells us how we should behave in order to maximize reinforcement, not how we do behave.”<sup>61</sup>

### 2.3. The routine activity approach

This theory, usually linked with the rational choice theory,<sup>62</sup> concentrates on the circumstances whereby the most criminal activities require the convergence of three major factors, that is; likely offenders, suitable targets and the absence of capable guardians against a crime.<sup>63</sup> Therefore, the absence of one of these three factors is “sufficient to prevent the successful completion of a direct-predatory crime.”<sup>64</sup> This class of crime refers to illegal acts in which someone definitely and intentionally takes or damages the person or property of another.<sup>65</sup> This however does not ascertain the occurrence of a criminal activity but rather argues that the likelihood of an increase or decrease of a crime is based on the existence of these three elements.<sup>66</sup>

In relation to the first factor of the routine activity approach, Cohen and Felson state that each successfully completed violation minimally requires an offender with both criminal desires and the ability to carry them out.<sup>67</sup> Simple intent is not sufficient for a crime to occur; a motivated offender must be capable of carrying out his desires.<sup>68</sup> The theory works on the presumption that some members of society will be motivated toward criminal behavior and will seek to act on these motivations when opportunities arise. These opportunities can be as a result of silent factors that attract the offender to commit the said crime such as weak enforcement laws or rampant corruption that corrodes the effectiveness and credibility of legitimate legal frameworks.

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<sup>61</sup> Herrnstein R J, *Rational Choice Theory: Necessary but Not Sufficient*, 356.

<sup>62</sup> Grote U and Neubacher F, *Rural Crime in Developing Countries: Theoretical Framework, Empirical Findings, Research Needs*, 9.

<sup>63</sup> Cohen L and Felson M, ‘Social Change and Crime Rate Trends: A Routine Activity Approach,’ *American Sociological Review*, University of Illinois, 1979, 589.

<sup>64</sup> Cohen L and Felson M, ‘Social Change and Crime Rate Trends: A Routine Activity Approach,’ 589.

<sup>65</sup> Cohen L and Felson M, ‘Social Change and Crime Rate Trends: A Routine Activity Approach,’ 590.

<sup>66</sup> Branich N, *Routine Activity Theory*, University of California, Irvine [https://webfiles.uci.edu/ckubrin/Branich\\_Routine\\_Activities\\_Theory\\_Entry.pdf](https://webfiles.uci.edu/ckubrin/Branich_Routine_Activities_Theory_Entry.pdf) last accessed on 30th December 2016.

<sup>67</sup> Cohen L and Felson M, ‘Social Change and Crime Rate Trends: A Routine Activity Approach,’ 591.

<sup>68</sup> Branich N, *Routine Activity Theory*, University of California, Irvine [https://webfiles.uci.edu/ckubrin/Branich\\_Routine\\_Activities\\_Theory\\_Entry.pdf](https://webfiles.uci.edu/ckubrin/Branich_Routine_Activities_Theory_Entry.pdf) last accessed on 30th December 2016.

The suitability of a target to a particular crime is determined by a four part criteria; value of the target, their inertia, visibility and access.<sup>69</sup> Value here is relation to the offender's point of view, in which it should be in line with the said offender's desires. If a target is high in inertia, offenders are more often discouraged to attack it.<sup>70</sup> This however, can be countered if the visibility of the target is more evident to the offender and the access to it is available. This can be more in relation to lack of a guardian or legal enforcements or rather weak enforcement systems surrounding the target.

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<sup>69</sup> Cohen L and Felson M, 'Social Change and Crime Rate Trends: A Routine Activity Approach,' 590.

<sup>70</sup> The Routine Activity Approach as a General Crime Theory, *Criminological Perspectives: Essential Readings* 191.

## CHAPTER 3: THE HISTORICAL DEVELOPMENT OF THE LEGAL FRAMEWORK RELATING TO WILDLIFE CRIMES IN KENYA

### 3.1. Introduction

This chapter seeks to provide an in depth review of the legislation surrounding wildlife crimes and their changing dynamics over the years. It seeks to unfold the various elements that have actively played a role in the growth of this industry. The first part of this chapter will analyze the history of wildlife crimes with particular emphasis on the institutions and legislation that were in place at the time. The second part will analyze the current legislative framework on wildlife related crimes.

### 3.2. Historical legislative background

#### *a. Pre-colonial ordinances*

The earliest form of conservation of wildlife can be dated to 1898 when Kenya became a British Protectorate. At that time, the laws mainly dealt with the regulation of hunting, hunting methods and trade of wildlife with some endangered species being fully protected.<sup>71</sup> For example, the Proclamation Order of 1917, introduced hunting permits and licenses which were to be issued on payment of a fee. This later resulted to the establishment of a Game Department by the British government, whose main objective was to administer game reserves, enforce the said hunting regulations and protect settler farmer communities' property and crops from wildlife.<sup>72</sup>

These ordinances were enacted during the colonial times in order to regulate the access to utilization of wildlife. The Game Preservation Proclamation of 1920 prevented 'natives' from being granted a game license of any nature without express permission from the Governor.<sup>73</sup> The Game Ordinance of 1921 put tighter controls on game hunting and expanded wildlife reserves.<sup>74</sup> However, in 1945, there were policy shifts which focused on protection of wildlife through the protected area concept and the vesting of all wildlife resources in the government,

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<sup>71</sup> *The National Wildlife Conservation and Management Policy*, Ministry of Forest and Wildlife, (2012) 10.

<sup>72</sup> *The National Wildlife Conservation and Management Policy*, Ministry of Forest and Wildlife, (2012) 10.

<sup>73</sup> MacKenzie J M, *The Empire of Nature: Hunting, Conservation and British Imperialism*, Manchester University Press, 1997, 312.

<sup>74</sup> *Annual Colonial Reports for 1921*, Colony and Protectorate of Kenya, His Majesty's Stationery Office, 1923, 28.

hence the promulgation of the Royal National Parks of Kenya Ordinance<sup>75</sup> which provided for the establishment of national parks. For the first time, the colonial government started addressing wildlife management issues from the point of view of wildlife security.

*b. Sessional Paper No. 3 of 1975*

After independence, the first policy with specific focus on wildlife conservation and management was published under the name Statement on Future Wildlife Management Policy in Kenya - Sessional Paper No. 3 of 1975.<sup>76</sup> This was as a result of the proliferation of diminished wildlife resources in the country. It emphasized on the role of the government to generally assist in the problem of animal control in instances of wildlife impinging adversely on human life and property, as well as the need to minimize depredations by wildlife on agricultural land.<sup>77</sup>

Despite all this, there was a lack of the policy mentioning anything on the need to preserve and protect the wildlife from illegal poaching and selling of their trophies for profits. The reason behind this lacuna was because in that period of time, the predominant threat to wildlife was its conflict with humans, which was further highlighted in the paper whereby it emphasized on the need to promote an integrated approach to wildlife conservation and management in order to minimize on the said conflict.<sup>78</sup>

*c. The Wildlife (Conservation and Management) Act of 1976*

This Act<sup>79</sup> was enacted in order to implement the findings and recommendations of the above-mentioned policy paper. This was the first legislation enacted by the Kenyan government post-independence that specifically dealt with the conservation and management of wildlife resources in Kenya. One of the main features of the Act was the formation of the Wildlife

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<sup>75</sup> No. 9 of 1945.

<sup>76</sup> Republic of Kenya, *Statement on Future Wildlife Management Policy in Kenya*, Sessional Paper No. 3, 1975.

<sup>77</sup> Mbote P K, *Land Tenure, Land Use and Sustainability in Kenya: Towards Innovative use of Property Rights in Wildlife Management*, IELRC Working paper, 2005, 6.

<sup>78</sup> *Lifting the Siege: Securing Kenya's Wildlife*, Taskforce on Wildlife Security, Ministry of Environment, Water and Natural Resources, 2014, 2.

<sup>79</sup> CAP 376.

Conservation and Management Department,<sup>80</sup> whose main mandate was to manage the wildlife resources in Kenya. Notwithstanding this landmark legislation, there was a large surge in the illegal killing of wildlife species on a global scale, particularly the Elephants and Rhinos. This was not only taking place in other parts of the world but especially in Kenya, due to the soaring rise of the value of Ivory.<sup>81</sup> As a result of this proliferation in the crimes committed against the wildlife resources, the Act was later amended in 1989 which established the Kenya Wildlife Service (KWS).<sup>82</sup> This service replaced the Wildlife Fund Trustees in the formerly repealed Act, and was tasked with the mandate of promoting and preserving wildlife resources through conservation and management.<sup>83</sup>

### 3.3. Current legislation

It was not until the promulgation of her constitution in 2010 that Kenya sought to review the Wildlife (Conservation and Management) Act of 1989. This was due to the recognition of the importance of wildlife resources to her economy as is illustrated in the preamble of the Constitution which states “... Respectful the environment, which is our heritage, and determined to sustain it for the benefit of future generations ...” As a result the said act was amended in 2013 and provided for stiffer penalties as a response to the emerging sophisticated trends surrounding poaching threats in Kenya.<sup>84</sup>

The new amendments in the 2013 Act emphasize and strengthen the mandate of the KWS to protect, conserve for sustainable use and management of wildlife in Kenya.<sup>85</sup> Through the amendments, the offences have been increased to include certain offences such as those relating to licenses and permits,<sup>86</sup> endangered and threatened species,<sup>87</sup> trophies and trophy

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<sup>80</sup> This was an amalgamation of the Game Department which was established by the colonial administration in 1907 and the Kenya National Parks. Read more here: *Lifting the Siege: Securing Kenya's Wildlife*, Taskforce on Wildlife Security, Ministry of Environment, Water and Natural Resources, 2014, 2.

<sup>81</sup> Otuoma J, “The National Wildlife Conservation and Management Policy” International Livestock Research Institute, LUCID Project Working Paper 39, 2004, 5\_ [http://www.lucideastafrica.org/publications/Otuoma\\_LUCID\\_WP39.pdf](http://www.lucideastafrica.org/publications/Otuoma_LUCID_WP39.pdf) on 25<sup>th</sup> December 2016.

<sup>82</sup> *Section 3 (1)*, Wildlife (Conservation and Management) Act, 1989.

<sup>83</sup> *Section 3A*, Wildlife (Conservation and Management) Act, 1989.

<sup>84</sup> For instance, *Section 92*, The Wildlife Conservation and Management Act, 2013, provides for the offence relating to endangered and threatened species, which is a fine of not less than 20 million Kenya shillings or life imprisonment or both.

<sup>85</sup> *Section 7*, Wildlife Conservation and Management Act, 2013.

<sup>86</sup> *Section 91*, Wildlife Conservation and Management Act, 2013.

<sup>87</sup> *Section 92*, Wildlife Conservation and Management Act, 2013.

dealing,<sup>88</sup> importing and exporting wildlife species,<sup>89</sup> which, among others in the Acts, apply to both individuals and body corporates.<sup>90</sup> Over and above these offences, the penalties attached to them are more stringent, thus seeking to completely deter offenders from committing the said offences.

With the new Act came the establishment of the Office of the Director of Public Prosecution (ODPP) Wildlife Crime Prosecution Unit (WCPU) that enables them to apply them outside the ambit of the Wildlife Conservation and Management Act.<sup>91</sup> This was due to the evident incapacity of the KWS since they only had the power to prosecute offenders under the Wildlife Conservation and Management Act. This gives the ODPP a broader base of law to rely on since they can bring matters relating to wildlife crimes against offenders under other legislations such as the Proceeds of Crime and Anti-Money Laundering Act No. 9 of 2009 which recognizes offences such as money laundering,<sup>92</sup> corruption and fraud.<sup>93</sup> These offences are key contributors to the commission of wildlife crimes in Kenya.<sup>94</sup> These offences also have penalties attached to them in the said Act. The Prevention of Organized Crimes Act of 2010 also applies following the recent shift and recognition of wildlife crimes as organized crimes.<sup>95</sup>

Following Article 2 (6) of the Constitution of Kenya, whereby any treaty or convention ratified by Kenya shall form part of the laws of the land, Kenya ratified the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) in 1987.<sup>96</sup> This is an international agreement between states whose aim is to ensure that the international trade of wildlife resources, which includes the flora and fauna, does not threaten their survival.<sup>97</sup> This is founded on the basis of the need to foster cooperation between states that often engage in

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<sup>88</sup> Section 95, Wildlife Conservation and Management Act, 2013.

<sup>89</sup> Section 99, Wildlife Conservation and Management Act, 2013.

<sup>90</sup> Section 103 (1), Wildlife Conservation and Management Act, 2013.

<sup>91</sup> Section 107, Wildlife Conservation and Management Act, 2013.

<sup>92</sup> Section 3, Proceeds of Crime and Anti-Money Laundering Act No. 9 of 2009.

<sup>93</sup> Section 48, Proceeds of Crime and Anti-Money Laundering Act No. 9 of 2009.

<sup>94</sup> Wildlife Direct, *Outcome of Court Trials in the First Two Years of Implementation of the Wildlife Conservation & Management Act 2013*, 2016, 21-22.

<sup>95</sup> Chapter 4 of this paper provides a comprehensive understanding of what an organized crimes consists of.

<sup>96</sup> CITES List of Contracting Parties, <https://cites.org/eng/disc/parties/chronolo.php> last accessed on 23rd December 2016.

<sup>97</sup> Read more here: <https://cites.org/eng/disc/what.php> last accessed on 23rd December 2016.

cross border trade as well as the need to regulate such trades so as to safeguard certain species from over-exploitation.

CITES has been actively involved in Kenya's move towards curbing wildlife crimes in the country. Kenya has been marked as a party of "primary concern" due to its role as a source, transit and or destination country of illegally traded ivory.<sup>98</sup> This means that Kenya, based on the Elephant Trade Information System (ETIS) which is a tool that analyses ivory seizure data, is required to prepare National Ivory Action Plans (NIAPs) due to the need for urgency and targeted actions in order to reduce the illegal trade in ivory, with time frames, deliverables and milestones.<sup>99</sup> Following this ranking Kenya has taken drastic measures in response by issuing its NIAPs over the years.

The National Ivory Action Plan of 2013 outlines 14 actions in which Kenya can control elephant poaching and illegal wildlife trade,<sup>100</sup> which included enacting ivory legislation and regulations, scaling up enforcement actions, investigations and national interagency collaboration and co-ordination (including sensitizing the judiciary), strengthening international and regional wildlife enforcement collaboration, engaging in outreach, public awareness and education and strengthening national reporting to the CITES Secretariat and Standing Committee.<sup>101</sup> These actions were commended by the CITES Scientific Committee, however, despite the evident progress, large volumes of ivory have continued to evade Customs control and successfully move out of Mombasa to international markets.

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<sup>98</sup> Read more here: CITES, Sixty-seventh meeting of the Standing Committee Johannesburg (South Africa), 23 September 2016 <https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-24-R1.pdf> last accessed on 23rd December 2016.

<sup>99</sup> CITES, Sixty-seventh meeting of the Standing Committee Johannesburg (South Africa), 23 September 2016 <https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-24-R1.pdf> 2.

<sup>100</sup> CITES, *Interpretation and implementation of the Convention Species trade and conservation Elephants National Ivory Action Plans*, Sixty-fifth meeting of the Standing Committee Geneva (Switzerland), 7-11 July 2014, 15 [https://cites.org/sites/default/files/eng/com/sc/65/E-SC65-42-02\\_1.pdf](https://cites.org/sites/default/files/eng/com/sc/65/E-SC65-42-02_1.pdf) last accessed on 23rd December 2016.

<sup>101</sup> TRAFFIC, *Wildlife Protection and Trafficking Assessment in Kenya*, 37.

## **CHAPTER 4: ANALYSIS OF THE UNDERLYING FACTORS THAT CONTRIBUTE TO THE PROLIFERATION OF WILDLIFE CRIMES**

### **4.1.Introduction**

Following the above analysis of the legislative framework surrounding wildlife crimes in Kenya, this chapter shall seek to unearth the underlying factors that contribute to the proliferation of wildlife crimes in Kenya. The first part of this chapter shall focus on the current situation on the ground relating to wildlife crimes in Kenya and highlight the emerging trends surrounding this particular crime. The second part shall then provide an in depth analysis of some of the major underlying factors that exacerbate the problem of poaching and illegal wildlife trade in Kenya. This chapter shall seek to show that despite the commendable advancements in the legal framework, there are silent issues at play in the shadows that are yet to be dealt with in this fight against wildlife crimes, thus contributing to the increase of wildlife trophies and contraband escaping from Kenyan borders.

### **4.2.The situation on the ground**

#### *a. Transnational wildlife crimes*

An organized crime occurs when three or more persons who operate in a structured group or network, are repeatedly involved in the commission of serious crime for profit.<sup>102</sup> Such a crime becomes transnational in nature if;<sup>103</sup>

4. It is committed in more than one state;
5. It is committed in one state, but a substantial part of its planning or perpetration takes place in another state;
6. It is committed in one state, but involves a criminal group that engages in criminal activities in more than one state;
7. It is committed in one state, but has substantial effects in another state.

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<sup>102</sup> Article 2 (a), *United Nations Convention against Transnational Organized Crime*, 15 November 2000, A/RES/55/25.

<sup>103</sup> Article 3 (2), *United Nations Convention against Transnational Organized Crime*.

It is important to note that for a crime to be deemed organized in nature, any criminal activity that is profit-motivated and serious<sup>104</sup> in nature will suffice.

In relation to wildlife crimes, majority of it is committed across borders whereby the poaching of the animal itself occurs in one country and the transportation and consequent illegal sale of their trophies occur in another country.<sup>105</sup> For instance, according to statistics, between 2002 and 2010, the price of ivory increased eighteen-fold from about \$100 per kilogram to \$1,800<sup>106</sup> fueled mainly due to the proliferation of their demand in Asia.<sup>107</sup> In order to meet this demand, the poaching of wildlife in Kenya increased accordingly whereby it was reported that 247 tusks from 123 Elephants were seized in Thailand following their smuggling from Kenya.<sup>108</sup>

The penalties in relation to specific wildlife crimes in Kenya have become more stringent following the proliferation of the crime. Following the recent amendments to the Wildlife (Conservation and Management) Act of 2013, fines have increased to up to twenty million Kenya shillings as well as life imprisonment sentences.<sup>109</sup> Following this premise and illustration, among others, wildlife crimes fulfil the criteria of being labelled a transnational organized crime.

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<sup>104</sup> Serious crime here means conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty. Article 2, *United Nations Convention against Transnational Organized Crime*.

<sup>105</sup> Mulqueeny K K and Cordon F J J, 'Symposium On Combating Wildlife Crime Securing Enforcement, Ensuring Justice, And Upholding The Rule Of Law,' Mandaluyong City, Philippines: Asian Development Bank, 2014, 27.

<sup>106</sup> Straziuso J, Casey M, Foreman W, *Ivory Trade Threatens African Elephant*, Associated Press, May 15, 2010, [http://www.nbcnews.com/id/37167109/ns/world\\_news-world\\_environment/#.WHSvVfl97IU](http://www.nbcnews.com/id/37167109/ns/world_news-world_environment/#.WHSvVfl97IU) last accessed on 23rd December 2016.

<sup>107</sup> Gastrow P, *Termites at Work: Transnational Organized Crime and State Erosion in Kenya*, International Peace Institute, 2011, 5.

<sup>108</sup> Ombati C, *Sh274 Million Ivory Confiscated in Thailand in Largest Seizure Ever*, The Standard, April 2, 2011, <https://www.standardmedia.co.ke/business/article/2000032412/sh274-million-ivory-confiscated-in-thailand-in-largest-seizure-ever> last accessed 28th December 2016.

<sup>109</sup> See: *Section 96*, Wildlife Conservation and Management Act, 2013.

*b. Poaching and trafficking in Kenya*

The main species often affected by the wildlife crimes in Kenya are elephants and rhinos.<sup>110</sup> The increase in their deaths has increased over the years due to the increase of their demands in destination countries, more specifically Asian countries.<sup>111</sup>

In relation to the poaching of elephants, the elephant species are a cause of conservation concern due to their numbers reducing dramatically over the last 100 years mainly as a consequence of trade in ivory.<sup>112</sup> Following recent statistics on the population of elephants in Kenya, as of 2014, of 32520 elephants, a whopping 164 have been killed as a result of poaching for their meat and tusks, mainly from the savannah lands.<sup>113</sup> The 2011–2020 Strategy for Conservation and Management of the Elephant provides an elaborate analysis of the poaching situation in Kenya, more specifically in relation to the poaching of her elephants. It seeks to secure a future for elephants and their habitats, based on peaceful and beneficial co-existence with people now and for generations yet to come.<sup>114</sup>

In relation to the Rhinoceros, their number has decimated over the years due to unregulated legal hunting and rampant poaching. Despite efforts to increase the population of the black rhino in Africa, currently only 4 countries in Africa accommodate for 96% of the remaining black rhinos; South Africa, Namibia, Kenya and Zimbabwe,<sup>115</sup> thus making them critical global actors in securing the survival of this species.

As of 2014, Kenya has the third largest population of rhinos following a robust increase in the population of the species since 1992.<sup>116</sup> They are currently being housed in 16 government and private sanctuaries, one Intensive Protection Zone (IPZ) at Tsavo West National Park and three free ranging populations whose dispersal areas include community lands.<sup>117</sup> Kenya Wildlife

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<sup>110</sup> This is subject to the general statistics regarding the flora and fauna that are considered vulnerable and endangered species in Kenya. See a summary of the threatened species of flora and fauna in Kenya here: TRAFFIC, *Wildlife Protection and Trafficking Assessment in Kenya*, 4.

<sup>111</sup> UNODC, *World Wildlife Crime Report Trafficking in Protected Species*, 2016, 41.

<sup>112</sup> Kenya Wildlife Service, *2011–2020 Strategy for Conservation and Management of the Elephant*, 2011, 21.

<sup>113</sup> TRAFFIC, *Wildlife Protection and Trafficking Assessment in Kenya*, 5.

<sup>114</sup> Kenya Wildlife Service, *2011–2020 Strategy for Conservation and Management of the Elephant*, 34.

<sup>115</sup> Knight M, *African rhinos: A Brief Update. PowerPoint to Workshop on Wildlife Poaching and Trafficking in Southern Africa*, Gaborone, Botswana, October 22-23, 2013.

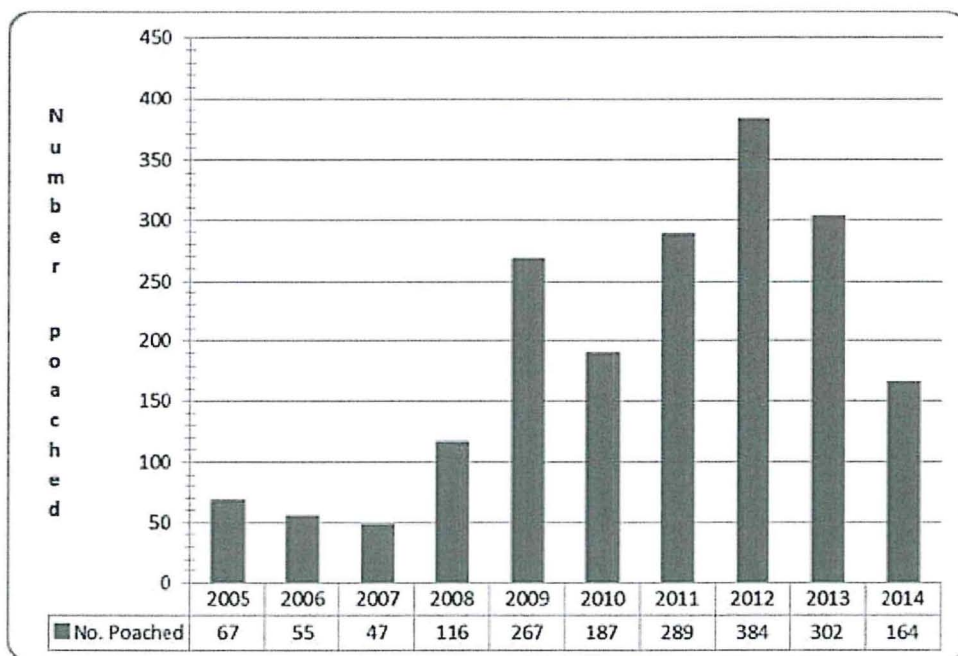
<sup>116</sup> TRAFFIC, *Wildlife Protection and Trafficking Assessment in Kenya*, 8.

<sup>117</sup> Omondi P, *PowerPoint presentation at the Kenya Wildlife Poaching and Trafficking Workshop*, April 14-15, 2015.

Service has also prepared a Conservation and Management Strategy for the Black Rhino in Kenya, which seeks to conserve at least 750 Black Rhinos by the end of 2016, achieving at least 5% national growth rate and less than 1% man-induced and disease-related deaths.<sup>118</sup>

### 4.3. The underlying factors unearthed.

The above breakdown of the situation on the ground illustrates how poachers are still making a living from the illegal poaching of Kenya’s wildlife resources. This is on the background of the recently amended Wildlife Conservation and Management Act of 2013, which now provides for stringent punishments for those caught in the act of poaching wildlife animals and/or illegally trading of wildlife trophies. Indeed, over the years, there has been a fluctuating rate in the poaching and trafficking of wildlife animal and their trophies,<sup>119</sup> as illustrated in *Figure 1.*



*Figure 1: National elephant poaching trends between 2005 and 2014*  
 Source: KWS database

<sup>118</sup> Kenya Wildlife Service, *Conservation and Management Strategy for the Black Rhino in Kenya*, 5 ed., 2012, 23.

<sup>119</sup> TRAFFIC, *Wildlife Protection and Trafficking Assessment in Kenya*, 14.

This research illustrates that despite Kenya's move to improve her laws in order to ensure that they are commensurate to the increased advancements of wildlife crimes, the implementation of the said laws still pose a challenge. If analyzed in relation to the rational choice theory and the routine activities approach, this research shows that those that commit wildlife crimes are motivated to do so due to the insufficiency of capable guardians, in this case being weaknesses in the areas of law enforcement, border enforcement, and economic opportunity to facilitate illicit trade.<sup>120</sup>

Despite the availability of stringent laws that should deter the offenders from the commission of wildlife crimes, they are still motivated to participate in it due to the systemic failure present. Poachers and all parties involved in the transit of these contraband profit from this state of weakness on our borders and in the judicial system, therefore making it easy to entice people to venture into poaching and operate in areas where there is little government presence.<sup>121</sup> Even where there is some government presence, bribing is an easy way to facilitate the smuggling due to the lack of integrity. This provides an opportunity for offenders to continue committing wildlife crimes due to the lack of proper enforcements to effectively prevent their illegal business.<sup>122</sup>

It has been averred that poaching thrives where corruption is rife, and the enforcement measures by the government is weak.<sup>123</sup> The following part of this chapter seeks to delve deeper into understanding how weak enforcement mechanisms, corruption and fraudulent activities influence the rate at which wildlife crimes are flourishing, despite the availability of the Wildlife Conservation and Management Act of 2013 which provides for strict offences and subsequent sentences on the same.

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<sup>120</sup> Haken J, *Transnational Crime in the Developing World*, Global Financial Integrity, 2011, 12.

<sup>121</sup> Haken J, *Transnational Crime in the Developing World*, 12.

<sup>122</sup> Haken J, *Transnational Crime in the Developing World*, 13.

<sup>123</sup> Dalberg, *Fighting Illicit Wildlife Trafficking: A consultation with governments*, 2012, 14.

a. *Corrupt and fraudulent activities*

In order to effectively combat wildlife crimes, it is necessary to identify and understand all the driving factors that lie beyond the areas where the actual crime of poaching occurs.<sup>124</sup> Kenya is notorious for being a transit country for most of these contraband goods such as ivory tusks.<sup>125</sup> This is due to its porous ports in Mombasa as a result of fraudulent and corrupt activities being rampant at the ports.<sup>126</sup> The use of fraudulent documents to transport illegally acquired wildlife trophies from one state to another, through legitimate commercial channels, make it even more difficult to trace whether such contraband are in the system or not.<sup>127</sup> Often the necessary paperwork required to transport the illegal wildlife trophies outside the country are more often than not “bought from corrupt officials in timber source countries.”<sup>128</sup>

For trafficking to occur successfully, it relies on porous borders, corrupt officials and strong networks of organized criminal trade.<sup>129</sup> This is evident when most of these wildlife trophies are seized not at the exit points, which is the ports in Mombasa, but rather in transit or at the destination countries, thus showing the major gap in the law enforcement network in Kenya.<sup>130</sup>

Corruption is a key enabling factor of the illegal wildlife trade, especially in governmental institutions and the private sector.<sup>131</sup> It is a deeply embedded feature of environmental crime, especially in relation to wildlife crimes as it is evident on all levels of the supply chains.<sup>132</sup> The rampant culture of impunity in the country fosters the proliferation of corrupt activities thus contributing greatly to this rise of wildlife crimes.<sup>133</sup> This consequently weakens the enforcement mechanism of the country, thus giving offenders an opportunity to further advance their criminal activities. The ever so rampant rate of corruption in the police, judiciary

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<sup>124</sup> UNODC, *Wildlife and Forest Crime Analytic Toolkit*, 2012, 34.

<sup>125</sup> TRAFFIC, *Wildlife Protection and Trafficking Assessment in Kenya*, 16.

<sup>126</sup> Elephant Action League and WildLeaks, *Flash Mission Report – Port of Mombasa, Kenya*, 2015, 10.

<sup>127</sup> UNODC, *World Wildlife Crime Report Trafficking in Protected Species*, 2016, 23.

<sup>128</sup> UNODC, *Environmental Crime – The Trafficking of Wildlife and Timber*, 2012, 26.

<sup>129</sup> Marina R, Beth A, Paul T, ‘Criminal Nature: The Global Security Implications of the Illegal Wildlife Trade’ *International Fund for Animal Welfare*, 14.

<sup>130</sup> TRAFFIC, *Wildlife Protection and Trafficking Assessment in Kenya*, 16.

<sup>131</sup> TRAFFIC, *Wildlife Protection and Trafficking Assessment in Kenya*, 16.

<sup>132</sup> Nellemann C, Henriksen R, Raxter P, Ash N and Mrema E, *The Environmental Crime Crisis – Threats to Sustainable Development from Illegal Exploitation and Trade in Wildlife and Forest Resources: Rapid Response Assessment*, UNEP and GRID-Arendal, 2014, 14.

<sup>133</sup> Straziuso J, Casey M, Foreman W, *Ivory Trade Threatens African Elephant*, Associated Press, May 15, 2010, [http://www.nbcnews.com/id/37167109/ns/world\\_news-world\\_environment/#.WHSpVf197IU](http://www.nbcnews.com/id/37167109/ns/world_news-world_environment/#.WHSpVf197IU) last accessed on 23rd December 2016.

and other state institutions has further facilitated the penetration of criminal networks' penetration in political institutions.<sup>134</sup> These conditions consequently offer offenders a green light to further exploit the rotting situations created by corruption, thus resulting to the increase of wildlife crimes in Kenya.

*b. Poor case management*

Even where some perpetrators are arrested and arraigned before the court on charges relating to wildlife crimes, other underlying factors here hinder the full effect and force of the law from being realized. The incapacity of the judicial system to effectively deal with the prosecution and sentencing of these crimes contributes to the low success rate of the legal framework put in place to combat wildlife crimes.

According to a report conducted by the Wildlife Direct on the outcome of court trials in relation to the Wildlife Conservation and Management Act, reported that most offenders, when captured, after the new amendments, most offenders would plead not guilty due to the fact that they are cognizant of the minimum penalties therefore a plea of guilty would result to very hefty fines that they would not be able to avoid.<sup>135</sup> The challenge with this is that with more cases going to trial, they pile up thus adding onto the backlog of cases in the courts.

Moreover, despite the changes in the law that offer much more stringent punishments, the same is not reflected in courts since the punishments given are still too lenient, despite the fact that these offenders are actively threatening the wildlife resources of the country and consequently her economy.<sup>136</sup> An illustration of such a situation is in relation to the case of *Republic v Henry Thurairira Mabiraki (2014) CM. Cr. C. No. 701* the accused, following a charge of being in possession of three wildlife trophies and five rounds of ammunition, was fined Ksh. 1 million with a five months imprisonment in default first offence and five years' imprisonment for the second offence.

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<sup>134</sup> Gastrow P, *Termites at Work: Transnational Organized Crime and State Erosion in Kenya*, International Peace Institute, 1.

<sup>135</sup> Wildlife Direct, *Outcome of Court Trials in the First Two Years of Implementation of the Wildlife Conservation & Management Act 2013*, 25.

<sup>136</sup> Wildlife Direct, *Outcome of Court Trials in the First Two Years of Implementation of the Wildlife Conservation & Management Act 2013*, 25.

The case of *Republic v Feisal Mohamed Ali in (2014) CM. Cr. C. No. 1098* involved the arraigning of a suspected ivory kingpin after he was caught in possession of 2 tonnes of ivory in Mombasa. The accused managed to escape to Tanzania where he was recaptured following a red notice alert<sup>137</sup> issued by International Criminal Police Organization (INTERPOL). However, due to recurrent delays caused by loss of evidence and procedural irregularity.<sup>138</sup>

#### **4.4. The way forward.**

It is evident from the above analysis that there is indeed an improvement on the law. It is through the participation of the private sector and non-governmental organizations that have actively engaged the Kenyan government on improving the laws and policies on how to better the criminal justice system in Kenya, specifically in relation to wildlife crimes.<sup>139</sup> The major problem of poaching has reduced significantly in Kenya over the years due to the new Wildlife (Conservation and Management) Act, however, we are still considered a transit country that facilitates the exportation of wildlife contraband from neighboring countries such as Uganda.<sup>140</sup> This is further fueled by the above mentioned problems, that is, corruption, fraud and poor case management.

There is therefore a need to further look into the policies in place to further tighten Kenya's criminal justice system along her borders as well as the judicial system in a bid to further Kenya's active fight against wildlife crimes and associated crimes. The following chapter provided plausible recommendations on how the law and policies developed may address these issues.

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<sup>137</sup> See more here: <https://www.interpol.int/INTERPOL-expertise/Notices> last accessed 2nd January 2017. This is an international instrument that is circulated to member countries in a bid to locate and arrest wanted persons with a view to extradition or similar lawful action.

<sup>138</sup> Wildlife Direct, *Outcome of Court Trials in the First Two Years of Implementation of the Wildlife Conservation & Management Act 2013*, 19.

<sup>139</sup> Nath B, 'NGOs For The Conservation of Africa's Wildlife and their Habitats' in Nath B (vol. 2), *Environmental Education and Awareness*, EOLSS Publishers, 2009, 290.

<sup>140</sup> TRAFFIC, *Wildlife Protection and Trafficking Assessment in Kenya*, 20.

## **CHAPTER 5: CONCLUSION AND RECOMMENDATIONS**

### **5.1.Introduction**

The final chapter to this research paper shall offer a summary of the previous chapters, highlighting the key ideas they sought to explain in depth as well as provide a summary of the findings from the research. It shall then seek to offer plausible recommendations for the issues outlined from the findings of the research.

### **5.2.Chapter summaries**

#### *Chapter 1*

This chapter offers an introduction to the research highlighting the problem questions that the research sought to answer as well as provide the hypothesis which states that there are underlying issues such as corruption prohibit the full actualization and effectiveness of the current legal framework put in place to fight wildlife related crimes in Kenya. It therefore sets the tone for the research by providing a summary of the literature review that was to be relied on for the research as well as the theoretical framework that was to be used to guide the research.

#### *Chapter 2*

This chapter provides a comprehensive analysis of the theoretical framework that the research was guided by. It elaborates on the Rational Choice Theory that asserts an offender's lifestyle and behavior influences the achievement of a particular goal which is in line with their personal desires. This theory avers to the purposive nature of this behavior, and the role of rationality whereby an offender will select the best available means to achieve their desired goals or desires. This rationality however, is not perfect since the circumstances surrounding the offender when making a choice on the commission of a particular crime are not perfect.

The routine activities approach is a theory linked to the rational choice theory which asserts that the routines of both the victim and the offender create opportunities that influence the decision making process of the offender to commit a particular crime. It provides a three part test for this; the presence of a motivated offender alongside a suitable target or victim and the

absence of a capable guardian. Theorists here advance that the absence of one of these three factors is sufficient enough to influence the decision maker, that it the offender, to commit a crime.

### *Chapter 3*

Chapter three explores the historical development and the current legislation surrounding wildlife crimes in Kenya. It illustrates the growth and development that Kenya has put effort in to in relation to better adapt her laws following the emerging concerns surrounding the security of her wildlife resources. This chapter further highlights the major amendments to the main piece of legislation relating to wildlife resources, that is the Wildlife (Conservation and Management) Act, with emphasize given to the new stringent penalties and punishments accorded to certain offences relating to animal species that are at threat.

It is also important to note the inclusion of the ODPP through the WCPU in a bid to further improve on the quality of prosecution of wildlife crime offenders, by using other legislations other than the Wildlife Conservation and Management Act. It also illustrates the interactions that Kenya has with the international organization CITES and her cooperation with the recommendations given to better deal with the issue of wildlife crimes in Kenya.

### *Chapter 4*

This chapter provides a comprehensive look into the situation on the ground in relation to wildlife crimes in Kenya. It paints a picture of the poaching situation in Kenya particularly in relation to her elephant and rhinoceros species, following the emerging trend of wildlife crimes becoming more organized in their nature. It therefore provides an analysis to the underlying factors that limit the effectiveness of the current legal framework in relation to the fight against wildlife crimes, which include rampant corruption, weak enforcement mechanisms as well as the incapacity of the judicial system to effectively deal with the prosecution and sentencing of these crimes.

### *Chapter 5*

The findings and plausible recommendations of this research are highlighted in this chapter.

### **5.3. Findings and recommendations**

#### *Findings*

The major findings in the research highlight the issues under the radar that are limiting the effectiveness of the current laws set up to fight wildlife crimes in Kenya. Corruption, fraudulent activity at the Mombasa boarder and poor case management in Kenya creates an opportunity for offenders to participate in the transit of wildlife contraband from poached wildlife to the destination countries of demand. This is despite the stringent laws that provide for harsh punishments against those who commit wildlife crimes. Moreover, following the organized nature of wildlife crimes in Kenya, then offenders easily penetrate the system through organized corrupt dealings that often involve the government officials when transporting illegal contraband out of the country. Indeed as a result of the decaying state of our country, caused by corruption, then a trickling effect results to the other institutions set to combat the said crime. This is evident in the prosecutorial and investigation stages whereby despite the inclusion of the ODPP to prosecute perpetrators of wildlife crimes, evidence seems to vanish when most needed, as well as the offenders themselves escape arrests, thus delaying justice.

#### *Recommendations*

1. The government of Kenya should strengthen her institutional, legal and regulatory systems to supplement the fight against corruption and effectively address wildlife-related offences and to ensure that legal trade is monitored and managed effectively.
2. A KWS anti-corruption strategy should be established in order to increase the enforcement capacity to fight corruption accordingly in the national reserves.
3. The classification of wildlife crimes as a serious one that is organized in nature should be well reflected and implemented by the Inspector General of the Police force in Kenya under the Criminal Investigation Department thus accord the fight against corruption with the level of seriousness it deserves.
4. Security at the border points in Kenya that are popular exit points for traffickers, particularly in relation to the trafficking of wildlife trophies, should be increased and strengthened with the use of advance technology to discourage the opportunity to smuggle the said goods out of the country.

5. Cooperation between Kenya and the destination countries of these illegal wildlife trophies should be strengthened in order to deal with the trade of wildlife trophies on both ends effectively.

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