

**ADVANCEMENTS IN THE PROSECUTION OF WILDLIFE CRIMES: WHAT CAN  
WE LEARN FROM THE KENYAN EXPERIENCE?**

**BY**

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## DECLARATION

I, the undersigned, declare that this thesis is my original work, and has not been submitted to any other college, institution or university other than the United States International University – Africa for academic credit. All material obtained from other sources are duly recognized.

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## **LIST OF ACRONYMS**

ASEAN	Association of Southeast Asian Nations
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CSO	Community Service Order
DPP	Director of Public Prosecutions
ICCWC	International Consortium on Combating Wildlife Crime
ICJ	International Court of Justice
IGAD	Intergovernmental Authority on Development
IWT	Illegal Wildlife Trade
JKIA	Jomo Kenyatta International Airport
KWS	Kenya Wildlife Service
LATF	Lusaka Agreement Task Force
MLA	Mutual Legal Assistance
ODPP	Office of the Director of Public Prosecutions
RRG	Points to Prove: a Rapid Reference Guide for the Investigation and Prosecution of Wildlife Related Offences
TOC	Transnational Organized Crime

UN	United Nations
UNCAC	United Nations Convention against Corruption
UNODC	United Nations Office on Drugs and Crime
UNTOC	United Nation's Convention Against Transnational Organized Crime and the Protocols thereto
WCMA	Wildlife and Conservation Management Act (2013)
WCO	World Customs Organization
WLC	Wildlife Crime

## **ABSTRACT**

The study examines how the prosecution of wildlife crimes has changed over time in Kenya. Specifically, the research analyzed impacts the Wildlife and Conservation Management Act, 2013, and the Wildlife Crimes Prosecution Unit of the Office of the Director of Public Prosecutions have had, and international cooperation tools utilized by the Wildlife Crimes Prosecution Unit to pursue transnational wildlife crime cases.

This research utilizes a mixed method approach. The researcher collected primary data on the prosecutions of wildlife crimes and carried out unstructured interviews with senior officials from the Kenya Wildlife Service, the Office of the Director of Public Prosecutions, intergovernmental organizations and civil society organizations. The researcher adopts the deterrence theory as the theoretical framework in this study.

The research finds that the Wildlife and Conservation Management Act, 2013, and the Wildlife Crimes Prosecution Unit has had measurable and positive impact, proving that a shift has taken place in Kenya, whereby wildlife crimes are responded to in courts of law. The research attributes this to many factors which are discussed in this research. This research also identifies international cooperation tools and lessons learnt by the Wildlife Crimes Prosecution Unit for prosecuting transnational wildlife crime cases.

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# **CHAPTER ONE: GENENRAL INTRODUCTION**

## **1.0 INTRODUCTION**

Kenya has undergone significant changes since independence in 1963. The height of these changes is evidenced by the promulgation of the Constitution of Kenya, 2010, which established various institutions to safeguard democratic principles and the rule of law. Chapter Ten of the Constitution of Kenya, entitled “Judiciary” establishes a number of institutions, such as the Office of the Director of Public Prosecutions (2010, Art. 157), the Supreme Court (2010, Art. 163), the Court of Appeal (2010, Art. 164) and the High Court (2010, Art. 165). Chapter Ten also reforms the functions of the Office of the Attorney General (2010, Art. 156).

Kenya is developing and making great strides in growth, but new challenges also arise. Some of the challenges relate to the non-inclusiveness of this economic growth to all Kenyans (World Bank, 2016, p. vi). The non-inclusivity of the economy has resulted to the emergence of new challenges in the criminal justice system, which is transnational organized crime.

Transnational organized crime (TOC) has been taking root in Kenya for some time now (Gastrow, 2011; United Nations Office on Drugs and Crime, 2013). Wildlife crime (WLC) is one form of TOC. The thesis’s focus is an investigation on WLC. The United Nation’s Convention Against Transnational Organized Crime and the Protocols thereto (UNTOC), 2004, states in its preamble that UNTOC “... will constitute an effective tool and the necessary legal framework for international cooperation in combating ... such criminal activities as money-laundering, corruption, illicit trafficking in endangered species of wild flora and fauna” affirming the fact that WLC is among crimes that UNTOC’s legal framework seeks to prevent.

WLC not only affects Kenya's wildlife, but it also affects its economy and the livelihoods of its people (Karanja, 2012, p. 74; Task Force On Wildlife Security, 2014, p. 1). Although WLC touches on a number of institutions, this thesis focuses on two institutions, namely, the Kenya Wildlife Service, the government institution mandated for conserving and protecting Kenya's wildlife, and the Office of the Director of Public Prosecutions (ODPP).

The Constitution of Kenya establishes the ODPP, outlining the mandate of the institution, and the powers of prosecution the institution carries (2010). The ODPP is composed of various units for prosecuting all types of crimes (Government of Kenya, Office of the Director of Public Prosecutions (2017); Ogoma, 2017; Wambua, 2017), one unit being the Wildlife Crimes Prosecution Unit (WCPU), which only prosecutes wildlife crimes (Ogoma, 2017; Wambua, 2017). The Kenya Wildlife Service (KWS) has a Security Division, which is composed of an intelligence branch and an investigation branch. The Security Division is charged with preventing and eliminating poaching, protection of wildlife and people in protected and non-protected areas, as well as training its frontline officers. Not only does the Security Division work in national parks and reserves, but it also works at the Kilindini Port in Mombasa, the Jomo Kenyatta International Airport (JKIA) in Nairobi and the Moi International Airport in Mombasa. Officers who work at the Port and Airports must profile passengers and cargo for wildlife products being trafficked in or out of the country (Montano, 2017; Mwalenga, 2017; Mwandai 2017).

The ODPP's Wildlife Crimes Prosecution Unit was established in 2014 and is mandated to prosecute any crime in relation to WLC (Jayanathan, 2017; Ogoma, 2017; Wambua, 2017). The unit is not limited in its decisions to charge, in other words, the unit is able to charge crimes using the Wildlife and Conservation Management Act (WCMA), 2013,

but has discretion to charge using subsidiary legislation, as well as international cooperation tools. International cooperation tools that guide prosecution of WLCs in Kenya shall be discussed in this thesis. Currently, KWS has two investigators who are gazetted in the Government Gazette to prosecute WLCs, however, any KWS led prosecutions are conducted in accordance with the WCMA only (Jayanathan, 2017; Mwalenga, 2017; Wambua, 2017). Any other case that seeks to go beyond the WCMA requires the ODPP's WCPU to prosecute (Jayanathan, 2017; Mwalenga, 2017; Wambua, 2017).

Wildlife crime is not a new phenomenon in the international criminal justice system. During the 1970s and 1980s, a poaching crisis took place that saw populations in elephants decline near extinction (Clinton, 2013; Kideghesho, 2016, P. 371; WWF, 2016). This was followed by an international ban on the trade of ivory in 1989 by Member States to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

Since the 1989 ban, however, the demand in wildlife products has turned into what is now a multi-million-dollar trade. This demand, mainly from Asia (Task Force on Wildlife Security, 2014, p. 3; United Nations Office on Drugs and Crime, 2013, p. 27), has created a massive black-market business, and is devastating wildlife populations.

Kenya finds itself situated amongst the gang of eight countries. The term gang of eight arose from the 2013 CITES Conference during the state parties meeting, where eight countries were identified for their role in wildlife crime. The gang of eight includes, supply countries, such as Kenya, Tanzania and Uganda, trafficking countries, such as Malaysia, Vietnam and Philippines, and consuming countries, such as China and Thailand (British Broadcasting Company, 2013; The Guardian, 2013). Since the establishment of the gang of eight, Kenya's role has shifted to also being a transit country. This is evident through consistent seizures of

wildlife products taking place at Kenya's entry and exit points. A simple Google search reveals countless newspaper articles on wildlife seizures taking place at the Jomo Kenyatta International Airport and at the Kilindini Port of Mombasa (IFAW, 2013; Mail and Guardian Africa, 2016; The Star, 2016).

## **1.1 PROBLEM STATEMENT**

KWS and the ODPP realize that fighting WLC takes much more than only physically protecting wildlife. KWS and the ODPP recognized that to deter future poaching incidences from occurring, legal measures should be put in place to stop the crime in the long term, for example, enacting high monetary fines and maximum sentence penalties (Jayanathan, 2017; Mwalenga, 2017; Ogoma, 2017).

To this end, the thesis investigates the role prosecutions play in fighting WLCs. To deter offenders, Kenya repealed the Wildlife Conservation Act and Management Act, 1976, and replaced it with the Wildlife and Conservation Management Act, 2013. An important development in the Wildlife Conservation and Management Act, 2013 (WCMA) is the enactment of custodial penalties and monetary fines. Shortly after the enactment of the WCMA, the ODPP's WCPU was established.

There are no studies or academic work that examines and evaluates how the prosecution of wildlife crimes has changed after the enactment of the WCMA, and whether the WCMA has had significant impact on prosecutions of WLCs when compared to the repealed law. Therefore, this thesis fills the gap on the empirical research on the implications of WCMA, and the extent in which international cooperation tools for responding to WLCs are utilized by the ODPP in prosecuting WLCs in Kenya.

Through analysis of WLC prosecution and conviction rates, this research attempts to investigate whether the enactment of the WCMA and the establishment of the WCPU has had an impact in reducing WLC in Kenya.

Research questions leading this thesis are:

1. How has the enactment of WCMA, 2013, impacted prosecutions of WLC cases?
2. Has the ODPP's Wildlife Crimes Prosecution Unit had a measureable effect on prosecution rates of WLC cases?
3. What international cooperation tools have been utilized by the WCPU on transnational WLC cases, which can guide best practices for future cases?

## **1.2 OBJECTIVES OF THE STUDY**

The objectives of the study are to:

1. Determine if the WCMA has had a measureable impact on the prosecution of WLC cases;
2. Determine if the ODPP's Wildlife Crimes Prosecution Unit has had a measureable effect on prosecution rates of WLC cases since its inception;
3. Identify international cooperation tools utilized by the WCPU on transnational WLC cases to determine best practices for future cases.

### **1.3 SIGNIFICANCE OF THE STUDY**

This thesis analyzes the role prosecutions plays in fighting and deterring wildlife crimes in Kenya. In light of the Government of Kenya implementing the updated Wildlife and Conservation Management Act (WCMA), 2013, and incorporating a Wildlife Crime Prosecution Unit (WCPU) within its Office of the Director of Public Prosecution, both of which are viewed by its stakeholders as positive steps towards deterring transnational organized crime (Jayanathan, 2017; Montano, 2017; Mwalenga, 2017; Wambua, 2017), however, no academic analysis has taken place to determine if these advancements are making a positive contribution.

This thesis contributes to academic literature on the prosecution of WLC by examining the impact of policy in responding to crime. An analysis of primary data examines whether the current statute has any impact on deterring WLC in Kenya.

The thesis discovers that the establishment of WCPU has had some positive impact on responding to WLC in Kenya. The enhanced sentences and fines has sent a message to criminals that the Government of Kenya values its wildlife as a national treasure and an asset. The thesis' findings show that for the WCPU to be successful in fighting WLC, it needs support from intergovernmental organizations and civil society organizations for its success.

In addition to illustrating how the WCMA has changed the nature of prosecution of wildlife crimes, this thesis also seeks to recognize the importance of having a functioning WCPU. Having such a unit is a major step towards fighting transnational syndicates behind the international trade of wildlife products. The overall objectives of this thesis benefits all stakeholders involved in protecting wildlife, as well as stakeholders who investigate and prosecute wildlife crimes. Specifically, stakeholders will benefit from the findings of this



thesis to inform future legal advancements in relation to the prosecution of WLCs. Chapters 2 and 5 discuss various interventions being implemented by intergovernmental organizations, for example the United Nations Office on Drugs and Crime (UNODC), which assists governments in fighting the crime.

Civil society organizations involved in fighting WLC will also benefit from the findings of this thesis, as it acknowledges successful examples of cooperation between KWS, the WCPU and civil society organizations. Such partnerships are important to recognize, since fighting a crime of this nature necessitates joint efforts and cooperation.

This thesis recognizes the advancements Kenya has made in prosecuting WLCs. The intention of the researcher is for the people of Kenya, as well as global citizens, to understand the strides Kenya has made towards protecting its national assets, but also assets of the world.

## **CHAPTER TWO: LITERATURE REVIEW**

### **2.0 INTRODUCTION**

The chapter reviews the existing literature on the key themes of this thesis, specifically, wildlife crimes in Kenya, the transnational nature of the crime, and suggested solutions to fight the crime. The literature review then examines international laws relevant to this thesis, as well as Kenya's international and domestic legal frameworks. Since this research focuses on the prosecution of wildlife crimes, the literature review focuses on literature examining the role of Kenya's Office of the Director of Public Prosecutions and its delegation of powers.

The literature review examines two reports from a Kenyan civil society organization, which analyzed records of prosecutions from courts in Kenya. The researcher adopts the deterrence theory as the theoretical framework in this study, and discusses this analysis at the end of the chapter.

From exploring the available literature on key areas touching on the various themes detailed in the literature review, this study seeks to fill the gap in knowledge on how the prosecution of wildlife crime cases has changed over time, by specifically examining whether the WCMA, has had measureable positive impact on the prosecution of WLC in Kenya.

### **2.1 WLC AND ITS ENABLERS**

Wildlife crime has become a growing illicit crime in recent times (UNODC, 2013, p. 27). It is now widely accepted that WLC, and its trade, has become a top illegal crime, contributing millions of dollars to the black market. Bolton (2015, p. 5), IFAW (2013, p. 26)

and Weru (2016, p.16) agree that “...the scale and magnitude of the wildlife trade has grown tremendously such that income from illegal wildlife trade now ranks among the top global sources of illegal wealth”. Anderson and Jooste (2014, p. 1) concur, saying that “a booming black-market trade worth hundreds of millions of dollars is fueling corruption in Africa’s ports, customs offices, and security forces as well as providing new revenues for insurgent groups and criminal networks across the continent”.

This global industry is fueled by many factors, but in source and transit countries, corruption is one of the top enablers. For WLC to take place, corruption must take place. Anderson and Jooste (2014, p. 7), EIA (2016, p. 8), IFAW (2013, p. 18), Maguire and Haenlein (2015, pp. ix, 33-35), Miller, Vira, and Utermohlen (2015, p. 18) and UNODC (2016, p. 20) all recognize corruption as a major enabling factor to WLC. Such corruption also compromises attempts to fighting it (Jooste and Anderson, 2014, p. 7). Weru explains that in Kenya,

Corruption among government and private sector officials is a key enabling factor of the illegal wildlife trade. The fact that wildlife contraband, especially rhino horn and elephant ivory, has been exported from Kenya only to be seized in transit or in destination countries means that wildlife traffickers are able to exploit security loopholes in the country’s law enforcement network” (2016, p. 16).

For WLC to take place, many actors must be involved. The crime does not involve one or two individuals, but teams, or networks of people in source and transit countries,

The fact that heavily armed gangs of poachers can enter national parks, reserves, and other protected areas and kill large numbers of animals and then move those products across multiple jurisdictions and ship their contraband out to destinations throughout the world through major airports and seaports is a cause for alarm for many... (IFAW, 2013, pp. 8-9).

UNODC (2016) discusses the power that CITES paperwork holds, explaining it can turn “millions of dollars of suspected contraband into millions of dollars of legitimate merchandise, much of the “trafficking” of these goods proceeds through the front door, with paperwork provided through fraud, forgery, and corruption” (Ibid, p.23).

Another enabler of WLC is the perceived low risk involved with the crime. Anderson and Jooste (2014, p. 4) EIA (2016, p. 3) IFAW (2013, p. 5, 16), and Maguire and Haenlein (2015, p. 18) concur that WLC and illegal wildlife trade (IWT) are taking place due to criminal's lack of fear of consequences. For example, "because of low detection rates and lenient punishment, the potential rewards for offenders far outweigh the risk of being penalized" (Sollund, 2016, p. 554). Of course, corruption and perceived low risk are not the only factors enabling these crimes to take place.

WLC is a multifaceted problem, with many contributing factors. Maguire and Hainelein (2015, p. 33), Weru (2016, p. 13, 19) and UNODC (2016, p. 19) recognize this, and also state poverty as a driver on the local level in source countries. In addition to this, the internet appears to be an emerging enabler, playing a significant role as an intermediary between supply and demand (Sollund, 2016, p. 554). IFAW (2013, p. 8) and Sollund (2016, p. 558) recognize that there is a gap amongst internet governance, law enforcement and legislation which is having an effect on WLC. Wyler and Sheikh (2008, p. 3) posit that "...some analysts question whether demand for illegal wildlife is necessarily growing or whether new data is simply capturing more information about a potentially stagnant or declining source of demand".

## **2.2 WLC IS TRANSNATIONAL ORGANIZED CRIME (TOC) AND ITS CONVERGENCE WITH OTHER TOCS, AND THEIR COMMON MODUS OPERANDI**

According to Miraglia, Ochoa and Briscoe (2012) TOC takes place in states with weak state security institutions, as well as where officials can be corrupted. Once active in these

states, TOC exploits state institutions further, permitting the secure passage of illicit goods to another country (p. 8-9). IFAW (2013), Miraglia et al., (2012), Weru (2016), and Wyler and Sheikh (2008) all agree that there are clear links between TOC and WLC. Anderson and Jooste (2014) indicate that “Africa’s wildlife crisis is not just a poaching challenge but involves sophisticated criminal networks employing advanced trafficking techniques” (p. 6). To carry out WLC and IWT, a sophisticated network is needed, leading scholars to agree that TOC is a driver of WLC and IWT (Maguire and Haenlein, 2015, p. 35, 43). Further to this, IFAW (2013) states that “only recently have law enforcement officials and security analysts begun to understand the linkages among criminals involved in global illegal wildlife trade” (p.8).

In addition, there is “...a growing body of evidence to suggest that wildlife trafficking converges with alternative forms of illicit activity, including narcotics, weapons and resource trafficking, money laundering, and various transnational threats” (Miller, Vira, and Utermohlen, 2015, p. 17). Concurring with Miller, et al, Anderson and Jooste (2014, p. 3) and IFAW (2013, p. 5, 8, 14, 16) go further, indicating that the high profits from WLC are too attractive for transnational organized criminals to ignore.

Aside from the UNTOC/UNODC’s definition of TOC, observing the common *modus operandi* of WLC corroborates that highly sophisticated and organized networks, composed of multiple people is at work. Containerized sea freight is the common *modus operandi* (UNODC, 2016, p. 45), stating “seizure data show that most enforcement activities to combat international wildlife trafficking take place at ports of entry, rather than in domestic markets, and thus customs agents form the front line of enforcement in many parts of the world” (p. 10). “The growing number of large-scale seizures of elephant ivory (defined by CITES as any consignment weighing more than 500 kg) in Africa and Southeast Asia points to several

worrying characteristics which clearly indicate the presence of transnational criminal syndicates” (Weru, 2016, p. 17). Anderson and Jooste (2104), Maguire and Haenlein (2015), Miller, Vira, and Utermohlen (2015) and Wyler and Sheikh, 2008, all concur with Weru (2016), and recognize the increase in containerized seizures of wildlife products.

For large consignments of wildlife products to pass through seaports, many actors are needed from various national institutions, confirming “the level of consolidation along this supply chain suggests the collusion of transnational organized crime” (Miller, Vira, and Utermohlen, 2015, p. 5). Of course, not all in the supply chain are aware of the illegal trafficking, nor is it possible to stop every container at a seaport.

### **2.3 KENYA’S ROLE**

“Kenya’s unique wildlife asset is under increasing threat due to the activities of international crime syndicates in the illegal wildlife trade” (Miraglia et al., 2012, p. 26). It appears to be widely recognized that Kenya’s port in Mombasa and the international airports are hubs being exploited by TOCs. Anderson and Jooste (2014), Maguire and Haenlein (2015), Milliken (2014), Miller, Vira, and Utermohlen (2015), Miraglia et al., (2012), UNODC (2016) all concur with Weru (2016), that

Kilindini Port in Mombasa and JKIA, Kenya’s main international airport in Nairobi, has been identified as the leading exit points for large volumes of wildlife contraband leaving Kenya. Since 2009, more ivory has exited through Mombasa than any other trade route out of Africa, primarily destined for China and Hong Kong with transit points in Malaysia, Viet Nam, Thailand and Singapore (p. 21).

“Kenya offers a view of how TOC has exploited the state’s weaknesses to create a regional hub of operation for many forms of illicit transnational crime” (Miraglia et al., 2012, p. 23). This has been allowed to take place due to “... weak wildlife legislation with low

penalties for poaching and trafficking, limited prosecution capacity and poor co-ordination among law enforcement and Customs agencies” (Weru, 2016, p. 13).

The tide to fight TOC in Kenya is turning. Kenya’s Wildlife Conservation and Management Act (WCMA) came into effect in January 2014 and strengthened the legislative framework for fighting WLC, with larger penalties and sentences prescribed for the crimes. “Although all the MEAs [multilateral environmental agreements] that Kenya has acceded to are theoretically part of Kenyan law, their importance is rarely considered at the national level. There exists, therefore, a huge disconnect between international and local legal regimes.” (Weru, 2016, p. 35).

## **2.4 THE INTERNATIONAL SYSTEM’S RESPONSE TO WLC**

Seeing that WLC and its transnational nature is an international problem, which has an effect on all global citizens, an international approach to fighting crime is what this thesis supports. Due to these crimes knowing no borders, its exploitative nature, and lucrative profits which only fuels the crime, the international system, and its legal frameworks must be utilized to fight this TOC. Weru (2016) and EIA (2016) agree that the intergovernmental agencies INTERPOL, the United Nations Office on Drugs and Crime and the World Customs Organization (WCO) are critical intergovernmental agencies with the ability to operate across international political boundaries. Weru (2016, p. 37-38) also discusses the Lusaka Agreement Task Force (LATF), who holds a cross-border mandate in various countries in East and Central Africa for fighting WLC. However, “despite these commitments and the availability of existing channels to facilitate co-operation, lack of effective international co-operation across source, transit and destination countries remains a critical challenge” (EIA, 2016, p. 11).

UNODC (2016) recognizes that “the international community can support local law enforcement through various forms of technical assistance and capacity building, including the coordination of international operations” (p. 11). UNODC actively promotes the use of international cooperation tools such as mutual legal assistance, extradition, proceeds of crime, as well as international conventions to fight WLC (Wildlife Inter-Regional Exchange (WIRE) meeting for Prosecutors, 24 March 2017). In addition to assisting law enforcement officials and prosecutors, UNODC seeks to build awareness amongst judiciary officials in East Africa and South-East Asia, as well as build the capacity of customs officers in both regions (Montano, 2017).

## **2.5 COMPILATION OF CURRENT INITIATIVES TO COMBAT WILDLIFE CRIME**

### **2.5.1 VARIOUS ENFORCEMENT AND PROSECUTORIAL INTERVENTIONS**

Anderson and Jooste (2014) and Weru (2016), concur with Maguire and Haenlein (2015), that a major solution to fight the TOC is to “...disrupt[ing] those criminal networks involved, especially at a high level – to the point at which the risk of ongoing involvement becomes too great. This, however, is where capacity and political will have been most lacking” (p. 43). Disrupting TOCs is a higher-level goal in the fight against WLC. In order to reach this, a number of initiatives are needed. Such initiatives include improving specialized investigative and intelligence gathering techniques, as well as establishing multi-agency enforcement units. Anderson and Jooste (2014), Maguire and Haenlein (2015), UNODC (2016, p. 11) agree with IFAW (2013), that “countries must follow the money and deploy anti-money-laundering tools and training to make the risks of wildlife crime greater than the



rewards by increasing the cost of doing business” (p. 26), but EIA (2016) recognizes that “... some FIUs [financial intelligence units] have a limited mandate or may not treat wildlife crime as a priority” (p. 11).

Duffy and Humphreys (2014) suggest approaching WLC from a criminological approach, recognizing that “funding related to intelligence gathering, surveillance, capacity building in crime scene management is increasing as a priority” (p. 3). It is clear that greater intelligence gathering, and special investigative techniques is an obvious solution for scholars, as IFAW (2013), EIA (2016), Weru (2016), Maguire and Haenlein (2015) all concur on this point to varying detail.

A national multi-agency approach is suggested by IFAW (2013) and Anderson and Jooste (2014) who posit that an approach “... would reinforce the priority of mounting determined countermeasures that encompass multiple ministerial authorities” (p. 6). Anderson and Jooste go further, explaining that “...stronger institutional exchanges with wildlife management agencies should be established so that police and customs officers are familiarized with wildlife products and are on the lookout for tell-tale signs of suspect shipments” (2014, p. 6). In addition to national institutional cooperation, international and transboundary cooperation is necessary (Anderson and Jooste, 2014, p. 7; IFAW, 2013, p. 7; Weru, 2016, p. 11). Maguire and Haenlein (2015) explain that “this is vital to collecting actionable intelligence and conducting credible investigations into transnational OCGs [organized criminal gangs]. Given an ongoing lack of trust, national governments and international organisations should focus on confidence-building initiatives both within and across borders” (p. x)

National and international tools suggested include, mutual legal assistance (Weru, 2016, p. xx), ancillary legislation, specifically addressing corruption and money laundering (EIA, 2016, p. 7), dissemination and replication of the *Points to Prove: a Rapid Reference Guide for the Investigation and Prosecution of Wildlife Related Offences (RRG)* (Jayanathan, 2017; Montano, 2017; Weru, 2016, p. xiii), and controlled deliveries, although the legalities of controlled deliveries appear to be unclear (EIA, 2016, p. 10). Weru (2016, xii) and EIA (2016, p. 16) also suggest that states must create a database of offenders. Owning a secure database will allow wildlife investigators to easily check if offenders are repeat offenders, as well as link cases with other enforcement institutions which will allow wildlife investigators to understand a broader picture of the criminal.

## **2.5.2 CORRUPTION PREVENTION**

Corruption has been identified in this chapter as a clear enabler of WLC. Although strengthening of anti-corruption legislation has been suggested (Maguire and Haenlein, 2015, p. xi), most states have anti-corruption legislation and are signatories to the United Nations Convention against Corruption (UNCAC). However, there is a need for programs that address anti-corruption within state agencies, specifically, in this context, agencies working with wildlife (Duffy and Humphreys, 2014, p. ii, 6). Anderson and Jooste (2014) concur, arguing “wildlife trade also needs to be on the agenda of anti-corruption commissions, where asset and financial disclosures of state officials should be reviewed for connections to potential trafficking activities” (p. 7). In addition to this, Weru (2016), who is specifically focusing on Kenya, advises that the Kenya Wildlife Service should develop an institutional anti-corruption strategy (p. xiii). UNODC (2016) advises “implementing measures to prevent and combat corruption among rangers, wildlife investigators, and other relevant officials ... [and] where

public servants are implicated in facilitating trafficking, the United Nations Convention on Corruption should be utilized” (p. 11).

### **2.5.3 THE INTERNATIONAL CONSORTIUM ON COMBATING WILDLIFE CRIME (ICCWC)’S WILDLIFE AND FOREST CRIME ANALYTIC TOOLKIT AND INDICATOR FRAMEWORK**

“Fortunately, the detailed “Wildlife and Forest Crime Analytic Toolkit” developed jointly by the United Nations Office on Drugs and Crime and several top wildlife nongovernmental groups lays out the investigative techniques and inter-ministerial cooperation needed to combat wildlife trafficking” (Anderson and Jooste, 2014, p. 6). “UNODC has a clear mandate to tackle TOC (UNODC, 2008). It operates a number of protocols such as the United Nations Convention against Transnational Organized Crime, as well as the United Nations Convention against Corruption” (Miraglia et al., 2012, p. 16). “EIA reinforces the need for governments and donors to adopt a meaningful monitoring and evaluation framework. In relation to measuring progress in the law enforcement and criminal justice response, EIA recommends the ICCWC Indicator Framework for Combating Wildlife and Forest Crime” (EIA, 2016, p. 16).

### **2.5.4 TRAFFICKING, THE USE OF THE PORT OF MOMBASA AND JKIA, AND WORKING WITH THE PRIVATE SECTOR**

Through this literature review, it has become clear that TOC is utilizing, or exploiting, exit and entry points of states to traffic wildlife products. In Kenya, specifically the port of Mombasa and the JKIA are being heavily used. UNODC states (2016) wildlife seizures are made when the goods are being transported, and the source and destination of the shipment are specified in the majority of recorded seizure incidents. Rich detail can be culled concerning the routes and techniques used by the traffickers, and even which interdiction strategies are

most successful. Triangulated with qualitative research, they can provide a key data source for understanding the mechanics of wildlife crime (p. 14).

Weru (2016), Anderson and Jooste (2014, p. 6) and UNODC (Montano, 2017) believe that multi-agency capacity building must take place at the port and airport for the various institutions to detect WLC. UNODC (2016) suggests that, “profiling and targeting mechanisms for suspicious shipments and persons should be further mobilized to improve risk management systems and promote their active use” (p.11).

In connection to this, Weru (2016, p. xiv) and EIA (2016, p. 11, 15) agree that working with the private sector is key to disrupting TOC, for example, transport and logistical companies, as well as banks and communication companies. Miller et al. (2015) explain that

Private transportation logistics and financial services companies have independently expressed concern due to their potential exposure to wildlife and environmental TOC activity, and also a desire to take action. A key impediment to addressing their concerns has been a lack of information on both the types of supply chain abuse that may occur and the types of wildlife criminal networks that may be operating. Such information may help refine and strengthen compliance controls to ensure that funds and services reach their intended beneficiaries (p. 4).

Maguire and Haenlein (2015) and UNODC (2016, p. 23) concur, and suggest strengthening security amongst the various actors in the supply chain, and believe that in addition to following the money, actors must make “efforts to map ... logistics networks that support the trade should be prioritized. In so doing, these efforts should engage the private sector, with all its resources, in disrupting the illegal trade” (p. xi).

### **2.5.5 THE INTERNET**

The Internet appears to be an emerging issue for WLC, particularly facilitating the trade of products. The authors cite e-commerce and the ‘dark web’, indicating that wildlife products are openly sold online, and that “it is crucial that governments not only monitor the scale of

trade online but also investigate the individuals and companies involved in such trade.” (EIA, 2016, p. 11; IFAW, 2013, p. 17). Sollund (2016) suggests that CITES establishes

...units dedicated to investigating wildlife crime linked to the Internet be established at national levels, that wildlife trade issues be incorporated into existing units that investigate or monitor computer or cyber-crime, and those mechanisms to coordinate the monitoring of Internet-related wildlife trade be established at national levels (p. 565).

## **2.6 INTERNATIONAL LAW**

Kenya became a member state to the United Nations (UN) in 1963. As a member of the UN, Kenya is an automatic party to the International Court of Justice (ICJ) (UN Charter, 1945, Article 93). The ICJ is a legal organ of the UN, with its Statute being an annex of the Charter of the United Nations.

The United Nations Convention Against Corruption, the United Nations Convention on Transnational Organized Crime, various international conventions, treaties and bi-lateral and multi-lateral agreements have created international best practices, or rather, a general framework for international cooperation on criminal matters. In this regard, mutual legal assistance, extradition, special investigative techniques, anti-money laundering and recovering proceeds of crime are all methods utilized for international cooperation, and subsequently are the tools for international cooperation for combating WLC.

### **2.6.1 THE UNITED NATIONS CONVENTION AGAINST CORRUPTION (2004)**

The United Nations Convention Against Corruption, (UNCAC) establishes core values, such as respect for the rule of law, justice, accountability, integrity and transparency must be protected and promoted as the foundation of development for all. UNCAC’s Article 1 states its purposes are for the promotion and strengthening of measures to prevent and combat

corruption more efficiently and effectively; the promotion, facilitation and support of international cooperation and technical assistance, including in asset recovery; and the promotion of integrity, accountability and public management of public affairs and public property. Article 14 discusses measures to prevent money-laundering, and suggests numerous measures parties should consider implementing to prevent money laundering. Article 46 discusses mutual legal assistance (MLA), outlining how requests should be made, and for what purpose MLA can be utilized. Article 55 gives detail to international cooperation for purposes of confiscation of proceeds of crime, and similarly, Article 57 outlines the return and disposal of assets.

### **2.6.2 THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOLS THERE TO (2004)**

The United Nations Convention Against Transnational Organized Crime and the Protocols Thereto (UNTOC) is a robust convention which allows states undertake to punish a large range of offences, which constitute organized crime. Article 2(a) defines “organized criminal group” as

a structured group of three or more persons, existing for a period and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

This definition is the basis and foundation of defining a group who takes part in a TOC. In general, UNTOC establishes best practices of international cooperation in regard to transnational crimes, as stated in the General Assembly’s preamble of the Convention:

Strongly convinced that the United Nations Convention against Transnational Organized Crime will constitute an effective tool and the necessary legal framework for international cooperation in combating, inter alia, such criminal activities as money-laundering, corruption, illicit trafficking in endangered species of wild flora and fauna, offences against cultural heritage and the growing links between transnational organized crime and terrorist crimes.

Article 18 of UNTOC, like UNCAC, goes into depth on MLA. UNTOC discusses measures to combat money laundering (Article 7) and the criminalization of corruption (Article 8), measures against corruption (Article 9) linked to offences constituting organized crime and the obstruction of justice. Confiscation and seizure from proceeds of crime are outlined in Articles 6 and 12. UNTOC also discusses regulations covering extradition (Article 16). Other Articles discuss victim and witness protection, police collaboration, such as exchange of information, training, technical assistance, as well as prevention measures.

### **2.6.3 KENYA'S INTERNATIONAL LEGAL FRAMEWORK ON INTERNATIONAL COOPERATION**

Kenya acceded to UNTOC on 16 June 2004, and UNCAC on 9 December 2003. Other international treaties Kenya has in its international legal framework in regard to international cooperation include the African Union Convention on Preventing and Combating Corruption, ratified on 3 February 2007, and the Commonwealth treaties consisting of the Harare Scheme on MLA and the London Agreement on Extradition.

Kenya has also signed but not ratified the Intergovernmental Authority on Development (IGAD) Convention on Mutual Legal Assistance in Criminal Matters and the IGAD Convention on Extradition. Kenya, as a member of the East African Community, is Party to the East African Community Customs Management Act 2004, which sets out offences relating to the unlawful importation and exportation of prohibited goods.

### **2.6.4 KENYA'S DOMESTIC LEGAL FRAMEWORK**

Kenya has a strong domestic framework surrounding matters of international cooperation. Under the Constitution of Kenya, 2010, treaties and conventions ratified by

Kenya automatically become part of their law (Constitution of Kenya, 2010, Article 2(6)), meaning that the above-mentioned international conventions do not need to be domesticated through national laws. However, Kenyan authorities cannot resort to international law which has not been harmonized nationally.

### **2.6.5 MUTUAL LEGAL ASSISTANCE**

The Mutual Legal Assistance Act, 2011, applies to requests for assistance relating to investigations, prosecutions or judicial proceedings in relation to criminal matters involving individuals or legal entities (UNODC Country Review Report of Kenya, p. 196 (para.684)), from a “state or international entity to which Kenya is obligated on the basis of a legal assistance agreement or not” (Mutual Legal Assistance Act, 2011, Section 3(a)). The Mutual Legal Assistance Act, 2011, sets out an extensive list of types of assistance that can be requested (Mutual Legal Assistance Act, 2011, Section 6 (2)), as well as the catch-all “any other type of legal assistance or evidence gathering that is not contrary to Kenyan law” (Mutual Legal Assistance Act, 2011, Section 6 (2)(q)). The types of assistance include:

- i. Identifying and locating of persons for evidential purposes;
- ii. Examining witnesses;
- iii. Effecting service of judicial documents;
- iv. Executing searches and seizures;
- v. Examining objects and sites;
- vi. Providing, including formal production of where necessary originals or certified copies of relevant documents and records, including but not limited to government, bank, financial, corporate or business records;
- vii. Providing information, evidentiary items and expert evaluations;



- viii. Facilitating the voluntary attendance of witnesses or potential witnesses in a requesting state;
- ix. Facilitating the taking of evidence through video conference;
- x. Effecting a temporary transfer of persons in custody to appear as a witness;
- xi. Interception of items during the course of carriage by a public postal service;
- xii. Identifying, freezing and tracing proceeds of crime;
- xiii. The recovery and disposal of assets;
- xiv. Preserving communications data;
- xv. Interception of telecommunications.

The Mutual Legal Assistance Act, 2011, sets out detailed provisions in relation to the interception and surveillance of communications and preservation of communications data (Mutual Legal Assistance Act, 2011, Part VI), and video and audio transmission of witness evidence (Mutual Legal Assistance Act, 2011, Sections 6(2) (i), 22). The Act allows for flexibility and some consultation in processing requests. It requires a competent authority to inform the requesting state and gives reasons if the request does not comply with the provisions of the Mutual Legal Assistance Act, 2011, stating there will be delay in responding to it or the request is to be refused or cannot be complied with (Mutual Legal Assistance Act, 2011, Section 8(6)). Consultation between Kenya and the requesting state, in the case of overlapping jurisdiction must be considered because of factors involved (Section 49).

If a request requires the transmission of any document, record or property required for proceedings in Kenya, it may postpone the transmission of the material and require the “requesting state to agree to terms and conditions to protect third party interests in the material” (Mutual Legal Assistance Act, 2011, Section 47). The Act also makes provision for requests

for the attendance of witnesses not in custody in the requesting state to be submitted in less than the minimum 30 day time period prior to a hearing in urgent cases (Section 15). The Mutual Legal Assistance Act, 2011, requires that documents in support of a request for MLA be submitted in English (Section 44), and that Kenya shall bear the ordinary costs of executing a request and the payment of any extraordinary costs shall be determined by agreement (Section 45). In relation to witness related costs, the Act requires the requesting state to provide details of the travel, subsistence and other expenses payable by them for personal appearance of a witness in the requesting state (Section 15(4) (d)).

In regards to the dual criminality requirement of the Act, if it is not met (Section 11(a)), the Act provides that it shall adopt “measures as may be necessary to enable it to provide a wider scope of legal assistance to a requesting state in absence of dual criminality and reciprocity” (Section 40).

The Mutual Legal Assistance Act, 2011, sets out provisions governing the admissibility of evidence received from a foreign state by Kenya (Part VII). These provisions deal the admission of records and any statement or affidavit in relation to a record or thing where it contains hearsay or an opinion (Sections 33-34) and ensures the safe conduct of persons travelling to Kenya in accordance to a request (Section 38). The Act also states that foreign records submitted in support of a request to Kenya are privileged (Section 39).

The Attorney General is the central authority under the Act (Section 5(2)), although requests are submitted through the Ministry of Foreign Affairs and International Trade (UNODC Country Review Report of Kenya, pp.12 and 194 (para.676)). The Attorney General forwards requests to the ODPP or any other relevant body. The ODPP has an Extradition, MLA and International Cooperation Division, which is under the Department of Economic,

International and Emerging Crimes (Ogoma, 2017). Where urgent, Kenya also allows requests to be sent via INTERPOL rather than diplomatic channels (UNODC Country Review Report of Kenya, p.12).

### **2.6.6 SPECIAL INVESTIGATIVE TECHNIQUES**

The Mutual Legal Assistance Act, 2011, allows Kenyan authorities, with an MLA request and in accordance with its domestic law, to intercept and immediately transmit or record and later transmit telecommunications (Sections 6(2) (o), 27(1)). Such requests must contain “confirmation that a lawful interception order or warrant has been issued in connection with a criminal investigation, if such an order or warrant is required by law” (Section 27(3) (b)). Requests may also be made for Kenya to conduct covert electronic surveillance (Sections 6(2) (p) and 32). There are no provisions for controlled delivery.

The National Intelligence Service Act, 2012, grants an officer the authority upon issuance of a warrant “to enter any place to obtain access to anything, to search for or remove or return, examine, take extracts from, make copies of or record in any other manner the information, material, record, document or thing, to monitor communications and install, maintain or remove anything” (Sections 43 and 45).

### **2.6.7 PROCEEDS OF CRIME**

Part XII of the Proceeds of Crime and Anti-Money Laundering Act, 2009, is a detailed Act regulating search, seizure and confiscation of the proceeds of crime as well as MLA in relation to them (Section 2). In situations related to the proceeds of crime and money-laundering offences, requests may be submitted by the Attorney General to a foreign state, or

to the Attorney General by a foreign state (Section 115(2)), for evidence to be taken, or information, documents or articles to be produced or obtained (Sections 115(1)(a) and 118).

A warrant or other legal instrument of its nature must be authorized to institute search and seizure in said country (Section 115(1) (b)). A search and seizure warrant may be obtained in Kenya by a foreign state if it relates to a “serious offence” (Section 119(2) (a)). A restraint order or forfeiture order made under the Act to be enforced in that country, or a similar order to be obtained and executed in that country to preserve property that, had it been located in Kenya, would be subject to forfeiture or confiscation under the Act (Sections 115(1)(d) and 120(4)). Like the Mutual Legal Assistance Act, 2011, the Act contains a catchall provision for “other assistance to be provided”, whether in accordance to the treaty or otherwise (Section 115(1) (f)). This allows for assistance to be provided in accordance to the terms of the UNTOC or other treaties, or without such a treaty.

Part V of the Mutual Legal Assistance Act, 2011, also regulates Kenya’s assistance to other states in relation to the “identification, tracing, freezing, seizure and confiscation of the proceeds and instruments of crime under its laws or any other arrangement to which Kenya may be bound in relation to a requesting state” (Section 23(1)). A request for legal assistance would require details of the property sought, the connection between it and the relevant offences, any details of third party interests where known, and a certified copy of the freezing or seizing decision or final confiscation decision by a requesting state’s court (Section 23(2)).

Kenya may refuse to provide such assistance if the requesting state fails to provide sufficient or timely evidence or the property is of insignificant value (Section 25) although presumably not without informing them first (Section 8(6)) and thereby giving them the

opportunity to address the issue. There are a plethora of other domestic Acts that support the search, seizure and confiscation of the proceeds of crime.

### **2.6.8 EXTRADITION**

Kenya's laws facilitate extradition for various offences and in situations where it has a bilateral agreement with another country. The Extradition (Commonwealth Countries) Act, 1968, (Section 4) and the Extradition (Contiguous and Foreign Countries) Act, 1966, (Section 2) provide for the extradition of accused or convicted persons in relation to a broad range of crimes, including organised criminal group offences, and other transnational crimes, such as forgery, fraud, bribery, corruption and money laundering.

The Extradition (Commonwealth Countries) Act, 1968, allows for the extradition of a fugitive, accused or convicted person upon a request from a foreign state to the Attorney General upon evidence of a duly authenticated (Section 16(2)) foreign warrant of arrest or certificate of conviction and sentence (and specification of the amount that has been served).

The Extradition (Contiguous and Foreign Countries) Act, 1966, provides two mechanisms for extradition. The second part of the Act provides for the surrender of a fugitive, accused or convicted criminal upon request where an agreement has been made with a country other than a designated Commonwealth country with respect to surrender. The Act also applies "whether or not there is any concurrent jurisdiction in a court in Kenya over that crime" (Section 4(b)) and, like the Extradition (Commonwealth Countries) Act, 1968, provides for a warrant to be issued by a magistrate following a request from the Minister to whom a request is addressed (Section 5) or a provisional warrant to be issued, by a magistrate, following the receipt of information or a complaint and relevant evidence.

Part III of this Act provides for the mutual backing of warrants. Where the Minister is satisfied a reciprocal provision has been or will be made with a “contiguous country other than a designated Commonwealth country” (Section 11). Part III also stipulates that a magistrate may endorse a foreign warrant, which shall be sufficient authority to arrest the named person (Section 12).

Unlike the Extradition (Contiguous and Foreign Countries) Act, 1966,, the Extradition (Commonwealth Countries) Act, 1968, prevents extradition if the person would be entitled to discharge under any Kenyan law relating to a previous acquittal or conviction ‘double jeopardy’ (Section 6(2)), or if the request is made for the purposes of prosecuting or punishing a person on account of their race, religion, nationality or political opinions (Section 6(1) (b)). The Attorney General may also order that the fugitive remain in custody in Kenya if surrendering him or her would endanger their life or prejudice their health, until such circumstances no longer prevail (Section 11(5)).

Kenya’s extradition acts also contain provisions stipulating the transfer of evidence along with an accused or convicted person. The Extradition (Commonwealth Countries) Act, 1968, provides that any property in the possession of a person subject to an extradition request that is material as evidence in determining his or her extradition may be provided to the requesting state upon surrender (Section 9(6)).

All extradition requests must be submitted through the Ministry of Foreign Affairs and International Trade to the central authority, the Attorney General, who reviews them and forwards them to the ODPP to initiate extradition proceedings. However, the Extradition (Commonwealth Countries) Act, 1968, (Sections 7-8 and 11) grants the Attorney General the

power to issue an authority to proceed to a magistrate upon a request for extradition and to accept or reject the magistrate's resulting warrants.

### **2.6.9 ORGANIZED CRIME**

UNTOC's definition of organized crime (Article 2 (a)) is clearly reflected in Kenya's Prevention of Organised Crimes Act, 2010, in Part 12(a)(b). The Act provides a comprehensive and detailed list of conduct which constitutes engaging in organised criminal activity (Section 2, 3-7). The Act captures those attempting, aiding, abetting, counselling, procuring, or conspiring with another to commit an offence under the Act, setting a maximum punishment of one million shillings and/or 14 years imprisonment (Section 6). It also sets out offences related to the consenting to, administering of, taking of or compelling another to take oaths to belong to an organised criminal group or engage in an organised criminal activity, punishable by life imprisonment (Section 5).

### **2.6.10 KENYA'S WILDLIFE INTERNATIONAL LEGAL FRAMEWORK**

Kenya is a party to international conventions relating to the protection of wildlife. Kenya ratified The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) on 13 March 1979. CITES is an international convention, which regulates exports, imports and re-exports of wildlife, and aims at protecting species of endangered fauna and flora, including their by-products, by creating a control system for any trade and transaction in these species. This regulation is carried out through: (i) permits issued by CITES authorities for species which are threatened with extinction (Annex I of the Convention), (ii) export certificates issued by CITES authorities for those species not necessarily in danger of

extinction but which may become endangered if trade is not regulated, and (iii) export certificates issued by the country's authority for those species chosen by Parties to be subject to regulation. There are two amendments to CITES, the Bonn and Gaborone amendments which Kenya has ratified as well.

In addition to CITES, Kenya is a party to the Lusaka Agreement on Co-operative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora. The agreement establishes that a Task Force be established consisting of the seven Parties to the agreement: The Republics of Congo (Brazzaville), Kenya, Liberia, Tanzania, Uganda, Zambia and the Kingdom of Lesotho. The Agreement came into force in 1996, and allows the parties of the Task Force to investigate any flora or fauna case within the states under the Task Force, hence giving it cross-border rights. LATF is a unique organization due to its mandate to be able to investigate international wildlife crimes.

### **2.6.11 KENYA'S WILDLIFE DOMESTIC LEGAL FRAMEWORK**

The Wildlife Conservation and Management Act, 2013, consists of a comprehensive range of offences relating to wildlife committed by individuals or other types of bodies (Section 103), including possession of, dealing in and manufacture of any item from a wildlife trophy, with a minimum punishment of five years imprisonment and/or one million shillings (Section 95).

Trading in, importing, exporting, re-exporting and introducing any specimen of a wildlife species without a permit, holds a minimum punishment of 10 years imprisonment and/or one million shillings (Section 99(1), (3)). More specifically, no person shall:

- i. Import any such species into, or export any such species from Kenya;
- ii. Take any such species within Kenya or Kenya's territorial waters;



- iii. Take any such species upon the high seas;
- iv. Possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of paragraphs (b) and (c);
- v. Deliver, receive, carry, transport, or ship in county commerce, by any means whatsoever and in the course of a commercial activity, any such species;
- vi. Sell or offer for sale in commercial transaction within or outside Kenya any such species;
- vii. Products of listed species; or
- viii. Violate any rules and regulations pertaining to such listed species (Section 99(2)).

The Act sets out high penalties and maximum sentences, for example Section 92's penalty for offences relating to endangered and threatened species is a minimum fine of 20 Million Kenya Shillings and/or life imprisonment. Section 95 that deals with possession, dealing, and manufacturing of a wildlife trophy without a permit or exemption carries a minimum fine of 1 million Kenya Shillings and/or a minimum of 5 years imprisonment.

## **2.7 THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS AND POWERS OF DELEGATION**

The establishment of the Office of the Director of Public Prosecutions (ODPP) was formally ratified by the Constitution of Kenya, 2010 (Article 157), and is the national prosecuting authority on all criminal matters. Article 157 of the Constitution of Kenya, 2010, (GoK, 2010) outlines the ODPP's role and mandate in carrying out prosecutions. Kiage (2010) explains that the ODPP "... has a special constitutional role in the conduct of prosecutions and he is under duty to take into account and safeguard the public interest" (p. 51).

Further to the establishment of the ODPP in the Constitution of Kenya, the Office of the Director of Public Prosecutions Act (2013) gives greater detail to the ODPP, including its operations and management. Similar to Article 157(9) of the Constitution of Kenya 2010 (GoK, 2010), and Section 22 of the Office of the Director of Public Prosecutions Act, 2013, the Director of Public Prosecutions gives prosecutorial power of delegation, stating that “the Director may subject to such conditions as he or she may impose in writing, delegate any power and assign any duty conferred on him or her in terms of this Act or any other written law to a subordinate officer”. This allows the Director of Public Prosecutions (DPP) to delegate prosecutorial authority to officers of other institutional bodies to carry out prosecutions. Given such an authority is a privilege, and “... officers subordinate to him who may exercise delegated authority on his behalf must strive to reflect community opinion in the making of decisions as to whether to prosecute” (Kiage, 2010, p. 53).

The DPP has given delegated powers of prosecution to the Kenya Wildlife Service. KWS officers who are gazetted by the ODPP to carry out prosecutions are bound to the Wildlife Conservation and Management Act, 2013, in other words, KWS can only prosecute within the WCMA. If KWS prosecutors wish to charge beyond the WCMA, the ODPP Wildlife Crimes Prosecution Unit must take over the case.

The ODPP updated its National Prosecution Policy in 2014. The foreword of the Policy states the need for inter-agency cooperation, particularly between investigators and prosecutors, and the importance of the updated charging standard, which introduces the threshold test (p. iv). The Policy is meant to be a tool for prosecutors to assist them in their daily work. The Policy outlines the roles of a prosecutor, as well as principles and values to be upheld during a prosecution (p. 4-5). The Policy discusses the two-stage test for making

decisions to prosecute, common factors tending to be in favour for prosecution, common factors against prosecution, selecting charges, reviewing the decision to prosecute, and alternatives to consider instead of trial (p. 5-15).

The *Points to Prove: A Rapid Reference Guide for the Investigation and Prosecution of Wildlife Related Offences* (2014, 2016) is a tool developed by the ODPP for prosecutors and investigators of wildlife crimes. The tool lays out the points to prove of common WLC offences in order for the user to easily build a case, and it also includes ancillary legislation for the user to consider. The tool also has standard operating procedures. The tool is a rapid reference guide, to assist prosecutors and investigators in developing charge sheets faster for WLCs without having to directly refer to the actual legislation. The tool acts as a synthesized version of the WCMA, as well as relevant ancillary legislation for the most common offences.

### **2.7.1 ASSESSING PROSECUTIONS OF WLCS IN KENYA**

The non-governmental organization (NGO), WildlifeDirect, is a prominent wildlife conservation NGO based in Kenya with the mission of “changing hearts, minds and laws to ensure Africa’s critical species endure forever” (WildlifeDirect website, “Mission”). WildlifeDirect published in 2014, the *Scoping Study on the Prosecution of Wildlife Related Crimes in Kenyan Court* (Kahumbu, Byamukama, Mbutia & Drori), a unique analysis which sought to document how wildlife crimes had been prosecuted from January 2008 to June 2013. This report, a first of its kind, analysed records from only eighteen magistrate courts. The terms of reference indicate the study to be a baseline study on wildlife related crimes (2014, p. 26) that surround hotspot wildlife conservation areas, with the aim “...to examine the files and analyse outcomes of those cases with a view to determining how legislation in Kenya was being implemented to combating wildlife crime” (2014, p. 5).

The report identified a total of 743 cases which involved WLC, and “...were generally handled by the National Police Service though it was not clear how closely they collaborated with the Kenya Wildlife Service on the setting of charges” (2014, p. 11). However, “...over 70 percent of court files were reported missing or had been misplaced”, resulting in the review of only 202 files (2014, p. 11). Main results of the review of these cases were “...that the main crimes charged in court involved killing of wild animals and/or trading in their products” and that 115 of the cases involved bush meat (2014, p. 12). The report highlights different types of crime in different regions

For example, offending in areas around Mount Kenya consisted mainly of trespassing, illegal hunting and ivory related crimes. In areas around Tsavo and Amboseli, there was a prevalence of ivory related crimes and offences relating to bush meat trafficking. In Narok, the offending was seasonal in nature with a spike in April, August and December. Embu and Mombasa offenders showed a particular affinity to cat and reptile related crimes. Makadara Court handled mainly trafficking cases, indicative of the fact that most cases are apprehended at Jomo Kenyatta International Airport with the offenders being primarily of Asian descent (p. 12).

The report gives an analysis of concluded cases, conviction patterns, penalties paid, specific results on rhino and elephant related crimes, and bail and fines in ivory and rhino horn cases (2014, p. 13-15). The report also provides a number of observations, points of discussion, and culminates with a set of recommendations. Of the 202 cases analyzed, only 4% of convictions resulted in prison sentences, making the authors “...conclude that the full force of the law is not being currently implemented” (2014, p. 16). The authors discuss that although the WCMA had been enacted during the period of the study, “...the study did not find evidence that custodial sentencing was used, and in no case was the maximum sentence applied” (2014, p. 16). Kahumbu et al., 2014 explain that,

This leniency in the majority of sentencing encourages suspects to plead guilty at first appearance while a significant proportion of offenders change their plea to guilty after first appearance but before or even during trial. This is particularly so for those who engage in the trafficking of ivory and rhino where the value of the trophy greatly exceeds the fines prescribed (p. 16).

Kahumbu et al., believe that the “powers of prosecution are clearly not being fully utilized” (2014, p. 17). Going further, the authors discuss KWS’ limited prosecutorial powers to the WCMA, and infer that,

If cases relating to ivory and horn trafficking were to be prosecuted within the remit of the ODPP, the full range of legislative powers would become available such as the Organized Crime Act, Proceeds of Organized Crime Act and the Economic Crimes Act (2014, p. 17).

The report also suggests that the leniency discussed in the report can be addressed by changing the perception of magistrates, and sensitizing them to the fact the WLCs are not petty, but serious crimes (2014, p. 18). The report concludes with 10 recommendations on reforms which include: the ODPP should adopt standard operating procedures and be responsible for charging decision on specific cases; the justice institutions affirm that poaching offences are ‘organised criminal activities’ and adopt rules for streamlining the progression of a case; the Chief Justice to issue sentencing guidelines, should advise the judiciary on withholding bail in offences related to endangered species, should establish a digitized case file management system; the establishment of an NGO to act as a watchdog for the justice system; the Government of Kenya to carry out annual audits of its stockpile of ivory and rhino horns; and KWS improving its relations with communities and private sector (2014, p. 20-23).

*Outcome of Court Trials in the First Two Years of Implementation of the Wildlife Conservation & Management Act, 2013: Courtroom Monitoring Report, 2014 & 2015* (Gitari et al., 2016), is a second study published by WildlifeDirect in 2016 which sought to look at progress of wildlife trials since the enactment of the WCMA. Unlike the initial report, this report gathered information from 50 courts in 2014 and 52 courts in 2015, looking at 330 cases

in 2014 and 218 cases in 2015 (2016, p. 7). During this reporting period, 92% of the case files were accessed, unlike in 2014, where 70% were missing (2016, p. 7).

The report highlights that the WCPU was established during the reporting period, and recognizes that the WCPU prosecuted the majority of the cases during the study period (2016, p. 14). The report observes an increase in not guilty pleas since the introduction of the WCMA, and attributes this to high penalties as outlined in the law (2016, p. 15). In addition to not guilty pleas, the report discusses bail and bond, overall conviction patterns, sentencing, types of crime, elephant and rhino cases, and cases of concern (2016, p. 15-20).

The report includes the authors' opinions on the efficacy of the WCMA, as well as outcomes of the court, record keeping, and case management (2016, p. 21-25). The report concludes with a number of recommendations touching on policy and legislative reforms, prosecution and law enforcement reforms, judicial reforms, and national and international outreach (2016, p. 29-28).

## **2.8 DETERRENCE THEORY**

Deterrence theory dates back to the 18<sup>th</sup> century with its main proponents being Cesare Beccaria and Jeremy Bentham (Bosworth, 2005, p. 234; Ritchie, 2011, p. 8; Sullivan, 2009, p. 147). According to Slantchev (2005), deterrence is a form of strategic coercion with the aim to dissuade a criminal to not take action (p.3). Slantchev goes further, explaining that society, through law “make[s] the demand, explain[s] the consequences of acting, and then wait[s] (success is measured by whether something happens); if the opponent “crosses the line” we’ve drawn we take punitive action” (2005, p.3). Lebow (2007) concurs, stating

Deterrence is an attempt to influence another actor's assessment of its own interests. It seeks to prevent an undesired behavior by convincing the party who may be contemplating such an

action that its cost will exceed any possible gain. Deterrence presupposes that decisions are made in response to some kind of rational cost-benefit calculus, that this calculus can be successfully manipulated from the outside, and that the best way to do so is to increase the cost side of the ledger (p.121).

West's Encyclopedia of American Law also concurs, and explains that in an ideal world, "the most powerful deterrent would be a criminal justice system that guaranteed with certainty that all persons who broke the law would be apprehended, convicted, and punished, and would receive no personal benefit from their wrongdoing" (2008).

In relation to crime, there are two major types of deterrence, general deterrence and specific deterrence. General deterrence "...is more likely to have an effect on crime where there is an identifiable choice – or in effect, a series of choices – that requires consideration on the part of the offender of the costs and benefits of the crime" (Bosworth, 2005, p. 233; Ritchie, 2011, p. 4; Sullivan, 2009, p. 147). In other words, general deterrence believes "the threat of punishment might also discourage potential and actual criminals in the general public from committing crime" (Apel & Nagin, 2011, p. 179).

Specific deterrence involves "...the way in which the experience of a particular sanction may deter a particular offender from committing further criminal acts" (Bosworth, 2005, p. 234; Ritchie, 2011, p. 7; Sullivan, 2009, p. 147), or simply "...the reduction in re-offending that is presumed to follow from the experience of actually being punished" (Apel & Nagin, 2011, p. 179).

### **2.8.1 THEORETICAL FRAMEWORK**

Research questions 1 and 2 seek to determine how, if any, the WCMA, 2013, and the WCPU have had an effect on the prosecution of WLC cases, while research question 3 looks at international cooperation tools used to prosecute by the WCPU. The framework, or lens,

being used to analyze the data and findings for these research questions utilizes deterrence theory. Deterrence theory illustrates how the findings to the research questions should be viewed. According to Piquero, Paternoster, Pogarsky & Loughran (2011),

...deterrence is concerned with how sanction threats and the imposition of sanctions inhibit criminal activity from occurring in society at large (in the case of general deterrence) and with the persistence of crime among offenders (in the case of specific deterrence). Sanctions are presumed to deter future crime to the extent that punishment is certain, swift, and severe enough to outweigh the reward obtained from crime commission (p. 337).

Apel and Nagin (2011) indicate that "...any sanction policy that increases sentence length or mandates the imposition of a more onerous sanction ... is an example of a policy that may have a deterrence-based rationale" (p. 181). The WCMA's increase in monetary penalties and prison sentences is a clear example of deterrence theory being utilized by the authors of the legislation. In general, the establishment of the WCPU is also an example of a deterrence based policy.

The use of deterrence theory is limited however in this study. Specifically, the author only uses general deterrence for analysis in this thesis. The author recognizes that there are a number of variables to be considered in this research. For example, the WCMA and the WCPU have varying effects on local poachers when compared to TOCs. The findings in Chapter 4 speak by in large to the prosecution of local poachers, however research question 3 refers to the prosecution, if any, to TOCs. Piquero et al. (2011) support this fact, stating that "...the effect of sanctions on compliance is not one size fits all, and it is important to recognize the differential deterrability that exists across different people with respect to sanction threats" (p. 338).

The certainty of punishment is a key concept of deterrence theory (Apel & Nagin, 2011, p. 181). This concept must be considered when viewing Chapter 4, specifically, in response



to the WCMA and the establishment of the WCPU, changes in guilty pleas have been viewed, and in addition to this, the types of crimes being charged has shifted.

Moreto & Gau (2017) state that “importantly, the extant literature on deterrence heavily derives from research conducted in the global north; it is therefore difficult to state whether the theory is culturally bounded” (p. 47). This fact must be considered when viewing this thesis, as this research is the first of its kind which looks at the prosecution of WLC cases in Kenya.

## **CHAPTER THREE: METHODOLOGY**

### **3.0 INTRODUCTION**

This research utilizes a mixed method approach. The researcher collected primary data on the prosecution of wildlife crimes cases in Kenya to inform the thesis. In addition, the researcher carried out unstructured interviews with senior officials from the Kenya Wildlife Service, the ODPP's Wildlife Crimes Prosecution Unit, the United Nations Office on Drugs and Crime (UNODC), as well as the civil society organizations WildlifeDirect and Space for Giants, to understand the qualitative aspects of the data collected. The research employs the deterrence theory to interpret and analyze all data collected in order to inform discussions and conclusions as indicated in Chapter 5.

### **3.1 DATA COLLECTION**

The researcher collected primary data from the WCPU and KWS, and through analysis of the data, the researcher could determine if and how the WCMA and the WCPU has had an impact on the prosecutions of wildlife crimes. In addition to this, it was necessary to have a deeper understanding behind what the data indicates. To understand the data better, the researcher carried out unstructured interviews with senior officials of the WCPU and KWS in order to determine what could be attributable to the measured impacts extrapolated from the data.

Furthermore, the researcher identifies cases that involved the WCPU to use international cooperation tools. Although only few cases, this research identifies what specific tools were utilized by the WCPU, and based on these findings, seeks to recommend best practices to be utilized in future. In addition to the primary data collected from the WCPU and

KWS, primary sources of law are analyzed in this research; this includes international instruments, conventions, national laws, and national case law. Library services were vital to the research, and provided the relevant secondary data sources from scholarly articles, reports, and journals to carry out the study. Scholarly databases utilized for this proposal include JSTOR, Wiley Online, as well as the National Council for Law Reporting's website, Kenyalaw.org.

### **3.2 DATA ANALYSIS**

Primary data received from KWS for research question 1 involved various levels of categorization of the data in order for it to be analyzed. In order to find impacts of the WCMA, the researcher first categorized the data between two time periods, before and after the enactment of the WCMA, 2013, specifically, 2010-2013 time period and 2014 – 2017 time period. Following this, the researcher categorized adjudicated sentences per each time period, as well as guilty pleas, range of monetary fines, and range of prison sentences in default of fine sentences. Upon categorizing the primary data, the researcher was able to analyze the data in order to ascertain the results and findings.

Primary data received from the WCPU for research question 2 did not require extensive categorization. For both research questions 1 and 2, the researcher used critical analysis and interpretation in order to determine the findings. Interviews were also utilized for interpreting the primary data further.

Unstructured interviews undertaken with KWS, WCPU, UNODC, WildlifeDirect and Space for Giants were necessary to contextualize the data received for the research questions. Inputs from the interviews can be found throughout this thesis, however the qualitative aspects of the data as indicated by the interviewees comes out in the discussions section in Chapter 5.

## **CHAPTER FOUR: RESULTS AND FINDINGS**

### **4.1 DETERMINE IF THE WCMA HAS HAD MEASUREABLE IMPACT ON THE PROSECUTION OF WLC CASES**

Over the 2010-2013 time period, KWS concluded a total of 289 cases. Of the 289 cases, 192 cases carried a monetary or custodial sentence. The remaining 97 cases concluded were acquitted, withdrawn, discharged, or the accused absconded. Of the 289 cases, 59 of the cases entered a guilty plea. Table 1 and Table 3 outline the monetary or custodial sentence outcomes over the time period, while Table 2 and Table 4 outline the non-monetary or non-custodial outcomes for the time period.

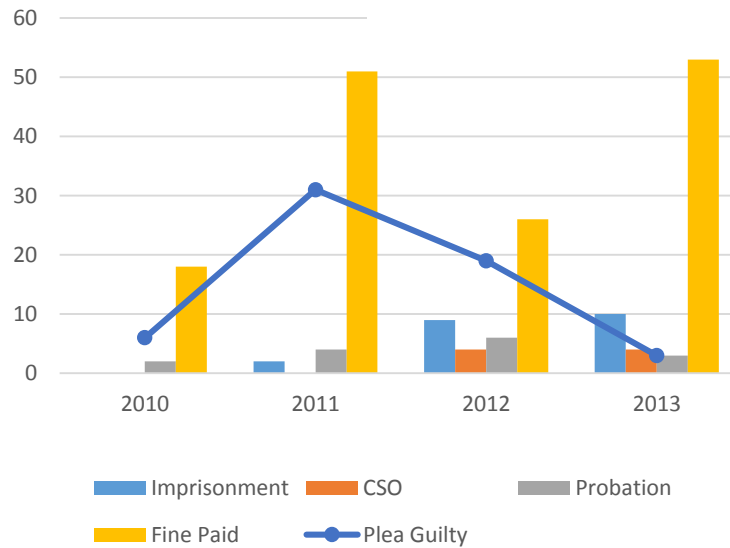
From this time period, 2010 had the least amount of data, totaling to only 39 concluded cases; 18 of these cases paid a fine, 2 were sentenced to probation, 9 cases acquitted, 1 dismissed and 9 withdrawn. Only 6 of the 39 cases pleaded guilty. Of the 18 cases that were sentenced to pay a fine, 10 of those cases paid up to Ksh. 10,000, as indicated in Table 6.

Following this, 81 cases were concluded in 2011; 51 of these paid a fine, 4 sentenced to probation, 2 sentenced to prison, 7 acquitted, 4 dismissed, 9 withdrawn and 4 cases the witness absconded. Of the total 81 cases, 31 cases pled guilty. Of the 51 cases sentenced to pay a fine, 34 cases paid up to Ksh. 10,000 as indicated in Table 7.

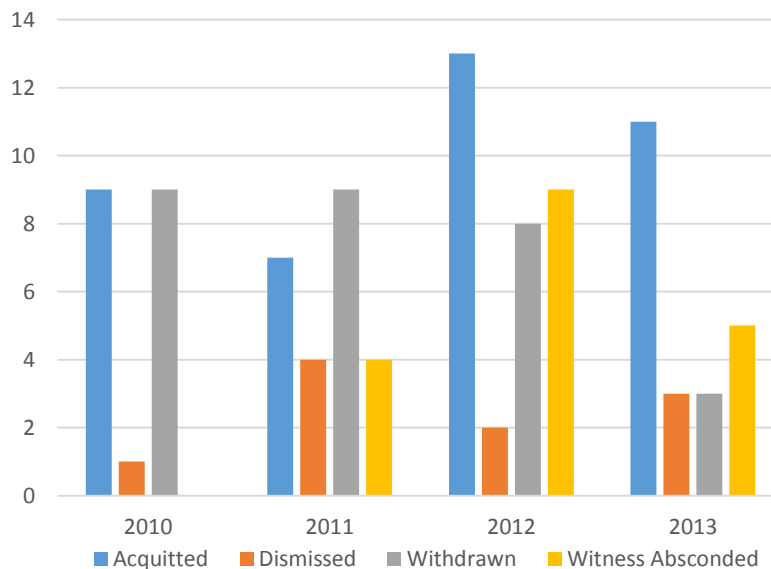
In 2012, 77 cases were concluded; 26 of these paid a fine, 6 sentenced to probation, 9 sentenced to prison, 4 sentenced to a community service order (CSO), 13 acquitted, 2 dismissed, 8 withdrawn and 9 cases the witness absconded. Of the total 77 cases, 19 cases

pled guilty. Of the 26 cases sentenced to pay a fine, 6 cases paid up to Ksh. 10,000, and 10 cases paid in the range in Ksh. 10,001 – 20,000 as indicated in Table 8.

*Table 1: Monetary and Custodial Sentences, 2010 - 2013*



*Table 2: Non-Monetary and Non-Custodial Sentences, 2010 - 2013*



The 2013 year saw 92 cases concluded; 53 of these paid a fine, 3 sentenced to probation, 10 sentenced to prison, 4 sentenced to a community service order, 11 acquitted, 3 dismissed, 3

withdrawn and 5 cases the witness absconded. Of the total 92 cases, 3 cases pled guilty. Of the 53 cases sentenced to pay a fine, 23 cases paid up to Ksh. 10,000, 10 cases paid in the range in Ksh. 10,001 – 20,000, and 11 cases paid in the range of Ksh. 20,001 – 30,000 as indicated in Table 9.

Table 3: Breakdown of Monetary and Custodial Sentences, 2010 - 2013

	2010	2011	2012	2013	Total
Imprisonment	0	2	9	10	21
CSO	0	0	4	4	8
Probation	2	4	6	3	15
Fine Paid	18	51	26	53	148
<b>Total Concluded cases per year</b>	<b>20</b>	<b>57</b>	<b>45</b>	<b>70</b>	<b>192 cases with a monetary or custodial sentence</b>

Table 4: Breakdown of Non-Monetary and Non-Custodial Sentences, 2010 - 2013

	2010	2011	2012	2013	Total
Acquitted	9	7	13	11	40
Dismissed	1	4	2	3	10
Withdrawn	9	9	8	3	29
Witness Absconded	0	4	9	5	18
<b>Total</b>	<b>19</b>	<b>24</b>	<b>32</b>	<b>22</b>	<b>97 cases without a monetary or custodial sentence</b>

Table 5: Breakdown of Guilty Pleas, 2010 - 2013

Outcome of guilty plea	2010	2011	2012	2013	Total Outcomes of Guilty Pleas
Monetary fine	4	29	9	3	45
Acquitted	2	0	0	0	2
Probation	0	1	4	0	5
Dismissed	0	1	0	0	1
CSO	0	0	1	0	1
Prison	0	0	4	0	4
Withdrawn	0	0	1	0	1
<b>Total</b>	<b>6</b>	<b>31</b>	<b>19</b>	<b>3</b>	<b>59 total pleas over time period</b>

Table 7: Range of Monetary Fines, 2010

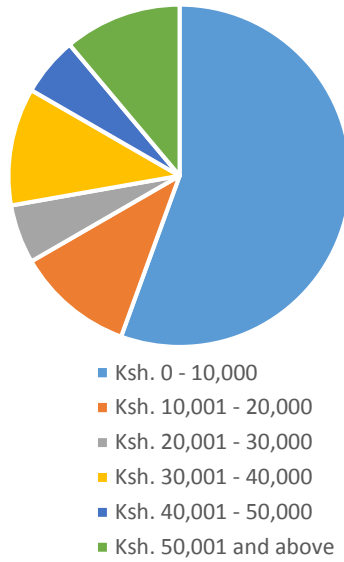


Table 6: Range of Monetary Fines, 2011

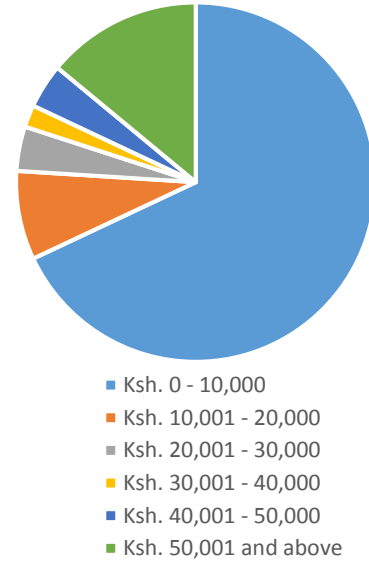


Table 9: Range of Monetary Fines, 2012

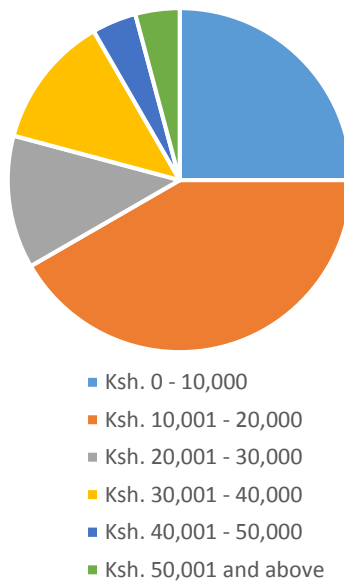
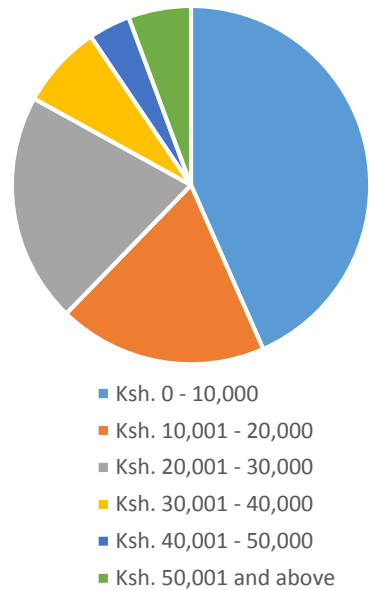


Table 8: Range of Monetary Fines, 2013



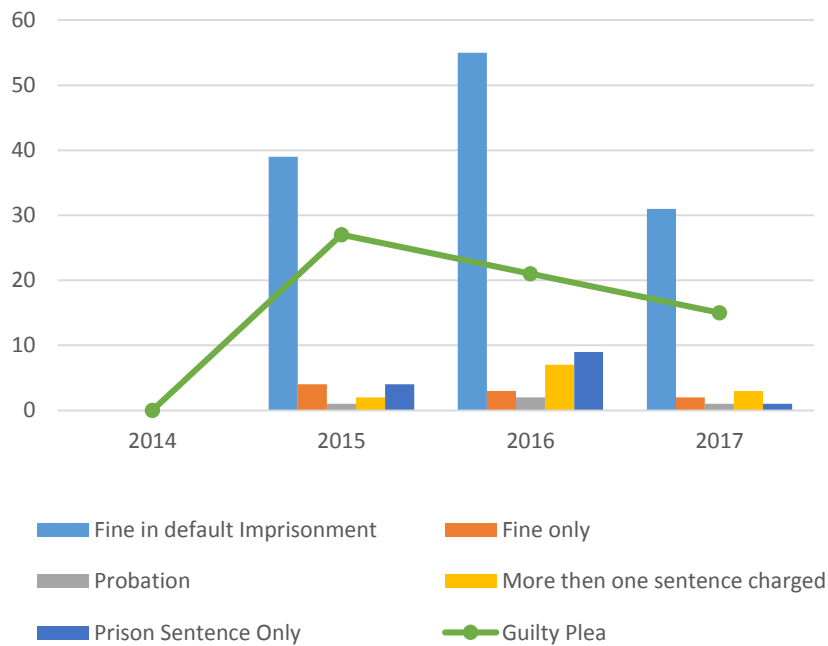


The ranges of monetary fines over the 2010-2013 time periods, as indicated in Tables 6 – 9, appear to have a broad variety. In 2010, 17 cases received a monetary fine, 10 of which held the lowest possible range of Ksh. 0 – 10,000. In 2011, an increase is observed in cases receiving a monetary penalty, totaling to 50 cases. The majority, 34 of these cases were in the Ksh. 0 – 10,000 range, but a slight increase is observed in the other fine ranges; notably an increase in fines of Ksh. 50,001 and above. Cases in 2012 holding a monetary fine totaled to 24 cases. 10 of these cases were in the Ksh. 10,001 – 20,000 range, and 6 in the Ksh. 0 – 10,000 range. The year 2013 saw the highest number of cases sentenced to a monetary fine for this time period, totaling 53 cases. Compared to the other years in the time period, there is a wider distribution of fines, with 23 cases in the Ksh. 0 – 10,000 range, 10 cases in the 10,001 – 20,000 range and 11 cases in the Ksh. 20,001 – 30,000 range.

Over the 2014 - 2017 time period, after the enactment of the Wildlife and Conservation Management Act, a total of 195 cases were concluded by KWS. Of the 195 cases, 164 cases carried a monetary or custodial sentence, and 31 cases were either acquitted, withdrawn, discharged or the accused absconded. Of the 195 concluded cases, 72 cases entered a guilty plea.

Tables 10 and 12 outline the monetary or custodial sentences outcomes over the time period, while Tables 11 and 13 outline the non-monetary or non-custodial outcomes for the time period. There was no data available on monetary or custodial sentences for the year 2014, with only 1 case being recorded for the year, which was an acquittal.

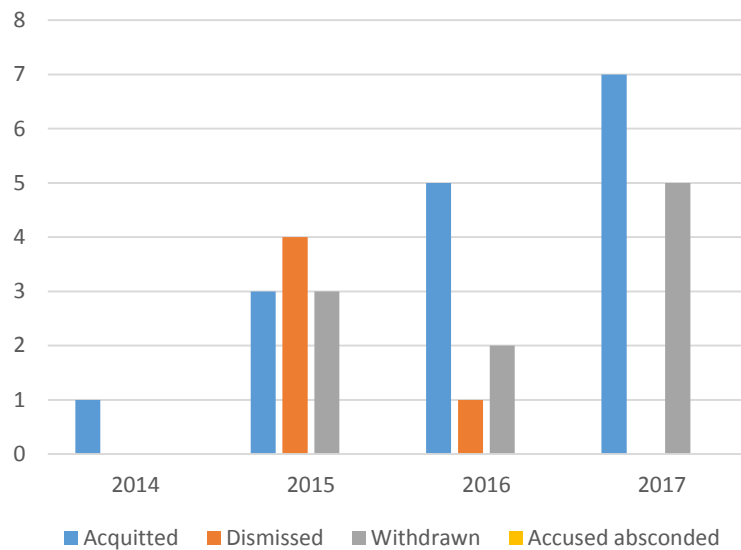
Table 10: Monetary and Custodial Sentences, 2014 - 2017



In 2015, 60 cases were concluded; 39 of these cases carried a fine in default imprisonment sentence, 4 cases were sentenced to pay only a fine, 1 sentenced to probation, 2 cases had more than one sentence charged, 4 sentenced to prison, 3 acquitted, 4 dismissed, and 3 cases were withdrawn. Of the 60 concluded cases, 31 of the cases pled guilty.

The 2016 year saw 84 cases concluded; 55 of these cases carried a fine in default imprisonment sentence, 3 cases were sentenced to pay only a fine, 2 sentenced to probation, 7 cases had more than one sentence charged, 9 sentenced to prison, 5 acquitted, 1 dismissed, 2 cases were withdrawn. Of the 84 concluded cases, 25 of the cases pled guilty.

Table 11: Non-Monetary and Non-Custodial Sentences, 2014 - 2017



During the analysis of this thesis, 50 cases had been concluded in 2017; 31 of these cases carried a fine in default imprisonment sentence, 2 cases were sentenced to pay only a fine, 1 sentenced to probation, 3 cases had more than one sentence charged, 1 sentenced to prison, 7 acquitted, and 5 cases were withdrawn. Of the 50 concluded cases, 16 of the cases pled guilty.

Table 12: Breakdown of Monetary and Custodial Sentences, 2014 – 2017

	2014	2015	2016	2017	Total
Fine in Default Imprisonment Sentence	0	39	55	31	<b>125</b>
Fine Only	0	4	3	2	<b>9</b>
Probation	0	1	2	1	<b>4</b>
More than one sentence charged	0	2	7	3	<b>12</b>
Prison sentence only	0	4	9	1	<b>14</b>
<b>Total Concluded cases per year</b>	<b>0</b>	<b>50</b>	<b>76</b>	<b>38</b>	<b>164 cases with a monetary/custodial sentence</b>

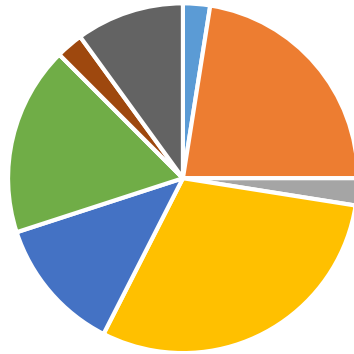
Table 13: Breakdown of Non-Monetary and Non-Custodial Sentences, 2014 - 2017

	2014	2015	2016	2017	Total
Acquitted	1	3	5	7	<b>16</b>
Dismissed	0	4	1	0	<b>5</b>
Withdrawn	0	3	2	5	<b>10</b>
Witness Absconded	0	0	0	0	<b>0</b>
<b>Total Concluded cases per year</b>	<b>1</b>	<b>10</b>	<b>8</b>	<b>12</b>	<b>31 without a monetary or custodial sentence</b>

Table 14: Breakdown of Guilty Pleas, 2014 - 2017

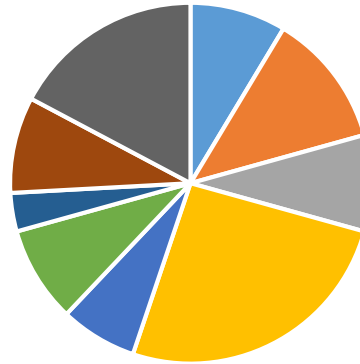
Outcome of guilty plea	2014	2015	2016	2017	Total Outcomes of Guilty Pleas
Monetary fine in default imprisonment	0	25	21	14	<b>60</b>
Acquitted	0	0	0	0	<b>0</b>
Probation	0	1	0	0	<b>1</b>
Dismissed	0	0	0	0	<b>0</b>
Community Service Order	0	0	0	0	<b>0</b>
Prison	0	2	3	0	<b>5</b>
Fine Only	0	3	1	2	<b>6</b>
<b>Total</b>	<b>0</b>	<b>31</b>	<b>25</b>	<b>16</b>	<b>72 total guilty pleas</b>

Table 16: Range of Monetary Fine Sentences, 2015



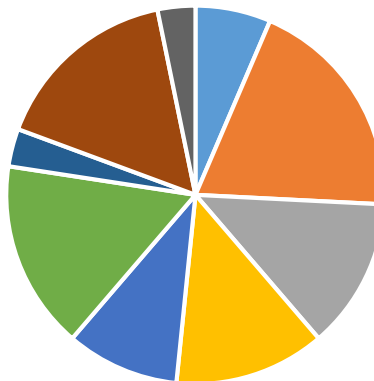
- Ksh. 0 - 15,000
- Ksh. 15,001 - 50,000
- Ksh. 50,001 - 100,000
- Ksh. 100,001 - 200,000
- Ksh. 200,001 - 500,000
- Ksh. 500,001 - 1,000,000
- Ksh. 1,000,001 - 5,000,000
- Ksh. 5,000,001 - above
- Prison sentence only

Table 15: Range of Monetary Fine Sentences, 2016



- Ksh. 0 - 15,000
- Ksh. 15,001 - 50,000
- Ksh. 50,001 - 100,000
- Ksh. 100,001 - 200,000
- Ksh. 200,001 - 500,000
- Ksh. 500,001 - 1,000,000
- Ksh. 1,000,001 - 5,000,000
- Ksh. 5,000,001 - above
- Prison sentence only

Table 17: Range of Monetary Fine Sentences, 2017



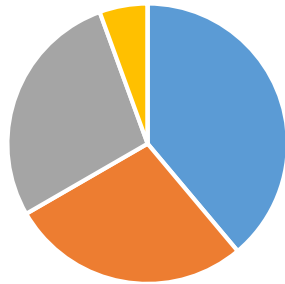
- Ksh. 0 - 15,000
- Ksh. 15,001 - 50,000
- Ksh. 50,001 - 100,000
- Ksh. 100,001 - 200,000
- Ksh. 200,001 - 500,000
- Ksh. 500,001 - 1,000,000
- Ksh. 1,000,001 - 5,000,000
- Ksh. 5,000,001 - above
- Prison sentence only

In 2015, 40 concluded cases were analyzed to determine the range of monetary in default imprisonment sentences. Of these cases, 12 cases received a range of Ksh. 100,001 – 200,000, 9 cases Ksh. 15,001 – 50,000 range, and 7 cases in the range of Ksh. 500,001 – 1,000,000. Only 4 of the cases were sentenced to prison without an option to pay a fine.

In 2016, 57 concluded case were analyzed; with 15 cases being in the Ksh. 100,001 – 200,000 range, 7 cases in the Ksh. 15,001 – 50,000 range, and equal number of cases, five, in other monetary categories. It should be noted that 7 cases were sentenced to Ksh. 1,000,001 or above, in default imprisonment. In addition to this, 9 cases were sentenced to prison without an option to pay a fine.

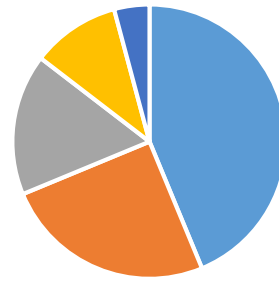
At the time of writing, 31 concluded cases were analyzed; the sentences for this time period appear to have a more equal distribution, with 6 cases being sentenced to Ksh. 15,001 – 50,000 and 5 cases sentenced to Ksh. 500,001 – 1,000,000. Six cases were sentenced to Ksh. 1,000,001 or above, in default imprisonment and 1 case was sentenced to prison without an option to pay a fine.

Table 19: Range of Prison Sentences in Default, 2015



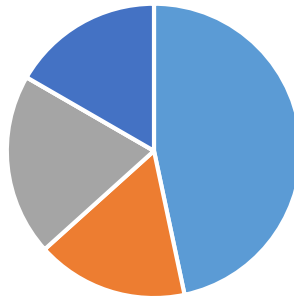
- 1 month - 1 year in default of fine
- 13 months year - 3 years in default of fine
- 37 months - 5 years in default of fine
- 61 months - and above in default of fine
- Life imprisonment

Table 18: Range of Prison Sentences in Default, 2016



- 1 month - 1 year in default of fine
- 13 months year - 3 years in default of fine
- 37 months - 5 years in default of fine
- 61 months - and above in default of fine
- Life imprisonment

Table 20: Range of Prison Sentences in Default, 2017



- 1 month - 1 year in default of fine
- 13 months year - 3 years in default of fine
- 37 months - 5 years in default of fine
- 61 months - and above in default of fine
- Life imprisonment

Looking at the monetary fine in default imprisonment sentences, 36 cases held such a sentence in 2015. 14 of these cases carried a 1 month to 1 year imprisonment default, 10 cases 13 months to 3 years, 10 cases 37 months to 5 years, and 2 cases were sentenced to 61 months

or above. 2016 saw 48 cases holding such a sentence, with 21 cases up to 1 year in default imprisonment, 12 cases sentenced to 13 months to 3 years, 8 cases between 37 months and 5 years, 5 cases over 61 months imprisonment, and 2 life imprisonment sentences. From the 2017 cases, 14 cases were sentenced up to 1 year, 5 cases from 13 months up to 3 years, 6 cases sentenced to 37 months to 5 years, and 5 cases sentenced to life imprisonment (Government of Kenya, Kenya Wildlife Service, unpublished data).

The repealed Wildlife Conservation and Management Act (Cap 376, 1976) was an outdated piece of legislation that was being exploited by wildlife criminals. The legislation carried low monetary and custodial penalties. From the data collected, the researcher can determine that the majority of cases over the 2010-2013 period only paid a monetary fine. For example, when reviewing data from the 2010-2013 period, there were numerous cases involving rhinoceros horn or ivory which were concluded with only a fine. Of the 289 concluded cases from the time period, only 21 cases were sentenced to prison, while many of the cases, 148 specifically, only paid a fine. Of the cases which paid a fine, fines were very low, with the majority paying an average of only up to Ksh. 10,000.

The WCMA dramatically changed this precedent by enacting high minimum fines and in default of paying the fine, high prison penalties. From the data collected, a decrease has been observed for cases acquitted, dismissed or withdrawn. There have been less concluded cases over the 2014-2017 period when compared to the 2010-2013 period; specifically, 289 concluded cases over the 2010-2013 and 195 concluded cases respectively. When considering this fact, one must be cognizant that KWS provided little data on prosecutions for the 2014 year, and that this is the year the WCPU came into effect. The lack of KWS data for 2014 could be due to the WCPU inheriting many cases.



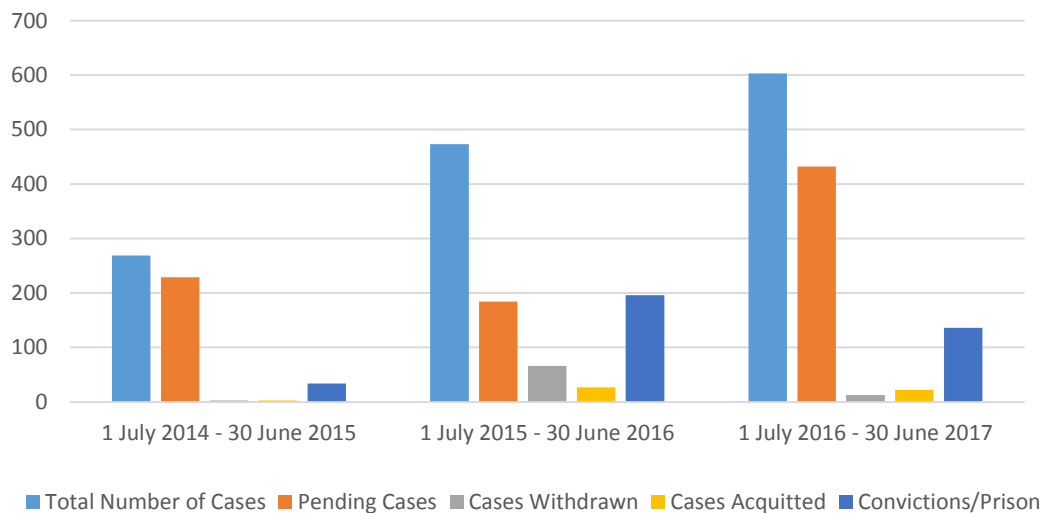
Over the 2010 – 2013 period, 59 cases entered a guilty plea, and over the 2014 – 2017 period, 72 cases entered a guilty plea. Although there has been an overall increase, the bulk of the cases entering a guilty plea after the ratification of the WCMA involve illegal entry and bush meat offences. These offences are common in remote locations where suspects cannot afford or access a defense counsel, hence pleading guilty. It must be noted that over the 2014 – 2017 period, guilty pleas reduced year by year, and that there has been a significant decrease in guilty pleas for possession of ivory tusk or rhino horns (Mwalenga, 2017; Wambua, 2017). Also, a number of the guilty pleas found in the 2015 data were cases involving the repealed law.

When analyzing the fine in default imprisonment data, and prison only sentences, over the 2014 – 2017 period, an increase and variance in the amounts being fined is observed. The in default prison sentences steadily become more varied, with higher prison sentences being given as time progresses. In addition to this, life imprisonment sentences steadily increase over the time period, from 2 sentences in 2016 to 5 sentences in 2017. In this regard, and taking all data into consideration, it is clear that the WCMA has had positive impacts. The researcher finds that the WCMA has had the effect the stakeholders of the legislation intended for it to have – better cases being presented in court, increase in revenue collected by the Government through high fines, higher prison sentences if criminals default paying the fine, and a few life imprisonment sentences being given. This last point is significant, and illustrates that by magistrates adjudicating the option of life imprisonment, the seriousness of wildlife crimes is now being recognized. Over time, this should result in the crime being deterred.

## 4.2 DETERMINE IF THE ODPP WILDLIFE CRIMES PROSECUTION UNIT HAS HAD A MEASUREABLE EFFECT ON WLCS CASES SINCE ITS INCEPTION

The ODPP records all case data based on the financial year rather than a calendar year, with the financial year beginning on 1st July and ending on 30th June of each calendar year. The unit, only established in 2014, began prosecuting WLC cases from January 2014. The 2014-2015 financial year data is intended to serve as a baseline reference for the WCPU, and

*Table 21: WCPU Data, 2014 - 2017*



during this period, the Unit inherited numerous cases from KWS, which were charged under the repealed WCMA. During the 2014-2015 year, the WCPU had a total of 269 cases, the majority of which, 229, remained pending, 34 of the cases were convicted, 3 withdrawn and 3 acquitted.

Over the 2015-2016 year, the WCPU had a total of 473 cases; 196 of the cases were convicted, 66 withdrawn, 27 acquitted, and 184 remained pending. The WCPU had a total of 603 cases over the 2016-2017 period; 136 of these cases were convicted, 13 withdrawn, 22

acquitted, and 432 remain pending (Government of Kenya, Office of the Director of Public Prosecution, unpublished data).

The data indicates that measureable, positive effects can be seen. During the 2015-2016 year, the WCPU nearly cleared all cases charged under the repealed WCMA. This process saw the WCPU review all cases, and make the necessary withdrawals if a case was not deemed worthy enough to go to court. When comparing the 2015-2016 number of the withdrawn cases to the 2016-2017 withdrawn cases, we see a significant decrease in cases. This can indicate that better case files and charge sheets are being produced. A decrease in acquittals should also be noted when comparing the two periods.

As the WCPU moved to charging under the WCMA a trend emerged since the 2015-2016 period, whereby the accused do not opt for a guilty plea forcing cases to go to trial. This is evident when looking at the increase in pending cases from the 2015-2016 year to the 2016-2017 year. These pending cases have created a backlog for the Judiciary. In addition to this, the WCPU experienced an increase in overall fresh cases from the 2015-2016 period compared to the 2016-2017 period.

#### **4.3 IDENTIFY INTERNATIONAL COOPERATION TOOLS UTILIZED BY THE WCPU ON TRANSNATIONAL WLC CASES TO DETERMINE BEST PRACTICES FOR FUTURE CASES**

The WCPU utilizes the IGAD Convention on Mutual Legal Assistance in Criminal Matters and the IGAD Convention on Extradition when applicable. Although these are formal conventions, the WCPU uses informal channels when dealing with a case within the East Africa region, with hardly any paperwork needing to be completed. The WCPU only processes mutual legal assistance (MLA) for cases within the region if evidence is required for

documentation purposes, otherwise the WCPU utilizes its informal relationships with counterparts in other countries (Wambua, 2017).

In regards to inter-continental cases, MLA requests have been requested to assist in procuring evidence for cases involving seized wildlife products in Thailand, Singapore and Vietnam. All three cases originated from the Port of Mombasa.

The Thailand and Singapore seizures occurred nearly a month apart, in 2015, with both containing over 3 tons of ivory, and both used tea leaves as the concealment method (Government of Kenya, Office of the Director of Public Prosecutions, unpublished data; WildlifeDirect, unpublished data). All three MLAs are still in the processing stage by the receiving states.

Since Kenya has no established protocols regarding MLAs outside of its regional agreements, the three MLA requests are still outstanding, at the time of writing this thesis. With this established, no best practices can be extrapolated, and instead lessons learned can be considered. The WCPU has learned from the three Asian MLA experiences that an agreement should be made with the Association of Southeast Asian Nations (ASEAN) bloc. Such an agreement should include all necessary requirements of each state to fulfill an MLA, including language interpretation, an outline of the necessary channels of communication clarified, responsibilities of requesting and requested states, for example who pays for repatriating seized goods (UNODC, Wildlife Inter-Regional Exchange (WIRE) meeting for Prosecutors, 2017).

## 4.4 CONCLUSION

In order to answer the Research Questions, official and unpublished data was collected from the Kenya Wildlife Service and the Office of the Director of Public Prosecutions. In order to determine whether the WCMA, 2013, has had measureable impacts, the researcher categorized data from two time periods, specifically from 2010 – 2013, before enactment of the WCMA, and 2014 – 2017, after the enactment of the WCMA. From the 2010 – 2013 time period, it became evident that very few cases were sentenced to prison, seeing the majority of cases resulting in monetary fines. The average monetary fine sentenced over the time period was up to Ksh. 10,000, with a slight variance only in 2012, where a number of cases were sentenced to fines in the range of Ksh. 10,001 – 20,000.

Over the second analyzed time period, 2014 – 2017, an increase was observed in the range of monetary fines being sentenced, as well as an increase in in default imprisonment sentences, including life imprisonment. During this period, there was also an increase in guilty pleas, but these guilty pleas are for less serious crimes as compared to the guilty pleas during the 2010 – 2013 time period. The 2014 – 2017 period has experienced less concluded cases, as well as less acquitted, withdrawn or discharged cases. It is clear that the WCMA has had positive impacts, bringing the researcher to conclude that the WCMA has had the effect the stakeholders of the legislation intended for it to have – better cases being presented in court, increase in revenue being collected by the Government through high fines, higher prison sentences if criminals default paying the fine, with a few life imprisonment sentences being given.

To determine if the ODPP WCPU has had a measureable effect on WLC cases since its inception in 2014, the researcher analyzed data from the WCPU over three financial years.

The 2014 – 2015 year serves as a baseline for the unit, and saw the majority of cases remain pending. The cases for this period were mainly inherited from KWS, and the cases which went to court, were charged under the repealed WCMA. The 2015 – 2016 time period experienced a review by the WCPU of all of its cases. This can be evident through the high number of cases withdrawn and the decrease in pending cases for that year. The 2015 – 2016 and 2016 – 2017 time periods saw increases in total number of cases and decreases in acquittals. During these time periods the Unit was able to charge under the WCMA resulting in many not guilty pleas. This increased the pending cases for the 2016 – 2017 year. The researcher found that the WCPU has had positive impacts since its inception in prosecuting WLC cases.

For Research Question 3, the researcher concluded that best practices could not be extrapolated at the time of writing the thesis. There are two reasons for this, firstly, the WCPU uses informal channels for any case within the East African region which does not require evidentiary documentation. For inter-continental cases, mutual legal assistance has been requested in three cases. In all three cases, very little or no information has been received at the time of writing this research. The researcher concludes that instead of determining best practices, the researcher can identify lessons learnt by the WCPU. The WCPU learned from the three Asian MLA experiences that an agreement should be made with the Association of Southeast Asian Nations (ASEAN) bloc. Such an agreement should include all necessary requirements of each state to fulfill an MLA, including language interpretation, an outline of the necessary channels of communication clarified, responsibilities of requesting and requested states, for example who pays for repatriating seized goods.

# **CHAPTER FIVE: DISCUSSIONS AND CONCLUSIONS**

## **5.0 INTRODUCTION**

This study sought to evaluate how the prosecution of wildlife crimes has changed over time, and what best practices have been utilized by the WCPU on transnational wildlife crime cases. The research answered three research questions as outlined in Chapter 1, and sought to find out whether WCMA and the WCPU have had a measureable impact on the prosecution of wildlife crime cases in Kenya. It also looked cases which the WCPU used international cooperation tools on transnational WLC cases to determine best practices for future cases.

## **5.1 SUMMARY OF KEY FINDINGS**

Research question 1 analyzed data from before and after the enactment of the WCMA, 2013, to determine if an on the prosecutions of WLCs could be observed. The research gives an analysis of the available wildlife cases that have been concluded, conviction patterns, penalties paid,

Key findings establish that wildlife cases have experienced a shift from petty crimes and misdemeanors to serious and chargeable offenses. The value of the non-custodial sentences, for example, monetary fines and prison sentences has increased significantly reflecting how the Government of Kenya values its wildlife.

An increase in in default custodial sentences in regard to time served has also increased to reflect the magnitude of WLCs. There has been a shift from pleading guilty for crimes involving ivory or rhino horn to crimes involving illegal entry and bush meat, meaning that wildlife crimes of high magnitude, which are of considerable value to Kenya, are now being recognized with the seriousness they deserve, since the law now reflects the actual value of the

wildlife at stake. In this regard, and taking all data from Chapter 4 into consideration, it is clear that the WCMA has had positive impacts. The researcher finds that the WCMA has had the effect the stakeholders of the legislation intended for it to have – better cases being presented in court, increase in revenue being collected by the Government through high fines, higher prison sentences if criminals default paying the fine, and a few life imprisonment sentences being given. This last point is significant, and illustrates that by magistrates adjudicating the option of life imprisonment, the seriousness of wildlife crimes is now being recognized. Over time, this should result in the crime being deterred.

Research question 2 sought to determine if the ODPP's WCPU has had a measureable effect on WLC cases since its inception. The unit has a mandate to prosecute any crime in relation to wildlife crimes. The unit not only has the discretion to charge crimes under the WCMA but it also has the option of charging using additional and secondary legislation, as well as international cooperation tools such as mutual legal assistance, or the recognition and implementation of international legal frameworks that Kenya is party to.

The researcher made an analysis of data from the WCPU over three financial years in order to determine if the WCPU has actually had a significant effect on WLC cases since its inception. Data from the 2014 – 2015 period saw cases which were mainly succeeded from KWS, hence making them already in the pipeline, to be charged under the repealed WCMA. In 2015 – 2016, all cases under the WCPU were reviewed causing an increase in the number of cases withdrawn and in turn a decrease in pending cases over the time period. 2015 - 2016 as well as the 2016 – 2017 time period saw an increase in total number of cases and likewise, a drop in the number of acquittals. During this time, the Unit began charging under the WCMA. This consequentially turned over an increased number of pleas of not guilty entered



in relation to wildlife cases, which subsequently increased the pending cases for the year 2016 – 2017. Through this analysis, the researcher deduces that the WCPU seems to have had a positive impact in prosecuting WLC cases since its inception.

For Research Question 3, the researcher concluded that best practices could not be extrapolated at the time of writing the thesis. There are two reasons for this, firstly, the WCPU uses informal channels for any case within the East African region which does not require evidentiary documentation. For inter-continental cases, mutual legal assistance has been requested in three cases. In all three cases, very little or no information has been received at the time of writing this research. The researcher concludes that instead of determining best practices, the researcher can identify lessons learnt by the WCPU. The WCPU learned from the three Asian MLA experiences that an agreement should be made with the Association of Southeast Asian Nations (ASEAN) bloc. Such an agreement should include all necessary requirements of each state to fulfill an MLA, including language interpretation, an outline of the necessary channels of communication clarified, responsibilities of requesting and requested states, for example who pays for repatriating seized goods.

## **5.2 DISCUSSIONS**

Through unstructured interviews carried out with senior officials from KWS, WCPU, UNODC and the civil society organizations, WildlifeDirect and Space for Giants, a number of qualitative factors which have had an impact or influence on the prosecution of WLC should be acknowledged.

The ratification of the WCMA can directly be attributed to the positive impacts discussed in Chapter 4. This fact, and other qualitative factors outlined in this section have contributed

to moving WLCs from petty crimes to serious offenses. This can be observed in the increase in monetary fines, as well as the increase in in default prison sentences. Although there has been an increase in guilty pleas over the two time periods, the type of crimes which suspects are pleading guilty has changed, and has moved from pleading guilty for crimes involving ivory or rhino horn to crimes involving illegal entry and bush meat.

Inter-agency coordination is a point stressed by all officials interviewed. It has been recognized that inter-agency coordination is a successful approach to fighting WLCs, and is further needed in order to disrupt the transnational organized syndicates (Montano, 2017; Jayanathan, 2017; Wambua, 2017). In addition, it was recognized that such collaboration amongst the Judiciary, KWS, the National Police Service, and ODPP should be carried out more with civil society organizations involved in WLCs.

Senior officials from KWS and the WCPU recognized that civil society organizations contributed to the increase in cases being brought to court (Government of Kenya, Kenya Wildlife Service, Office of the Director of Public Prosecutions, unpublished data; Ogoma, 2017; Space for Giants, 2017; Wambua, 2017; WildlifeDirect, 2017).

The WCPU has seen a decrease in withdrawn and acquitted cases when comparing the 2015-2016 year to the 2016 - 2017 year. As mentioned in Chapter 4, the WCPU carried out a review of all cases upon beginning the 2015-2016 year (Government of Kenya, Office of the Director of Public Prosecutions, unpublished data). Carrying out a review of cases is a responsibility and duty of public prosecutors. According to the Office of the Director of Public Prosecution's National Prosecution Policy (2014), a prosecutor is

... to continually review prosecutions once commenced. This should be informed by a change in circumstances following which a re-application of the decision to prosecute indicates that the evidence is no longer sufficient to justify a reasonable prospect of conviction or when it is no longer in the interest of justice for the prosecution to continue (p. 12).

In addition to the review, and according to the Senior Assistant Director of Public Prosecutions, and head of the WCPU, secondary factors attributable include the recruitment of additional prosecutors to the ODPP; this enables the workload of prosecutors to be reduced, and allows the prosecutors to prepare cases better. In relation to improved inter-agency coordination, the ODPP has also been implementing prosecution-led investigations since late 2014. This has changed the paradigm from police-led investigations to now joint investigations being carried out in order to ensure a strong case is being made from the start (Ogoma, 2017).

The ODPP also updated its National Prosecution Policy in 2014. This Policy is a tool to assist prosecutors as it outlines the roles of a prosecutor, as well as ideologies and ethics to be adhered to during trial and charging. The Policy discusses the two-stage test, including the threshold test for prosecutor decision-making, significant factors, common factors, specific selective charges, reviewing decisions to prosecute as well as alternatives to consider instead of trial are specifically outlined in this new policy. This is a significant step the ODPP has taken towards carrying out better prosecutions.

Since the enactment of the WCMA and establishment of the WCPU, better cases have been brought to court. This can be seen in the decrease in acquitted, dismissed and withdrawn cases, as well as through courts giving higher fines, prison sentences, and even life sentences. In addition to the above-mentioned factors, the work of civil society organizations, development partners and intergovernmental organizations, such as United Nations agencies, must also be underscored.

Civil society organizations such as, Space for Giants and WildlifeDirect are assisting the Government of Kenya and WLC stakeholders with scrutinizing court procedures and

outcomes of the court through case tracking, monitoring, follow up and even providing legal assistance to prosecutions (Jayanathan, 2017; Karani, 2017). On the ground partnerships between civil society organizations and wildlife stakeholders builds awareness amongst the various government agencies, for example, the civil society organizations can alert the ODPP, Judiciary, or KWS of problems, cases and/or crimes which are occurring in real time. Such vigilance ensures that court procedures, prosecutions and investigations are carried out with the utmost integrity. This vigilance also ensures that the public has a voice in regards to wildlife, and wildlife crimes, maintaining a check on the government stakeholders involved.

Capacity building and heightened sensitization amongst government stakeholders and the public is also incredibly relevant to the impacts seen from this research. In 2013, the WCPU began working with development partners on adopting an updated charging standard for WLCs. The charging standard involves the two-stage test, namely the first stage is composed of an evidential test which is an objective assessment of evidence, where a prosecutor determines if the evidence is admissible and reliable. If the evidential test is passed, then the prosecutor uses the threshold test, which is applied when a suspect can be a potential bail risk and when evidence is not available at the time when the suspect must be charged or released. The threshold test is applicable in certain cases only. The second stage is the public interest test, which is when prosecutors decide if a prosecution should move forward in the name of the public's interest (Ogoma, 2017; Jayanathan, 2017). The ODPP's National Prosecution Policy (2014) has a section on the public interest test and factors to consider. Upon going through these stages, the prosecutors have a decision to charge template, which documents the decisions of the prosecutor on the specific case.

In addition to the updated charging standard, the WCPU worked with development

partners in 2013 to develop the *Points to Prove: a Rapid Reference Guide for the Investigation and Prosecution of Wildlife Related Offences (RRG)*. This guide includes all relevant laws, as well as standard operating procedures on investigating and prosecuting WLC cases. The WCPU and KWS prosecutors attribute the RRG, and the updated charging standard, to the improvement seen in case files and charge sheets, which is observable in this thesis through the reduction in cases being acquitted, withdrawn or dismissed, as well as greater sentences being adjudicated. The WCPU views the RRG as a vital tool to assisting prosecutors in WLC cases, and through civil society organizations and United Nations agencies, are constantly updating the RRG as new trends emerge (Ogoma, 2017).

The updated charging standard and the RRG were developed and disseminated when the WCMA was ratified and assisted the WCPU and KWS in sensitizing all stakeholders – prosecutors, investigators and magistrates – on the updated law, the seriousness of WLCs and the importance in the increased monetary and prison penalties found in the WCMA.

### **5.3 CONCLUSION**

This research analyzed data on prosecution and conviction rates of WLC, from 2010 to present. Through an analysis of the findings for Research Question 1, it is clear that the repealed Wildlife Conservation and Management Act (Cap 376) of 1976 was being thoroughly exploited by wildlife criminals and hence its repeal. The legislation carried low monetary and custodial penalties for serious wildlife offences that in turn had a major effect on wildlife populations in Kenya. As earlier discussed, and reiterated from the data collected, the research shows that for the majority of cases over the 2010-2013 period, defendants only paid a monetary fine. This time period saw numerous cases involving rhinoceros horn or ivory, which were concluded with only a minimal fine. Monetary fines did not deter the crime, and did not

reflect the value of the wildlife, nor express the seriousness and magnitude in the committal of wildlife related crimes. Of the 289 concluded cases over the time period, only 21 cases were sentenced to prison, while 148 of these cases paid the low fine that was stated in the law at the time.

The WCMA, however, invoked a radical change, seeing wildlife crimes become serious offences, as well as setting sentencing precedence, by enacting high minimum fines and in default of paying the fine, long prison penalties. From the data collected, a decrease has been observed for cases acquitted, dismissed or withdrawn. There have been less concluded cases over the 2014-2017 period compared to the 2010-2013 period.

It has been noted that longer prison sentences are being given as time progresses. In addition to this, the WCMA's established minimum fines and prison penalties include life imprisonment sentences for some offences (Section XI, Offences and Penalties). Such sentences were not in the repealed WCMA, and as such, life imprisonment sentences for WLCs have steadily increased over time, from 2 sentences in 2016 to 5 sentences in 2017. The thesis finds considerable evidence that the WCMA has had considerable effect and impact on responding to WLC in Kenya.

Other positive effects of the WCMA is increased revenue base repatriated to the Government through new higher fines, which reflect the value of the wildlife. Additionally, there has been an increase in length of custodial sentencing terms when criminals default paying the fine, as well as a few life imprisonment sentences being issued. This is significant, and shows the precedent that magistrates' adjudicating the option of life imprisonment reflects the magnitude and seriousness of wildlife offences, and that such violations will be regarded as such. It can therefore be determined, that this, over time, will deter future wildlife offences.

The ranges of monetary fines over the 2010-2013-time period, as indicated in Tables 6 – 9, varied depending on the case adjudicated. These fines however did not reflect the value of the wildlife crime offence, and therefore, in assessing the risk of the consequences of criminals being caught versus the value of the proceeds of the crime, the repealed WCMA did not have any deterrent effects. This is where the trend of guilty pleas and the low fines had been observed. But a slight increase is observed in the other fine ranges, notably an increase in fines. However, over the 2014 - 2017 time period, after the enactment of the WCMA a total of 195 cases were concluded by KWS. Of the 195 cases, 164 cases carried a monetary or custodial sentence, and 31 cases were either acquitted, withdrawn, discharged or the accused absconded. Of the 195 concluded cases, 72 cases entered a guilty plea.

Tables 10 and 12 outline the monetary or custodial sentence outcomes over the time period, while Tables 11 and 13 outline the non-monetary or non-custodial outcomes for the time period. There was no data available on monetary or custodial sentences for the year 2014, with only 1 case being recorded for the year, which was an acquittal. This reflects the effectiveness of the WCMA since Research Question 1 asks for a comparative analysis of pre and post implementation of the WCMA.

Research Question 2 sought to learn if the ODPP Wildlife Crimes Prosecution Unit has had a measureable effect on wildlife cases since its inception. The ODPP updated its National Prosecution Policy in 2014, with the aim to aid prosecutors as it outlines their roles when it comes to the charging and prosecution of wildlife crime. The ODPP has taken major steps towards the action or ease in the prosecution of wildlife crimes, as has been earlier ascertained. After the enactment of the WCMA the ODPP's WCPU was established. From the WCPU data analysis over the three financial years as discussed in Chapter 4, a conclusion can be drawn

that the ODPP's WCPU has principally had a significant effect on WLC cases. This can be ascertained from the increased number of not guilty pleas entered in relation to WLCs, which subsequently increased pending cases for the year 2016 – 2017. This illustrates the impact the WCPU has had on wildlife offences.

The empirical evidence on the effect of the WCPU on wildlife crimes thus far can be accounted through the analysis in Chapter 4. The thesis highlights the shift from defendants pleading guilty for crimes involving ivory or rhino horn to crimes involving illegal entry and possession of bush meat. The conclusion that can be drawn from this fact is that wildlife crimes of high magnitude, which are of considerable value to the country, and the world as a whole, are now being recognized with the seriousness they carry, since the law now reflects the actual current value of the wildlife at stake.

The thesis finds that there has been a rise in the actual number of cases being brought forward. Not only is the law now more encompassing, thus, increasing success when it comes to prosecution of wildlife crime, but also reflects the active role the ODPP has taken, for example, by increasing human resources, including the number of prosecutors, court stations and mobile courts, as well as improving responsiveness of law enforcement and prosecutions in regards to wildlife crime.

Research question 3 evaluates the use of international cooperation tools that have been utilized by the WCPU on transnational wildlife crime, and sought to ascertain best practices for future cases. The thesis finds that there are a plethora of proposed, or considered solutions on how to fight wildlife crime, especially at the international, or inter-continental level. Kenya is party to international instruments which can be used for fighting WLCs, for example UNTOC, UNCAC and CITES, and is involved in a number of initiatives, including working



with intergovernmental organizations and civil society organizations on improving national enforcement and prosecution capacity, corruption prevention initiatives, using the UNODC Toolkit and Indicator Framework, and other initiatives in relation to trafficking at the Port of Mombasa, JKIA and exit/entry points in the country. Although Kenya is party to various international conventions as pointed out in this thesis, which facilitate international cooperation in regards to WLCs, there is much room for improvement, specifically, utilizing mutual legal assistance successfully outside of the East African region.

The WCPU uses the IGAD Convention on Mutual Legal Assistance in Criminal Matters and the IGAD Convention on Extradition when applicable. Although these are formal conventions, the WCPU uses informal channels when dealing with a case within the East Africa region, with hardly any paperwork needing to be completed. The WCPU only processes mutual legal assistance for cases within the region if proof is mandatory for certification purposes; otherwise the WCPU uses its unofficial relationships with counterparts in other countries.

In regards to inter-continental cases, MLA requests have been dispatched to assist in obtaining evidence for cases involving seized wildlife products in Thailand, Singapore and Vietnam as earlier discussed. All three cases, originated from the Port of Mombasa. Since Kenya has no established protocols regarding MLAs outside of its regional agreements, the three MLA requests are still outstanding. With this established, no best practices can be extrapolated, and instead lessons learned can be considered.

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# APPENDIX A

## RESEARCH INTRODUCTION LETTER



5<sup>th</sup> June, 2017

**TO WHOM IT MAY CONCERN.**

Dear Sir/Madam,

**RE: RESEARCH INTRODUCTION LETTER – LAUREN R. FRIEDMAN**

This is to confirm that Lauren R. Friedman, I.D. 631639 is Master's Degree of Arts student at the United States International University- Africa.

She is currently conducting a research thesis on: "*Factors Influencing the Prosecutions of Wildlife Crime Cases in Kenya: What Can We Learn from the Kenyan Experience?*" which is in partial fulfilment of the requirement to qualify for graduation.

Kindly accord her the desired assistance and please note that any information provided will be treated with confidentiality and at no time will it be used for any other purpose, other than for this research.

For further information, please contact the undersigned.

Sincerely,

A handwritten signature in black ink, appearing to read "Francis W. Wambalaba".

Francis W. Wambalaba, Ph.D., AICP  
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## **APPENDIX B**

### **UNSTRUCTURED INTERVIEW QUESTIONS**

1. Is wildlife crime an issue for your organization?
2. What is your view on WLC's linkages to transnational organized crime?
3. Is WLC a TOC?
4. How does WLC occur in Kenya?
5. What is your view on the current legal regime surrounding WLC? Is it enough?
6. What are factors attributable to changes in prosecution rates of WLCs?
7. What is the KWS prosecution unit doing to ensure successful prosecutions of WLCs?
8. How has the new WCMA had an impact on the prosecution of WLCs?
9. Why did the ODPP establish the WCPU?
10. What tools have assisted the WCPU in prosecuting WLCs?
11. Has the WCPU used international cooperation instruments for a WLC case? Please give details.
12. If the WCPU has used international cooperation instruments for a WLC case, what best practices can be extrapolated from this experience?