

Abstract

The evolution of regional wildlife conservation, environmental protection and anti-poaching law in the Southern African development community

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Abstract

Environmental laws in Africa have their roots in the political economy of colonialism. This article examines the evolution of wildlife crime and conservation institutional framework in the Southern African Development Community (SADC) region. SADC countries have ratified multilateral environmental agreements and embraced Transboundary Conservation Areas. However, SADC states are hesitant to ratify treaties that make inroads into their sovereignty. Classification of poaching as a transnational organised crime is essential in effectively combating this crime. Policy recommendation on the effective use of wildlife instruments is made. It is recommended that the SADC Tribunal be resuscitated with jurisdiction over transnational environmental issues.

1. Introduction

Transnational Environmental Crime (TEC) entails the unlawful cross-border movement of species, resources, and pollutants in contravention of domestic law or in violation of multilateral environmental agreements.¹ TEC is one of the fastest growing areas of organised crime worth billions of dollars.² Environmental crimes are committed by a variety of actors such as states affiliated entities, rebel or terrorist groups, and organised criminal organisations.³ The different types of actors involved in TEC reflect the complexity of these kind of crimes. Consequently, there is an urgent need for governments and non-state entities to collaborate in combating TEC.

The common environmental criminal activity in Southern Africa is wildlife crime, which is the focus of this article. The illicit trade in wildlife is one of the most profitable ventures on the global black market.⁴ Animals frequently targeted by poachers in Southern Africa include rhino, elephant, lion, leopard, cheetah and wild dog.⁵ Although wildlife crime and the trafficking of endangered species have been designed priority crimes by the Southern African Regional Police Chiefs Co-operation Organisation, available data point that the region is losing the war against wildlife crime.⁶

Africa is experiencing an increase in the poaching of large endangered mammals such as African bush elephants (*Loxodonta africana*) and rhinoceros (*Diceros bicornis*) for their tusks or horns.⁷ Countries such as Botswana, which is known to be a safe haven for elephant conservation, are experiencing rising levels of violent poaching by heavily armed criminal syndicates resulting in the decline of wildlife population.⁸ In a recent wildlife population census survey, it was observed that carcasses of poached elephants

in Botswana have increased by 593% from 2014 to 2018.⁹ Although ivory sales and killing of elephants are illegal in SADC countries, it has been observed that countries such as Angola have ineffective law enforcement mechanisms, resulting in ivory being commonly sold.¹⁰ It is for that reason that Angola is considered to be a probable location for international ivory trafficking and a hotspot for violent poaching.¹¹ At a continental scale, elephant poaching engaged by organised militant syndicates has reached 'epidemic' levels standing at an estimated 600,000 elephants poached annually.¹²

Further, the African continent is rapidly experiencing a decline of the endangered black rhinoceros population. It is estimated that between the 1960s and the early 2000s, the Republic of South Africa lost more than 6000 rhinos.¹³ Poaching of wildlife is not only a problem in Southern Africa. There is also an increase in rhino poaching in some East African countries due to the surge in demand for rhino horn in Asia.¹⁴ The organised criminal networks engaged in illegal trade of wildlife or wildlife products have acquired sophisticated equipment, including helicopters and deadly weapons.¹⁵ These militia and organised crime syndicates have transformed poaching to be more deadly and precise through the use of Global Positioning System (GPS) to track down the wildlife in parks and shoot them from helicopters.¹⁶ These facts call for scholarly investigation to understand the current regulatory framework in order to identify the weaknesses and make appropriate recommendations for its strengthening.

The fact that Transnational Environmental Crime (TEC) leads to environmental resource depletion or irreversible damage should be the basis for its prevention.¹⁷ Inter-agency collaborations and institutional building are needed to match the changing complexity of TEC.¹⁸ Individual countries cannot effectively combat TEC, let alone any type of transnational crime without any form of international cooperation. In order for Southern African countries to succeed in reducing the levels of environmental crimes, states should work closely together and have some common legislative frameworks to be implemented within their territories. International cooperation for the effective combating of environmental crime should be done at various stages of law enforcement, not only at investigation and trial stages.¹⁹ A comprehensive cooperation framework and environmental governance regime should include the conservation of natural resources which transcend over international boundaries and disruption of illicit wildlife trade. That is important because TECs are strongly related to global market economy chains from production sources to consumption markets.²⁰ Therefore, administrative and judicial cooperation need to be balanced in order to achieve the desired results.²¹

The increasing level of transnational environmental management has to correspond with effective regulatory regimes for combating the scourge of TEC.²² This is an area of scholarship that has not adequately been researched on in the Southern African region, a gap this article seeks to address. This article discusses the prevailing anti-poaching and environmental legal regime applicable in the Southern African Development Community (SADC) region.

This article is made up of six sections, the introduction being the first one. Section 2 briefly gives a historical overview and the impact of colonialism of the conservation policy and law in the African continent. Section 3 discusses the general concept of utilisation and conservation of transnational natural resources, specifically wildlife resources. Section 4 is the substantive discussion of the environmental regulatory framework applicable to SADC with a narrow focus on wildlife law. The importance of a regional court and the development of regional environmental jurisprudence are discussed in section 5. The sixth and the final section provides concluding remarks and policy recommendations.

2. The coloniality of wildlife conservation in Africa

The modern-day conservation laws and practices in the African continent are traceable to the colonial era. Therefore, it is imperative to briefly discuss the impact of the shared history of colonialism on environmental and conservation laws in Africa. The arrival of European colonial powers in Africa brought about centralised control over natural resources that resulted in the taking away of decision-making from rural communities.²³ As a result, conservation in the African continent relies upon global power relations rooted in the continent's history of colonisation.²⁴ Conservation laws in Africa place a great emphasis on the capitalist, imperialist, and scientific knowledge-based approaches to nature conservation inherited from colonial period.²⁵ This conservation model often does not provide room for indigenous knowledge systems, participation of local communities and the recognition of livelihoods of communities living adjacent to protected areas.

Wildlife reserves and laws were established in Africa by European imperial powers to safeguard the colonial profits from ivory and for the enjoyment of the globetrotting hunting elites.²⁶ That fits within the primary motive behind colonising Africa, which was to safeguard access over the natural resources such as minerals for the development Europe.²⁷ It was in the interests of colonial powers to promulgate environmental laws that protected their interests in the African continent. The first international legal instrument aimed at conserving the African environment or some aspects of it, the Convention for the Preservation of Wild Animals, Birds, and Fish in Africa, was signed by the colonial powers on 19 May 1900 in London, United Kingdom.²⁸ It has interestingly been observed that the real rationale behind negotiating and signing of that convention by European governments was to 'save the African environment from Africans.'²⁹ This paternalistic viewpoint considered Africans to be incapable of protecting their own resources besides plenty of evidence pointing to excellent indigenous conservation practices. Essentially, Africans have been subjected to environmental colonialism in the last century.³⁰

The creation of protected areas in the colonial era and in modern times was mainly for their economic, scientific, and tourism value which explain their separation and

seclusion from people.³¹ The coloniality of conservation regimes in Africa continues to cast local people as the principal threat to wildlife and excludes Africans from utilising and controlling their natural resources.³² It has been succinctly argued that the idea of 'modernity/coloniality' is critical in debates of decolonisation and reformation of legal institutions.³³ This is largely due to the fact that coloniality is still the most general form of domination in the world today.³⁴ In most instances, the transfer of power from the imperial colonial powers to national authorities brought no fundamental transformation, especially pertaining to the state apparatus, state politics, governance institutions, legal systems and legislation.³⁵ The coloniality of power refers to the interrelation among modern forms of exploitation and domination either economic or political.³⁶ The same is true with regards to understanding conservation and the laws relating to it in Africa. The history is as important as it is the status quo and planning of the future.

The legacy and history of colonialism in Southern Africa is varied in terms of language and legal systems across the region. Five European powers being the British, French, Germans, the Portuguese and Belgians occupied at least one SADC country during colonialism. Consequently, the history of conservation and wildlife in the subregion is not uniform, although there are similarities. Post-colonial Southern Africa continues to pursue state-building and neo-liberal conservation policies which are influenced by bureaucratic legacy of colonialism.³⁷ Modern day conservation programmes in Africa which are colonial in outlook have not only disposed communities of their lands and resources, but also created opportunities for territorial claim-making by the post-colonial state and international actors.³⁸ The neo-liberal ideas of bioregionalism and touristic nature parks have allowed international actors and western countries to re-colonise Southern Africa through conservation practices.³⁹

Even the much-touted transboundary conservation areas which are deemed to be a conservation model of the future are not decolonised as imagined. The uncontroverted truth is that the intended beneficiary of transfrontier conservation is biodiversity with little or no focus on local communities.⁴⁰ Various pieces of land with differing tenures are integrated with the purpose of transforming the given cross-border area into a borderless landscape to allow free movement of wildlife and, in some cases, people.⁴¹ Although it would be commendable to have free movement of people in Southern Africa where most families have relatives in more than one country, such has not found the light of day for close to six decades after most Africa countries gained independence. The colonial borders are still dividing families and causing conflicts due to the movements of animals from country to the other.

The debates around decolonisation in Africa, and particularly in the Southern African region have recently gained prominence. As to be expected, the regional economic and political superpower, South Africa, is leading the said debates. It is reasonable to expect similar dialogues to go beyond the confines of universities but to other sphere of public life such as the decolonising of conservation. This is so much as the region is

having animated and often emotional discussions around land reforms and redistribution which will undoubtedly feature protected areas. It is worthwhile to note that although it was important to discuss the nature of conservation and the laws regulating it, with specific reference to the influence of colonisation, such is not the focus of this article. However, the general impact of colonialism in post-independence environmental law making in various African countries is undoubtful. Most government adopted laws that limited wildlife resources utilisation and criminalised hunting in many instances. It is on that basis that the next section discusses the conflicting notions of utilisation and conservation of shared environmental resources at state level by neighbouring countries.

3. Conservation and utilisation of transboundary natural resources

Conservation and judicious use of natural resources are inseparable but often conflicting concepts in natural resources management.⁴² Ordinarily, it is a sovereign decision of each state on how to protect and use wild flora and fauna within its borders. That decision-making can be complicated in respect of transboundary natural resources. It is imperative to discuss various means on how more than one state may conserve and use natural resources straddling between them.

There are two main ways through which states share transboundary natural resources between themselves, being the multilateral and bilateral.⁴³ The bilateral resource sharing is a residual solution while the multilateral form is confined to specialised ambits of application.⁴⁴ The multilateral sharing of common natural resources is often done through multilateral decision-making under the auspices of an international organisation.⁴⁵ However, nation states are generally reluctant to cede their sovereignty by entering into international environmental agreements. This explains the general lack substance and depth in those agreements, mostly veering towards the informational and aspirational ideas.⁴⁶

It is a historical fact that nation states had unlimited authority over all wildlife within their borders. However, that has changed due to the acceptance of the reality that states cannot individually conserve some types of wildlife species effectively.⁴⁷ This is because ecosystems do not know boundaries and are not limited by territorial sovereignty of states.⁴⁸ The migrating biodiversity which cannot be subjected to exclusive control of a single sovereign states are subjected to transnational decision-making.⁴⁹ This is because biodiversity can be likened to small children; they do not understand or even recognise artificial boundaries imposed on them. They will always behave in what is innately correct and natural to them including crossing borders. International environmental regimes typically involve a trade-off between autonomy and control which results in sovereignty bargains.⁵⁰ Although individual countries have

exclusive set of rights over the resources within their territories, that is often diluted through voluntary environmental treaties entered into.⁵¹

International law does not prevent governments from erecting border fences except under few circumstances such as when the border infrastructure would violate international human rights law or international wildlife law.⁵² SADC member states are increasingly appreciating that border fences impede the combating of poaching syndicates across international boundaries.⁵³ That can be resolved by adopting common wildlife management and anti-poaching operations to conserve those migratory wildlife resources which are shared by more than one state.⁵⁴ In that note, SADC states have to recognise the fact that border control and law enforcement in shared protected areas are a mutual responsibility.⁵⁵

It is fair to note that wildlife law enforcement is not virtually non-existent in the subregion. The SADC regional block is experiencing a growing cooperation in combating poaching and the protection of wildlife in general across the otherwise badly patrolled vast forest area of common conservation areas.⁵⁶ The transnational or transfrontier management of wildlife and other natural resources is often credited as one of the best practices in the protection and conservation in the modern era.⁵⁷ Transboundary conservation is viewed as a viable solution to protect wildlife populations leading to increased wildlife-based revenue generation through tourism circuits beneficial to the neighbouring countries.⁵⁸

Transboundary protected areas are such as transfrontier conservation areas (TFCAs) are established not only for purpose of expanding conservation areas and collaborative management of natural resources across national borders, but also for the promotion of regional economic integration.⁵⁹ TFCAs, which are also referred as 'peace parks,' have the main objective of stimulating international cooperation in resource management.⁶⁰ TFCAs are formed through the amalgamation of a mosaic land uses, often under various forms of tenure and across the borders of two or more countries in order to create one transnational conservation unit to be jointly managed by the countries involved.⁶¹

International wildlife law which governs TFCAs is a sub-field of the broader international environmental law which, notwithstanding the fact that it is a relatively new area of law, has experienced the development of a number of sub-specialities.⁶² These various aspects of international environmental law are often implemented by countries at regional level either bilaterally or multilaterally.⁶³ This is in recognition of the customary international law duty of states to cooperate in good faith in pursuit of common environmental management objectives.⁶⁴

This article recognises the existence of the Third World Approaches to International Law (TWAIL) philosophical perspective that international law generally can be a tool to be used to recolonise the global south.⁶⁵ In that regard, it has been posited that international environmental law appears to offer little assistance to transnational

environmental problems in the global south and there is a need to examine international environmental law through the lens of TWAIL.⁶⁶ Although the earlier sections of this article have highlighted the coloniality of the African environmental law, the in-depth assessment of TWAIL approaches to wildlife law are beyond the scope of this article. A discussion on the decolonialisation of environmental management and conservation law deserve in-depth study or studies on its own.

Having briefly discussed the international law principles governing the interaction of states in the conservation and use of environmental resources, the next section discusses regional wildlife law in Africa with a specific focus to Southern Africa.

4. Regional wildlife and conservation law in [Southern] Africa

The convergence of wildlife management and environmental law is traced to a few hundred years ago.⁶⁷ Historically, environmental laws were promulgated largely to protect species for the benefit of societal elites who wished to hunt them, while in recent times the conservation movement has emerged from its roots in wildlife management.⁶⁸ It is trite that the regulatory efficacy impacts on how wildlife species protections operate across multiple jurisdictions.⁶⁹ International collaborative attempts to protect the African environment were devised at the height of colonial conquest in the continent by the European imperialist powers.⁷⁰ This is consistent with discussion in the preceding section that in order to appreciate the structural weaknesses of environmental law in Africa, it is essential to understand its coloniality/modernity background.

The field of International Environmental Law has grown rapidly since the 1970s, a phenomenon that is known as 'treaty congestion' in the literature.⁷¹ However, such treaty congestion has not been experienced in the Africa continent which received its first environmental treaty in the late twentieth century, the 1900 Convention which was followed by the London Convention on Preservation of Fauna and Flora in their Natural State (focused primarily on Africa) thirty-three years later.⁷² That is not to suggest that the transboundary regulation for the protection and conservation of wildlife has not gained acceptance in the African continent. The progress has been slow relative to other regions of the world. Notwithstanding the slow pace, there are notable multilateral environmental instruments entered into at the continental level and various sub-regional levels in Africa.

Before narrowing down the discussion on the SADC region specific agreements, the next sub-section shortly interrogates the revised African Union Convention which applies to all regions in the continent.

4.1. Revised African convention on the conservation of nature and natural resources

The African Convention for the Conservation of Nature and Natural Resources of 1968 (hereinafter 'the 1968 Convention'), was negotiated and agreed under the auspices of the Organisation of African Unity, now the African Union.⁷³ Its adoption in 1968 was an important milestone in the development of environmental law in the African continent.⁷⁴ The 1968 Convention was adopted when African countries were gaining political self-governance and pursuing independence in all spheres including the continent's natural resources and environmental policies.⁷⁵ This was not the first attempt by African states to address environmental concerns in continent, but a continuation of an integral part of the religious, cultural and social life of Africans before colonisation.⁷⁶

The 1968 Convention presented a break from the chain of environmental and political colonialism to all African countries. It was a promising start towards environmental multilateralism by newly emancipated countries who sought to chart an African path in environmental governance. Through the 1968 Convention, African leaders adopted the doctrine of Permanent Sovereignty over Natural Resources as the overarching philosophy on the use of natural resources in the continent.⁷⁷ That intention was captured in the preamble of the 1968 Convention which stipulated that parties undertook to harness natural resources for the total advancement of the African peoples.⁷⁸

The continent has adopted other treaties to regulate specialised aspects of the environment such as maritime affairs, management of hazardous waste among others. However, the 1968 Convention was the main source of the continental law on the use and conservation of wildlife resources until it was revised. The Revised Nature Convention on the Conservation of Nature and Natural Resources, herein 'the Revised Convention' provides an overarching framework for sustainable use and protection of natural resources.⁷⁹ The Revised Convention was adopted in Maputo, Mozambique on July 2003 and came into force thirteen years later replacing the earlier 1968 Convention.⁸⁰ This is reflective of the general absence of political will on the part of many African governments to come up with laws and policies which protect the environment. There is a general reluctance to sign regional agreements on environmental protection from the African Union level, to sub-regions such as SADC. The coming into force of environmental agreements is often delayed by the shortage of the required signatories.

The Revised Convention adopts a comprehensive and general approach to environmental protection.⁸¹ It defines natural resources, addresses economic and social goals, and stresses the necessity to implement international and regional instruments supporting the goals of the Rio Declaration and Agenda 21.⁸² The Revised Convention applies to all areas which are within the limits of national jurisdiction of the state parties.⁸³ It is also applies to the activities beyond the national jurisdiction or beyond the limits of national jurisdictions of parties.⁸⁴ The parties appreciated the transboundary nature of environmental protection, and the inherent limitations in the

territorial jurisdiction over environmental matters. It is trite that no single country has the capacity to address environmental degradation and TECs. It is thus commendable for African countries to be cognisant of such a reality.

The Revised Convention refocuses and re-orientates African conservation policy to be in tune with international standards.⁸⁵ One of the main objectives of the Revised Convention is to harmonise policies in environmental protection in Africa continent.⁸⁶ A properly structured, coherent and comprehensive environmental treaty regime in the African continent is both necessary and attainable.⁸⁷ It is important to accept the difficulty in coordinating the compliance with and implementation of many international environmental agreements.⁸⁸ Consequently, regional groupings are advised to consider negotiating and ratifying a single environmental treaty to avoid the spaghetti syndrome due to multiple memberships of some states in various regional economic communities. The proposed single treaty might have to contain as an appendix a model environmental statute for countries for domestication by member states. That will assist in making harmonisation and effective enforcement of anti-environmental degradation and environmental crimes laws a reality by state parties.

The Revised Convention provides for the hunting, killing, capture and collection of wildlife species within the limitation of national laws.⁸⁹ Further, state parties are obliged to adopt legislation governing the issuance of hunting permits and the prohibition of unauthorised hunting methods.⁹⁰ Those laws should be in compliance with other international commitments states parties have such as the CITES (the Convention on International Trade in Endangered Species of Wildlife Fauna and Flora) which regulates against the hunting and trading of certain endangered wildlife species. In that regard, the Revised Convention cannot be accused of potentially opening the floodgates for indiscriminate killing against the dictates of international law. The states parties should ensure that a delicate balance is struck between the utilisation of environmental resources for developmental needs and the sustainability of natural resources.⁹¹

The Revised Convention places a duty on African states to promulgate laws that criminalise the illegal trade, transportation and possession of natural resources obtained contrary to the provisions of the both domestic and international law.⁹² Appropriate penal sanctions for environmental crimes including confiscation and forfeiture measures should be put in place by state parties to give effect to the provisions of the Revised Convention.⁹³ Furthermore, state parties are enjoined to enter into bilateral and sub-regional conservation agreements to operationalise the provisions of the Revised Convention.⁹⁴ These conservation agreements should be aimed at reducing and eliminating the illegal trade of African wild fauna and flora.⁹⁵ The Revised Convention recognises the transnational nature of environmental crimes and the impact of trade as a driving force in the increasing rates of environmental crime. Effective multilateral efforts are essential to reduce and

eventually eliminate the incidences of transboundary environmental crime in Africa. The cooperation of state parties should also extend to the harmonisation of policies and law.⁹⁶ The practicability of harmonisation of environmental law and enforcement of transnational environmental crimes are an interesting scholarly issue on its own deserving a separate study from this one.

The Revised Convention aims to enhance protection of the environment,⁹⁷ and to promote the conservation and sustainable use of natural resources.⁹⁸ It also provides for the harmonisation and coordination of environmental management policies in Southern Africa.⁹⁹ In furtherance of these objectives, state parties are obliged to adopt policies for the sustainable use of plant and animal species.¹⁰⁰ State parties acting in terms of the Revised Convention to establish or strengthen existing facilities for *ex situ* conservation to perpetuate population of certain wild animal or plant species.¹⁰¹ State parties are also obliged to maintain and extend conservation areas to ensure long-term conservation of biological diversity.¹⁰²

The establishment of state run conservation areas should be complemented by the establishment of areas managed by local communities for the conservation and sustainable use of natural resources.¹⁰³ State parties to the Revised Convention are under an obligation to regulate domestic and international trade, transportation and possession of wild specimen and products.¹⁰⁴ These include the criminalisation of certain conduct and imposition of penal sanctions against perpetrators.¹⁰⁵ State parties are further expected to enter into bilateral or multilateral agreements on the elimination of illegal trade in wild flora and fauna.¹⁰⁶

The Revised Convention provides for the regulation of conduct of states towards the environment during periods of war and other armed conflicts. During war or any other armed hostilities, state parties are under a legal duty to take practical and reasonable steps to protect the environment from harm.¹⁰⁷ Southern African states which are party to the Revised Convention are under a legal duty to refrain from using methods or means of combat which may cause long-term or severe harm to the environment during wartime.¹⁰⁸ The use of the environment as a target of war is also outlawed under International Humanitarian Law.¹⁰⁹ The Revised Convention provides for better and direct protection to the environment during periods of military action in that it requires a lower threshold for its application as compared with the Additional Protocol I to the Geneva Conventions.¹¹⁰

Ineffective institutional framework is generally blamed for the failures of the 1968 Convention.¹¹¹ The absence of a dedicated secretariat to arrange for regular meetings of the parties or to monitor implementation of the treaty is one of the main reasons for its failure.¹¹² The Revised Convention has addressed that structural shortcoming by establishing the Secretariat which is responsible for arranging the meetings of the Conference of the Parties.¹¹³ The Secretariat is also responsible for executing the decisions of the Conference of the Parties and, to coordinate its activities with the

secretariats of other international bodies and conventions.¹¹⁴ The 1968 Convention (and by extension the Revised Convention) has been credited as the most comprehensive international conservation treaty ever negotiated.¹¹⁵

To supplement and give effect to the 1968 Convention (now the Revised Convention) a few multilateral agreements have been entered into and policies put in place in the SADC region. Some of these include the Lusaka Agreement, the SADC Protocol on Wildlife Crime and Law Enforcement, and the SADC Law Enforcement and Anti-Poaching Strategy which are examined in that order below.

4.2. Agreement on cooperative enforcement operations directed at illegal trade in wild fauna and flora (Lusaka agreement)

One of the notable regional environmental agreements in the African continent is the Lusaka Agreement on Cooperative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora, hereinafter 'the Lusaka Agreement.' The Lusaka Agreement was adopted in Lusaka, Zambia on the 8 September 1999 and is open for ratification to all African states. However, its membership is currently made up of few Eastern and Southern countries.¹¹⁶ The seven parties to the Lusaka Agreement are the Republic Congo, Kenya, Liberia, Tanzania, Uganda, Zambia and the Kingdom of Lesotho. Although they are not members, South Africa, Ethiopia and the Kingdom of Eswatini are signatories to the Lusaka Agreement.

The Lusaka Agreement recognises that poaching is depleting the wildlife population in Africa.¹¹⁷ The state parties recognised that poaching will not be effectively addressed unless illegal trade of wildlife is eliminated.¹¹⁸ In order to eliminate illegal trade of wildlife and curb the rising levels of poaching, the parties have agreed to cooperate on wildlife crime law enforcement.¹¹⁹ The rationale behind the Lusaka Agreement is to facilitate states' cooperation on illegal trade in wildlife.¹²⁰ The Lusaka Agreement was never intended to be the reinvention of the wheel in so far as environmental protection in the African continent is concerned. It is meant to complement other multilateral environmental treaties such as the 1968 Convention (now the Revised Convention), CITES, and the Convention on Biological Diversity (CBD).¹²¹

The Lusaka Agreement regulates the trade of wild flora and fauna in Africa in a manner that complements CITES. However, it has a broader mandate than CITES and has often been used to implement other treaties such as the CBD.¹²² The Lusaka Agreement provides for an institutional mechanism and platform for the operationalisation of other international and regional environmental agreements. It does so by focusing on the combating of illegal trade of wildlife as a basis of poaching and disrupting the economic markets of illicitly obtained wild flora and fauna to address the weaknesses in the CITES regime such as lack of cooperation between law enforcement agencies and management authorities.¹²³ State parties are enjoined to enforce CITES through the adoption of measures that reduce and eliminate illegal trade in wildlife.¹²⁴ Further,

state parties have to domesticate the provisions of CITES.¹²⁵ State parties are placed under a duty to put in place appropriate measures to investigate and prosecute cases of illegal trade.¹²⁶

Furthermore, the Lusaka Agreement obliges state parties to conduct public awareness campaigns to sensitise members of the public about objectives of the agreement and to encourage them to report incidents of illegal trade in wildlife.¹²⁷ This is an interesting aspect in any treaty which recognises the importance of public participation and the need for public buy-in order to for achieve its objectives. Usually states are viewed as the only important stakeholders in the implementation of treaties. The Lusaka Agreement can be deemed to be progressive and a template for other international agreements.

To coordinate the implementations of the Lusaka Agreement, a secretariat known as the Lusaka Agreement Task Force (LATF) has been established.¹²⁸ LATF is a permanent inter-governmental task force for cooperative cross-border wildlife enforcement. LATF has an international legal personality and legal capacity which are necessary for performance of its functions, further its employees, the official documents and equipment of the LATF enjoy diplomatic immunity and inviolability.¹²⁹ The Lusaka Agreement obliges member states to provide access to officials of the secretariat to carry in-country audits for compliance with wildlife laws, undertake intelligence and joint investigations in collaboration with national agencies.¹³⁰ It provides a comprehensive anti-poaching and anti-smuggling framework, although it has been criticised for encroaching on the sovereign regulation of hunting.¹³¹

The powers of the LATF have been criticised for infringing on states sovereignty which has led to the reluctance of majority of countries to ratify it.¹³² This has crippled the effectiveness of the Lusaka Agreement due to limited membership. However, it has been observed that the concerns about sovereignty infringement by the LATF are baseless excuses.¹³³ The objections over infringement of the sovereignty are ill-founded as all African states are subjecting themselves to a more similar invasive regime through the Financial Action Task Force (FATF). FATF has emerged as a powerful institution imposing on governments on how to legislate and enforce anti-money laundering laws. FATF has not been met with resistance and contempt the African governments seem to be having towards the LATF. The unfortunate reality is that the Lusaka Agreement has not reached its full potential as a mechanism for combating poaching as a form of organised crime in the Africa.

Besides the reservations the majority of African countries have towards the Lusaka Agreement, the reality is that illegal trade of wildlife in the continent is spiralling out of control, which requires radical interventions. The arrest and prosecution of poachers without dismantling the lucrative trade of wildlife specimen is not different from dealing with the symptoms not the causes of the disease. African countries

should revisit the principles of the Lusaka Agreement and find means of making them to work for effective transboundary environmental management.

4.3. SADC protocol on wildlife conservation and law enforcement

Subsequent to the negotiation of the Lusaka Agreement, the Southern African region developed a protocol relating to the conservation of wildlife and the enforcement of conservation laws.¹³⁴ The SADC Protocol on Wildlife Conservation and Law Enforcement, hereinafter the 'SADC Wildlife Protocol' is the principal source of wildlife law in region.¹³⁵ This sub-section examines the legal aspects of the SADC Wildlife Protocol and the extent to which they address the prevention of wildlife crime and facilitate law enforcement.

The SADC Wildlife Protocol provides for the governance framework for the sustainable utilisation and transboundary management of the environment.¹³⁶ One of the guiding principles of the SADC Wildlife Protocol is to provide common approaches for the conservation, sustainable use of and the effective enforcement of laws governing wildlife resources in the subregion.¹³⁷ Collaboration of state parties for the attainment of international agreements on the conservation and sustainable use of wildlife is one of the guiding principles of the SADC Wildlife Protocol.¹³⁸ The SADC Wildlife Protocol obliges state parties to protect wildlife habitats to ensure the viability of wildlife populations.¹³⁹

Training and educational provisions are embedded in the SADC Wildlife Protocol requiring state parties to develop training programmes for wildlife enforcement and management officers on issues of wildlife conservation.¹⁴⁰ Further, it provides that state parties should develop public education programmes to raise awareness on issues of wildlife conservation and increase law enforcement effectiveness.¹⁴¹ This approach is similar to the one adopted in the Lusaka Agreement which focuses on public education and awareness. The Lusaka Agreement has positive influence in the development of the regional wildlife law notwithstanding its failure to reach its full potential. One of the SADC Wildlife Protocol's main objectives is to promote the harmonisation of laws on wildlife conservation.¹⁴² Such harmonisation relates to measures governing the trade of wildlife and wildlife products, powers granted to law enforcement personnel, the facilitation of community management, and the removal of life wildlife species.¹⁴³

The SADC Wildlife Protocol embraces multilateralism in environmental law using the public trust responsibilities to pierce the veil of state sovereignty to safeguard transboundary habitats and ecosystems, and the wildlife therein.¹⁴⁴ Further, an obligation of each of its contracting parties to ensure the sustainable use of wildlife resources and to implement such policies, administrative and legal measures is appropriate.¹⁴⁵ The SADC Wildlife Protocol sets in place the foundation for broad wildlife management and enforcement cooperation across SADC state

boundaries.¹⁴⁶ It promotes the shared management of trans-boundary environment and natural resources proposed measures to be taken, and co-operation on environmental crime, extradition and penalties.¹⁴⁷

To operationalise the criminal justice aspects of the agreement, SADC states have to conclude mutual assistance and extradition treaties amongst each other. That is important in that in most instance, poachers across international boundaries from one SADC state to commit crime in the other. The artificial construct of international boundaries is often used by criminals from running away from the consequences of their actions. The cooperation of parties should include joint law enforcement operations between states and international law enforcement agencies in the apprehension of criminals and the destruction of illicit specimen of wildlife.¹⁴⁸ In order to succeed in the objectives of the protocol, SADC countries should share information,¹⁴⁹ and the necessary intelligence on poaching syndicates operating within the region or individual countries.¹⁵⁰

The SADC Wildlife Protocol provides a regional legal basis for the creation and expansion of transfrontier conservation areas or parks as a policy tool of choice in the region. State parties are enjoined to enter into collaborative agreements to facilitate the cooperative management of shared wildlife resources including cooperation over any transfrontier wildlife activities.¹⁵¹ In furtherance of this goal, about eighteen existing or potential TFCAs covering over 700,000km² in the SADC region have been implemented.¹⁵² TFCAs are mostly used as policy tools to perverse wildlife resources and to manage conflicts between neighbouring states due to their legally binding nature.¹⁵³ They further and enhance the goal of conservation at international wildlife law.¹⁵⁴

Negative attitudes toward wildlife by local communities due to the damage they cause to their crops and livestock lead retaliatory killings and at times involvement in poaching activities, undermining wildlife sustainability.¹⁵⁵ In an attempt to address the concerns of communities living adjacent national parks and other wildlife conservation management areas, the SADC Wildlife Protocol imposes a duty to devise and implement community based wildlife management programmes.¹⁵⁶ The approach of SADC countries finds scientific basis from some scholars who have argued that the interactions in human-wildlife can only be improved when local communities' experiences are understood and addressed.¹⁵⁷

The SADC Wildlife Protocol places an obligation of state parties to pursue both the economic and social incentives to promote the sustainable conservation of wildlife.¹⁵⁸ In most cases, the social incentives for conservation are not considered when coming up with international agreements. The focus tends to be on ecological and economic considerations for conservation and wildlife law. Such a skewed approach ignores the reality that wildlife must co-exist with communities who often pay social and economic price for conservation activities to take place. The SADC

region has to a certain extent departed from the conservation approach values wildlife over local community welfare.¹⁵⁹ This is a notable paradigm shift from fortress conservation to contemporary conservation collaborators and partners in sustainable conservation.¹⁶⁰

It is commendable that SADC regional wildlife law is anchored in conservation science and attempt to embrace the modern approaches in wildlife management. To give effect to some provisions of the SADC Wildlife Protocol, the regional body has devised and implemented a strategy on law enforcement which is briefly discussed in the next sub-section.

4.4. SADC law enforcement and anti-poaching strategy

The Law Enforcement and Anti-poaching Strategy of the Southern African Development Community, hereinafter the 'SADC LEAP' was adopted during the Joint Extra Ordinary Meeting of the Ministers of Environment and Natural Resources and the Organ on Defence, Peace and Security Cooperation of SADC in February 2017.¹⁶¹

The SADC LEAP is intended to address the growing wildlife poaching crisis in Africa which has caught the global attention.¹⁶² One of the main issues that drove Southern African countries to conclude the SADC LEAP were the unprecedented poaching levels of the African elephants and rhinos.¹⁶³ The SADC region intends to reduce the level of poaching and illegal trade in wildlife in the region by implementing the strategy.¹⁶⁴ Such is to be done through the enhancement of legislation and judicial processes, the minimisation of wildlife crime and illegal trade. Further, state parties intend to improve and strengthen field protection, integrate people and nature in natural resources management and ensuring sustainable use of natural resources.¹⁶⁵ SADC states have recognised that the multifaceted causes of poaching ranging from land use pressure, range and habitat loss, human-elephant conflict, and illegal killing for both meat and ivory need a comprehensive strategy in order to be effectively addressed.¹⁶⁶

The SADC LEAP makes an emphasis on the strengthening of apprehension and prosecution of poachers. It has been recognised that it is important for state parties to introduced mandatory minimum penalties for poaching offences.¹⁶⁷ That is intended to take away discretionary sentencing powers from judicial powers by having uniform penalties across the sub-region.¹⁶⁸ Further, capacity building for judicial officers has been identified as one of the priority areas necessary to ensure that the judiciary is knowledgeable of the seriousness of wildlife offences and the appropriate sentencing guidelines.¹⁶⁹ This regional strategy document rightly recognises that wildlife crime is often not classified as a 'serious crime' in penal statutes of number of countries.¹⁷⁰ This results in less resources and investigatory emphasis being put towards environmental crimes. Such a weakness needs to be addressed throughout all countries to give poaching the attention and resources it deserves to be eliminated

in the SADC region. The SADC LEAP identifies priority actions by states being the establishment of community based natural resources management, cooperation on crime intelligence and transboundary wildlife management.¹⁷¹

The classification of poaching as a serious crime will make it to fall under the provisions of the United Nations Convention against Transnational Organised crime commonly known as 'the Palermo Convention.' The Palermo Convention is one of the most relevant international treaties for combating and conceptualising transnational organised crime.¹⁷² The main objectives of the Palermo Convention is to facilitate international cooperation in the prevention and combating of cross-border crimes.¹⁷³ The Palermo Convention obliges state parties to criminalise the acting in concert with one or more other persons to commit a serious crime in order to obtain financial or other material benefit.¹⁷⁴ For a criminal activity to fall within the scope of the Palermo Convention, it must accrue financial or material benefit to the perpetrator and it must be committed transnationally. It is indisputable that poaching is, in most cases, committed across international boundaries. Therefore, poaching easily falls within the intended focus of the Palermo Convention. The classification of poaching as a serious crime will other allow member states to be able to apply anti-money laundering laws promulgated in compliance with the FATF standards to combat poaching as a predicate offence of money laundering.

The state parties to the SADC LEAP have established Regional Wildlife Crime Prevention and Coordination Unit as the implementing institution for the strategy which has to work closely with National Wildlife Crime Prevention Task forces comprising of Police, Wildlife, Customs, Defence, Immigration, Intelligence and Judiciary officials in each member State.¹⁷⁵ The SADC LEAP, like other multilateral environmental agreements, is largely dependent on the willingness of state parties to implement its provisions. Its effectiveness will be determined by the extent to which it is embedded as a core provision within individual countries' domestic institutions.

The next section discusses the common themes cutting across the international instrument examined in this article being the need to domesticate state obligations and to harmonise environmental laws as mechanisms for the development of the regional jurisprudence.

5. The development of regional environmental jurisprudence

The illegal natural resource use or translocation of environmental resources constitute a particular dimension of the non-compliance and enforcement problem that is central to the politics of the environment.¹⁷⁶ Individual countries are expected to enact legislations domesticating the aspects of multilateral environmental agreements.¹⁷⁷ The declaration of certain conduct as transnational offences requires the corresponding action at state level due to the impracticability to enforce, investigate and prosecute environmental crimes at multilateral level.¹⁷⁸

The effectiveness of international regime is ordinarily dependent on the willingness of individual states to domesticate such in terms of their internal legislative processes. The harmonisation of laws by states on issues of common interest is desirable as it brings about consistency over what is being sought to be regulated. Further, the harmonisation of laws in the context of environmental crimes allows states to have similar criminal sanctions where necessary. It also allows for the emergence of regional jurisprudence over the years for the attainment of the common good. It is trite that the effective compliance with environmental laws is comprised of both enforcement through courts and access to judicial remedies whenever laws are violated or damage occurs.¹⁷⁹ The domestication and harmonisation of environmental laws should be complemented with regional courts or tribunals which are important in developing regional jurisprudence.

Although domestic judiciaries have an important role to play in the effective enforcement of environmental law, they should be complemented with regional and international courts to resolve cases with transnational effects.¹⁸⁰ International tribunals are essential for the protection of global commons and the development of *erga omnes* obligations.¹⁸¹ In the Southern African region, it is rather unfortunate that the regional court, the SADC Tribunal, which played a significant role in developing the regional law has been defunct for a number of years now. It is in the interest of the region to resuscitate the tribunal in the original form and give it further jurisdiction on environmental issues. That will immensely contribute towards the emergence of harmonised environmental law and jurisprudence in a region where individual countries' legal systems have different backgrounds such as English, Roman-Dutch, Portuguese, German and French laws.

Although members of regional economic communities in the African continent to a larger extent maintain a considerable degree of sovereignty, there are areas where they have relinquished some degree of sovereignty. That include environmental protection where state parties are under an obligation to cooperate and harmonise their policies and laws on.¹⁸² The areas which countries have agreed to cooperate on should be subjected to the jurisdiction of supranational tribunals for interpretation when disputes arise. For the sake of completeness, it is essential to note that there are views against the establishments of international courts at a regional level or a given geographical area because it would allegedly give rise to 'a particularistic development of international law.'¹⁸³ Such views are beyond the scope of the instant discussion, therefore will not be interrogated beyond acknowledging their existence

The abovementioned interventions should be complemented by enacting environmental crime statutes and conferring extraterritorial jurisdiction on environmental crimes to domestic courts. This is due to the reality that poachers escape prosecution due to lack of laws that allow extraterritorial jurisdiction coupled by complex extradition procedures.¹⁸⁴ Extraterritorial jurisdiction will provide for a more effective approach in the prosecution of wildlife crimes taking place beyond the

borders of each SADC states. It will also reduce the administrative and financial burdens associated with extradition proceedings in some cases as prosecutions can easily be carried out in countries where the fugitive would have escaped justice to.

6. Conclusion

Notwithstanding some incidents of political instability and armed hostilities, the African continent has generally done well in protecting its environment and conserving some of the world's endangered wildlife species. That has proven to be a double-edged sword, resulting in the continent to be one of the most well sought-after destinations for poaching rings from all over the world.

To address the threats posed to its biodiversity, Africa in general and Southern Africa specifically have promulgated some notable environmental conservation standard setting multilateral agreements. The Revised Convention is the main source of environmental law at a continental level. Various regional bodies such as SADC have negotiated sub-regional specific multilateral environmental agreements to complement the Revised Convention. However, it is worth noting that the development of regional environmental law is not an easy endeavour as reflected by the less vigorous ratification by member states in most instances across the continent. It is recommended that the re-establishment of the SADC Tribunal should be given a priority by the state parties with an added responsibility to preside over transboundary environmental disputes which is important to develop the harmonised regional environmental jurisprudence.

Succeeding in fighting the scourge of poaching and illegal trade of wildlife is not necessarily dependant on negotiating a myriad of multilateral agreement. What is essential is the implementation and enforcement of the laudable provisions of these agreements. It would be worthwhile for state parties to acknowledge the need to harmonise laws and policies to effectively address anti-poaching. Multilateral environmental agreements have been increasing exponentially in the past four decades. However, environmental degradation is not decreasing. Various wildlife species have become extinct or endangered, forests of ecological importance unsustainably harvested yet counties around the world are ratifying environmental agreements more than any other period in the history. This might be an indication of the lack of political will to operationalise what the issues of common concern toward environmental protection.

The SADC countries deserve commendation for embracing transboundary approach towards wildlife conservation which is reflected by the growing number of TFCAs. This is indicative of the willingness to cede individual state sovereignty to attain the common goal of conserving wild flora and fauna. The establishment of TFCAs comes with great responsibility of joint policing, intelligent sharing and vigorous prosecution

of poaching. Indisputably, SADC countries have accepted the shared responsibility of conserving wildlife species for the future generations.

Following a strong institutional response in wildlife conservation and environmental management in the SADC region, it is important to examine the effectiveness of the same and the extent to which state parties have domesticated the provisions of these multilateral agreements. Further research should be carried out in that area although it requires substantial funding. The importance of such a scholarly exercise cannot be overemphasised especially because the war against poaching has not been won. Instead, it is seemingly getting out of control. Therefore, SADC countries need an objective assessment which will inform their future actions and conduct. Furthermore, the TWAIL approach to international wildlife law should be investigated as it has the potential to develop a uniquely decolonised approach to conservation which takes into consideration the special and painful experiences of local communities living adjacent to conservation areas.

Disclosure statement

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