COURTROOM MONITORING

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COUNTERING CORRUPTION IN WILDLIFE CRIME

[1] Illustration by Ken Gitau

PREFACE

Much of recent attention relating to international wildlife crime has been in the area of poaching and the subsequent end market. Indeed, there have been significant improvements in both areas, poaching numbers are generally down, penalties for poaching have increased, China has closed its markets and Hong Kong is apparently on the way.

What has received scant attention, however, are the continuing obstacles with illegal wildlife trade (IWT) investigations and prosecutions, striving to achieve convictions amidst an ocean of corruption.

Corruption is, no pun intended, quite definitely the “elephant in the room”. Certainly anyone that is even remotely involved in countering wildlife crime is aware of its omnipresence. It is everywhere. But most amongst the conservation world and corresponding government entities treat it like the alcoholic mother who everyone pretends doesn’t drink; who change their behaviour to keep the peace while in fact enabling the drinking even more.

This report is about one of the prime strategies that can counter this corruption, wildlife crime courtroom monitoring. Not given the credit it deserves, definitely under funded and subsequently under utilized, the process of wildlife crime courtroom monitoring and its positive impact on corruption is not only proven but uniquely validated as shall be explained in this report.

The backdrop is Kenya where the author has been for the last three years. This is not indicative in any way that Kenya is any worse or any better than any other African elephant range state. Indeed, from a corruption perspective, what is happening in Kenya is simply a microcosm of what is happening on the rest of the continent to a greater or lesser degree.

This report is based on a compilation of information of what is happening within the criminal justice system of Kenya, and in particular with respect to wildlife crime. Much of it is open source or from previously published reports that are easily corroborated but some is anecdotal from confidential sources. The information from confidential sources simply corroborates what the general Kenyan public and global conservation pundits are already aware.

The author had the privilege of doing volunteer work on an informal basis with both The Eagle Network (Eco-Activists for Governance and Law Enforcement) and Kenyan NGO, Wildlife Direct. Time spent with Ofir Drori, Paula Kahumbu, Liz Gitari, Jim Karani and the many others who are part of those organizations was, not only invaluable but altered the author’s life course. You have the author’s profound thanks and gratitude.

The author, coming from a law enforcement background, is in the unique position of writing this report as an independent researcher, unfettered by political or sponsorship considerations. There is no hidden agenda, just a simple desire to present an honest and impassioned belief that corruption can, at anytime and any place, subvert the course of justice in IWT and that courtroom monitoring presents an effective counter to that subversion.

INTRODUCTION

On January 24th, 2018, a middle aged Kenyan man by the name of Nicholas Maweu John was acquitted for his role in the attempted exportation of 3.3 tonnes of ivory from Mombasa port destined for Malaysia[2]. You are forgiven if you have never heard of this individual. His arrest in December 2013 barely made seven lines in The Star[3]. His acquittal did not make the news at all.

Also of interest, Wildlife Direct, monitoring wildlife crime cases in Mombasa at the time, and who had attended Mombasa court countless times prevously, who had a seemingly open and cooperative relationship with the ODPP, the judiciary, and court administration staff in Mombasa, found out about this prosecution by accident while perusing an unrelated file that made reference to Maweu. That revelation came in August 2016, over 2 1/2 years after proceedings had been instituted. A foreshadowing of where this prosecution was heading perhaps?

Nicholas Maweu John's charge sheet, presented to the Mombasa court read in part: "On diverse dates between the 25th June 2013 and 8th July 2013"……"jointly with others not before the court conspired to contravene…..". But there were never any others brought before the court and no conspiracy ever identified.

AIDING AND ABETTING: Nicholas Maweu at the Mombasa law courts yesterday. He is charged with having ivory. Photo/Nobert Allan

[2] CR 3081/13 R v. Nelson Maweu John, Mombasa Court

[3] The Star, Man Charged for Importing sh 164 million in ivory in Changamwe December 24, 2013

Chief Magistrate J. M. Nang'ea made comment in his judgement that "the case was poorly investigated". Indeed, the testimony of the eight prosecution witnesses clearly showed that there were at least two other individuals who played a much more significant role. *Mwinyi Hamisi*, a Mombasa based clearing agent of some years, accompanied the container to the port. He was never located by police. *Ali Suleiman Karisa,* if that was his actual name, was the apparent owner of the shipment, and also never located. A third Mombasa man, *Abdul Halim Sadiq Omar,* who was identified as the owner of the lorry that transported the 444 pieces of ivory to the port was interviewed by police and released. His name re-appeared in public the following June, when he was named as co-accused and right hand man to Feisal Mohammed Ali in that 2.2 tonne Mombasa ivory seizure.

3.3 tonnes of seized ivory displayed at Mombasa Port July 8th, 2013.

In total contrast to the minimal Maweu investigation, was an Interpol supported Kenyan and Ugandan investigation for a 1.5 tonne ivory seizure that happened in Mombasa five days earlier. On July 3rd, 2013, a container of ivory (and fish maws) that started its journey in Kampala three weeks previously, was found by KRA officials still parked in a Mombasa petrol station waiting for port access. The subsequent cross border investigation identified over 30 persons and business entities who were part of that chain; from the time the ivory and fish maws were loaded into its truck borne container at a Kampala compound, to its crossing the Malaba border into Kenya, to its arrival in Mombasa. *Mwinyi Hamisi* was amongst those identified as complicit. No charges were ever instituted in this investigation. Of interest, DNA analysis showed that amongst the seized ivory, were tusks from 22 elephants shot from a helicopter in the DRC in March 2012, allegedly by the Uganda Defence Force[4].

[4] Wasser, Dr. S. et al (2018) "Combatting Transnational Organized Crime by Linking Multiple Large Ivory Seizures to the Same Dealer"

To summarize, two major ivory seizures totalling 4.8 tonnes destined for Malaysia, 5 days apart, clearly linked, one investigated vigorously with Interpol support and no charges laid, the second shoddily investigated and prosecuted, one man charged and acquitted 4 1/2 years later. At the time of this report, there is still a lingering question as to whether the seized 3.3 tonnes of ivory is still in secure police custody. There are clear indications in both these cases that the course of justice was subverted.

There is rarely a "smoking gun" scenario when a corruptive force becomes complicit or actively involved in committing wildlife crime. Yes, there have been more than a few cases across the African continent where ivory or rhino horn, kilos or even tonnes, have gone 'missing' from secure government storage facilities. Generally, the 'act' is much more subtle, a 'missing' file, witnesses (police or civilian) who fail to attend court, contradictory testimony, continual adjournments for seemingly innocuous reasons, improper/illegal exhibit handling processes, a 'typo' on a charge sheet, or an apparent act of 'incompetence' invariably attributed to lack of institutional capacity. These 'acts', viewed individually by the casual observer may even appear to be the result of random and genuine human failing. They are all, however, the mask and cloak of corruption.

The aim of this report is primarily to extol the success and potential of the wildlife crime courtroom monitoring initiative. As part of that, it has to be realized, that however distasteful it may be, corruption is ever present within the criminal justice processes of virtually all African elephant range states.

This report will present a brief overview of the existing status quo relating to the agencies who are part of the Kenyan judicial process who impact wildlife crime investigations. It will conclude by detailing a number of methods by which courtroom monitoring can mitigate, proactively and reactively, corruption within the judicial process. Some of these methods have been previously identified by other NGO's who include IWT courtroom monitoring in their mandate such as Space for Giants, Wildlife Direct, The Eagle Network and Lilongwe Wildlife Trust (Malawi) to name but a few, who provide further validation towards the purpose of this report.

The Players within the Judicial Process

All of those who follow the investigative side of IWT are more than aware of the presence of corruption within the criminal justice systems of most subject countries. These justice systems, and particularly relating to the police, did not become corrupt by themselves or over night. The corruption came from the society of which they are part and started at the top.

The recent statement by the task force on the Kenya Forest Service[5] said it all: *"The Kenya Forest Service has institutionalized corruption and the system is replete with deep rooted corruptive practices, lack of accountability and unethical behaviour".* The statement was refreshingly honest, a Kenyan task force that was able to tell the government that commissioned it, publicly and undeniably, that the KFS had systemic, institutionalized, integrity issues. There is no reason to believe that this statement is not equally applicable to the rest of the players involved in the Kenyan criminal judicial process.

[5] The Star, Corrupt, incompetent KFS to blame for Kenya's depleted forests April 30, 2018

It cannot be denied that Kenya has made impressive strides in reducing its poaching numbers, increasing IWT conviction rates and handing down stiffer penalties legislated under the new Wildlife Conservation and Management Act. In the last year or so, statistics would even indicate that cartels have shifted their egress port of preference from Mombasa to locations in Mozambique and Nigeria. That being said, it is also clear that from an integrity perspective, the institutions involved within the Kenyan criminal justice system fall more in line with what was found within the Kenya Forest Service to a greater or lesser degree.

It is beyond doubt, within the Judiciary, the Office of the Director of Public Prosecutions (ODPP), the National Police Service (NPS), the Kenya Wildlife Service (KWS), and the Kenya Revenue Authority (KRA) that there are many highly capable, diligent persons of integrity, motivated to perform their duties or calling in an exemplary fashion. One can read on any given day of successful arrests, investigations, prosecutions and convictions. But also, and known to all Kenyans, is that on any given day, at any given time, justice can be thrown to the wind by a player in any one of these institutions. Greed overcoming integrity.[6]

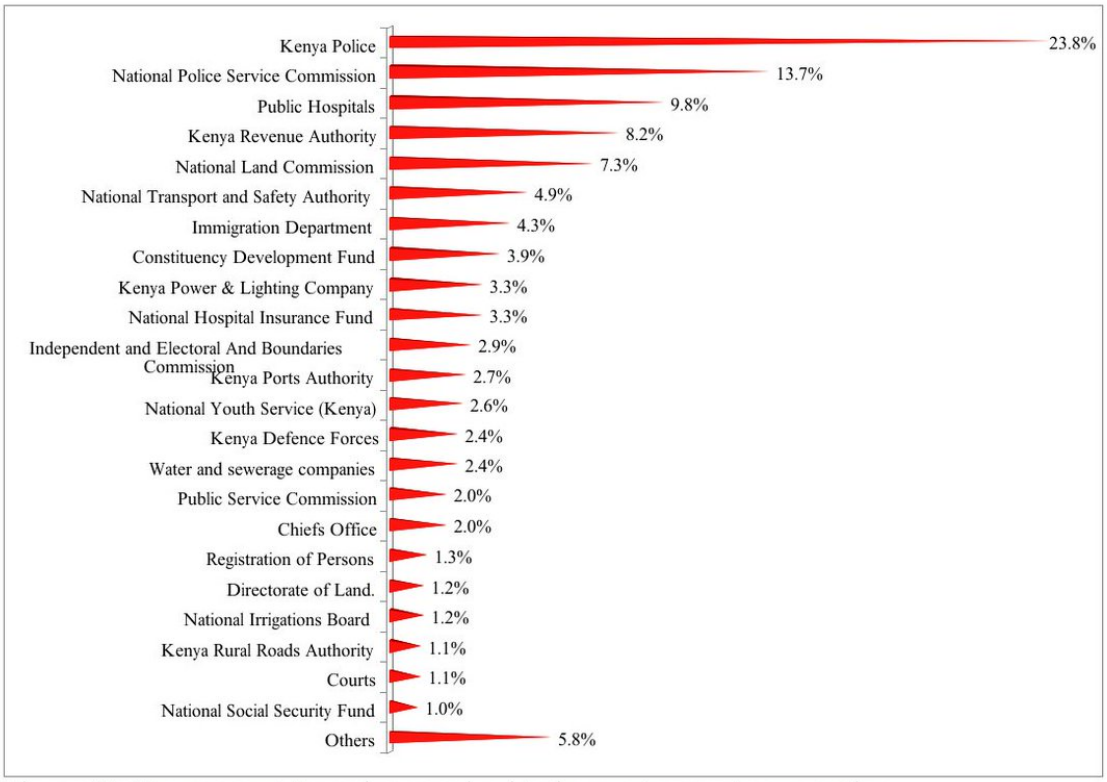

Figure 19: Government Agencies perceived to be most prone to corruption

[6] EACC (2017) National Ethics and Corruption Survey

National Police Service:

The report, "*The Criminal Justice System in Kenya - an Audit"* [7] refers to the police as "gate keepers of the Criminal Justice System". The NPS would be that gateway. In 2017, they were selected as the 3rd worst police agency on the World Internal Security and Police Index (Nigeria came in last followed by DRC)[8]. That same year, they were rated by the Kenya Ethics and Anti-Corruption Commission (EACC) as the most corrupt government department in the country[9]**.** And if it could not get any worse, Amnesty International states that the NPS has committed the most extrajudicial killings of all African countries[10].

Unbeknownst to many, the investigative branch of the NPS, the Directorate of Criminal Investigation (DCI), is the lead agency in all major wildlife crime investigations. The response they give to those investigations is not only inconsistent but appears based on the amount of publicity a particular seizure or arrest has received. The two back to back ivory seizures in Thailand and Singapore in April-May of 2015 rated a multi-agency investigation led by Chief Inspectors. The most recent large scale container seizure in Mombasa in December 2016[11] (it had been recalled mid-journey from Singapore), with clear transnational links to Uganda, South Sudan, Cote d'Ivoire, Mozambique, Vietnam and Cambodia has a corporal as its lead investigator. DCI investigations have yet to yield a wildlife crime conviction on any seizure of significance.

Kenya Wildlife Service:

KWS have escaped the international notoriety of the NPS, but nationally not so much. A 2014 newspaper article entitled: *"National Park where Rampant Poaching Thrives as Rogue KWS Officers go Scot Free"* presented a detailed expose on how senior KWS personnel were involved.[12] This was after 17 rhinos had been killed within a three month period from KWS protected parks. In July 2018, two KWS officers were suspended after a rhino was killed near Lake Nakuru. KWS has also been accused of committing extrajudicial killings as documented in Poachers And Butchers[13] and a May 2015 incident[14] where a man was arrested by KWS never to be seen again. KWS are presently still stinging from a rhino re-location project that turned into an international debacle after eleven rhinos died of apparent salt water poisoning.[15]

In serious wildlife crime investigations, KWS, for all intensive purposes, are subservient to the DCI, with the DCI doing all the heavy lifting. Duplicate files are kept in some investigations but

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[7] National Council on the Administration of Justice (2016) The Criminal Justice System in Kenya - an Audit

[8] The Standard, Kenyan police ranked world's third worst by World Internal Security and Police Index November 11, 2017

[9] Supra n.6.

[10] Daily Nation, Amnesty report says Kenya tops Africa in extrajudicial killings February 23, 2017

[11] CR 2511/16 R v. Mbare

[12] The Standard, National park where rampant poaching thrives as rogue KWS officers go scot free March 31, 2014

[13] KTN News, Dennis Onsarigo Poachers and Butchers March 26, 2014

[14] Daily Nation, KWS denies kidnapping allegations July 1, 2015

[15] Daily Nation, Last black rhino moved to Tsavo park dies August 7th, 2018

there is minimal collaboration between the two. More often than not, the KWS is in a support role. It has been seen on a number of occasions where the NPS have made the initial arrests, taken the preliminary statements but handed the file over to KWS once the accused have been arraigned in court. This has nothing to do with ability as KWS investigators have a proven track record where they have had the lead.

From a corruption perspective, the Kenya Wildlife Service is more difficult to gauge as they are a smaller service and not under public scrutiny on a daily basis. In obtained data going back to 2012, of 2000+ accused persons (of which 18 were serving police officers), there was not one instance found of a KWS officer being charged with an offence under the Wildlife Conservation and Management Act[16]. The reason for this impossibility? KWS keeps everything in-house. When a wrong doing by one of their members is discovered, the offender is simply transferred or "re-shuffled" to another station in the country. In a 2015 KWS internal investigation, almost an entire KWS post was implicated in wildlife trafficking offences and after investigation, they were all transferred. The cancer was simply spread elsewhere and the public and donors were none the wiser. The author, has discovered in a number of instances, statements by accused persons indicating that the ivory allegedly found in their possession, had been planted by KWS. While this is not an uncommonly utilized defence by accused persons, it is a virtual certainty that there are persons languishing in prison for an offence they did not commit; the down side to legislated 20+ year custodial sentences.

Kenya Revenue Authority:

The Kenya Revenue Authority are the customs and border control people and should be playing a significant role in deterring wildlife crime at the various inland border points and certainly at Mombasa Port. This is not the case. At the various inland border crossings, KRA have not made an ivory seizure since at least 2002. The KRA in Mombasa, based on their existing inspection protocols, have not made an ivory seizure within Mombasa port since October 2013.[17]

In every major ongoing ivory trafficking case in Mombasa, a KRA officer is either an accused or complicit. In the longest running case in Mombasa, CR 530/12 R v Ndrigi Maina, there is clear indication that the KRA Head of Verification, James Kinyua Njagi, forged an Inspection and Verification report that would have allowed the contraband ivory to pass. He was later charged for his involvement in a March 2014 ivory seizure that transited Mombasa for Singapore.[18] One has to wonder how many times he forged similar clearances. In August 2016, 25 KRA and Kenya Port Authority (KPA) staff were arrested for fraud and container diversion[19] related charges, one of them being in charge of IT. Further evidence of the significant corruption issues within the port, in October 2015, 140 police officers manning the port were transferred amidst allegations of corruption and tribalism.[20]

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[16] Authors observations from data and open source

[17] ibid

[18] CR 418/17 R v Falah Manzu +6

[19] The Star, Port officials, police held over tax evasion, diversion of goods August 8, 2016

[20] The Star, 140 cops transferred from Mombasa Port over corruption, tribalism October 19, 2015

The Judiciary:

The fight against corruption must come from the very top. Certainly the overturning of the Kenyan election results in August 2018 by Chief Justice Maranga and the High Courts was unheralded, brave beyond belief and an indicator of the direction in which he wants to take the Judiciary. Chief Justice Maranga has admitted on more than one occasion that there are corruption issues within the CJS, something that the other institution heads have failed to do. The executive summary of the report: "*The Criminal Justice System in Kenya - an Audit*"[21] states: *"No agency can read this report and fail to be moved by its disturbing findings. It is an urgent call to action for all the justice sector actors of the inescapable need to align the Criminal Justice System with the promise contained in the Bill of Rights of the Constitution of Kenya."* Does anything more need to be said?

ODPP:

On the surface, the ODPP would appear to be the lone bright spot amongst the players of the Kenya CJS. The new ODPP boss, Nordic Haji, recently appointed from the National Intelligence Service (NIS), appears to be dedicated in his fight against corruption and has instituted a number of high level prosecutions in the past months. The ODPP, however, would fall within the parameters of "justice sector actors" referred to in the justice audit report with the disturbing findings. It is known, and not surprisingly, that there are prosecutors who have taken considerations in major wildlife crime prosecutions. Recently, a ODPP prosecutor was arrested by EACC in Taita Taveta for allegedly demanding a bribe to influence a defilement case[22]. One wonders if the bribe was being shared up the chain?

The author has more specific knowledge of how corruptive the CJS can be. Eighteen months ago, a Kenyan was arrested by DCI in the Nairobi area regarding a fraud allegation. The subject was offered release if he paid the investigators sh 50,000. He was going to pay the bribe but was persuaded by others to decline. The expectation was that he would be taken to court the following day and released for a court date in the future. He was taken to court the next day but remanded in custody without having the opportunity to speak. *He remained in custody for a further three weeks and in the process, paid out upwards of sh 400,000 in bribes to police, the prosecutor, the magistrate, court administration staff and prison officials.* This did not include the fees for his own counsel. He also had to come up with a further sh 1,000,000 in sureties.

In the ensuing proceedings, a criminal charge was laid but it was agreed with the complainants and the court that should the outstanding monies be repaid within a reasonable time frame, the charges would be withdrawn. At the time of this report the monies have been repaid, however, the magistrate and prosecutor, through the DCI investigator, are requesting another sh 100,000 to finally terminate the case.

In a functional criminal process, there is a presumption that agents of the State will tell the truth. In Kenya at the present time, that presumption cannot be made. While there are officers

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[21] Supra n.7.

[22] The Star, DPP says DCI is probing his office over bribery claims May 31, 2018

making legitimate, legal arrests, and following case management and exhibit handling protocols, there are many doing otherwise and not from lack of knowledge or capacity. At the end of the day, integrity of process is minimal.

"The strengthened laws of the Wildlife Conservation and Management Act will have little or no impact on serious wildlife crime in Kenya unless corruption is brought under control"[23]

WHY COURTROOM MONITORING?

Despite the fact that many elected officials, public service employees and actors within the criminal justice system are 'eating', and that it is even condoned within their respective organizations, no person likes to be singled out and/or identified as being corrupt. In a nutshell, this is what wildlife crime courtroom monitoring can do. By simply watching proceedings as a member of the public, in a public courtroom, courtroom monitoring can affect an almost instantaneous and positive change in the course of justice.

There are a number of NGO's within African elephant range states and Asian ivory market countries that maintain a watch in their respective courts of justice with regard to what is happening in relevant IWT prosecutions. Each NGO operates their courtroom monitoring process in their own fashion, dependant on the lay of the land relating to the criminal justice process and their individual organizational priorities. In Kenya, NGO's Wildlife Direct and Space for Giants both conduct courtroom monitoring programmes with spin off initiatives relating to those programmes. For the purpose of this report, the author will refer to wildlife courtroom monitoring as "Eyes in the Courtroom"(ECR), the moniker given by Wildlife Direct for their courtroom monitoring programme.

The conviction of Kenyan ivory trafficker, 'Feisal Mohamed Ali", (since acquitted on appeal) was seemingly the pinnacle, the shining example of what could be done through ECR, what social media pressure and public awareness could achieve when acting in concert. Despite police incompetence and obstruction, tampered evidence, and an interdicted magistrate, Feisal Mohamed Ali was found guilty and the courtroom monitoring process during that trial was without doubt, a major contributing factor.

But it was during the trial process, even before conviction, that the true measure of success was realized. Every process requires evaluation and "Eyes in the Courtroom" received its validation in the most unique of ways; harassment, intimidation and threats to the staff of Wildlife Direct who attended Mombasa court at various times through out the trial.

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[23] EIA (2018). Taking Stock: An assessment of progress under the National Action Ivory Plan Process

THE COURTROOM IS THE CHOKE POINT

In the CJS, arrest is the initial stage of the process. In Kenya, arrest is sometimes legitimate and based on reasonable grounds; sometimes arrest is based on mere suspicion; sometimes an arrest is groundless, a means to facilitate a bribe or to perhaps remove public pressure from investigators on a particularly sensitive and high profile case. In the world of IWT, agencies, both national and international, often use arrest statistics as an indicator of a job well done. But ask these same agencies for numbers on convictions and the story is very different.

For an arrest to lead to conviction, investigators and prosecutors have to follow the rule of law. This includes dealing with an accused in a manner consistent with the constitution and collecting evidence so as to be admissible for court. Even in criminal justice systems where integrity is not an active challenge, this is not an easy task. But in a CJS were integrity can oft be suspect, these investigative files run a gauntlet. How simple is it to arrange for a witness to fail to attend court, for their recollection of events to change, for a critical document to be misfiled or for evidence to be tampered with or mishandled.

Much has been made of recent advances in technology with respect to IWT; data mining from smart phones, the lifting of fingerprints from ivory and pangolins scales, ivory DNA analysis, and even drone photography, but all obtained evidence, regardless of source, has to enter the evidentiary chain for admissibility. There has been a recent push for investigative agencies to conduct financial crime investigations on IWT suspects. Again, for this evidence to be utilized against relevant accused, it has to enter the evidentiary chain. In other words it has to "run the gauntlet" and is susceptible to tampering and corruption.

The courtroom is the choke point. All evidence against an accused has to be presented in court so it is here where corruptive anomalies can be identified and derailed. When the various players know they are under scrutiny, they are less likely to make a "mistake". In circumstances where a "mistake" has been made, ECR can ask questions to those within the CJS handling that case. When mistakes cannot be rectified, records can be kept of the individuals responsible so as to prevent a reoccurrence. No individual likes to be singled out, let alone be criminally charged. **Wildlife courtroom monitoring executed with purpose, resolve and commitment can trump or minimize the effects of corruption.**

"What is also clear is that corruption is viewed as a significant challenge in improving the criminal justice pathway for wildlife crime. For that reason, any interventions, in order to have sustainable impact, must address the issue of corruption into their design and delivery of projects".[24]

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[24] Shamini Jaynathan, Stop Ivory and International Conservation Caucus Group (2016) Stopping poaching and wildlife trafficking through strengthened laws and improved application

EXPANDING THE CAPACITY OF WILDLIFE CRIME COURTROOM MONITORING

The foundation of the ECR initiative is to counter corruption and to promote accountability and transparency within the CJS relating to IWT cases. Here are a number of ways that it can enhance that basic function; some are in play already, some are on the drawing board, some are new, some big, others small but immediately impactful, some are pie in the sky and others that take a generation.

1. Establish a Global Network of "Eyes in the Courtroom" (ECR)

There are a number of already existing organizations that conduct their own version of ECR. The ideal scenario would be for one large global organization or a network of existing ECR organizations brought together, from countries of IWT origin, to transit countries, to Asian market countries for the purposes of sharing information but also large enough to exert pressure on political entities when required. This also goes toward mitigating threats, harassment and intimidation. A larger organization can be the "face" of ECR as opposed to one individual who presents an obvious target for that intimidation.

2. Expand Capabilities of Presently Existing National ECR Entities

Of the organizations that have an ECR capability, many are doing it on an ad hoc or limited basis, perhaps due to funding or resource challenges. Proposal #12 in *"Stopping poaching and wildlife trafficking through strengthened laws and improved application"* is reiterated: "*Stakeholders may also consider supporting 'champions' within their local court districts, to empower individuals to oversee and report on criminal trials and engage with court stakeholders e.g. through court user committees (CUC) where they exist……"Court user committees bring together prosecutors, judges, police, probation and prison services within a local court district."*[25] In areas were a Court User Committee is not viable, it is suggested that interested individuals could be recruited locally to attend for ECR on an "as required" basis.

3. Galvanize the Media

In Kenya, the media generally provide excellent coverage when an IWT arrest or seizure is effected. The challenge is in the followup and keeping it in the public eye. ECR can assist the media in its followup coverage with what is happening in the courtroom. No person(s) involved in the judicial process likes to see their name or court station in the news for the wrong reasons. 'Space for Giants' has a journalism fellowship programme to this end and it may be a model to follow.

4. Maintain Impartiality

It is imperative that the ECR group be as free as possible from political intervention/pressure. While understanding that diplomatic and political acumen will be required from time to time, the ECR initiative cannot achieve optimal results if entering into partnerships with entities that will impact on that impartiality.

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[25] ibid

5. This is a Conservation Issue and a Justice Issue

ECR, besides being an initiative for countering wildlife crime, is also an initiative for countering corruption within the entire criminal justice process. From a funding and support perspective, NGO's with a justice background should be identified.

6. Bridge Trust/Cooperation Issues in Cross Border Investigations

One of the more predominant discussion points constantly arising on the subject of countering IWT is interagency cooperation, or the lack thereof, and particularly cross borders. Corruption is the primary stumbling block and flowing from that are corresponding issues of trust. An ECR group could assist in bridging trust issues between different law enforcement entities, nationally and internationally.

7. Provide an NGO component (embedded mentors) to Vetted Multi-Agency Investigational Teams

This recommendation is part and parcel of recommendations made in both the Stop Ivory and ICCG 2016 report[26] and Wildlife Direct's 2014[27] and 2016[28] reports. The suggestion advocates an NGO structure to support wildlife investigations/prosecutions and the use of embedded mentors within the vetted investigative teams. Embedded mentors from the ECR group would work shoulder to shoulder with mentees on a regular and day to day basis. This combination would combine capacity training with transparency in process.

An example to follow here may be the combined achievements of Asian based NGO, Freeland, and the multi-national Lusaka Agreement Task Force. In 2016, they came together to investigate two ivory shipments that had originated from the Republic of Congo later seized in Vietnam and Thailand[29]. A number of persons were charged and convicted. This investigation lead to Kenya and a related ivory shipment that had been seized in Singapore in 2014 having transited Mombasa[30]. Seven persons were charged including James Kinyua Njagi, head of the KRA Verification Unit and two Ugandan nationals (who have since absconded).

8. Provide Impetus For Transnational Investigations

In a recently published scientific paper, "Combatting Transnational Organized Crime by Linking Multiple Large Ivory Seizures to the Same Dealer"[31], it was shown through ivory DNA analysis that there were clear linkages between many large ivory shipments, even between those

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[26] Supra n.21.

[27] Wildlife Direct (2014). Scoping study on the prosecution of wildlife related crimes in Kenyan courts, January 2008 to June 2013.

[28]Wildlife Direct (2016). Outcome of court trials in the first two years of implementation of the Wildlife Conservation & Management Act, 2013.

[29] Freeland. Covert Ivory Pipeline Broken African Task Force Snares Syndicate Trafficking Ivory to Asia.

[30] Supra n.16.

[31] Supra n.4.

originating from opposite sides of the African continent. Is there an investigational organization that will pick this up and run with it? No.

9. Institute an Information and Whistle Blower Hotline

This could easily be part of an ECR initiative. The public essentially does not trust the police or KWS. They need to know that there is an organization with integrity in process.

10. Participate in Wildlife Trophy Stockpile Accountability Programme

There have been many incidents across African elephant range states where ivory or rhino horn has been stolen from secure government vaults. In more rural areas, ivory or rhino horn exhibits may be kept for years in small insecure rooms, lockers, desk drawers or even in impounded vehicles from which the ivory was initially seized. As this is written, there is a question as to whether 3.3 tonnes of ivory or a significant portion thereof, has gone 'missing' from police custody in Mombasa. An ECR group, as part of its regular duties, would be aware of the various ivory/rhino horn seizures made by investigating authorities. It would be a logical progression for ECR to be part of this exercise. In Kenya at present, there is no third party organization actively working with KWS to independently ensure stockpile accountability and transparency.

11. Attend Prisons on an Irregular Basis to Prevent Early Release

The Eagle Network, as a standard operating procedure when an accused receives a custodial sentence, attends the appropriate prison on an irregular basis to ensure that the accused has not been released due to corruption. This can be a responsibility for an ECR group.

Bureaucracies are typically slow to effect change, particularly when corruptive forces are at play.

An ECR group cognizant of what is happening within the judicial process through their constant monitoring can make recommendations and provide impetus for legislative or administrative improvements relating to how IWT is handled by the criminal justice process as follows:

12. Advocate for Change and Consistency in Production of Ivory as Courtroom Evidence

There is presently a delay in a major Mombasa ivory trafficking prosecution due to the trial magistrate ordering that all 3.2 tonnes of ivory be returned to his court as evidence. It is presently in Thailand where it has been sitting in a container since its seizure on April 25, 2015. To many, this requirement, besides being logistically and economically inane, is not in the best interests of the administration of justice relating to IWT and should be changed. There is presently an ongoing prosecution in Mombasa relating to a 1 tonne ivory shipment seized in Singapore in 2014[32] and that ivory was destroyed almost 2 years previous. Is there a difference?

[32] Supra n.16.

3.2 tonnes seized in Thailand April 25th, 2015 originating from Mombasa

13. Advocate for the use of Ancillary Legislation in Wildlife Crime Prosecutions

To even the most uninformed, it is clear that IWT has to be organized. Cartels move large consignments of wildlife trophies across continents by way of air, rail, truck, seaborne container to name just the obvious. In the most recent Wildlife Direct report[33] it was noted that 47% of all wildlife crime cases had an organized crime element. In only two of those cases were charges preferred relating to organized crime and one of those cases was through Wildlife Direct's involvement. Investigators and prosecutors also appear reticent to utilize existing legislation relating to proceeds of crime and anti-money laundering.

14. Provide Kenya Wildlife Service the Autonomy to Investigate all Wildlife Crimes

It is the Directorate of Criminal Investigations who conduct the investigations into serious/ significant instances of IWT, not the Kenya Wildlife Service. The DCI gives every indication that these investigations are not an organizational priority despite IWT's clear connections to organized crime. Certainly KWS can execute this responsibility as well as, if not better, especially in light of the fact that it falls under their mandate. There will be greater efficiency and accountability while eliminating jurisdictional conflict.

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[33] Wildlife Direct (2018). Eyes in the Courtroom Program: An analysis of Kenya's Law Enforcement response to wildlife crime through monitoring of wildlife crime court room trials

15. Discourage the KWS Policy of Discipline Through Transfer

KWS rarely hold one of their own judicially accountable when found committing an offence. The author, in examining 6 years of data, found not one instance of a KWS officer being charged with an offence under the Wildlife Conservation and Management Act. Under these circumstances, it is virtually impossible for a culture of impunity not to exist. The KWS policy of discipline through transfer is not accountability or transparency. KWS offenders need to be held to account through judicial process. Their country, their dedicated staff, the wildlife they protect, their donors, deserve better.

16. Promote Greater Cooperation Between Investigators and Prosecution

It has been observed that once a trial has commenced, particularly in major prosecutions, investigators rarely attend court except to testify. In the more complex cases, the lead investigator should be sitting in court with the prosecutor to assist. The lawyer knows the law, the investigator knows the file.

17. Promote Accountability Within the Bail/Bond System

The process of release for an accused in Kenya relating to bail, bond and sureties is a rats nest of corruption. ECR has identified numerous cases where highly questionable documentation was submitted for an accused's release that had not been properly verified or challenged.

18. Promote General Police Reform and Recruiting Practices

The Kenyan police are the gateway to the justice system but also seen as the most corrupt government institution in the country. While it is not the object of this report to deal with police reform, very clearly status quo does not bode well for IWT investigations.

In the same vane, and also a long term project, is the subject of police recruiting. The Kenya Independent Police Oversight Authority stated in their recent report[34] that in 2014 they "monitored the (recruiting) exercise in various centres and observed that the exercise was marred with corruption, fraud and massive irregularities". The report did later indicate that an improvement in the recruiting process had been noted, but presently it is still common practice for prospective inductees to pay out bribes to enable selection. Considering the lack of organizational integrity noted, especially within the NPS, what type of individuals are now attracted to become police? This needs to be addressed in a serious and committed way.

19. Advocate for the Digitizing of Court Proceedings

This is also a recommendation in the latest Space for Giants report[35]. At present, trial magistrates make detailed notes of testimony and evidence as presented. With their concentration focused on their note taking, they are unable to make proper assessment of the body language of the witness, therefore missing vital indicators in evaluating veracity. It is also often the situation where these handwritten notes are illegible to anyone but themselves,

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[34]Independent Police Oversight Authority, End Term Board report (May 2012 – May 2018)

[35] Space for Giants (2018) Analysis of Prosecutions of Ivory, Rhino Horn and Sandalwood Crime in North Central Kenya – A Case Study January 2014 - May 2018

thereby causing unnecessary delays in providing accurate transcripts to the prosecution or the defence within a short period of time.

20. Promote Requirement of Computers for Investigators

At present, most police reports and statements are handwritten and legibility is always an issue, particularly for prosecutors who have serious time constraints when reading files. The consequence to this is that small and often critical details are missed by the prosecutor in the trial process.

21. Discourage Practice of Requiring Trophy Values on Charging Documents

Sentencing in some countries is based on the perceived monetary value of the ivory seized. In Kenya, charging documents relating to WCMA charges typically include the perceived value of the poached or trafficked 'trophy'. Any practice showing that ivory has a monetary value should be discouraged.

22. De-emphasize the Need of Capacity Training

Capacity training, workshops and seminars are generally seen as a quick fix for many government agencies and NGO's, an idea also fostered by integrally corrupt organizations where their corruption is blamed on lack of capacity. It is also a method of assisting donor organizations to skirt or ignore the one stanchion on which IWT is based, corruption.

For starters, capacity building is an easy way to get into the "sandbox" of the recipient nation. Who is going to refuse training, especially when it is free and there are accompanying financial incentives for administrators and trainees. Capacity building costs can be easily budgeted, there are a minimal unknowns, it is attractive to donors, it is attractive to attendees, and produces seemingly tangible results.

There is, of course, a down side. One just has to look at past experience in Iraq and Afghanistan where billions of dollars were poured into police capacity building with minuscule returns. Trained officers were transferred to other duties; officers left for other more lucrative jobs in the private sector; the training was wasted because it was not supported by either the criminal justice system, their respective agencies or their respective managers; it was wasted because the respective officer was there for the extra money and had no interest in the new skill; it was wasted because the respective agency did not have the infrastructure in place for the new skill to be utilized; or it was wasted because the trainers did not fully understand the context in which their students were operating.

This is not to say that there is not a place for capacity training but considering how corruptive practises are entrenched institutionally in many of the state investigative agencies, "any interventions, in order to have sustainable impact, must address the issue of corruption into their design and delivery of projects"[36]

[36]Supra n. 24.

CONCLUSION

"Any judicial process is no stronger than its weakest link. In many cases, the weakest link in the system is a low- level official, out of the public spotlight, who is easiest to corrupt. Complex cases, prepared at huge cost, can easily flounder in a mire of petty corruption that manifests itself in lost evidence, arbitrary decisions in the courtroom, mislabeled files or "innocent errors" on charge sheets.

There is little point in launching large-scale investigations against high-level criminals as long as low-level officers are able to compromise the cases with impunity."[37]

This quote from Shamini Jaynathan, Director of Wildlife Protection for Space for Giants, is found in Wildlife Direct's 2014 - 2015 court monitoring report. This author would submit that the quote has been tempered for the purposes of political correctness. High-level officers are also clearly involved in compromising IWT prosecutions.

Ofir Drori's, The Eagle Network, working against IWT in eight West African countries states: *"we detect corruption in 85% of our arrest operations, and in 80% of our cases in court."*[38]

The Environmental Investigative Agency, in their most recently released report stated: *"The strengthened laws of the Wildlife Conservation and Management Act will have little or no impact on serious wildlife crime in Kenya unless corruption is brought under control".*[39]

It makes one wonder how CITES just exempted Kenya from their reporting obligations under the National Ivory Action Plan process.[40]

Corruptive practises are entrenched in many criminal justice systems and particularly relating to IWT. That is obviously not a war that can be won overnight but in the short term its effects can certainly be mitigated. That mitigation point, that choke point for attack, is in the public courts through courtroom monitoring. And while courtroom monitoring has shown the successes that can be achieved, there is yet untapped potential to be developed.

A programme of wildlife crime courtroom monitoring, executed with purpose, resolve and commitment, preferably on a global basis or within a global network, is a proven methodology in the short and long term, for countering corruption and thereby tackling organized crime while strengthening law enforcement and existing legal frameworks.

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[37] Supra n.28.

[38] The Eagle Network http://www.eagle-enforcement.org/

[39] Supra n.23.

[40] The Star Outrage as CITES exempts Kenya from monitoring illegal ivory trade October, 2, 2018