

THE LAW NEVER FORGETS: AN ANALYSIS OF THE ELEPHANT POACHING CRISIS, FAILED POLICES, AND POTENTIAL SOLUTIONS

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“Elephants are living treasures. Nature’s gardeners. Nature’s great teachers. Tragically some people don’t give a damn. They prefer the dead treasure to the living one. The ivory. We must challenge this so-called ‘trade’ with all our might and shame on those who would condone it.”¹

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¹ Virginia McKenna, *What the Experts Say*, BLOOD IVORY, <http://www.bloodivory.org/quotes> (last visited Mar. 10, 2013).

INTRODUCTION

The African elephant is the largest land-dwelling animal on earth.² Unlike the Asian elephant, the African elephant develops large ivory tusks. Individuals covet these tusks, usually tusks that are larger and stronger, in order to manufacture and sell goods.³ The only way to acquire elephant tusks is to kill the elephant and then remove the tusks. Thus, poachers must kill elephants to fill the demand for ivory, which in turn has decimated elephant populations at two different junctures in recent history.

In the 1970s and 1980s countries legally traded ivory.⁴ African countries with elephant populations exhausted the resources - including ivory, meat, and skin - provided by elephants.⁵ They extracted ivory from dead elephants and traded it⁶ to other (mostly Asian) countries.⁷ The trade of ivory created a market for ivory and allowed poachers to profit from their illegal trade. However, the systems created to manage the legal trade of ivory did not provide an effective way to differentiate between legally acquired ivory and poached ivory. Ninety percent of the ivory traded was obtained illegally.⁸ Poachers organized and began to use automatic weapons, which dramatically depleted elephant populations.⁹ They then flooded the market with ivory in turn for a substantial profit.

In response to this threat to elephant populations, many countries enforced unilateral bans on the export and import of ivory in 1988. The movement began with the United States' ban on the import of ivory products.¹⁰ West Germany and twelve other European countries banned the import of ivory as well.¹¹ Kenya banned the export of ivory and

² DAVID HARLAND, *KILLING GAME: INTERNATIONAL LAW AND THE AFRICAN ELEPHANT* 18 (1994).

³ *The Shrinking Roots of Heaven*, U.S. NEWS & WORLD REP., May 22, 1989, at 11. Such products include Japanese seals (hanko), knife handles, and powder for medicine. *Id.* at 11-12.

⁴ Michael J. Glennon, *Has International Law Failed the Elephant?*, 84 AM. J. INT'L L. 1, 3 (1990); Sam B. Edwards, III, *Legal Trade in African Elephant Ivory: Buy Ivory to Save the Elephant?*, 7 ANIMAL L., 2001, at 119, 122.

⁵ David Harland, *Jumping on the "Ban" Wagon: Efforts to Save the African Elephant*, 14 FLETCHER F. WORLD AFF. 284, 286 (1990).

⁶ *Id.*

⁷ See Edwards, *supra* note 4, at 122. Prior to the ban in 1989 Japan was the largest importer of ivory.

⁸ *Id.*

⁹ *Id.*

¹⁰ Glennon, *supra* note 4, at 16.

¹¹ *Id.*

implemented a system intended to stop all illegal poaching of African elephants.¹² However, not all countries agreed to impose a unilateral ban; Japan and Hong Kong did not ban the import of ivory and South Africa and Zimbabwe refused to stop exporting ivory.¹³ Nonetheless, in 1989, the Convention on International Trade of Endangered Species of Wild Fauna and Flora (CITES) imposed a complete, world-wide ban on the ivory trade.¹⁴

Initially, the ban dramatically reduced the incidence of illegal poaching because it destroyed the market for ivory.¹⁵ However, in 1999 Zimbabwe, Botswana, and Namibia exported their ivory stores to Asian nations revitalizing the ivory market.¹⁶ Poaching started to increase again¹⁷ and now, in 2013, the African elephant is facing its largest poaching crisis since the 1989 ban. As the *New York Times* reported, “Africa is in the midst of an epic elephant slaughter.”¹⁸ Conservation groups note, “poachers are wiping out tens of thousands of elephants a year, more than at any time in the previous two decades, with the underground ivory trade becoming increasingly militarized.”¹⁹ The new demand has pushed the value of ivory upwards of \$1,000 per kilogram, which makes poaching very profitable.²⁰ Due to the renewed threat to elephants, CITES members commissioned African range states –African states with elephant populations– to develop a plan to combat the crisis.²¹ These range states developed the African Elephant Action Plan (AEAP), which was subsequently adopted by all of the range states; though the strategies have not been implemented in most of them.

¹² *Id.*

¹³ *Id.* at 16-17

¹⁴ Susan J. Keller, *Is the International Ban on the Importation of Ivory Saving the African Elephant?*, 3 COLO. J. INT’L ENVTL. L. & POL’Y 381, 393–95 (1992).

¹⁵ Bill Padgett, *The African Elephant, Africa, and CITES: The Next Step*, 2 IND. J. GLOBAL LEGAL STUD. 529, 540-541 (1994-1995).

¹⁶ Scott Hitch, *Losing the Elephant Wars: CITES and the “Ivory Ban”*, 27 GA. J. INT’L & COMP. L. 167, 170 (1998-1999).

¹⁷ *Id.* at 184.

¹⁸ Jeffrey Gettleman, *Elephants Dying in Epic Frenzy as Ivory Fuels Wars and Profits*, NEW YORK TIMES, Sept. 3 2012, available at <http://www.nytimes.com/2012/09/04/world/africa/african-elephants-are-being-slaughtered-in-poaching-frenzy.html>.

¹⁹ *Id.*

²⁰ *Id.*

²¹ See Convention on International Trade in Endangered Species and Wild Fauna and Flora [CITES], Fifteenth Meeting of the Conference of the Parties, Doha (Qatar), Mar. 13–25, 2010, *African Elephant Action Plan*, [hereinafter AEAP], available at <http://www.cites.org/common/cop/15/inf/E15i-68.pdf>.

This pressing problem suggests a failure of the current system to prevent elephant poaching and the trade of illegal ivory. Currently, the international community is not united against the problem; there are many different enforcement procedures, penalties, and rules about what can be done with elephant resources. Countries must implement a unified strategy to quell the current problem. They need to do more than just adopt the AEAP; they need to effectuate the AEAP through creating uniformed enforcement mechanisms including shoot-to-kill laws, garnering citizen support through sustainable use programs, and increasing funding from both the international community and sustainable use programs.

In Part I of this note, I discuss the history of CITES and the subsequent changes to the law and different conservation strategies in African countries through the 1990s. In Part II, I discuss the current rise in elephant poaching and the international reaction to the problem. In Part III, I discuss the discrepancies in the laws of Botswana and Kenya as well as the approach commissioned by CITES and the approach adopted by the range states— the AEAP. Finally in Part IV, I argue that the African range states need to properly implement the AEAP system, impose harsher enforcement mechanisms, and increase funding through sustainable use programs and other means in order to combat the current crisis.

I. THE INITIAL BAN AND THE SUBSEQUENT DEVELOPMENTS IN ELEPHANT PROTECTION LAW

A. CITES

In 1975 ten states ratified CITES to protect wildlife (animals and plants) from exploitation often found in international trade.²² The member states have since swelled to 175.²³ CITES members meet annually to assess situations affecting wildlife and issue reports. This convention sought to protect individual species and plants from humans.²⁴ In order to accomplish this goal CITES classified animal

²² Padgett, *supra* note 15, at 529.

²³ Joint Press Release, CITES, Experts Report Highest Elephant Poaching and Ivory Smuggling Rates in a Decade (June 21, 2012), *available at* http://www.cites.org/eng/news/pr/2012/20120621_elephant_poaching_ivory_smuggling.php.

²⁴ Padgett, *supra* note 15, at 531.

species in certain appendices depending on how threatened the species is.²⁵ “CITES acts as the ultimate traffic cop, deciding when international trade in certain species, whether the African elephant, jaguar, or exotic birds, can continue unimpeded, when it must slow, and when it must stop entirely to avoid the tragedy of extinction.”²⁶

CITES established three different appendices to categorize animal species. The most protected species garnered Appendix I status. Species placed into Appendix I include “all species threatened with extinction which are or may be affected by trade.”²⁷ Placement in Appendix I demands a halt on all trade of that species between member states.²⁸ The next level, Appendix II, is the intermediate level. It includes “all species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation.”²⁹ Regulated trade of Appendix II species is allowed, however, CITES requires member states to submit quotas of how much of an animal resource they are allowed to trade.³⁰ The last level, Appendix III, is the least regulated level. Appendix III status includes “all species which any Party identifies as being subject to regulation within its jurisdiction for the purposes of preventing or restricting exploitation.”³¹ Appendix III demarcation leaves all regulation matters of the species to the individual member states.

B. THE FIGHT OVER A TOTAL BAN ON THE IVORY TRADE

Parties to CITES initially listed elephants in Appendix II. Under the Appendix II listing, the CITES secretariat implemented a quota system in order to try to regulate the amount of ivory member states may export. Under this system each country determined its own quota for the amount of raw ivory they could export,³² which they set unreasonably

²⁵ INTERNATIONAL WILDLIFE TRADE: A CITES SOURCEBOOK, at ix (Ginette Hemley ed., 1994).

²⁶ *Id.*

²⁷ Convention on International Trade in Endangered Species of Wild Fauna and Flora, art. II(1), Mar. 3, 1973, 27 U.S.T. 1087 [hereinafter CITES].

²⁸ Padgett, *supra* note 15, at 533.

²⁹ CITES, *supra* note 27, at art. II(2)(a).

³⁰ *Id.*

³¹ *Id.* at art. II(3).

³² UNITED NATIONS ENV'T PROGRAMME, UNEP ENVIRONMENT BRIEF NO. 8, CITES THE CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA, 2, 4-5 (1989).

high at levels their elephant populations could not sustain.³³ Countries monitored their quotas with an elaborate system that was overseen by the CITES secretariat.³⁴ However, this system failed, as it did not adequately distinguish legal from illegal ivory.³⁵ Corruption overran many of the government organizations responsible for monitoring and implementing the policies.³⁶ Poachers bribed officials in the system and legal and illegal ivory became indistinguishable.³⁷ A combination of not “providing adequate measures to combat poaching” and the free trade of ivory perpetuated a market for illegal ivory.³⁸ Therefore, African elephant populations decreased dramatically.³⁹

In 1988 many countries, including the United States, West Germany, and Kenya, took notice of this problem and advocated for a worldwide ban of ivory sales.⁴⁰ These countries implemented unilateral bans on their export and import of ivory and advocated for a reclassification of African elephants from Appendix II to Appendix I species.⁴¹ The Kenyan government not only banned the killing of elephants and the sale of ivory, but it also implemented a shoot-to-kill policy.⁴² Shoot-to-kill policies allow rangers to shoot poachers on-sight. The Kenyan government would not even sell confiscated ivory or ivory taken from elephants who died naturally because, as President Moi stated, “we believe that this is only fueling the market.”⁴³

While some countries supported the ban on ivory trade, other countries vehemently opposed it. Southern African countries did not want to ban the sale of ivory outright both because they used the proceeds to fund elephant conservation efforts and because their populations viewed elephants as nuisances.⁴⁴ Zimbabwe, South Africa,

³³ Padgett, *supra* note 15, at 540.

³⁴ Harland, *supra* note 5, at 294 (citing UNITED NATIONS ENV'T PROGRAMME (UNEP), *The African Elephant*, (Nairobi: UNEP, 1989) 33-37).

³⁵ Harland, *supra* note 5, at 294.

³⁶ Yvonne Fiadjoe, *CITES In Africa: An Examination of Domestic Implementation and Compliance*, 4 SUSTAINABLE DEV. L. & POL'Y, no.1, 2004, at 38, 40.

³⁷ *See id.*

³⁸ Harland, *supra* note 5, at 295.

³⁹ Edwards, *supra* note 4, at 122.

⁴⁰ Glennon, *supra* note 4, at 15-16. This included both exporting governments, such as Kenya, and importing governments such as the United States and West Germany. *Id.*

⁴¹ Glennon, *supra* note 4, at 16.

⁴² *Id.* at 15.

⁴³ Glennon, *supra* note 7, at 23 (citing SUNDAY TELEGRAPH (London), July 16, 1989, at 14.).

⁴⁴ Andrew J. Heimert, *How the Elephant Lost his Tusks*, 104 YALE L.J. 1473, 1474, 1483 (1995).

and Botswana did not support the ban and intended to continue to export ivory to Japan, Hong Kong, and other countries in the Far East.⁴⁵

At the 1989 CITES meeting Kenya proposed changing the status of African elephants from Appendix II to Appendix I.⁴⁶ In order to move species from Appendix II to Appendix I, the species must satisfy the Berne Criteria.⁴⁷ The primary criterion is that the “species must be currently threatened with extinction.”⁴⁸ The remaining Berne Criteria allow countries to take other factors into account including economic and political self-interest, ethical positions, and sentimentality.⁴⁹ Countries that opposed the ban – lead by Zimbabwe – noted that, on the whole, African elephant populations were not threatened with extinction, only threatened in certain countries.⁵⁰ Therefore, they argued that upgrading them to an Appendix I species circumvents the Berne Criteria and the laws set by this Convention.⁵¹

Over the protest of Southern African countries, the pro-ban lobby won the fight and African elephants were reclassified as an Appendix I species.⁵² The pro-ban lobby’s argument was strengthened by the lack of adequate enforcement techniques for the current system and the unilateral bans that some supporters put in place prior to the 1989 meeting.⁵³ However, the final push to gain the requisite backing and move African elephants from Appendix II to Appendix I listing came from the actions of President Moi of Kenya, who set ablaze \$3 million dollars worth of ivory instead of selling it for government revenue.⁵⁴

Despite the apparent win for the pro-ban forces and African elephants, some of the member states rejected the ban and invoked

⁴⁵ Glennon, *supra* note 4, at 16–17.

⁴⁶ See CITES, Seventh Meeting of the Conference of the Parties, Oct. 9–20, 1989, Lausanne, *Proposals for amendment of Appendices I and II*, available at http://www.cites.org/eng/cop/07/prop/E07-Prop-26_Loxodonta_AT.PDF.

⁴⁷ Harland, *supra* note 5, at 294–295.

⁴⁸ CITES, First Meeting of the Conference of the Parties, Nov. 2–6, 1976, Berne, *Criteria for Addition of Species and Other Taxa to Appendices I and II and for the Transfer of Species and Other Taxa from Appendix II to Appendix I* [hereinafter Berne Criteria], available at <http://www.cites.org/eng/res/all/01/E01-01.pdf>.

⁴⁹ Hitch, *supra* note 16, at 178.

⁵⁰ Harland, *supra* note 5, at 294.

⁵¹ *Id.* at 296.

⁵² CITES, Seventh Meeting of the Conference of the Parties, Oct. 9–20, 1989, Lausanne, *Amendments to Appendices I and II of the Convention*, available at <http://www.cites.org/eng/cop/07/E07-Amendments-to-Appendices.pdf>.

⁵³ Glennon, *supra* note 4, at 15–16.

⁵⁴ Padgett, *supra* note 15, at 540.

reservations.⁵⁵ Reservations occur when a party in CITES opts out of following the policies such as a total ban on the trade of elephants.⁵⁶ Any party to CITES is allowed to claim a reservation with respect to the amendments as long as they notify the secretariat.⁵⁷ Usually countries take reservations because of a significant economic interest in the trade of that species.⁵⁸ Despite these nations initial use of reservations, they quickly caved to international pressure and withdrew their reservations because of a decline in the international demand of ivory.⁵⁹

C. SINCE THE BAN: THE TWO APPROACHES TOWARDS MAINTAINING ELEPHANT POPULATIONS

After the move from Appendix II to Appendix I, two different approaches emerged towards how best to protect and utilize the elephant population: 1) total ban pure protectionist and 2) sustainable use.⁶⁰ Proponents of the pure protections support “a complete ban on all hunting and cultivation of wildlife resources, and instead focuses on nonconsumptive activities such as tourism.”⁶¹ Kenya favored this approach towards its elephant population. Kenya fenced in reserves in order to protect elephants by keeping them away from citizens.⁶²

The downside to this approach is it does not allow for revenues from elephant resources, which can be used to fund the preservation of the species; instead, it relies primarily on funds from tourism.⁶³ Despite the downsides, the policies implemented by Kenya allowed their elephant populations to recover. During the previous two decades (1970-1989), poachers reduced Kenya’s elephant population from 167,000 to 17,000.⁶⁴ Between 1989 and 2000, following the adoption of a shoot-to

⁵⁵ Dennis McAuliffe, Jr., *U.N. Conference Bars Ivory Imports*, WASH. POST, Oct. 17, 1989, at A13.

⁵⁶ Padgett, *supra* note 15, at 536.

⁵⁷ CITES, art. XV, *opened for signature* Mar. 3, 1973, 993 U.N.T.S. 14537, *available at* <http://treaties.un.org/doc/Publication/UNTS/Volume%20993/volume-993-I-14537-English.pdf>.

⁵⁸ Padgett, *supra* note 15, at 535.

⁵⁹ *Id.*

⁶⁰ Edwards, *supra* note 4, at 128–129.

⁶¹ *Id.* at 128.

⁶² *Id.* at 128.

⁶³ *Id.* at 128.

⁶⁴ Kent Messer, *Protecting Endangered Species: When are Shoot-on-Sight Policies the Only Viable Option to Stop Poaching?*, 69 ECOLOGICAL ECON. 2334, 2336–37.

kill policy and fencing in reserves, Kenya's elephant population grew to 26,000.⁶⁵

Conversely, sustainable use "treat[s] species as resources to be used, rather than merely preserved."⁶⁶ As Zimbabwe President Robert Mugabe said "we believe a species must pay [its] own way to survive."⁶⁷ Elephants can be a drain on a country's resources. The cost of preserving elephants can be quite high, which diverts needed funds from other programs such as social services. Elephants can also be a nuisance to citizens by taking their water and trampling their crops. Therefore some African countries, including Botswana, Zimbabwe, and other states in Southern Africa, want to control their elephant populations and use them to help pay for their preservation.⁶⁸ South Africa and Zimbabwe employed culling, the killing of some elephants in order to ensure that the population does not grow to unsustainable levels, to maintain their elephant populations.⁶⁹ Countries utilize culling to save elephants and their habitats.⁷⁰ Culling also provides elephant resources, such as elephant meat, to the people.⁷¹ However, "culling adds to the ivory stockpile, creating pressure for increased trade."⁷²

Sustainable use countries also implement programs that allow citizens to benefit from elephants. In 1989 Zimbabwe country implemented the Communal Areas Management Programme for Indigenous Resources (CAMPFIRE). "CAMPFIRE asks local people to manage their wildlife resources, on 'the premise that the wildlife belongs to the person on whose land it is found.'"⁷³ This program gave one percent of the elephant population to the people, who were allowed to either kill them and use them for resources or allow them to live. This program gave citizens a stake in the elephant's future through economic incentives: a share of the profits from their elephants supports their areas and the rest supports preservation.⁷⁴ CAMPFIRE, "earned enough from the sale of wildlife products (not just elephants) to support its

⁶⁵ *Id.* at 2337.

⁶⁶ Edwards, *supra* note 4, at 129.

⁶⁷ *Id.*

⁶⁸ *See Id.*

⁶⁹ Padgett, *supra* note 15, at 543.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Hitch, *supra* note 16, at 189.

⁷³ Heimert, *supra* note 44, at 1483.

⁷⁴ *See id.*

conservation at a level well above the norm and to support its purchases of otherwise unaffordable social services.”⁷⁵

D. AFTERMATH OF THE UPGRADE IN THE AFRICAN ELEPHANTS’
STATUS

The ivory ban squelched the worldwide demand for ivory. Initial data after the 1989 ban showed a sharp decrease in the price of ivory.⁷⁶ The price of ivory collapsed in most parts of Africa.⁷⁷ In the Central Africa Republic, the price of ivory dropped to 65 percent less than the price in mid-1989.⁷⁸ The South Africa government, a country that took a reservation on the ban, did not receive a bid on the 1.3 tons of ivory it had stockpiled.⁷⁹ While the ban made it harder for poachers to sell illegal ivory, it also made it impossible for countries to sell their stockpiles of ivory.⁸⁰

Throughout the 1990s elephant populations started to recover.⁸¹ With their recovery, nations that employed sustainable use methods to pay for the preservation of elephants wanted to sell their ivory stockpiles. Zimbabwe, Botswana, and Namibia lobbied to have their elephant populations moved from Appendix I to Appendix II and to get approval for a one time ivory trade with Japan.⁸² After much debate, the initiative was passed in 1999.⁸³ This allowed the countries to fuel their preservation efforts with the proceeds from the ivory sale. However, the temporary lift on the complete ban led to renewed poaching as well as the ineffective enforcement of a trading system and highly weaponized poachers who were present before the initial ban.⁸⁴ Parties to CITES relaxed the ban again in 2008 to allow for another one-time sale in ivory from those three countries.⁸⁵

⁷⁵ *Id.*

⁷⁶ Jeffery Vail, *Halting the Elephant Ivory Trade: A True Test for International Law*, 9 WIS. INT’L L.J. 227, 244 (1990-91).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Edwards, *supra* note 4, at 127.

⁸¹ Messer, *supra* note 64, at 2337.

⁸² Shawn M. Danksy, *The CITES “Objective” Listing Criteria: Are They “Objective” Enough to Protect the African Elephant?*, 73 TUL. L. REV. 961, 971–972 (1999).

⁸³ *Id.*

⁸⁴ Hitch, *supra* note 15, at 184.

⁸⁵ Joint Press Release, CITES, *supra* note 23.

As a result of the changed status allowing some nations to reinstate ivory trade, the international community no longer has a unified approach to the problem and there is a renewed market for ivory. While this allows for demand to continue, it also benefits the economic development of Southern African countries. However, nations with elephant populations need to actually enforce a uniform plan to best address the problems of elephant conservation.

II. ELEPHANT POACHING ON THE RISE

A. THE THREAT TO THE ELEPHANT

In the last few years, reports surfaced addressing the renewed elephant poaching crisis in Africa.⁸⁶ As the *Washington Post* reported in October 2012, “elephant poaching levels are currently at their worst in a decade, and seizures of illegal ivory are at their highest level in years.”⁸⁷ The UN acknowledged the problem in June 2012 stating that poaching is plaguing the African elephant population.⁸⁸ The UN also reported that elephant poaching is the highest it has been since 1989 and that the illegal ivory trade has gotten worse.⁸⁹ The conservationist Ian Craig⁹⁰

⁸⁶ See Gettleman, *supra* note 18; Jethro Mullen and Dayu Zhang, *Booming Illegal Ivory Trade Taking Severe Toll on Africa's Elephants, Groups Say*, CNN, Sept. 5, 2012, available at <http://www.cnn.com/2012/09/05/world/africa/africa-ivory-elephant-slaughter/index.html>; Gayne C. Young, *22 Elephants Shot from Helicopter, Africa Facing its Worst Poaching Spree Ever*, OUTDOOR LIFE, Sept. 7, 2012, available at <http://www.outdoorlife.com/blogs/newshound/2012/09/22-elephants-shot-helicopter-africa-facing-its-worst-poaching-spree-ever>; David Braun, *Philippines to Prosecute Ivory Smugglers*, NATIONAL GEOGRAPHIC, Sept. 26, 2012, available at <http://newswatch.nationalgeographic.com/2012/09/26/philippine-officials-to-prosecute-ivory-smugglers/>; Apolinari Tairo, *Poaching threatens Africa elephants and tourism*, ETURBONNEWS, Oct. 4, 2012, available at <http://www.eturbonews.com/31557/poaching-threatens-africa-elephants-and-tourism>.

⁸⁷ *Slaughtering Elephants for Ivory*, WASH. POST, Oct. 2012, available at http://www.washingtonpost.com/national/health-science/slaughtering-elephants-for-ivory/2012/10/01/f736f4ba-0c14-11e2-bb5e-492c0d30bfff_gallery.html#photo=1.

⁸⁸ Amantha Perera, *UN-backed Report Finds that Elephant Poaching Levels are Worst in a Decade*, UN NEWS CENTRE (June 21, 2012), <http://www.un.org/apps/news/story.asp?NewsID=42295&Cr=endangered+species&Cr1=#.UEpn9KT-9ao>; See also Philipp Barth, *Elephant Poaching in Africa Continues Unabated*, DW (Nov. 30, 2012), <http://www.dw.de/elephant-poaching-in-africa-continues-unabated/a-16419764>; Anne Look and William Eagle, *Interpol Conducts 'War' on Poaching in Africa*, VOICE OF AMERICA (Nov. 26, 2012).

⁸⁹ *Id.*

⁹⁰ Ian Craig is a founding member of both Namunyak Wildlife Conservation Trust and II Ngwesi Group Ranch in 1995. As executive Director of the Lewa Wildlife Conservancy, Ian was a

noted that poaching is “the worst it’s been in the last 30 years. . . . It’s a steady deterioration, and it’s getting worse.”⁹¹

In 2010-12, the elephant population took a dramatic hit. Reports indicate that poachers killed upwards of 20,000 elephants in those years.⁹² In Kenya, the number of elephants killed every year skyrocketed from fifty in 2007 to 300 in 2012.⁹³ In early 2013, Kenya experienced its worst poaching in three decades, including when armed poachers killed a family of eleven elephants in one incident.⁹⁴ This staggering increase in the level of poaching is occurring throughout Africa.⁹⁵ *Outdoor Life* newspaper quoted a Ugandan ranger, stating, “it was the worst slaughter [I have] seen in 30 years of fighting poachers.”⁹⁶ As the below graph indicates, the amount of illegal ivory seized is on the rise.

founding member of the Northern Rangelands Trust. He has spent most his life in northern Kenya dealing with the multiple conservation issues there. M. Sanjayan, *Kenya Takes Drastic Steps to Save Elephants*, CBS NEWS (Nov. 26, 2012), http://www.cbsnews.com/8301-18563_162-57554503/kenya-takes-drastic-steps-to-save-elephants/.

⁹¹ *Id.*

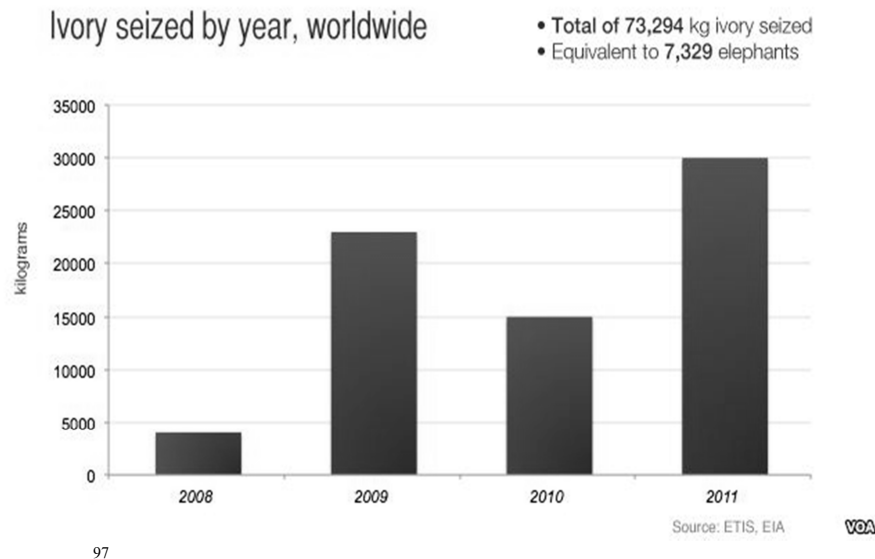
⁹² Look, *supra* note 88.

⁹³ Barth, *supra* note 88.

⁹⁴ *Kenya Hunts for Armed Elephant-Poachers: Wildlife Rangers are Searching for Poachers in What Officials say is the Worst Elephant Killing in Three Decades*, ALJAZEERA (Jan. 8, 2013), <http://www.aljazeera.com/news/africa/2013/01/2013181422525172.html>.

⁹⁵ Look, *supra* note 88.

⁹⁶ Young, *supra* note 86.



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This dramatic increase is worrisome for African nations because elephants serve as a valuable resource. The rise in poachers deprives the nations of their elephant population and the money generated from that population, either by tourism or through programs such as CAMPFIRE. The poaching problem presents another economic resource problem for nations as the demand for funds needed to protect elephants continue to increase. Ian Craig discussed the Kenyan problem, “it is not a winnable war in the long term. . . . As a country, we can’t keep putting this level of resources into the protection of elephants forever.”⁹⁸ While Craig is specifically discussing the problems that Kenya faces, this is true throughout Africa. Craig argues that African elephants produce funds beneficial to the nation, and when citizens realize the benefit it is easier to garner support to protect against poaching.⁹⁹ Craig goes on to explain that where the benefits from elephant conservation are apparent to communities and Kenyans see “money being generated from tourism going into education, [and] water projects,” citizens support the conservation of elephants.¹⁰⁰ However, where citizens do not recognize the financial benefit of elephant conservation they do not support the

⁹⁷ Look, *supra* note 88.

⁹⁸ Sanjayan, *supra* note 90.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

funding of such programs and sometimes actively participate in the poaching crisis.¹⁰¹

B. WHO ARE THE POACHERS?

Crime syndicates appear to be the leaders of the current poaching crisis.¹⁰² Countries have noted that the large shipments of ivory are indicative of organized crime.¹⁰³ These crime organizations also fuel the wars and conflicts persisting in nations such as the Democratic Republic of Congo and the Darfur area.¹⁰⁴ It appears that the Chinese lead the crime organizations in some countries while warlords lead the crime organizations in other countries.¹⁰⁵ The crime organizations use the income poaching generates to pay for weapons.¹⁰⁶ The United States Secretary of State Hilary Clinton recently warned that ivory could be used to fuel armed conflict and expressed the need for a solution to this problem.¹⁰⁷

This concern is bolstered because the poachers/members of organized crime are well equipped with firearms.¹⁰⁸ A recent raid conducted by Interpol's Operation Worthy uncovered military grade firearms that poachers used.¹⁰⁹ William Clark, a member of Interpol's Environmental Crime program, explained that M16s are more accurate and dangerous than Kalashnikov rifles (that were previously used by poachers).¹¹⁰ The organization of the poachers and their increased firepower is not only threatening the lives of elephants, but of rangers as well. Since the poachers are so well armed, they sometimes do not even stop at national park borders.¹¹¹ This caused deadly exchanges in many African countries where the weaponry of the poachers outmatches the

¹⁰¹ *Id.*

¹⁰² See Press Release, CITES, New Report Warns of Uncertain future for African Elephants (March 6, 2013), available at http://www.cites.org/eng/news/pr/2013/20130306_ivory.php.

¹⁰³ *Id.*

¹⁰⁴ Gettleman, *supra* note 18.

¹⁰⁵ Barth, *supra* note 88; See also Look, *supra* note 88.

¹⁰⁶ Lisa Scott, *Infographic: Poaching Increases with Demand for Ivory From Elephant Tusks*, METRO (Nov. 28, 2012), <http://www.metro.co.uk/news/newsfocus/919132-infographic-poaching-increases-with-demand-for-ivory-from-elephant-tusks#ixzz2DvIapiJS>.

¹⁰⁷ Barth, *supra* note 88.

¹⁰⁸ See *id.*

¹⁰⁹ Look, *supra* note 88.

¹¹⁰ *Id.*

¹¹¹ Barth, *supra* note 88.

rangers. In Kenya, in “armed exchanges between [poachers and rangers,] 30 poachers and 6 rangers los[t] their lives [in 2012].”¹¹²

It is not only remote crime organizations that are involved in poaching. The criminal organizations also involve rural citizens of the affected nations.¹¹³ A rural farmer makes more money poaching than he can from farming.¹¹⁴ Some reports claim that citizens can make ten times the amount they would make from farming in one year in just one poaching raid.¹¹⁵ With the potential gains so high, the low fines fail to deter poaching.¹¹⁶ Economist Kent Messer finds that only by including the risk of death as a potential cost to the poacher can the drawbacks of poaching outweigh the benefits of poaching.¹¹⁷ This combined with the risk to rangers created by the heavy weaponry supports implementing shoot-to-kill policies because it will enable rangers to protect themselves from heavily weaponized and organized poaching gangs.

C. WHY IS POACHING ON THE RISE?

The demand for ivory has skyrocketed in recent years. The demand for ivory in Asia fuels this problem.¹¹⁸ A report produced by parties to CITES noted, “China and Thailand are the two primary destinations for illegal ivory consignments.”¹¹⁹ Allan Thornton, the chairman of the Environmental Investigation Agency stated, “a rising demand for ivory in China is keeping the [illegal ivory] market going.”¹²⁰ Moreover criminal networks are more than willing to supply Asian markets with ivory.¹²¹

The middle classes in Asian countries see ivory as a status symbol, which fuels the demand.¹²² The members of the middle class in the Far East see “this ‘white gold’ [as] just another luxury acquisition that demonstrates their wealth.”¹²³ As the *New York Times* reported,

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Messer, *supra* note 64, at 2336.

¹¹⁷ *Id.*

¹¹⁸ Tairo, *supra* note 86.

¹¹⁹ Joint Press Release, CITES, *supra* note 23.

¹²⁰ *Id.*

¹²¹ Barth, *supra* note 88.

¹²² *Id.*

¹²³ Scott, *supra* note 106.

The vast majority of the illegal ivory — experts say as much as 70 percent — is flowing to China, and though the Chinese have coveted ivory for centuries, never before have so many of them been able to afford it. China's economic boom has created a vast middle class, pushing the price of ivory to a stratospheric \$1,000 per pound on the streets of Beijing.¹²⁴

Without the demand in China the black market for ivory essentially disappears, according to Robert Hormats, a Senior United States State Department official.¹²⁵ The lack of effective preventive measures in China exasperates the problem.¹²⁶ While the Chinese government has successfully confiscated some of the illegally traded ivory, it has not been able to strike a noticeable dent in the operations in order to stymie the illegal traders' efforts.¹²⁷

Thus, the dramatic increase in the number of elephants killed is fueled by the relatively new demand stemming from China. Because of this new demand, ivory is valued at upwards of \$1000 per pound and is therefore a very profitable enterprise.¹²⁸ International researchers have discovered that the black market price of ivory has doubled in the Samburu National Reserve area of Kenya.¹²⁹ The demand combined with the sophisticated weaponry has created the greatest poaching crisis since at least 1989, if not ever. Thus, the international community needs to respond to this problem.

D. INTERNATIONAL REACTION

In 2010, CITES parties voted to stop the sale of ivory, which passed.¹³⁰ At the triennial meeting, some member nations, such as Zambia, withdrew their request for a one-time sale of their stockpiled ivory.¹³¹ Other nations, including Tanzania, however, still pushed for approval of a one-time sale of their stockpiled ivory.¹³²

¹²⁴ Gettleman, *supra* note 18.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Scott, *supra* note 106.

¹²⁸ Gettleman, *supra* note 18.

¹²⁹ Barth, *supra* note 88.

¹³⁰ *Elephant Ivory Sales Denied to Halt Worldwide Poaching Crisis*, ENVIRONMENTAL NEWS SERVICE (March 23, 2010), <http://www.ens-newswire.com/ens/mar2010/2010-03-23-01.html>.

¹³¹ *Id.*

¹³² *Id.*

In 2012, CITES members released a report urging range states “to take immediate action to protect elephant populations through improved monitoring and effective enforcement, to prevent illegal trade of ivory.”¹³³ The CITES Secretary General, Mr. John E. Scanlon, said

we need to enhance our collective efforts across range transit and consumer states to reverse the current disturbing trends in elephant poaching and ivory smuggling. While being essential, enforcement efforts to stop wildlife crime must not just result in seizures – they must result in prosecutions, convictions and strong penalties to stop the flow of contraband. The whole “enforcement chain” must work together.¹³⁴

Therefore, CITES members advocated that innovative and creative responses are needed at the international level. Such response could include using DNA forensics to bolster traceability of ivory.¹³⁵ CITES members also advocate actual implementation of the strategies of the AEAP (discussed in the next section) and not just nominal adoption by all elephant range states.¹³⁶ The report issued by CITES members encourages parties to actually report data to the secretariat and to implement effective measures to enforce anti-poaching laws.¹³⁷ The report also advocates greater funding to African countries to protect and preserve their elephant populations.¹³⁸ At the same time, nations need to allow their rangers to shoot-to-kill poachers in order to protect both themselves and elephants.

III. A CASE STUDY OF CURRENT LAWS

A. FRACTURED APPROACH AMONG AFRICAN NATIONS

The current laws in place in African range states differ. While nations have overlap in their laws, the enforcement procedures and punishments differ enough to encourage organized crime to target certain states over others. These differences stem from the different approaches

¹³³ Convention on International Trade in Endangered Species of Wild Fauna and Flora, Geneva, Switzerland, July 23-27, 2012, Elephant Conservation, Illegal Killing and the Ivory Trade, CITES Decision 14.78 (July 27, 2012) [Hereinafter 2012 Report].

¹³⁴ Joint Press Release, CITES, *supra* note 23.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ 2012 Report, *supra* note 133, at 2.

¹³⁸ *Id.*

used by states towards elephants: pure protectionist vs. sustainable use. The disparate treatment of elephants' fuels poaching and conservation problems.¹³⁹ The laws of Botswana, a Southern African country that downgraded their elephant population to Appendix II in 1998, and Kenya, a pure protectionist country, illustrate this point.

B. COMPARISON: BOTSWANA VS. KENYA

Despite elephants' status as Appendix I animals, they are still considered "dangerous animals" by the laws of some African countries.¹⁴⁰ Nations consider elephants "dangerous animals" because of their size and ability to kill humans. Thus, the laws of both Botswana and Kenya recognize the protected status of elephants while at the same time allowing for citizens to protect themselves against such dangerous animals.¹⁴¹

The majority of Botswana's laws discuss the regulation of hunting elephants in Chapter 38: Wildlife Conservation and National Parks. The laws of Botswana designate elephants as partially protected game animals in Part I of the Seventh Schedule.¹⁴² Section 18 of Chapter 38 states "the animals specified in Part I of the Seventh Schedule shall be partially protected game animals throughout Botswana, and no person shall, except under and in accordance with the terms and conditions of a licence or permit issued under this Act, hunt or capture any partially protected game animal."¹⁴³ Elephants are also included in Part II of the Seventh schedule, which allows them to be hunted with a license.¹⁴⁴

Botswana permits elephant hunting and the export of elephants.¹⁴⁵ The law limits the types of weapons that hunters are permitted to use to kill elephants.¹⁴⁶ The government imposes a punishment of a fine and imprisonment if hunters use other types of weapons.¹⁴⁷ Botswana succeeded in having its elephant population

¹³⁹ AEAP, *supra* note 21, at 1.2, 7.

¹⁴⁰ See, e.g. The Wildlife (Conservation and Management) Act, (2012) Cap. 376 § 2(c) (Kenya); and Wildlife Conservation and National Parks Act, Cap. 38:01, § Ninth Schedule (1999) (Bots.).

¹⁴¹ *Id.*

¹⁴² Wildlife Conservation and National Parks Act, Cap. 38:01, § Seventh Schedule, Part I (1999) (Bots.).

¹⁴³ *Id.* § 18.

¹⁴⁴ *Id.* § 19(2).

¹⁴⁵ *Id.* § 58 and Part X.

¹⁴⁶ *Id.* § 58(1).

¹⁴⁷ *Id.* § 58(2).

moved from Appendix I to Appendix II in 1998 and therefore it allows limited trade of elephant products.¹⁴⁸ Botswana's laws specifies conformance with all CITES' regulations for the export/trade of any species.¹⁴⁹ It also establishes a regulation system for the sale of ivory, which requires that the weight of the ivory and a distinctive mark be placed on the ivory and that this information be placed on a corresponding permit.¹⁵⁰

Botswana permits the hunting of elephants with a license.¹⁵¹ However, the law prohibits citizens from killing animals listed on the Seventh Schedule, including elephants, without a license.¹⁵² Chapter 38:19(3)(a) establishes that, "provided that where the animal in respect of while the offence is committed is an elephant, the offender shall be liable to a fine of P50,000¹⁵³ and to imprisonment for 10 years."¹⁵⁴

The law does provide some exceptions to this rule. Citizens can kill elephants outside of the preserves without a permit when the elephants are causing or threatening to cause damage, in self-defense, or if they kill the animal in error and promptly report the killing to the government.¹⁵⁵ In some cases, the citizen will be allowed to keep the resources of the elephant, while in others the government will confiscate them.¹⁵⁶ Citizens must promptly report the death to the government or they will face the same punishment under 38:19(3)(a).¹⁵⁷ Botswana allows for the killing of elephants in these situations because of their status as a dangerous animal¹⁵⁸ and because elephants not in preserves can cause conflict with humans, who need to be able to protect themselves.

In Part XI of the law, the Botswana government addresses ivory¹⁵⁹ and rhinoceros horn. This section addresses what an individual must do with elephant parts after they legally kill the elephant.¹⁶⁰ The act

¹⁴⁸ CITES, *supra* note 27, at art. II(2)(a).

¹⁴⁹ Wildlife Conservation and National Parks Act, Cap. 38:01, § 62(2).

¹⁵⁰ *Id.* § 62(4).

¹⁵¹ Wildlife Conservation and National Parks Act, Cap. 38:01, § 19(2) (1999) (Bots.).

¹⁵² *Id.* § 19(3).

¹⁵³ 50,000 Pulas is roughly equivalent to 6,000.00 U.S. dollars.

¹⁵⁴ Wildlife Conservation and National Parks Act, Cap. 38:01, § 19(3)(a) (1999) (Bots.).

¹⁵⁵ *Id.* §§ 46–48.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* § 19(3)(a).

¹⁵⁸ *Id.* § Ninth Schedule.

¹⁵⁹ *Id.* § 2. (Defining ivory as elephant ivory in whatever form).

¹⁶⁰ *Id.* § 67

requires that, within seven days, citizens bring tusks to a government official who will then register them.¹⁶¹ However, where an officer does not believe that the tusks were lawfully obtained, he or she may conduct an investigation to ensure compliance with CITES.¹⁶² An individual is only allowed to transfer ivory if it has been registered with the government.¹⁶³ If an individual violates these rules, they will be guilty of an offence and liable for P50,000 (\$5,580) and imprisonment for ten years.¹⁶⁴ Botswana's laws try to implement an effective registration system to stop the trade of illegal ivory. The laws also try to impose a high enough fine and length of imprisonment to deter poaching.

While Botswana allows for limited trade of ivory, Kenya prohibits the trade of ivory.¹⁶⁵ However, Kenya's laws regarding the treatment of elephants are fairly similar to those of Botswana. In Chapter 376, Wildlife Conservation and Management, Kenyan law defines an elephant as a dangerous animal.¹⁶⁶ It also defines an elephant as a game animal, which may be hunted with an appropriate license.¹⁶⁷ In Kenya, just as in Botswana, individuals must register their trophies (parts of the elephant, including ivory) with the government once they have killed the animal.¹⁶⁸ Kenya also makes exceptions to killing elephants without a hunting license when the animal was killed in the protection of human life or property.¹⁶⁹

The Kenyan government also regulates the means allowed for hunting. Kenyan law specifies that the minister may, by notice of the Gazette, prohibit the use of certain weapons.¹⁷⁰ However, the punishment for violation of these rules is more lax than for the violation of similar rules in Botswana. While in Botswana an individual can be fined P500 and faces imprisonment of up to six months,¹⁷¹ in Kenya the punishment is forfeiture of their hunting license.¹⁷²

¹⁶¹ *Id.* § 67(1).

¹⁶² *Id.* § 67(3).

¹⁶³ *Id.* § 69(1).

¹⁶⁴ *Id.* §§ 67(5), 69(3).

¹⁶⁵ THE LAWS OF KENYA, (1976) Cap. 376 § 67(2).

¹⁶⁶ *Id.* § 2(c).

¹⁶⁷ *Id.* § 23(2), Schedule 1.

¹⁶⁸ *Id.* § 42.

¹⁶⁹ *Id.* §§ 29-30.

¹⁷⁰ *Id.* § 37(1).

¹⁷¹ Wildlife Conservation and National Parks Act, Cap. 38:01, § 58(2) (1999) (Bots.).

¹⁷² THE LAWS OF KENYA, (1976) Cap. 376 § 37(2).

Under the Kenyan penal code, the killing of animals with the intent to steal its parts is a crime.¹⁷³ The law states, “any person who kills any animal capable of being stolen with intent to steal the skin or carcass, or any part of the skin or carcass, is guilty of an offence and is liable to the same punishment as if he had stolen the animal.”¹⁷⁴ The Kenyan code also provides rangers with more methods of enforcement against the illegal killing of animals than the Botswana code does. In particular, the Kenyan code allows authorized officers to utilize firearms, if necessary, to prevent “any person [from] unlawfully hunting any game animal or protected animal in any place or hunting any animal, bird or reptile within a National Park, National Reserve or local sanctuary.”¹⁷⁵ The Kenyan code also provides harsher enforcement mechanisms than the Botswana code. It authorizes officers to shoot-to-kill elephant poachers in order to protect the conservation of the species.¹⁷⁶

Despite allowing for limited hunting of elephants, Kenya strictly prohibits the import and export of ivory. In Chapter 376 Section 67, the Wildlife (Conservation and Management) (Control of Raw Ivory) regulations states, “raw ivory is hereby declared to be a prohibited import and export and shall not be imported or exported by any person or organization other than the Government.”¹⁷⁷ The government will provide raw ivory to citizens from time to time, but otherwise individuals will not be able to get it.¹⁷⁸

While the laws of Kenya and Botswana are not vastly different, their disparate punishments and enforcement mechanisms allow poachers to pick and choose which laws they would rather be exposed to. This choice undercuts the effectiveness of anti-poaching efforts across the continent.

C. A UNIFORM APPROACH PROMULGATED BY PARTIES TO CITES

While nations have individualized laws, members of CITES came together to formulate a uniformed approach to deal with elephant conservation across the continent. After the 1998 recategorization of elephants from Appendix I to Appendix II in Zimbabwe, Botswana, and

¹⁷³ *Id.* at Cap. 63 § 289.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at Cap. 376 § 57A(2)(a)(iv).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* Subsidiary § 67.

¹⁷⁸ *Id.*

Namibia, other nations wanted to utilize their elephant populations to aid their economies and thus wanted to trade elephant resources again.¹⁷⁹ Therefore, at the fourteenth meeting of CITES countries in 2007, CITES members directed African elephant range states to develop a joint conservation policy in order to “co-ordinate and [provide] immediate action to provide effective protection of remaining elephant populations.”¹⁸⁰ Over the course of three meetings, the African elephant range states created the AEAP to address the problems of conserving elephants when some nations trade elephant resources again.¹⁸¹

The range states created the AEAP as a comprehensive plan to address the problems concerning the conservation of African elephants. They developed the plan as a way to “address the real ‘situation on the ground’ in terms of what actions must be taken in order to effectively conserve elephants in Africa across their range.”¹⁸² The range states authored the plan because they are in the best position to know what must be done in order to protect and conserve elephant populations across the range states.¹⁸³ The plan lays out the most essential actions that need to be taken across all the range states in order to implement a uniform plan that protects elephants from the threats they face.¹⁸⁴ The range states considered a national and regional approach to this problem essential because poaching threatens the whole continent and not just individual range states.¹⁸⁵ The states decided the best way to address the problem was to develop eight objectives and devise strategies to implement these objectives.¹⁸⁶

These objectives span from reducing illegal killing to increasing education and cooperation among range states to aid elephant conservation.¹⁸⁷ The plan puts forth multidimensional strategies for countries to administer in order to achieve the desired result: protecting elephants.¹⁸⁸ These strategies focus on uniformity as a means to effectively prevent poaching and increase citizen support of elephant

¹⁷⁹ *Elephant Ivory Sales*, *supra* note 130.

¹⁸⁰ AEAP, *supra* note 21, at 3.

¹⁸¹ *Id.* at 4.

¹⁸² *Id.* at 1.

¹⁸³ See AEAP, *supra* note 21, at 1.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 7.

¹⁸⁶ *Id.* at 6.

¹⁸⁷ See *id.*

¹⁸⁸ *Id.* at 5.

conservation.¹⁸⁹ The AEAP strives “to ensure a secure future for African Elephants and their habitats to realize their full potential as a component of land use for the benefit of human kind.”¹⁹⁰

The range states designated illegal killing of elephants and illegal trade of elephants the top objectives of the AEAP.¹⁹¹ As the AEAP acknowledged, “the threat of poaching appears, in some regions, to be increasing.”¹⁹² Therefore, the nations developed strategies and ways to implement the procedures.¹⁹³ The goal of the strategies is to coordinate national policies across range states and strengthen enforcement of the laws.¹⁹⁴ Under the plan, the first step nations must take towards combating illegal poaching is to “strengthen the capacity of law enforcement authorities/agencies to combat poaching and illegal trade in ivory and other elephant products.”¹⁹⁵ One of the suggested activities towards completing this is to “equip wildlife authority staff on the frontline of enforcement with appropriate tools to carry out their mission as safely and effectively as possible.”¹⁹⁶ This is an important goal because, as seen in the current crisis, enforcement staffs tend to be wholly under equipped to combat poachers.¹⁹⁷

The AEAP addressed a myriad of conservation issues, including human-elephant conflict and maintaining elephant habitats.¹⁹⁸ The AEAP addresses multiple issues because more than poachers threaten elephant populations.¹⁹⁹ Citizens who consider elephants a nuisance also threaten elephant populations and care less about conserving elephant populations and are more likely to get involved in poaching.²⁰⁰ Addressing problems such as the human-elephant conflict will lead to a better appreciation of elephant populations by citizens. The AEAP suggests the implementation of sustainable use programs so that elephants help pay for their own protection and sometimes for the development of the

¹⁸⁹ See *id.*

¹⁹⁰ *Id.* at 5.

¹⁹¹ *Id.* at 7.

¹⁹² *Id.*

¹⁹³ *Id.* at 7–8.

¹⁹⁴ *Id.* at 7.

¹⁹⁵ *Id.* at 1.1, 7.

¹⁹⁶ *Id.*

¹⁹⁷ Barth, *supra* note 88.

¹⁹⁸ AEAP, *supra* note 21, at 8–11.

¹⁹⁹ *Id.* at 6.

²⁰⁰ *Id.* at 11–12, 14.

nation.²⁰¹ When citizens see funds from elephants contributing to other programs, they will no longer consider elephants as a nuisance but as a benefit to their economy.

The range states identified funding as a key problem for dealing with elephant conservation.²⁰² Conservation of elephants costs a great deal of money, which is why some nations want to trade elephant resources in order to help pay for elephant conservation.²⁰³ The range states' projected strategies include creating a fund in order to implement the AEAP and to link the AEAP with the African Elephant Fund.²⁰⁴ The pooling of resources between range states and international nations accords range states the opportunity to effectively implement these new strategies.²⁰⁵

IV. SOLUTIONS AND STEPS THAT NEED TO BE TAKEN

A. AEAP AND ENFORCEMENT

As the CITES members' report stated, African range states need to focus on the first three objectives of the AEAP: 1) reduce illegal killing of elephants and illegal trade in elephant products; 2) maintain elephant habitats and restore connectivity; and 3) reduce human-elephant conflict.²⁰⁶ These objectives need to be the priorities of the member states in order to protect their elephant populations.

Returning to a total ban of ivory is an impractical solution. Zimbabwe, Botswana, and Namibia have had two sales of their stockpiled ivory.²⁰⁷ Other nations, including Zambia and Tanzania, want to downgrade their elephant populations from Appendix I to Appendix II and only stopped pushing for the change because of the current crisis.²⁰⁸ Nations that have been able to sell their stockpiled ivory are unlikely to upgrade their elephant populations to Appendix I again. While the total ivory ban in 1989 stymied illegal poaching and ivory trade for a while, the current trading in ivory, the organization of the poachers, and the

²⁰¹ *Id.* at 10–11.

²⁰² *Id.* at 6, 15.

²⁰³ *Id.* at 6.

²⁰⁴ *Id.* at 15–16.

²⁰⁵ *Id.* at 15–16.

²⁰⁶ *Id.* at 7, 8, 10.

²⁰⁷ Joint Press Release, CITES, *supra* note 23.

²⁰⁸ Elephant Ivory Sales, *supra* note 130.

conflicts persisting in certain regions have made this solution improbable a second time. The African nations would, most likely, not support another ban because trading in ivory helps to bolster their economies. The demand stemming from China is also unlikely to subside like other nations demand did after the ban in 1989 because a renewed ban lacks the almost universal support it experience in 1989.

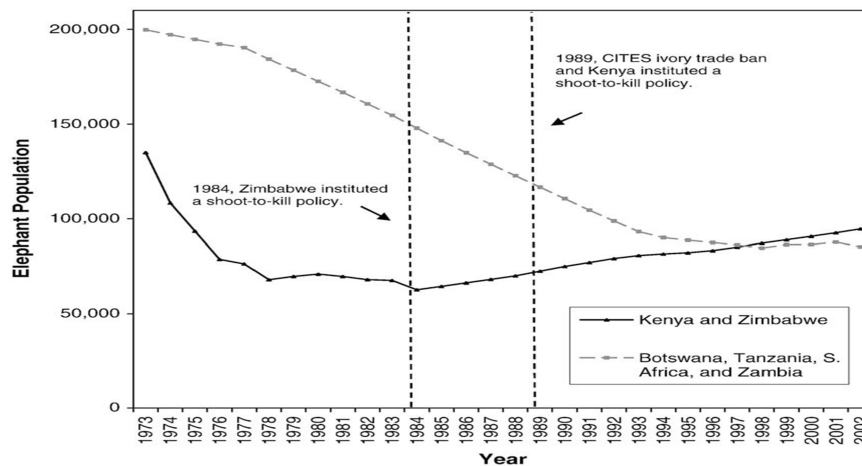
Instead these nations need to effectively implement the AEAP in order to effectively fight the poaching crisis. The unification of enforcement programs and punishments will help place the countries on an even playing field. Therefore poaching will be equally discouraged throughout the range states, affording poachers no refuge of lesser punishments. Poachers will not be more apt to poach in any particular country because all countries will have the same punishments and enforcement mechanisms. If punishments were the same in every country then poachers would face the same risks in all countries and no one country would be more appealing because of shorter prison terms or smaller fines

For this to be effective corruption in some nations must be overcome. A uniform approach, that includes mechanisms to fight corruption, will help address this obstacle. As a joint report released by CITES, the UN Environment Programme, the Union for Conservation of Nature and the Wildlife Trade Monitoring Network states, “improved enforcement tactics, such as through specialized tactical tracking teams on the ground, the investigation of corruption and organized crime, and successful prosecution” will help halt the current elephant crisis.²⁰⁹ By unifying the nations in their quest to conserve African elephants, external pressure will decrease the likelihood of corruption. The multidimensional approach of the AEAP will decrease the chances of corruption as well because it aims to get citizens involved and invested in the conservation of elephants and therefore countries will face internal pressure from its citizens to quell corruption. This internal pressure reduces the chance that corruption in some countries will erode the efforts toward a uniform and effective approach towards illegal killing of elephants and illegal trade in ivory.

One uniformed enforcement measure that should be implemented by the range states to achieve uniformity is shoot-to-kill laws. These laws allow rangers to shoot-to-kill poachers and are

²⁰⁹ UN Environment Programme, *Elephants in the Dust: The African Elephant Crisis*, 70, (2013), available at http://www.unep.org/pdf/RRAIvory_draft7.pdf [hereinafter 2013 Report].

currently in effect in Kenya, Zimbabwe, and Nepal.²¹⁰ This type of law should be extended to all of the range states to serve as both a deterrent and a protection mechanism. As economist Messer notes, the general increase in animal populations in countries with shoot-on-sight policies suggests that they have been successful.²¹¹ “Zimbabwe instituted ‘Operation Stronghold’ in 1984 [and, in] the decade afterward, anti-poaching forces killed 167 poachers, while its elephant population increased by nearly 50% —from approximately 44,000 to more than 65,000.”²¹² This general increase in animal populations is also seen in Kenya and Nepal.²¹³ The rhinoceros population of both nations increased by over 500 in the years that followed the implementation of the shoot-to-kill law, and Kenya’s elephant population increased from 17,000 to 26,000.²¹⁴ The graph below depicts the growth in Kenya and Zimbabwe’s elephant populations after instituting shoot-to-kill laws compared to the growth of elephant populations in nations that do not have such laws.²¹⁵



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²¹⁰ Messer, *supra* note 64, at 2336-37.

²¹¹ Messer, *supra* note 64, at 2336.

²¹² *Id.* at 2336.

²¹³ *Id.* at 2336-37.

²¹⁴ *Id.*

²¹⁵ *Id.* at 2337.

²¹⁶ *Id.* at 2337.

Despite the fact that many poachers probably make more money by poaching elephants than they could in legal activities, the cost of losing their lives will be greater than just a mere fine; thus it will serve as a deterrent to poaching in the first place. This law would also serve to protect enforcement officials. As reports indicate, poachers are heavily weaponized and this has cost some rangers their lives.²¹⁷ Enforcement officials need to be able to protect their own lives by shooting poachers instead of allowing poachers to kill them. This type of law should be adopted in all range states to equally discourage poaching throughout the continent and to increase all threatened animal populations.²¹⁸

B. AEAP AND SUSTAINABLE USE

Another key to the AEAP is its multidimensional approach towards conservation. The AEAP acknowledges that solely dealing with poachers is not enough to save elephants from the current crisis; other factors must be addressed as well.²¹⁹ Range states need to garner support for elephant conservation from its citizenry. A main obstacle to gaining citizens support of the conservation of elephants is the view of elephants as a nuisance.²²⁰ This, combined with funds being put towards elephants that could be used to fund much needed social programs, creates an environment where citizens are – at best – lackadaisical towards elephant conservation and poaching – and at worst – become actively engaged in the poaching. Thus, countries cannot invest solely in anti-poaching measures, but must also address human-elephant conflict and try to educate citizens about the importance and benefits of elephant conservation.²²¹

A way to make elephants less of a nuisance and more of a benefit is to make elephants “pay their own way.”²²² To do this, countries should implement “sustainable use” programs. Sustainable use programs have proceeds generated from elephants go towards conservation and other programs such as clean water and school

²¹⁷ Look, *supra* note 88.

²¹⁸ Messer, *supra* note 64, at 2337 (supporting the contention that animal populations increase when countries implement shoot-to-kill laws).

²¹⁹ AEAP, *supra* note 21.

²²⁰ Heimert, *supra* note 44, at 1483.

²²¹ See AEAP, *supra* note 21.

²²² Edwards, *supra* note 4, at 129.

programs. When conservation of elephants has visible benefits to citizens through productive programs, citizens will see conservation of the elephant as less of a nuisance and more as a benefit to themselves. As the CAMPFIRE program in Zimbabwe demonstrates, citizens feel better about the protection of elephants when they see rewards to themselves because of that protection. With the CAMPFIRE program, individuals receive ownership over some elephants and therefore receive some of the money from selling the resources from elephants.²²³ This type of program also encourages those citizens to protect their elephants from illegal poaching because they now have a vested interest in the elephant's survival.²²⁴ Engaging the citizens of the country in the conservation of elephants and unifying range states are dual approaches that countries need to develop and implement to halt the decimation of African elephants.

C. AEAP AND FUNDING

Another major problem that needs to be addressed in order to more efficiently fight poachers is the lack of funding. Nations with the largest elephant populations are developing third world nations that do not have the massive amount of resources needed to effectively fund conservation efforts. The international community needs to do more to aid the conservation effort. The push to ban ivory trade started with the United States and other western countries.²²⁵ They considered the elephant a majestic creature that needed protection. Therefore, those countries, along with Kenya, had the elephant recategorized from Appendix I to Appendix II.²²⁶ While this squelched illegal trade of ivory and illegal poaching for a time, it also did away with funds these countries received from the legal trade of ivory. Therefore, these developing nations had to pull resources from other sources and programs to help fund elephant conservation.

Placing the burden on the nations with elephant populations is unsustainable. CITES has recognized the importance of obtaining external funding. In the members' 2012 report, some of the directions given to the secretariat and range state nations are dependent upon

²²³ Heimert, *supra* note 44, at 1483.

²²⁴ *Id.* at 1483.

²²⁵ Glennon, *supra* note 4, at 13–16.

²²⁶ Glennon, *supra* note 4, at 15–16.

external funding.²²⁷ In the report, CITES members urged all parties and stakeholders to aid the range states and to help fund the AEAP in order to stop this decimation of the elephant population.²²⁸ Sustainable use programs will also contribute to funding. Without adequate funding, nations will not be able to comprehensively address the current crisis besieging the African elephant or properly implement the AEAP.

CONCLUSION

The current poaching crisis seriously threatens the African elephant. This crisis mirrors the crisis in 1989. However, different solutions are required to address the problem this time. While CITES banned the international trade of ivory, the treaty does not enforce the means of carrying out this initiative. Therefore, nations are left to their own methods on how to enforce and punish the illegal poaching and trade of ivory. These countries need to effectuate the multifaceted approach laid out in the AEAP. If they do not, extinction of African elephants will become a real possibility. In 2011, 7.4% of African elephants were illegally killed.²²⁹ If stronger enforcement mechanisms and punishments are not implemented, this rate will continue and, because reproduction rates are lower than poaching rates,²³⁰ this will lead to the extinction of African elephants. Therefore immediate action is required to save these majestic creations from such a horrid fate.

²²⁷ 2012 Report, *supra* note 133, at 1.

²²⁸ *Id.* at 2.

²²⁹ 2013 Report, *supra* note 209, at 32.

²³⁰ *Id.* at 33.