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How International Law Can Save The African Elephant

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How International Law Can Save The African Elephant

Jacob Templer*

The substantial decline of the African elephant population over the last few centuries has resulted in regionally distinct challenges for the different sub-Saharan regions of Africa. Across the continent, the most significant short-term threat to African elephant survival is poaching and the illegal trade it sustains. Furthermore, the greatest long-term threat these creatures face is habitat and range area loss. The Convention on International Trade in Endangered Species of Wild Fauna and Flora, (“CITES”), is an international agreement between governments charged with management of the trade in endangered species. CITES has contributed to the major threats that encumber African elephant survival by its creation of the legal ivory market, and its structure that neglects the management of African elephants as a transboundary species. This article’s proposed solutions to ensure the survival of the African elephant are to: eliminate the legal ivory market and increase the incorporation of transboundary conservation practices in CITES elephant management.

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I. INTRODUCTION

In 2018, I had the privilege to volunteer for the African Elephant Research Unit of Knysna Elephant Park in Knysna, South Africa. Each morning I would eagerly rise and rush to the common room to watch the sun rise over the Outeniqua mountains, exposing the giants I had come halfway around the world for. The park has rescued and relocated elephants in need since its inception in 1994, brought on by the decision of wildlife management to cull elephant herds as a means of crude population control.¹ The Knysna forest of the Western Cape that surrounds the park was historically the southernmost point where one could find wild African elephants.² While the forest was once home to over a thousand elephants, its last inhabitant, a lone female named Oupoot, serves as a symbol of the greater fight for survival elephants face across the continent today.³ Only a few thousand years ago, the African elephant's range extended nearly five-thousand miles from the Cape to the Mediterranean.⁴

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”), a multilateral environmental agreement

¹ KNYSNA ELEPHANT PARK, <https://knysnaelephantpark.co.za> (last visited Oct. 30, 2020).

² Heather Dugmore, *The Last Knysna Elephant Has A Message For People*, BUSINESSDAY (Feb. 6, 2019), <https://www.businesslive.co.za/bd/life/2019-02-06-the-last-knysna-elephant-has-a-message-for-people/>

³ Riaan Grobler, *Meet Oupoot, the only elephant left in the entire Knysna forest*, NEWS24 (Feb. 2, 2019), <https://www.news24.com/SouthAfrica/News/meet-oupoot-the-only-elephant-left-in-the-entire-knysna-forest-20190215>.

⁴ *African Elephants*, WORLD WILDLIFE FUND, https://wwf.panda.org/discover/knowledge_hub/endangered_species/elephants/african_elephants/ (last visited, Sept. 8, 2020).

among 183 nations, effectively controls the fate of endangered species today.⁵ CITES' aim, to ensure that the trade in endangered species does not threaten their survival, should require its parties to address the challenges that threaten the survival of both African elephant species: the savannah and forest elephant.⁶ This article explores CITES' ability to address both the short- and long-term threats to the survival of the African elephant. How humanity chooses to care for the fabled African elephant speaks bounds about our relationship with the natural world, one that we depend on for our survival. With nearly one million animal and plant species at risk of extinction, biodiversity loss around the world grows at unprecedented rates.⁷ Saving the African elephant does more than just preserve one of the most magnificent creatures on Earth: it allows the largest animal on Earth to show that international cooperation and innovation can produce effective conservation on a continental scale.

Part II of this article presents the historical relationship between humans and elephants from ancient times to the modern crisis. Part III examines the short- and long-term threats that face African elephants, along with their prospective solutions. Part IV exposes recent CITES proposals as emblematic of the underlying elephant conservation issues they mask. Part V concludes that CITES' approach to the short- and long-term threats that face African elephants is antithetical to their survival, however it recognizes the enormous opportunity for elephants and humans alike to adjust course and preserve the species.

II. THE RELATIONSHIP BETWEEN HUMANS AND ELEPHANTS

Humans and elephants share a long history beginning with our ancestor, *homo erectus*, dating back to approximately 1.8 million years ago.⁸ Excavations of stone tools in northeast Tanzania found alongside the bones of an ancient elephant species revealed the human reliance on elephants as an ancient food source.⁹ Human's evolution into a smaller,

⁵ *What is CITES?*, CONVENTION ON INTL. TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA, <https://www.cites.org/eng/disc/what.php> (last visited Oct. 30, 2020).

⁶ *Summary for policymakers of the Global Assessment Report on Biodiversity and Ecosystem Services*, INTERGOVERNMENTAL SCIENCE-POLICY PLATFORM ON BIODIVERSITY AND ECOSYSTEM SERVICES [IPBES] at 12 (Nov. 26, 2019), https://ipbes.net/sites/default/files/2020-02/ipbes_global_assessment_report_summary_for_policymakers_en.pdf.

⁷ Raman Sukumar, *Conflict, Negotiation and Coexistence: Rethinking Human-Elephant Relations in South Asia* 31-46 (Piers Locke & Jane Buckingham eds., 1st ed. 2016).

⁸ *Id.* at 40.

⁹ Doran H. Ross, *Elephant the Animal and Its Ivory in African Culture*, 25 *Afr. Arts* 65, 66 (1992).

more agile species, coincides with the extinction of some elephant species, which is suggestive of the impact elephants had as a food source.¹⁰ Archaeological findings indicate that many African cultures incorporated elephant imagery into different forms of their oral literature.¹¹ Elephant imagery in African culture varied in use from secular to spiritual. One example is the Kongo tribe in present day Democratic Republic of Congo, which adorned antelope horns with elephants carvings to summon ancestral spirits.¹² In 3,000 BC, the first records of tamed African elephants came from the First Dynasty Egyptian hieroglyphics, which depicted separate symbols for wild and domestic elephants (the latter included a human rider).¹³ The most famous tame African elephants in history were those of Hannibal's Carthaginian army that climbed through the Italian Alps in 218 BC.¹⁴

The advent of European exploration and later colonization of Africa brought with it a terrible fate for elephants throughout the continent. In 1800, the estimated population of African elephants roaming the continent was 26 million.¹⁵ The late nineteenth century witnessed a European demand for products made from elephant tusks (i.e. ivory) that included items such as pool balls, piano keys, and brush handles.¹⁶ This exploitation was enabled by the creation and distribution of large caliber elephant guns, marking the transition from historically subsistence hunting to hunting for ivory and trophy hunting.¹⁷ By 1913, the total population of African elephants was reduced to ten million. At that time, the United States consumed 200 tons of ivory a year.¹⁸ The ivory trade to Europe and America in the nineteenth century served as a prelude to the legal and illegal trade that occurs today.¹⁹

As the twentieth century rolled on, elephants were cast in a new light. In 1930, Jean de Brunhoff wrote the first of fifty stories that detailed the adventures of the fictional elephant, Babar, which inspired other depictions of fictional elephants like Dr. Seuss's "Horton" and Disney's

¹⁰ Sukumar, *supra* note 7, at 32.

¹¹ Ross, *supra* note 9, at 65.

¹² *Id.* at 70.

¹³ *Id.* at 68.

¹⁴ Elaine Larson, *The History of the Ivory Trade*, NAT'L GEOGRAPHIC (Feb. 25, 2013), <https://www.nationalgeographic.org/media/history-ivory-trade>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Martha Chaiklin, *Early Modern Trade in Context: Ivory in World History*, 8 HISTORY COMPASS

530, 539 (2010); *see also* Ross, *supra* note 9, at 67.

¹⁸ Larson, *supra* note 14.

¹⁹ *See id.*

“Dumbo.”²⁰ Despite the newly won fictional affinity, elephant populations would receive no reprieve. Widespread bush wars that followed the decolonization of Africa contributed to a substantial increase in elephants poached for ivory, with estimates of about 250 elephants killed a day in the 1950s.²¹ In the 1960s, an increased global interest in the conservation of endangered animals led to the convention of eighty nations in Washington, D.C. that ultimately signed CITES in 1973.²² The mission of CITES remains “to ensure that international trade in specimens of wild animals and plants does not threaten their survival.”²³

By 1979 the global demand for ivory had depleted the African elephant population to 1.3 million.²⁴ In 1988, the decade-long attempt to regulate a legal commercial trade in African elephant ivory by CITES proved to be unsuccessful as the population reduced to a meager 600,000.²⁵ The United States Congress banned the importation of African elephant ivory for commercial purposes in 1988 when it passed the African Elephant Conservation Act.²⁶ In January 1990, CITES placed a total ban on the international trade in ivory with an upgrade of the protection status of African elephants globally to the highest level available under the treaty.²⁷

However, in 1997 and 2000, CITES downgraded the protection status of the elephant populations in Botswana, Namibia, South Africa, and Zimbabwe, which permitted limited commercial trade in ivory and other elephant products.²⁸ After the parties to CITES approved the sale of those government’s registered ivory stocks to China and Japan in 2008, the legal ivory trade reignited the parallel illegal ivory trade.²⁹ As of 2016, the African elephant population is estimated to be 415,000, a ninety percent decrease in just over *one-hundred years*.³⁰

²⁰ Bianca Sánchez, *The Complicated History of the Human and Elephant Relationship*, SMITHSONIAN MAGAZINE (Dec. 4, 2018), <https://www.smithsonianmag.com/smithsonian-institution/complicated-history-human-and-elephant-relationship-180970858/>

²¹ Larson, *supra* note 14.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Elephant Ivory Trade-Related Timeline with Relevance to the United States*, HUMANE SOCIETY INTERNATIONAL (last visited Oct. 30, 2020), https://www.hsi.org/wp-content/uploads/assets/pdfs/Elephant_Related_Trade_Timeline.pdf.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*; see also Solomon Hsiang and Nitin Sekar, *Does Legalization Reduce Black Market Activity? Evidence from a Global Ivory Experiment and Elephant Poaching Data*, NATIONAL BUREAU OF ECONOMIC RESEARCH, 17, <https://www.nber.org/papers/w22314>.

²⁹ *Id.*

³⁰ *The status of African elephants*, WORLD WILDLIFE MAGAZINE (2018),

III. CITES & THREATS TO ELEPHANT SURVIVAL

Today, CITES' regulation of the trade in endangered species affords its parties the opportunity to affect policies that sustain effective elephant conservation. CITES' facilitation of the legal ivory trade is made possible by the split-listing³¹ of African elephant populations in different countries. Meanwhile, the continued use of a system that fails to account for the inherent weakness in management of Africa's elephants on a country-by-country basis has threatened the African elephant with extinction. These two issues substantially contribute to the short- and long- term threats to elephant survival. However, the parties to CITES are simultaneously poised to correct their issues and accomplish a remarkable feat for elephants: save a species that still occupies a large expanse of its historic range and thereby preserve the crucial role elephants serve as a creator of the ecosystems they inhabit. Without concerted action against the threats that face the African elephant, their future will likely be relegated to small, fragmented population pockets. Elephants have viable options that could reroute their fate.

CITES' aim as an international agreement is, through ratification, to legally bind parties to adopt national legislation that comports with the regulations imposed on endangered species by CITES.³² One such example is a Declaration of Prohibited Exports by the Director of the Kenya Wildlife Service, under the Wildlife Conservation and Management Act, that bans the export of elephant ivory.³³ The basic structure of CITES requires all import, export, and re-export of species to be authorized by a licensing system managed by a party's domestic management authority, and requires each party to have a scientific authority advise them on the possible trade effects felt by the species.³⁴ Many parties operate their management and scientific authorities within

<https://www.worldwildlife.org/magazine/issues/winter-2018/articles/the-status-of-african-elephants>.

³¹ Split-listing is when a species' population is in on different Appendices depending on which Country the species is in i.e. an elephant in Zambia is in Appendix I, until it walks across the border to Zimbabwe, then it enters Appendix II.

³² *What is CITES?*, *supra* note 5

³³ THE LAWS OF KENYA, REVISED EDITION (2012), http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/WildlifeConservationandManagementActCap376_2_.pdf

³⁴ *What is CITES?*, *supra* note 5.

the same entity, such as Botswana's Department of Wildlife and National Parks.³⁵

CITES uses three Appendices to designate the level of species protection.³⁶ Appendix I is the highest level of protection for species threatened by extinction, with trade permitted only in exceptional circumstances.³⁷ Appendix II includes species not threatened by extinction, but nonetheless afforded controls on their trade to prevent adverse effects on their survival.³⁸ Appendix III protects a species in at least one country that seeks assistance in management of that species' trade internationally.³⁹ The original 1973 text provides criteria to determine which Appendices a species should belong in, along with Resolution Conf. 9.24 Criteria for Amendment of Appendices I and II ("Conf. 9.24") that provides additional considerations to determine whether a species should be in Appendices I or II.⁴⁰ Some factors considered to determine if a species qualifies for Appendix I include a decline in habitat area and quality, number of individuals, and area of distribution.⁴¹ The added criteria also emphasizes that species should not be split-listed under different Appendices given the added enforcement challenges it presents.⁴²

a. Short-Term Threat to Survival

The short-term threat to the African elephants' survival is poaching and illegal trade.⁴³ With over 100,000 elephants dead as a result of poaching since 2007, the continental population estimate is 415,000.⁴⁴ The rate of poaching varies between the four different regions elephants inhabit: African elephant's ranges commonly extend across national

³⁵ *Botswana - National Authorities*, CONVENTION ON INTL. TRADE IN ENDANGERED SPECIES, <https://www.cites.org/eng/parties/country-profiles/bw/national-authorities> (last visited Oct. 30, 2020).

³⁶ *What is CITES?*, *supra* note 5.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Criteria for amendment of Appendices I and II (Resolution Conf. 9.24)*, CONVENTION ON INTL. TRADE IN ENDANGERED SPECIES 2 (1994), <https://cites.org/sites/default/files/document/E-Res-09-24-R17.pdf> [hereinafter 9.24].

⁴¹ *Id.* at 4.

⁴² *Id.* at 5.

⁴³ C.R. Thouless et al., *African Elephant Status Report 2016: An update from the African Elephant Database*, INTL. UNION FOR CONSERVATION OF NATURE (2016), <http://savetheelephants.org/wp-content/uploads/2017/09/2016-AfESG-African-Elephant-Status-Report.pdf>.

⁴⁴ *Id.*

borders,⁴⁵ which makes CITES' structural design that manages national populations independently of one another ill-suited to continental survival. An understanding of the unique situation each of the four regions experiences provides context for the interrelated nature of elephant conservation and how policy in one region affects the others.

West Africa's elephant population is the smallest and comprises about three percent of the continental population with approximately 12,000. This region experienced extensive poaching in the 19th century.⁴⁶ The vast majority of West Africa's elephant population is concentrated in the W Transborder Park shared among Benin, Burkina Faso, and Niger, with the remaining populations highly fragmented and isolated.⁴⁷ Since 2007, local populations have been exterminated in Cote d'Ivoire, Ghana, Guinea, Guinea Bissau, Sierra Leone, Nigeria, and Togo.⁴⁸ West Africa hosts the largest illegal ivory transport hub on the west coast, one of the two largest on the continent, in Nigeria.⁴⁹ As West Africa's elephant population diminishes further, poachers will have to concentrate their efforts in the regions that still contain higher populations.

Central Africa has experienced severe poaching since 2003, with sixty percent of its elephant population killed between 2002 and 2011.⁵⁰ Notably, accurate population surveys are nearly impossible given the Congo Rainforest's impenetrable vegetation cover, and decades of significant and pervasive armed conflict in the region.⁵¹ With speculation that there may be up to 100,000 unaccounted for elephants, there is great uncertainty surrounding the estimated population of 25,000.⁵² Central Africa is the home of the lesser known African elephant subspecies, the African forest elephant; the majority of their population is isolated to

⁴⁵ Keith Lindsay, *The shared nature of Africa's elephants*, 215 BIOLOGICAL CONSERVATION 260, 261 (2017).

⁴⁶ *Elephants In The Dust The - African Elephant Crisis*, UNEP, CITES, IUCN, and TRAFFIC, at 23 (2013), <http://africanelephantdatabase.org> (last visited Feb. 2, 2020) [hereinafter *UNEP*].

⁴⁷ Thouless et al., *supra* note 43, at 10.

⁴⁸ *Id.*

⁴⁹ CONVENTION ON INTL. TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA [CITES], *Report on the Elephant Trade Information System*, 14 (Working Paper, CoP18 Doc. 69.3) (2019) <https://cites.org/sites/default/files/eng/cop/18/doc/E-CoP18-069-03.pdf> [hereinafter *ETIS*].

⁵⁰ CONVENTION ON INTL. TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA [CITES], *Report on Monitoring the Illegal Killing of Elephants*, 9, CoP18 Doc. 69.2, (2019) <https://www.cites.org/eng/prog/mike/index.php> [hereinafter *MIKE*].

⁵¹ Stephen Blake, et al., *Forest Elephant Crisis in the Congo Basin*, 5 PLOS BIOLOGY 945, 951

(2007); *see also* Thouless et al., *supra* note 43.

⁵² Thouless et al., *supra* note 43.

Gabon and Congo.⁵³ The legal ivory trade of the four Southern African nation's populations has an incalculable toll on Central Africa's uncertain population.

East Africa has experienced the most poaching of all regions in recent years, with nearly 87,000 elephants or 50% of their population lost since 2007.⁵⁴ Improved enforcement and management has stymied a local eradication of the 86,000 elephants left, which comprise nearly twenty percent of the continental population.⁵⁵

The legal trade permitted by the split-listing of elephants in Southern Africa into lower protection status than their counterparts undermines the security of populations in West, Central, and East Africa, as those population's poached ivory is invariably smuggled into the legal ivory market.⁵⁶ Southern Africa holds over seventy percent of the continental population at 294,000, seventy-five percent of them found in the Kavango-Zambezi Transfrontier Conservation Area: a 200,000 square mile cross-border conservation area shared among Angola, Botswana, Namibia, Zambia, and Zimbabwe.⁵⁷ Southern Africa contains the largest illegal ivory transport hub on the east coast in Mozambique, a country rife with corruption that enables poaching and illegal trade to flourish.⁵⁸ In recent years, Southern Africa has seen the emergence of a growing poaching threat.⁵⁹

⁵³ Blake et al., *supra* note 51, at 951.

⁵⁴ Thouless et al., *supra* note 43, at 8.

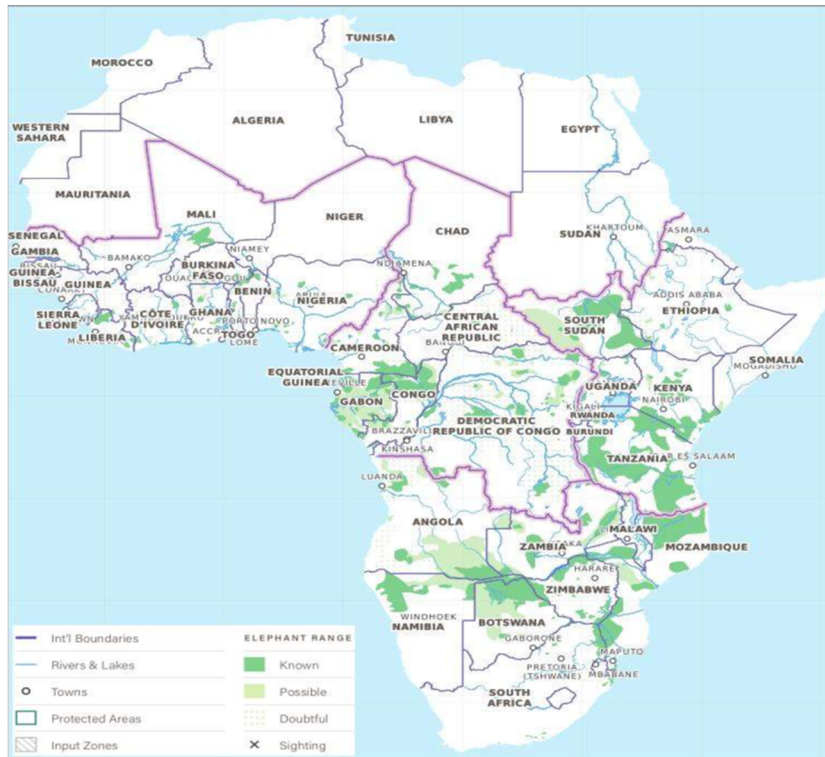
⁵⁵ *Id.*

⁵⁶ See Hsiang & Sekar, *supra* note 28, at 3.

⁵⁷ *Id.* at 9.

⁵⁸ ETIS, *supra* note 49, at 14, 18.

⁵⁹ Hsiang & Sekar, *supra* note 28, at 3.



The purple boundaries distinguish the regions of Africa: North, West, Central, East, Southern.

b. Short-Term Solution

Through CITES, the international community could curtail poaching and reduce the illegal trade by promulgating an amendment that extends Appendix I status to all African elephants. Under CITES' criteria, Appendix I is to include "species threatened with extinction that are or may be affected by trade," while Appendix II is intended to include "[species] not necessarily threatened with extinction."⁶⁰ The crucial difference is Appendix II status permits commercial trade, while Appendix I status prohibits it. While the threats that face African elephants are agreed upon throughout the scientific community, the central disagreement among CITES parties revolves around whether the legal trade in ivory has negatively impacted poaching and the illegal trade. The legal ivory trade

⁶⁰ CONVENTION ON INTL. TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA, Convention text, 1 (Mar. 3, 1973), <https://www.cites.org/eng/disc/text.php>.

today is derived from the ivory sold in past government stockpile selloffs.⁶¹

While all African elephants were in Appendix II between 1977 and 1989, the total population decreased from about 1.3 million to 600,000. In 1989, CITES moved all African elephant populations to Appendix I, where they remained until the populations of Botswana, Namibia, South Africa, and Zimbabwe moved back to Appendix II in 1997 and 2000. Those four countries claimed the elephant populations in their countries were large enough that their survival would not be threatened by the legal trade.⁶² The result was the creation of the modern-day legal ivory market.⁶³ Appendix II status allows trade in hunting trophies, live animals, other elephant derived products, but most significantly – trade in government registered raw ivory stocks.⁶⁴

The first legal sale of raw ivory stocks occurred in 1999 when a total of 49,574 kilograms of ivory were sold from Botswana, Namibia, and Zimbabwe to Japan.⁶⁵ However, with no poaching data being collected at the time, a connection between the sale's effect on poaching and the illegal market is indeterminable.⁶⁶ A second sale occurred in 2008 with the addition of South Africa as a supplier and China as a buyer.⁶⁷ This time, CITES' new programs started in 2002, Monitoring the Illegal Killing of Elephants, ("MIKE"), and the Elephant Trade Information System, ("ETIS"), enabled a connection to be drawn between the legal sale and its effect on poaching and the illegal trade.⁶⁸

MIKE was created to provide information to parties that enables informed management and enforcement decisions.⁶⁹ MIKE's objectives are to: record levels and trends of poaching in elephant range states, assess CITES' decisions effects on elephant poaching and the illegal trade, provide an information pool to execute appropriate management and enforcement decisions, and build an institutional capacity that enables range states to manage their elephant populations long term.⁷⁰ MIKE evaluates relative poaching levels based on the Proportion of Illegally

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 4.

⁶⁴ *Id.*

⁶⁵ *Buyers of Elephant Ivory*, POACHING FACTS: TRUTHS FROM THE FRONTLINES, <http://www.poachingfacts.com/faces-of-the-poachers/buyers-of-ivory/>

⁶⁶ *Id.*

⁶⁷ *See generally id.* China was then the largest global importer of illegal ivory; today, it is Vietnam.

⁶⁸ *See id.*

⁶⁹ CONVENTION ON INTL. TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA (CITES), <https://www.cites.org/eng/prog/mike/index.php>, last visited (Jan. 1, 2020).

⁷⁰ *Id.*

Killed Elephants, (“PIKE”), with scores above 0.50 indicative of elephant populations in net decline.⁷¹ The ETIS program tracks and records the illegal trade in ivory and other elephant products, and provides analyses of levels and trends in the illegal trade.⁷² ETIS records contain elephant specimen seizures that have occurred globally since 1989.⁷³

A notable discontinuous increase in the poaching and illegal trade of African elephant ivory followed the 2008 sale.⁷⁴ In 2019, the Hsiang study analyzed the 2008 legal sale’s net effect on the illegal market.⁷⁵ The study revealed that the legal market served as a conduit for smuggler’s to infuse illegal ivory into the legal market, increased the cost of law enforcement, and lowered the cost of the illegal ivory as the risk of arrest decreased.⁷⁶ Despite the introduction of the legal market, the illegal market demand increased as new consumers were attracted by the reduced stigma of being caught or involved in an illegal trade, further complicated by the fact that consumers are generally unable to tell the difference between legal and illegal ivory.⁷⁷ In Hong Kong, one of the world’s largest ivory markets, it is well known that ivory acquired before the 1989 ban, which is permissible to sell, is regularly replenished with ivory derived from poaching and the illegal trade.⁷⁸

Data analysis in the Hsiang study included MIKE and ETIS data from between 1996 and 2013.⁷⁹ The data revealed a thirty-eight percent increase in the proportion of illegally killed elephants, a sixty-six percent increase in poaching rates, and a seventy-one percent increase in illegal smuggling out of Africa, all of which coincided with the 2008 legal sale.⁸⁰ The study supported the theory that the 2008 legal ivory sale caused an “abrupt, significant, permanent, robust, and geographically widespread increase” in poaching and illegal smuggling.⁸¹ Further support for this conclusion can be found in the continued existence of the Hong Kong ivory market.⁸²

⁷¹ *Id.*

⁷² CONVENTION ON INTL. TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA, *The Elephant Trade Information System*, <https://cites.org/eng/prog/etis/index.php>, (last visited Jan. 1, 2020).

⁷³ *Id.*

⁷⁴ *See* Hsiang & Sekar, *supra* note 28, at 21-22.

⁷⁵ *See id.* at 11.

⁷⁶ *See id.* at 7.

⁷⁷ *Id.*

⁷⁸ *See* Peter Knights et al., *The Illusion of Control: Hong Kong’s ‘Legal’ Ivory Trade*, WILDAID, 4 (2015).

⁷⁹ Hsiang & Sekar, *supra* note 28, at 10.

⁸⁰ *Id.* at 15, 27.

⁸¹ *Id.* at 30.

⁸² *See* Knights et al., *supra* note 78, at 9.

Before the ivory trade was banned in 1989, the British government exercised a reservation in CITES that allowed what was then the colony of Hong Kong to continue to sell the ivory already in its possession.⁸³ The initial 670 tons of ivory in Hong Kong then became 474 tons, with wide suspicions that nearly 200 tons were smuggled into Japan; of the initial 670 tons, 570 tons were found to have originated from illegally sourced poaching.⁸⁴

Importantly, alternative theories for the increase in poaching and illegal trade were ruled out: the 2008 financial crisis, an abrupt increase in purchase of valuable raw materials, an abrupt increase of poaching in other slow-breeding species (rhinoceros, tiger, leopard), a notable increase in Chinese GDP, or the financial investment and physical presence in African elephant range states.⁸⁵ None of these alternative theories saw an increase consistent with the 2008 sale that would explain them as the cause of, or a significant factor towards, the increase in poaching and illegal smuggling.⁸⁶ While CITES dedicates an entire section of MIKE reports towards assessment of CITES' decisions effects on poaching, their position is that no evidence exists that suggests the 2008 sale affected poaching and illegal smuggling in any way.⁸⁷ Furthermore, pre-1989 ivory should have been sold-off entirely by 2004 if Hong Kong's sales records are to be taken as accurate.⁸⁸ Those records, along with statements made by ivory vendors in Hong Kong attesting to the ease in which illegal ivory replaces pre-1989 stocks, are direct evidence of the legal ivory market's impact on poaching and the illegal trade.⁸⁹

Inclusion of all African elephant populations in Appendix I will ban the legal trade in elephant ivory. The data supports the conclusion that a ban on the legal trade in ivory would drastically reduce poaching and illegal trade, the most significant short-term threat to the survival of the African elephant.

c. Long-Term Threat to Survival

The long-term threat to African elephant survival is habitat and range area loss.⁹⁰ African elephant range includes diverse ecosystems of desert, forest, jungle, savannah, and swamp.⁹¹ Between 1995 and 2007, elephant

⁸³ *Id.* at 8.

⁸⁴ *Id.*

⁸⁵ *Id.* at 28-30.

⁸⁶ *Id.*

⁸⁷ MIKE, *supra* note 50.

⁸⁸ Knights et al., *supra* note 78, at 8.

⁸⁹ *Id.* at 10.

⁹⁰ See UNEP, *supra* note 46, at 15; Range area is the area that elephants inhabit.

range area in Africa decreased by about forty-two percent.⁹² With more than half of global population growth projected to occur in Africa by 2050, encroachment is not poised to slow down.⁹³ One of the largest foreign investors in Africa is China, with sixty billion dollars pledged in 2018.⁹⁴ Chinese exploitation of natural resources, coupled with their enormous role in the illegal ivory trade, leaves them in a powerful position regarding the future of elephant conservation in Africa.⁹⁵ One of Africa's largest investors is also one of its most prolific natural resource exploiters.

In 2013, uncertainty surrounded whether the elephant populations of Senegal, Somalia, and Sudan would survive; however, in 2016 it was confirmed all three countries no longer possess resident elephant herds.⁹⁶ Without a concerted effort to preserve the African elephant habitat, their fate may resemble that of the Sumatran elephant. The lowland forests of Southeast Asia experienced a seventy percent deforestation rate within twenty-five years.⁹⁷ With a major part of their habitat lost, the critically endangered Sumatran elephant's population is now less than 2,800.⁹⁸ The Sumatran elephant serves as an example of the potential future of the African elephant species if their habitat is not secured for generations to come.

d. Long-Term Solution: Connectivity and Transboundary Regulation

In 1990, Michael Glennon proposed that the CITES parties should treat their duty to protect their endangered species as *erga omnes*,⁹⁹ and make the species' protection a priority over individual parties' usage of species for their own economic gain.¹⁰⁰ Glennon envisioned that protection

⁹¹ *Id.*

⁹² *Id.*

⁹³ Yomi Kazeem, *More than half of the world's population will be in Africa by 2050*, QUARTZ AFRICA (June 29, 2017), <https://qz.com/africa/1016790/more-than-half-of-the-worlds-population-growth-will-be-in-africa-by-2050/>

⁹⁴ Lonny J Avi Brooks, *The 21st century belongs to China – but the 22nd will be Africa's*, QUARTZ AFRICA (Feb. 21, 2019), <https://qz.com/1550626/chinas-investment-will-allow-africa-tolead-the-22nd-century/>.

⁹⁵ *See id.*

⁹⁶ *See* Thouless et al., *supra* note 43, at 5.

⁹⁷ *Sumatran Elephant Facts*, WORLD WILDLIFE FUND, <https://www.worldwildlife.org/species/sumatran-elephant> (last visited Jan 1, 2020). 25 years is also the equivalent of an "elephant generation."

⁹⁸ *Id.*

⁹⁹ *Erga Omnes* translates roughly to "rights or obligations owed towards all."

¹⁰⁰ Geoffrey Wandesforde-Smith, *Looking for Law in All the Wrong Places? Dying Elephants*,

of endangered species as *erga omnes* would enable legal causes of action to be brought against parties for failure to protect their endangered species as parties of CITES.¹⁰¹ Despite his proposal, CITES parties began to assert the United Nations Principle of Permanent Sovereignty over Natural Resources, “to prevent the exploitation of resources in developing countries by neocolonial interests,” as a means for them to profit off their natural resources – including elephants.¹⁰²

The problem with CITES parties’ application of this principle is that it fosters inconsistent elephant protection policy in different countries that neighbor each other. The majority of African elephants’ range area extends across national borders;¹⁰³ a treaty framework that distinguishes protection afforded to a species based on which country the species is in at any given time is antithetical to the nature of elephants as a species. Continued practice within CITES that permits parties to assert a sovereign right of determinism over their elephants places the continent’s interdependent population at increased risk. If CITES parties would forego their ability to exercise reservations in treaty proceedings regarding their national elephant populations, and embrace fundamental principles of transboundary conservation, it would reward parties with sustainable, long-term economic and environmental security.

With seventy-six percent of the African elephant population found spread across national borders, CITES incorporation of transboundary conservation is better suited to their survival.¹⁰⁴ Transboundary conservation achieves conservation goals across one or more national boundaries.¹⁰⁵ As a part of its Best Practice Protected Area Guidelines series, the International Union for Conservation of Nature provides a comprehensive and integrated guide for transboundary conservation.¹⁰⁶ The guide is essentially a “how to” model for transboundary conservation that includes: history, key concepts, viability, operation principles, implementation, and capacity building.¹⁰⁷ The potential benefits of transboundary conservation span legal and policy frameworks, ecosystem management, climate change responses, and socio-economics.¹⁰⁸ CITES

Evolving Treaties, and Empty Threats, 19 J. OF INT’L WILDLIFE L. & POL’Y 1, 7 (2016); citing

Michael Glennon, *Has International Law Failed the Elephant?* 84 AM. J. INT’L L. 1 (1990).

¹⁰¹ *Id.* at 8.

¹⁰² Lindsay, *supra* note 45, at 267.

¹⁰³ *Id.* at 260.

¹⁰⁴ *Id.* at 263.

¹⁰⁵ See Masa Vasilijevic et al., *Transboundary Conservation: A systematic and integrated approach*, INTL. UNION FOR CONSERVATION OF NATURE, xi (2013).

¹⁰⁶ *See id.*

¹⁰⁷ *See id.*

parties that invest in transboundary conservation plans are poised to benefit from enhanced connectivity of conservation areas, protection of migratory species, improved genetic diversity, increased opportunities for cross-border eco-tourism and related enterprises, and management collaboration that improves patrols and decreases operation costs.¹⁰⁹

Habitat and range area loss are mitigated by the transboundary model through maintenance and increase of connectivity between populations.¹¹⁰ Enhanced connectivity enables diffusive density-dependent dispersal that reduces human-elephant conflict, increases engagement of elephants in their roles as keystone species, and produces more reliable meta-population data.¹¹¹ Poaching in neighboring countries can prevent elephants migratory patterns, and thus produce unnatural population densities that increase the chances of human-elephant conflict (i.e. fighting over water sources).¹¹² Examples of elephant populations crossing borders to replenish extinct local populations include movements from Uganda to the Democratic Republic of Congo, and from South Africa to Mozambique.¹¹³ Connectivity across national borders allows for more natural elephant population densities, as elephants in overcrowded habitats seek out less crowded habitats to live in.¹¹⁴

Connectivity is more important today than ever as seasonal food and water variability increases with climate change.¹¹⁵ Increased connectivity of elephant habitat promotes elephants engagement in their roles as seed dispersers, that improves the quality of their habitat.¹¹⁶ Improvement in elephant habitat and more balanced population densities would reduce money spent by management authorities on water provision, contraception, and population control.¹¹⁷ For example, increased connectivity in drought ridden regions would permit elephants to migrate towards alternative water sources rather than compete for water with local human populations, and thereby require further resources to prevent the resulting human-elephant conflict. Those resources would therefore be available to meet other conservation needs, that may include increased capacity for cross-border eco-tourism investment.

¹⁰⁸ *See id.* at xi.

¹⁰⁹ *Id.*

¹¹⁰ Lindsay, *supra* note 45, at 261.

¹¹¹ Vasiljevic et al., *supra* note 105, at xi.

¹¹² *Id.*

¹¹³ *Id.* at 4.

¹¹⁴ Lindsay, *supra* note 45, at 261.

¹¹⁵ Vasiljevic et al., *supra* note 105, at 264.

¹¹⁶ Lindsay, *supra* note 45, at 2.

¹¹⁷ *Id.*

If CITES replaces the parties' ability to exercise reservations over their national elephant management with an integrated cross-border structure that manages elephants harmoniously across national borders, issues such as habitat and biodiversity preservation, habitat connectivity, and human-elephant conflict would be remedied and replaced with increased sustainable long-term economic opportunities for local communities.

Part of effective reform involves the national legislation in both range states and those affected by the illegal ivory trade.¹¹⁸ A comprehensive assessment of principal conservation legislation in numerous range states in Africa revealed significant loopholes and variations on provincial implementation of national laws, inadequate penalties, antiquated or CITES' contrary legislation, presence of limited prosecutorial power and experience, and inadequate judicial procedure and capacity.¹¹⁹ Recommendations included increased updates and homogeneity of domestic legislation, publication of prosecutorial statistics and judicial opinions, education of local communities about the realities of poaching and the illegal international trade, and the benefits that come with expansion of eco-tourism.¹²⁰

Sponsorship of initiatives that promote homogenous legislation across national borders for violations of CITES' elephant protections and poaching are inherent in the transboundary conservation model. The Space for Giants organization's judicial reform initiative that provides prosecutorial training to countries grappling with poaching is one example of a critical resource that facilitates long-term improvement of domestic prosecution and criminal justice.¹²¹

Protection of African elephant habitat extends to the African continent's many ecosystems. Elephants are a keystone species: those that maintain significant linkages in the natural food web to the extent that their extermination would cause a domino effect.¹²² In savannah ecosystems, negligible elephant populations are marked by low plant variation, while moderate elephant population density foster up to three times as much

¹¹⁸ DLA PIPER, *Empty Threat 2015: Does The Law Combat Illegal Wildlife Trade?* 1, 8 (2015).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ See Abbianca Makoni, *International legal experts head to Africa to support courts in poaching*

fight, THE INDEPENDENT (Oct. 29, 2020), <https://www.independent.co.uk/environment/stop-illegal-wildlife-trade-kenya-africa-zimbabwe-courts-poaching-b1248207.html>

¹²² See David Western, *The Ecological Role of Elephants in Africa*, 12 PACHYDERM 43, 46 (1989).

variety.¹²³ Much of the African savannah was created as elephants cleared dense bush and woodlands, allowing other species such as buffalo, gazelle, and zebra to flourish.¹²⁴ The cleared bush also helps cattle ranchers as it provides access to otherwise inaccessible grazing land, and reduces tsetse fly exposure.¹²⁵ Forest elephants play an enormous role in formation of ecosystems in Central and West Africa; they clear forest paths that open up the canopy and allow light to reach the rainforest floor.¹²⁶ These light patches common to the Congo Rainforest sustain increased plant diversity, and also create increased access pathways for other forest species such as forest hog, antelope, and gorilla.¹²⁷ Forest elephants are the most important seed dispersers in the Congo Rainforest, they contribute to the movement of at least ninety-six plant species in some locations.¹²⁸ Local extinctions have already suffered the ecological consequences that come with the loss of a keystone species.¹²⁹ Enactment of policies that protect elephant habitat, and thereby elephants, also protect the vast and varied natural ecosystems across the continent.

CITES' substantial incorporation of transboundary conservation into their institutional frameworks will promote increased quantity and quality of the African elephant habitat, as the species is permitted to keep their crucial role in the greater African ecosystem. As a species that mainly lives across national borders, a management model that is reflective of their nature is best suited to their sustained survival.

IV. SYMBOLS OF THE ISSUES: PROPOSALS TO CHANGE CITES ELEPHANT POLICY

a. Movement to Expand Appendix II

In 2019, Zambia submitted a proposal to reclassify elephants within their borders under Appendix I at the Conference of the parties to CITES.¹³⁰ Zambia is located in Southern Africa, the region of Africa that both contains the most elephants and has the only four parties (Botswana, Namibia, South Africa, Zimbabwe) whose elephant populations are in

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Lindsay, *supra* note 45, at 2.

¹²⁹ Western, *supra* note 122, at 46.

¹³⁰ Convention on Int'l Trade in Endangered Species of Wild Fauna and Flora [CITES], *Summary record of the eleventh session of committee I*, at 1, 2, CoP18 Com I. Rec. 11 (2019).

Appendix II. Zambia amended their initial proposal by removal of their sought after Appendix II permissible commercial ivory trade when they were met with staunch opposition by other parties.¹³¹ Opposition to Zambia's initial proposal was made by Burkina Faso, Ethiopia, the European Union, Gabon, Kenya, Nigeria, Rwanda, Senegal, and the United States; these parties affirmed that a commercial sale of government stockpile ivory may reignite the illegal trade.¹³² Zambia's final proposal was left with only the prospect of increased trade of some elephant hunting trophies and other derived goods.¹³³

In their proposal, Zambia noted that international trade is not a concern for the population of elephants in Zambia, and that the need to move the population to Appendix II arises from human-elephant conflict.¹³⁴ Zambia further noted its intention to benefit rural communities financially from their ivory and trophy hunting proceeds.¹³⁵ The CITES Secretariat agreed with Zambia that their elephant populations no longer met Appendix I criteria as set forth in Conf. 9.24.¹³⁶ The parties voted to reject Zambia's proposal, causing elephants within their borders to remain classified within Appendix I.¹³⁷

i. Problem with Expansion of Appendix II

The human-elephant conflict and benefits to affected local communities would have been made worse had Zambia's initial proposal been approved. Zambia's proposal would have exacerbated human-elephant conflict by increasing poaching and the illegal trade. Increase of the illegal trade would deprive local communities of elephants that could contribute to their economic well-being through eco-tourism initiatives possible in the transboundary conservation model.¹³⁸

One such example of local communities directly benefiting from management of their local elephants is the Reteti Elephant Sanctuary operated by the Samburu tribe in Kenya, the first community owned elephant orphanage in Africa.¹³⁹ Human-elephant conflict is reduced with transboundary conservation through cooperation that enables elephants to

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ See Vasiljevic et al., *supra* note 105.

¹³⁹ RETETI ELEPHANT SANCTUARY, <https://www.retetielephants.org/who-we-are/> (last visited Oct. 25, 2020).

have greater connectivity in their range area that produces less encounters with humans.¹⁴⁰ Human-elephant conflict reduction and increased benefits for local communities will be forever fleeting without commitment from CITES parties to transboundary conservation management of elephants.

CITES' split-listing of elephant populations highlights the parties' reluctance to embrace the transboundary conservation model. The criteria for amendment of a species' Appendices status recommends that split-listing should be avoided for the enforcement problems it creates.¹⁴¹ Zambia's elephant population is a part of the greater Kavango-Zambezi Transfrontier Conservation Area that spans five countries and holds seventy-five percent of Southern Africa's elephant population.¹⁴² Despite Zambia's claims and the CITES Secretariat's conclusion, their elephant population meets the criteria for Appendix I. The third criteria of Conf. 9.24 is a marked decline in the wild population.¹⁴³ Decline is defined as a reduction in the number of individuals, habitat area, or area of distribution, and can be expressed as long term or recent.¹⁴⁴ Recent decline is characterized by a fifty percent decline in the last seventy-five years.¹⁴⁵ Zambia's elephant population was approximately 200,000 in 1972 and today stands at approximately 22,000 – a near ninety percent decline in less than seventy-five years.¹⁴⁶ As such, Zambia's elephant population undoubtedly satisfies the third criteria of Conf. 9.24 for Appendix I.

Further, Zambia's claims that the illegal international trade in ivory is not of concern for their elephant population is disingenuous. The 2016 African Elephant Status Report, ("AESR 2016"), reported the Zambian elephant population had been severely affected by poaching.¹⁴⁷

Zambia is one example of many elephant range states that experience poor governance and corruption that prevent effective elephant conservation and contribute to poaching and the illegal trade. Zambia ranks in the bottom half of the 2018 Corruption Index and had three tons of ivory disappear from a government storage facility perpetrated by government game scouts in 2017.¹⁴⁸ Zambia's inability to maintain

¹⁴⁰ See Vasilijevic et al., *supra* note 105, at xi.

¹⁴¹ 9.24, *supra* note 40, at 5.

¹⁴² Thouless et al., *supra* note 43, at 9.

¹⁴³ 9.24, *supra* note 40, at 2.

¹⁴⁴ *Id.* at 8.

¹⁴⁵ *Id.* at 9.

¹⁴⁶ Convention on Int'l Trade in Endangered Species of Wild Fauna and Flora [CITES], *Consideration of proposals for amendment of appendices I and II*, at 1, CoP18 Prop. 10, 5 (2019) [*hereinafter* Prop 11].

¹⁴⁷ Thouless et al., *supra* note 43, at 9.

¹⁴⁸ *Corruption Perceptions Index*, TRANSPARENCY INTERNATIONAL, <https://www.transparency.org/cpi2018> (last visited Jan. 1, 2020) [*hereinafter*

effective governance necessary for a legal trade has been further undermined by its neighbors, with some of the worst records of elephant poaching and involvement in the illegal trade. To the west, Angola ranks 165 out of 180 countries in the 2018 Corruption Index; and harbors a significant presence of Vietnamese crime syndicates.¹⁴⁹ To the east, Mozambique ranks 158 out of 180 countries in the 2018 Corruption Index, illustrated by a number of large thefts from government ivory stockpiles.¹⁵⁰ Mozambique is the largest illegal ivory trade base on the east coast of Africa, with only Nigeria as a comparable operation in the west.¹⁵¹ And while Zambia should not be judged by the actions of their neighbors, the reality that elephants do not know when they have crossed between Angolan, Mozambican, and Zambian borders, highlights the needs for transboundary conservation.

Zambia's proposal sought to address issues that are in fact symptoms of the underlying lack of commitment to solutions for the short- and long-term issues that face African elephants. Employment of the transboundary conservation model across all CITES parties, along with universal Appendix I status for African elephants, would help Zambia realize its goals and positively impact affected parties.

b. Movement to Expand Legal Ivory Trade

Botswana submitted a proposal at the Conference of the Parties of CITES in 2019 on behalf of themselves, Namibia, South Africa, and Zimbabwe, that would have allowed increased quotas for a proposed future government stockpile sale.¹⁵² The original limits permitted the parties to sell 20,000 kilograms for Botswana, 10,000 kilograms for Namibia, and 30,000 kilograms for South Africa.¹⁵³ Botswana's proposal would have permitted a future sale of 100,000 kilograms for Botswana, 30,000 kilograms for Namibia, 57,717 kilograms for South Africa, and 120,889 kilograms for Zimbabwe.¹⁵⁴ Botswana's proposal further reduced

Transparency]; SAPA, *Tons of ivory stolen in Zambia*, INDEPENDENT ONLINE (June 20, 2012), <https://www.iol.co.za/news/africa/tons-of-ivory-stolen-in-zambia-1323771>.

¹⁴⁹ Convention on Int'l Trade in Endangered Species of Wild Fauna and Flora [CITES], *Report on the Elephant Trade Information System*, at 15, 17, 20, CoP18 Doc. 69.3 (2019) [hereinafter ETIS].

¹⁵⁰ See Transparency, *supra* note 148. ETIS, *supra* note 149, at 17-18.

¹⁵¹ ETIS, *supra* note 149, at 17-18.

¹⁵² See Prop 11, *supra* note 146, at 11.

¹⁵³ Convention on Int'l Trade in Endangered Species of Wild Fauna and Flora [CITES], *Summary record of the eleventh session of committee I*, at 1, 2, CoP18 Com I. Rec. 11 (2019).

¹⁵⁴ *Id.* at 2.

the time between proposals of single government registered ivory sales from nine to six years from the last proposal.¹⁵⁵

Botswana cited the burden of increased elephant populations on local communities, fragile ecosystems, and the burden of government compensation for communities affected by human-elephant conflict, as the reasons for the proposal.¹⁵⁶ Among the parties in opposition were Gabon, which noted even a controlled ivory trade has negative impacts on elephant populations, and Kenya, which noted the previous single sale of government registered ivory resulted in an increase in ivory poaching and laundering.¹⁵⁷ The parties voted to reject Botswana's proposal.¹⁵⁸

Botswana's proposal symbolized the issues of the legal trade in ivory along every sequence of the chain; from the nature of ivory itself, to the countries that seek to trade it being inherently ill-equipped, along with the historical roots of poor governance and corruption today. Paradoxically, the proponents represent the countries with the most to lose if a legal sale were to occur.

i. Why the Legal Ivory Trade Will Never Work

The nature of ivory itself doomed any chance of a viable legal trade from the beginning, in part because ivory itself is a luxury item mainly sought after in countries where rapid swaths of the population are gaining disposable income at increased rates that enables more people to buy more ivory as those economies grow.¹⁵⁹ Ivory's demand far exceeds elephant's ability to supply it, with elephants being one of the slowest reproducing of all mammal species, there is a large incentive for poachers.¹⁶⁰

The path that ivory takes to its buyers is full of the number one factor associated with high poaching rates: poor governance and corruption, which enables centers of the illegal ivory trade to grow through increased operation of organized crime.¹⁶¹ Vietnam is the largest destination country for illegal ivory; Vietnamese criminal syndicates are known to operate in Angola, Congo, Mozambique, South Africa, and Togo.¹⁶² Countries with

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 3.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Elizabeth L. Bennett, *Legal ivory trade in a corrupt world and its impact on African elephant populations*, 29 CONSERVATION BIOLOGY 54, 58 (2014).

¹⁶⁰ *Id.* at 55.

¹⁶¹ Robert W. Burn, *Global Trends and Factors Associated with the Illegal Killing of Elephants*:

A Hierarchical Bayesian Analysis of Carcass Encounter Data, 6 PLOS ONE 1, 9 (2011).

¹⁶² ETIS, *supra* note 149, at 17.

large elephant populations such as Zimbabwe host corruption rankings of 160 out of 180 countries.¹⁶³ The Central African countries are starkly emblematic of the correlation, with the Central African Republic ranked 149, Congo: 165, Gabon: 124, and the Democratic Republic of Congo: 161.¹⁶⁴ Higher vegetation cover reduces chances of detection by law enforcement and enables increased poaching opportunities that may explain why forest elephants are poached at rates significantly higher than savannah elephants.¹⁶⁵ Examples of corruption include wildlife officials accepting bribes to alter CITES documentation, ignored poaching, and falsification of certificates.¹⁶⁶ Vietnam reports that up to forty-five percent of wildlife outlets contain a corruption presence.¹⁶⁷ Many stocks of ivory are also owned privately, with owners that speculate a crash in elephant populations would enable them great profits from sales of their ivory caches at a premium.¹⁶⁸ The path ivory takes from source to destination is perfectly situated to accommodate the illegal activities required for its sale.

Why is corruption so pervasive across many of the countries involved in poaching and the illegal ivory trade? The corruption and ineffective governance present today is in large part due to the historical exploitation of Africa by colonial powers. The scramble for Africa that began in the nineteenth century witnessed European exploitation of the continent's resources at the expense of the native population.¹⁶⁹ Subjugation of Africa continued until after World War II, when colonial rulers decided that the end of their empires had come.¹⁷⁰ Decolonization was commonly a violent and haphazard process; nearly all the countries had their boundaries drawn for the convenience of their rulers that ignored tribal mixtures bound to fail.¹⁷¹ In 1948, the British government projected full decolonization would not take place until 1975, but violence erupted in Cote d'Ivoire that prompted the imperial governments to expedite independence for countries such as Ghana, Nigeria, Sierra Leone, Sudan, and Uganda.¹⁷² The different European colonial governments' displacement of social and economic orders made the chances of national unity around their systems

¹⁶³ Transparency, *supra* note 148.

¹⁶⁴ *Id.*

¹⁶⁵ See Blake, *supra* note 51, at 1.

¹⁶⁶ Bennett, *supra* note 159, at 56.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ LAWRENCE JAMES, THE RISE AND FALL OF THE BRITISH EMPIRE 310 (St. Martin's Griffin 1997).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 608.

¹⁷² *Id.*

lack appeal, their governments had been in place for less than many of their subject's lifetimes.¹⁷³

This history of the corruption that facilitates the illegal ivory trades is a part of the foundation of the greater poor governance that exists today in Africa. If the parties that possess elephants can recognize the futility of the ivory trade in the long-term as a means of economic stimulus, they can embrace a more sustainable economic and cultural benefit: the value of the species alive. Western countries' investment in the preservation of African wildlife contrasts their own lack of comparable diversity in wildlife, in large part due to their own historical role in their wildlife's decimation.

ii. The Last Elephant Stronghold: Southern Africa

Southern Africa is the last major stronghold of African elephants. The elephant conservation choices the regions' respective governments make have the largest impact on the future of the continental population. With elephant populations in West and Central Africa decimated by poaching, and East Africa recently benefited from improved enforcement, Southern Africa's seventy percent of the continental elephant population is at dire risk.¹⁷⁴ MIKE data shows Southern Africa's PIKE score increased 2016 to 2017.¹⁷⁵ Of the nearly 294,000 elephants in Southern Africa, about 75% are found in the Kavango-Zambezi Transfrontier Conservation Area shared between Angola, Botswana, Namibia, Zambia, and Zimbabwe.¹⁷⁶ Southern Africa also contains nearly forty-two percent of the range area of the species, spanning over 1.3 million square kilometers.¹⁷⁷ Despite recorded increases in the available elephant range in Southern Africa since 2007, the population has declined by 30,000.¹⁷⁸ The data suggests the emergence of a growing poaching threat in Southern Africa includes the populations of Botswana, Namibia, South Africa, and Zimbabwe.¹⁷⁹ Botswana's proposal to expand the legal ivory trade for themselves, Namibia, South Africa, and Zimbabwe, would be the beginning of the end for the last elephant stronghold on the continent. A larger more frequent legal trade would undoubtedly expand poaching and the illegal trade in the region.

Botswana contains the most elephants of any country in the world with about 132,000 or nearly twenty-five percent of the global African elephant

¹⁷³ *Id.*

¹⁷⁴ Thouless et al., *supra* note 43, at 6.

¹⁷⁵ MIKE, *supra* note 50, at 5.

¹⁷⁶ Thouless et al., *supra* note 43, at 9.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

population.¹⁸⁰ Historically safe from the threat of poaching, Botswana has begun to emerge as a source of illegal ivory.¹⁸¹ A 593% increase in fresh elephant carcasses between 2014 and 2018 suggested that ivory poached from hundreds of elephants had recently occurred in northern Botswana.¹⁸² Namibia has 23,000 elephants and is a source country for illegally processed ivory with seventy-five kilograms seized between 2015 and 2017.¹⁸³ South Africa contains nearly 19,000 elephants, and has emerged as a major consolidation point for export of illegal ivory smuggled from individuals poached in nearby Botswana, Malawi, Mozambique, and Zimbabwe.¹⁸⁴ South Africa is a significant source of both raw ivory – one 2017 seizure totaled 2,478 kilograms – and illegally processed ivory, with 364 kilograms seized in 2017.¹⁸⁵ A significant presence of criminal activity that includes a substantial presence of Vietnamese organized crime plays a large role in the operation of the illegal market in South Africa.¹⁸⁶ Zimbabwe contains nearly 83,000 elephants, and was ranked amongst the top three countries most affected by poaching in Southern Africa in the AESR 2016.¹⁸⁷ Zimbabwe emerged as a country affected by the illegal ivory trade for the first time in the 2018 ETIS report, and was cited as a source of raw ivory with 3,552 kilograms seized in 2017.¹⁸⁸ Zimbabwe is also one of the two most important countries of origin or export of illegally processed ivory; combined with Angola, they occupy thirty-eight percent of the global market.¹⁸⁹

Increased legal sales of government ivory stockpiles poses an enormous threat to the elephants of Southern Africa as the largest regional population on the continent. The double-edged sword of the situation is that while the proponents of Botswana's proposal seek to gain financially in the short-term, they would do so at the expense of their long-term potential. Placement of all African elephants on Appendix I would ban the legal trade and affect a significant decrease in poaching and the illegal trade.

¹⁸⁰ See AFRICAN ELEPHANT DATABASE, http://africanelephantdatabase.org/report/2016/Africa/Southern_Africa (last visited Nov. 4, 2020)

[*hereinafter* AED].

¹⁸¹ Scot Schlossberg et al., *Evidence of a Growing Elephant Poaching Problem in Botswana*, CURRENT BIOLOGY VOL. 29, ISS. 13, at 2222 (2019).

¹⁸² *Id.*

¹⁸³ AED, *supra* note 180.

¹⁸⁴ AED, *supra* note 180.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ AED, *supra* note 180; Thouless et al., *supra* note 43, at 9.

¹⁸⁸ ETIS, *supra* note 149, at 20.

¹⁸⁹ *Id.*

c. Proposal to Extend Appendix I Universally

In a change of theme, Gabon submitted a proposal on behalf of themselves, Burkina Faso, Cote d'Ivoire, Kenya, Liberia, Niger, Nigeria, Sudan, Syria, and Togo, that would transfer the elephant populations of Botswana, Namibia, South Africa, and Zimbabwe to Appendix I. In Gabon's proposal, the proponents cite three criteria from Conf. 9.24 in support: 1) a marked decline in the wild population, either as ongoing and expected to continue, or projected based on levels of exploitation, 2) split-listing of species should generally be avoided because of the enforcement problems created, 3) and "in case[s] of uncertainty . . . act in the best interest of the conservation of the species."¹⁹⁰ Gabon cited a sixty-eight percent decline in the total African elephant population recorded over a three-generation period (seventy-five years) as satisfying the criteria for Appendix I.¹⁹¹

Proponents of Gabon's proposal highlighted: the widespread illegal killing of elephants and ivory smuggling throughout the continent, the high likelihood that estimates are below actual figures, the collapse in global ivory markets that followed the 1989 decision to move all African elephant populations to Appendix I, and the positive correlation between the 2008 sale of government registered ivory and the subsequent dramatic increase in poaching and illegal ivory trade.¹⁹²

Botswana's response to Gabon's proposal was a perfect example of the deficiency in CITES' structure. Botswana threatened their Article XXIII right of the Convention that would have allowed them to exercise a reservation that removed their elephant population from CITES regulation.¹⁹³ In spite of the proponents of Gabon's proposal citing that the continent's population of elephants should be in Appendix I, based on language in the CITES agreement, Botswana essentially vetoed the strongest amendment to the parties' elephant policy in favor of their own self-interest. In an effort to assuage Botswana, thereby retaining the country with the most elephants in the world in CITES' elephant trade management, the parties rejected Gabon's proposal.¹⁹⁴ Examples such as Gabon's proposal highlight the management challenges of a transboundary species within a system that permits one party to undermine policy reflective of CITES' aim to not allow trade to jeopardize the survival of endangered species.

¹⁹⁰ See Prop 11, *supra* note 146, at 12.

¹⁹¹ Convention on Intl. Trade in Endangered Species of Wild Fauna and Flora [CITES], *Summary record of the eleventh session of committee I*, at 1, 2, CoP18 Com I. Rec. 11, 3 (2019).

¹⁹² *Id.* at 3.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

While Zambia and Botswana's proposals were symptoms of the underlying issues facing African elephants, Gabon's proposal served as a sign of hope for the future of elephant conservation in CITES. China, the former lead global destination of illegal ivory, only second to Vietnam today, voted to move all African elephant populations to Appendix I. China's vote along with their closure of domestic ivory markets should signal other countries that a refusal to transfer all African elephants to Appendix I will continue the poaching and illegal trade that pose the greatest short-term threat to their survival.

V. CONCLUSION

Proposals to modify CITES' elephant policy will continue to be brought in various forms at each Conference of the Parties until the underlying issues they mask are addressed. CITES' aim to not allow the trade in a species to threaten its survival will remain impossible without a total ban on the legal trade in ivory for time immemorial, and greater adoption of transboundary conservation into CITES organizational structure for elephants throughout Africa. Conceitedly, the vast complexity that accompanies an overhaul of CITES' African elephant management cannot be outlined in a single article; however, the first step is to recognize the threats to the survival of African elephants and identify solutions. Parties that supported Gabon's proposal may represent a brighter future for African elephants. CITES has the choice to proceed along its current route towards African elephant's inevitable extinction; or adjust course towards a future where our grandchildren can still see elephants throughout Africa. The African elephant can be saved if their short- and long-term threats are properly addressed. While the forests of Knysna may never again play host to trumpets of days past, their kin across the continent can still be afforded the opportunity in the future.