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TRANSBOUNDARY WILDLIFE LAWS AND TRAFFICKING:
THE PLIGHT OF THE AFRICAN ELEPHANT IN MALAWI
AND THE NEED FOR INTERNATIONAL COOPERATION

EMILY SCHENNING†

I. INTRODUCTION

The African elephant (*Loxodonta Africana*) is one of the most iconic and arguably one of the most important species of the African savanna.¹ It has, however, seen a serious decline in population densities across the continent, due mainly to poaching and illegal ivory trade.² This devastation of elephant populations has significant implications, not only for the elephant, but for savanna habitats and many other species that rely on elephants.³ Moreover, the transboundary nature of the species implicating several countries and their laws in the conservation of single populations of elephants makes the issue of elephant conservation even more difficult.⁴

Focusing on Malawi and its border states, the elephant is afforded very different levels of protection in Southern Africa.⁵ In 2017, according to the Convention on International Trade in Endangered Species (CITES), Tanzania had a quota (amount of tusks allowed to leave the country) of one-hundred elephants' tusks, Zambia had a quota of one-hundred and sixty, Mozambique had a quota of thirty-eight, and Malawi had a quota of zero.⁶ Some African countries also differ in the way the elephant is ranked as an

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1. *See infra* notes 32-56 (noting elephants are considered keystone species and ecosystem engineers who shape their habitat).

2. *See infra* notes 20-31 (stating elephant population has dropped from nearly two million to only 350,000 and that poachers kill up to 30,000 elephants each year).

3. *See infra* notes 32-56 (noting elephants are important for ecosystem health and other species).

4. *See infra* notes 46-56 (noting elephants are highly mobile species).

5. *See infra* notes 195-213 (showing elephants are listed differently on CITES among their range states and some countries allow trophy hunting while others do not).

6. *See* UN Environment, *Loxodonta Africana*, SPECIES PLUS (2017) https://www.speciesplus.net/#/taxon_concepts/4521/legal (listing amount of elephant tusks allowed to be taken from Tanzania, Zambia, Mozambique, and Malawi).

endangered species under CITES.⁷ An elephant crossing these arbitrary country borders faces different threats depending on the differing laws of each country.⁸

In Malawi, the government partnered with an independent conservation organization (African Parks) to manage wildlife and national parks after poaching and lack of management nearly decimated local wildlife populations.⁹ Poverty and government corruption continue to be major drivers of elephant poaching in the country, with poor local attitudes toward wildlife and isolation of local people from national parks contributing further to the issue.¹⁰ The almost nonexistent recourse for those who violate wildlife laws making poaching a profitable enterprise is also concerning.¹¹

The driving force behind poaching in many African nations is the demand for ivory in international markets.¹² CITES attempts to control the international sale of elephant parts, but significant illegal markets still exist in many Asian countries and the United States.¹³ The Lacey Act is an important legal tool in the United States used to combat the importation of elephant trophies illegally obtained from foreign jurisdictions.¹⁴ Under the Trump administration, the African elephant faces uncertainty as the ban on elephant trophies from Zambia and Zimbabwe has been lifted twice within five months.¹⁵

7. *See infra* notes 195-213 (noting that not all of Africa lists elephants as appendix I species).

8. *See id.* (finding four nations in Africa list elephants as appendix II species while thirty-three list elephants as appendix I species).

9. *See infra* notes 101-112 (explaining Malawi entered into twenty five year agreement with African Parks for African Parks to take over management of some national parks because poaching had largely destroyed many of them).

10. *See infra* notes 57-77 (noting there is high incidence of corruption among ministry heads and yet they have great power; also finding many Malawians having to choose between degrading environment and feeding their families).

11. *Id.* (stating penalties for poaching are meager, with fines about forty dollars).

12. *See infra* notes 20-31 (noting illegal ivory trade is single greatest threat to elephants due to poaching and booming international ivory market).

13. *See infra* notes 195-214 (noting CITES is leading and only international agreement to control international wildlife trade and that China and United States have largest markets for ivory).

14. *See infra* notes 228-78 (explaining Lacey Act allows United States to prosecute those who have violated wildlife laws in other countries).

15. *See infra* notes 278-307 (noting Trump lifted ban on importation of elephant trophies from Zimbabwe and Zambia in November 2017 and again four months later after reversing his decision to lift ban due to public outcry).

The largest ivory markets in the world are in Asia, with China leading the way.¹⁶ In early 2018, China passed a ban on the legal ivory market, but the efficacy of the law has yet to be seen amid serious enforcement issues.¹⁷ One concern is that the market will merely shift to other Southeast Asian countries where there are still legal ivory markets.¹⁸ With elephant populations dwindling, coordination among countries from Asia to Africa is needed to save the elephant from extinction.¹⁹

II. THE INTERNATIONAL ILLEGAL IVORY TRADE

The illegal ivory trade is the single greatest threat to the elephant due to poaching and a booming international ivory market.²⁰ Poaching and the demand for ivory dwindled the African elephant population to less than half a million individuals.²¹ In the 1900s, estimates suggest there were as many as twelve million elephants in Africa; now there are less than 350,000.²² According to recent reports, up to 30,000 elephants are killed each year.²³ The illegal wildlife trade is roughly worth between eight billion dollars and ten billion dollars in revenue each year.²⁴ Figure 1 shows the range of

16. See *infra* notes 214-341 (noting China and United States have largest markets for ivory).

17. *Id.* (finding China passed ban on legal ivory markets but also noting that China has had serious enforcement issues with environmental laws).

18. *Id.* (acknowledging that people in China are looking to neighboring countries for ivory and that ivory markets in neighboring countries where trade is legal are thriving).

19. See *infra* notes 21-24 (describing decline in elephant populations due to poaching).

20. See Keith Lindsay et al., *The Shared Nature of Africa's Elephants*, *Biological Conservation*, 215, 260-267 (Nov. 2017) <https://www.sciencedirect.com/science/article/pii/S0006320717303890> (stating in some regions poaching has spurred decline of elephants by nearly eighty percent and that international wildlife trade is major crisis facing African elephant).

21. See John Sudworth, *Can China's Ivory Trade Ban Save Elephants?*, *BBC* (Mar. 31, 2017) <http://www.bbc.com/news/world-asia-china-39440486> (*explaining that due to poaching there are fewer than half million elephants left*).

22. See Scott Ramsey, *Elephants Decline by 97% in Less than a Century*, *AFRICA GEOGRAPHIC* (Feb. 9, 2016) <https://africageographic.com/blog/elephants-decline-97-less-century/>. (stating that elephant populations have fallen from as many as 12 million in early 1900s to only 350,000 today).

23. See Jafari Kideghesho, *The Elephant poaching crisis in Tanzania: a need to reverse the trend and the way forward*, *TROPICAL CONSERVATION SCIENCE* (Jan. 5, 2016) <http://journals.sagepub.com/doi/pdf/10.1177/194008291600900120> (noting that recent reports indicate that thousands of elephants are being killed each year).

24. *Id.* (stating that illegal wildlife trade is worth billions of dollars a year).

the African elephant as of 2017.²⁵ This is but a fraction of the historical range of the species which has declined by fifty percent since 1979.²⁶

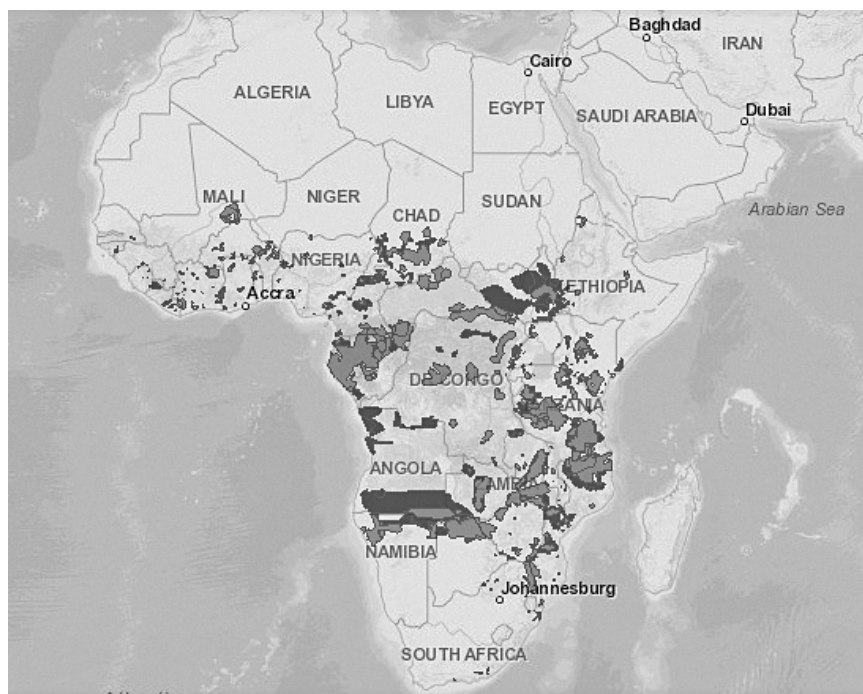


Figure 1: The range of the African Elephant as of 2017. Yellow shaded areas are known range while purple shaded areas are possible range areas.

Not only does wildlife trafficking threaten the existence of species, such as the African elephant, but it also funds rebel militant groups and organized crime.²⁷ Money from the sale of ivory is used by militant groups to fund war in countries like the Democratic Republic of the Congo.²⁸ Funds generated through elephant poach-

25. See *Species Range, Loxodonta Africana*, IUCN RED LIST (2018) <http://maps.iucnredlist.org/map.html?id=12392> (Showing map of historical African elephant range versus current range).

26. See *African Elephants*, WWF (2017) http://wwf.panda.org/what_we_do/endangered_species/elephants/african_elephants/ (stating range of African elephant has declined by fifty percent since 1979).

27. See Bryan Christy, *How Killing Elephants Finances Terror in Africa*, NATIONAL GEOGRAPHIC (Aug. 2, 2015) <https://www.nationalgeographic.com/tracking-ivory/article.html> (describing how Joseph Kony and the Lord's Resistance Army poach elephants for ivory to supply war).

28. *Id.* (detailing how Lord's Resistance Army of DRC smuggle ivory to fund their conflicts).

ing have been shown to finance known terrorist groups throughout Africa including al-Shabaab, the Lord Resistance Army, and Boko Haram.²⁹ In 2013, at the annual African Development Bank meeting, the President of Gabon stated:

“Today wildlife crime has become a serious threat to the sovereignty and stability of some of our countries. More and more of the profits are used to finance civil conflicts and terrorist-related activities. Furthermore, illicit wildlife trafficking is often linked to other forms of illegal trafficking and to money laundering.”³⁰

Halting the illegal wildlife trade is essential for the survival of the elephant, but also to curb terrorist groups and devastating civil wars.³¹

III. THE ECOLOGICAL IMPORTANCE OF THE AFRICAN ELEPHANT

The African elephant is considered a keystone species and an ecosystem engineer, playing an especially important role in preserving the savanna ecosystem.³² It has also been shown that as much as a third of tree species found in African forests require elephants to disperse their seeds.³³ Elephants are considered “umbrella” species meaning they require a large tract of habitat.³⁴ Elephants are also water dependent animals, migrating according to rainy seasons.³⁵ Their diets vary according to precipitation levels; eating mostly grasses in the wet season and woody plants in the dry season.³⁶

Second only to the human race, the elephant has more physical impact on its landscape than any animal.³⁷ This destruction is

29. See Kideghesho, *supra* note 23, at 369-88 (stating al-Shabaab, Lord’s Resistance Army, and Boko Haram are among those terrorist groups thought to generate significant revenue through ivory sales).

30. *Id.* (quoting President of Gabon, Ali Bongo, at African Development Bank 2013 Annual meeting).

31. See *supra* notes 20-31 (noting that up to 30,000 elephants are being killed each year; elephant population has dropped to only 350,000 from twelve million in early 1900’s; and that poaching helps to fund known terrorist groups and wars).

32. See Kideghesho, *supra* note 23 (stating elephants are critical to shaping savanna ecosystems and thus have been termed ecosystem engineers and keystone species).

33. *Id.* (noting as many as one-third of tree species depend on elephants for seed dispersal).

34. *Id.* (stating elephants have also been described as umbrella species and thus require large tracts of land).

35. See Richard Estes, *THE BEHAVIOR GUIDE TO AFRICAN MAMMALS INCLUDING HOOFED MAMMALS, CARNIVORES, PRIMATES* 259-269 (University of California Press, 20th anniversary ed. 1992) (discussing elephant migration patterns).

36. *Id.* (discussing elephant grazing patterns).

37. *Id.* (discussing elephant’s environmental impacts).

beneficial, however, to other wildlife living in the African savanna. Elephants help create trails and wells and bring food that would otherwise be inaccessible within the reach of smaller animals.³⁸ Furthermore, the destruction of trees by elephants, if spread out over an adequate range, helps promote habitat diversity and soil turnover.³⁹ As a result, the species is even known as “ecological engineers.”⁴⁰

The elephant has poor digestion, breaking down only forty four percent of its food.⁴¹ This incomplete digestion helps move seeds from where they were eaten to wherever the elephant has traveled, promoting seed dispersal.⁴² An ecological study found that amphibians and reptiles generally do better in habitats impacted by elephants.⁴³ The study compared two areas, one with elephants and one without, and found that a greater diversity and number of amphibians were present in the habitat where elephants were also present.⁴⁴ The survival of the African elephant is vital not only for its own sake, but for the continued survival of many other species.⁴⁵

African Elephants are a highly mobile species requiring large tracts of land and habitat to survive.⁴⁶ Global climate change is increasing the mobility of elephants since they now have to travel further to find adequate water resources.⁴⁷ National parks are not large enough to contain the African elephant.⁴⁸ A study published

38. *Id.* (describing benefits of elephant behavior and destruction).

39. *Id.* (describing benefits of elephant tree felling).

40. See Mark Kinver, *Elephant ecological engineering ‘benefits amphibians’*, BBC NEWS (Oct. 23, 2010) <http://www.bbc.com/news/science-environment-11607299> (stating that elephants are referred to as ecosystem engineers since many other species depend on their habitat modifications).

41. See Estes, *supra* note 35 (describing elephant diets and digestion).

42. See Kinver, *supra* note 40 (noting that elephants’ poor digestion promotes seed dispersal through elephant dung).

43. *Id.* (discussing study done in Northern Tanzania observing that areas with more elephant damage had higher incidences of certain species of amphibians and reptiles).

44. *Id.* (describing study and elements of study done in Northern Tanzania looking at how elephants impact amphibians and reptiles).

45. See *infra* notes 46-56 (noting many species are dependent on elephants to shape their habitat).

46. See Kideghesho, *supra* note 23 (stating elephants are umbrella species that require large tracts of habitat).

47. See Lindsay, *supra* note 20 (stating global climate change is increasing variability of food and water sources, forcing elephants to travel further for resources).

48. See Arnold Tshipa et al., *Partial Migration Links Local Surface-Water Management to Large-Scale Elephant Conservation in the World’s Largest Transfrontier Conservation Area*, BIOLOGICAL CONSERVATION 215, 46-50 (Nov. 2017) <https://www.sciencedirect.com/science/article/abs/pii/S0006320717309047> (noting elephants often

in 2017 found that over the course of the study, twenty percent of the elephants in question crossed the border from Zimbabwe into Botswana.⁴⁹ Transboundary migration occurred mostly during the dry season in response to changing surface water levels.⁵⁰ Most protected areas within African nations are on country borders, a vestige of colonial rule.⁵¹ The migratory nature of the species also raises census challenges among countries if efforts are not coordinated.⁵² Thus, some elephants go unreported or are double counted.⁵³ As seen in figure 2, Malawi's national parks are located along its borders, further emphasizing the need for international cooperation.⁵⁴ At least one transboundary elephant population in Malawi, on the Zambia border has been identified as of 2017.⁵⁵ As a result, coordinated management is needed to adequately protect this population of elephants.⁵⁶

migrate out of protected areas; and finding specifically, twenty percent of elephants in Hwange National Park routinely migrate out of park).

49. *Id.* (finding twenty percent of elephants in Hwange National Park, in Zimbabwe, migrate out of park on regular basis).

50. *Id.* (stating elephant migrations in Hwang National Park mostly occur seasonally in response to water levels).

51. *See* Lindsay, *supra* note 20. (stating most national parks in Africa are located on or near national borders due to colonialism).

52. *Id.* (discussing migratory nature of elephants and census challenges that occur as result).

53. *Id.* (stating that if census efforts are not coordinated, elephants can be double counted).

54. *See* figure 2, *Google Maps*, GOOGLE (2018) <https://www.google.com/maps> (showing Map of Malawi and its national parks).

55. *See* Lindsay, *supra* note 20 (noting population of elephants on Nyika, Malawi and Zambia border).

56. *Id.* (listing Nyika elephant population on border of Malawi and Zambia as transboundary population).

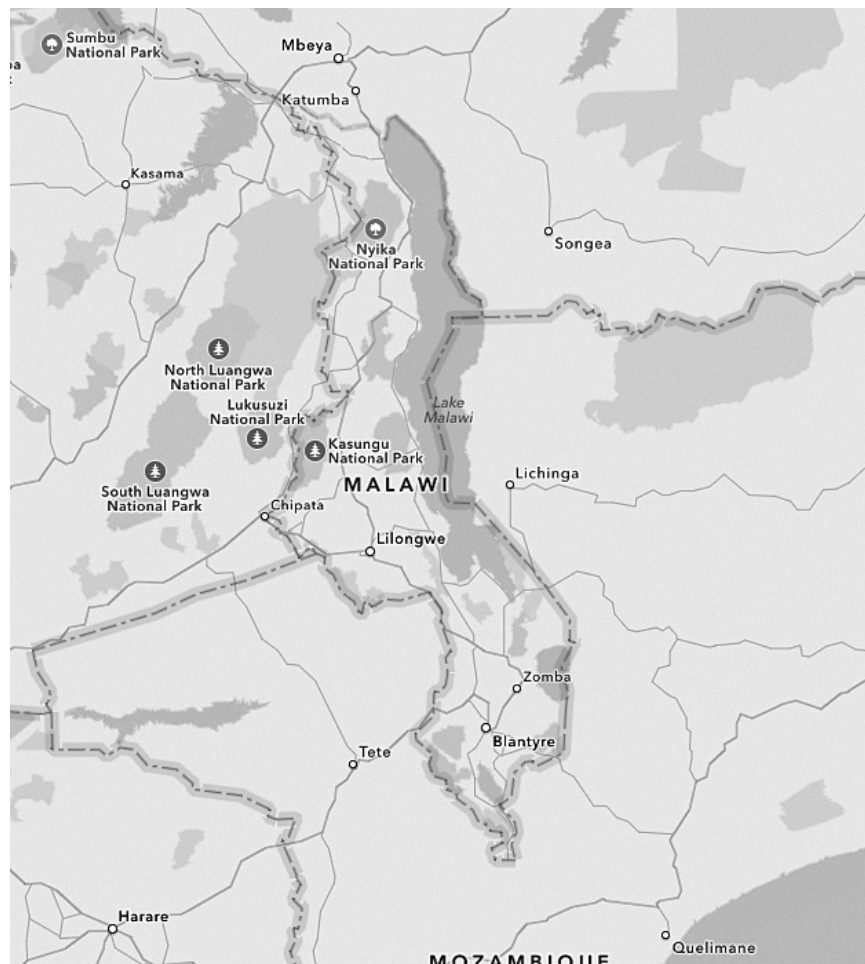


Figure 2: Malawi and its border countries

IV. WILDLIFE LAWS OF MALAWI AND ITS BORDER STATES

A. Malawi

Elephant poaching has been and continues to be a serious issue in Malawi.⁵⁷ Within just twenty years the elephant population fell by fifty percent.⁵⁸ A report written by the national parks system

57. See Shelley Waterland et al., *A Technical Assessment Undertaken on Behalf of the Department of National Parks and Wildlife of Malawi*, ILLEGAL WILDLIFE TRADE REVIEW, MALAWI (May 2015) <https://www.lilongwewildlife.org/wp-content/uploads/IWT-Review-Malawi.pdf> (noting wildlife in Malawi are under serious threat from poaching).

58. *Id.* (stating elephant populations in Malawi have been poached extensively, resulting in population decline of fifty percent before partnership with African Parks).

of Malawi states that the risk of being prosecuted for wildlife crimes is low yet the reward for selling ivory is high in Malawi.⁵⁹ The fines for trafficking ivory in Malawi are only about forty dollars or even less.⁶⁰

Another major issue in Malawi is that the country is often used as a through way to transport illegal ivory.⁶¹ The park service stated about Malawi being a transportation hub for ivory that, “Malawi is, geographically speaking, very conveniently i.e. centrally placed for this purpose.”⁶² With better wildlife trafficking legislation and enforcement, Malawi is in a prime position to help halt the Southern African illegal ivory trade.⁶³

1. *Wildlife Laws of Malawi*

Malawi received its independence from Great Britain in 1964.⁶⁴ After gaining independence, Malawi was ruled as a brutal dictatorship under President Banda until 1994.⁶⁵ President Banda’s government was overthrown in 1994 and a democracy was instituted in its place.⁶⁶ A new Constitution was written and adopted in 1994 and lists environmental protection as a national policy.⁶⁷ The Constitution of Malawi does have a special provision for environmental protections.⁶⁸ The Constitution lists some of its principles of national policy are to: (1) prevent the degradation of the environment; (2) provide a healthy living and working environment for the people of Malawi; (3) accord full recognition to the rights of future generations by means of environmental protection and the sustainable development of natural resources; and (4) con-

59. *Id.* (stating most wildlife trafficking cases are tried in low grade courts leading to lower fines; also, this low fine does not provide a deterrent when reward is so high).

60. *Id.* (stating average fine for trafficking is about 20,000 kwacha or twenty dollars).

61. *See* Waterland, *supra* note 57 (discussing use of Malawi as distribution and transit hub for illegal ivory).

62. *Id.* (discussing prime location of Malawi as transportation hub for illegal ivory).

63. *See supra* notes 57-62 (discussing wildlife trafficking in Malawi and challenges to enforcement).

64. Chikosa Banda, Professor, Lecture at the University of Malawi Chancellor College (July 2018) (describing history of Malawi).

65. *Id.* (discussing how Malawi gained independence and subsequent events).

66. *Id.* (discussing major political events in Malawi and how President was overthrown in 1994).

67. *Id.* (discussing history of Malawi constitution).

68. Republic of Malawi [Constitution] Act (1994) (including environmental goals as principles of national policy along with gender equality, nutrition, health, rural life and education).

serve and enhance the biological diversity of Malawi.⁶⁹ A constitutional environmental right, however, is not provided in the Constitution of Malawi.⁷⁰ Thus, this national policy is not binding on the government of Malawi.⁷¹

Although the government of Malawi is now a democracy, it still functions like a dictatorship in some respects.⁷² Each department is run by a minister, and corruption among these government officials is rampant.⁷³ Ministers are appointed by the President and do not need senate approval.⁷⁴ These positions are highly political, and ministers will not do anything that will jeopardize their position.⁷⁵ Corruption is also rampant among ministers.⁷⁶ For example, the Minister of the Environment has been caught selling charcoal, an act that is highly unsustainable and illegal for Malawian citizens without a permit.⁷⁷

The controlling wildlife law in Malawi is the National Parks and Wildlife Act of 1992, which was amended in 2017.⁷⁸ The National Parks and Wildlife Act is meant to control the illegal wildlife trade and conserve wildlife and habitats.⁷⁹ This Act states in part, “The Director may issue to any person a permit in the prescribed form, to import or to export, or to re-export any specimen of a game species, protected species, or endangered species or listed species. . . .”⁸⁰ Given the prevalence of corruption among government officials and ministers, this degree of power to hand out permits raises concerns.⁸¹

69. *Id.* (describing environmental goals that are priorities of national policy).

70. See J. Kalma, *Environment and development in Malawi – any balancing of interests?*, BALANCING OF INTERESTS IN ENVIRONMENTAL LAW IN AFRICA, 219 (2012) (noting there is no explicit constitutional environmental right in Malawi).

71. See Banda, *supra* note 64 (lecturing on Constitution of Malawi).

72. *Id.* (discussing politics and government of Malawi post 1994).

73. *Id.* (discussing structure of Malawian government and government corruption).

74. *Id.* (describing structure and politics of Malawian government).

75. *Id.* (describing political nature of government appointments).

76. See Banda, *supra* note 64. (discussing government corruption in Malawi).

77. *Id.* (discussing illegal acts committed by government officials).

78. See National Parks and Wildlife Act (Act No. 11/1992) (Malawi) (describing statutory duties concerning national parks and wildlife in Malawi); see also National Parks and Wildlife (Amendment) Act (Act No. 11/2017) (Malawi) (amending National Parks and Wildlife Act of 1992).

79. See National Parks and Wildlife Act (Act No. 11/1992) (Malawi) (stating purposes of National Parks and Wildlife Act).

80. National Parks and Wildlife (Amendment) Act (Act No. 11/2017) (Malawi) (describing permitting duties of Director).

81. *Id.* (describing National Park and Wildlife Director’s power to issue permits); See *supra* notes 72-77. (describing structure of Malawian government and high incidence of corruption among officials).

The Act was also amended to include tougher fines and penalties, an issue with the past Act as seen in case law.⁸² In *Republic v. Akimu*,⁸³ a woman was found in possession of illegally obtained ivory in 2003.⁸⁴ Officials from the National Parks and Wildlife Department posed as buyers of ivory and arrested Maria Akimu when she attempted to sell pieces of ivory.⁸⁵ When the officials arrested Akimu, they were faced with hostility from her neighbors, and one wildlife official was severely injured.⁸⁶ After being convicted of unlawful possession of ivory under the National Parks and Wildlife Act, Akimu was only fined six-thousand Malawian Kwacha which translates to about eight USD.⁸⁷ This sentence was the controversy over which the case was brought before the high court of Malawi in 2003.⁸⁸ The concern the Department of National Parks and wildlife had over this low fine was that—considering the price that can be obtained from selling ivory is significantly higher than 6,000 Kwacha—the fine will be an ineffective deterrent.⁸⁹

The National Parks and Wildlife Act states in part:

Any person who unlawfully possesses or who purports to buy, sell or otherwise transfer or deal in any government trophy shall be guilty of an offence. . . . and shall be liable to a fine of K10, 000.00 and to imprisonment for a term of 5 years and in any case the fine shall not be less than the value of the specimen involved in commission of the offence.⁹⁰

The court weighed the opposing views, and placed high importance on the events that transpired during the arrest, including when the defendant incited her neighbors to violently attack the

82. See National Parks and Wildlife Act, *supra* note 78 (increasing fines for multiple wildlife trafficking crimes); see *infra* notes 95-100. (discussing Malawian case where man was found guilty of wildlife trafficking, but his sentence was vacated due to his inability to pay fine).

83. *Republic v. Akimu*, Malawi High Ct. 96 (Dec. 29, 2003) (discussing case where woman trafficked in ivory and was given tougher sentence).

84. *Id.* (describing events that lead to arrest).

85. *Id.* (describing how officers made arrest of Akimu).

86. *Id.* (describing violence during arrest).

87. *Id.* (describing holding of lower court).

88. See *Akimu*, *supra* note 83 (stating that low sentence raised concern and is subject of this review).

89. *Id.* (describing concerns of the Department of National Parks and Wildlife).

90. *Id.* (reciting relevant section of the National Parks and Wildlife Act of 1992). Fine for possession of and selling of ivory under the amended act is now two million Kwacha and prison sentence of up to four years. See National Parks and Wildlife (Amendment) Act, *supra* note 78.

wildlife officials.⁹¹ The judges were also unmoved by the argument that the defendant was a single mother with children to care for and her imprisonment would cause undue hardship; finding that she should have had them in mind when she committed the offense.⁹² Ultimately, the court upheld the fine and gave Akimu a one year prison sentence.⁹³ Media pressure and fears of a poor image also influenced the court to impose a higher sentence.⁹⁴

In *Republic v. Namputo*,⁹⁵ a man (Isaac Namputo) was charged with being in unlawful possession of ivory in violation of the National Parks and Wildlife Act and was given the maximum fine of 100,000 Kwacha (about 133 USD).⁹⁶ Having been unable to pay the fine, Namputo was imprisoned for a sentence of one year.⁹⁷ The court found the fine excessive because the lower court did not take into account Namputo's ability to pay the fine and it was his first offense.⁹⁸ The sentence was vacated and a new sentence was to be decided based on the defendant's ability to pay.⁹⁹ This type of sentence reduction based on ability to pay will only encourage the poor to poach as the consequences will be almost nonexistent.¹⁰⁰

2. *Wildlife Management in Malawi*

Malawi is one of the poorest nations in Africa with a high dependence on foreign aid.¹⁰¹ According to the UK Business Insider, Malawi is the sixth poorest country in the world with a GDP per capita of only \$1,132.¹⁰² One of the primary wildlife aid groups

91. *Akimu*, *supra* note 83 (noting defendant was well connected to illegal trafficking rings; finding this major threat to ecosystem; and stating that punishment must be high to avoid violence).

92. *Id.* (finding domestic matters irrelevant during sentencing).

93. *Id.* (ruling of the court was to impose prison sentence).

94. *Id.* (noting high media coverage and public concerns over international interests in environmental conservation).

95. *Republic v. Namputo*, Malawi High Ct. 78 (Jun. 21, 2007) (describing case in which man was caught in unlawful possession of ivory and was sent to jail when unable to pay fine).

96. *Id.* (describing procedural history of case).

97. *Id.* (discussing how defendant ended up incarcerated for possessing illegal ivory).

98. *Id.* (discussing rationale for overruling jail sentence).

99. *Id.* (discussing standard for sentencing).

100. *See Namputo*, *supra* note 95 (vacating defendant's sentence due to his inability to pay fine which resulted in jail time).

101. *See Norimitsu Onishi, Poverty, Drought, and Felled Trees Imperil Malawi Water Supply*, THE NEW YORK TIMES (August 20, 2016) <https://www.nytimes.com/2016/08/21/world/africa/poverty-drought-malawi-water-supply.html> (describing poverty in Malawi and prevalence of foreign aid groups and workers).

102. Barbara Tasch, *The 30 Poorest Countries in the World*, BUSINESS INSIDER (March 7, 2017) <http://uk.businessinsider.com/the-25-poorest-countries-in-the->

operating in Malawi is a conservation nonprofit known as “African Parks.”¹⁰³ African Parks is responsible for much of the wildlife conservation efforts (specifically involving elephants) in Malawi.¹⁰⁴ The conservation group entered in to a public-private partnership with the government of Malawi to take over management of a few national parks, including Majete National Park and Liwonde National Park.¹⁰⁵ Before African Parks took over management of Majete in 2003, most of the endemic species were completely gone and locals were cutting trees for charcoal production.¹⁰⁶ One ranger in Majete noted a marked improvement in the state of the park since African Parks took over management fifteen years ago.¹⁰⁷

African Parks took over management of Liwonde National Park more recently back in 2015.¹⁰⁸ Human wildlife conflicts combined with serious poaching eliminated the elephant population in the park.¹⁰⁹ African Parks relocated 400 elephants into Liwonde and decided to combat human wildlife conflict and poaching by building a fence and posting guards; efforts that have seemed to work as the elephant population in Liwonde is now over 800.¹¹⁰ After taking over management of Liwonde, African Parks and rangers removed over 23,000 snares set by poachers.¹¹¹ Now that Liwonde’s elephant population has recovered, conservationists are

world-2017-3?IR=T/#30-senegal-gdp-per-capita-2578-2102-1 (listing and describing thirty poorest nations in world).

103. See David McKenzie and Brent Swails, *The Big Move*, CNN WORLD (June 28, 2017) <https://www.cnn.com/2017/06/29/africa/malawi-elephants-rehomed-conservation/index.html> (describing African Parks’ conservation efforts in Malawi).

104. *Id.* (describing major effort to relocate 500 elephants in effort to conserve elephants in Malawi).

105. See *Boost for Malawi’s Wildlife: African Parks Takes Over Liwonde National Park and Nkhotakota Wildlife Reserve*, MALAWI TOURISM (July 24, 2015) <http://www.malawitourism.com/pages/news/index.asp?NewsID=611> (describing partnership between African Parks and Malawian government and subsequent impacts on national parks).

106. See *Majete National Park: Overview*, AFRICAN PARKS, <https://www.africanparks.org/the-parks/majete> (last visited Dec. 19, 2018) (describing state of Majete National Park before African Parks took over management).

107. Interview with Osmund, Game Ranger, Majete National Park, in Majete, Malawi (June 2018) (discussing how park has changed over his long time working in Majete).

108. See McKenzie and Swails, *supra* note 103 (discussing African Parks’ conservation efforts in Liwonde).

109. *Id.* (describing what happened before African Parks took over management of Liwonde).

110. *Id.* (describing efforts to relocate hundreds of elephants in to Liwonde).

111. *Id.* (describing state of park when African Parks took over management).

moving some of the elephants to other parks in Malawi that have dwindling populations such as Nkhotakota park.¹¹²

3. *Local Attitudes Toward Wildlife in Malawi*

One of the greatest obstacles to conservation, especially conservation of elephants who have high economic value by way of their ivory, is that Malawi is an extremely poor country.¹¹³ When faced with the choice of killing an elephant for ivory and not being able to feed their families, most Malawians would choose to kill elephants.¹¹⁴ According to Monica Namonde, a law student at the University of Malawi, many Malawians see wildlife more as a source of income or food.¹¹⁵ Many Malawians also question “why animals have to be more protected than people.”¹¹⁶

Also, Malawians are systemically excluded from enjoyment of wildlife resources due to high park fees.¹¹⁷ These fees are often more than many Malawians make in a month, making it impossible for locals to enjoy their own natural resources.¹¹⁸ Smith Chaoneka, a fourth year law student at the University of Malawi, stated that many locals view wildlife as a source of wealth (in the form of ivory) and place less value on wildlife in terms of tourism.¹¹⁹ Chaoneka also found that due to his environmental education he now places more value on wildlife and thinks that “wildlife [has] a right to exist in [its] own right.”¹²⁰

112. *Id.* (discussing success of African Parks’ conservation efforts in Liwonde).

113. *See* Banda, *supra* note 64 (discussing challenges of poverty in Malawi).

114. *Id.* (discussing poverty in Malawi and local attitudes toward wildlife).

115. Interview with Monica Namonde, Environmental Law Clinic Student, University of Malawi Chancellor College, in Zomba, Malawi (July 2018) (describing local attitudes toward wildlife in Malawi).

116. *Id.* (describing how Malawians feel protections of wildlife are misplaced when many people are suffering from poverty).

117. *See* Banda, *supra* note 64 (discussing how many Malawians cannot afford park fees that cost as much or more than monthly income).

118. *Id.* (discussing how high park fees exclude Malawians from enjoying their own environment).

119. Interview with Smith Chaoneka, Environmental Law Clinic Student, University of Malawi Chancellor College, in Zomba, Malawi (July 2018) (discussing his impression of local attitudes toward wildlife in Malawi).

120. *Id.* (describing how his own views have changed after being in law school).

B. Zambia

Zambia's controlling wildlife law is the Zambia Wildlife Act of 2015.¹²¹ This Wildlife Act makes several provisions for protected species and hunting.¹²² According to the Wildlife Act of 2015, any hunting of listed protected species absent a license is prohibited.¹²³ The Wildlife Act itself does not specify which animals are protected, and which may be hunted with the possession of a license.¹²⁴ The Minister of Tourism and Arts determines the status of species as protected or game species pursuant to a statutory order.¹²⁵ In 2017, eighty elephants were killed as trophies in Zambia.¹²⁶ This number is likely to rise due to the reversal of the trophy ban in the United States in March 2018.¹²⁷

The Great Elephant Census found that the Southern portion of Zambia is being particularly hard hit by poaching with elephant populations down a staggering ninety-five percent.¹²⁸ The Sioma Ngwezi park has been especially hard hit according to the census data.¹²⁹ It was found during the census that eighty-five percent of the elephants found in the park were already dead, as the census counts both live and dead elephants.¹³⁰ Poachers in this area hunt elephants without any recourse due to the remoteness of the area.¹³¹ These poachers are also able to easily escape law enforcement by crossing into either Botswana, Zimbabwe, or Angola know-

121. The Zambia Wildlife Act No. 14 (2015) (noting as its purpose to "wind up affairs of Zambia Wildlife Authority").

122. *Id.* (stating as its purpose to conserve ecosystems and biodiversity but allowing in section VIII for licenses and permits to hunt wild animals).

123. *Id.* (noting in section VIII that any person hunting without permit commits offence).

124. *Id.* (noting in section VIII that license is required to hunt wild animals but not specifying any species restrictions).

125. *Id.* (stating in section VIII various duties of Minister).

126. See UN Environment, *supra* note 6 (listing quotas of elephants tusks taken from many African Nations).

127. See *infra* notes 278-307 (discussing turbulent times in America for African elephant conservation including reversal of trophy ban).

128. See Adam Cruise, *Elephants Wiped Out on Alarming Scale in Southern Africa*, NATIONAL GEOGRAPHIC (April 6, 2016) <https://news.nationalgeographic.com/2016/04/160406-elephants-wiped-out-alarming-scale-Southern-Africa/> (discussing how Sioma Ngwezi park in Southern Zambia has become hot spot for elephant poaching).

129. *Id.* (stating Great Elephant Census counts live and dead elephants to determine carcass ratio).

130. *Id.* (noting census found majority of elephants in Sioma Ngwezi have been killed by poachers).

131. *Id.* (noting poachers are seldom caught due to little human activity in area).

ing that Zambian police will not cross borders to chase them.¹³² A more coordinated law enforcement effort is needed to curb poaching in Southern African nations.¹³³

C. Mozambique

Another border country to Malawi, Mozambique, has a turbulent history.¹³⁴ Mozambique is home to one of Africa's most breathtaking national parks, Gorongosa.¹³⁵ Between 1977 and 1992, the country was ravaged by a deadly civil war.¹³⁶ This civil war, in conjunction with the fight for independence from Portugal in the 1970s, led to the near total destruction of wildlife populations in Mozambique.¹³⁷ Nearly ninety percent of the wildlife in Gorongosa were killed in the conflict.¹³⁸ Between 1946 and 2010, war has impacted seventy percent of all national parks in Africa.¹³⁹ Elephants are often killed in conflicts for their meat and their ivory; the ivory being used to further fund the conflict.¹⁴⁰ Gorongosa park is now returning to its former glory thanks to a partnership between the Mozambique government and the nonprofit Carr Foundation.¹⁴¹

In July of 1999, the Mozambique government passed Law No. 10, the controlling wildlife protection legislation.¹⁴² Decree No. 12

132. *Id.* (stating poachers have "easy escape route" because poachers could enter one of four different countries with law enforcement not chasing poachers across borders).

133. *See* Cruise, *supra* note 128 (noting law enforcement will not cross country borders to arrest poachers).

134. For a discussion on Mozambique's civil war, *see infra* note 135.

135. *See* Morgan Kelly, *The Ecological Costs of War in Africa*, PRINCETON ENVIRONMENTAL INSTITUTE (January 10, 2018) <https://www.princeton.edu/news/2018/01/10/ecological-costs-war-africa> (describing ecological research done in Gorongosa).

136. *See* *Elephants of Gorongosa*, PBS.ORG <http://www.pbs.org/gorongosa/gorongosa-national-park/elephants/> (last visited Nov. 26, 2018) (discussing how most elephants in Gorongosa were killed during civil war).

137. *See* Kelly, *supra* note 135 (stating that civil war in Mozambique led to fighting in park and much dependence on wildlife for meat and income).

138. *Id.* (noting that civil war and subsequent hunting destroyed elephant population in Gorongosa).

139. *Id.* (finding most national parks in Africa have been influenced by conflict).

140. *Id.* (noting elephants were killed to support war).

141. *See* Rob Morley and Ian Convery, *Restoring Gorongosa: Some Personal Reflections*, DISPLACED HERITAGE: RESPONSES TO DISASTER, TRAUMA, AND LOSS, 129-140 (Dec. 2014) (discussing war in Mozambique and noting how Carr Foundation helped restore Gorongosa).

142. *See* Eduardo Soares, *Wildlife Trafficking and Poaching: Mozambique*, LAW LIBRARY OF CONGRESS (Dec. 2012) <https://www.loc.gov/law/help/wildlife-poaching/mozambique.php> (discussing Law no. 10 and legal framework of wildlife preservation in Mozambique).

and the Penal Code are meant to enforce this wildlife law in the country.¹⁴³ The law allows for hunting and sport hunting with the required licensing.¹⁴⁴ The government of Mozambique is rife with corruption and scandal, calling into question the efficacy of its laws.¹⁴⁵ Elephant poaching is still a major concern for Mozambique's elephant population; a concern the government is ill equipped to handle.¹⁴⁶

D. Tanzania

Tanzania lies on the Northern border of Malawi and is likewise home to a substantial African elephant population.¹⁴⁷ Illegal elephant poaching is the driving factor in declining elephant populations in Tanzania.¹⁴⁸ Poaching has become a major issue due to the high demand for ivory products, poverty, unemployment, and corruption in source countries.¹⁴⁹ Poaching has led to serious declines in the elephant population in Tanzania.¹⁵⁰ In 2013, there were 50,500 elephants in Tanzania, but in 2015 that number dropped to 43,521.¹⁵¹

Another major issue concerning wildlife trafficking in Tanzania, is the difference in laws between mainland Tanzania and Zanzibar.¹⁵² The laws of Zanzibar only protect and regulate the

143. *Id.* (explaining legal framework for wildlife protection in Mozambique).

144. *Id.* (noting that it is violation to hunt without license).

145. *See Mozambique is floundering amid corruption and conflict*, THE ECONOMIST (Mar. 18, 2016) <https://www.economist.com/news/middle-east-and-africa/21695203-scandals-and-setbacks-gas-and-fishing-industries-darken-mood-mozambique> (describing corruption in Mozambique).

146. *See Poachers killed half Mozambique's elephants in five years*, THE GUARDIAN (May 26, 2015) <https://www.theguardian.com/environment/2015/may/26/poachers-killed-half-mozambiques-elephants-in-five-years> (discussing government survey that found 48% decline in elephant population in Mozambique due to poaching in just five years).

147. *See Ramsey, supra* note 22 (noting Tanzania has over 40,000 elephants).

148. *Id.* (discussing seriousness of elephant poaching in Tanzania and East Africa).

149. *Id.* (discussing why elephant poaching and illegal wildlife trade are one of top wildlife crimes around world).

150. *Id.* (noting that elephant population in Tanzania dropped by sixty percent by 2015 from 2009 levels).

151. *Id.* (discussing how elephant population has plummeted in recent years in Tanzania).

152. *See Roz Price, National and regional legal frameworks to control the illegal wildlife trade in sub Saharan Africa*, INSTITUTE OF DEVELOPMENT STUDIES (Jul. 4, 2014) <http://www.gsdrc.org/wp-content/uploads/2017/07/147-Enforcement-and-Regulation-IWT.pdf> (noting that mainland Tanzania and Zanzibar are separate states and environmental legislation is left to respective state).

trade in native species, thus excluding the African elephant.¹⁵³ Consequently, the smuggling of elephant and other wildlife products through Zanzibar has become a serious problem in Tanzania.¹⁵⁴ The disparity between the laws of mainland Tanzania and Zanzibar have created a legislative loophole that traffickers have been exploiting.¹⁵⁵ This again highlights the need for coordinated wildlife laws between countries in order to avoid this kind of exploitation of the weaker legislation.¹⁵⁶

The Wildlife Conservation Act of 2009 is the primary law regulating wildlife in Tanzania.¹⁵⁷ One objective of the Wildlife Conservation Act of 2009 is to “foster sustainable and legal use of wildlife resources and take appropriate measures to prevent illegal use of wildlife.”¹⁵⁸ The Act also lists as a goal to participate in international agreements and “co-operate with neighboring countries in the conservation of trans-boundary ecosystems.”¹⁵⁹ While the Act lays out important goals for conservation, it lacks power, especially because the judiciary is weak.¹⁶⁰

The Wildlife Conservation Act explicitly permits licensed trophy hunting.¹⁶¹ In 2017, Tanzania had a quota of 100 elephant tusks from fifty elephants hunted as trophies.¹⁶² The legality of trophy hunting in Tanzania has been shown to have effects on trans-boundary elephant populations.¹⁶³ In 1973, Kenya banned trophy

153. *Id.* (noting law of Zanzibar only protects native species to Zanzibar and therefore not many listed CITES species).

154. *Id.* (noting difficulty of legislative loophole and discussing smuggling case through Zanzibar).

155. *Id.* (noting need to address difference in wildlife protection laws between mainland Tanzania and Zanzibar).

156. *Id.* (noting difficulties of legislative loophole and need to coordinate laws).

157. The Wildlife Conservation Act (Act No. 5/2009) (Tanz) (noting purpose of Act is to replace previous Wildlife Conservation Act and to protect and conserve wildlife).

158. *Id.* (stating under Part II objectives of Wildlife Conservation Act).

159. *Id.* (discussing objectives of Act that promote conservation of species globally).

160. *See* Price, *supra* note 153 (discussing lack of training of judiciary on wildlife crimes).

161. Wildlife Conservation Act, *supra* note 158 (discussing in Part IV requirements to obtain game hunting license).

162. *See* UN Environment, *supra* note 6 (noting amount of elephant tusks taken from Tanzania in 2017).

163. *See* Virginia Morell, *What Trophy Hunting Does to the Elephants it Leaves Behind*, THE ATLANTIC (Nov. 18, 2017) <https://www.theatlantic.com/science/archive/2017/11/elephant-trophy-hunting-psychology-emotions/546293/> (describing how elephant behavior is affected by uncoordinated wildlife laws).

hunting but the practice continued in Tanzania.¹⁶⁴ This disparity in trophy hunting laws created issues for the elephant population of Amboseli National Park in Kenya.¹⁶⁵ The elephants became complacent due to their safety on the Kenyan side of the border and became easy targets on the Tanzanian side of the border.¹⁶⁶

Enforcement of wildlife laws in Tanzania is a chronic problem both for lawyers and the judiciary.¹⁶⁷ Most of the judiciary has little to no training concerning wildlife crime litigation.¹⁶⁸ Persistent delays in the judicial system in Tanzania have stifled wildlife crime prosecutions.¹⁶⁹ Currently, there is a case concerning the smuggling of ivory through Zanzibar that has not yet gone into the hearings stage after three years.¹⁷⁰ A big challenge to the enforcement of wildlife laws and subsequent litigation in Tanzania is governmental corruption.¹⁷¹ Even with wildlife laws on the books and penalties for those who violate them, these laws will be ineffective with the slow pace of the judiciary and governmental corruption.¹⁷²

Tanzania has made some progress with the enforcement of wildlife trafficking laws.¹⁷³ The Tanzania Wildlife Authority was established in 2014 and regulates wildlife outside of national parks.¹⁷⁴ Border control started using dogs to sniff out illegal ivory and other wildlife products.¹⁷⁵ This began in 2016 and has led to the apprehension of twenty-six individuals smuggling wildlife products.¹⁷⁶

164. *Id.* (discussing differing wildlife laws in Tanzania and Kenya).

165. *Id.* (describing how elephants become vulnerable when migrating across country borders when countries have different levels of protection for wildlife).

166. *Id.* (stating it was observed that elephants didn't run from hunters in Tanzania because they didn't expect to be shot by tourists).

167. *See* Price, *supra* note 153 (discussing lack of training of judiciary on wildlife trafficking issues).

168. *Id.* (describing study conducted by TRAFFIC finding judiciary has little knowledge of wildlife crimes).

169. *Id.* (noting there are often delays and frequent adjournments that lead to derailing of wildlife crime cases even with great evidence).

170. *Id.* (discussing delays in ivory smuggling case through Zanzibar in its third year).

171. *Id.* (noting corruption is serious issue in Tanzania).

172. *See* Price, *supra* note 153 (finding corruption to be rampant in Tanzania).

173. *Id.* (discussing recent investments for enforcement of wildlife crimes in Tanzania).

174. *Id.* (describing Tanzania Wildlife Authority).

175. *Id.* (describing canine units deployed at borders).

176. *Id.* (noting success of canine units at finding illegal wildlife products).

E. Regional Agreements

Few regional agreements exist among Southern African countries that attempt to coordinate laws and goals in order to curb the international illegal wildlife trade.¹⁷⁷ These agreements include the African Elephant Action Plan, the Arusha Declaration on Regional Conservation and Combating Wildlife/Environmental Crime (November 2014), and the Southern African Development Countries Protocol of 2003.¹⁷⁸ These regional agreements hoped to coordinate efforts to combat the illegal wildlife trade, but they fell short as evidenced by the differing national strategies and burgeoning illegal market.¹⁷⁹

The range states of the elephant considered and adopted the African Elephant Action Plan in 2010.¹⁸⁰ The eight main objectives of the action plan include: (1) reduced illegal killing of elephants and illegal trade in elephant products, (2) maintenance of elephant habitats and restoration of connectivity, (3) reduced human-elephant conflict, (4) increased awareness of elephant conservation and management of key stakeholders that include policy makers, local communities among other interest groups, (5) strengthened range states knowledge of African elephant management, (6) strengthened cooperation and understanding among range states, (7) improved local community cooperation and collaboration on African elephant conservation, and (8) effective implementation of the African Elephant Action Plan.¹⁸¹ The second goal of the Action Plan (increased connectivity) cannot be achieved through African Parks' management style of completely fencing its parks.¹⁸²

The Arusha Declaration on Regional Conservation and Combating Wildlife /Environmental Crime was signed in 2014 by Malawi, Tanzania, Mozambique, and Zambia among others.¹⁸³ The

177. See Price *supra* note 153 (discussing regional frameworks to reduce wildlife crimes).

178. *Id.* (listing and describing various regional agreements to address wildlife crimes).

179. *Id.* (describing regional agreements and their goals).

180. See Conservation on International Trade in Endangered Species of Wild Fauna and Flora, *African Elephant Action Plan*, Mar. 13-25 2010 (describing purpose of agreement and parties to agreement).

181. *Id.* (listing objectives of this agreement between African elephant range states).

182. *Id.* (stating objective two of Act is "maintenance of elephant habitats and restoration of connectivity").

183. See Price, *supra* note 153 (discussing Arusha Declaration).

signatories to the agreement promised to take measures to combat the illegal wildlife trade.¹⁸⁴ Some of the measures include

[c]ollaborating in combating illegal off-take; [d]eveloping protocols for the joint training and patrolling of wildlife and environmental law enforcement agencies where appropriate; and [c]oordinating the harmonisation of wildlife and environmental crime enforcement and penalties, with particular reference to elevating certain wildlife and environmental crimes to the level of serious crimes.¹⁸⁵

The SADC Protocol contains similar goals of harmonizing wildlife trafficking laws in the region.¹⁸⁶ Malawi, Mozambique, Tanzania, and Zambia are all also signed on to the SADC Protocol.¹⁸⁷ When signing the protocol, “Member States agree to policy, administrative, and legal measures for promoting conservation and sustainable wildlife practices within their jurisdictions.”¹⁸⁸ “The Protocol advocates Member States harmonise legal instruments for wildlife, establish management programmes for wildlife, and create a regional database of wildlife status and management.”¹⁸⁹ Under the SADC Protocol, members created a Technical Committee and a Wildlife Sector Coordinating Committee were created that were meant to improve execution of the agreement.¹⁹⁰ They also made some cross-border control agreements in accordance to the agreement along with a few Transfrontier Conservation Areas.¹⁹¹ The successful implementation of these agreements remains a major issue and is key to protecting transboundary animals such as the African elephant.¹⁹² Given these regional agreements, the knowledge

184. *Id.* (noting that South African Development Community and East African Community signed agreement to improve cross border collaboration to reduce wildlife crimes).

185. *Id.* (describing measures taken in agreement to protect wildlife).

186. *Id.* (describing South African Development Community Protocol of 2013 aimed at harmonizing wildlife legislation in Southern Africa).

187. *Id.* (discussing signatories to SADC Protocol).

188. *See* Price, *supra* note 153 (describing obligations of parties to SADC Protocol).

189. *Id.* (describing suggestions to member states set out in SADC Protocol to meet goals of agreement).

190. *Id.* (discussing mechanisms meant to enforce SADC Protocol).

191. *Id.* (discussing conservation areas created across Mozambique and South African borders and South Africa and Zambia; meant to conserve wildlife across borders).

192. *See* Price, *supra* note 153 (noting regional agreements are underutilized).

of the problem (need for coordinated wildlife trafficking laws) exists but execution remains a serious issue.¹⁹³

V. CITES AND INTERNATIONAL WILDLIFE TRAFFICKING LAWS OF MAJOR IVORY MARKETS

A. CITES: Convention on International Trade of Endangered Species

CITES controls the international wildlife trade that threatens the survival of several endangered species.¹⁹⁴ CITES includes three levels of protection: Appendix I, Appendix II and Appendix III.¹⁹⁵ Appendix II listing regulates trade of species through a permit system while Appendix I listing bans all trade of species internationally.¹⁹⁶ During the ninth meeting of the parties, participants amended the listing criteria so that the precautionary principle is followed when deciding how to list a species.¹⁹⁷ For a species to be listed under Appendix I, the species must be currently in danger of becoming extinct and be threatened due to international trade.¹⁹⁸ To qualify for Appendix II listing under CITES a species must be likely to require Appendix I listing if international trade is not regulated.¹⁹⁹ Appendix III listing is available for any country that requires assistance in controlling the trade of a species and allows for cooperation in upholding domestic trade laws.²⁰⁰ Once a species has been listed under CITES it is up to individual countries and border control to actually enforce the agreement.²⁰¹ Enforcement of CITES continues to be a major challenge as the agreement must rely on the competence of international governments and border control for implementation.²⁰² CITES made steps to improve enforcement, most notably by directing the Secretariat “to pursue closer international liaison between the Convention’s institutions,

193. *Id.* (describing multiple regional agreements between African countries to combat wildlife crimes).

194. See PHILIPPE SANDS & JAQUELINE PEEL, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* (3d ed. 2012). (discussing CITES framework to protect endangered species).

195. *Id.* (describing protections afforded endangered species under CITES).

196. See Lindsay, *supra* note 20 (discussing differences in protection level between Appendix I and Appendix II listing).

197. See Sands & Peel *supra* note 195 (Discussing CITES amendments).

198. *Id.* (describing listing criteria for Appendix I protection under CITES).

199. *Id.* (describing Appendix II listing criteria).

200. *Id.* (describing low level of protection granted to Appendix III species).

201. *Id.* (discussing enforcement of CITES).

202. See Sands & Peel, *supra* note 195 (describing issues with enforcement of CITES).

national enforcement agencies and existing intergovernmental bodies, particularly the World Customs Organization and ICPO-Interpol.”²⁰³

In 1989, supporters tried to list the African elephant under Appendix I, but some opponents to this listing stated that the elephant did not require such a listing and it would be too protectionist.²⁰⁴ Some African countries disagree over the degree of protection to afford elephants under CITES.²⁰⁵ Four nations in Africa list the elephant as an Appendix II species while thirty-three list the elephant as an Appendix I species.²⁰⁶ Thus, even the protection offered by CITES is not uniform throughout the African elephant’s range.²⁰⁷

The “Conference of the Parties” (CoP) meets once every two years in order to modify the agreement.²⁰⁸ The CITES 15th Conference of the Parties (CoP15), held in Qatar in March 2010 resulted in the creation of the African Elephant Action Plan by the “Range States” of the African Elephant.²⁰⁹ Priority 1 of the plan focuses on, “reduc[ing] illegal killing of elephants and illegal trade in elephant products” and strategy 1.2 in support of this priority is to “[h]armonize national policies and laws relevant to conservation and management of African elephants within and across range States where possible.”²¹⁰ Priority Objective 6 similarly states the goal to, “strengthen cooperation and understanding among range States.”²¹¹ The thirty-eight parties to this agreement including Malawi, Zambia, Mozambique, and Tanzania have recognized the need for more uniform wildlife laws but these goals have not been met.²¹²

203. *Id.* (discussing ways CITES has tried to improve enforcement).

204. *Id.* (describing history of African elephant protection under CITES).

205. *See* Lindsay, *supra* note 20 (noting that some African elephant range states list elephant as Appendix II species while others list it as Appendix I species).

206. *Id.* (discussing protection afforded elephant under CITES).

207. *Id.* (discussing difference in protection afforded Appendix I species versus Appendix II species).

208. *See* Sands & Peel, *supra* note 195 (discussing procedures to update CITES agreement).

209. *See* Lindsay, *supra* note 20 (discussing international agreements to protect elephant).

210. *See* CITES, *supra* note 181 (listing priorities followed by strategies for achieving priorities).

211. *Id.* (listing priority objectives under action plan).

212. *Id.* (noting that Malawi, Mozambique, Tanzania, and Zambia are signatories to action plan).

B. The United States

1. *Ivory Market and Trafficking in the United States*

The United States (U.S.) is one of the two largest markets for ivory in the world along with China.²¹³ In 2016, the Fish and Wildlife Service made use of a rule making procedure under the Endangered Species Act to implement a ban on interstate trade of ivory and ivory products.²¹⁴ The ban contains exemptions to this, however, for antiques and products with a small amount of ivory.²¹⁵

The federal government banned the interstate sale of ivory, but this does not restrict the sale within states themselves.²¹⁶ Only California, Hawaii, Nevada, New Jersey, New York, Oregon, and Washington have banned the sale of ivory within their states.²¹⁷ Without in-state bans on ivory, once in the state, traders can buy and sell ivory legally.²¹⁸ After the bans took effect in New York and California—two of the largest U.S. markets for ivory—the markets simply moved.²¹⁹ The District of Columbia is now a major market for ivory in the U.S.²²⁰ Like in other countries, the legal trade of “antique” ivory can be used as a cover for illegal ivory.²²¹ Eliminating the legal trade throughout all fifty states will remove any legal cover for illegal traffickers in the U.S.²²²

213. See Colin Dwyer, *China’s Ban on its Domestic Ivory Trade Takes Effect*, NPR.ORG (Jan. 1, 2018) <https://www.npr.org/sections/thetwo-way/2018/01/01/574952304/chinas-ban-on-its-domestic-ivory-trade-takes-effect> (noting China and United States have largest ivory markets and discussing their respective measures to address issue).

214. See Fish and Wildlife Service, *Administration Takes Bold Step for African Elephant Conservation: Completes Near-Total Elephant Ivory Ban to Cut Off Opportunities for Traffickers* FISH AND WILDLIFE SERVICE PRESS RELEASE (June 2, 2016) https://www.fws.gov/news/ShowNews.cfm?ref=administration-takes-bold-step-for-african-elf-phant-conservation%3A-&_ID=35686#.V1BhTjFIG2Q.twitter (noting Obama administration’s commitment to ending illegal ivory trade).

215. *Id.* (discussing new ban on ivory trade among states).

216. *Id.* (noting ivory sales have been banned between states but says nothing about within single states).

217. See Rachael Bale, *Why D.C. is the new hub for U.S. ivory sales*, NATIONAL GEOGRAPHIC (July 27, 2018) <https://news.nationalgeographic.com/2017/07/wild-life-watch-washington-elf-phant-ivory-for-sale-united-states/> (listing states with in state ivory bans).

218. *Id.* (noting federal government has no control over instate sales of ivory).

219. *Id.* (noting rise in ivory sales in D.C. after New York and California impose stricter bans).

220. *Id.* (discussing rise in ivory sales in Washington D.C. and noting lack of ban on ivory sales in D.C. besides federal restrictions).

221. *Id.* (discussing legal antique ivory market still in place).

222. See Bale, *supra* note 218 (noting legal antique market in U.S. is often used to smuggle illegal ivory).

Many states have considered ivory ban bills, but face strong opposition.²²³ During the 2017 legislative session in Maryland, politicians proposed legislation to ban in state sale of ivory, but the law faced much disfavor and did not even make it to a floor vote.²²⁴ Opponents showed concern over not being able to trade antique ivory goods.²²⁵ If the trade of ivory is to truly stop, states must start implementing bans.²²⁶

2. *The Lacey Act*

a. *Introduction*

The Lacey Act remains the primary legal mechanism through which the U.S. may prosecute individuals for violating wildlife laws of other countries.²²⁷ Congress passed the Lacey Act in 1900 with several amendments added in 1981 and 2008.²²⁸ Section 3372 of 16 U.S.C.A(2)(a) states that it is prohibited to “import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce—any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law. . . .”²²⁹ The 2008 amendment further defined the term “plant” in order to protect endangered flora as well as fauna.²³⁰

The Lacey Act makes it a crime in the United States to violate the law of a foreign country.²³¹ For example, the courts ruled that the defendants in *United States v. McNab* were guilty of violating the Lacey Act when transporting Caribbean spiny lobsters to Alabama in violation of Honduran law.²³² In order to violate the Lacey Act,

223. Author worked for the Humane Society in Maryland during 2017 and lobbied for humane laws. (observing opposition to ivory ban bill during 2017 legislative session in Maryland).

224. *Id.* (observing and lobbying for ivory ban bill during 2017 legislative session in Maryland).

225. *Id.* (observing representatives cite concern over antique ivory sales).

226. See Bale, *supra* note 218 (discussing importance of state level ivory bans).

227. See 16 U.S.C. §§ 3371–3378. (prohibiting import, export, or trade in wildlife taken in violation of any domestic or international wildlife law).

228. See Fish and Wildlife Service, *Lacey Act*, FISH AND WILDLIFE SERVICE INTERNATIONAL AFFAIRS <https://www.fws.gov/international/laws-treaties-agreements/us-conservation-laws/lacey-act.html>. (discussing history of Lacey Act).

229. See *supra* note 228, § 3372 A(2)(a) (noting it is violation to trade in wildlife species contrary to international law).

230. See Stephanie Eberhardt, Comment, *The Lacey Act Amendments and United States’ Policing of International Trade*, 35 Hous. J. Int’l L. 397 (2013) (discussing 2008 amendment to Lacey Act).

231. *Id.* (noting purpose of Lacey Act).

232. See *U.S. v. McNab*, 324 F.3d 1266 (11th Cir. 2003) (describing Lacey Act offense committed by defendant).

another law or regulation must have been violated first.²³³ The Lacey Act thus seeks to punish American citizens for crimes committed in other states or countries in which the defendant otherwise would not have been held accountable.²³⁴

b. Conspiracy charges

Not only can individuals be charged with violating foreign laws under the Lacey Act, but they also can be charged with conspiracy to violate such laws.²³⁵ According to the Model Penal Code § 5.03, a conspiracy charge requires an agreement to commit a crime between two or more people.²³⁶ Therefore, the only act requirement is an agreement.²³⁷ Some jurisdictions as well as the MPC require an overt act requirement.²³⁸ An overt act is defined as an act “in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired.”²³⁹ Therefore, in order to be charged with a conspiracy crime under the Lacey Act, an individual must have taken a step-in furtherance of the goal of violating a foreign law or regulation.²⁴⁰ Conspiracy charges are an essential deterrent to foreign wildlife law violations as they allow prosecution before the law is actually violated.²⁴¹

c. Predicate laws and regulations

The courts of the United States enforcing the Lacey Act have found that the predicate laws must:²⁴²

1. Be valid laws or regulations,
2. Be published so as to give fair warning of illegality (does not violate the rule of lenity),
3. Be valid law when the crime was committed.

233. *See supra* note 228, § 3372 (noting offense under Lacey is to import, export wildlife in violation of any law).

234. *Id.* (imposing liability for committing wildlife offense under foreign law).

235. *See* United States v. Molt, 599 F.2d 1217 (3d Cir. 1979) (defendant charged with conspiracy to violate wildlife laws).

236. *See* Model Penal Code § 5.03 (stating definition of conspiracy).

237. *Id.* (noting conspiracy charge requires an “agreement” between people to commit a crime).

238. *Id.* (stating actual act is prerequisite for conspiracy charge).

239. *Id.* (stating definition of overt act requirement for conspiracy charge).

240. *Id.* (noting that defendant must take action in order to be charged with conspiracy).

241. *See* Model Penal Code, *supra* note 237 (noting only act required for conspiracy charge is agreement to violate law; not actual violation of predicate law).

242. *See infra* notes 244-254 (noting requirements of predicate offense for Lacey Act liability as evidenced in case law).

The Court in *U.S. v. Reeves* found the predicate law must be valid.²⁴³ Defendant Reeves violated his oystering permit in New Jersey and sold his oysters across state lines.²⁴⁴ The court found that the violation of the terms of the permit was not a violation of any defined law or regulation.²⁴⁵ Therefore, there was no predicate offense that subjected the defendant to prosecution under the Lacey Act.²⁴⁶ The “any foreign law” language of the Lacey Act was found to encompass regulations as well as statutes.²⁴⁷ In *US v. 594,464 Pounds of Salmon*, the Court found a violation of the Lacey Act had been committed when the defendant exported salmon without the permit required by regulations.²⁴⁸

Predicate laws for Lacey Act conviction must be published so as to give fair warning to the defendant.²⁴⁹ In *U.S. v. Cannon*, the Court found that predicate laws must be published, or the defendant have actual notice of the regulation in accordance with the federal Administrative Procedure Act.²⁵⁰ Finally, predicate laws must be valid at the time of the alleged offense.²⁵¹ The Ninth Circuit found in *McNab* that even though the Honduran government later repealed the law that McNab was charged with violating pursuant to his charges under the Lacey Act, he could still be held accountable since the laws were valid at the time of the offense.²⁵² The Court in *McNab* states, “[i]f the laws were valid in Honduras during the time period covered by the indictment, the defendants

243. See *U.S. v. Reeves*, 891 F.Supp.2d 690 (D.N.J. 2012) (finding violation of permit not to be adequate for Lacey Act liability).

244. *Id.* (discussing factual background of case and premise for Lacey Act charge).

245. *Id.* (finding permit violation to not be violation of law as defined in Lacey Act).

246. *Id.* (finding defendant did not violate any wildlife “law”).

247. See Trevor Krost, *The World’s Laws in American Justice: The Foreign Law Provisions of the 2008 Lacey Act Amendments*, 8 PITT. J. ENVTL. PUB. HEALTH L. 55 (2013) (discussing foreign law violations under Lacey Act and discussing *U.S. v. 594,464 Pounds of Salmon*, concerning violation of Chinese salmon regulation).

248. See *United States v. 594,464 Pounds of Salmon*, 871 F.2d 824 (9th Cir. 1989) (finding violation of permitting regulation to qualify as predicate law for Lacey Act charges).

249. See *United States v. Cannon*, 345 Fed.Appx. 301 (9th Cir. 2009) (finding that Lacey Act conviction requires showing of actual notice or publication of predicate wildlife law).

250. *Id.* (noting Administrative Procedures Act requires publication of statute or regulation or actual knowledge of regulation).

251. See *McNab*, *supra* note 233 (finding defendant liable under Lacey Act even though law is no longer valid because it was valid at time of offense).

252. *Id.* (discussing ruling of court).

violated the Lacey Act by importing the lobsters in violation of those laws.”²⁵³

d. Penalties

Those in violation of the Lacey Act are subject to both civil and criminal proceedings.²⁵⁴ The civil penalty for violation includes a fine that “shall not exceed the maximum provided for violation of said law, treaty, or regulation, or \$10,000, whichever is less.”²⁵⁵ Section 3373 of Title 16 of the U.S.C. states that anyone in violation of the act could receive a fine or up to five years imprisonment.²⁵⁶ Section 3374 also mandates forfeiture of illegally taken wildlife or plants.²⁵⁷ The forfeiture requirement under the Lacey Act is a strict liability requirement.²⁵⁸ Ignorance of the foreign law cannot provide a defense to the forfeiture requirement under the Lacey Act.²⁵⁹

A violation of the Lacey Act can be either a misdemeanor or a felony, depending on knowledge of illegality of the taking.²⁶⁰ The mens rea necessary for a felony conviction is knowledge and carries a fine of up to \$250,000 for individuals.²⁶¹

e. Scierter Requirements

The scienter requirement for a Lacey Act conviction is “knowledge.”²⁶² In order for a Lacey Act conviction to stand, the perpetrator must have had the knowledge at the time of the offense that their act or agreement to act was against the foreign law they are charged with violating.²⁶³

253. *Id.* (noting predicate wildlife law must be valid at time of offense for Lacey Act liability).

254. *See* Krost, *supra* note 248 (noting levels of liability under Lacey Act).

255. *See supra* note 228, § 3373 (describing civil penalties available under Lacey Act).

256. *Id.* (discussing criminal penalties under Lacey Act).

257. *See supra* note 228, § 3374 (describing forfeiture provision of Lacey Act).

258. *See* United States v. Fifty-Three (53) Eclectus Parrots, 685 F.2d 1131 (9th Cir. 1982) (noting during forfeiture proceeding under Lacey Act culpability is not considered).

259. *See* Krost, *supra* note 248 (discussing strict liability forfeiture component of Lacey Act).

260. *See* Eberhardt, *supra* note 231 (discussing penalties and sanctions available under Lacey Act).

261. *Id.* (noting felony conviction requires defendant to “knowingly” violate Lacey Act).

262. *Id.* (finding for Lacey Act conviction defendant must knowingly break wildlife law).

263. *Id.* (noting scienter requirement of Lacey Act).

f. International Cooperation

The Lacey Act is unique in that the predicate offense is often an offense under a foreign law.²⁶⁴ As a result, judges sitting in courts in the U.S. are not experts on international law that defendants in such cases are charged with violating.²⁶⁵ Many courts must seek the counsel and expertise of foreign governments to ensure accuracy when trying individuals for the crimes conducted in such foreign countries.²⁶⁶ In addition, courts have sought counsel from foreign jurisdictions in order to prosecute individuals under the Lacey Act including the court in *U.S. v. Molt* in which the court obtained legal advice from Fiji and Papa New Guinea.²⁶⁷ This ensures that the court properly understands and upholds the foreign law in question.

g. Conclusion

The United States is one of the major markets for illegal ivory along with China.²⁶⁸ The Lacey Act ensures that American citizens do not violate or conspire with others to violate wildlife laws in other countries.²⁶⁹ The conspiracy component to the Lacey Act is important because it holds Americans responsible for the illegal acts of others that supply Americans with illegal ivory or other wildlife products.²⁷⁰

Further, the Lacey Act underscores the importance that countries have their own robust wildlife protection laws, especially where these highly endangered and sought-after animals reside.²⁷¹ The laws of Eastern and Southern African countries are especially critical to the protection of the African elephant under the Lacey Act.²⁷² Therefore, in order to prevent Americans (or others in concert with Americans) from violating Malawi law in order to obtain

264. *Id.* (discussing foreign law component of Lacey Act).

265. *See Molt, supra* note 235 (noting court sought expertise on foreign law during Lacey Act case).

266. *Id.* (noting expert witness testifying to state of law in Fiji).

267. *Id.* (noting court used expert witnesses to testify about purpose and characteristics of foreign laws).

268. *See supra* notes 214-26 (noting United States has large illegal ivory market compounded by lack of intrastate ivory bans).

269. *See supra* notes 227-41 (discussing Lacey Act predicate laws and conspiracy charges).

270. *See supra* notes 235-41 (discussing conspiracy charges under Lacey Act).

271. *See supra* notes 242-53 (discussing culpability for violating foreign laws).

272. *See supra* notes 242-53 (discussing foreign law provision under Lacey Act); and see figure 1 (showing range states of African elephants).

ivory, Malawi must have strict anti-poaching laws.²⁷³ Due to the migratory nature of the African elephant, border countries must also have strict anti-poaching laws in order to protect Malawian elephants.²⁷⁴ For example, even if an elephant in Kasungu National Park in Western Malawi were adequately protected under Malawi law, this same Malawian elephant would face serious risk by crossing the man-made border into Zambia because the level of protection differs in Zambia.²⁷⁵ This further highlights the need for cooperation between nations concerning wildlife protections.²⁷⁶

3. *Big Game Hunting: Current Issues in the United States*

Big game hunting came to the forefront of the American conscience in 2015 with the slaying of Cecil the Lion in Zimbabwe.²⁷⁷ American hunter, Dr. Walter Palmer, lured the fabled lion out of a protected national park to kill the animal in unprotected territory.²⁷⁸ Charges were never brought against the American hunter by the Zimbabwean government because he had a permit, making the hunting of the lion technically legal in the country.²⁷⁹ Theo Bronkhorst, a local hunter, was charged, however, with conducting an illegal hunt for luring Cecil out of a protected area, but these charges were dropped.²⁸⁰ Reports state that Palmer paid over \$50,000 to hunt Cecil.²⁸¹ Dr. Palmer was forced to close his dental

273. *See supra* notes 242-53 (noting prosecution under Lacey Act requires violation of predicate state, federal, or foreign law).

274. *See supra* notes 178-93 (discussing regional agreements between African nations to protect elephants).

275. *See supra* notes 194-212 (describing differing levels of protection afforded under CITES).

276. *See supra* notes 178-94 (describing regional agreements to protect elephant); and *see supra* notes 46-56 (discussing transboundary nature of elephants).

277. *See* Katie Rogers, *American Hunter Killed Cecil, Beloved Lion Who Was Lured Out of His Sanctuary*, THE NEW YORK TIMES (July 28, 2015), <https://www.nytimes.com/2015/07/29/world/africa/american-hunter-is-accused-of-killing-cecil-a-beloved-lion-in-zimbabwe.html> (discussing public outcry after Cecil's death including thousands signing petition to Zimbabwean president asking for repercussions).

278. *Id.* (discussing controversy of illegal lion hunt in Zimbabwe).

279. *See* Kate Samuelson, *Zimbabwe Court Drops Charges Against Hunter Accused of Helping to Kill Cecil the Lion*, TIME (November 11, 2016) <http://time.com/4568218/charges-hunter-cecil-the-lion/> (noting charges were not brought against American hunter but were brought against local hunter that lured Cecil from protected area).

280. *Id.* (noting all charges were dropped against hunters in Cecil hunting controversy).

281. *See* Rogers, *supra* note 278 (discussing amount Palmer paid for permits to hunt big game species).

office due to public outcry and to take down his business's website.²⁸²

Dr. Palmer and other big game hunters even go so far as to claim that big game hunting helps conservation efforts and supports local communities.²⁸³ These claims are contested, however, by most conservationists.²⁸⁴ The trophy hunting business employs only a small amount of people and a very small amount of the license fee actually goes to the community.²⁸⁵ The trophy hunting industry amounts to a mere two percent of the tourism industry.²⁸⁶ Hunters claim that the selling of hunting licenses for thousands of dollars monetarily supports the animals they pay to kill.²⁸⁷

The status of the African Elephant has been seriously threatened under the Trump administration.²⁸⁸ In November 2017 President Trump announced a lifting of the ban of elephant trophy importation into the United States.²⁸⁹ The Fish and Wildlife Service claimed that “[l]egal, well-regulated sport hunting as part of a sound management program can benefit certain species by providing incentives to local communities to conserve those species and by putting much-needed revenue back into conservation.”²⁹⁰ Yet, studies show that Zimbabwe and Zambia have management plans that are far from adequate and this problem is compounded by corruption concerns.²⁹¹

The reversal of the trophy ban would have allowed elephant trophies to be imported to the United States from Zimbabwe and Zambia.²⁹² Trump later reversed this decision due to public outcry,

282. *Id.* (describing public outrage over controversial Cecil hunt).

283. *Id.* (noting that big game hunters claim funds generated from hunting licenses ensure survival of endangered species).

284. *See* Morell, *supra* note 164 (noting conservationists and the International Union for the Conservation of Nature disagree with big game hunters that hunting helps conserve species).

285. *Id.* (discussing what actually happens with funds from hunting fees).

286. *Id.* (noting hunting funds do not contribute as much to tourism revenue).

287. *Id.* (noting hunters still claim funds from licenses significantly contribute to conservation efforts).

288. *See* Laurel Wamsley, *Trump Keeps Elephant Trophy Import Ban in Place, For Now*, NPR (November 16, 2017) <https://www.npr.org/sections/thetwo-way/2017/11/16/564712084/u-s-lifts-ban-on-importing-elephant-trophies-from-zimbabwe-and-zambia> (noting Trump lifted ivory trophy ban from certain countries).

289. *See id.* (discussing Trump policy concerning elephant trophy ban).

290. *Id.* (discussing recent plans to allow for trophy hunting imports to United States from Zimbabwe and Zambia).

291. *Id.* (discussing reality of removing elephant trophy ban for elephant populations in Zimbabwe and Zambia).

292. *Id.* (noting specifics of plan to lift ivory ban).

stating via Twitter that “all conservation facts” would be considered.²⁹³ Ryan Zinke (Interior Secretary) issued a statement that the issuance of permits would be put on hold.²⁹⁴ Not four months later, Trump has lifted the ban once again. President Trump even stated after reinstating the ban on elephant trophies that “he would be ‘very hard-pressed’ to change his opinion ‘that this horror show in any way helps conservation of elephants or any other animal.’”²⁹⁵ Yet, Trump has once again lifted the ban on elephant trophies.²⁹⁶ On March 1, 2018 the Fish and Wildlife Service announced that they will now consider elephant trophy imports on a “case by case” basis.²⁹⁷ When questioned about how the money for trophies would supposedly help conservation efforts, Trump even admitted that the funds were unlikely to go to conservation efforts due to corruption.²⁹⁸

One could question Trump’s motives for reversing the ban on trophies.²⁹⁹ His own sons are notorious big game hunters, known for hunting endangered species in Africa.³⁰⁰ One of his sons has even been photographed next to a dead elephant, holding its tail.³⁰¹ Even during the campaign, President Trump spoke of his own love of hunting.³⁰²

The D.C. Circuit found that the 2014 enhancement findings of the Fish and Wildlife Service (restrictions placed on elephant trophy importation from Zimbabwe) were invalid because they did not adhere to notice-and-comment requirements.³⁰³ Thus, in a memorandum the Fish and Wildlife Service released on March 1, 2018

293. See Wamsley, *supra* note 289 (discussing policy change due to public opposition to lifting ivory ban).

294. *Id.* (discussing announcement made by Secretary of Interior concerning ivory trophy ban).

295. See Joseph Hincks, *President Trump Once Criticized the ‘Horror Show’ of Trophy Hunting. Now He’s Lifting a Ban on Elephant Part Imports*, TIME (March 7, 2018) <http://time.com/5188989/elephant-trophy-ban-fws/> (discussing Trump tweet pulling back from original position on ivory trophy imports).

296. *Id.* (noting Trump’s change in position concerning trophies).

297. *Id.* (discussing new announcement concerning trophy imports).

298. *Id.* (noting Trump himself conceded fact that much of funds generated from hunting permits are unlikely to go to conservation).

299. See Kerry Lauerma, *The Trump Sons Go Hunting Again. Will More Trophy Photos Follow?*, THE WASHINGTON POST (August 6, 2016) https://www.washingtonpost.com/news/animalia/wp/2016/08/06/the-trump-sons-go-hunting-again-will-more-trophy-photos-follow/?utm_term=.610b49b1480a (discussing Trump’s sons’ proclivity for trophy hunting big game species).

300. *Id.* (discussing Trump’s personal ties to trophy hunting).

301. *Id.* (noting controversial photo of Trump’s son with hunted elephant).

302. *Id.* (noting Trump went to Iowa to hunt pheasants).

303. See *Safari Club International v. Zinke*, 878 F.3d 316 (D.C. Cir. 2017) (discussing finding that 2014 negative enhancement findings were invalid and discuss-

the service withdrew ESA enhancement findings for African Elephants in Zimbabwe, along with several other enhancement findings for other species and nations.³⁰⁴ This effectively removed management plans for these species without any mention of a replacement.³⁰⁵ As of March 2018, President Trump has reversed the elephant trophy ban twice, indicating the uncertain protection status for the species in the United States.³⁰⁶

C. The Chinese Market and Regulations

1. 2018 Ivory Ban

In December 2017, the ban on ivory in China officially went into force.³⁰⁷ This means that China has now closed all of its ivory factories and shops, well over 150 combined.³⁰⁸ This is a crucial step, not only to eliminate legal ivory but also to stop the trade of illegal ivory.³⁰⁹ In accordance with CITES, China bought a sixty-two ton reserve of ivory in 2008 in an attempt to fill the demand for ivory in China with legal ivory and not poached ivory.³¹⁰ The effect, however, was the opposite of what was intended.³¹¹ This influx of legal ivory only spurred the overall demand and provided a guise for illegal traffickers.³¹² The closing of the legal market will make it

ing 2014 negative enhancement findings that found trophy hunting negatively affected elephants).

304. See Fish and Wildlife Service, *Withdrawal of Certain Findings for ESA-listed Species Taken as Sport Hunted Trophies*, UNITED STATES DEPARTMENT OF INTERIOR (March 1, 2018) <https://www.fws.gov/international/pdf/memo-withdrawal-of-certain-findings-ESA-listed-species-sport-hunted-trophies.pdf> (discussing withdrawal of enhancement findings for elephants in Zimbabwe, Tanzania, Zambia, Botswana, Namibia, and South Africa).

305. *Id.* (noting removal of findings with no mention of replacement).

306. See *supra* notes 289-307 (discussing Trump's multiple reversals of elephant trophy ban).

307. See Simon Denyer, *Ivory Sales in China Finally End this Month. But Elephants Aren't Safe Yet*, WASHINGTON POST (Dec. 14, 2017) https://www.washingtonpost.com/world/ivory-sales-in-china-finally-end-this-month-but-telephants-arent-yet-safe/2017/12/14/7b09d800e08d11e79eb6e3c7ecfb4638_story.html?utm_term=.652ea0b0ecd8 (discussing Ivory trade in China and recent ban).

308. See John Sudworth, *Can China's Ivory Trade Ban Save Elephants?*, BBC (Mar. 31, 2017) <http://www.bbc.com/news/world-asia-china-39440486> (noting legal ivory trade has been banned in China resulting in closure of thirty-four factories and 138 shops).

309. *Id.* (noting legal ivory trade in China spurred illegal ivory market).

310. *Id.* (discussing China's ill-advised attempt to fill demand by selling stockpiled ivory).

311. *Id.* (describing how flooding legal market with stockpiled ivory resulted in surge in illegal market).

312. *Id.* (noting adverse effects of selling stockpiled ivory in China).

impossible for illegal traffickers to pass off their ivory as legal.³¹³ Some question, however, what the government will do with their stockpiles of ivory and whether the allowance of trade in ivory antiques will still provide a loophole for traffickers.³¹⁴

In early 2018, Hong Kong banned the sale of ivory.³¹⁵ Even though Hong Kong was a party to the CITES convention, the sale of hunting trophies and antique ivory were still legal until 2018.³¹⁶ Even though the legal ivory market in China officially closed last year, many were traveling to Hong Kong to purchase ivory.³¹⁷ Therefore, the closing of the Hong Kong ivory market is especially crucial.³¹⁸

Not only is transboundary coordination of laws important to protect elephants on the ground in Africa, so too is it important at the other end of the trafficking spectrum.³¹⁹ The ivory market and demand in China will not be gone simply because there is a ban on ivory in the country.³²⁰ Some fear that with the ban in China, consumers will merely look to neighboring countries without such laws in order to find ivory.³²¹ This was already occurring with the market in Hong Kong until it was finally closed.³²² Reporters note that, with the ban in China, the ivory markets of neighboring countries are thriving including Laos which is becoming one of the leading

313. See Sudworth, *supra* note 309 (noting legal market provided cover for illegal ivory).

314. *Id.* (discussing continued concerns over illegal ivory market despite recent ban on legal market).

315. See Nick Visser, *A Great Day for Elephants: Hong Kong Votes to Ban All Ivory Sales*, THE HUFFINGTON POST (Feb. 1, 2018) https://www.huffingtonpost.com/entry/hong-kong-ivory-sales_us_5a7265f5e4b05253b2757850?utm_hp_ref=animal-rights (noting Hong Kong allowed for trade in antique ivory and import of hunting trophies; thus, had major illegal ivory market as illegal ivory was passed off as antique).

316. *Id.* (discussing legal ivory trade in Hong Kong).

317. *Id.* (noting that most people who buy ivory in Hong Kong are from China where legal market has now closed).

318. *Id.* (noting many simply went to Hong Kong to buy ivory after market in China closed).

319. *Id.* (finding countries with less strict ivory bans or none at all provide loopholes for continued buying and selling of ivory across Asia).

320. See Colin Dwyer, *China's Ban on its Domestic Ivory Trade Takes Effect*, NPR (Jan. 1, 2018) <https://www.npr.org/sections/thetwo-way/2018/01/01/574952304/chinas-ban-on-its-domestic-ivory-trade-takes-effect> (noting legal market may shift to neighboring countries, allowing for traffickers to smuggle illegal ivory).

321. *Id.* (noting other Asian countries must ban ivory trade or trade will just shift to other countries from China).

322. See Visser, *supra* note 316 (finding ninety percent of ivory purchasers in Hong Kong were from China).

ivory markets in Asia.³²³ As figure three shows, China borders several other countries some of which do not enforce ivory bans, making ivory trafficking relatively easy.³²⁴



Figure 3: China and its border

A recent report by TRAFFIC indicates that Malaysia is also a key player in the trafficking of elephant products in Asia.³²⁵ Though Malaysia's role is purely a transitory one, the amount of ivory making it through its ports is simply staggering.³²⁶ In an eleven-year period from 2003-2014, sixty-six seizures of ivory were linked to Malaysia totaling 63,419kg.³²⁷ Malaysia has even been named the principal transit point for African ivory headed to Asian markets.³²⁸ Though not a source state nor a major ivory market in

323. See Alastair Leithead, *Laos is 'World's Fastest Growing' Ivory Market*, BBC (Sept. 28, 2017) <http://www.bbc.com/news/world-africa-41432963> (discussing booming ivory trade in other Asian countries after Chinese ivory ban).

324. *Id.* (noting Laos does not police illegal ivory trade and does not have much interest in doing so).

325. See Kanitha Krishnasamy, *Malaysia key conduit in global illegal ivory trade*, TRAFFIC (Sept. 1, 2016) <http://www.traffic.org/home/2016/9/8/malaysia-key-conduit-in-global-illegal-ivory-trade.html> (discussing Malaysia's role in illegal ivory trade).

326. *Id.* (finding 63,419 kg of ivory have been moved through Malaysia from 2003 to 2014).

327. *Id.* (noting large amount of ivory being moved through Malaysia on its way from Africa to Asian markets).

328. *Id.* (noting Malaysia is principle transit point from ivory coming from Africa going to Asia).

itself, Malaysia is in a unique position to combat the illegal ivory trade within its own borders.³²⁹

2. Enforcement

Serious questions remain as to whether China is equipped to enforce its ban on the trade in ivory.³³⁰ The trade in rhino horn has been officially banned in China for years with heavy penalties for offenders.³³¹ However, rhino horn is still readily available for those who seek it.³³² Even with the ban, a significant market remains with a culture that sometimes values ivory over elephants.³³³

Enforcement of the ban is concerning due to a history of a lack of enforcement of other environmental laws in China.³³⁴ For example, enforcement of chemical regulations usually only occurs after safety or environmental accidents.³³⁵ Also problematic for enforcement is the fact that multiple agencies often manage the same environmental problem/regulation.³³⁶ For example, over ten different agencies have management duties and responsibilities under the chemical regulations legislation in China.³³⁷ Another issue is the lack of environmental knowledge of judges in the judiciary in China.³³⁸ According to Ferris and Wolfson, “. . . China’s State Council observed in 2005 that ‘it is not uncommon that environmental laws are not fully observed or strictly enforced.’”³³⁹ China’s poor track record of environmental enforcement combined with a

329. *Id.* (finding Malaysia’s role in illegal ivory trade is transitory and CITES identified Malaysia as country of ‘primary concern’).

330. *See infra* notes 335-341 (discussing China’s issues with environmental enforcement).

331. *See* Sudworth, *supra* note 21 (noting trade in rhino horn has been banned for more than twenty years in China).

332. *Id.* (noting rhino can easily be bought and sold on the internet).

333. *Id.* (finding rhino horn is easily obtainable with little risk involved in buying or selling).

334. *See* Tad Ferris and Steve Wolfson, *China*, INTERNATIONAL ENVIRONMENTAL LAW: THE PRACTITIONER’S GUIDE TO THE LAWS OF THE PLANET (2014) (noting lack of enforcement of air emissions standards).

335. *Id.* (noting enforcement of chemical regulations usually only occurs after accident).

336. *Id.* at 744. (noting ten different agencies in charge of regulating chemicals).

337. *See* Ferris and Wolfson, *supra* note 335 (noting there is no organization that has overall authority over chemical regulations).

338. *Id.* (noting judges have little training on complex environmental issues and government has invested very little in these skills).

339. *Id.* (noting China’s own state council noted that environmental laws are not fully enforced).

continuing demand for ivory does not bode well for the success of the ivory ban.³⁴⁰

VI. CONCLUSION

The illegal trade in ivory has had devastating effects on the African elephant across its range.³⁴¹ Not only is the elephant a keystone species, but they are an ecosystem engineer that many other species rely on to shape the environment.³⁴² The transboundary nature of the elephant requires that range countries, including Malawi, make efforts to coordinate their wildlife laws and protections.³⁴³ It is only through coordination that wildlife laws will be effective.³⁴⁴ Coordination of laws is also required at the other end of the trafficking issue.³⁴⁵ We have continued to see countries ban the sale of ivory within their boundaries.³⁴⁶ This will all be in vain, however, if some countries continue to allow the sale of ivory, thus simply shifting the market.³⁴⁷ The fate of the elephant has not yet been sealed but quick action must be taken across the globe to save the species from the brink of extinction.³⁴⁸

340. *See supra* notes 335-341 (discussing environmental enforcement issues in China).

341. *See supra* notes 20-31 (discussing decline in elephant populations due to illegal ivory trade).

342. *See supra* notes 32-45 (discussing ecological importance of African elephant).

343. *See supra* notes 46-56 (discussing migratory nature of African elephant).

344. *See supra* notes 195-202 (discussing differing levels of protection for elephants in Africa).

345. *See supra* notes 308-341 (discussing ivory markets in Asia).

346. *See supra* notes 308-341 (discussing ivory bans in Hong Kong and China).

347. *See supra* notes 308-341 (discussing how ivory markets shift to countries that have yet to ban ivory or have poor enforcement).

348. *See supra* notes 20-31 (discussing decline in elephant populations across Africa).