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This next article is the first place winner of the First Annual New York State Bar Association's, Committee on Animals and the Law, Student Writing Competition. Submissions for the Second Annual Student Writing Competition were accepted through June 15, 2009, and the Committee expects to announce a winner by the end of September, 2009. The Committee thanks the many outstanding students who submitted papers to both competitions.

The author of the winning article is Laurel McNeill, who currently resides in Suffolk County, New York and is starting her third year of law school at Hofstra University.

After having established a career as a paralegal, Ms. McNeill commenced law school at Hofstra University in 2006 to further pursue her ambitions. As a part-time evening student, Ms. McNeill found that managing a career and balancing the rigors of law, though often challenging was also a source of personal satisfaction. She states that her decision to become a lawyer was motivated by a desire to advance her career as well as an opportunity to one day combine it with her passion for animals and their welfare.

Ms. McNeill credits her grandfather for sparking her interest in elephants through his storytelling when she was a child. Therefore, the choice of this topic for her Animal Law class was effortless.

Ms. McNeill's career interests include actively working with legal organizations that aim to protect animals and collaborating with others in the field. In her own words she states:

"I am confident that in the years to come the relationship between humans and animals will be a stark contrast to how it has been historically understood and accepted. Laws affecting this relationship are an integral component of any meaningful change and it is a change that I endeavor to make and be a part of."

Giant Steps:

The African Elephant and The United States' Effect on The Survival of The Species

By: Laurel McNeill
Hofstra University School of Law
J.D. anticipated May 2010

Nature's great master-peece, an Elephant,
The only harmlesse great thing ...¹

Human fascination with elephants can be traced back for centuries, as evidenced by the stirring words of the seventeenth century poet John Donne. Perhaps it is due to their grandeur – they are the “largest land animals on earth”² – or the more recent scientific studies that reveal their capacity for humanistic traits – traveling in familial units,³ the care and nurture of their young,⁴ and the respect shown for their dead,⁵ some are even artists.⁶ “[T]he elephants of today are the relics of a once much more diverse family that ... inhabited [almost] every part of the earth”⁷ Sadly, the survival of the African elephant species is in question due to the effects of human behavior worldwide.

¹ MARTIN MEREDITH, *ELEPHANT DESTINY* 44 (Public Affairs 2003) (2001) (quoting JOHN DONNE, *THE PROGRESS OF THE SOUL* (1601)).

² National Geographic, African Elephant, <http://animals.nationalgeographic.com/animals/mammals/african-elephant.html> (last visited Dec. 7, 2007) (providing general information on elephants).

³ JULIET CLUTTON-BROCK, *DOMESTICATED ANIMALS FROM EARLY TIMES* 115 (1981). (“All elephants are highly social mammals that will remain together as an integrated family group over several generations.”). *Id.*

⁴ MEREDITH, *supra* note 1, at 3.

⁵ *Id.* at 31.

⁶ See The Asian Elephant Art & Conservation Project, <http://www.elephantart.com/catalog/default.php?cPath=48> (“[C]ollaboration with an African elephant, Renee, at the Toledo Zoo in Ohio in 1995. It was here that [the founders] first developed their method of teaching elephants to paint.”). *Id.* Mission statement – “The Asian Elephant Art & Conservation Project (AEACP) is a non-profit organization dedicated to saving the diminishing number of Asian elephants left on our planet through its work with domesticated elephants. The AEACP raises funds through donations and the sale of artwork created by elephants in order to fulfill its mission.” *Id.* at <http://www.elephantart.com/catalog/mission.php> (last visited Dec. 7, 2007).

⁷ CLUTTON-BROCK, *supra* note 3, at 113.

Why should we care about the continued existence of the African elephant? Why does it matter to us, or more precisely, why does it matter to the United States? In the 1900's the African elephant population was estimated at "over ten million animals,"⁸ compared to "fewer than 500,000 by the late 1980's".⁹ In the ten year span from 1979 through 1989 alone, the species was nearly decimated, and the total population was halved.¹⁰

Despite our reverence for the virtues of the elephant, our lust for the ivory they bear and our need to devour the very land they roam, have resulted in "African elephants [being] among the most persecuted animals on earth."¹¹ The effects of poaching for ivory, development of land that was once the elephant's habitat for human consumption and agriculture progression, and corruption in the government that should be protecting this natural resource are just some of the transgressions imposed on these great animals.

This persecution is not new; it has persisted over centuries, culminating in an eye opening reality that our interactions with the African elephant must change if there are to be any future interactions. As far back as the seventeenth century the elephant was regarded as "a subject in which moral virtues stand out, polity prevails, integrity is triumphant and torment and punishment the sole reward for vice."¹² All of this should concern those of us in the United States – half way across the globe – as well. "[W]ildlife ... do[es] not recognize national boundaries."¹³ Similarly, the United States'

⁸ U.S. Fish & Wildlife Service, African Elephant Conservation Fund, http://www.fws.gov/international/pdf/African_Elephant_jan06.pdf (2006) (providing summary and data regarding the African elephant Conservation Fund.).

⁹ *Id.*

¹⁰ See MEREDITH, *supra* note 1, at 4 (stating that the ivory trade was the major cause for extreme decline in the African elephant population during this time period.).

¹¹ *Id.* at 5.

¹² *Id.* at 42 (quoting S. DE PRIEZAC, HISTOIRE DES ELEPHANTS (1650)).

¹³ U.S. Fish & Wildlife, International Affairs, Wildlife Without Borders: <http://www.fws.gov/international/dicprograms/wwbp.htm> (last update June 8, 2007) (providing a summary of the Wildlife Without Borders multinational programs funded by the federal agency.).

affluence has traversed borders. The benefit of “preserv[ing] the planet’s rich abundance of wildlife,” such as the African elephant, “for all the citizens of the Earth”¹⁴ cannot be calculated in dollars and cents, but has an investment value that exceeds many of the United States’ financial endeavors.

Having suggested why the United States’ interest should be piqued, we must proceed to ask how we should get involved in their survival. What are we currently doing and what more can be done? The focus of this paper is on the United States’ involvement in the preservation of the African elephant. As a world leader, our country has great political and financial impact on the conduct of other countries. The United States’ standard should be set at home and across continents.

Initially, this paper will explore the major conditions affecting African elephant populations, the deleterious relationship between these animals and humans, and what is necessary to strike a balance for successful coexistence. The focus will then move towards an examination of the federal agencies that the United States charges with carrying out laws specific to the African elephant and the international organizations and treaties the United States is involved with to perpetuate the existence of the species. The analyses below demonstrate the need for different strategies to achieve long-term, effectual solutions to sustain the African elephant and our continued relations with the species.

I. Detrimental Effects

The interaction of human with elephants may be divided into three categories: firstly, predation for food which was presumably the earliest form of exploitation. Secondly the killing of elephants for their ivory alone, a trade that has been of the greatest importance in human economies since the rise of the earliest civilizations. Finally there is the

¹⁴ *Id.*

taming of live elephants for use in warfare, in circuses and zoos, and as beasts of burden, and this has a history of at least 4000 years.¹⁵

It is undisputed that economic and political causes have had devastating effects on the existence of the African elephant. In modern times, environmental concerns are also playing a role in the demise of the species.¹⁶ However, it is the ivory trade that has taken the greatest toll on the African elephant population. In fact, the elephant is so synonymous with its ivory that as far back as the time of Homer “the greek word Elephas meant ivory not the animal....”¹⁷

Prior to establishing an international ban on illegal ivory trading with the creation of the Convention on International Trade in Endangered Species of Fauna and Flora (hereinafter “CITES”) in 1975,¹⁸ the killing of African elephants by poachers for the ivory found in their tusks was rampant. While this has affected the Asian Elephant as well, the ivory between the two species can be differentiated.¹⁹ Though the ban on export and import of illegal ivory has curtailed the poaching epidemic greatly, it has not halted killings of African elephants for this purpose entirely.²⁰

Awareness that a long-term solution to protect the African elephant was necessary, the governments of many African states created refuges and national parks to

¹⁵ CLUTTON-BROCK, *supra* note 3, at 115.

¹⁶ See Smithsonian National Zoological Park, Friends of the National Zoo, African Savanna, <http://nationalzoo.si.edu/Animals/AfricanSavanna/fact-afelephant.cfm> (2002)(last visited Dec. 7, 2007) (“African elephants have lost much of their habitat to ranches, farms, and desertification. The forest elephant ... is under threat from logging and market hunting for its meat. African elephants are now found mostly in reserves. In some parks, confined elephant populations have major impacts on habitat, changing open forests into grasslands.”). *Id.*

¹⁷ CLUTTON-BROCK, *supra* note 3, at 117.

¹⁸ See Convention on International Trade in Endangered Species of Fauna and Flora, March 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249 (effective July 1, 1975) [hereinafter “CITES”].

¹⁹ See CLUTTON-BROCK, *supra* note 3, at 118. (“Craftsmen in ivory, before the age of plastics, could assess the quality of ivory by its appearance, colour, and feel. The best ivory for billiard balls was obtained from West African elephants. East African elephants produced ‘soft’ ivory and Indian elephants had tusks that, although they are fine-grained, were not so highly esteemed as the African.”). *Id.*

²⁰ See Smithsonian National Zoological Park, *supra* note 16.

house segments of the elephant population.²¹ These parks were to serve as the new habitats for the African elephant, and while offering greater protection than freedom had in the past, many new concerns developed. In addition to the inability to eliminate recurring poaching, the over-population of elephant herds within these contained areas brought a two-fold dilemma – destruction of the delicately balanced ecosystem shared with other endangered species and flora,²² and the escape of Elephants into surrounding neighborhoods. Elephants in search of food and appeasing their natural instinct to roam entered into human communities, reeking havoc on crops and buildings. This human-animal conflict often resulted in death on both sides.²³

The current state of the African elephant population is somewhat paradoxical; an endangered species that overpopulates the spaces set aside for its conservation. This side effect of containment forced an unthinkable solution to be adopted as protocol - culling. To cull means “to reduce or control the size of (as a herd) by removal (as by hunting) of especially weaker animals; *also*: to hunt or kill (animals) as a means of population control.”²⁴ The systematic killing of segments of overpopulated herds became to many conservationists an answer to preserving the overall species. “[E]lephant numbers in national parks and reserves were reduced to counteract excessive immigration” into the parks, in order that the whole ecosystems would not be destroyed, “causing the extinction

²¹ See MEREDITH, *supra* note 1, at 5 (“After decades of slaughter in the nineteenth century, governments of Africa set aside vast areas of land as national parks and wildlife reserves to ensure the survival of endangered species such as elephants.”). *Id.*

²² See Patty F. Storey, *Development vs. Conservation: The Future of the African Elephant*, 18 WM. & MARY J. ENVTL. L. 375, 380 (Spring 1994) (citing to David Western, *The Balance of Nature*, WILDLIFE CONSERVATION, March/April 1993, at 52.).

²³ See U.S. Fish & Wildlife Service, *supra* note 8 (stating the key issues and objectives of the African Elephant Conservation Act and the African Elephant Conservation Fund.); see also P. Omondi et al., *Managing Human-Elephant Conflicts: The Kenyan Experience*, PACHYDERM No. 36, at 80, January – June 2004.

²⁴ Merriam-Webster’s Dictionary, <http://www.m-w.com/dictionary/culling> (referenced on 10/10/07) (emphasis in original) (printed sources apply variations to the wording found on the internet site.).

not only of elephants but of other species.”²⁵ Often, several family members would be selected to die together in order to avoid the traumatic effects experienced by a parent, or calf “lucky” enough to survive,²⁶ and the behavioral reactions handlers would be left to deal with in the remaining herd.

The governments of the African states, facing economic hardship and/or misappropriating monies in their possession,²⁷ could not act alone to counter the problems of co-existing with the African elephant. Fortunately, the international community, including the United States, was willing to aid the cause. This was evidenced by the statement of Congressman Beilenson explaining the bill that became the African Elephant Conservation Act:

Some people argue that the elephants belong to Africa, and that, ultimately, it will be up to the countries there to determine whether or not the elephant will survive. However, it has become apparent that even the best-intentioned and uncorrupted African governments are limited in their ability to control poachers.... I believe very strongly that the United States, and other ivory consuming nations, can and must play a bigger role in restricting the ivory trade.²⁸

II. The Role of the United States

While the African elephant is not indigenous to the United States, our role in the international community and the ivory trade²⁹ explains the United States’ obligation to

²⁵ MEREDITH, *supra* note 1, at 192.

²⁶ *See id.* (“Whole families were wiped out to prevent panic and fear spreading through the park. As they grouped tightly bunched in defensive circles, with mothers facing outwards and calves hidden behind, professional hunters ... opened fire first on older females, then finished off the rest as they milled about.”). *Id.*

²⁷ *See* Richard Leakey, *A Poacher’s Charter: Allowing ‘Sustainable Trade’ in Endangered Species Would Make a Few Dealers Rich, While Wiping Out Africa’s Wildlife*, THE GUARDIAN, October 7, 2004. (Leakey commented that “[f]unding conservation is often a question of political priorities.... Swaziland wants to raise funds ... while the king is reportedly building palaces for each of his 13 wives.”). *Id.*

²⁸ 134 CONG. REC. 21, 012,21,013 (1988) (statement of Rep. Beilenson).

²⁹ *See id.* (“As a major importer of carved ivory, we in the United States can-and indeed must-play a role in seeing that the demand ... is not permitted to continue at such an uncontrolled rate, and at the expense of a truly unique and beautiful species.”). *Id.*

play an active part in preserving the species for all mankind. The United States currently enforces two federal Acts which in turn support the implementation of an international treaty to protect the African elephant. These are the Endangered Species Act (hereinafter “ESA”),³⁰ the African Elephant Conservation Act (hereinafter “AECA”),³¹ and the Convention on International Trade in Endangered Species of Fauna and Flora (“CITES”).³² The purpose and effect of each of these methods of United States involvement are discussed below.

³⁰ See 16 U.S.C. §§ 1531-1544 (2003).

³¹ See 16 U.S.C. §§ 4201-4245 (2003).

³² See CITES, *supra* note 18.

A. Endangered Species Act

The Endangered Species Act (“ESA”) was enacted in 1973. It “is widely considered to be the most powerful environmental law in the nation.”³³ It is essentially designed

[t]o provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the [international] treaties and conventions [to which the United States has pledged itself as a sovereign state].³⁴

The ESA empowers the Secretary of the Interior to list species (domestic or foreign) whose existence is endangered or threatened and designate critical habitats of such species. Steps to protect the listed species then receive the full backing of the United States government and individual state governments. In particular, the ESA requires the Secretary of the Interior to develop and implement recovery plans for the conservation and survival of such species.³⁵

What makes the ESA so “powerful” is the express intention for “the terms ‘conserve’, ‘conserving’, and ‘conservation’ [within the Act to] mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.”³⁶ As evidenced by the historical United States Supreme Court

³³ Ike C. Sigg, *Caught In The Act: Evaluating The Endangered Species Act, Its Effects On Man And Prospects For Reform*, 24 CUMB. L. REV. 1, 2 (1993) (citing to Timothy Egan, *Strongest U.S. Environment Law May Become Endangered Species*, N.Y. TIMES, May 26, 1992, at A-11; and Virginia S. Albrecht & Thomas C. Jackson, *Battle Heats Up as Congress Begins Review of Endangered Species Act*, NAT’L. L. J. (May 18, 1992), at S1) (characterizing the ESA as “the most stringent environmental statute in the world.”). *Id.* at 78, n.2.

³⁴ *Id.* at 22 (citing to 16 U.S.C. § 1531(b)).

³⁵ See 16 U.S.C. § 1533(f)(1).

³⁶ 16 U.S.C. § 1532(3).

holding in *Tennessee Valley Authority v. Hill*,³⁷ “the plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost.”³⁸ Congressional intent is made clear in that,

[t]his subsection *requires* the Secretary and the heads of all other Federal departments and agencies to use their authorities in order to carry out programs for the protection of endangered species, and it further *requires* that those agencies take *the necessary action* that will *not jeopardize* the continuing existence of endangered species or result in the destruction of critical habitat of those species.³⁹

There has been extensive commentary regarding the far-reaching effects of the ESA. Despite negative implications for subjugating all other state and federal laws to the ESA’s requirements for endangered species preservation, it has been said that “[a]ny serious criticism of the Act will be construed as an unholy war against Mother Nature herself.”⁴⁰ As the United States Supreme Court noted, “Congress viewed the value of endangered species as ‘incalculable’.”⁴¹ It is precisely this reasoning that supports United States involvement in species preservation in other countries as well as our own.

Successful actions brought to redress violations of the ESA can result in civil penalties and/or criminal convictions.⁴² The ESA even provides for enforcement of the terms of the Act via “citizen suits”.⁴³ However, the United States Supreme Court holds that individuals initiating such actions must still satisfy the elements of standing as required under Article III of the United States Constitution. It is well-settled law that standing to sue includes a demonstration of an injury in fact, a causal connection between

³⁷ See *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) (renowned decision construing the ESA).

³⁸ *Id.* at 184.

³⁹ *Id.* at 182-183 (quoting H.R. Rep. No. 93-412, at 14 (1973) (emphasis added)).

⁴⁰ Sigg, *supra* note 33, at 3.

⁴¹ *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 187 (1978).

⁴² See 16 U.S.C. § 1540.

⁴³ *Id.* § 1540(g). Such suits may be commenced by any person “to enjoin violations of the Act or its regulations.” *American Society for the Prevention of Cruelty to Animals v. Ringling Bros. and Barnum & Bailey Circus*, 317 F.3d 334, 433 (D.C. Cir. 2003) (citing 16 U.S.C. § 1540(g)(1)(A)).

the injury and a defendant's conduct, and judicial redressability.⁴⁴ The injury in fact element tends to be difficult to prove since "harm to the animals is not [the] main focus. It is [the complainant] who must be suffering injury [at present] or in the immediate future."⁴⁵ Despite the "citizen suit" provision within the ESA, establishing standing to bring an action on behalf of an animal by individuals and/or animal welfare organizations is often an impediment to resolving violations of the Act.⁴⁶

Fortunately for the African elephant, there are other avenues to afford the species an opportunity for additional protection.

B. African Elephant Conservation Act

The African Elephant Conservation Act ("AECA") was enacted "on October 7, 1988."⁴⁷ This was essentially an amendment to the ESA of 1973 – "Title I is the Endangered Species Act of 1988, and Title II is the AECA."⁴⁸ The AECA was deemed necessary to authorize explicit enforcement of illegal ivory trade violations; in this capacity, it "supplements the Endangered Species Act."⁴⁹ The purpose of the AECA "is to perpetuate healthy populations of African elephants."⁵⁰ Among the enumerated reasons for United States involvement, Congress found that,

Although some African countries have effective African elephant conservation programs, many do not have sufficient resources to properly manage, conserve, and protect their elephant populations.

⁴⁴ See generally *American Society for the Prevention of Cruelty to Animals v. Ringling Bros. and Barnum & Bailey Circus*, 317 F.3d 334 (D.C. Cir. 2003).

⁴⁵ *Id.* at 336.

⁴⁶ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992) (noting that Article III standing requirement was not satisfied due to, among other elements, the lack of establishing an immediate injury.).

⁴⁷ 16 U.S.C. §§ 4201-4245; see also *United States v. Grigsby*, 111 F.3d 806, 810, n. 3 (11th Cir. 1997) (citing 54 Fed. Reg. 24, 758 (1989)).

⁴⁸ *United States v. Grigsby*, 111 F.3d 806, 815 (11th Cir. 1997) (citing Endangered Species Act of 1988, codified at 16 U.S.C. §§ 1531-1544; AECA, codified at 16 U.S.C. §§ 1538, 4201-4245).

⁴⁹ *Id.*; see also 16 U.S.C. § 4241 (entitled "Relationship to Endangered Species Act of 1973").

⁵⁰ 16 U.S.C. § 4201.

The United States, as a party to CITES and a large market for worked ivory, shares responsibility for supporting and implementing measures to stop the illegal trade in African elephant ivory and to provide for the conservation of the African elephant.⁵¹

⁵¹ *Id.* §§ 4202(7), (8).

Based on these findings, the AECA explicitly recites:

It is the policy of the United States--

(1) to assist in the conservation and protection of the African elephant by supporting the conservation programs of African countries and the CITES Secretariat; and

(2) to provide financial resources for those programs.⁵²

Pursuant to the AECA, a fund was established to support such conservation projects, known as the Multinational Species Conservation Fund.⁵³ This fund is managed by the U.S. Fish and Wildlife Service,⁵⁴ and all monies deposited to the fund are used to subsidize African elephant conservation programs⁵⁵ as well as provide the source of rewards “to any person who furnishes information which leads to a civil penalty or a criminal conviction under” the Act.⁵⁶

Additionally, the integral function of the AECA was to authorize the Secretary of the Interior to institute moratoriums on the importation of raw and worked ivory from ivory producing countries that do not meet certain criteria – including being a party to CITES.⁵⁷ “The act of importation has been said to be an act of grace, and ... not a vested right of citizens or individuals;”⁵⁸ therefore prohibitions to importation may be declared by Congress. Moreover, moratoriums were imposed on the importation of ivory products from non-ivory producing countries as well, although this initiative did not become

⁵² *Id.* § 4203.

⁵³ *See id.* § 4246 (entitled Multinational Species Conservation Fund).

⁵⁴ *See* U.S. Fish & Wildlife Service, *supra* note 8.

⁵⁵ *See* 16 U.S.C. §§ 4211, 4212. African elephant projects funded in 2006 include 29 grants totaling \$1,384,865. U.S. Fish & Wildlife Service, Division of International Conservation, CFDA 15.620.

⁵⁶ 16 U.S.C. § 4225(a).

⁵⁷ *See id.* § 4222(a)(1).

⁵⁸ 25 C.J.S. *Customs Duties* § 31 (2007) (citing *Buttfield v. Stranahan*, 192 U.S. 470 (1904)).

effective until June 1989.⁵⁹ The AECA also provides for enforcements of its terms via civil penalties and criminal prosecution for violations of the Act.⁶⁰

While the AECA serves to counter the effects of illegal trading in ivory on the African elephant, there is an exception to the statute that should be noted. First, “[i]ndividuals may import sport-hunted elephant trophies that they have legally taken in an ivory producing country that has submitted an ivory quota.”⁶¹ Courts have upheld this exemption and gone further to assert that the statute provides that “the characterization of sport-hunted trophies remains the same, despite a later change in ownership or the subsequent sale for a commercial purpose.”⁶² To some this exemption may seem to defeat the purpose behind the AECA – to perpetuate the African elephant population.⁶³ Yet, the legislative rationale supporting this exception to criminal liability under the Act is that in “allowing sport-hunted trophies ... the African elephant [is preserved] from destruction by Africans, who appreciate the value placed on these elephants by sport hunters.”⁶⁴ In fact, it has been held that “lawful, sport-hunted trophies do not deplete African elephants sufficiently to be protected under the AECA and that preservation of elephants for sports hunters actually protects African elephants by placing considerable value on live elephants.”⁶⁵ This author cannot look past the disparity in the foregoing statement; to state that sport-hunting “*do[es] not deplete African elephants sufficiently*” and “*actually protects African elephants*” seem contradictory remarks.⁶⁶

⁵⁹ See *Grigsby*, 111 F.3d at 810, note 3 (citing 54 Fed. Reg. 24, 758 (1989); 16 U.S.C. §§ 4201-4245).

⁶⁰ See 16 U.S.C. § 4224.

⁶¹ *Id.* § 4222(e).

⁶² *Grigsby*, 111 F.3d at 823 (citing 16 U.S.C. § 4222(e)).

⁶³ See 16 U.S.C. § 4201; see also *Grigsby*, 111 F.3d at 815.

⁶⁴ *Grigsby*, 111 F.3d at 823.

⁶⁵ *Id.*

⁶⁶ *Id.* (emphasis added).

Furthermore, while proof of a mere violation of a provision of the AECA may meet with civil penalties,⁶⁷ “specific intent” of a violation of the AECA must be proven for criminal penalties to apply.⁶⁸ Specifically, a “knowing violation” of the AECA must be demonstrated for a criminal conviction to result.⁶⁹ This specific intent element of a violation, if applied more broadly, may serve as an impediment to effectuate convictions, and consequently, negate the use of AECA to deter conduct that contributes to the endangerment of the African elephant.

The moratorium imposed on imported ivory, even in light of the exceptions mentioned above, has had a dramatic effect on the ivory trade. This United States policy was effective in great part due to a large portion of the international community imposing similar prohibitions and the simultaneous establishment of national parks in African states in an effort to conserve the remaining herds of African elephants.

C. Convention on International Trade in Endangered Species of Fauna and Flora (“CITES”)

Though the ESA and the AECA set out legal requirements for the protection of African elephants and provide their own enforcement mechanisms, they are also the implementing regulations for CITES.⁷⁰ CITES entered into force in July 1975,⁷¹ with the mission “that international cooperation is essential for the protection of certain species of wild fauna and flora against over-exploitation through international trade.”⁷² Each year,

⁶⁷ See 16 U.S.C. § 4224(b).

⁶⁸ *Grigsby*, 111 F.3d at 823.

⁶⁹ 16 U.S.C. § 4224(a).

⁷⁰ See CITES, *supra* note 18.

⁷¹ See *id.*

⁷² *Id.* at Preamble.; see also *Grigsby*, 111 F.3d at 814.

the trade in international wildlife, including the African elephant, “is estimated to be worth billions of dollars.”⁷³

Prior to the enactment of the AECA, the ESA underwent amendments to reach its current structure and to perform as the implementing legislation for CITES.⁷⁴ Similar to the Statement of Policy⁷⁵ of the AECA, detailed above, the findings of the ESA are as follows:

[T]he United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to--

the Convention on International Trade in Endangered Species of Wild Fauna and Flora....⁷⁶

The importance of the ESA in relation to CITES is clearly explained in *H.J. Justin & Sons, Inc. v. Brown*,⁷⁷

[t]he Convention is not self-executing since implementing legislation must be enacted by Congress before the Convention has the force of law. Moreover, once enacted, it is the implementing legislation, and not the treaty itself, that is the law of the land. *** The implementing legislation of the Convention is the Endangered Species Act of 1973.⁷⁸

⁷³ See What is CITES?, <http://www.cites.org/eng/disc/what.shtml> (last visited Oct. 10, 2007). These rough figures “include hundreds of millions of plant and animal specimens.” *Id.* <http://www.cites.org/eng/disc/what.shtml> (last visited Oct. 10, 2007).

⁷⁴ See Sigg, *supra* note 33, at 20 (quoting Michael J. Bean, *The Evolution Of National Wildlife Law*, 380 (1977)). “Even at its birth, CITES was viewed as ‘quite important, not only because of its substantive restrictions, but also because of the conceptual underpinnings which it provided for subsequent domestic legislation.’ The primary domestic legislation engendered by CITES was the ESA. However, while the ESA became law on December 28, 1973, CITES did not receive sufficient ratifications to become effective until July 1974. Interestingly, Congress justified the passage of the ESA partially on the grounds that it was needed to implement CITES.” *Id.*

⁷⁵ See 16 U.S.C. § 4203.

⁷⁶ 16 U.S.C. § 1531(a)(4)(f).

⁷⁷ 519 F. Supp. 1383 (E.D. Cal. (1981), *affm’d. in pertinent part*, *H.J. Justin & Sons, Inc. v. Deukmejian*, 702 F.2d 758 (9th Cir. 1983).

⁷⁸ *Id.* at 1390; *see also* CITES, *supra* note 18, at art. XIV.

The same United States Circuit Court of Appeals reiterates this point in a similar matter decided the same date, *Man Hing Ivory and Imports, Inc. v. Deukmejian*,⁷⁹ “[l]egislation must be enacted if any of its provisions are to have the force of United States law.”⁸⁰ In addition, CITES established an ivory quota and marking system to aid in “curtail[ing] illegal trade in African elephant ivory”⁸¹ called the CITES Ivory Control System. Yet, it was the enactment of the AECA that elaborates on this system, and utilizes CITES criteria as a basis for United States’ decisions to initiate moratoriums on the import of raw and/or worked ivory.⁸² Both of the federal court cases referenced above involved the resolution of conflicts between state law and the federal statutes, as well as the proper application of the international CITES treaty. As evidenced from this litigation, there has been occasion for the courts to intervene with a need to explain which laws apply to specific conduct; and in the case of the United States, when more restrictive, individual state laws are or are not preempted by these federal statutes.

Despite any confusion addressed in the United States, CITES is regarded as an international cooperative that performed outstandingly in regards to reducing the number of killings of African elephants for the ivory trade since its institution. “Because the trade in wild animals ... crosses borders between countries, the effort to regulate it requires international cooperation to safeguard certain species from over-exploitation. CITES was conceived in the spirit of such cooperation.”⁸³ In 1975 when the Convention began, 80 countries, including the United States, committed to the principles and

⁷⁹ 702 F.2d 760 (9th Cir. 1983).

⁸⁰ *Id.* at 762.

⁸¹ 16 U.S.C. §§ 4202, 4244.

⁸² *See id.* § 4222.

⁸³ What is CITES?, *supra* note 73.

guidelines set out in the treaty.⁸⁴ Today, there are more than 172 “Party” countries that adhere to the accord.⁸⁵

The species that CITES aims to protect from international trade are listed in one of three appendices. “The level of monitoring and control to which an animal or plant species is subject depends on which of the three appendices the species is listed.”⁸⁶ The African elephant was originally listed under Appendix II of CITES “on February 4, 1977,” but was “upgraded to Appendix I in 1990.”⁸⁷ Due to the successful decrease in the poaching of African elephants for use in the illegal ivory trade since 1990, CITES was able to downgrade the status of certain populations of African elephants to Appendix II again in June, 2007.⁸⁸ This recent amendment to Appendix II applies only to African elephants in certain African states whose conservation efforts have been able to sustain or increase local herd populations, such as “the populations of Botswana, Namibia, South Africa and Zimbabwe, which are included in Appendix II,” all other populations remain in Appendix I.⁸⁹

Article II of the CITES Treaty states the Fundamental Principles regarding pertinent listed species:

1. Appendix I shall include all species threatened with extinction which are or may be affected by trade. Trade in specimens of these species must be subject to particularly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances.
2. Appendix II shall include:

⁸⁴ *See id.*

⁸⁵ *See* 72 Fed. Reg. 45260-01 (August 3, 2007).

⁸⁶ U.S. Fish & Wildlife Service, General Overview, http://www.fws.gov/international/appendix_III/overview.html (last visited Dec. 7, 2007).

⁸⁷ *Grigsby*, 111 F.3d at 814-815.

⁸⁸ *See* 72 Fed. Reg. 45260 (August 3, 2007); *see also* Conference of the Parties to CITES, CoP14, The Hague, Netherlands, June 3-15, 2007 (effective Sept. 13, 2007).

⁸⁹ CITES, *supra* note 18, at app. I, II, and III, *available at* <http://www.cites.org/eng/app/appendices.shtml> (valid as of Sept. 13, 2007).

a) all species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival.⁹⁰

There is one key difference in the regulation of trade of a member of an Appendix I species and a member of an Appendix II species. Trade in any species listed in Appendix I requires both an export permit from the originating country of the species and an import permit from the country of destination, while trade in an Appendix II species requires only an export permit from the originating country.⁹¹ Additionally, the treaty includes standardized criteria for permit issuance and shipment of live animals.⁹² The criteria include:

Article I species – Import permits issue only if “specimen is not to be used for primarily commercial purposes, and if the import will be for purposes that are not detrimental to the survival of the species.... In the case of a live animal ... the proposed recipient is suitably equipped to house and care for it.”⁹³

Export permits issue “if specimen was legally obtained; the trade will not be detrimental to the survival of the species; and an import permit has already been issued.”⁹⁴

Article II species – Export permits issue “if specimen was legally obtained and if the export will not be detrimental to the survival of the species.”⁹⁵

⁹⁰ *Id.* at art. II, §§ 1, 2(a).

⁹¹ *See id.* at art. III and IV.

⁹² *See id.* at art. VI.

⁹³ *Id.* at art. III, available at How CITES Works, <http://www.cites.org/eng/disc/how.shtml> (last visited Oct. 10, 2007).

⁹⁴ *Id.* at art. III.

As is the case with the ESA and AECA, there are also exceptions to the general principles of CITES.⁹⁶ Though a permit may still be required, exemptions and special provisions are made in the following circumstances that may apply to African elephants:

- Specimens in transit;
- Specimens acquired prior to the enactment of CITES;
- Specimens that are personal or household effects;
- Animals that were ‘bred in captivity’;
- Specimens that are destined for scientific research; and
- Animals that are part of a traveling collection or exhibition, such as a circus.⁹⁷

In summary, the fact that national laws must be put in place to effectuate the CITES agreement by individual “Party” nations could pose a hindrance to carrying out the intended plan to prosecute offenders once apprehended. Further, the many exceptions that exist to both the United States’ federal laws and the CITES treaty itself, tend to diminish the rationale behind the Acts. While the number of African elephants grows in some African states, there is still much work to be done in others. It seems apparent that the funding for African elephant conservation programs from the international community has contributed to the success of the CITES objectives, yet programs to combat overpopulation in contained spaces and to reduce the occurrences of human-animal conflicts are still pressingly needed.

III. Human-Animal Conflict

The foregoing analyses illustrate that the United States’ international policy and enactment of the Endangered Species Act, along with the African Elephant Conservation Act, are effective in curtailing poaching for ivory and aiding in conservation of this species. However, greater steps need to be taken to reduce the deleterious effects of

⁹⁵ *Id.* at art. IV.

⁹⁶ *See id.* at art. VII.

⁹⁷ *See* How CITES Works, <http://www.cites.org/eng/disc/how.shtml> (last visited Oct. 10, 2007).

conservation efforts to date. This reflects back on the paradox, whereby the African elephant, facing a reprieve from poachers due to the ban on ivory trading, is overpopulating and damaging the habitats set aside in African states to sustain its numbers.⁹⁸ Further, the increase in the number of incidents of human-animal conflict which too often results in death on both sides,⁹⁹ requires a long-term solution be put in place.

“Hand in hand with this increase [in elephant population] has been an increase in human population (from 8.6 million in 1962 to the [2004] estimate of over 30 million) leading to human encroachment into dispersal areas, corridors and available ranges.”¹⁰⁰ As elephants venture out of refuges in search of food and water, they are forced to compete with humans that have settled into communities on the edge of these parks and elephant ranges.¹⁰¹ “Most conflict zones are concentrated in the central part of the country where agriculture is the mainstay of the economy. Due to lack of a national land-use policy that has resulted in changes in types of land use, conflict incidents are increasing....”¹⁰² Considering the impact humans have had on the African elephant in the past with our nearly incessant killing for ivory, it is likely that if these struggles between man and elephant continue unchecked the elephant population will once again suffer severe consequences.

Currently, national parks throughout African states use a variety of methods in an effort to maintain a balance between the total elephant populations their refuges can support and harmonious co-existence with humans that occupy nearby habitats. The

⁹⁸ See Storey, *supra* note 22; see also MEREDITH, *supra* note 1, at 5.

⁹⁹ See Omondi et al., *supra* note 23.

¹⁰⁰ *Id.*

¹⁰¹ See *id.* at 81.

¹⁰² *Id.*

following methods all take aim at managing the elephant populations, with the exception of one: “creating sanctuaries; sensitizing communities; using physical barriers ([such as] electric fences ...); deterring animals through problem-animal control activities...; translocating elephants; and conducting elephant drives.”¹⁰³

The creation of sanctuaries seems to be the optimal solution as it “can generate revenue from eco-tourism activities for local people” and “mitigat[es] conflicts, particularly in areas with low agricultural potential.”¹⁰⁴ This method would likely work well combined with “community sensitization,” as the goal here would be for local inhabitants to “view the elephant as a useful and manageable animal.”¹⁰⁵ The remaining methods have flaws such as great expense, habitat destruction within confined areas, destabilization to the structure of herds, and continuous maintenance due to the “migratory nature of elephants.”¹⁰⁶

The problems inherent in the types of human-animal conflicts discussed above are not easily addressed by one particular solution. The methods reviewed may all need to play a role in managing the interactions of elephants and their human neighbors, at least until some more stable form of government intervention can be implemented, such as an organized program for land-use zoning that considers the needs of both species and the environment they share.

IV. Conservation versus Sustainable Use

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 83.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 81-84.

Conservation has been defined as “the planned management of a natural resource to prevent exploitation, destruction or neglect.”¹⁰⁷ Interestingly, this differs from the goal of most national parks, and even CITES for that matter,¹⁰⁸ which is leaning towards ensuring sustainable use of wildlife. “Sustainable use” is a term currently associated with The Convention on Biological Diversity, a Biodiversity Treaty presented by the United Nations Conference on Environment and Development (UNCED) in 1992.¹⁰⁹ UNCED has been said to “affirm sovereign rights over the biological resources found within their countries, while accepting responsibility for conserving biological diversity and using biological resources in a sustainable manner.”¹¹⁰

There are key issues distinguishing the conservation efforts of CITES and the UNCED Biodiversity Treaty, however. “CITES primarily emphasizes the preservation of individual endangered species,”¹¹¹ while sustainable use “emphasizes the survival of the species, even at the expense of individual animals.”¹¹² Additionally, UNCED would require that developed countries, such as the United States, share intellectual property rights and genetic resources with developing nations that in turn share their natural and

¹⁰⁷ Carol Buckley, *Conservation?*, <http://www.elephants.com/conservation.doc> (last visited on Oct 10, 2007). Ms. Buckley is the Founding Director of The Elephant Sanctuary in Tennessee. Mission Statement – “The Elephant Sanctuary in Tennessee, founded in 1995, is the nation’s largest natural habitat refuge developed specifically for endangered African and Asian elephants. It operates on 2,700 acres in Hohenwald, Tennessee . . .” <http://www.elephants.com/mission.htm> (last visited on Dec. 9, 2007); *see also* Merriam-Webster Dictionary, <http://www.m-w.com/dictionary/conservation> (printed sources apply variations to the wording found on the internet site.).

¹⁰⁸ *See* U.S. Fish & Wildlife Service, Fact Sheet on CITES, <http://www.fws.gov/international/pdf/CITESfall01.pdf> (2003) (last visited Dec. 7, 2007) (stating that CITES is a “global treaty that ensures that international wildlife trade is based on sustainable use and management of wild and captive populations.” *** “The[] data [collected is] used to determine trends in trade and to ensure that significant trade in wildlife is sustainable.”) *Id.*

¹⁰⁹ *See generally* United Nations Convention on Environment and Development – Convention of Biological Diversity, 31 I.L.M. 822 (June 5, 1992); *see also* CIESIN Thematic Guides, The Convention on Biological Diversity, <http://www.ciesin.org/TG/PI/TREATY/bio.html> [hereinafter CIESIN].

¹¹⁰ CIESIN Thematic Guides, The Convention on Biological Diversity, <http://www.ciesin.org/TG/PI/TREATY/bio.html> (comment attributable to the International Union for the Conservation of Nature Assessment of the UNCED Treaty.).

¹¹¹ Storey, *supra* note 22, at 387.

¹¹² *Id.* at 393.

often endangered biodiversity.¹¹³ The UNCED Treaty also calls for financial commitment of wealthier countries to the developing nations to support implementation of the Treaty.¹¹⁴ It is important to note that “[t]he transfers involve an equalization of the standards of living between the developed and developing worlds.”¹¹⁵ The UNCED Biodiversity Treaty was rejected by the United States based on concerns over sharing intellectual property rights and the much broader apprehension regarding a trend towards socialism.¹¹⁶

Additional concerns have been expressed by conservationists such as Richard Leakey. In an article addressing “sustainable trade” and the fear that CITES was being swayed by this doctrine,¹¹⁷ Leakey expressed his concern “that people in developing countries will only hold back from wiping out species if they can see a financial benefit in preserving them.”¹¹⁸ In a fitting rejoinder to those countries that say they have a right to benefit from the natural resources and biodiversity they cohabit with, Leakey states,

Animals are often worth significantly more over a lifetime in terms of tourist dollars than the sale of their body parts, so trading wildlife in the name of either conservation or development is a flawed strategy. Centuries of trade in products such as ivory have never alleviated poverty in Africa, and never will.¹¹⁹

¹¹³ See CIESIN, *supra* note 110.

¹¹⁴ *See id.*

¹¹⁵ Storey, *supra* note 22, at 394.

¹¹⁶ *See id.*

¹¹⁷ Leakey, *supra* note 27.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

V. Conclusion and Recommendations

“[E]lephants of all races have been closely involved with humans for perhaps half a million years and it will be mankind’s loss if we continue the process of extermination that was begun by ... man” since the time of the mammoth.¹²⁰ It is quite distressing that the African elephant species, which the United States has enacted laws and raised funds to support, is facing another crisis. This time they are losing their homeland, instead of their lives; however, the loss of their habitat is also having deadly effects. The African elephant is still sought for its ivory, although CITES, with the aid of the United States, has provided for great reductions in the number of elephants killed for this purpose. It is precisely because of the salvation from ivory poachers that the African elephant has begun to re-populate. Unfortunately, the species is increasing too rapidly for the restrictive environment they are currently housed in throughout African countries. Other than reestablishing unfettered elephant ranges, which would be impossible to protect against poachers, elephant populations must be relegated to the reserves and national parks within the midst of their natural habitat. “In the long term, the survival of the remaining herds depends on the effective management of [these] national parks. ...[T]hey provide elephants with their last refuge.”¹²¹

Of great concern is the fact that “nations that use culling will increase their pressure on the international community to allow a return to ivory trading.”¹²² CITES has already approved the release of stockpiled ivory for certain African states.¹²³ These

¹²⁰ CLUTTON-BROCK, *supra* note 3, at 120.

¹²¹ MEREDITH, *supra* note 1, at 224.

¹²² Storey, *supra* note 22, at 383.

¹²³ See 72 Fed. Reg. 45262 (August 13, 2007). (CITES approved “trade in registered raw ivory for Botswana, Namibia, South Africa and Zimbabwe from existing stockpiles,” upon the condition “that no

stockpiles are not composed of illegally obtained ivory, but are the bounty taken from the culling of thousands of African elephants under the guise of population management. It is not just the ivory that is valuable; other parts of the elephant's body are used in ways that make them a veritable goldmine in the arena of international wildlife trade.¹²⁴ While CITES has put conditions upon the sale, such as a prohibition to resubmit similar proposals from the same African countries for a period of at least nine years,¹²⁵ “[a]s pressure grows for a change to the rules, the ban, in its present form, is unlikely to remain in place.”¹²⁶ According to renowned African elephant researcher, Cynthia Moss,

[a]necdotal evidence suggests that poaching has increased since [the CITES approved] ivory sales. Even if elephant numbers have recovered, there is nothing new since the horrors of the '80s to stop the ivory trade. Laws are just as lax, African wildlife departments are even more poorly funded, and corruption is worse.¹²⁷

Some recommendations to combat the conditions the African elephant presently face are feasible however. First, whether the UNCED Biodiversity Treaty came about through good intentions or not, it is simply unrealistic. The best approach to conservation of the African elephant, while simultaneously supporting rapid human development in African countries is, in this author's opinion, to strengthen CITES. This includes more efficient management of financial and intellectual aid to conservation programs in African states. In contrast to UNCED's concept to manage elephant populations “according to measured effects on biodiversity rather than on absolute numbers of

further proposal to allow trade in elephant ivory from these populations may be submitted until nine years following sale of approved ivory stock.”). *Id.*

¹²⁴ See MEREDITH, *supra* note 1, at 224.

¹²⁵ See 72 Fed. Reg. 45262 (August 13, 2007).

¹²⁶ MEREDITH, *supra* note 1, at 225.

¹²⁷ Simon Robinson, *Kenya's Elephant Team: You Might Not Buy Ivory If You Saw This Family* (February 28, 2000), in *Time's Heroes of the Planet*, <http://www.time.com/time/reports/environment/heroes/heroesgallery/0,2967,moss,00.html> (last visited on Dec. 7, 2007). Cynthia Moss is an Elephant researcher, conservationist and author. Ms. Moss is considered the world's leading expert on African elephants.

elephants,”¹²⁸ focus must remain on controlling the effects of an increasing African elephant population. This should be the main objective of all conservation plans. Since culling as a form of management is sharply contradictory to such an aim, not to mention defies moral reasoning for use on an endangered or threatened species, other methods should be explored. Such methods include, but are not limited to, the use of contraceptives and instituting better processes to accomplish translocation to other parks with the capacity for housing larger populations.¹²⁹

Additionally, African governments can effectuate plans to reduce human-animal conflict with initiatives in land-use zoning. The United States can readily assist in this area by sharing resources from an established and proven set of regulations that address the intricacies involved in zoning and city planning. The United States can, and should, also consider limitations to the exceptions found in the ESA, AECA and CITES to foster a stronger commitment to the purposes of each of these legal enactments. Further complications in the enforcement of these statutes on United States soil can also be averted with a clarification that general intent to violate such statutes would achieve greater deterrence of future violations than “specific intent” will.¹³⁰

Clearly, more can be done to address the needs of the African elephant, in the United States and abroad. The United States, as always, is in a position to set a positive precedent on the issues discussed herein.

¹²⁸ Omondi, *supra* note 23, at 102.

¹²⁹ *See id.*

¹³⁰ *See Grigsby*, 111 F.3d at 823.