

The Conservation of African Elephants under the CITES International Ivory Trade Ban

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Abstract

1989 CITES decision to put a total ban on international trade in ivory and the decisions to allow the 1999 and 2008 one-off-sales have generated polarized debates on whether or not these decisions are the reasons behind increasing levels of poaching in Africa. An undisputed fact is that; international illegal ivory trade has promoted rampant elephant poaching in Africa. What has and is contested is whether the ban or the one-off sales have a role to play in the current elephant poaching and increase in the illegal ivory trade. The Southern African range countries blame the international ivory trade ban for the current ivory poaching levels, while Countries such as Kenya, Benin and Uganda have blamed the sales for reigniting international appetite for ivory. The available evidence suggests that the international ivory trade ban with an unbanned domestic market has promoted poaching and negatively impacted on range countries' ability to effectively and sustainably protect elephants. Besides the reduction or elimination of revenue, the ban undermined the economic incentives associated with elephant conservation, thereby making elephant conservation unattractive, unachievable and subsequently opening up to poaching and illegal trade.

Introduction

Elephant poaching and illegal trade in ivory have become a global problem that has resulted in serious threats to the survival of elephants. The reduction of the African elephant has largely been attributed to massive poaching through trans-boundary wildlife criminal activities.

The high financial value of ivory and the availability of an international black market especially in Asia has created a huge problem in Africa.¹ Transnational poaching and illegal trade syndicates can exploit the institutional weakness, porous borders, civil conflicts and legislative loopholes in both the range and the non-range consuming countries to feed the rising demand for ivory in some Asian countries where ivory

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¹ Caitlin O'Connell-Rodwell and Rob Parry-Jones, 'An Assessment of China's Management of Trade in Elephants and Elephant Products', TRAFFIC East Asia, 15 July 2002.

is regarded as having a medicinal component.² It has been said that between 1979 and 1989, the period of the uncontrolled ivory trade, Africa lost over half of its elephant population from about 1.3 Million to 600 000.³ As a result of the devastating effects of trade, a blanket international ivory trade ban was put by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) in 1989. Since then CITES approved two one-off sales of ivory from elephants that had not been illegally killed to Japan in 1999 and to China and Japan in 2008.⁴ ‘The legitimacy and effectiveness of these regulations have been placed under considerable scrutiny, to the point that states now question whether they are helping the situation or merely fueling the incentives for further species exploitation.’⁵

Both the ban and the sales have generated a polarized debate among lawyers, academics and state parties as to their impact on the current poaching levels and on elephant conservation in Africa. The debates are polarized, with one group, arguing that despite the intention of these sales to mitigate growing demand for ivory this has increased both demand and poaching. On the other hand, range countries and other scholars oppose this view saying it is the ban that has promoted illegal ivory trade. Southern African range countries opposed the ban and continuously spoke against the ban, citing it as unfair, with the Zimbabwean President recently saying ‘that one size fits all approach from CITES of banning everything disregards the good efforts of our governments and is neither sustainable nor advisable. We must reject it.’⁶ Apart from the trade restrictions, negligent or disregard of CITES mandate by some non-range countries has also contributed to poaching levels in the range countries as consumers, middlemen and traders may be residents of these countries. Given the continued decline of the elephant population in Africa due to poaching and illegal trade, this article is therefore centered on analysing, firstly the role of CITES as an instrument of international law, its main “controversial” decisions on ivory trade, that is the international ivory trade ban and the one-off sales and their impact on elephant conservation and the current poaching levels, with a focus on Southern African particularly Zimbabwe. Secondly, on how it has been implemented by member countries to protect the African elephant from poaching and illegal ivory trade. Thirdly, using the case of Zimbabwe, the paper’s examination continues by highlighting several peculiar challenges faced by African range countries, which are negatively impacting on their efforts to effectively conserve elephants.

² Yollanda Washaya & Jeffrey Kurebwa, 'Effectiveness of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) in Curbing Elephant Poaching in Zimbabwe', vol. 1, IARJ Bus Mng p. 38, 2020, p.38.

³ Andrew M. Lemieux & Ronald V. Clarke, 'The International Ban on Ivory Sales and Its Effects on Elephant Poaching in Africa'. vol.49, BJC p.451, 2009, p. 453.

⁴ Joseph Vandergrift, 'Elephant Poaching: CITES Failure to combat the Growth in Chinese Demand for Ivory', vol. 31, VELJ p. 102, 2013, pp. 109-111.

⁵ Ryan Cole, 'The Effect of International Trade Bans on the Population of Endangered Species', PSJIA p. 35, 2012, p. 35.

⁶ Denis Farrell, 'African countries want to lift ban on ivory sale and elephant hunting', Washington Post, Washington, 8 May 2019, available at https://www.washingtonpost.com/lifestyle/kidspost/african-countries-want-to-lift-ban-on-ivory-sale-and-elephant-hunting/2019/05/08/e3a1acee-71af-11e9-9f06-5fc2ee80027a_story.html?utm_term=.18dece82648, accessed on 30 April 2020.

CITES and International Trade Restrictions

The will to create cooperation in the protection of endangered species resulted in the creation of the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) signed on 6 March 1973 and entered into force on 7 July 1975.⁷ CITES was formed as a response to the decline and over-exploitation of wildlife and plants through international trade.⁸ It is meant to ensure that international trade does not threaten the survival of wild fauna and flora; this is done through regulating, monitoring and banning international trade in some wild species and their specimens.⁹ CITES has classified animals and plants into three appendices depending on the threat to the species.¹⁰ The elephant was identified as one of the most threatened species and therefore, in 1989 it was put in Appendix I, which means it is likely to face extinction. The African elephant is in Appendix I of the CITES, except those from Botswana, Namibia, South Africa (2002) and Zimbabwe, which in 1997 were placed in Appendix II, after these countries protested and made a request to have their elephants downgraded owing to its huge population.¹¹ Realizing the importance of scientifically proven information to inform decision-making at the CITES meeting. At the COP10 of 1997 members agreed to establish the Monitoring of Illegal Killing of Elephants (MIKE)¹² and ETIS, which is managed by TRAFFIC. The former aimed at assisting member states especially the developing range countries to control its domestic population, create and enforce laws and regulations to protect elephants from poaching.¹³ The latter serving as a complement to MIKE mandated with compiling law enforcement information on seizures, which information is then used to monitor the scale of international illegal trade.

CITES as a non-self-enforcing treaty requires state parties to effectively enforce all the provisions of the convention. Part of the obligation consists of implementing the treaty in domestic law, making CITES binding upon the States' citizens. Failure by member states to take their obligations will result in the failure of the convention and subsequent failure to save elephants from extinction. Upon joining CITES countries

⁷ Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 983 UNTS 243, entered into force 7 July 1975.

⁸ Elisabeth M. McOmer, 'Problems in Enforcement of the Convention on International Trade in Endangered Species', vol. 2, *BJIL* p. 673, 2002, p. 675.

⁹ David Harland, 'Jumping on the "Ban" Wagon: Efforts to Save the African Elephant', vol. 14, *FFWA* p. 284, 1990.

¹⁰ CITES classified animals and plants into three appendices depending on the threat to the species. Appendix I is of all species that are in danger of extinction, and commercial trade of those species or their specimens is prohibited. Appendix II is for species not threatened with extinction but may suffer decline if commercial trade in the species or their specimens is not restricted. Appendix III is of species controlled in one party and has asked other parties to control international trade.

¹¹ 'CITES and Elephants, what is the "Global Ban" on Ivory Trade?' US Fish and Wildlife Services International, November 2013 available at <https://www.fws.gov/le/pdf/CITES-and-Elephant-Conservation.pdf>, accessed on 23 January 2017.

¹² CITES, 'Establishing a Long Term System for Monitoring the Illegal Killing of Elephants (MIKE)', 1997, Cop 10 Resolution Conf 10.10.

¹³ US Fish and Wildlife Services International (n 11).

are expected to take appropriate measures to implement the convention. This is elaborated in resolutions and decisions, particularly Resolution Conf 8.4. According to Article VIII, member states are required to take appropriate measures in enforcing the provisions of the convention, by prohibiting any form of trade in endangered species and or their products in violation of the convention. Part of the obligation consists of implementing the treaty in domestic law. The national measures the State Parties are obligated to give effect to, do not hinder the parties from adopting more stringent domestic legislation,¹⁴ meaning countries can go an extra mile in implementing the convention. In implementing their obligations countries such as Kenya and Zimbabwe taking a 'zero tolerance' approach on domestic ivory trade and poaching by introducing a shoot-to-kill policy that would allow rangers to shoot poachers.¹⁵¹⁶ Accordingly, CITES National Legislation Project classifies Zimbabwe as a 'Category 1' country, meaning that it has enacted domestic legislation that is believed generally to meet the requirements for effective implementation of CITES.¹⁷

In 1992 through its land policy, Zimbabwe declared 13% of its land to be protected land or National Parks (NP) under wildlife.¹⁸ Hunting in these parks is generally prohibited unless one has a license issued by the responsible authorities. Hunting is thoroughly monitored through permits and collection of data from all hunting activities in both private and communal land. Zimbabwe has very strong anti-poaching laws if convicted a poacher is sentenced up to 20 years in jail or a fine of up to \$20,000 or both.¹⁹ In Namibia, a poacher if convicted pays a fine of \$14,282 and/or faces up to twenty years imprisonment,²⁰ while in Kenya the Act mandates sentences of not less than \$232,000 in fines or life imprisonment for trafficking in endangered or threatened animal trophies.²¹ The laws of Botswana designate elephants as partially protected game animals in Part 1 of the Seventh Schedule.²² Under its laws hunting is permitted to license holders, poaching can result in a fine of US\$6,400 and or ten years imprisonment, while illegal export attracts US\$5,400 or ten years imprisonment.²³ China once regarded as a hub for poached ivory since 2013 took a very successful strong stance against illegal ivory. With

¹⁴ CITES (n 7), art XIV.

¹⁵ Emily Hutchens, 'The Law Never Forgets: An Analysis of the Elephant Poaching Crisis, Failed Policies, and Potential Solutions', vol. 31, WILJ p. 934, 2014, p. 958.

¹⁶ Tom Milliken, Robert W. Burn and Louisa Sangalaku, 'A report on the status of the Elephant Trade Information System (ETIS) to the 14th meeting of the Conference of the Parties', CITES, 2007, CoP14 Doc 53.2.

¹⁷ CITES Standing Committee, 'National Laws for the Implementation of the Convention - Annex, Status of Legislative Progress for Implementing CITES', 2014, SC65 Doc. 22 available at <http://www.cites.org/sites/default/files/eng/com/sc/65/E-SC65-22.pdf>, accessed on 11 November 2017.

¹⁸ 'Wildlife conservation in Zimbabwe: A review of the relevant statutes and an assessment of protected areas, conservation and implications of the indigenisation policy' African Wildlife Foundation, Nairobi, Kenya, September 2011.

¹⁹ Zimbabwe Parks and Wildlife Act of 1975(2009 amendment); Ann Linder, 'Detailed Discussion of Elephants and the Ivory Trade', Animal Legal & Historical Center, Michigan, USA, 2016 available at <https://www.animallaw.info/article/detailed-discussion-elephants-and-ivory-trade>, accessed on 1 March 2019.

²⁰ Nature Conservation Ordinance of 1975 (1996 Amendment), Namibia.

²¹ The Wildlife Conservation and Management Act 2013, Kenya.

²² Wildlife Conservation and National Parks Act 1999, sch 9, Botswana.

²³ Wildlife Conservation and National Parks Act 1992, revised edition, 2011, Cap 38, 18, Botswana.

a recent domestic ivory ban in China, it was said that several 'ivory carving enterprises closed their ivory business activities since this domestic ban.'²⁴ This has led to noticeably reduced demand for ivory in China since 2013. The domestic ban is said to have 'led many young people in China to believe that consuming ivory carvings is 'shamed' and have adopted negative attitudes toward ivory carving purchase.'²⁵ The recent efforts, taken by China and the fall of ivory price on the legal market²⁶ could be a sign of the end of the ivory trade.

As a weakness of international law CITES like other international treaties, is a voluntary treaty, and national laws regulating trade in wildlife varies according to individual countries. Through effective implementation of the convention, the Southern African countries have managed to steadily grow their elephant populations. In Zimbabwe 'elephant population has grown steadily, from 46,000 in 1980 to more than 58,000 in 1989. Today, the country has an estimated 85,000 elephants — 30,000 more than its carrying capacity.'²⁷ Botswana's population increased from 55, 000 in 1991 to the current population of almost 160, 000. The commitments of these and other countries to implement the convention have to some extent failed to have an international positive impact due to the failure of the importing countries such as Thailand, Vietnam, and the USA to adequately deal with illegal imports. There has been some inconsistency in the implementation of CITES, though some countries have enacted adequate laws to fully implement the convention, a number of them are yet to comply.²⁸ Failure to effectively implement the convention has promoted rampant poaching of the African elephants as it has provided loopholes in both the African range countries and the Asian consuming countries. It is argued that almost half of the member states are yet to fully implement the convention.²⁹ Due to minimal enforcement and compliance, the convention has been relatively ineffective in Africa³⁰ and Asia. Countries such as Mozambique³¹ and Nigeria, (though the latter has been accorded the category A/1 status by CITES),³² due to corruption, are some of the countries with a very weak legal system that has promoted internal illegal ivory trade and poaching resulting in an

²⁴ Xuehong Zhou et al., 'Elephant poaching and the ivory trade: The impact of demand reduction and enforcement efforts by China from 2005-2017', vol. 16, *Global Ecology and Conservation*, 2018, p. 1.

²⁵ *Ibid*, p. 5.

²⁶ Adam Cruise, 'China's Legal Ivory Trade is 'Dying' as Price Fall', *China Dialogue*, 5 April 2017 available at https://www.chinadialogue.net/article/show/single/en/9717-China-s-legal-ivory-trade-is-dying-as-prices-fall?mc_cid=bbeb34e600&mc_eid=582de06226, accessed on 6 April 2017.

²⁷ Busani Bafana, ' "Let us trade": Debate over ivory sales rages ahead of CITES summit', *Mongabay Series: Conservation Effectiveness*, 11 July 2019 available at <https://news.mongabay.com/2019/07/let-us-trade-debate-over-ivory-sales-rages-ahead-of-cites-summit/>, accessed on 23 March 2019.

²⁸ Vandergrift (n 4), p. 107.

²⁹ Katarzyna Nowak, 'Cites Alone Cannot Combat Illegal Wildlife', vol. 34, *Trade*, SAIIA Policy Insight, 2016, p. 4.

³⁰ Yvonne Fiadjoe, 'Cites in Africa: An Examination of Domestic Implementation and Compliance', vol. 4, *Sustainable Development Law and Policy*, p. 38, 2004, p. 38.

³¹ 'Mozambique: Diminishing the effectiveness of CITES Rhinos and Elephants Protection', *Environmental Investigation Agency, USA*, 2014 available at https://content.eia-global.org/posts/documents/000/000/334/original/Mozambique_Pelly.pdf?1468593671, accessed on 12 March 2019.

³² Category 1: legislation that is believed generally to meet the requirements for the implementation of CITES.

uncontrolled feeding of the international illegal ivory market.³³

The effectiveness of CITES does not depend only on whether countries have enacted the necessary legislation, but on whether the legislation is being enforced.³⁴ Further to Article, VIII.1, members are obliged to keep all records of all related international trade in endangered species. Besides, state parties should biannually ‘report on legislative, regulatory and administrative measures taken to enforce the provisions of the present convention’³⁵ Through reporting, countries with weak legislation are identified and appropriate action or advice is given. However, some countries with weak legislation have been identified and CITES has failed to decisively deal with them. Reports by ETIS and MIKE have shown a serious situation affecting the African elephants; a total of 300 tonnes of ivory were seized between 2009 and 2011.³⁶ They have further shown an increase in poaching and the number of seized illegally imported and exported ivory and ivory works in Central Africa and however ‘almost none of the seizures . . . resulted in successful investigations of the criminals behind these transactions.’³⁷ To make matters worse, at the 70th meeting of the Standing Committee of CITES countries such as Uganda, Tanzania, Thailand and the Philippines, regarded as some of the worst poaching and illegal ivory trade countries were allowed to exit the National Ivory Action Plan (NIAP),³⁸ an initiative meant to strictly monitor the implementation and enforcement of CITES in reducing massive elephant poaching. This decision was taken while some of them are part of the few countries still allowing domestic ivory trade despite CITES recommendation to immediately close domestic markets.

(a) International ivory trade ban

The 1989 international ivory trade ban and the one-off-sales have generated a lot of inconclusive debate as to their effectiveness in elephant conservation. Since the ban in 1989, four countries in Africa have therefore been given CITES approval to auction their ivory stockpiles to Japan in 1999 and China and Japan in 2008. The ban on ivory trade has mainly been supported by western countries and NGOs. The general assumption in most pro-ban western countries is that ivory always comes from poached elephants and that legal ivory trade promotes poaching. The position ‘reflects an overly simplistic, Western viewpoint founded in animal rights ideology.’³⁹ In reality, poaching has taken place over a very long period and governments do collect ivory from elephants’ natural mortality. Notable conservationists such as Daniel Stiles and Mary Rice are divided as to the impact of the ban on promoting poaching in Africa.

³³ Fiadjoe (n 30), p. 40.

³⁴ Ibid.

³⁵ CITES (n 7), art VIII (7) b.

³⁶ CITES Secretariat, ‘Status of African elephant populations and levels of illegal killing and the illegal trade in ivory: A report to the African Elephant Summit’, 2013 available at https://cmsdata.iucn.org/downloads/african_elephant_summit_background_document_2013_en.pdf, accessed on 11 January 2017.

³⁷ CITES, ‘Report on the Elephant Trade Information System (ETIS)’, 2016, CoP17 Doc. 57.6.

³⁸ CITES Seventieth Meeting of the Standing Committee, Sochi, Russia, and (SC70) 2017SC70 Doc. 27.1.

³⁹ Daniel Stiles, ‘Only Legal Ivory Can Stop Poaching’, Earth Island Journal, available at <http://www.earthisland.org/journal/index.php/magazine/entry/stiles/>, accessed on 21 March 2019.

Stiles is of the view that trade bans are counterproductive and the current ban is not supported by scientific evidence, therefore it will not have a positive impact on reducing poaching.⁴⁰ Meanwhile, pro-ban conservationists such as Mary Rice are of the view that legal trade provides for laundering mechanisms for ivory⁴¹ thereby encouraging poaching and must be stopped.⁴²

Though bans can be effective as it was with the 1980s -1990s Mexican parrot ban⁴³ which was supported by the major importing country USA through the US Wild Bird Conservation Act 1992.⁴⁴ It is, however, impossible to tell that this same approach will bring the same results in the ivory trade. However, most previous international bans have proved a different point as to what pro-ban advocates have said. Based on history, bans on certain products and services have created an appetite for such products and services. Consumers of such products have responded by creating and sustaining black markets. The Alcohol ban in the USA is said to have further promoted illegal underhand and rampant abuse of alcohol.⁴⁵ If a lawful trade were permitted, it is claimed, these harmful effects could simply be avoided.⁴⁶ In this case, a ban on legal international ivory trade will make the illegal trade a lucrative business thus promoting poaching. Previous CITES related international bans have had far-reaching problems. It is argued that the rhino horn trade ban proved not to be fully effective as it is said that, despite the international trade ban and Appendix I listings, the black market price of the rhino horn price rose, providing an incentive for more poachers,⁴⁷ in Korea, prices increased by almost 400% in just two years.⁴⁸ The global rhino population decreased from 75 000 in the 1970s to about 11 000 in 2000. In Tanzania it is said the rhino population, which stood at 3795, reduced to 275 within 7 years into the ban.⁴⁹ 'Regarding the Wild Bird Declaration, scholars determined that several bird species were harmed by the imposition of the international blanket ban.'⁵⁰ In the Americas, the parrot ban in the 1990s is said to only have reduced international trade but between

⁴⁰ Diana S. Weber et al, 'Unexpected and Undesired Conservation Outcomes of Wildlife Trade Bans—An Emerging Problem for Stakeholders?', vol. 3, GEC p. 389, 2015, p. 391.

⁴¹ Mary Rice, 'The Case Against a Legal Ivory Trade: It Will Lead to More Killing of Elephants', Yale Environment 360, 13 October 2014 available at http://e360.yale.edu/features/counterpoint_the_case_against_a_legal_ivory_trade_it_will_lead_to_more_killing_of_elephants, accessed on 17 January 2014.

⁴² Mary Rice, 'Stop Stimulating the Ivory Trade, Just Stop Trade', National Geographic, 14 January 2013 available at <http://voices.nationalgeographic.com/2013/01/14/stop-stimulating-the-ivory-trade-just-stop-trade/>, accessed on 17 January 2017.

⁴³ Jose L. Tella and Fernando Hiraldo, 'Illegal and Legal Parrot Trade Shows a Long-Term, Cross-Cultural Preference for the Most Attractive Species Increasing Their Risk of Extinction', vol. 9, PlosOne, 2014, p. 9.

⁴⁴ Wild Bird Conservation Act 1992, USA.

⁴⁵ Mark Thornton, 'Cato Institute Policy Analysis No. 157: Alcohol Prohibition Was a Failure', Policy Analysis, Cato Institute, 1991 available at <https://object.cato.org/sites/cato.org/files/pubs/pdf/pa157.pdf>, accessed on 1 April 2019.

⁴⁶ Ibid.

⁴⁷ IUCN, 'Trade Measures in Multilateral Environmental Agreements: A Report by IUCN - The World Conservation Union on the Effectiveness of Trade Measures Contained in The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)', IUCN Report (09/11/00), 2000.

⁴⁸ Philippe Rivalan, 'Can Bans Stimulate Wildlife Trade?', vol. 447, JSN p. 529, 2007, p. 530.

⁴⁹ Cole (n 5), p. 38.

⁵⁰ Ibid, p. 38.

‘65,000 to 78,500 parrots continued to be poached annually in Mexico, an estimated 86-96 percent of which were sold domestically.’⁵¹ Similarly, the International Whaling Commission’s (IWC) ban on whaling soon after the World War 2 did not produce the desired results as the possibly unhappy leading whaling countries USSR and Japan continued to engage in illegal whaling while falsifying data and misreporting to IWC.⁵²

Pro-ban tends to argue that legalising the trade would remove any stigma effect that may currently be in operation to reduce demand, and ignite demand among consumers who may otherwise have been reluctant to purchase a banned product. They further argue that illegal ivory will find its way into the legal market and it is difficult to distinguish between illegal and legal market but in a study by Stiles in China that ‘a relatively tiny amount of illegal ivory is mixed in with the legal ivory... 99 percent of poached ivory is sold in illegal outlets, online, and through personal networks – no laundering is involved’⁵³ According to Solomon Hsiang and Nitin Sekar, the ivory black market grew by an estimate of 66 per cent after the 2008 one-off sale and ivory seizure grew from 4.8 per cent to 8.4 per cent.⁵⁴ The research that has been done by all CITES related institutions have failed to produce clear evidence linking the sales and poaching. At the COP17 MIKE reported an increase in elephant poaching⁵⁵ but disputed this claim by some members and NGOs, that the rise in poaching was directly linked to the 2008 one-off sale. Further, the analysis by ETIS between 1989 and 2007 ‘concluded that no evidence could be found to validate the hypothesis that CITES decisions produce ‘signals’ that lead to increased illicit ivory trade and elephant poaching’⁵⁶ Looking at the latest global changes the appetite could have been driven by the economic development in South East Asia, Taiwan, Hong Kong and South Korea beginning in the 1980s and 1990s,⁵⁷ and infrastructure links between Africa and Asia.⁵⁸ The 2008 sale is said to have had little to do with demand, as Japan’s market was unaffected and demand there has been gradually decreasing since the 1990s⁵⁹ while China’s illegal trade was increased after the 2005 Chinese government's declaration of ivory carving as an intangible cultural heritage.⁶⁰

The ban is more of a top-down approach failing to take into consideration the views of those with the elephants who unfortunately are at the bottom. African range countries

⁵¹ Stephen Pires and Ronald V. Clarke, ‘Are Parrots CRAVED? An Analysis of Parrot Poaching in Mexico’, vol. 49 JRCDD p. 122, 2012, p. 127.

⁵² Yulia V. Ivashchenko and Phillip J. Clapham What's the catch? Validity of whaling data for Japanese catches of sperm whales in the North Pacific, vol. 2, Royal Society Open Science, 2015.

⁵³ Stiles (n 39).

⁵⁴ Solomon Hsiang and Nitin Sekar, ‘Does Legalization Reduce Black Market Activity? Evidence from a Global Ivory Experiment and Elephant Poaching Data’, National Bureau of Economic Research working paper series working paper 22314, 2016, p. 27 available at <http://www.nber.org/papers/w22314>, accessed on 1 March 2019.

⁵⁵ CITES, ‘Report on Monitoring the Illegal Killing of Elephants (MIKE)’, 2016, CoP17 Doc 57.6.

⁵⁶ Daniel Stiles, ‘CITES–approved ivory sales and elephant poaching’, vol. 45, *Pachyderm* p. 149, 2008, p. 151.

⁵⁷ *Ibid.*

⁵⁸ Elizabeth L. Bennett, ‘Legal Ivory Trade in a Corrupt World and its Impact on African Elephant Populations’, vol. 29, no. 1, *Conservation Biology*, 2014, pp. 1–7.

⁵⁹ Stiles (n 39).

⁶⁰ *Ibid.*

have also taken a strong position against the ban which might make it difficult for them to have that zeal to effectively protect elephants, as they feel greater involvement of outsiders than they are. These suggestions come from the statements by Botswana President who recently said ‘We cannot continue to be spectators while others debate and take decisions about our elephants,’⁶¹ and Namibia’s president saying ‘I listened this morning to all the experts lecturing us, and I wanted to ask where they come from?... If they are from Europe or the US, I wanted to ask them how they destroyed all their elephants, but come to lecture us.’⁶² At the Cop17 Zimbabwe rejected any move to transfer its elephant to Appendix I and advocated for the lifting of the ivory trade ban, a move that was vehemently rejected by other members such as Benin, Kenya and Uganda among others who wanted African elephant moved to Appendix I.⁶³ Zimbabwe and other range countries felt cheated and abused as they felt that non-range countries are abusing them by deciding on matters they do not have the first-hand experience. Unhappy countries are likely to abrogate their commitments, with Southern African countries contemplating invoking article XXIII,⁶⁴ which if they are to make a reservation or pull out of the convention will expose the elephants to an unregulated high rate of both domestic and international trade. This brings us to Article XV on the voting procedures, any amendment to the convention is decided upon by two-third of the state parties who in their decision can disregard scientific evidence and settle for opinions. This has formed the basis for contestations within CITES, with the range countries accusing non-range countries of making political decisions disregarding scientific evidence as provided for by the official institutions of CITES like MIKE.⁶⁵ Decisions have been reached mainly by non-range countries such as Western countries that lack a clear first-hand experience of elephant conservation. The question now is; will the range countries just take a back seat or take action? One of the actions that can be taken by the range countries is to either make a reservation or completely withdraw from CITES. The withdrawal of the range countries will be more catastrophic and ‘it would critically weaken the CITES if the states with the largest elephant populations simply left the convention and began to trade outside it.’⁶⁶ This will defeat the whole purpose of CITES concerning elephant conservation. It is, therefore, important that any decision to list in the CITES appendices should consider whether such a listing is beneficial to the conservation of the species.

Elephant Poaching and the Presence of Market

⁶¹ Farrell (n 6).

⁶² Ibid.

⁶³ CITES, ‘Listing all Elephants in CITES Appendix I’, 2016, CoP17 Prop 16.

⁶⁴ Kaula Nohongo, ‘Southern African nations threaten to pull out of global wildlife trade pact’, Bloomberg, 28 August 2019 available at <https://www.businesslive.co.za/bd/national/science-and-environment/2019-08-28-southern-african-nations-threaten-to-pull-out-of-global-wildlife-trade-pact/>, accessed on 21 March 2019.

⁶⁵ CITES (n 7), art XVIII; Under this article country, are allowed to make reservations, especially on decisions they are not comfortable with, a thing that has limited the effectiveness of the convention.

⁶⁶ Rosaleen Duffy, ‘Global Environmental Governance and North-South Dynamics: The Case of the CITES’, vol. 31, EPC:GP p. 222, 2013, p. 235.

The availability of both regulated and unregulated ivory markets even in those countries that do not have elephants is the greatest threat to elephant poaching. CITES Article VIII, is, however, silent on the domestic market, and this has resulted in the availability of unregulated domestic trade threatening the survival of elephants. At the CoP16, members adopted a non-binding resolution to end domestic ivory markets.⁶⁷ However, it is not binding and does not attract any form of sanction from CITES or any other member. Though, through Article XIII and the Resolution 14.3⁶⁸ multilateral actions can be taken against the violator not so much has been done in the past to effectively force countries into compliance. Though previously, with some level of success, individual countries have imposed sanctions on other countries for non-compliance,⁶⁹ under a non-binding resolution, countries act out of their volition and failure to act appropriately will not attract sanctions or any form of punishment. In this case, CITES will entirely rely on the actions of such countries as China, Thailand, Vietnam, and the USA to pass laws to effectively put out any form of domestic ivory market. CITES permits each member state to individually determine how it will penalise violators, but half of the member states have not created any legislation allowing for domestic or international sanctions where a violation of CITES occurs. Notably, the Pelly amendment of the USA has been described as a 'stick' against other countries violating the convention, but without other countries taking the same route the impact of CITES sanctions will not be very much effective.

Several countries have legal domestic markets and surprisingly most of these countries are not range countries. It was reported in 2008 that more than a third of ivory on the US market could have been illegally imported mainly from Africa.⁷⁰ The CoP14 ETIS analysis shown that Vietnam in recent times has joined a group of countries that were identified as playing a secondary, though important, role in the illegal ivory trade. ETIS established that these countries fell within a group of countries that exhibits poor law enforcement effort and they potentially could become the more prominent players in the future illegal ivory trade.⁷¹ In a publication by the Namibia Financial Intelligence Centre, it was recently shown that 'In two of the (Asian) countries where rhino horns and ivory are consumed, it was surprising to find that these countries have only criminalized possession of wildlife and wildlife products if they originate from within their jurisdictions.'⁷² In a study of some African countries, Stiles⁷³ found that the Central African region with unregulated domestic ivory trade had the highest poaching levels as opposed to the Southern counterparts who benefited from the international

⁶⁷ CITES, 'Actions to Combat Wildlife Trafficking', 2016, CoP17 Doc 27.

⁶⁸ CITES, 'CITES compliance procedures', 2007, Resolution Conf 14.3.

⁶⁹ Peter H. Sand, 'Enforcing CITES: The Rise and Fall of Trade Sanctions', vol. 22, RECIEL p. 251, 2013, p. 253; individual countries such as US and EU have imposed restrictions on Japan in 1986, Taiwan in 1993, while EU imposed restrictions on Indonesia in 1991-1995.

⁷⁰ 'Ivory Trade and CITES', Humane Society International, 2013 available at http://www.hsi.org/campaigns/dont_buy_wild/african_ivory_trade.html, accessed on 3 January 2017.

⁷¹ Milliken, Burn and Sangalakula (n 16).

⁷² Republic of Namibia Financial Intelligence Centre, 'Rhino and Elephant Poaching, Illegal Trade in Related Wildlife Products and Associated Money Laundering in Namibia', Trends and Typology Report No 1, 2017.

⁷³ Daniel Stiles, 'The Ivory Trade and Elephant Conservation', vol. 31, EC p. 309, 2004, p. 317.

regulated trade.

Several ETIS reports issued so far have all shown that illegal trade in ivory is mainly connected to the availability of large-scale, poorly controlled, domestic ivory markets in non-range countries in both Asia and Africa. In these places, there is a likelihood of high levels of corruption and poor law enforcement effort.⁷⁴ The effectiveness of the current efforts has largely been undermined by corruption and abuse of power. Though laws and regulations may be there issues of corruption have undoubtedly undermined the effectiveness of these laws. The well organised trans-boundary wildlife criminal activities have been necessitated by the involvement of senior government officials in both the range and the consuming countries. Corrupt governments have been said to be enabling poachers to smuggle ivory under diplomatic cover and using forged documents.⁷⁵ According to a TRAFFIC Report, 'Asian criminal networks, often in collaboration with local political and economic elites, completely dominate the supply of raw ivory out of Africa.' With Tanzania dismissing officials from the Ministry of Natural Resources and Tourism for wildlife trafficking.⁷⁶

Elephant conservation and Challenges faced by range countries

The Southern African Range Countries have been advocating for the sustainable use of endangered species rather than a total ban on international trade. The philosophy in the region is that in poor economy elephants cannot survive unless they look after themselves. The ivory ban is said to have taken away a source of foreign currency that the governments' claims would be used for conservation efforts. There is a cost involved in elephant conservation and this cost can be covered through the sale of ivory as countries such as Zimbabwe are said to have an extra 30 000 elephants against its national capacity of about 50 000⁷⁷ and Botswana with 160,000 has exceeded its carry capacity of 54,000.⁷⁸ Most African countries appear to be unable to meet the basic demands of the associated costs required to fully protect their elephants; this could partly be because the regulatory mechanism adopted by CITES are characterized by a lack of incentives to protect elephants. Besides, the reduction or elimination of revenue can undermine the economic incentives associated with elephant conservation, thereby making elephant conservation unattractive, unachievable and subsequently opening up to illegal trade. Giving oral evidence in the USA Senate Iain Douglas Hamilton agreed that, it is easy to poach African elephant as it is poorly protected.⁷⁹ In most Southern

⁷⁴ Keane A. Jones, Edward Jones and Milner Gulland, 'The sleeping policeman: understanding issues of enforcement and compliance in conservation', vol. 11, AC 75, 2008.

⁷⁵ Lemieux and Ronald (n 2), p. 458.

⁷⁶ Bradley Anderson and Johan Jooste, 'Wildlife Poaching: Africa's Surging Trafficking Threat', African Security Brief No 28, African Centre for Strategic Studies, 2014 available at <https://africacenter.org/publication/wildlife-poaching-africas-surging-trafficking-threat/>, accessed on 1 March 2019.

⁷⁷ Zimbabwe National Elephant Management Plan 2015-2020, Zimbabwe Parks and Wildlife Management Authority, 2014.

⁷⁸ Rowan Martin, 'The Great Elephant Debate: Let's Remove Emotions and Pseudo-Science from Wildlife Management and get down to Scientific Facts', Daily Maverick, 30 June 2019 available at <https://www.dailymaverick.co.za/article/2019-06-30-the-great-elephant-debate-lets-remove-emotions-and-pseudo-science-from-wildlife-management-and-get-down-to-scientific-facts/>, accessed on 1 March 2019.

⁷⁹ Iain Douglas Hamilton, 'Ivory and Insecurity: The Global Implications of Poaching in Africa before the

Africa range country poor protection does not necessarily emanate from lack of will but sometimes genuine lack of resources, which with a sell they can easily generate. For example, it is said that only 50 rangers patrol the Zimbabwean 14,650-square kilometer Hwange National Park while wildlife experts recommend at least 500 as needed.⁸⁰ Unlike the Convention on Biological Diversity which has a special fund called the Special Voluntary Trust Fund,⁸¹ CITES with a total budget of US\$5 Million,⁸² cannot effectively fund national conservation programs. Total revenue from trophy hunting in Zimbabwe was once said to be about 18.5 Million,⁸³ the money, however, is not enough to effectively look after its elephant population of which US\$300 per 2000/km² per annum is required for a single ranger to be effective in managing elephants and protect them from poaching.⁸⁴ Unfortunately, the CITES has adopted the 'every man for himself and God for us all' approach when it comes to national elephant conservation. While they pass international decisions collectively,⁸⁵ the conservation problems have to be dealt with by individual countries.

The same value given to elephants by the international community seems to be different from how the local people see elephants. The human-elephant population increase has resulted in conflicts between the animals and humans and in most cases, elephants are on the receiving end. Zimbabwe's human population is currently at 13 million and 68% of the population are said to be in the rural/ communal areas⁸⁶ and almost 10 000 elephants are also said to reside in communal lands.⁸⁷ In 2015 about 27 people were killed by wild animals, 640 cattle and 420 goats have been lost to wildlife and from 2009 some areas have failed to harvest anything after their crops have been destroyed by elephants.⁸⁸ In Botswana, it has been reported that about 40% of annual crops are destroyed by elephants.⁸⁹ Protected areas such as National Parks, which are supposed

Committee on Foreign Relations', U.S. Senate, 24 May 2012.

⁸⁰ CITES Standing Committee (n 17).

⁸¹ CBD Secretariat, 'Interim Arrangements for the Allocation of Funding for Facilitating Participation of Parties in the Convention Process and its Biosafety Protocol' available at <https://www.cbd.int/doc/meetings/cop-bureau/cop-bur-2007/cop-bur-2007-travel-funding-en.pdf>, accessed on 11 January 2017.

⁸² Erica Thorson and Chris Wold, 'Back to Basics: An Analysis of the Object and Purpose of CITES and a Blueprint for Implementation', IELP, 2010.

⁸³ Peter A. Lindsey et al, 'Potential of Trophy-Hunting to Create Incentives for Wildlife Conservation in Africa Where Alternative Wildlife-Based Land Uses May not be Viable', vol. 9, *Animal Conservation* p. 283, 2006, p. 283.

⁸⁴ Victor K. Muposhi, Edson Gandiwa, Paul Bartels and Stanley M. Makuza, 'Trophy Hunting, Conservation, and Rural Development in Zimbabwe: Issues, Options, and Implications', *International Journal of Biodiversity*, 2016, p. 8.

⁸⁵ CITES (n 7), art XV (b).

⁸⁶ 'Rural population (% of the total population)', The World Bank, Washington D.C., USA, 2015 available at <http://data.worldbank.org/indicator/SP.RUR.TOTL.ZS>, accessed on 12 April 2017.

⁸⁷ David Cumming and Brian Jones, 'Elephants in Southern Africa: Management Issues and Options', WWF – SARPO Occasional Paper Number 11, 2005, p. IV available at http://www.fitzpatrick.uct.ac.za/sites/default/files/image_tool/images/275/Staff_And_Associates/Academic_Staff/Prof_David_Cumming/Cumming_Jones_2005.pdf, accessed on 12 April 2017.

⁸⁸ Allan W Maki and Charles Jonga, 'Hunting is Conservation: The CAMPFIRE Program in Zimbabwe', *Hunt forever*, 21 September 2015 available at <https://huntforever.org/2015/09/21/hunting-is-conservation-the-campfire-program-in-zimbabwe/>, accessed on 12 April 2017.

⁸⁹ Haru Mutasa, 'Zimbabwe's Elephant Challenges', Commercial Farmers Union of Zimbabwe, Harare, 20 March 2010 available at <http://www.cfuzim.org/index.php/newspaper-articles-2/wildlife-and-conservancies/467-zimbabwes-elephant-challenge>, accessed on 12 April 2017.

to be sanctuaries for elephants, have to a larger extent made elephants easily accessible by poachers. Rangers cannot effectively patrol the whole parks and even when they can, poachers in isolated areas easily attack them. Between 2009 and 2016 poachers reportedly killed at least 595 park rangers.⁹⁰ Without adequate resources, the job will remain unattractive thereby exposing elephants to more danger. Such conflicts and lack of financial benefits from elephants is likely to have the people develop a negative attitude towards elephant conservation and might actively participate in poaching of elephants.

Conclusion

International illegal ivory trade has promoted rampant elephant poaching in Africa, this has largely been as a result of unregulated domestic ivory trade in member states and countries failing to effectively implement CITES. Despite countries` willingly joining CITES, several countries have failed to meet their obligations and, to enact strict laws to implement the convention or some who have enacted laws are reluctant to effectively enforce the laws. Failure by countries to meet their obligations has promoted poaching and has acted as a conduit for the international illegal ivory trade. The availability of unregulated domestic ivory trade poses a great danger to elephants in general, equally or even more than the threat posed by international trade. The continued rise in poaching has exposed the international ivory trade ban's shortcomings and has been negative on elephant conservation. Based on the available evidence, an international ivory trade ban not supported by range countries hurts sustainable elephant conservation. Therefore, the decision on whether to list a species in the appendices or ban international trade under CITES should take into consideration whether such a listing or ban will benefit the conservation of the species. The Parties to CITES should put less emphasis on using CITES to restrict the trade in ivory and more on promoting a regulated and sustainable trade in ivory. This would be more consistent with conservation and, possibly, poverty reduction goals. The Parties to CITES should recognise the importance of linking conservation to development, given that many range states are also developing countries.

⁹⁰ Matt McGrath, 'Crime Threatens Nearly Half the World's Natural Heritage Sites', BBC, London, 18 April 2017 available at <http://www.bbc.com/news/science-environment-39590117>, accessed on 18 April 2017.