

“The Big 5”: Re-evaluating the Role of the Biodiversity Conventions in Protecting the African Elephant

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Twenty-six million elephants roamed across Africa in 1800. Today, the population sits around 415,000. Numerous statutes and agreements at the local, national, and international levels have been formulated to deal with this catastrophe, yet, the number of elephants across Africa continues to drop. While the most prominent tool for managing this decline has come to be the Convention on International Trade in Endangered Species of Wild Flora and Fauna (“CITES”), it is not the only international agreement which affects the conservation of African elephants. In fact, CITES is one of five prominent global conventions which manage biodiversity around the world. This Note argues that CITES has unfairly shouldered the responsibility of conserving African elephants, and that attention ought to be given to the other four conventions. While many analyses of CITES’ role in managing the ivory trade exist in the literature, they generally fail to consider its position within the larger system of international environmental law. Through an analysis of each convention in turn, this Note demonstrates where opportunities exist to protect elephants under this broader structure. In doing so, the Note highlights the interconnected nature of international law and provides a method for the collaborative interpretation of international agreements.

INTRODUCTION

Twenty-six million elephants roamed across Africa in 1800.¹ Today, that number is closer to 415,000.² Over the past two centuries, the number of elephants has plummeted at the hands of mankind. This decline can in part be blamed on diminished range size, human-wildlife conflict over resources, and trophy hunting. However, the root cause is poaching.

Poaching levels reached their peak in the 1980s. During the decade, it was estimated that 100,000 elephants were killed per year, with up to 80% of herds being lost in certain locations.³ These precipitous numbers slowed in 1989. In that year, the Convention on International Trade in Endangered Species of Wild Flora and Fauna, referred to as CITES, banned the international sale of ivory. The population of African elephants markedly improved

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1. *Battle for the Elephants*, PBS (Feb. 27, 2013), <https://perma.cc/57JB-E26K>. This paper focuses on the African elephant (*Loxodonta africana*) rather than the Asian elephant (*Elephas maximus indicus*). All subsequent uses of the term elephant refer to said population.

2. *African Elephants*, WWF (2017), <https://perma.cc/V2Y4-7EPE> (last visited Dec. 11, 2018).

3. *Threats to African Elephants*, WWF (2017), <https://perma.cc/6R2B-2PFL> (last visited Dec. 11, 2018).

following this ban, increasing from roughly 600,000 individuals in 1989 to 1 million in 1999.⁴

Yet, the story does not end there. Following the success of the ban, CITES sanctioned two international sales of ivory, in 1999 and 2008. In 1999, three African nations sold stockpiled ivory to Japan, while in 2008, four African nations sold stockpiled ivory to China and Japan. Following the 2008 sale, there was “an abrupt, significant, permanent, robust and geographically widespread increase” in elephant poaching across the continent.⁵

Since 2008, it has been estimated that between 20,000 and 30,000 African elephants are killed each year for their ivory.⁶ This works out to roughly sixty-eight elephants killed per day. These statistics have led some scientists to warn that elephants are on a quick path to extinction.⁷ However, remarkably, these numbers reflect recent improvements.⁸ In fact, 2017 marked the fifth straight year of decline in the number of elephants killed by poachers.⁹

Numerous statutes and agreements at the local, national, and international levels touch on elephant conservation and limiting the sale of ivory, the most prominent of them being CITES. CITES has taken on this role as the only major biodiversity convention which focuses on the issue of cross-border trade in species. Additionally, it has been severely critiqued by the media for causing the uptick in international sales of ivory due to its approved sales. Given this emphasis on CITES, a viewer could be forgiven for assuming that it is the only international agreement on point. However, this is far from the case. Rather, CITES is part of a framework of international agreements dedicated to preserving biodiversity, all of which can be used in some capacity to address the poaching of African elephants.

This Note focuses on the “Big 5” biodiversity conventions. These conventions are: CITES, the Convention on Biological Diversity (“CBD”), the Convention on the Conservation of Migratory Species of Wild Animals (“CMS” or the “Bonn Convention”), the Ramsar Convention on Wetlands (the “Ramsar Convention”) and the World Heritage Convention (“WHC”).¹⁰ These treaties are responsible for the foundation of international wildlife law, and therefore each plays a part in the conservation of elephants. For too long, CITES has unfairly shouldered the responsibility of conserving the species, and it is time that attention is given to the other four

4. *Battle for the Elephants*, *supra* note 1.

5. Solomon Hsiang and Nitin Sekar, *Does Legalization Reduce Black Market Activity? Evidence from a Global Ivory Experiment and Elephant Poaching Data*, NBER WORKING PAPER No. 22314, 30 (2016).

6. *Collaring Elephants in One of Africa's Last Great Wildernesses*, WWF (Apr. 3, 2018), <https://perma.cc/QFC3-L4WJ>.

7. Karl Mathieson, *Elephants on the Path to Extinction - the Facts*, GUARDIAN (Aug. 12, 2016), <https://perma.cc/T3PF-44XL>.

8. Press Association, *Elephant Poaching Drops in Africa but Populations Continue to Fall*, GUARDIAN (Oct. 24, 2017), <https://perma.cc/MQ3M-9R55> (last visited Dec. 11, 2018).

9. *Id.*

10. *Box 3.4 The Biodiversity-related Conventions*, GREEN FACTS (2006), <https://perma.cc/7MNY-C3EL> (last visited Dec. 11, 2018).

conventions. While many studies of CITES' role in managing the ivory trade exist in the literature, they generally fail to consider its position within the broader system of international environmental law. Therefore, through an analysis of each convention in turn, this Note demonstrates where opportunities may exist to protect elephants under this broader structure. This method of analyzing multiple international agreements, each addressing different elements of a problem and from differing levels of generality, may also be applied to other complex problems in international law.

The Note is structured in seven Parts. Part I provides an overview of CITES and how it has failed to protect elephants on its own. Parts II through V outline the four other biodiversity conventions and analyze how they may be able to fill the gaps left by CITES. The Note concludes with a set of findings and recommendations, both specific to protecting African elephants and more generally applicable to the analysis of international law.

I. THE CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FLORA AND FAUNA

This Part describes the history and framework of CITES and how it currently is used to protect African elephants. It includes an analysis of why and how the Convention has been unable to stop the illegal ivory trade.

A. *History and Framework of CITES*

In the 1960s it became apparent that the world was losing biodiversity at a rapid rate due to unregulated trade in various species. As such, during a 1963 meeting of the International Union for the Conservation of Nature ("IUCN"), delegates drafted a convention that would regulate this trade.¹¹ Ten years later, this text was agreed upon by eighty nations in Washington, D.C.¹² In 1975, this convention, CITES, entered into force.¹³ Today, 182 nations plus the European Union are parties to CITES.¹⁴

CITES is not "a general-purpose wildlife management treaty. As it stands, it is but one component of the existing patchwork of global and regional regimes for wild animal and plant species" which focuses on international trade.¹⁵ The treaty requires all trade in species listed by the Convention to be registered and approved through a licensing system.¹⁶ It

11. *What Is CITES?*, U.S. FISH AND WILDLIFE SERVICES, <https://perma.cc/3FPA-G35B>.

12. *Id.*

13. *What Is CITES?*, CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES, <https://perma.cc/6S74-ALQR>.

14. *List of Parties to the Convention*, CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES, <https://perma.cc/GN4S-3MD6> (last visited Dec. 11, 2018).

15. Peter Sand, *International Protection of Endangered Species in the Face of Wildlife Trade: Whither Conservation Diplomacy?*, 20 *ASIA PAC. J. ENVTL. L.* 5, 8 (2017).

16. *How CITES Works*, CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES, <https://perma.cc/5GRL-2CY4>.

operates through three “Appendices” where these species are listed. Appendix I species are provided the highest level of protection. These species may be threatened with extinction, and trade is “permitted only in exceptional circumstances.”¹⁷ When trade is permitted, it requires export, import, and re-export permits.¹⁸ Appendix II covers the majority of species listed with CITES.¹⁹ Trade in these species is allowed, but only with strong controls, including export and re-export permits, but not import permits.²⁰ Finally, Appendix III lists the species countries have asked for assistance in protecting.²¹ These species receive the lowest level of protection, and controls may vary based on the state where export and import occurs.²²

Decisions regarding the placement of a species on an appendix are made by Conferences of the Parties (“COPs”).²³ Occurring every three years, COPs allow nations to submit proposals to list or relist various species. These proposals are then debated and often put to a vote. The day to day management of the Convention is handled by a Standing Committee and Secretariat, administered by the United Nations Environmental Program.²⁴

The Convention is structured as an international agreement which parties adhere to voluntarily.²⁵ Therefore, it is the parties, rather than the Secretariat, who are responsible for enforcement. This is done through implementing legislation enacted at the national level by the various states parties.²⁶ It is also done through a system of trade sanctions.²⁷ Sanctions may be issued both unilaterally²⁸ and collectively.²⁹

17. *Id.*

18. *Id.*

19. *The CITES Species*, CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES, <https://perma.cc/HZK4-PPVX> (last visited Dec. 11, 2018).

20. *How CITES Works*, *supra* note 16.

21. *Id.*

22. *Id.*

23. Any amendment to Appendices I or II requires a two-thirds majority of the parties present and voting. Appendix III operates in a different manner from I and II, as parties are able to make unilateral amendments to it. See *How CITES Works*, *supra* note 16.

24. *The Structure of CITES*, CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES, <https://perma.cc/L53U-29ML>.

25. *What Is CITES?*, *supra* note 13.

26. In the United States, CITES is primarily implemented through the Endangered Species Act.

27. Peter Sand, *Enforcing CITES: The Rise and Fall of Trade Sanctions*, 22 REV. EUR., CMTY. & INT’L ENVTL. L. (2013).

28. *Id.* at 253 (“The most prominent examples of unilateral state practice in this field are the trade embargoes imposed by the United States under the Lacey Act of 1900 as amended in 1935, the so-called ‘Pelly Amendment’ of 1971 to the 1954 Fishermen’s Protective Act, and the 1976 Fishery Conservation and Management Act as amended.”).

29. *Id.* at 254 (noting that collective sanctions are generally only used following a breakdown of discussions with the CITES Secretariat).

B. *African Elephants Under CITES*

In 1976, the African elephant was listed by Ghana on CITES Appendix III.³⁰ It was quickly raised to Appendix II, allowing legal but regulated trade in the species.³¹ However, the following decade saw the population of African elephants decline by nearly half.³² As a result, at the 1989 COP in Lausanne, Switzerland, the parties voted to move the species to Appendix I.³³ The move to Appendix I became official the following year, and has since become known as the “ivory trade ban.”³⁴

This move was controversial, and multiple nations lodged official reservations against the action.³⁵ Nonetheless, following the ban the market price of ivory fell significantly and populations began to recover across the continent.³⁶ In part due to this success, in 1997, the CITES parties approved moving the elephant populations of Zimbabwe, Namibia, and Botswana to Appendix II, allowing for limited legal trade in these national populations.³⁷ This move came with an additional restriction—an annotation that deemed “elephant ivory from these populations as being on Appendix I.”³⁸ Therefore, while these nations can conduct legal international trade in most elephant specimens (such as hides and hair), they still need approval from CITES for all international sales of ivory.³⁹

The CITES parties approved a one-off sale of ivory from these three nations in 1997.⁴⁰ The sale occurred in 1999, when the three countries sold roughly fifty tons of ivory to Japan.⁴¹ The sale encouraged other range states to petition CITES to move their populations to Appendix II and allow for additional sales of ivory.⁴² While multiple petitions were denied, in 2002

30. *CITES & Elephants: What is the “Global Ban” on Ivory Trade?* U.S. FISH AND WILDLIFE SERVICE (Nov. 2013), <https://perma.cc/55AZ-YF97>.

31. *Id.*

32. Jane Perlez, *Ivory Trade Is Banned To Save the Elephant*, N.Y. TIMES (Oct. 17, 1989), <https://perma.cc/XJ96-JEL4>.

33. *Id.* This move gave the African elephant the same listing as its cousin the Asian elephant, which had been placed originally on Appendix I. *CITES & Elephants: What is the “Global Ban” on Ivory Trade*, *supra* note 30.

34. *Id.*

35. See Ann Linder, *Detailed Discussion of Elephants and the Ivory Trade*, MICHIGAN STATE UNIVERSITY COLLEGE OF LAW: ANIMAL LEGAL & HISTORICAL CENTER, <https://perma.cc/2ZLH-K7EV>.

36. *Id.*

37. *CITES & Elephants: What is the “Global Ban” on Ivory Trade*, *supra* note 30.

38. *Current Rules on Commercial International Trade in Elephant Ivory Under CITES and Proposals to CITES CoP17*, CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES (July 21, 2016), <https://perma.cc/AC5M-8S6D>.

39. *Id.* (showing that for a sale to be approved, it needs a two-thirds majority vote by the COP).

40. Daniel Stiles, *The Ivory Trade and Elephant Conservation*, 31 ENVTL. CONSERVATION 309, 310 (2004).

41. Daniel Stiles, *CITES-Approved Ivory Sales and Elephant Poaching*, 45 PACHYDERM 150 (July 2008 – June 2009). The ivory was sold at an average price of \$103/ kg, providing revenue of roughly \$5 million. *Id.*

42. Ann Linder, *supra* note 35. “Range State” is a term commonly used in conservation biology to denote nations which exercise jurisdiction over any part of the territory or range of a species. *CITES*

the parties approved the move of South Africa's elephants to Appendix II.⁴³ In 2008, an additional one-off international ivory sale occurred, with South Africa, Botswana, Zimbabwe, and Namibia selling 102 tons of ivory to Japan and China.⁴⁴

Currently, the African elephant is "split listed" on the CITES appendices.⁴⁵ The elephant populations of South Africa, Botswana, Zimbabwe, and Namibia are listed on Appendix II, while the populations of all other African nations are listed on Appendix I.⁴⁶ The Appendix I listings mean that most nations cannot conduct any international trade in African elephant specimens.⁴⁷ The Appendix II listings mean that South Africa, Botswana, Zimbabwe, and Namibia may conduct international trade in certain parts of elephants, but they cannot do so for ivory without pre-approval from CITES.⁴⁸ However, the Appendix II listing also means that it is easier for these nations to obtain such an approval than it would be for the nations on Appendix I.⁴⁹ As such, at the moment, all commercial international trade in African elephant ivory is *technically* prohibited under CITES, though the strength of this prohibition varies by country.

C. Analysis of the Role of CITES in Protecting Elephants

At this moment, it is illegal to conduct commercial international trade in elephant ivory under CITES. However, "a de jure prohibition on the trade of a good does not necessarily equate to a de facto ban on trade."⁵⁰ This distinction exemplifies the central weakness of CITES with regard to its ability to protect African elephants. Elephant poaching and the illegal ivory trade do not occur through the CITES-regulated legal international trade. Instead, the behavior which is putting African elephants at risk of extinction occurs largely beyond the explicit purview of the treaty.

It would require a remarkable effort by the CITES parties to use the treaty to stop this illegal trade. All elephant populations would likely need

Glossary, CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES, <https://perma.cc/AS2Q-XNQP>.

43. *Conservation*, GREAT ELEPHANT CENSUS, <https://perma.cc/K7NA-SQGX>.

44. Stiles, *supra* note 41, at 150 (stating that the ivory was sold for roughly \$152/kg, raising over \$15 million).

45. Grace Ge Gabriel, *No on Split-Listing: Give Elephants Equal Protections Across Africa*, INTERNATIONAL FUND FOR ANIMAL WELFARE (Sept. 7, 2016), <https://perma.cc/6MZU-7U7F>.

46. *Id.*

47. *How CITES Works*, *supra* note 16. Note that there are exceptions in exceptional circumstances. *Id.*

48. *Current Rules on Commercial International Trade in Elephant Ivory Under CITES and Proposals to CITES CoP17*, *supra* note 38.

49. Grace Ge Gabriel, *supra* note 45. For example, if a state on Appendix I wished to conduct an international sale of ivory, it would first need to obtain a two-thirds majority in favor of its elephant population being moved to Appendix II, and then it would need to obtain a two-thirds majority in favor of approving a sale of ivory. For a state on Appendix II to conduct an international sale, they would only need to win this second vote. *Convention on International Trade in Endangered Species of Wild Flora and Fauna*, (1973).

50. Branden D. Jung, *The Tragedy of the Elephants*, 2017 WIS. L. REV. 695, 711 (2017).

to be moved to Appendix I, states would have to actively engage in internal policing and monitoring, and the CITES parties would likely have to enforce strict sanctions against one another. Unfortunately, the history of CITES and current political reality demonstrates that this is an unlikely outcome for multiple reasons.

First, the CITES parties have varying levels of incentive to stop this unregulated and illegal trade. This can be seen throughout both the range and consumer states. For instance, elephant poaching rates vary dramatically across the continent. Elephant populations in Southern Africa are growing, and in East Africa they are fairly stable.⁵¹ Yet, populations in Central Africa continue to decline.⁵² This split is reflected in the nations which push for looser regulation of trade in elephant specimens and those that push for greater regulation.⁵³

The split listing of African elephants on both Appendices I and II demonstrates these varying incentives. Nations with large and stable populations of elephants generally wish to utilize the species in an economic manner, while nations with smaller populations are simply trying to maintain the herds they have. Additionally, the split listing indicates that there may be additional legal sales in the future. It is debated how this fact affects the illegal ivory market,⁵⁴ but, at the very least, it creates confusion regarding the future of the ivory trade which makes it difficult for nations to act in concert.

Second, the main enforcement mechanism of CITES—trade sanctions—is rarely used to effect. Under the Convention, when nations are in violation of an obligation, the other states parties may band together to stop legal species-based trade to and from that nation. Sanctions have been used to force nations to take actions with regards to the ivory trade. For instance, in 2016, the COP initiated trade sanctions against Angola, Laos, and Nigeria for failing to submit reports on their efforts to halt the illegal ivory trade within their borders.⁵⁵ However, while this strategy is often successful when used, it is generally implemented in a highly political manner.⁵⁶ Sanctions are commonly only implemented against smaller nations and it has been found that roughly 95% of countries targeted by sanctions are developing nations. Consequently, it is unlikely that the tool would be used to force larger nations, such as China, which are responsible for much of the demand for illegal ivory, to stop the trade within their borders.

51. Press Association, *supra* note 8.

52. *Id.*

53. For instance, the Southern African countries of Zimbabwe, Namibia, South Africa, and Botswana are the only nations to have conducted CITES-sanctioned ivory sales since the 1989 trade ban. *CITES & Elephants: What is the "Global Ban" on Ivory Trade*, *supra* note 30.

54. Keith Lindsay et al., *The Shared Nature of Africa's Elephants*, 215 *BIOLOGICAL CONSERVATION* 260, 262 (2017).

55. Adam Cruise, *Trade Sanctions for Three Countries Over Illegal Ivory*, *NAT'L GEOGRAPHIC* (Jan. 19, 2016), <https://perma.cc/NH4T-EEJP>.

56. See Sand, *supra* note 15, at 22.

CITES was not structured to deal with the illegal ivory trade. Rather, it was created to regulate the legal trade in species. As a result, technically, much of the current behavior which threatens African elephants is simply beyond its purview. Additionally, the states parties do not have the incentives or political will to take actions under CITES which would change this. It is therefore unlikely that CITES can or will be used effectively in the near future to stop the illegal ivory trade. Instead, sympathetic nations and civil society ought to look to the other biodiversity conventions to fill in the gaps left by CITES.

II. THE WORLD HERITAGE CONVENTION

This Part describes the history and framework of the World Heritage Convention (“WHC”) and how it currently is used to protect African elephants. It ends with an analysis of its current role and a set of recommendations for how the WHC may be able to fill gaps left by CITES.

A. *History and Framework of the WHC*

In 1959, the Egyptian government sought to build the Aswan High Dam, which would allow the country to control the annual flooding of the Nile.⁵⁷ The construction of the dam drew international attention as it threatened the preservation of a piece of world history, the Abu Simel temple.⁵⁸ Following this attention, the United Nations Educational, Scientific, and Cultural Organization (“UNESCO”) began a campaign to save the temple. By bringing together the donations of roughly fifty countries, UNESCO successfully dismantled and reassembled the temple in another location, and Egypt was able to successfully build its dam.⁵⁹

This achievement led UNESCO to draft a convention dedicated to the protection of cultural heritage. Finalized in 1972, the World Heritage Convention “identif(ies) and protect(s) the world’s natural and cultural heritage considered to be of Outstanding Universal Value.”⁶⁰ Significantly, it connects the ideas of the conservation of nature and cultural property, protecting everything from the Great Barrier Reef to the Great Wall of China.⁶¹ Today, 193 countries are party to the Convention.

The WHC requires states parties to conserve all World Heritage Sites on their territory.⁶² Article V of the Convention states that each country “shall endeavor . . . to take the appropriate legal, scientific, technical, administra-

57. *Aswan High Dam*, ENCYCLOPEDIA BRITANNICA, <https://perma.cc/MVE3-PLWA>.

58. *Abu Simbel: The Campaign That Revolutionized the International Approach to Safeguarding Heritage*, UNESCO, <https://perma.cc/3H75-KMEZ>.

59. *The World Heritage Convention*, UNESCO, <https://perma.cc/RWE9-JESQ>.

60. *World Heritage Convention*, IUCN, <https://perma.cc/G59U-PGT2>.

61. *The World Heritage Convention*, *supra* note 59.

62. *Id.*

tive, and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage.”⁶³ The Convention thus is designed to promote preservation and support the conservation of heritage sites and the creatures that live within them. States begin by putting together “tentative list(s)” of sites on their territory, and then formally nominate individual sites for inclusion on the Convention list.⁶⁴ These proposals are evaluated by the IUCN and then decided upon by the World Heritage Committee, the central decision-making body with a rotating membership of twenty-one states parties.⁶⁵

Sites are listed based on their “outstanding universal value,” meaning they meet “one or more of the ten selection criteria, [are] relatively intact and effectively protected and managed.”⁶⁶ Four of the selection criteria relate to natural sites (the other six are for cultural ones), and three of these allow for the recognition of the importance of species.⁶⁷ Criterion 10 even explicitly focuses on the protection of sites which “contain the most important and significant natural habitats for in-situ conservation of biological diversity.”⁶⁸

The day to day operations of the Convention are managed by the World Heritage Committee. It administers the World Heritage Fund, with an annual budget of roughly \$3 million, through which it can provide targeted assistance to specified sites.⁶⁹ The Committee also manages the List of World Heritage in Danger, which notes sites that are “threatened by serious and specific dangers.”⁷⁰ Currently, fifty-four sites from around the world are included on this list.⁷¹ Finally, the Committee has the authority to request that parties take action to protect certain sites and has the final decision in regard to whether a site is added to or removed from the list.⁷²

B. *African Elephants Under the WHC*

Elephants across Africa benefit from the protections of the WHC. In fact, each of the thirty-five range states in which African elephants reside are

63. *Convention Concerning the Protection of the World Cultural and Natural Heritage*, UNESCO, (1972).

64. Arie Trowburst et al., *International Law and Lions (Panthera Leo): Understanding and Improving the Contribution of Wildlife Treaties to the Conservation and Sustainable Use of an Iconic Carnivore*. 21 *NATURE CONSERVATION* 83, 97 (2017).

65. *The World Heritage Committee*, UNESCO, <https://perma.cc/NKE4-X2X4>.

66. *World Heritage and Species: Save Havens for Wildlife?*, 73 *WORLD HERITAGE REVIEW: SPECIAL ISSUE* 28, 32 (2014).

67. *Id.*

68. *The Criteria for Selection*, UNESCO, <https://perma.cc/SY3Y-NYT7>.

69. *World Heritage Fund*, UNESCO, <https://perma.cc/6XM3-XU5U>.

70. *Convention Concerning the Protection of the World Cultural and Natural Heritage*, *supra* note 63, at art. XI.

71. *List of World Heritage in Danger*, UNESCO, <https://perma.cc/XE9F-QAZH> (last visited Dec. 11, 2018).

72. *The World Heritage Committee*, *supra* note 65.

states parties to the Convention.⁷³ It is estimated that roughly 40% of African elephants live within twenty different World Heritage Sites on the continent.⁷⁴ The list of protected sites includes numerous parks across the continent which are vital to the conservation of elephants.⁷⁵ This includes the Okavango Delta in Botswana, which is home to roughly 130,000 elephants, the largest population in the world.⁷⁶

However, eight of the twenty World Heritage Sites which house African elephants are listed on the World Heritage Sites in Danger List.⁷⁷ This means the sites are either “ascertained” or in “potential” danger of losing their “outstanding universal value.”⁷⁸ In some cases, this can be due to a serious decline in the population of an endangered species.⁷⁹ The World Wildlife Fund has found that poaching and illegal harvesting is frequently reported within these sites.⁸⁰ Some examples of sites which house elephants include: Garamba National Park in the Democratic Republic of the Congo, Virunga National Park in the Democratic Republic of the Congo, Niokolo-Koba National Park in Senegal, and Selous Game Reserve in Tanzania. Each of these parks has struggled to stop the poaching of elephants. For instance, both Virunga National Park and Selous Game Reserve have lost nearly 90% of their elephants in the past twenty years.⁸¹

C. Analysis of the Role of the WHC in Protecting Elephants

The WHC focuses on the protection of individual sites around the world. Its protections for elephants are therefore dependent on its ability to prevent illegal poaching in and around sites that are listed on the Convention. In this way, the WHC protections touch on a separate component of the ivory trade than CITES. Where CITES’ focus is at the national and international levels, WHC protections focus on specific locations where elephant populations are found. Therefore, WHC is in a position to protect elephants in ways that CITES cannot.

The main protections for elephants under WHC stem from the prestige and funding which comes with the designation.⁸² First, listing comes with

73. *States Parties Ratification Status*, UNESCO, <https://perma.cc/7WM8-V849>; J. Blanc, *Loxodonta Africana*, THE IUCN RED LIST OF THREATENED SPECIES 2008 (2008), <https://perma.cc/3G7H-7HNT> (last visited Dec. 11, 2018).

74. DAHLBERG GLOBAL DEVELOPMENT ADVISORS, WWF, NOT FOR SALE: HALTING THE ILLEGAL TRADE OF CITES SPECIES FOR WORLD HERITAGE SITES (2017), 43–44.

75. *Id.*

76. *Id.*

77. *Id.*

78. *World Heritage in Danger*, UNESCO, <https://perma.cc/T48H-KJD8>.

79. *Id.*

80. DAHLBERG GLOBAL DEVELOPMENT ADVISORS, *supra* note 74, at 18.

81. *Save Virunga’s Elephants*, UNESCO, <https://perma.cc/M6WK-7MC6>; *World Heritage and Species: Save Havens for Wildlife*, *supra* note 66, at 95.

82. *What Does It Mean for a Site to Be Inscribed on the World Heritage List?*, UNESCO, <https://perma.cc/CWG5-69GS>.

significant prestige due to the rigorous selection process and limited number of sites.⁸³ This prestige often brings increased tourism dollars, which can then be used to further protect a site.⁸⁴ The prestige and international attention can also force governments to act to preserve territory. For example, in 2014 and 2015, the East African Court of Justice used the Serengeti's World Heritage status as a reason to halt the construction of a road through the Tanzanian park.⁸⁵ This road would have allowed for increased access to the park, likely resulting in heightened levels of human-wildlife conflict and poaching.⁸⁶ Second, once a site is listed, it becomes eligible for funding from the World Heritage Fund. With an annual budget of roughly \$3 million, this funding is limited.⁸⁷ However, the committee that runs the fund is able to require states to take certain actions before receiving money. Therefore, the international community may be able to control what measures are taken on the ground to protect elephants. Additionally, by listing a site, the World Heritage Committee gains the ability to de-list the site if it is not being managed in compliance with the WHC.⁸⁸

In certain instances, the protections of the WHC are also extended beyond the territory to the species themselves. This occurs when the presence of a species, such as the elephant, was integral to the decision to list a site (such as under Criterion 10).⁸⁹ For instance, large herds of elephants were part of the consideration for listing the Okavango Delta in Botswana.⁹⁰ In cases such as this, the Convention's protections are explicitly extended beyond the territory itself, to the elephants and other animals described.⁹¹ This means the state in which the site is located is not only bound to protect and preserve the territory under the Convention, but also the animals within that territory.

Yet, despite the benefits associated with listing as a World Heritage Site, poaching within sites is still rampant.⁹² Poaching has been reported in over 60% of the World Heritage Sites around the world which contain elephants.⁹³ Therefore, steps need to be taken to help the WHC more proactively protect the elephants within sites. First, sympathetic nations and civil

83. *What Is UNESCO World Heritage?*, NAT'L GEOGRAPHIC, <https://perma.cc/R5Y8-DUMH>.

84. Paul Valley, *The Big Question: What is a World Heritage Site, and Does the Acolade Make a Difference?*, INDEPENDENT (Nov. 7, 2008), <https://perma.cc/2H6P-B6BZ>.

85. Trowburst, *supra* note 64.

86. Friends of Serengeti, *The Serengeti Highway Battle Won, the War With the Courts Continues*, AFR. GEOGRAPHIC (July 30, 2008), <https://perma.cc/S75W-DFY6>.

87. *World Heritage Fund*, *supra* note 69.

88. *Id.*

89. *Id.*

90. *Okavango Delta*, UNESCO, <https://perma.cc/NWT2-PQ9W>.

91. Arie Trowburst, *Global Large Carnivore Conservation and International Law*, 24 BIODIVERSITY AND CONSERVATION 1567, 1575 (2015) ("In such cases the Convention's protection requirements extend not indirectly but expressly to the animals involved—if not at the individual level then at least at the level of a healthy population.")

92. DAHLBERG GLOBAL DEVELOPMENT ADVISORS, *supra* note 74.

93. *Id.*

society ought to focus on increasing the size of the World Heritage Fund and improving how it is managed. Currently, only 1% of state-parties' UNESCO membership fees are directed to the Fund, and much of this money ends up flowing back into the hands of developed nations.⁹⁴ Increasing this financing would provide the international community with a strong tool for encouraging increased protections for sites which contain elephants. Second, both the WHC and CITES would be strengthened through increased cooperation. In 2016, the World Heritage Committee formally embraced cooperation with other biodiversity conventions.⁹⁵ The Committee needs to be pushed to act on this announcement, as through coordination WHC and CITES could take actions to impact both the individual locations where elephants reside, and the larger international market in which ivory is sold.

In sum, although poaching still occurs within far too many World Heritage Sites, the WHC provides a unique opportunity for change. Through the dual levers of prestige and financing, the international community can use the world heritage designation as a means to better protect African elephants.

III. THE 1971 CONVENTION ON WETLANDS OF INTERNATIONAL IMPORTANCE ESPECIALLY AS WATERFOWL HABITAT (RAMSAR CONVENTION)

This Part describes the history and framework of the Ramsar Convention and how it is currently used to protect African elephants. The Part includes an analysis of Ramsar's current role and a set of recommendations for how the Convention may be able to strengthen the international framework for protecting the species.

A. *History and Framework of the Ramsar Convention*

Similar to the WHC, the Ramsar Convention focuses on protecting natural lands around the world. In fact, it is the only international environmental treaty which focuses on the protection of a particular ecosystem, that of wetlands (defined broadly).⁹⁶ The treaty was signed in Ramsar, Iran in 1971 and entered into force in 1975.⁹⁷ Today, 169 countries are party to the Con-

94. Mats Djurberg & Tora Aasland, *Reforming UNESCO's World Heritage*, GLOBALIST, (June 27, 2018) <https://perma.cc/3AZ3-J6MG>. The World Heritage Fund covers the cost of evaluating all nominations to the world heritage list, which averages \$22,000 per nomination. This is true whether the nomination is located in a wealthy or poor nation. The result is that the fund has approximately \$2,000 to spend on each site per year. *Id.*

95. DAHLBERG GLOBAL DEVELOPMENT ADVISORS, *supra* note 74.

96. *Ramsar Wetlands Convention*, U.S. FISH AND WILDLIFE SERVICE, <https://perma.cc/4JMF-7LBH>.

97. *History of the Ramsar Convention*, RAMSAR, <https://perma.cc/NK9A-QRES>.

vention and over 2,200 sites have been listed on the List of Wetlands of International Importance, or the Ramsar List.⁹⁸

The Convention is designed in a similar fashion as the WHC. Its centerpiece is the Ramsar List. Member states are required to “formulate and implement their planning so as to promote the conservation of the wetlands included in the List, and as far as possible the wise use of wetlands in their territory.”⁹⁹ This “wise use” principle is a central feature of the Convention, and refers to the idea that wetlands ought to be maintained through ecosystem based approaches “within the context of sustainable development.”¹⁰⁰ Parties are also expected to designate wetlands as nature reserves, regardless of whether they are listed or not, and to cooperate in the protection of cross-border wetlands.¹⁰¹

The parties are in control of all listing and de-listing decisions. Sites which meet the requisite criteria are added to the list by the parties.¹⁰² They may also be removed by the parties, but only in the case of “urgent national interest.” Additionally, “as far as possible” any loss of wetlands ought to be “compensate(d)” for, in particular by creating “additional reserves.”¹⁰³ Finally, parties may place struggling sites on the Montreux Record, which notes sites whose ecological character has changed or is likely to change, and request assistance from the Convention Secretariat to provide advice on the situation.¹⁰⁴

In general, the treaty obligations under the Ramsar Convention are broad and there are few enforcement methods.¹⁰⁵ COPs may impose certain monitoring and reporting requirements, but nearly every action requires the consent of the party in question. In addition, while the Convention does have a Small Grants Fund, the funding is very limited.¹⁰⁶ All grants are less than 40,000 swiss francs, and from 1991-2010 the Fund gave out only 7.8 million swiss francs.¹⁰⁷ The fund is financed by volunteer contributions from

98. *The Ramsar Sites*, RAMSAR, <https://perma.cc/GXF2-3ETM> (last visited Dec. 11, 2018).

99. *Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Article 3(1)*, UNESCO, July 13, 1994.

100. *Ramsar COP Resolution IX.1*, 2005.

101. Trowburst, *supra* note 64.

102. *Convention on Wetlands of International Importance Especially as Waterfowl Habitat*, UNESCO, July 13, 1994. There are nine criteria for identifying wetlands of international importance under the Convention, having to do with everything from wetlands which support vulnerable species to those which contain unique types of wetlands. *The Ramsar Sites Criteria*, RAMSAR CONVENTION ON WETLANDS, <https://perma.cc/E5FF-F8D5>.

103. *Convention on Wetlands of International Importance Especially as Waterfowl Habitat*, *supra* note 102.

104. *Change in Ecological Character*. RAMSAR CONVENTION ON WETLANDS, <https://perma.cc/D39G-T2NK>.

105. Ornella Ferrajolo, *State Obligations and Non-Compliance in the Ramsar System*, 14 J. INT'L WILDLIFE L. & POL'Y 243 (2011).

106. *Id.*

107. *The Ramsar Convention Manual 1.7.5*, RAMSAR, <https://perma.cc/J5GS-FPER>.

states parties and private donors.¹⁰⁸ The Ramsar Convention is thus limited in its ability to engage in carrot and stick diplomacy.

B. *African Elephants Under the Ramsar Convention*

While the Ramsar Convention originally was designed to protect waterfowl, its protections extend to the conservation of all creatures which reside within wetlands, and elephants are no exception. Thirty-one of the thirty-five range states are parties to the Convention.¹⁰⁹ Additionally, numerous sites which play a crucial role in elephant conservation are featured on the Ramsar List. For instance, in September 2018, the Republic of Benin, Burkina Faso, and the Republic of Niger came together to designate a new cross-border site. This site is the third “transboundary Ramsar site” in Africa, and is home to the largest population of elephants in West Africa.¹¹⁰

C. *Analysis of the Role of the Ramsar Convention in Protecting Elephants*

The Ramsar Convention, like the WHC, focuses on the protection of individual natural sites around the world. Its basic goal is to protect wetland habitats, which, while they are not the only ecosystem in which elephants reside, are vital to the continued existence of the species. For instance, the Okavango Delta, which houses the largest single population of African elephants, is a wetland listed on the Ramsar list.¹¹¹ Therefore, in a similar manner as the WHC, the Ramsar Convention’s focus on individual territories allows it to provide protections for elephants that CITES cannot.

Where states parties comply with their responsibilities under the Convention, elephants will benefit from their conservation efforts and the “wise use” of wetlands. These protections are likely to help mitigate elephants’ level of interaction with humans by providing the animals with larger areas to roam.¹¹² Additionally, the Ramsar Convention actually extends habitat based protections beyond that done by the WHC. While there are 1,092 World Heritage Sites, only 209 are designated as natural ones.¹¹³ In contrast, over 2,200 sites are found on the Ramsar List, all of which are from the natural world. Nearly 100 sites around the world are listed by both

108. *Id.*

109. Blanc, *supra* note 73; *Contracting Parties to the Ramsar Convention*, RAMSAR, (May 16, 2018), <https://perma.cc/CLN3-GHEX> (last visited Dec. 11, 2018).

110. *Benin, Burkina Faso and Niger Declare a New Transboundary Ramsar Site*, RAMSAR, (Sept. 14, 2018), <https://perma.cc/MQ9M-KL5Y> (last visited Dec. 12, 2018).

111. *Ramsar and World Heritage Conventions: Converging Towards Success*, RAMSAR, <https://perma.cc/8UU6-PSZR>.

112. Royal Gardner et al., *African Wetlands of International Importance: Assessment of Benefits Associated with Designations Under the Ramsar Convention*, 21 *GEO. INT’L ENVTL. L. REV.* 257 (2009) (Interestingly, a site’s inclusion on the Ramsar List has been found to alleviate poverty in the surrounding area, which in turn has been shown to help reduce human-elephant conflict).

113. *World Heritage List*, UNESCO, <https://perma.cc/9MDP-HL5W> (last visited Dec. 11, 2018).

conventions.¹¹⁴ Even where covered by both conventions, Ramsar often provides broader protections as well. For instance, the Okavango Delta has been placed on both lists. The Okavango Delta Ramsar Site covers 5,537,400 hectares while its World Heritage Site covers only 2,023,590 hectares.¹¹⁵ The designation of this extra land under the Ramsar Convention provides another level of protection for the elephants which are found within it.

However, poaching continues to occur within Ramsar sites, as it does within World Heritage Sites.¹¹⁶ Therefore, it is clear that the Convention is not entirely effective. The major flaw within the convention is its lack of enforcement mechanisms. Party obligations under the Convention are very broad and decisions are generally left to the individual states.¹¹⁷ Thus, sympathetic states parties and civil society have few levers to pull on in order to encourage states to take measures to protect elephants under Ramsar. One area where the Convention could be improved is in the structure and financing of the Small Grants Fund. At the moment, the Fund is reliant on voluntary contributions, and it receives far too few.¹¹⁸ With an increased Fund, the Convention would be better able to use financing as an incentive to protect elephants.

IV. THE CONVENTION ON MIGRATORY SPECIES (BONN CONVENTION)

This Part describes the history and framework of the CMS—also known as the Bonn Convention—and how it is used to protect African elephants. It ends with an analysis of the Convention’s current role and a set of recommendations for how it may be able to work with CITES on this issue.

A. *History and Framework of the Bonn Convention*

The Bonn Convention works to protect migratory species. It was adopted in Bonn, Germany in 1979 and entered into force in 1985.¹¹⁹ The Convention works to bring together the states across which animals migrate, known as “Range States.”¹²⁰ The CMS defines “migratory species” as species “whose members cyclically and predictably cross one or more national jurisdictional boundaries,” but interprets this broadly to refer to species with

114. *World Heritage and Ramsar Convention on Wetlands*, UNESCO, <https://perma.cc/XZ38-RGR9>.

115. *Ramsar and World Heritage Conventions: Converging Towards Success*, *supra* note 111.

116. Kimon de Greef, Scores of Dead Elephants Found in Botswana ‘Poaching Frenzy,’ N.Y. TIMES (Sept. 4, 2018), <https://perma.cc/QSZ9-BRLC> (describing recent poaching within the Okavango Delta, a Ramsar Site); DAHLBERG GLOBAL DEVELOPMENT ADVISORS, *supra* note 74, at 6.

117. Ferrajolo, *supra* note 105.

118. *The Ramsar Convention Manual*, *supra* note 107; Ferrajolo, *supra* note 105, at 254.

119. *The Convention on the Conservation of Migratory Species of Wild Animals*, JOINT NATURE CONSERVATION COMMITTEE, June 2013, <https://perma.cc/HZ9B-NP6N>.

120. CMS, CONVENTION ON THE CONSERVATION OF MIGRATORY SPECIES OF WILD ANIMALS, <https://perma.cc/J5U2-77RV>.

range in multiple countries.¹²¹ The result is that many non-traditional migratory species are included because their ranges cross national boundaries.¹²² This definition also allows the Convention to attach different levels of legal protection to different populations of the same species, depending on their migratory status.¹²³

Like CITES, CMS is structured around the listing of species on various appendices. Appendix I lists migratory species which are threatened with extinction throughout all or a significant portion of their range.¹²⁴ If parties are range states of such species, they must “endeavor to strictly protect them by: prohibiting the taking of such species, with very restricted scope for exceptions; conserving and where appropriate restoring their habitats; preventing, removing or mitigating obstacles to their migration and controlling other factors that might endanger them.”¹²⁵ Thus, on a strict reading, an Appendix I listing results in a heavy burden for range states.¹²⁶ However, the Convention tempers this by making all habitat conservation required only where “feasible and appropriate.”¹²⁷

Appendix II lists migratory species that “have an unfavorable conservation status and that require international agreements for their conservation and management,” along with species which would “significantly benefit” from international cooperation.¹²⁸ The Convention encourages the range states of Appendix II species to form global and regional agreements for the protection of such species. Thus, Appendix II sets CMS up as a framework convention through which other agreements are reached. These secondary agreements can be legally binding treaties, referred to as Agreements, or less official decisions, referred to as Memoranda of Understanding (“MoU”).¹²⁹ So far, there have only been seven Agreements and nineteen Memoranda of Understanding created under the Convention.¹³⁰

To list or de-list a species on either appendix, a state party must first propose the designation and then win a two-thirds majority vote by the parties present and voting.¹³¹ This listing is then binding on all parties un-

121. *Convention Text*, CONVENTION ON THE CONSERVATION OF MIGRATORY SPECIES OF WILD ANIMALS, <https://perma.cc/MVL9-VE2K>.

122. S. A. Jeanetta Selier et al., *The Legal Challenges of Transboundary Wildlife Management at the Population Level: The Case of a Trilateral Elephant Population in Southern Africa*, 19 J. INT’L WILDLIFE L. & POL’Y 116 (2016).

123. Cf. Trowburst, *supra* note 64 (applying this principle to lions).

124. *Convention Text*, *supra* note 121, at art. III.

125. *Appendix I & II of CMS*, CONVENTION ON THE CONSERVATION OF MIGRATORY SPECIES OF WILD ANIMALS, <https://perma.cc/W8W6-ACSW> (last visited Dec. 12, 2018).

126. Richard Caddell, *International Law and the Protection of Migratory Wildlife: An Appraisal of Twenty-Five Years of the Bonn Convention*, 1 COLO. J. INT’L ENVTL. L. & POL’Y 113, 117 (2005).

127. *Id.*

128. *Appendix I & II of CMS*, *supra* note 125.

129. *Id.*

130. *Memoranda of Understanding*, CONVENTION ON THE CONSERVATION OF MIGRATORY SPECIES OF WILD ANIMALS, <https://perma.cc/5HFU-EXEE>.

131. *Convention Text*, *supra* note 121, at art. XI.

less they submit a reservation.¹³² The Convention's enforcement mechanisms focus on reporting and research. Range states parties must submit reports on their implementation of CMS requirements to the Convention's Secretariat prior to COPs.¹³³ It appears, however, that compliance with this requirement is relatively low.¹³⁴ The Convention has also set up a dispute resolution procedure. Parties are to first handle a dispute through negotiation, and, if that fails, then may go to the Permanent Court of Arbitration in The Hague by mutual consent.¹³⁵

B. *African Elephants Under the Bonn Convention*

The African elephant was listed on Appendix II of the Bonn Convention in 1979.¹³⁶ Since then, its status has gone unquestioned, as no parties have submitted proposals to either raise the listing to Appendix I or remove elephants from Appendix II.¹³⁷ However, its status has been questioned by non-parties. In 2013, the Secretary General of CMS stated:

CMS has a strong mandate to conserve endangered migratory species such as elephants. Most of the range states of the two species of African Elephant are Parties to CMS and are therefore obliged to try to improve these animals' conservation status, and maintain and restore their habitats. If the population of African Elephants in this region were put on CMS Appendix I, it would commit parties and all range states parties to afford the species strict protection, including the prohibition of all taking.¹³⁸

With an Appendix II listing, range states are encouraged to form agreements to protect and conserve African elephants. One relevant MoU has been agreed to under the Appendix II listing. In 2005, the memorandum was agreed to by the thirteen West African range states for the protection of

132. "An amendment to the Appendices shall enter into force for all Parties ninety days after the meeting of the Conference of the Parties at which it was adopted, except for those Parties that make a reservation. . . . During the period of ninety days [before the entry into force of an amendment], any Party may by notification in writing to the Depositary make a reservation with respect to the amendment. A reservation to an amendment may be withdrawn by written notification to the Depositary (the Foreign Ministry of the German Federal Republic) and thereupon the amendment shall enter into force for that Party ninety days after the reservation is withdrawn." *Id.* at art. VI.

133. KARIN BAAKMAN, TESTING TIMES: THE EFFECTIVENESS OF FIVE INTERNATIONAL BIODIVERSITY-RELATED CONVENTIONS 320 (2011).

134. *Id.* at 321.

135. *Convention Text*, *supra* note 121, at art. XIII.

136. *The African Elephant*, CONVENTION ON THE CONSERVATION OF MIGRATORY SPECIES OF WILD ANIMALS, <https://perma.cc/N44R-2BGZ> (last visited Dec. 12, 2018).

137. *Proposals for Amendments of the CMS Appendices*, CONVENTION ON THE CONSERVATION OF MIGRATORY SPECIES OF WILD ANIMALS, <https://perma.cc/NBC3-X4X4> (last visited Dec. 12, 2018).

138. Peter Peuschel, *Convention on Migratory Species Offers a Good Chance for Elephants*, INTERNATIONAL FUND FOR ANIMAL WELFARE (2013), <https://perma.cc/ZG53-952N>.

elephants within their borders.¹³⁹ It provides a framework for states, civil society, academics, and locals to come together to protect elephants. The memorandum also sets out a “work program” which includes efforts to control the ivory trade, implement CITES requirements, reduce habitat loss, and improve the collection of information.¹⁴⁰

C. *Analysis of the Role of the Bonn Convention in Protecting Elephants*

At this current time, the Bonn Convention does not play a significant role in the protection of African elephants. The listing on Appendix II provides elephants with scant protection. In fact, West African elephants are the only population specifically protected under this listing. That means that less than 10,000 elephants, representing just 2% of the population, receive this protection.¹⁴¹ Additionally, the MoU between West African states has not created a haven for elephants in the region, as they continue to suffer from many threats, and very few populations in the area are stable.¹⁴²

However, CMS could be used effectively to protect elephants. This could first be accomplished by moving the African elephant to Appendix I, as the CMS Secretary General has previously recommended.¹⁴³ The Bonn Convention COP has stated that listings ought to be coherent “with existing measures in other multilateral fora.”¹⁴⁴ Currently, the elephants’ position on Appendix II is contradicted by the listing of most populations on CITES Appendix I.¹⁴⁵ This, combined with African elephants’ designation as “vulnerable” by the IUCN Red List, could be enough to qualify the species for listing on Appendix I.¹⁴⁶ If this change occurred, each range state would be required to engage in certain actions to protect the species. This includes the requirement that range states “shall prohibit the taking of animals belonging to such species,” with very limited exceptions.¹⁴⁷

While all African elephants would undoubtedly benefit from inclusion on Appendix I, it remains the case that this scenario is unlikely. The Southern African nations are generally in favor of trade in elephant specimens and are unlikely to support any change in international law which may threaten

139. *West African Elephants*, MEMORANDUM OF UNDERSTANDING CONCERNING CONSERVATION MEASURES FOR THE WEST AFRICAN POPULATIONS OF THE AFRICAN ELEPHANT (2005), <https://perma.cc/L7LN-FNHL>.

140. *Id.*

141. *Threats and Challenges*, MEMORANDUM OF UNDERSTANDING CONCERNING CONSERVATION MEASURES FOR THE WEST AFRICAN POPULATIONS OF THE AFRICAN ELEPHANT, <https://perma.cc/QHT9-5STV>.

142. *Id.*

143. Peuschel, *supra* note 138.

144. *Resolutions to Repeal in Part, Resolution 11.33, Guidelines for Assessing Listing Proposals to Appendices I and II of the Convention*, CONVENTION ON THE CONSERVATION OF MIGRATORY SPECIES OF WILD ANIMALS, <https://perma.cc/L5PX-SWBM> (last visited Dec. 12, 2018).

145. *The African Elephant*, *supra* note 136; *Current Rules on Commercial International Trade in Elephant Ivory Under CITES and Proposals to CITES CoP17*, *supra* note 38.

146. Blanc, *supra* note 73.

147. *Convention Text*, *supra* note 121, at art. III.

their ability to do so. However, the unique structure of the Bonn Convention is such that certain populations of African elephants could be moved to Appendix I, while still allowing others to remain on Appendix II.¹⁴⁸ This “split-listing,” while generally un-advisable under CITES, could be beneficial for elephants under CMS. If certain populations were moved up to Appendix I, the result would be increased protections for a larger number of elephants. By taking advantage of the regional focus of the treaty, the international community may be able to bypass those nations which are looking for looser protections.

The second manner in which the Bonn Convention could be used more effectively to protect elephants is through the formation of Agreements and MoUs. The West African Elephant MoU is a positive development under the treaty, but a single MoU on the topic is not enough to combat elephant poaching. MoUs and Agreements provide a unique opportunity for regional blocks with common needs to coordinate efforts and bypass states parties which may have different conservation goals.

V. THE CONVENTION ON BIOLOGICAL DIVERSITY

This Part describes the history and framework of the Convention on Biological Diversity with an analysis of its role in protecting elephants. It ends with recommendations for how the CBD may be able to strengthen the international framework for protecting elephants.

A. *History and Framework of CBD*

The CBD was established based on the efforts of the United Nations Environment Programme (“UNEP”). In 1988, UNEP initiated a working group to discuss biodiversity around the globe and the prognosis for its protection.¹⁴⁹ This led to a string of international expert meetings focused on the conservation and sustainable use of biodiversity. Finally, in 1992, at the Rio Earth Summit, the CBD was presented to the world and its text was opened for signature. In one year, 168 nations signed on.¹⁵⁰ Today, 193 nations are party to this Convention, which is dedicated to the “conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of benefits arising from the use of genetic resources.”¹⁵¹

148. For instance, the *Trichechus manatus* is split between Appendix I and II. *Appendices I and II of the Convention on the Conservation of Migratory Species of Wild Animals*, <https://perma.cc/MQ7Q-44VK> (last visited Dec. 12, 2018).

149. *History of the Convention*, CONVENTION ON BIOLOGICAL DIVERSITY, <https://perma.cc/JSV8-HKXD>.

150. *Id.*

151. *Id.*

The Convention requires its parties to agree to a set of obligations. These include: creating a system of protected areas (Article VIII), developing national strategies for the conservation and sustainable use of biodiversity (Article VI), and conducting environmental impact assessments (Article XIV).¹⁵² While the obligations are promising, the treaty is phrased in very broad terms. For instance, Article XIV, which deals with environmental impact assessments, states that parties shall conduct these assessments “as far as possible and as appropriate.”¹⁵³ This broad, party-dependent language is included in nearly every provision, making it difficult to determine what behavior may actually constitute a violation of the CBD.

The CBD also differentiates between party obligations depending on the development status of the state in question. Under the Convention, developing countries are often assisted in reaching their conservation goals through financial and technical assistance from more developed countries.¹⁵⁴ This funding is organized through the Global Environment Facility (“GEF”), which acts as the “funding mechanism” for five international conventions.¹⁵⁵ The GEF sources financing from thirty-nine nations to support biodiversity efforts in the developing world.¹⁵⁶ The GEF has a significant budget, and has “provided over \$17.9 billion in grants and mobilized an additional \$93.2 billion in co-financing for more than 4,500 projects in 170 countries” since 1992.¹⁵⁷ The relationship between the CBD and GEF is guided by an MOU between the two bodies, which generally requires the GEF to apply “the guidance, including policy, strategy, program priorities, and eligibility criteria relating to access to and use of its resources from the Conference of the Parties.”¹⁵⁸

Given its broad nature, the Convention is also used by parties as a forum for discussion and guidance. For instance, in 2010, the international community came together under the CBD to create the Aichi Biodiversity Targets, a set of goals for biodiversity around the world.¹⁵⁹ These targets include the goals of preventing the extinction of threatened species and conserving more habitat.¹⁶⁰

152. *Convention on Biological Diversity*. UNITED NATIONS. 1992.

153. *Id.*

154. *Id.*

155. *Conventions*, GLOBAL ENVIRONMENT FACILITY, <https://perma.cc/C79H-5C55>.

156. Gloria Dickey, *The US Is the Only Country That Hasn't Signed on to a Key International Agreement to Save the Planet*, QUARTZ (Dec. 25, 2016), <https://perma.cc/5N8M-HATM>.

157. *About Us*, GLOBAL ENVIRONMENT FACILITY, <https://perma.cc/X34F-UZTP>.

158. *COP 3 Decision III/8*, CONVENTION ON BIOLOGICAL DIVERSITY, <https://perma.cc/P7W6-QPEP>.

159. *Aichi Biodiversity Targets*, CONVENTION ON BIOLOGICAL DIVERSITY (2010), <https://perma.cc/94V9-X99N>.

160. *Id.*

B. *African Elephants Under CBD*

While the CBD does not directly address elephant conservation, each of the elephants' thirty-five range states are party to the Convention.¹⁶¹ Additionally, many of its goals and programs are relevant to the species. For instance, the Aichi Biodiversity Targets, discussed above, include multiple targets which are relevant to elephants. Target 2 states that by 2020 biodiversity values are to be integrated into national and local planning, accounting, and reporting systems.¹⁶² If successful, this target could force governments to account for the benefits of elephant populations when making larger budget and policy determinations. Target 5 makes it a goal for countries to halve the rate of habitat loss by 2020, and significantly reduce degradation and fragmentation.¹⁶³ This would also help protect African elephants, as habitat loss often leads to increased human-wildlife conflict. Finally, Target 12 commits countries to work towards preventing the extinction of threatened species.¹⁶⁴ This clearly would benefit African elephants, as it is another international commitment to preserving the species. These are just a few examples of how the Aichi Biodiversity Targets address the protection of elephants, and more broadly how agreements and programs under the CBD can do so.

Additionally, the GEF has been involved in funding multiple programs which work to protect African elephants. As of 2014, the GEF had contributed \$78 million and leveraged over \$206 million in co-financing for projects related to wildlife conservation and halting the illegal wildlife trade.¹⁶⁵ More specifically, the GEF funds the Global Wildlife Program, a program led by the World Bank which "promotes wildlife conservation and sustainable development by combatting illicit trafficking in wildlife."¹⁶⁶ Through this program, it is expected that over \$800 million will be given out in grants to promote conservation across Africa and Asia.¹⁶⁷ This money is to be used to combat wildlife crime such as poaching, and therefore will be directly beneficial to Africa's elephants.¹⁶⁸

161. *List of Parties*, CONVENTION ON BIOLOGICAL DIVERSITY, <https://perma.cc/W4JE-YSQC> (last visited Dec. 12, 2018).

162. *Aichi Biodiversity Targets*, *supra* note 159.

163. *Id.*

164. *Id.*

165. *Preventing Extinction and Empowering Communities: The GEF's Role in Combating Poaching and Illegal Wildlife Trade*, GLOBAL ENVIRONMENT FACILITY, <https://perma.cc/5MU5-X3TB>.

166. *Global Wildlife Program*, WORLD BANK, <https://perma.cc/6UEZ-8R5U>.

167. *GEF Steps up Efforts to Combat Wildlife Crime with Additional \$40 Million to Expand Program*, GLOBAL ENVIRONMENT FACILITY, <https://perma.cc/YB42-YRVH> ("The \$131 million program is expected to leverage \$704 million in additional co-financing over seven years.").

168. *Id.*

C. Analysis of the Role of CBD in Protecting Elephants

The structure of the CBD provides a promising idea of how a generalized treaty could assist in protecting African elephants. The treaty has been widely adopted, except by the United States, and it provides a framework for nations to discuss all biodiversity issues. On its face, therefore, it appears that the CBD may be able to handle the protection of elephants in a more comprehensive manner than CITES. However, while it is promising on the surface, the Convention is structured in a manner which keeps power at the nation-state level, making it difficult to initiate global action.¹⁶⁹ The obligations under the treaty are also phrased more as suggestions than requirements, making enforcement difficult. This is also the case with agreements that are made under the Convention, such as the Aichi Biodiversity Targets. At this time, the international community is not on track to meet the goals laid out in the targets. Scholars believe this is due in part to the ambiguous nature of the goals and the inability to quantify success.¹⁷⁰

However, one area where the CBD has had an impact on the protection of African elephants is through the GEF. The GEF is a significant source of funding for international conservation, and has been responsible for over \$100 billion in financing and co-financing for largely successful projects.¹⁷¹ The GEF operates “under the authority and guidance of” and is “accountable to” the CBD COP, and therefore the states parties have at least some ability to control significant amounts of money.¹⁷² Sympathetic states and civil society ought to continue to take advantage of this relationship, and push for more funding to be used for the protection of elephants. This funding could be used to purchase more habitat for elephants, finance anti-poaching work, or improve general enforcement efforts. GEF funding could also be funneled directly to the protection of elephants through coordination with other organizations or treaties such as CITES.¹⁷³

CONCLUSION AND RECOMMENDATIONS

The “Big 5” biodiversity conventions approach conservation from different angles. CITES focuses on regulating trade in species, WHC and the Ramsar Convention look to protect specific locations, the Bonn Convention emphasizes protection of cross-border populations, and the CBD looks to

169. *Convention on Biological Diversity*, *supra* note 152, at art. III (describing the principle behind the Convention as focused on states’ “sovereign right to exploit their own resources” and their responsibility for events within their own jurisdiction).

170. Stuart H. M. Butchart et al., *Formulating Smart Commitments on Biodiversity: Lessons from the Aichi Targets*, 9 CONSERVATION LETTERS 457, 458–66 (2016).

171. About Us, *supra* note 157; see generally Holly T. Dublin et al., *Evaluating the Global Environment Facility: A Goodwill Gesture or a Serious Attempt to Deliver Global Benefits?* 18 GLOBAL ENVTL. CHANGE (2008) (providing an analysis of the success of GEF’s successes and failures).

172. *Convention on Biological Diversity*, *supra* note 152.

173. Rosie Cooney, *CITES and the CBD: Tensions and Synergies*, 10 RECIEL 259, 265 (2001).

promote the protection of biodiversity in general. Two of the conventions operate by listing species on appendices, two others have states list specific habitats, and the last just requires states to agree to certain broad obligations. As is clear, the regulation and management of African elephants under each of these conventions looks very different.

These different approaches should allow for a species such as the elephant to receive protections from multiple angles. However, to date, the international community has focused its efforts on a single convention, CITES, and ignored the possibility of a multi-directional approach. CITES was set up to regulate the legal international wildlife trade, and to handle it at the level of states and international institutions. As a result, illegal poaching and many layers of the ivory trade beneath this level are not technically within its wheelhouse. This limitation, coupled with the political realities of the Convention, mean that CITES alone is not the answer.

Instead, sympathetic nations and civil society ought to think of the biodiversity conventions as a comprehensive framework of tools for addressing the plight of the African elephant. By utilizing the strengths of these other conventions, the international community may be able to fill in the holes left by CITES. In addition, by carefully selecting which aspects of each convention are emphasized, these groups may be able to sidestep the often overly political and slow-moving nature of international law. In order to do so, they ought to focus their efforts on utilizing the local and regional abilities of these conventions, improving their financial tools, and increasing cooperation and coordination between them.

First, the international community ought to take advantage of the local nature of the WHC and Ramsar Convention. These two treaties are focused on protecting specific sites around the world, which allow them to think of the problem of elephant poaching from a local level, something CITES is not structured to do. Under the WHC, international actors may use the dual levers of prestige and funding to exert more control over how elephant populations are protected. The treaty could be strengthened though by improving the structure and increasing the resources of the World Heritage Fund. Currently, only 1% of states parties' UNESCO membership fees are directed to the World Heritage Fund, and even less than that ends up being used for projects on the ground in developing nations.¹⁷⁴ Were this to be improved, the international community would be better able to target protections for elephants living within World Heritage Sites.

In addition, while the Ramsar Convention generally contains weaker protections than the WHC, the Convention does cover more territory. This means that the Ramsar Convention likely protects more elephants than the WHC. Thus, it should not be overlooked as a tool. Instead, it too could be strengthened through improving the structure and financing of its Small

174. Djurberg & Aasland, *supra* note 94.

Grants Fund. At the moment, the Small Grants Fund relies on voluntary contributions and it receives very few. Were this to change, the Convention could become a strong tool, in particular given its reach beyond the WHC.

Second, sympathetic nations and civil society ought to utilize the regional nature of CMS to bypass those states which tend to block increased protection for elephants. CITES has been stymied by the varied incentives of its states parties. This is evident in the current "split-listing" of elephants on the CITES appendices which demonstrates that certain Southern African nations wish to trade in elephant specimens while other range states do not. These divergent views on how elephants should be managed have made it remarkably difficult to make any sort of change through CITES. In contrast, CMS allows states to act in regional blocks outside of the larger treaty body. In fact, for all species listed on Appendix II of CMS, which African elephants are, the Convention encourages the formation of regional agreements and MoUs. To date, only one MoU exists to protect elephants. This is a missed opportunity, and the international community ought to take advantage of it. While CITES may be bogged down by larger political maneuvering, the international community can still utilize more direct regional and local protections.

Third, attention ought to be given to the financial capabilities of these other treaties. As described above, both the WHC and Ramsar Convention could be strengthened through changes in how their grant programs are managed and increased funding for said programs. Additionally, the international community ought to take advantage of the significant funding that is available through the CBD. The CBD is one of five international conventions (separate from those discussed here) that utilizes the Global Environment Facility as its funding mechanism. Since 1992, the GEF has been responsible for deploying over \$100 billion in financing and co-financing for conservation efforts around the world.¹⁷⁵ The GEF is also expected to give out over \$800 million in grants focused on combatting wildlife trafficking through the Global Wildlife Program.¹⁷⁶ While this is an incredibly impressive number, it is a small percentage of the total funds available to the GEF. Therefore, sympathetic states and civil society ought to use the authority of the CBD over the GEF to direct more of these funds to this effort, and specifically to the protection of African elephants.

Fourth, each of these conventions, and the framework they create, could be strengthened through increased cooperation and alignment. Currently, these treaties share little more than memorandums of understanding stating that they will work together.¹⁷⁷ If these memorandums were put into effect, the conventions likely could increase their ability to protect African ele-

175. *About Us*, GLOBAL ENVIRONMENT FACILITY, *supra* note 157.

176. *GEF Steps up Efforts to Combat Wildlife Crime with Additional \$40 Million to Expand Program*, *supra* note 167.

177. *Convention on Biological Diversity*, *supra* note 152.

phants. Through collective action, the treaties would act to reinforce their various strengths and counteract their weaknesses.

Each of these five treaties has a distinct role to play in protecting elephants. Instead of focusing all energy on CITES, the international community ought to think of the “Big 5” as a suite of tools for protecting the species. Each convention comes with its own limitations, but together, they may be able to provide additional and untested avenues for saving the African elephant.

Finally, these lessons are not only applicable to protecting elephants, but can also provide guidance in other areas of international environmental law and international law more generally. It is not uncommon for progress to be stymied by outdated conventions and regional group politics, and it appears increasingly difficult to create new binding international agreements. Thus, in many circumstances, it may be more fruitful for international actors to focus their efforts on re-thinking the agreements which currently exist rather than dreaming up new ones. In these situations, focusing on local and regional efforts, utilizing financing in creative ways, and increasing coordination between existing treaties could help promote progress. International actors also ought to remember to look beyond individual treaties to the larger structure of international law. By looking at international agreements in a holistic manner, and discovering and filling the gaps between them, it is possible that existing tools may be used to address many other problems.

