

HAS INTERNATIONAL LAW FAILED THE ELEPHANT?

By Michael J. Glennon*

Are we no longer capable of respecting nature, or of defending a living beauty that has no earning power, no utility, no object except to let itself be seen from time to time?

Romain Gary

If, as Lao-tse said, nature is not anthropomorphic, some fellow creatures nonetheless seem to share the better angels of our character; among these animals, none is grander than the African elephant.¹ Elephants live in close-knit "families" of about ten members² that seem to do just about everything synchronously—feeding, walking, resting, drinking or mud wallowing.³ Each unit has a matriarchal structure: it is headed by the oldest female and consists of younger females and their calves, as male calves tend to leave the family and strike out on their own when they reach sexual maturity between the ages of 10 and 15.⁴ Fighting is rare.⁵

Elephants are the largest land animals on earth. They grow for their entire life,⁶ weighing up to 6 tons⁷ and eating up to 300 pounds of food a day, consisting primarily of grasses and bark.⁸ Left alone, they can live past 60.⁹ They seem able to communicate with low-frequency calls that carry for 6 miles,¹⁰ which may explain the coordinated movement and behavior of separated groups. On the same day that the culling of elephants began in Hwange National Park in Zimbabwe, elephants 90 miles away fled to the opposite corner of the reserve.¹¹

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¹ This article deals with the African elephant, *Loxodonta africana*. The Asian elephant, *Elephas maximus*, is somewhat smaller and more often tuskless. *A Program to Save the African Elephant*, WORLD WILDLIFE FUND LETTER, No. 2, 1989, at 1-2 [hereinafter *To Save the Elephant*].

² C. MOSS, *ELEPHANT MEMORIES: THIRTEEN YEARS IN THE LIFE OF AN ELEPHANT FAMILY* 34 (1988). Moss, pointing out that no one has established that all members of these groups are related, prefers the term "kin groups." See also I. & O. DOUGLAS-HAMILTON, *AMONG THE ELEPHANTS* (1975).

³ C. MOSS, *supra* note 2, at 35.

⁴ *Id.* at 34.

⁵ *Id.* at 114.

⁶ *Id.* at 103.

⁷ *Id.* at 188.

⁸ *Id.* at 123, 185.

⁹ *Id.* at 239.

¹⁰ *Id.* at 314.

¹¹ *Id.* at 314, 316. See also Payne, *Elephant Talk*, NAT'L GEOGRAPHIC, August 1989, at 264.

Elephants are quite tactile. They often touch each other with their trunks, and tend to stand and even walk bunched together, leaning on or rubbing each other.¹² After being apart for a while, they greet each other by intertwining trunks, clashing tusks and flapping ears, exhibiting great excitement even if the separation has lasted for only a few days.¹³ They aid other members of the group that are threatened or disabled.¹⁴

Elephants have a haunting sense of death. When a member of the family dies, they touch the carcass gently with their trunks and feet, and cover it with loose earth and branches.¹⁵ They do not react to the remains of other species but are fascinated by those of their own:

When they come upon an elephant carcass they stop and become quiet and yet tense . . . First they reach their trunks toward the body to smell it, and then they approach slowly and cautiously and begin to touch the bones, sometimes lifting them and turning them with their feet and tusks. They run their trunk tips along the tusks and lower jaw and feel in all the crevices and hollows in the skull [probably] trying to recognize the individual.¹⁶

Observers noticed one 7-year-old male lingering at such a site long after the others had gone, "repeatedly feeling and stroking the jaw and turning it with his foot and trunk." It was the remains of his mother.¹⁷ Females whose calves have died have seemed lethargic and depressed for many days afterwards.¹⁸ When the matriarch dies, the entire family can disintegrate,¹⁹ its former members seemingly becoming asocial and aggressive.²⁰

Elephants have no natural enemies;²¹ threats come entirely from man.²² Licensed hunting continues to account for several hundred deaths per year.²³ The Governments of South Africa and Zimbabwe conduct culling programs aimed at maintaining their elephant populations at a level the available habitat can support.²⁴ As with many other species, loss of habitat to human encroachment is a major problem. Elephants and cattle compete for some of the same food, and as Africa has become increasingly agricultural, the natural range of the elephant has diminished.²⁵ Certain native groups

¹² C. MOSS, *supra* note 2, at 35.

¹³ *Id.* at 35, 127, 128.

¹⁴ *Id.* at 72, 260.

¹⁵ *Id.* at 73-74, 270.

¹⁶ *Id.* at 270.

¹⁷ *Id.* at 271.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 289.

²¹ A lion cannot kill an adult elephant, but it can kill a calf. *Id.* at 48. There is some evidence, however, that an adult elephant was killed by a snake bite, possibly by a puff adder, black mamba or cobra. *Id.* at 268.

²² Fewer than a thousand elephants are shot each year by sport hunters, who usually possess permits. *To Save the Elephant, supra* note 1, at 5.

²³ *Saving the Elephant: Nature's Great Masterpiece*, ECONOMIST, July 1, 1989, at 15. On June 30, 1989, Tanzania banned elephant hunting by its citizens. Director of Wildlife Costa Mlay said: "This is just one step towards our call for a global ban on the ivory trade." Reuters (June 30, 1989).

²⁴ *To Save the Elephant, supra* note 1, at 7.

²⁵ C. MOSS, *supra* note 2, at 53-54.

have engaged in random killing of elephants: the Masai, for example, spear elephants as proof of their bravery²⁶ and even as a form of political protest.²⁷ As the Masai began to grow crops, their harassment of elephants increased.²⁸

Tourism, too, has had its effect. Tourist lodges in the parks have garbage pits that attract various animals, including elephants. Plastic bags and gloves, medicine bottles, broken glass, metal, wrappings and containers have all turned up in elephant dung.²⁹ A psychiatrist has concluded that these environmental pressures may drive the elephant to increased feeding on fermenting food: "environmental stress can be an important variable in the self-administration of alcohol [from fermented fruits and grains] in these natural habitats. Elephants drink, perhaps, to forget . . . the anxiety produced by shrinking rangeland and the competition for food. And I think that we can see a little bit of ourselves in this kind of behavior."³⁰

By far the greatest threat to the elephant's survival is poaching. The elephant is killed for its ivory tusks, which are carved and used for dice, jewelry, trinkets, ornaments, billiard balls, piano keys and knife handles.³¹ A principal use is for *hanko*, personalized signature seals considered status symbols in Japan.³² International conservation groups estimate that the illegal killing of elephants for their ivory has reduced Africa's elephant population from 1.5 million to fewer than 500,000 in the last decade.³³ By some estimates, the poachers kill two to three hundred a day;³⁴ at this rate, the African elephant could be extinct by the end of the century.³⁵ The *New York Times* compared the elephant population in 1989 for countries where there were more than 50,000 in 1979:

²⁶ *Id.* at 27, 244, 272.

²⁷ *Id.* at 53.

²⁸ *Id.* at 78.

²⁹ *Id.* at 274.

³⁰ R. YAEGER & N. MILLER, *WILDLIFE, WILD DEATH: LAND USE AND SURVIVAL IN EASTERN AFRICA* 115 (1986) (discussing study on alcoholism by Dr. Ronald Siegal). "Elephants are very vulnerable to stress. These stopped breeding under the pressure of hunting and poaching until 1984, when we began to get a grip on conservation in this area." Reuters (July 13, 1989) (comments of Garth Owen-Smith, referring to Namibia's Hoanib River Basin).

³¹ *The Shrinking Roots of Heaven*, U.S. NEWS & WORLD REP., May 22, 1989, at 11.

³² Allman, *Endangered Species: Can They Be Saved?*, U.S. NEWS & WORLD REP., Oct. 2, 1989, at 52, 53.

³³ N.Y. Times, June 11, 1989, §1, at 6. Estimates vary. In 1987, for example, the African Elephant and Rhino Specialist Group of the Union for the International Conservation of Nature reported that the total was 764,000. H. REP. NO. 827, 100th Cong., 2d Sess. 7 (1988) (Endangered Species Act Amendments of 1988) [hereinafter 1988 HOUSE REPORT]. One recent estimate put the number at 625,000. N.Y. Times, June 2, 1989, at A9. Using sophisticated computer modeling techniques, the United Nations Environment Programme (UNEP) estimated the 1989 population at between 1.3 million and 800,000. UNEP, UNEP/GEMS ENVIRONMENT LIBRARY NO. 3, *THE AFRICAN ELEPHANT* 30 (1989) [hereinafter UNEP REPORT].

³⁴ N.Y. Times, June 11, 1989, §1, at 6. About 40% of the deaths are caused by killing mothers with calves under 10 years old. *ECONOMIST*, *supra* note 23, at 15, 16.

³⁵ Population projections carried out at Imperial College, London, using fast and slow rates of decline, suggest that the date of disappearance will be somewhere between 2010 and the 2030s. *ECONOMIST*, *supra* note 23, at 15.

<u>COUNTRY</u>	<u>1979</u>	<u>1989</u>
Central African Republic	63,000	19,000
Kenya	65,000	19,000
Mozambique	54,800	18,600
Sudan	134,000	40,000
Tanzania	316,300	80,000
Zaire	377,700	85,000
Zambia	150,000	41,000 ³⁶

Numbers, however, do not tell the whole story. They do not convey the brutality of the killing, sometimes by paramilitaristic poachers who spray bullets from semiautomatic weapons over entire herds.³⁷ They do not disclose the horror burned in the memories of survivors that have witnessed the hacking of parents and siblings they have lived with for decades and afterwards wander aimlessly in despair.³⁸ Numbers—and dispassionate references to “ivory” and “offtake”—do not reveal what really is at issue:

The word *ivory* disassociates it in our minds from the idea of an elephant. One tends to lump it with jade, teak, ebony, amber, even gold and silver, but there is a major difference: The other materials did not come from an animal; an ivory tusk is a modified incisor tooth. When one holds a beautiful ivory bracelet or delicate carving in one's hand, it takes a certain leap of understanding to realize that piece of ivory came from an elephant who once walked around using its tusk for feeding, digging, poking, playing and fighting, and furthermore that the elephant had to be dead in order for that piece of ivory to be sitting in one's hand.³⁹

“Every 10 minutes, another elephant is slain and its tusks wrenched or cut from its face by poachers intent on delivering more ivory to the marketplace.”⁴⁰

³⁶ N.Y. Times, June 2, 1989, at A9. (The *Times* listed its sources as Iain Douglas-Hamilton for the 1979 figures, and the Ivory Trade Review Group for the 1989 figures. *Id.*)

³⁷ “Bands of as many as 75 guerrillas, armed with Russian-made Kalashnikov assault rifles and rocket-propelled grenades, scour the bush in quest of elephants, and when they find them they are destroyed without mercy.” Daily Telegraph (London), May 15, 1989, at 15. At Tsavo National Park in Kenya, poachers killed ten elephants before attacking police—who emerged victorious, killing six poachers in the fire fight. Ransdell, *Heavy Artillery for Horns of Plenty*, U.S. NEWS & WORLD REP., Feb. 20, 1989, at 62. In Uganda, elephant poachers have employed rocket-propelled grenades. *Id.* at 61. See *infra* note 181 and accompanying text. In the Central African Republic, Chadian and Sudanese poachers allegedly killed elephants with spears, after slowing them down during the chase by slashing the hamstring muscles of their back legs. Achiron, *Africa: The Last Safari?*, NEWSWEEK, Aug. 18, 1986, at 40-42.

³⁸ According to the London Daily Telegraph, *supra* note 37:

Those left alive are mostly orphans, growing up without their natural inheritance of family guidance and discipline. Instead of occasional rogue elephants, we have scattered communities of delinquents, wondering what they are supposed to do to behave properly as members of their kind. They are lost and cruelly confused—betrayed by an uncaring enemy grown mad with war and the lust for riches. When their tusks develop, they too will die.

Id. at 25.

³⁹ C. Moss, *supra* note 3, at 291. This book is the authoritative work concerning the life and plight of the elephant.

⁴⁰ Brennan, *Ivory Wars; Fighting to Save the Elephants*, Wash. Post, Sept. 24, 1989, at Y7.

This article analyzes the adequacy of the international legal protection of the elephant. In part I, I discuss why the elephant should be protected. Part II summarizes the applicable law, principally the Convention on International Trade in Endangered Species of Wild Fauna and Flora, known as CITES.⁴¹ In part III, I analyze the shortcomings of CITES in protecting the elephant by examining the dynamics of the ivory trade and why that trade has flourished under CITES. In part IV, I consider how those shortcomings might be remedied through two approaches to elephant protection, management and embargo, concluding that embargo is likely to be more effective. Part IV then relates the implementation of the embargo approach to a broader framework, focusing on emerging customary norms concerning the protection of endangered species. It concludes by summarizing steps needed to protect the elephant.

I. WHY PROTECT THE ELEPHANT?

In 1961 Milton Friedman argued that Yellowstone National Park should be sold to private enterprise.⁴² If enough people wanted to preserve it as a park, he contended, they would vote with their dollars and gate receipts would dictate its continued use as a park—rather than, say, as a source of lumber. If the public wants this kind of activity enough to pay for it, "private enterprises will have every incentive to provide such parks."⁴³ Essentially this same argument has been made with respect to other natural resources such as wildlife.⁴⁴

Why not leave the future of the elephant to the market?⁴⁵ If its greater utility lies in its appeal to tourists, the argument would go, the elephant will and should be preserved by gate receipts at parks; if its greater value lies in its ivory, the ivory will be harvested. Let the market decide.

The trouble with this argument, as applied to either Yellowstone or the elephant, is that it assumes a perfect market, one that will accurately measure *all* demand for alternative uses (ivory versus protection). But the market does not accurately measure demand for protection.⁴⁶ Many people who have never been to Yellowstone nonetheless want it preserved as a park and

⁴¹ Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 6, 1973, 27 UST 1087, TIAS No. 8249, 993 UNTS 243 [hereinafter CITES].

⁴² M. FRIEDMAN, *CAPITALISM AND FREEDOM* 31 (1961).

⁴³ *Id.*

⁴⁴ See, e.g., A. ALCHIAN & W. ALLEN, *EXCHANGE AND PRODUCTION: COMPETITION, COORDINATION AND CONTROL* 346 (3d ed. 1983). For analysis of a similar argument, see Wijkman, *Managing the Global Commons*, 36 INT'L ORG. 511, 522-23 (1982).

⁴⁵ "The solution to protecting the African elephant and other endangered species is to let individuals with an economic stake in their growth and preservation own them. Idealistic efforts to suppress inevitable demand for tusk of the African elephant will only quicken its extinction." Woodlief, *Banning Ivory Imports Is Counterproductive*, Wash. Post, June 9, 1989, at A26.

⁴⁶ "[O]bservable evidence of the willingness of people to 'buy' environmental amenities does not fully show the extent of the public's demand for environmental quality. . . ." C. HITE, H. MACAULAY, J. STEP & B. YANDLE, *THE ECONOMICS OF ENVIRONMENTAL QUALITY* 40 (1972).

are willing to pay tax dollars for its preservation *merely because they like knowing Yellowstone is there*. These preferences for preservation are not measured by gate receipts; the market that reflects conservationist demand is not an economic market—it is a political one. In voting for or against one's congressional representative, one considers whether the representative has voted for or against preservation of Yellowstone. Similarly, tourist revenues in Africa do not accurately reflect the total demand for preservation of the elephant. Many people who have never been to Africa would wish their governments to support elephant conservation *simply because they like knowing that the elephant is still there*.

Stated in traditional economic terms, the ivory market represents a classic case of market failure. The ivory market produces effects external to the exchange that occurs between a buyer of ivory and a poacher/seller. This "externality" is the cost imposed upon those who prefer that the elephant remain alive—a cost comparable to that imposed upon townspeople by a factory that belches pollutants. The market in both situations fails, for the generator of the externality does not have to pay for harming others. One might object that no market failure occurs because the victims could simply bargain with the poachers (or polluters) and offer them a higher price for stopping than they could get for continuing. But—aside from practical difficulties (such as figuring out whom to pay to stop shooting elephants and how to monitor contractual compliance)⁴⁷—such an approach overlooks the problem of the free rider: not all who benefit from the negotiated restriction will contribute.⁴⁸ Private solutions thus fail.⁴⁹ What is required, it becomes evident, is a public solution—regulation.⁵⁰

⁴⁷ These practical difficulties or "transactional costs" can be greater than the benefits to be gained by the exchange. In such circumstances, absent government intervention, the initial allocation of resources will be final. See Calabresi, *Transaction Costs, Resource Allocation and Liability Rules—A Comment*, 11 J. L. & ECON. 67, 67-69 (1968).

⁴⁸ For a discussion of this issue, see generally E. DOLAN, *TANSTAAFL*: THERE AIN'T NO SUCH THING AS A FREE LUNCH* 45 (1969).

⁴⁹ A variant is the answer of Professor David W. Pearce: market evidence is available for these preferences only "in the highly approximate form of voluntary donations, which suffer from the usual problem that such charities are in the nature of public goods. Indeed, the main reason such donations take place is that consumers have moral as well as purely selfish motives at heart." *THE VALUATION OF SOCIAL COST* 24 (D. Pearce ed. 1978).

Pearce also points out that the free market approach to resource allocation fails to take into account the preferences of future generations, even though they may be radically affected by current decisions, "particularly when these involve long-term or irreversible changes in the environment, for instance by depleting stocks of natural resources." Although "the views of the unborn cannot be directly taken into account," he continues, "it can hardly be disputed that those who have made a special study of long-run economic, social and environmental prospects are in a better position to represent their interests (for instance, to argue which resources are in particular need of conservation) than is the man in the street." *Id.* It has been forcefully argued that each generation owes a fiduciary obligation to future generations to pass on an environmentally sound planet, "in no worse condition than it receives it." See Weiss, *The Planetary Trust: Conservation and Intergenerational Equity*, 11 *ECOLOGY L.Q.* 495, 499 (1984).

⁵⁰ For a useful discussion of many of these issues, see R. COOTER & T. ULEN, *LAW AND ECONOMICS* 46, 107, 116-17, 170 (1988).

Regulation directed at protecting the elephant, however, would still assume the point at issue: *why* regulate to save the elephant? Two classes of arguments have been made for protecting wildlife in general (and various other natural resources): that it is *intrinsically* valuable, and that it is valuable *instrumentally* because of its usefulness to human beings.

Many naturalists have espoused the view that nature is intrinsically valuable because it is beautiful. According to Aldo Leopold, "A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic environment. It is wrong when it tends otherwise."⁵¹ But how does one know that something is beautiful? The notion seems implicit in Leopold's thought that one somehow *discovers* beauty or value that exists *out there*, independently of human response and without any relation to human judgment, valuation, use, interests or needs.⁵² The United Nations General Assembly seems to have adopted this view when it proclaimed in 1982 that "[e]very form of life is unique, warranting respect regardless of its worth to man."⁵³

This approach to intrinsic value⁵⁴ has been termed "aesthetic objectivism"—a theory that seems upon reflection to be "a refuge for knowledge claims that cannot really be substantiated."⁵⁵ "The experience of natural beauty is a relative affair. It is conditioned by such things as kind and adequacy of sensory receptors, imagination, emotional temperament, contemplative capacity, age, education, knowledge of the functions of natural objects, and the aesthetic standards and tastes of society."⁵⁶

For the same reason, other arguments for intrinsic value seem similarly unpersuasive.⁵⁷ The elephant's beauty lies in the eyes of its beholder, and its beholders come from many different cultures. Hear the outrage, for example, of Gary's Waitari, an African nationalist:

Meat! It was the oldest, the most true and sincere, and the most universal aspiration of humanity. . . . To the . . . black man [the elephant] always meant merely meat The idea of the "beauty" of the elephant, of the "nobility" of the elephant, was the idea of a man who had enough to eat, a man of restaurants and of two meals a day and of museums of abstract art—an idea typical of a decadent society. . . .⁵⁸

⁵¹ A. LEOPOLD, *A SAND COUNTY ALMANAC* 225 (1949).

⁵² See Hargrove, *An Overview of Conservation and Human Values: Are Conservation Goals Merely Cultural Attitudes?*, in *CONSERVATION FOR THE TWENTY-FIRST CENTURY* 227 (D. Western & M. Pearl eds. 1989).

⁵³ World Charter for Nature, GA Res. 37/7 (Oct. 28, 1982), *reprinted in* 22 *ILM* 455 (1983).

⁵⁴ For a more fully developed example of this perspective, see Rolston, *Biology Without Conservation: An Environmental Misfit and Contradiction in Terms*, in *CONSERVATION FOR THE TWENTY-FIRST CENTURY*, *supra* note 52, at 232.

⁵⁵ G. DICKIE, *AESTHETICS* 170 (1971).

⁵⁶ Willard, *On Preserving Nature's Aesthetic Features*, 2 *ENVTL. ETHICS* 293, 296 (1980).

⁵⁷ See, e.g., Norton, *The Cultural Approach to Conservation Biology*, in *CONSERVATION FOR THE TWENTY-FIRST CENTURY*, *supra* note 52, at 241.

⁵⁸ R. GARY, *THE ROOTS OF HEAVEN* 274 (J. Griffin trans. 1958). For the epigraph to this article, see *id.* at 60.

Gary himself rejected aesthetic objectivism: "Each of us," he wrote, "carries in his soul and mind a different notion of what is essential to our survival, a different longing, and a personal interpretation, in the largest sense, of what life preservation is about."⁵⁹ If there is some objective means of assessing the intrinsic value of a given species, or even of one species relative to that of another,⁶⁰ it has not been disclosed to all of us.⁶¹

To reject aesthetic objectivism, of course, is not to concede that it would be permissible to wipe out the elephant population for its ivory. Whether its value can be established objectively or not, some people *do* derive aesthetic satisfaction from the elephant. For them, "the ontological status of aesthetic value is simply irrelevant,"⁶² and it is entirely legitimate for them to attempt to make the law reflect their preferences. Their argument is not that the elephant has intrinsic value, but that other widely held values, such as those reflected in humanitarian and compassionate considerations, would be better upheld by elephant preservation, or that, in effect, the elephant is instrumental in providing aesthetic satisfaction.⁶³

⁵⁹ *Id.* at xvi.

⁶⁰ For a provocative exchange, see T. REGAN, *THE CASE FOR ANIMAL RIGHTS* (1983); Professor Robert Nozick's review of the book, *About Mammals and People*, N.Y. Times, Nov. 27, 1983, §7, at 1, col. 1; and Professor Regan's rejoinder, *Animal Rights*, N.Y. Times, Dec. 25, 1983, §7, at 2, col. 1. As characterized by Nozick, Regan argues that mentally normal mammals of a year or more are comparable to mentally enfeebled human beings; they

have beliefs and drives; perception, memory, and a sense of the future, including their own future; an emotional life together with feelings of pleasure and pain; preference- and welfare-interests; the ability to initiate actions in pursuit of their desires and goals; a psychophysical identity over time; and an individual welfare in the sense that their preferential life fares well or ill for them.

Nozick, *supra*, at 11. Nozick considers this description "highly overblown" and takes issue with the suggestion that a species-membership characteristic is morally irrelevant; yet he acknowledges that he cannot explain completely why membership in the human species does and should have moral weight. "Shouldn't only an organism's own individual characteristics matter?" he asks. "Normal human beings have various capacities that we think form the basis of the respectful treatment these people are owed. How can someone's merely being a member of the same species be a reason to treat him in certain ways when he so patently lacks those very capacities?" Nozick, *supra*, at 1. Nozick predicts that Regan will respond that Nozick's view "will smack of 'speciesism.'" Regan does: "I fail to see how or why species membership is itself a morally decisive consideration for deciding anything, least of all which individuals have moral rights or how much value they possess." Regan, N.Y. Times, *supra*, at 2. "Animal rights activists," Regan concludes, "are moral activists, a part of, not apart from, such larger efforts as the human rights and environmental movements." *Id.*

The relevance of animal rights theories to environmental ethics is not universally accepted. See, e.g., Callicott, *Animal Liberation*, 2 ENVTL. ETHICS 311 (1980); Warren, *The Rights of the Non-Human World*, in ENVIRONMENTAL PHILOSOPHY: A COLLECTION OF READINGS (R. Elliot & A. Gare eds. 1983).

⁶¹ "This is fundamentally a religious argument. There is no scientific way to 'prove' that nonhuman organisms (or, for that matter, human organisms) have a right to exist . . ." P. & A. EHRLICH, *EXTINCTION* 49 (1981).

⁶² See Willard, *supra* note 56, at 297.

⁶³ There is, I acknowledge, a bit more going on here than "mere" compassion. We might not be so compassionate if extinction of the tsetse fly or black widow were at issue. Why focus on the elephant? Rightly or wrongly, our compassion seems to be generated by *empathy*—by our

Other instrumental arguments are advanced for saving the elephant.⁶⁴ If the objective were merely to maximize ivory production, the elephant would best be left alone, and the tusks removed after a natural death.⁶⁵ Tusks grow larger and denser with age; more ivory would be yielded by preserving many older elephants than by killing the fewer and fewer remaining young ones.⁶⁶

Ivory production, of course, is not the elephant's only economic value. Tourism is, or could be, a key industry in many African countries with a substantial elephant population,⁶⁷ and elephants are one of the principal attractions. Moreover, their presence helps preserve ecosystems and the species they embrace. When a keystone species⁶⁸ (e.g., the elephant) in an ecological system is removed, the system can collapse as other species swell or shrink in number,⁶⁹ depending on their relationship to the missing element.⁷⁰ Saving the

ability to identify with a given species because its characteristics are similar to our own. I do not mean to imply that species more like ourselves are *entitled* to greater protection than species less like ourselves. Nor, for that matter, am I prepared to defend the proposition that any one species is more worthy of protection than some other, although many of us have an intuitive sense that this may be true. These are difficult issues. See *supra* note 60 and accompanying text. But, according to a study by the General Accounting Office, man now extinguishes more than one species each day—and the rate could soon rise to one species per hour. *Boston Globe*, Jan. 30, 1989, at 28. Worldwide, the GAO report said, the planet is near a stage of extinction "unequaled since the age of the dinosaurs." *Id.* Up to 20% of all species alive in 1980 could now be extinct. U.S. DEPARTMENT OF STATE AND COUNCIL ON ENVIRONMENTAL QUALITY, *GLOBAL 2000 REPORT TO THE PRESIDENT* 331 (1980). Not all endangered species can be examined in one article. The problem is worsening, and it is simply necessary to start somewhere.

⁶⁴ For an overview of such arguments with respect to endangered species in general, see S. FITZGERALD, *INTERNATIONAL WILDLIFE TRADE: WHOSE BUSINESS IS IT?* 5-12 (1989). See generally R. & C. PRESCOTT-ALLEN, *WHAT'S WILDLIFE WORTH?* (1982).

⁶⁵ *To Save the Elephant*, *supra* note 1, at 6. The general problem confronted here is analyzed brilliantly in Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968). Elephants' poached price "does not indicate the economic value of these animals because here the 'factory' is sold along with the 'product'. 'A management of fools' is how some economists term it." W. VAN DIJEREN & M. HUMMELINCK, *NATURE'S PRICE: THE ECONOMICS OF MOTHER EARTH* 137 (1979). "The core of the problem," *The Economist* opined, "is that, where rare animals or plants are concerned, the interests of an individual may differ from those of society at large." *The Price of a Tusker*, *ECONOMIST*, Oct. 14, 1989, at 19.

⁶⁶ Linden, *Last Stand for Africa's Elephants*, *TIME*, Feb. 20, 1989, at 77 (quoting David Western).

⁶⁷ In Kenya, for example, it is the country's largest foreign exchange earner. *N.Y. Times*, Feb. 11, 1989, at 4. In 1989, some 700,000 tourists were expected to spend \$350 million in foreign currency. *L.A. Times*, May 8, 1989, at 6.

⁶⁸ See generally Paine, *A Note on Trophic Complexity and Community Stability*, 103 *AM. NATURALIST* 91 (1969).

⁶⁹ Diamond, *Overview of Recent Extinctions*, in *CONSERVATION FOR THE TWENTY-FIRST CENTURY*, *supra* note 52, at 37, 40; S. FITZGERALD, *supra* note 64, at 5.

⁷⁰ The living community, or biocenosis, comprising the interdependent organisms in a given environment comes over time to achieve a state of balance or biological equilibrium. "If man influences any one of the complexly and delicately interrelated components of this living, modulating equilibrium, a significant displacement which can lead to the destruction of an entire environment may result." 2 V. ZISWILER, *EXTINCT AND VANISHING ANIMALS* 72

species can mean saving the ecosystem.⁷¹ Further, by diminishing the size of the elephant's gene pool, the species is made more vulnerable to epidemic and other environmental alterations, which pose a lesser threat to a genetically varied population consisting of diverse elements better able to resist change and disease.⁷² Poaching also reverses processes of natural selection; animals with the largest tusks are taken first, leaving the weaker ones to constitute the breeding pool.⁷³ As time goes on, more and more elephants need to be killed to produce the same amount of ivory, resulting in an ever-accelerating rate of disappearance and an ever-younger population.⁷⁴

II. THE CURRENT STATE OF THE LAW

International law has developed a system, of sorts, directed at the preservation of species such as the African elephant. Although customary international law now requires states to protect endangered species,⁷⁵ the norm has received virtually no attention, perhaps because of its acknowledged indeterminacy in application. Rather, discussion has focused on conventional norms—specifically, those set out in CITES.⁷⁶

The Convention on International Trade in Endangered Species of Wild Fauna and Flora was signed in Washington, D.C., on March 6, 1973, and entered into force on July 1, 1975. By October 1989, 103 states were parties.⁷⁷ CITES establishes a straightforward, three-tiered structure. Levels

(1967). See also P. & A. EHRLICH, *supra* note 61, at 96. "To keep every cog and wheel," Aldo Leopold said, "is the first precaution of intelligent tinkering." A. LEOPOLD, *supra* note 51, at 191.

⁷¹ See Myers, *The Extinction Spasm Impending: Synergisms at Work*, 1 CONSERV. BIOL. 14 (1987).

⁷² According to Joyce Poole, a biologist who studies elephant behavior in Kenya, "The combined loss of wisdom and leadership as well as genetic strength is incalculable." Bohlen, *Nightmare in Africa: Wanton Elephant Poaching Takes Huge Toll*, FOCUS, March/April 1989, at 1, 6. See generally COUNCIL ON ENVIRONMENTAL QUALITY, ELEVENTH ANNUAL REPORT, ENVIRONMENTAL QUALITY—1980, at 32 (1980); R. NASH, WILDERNESS AND THE AMERICAN MIND 257-58 (3d ed. 1982). For an excellent discussion of the importance of preserving genetic diversity, see Note, *Genetic Ark: A Proposal to Preserve Genetic Diversity for Future Generations*, 40 STAN. L. REV. 279 (1987).

⁷³ In an aerial survey of Tsavo in 1985, about two thousand elephants were seen, but only one male as old as 35. The loss of older elephants is particularly threatening to the population, since bulls over 35 are responsible for perpetuating the species. A male that dies before reaching the age of 30 will not likely have reproduced. *To Save the Elephant*, *supra* note 1, at 6.

⁷⁴ Marketed tusks used to weigh 15-20 pounds, but the average weight has gradually declined to about 7 pounds. *Id.* at 5. "The poachers now must kill three times as many elephants to get the same quantity of ivory." *Outlawing Ivory*, TIME, June 19, 1989, at 62 (comment of Curtis Bohlen, senior vice president, World Wildlife Fund). According to David Western, the average tusk weight of commercial ivory has fallen from 10.1 kg. in 1979 to 6.2 kg. in 1982. UNEP REPORT, *supra* note 33, at 11, 12. A 1986 survey of tusks from the Central African Republic showed none from animals over the age of 35. *Id.* at 12.

⁷⁵ See *infra* notes 240-80 and accompanying text.

⁷⁶ See note 41 *supra*.

⁷⁷ S. FITZGERALD, *supra* note 64, at 13.

of protection are a function of the degree of threat to the survival of a species, which corresponds to the appendix in which the species is listed.⁷⁸

Appendix I provides the highest level of protection; it includes "all species threatened with extinction which are or may be affected by trade."⁷⁹ It applies to specimens of those species, whether dead or alive. Export is allowed solely pursuant to permit, which is only issued, inter alia, when "a Scientific Authority of the State of export has advised that such export will not be detrimental to the survival of that species."⁸⁰ The import of such specimens is allowed only pursuant to a similar permit.⁸¹ In addition, the Convention contains provisions governing the re-export of Appendix I specimens: a "re-export certificate" is required, which may be granted only when the re-exporting state is satisfied that the specimen was imported into that state in accordance with the Convention.⁸² The most restrictive provisions, those governing the trade in species listed in Appendix I, thus apply to producer states, middleman states and consumer states. In net effect, these provisions are intended to close down international trade in the species listed in Appendix I.⁸³

Appendix II provides an intermediate level of protection; it includes "all species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation."⁸⁴ Thus, trade in species found in Appendix II is permitted, but regulated. The principal distinction between its regime of protection and that accorded Appendix I specimens is that, while the limitations applicable to export and re-export are similar, the limitations governing import are far less rigorous. No import permit is required with respect to Appendix II specimens, and imports for commercial purposes are allowed. Appendix II covers tens of thousands of species.⁸⁵

Appendix III provides the least protection; it includes "all species which any Party identifies as being subject to regulation within its jurisdiction for the purposes of preventing or restricting exploitation."⁸⁶ Limitations applicable to Appendix III specimens are much narrower than those pertinent to Appendix I or II specimens and derive primarily from the laws of the exporting state; unlike species listed in the first two appendixes, Appendix III species are unilaterally designated by the exporting state.

⁷⁸ For a more detailed analysis of the Convention, see S. LYSTER, *INTERNATIONAL WILD-LIFE LAW* 239-77 (1985).

⁷⁹ CITES, *supra* note 41, Art. II(1).

⁸⁰ *Id.*, Art. III(2)(a).

⁸¹ *Id.*, Art. III(3)(a).

⁸² *Id.*, Art. III(4)(a). *But see* Art. I(b)(ii) (discussed at note 90 *infra* and accompanying text). *See also infra* text at note 111.

⁸³ An exception is allowed only in "exceptional circumstances." CITES, *supra* note 41, Art. II(1).

⁸⁴ *Id.*, Art. II(2)(a).

⁸⁵ S. LYSTER, *supra* note 78, at 245. However, nearly all are plants; 303 are mammals, 618 are birds, and 340 are reptiles. In 1986 Appendix I contained 179 mammals, 133 birds and 52 reptiles. Woodruff, *The Problems of Conserving Genes and Species*, in *CONSERVATION FOR THE TWENTY-FIRST CENTURY*, *supra* note 52, at 83.

⁸⁶ CITES, *supra* note 41, Art. II(3).

CITES permits any party to enter a specific reservation with regard to any species included in any one of the appendixes.⁸⁷ Thus, Japan, although a party, has entered reservations with respect to four different species of whales.⁸⁸

CITES provides that the parties will meet every 2 years. At the 1985 meeting, the parties adopted a system directed at controlling the international trade in raw ivory, which operated as follows:

[E]ach African country first sets a quota establishing the number of elephants that can be killed within its borders during the following year. All tusks and large pieces of unworked ivory taken within each country must be marked with that country's identification number. The export of those tusks or pieces must be accompanied by an export permit, and a copy of the permit must be sent to the CITES Secretariat. The Secretariat then tallies the number of tusks that are exported from each African country to ensure that its quota is not surpassed. Before an importing country accepts a shipment of ivory, it must first receive notification from the Secretariat that the permit is in order and that the quota has not been reached.⁸⁹

Because CITES defines "specimen" as "any readily recognizable part or derivative thereof,"⁹⁰ CITES has been construed as governing only raw ivory, not worked ivory.⁹¹

One central function of the biennial meeting is to review the species listed in each appendix and to determine whether to add, delete or transfer species from one appendix to another.⁹² Such amendments to Appendixes I and II require the approval of a two-thirds majority of those parties present and voting.⁹³ The amendment enters into force 90 days after the meeting.⁹⁴ At the biennial CITES meeting held in October 1989 in Lausanne, the elephant was moved to Appendix I from Appendix II, where it had been listed since 1977.⁹⁵

Several other CITES provisions are worth noting. First, CITES prohibits a party from trading in specimens with a nonparty unless the latter produces documentation comparable to that required of a party.⁹⁶ Second, CITES

⁸⁷ *Id.*, Art. XXIII(2)(b).

⁸⁸ S. FITZGERALD, *supra* note 64, at 377-78.

⁸⁹ 1988 HOUSE REPORT, *supra* note 33, at 9-10.

⁹⁰ CITES, *supra* note 41, Art. I(b)(ii). This definition applies with respect to species listed in Appendixes I or II; a different definition applies with respect to species listed in Appendix III. See *infra* text at notes 321-25.

⁹¹ The terms "readily recognizable" and "derivative" are not defined by CITES. Consequently, trade in certain parts and derivatives is regulated by some parties but not by others. S. LYSTER, *supra* note 78, at 242.

⁹² CITES, *supra* note 41, Art. IX(3)(b).

⁹³ *Id.*, Art. XV(1)(b).

⁹⁴ *Id.*, Art. XV(1)(c).

⁹⁵ Perlez, *Ivory Trade Is Banned To Save the Elephant*, N.Y. Times, Oct. 16, 1989, at C13. See also 54 Fed. Reg. 24,759 (1989). No formal change was made to expand the application of CITES to worked as well as raw ivory, but the parties may have assumed that the distinction made in the prior regulatory regime lapsed with that system.

⁹⁶ CITES, *supra* note 41, Art. X.

requires each party to "take appropriate measures to enforce" the Convention,⁹⁷ both by imposing penalties⁹⁸ and by confiscating illegal specimens.⁹⁹ Third, a secretariat, headed by a secretary-general, is established to oversee the operation of the Convention.¹⁰⁰ Other provisions recommend that each party designate ports of entry and exit,¹⁰¹ require that each party keep detailed records of trade in specimens of listed species,¹⁰² and make clear that the Convention does not preclude the right of the parties to adopt stricter domestic measures.¹⁰³

In the United States, although some states have attempted to enact "stricter domestic measures,"¹⁰⁴ the principal such measure is the federal Endangered Species Act of 1973 (ESA).¹⁰⁵ In addition to implementing the Convention in the United States, the ESA prohibits the importation into the United States of endangered species that are listed in the ESA.¹⁰⁶ Although "threatened" species are also listed in the ESA,¹⁰⁷ it does not prohibit their importation; the Secretary of the Interior is directed "to issue such regulations as he deems necessary and advisable" to provide for the protection of threatened species.¹⁰⁸ Beginning in 1978, the elephant was listed as a "threatened" species.¹⁰⁹ Regulations issued by the Secretary pursuant to the ESA permitted the importation of worked ivory from states parties to CITES.¹¹⁰ The regulations further required that imported ivory be accompanied by an export permit from the country of origin, even if it had been shipped to an intermediate country and worked there into a finished product.¹¹¹ Further, the United States Fish and Wildlife Service was authorized

⁹⁷ *Id.*, Art. VIII(1).

⁹⁹ *Id.*, Art. VIII(1)(b).

¹⁰¹ *Id.*, Art. VIII(3).

¹⁰³ *Id.*, Art. XIV(1)(a).

⁹⁸ *Id.*, Art. VIII(1)(a).

¹⁰⁰ *Id.*, Art. XII.

¹⁰² *Id.*, Art. VIII(6).

¹⁰⁴ See, e.g., CAL. PENAL CODE §§6530 and 653r (West 1988) (prohibiting, inter alia, the importation and sale of elephants within the state of California). Earlier, federal courts divided over whether the statute was permissible in light of §6(f) of the Endangered Species Act [hereinafter ESA], 16 U.S.C. §1535(f), which precludes the states from prohibiting what is permitted by the ESA. This provision was held by one federal district court to have preempted the California law, *Fouke Co. v. Brown*, 463 F.Supp. 1142 (E.D. Cal. 1979), and by another to have let the California law stand, *H. J. Justin & Sons v. Brown*, 519 F.Supp. 1383 (E.D. Cal. 1981), *rev'd in part on other grounds*, 702 F.2d 758 (9th Cir.), *cert. denied*, 464 U.S. 823 (1983). For a discussion of the two cases arguing the correctness of the second, see M. BEAN, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 377-78 (1983). The Ninth Circuit settled the dispute in *Man Hing Imports v. Brown*, 652 F.2d 63 (9th Cir. 1981), and *Man Hing Ivory & Imports, Inc. v. Deukmejian*, 702 F.2d 760 (9th Cir. 1983), holding that ESA §6(f) preempted operation of the California statute.

¹⁰⁵ 16 U.S.C. §§1531-1541 (1982). The ESA, however, is not the only statute pertinent to the illegal ivory trade. The Lacey Act Amendments of 1981, 16 U.S.C. §§3371-3378 (1982), criminalize under federal law any violation of a state, national or foreign wildlife law. Apparently, difficulty in identifying specific foreign wildlife laws has hampered prosecution. Note, *International Trade in Wildlife: How Effective Is the Endangered Species Trade?*, 15 CAL. W.L. REV. 111 (1985).

¹⁰⁶ ESA, 16 U.S.C. §1538.

¹⁰⁸ *Id.* §1533(d).

¹¹⁰ See 50 C.F.R. §17.40(e) (1988); 47 Fed. Reg. 31,384 (1982); 53 Fed. Reg. 52,242 (1988).

¹¹¹ 50 C.F.R. §17.40(c)(3) (1988).

¹⁰⁷ *Id.* §1533(c).

¹⁰⁹ 43 Fed. Reg. 20,504 (1978).

to impose additional regulatory restrictions on African ivory when necessary.¹¹² Spokesmen for the U.S. Department of the Interior indicated in 1988 that existing ESA authority permitted the Secretary to ban the importation of ivory (meaning, presumably, that the Secretary could simply move the elephant from the threatened list to the endangered list¹¹³), but the Secretary declined to exercise that authority because “[i]t probably needs some kind of national consensus.”¹¹⁴

Partly in response to this seeming invitation to act, Congress in 1988 enacted the African Elephant Conservation Act (AECA).¹¹⁵ Although legislation had been pending that would have imposed a complete ban on the importation of ivory,¹¹⁶ the AECA as enacted did not do that. The AECA required the Secretary of the Interior to conduct a country-by-country review of all African ivory-producing states and to determine, within 1 year after the date of enactment, whether each state had an effective elephant protection program.¹¹⁷ In the event of a negative determination with respect to a given state, the Secretary was required to place a moratorium on the importation of ivory from that state.¹¹⁸ The Act permitted the continued importation of ivory taken from elephants that die naturally or are killed to implement necessary wildlife management.¹¹⁹ The AECA also addressed the problem of “middleman” states. It required the Secretary to place a moratorium on the importation of ivory from any intermediate country meeting any one of seven criteria set forth in the AECA.¹²⁰ Other provisions of the AECA authorized the Secretary of the Interior to fund elephant conservation projects,¹²¹ prescribed criminal penalties for violating

¹¹² *Id.* Pursuant to this authority, the Service prohibited the importation of ivory into the United States from Burundi, a country with no resident elephant population and a huge reserve of poached ivory. The Service also prohibited the importation into the United States of ivory from any intermediary country that imports ivory from Burundi. 1988 HOUSE REPORT, *supra* note 33, at 8. The Service, in February 1988, also banned ivory imports from Somalia. FOCUS, May/June 1989, at 1. *See infra* text at notes 161–63.

¹¹³ The unilateral ban announced on June 9 by President Bush (*see text infra* at note 137) was taken under the authority of §2202(a) and (b) of the African Elephant Conservation Act, requiring the Department of the Interior to establish moratoriums on ivory trade with all nations that cannot meet its criteria for continuation of trade with the United States. 54 Fed. Reg. 24,759 (1989). *See supra* note 95.

¹¹⁴ *African Elephant Conservation: Hearing Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 100th Cong., 2d Sess. 30 (1988) (testimony of Ronald Lambertson, Regional Director for the Northeast, U.S. Fish and Wildlife Service) [hereinafter *1988 House Hearings*].

¹¹⁵ Pub. L. No. 100-478, §2001, 102 Stat. 2306, 2315 (1988) [AECA] (16 U.S.C.A. §§4201–4245 (West Supp. 1989)).

¹¹⁶ *See, e.g.*, H.R. 2999, 100th Cong., 1st Sess. (1987) (sponsored by Rep. Anthony Beilenson).

¹¹⁷ AECA, *supra* note 115, §2201.

¹¹⁸ *Id.* §2202(a)(1).

¹¹⁹ 54 Fed. Reg. 19,416 (1989).

¹²⁰ AECA, *supra* note 115, §2202(b). Those criteria included whether the state is a party to CITES, whether it adheres to the CITES Ivory Control System (*see supra* text at note 89) and the volume of its ivory imports.

¹²¹ AECA, *supra* note 115, §2102. No dollar amount was set; the funds will derive from private donations, civil and criminal penalties collected for violation of the AECA, revenues from the sale of confiscated ivory and other appropriated funds. *Id.* §2102(b).

its provisions,¹²² and directed that the Secretary study the effectiveness of the AECA and the CITES Ivory Control System and report the findings to Congress by 1991.¹²³ If the illegal importation of ivory into the United States had not "substantially stopped" by then, the Secretary was to recommend changes in the Act or "other action, including a total ban on the importation of ivory, if appropriate."¹²⁴

Events quickly overtook the AECA, which took effect on October 7, 1988. In the 10-month period after the House hearings on the AECA, ivory prices soared 25 percent and were expected to rise an additional 25 percent in the next 6 months.¹²⁵ But as poaching accelerated,¹²⁶ public awareness grew.¹²⁷ In late 1988, Kenya's President Daniel arap Moi ordered that poachers (many of them Somalis) be shot on sight.¹²⁸ Richard Leakey, the newly appointed Director of the Kenya Wildlife Service, said that he favored a flat-out ban: "If we can get some of the big consumer countries behind this, it will be very positive."¹²⁹ "The poaching is as bad as it has ever been," Leakey said. "We are losing the elephant."¹³⁰ Shortly afterwards, the U.S. Department of the Interior announced that it supported a ban on the ivory trade, and the Kenyan Government reversed its previous position and announced that it, too, favored a worldwide ban.¹³¹ On May 23, 1989, Britain joined the call for a ban.¹³² As governmental support mounted for moving the elephant from CITES Appendix II to Appendix I,¹³³ key non-

¹²² The maximum criminal penalty for an individual is a \$100,000 fine and 1 year in prison. *Id.* §2204(a). The Secretary is also authorized to pay rewards to individuals who furnish information that leads to civil or criminal penalties under AECA. *Id.* §2205.

¹²³ *Id.* §2304.

¹²⁴ *Id.*

¹²⁵ Reuters (Apr. 24, 1989).

¹²⁶ Daily Telegraph (London), May 15, 1989, at 15.

¹²⁷ In a widely publicized action, following an advertisement on the elephant placed in the Apr. 19 *New York Times* by Friends of Animals, Sotheby's of New York City withdrew from sale two elephant tusks valued at \$48,000. "We will never again sell elephant tusks," said Michael Ainslie, President of Sotheby's. "We would hope it sets an example." *Tusk, Tusk*, TIME, May 1, 1989, at 56. In London, Liberty's banned the sale of ivory ornaments and jewelry, after complaints from customers concerned about the dwindling African elephant population. The store said it "no longer wants to be involved in this trade or in the corruption involved." Daily Telegraph (London), May 17, 1989, at 9.

¹²⁸ N.Y. Times, May 23, 1989, at C1.

¹²⁹ Press, *Africans Back Ban on Ivory Sales*, Christian Sci. Monitor, Apr. 26, 1989, at 6. Leakey's outspokenness caused one Kenyan government minister to describe him as a "cheeky white" who felt black Africans could not manage their own affairs. L.A. Times, May 8, 1989, at 6.

¹³⁰ Hiltzik, *Public Backs Paleontologist Leakey; Rivalries Over Poaching Grip Kenya*, N.Y. Times, Apr. 23, 1989, §1, at 4. Shortly before, apparent poachers had attacked two minibuses on safari with tourists.

¹³¹ N.Y. Times, May 12, 1989, at A1. The week before, Tanzania called for a complete ban. *Id.*

¹³² Reuters (May 23, 1989). Over the previous 2 weeks, British television networks had carried a series of reports about the poaching of African elephants and two national newspapers had initiated campaigns to halt their slaughter. *Id.*

¹³³ By this time, support also came from Zaire, Gabon and Gambia. N.Y. Times, June 2, 1989, at A9.

governmental wildlife organizations feared that, in anticipation of a total ban at the CITES meeting in October, poaching would increase dramatically. These organizations urged immediate unilateral bans to preempt "what could become an elephant holocaust."¹³⁴ An "orgy" of killing, they warned, could occur before a CITES ban would take effect.¹³⁵

The dominoes then began to fall. France announced that it was banning the import of ivory as of June 5, 1989.¹³⁶ On the same day, President George Bush announced a ban by the United States.¹³⁷ Interior Secretary Manuel Lujan, Jr., said on June 6 that the United States (which in 1988 had imported about 12 percent of the world's raw and worked ivory¹³⁸) was imposing the moratorium on all ivory imports before the October meeting because a new review had found that there was no way to distinguish between legal and illegal ivory. "We believe the current international system for controlling ivory trade has failed to protect the elephant, and we have no choice but to halt commercial ivory shipments into the United States," Secretary Lujan said.¹³⁹ On June 6, West Germany announced an immediate ban.¹⁴⁰ And on June 9, the environment ministers of the European Community's 12 member nations voted to impose such a moratorium.¹⁴¹ (The European Community has accounted for about 20 percent of ivory imported from Africa.¹⁴²) The senior vice president of the World Wildlife Fund thereupon declared victory: "The ivory trade has been shut down," said Curtis Bohlen. "The African elephant is now in far less danger of extinction than it was only a week ago."¹⁴³

The unilateral bans, however, turned out to be less than universal. Hong Kong banned only imports of raw ivory;¹⁴⁴ Japan banned imports of raw and worked ivory, but not raw ivory from African countries that are parties to

¹³⁴ Daily Telegraph (London), June 2, 1989, at 9; Reuters (June 1, 1989). These groups included the International Union for the Conservation of Nature and Natural Resources (IUCN) (which had earlier helped initiate the campaign for a CITES treaty, S. Lyster, *supra* note 78, at 239) and the World Wide Fund for Nature, which had earlier opposed a complete ban.

¹³⁵ N.Y. Times, June 2, 1989, at A9.

¹³⁶ N.Y. Times, June 5, 1989, at A8.

¹³⁷ Wash. Post, June 6, 1989, at A6. Bush said: "If their populations continue to diminish at current rates, the wild elephant will soon be lost from this Earth. We urge the nations of the world to join us in this ban." *Id.*

¹³⁸ See *infra* note 175.

¹³⁹ N.Y. Times, June 7, 1989, at A18.

¹⁴⁰ *Id.*

¹⁴¹ N.Y. Times, June 11, 1989, §1, at 6. It turned out, however, that the ban finally adopted would not apply to tusks taken from elephants killed in authorized culls. Reuters (Aug. 17, 1989).

¹⁴² N.Y. Times, June 11, 1989, §1, at 6.

¹⁴³ *Id.* But, Mr. Bohlen added, "We should not fool ourselves that the ban alone will solve the problem." *Id.* Because the Wildlife Fund had not called for a halt to the global ivory trade before June 2, 1989, some other groups that had worked to save the elephant were not impressed. A spokesman for Friends of Animals said: "They are the last ones to jump on the bandwagon . . . ; they only flip-flopped after seeing that the rest of the world had already changed." N.Y. Times, June 9, 1989, at A24.

¹⁴⁴ Reuters (June 18, 1989).

CITES.¹⁴⁵ The Japanese also announced their intent to continue to trade with "managed" states such as South Africa,¹⁴⁶ which refused altogether to join the ban.¹⁴⁷ Southern African producer states, led by Zimbabwe and including South Africa and Botswana, similarly announced their intent to continue to export ivory to the Far East.¹⁴⁸

In October, the parties to CITES met in Lausanne and moved the elephant to Appendix I.¹⁴⁹ They rejected a "split-listing" proposal by southern African states that would have permitted the continued lawful sale of ivory by southern African states. Not surprisingly, five of those states refused to be bound by this outcome, entered reservations, and announced that they would continue to sell ivory.¹⁵⁰

III. THE SHORTCOMINGS OF CITES

It is too soon to assess the impact of the 1989 Lausanne decision to move the elephant from CITES Appendix II to Appendix I,¹⁵¹ or of the unilateral national bans that preceded that action. An analysis of the probable impact

¹⁴⁵ N.Y. Times, June 17, 1989, at 6. Japan has not been at the forefront of the international environmental movement. At about the same time, Japanese officials reiterated Tokyo's intention to kill at least four hundred minke whales next winter, despite demands from the International Whaling Commission that it completely observe the moratorium on whaling imposed in 1986. Besides six species of whales, Japan also engages in trade of skins or products of the Himalayan musk deer and certain species of sea turtles, monitor lizards and crocodiles. In addition, environmentalists accuse Japan of hastening the destruction of the Amazon rain forest by importing tropical timber products from Brazil. *Id.*

¹⁴⁶ ECONOMIST, *supra* note 23, at 16.

¹⁴⁷ South African officials argued that a ban penalizes states with effective elephant conservation programs, such as South Africa and Zimbabwe. Both states cull their elephant populations, and the proceeds from ivory so obtained reportedly go back into conservation. N.Y. Times, June 22, 1989, at A8.

¹⁴⁸ Reuters (Sept. 22, 1989); Sunday Telegraph (London), July 16, 1989, at 14. Malawi, Mozambique and Zambia reportedly will join them. UNEP, in a report released June 29, 1989, was pessimistic about chances of closing down the trade: "[A] complete ban on the ivory trade," it concluded, "is unlikely ever to be successful because world-wide investment in the ivory business is too large." CITES Secretary-General Eugene Lapointe said later, on July 3, 1989, that a worldwide ban on trade in ivory was unlikely to protect endangered African elephants and could create new problems. Sunday Telegraph, *supra*.

¹⁴⁹ See text *supra* at notes 92-95. However, a resolution was passed establishing a set of criteria, based on the African Elephant Conservation Act, that would allow a country to be removed from Appendix I if it were able to comply with the criteria. A panel of experts would be established to review an applicant's program to assess compliance. In any event, there will be no ivory quotas or commercial trade prior to the next conference in Japan in 1992.

¹⁵⁰ Those states are South Africa, Zimbabwe, Zambia, Botswana and Malawi. In addition, China entered a reservation concerning ivory imports, and Britain entered a reservation on behalf of Hong Kong permitting the colony a 6-month trading extension. *Ban on Ivory Takes Effect; Some Nations Defy It*, L.A. Times, Jan. 19, 1990, at 11A. Although Japan abstained from voting for the ban in Lausanne, it subsequently announced that it would abide by it. L.A. Times, Oct. 20, 1989, at 1. "That is probably more important than anything that was decided here," Simon Lyster said. Reuters (Oct. 20, 1989).

¹⁵¹ See *supra* note 95 and accompanying text.

is set forth in part IV below.¹⁵² What is clear is that the international system in effect before Lausanne permitted the trade in illegal ivory to flourish to the point of resulting in the slaughter of almost half of all elephants. As *The Economist* concluded, CITES had proven "utterly powerless" to control the ivory trade.¹⁵³ Without examining how and why that happened, it is difficult to predict whether the elephant is now safe under Appendix I, or to consider what further steps might be indicated.

The International Ivory Trade

Until recently, little was known about the ivory trade.¹⁵⁴ In the spring of 1988, the World Wildlife Fund sponsored a meeting in Lusaka, Zambia, to explore how the elephant could best be protected. Experts from various countries attended. Among the group's conclusions was that the ivory trade required much greater analysis: specifically, of how much ivory is involved, how it moves, and who benefits from it.¹⁵⁵ This point was underscored by David Western, Chairman of the IUCN's African Elephant and Rhino Specialist Group. "We do not, at this point, understand fully how the ivory trade works," he testified. "It is an illusion to believe that we do."¹⁵⁶

Nonetheless, the broader contours of the trade have now emerged.¹⁵⁷ We know, for example, something about the principal countries of origin. In addition to Kenya, they have included Zaire, Tanzania, Botswana, Zambia and South Africa.¹⁵⁸

We know something about the persons engaged in poaching. In Kenya, some of the poaching has been done by Somali bandits, called *shiftras*, armed with modern automatic rifles. The gangs have gotten \$6 a pound for tusks; a poacher can earn \$100 in a single night.¹⁵⁹ (The median income in Africa in 1988 was about \$300 per year.¹⁶⁰)

Other poachers in Kenya have been outsiders; in February 1989, an armed band of Somalian soldiers entered the country and slaughtered six

¹⁵² See *infra* notes 194-231 and accompanying text.

¹⁵³ *ECONOMIST*, *supra* note 23, at 16.

¹⁵⁴ D. FAVRE, *INTERNATIONAL TRADE IN ENDANGERED SPECIES: A GUIDE TO CITES* (1989); R. MARTIN, J. CALDWELL & J. BERZDO, *AFRICAN ELEPHANTS, CITES, AND THE IVORY TRADE* (1986); I. PARKER & M. AMIN, *IVORY CRISIS* (1985).

¹⁵⁵ Bohlen, *supra* note 72, at 6.

¹⁵⁶ *1988 House Hearings*, *supra* note 114, at 29. "[N]obody has any idea how much is coming out of Africa," Susan Lieberman testified, "because it is impossible to know what the smugglers and poachers are doing everywhere." *Id.* at 25 (testimony of Susan Lieberman, Associate Director of Wildlife and Environment Division, Humane Society of the United States).

¹⁵⁷ See generally S. FITZGERALD, *supra* note 64, at 61-77; Thornton, *The Ivory Trail*, *GREENPEACE*, September/October 1989, at 7, 8.

¹⁵⁸ *1988 House Hearings*, *supra* note 114, at 37 (testimony of W. K. Nduku, Director, Department of National Parks and Wildlife, Zimbabwe); S. COLB, *THE IVORY TRADE AND THE FUTURE OF THE AFRICAN ELEPHANT* (1989); ENVIRONMENTAL INVESTIGATION AGENCY, *A SYSTEM OF EXTINCTION: THE AFRICAN ELEPHANT DISASTER* (1989).

¹⁵⁹ Bohlen, *supra* note 72, at 1.

¹⁶⁰ *1988 House Hearings*, *supra* note 114, at 3 (testimony of Rep. Anthony Beilenson).

elephants. Kenyan security forces exchanged fire with the raiders, resulting in the death of one Somalian, the capture of another and the injury of three Kenyans. The Government of Kenya lodged a formal protest with the Somalian Embassy.¹⁶¹ The World Wildlife Fund determined that Somalia had sold or stockpiled about 29,000 tusks from 1986 to 1989—even though the country contained fewer than 4,500 elephants in 1987.¹⁶² The President of Somalia, Mohamed Siyaad Barre, explicitly authorized the import into Somalia of raw ivory from neighboring countries.¹⁶³

Poaching has been facilitated, through inadvertence or indifference, by developers. In 1981 the Shell Oil Company constructed roads in the previously isolated Selous game reserve in Tanzania. Its labor force "was not averse to poaching"; since the roads were built, elephants have declined rapidly in number.¹⁶⁴

Poaching has provided a source of revenue for guerrilla movements, which are well equipped to enter the business. Jonas Savimbi's UNITA, which is supported by the United States, has reportedly killed more than 100,000 elephants to finance its 14-year war against the Government of Angola.¹⁶⁵

We know from customs reports that an average of 800 metric tons of ivory has been leaving Africa annually.¹⁶⁶ But in ivory-exporting countries, the value of ivory to the export economy has rarely been greater than 1 percent.¹⁶⁷ Relatively little raw ivory has gone directly to the United States or other end-user countries.¹⁶⁸ For the most part, raw ivory has been transported to *entrepôts*, way stations en route to final ports where ivory is worked and its origin easily concealed.¹⁶⁹ Somalia, the United Arab Emirates and South Africa have been among the principal *entrepôts*.¹⁷⁰ Burundi has ex-

¹⁶¹ The protest stated: "The Government of Kenya takes very great exception to this incident where armed members of the Somalia National Army violate the Kenyan territorial integrity, butcher Kenya's wildlife, and open fire at Kenya security forces, injuring a number of them." FOCUS, May/June 1989, at 1.

¹⁶² *Id.*

¹⁶³ *To Save the Elephant*, *supra* note 1, at 9. In 1983 Sudanese hunters were crossing the border with Zaire in groups of up to 60, armed with Kalashnikovs and G3 automatic rifles. UNEP REPORT, *supra* note 33, at 15.

¹⁶⁴ UNEP REPORT, *supra* note 33, at 16.

¹⁶⁵ Ransdell, *supra* note 37, at 62. "Savimbi admitted to an arms-for-ivory deal with his South African allies in a 1988 interview with *Paris-Match*." *Id.*

¹⁶⁶ Bohlen, *supra* note 72, at 1. In 1987 and 1988 the trade is believed to have dropped to about 500 tons per year, though final figures are not yet available. *To Save the Elephant*, *supra* note 1, at 7.

¹⁶⁷ IVORY TRADE REVIEW GROUP, PUBLIC STATEMENT ON THE IVORY TRADE AND THE FUTURE OF THE AFRICAN ELEPHANT 4 (1989). Most of the profits go to middlemen. *See infra* note 321 and accompanying text.

¹⁶⁸ In 1986, for example, the entire amount of raw ivory imported into the United States represented the tusks of 500 elephants. 1988 HOUSE REPORT, *supra* note 33, at 9.

¹⁶⁹ Bohlen, *supra* note 72, at 6.

¹⁷⁰ *Id.* The UAE was a party to CITES but has withdrawn (the only party to do so). *See* note 187 *infra*.

ported most of the ivory from East Africa, even though it has no elephant population itself.¹⁷¹ Macao and Singapore also have participated in the illegal ivory trade.¹⁷²

From these intermediary countries, the raw ivory has been shipped to countries where it is "worked," or carved. Hong Kong and Japan have been among the most prominent of such states. As controls in Hong Kong were tightened, the main carving industry appeared to be moving to Macao.¹⁷³ Japan alone has consumed close to 75 percent of Africa's raw ivory production.¹⁷⁴

The worked ivory has then been either sold domestically or shipped to consumer states such as the United States. The United States has imported about 30 percent of worked ivory that enters the international trade.¹⁷⁵ About a third of Hong Kong's worked ivory exports have been sent to the United States.¹⁷⁶ It has been estimated that about 80 percent of the ivory sold in the United States was obtained illegally.¹⁷⁷

Why the Ivory Trade Flourished under CITES

However incomplete our current picture of the international ivory trade, it nonetheless seems fair to conclude that throughout the 1980s, the trade boomed despite the CITES protective regime for a fairly obvious reason: CITES did not sufficiently diminish the incentives of producers, middlemen or consumers.

Producer states faced a variety of problems. The vast profits available from poaching, or merely looking the other way, made the corruption of enforcement personnel a recurrent difficulty.¹⁷⁸ Game wardens, *The Economist* observed, "can make more from a couple of contraband tusks than they do in a year's honest work. Fat profits made government officials fairly easy to suborn."¹⁷⁹ Grinding poverty, as noted above, also has played a major role.¹⁸⁰

¹⁷¹ C. Moss, *supra* note 2, at 299. The CITES Secretariat estimates that in 1986 at least 300 tons of ivory left Africa illegally, much of it from Burundi via the United Arab Emirates for Singapore. Analysis of the stocks registered in Burundi revealed that 40% originated in Zaire, 30% in Tanzania, 20% in Zambia, and 10% in other African countries. UNEP REPORT, *supra* note 33, at 35.

¹⁷² *To Save the Elephant*, *supra* note 1, at 7.

¹⁷³ ECONOMIST, *supra* note 23, at 17.

¹⁷⁴ 1988 HOUSE REPORT, *supra* note 33, at 9.

¹⁷⁵ *Id.* According to the *New York Times*, however, the figure is much smaller; total U.S. imports of both raw and carved ivory amount to only 10-15% of the amount traded annually. *N.Y. Times*, June 2, 1989, at A9.

¹⁷⁶ Booth, *Africa Is Becoming an Elephant Graveyard*, 243 SCIENCE 732 (1989).

¹⁷⁷ *N.Y. Times*, Oct. 29, 1988, at 29.

¹⁷⁸ The Central African Republic's Emperor Bokassa reportedly presided over a government rife with ivory smugglers. *To Save the Elephant*, *supra* note 1, at 7.

¹⁷⁹ *The Slaughter of Elephants*, ECONOMIST, Apr. 15, 1989, at 49, 50.

¹⁸⁰ See text *supra* at notes 159-60. The gross domestic product per capita for Somalia, in 1982, was about \$200; for Kenya, in 1986, about \$230; for Tanzania, in 1987, about \$240; for Zaire, in 1986, about \$140. U.S. CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK (1988).

Even producer states that purposefully undertook the task of protecting their elephant populations from poachers faced a shortage of resources. Their game wardens frequently were overwhelmed by the poachers' firepower,¹⁸¹ to the extent that Kenya—a nation that has come to take wildlife conservation seriously—asked Britain for helicopter gunships, spotter planes, transports and automatic weapons for its new, paramilitary Anti-Poaching Unit.¹⁸² By one estimate, the cost of surveillance, fencing and support equipment needed to halt poaching entirely in Kenya's Tsavo National Park was \$200 per square mile per day—which worked out to \$1.6 million a day.¹⁸³

Producer states seemed little affected by the quota system they established under CITES. The system has been entirely voluntary and had no binding effect on the parties. Consequently, if a producer state exceeded its quota or even declined to supply a quota to the CITES Secretariat, other CITES parties had no legal basis under CITES for refusing entry to that producer state's ivory.¹⁸⁴ Moreover, the quotas have been based on ridiculously high estimates of sustainable yields provided by the producing countries.¹⁸⁵ "The quota system," the World Wildlife Fund concluded, "has proved to be little more than a procedure for ivory-producing states to notify the CITES Secretariat of the number of tusks they plan to export in a given year."¹⁸⁶

Entrepôt states thrived on the ivory trade under CITES. Burundi, which was not a party to CITES until 1987, and the United Arab Emirates, the only state to sign CITES and then withdraw,¹⁸⁷ operated free of constraints.¹⁸⁸ As conservationist pressures increased, individual middlemen stored raw ivory within Africa in the hope that those pressures would someday ease.¹⁸⁹

It is interesting to compare these income statistics with those of countries that have conducted more successful elephant conservation programs. The gross domestic product per capita for South Africa, in 1987, was about \$1,700; for Zimbabwe, in 1986, \$540; for Botswana, in 1985, \$880. *Id.*

¹⁸¹ See *supra* note 37. In March 1989, when 24 elephants were killed on a foreign-owned ranch in Kenya, one soldier was killed and another wounded in a battle with the poachers. A few days later, the same gang apparently was responsible for the killing of 17 elephants in the Tsavo Park, alongside the ranch. *ECONOMIST*, *supra* note 179, at 50.

¹⁸² Ransdell, *supra* note 37, at 64.

¹⁸³ *Id.* Zimbabwe, with a model elephant conservation program, spends about \$160 per kilometer per day. Most of Africa spends about 50 cents. Booth, *supra* note 176, at 732.

¹⁸⁴ 1988 House Hearings, *supra* note 114, at 35 (remarks of Clark Bavin, Chief, Law Enforcement Division, U.S. Fish and Wildlife Service).

¹⁸⁵ "In 1986," *The Economist* reported, "CITES authorities authorized the export of some 108,000 tusks. That would have represented more than 50,000 dead elephants—ten times the annual figure that some conservationists regard as Africa's sustainable yield." *ECONOMIST*, *supra* note 23, at 16.

¹⁸⁶ *To Save the Elephant*, *supra* note 1, at 8. In addition, WWF concluded, most of the export quotas have been set arbitrarily, without regard to the status of the respective elephant populations. *Id.*

¹⁸⁷ C. Moss, *supra* note 2, at 299.

¹⁸⁸ See *id.* When Burundi joined CITES, its Government announced a total ban on ivory trade. *Id.*

¹⁸⁹ *To Save the Elephant*, *supra* note 1, at 8.

Consumer states faced little incentive to cut back on ivory importation. There is no requirement in CITES that worked ivory be identified by country of origin when imported. Consequently, the worked ivory trade has not been controlled;¹⁹⁰ the U.S. Fish and Wildlife Service has not required that the country of origin be declared.¹⁹¹ In the past, this loophole has been exploited by intermediary countries that are parties to the Convention to avoid the CITES restrictions on raw ivory. "Traders in Hong Kong, for example, imported ivory from Dubai, a free-trade zone in the United Arab Emirates, where the tusks were superficially carved. This allowed Hong Kong traders to import 'ivory artwork' from Dubai . . ."¹⁹² A report by the United Nations Environment Programme observed: "Already ivory carvers are being moved to places such as the United Arab Emirates, Dubai and Taiwan—where there are few import controls on even raw ivory—so that the partly worked products can then be freely imported into the major centers."¹⁹³

Prior to the Lausanne Conference in October 1989, therefore, CITES failed to protect the elephant. Whether it will do so as a result of the changes made in Lausanne is problematic, for reasons that will be discussed next.

IV. MAKING CITES WORK

Two Models of Protection: Management and Embargo

When the Lausanne Conference began, two very different models of wildlife protection were competing for acceptance. The two approaches had earlier split the conservation community¹⁹⁴ and set southern Africa against East Africa.¹⁹⁵ One I will call the "embargo" model; the other, the "management" model.

The embargo model derived from the practical impossibilities inherent in distinguishing illegal ivory from legal ivory. It would attempt to close down

¹⁹⁰ *Id.* at 7.

¹⁹¹ 1988 House Hearings, *supra* note 114, at 14 (remarks of Ronald Lamertson, Chairman, Standing Committee, CITES; Regional Director for the Northeast Region, U.S. Fish and Wildlife Service); *id.* at 36 (remarks of Clark Bavin, Chief, Law Enforcement Division, U.S. Fish and Wildlife Service). "It is generally accepted that it should be, but we don't hold up shipments for that not being on there." *Id.* But see *supra* note 111.

¹⁹² Booth, *supra* note 176, at 732. Hong Kong indicated in August 1989 that it would require all carved ivory to be accompanied by permits confirming its legal origin. *Id.*

¹⁹³ UNEP REPORT, *supra* note 33, at 37. On June 6, 1989, however, Crown Prince Sheikh Maktoum bin Rashid al-Maktoum of Dubai issued an order banning "all activities relating to manufacture and trade in elephant and rhinoceros tusks." Reuters (June 6, 1989).

¹⁹⁴ Compare, e.g., testimony of David Western, Chairman, African Elephant and Rhino Specialist Group, 1988 House Hearings, *supra* note 114, at 29, and William K. Reilly, President, World Wildlife Fund, *id.* at 23, with testimony of Susan Lieberman, Associate Director, Wildlife and Environment Division, Humane Society of the United States, *id.* at 26.

¹⁹⁵ "On the one side you have those who believe in conservation, which implies utilization of wildlife as an economic resource; on the other you have those who believe purely in protection, and their pressure on public opinion in the West is enormous," CITES Deputy Secretary-General Jacques Berney said. Reuters (July 9, 1989). At a 4-day meeting of elephant experts and governmental officials from 26 countries held in Botswana in July 1989, Kenyan and Zimbabwean representatives barely exchanged a word. *Id.* See also L.A. Times, July 8, 1989, at 4.

the trade in ivory by completely prohibiting it. Its proponents reasoned that the more legal ivory is traded, the easier it will be for poachers to place illegal ivory into the trade stream. "By keeping the ivory trade going," one expert said, "there is no question that illegal trading will go on."¹⁹⁶ Kenyan President Moi, a leader of the proembargo forces, thus set fire to 2,500 ivory tusks, worth \$3 million.¹⁹⁷ "We could sell the ivory, and use the money for conservation," his conservation minister said, "but we believe that that is only fueling the market."¹⁹⁸

The management model would attempt to limit and control the ivory trade, rather than banning it altogether. Proponents of management would permit the sale of ivory from several sources: (1) supplies of confiscated poached ivory; (2) elephants that die a "natural death"; and (3) culling operations in states where elephant populations exceed the available habitat. They argued that such ivory is best placed on the market to provide revenues for stricter enforcement efforts. A ban would simply drive the trade underground and propel the price of ivory ever upwards. Thus, ivory should be marketed to relieve supply pressures created by the black market.¹⁹⁹ Moreover, management proponents contended, the *people* in these (largely) underdeveloped countries should not be left to starve while convertible "white gold" was being accumulated by their governments.

In good part, therefore, each model defined itself in terms of the shortcomings of the other. The embargo model insisted that the purely "legal" ivory trade presupposed by the management model was fanciful. The continuing lawful supply of ivory, its adherents contended, would enable poachers to hide illegal ivory, which can be mixed with the legal and rendered indistinguishable.²⁰⁰ Underpinning the management model, on the other hand, was the argument that the *termination* of ivory trading presupposed by the embargo model was fanciful. The continuing demand for ivory—lawful or unlawful—its adherents contended, would lure poachers into meeting that demand.

Which model is valid? Each proceeds from principles of economic theory that render its conclusions entirely plausible. That those conclusions are mirror images derives from differing answers to an *empirical* question: can the ivory trade be substantially ended? Because the issue is empirical, it may be illuminated by examining international efforts to limit or control trade in

¹⁹⁶ N.Y. Times, June 22, 1989, at A8 (comment of Richard E. Leakey).

¹⁹⁷ Wash. Post, July 19, 1989, at 1. The tusks represented more than two thousand elephants shot during the past 4 years. N.Y. Times, July 19, 1989, at A4.

¹⁹⁸ Sunday Telegraph (London), July 16, 1989, at 14.

¹⁹⁹ "If the elephant died from natural mortality or natural culling, I see no reason the ivory shouldn't be used. Most African countries are very poor, and this is one of the few natural resources they can exploit. But right now it is in a crisis situation," said Diana E. McMeekin, vice president of the African Wildlife Foundation. Chicago Trib., Mar. 12, 1989, at 5C.

²⁰⁰ According to Tanzania's proposal to CITES to move the elephant to Appendix I, the CITES registered legal ivory trade in 1987 was only 20% of the total estimated world trade of 771 tons. 54 Fed. Reg. 24,760 (1989). On June 1, 1989, a consortium of wildlife conservation groups concluded that "the legal (i.e., government controlled) and illegal trades have become virtually indistinguishable." *Id.*

other contraband substances. To the extent that the trade in these other substances resembles the ivory trade, the successes and failures of those efforts will be instructive.

Perhaps the substance that leaps first to mind is cocaine. That the effort to close down the international trade in cocaine has thus far failed dismally is a proposition that need hardly be elaborated. What is of interest is how the cocaine trade compares with the ivory trade. Are efforts to apply an embargo to the ivory trade likely to fare as poorly?

At first blush, the similarities between the cocaine and ivory trades seem apparent.²⁰¹ Each is demand-driven. Eliminate demand, one may think, and the trade in both will end. Permit demand to continue, and supply will continue. Suppress supply, one may suppose, and price will increase, which, in turn, will increase supply—coca growing and ivory poaching. Increase supply, and price will drop.²⁰²

Yet there are several crucial differences. First, whereas the potential supply of ivory is largely inelastic, at least at present, the potential supply of coca is not. Deregulation of the ivory trade would thus increase the price by rapidly depleting the supply; deregulation of the international cocaine trade would deflate the price of cocaine by increasing supply.²⁰³ Second, the objective of enforcement is the opposite in the two trades. Cocaine enforcement aims at eliminating the supply by eradicating or severely limiting the source (coca), but enforcement designed to close down the ivory trade aspires to preserve its source—elephants. The effect of these differing objectives suffuses the relationship between the supply and demand of each substance and skews other possible parallels. Consequently, the failure to suppress the cocaine trade is not instructive; the dynamics of that trade are simply too different.

Efforts to eradicate the trade in other contraband substances also invite comparison, but there, too, parallels are inexact and analogies suspect. The trade in stolen art, for example, seems beguilingly similar. Professor Paul Bator, discussing the international trade in looted art, noted that finding a domestic deterrent is "especially acute in societies where the administration

²⁰¹ In fact, wildlife smugglers not infrequently smuggle narcotics as well. S. FITZGERALD, *supra* note 64, at 19.

²⁰² This is in fact what has occurred in the international cocaine trade. From 1985 to 1989, worldwide coca production has increased by 50%, from 162,700 metric tons to 229,990 metric tons. The supply glut is reflected in plummeting prices: in 1980, the wholesale price of cocaine was \$50,000–\$55,000 per kilogram; by 1988, the price hit an all-time low of \$10,000–\$12,000. DEMOCRATIC STUDY GROUP, U.S. HOUSE OF REPRESENTATIVES, SPECIAL REPORT, RHETORIC VS. RESOURCES: "JUST SAYING NO" TO FUNDS FOR ANTI-DRUG EFFORTS DURING THE REAGAN-BUSH ADMINISTRATION 27 (1989).

However, as the supply of ivory dropped over recent months, contrary to some predictions, its price actually declined—perhaps because demand dropped even faster. In Zaire, its price has dropped by 50%; in Hong Kong, by 30%. Perlez, *The World Looks for a Way to Save the Elephant*, N.Y. Times, Oct. 15, 1989, at E6. *The Economist* nonetheless predicted that, in the long term, the Lausanne action would cause the price of ivory to rise. *The Price of a Tusker*, *supra* note 65.

²⁰³ See D. AARONSON, PUBLIC POLICY AND POLICE DISCRETION: PROCESSES OF DECRIMINALIZATION (1984).

of criminal justice is generally inefficient or corrupt." Much the same can be said of ivory poachers. Detection is difficult, and until then, there is no one to complain; and "[e]ven when there is complaint, the harm is often not widely appreciated. . . ." ²⁰⁴ The suppression of a lawful supply can drive a certain amount of supply underground: "The harder it is to obtain objects within that category legally, the more intense the demand to acquire them on the black market." ²⁰⁵ And as the embargo on exports becomes more effective, "the number of purchasers willing to deal illegally and the amount of funds available on the illegal market also increases." ²⁰⁶

Yet raw ivory, unlike many art objects, is fungible, creating different enforcement problems—and possibilities. A stolen art object, for example, can sometimes be identified and confiscated; a piece of worked ivory made from a poached tusk normally cannot be. A potential buyer of ivory can be made aware through mass educational efforts that the substance was probably taken unlawfully; generalized publicity campaigns are rarely possible with respect to stolen art objects. Hence, like the drug trade, the trade in stolen art seems not altogether parallel.

The international trade in other contraband substances is also too *dissimilar* on the whole to permit reliable analogy. ²⁰⁷ That applies equally to trade in a substance from a species often compared to the elephant in conservationist debates: the black rhinoceros.

The specter of the black rhino has loomed like a dark spirit over the debate on how to save the elephant. ²⁰⁸ A ban on trade in its horn was put in place when it was moved to Appendix I in 1983, yet the animal has been hunted to virtual extinction. ²⁰⁹ In 1970 there were 70,000 black rhinos; in 1988, 3,800. ²¹⁰ This dismal precedent is perhaps the most frequently made argument of proponents of the management model for the elephant. It was relied upon by South Africa in arguing against the ban. ²¹¹

Yet there are significant differences between the trade in ivory and the trade in rhino horn. ²¹² Elephant tusks sell for much less than the highly

²⁰⁴ Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 311 (1982).

²⁰⁵ *Id.* at 318.

²⁰⁶ *Id.*

²⁰⁷ Unlike the international trade in ivory, for example, that in blood has a more limited supply and a less elastic demand. See *Blood Banks: Precious Drops*, ECONOMIST, Oct. 14, 1989, at 28, 33; Altman, *Europe Supplying Blood for the U.S.*, N.Y. Times, Sept. 5, 1989, at A1; R. TITMUSS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* (1970).

²⁰⁸ See generally S. FITZGERALD, *supra* note 64, at 105–14; E. MARTIN, *THE INTERNATIONAL TRADE IN RHINOCEROS PRODUCTS* (1980); Knox, *Horns of a Dilemma*, SIERRA, November/December 1989, at 58.

²⁰⁹ N.Y. Times, May 12, 1989, at A6.

²¹⁰ D. Western & P. Olindo, *Conservationists Worldwide Are Determined to Save the Elephant*, N.Y. Times, June 26, 1989, at A18.

²¹¹ N.Y. Times, June 22, 1989, at A8. Even after the bans were announced, the rhino precedent was still cause for concern. N.Y. Times, June 11, 1989, §1, at 6. See also Simmons & Kreuter, *Wildlife Preservation: Save an Elephant—Buy Ivory*, Wash. Post, Oct. 1, 1989, at D3.

²¹² See generally THE STATUS AND CONSERVATION OF AFRICA'S ELEPHANTS AND RHINOS, PROCEEDINGS OF THE JOINT MEETING OF IUCN/SSC AFRICAN ELEPHANT AND RHINO SPECIALIST GROUPS AT HWANGE SAFARI LODGE, ZIMBABWE (1981). I am indebted to Frank Wissmuth for helpful comments on this issue.

valuable rhino horn, which is used for handles for ceremonial daggers in North Yemen²¹³ and is reputed in Asia to work in its powdered form as an aphrodisiac.²¹⁴ The price paid for raw ivory in 1989 was \$100 per pound,²¹⁵ rhino horn sells for \$13,000 a pound.²¹⁶ Rhino horn is believed (wrongly) to have medicinal value;²¹⁷ ivory is not. Rhino horn is transported much more easily; because of its mythic medicinal properties, it can be ground into powder and fitted into covert containers. Ivory is much harder to hide (even an uncut rhino horn measures only 2 feet in length). All in all, the embargo approach to protecting the elephant seems highly unlikely to cause it to suffer the tragic fate of the black rhino.

A more apposite analogy—in fact, probably the precedent most on point—can be made with the leopard.²¹⁸ Once mercilessly overhunted, leopards have recovered splendidly²¹⁹ since placement on CITES Appendix I.²²⁰ In large part, that recovery has been brought about by a broad-gauged educational campaign undertaken by nongovernmental conservation organizations. The campaign largely succeeded, to the extent that it has now become socially unacceptable to wear a leopard-skin coat.²²¹ The ivory campaign is directed at similarly educable people, many of whom were previously ignorant of the threat to the species and would gladly forgo purchasing derivatives to help save it. (In contrast, the publics in Yemen and various Asian countries continue to regard a rhino-horn dagger handle as a status symbol.)

The matter is not free from doubt, but the most reasonable conclusion is that the elephant would be better protected by the embargo approach than by the management approach. The management model works best in protecting nonendangered or formerly endangered animals, such as the American alligator and beaver, under a “sustainable use” regime.²²² Earlier arguments against a prophylactic ban on ivory trading were more plausible when developed countries would have had to initiate the ban over African opposition. Now that African states have taken the lead, the situation has changed. Among other things, their leadership role may lessen the possibil-

²¹³ The daggers sell for up to \$12,000. Vollers, *A War to Save the Black Rhino*, TIME, Sept. 7, 1987, at 62, 63.

²¹⁴ N.Y. Times, June 11, 1989, §1, at 6.

²¹⁵ FOCUS, May/June 1989, at 2; N.Y. Times, June 2, 1989, at A9.

²¹⁶ Cohn, *Halting the Rhino's Demise*, 38 BIOSCIENCE 740 (1988).

²¹⁷ Vollers, *supra* note 213, at 63.

²¹⁸ See generally S. MILLER & D. EVERETT, *CATS OF THE WORLD: BIOLOGY, CONSERVATION, AND MANAGEMENT* (1986).

²¹⁹ ECONOMIST, *supra* note 23, at 16. The argument that the leopard was never truly endangered to begin with (see Simmons & Kreuter, *supra* note 211) misses the point: whatever the level at which the leopard subsisted when moved to Appendix I, nearly all agree that that placement was in part responsible for its subsequent increase in number.

²²⁰ See D. FAVRE, *supra* note 154, at 95. Since 1983, a special quota has allowed the export of lawfully obtained leopard skins, but such skins may not be intended for resale. S. FITZGERALD, *supra* note 64, at 45-46.

²²¹ See generally Lemonick, *Coming Back from the Brink*, TIME, July 20, 1987, at 70.

²²² S. FITZGERALD, *supra* note 64, at 9.

ity that enforcement difficulties will prove insurmountable.²²³ The knowledge that *all* ivory in international commerce is there illegally would make effective control easier.²²⁴ Prior to the Lausanne Conference, the U.S. Fish and Wildlife Service announced that it would oppose a move at the sessions to allow countries to trade in ivory. It gave this reason: "It is very doubtful that legal trade of ivory stocks could be accomplished without providing cover for illegal trade."²²⁵ That position was correct then, and it is correct now.²²⁶

Nevertheless, that is not the solution that emerged from Lausanne. The solution that did emerge is a hybrid of the two models, and therein lies its defect. Although in principle a listing under Appendix I represents a CITES endorsement of the embargo model with respect to a certain species, in reality no bona fide embargo is put in place since CITES permits parties to enter reservations.²²⁷ Thus, under the post-Lausanne CITES regime, notwithstanding the elephant's Appendix I listing, it remains legal for ivory-producing states to sell ivory, and six have indicated their intent to do so²²⁸—even though a majority of the CITES parties recognized that termination of the trade is essential to protecting the elephant and major consumer states have agreed to ban imports.

The legality of continued ivory sales does not preclude nontrading states from attempting to compel trading states to stop. Such legislation has been introduced in the United States Congress and is directed at both producer²²⁹ and consumer²³⁰ states. Because of the highly pernicious effect on the ban of the actions of the continuing ivory traders, it would be entirely

²²³ Richard Leakey pointed out that in June 1989, 22 poachers were killed in Kenya and "not one elephant." Wash. Post, July 19, 1989, at A1. In Tanzania in that same month, authorities launched a crackdown on elephant and rhinoceros poachers, rounding up several hundred suspects and seizing elephant tusks, rhino horns and police and army uniforms presumably used as disguises. Reuters (June 29, 1989).

²²⁴ *Contra* D. FAVRE, *supra* note 154, at 123; *ECONOMIST*, *supra* note 23, at 15.

²²⁵ 54 Fed. Reg. 37,027 (1989).

²²⁶ However, it may not be correct a few years from now. See *infra* notes 315-20 and accompanying text.

²²⁷ See *supra* note 87 and accompanying text.

²²⁸ In addition, China and Hong Kong continue to import ivory. *Ban on Ivory Takes Effect*, *supra* note 150, at 11A. See *supra* text at notes 149-50.

²²⁹ H.R. 2519, 101st Cong., 1st Sess. (1989), introduced by Rep. John R. Kasich, would ban the importation of all ivory products into the United States and would revoke most-favored-nation treatment for elephant-producing countries that do not have or enforce appropriate elephant protection programs. See 135 CONG. REC. H2250 (daily ed. May 31, 1989). The bill was referred jointly to the Committees on Foreign Affairs and Ways and Means.

²³⁰ Sen. Daniel Patrick Moynihan has proposed to make actions that undermine agreements such as CITES "unfair trade practices" under §301 of the Trade Act of 1974, Pub. L. No. 96-39, 93 Stat. 295 (19 U.S.C. §2411 (1988)). See S. 261, 101st Cong., 2d Sess. (1989). Sen. Moynihan said:

If countries such as Japan or Hong Kong fail to follow through with the moratorium on ivory trade—or continue to import ivory from African countries should the CITES secretariat designate the African elephant an endangered species this October—retaliatory action should, for example, fall on sophisticated electronics or automotive products, or whatever would be most effective.

appropriate for the international community and individual states to impose sanctions on them. It must be made clear—multilaterally, if possible; unilaterally, if necessary—that *all* ivory trading is impermissible; so long as any trade is permitted, the embargo will be eviscerated because the legal trade will simply draw ivory poached from areas where herds are endangered. As Zambia's tourism minister put it in endorsing the ban, it will be useless unless it includes all the nations involved.²³¹

Carrots as well as sticks are available to the international community to produce the desired order. Indeed, when considered in the context of a comprehensive structure of global environmental resources, rights and obligations, the primary tools for compliance clearly ought to be incentives rather than disincentives.

Global Environmental Resources, Rights and Obligations

If the embargo model is to be preferred over the management model as the optimal approach to elephant protection, it does not follow that ivory-producing states should themselves absorb the cost of such programs or, for that matter, that "elephant-excess" states should themselves shoulder the opportunity cost of forgoing the sale of ivory from culling operations or confiscation. The equitable allocation of costs should be a function of the actual distribution of benefits. This principle, in a nutshell, animates the notion of global environmental resources, rights and obligations. Ali Hassan Mwinyi, President of Tanzania, succinctly alluded to these concepts in a recent speech: "That Tanzania has a rich wildlife resource is an accident of geography. It belongs to all mankind. The international community should therefore contribute to its survival."²³²

These ideas are not new; their elements, in one form or another, pervade the recent literature on international environmental preservation.²³³ Nor are they limited to leaders of the Third World. President George Bush,

135 CONG. REC. S7377 (daily ed. June 22, 1989). Such retaliatory action would be consistent with GATT, which allows trade restrictions for conservation purposes. General Agreement on Tariffs and Trade, Art. XX, Oct. 30, 1947, TIAS No. 1700, 55 UNTS 188.

²³¹ Reuters (July 14, 1989) (comments of Pickson Chitambala). Nonetheless, Zambia is one of the five producing states that entered a reservation and continue to export ivory. *Ban on Ivory Takes Effect*, *supra* note 150, at 11A.

²³² Address by President Ali Hassan Mwinyi (n.d.), *quoted in The Launch, MIOMBO: THE NEWSLETTER OF THE WILDLIFE CONSERVATION SOCIETY OF TANZANIA*, July 1988, at 9.

²³³ See, e.g., Stone, *Tax Nations to Repair the Earth*, L.A. Times, Aug. 25, 1989, §II, at 7; Chopra, *Whales: Towards a Developing Right of Survival as Part of an Ecosystem*, 17 DEN. J. INT'L L. & POL'Y 255 (1989); Magraw, *International Law and Park Protection: A Global Responsibility*, in OUR COMMON LANDS: DEFENDING THE NATIONAL PARKS (D. Simon ed. 1988); Hahn & Richard, *The Internationalization of Environmental Regulation*, 30 HARV. INT'L L.J. 421 (1989); Sands, *The Environment, Community and International Law*, *id.* at 393; BLUEPRINT FOR THE ENVIRONMENT: A PLAN FOR FEDERAL ACTION 227-28 (T. Comp ed. 1989); Sandbrook, *Towards a Global Environmental Strategy*, in ENVIRONMENTAL POLICIES (C. Park ed. 1986); Myers, *Endangered Species in the North-South Dialogue*, in ECONOMICS OF ECOSYSTEM MANAGEMENT (D. Hall, N. Myers & N. Margolis eds. 1985); N. MYERS, A WEALTH OF WILD SPECIES (1983); McDougal & Schneider, *The Protection of the Environment and the World Public Order*, in WORLD PRIORITIES 81 (B. Preger, H. Lasswell & J. McHale eds. 1977).

addressing the United Nations on September 25, 1989, noted that the United States had banned ivory imports and added: "The environment belongs to all of us. In this new world of freedom the world citizens must enjoy this common trust for generations to come."²³⁴

Yet it was not long ago that the international system placed far greater emphasis on national sovereignty over natural resources than on global interdependence. As recently as 1972, states were thought to have absolute control over all natural resources located within their boundaries. Principle 21 of the Stockholm Declaration on the Human Environment provided that "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources."²³⁵ Less-developed countries were particularly vigorous in asserting "permanent sovereignty over natural resources" and a correlative right to dispose of resources fully and freely.²³⁶ Even the new *Restatement of Foreign Relations Law* cautiously limits its discussion of international environmental law to transfrontier pollution.²³⁷

Since 1972, however, so many states have adopted laws directed at preserving their environment that it probably is no longer correct to think that states have unlimited authority to injure the environment in any manner so long as the injury is restricted to their own territory.²³⁸ States also have bound themselves increasingly by treaty to protect unique international treasures.²³⁹ The UN General Assembly, in the 1982 World Charter for Nature, affirmed general principles of conservation to which "[a]ll areas of the earth" are subject.²⁴⁰ Professor David Caron criticized the narrow approach of the *Restatement* and summed up emerging thought as follows:

[A]s humanity believes increasingly that in a theoretical sense the planet belongs to all . . . , the notion of legitimate interests seems to extend far beyond traditional notions of harm. Consequently, there is a perception that all have an interest in preventing the loss of a species, the destruction of cultural heritage, and the waste of natural resources.²⁴¹

²³⁴ N.Y. Times, Sept. 26, 1989, at A8.

²³⁵ UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT, REPORT at 3, 5, UN Doc. A/CONF.48/14/Rev.1, UN Sales No. E.73.II.A.14 (1973).

²³⁶ See General Assembly Resolutions: 1803 (XVII) (Dec. 14, 1962), 2692 (XXV) (Dec. 11, 1970), 3016 (XXVII) (Dec. 18, 1972), 3201 (S-VI), para. 4e (May 1, 1974), 3202 (S-VI), sec. 8 (May 1, 1974). See generally O. SCHACHTER, SHARING THE WORLD'S RESOURCES 124-34 (1977).

²³⁷ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. VI (1987) [hereinafter RESTATEMENT].

²³⁸ "General principles common to the major legal systems" constitute a supplementary source of customary international law. *Id.* §102(4). See Statute of the International Court of Justice, 59 Stat. 1055 (1945), TS No. 993, Art. 38(1)(c) (directing the Court to apply "the general principles of law recognized by civilized nations").

²³⁹ Such treaties include not only CITES, *supra* note 41, and other wildlife protection instruments, *infra* notes 261 and 264, but also treaties protecting other "internal" resources such as cultural heritage. See, e.g., Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 23, 1972, 27 UST 37, TIAS No. 8226.

²⁴⁰ World Charter for Nature, *supra* note 53, Principle 3.

²⁴¹ Caron, *The Law of the Environment: A Symbolic Step of Modest Value*, 14 YALE J. INT'L L. 528, 529 (1989).

Professor Oscar Schachter has pointed out that the earlier concern of have-not states derived from fears of "economic penetration by transnational companies,"²⁴² an issue that arose in nationalization disputes and the placement of regulatory limits on foreign firms.²⁴³ Today these considerations no longer arise with the same intensity in the context of wildlife protection in the Third World.

International law has been moving steadily to protect wider humanitarian interests and to prevent environmental degradation, even at the cost of eroding state sovereignty. Where once states were seen to have *carte blanche* to do what they would to persons within their own territory,²⁴⁴ later they were viewed as owing certain obligations to aliens, and now they are thought to owe such obligations to their own nationals as well.²⁴⁵ Where once states were free to pollute the "global commons" and the oceans, today they are enjoined against injuring unoccupied islands, ice floes and Antarctica;²⁴⁶ and they are obliged to prevent injury to the marine environment by pollution²⁴⁷ and to protect global wetlands.²⁴⁸ Indeed, as early as 1974, the UNEP Council viewed certain species as constituting "the common heritage of mankind."²⁴⁹

It is now possible to conclude that customary international law requires states to take appropriate steps to protect endangered species. Customary norms are created by state practice "followed by them from a sense of legal obligation."²⁵⁰ Like highly codified humanitarian law norms that have come to bind even states that are not parties to the instruments promulgating them,²⁵¹ wildlife protection norms also have become binding on nonparties as customary law. Closely related to this process of norm creation by practice is that of norm creation by convention: customary norms are created by international agreements "when such agreements are intended for adherence by states generally and are in fact widely accepted."²⁵² Several such

²⁴² O. SCHACHTER, *supra* note 236, at 125.

²⁴³ *Id.* at 124.

²⁴⁴ See Henkin, *The Internationalization of Human Rights*, in 6 GENERAL EDUCATION SEMINAR, PROC. 7 (1977). It was "unthinkable that international law should concern itself with protecting the interests of the individual against his own government, even less that it might give the individual international remedies against his own government." L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *INTERNATIONAL LAW: CASES AND MATERIALS* 980 (2d ed. 1987).

²⁴⁵ RESTATEMENT, *supra* note 237, §702; Henkin, *supra* note 244.

²⁴⁶ See Convention on the Regulation of Antarctic Mineral Resource Activities, Art. 4(2), June 2, 1988, reprinted in 27 ILM 868 (1988). See generally RESTATEMENT, *supra* note 237, pt. VI (Introductory Note), §601.

²⁴⁷ RESTATEMENT, *supra* note 237, §603.

²⁴⁸ See Convention on Wetlands of International Importance, Especially as Waterfowl Habitat, Feb. 2, 1971, reprinted in 11 ILM 963 (1972).

²⁴⁹ See Nanda & Ris, *The Public Trust Doctrine: Viable Approach to International Environmental Protection*, 5 *ECOLOGY L.Q.* 291, 294 (1976).

²⁵⁰ RESTATEMENT, *supra* note 237, §102(2). See also ICJ Statute, *supra* note 238, Art. 38(1)(b) (directing the Court to apply "international custom, as evidence of a general practice accepted as law").

²⁵¹ See T. MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* 3 (1989).

²⁵² RESTATEMENT, *supra* note 237, §102(3).

agreements are directed at wildlife protection,²⁵³ and CITES is one of them. It is intended for adherence by states generally²⁵⁴ and is accepted by the 103 states that have become parties. In addition, some nonparties comply with certain CITES documentary requirements so as to trade with parties.²⁵⁵ CITES is not "rejected by a significant number of states";²⁵⁶ only the United Arab Emirates has withdrawn from the agreement. In such circumstances, the International Court of Justice has observed, international agreements constitute state practice and represent law for nonparties.²⁵⁷

Moreover, customary norms are created by "the general principles of law recognized by civilized nations."²⁵⁸ Because CITES requires domestic implementation by parties to it,²⁵⁹ and because the overall level of compliance seems quite high,²⁶⁰ the general principles embodied in states' domestic endangered species laws may be relied upon as another source of customary law.²⁶¹ Even apart from the CITES requirements, states that lack laws protecting endangered species seem now to be the clear exception rather than the rule.²⁶² That there exists *opinio juris* as to the binding character of this obligation²⁶³ is suggested by the firm support given endangered species

²⁵³ See, e.g., Convention on Wetlands of International Importance, *supra* note 248; Convention Relative to the Preservation of Flora and Fauna in their Natural State, Nov. 8, 1933, 172 LNTS 241; International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, TIAS No. 1849, 161 UNTS 72; International Convention for the Protection of Birds, Oct. 18, 1950, 638 UNTS 186.

There are several regional wildlife preservation conventions. See, e.g., Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, Oct. 12, 1940, 56 Stat. 1374, TS No. 981, 161 UNTS 193; African Convention on the Conservation of Nature and Natural Resources, Sept. 15, 1968, 1001 UNTS 3; Convention on European Wildlife and Natural Habitats, Sept. 19, 1979, ETS No. 104, 1982 Gr. Brit. T.S. No. 56 (Cmd. 8738).

²⁵⁴ CITES parties, in a preambular provision, *supra* note 41, "recogniz[e] that peoples and States are and should be the best protectors of their own wild fauna and flora."

²⁵⁵ See *supra* text at note 96.

²⁵⁶ RESTATEMENT, *supra* note 237, § 102 comment *i*.

²⁵⁷ North Sea Continental Shelf (FRG/Den.), 1969 ICJ REP. 3, 28-29, 37-43 (Judgment of Feb. 20). See also RESTATEMENT, *supra* note 237, § 102 comment *i*.

²⁵⁸ ICJ Statute, *supra* note 238, Art. 38(1)(c). See also RESTATEMENT, *supra* note 237, § 102 comment *l*.

²⁵⁹ See *supra* text at notes 97-99.

²⁶⁰ See S. Lyster, *supra* note 78, at 264-69, 276-77. In 1986 the World Wildlife Fund described CITES as "perhaps the most effective conservation treaty in existence." WORLD WILDLIFE FUND, FACTSHEET: CITES, December 1986. But see Kosloff & Trexler, *The Convention on International Trade in Endangered Species: No Carrot, But Where's the Stick?*, 17 ENVTL. L. REP. 10,222 (1987).

²⁶¹ Several major legal systems contain legislation that protects certain species or sets aside protected areas for certain species. See generally C. du Saussay, LEGISLATION ON WILDLIFE, HUNTING AND PROTECTED AREAS IN SOME EUROPEAN COUNTRIES (UN Food and Agriculture Organization Legis. Study No. 20, 1980).

²⁶² Virtually all European countries have such laws. NATIONAL STRATEGIES FOR THE PROTECTION OF FLORA, FAUNA AND THEIR HABITATS, UN Doc. ECE/ENVWA/4, UN Sales No. E.88.II.E.2 (1988).

²⁶³ The ICJ found that *opinio juris* may be deduced from consent to General Assembly resolutions (in that case, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States). Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14, 99-100 (Judgment of June 27).

protection by the UN General Assembly and various international conferences.²⁶⁴

While the existence of a norm requiring the protection of endangered species thus seems likely, its scope remains uncertain. To the extent that the norm derives from CITES and laws implementing CITES, that scope would be fairly narrow, for the norm would cover only species in international trade, not those taken for domestic consumption or those endangered by threats to their habitat. Even if it could be shown that major legal systems generally comprise endangered species legislation, more work needs to be done to determine exactly what elements those laws have in common.²⁶⁵ What constitutes an "endangered species," for example, is debatable. Is it one that is endangered in *every* state, or only in the state making the assessment? And to what lengths must a state go in protecting a species it finds "endangered"? Must it do everything necessary to protect that species, notwithstanding the cost or the ecological significance of the species?²⁶⁶

As to the elephant in particular, it is hard to argue under customary international law that states such as South Africa and Zimbabwe are prohibited from selling ivory by a new customary norm, corresponding generally to the CITES restrictions. In the *North Sea Continental Shelf* case, the International Court of Justice said:

Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and *virtually uniform* in the sense of the provision invoked²⁶⁷

The nonparticipation of southern African states suggests that any such custom is not "virtually uniform." In fact, the southern African elephant

²⁶⁴ In the World Charter for Nature, *supra* note 53, the General Assembly proclaimed that "the population levels of all life forms, wild and domesticated, must be at least sufficient for their survival." *Id.*, Principle 2.

See also Conference on Security and Co-operation in Europe (CSCE), Final Act, Aug. 1, 1975, 73 DEP'T ST. BULL. 323 (1975) (participating states agreed to cooperate in the conservation of existing genetic resources, especially rare animal species); Declaration on the Conservation of Flora, Fauna and their Habitats (adopted by the ECE at its 43d annual session in 1988, Decision No. E(43) (members agree to take necessary measures to prevent and reduce damage to flora, fauna and their habitats, and to implement national legislation for their conservation)).

²⁶⁵ It is clear, however, that in a number of instances such legislation preceded CITES. *See, e.g.*, Belgian Law No. 1268 of July 12, 1973, on the Preservation of Nature, Art. 5, 1973 Bulletin Usuel des Lois et Arrêtés 831; French Law No. 76-629 of July 10, 1976, on Protection of Nature, Art. 5, J.O. July 11, 1976, at 4203, 59 Bulletin Législatif Dalloz 308 (1976).

²⁶⁶ In *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), the U.S. Supreme Court construed the ESA as requiring the courts to enjoin the operation of the virtually completed Tellico Dam when it had been determined that its operation would eradicate an endangered species, the snail darter, a small fish that eats snails. The district court had determined that saving the genetically unique fish would mean wasting a large portion of the \$78 million spent on the dam. *Tennessee Valley Authority v. Hill*, 419 F.Supp. 753, 760 (E.D. Tenn. 1976).

²⁶⁷ 1969 ICJ REP. at 43 (emphasis added).

"excess" states might be seen as partaking in a regional custom of the sort considered in the *Asylum* case.²⁶⁸ Or they might be seen as "persistent objectors" to an emerging norm during the inchoate stages of its development.²⁶⁹

It thus appears doubtful that a customary norm concerning the elephant or any other endangered species can yet play any significant role in its protection.²⁷⁰ But the trend cannot be doubted; and once its contours are more clear, the customary norm requiring states to protect endangered species ought to take on the character of an obligation *erga omnes*. Ordinarily, claims for the violation of an international obligation may be made only by the state to which the obligation is owed.²⁷¹ Obligations *erga omnes*, however, run to the international community as a whole; thus, their breach is actionable by any state since such matters are "[b]y their very nature . . . the concern of all States. . . . [T]hey are obligations *erga omnes*."²⁷²

The action *erga omnes* has its roots in the Roman law right of any citizen to bring an action (*actio popularis*) to protect the public interest.²⁷³ So, too, does another concept pertinent to states' environmental responsibilities: the public trust doctrine.²⁷⁴ Roman law recognized "common properties" (*res communis*);²⁷⁵ the seashores were "subject to the guardianship of the Roman people."²⁷⁶ "The central idea of the public trust is preventing the destabilizing disappointment of expectations of use of resources held in common but without formal recognition such as title."²⁷⁷ Authorities differ,²⁷⁸ but the U.S. Supreme Court has stated that Roman law regarded wildlife as part of the public trust,²⁷⁹ and the Court clearly considers it as such under U.S.

²⁶⁸ *Asylum* (Colom./Peru), 1950 ICJ REP. 266 (Judgment of Nov. 20).

²⁶⁹ See generally RESTATEMENT, *supra* note 237, §102 comment *d*; Stein, *The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457 (1985); Waldock, *General Course in International Law*, 106 RECUEIL DES COURS 1, 49-53 (1962 II).

²⁷⁰ The only international environmental norms recognized by the RESTATEMENT, *supra* note 237, involve transfrontier pollution, §§601-602, and injury to the marine environment, §603.

²⁷¹ *Id.* §§901, 902.

²⁷² *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)*, Second Phase, 1970 ICJ REP. 3, 32 (Judgment of Feb. 5). For an earlier argument along these lines, see Weiss, *supra* note 49.

²⁷³ This was pointed out by the ICJ in the earlier *South West Africa* cases. In those cases, however, the Court declined to accept this theory. *South West Africa* (Ethiopia v. S. Afr.; Liberia v. S. Afr.), Second Phase, 1966 ICJ REP. 6, 47 (Judgment of July 18). For a useful discussion of the origins of the doctrine, see T. MERON, *supra* note 251, at 188-93.

²⁷⁴ For an informative and creative discussion of this doctrine, see Nanda & Ris, *supra* note 249. See also Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

²⁷⁵ See Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, in *THE PUBLIC TRUST DOCTRINE IN NATURAL RESOURCES LAW AND MANAGEMENT: CONFERENCE PROCEEDINGS* 6 (H. Dunning ed. 1981).

²⁷⁶ T. SANDARS, *THE INSTITUTES OF JUSTINIAN* 159 (1865).

²⁷⁷ Sax, *supra* note 275, at 7.

²⁷⁸ See Nanda & Ris, *supra* note 249.

²⁷⁹ *Geer v. Connecticut*, 161 U.S. 519, 522-23 (1896) (upholding Connecticut's statutory prohibition against taking certain wildlife on the theory that wild animals have been seen as common property since Roman times).

law.²⁸⁰ Today, state courts employ the doctrine to protect aesthetic, as well as economic, interests²⁸¹ in holding the government responsible to the public for the preservation of property subject to a public trust.²⁸² At least in some states within the United States,²⁸³ a breach of that obligation can be challenged by any citizen. This development accords with long-standing principles of American jurisprudence that have viewed certain things that lack traditional property status as nonetheless generating property-like expectations.²⁸⁴ Indeed, a powerful case has been made for regarding natural objects themselves as having legal rights.²⁸⁵ Influenced by Professor Stone's ground-breaking essay,²⁸⁶ three Supreme Court Justices in *Sierra Club v. Morton* endorsed that approach.²⁸⁷

These considerations suggest the outline of a general framework for the protection of endangered species under customary international law. Although such principles may still represent *lex ferenda* with regard to a particular species (or other resource), they appear to constitute emerging *opinio juris* on a broader structure of global environmental resources, rights and obligations that might be summarized as follows.

A *global environmental resource* is a natural resource located within the territory of one country but broadly enjoyed, and arguably needed, by the world community as a whole. Tropical rain forests, described as the "lungs of the world" by Indonesian President Suharto,²⁸⁸ are a good example. Unique cultural artifacts are another. That these exist within specific states is largely an accident of geography; but for their presence, the life of all would be diminished. For the reasons outlined in this article, and in light of the tremendous worldwide concern generated recently over its possible extinction, the elephant seems properly regarded as a global environmental resource.

A *global environmental right* arises in connection with a global environmental resource. It refers to the right of all states to expect that the resource will be protected by the state in which it is found. States are trustees, responsible for the preservation of species within their territories. That obligation runs to the international community as a whole: any state should be regarded as suffering legally cognizable injury when that obligation is breached by another state. That states have a global environmental right to expect that the

²⁸⁰ *Lacoste v. Department of Conservation*, 263 U.S. 545, 549 (1924).

²⁸¹ See *Nanda & Ris*, *supra* note 249, at 303 (discussing cases).

²⁸² *Id.*

²⁸³ For a discussion of use of the doctrine by California courts with respect to water rights, see Dunning, *Instream Flows and the Public Trust*, in *INSTREAM FLOW PROTECTION IN THE WEST* (MacDonnell, Rice & Shupe eds. 1989).

²⁸⁴ See Sax, *supra* note 275, at 6. See also Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 *YALE L.J.* 1315 (1974); Reich, *The New Property*, 73 *YALE L.J.* 733 (1964).

²⁸⁵ See R. NASH, *THE RIGHTS OF NATURE* (1989).

²⁸⁶ Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 *S. CAL. L. REV.* 450 (1972).

²⁸⁷ 405 U.S. 727, 741-60 (1972) (Douglas, Blackmun and Brennan, JJ., dissenting).

²⁸⁸ Reuters (Aug. 16, 1989).

elephant will be protected is confirmed by emerging norms of customary international law pertaining to endangered species, discussed above.²⁸⁹ "The protection of the elephant," UNEP has said, "is an obligation of humankind"²⁹⁰

Global environmental obligation refers to the duty of states to share in preserving global environmental resources. There are two tiers of such obligations: *custodial* obligations, which refer to the preservation duties of states in which the resource is physically located; and *support* obligations, which refer to the duties of other states to contribute to the conduct of custodial obligations. First World states often complain about the failure of Third World states to meet their custodial obligations (concerning, for example, their elephant populations, rain forests and archaeological treasures), but few of the complainers have met their support obligations. *The Economist* put it well: "Logically, if the rest of the world wants the elephant to survive, then it should not only compensate Africa for \$60 million of lost exports, but help to foot the bill—of perhaps \$80m–\$100m—for an effective war on poachers."²⁹¹

The point bears elaboration. Support obligations are appropriately seen as applying to two sets of costs incurred by ivory-producing states: the opportunity cost of forgoing the sale of ivory from natural elephant deaths and confiscated poached ivory, as well as the cost of running conservation programs.

East African states such as Tanzania and Kenya should not be forced to shoulder the entire burden of running conservation programs themselves. All who benefit from elephant protection should share the cost. As the international system is structured, they do so indirectly, through assistance by their governments. Such assistance ought to be provided through an international authority able to administer and oversee an aid program to African states. UNEP, which is headquartered in Nairobi, seems to be the logical existing vehicle. Assumption of this task would entail something of a change of mission and restructuring for UNEP, which was conceived of more as a coordinating/monitoring agency than as an executive/administrative one.²⁹²

Until a multilateral approach can be instituted, unilateral assistance is appropriate, perhaps in the innovative form of "debt swaps." Debt swaps involve monetary concessions by lenders in exchange for enhanced resource management by borrower states that are unable to keep current on debt payments. Much of the attention paid to the idea has derived from concern

²⁸⁹ See *supra* text at notes 240–80.

²⁹⁰ Reuters (July 3, 1989).

²⁹¹ *ECONOMIST*, *supra* note 23, at 17.

²⁹² See generally Robinson, *Introduction: Emerging International Environmental Law*, 17 *STAN. J. INT'L L.* 229, 249–58 (1981).

An African Elephant Coordinating Group has been established, consisting of major nongovernmental donor organizations and the United States and EEC, to develop a coordinated funding program aimed at assisting protection and management of 42 key elephant populations. France, in the name of the EEC, has called for a donor conference in Paris in March 1990 to further coordinate assistance activities and implement the African Elephant Action Plan developed by the Coordinating Group.

about the disappearing tropical rain forests. Conservation International, for example, arranged to have Bolivia's external debt reduced by \$650,000 in exchange for that country's protection of 3.7 million acres of Amazonian forest.²⁹³ Costa Rica has also received debt reduction in return for setting aside certain tracts of land from development.²⁹⁴ Senator Joseph Biden proposed a plan to pay off the foreign debt of cocaine-producing countries in South America if they would fund crop substitution and eradication programs.²⁹⁵ "In the long run," Biden said, "the best way to cut coca production is to provide economic incentives to grow other crops."²⁹⁶

The same approach can be employed to further wildlife conservation in less-developed countries. Recently, in fact, the World Wildlife Fund (WWF) arranged with Madagascar to buy \$2.1 million of debt in return for expenditures of local currency on several conservation projects, including an additional four hundred park rangers.²⁹⁷ WWF also signed a debt-for-nature swap with Zambia under which WWF purchased \$2.27 million of debt owed by Zambia to commercial banks in return for the Government's agreement to expend an equivalent amount in local currency on conservation, including protection of the rhino and elephant.²⁹⁸ There is no reason for nongovernmental organizations or lending institutions to bear the burden; they should be reimbursed through initiatives by the public sector.²⁹⁹ One of the major such initiatives was taken by the Senate Foreign Relations Committee in the Foreign Relations Authorization Act, Fiscal Year 1990. The Global Environmental Protection Act, included in the bill, would have authorized the Agency for International Development to award grants to private conservation groups to purchase a country's commercial debt on the open market, usually at a highly discounted price, and offer the debt to the host government in exchange for a long-term financial or policy commitment to support a particular project.³⁰⁰

It is also appropriate for the international community to reimburse "elephant-excess" states such as Botswana and Zimbabwe for the cost of *not* selling ivory, if they were persuaded to do so. After all, revenues from the export of ivory help pay for conservation programs³⁰¹ (as was noted by the CITES Secretariat in opposing the effort to move the elephant to Appendix I³⁰²).

²⁹³ See Spittler, *Exchanging Debt for Conservation*, 37 BIOSCIENCE 781 (1987).

²⁹⁴ *What Can Americans Do?*, TIME, Sept. 18, 1989, at 85; Arias Sánchez, *For the Globe's Sake, Debt Relief*, N.Y. Times, July 14, 1989, at A13.

²⁹⁵ Reuters (Aug. 30, 1989).

²⁹⁶ *Id.*

²⁹⁷ *A Debt to Nature*, ECONOMIST, Aug. 19, 1989, at 31.

²⁹⁸ Reuters Library Report (Aug. 15, 1989).

²⁹⁹ "If the rain forest standing really has a greater value than the rain forest destroyed," *The Economist* said, "the world's consumers have the money to prove it." *The Month Amazonia Burns*, ECONOMIST, Sept. 9, 1989, at 16.

³⁰⁰ S. 1160, 101st Cong., 1st Sess. §§601-661 (1989); S. REP. NO. 46, 101st Cong., 1st Sess. 12 (1989).

³⁰¹ ECONOMIST, *supra* note 23, at 15.

³⁰² In recommending against movement of the elephant to Appendix I, the CITES Secretary-General warned: "Denied the opportunity to sell ivory through natural mortality, control

Estimates vary as to how much it would cost to meet *all* global environmental support obligations concerning the elephant, those deriving from both real and opportunity costs. Professor David Pearce of the University of London's Environmental Economics Center has calculated that Western donors would have to give Africa up to \$100 million in aid a year to compensate for lost revenue and to help governments strengthen anti-poaching patrols.³⁰³ Others suggest that the cost may be less. Professor David Favre, on the other hand, has written that in South Africa, from 1967 to 1989, the total retail value of the illicit ivory sold at auction to the local carving industry came to only \$2 million.³⁰⁴ One thing is clear, however: if live elephants really have a greater value than dead ones, "the world's consumers have the money to prove it."

Steps to Saving the Elephant

In sum, unless the elephant is to continue down the road of the black rhino, a number of steps must be taken.

1. *The ivory trade must be stopped immediately.* As discussed above, halting the ivory trade requires effective steps to dry up both supply and demand and to cut out middlemen. Kenya's President Moi put it well: "To stop the poacher, the trader must also be stopped and to stop the trader, the final buyer must be convinced not to buy ivory."³⁰⁵ States that do not comply with the international ban must be appropriately pressured into doing so, at least until the elephant is safe and an internationally controlled ivory-marking system is in place.

2. *Antipoaching squads and other enforcement units must be strengthened.* We ought not to be deluded into believing that domestic enforcement of the criminal law in producer countries can easily be tightened up. Corruption among law enforcement authorities is not unknown in those countries where the elephant is most threatened. This problem was exemplified by a

operations and confiscation, producer states would lose significant revenues which could otherwise be used to finance anti-poaching and enforcement operations." Letter from Eugene Lapointe, Secretary-General, CITES, to all CITES Management Authorities (June 8, 1989) (on file with author).

It has been reported that from 1985 to 1989, the CITES Secretariat has received \$200,000 from ivory traders, including at least one alleged poacher. Thornton, *supra* note 157, at 8.

³⁰³ Reuters (June 19, 1989). This figure includes the cost of buying off ivory traders, paying game park wardens more so they do not poach, buying and maintaining vehicles for patrols, and equipping personnel properly. Pearce, Britain's leading environmental economist, argues that we should value not only assets that are generally recognized as such—property, machinery, roads, housing—but also environmental assets such as clean water, clean air, forests, wetlands, wildlife, the ozone layer, even natural beauty. We may not pay for these assets, but the cost of replacing them is so high that it is vital to value them correctly. See Daily Telegraph (London), Aug. 16, 1989, at 13. Pearce's approach is set out in Pearce, *Optimal Prices for Sustainable Development*, in *ECONOMICS, GROWTH, AND SUSTAINABLE ENVIRONMENTS* 57 (Collard, Pearce & Ulph eds. 1988); *THE VALUATION OF SOCIAL COST*, *supra* note 49; D. PEARCE, *ENVIRONMENTAL ECONOMICS* (1976).

³⁰⁴ D. FAVRE, *supra* note 154, at 122.

³⁰⁵ N.Y. Times, July 19, 1989, at A4.

1989 incident involving the Indonesian Ambassador to Tanzania. The ambassador, Joesoef Hussein, was caught trying to leave Dar es Salaam with 184 elephant tusks stowed in his luggage. He apparently expected no problem and claimed diplomatic immunity. Rather than asking the Indonesian Government for a waiver so that Tanzania could prosecute, the local government officials reportedly tried to cover up the incident.³⁰⁶

Even when there is a will to succeed, it is hard to take seriously a commitment to elephant conservation that sends game wardens armed with pre-World War I carbines against poachers using machine guns.³⁰⁷ A multilateral entity such as the CITES Secretariat or UNEP should undertake to arrange appropriate assistance. If that means some form of paramilitary or police training—or operational, down-in-the-trenches participation—that agency ought to be empowered to call upon appropriate countries to help, much as the Security Council may call upon members of the United Nations when military units are needed.³⁰⁸ The objective should be “united international police action to eliminate the illegal ivory trade.”³⁰⁹

3. *Environmentally sustainable development must be supported as an essential prerequisite to elephant protection.* The elephant simply will not be safe as long as unlawful conduct pays so much more than lawful conduct. In the long term, enhanced law enforcement can only be a stopgap measure unless economic incentives to poach are greatly reduced.³¹⁰ This is true even though, in the short run, development and conservation can conflict at times. A principal means of development in have-not countries, for example, is agriculturalization, but agriculturalization deprives the elephant of its habitat; funds spent to build a dam are not available to buy spotter planes for game wardens.

At a certain point, therefore, some weighing of the value of development relative to that of elephant protection remains unavoidable in determining how many elephant populations to protect, and at what price. The questions that arise here are difficult and timeless. Above all, development is directed at the preservation and enrichment of *human* life.³¹¹ It is easy for Ameri-

³⁰⁶ *His excellency the ivory smuggler*, NEW AFRICAN, April 1989, at 13. In Kenya, the wildlife department fired or transferred 40 of its own officials suspected of participating in poaching. L.A. Times, May 8, 1989, at 6.

³⁰⁷ 1988 House Hearings, *supra* note 114, at 21 (testimony of William K. Reilly, President, World Wildlife Fund).

³⁰⁸ See UN CHARTER Art. 43(1).

³⁰⁹ 1988 House Hearings, *supra* note 114, at 145 (testimony of Iain Douglas-Hamilton).

³¹⁰ See *supra* notes 159–60 and 179–80 and accompanying text.

³¹¹ See generally A. GUPTA, *ECOLOGY AND DEVELOPMENT IN THE THIRD WORLD* (1988); MacKellar & Vining, *Natural Resource Scarcity: A Global Survey*, in *POPULATION GROWTH AND ECONOMIC DEVELOPMENT: ISSUES AND EVIDENCE* (D. Johnson & R. Lee eds. 1987); O. SCHACHTER, *supra* note 236. For a discussion of the problem of reconciling development with wildlife conservation, see Note, *Wildlife in the Third World: Current Efforts to Integrate Conservation with Development*, 5 B.C. THIRD WORLD L.J. 83 (1984). The clash between development and environmental preservation often arises in industrialized countries as well. See, e.g., J. MCPHEE, *ENCOUNTERS WITH THE ARCHDRUID* (1971), for a readable and provocative presentation of arguments for and against mining in wilderness areas in the United States.

cans, watching wildlife programs on color television in air-conditioned homes, to support elephant protection; it is not always so easy where the elephants actually live.³¹²

Yet, in the end, sustainable economic growth will be the elephant's best insurance, particularly growth that gives the local populace a concrete stake in the elephant's survival.³¹³ It is no accident that relatively rich countries have been more able than relatively poor ones to protect the elephant.³¹⁴

4. *An internationally operated ivory-marking system using the latest technology should be instituted.* Recent advances in the science of wildlife forensics have been impressive.³¹⁵ It is now possible not only to identify ivory by species of origin,³¹⁶ but also to mark ivory tusks so that parts of lawfully taken tusks are subsequently identifiable—easily and inexpensively.³¹⁷ In fact, secretly marked ivory is already in the stream of international commerce. The integrity of a tagging system depends upon that of the officials who operate it,³¹⁸ if they are corrupt and accept bribes to mark poached ivory, or if they permit the tagging technology to fall into the hands of poachers, the system loses its reliability. For this reason, international control at this point seems essential. If it eventually proves desirable to move from the embargo model to a management model—that is, if the elephant someday gets “back on its feet” in countries where it is now threatened³¹⁹—such a system could operate in the following way: An international authority such as UNEP or the

³¹² Zimbabwe officials called the drive for a ban on ivory trade “cultural imperialism” by outsiders. Chicago Trib., July 9, 1989, at 21. One Zambian wildlife manager, referring to Western conservationists, said: “The dimension they forget is that of people.” Reuters (July 9, 1989).

³¹³ In one of the more innovative programs aimed at generating local support for conservation, the Government of Kenya charged a “bed fee” for each bed used by a tourist in Amboseli lodges. The fee was passed on to the Masai, who in return agreed to move out of the elephant's watering areas. May, *Preservation for Profit*, N.Y. Times, Sept. 12, 1987, §6 (Magazine), at 146. Kenya's new conservation minister, Richard E. Leakey, said: “Tourism and the diversification of tourism are fundamental. I cannot let you think that I would see wildlife as anything but an integral part of development.” N.Y. Times, May 23, 1989, at A1. “We should be using elephants and wildebeest, in terms of the money they generate, to build good schools, to put in cattle dips and clinics, to buy books,” he said. *Id.* Kenya plans to use money generated by the parks for schools, health clinics and water systems. Allman, *supra* note 32, at 58.

³¹⁴ See *supra* note 180.

³¹⁵ Wiehl, *New Forensics Lab Joins War on Wildlife Crime*, N.Y. Times, Aug. 11, 1989, at A5.

³¹⁶ This is useful because, as the price of ivory has soared, other ivory-producing species such as the walrus have also faced increased pressure from poachers; enforcement efforts are aided if the source of the ivory can be identified.

³¹⁷ Telephone interview, official of United States Fish and Wildlife Service, Department of the Interior (Sept. 14, 1989) (name withheld at official's request).

³¹⁸ Efforts to tag ivory and other specimens with permits, certificates or other paper work have proven notoriously unsuccessful. When a wildlife smuggler was arrested in 1975, a search of his files revealed “a dazzling array of documents from all over the world—Africa, Asia, Australia—which hinted at extensive smuggling, double-invoicing, and other false documentation.” P. & A. EHRlich, *supra* note 61, at 195. “Getting the paperwork is easy,” another observer noted. “CITES permits for ivory are sold and traded by smugglers.” Thornton, *supra* note 157, at 8.

³¹⁹ Richard Leakey has estimated that this could take 5–10 years. UPI (Sept. 22, 1989).

CITES Secretariat could be established at regular intervals in all countries where ivory is lawfully taken. The governments of those countries could then bring ivory, up to the amount permitted in their quota, to the marking authority's clearinghouse for tagging. Certain aspects would have to be public to avoid bribes and corruption, but the tagging itself would have to be conducted privately to keep the technology confidential. A comprehensive and enforceable marking system could not be put in place immediately;³²⁰ however, the upshot is that modern science seems finally to have eliminated the problem most responsible for the elephant's decline: the indistinguishability of lawfully and unlawfully taken ivory.

5. *A long-term solution requires several modifications of CITES.* First, the CITES restrictions must be made applicable to worked, as well as raw, ivory. Middlemen, not producing states, have skimmed off the bulk of the profits of the ivory trade.³²¹ They are able to do so in good part because CITES effectively carves out a role for them: inasmuch as CITES does not apply to the trade in worked ivory,³²² it provides an incentive for "working" illegal tusks superficially so as to remove them from the CITES constraints. This incentive can and should be eliminated by the parties; indeed, the Convention itself already points the way. Article I(b)(3) provides for the express listing of "specified parts and derivatives" of already listed animals. A resolution was adopted at the first special session of the parties in Geneva that would have created a minimum list of readily recognizable parts and derivatives.³²³ However, no such list has been drawn up, in part because of concern that it would be a "maximum," rather than a "minimum," list.³²⁴ This concern, while perhaps valid at the time, seems to have been overtaken by events at Lausanne and should now give way to countervailing considerations—namely, that the failure to produce a "parts and derivatives" list has contributed mightily to the undoing of CITES. The parties should draw up a list, formalizing what was left implicit at Lausanne, and worked ivory should be on it.

This step is essential for another reason. The agility of middlemen at leapfrogging new restrictions has often been noted, though it takes little prescience to predict their next line of attack. If CITES continues to be

³²⁰ It is possible to determine the date on which an individual elephant was killed within a period of plus-or-minus 2 years. This means that only a 4-year age window can be ascertained with respect to any unmarked tusk. Consequently, under current technology, a marking system that is initiated in, say, 1992 would not provide effective enforcement possibilities until 1996, since unmarked ivory taken before 1992 could not be said with certainty to have been poached.

³²¹ 1988 House Hearings, *supra* note 114, at 166 (testimony of William K. Reilly, President, World Wildlife Fund). The entire ivory trade nets African countries only \$35 million per year. N.Y. Times, June 2, 1989, at A9. Total exports of ivory represent only 0.2% of Africa's merchandise exports (excluding South Africa and the Mediterranean states). ECONOMIST, *supra* note 23, at 16.

³²² See *supra* text at notes 91 and 190-93.

³²³ Special Working Session of the Conference of the Parties, Conf. Doc. 2.18, in PROCEEDINGS OF THE FIRST MEETING OF THE CONFERENCE OF THE PARTIES 23-24 (1976).

³²⁴ See D. FAVRE, *supra* note 154, at 18; Favre, *Tension Points within the Language of the CITES Treaty*, 5 B.U. J. INT'L L. 247, 259 (1987); S. LYSTER, *supra* note 78, at 242.

construed as permitting international trade in worked ivory, middlemen will be encouraged to move their carving facilities to the producing states; as a result, the principal international trade will be in an uncontrolled item, worked ivory. There is evidence, in fact, that this movement has already begun.³²⁵ Some might applaud the establishment of carving facilities in producer countries; the economic boost would be welcome and some of the proceeds, at least theoretically, could be put to the best use in conserving remaining elephant populations. Yet, in the end, the move would only prolong the ivory trade and continue to threaten a species that CITES now officially views as "threatened with extinction."³²⁶ If the values sought to be vindicated by CITES are to be protected effectively, its application to the international trade in worked ivory is imperative.

Second, CITES must be further modified to permit the provisional listing of a species on Appendix I, and a new, broader treaty must be negotiated that is not tied to commerce. Because no such provisional listing is possible, the international system not only has failed the elephant, but also has inadvertently accelerated the killing of elephants. The flurry of unilateral bans on ivory importation announced by various governments in June 1989 derived from a justifiable concern that movement of the elephant to Appendix I by the CITES parties meeting in Lausanne the following October would result in an "orgy" of killing,³²⁷ as poachers anticipated tighter international controls. CITES provides no mechanism by which an international entity (such as the CITES Secretariat) can promulgate a provisional ban subject to subsequent approval by a conference of the parties.³²⁸ It may be that some parties would not delegate this much authority to the secretariat, at least as currently constituted. It may also be that the process of settling upon a provisional listing would itself generate anticipated killing; a measure of confidentiality would be required that could prove difficult to achieve. Yet without such a procedure, any public effort to move a highly visible species up to Appendix I to prevent poaching—and virtually every effort to do so will be public because international publicity generates the necessary support—is almost guaranteed, in the short term, to bring about more killing of the species, not less. If the elephant is safer today than it was a year ago,³²⁹ thanks are due to the individual governments that banned

³²⁵ 1988 House Hearings, *supra* note 114, at 163 (testimony of William K. Reilly, President, World Wildlife Fund). Reportedly, one infamous poacher has held talks in the Congo, Zaire and the Central African Republic to move equipment and Chinese carvers from Hong Kong to Africa. *Id.*

³²⁶ CITES, *supra* note 41, Art. II(1). See *supra* note 95 and accompanying text.

³²⁷ See *supra* text at note 135.

³²⁸ CITES is "paid by the ivory trade," Iain Douglas-Hamilton said. "The result is, in the last five years there has been a complete decline of the elephant." Boston Globe, May 30, 1989, at 2. As noted above, the CITES Secretary-General urged parties not to move the elephant to Appendix I. See *supra* note 302.

³²⁹ At first blush, this appears to be the quintessential situation, discussed by Professor Richard Bilder, in which unilateral state action, because of its promptness, was effectively brought to bear against conduct threatening environmental injury. See Bilder, *Unilateral State Action*, 14 VAND. J. TRANSNAT'L L. 51, 79 (1981). As Bilder warned, however, "[p]rohibiting

ivory imports and the international wildlife organizations that spurred them to act, not the international legal system.

Further lessons about CITES taught by the elephant's plight can be generalized only to a point. Some species are threatened by poachers.³³⁰ Others face threats apart from poaching, most often loss of habitat.³³¹ The shortcomings of CITES that so hurt the elephant have little application to the difficulties those species confront. Yet the very inaptness of CITES to their problems is perhaps the most damning criticism of all: CITES does not even seek to protect those species, since its only concern is with endangerment posed by international trade. It is time for a new, worldwide treaty that broadly safeguards endangered species irrespective of commerce.³³²

6. *The broad-based educational campaign already successfully undertaken by nongovernmental organizations must be continued.* It is not enough to educate buyers of ivory to the horrors of its origins. Ultimately, protection of the elephant and other endangered species will require a change in mind set by both individuals and governmental institutions that have viewed concern about animals with a certain derision. Robert Nozick began his review of Thomas Regan's book with the following observations: "Animal rights seems a topic for cranks. Who else would devote major energy to promote changes in our treatment of animals or write a book on the subject?"³³³ Past failures by the United States to pay its dues to organizations such as CITES, the Senate Foreign Relations Committee said, "have called into question its commitment to these agreements."³³⁴ When the committee added a provision to the Foreign Relations Authorization bill for fiscal year 1990³³⁵ strengthening protection of the elephant,³³⁶ the *Washington Post* chided the

importation of endangered species or their products in one nation will not protect such species if other states increase their imports of such products by an equivalent amount." *Id.* at 85. We do not yet possess adequate data to assess the impact of the unilateral state bans of June 1989 on ivory imports. We do know that the bans were not universally adopted, and that some major consumer states such as Japan did not join in the bans; but we do not know whether ivory normally imported by banning states such as the United States, Britain and France was merely diverted to Japan. "[S]ome environmental problems," Bilder concludes, "may be incapable of solution if each nation acts alone . . ." *Id.* at 80.

³³⁰ See generally J. NICHOL, *THE ANIMAL SMUGGLERS* (1987). Species include the giant panda; their skins have been sold for \$4,000. Only about a thousand remain in the wild. Branson, *Poaching the Pandas*, *WORLD PRESS REV.*, March 1989, at 53.

³³¹ For an excellent overview of this problem in East Africa, see R. YEAGER & N. MILLER, *supra* note 30.

³³² Costa Rican President Arias Sánchez has written: "Efforts to negotiate as common resources our shared elements—such as atmosphere, the oceans and biodiversity—should be encouraged and expedited." Arias Sánchez, *supra* note 294, at A13.

³³³ Nozick, *supra* note 60, at 1.

³³⁴ S. REP. NO. 46, *supra* note 300, at 12. The committee reported legislation authorizing \$1,511,000 to meet U.S. obligations for dues and arrearages. S. 1160, *supra* note 300.

³³⁵ See S. 1160, *supra* note 300, §641.

³³⁶ The provision would have restricted ivory imports into the United States to those from countries that enforce the existing ban on the illegal hunting of elephants or on the illegal trade in ivory. S. REP. NO. 46, *supra* note 300, at 39. The bill was filed on June 8, three days after President Bush announced the U.S. ban. See *supra* note 137. The floor manager (and author of

senators for turning out a "global grab bag" of "hobby-horses" reflecting a "somewhat disoriented world view."³³⁷

Animating this view is the same uneasiness revealed in the Governor's complaint to Laurençot (who also prefers live elephants) in Gary's *The Roots of Heaven*:

Don't you think that there are in the world, at the present time, causes, liberties, well . . . let's say values, which have a rather better claim than the elephants to [our] devotion . . . ? There are still some of us who refuse to despair, to throw up the sponge and go over to the other species for solace. There are men fighting and dying at this very moment, in the streets, on the barricades and in the prisons . . . One may still be allowed to prefer to take an interest in them.³³⁸

That sentiment may lie behind the *Post's* belittlement of concern about the elephant's impending demise: there are more important causes, *human* causes, worth fighting for; to ignore those causes out of concern for the elephant is, if not to "go over" to their side, at least to demonstrate a fixation with the peripheral, the marginal, the "small"—to imply in some cranky way that the two species are somehow equally worthy of protection.

The responses to these criticisms made by characters in *The Roots of Heaven* are still persuasive. One is Laurençot's: "But the elephants are part of that fight. Men are dying to preserve a certain splendor of life. Call it freedom, or dignity . . . They are dying to preserve a certain natural splendor."³³⁹ Another is Father Fargue's: "Perhaps the lepers and the people with sleeping sickness aren't the whole story."³⁴⁰ But perhaps the best, for those concerned about wasting energy on nonhuman suffering, is that of Morel: "Today you say that elephants are archaic and cumbersome, that they interfere with roads and telegraph poles, and tomorrow you'll begin to say that human rights too are obsolete and cumbersome, that they interfere with progress . . ."³⁴¹

The struggle to protect beings without reference to any "objective," mathematically quantifiable utility enriches our spirit. Even if this is not a struggle to ensure our own survival, it is a battle to clarify our character, to define what we hold dear, for ourselves and our descendants.³⁴² It is the character of our species that is at issue. Who can say, on the day the last elephant dies, that the human race will ever again be the same?

the provision), Sen. Claiborne Pell, thus announced in presenting the bill to the Senate that "the President has preempted my provision by banning the importation of ivory." 135 CONG. REC. S7963 (daily ed. July 14, 1989).

³³⁷ Dewar, *State Dept. Spending Bill is Cornucopia of Pet Projects; Elephants, Ben Franklin's House Embraced*, Wash. Post, May 31, 1989, at A1. By including provisions such as that relating to the elephant, the committee basically "dabbled and tinkered, with members pursuing their own agendas, often in small or symbolic ways." *Id.* at A5.

³³⁸ R. GARY, *supra* note 58, at 60.

³³⁹ *Id.*

³⁴⁰ *Id.* at 149.

³⁴¹ *Id.* at 142.

³⁴² See Weiss, *supra* note 49, at 499; see also Agora, *What Obligation Does Our Generation Owe to the Next? An Approach to Global Environmental Responsibility*, *infra* at p. 190.