
**TROPHY HUNTERS, GLOBAL SADISM AND
INTERNATIONAL LAW: NOT EVEN THE ELEPHANTS
ARE SAFE**

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ABSTRACT

Things are not getting better for the remaining elephants of the world. In Africa, where most live, some fifty percent have been lost to poaching over the past decade. Some conservationists predict that in another 10-20 years, the wild elephants will be gone completely. One hundred elephants are still being killed by poachers every day. There are a mere half million elephants or so left in Africa, and around 40,000 in Asia. And yet, national governments in countries that are home to the elephants, encouraged by international trophy hunting interest, still clamor for more to be killed. This article makes the argument that the nature of elephants and other megafauna demands nothing less than a complete ban on hunting them. They are not creatures available to be slaughtered. The article notes that with the Trump administration, trophy hunting has experienced a resurgence. The argument presented in this article is that nothing less than an unequivocal, unambiguous ban on the hunting of endangered megafauna will be in any way effective. If we do not completely change our approach to the elephant, the elephant will at some point in the not distant future cease to exist in the wild. The article calls for an Endangered Species Treaty and an Elephant Protocol to go with it, as unlikely as it is that such a treaty would gain broad acceptance in the current anti-environmental climate. Along with treaty fatigue and deep skepticism about the effectiveness of international law generally, many African countries are resisting even the modest demands of the CITES Convention and threatening to pull out. This article makes the claim that every country and region needs to live up to the obligations of species stewardship, however inconvenient and however burdensome. Elephants cannot be the victims of the fact that human beings have not found better ways to achieve equitable development and good governance. Killing more elephants will most assuredly not lead to such a result.

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FOREWORD: ARE ELEPHANTS OPTIONAL?

This has been a very unpleasant article for which to conduct research. I, along with most people, would prefer not to see the harms of which human beings are capable and would prefer not to know about the steep decline of the global elephant population.¹ It is easier not to know how many people in various wealthy nations want to purchase elephant ivory or rhino tusks — to the point where these megafauna are close to extinction.² It is terrible to think of people shooting elephants from helicopters.³ It is terrible to think of the suffering elephants are enduring.⁴ Most of all, it is terrible to consider how unnecessary the slaughter is. This problem could be fixed, and clear international rules would be a good place to start. Elephant populations could be saved but, if one were to

¹ As far as I have been able to tell, there are no studies that project a rebound in the overall elephant population. While there are a few “success stories” out of individual countries, the general view is that the wild elephant population is being drastically reduced because of human activity, including both trophy hunting and poaching, and that the methods of killing used have caused enormous suffering to the animals.

² See Brandon Specktor, *Humans Are Eating Most of Earth’s Largest Animals to Extinction*, LIVE SCIENCE (Feb. 6, 2019), <https://www.livescience.com/64697-humans-meat-eating-megafauna-extinction.html> (noting that very large, ecologically significant animals like whales and elephants are called megafauna). Specktor writes: “Giant animals like these are known as megafauna. Beyond being awesome in every sense of the word, these mammoth species are crucial to keeping their respective ecosystems balanced — and, according to a new study, about 60 percent of them are hopelessly doomed. In new research published February 6, 2019, in the journal *Conservation Letters*, scientists surveyed the populations of nearly 300 species of megafauna around the world, and saw some troubling trends emerge. According to the authors, at least 200 species (70 percent) of the world’s largest animals are seeing their populations dwindle, and more than 150 face the risk of outright extinction.”

³ Jeremy Hance, *Grenades, Helicopters, and Scooping Out Brains: Poachers Decimate Elephant Population in Park*, MONGABAY (June 15, 2014), <https://news.mongabay.com/2014/06/grenades-helicopters-and-scooping-out-brains-poachers-decimate-elephant-population-in-park/> [<https://perma.cc/3C29-C8JC>].

⁴ Dina Fine Maron, *African Elephants Can Now Only Rarely be Taken From the Wild and Sent to Faraway Zoos*, NAT’L GEOGRAPHIC (Aug. 28, 2019), <https://www.nationalgeographic.com/animals/2019/08/wild-baby-elephants-zoo-ban.html>.

hazard an educated guess, they likely will not be.⁵ At some point in the not so distant future, elephants likely will not exist in the wild.⁶ One thing I have learned from this research is that the more painful the subject matter, the *less* likely international laws are to address a problem. In an intersection of law and psychology, a preference for ignorance might well doom the elephant.⁷

Some prefer to note recent progress in the passage of laws aiming to protect elephants, but these laws appear to be failing.⁸ A recent meeting of delegates to the Convention on International Trade in Endangered Species (“CITES”) in Geneva decided that elephants could no longer be sold to zoos abroad, which is a positive step.⁹ Additionally, China has enacted a ban on the importation of ivory.¹⁰ But every step forward is met with intense political resistance, such that the overall trajectory is clear: elephants are disappearing from the wild and are suffering enormously during the process. Along with lions and rhinos, elephant numbers are plummeting.¹¹

Legal writers on elephant conservation generally focus on whether there can be controlled killing, culling, or cropping of elephants in a way that enhances their value, encouraging local communities to treat them more carefully.¹² This seems like an analytical recipe for failure. Instead the core question must be: will people act now to save the elephant at a viable level of elephant population, or not? The question is not whether local people are sometimes in conflict with elephants that have been forced out of other spaces. There are certainly many

⁵ See Karla Mathiesen, *Elephants on the Path to Extinction – the Facts*, THE GUARDIAN (Aug. 12, 2016), <https://www.theguardian.com/environment/2016/aug/12/elephants-on-the-path-to-extinction-the-facts> [<https://perma.cc/5Q9J-93J4>].

⁶ See *Why Care? World Elephant Day*, WORLD ELEPHANT DAY (Aug. 12, 2019) <http://worldelephantday.org/about/elephants> [<https://perma.cc/APV7-5LKH>] (noting that the world is losing more elephants than the population can reproduce).

⁷ See Paul Slovic et al., *Informing Decisions to Prevent Genocide*, 36 SAIS REV. 33, 36 (2012).

⁸ Sharon Montazeri, Note, *Protecting the Pachyderm: The Significance of Ivory Trade Regulation for African Elephant Conservation*, 22 CARDOZO J. INT’L & COMP. L. 121, 132 (2013).

⁹ See Dina Fine Maron, *African Elephants Can Now Only Rarely be Taken From the Wild and Sent to Faraway Zoos*, NAT’L GEOGRAPHIC (Aug. 28, 2019), <https://www.nationalgeographic.com/animals/2019/08/wild-baby-elephants-zoo-ban/> (explaining that the recent meeting of CITES participating nations made the decision that elephants could only be exported from Botswana, Zimbabwe, Namibia and South Africa only to countries in Africa where elephants live in the wild).

¹⁰ *China’s Ban on Ivory Trade Comes into Force*, BBC NEWS (Jan. 1, 2018), <https://www.bbc.com/news/world-asia-china-42532017> [<https://perma.cc/H4H6-6YV8>].

¹¹ Precious G. Makuyana, *Trophy Hunting: To Ban or Not to Ban: Legal Pathways for Zimbabwe in the Aftermath of Cecil the Lion*, 9 J. SUSTAINABLE DEV. L. & POL’Y 133, 141 (2018).

¹² See e.g., Andrew J. Helmert, Note, *How the Elephant Lost His Tusks*, 104 YALE L.J. 1473, 1497 (1995).

instances of this.¹³ However, the issues are whether there will be a clear ban on their killing, international penalties for corruption in the implementation of laws, criminalization of poaching, and investment in the elephant's preservation as a species. Criminalizing the purchase of ivory in the U.S., Japan, and China is also vital.¹⁴ No purchase or possession of ivory should be lawful. Additionally, debating whether trophy hunting can save the elephant is a waste of time and fruitless form of argumentation.¹⁵ Trophy hunting will lead to greater losses. Elephant killing and conservation are not related, even though the opposite theory may contribute to an impressive law review article.¹⁶

In mid-2019, the new President of Botswana lifted a five-year ban on elephant hunting — a ban that had been put in place by his conservation-minded predecessor.¹⁷ Apparently seeking to boost his political support in rural areas, the president upended what had been a national elephant success story and made it both easier for poachers to pursue their trade and for hunters to use Botswana to carry out their thrill-seeking version of hunting.¹⁸ Despite the fact that tourism is a major driver of the economy in Botswana, and that tourism is largely centered on the *observation* of megafauna, including elephants, the President appeased special interests and put the African elephant on a fast track to extinction.¹⁹ His actions are in line with current global trends, including the decision of President Trump to loosen restrictions on trophy hunting, thereby

¹³ See generally LISA NAUGHTON ET AL., *THE SOCIAL DIMENSIONS OF HUMAN-ELEPHANT CONFLICT IN AFRICA: A LITERATURE REVIEW AND CASE STUDIES FROM UGANDA AND CAMEROON* (Human-Elephant Task Conflict Task Force, IUCN ed. 1999).

¹⁴ Sam B. Edwards, III, *Legal Trade in African Elephant Ivory: Buy Ivory to Save the Elephant?* 7 ANIMAL L. 119, 139 (2001).

¹⁵ This argument — that more killing equates to conservation — seems to be mainly the brainchild of the powerful pro-trophy hunting lobbies such as the Safari Club International. See, e.g., *SCI Foundation's Mission and Purpose*, SCI FOUNDATION, <http://safariclubfoundation.org/about/> [<https://perma.cc/YNP2-ZZPU>] (last visited Oct. 24, 2019).

¹⁶ See Prashant K. Khetan, *Trophy Hunting: We Can All Agree That Killing Wildlife is Not Conservation*, ADVOCACY FOR ANIMALS (Mar. 5 2018), <http://advocacy.britannica.com/blog/advocacy/2018/03/trophy-hunting-we-can-all-agree-that-killing-wildlife-is-not-conservation/> [<https://perma.cc/HH9N-7M64>].

¹⁷ See Shannon Ebrahim, *Greed and Politics Trump Elephants in Southern Africa*, IOL (June 1, 2019), <https://www.iol.co.za/news/opinion/greed-and-politics-trump-elephants-in-southern-africa-24660095> [<https://perma.cc/5RT3-H5GL>] (noting that president's decision is especially worrying in that one third of African elephants live in Botswana, which had been considered a safe zone for these animals until his reversal).

¹⁸ *Id.*

¹⁹ See Olivia Yasukawa and Katie Pisa, *In Botswana, Ecotourism and Conservation Draw Travelers*, CNN TRAVEL (June 13, 2016), <https://www.cnn.com/travel/article/botswana-ecotourism-mpa-feat/index.html> [<https://perma.cc/T5AW-Y7UE>].

making it seem more acceptable.²⁰ Members of his cabinet are strongly influenced by trophy hunting interests, and his sons are well-known trophy hunters.²¹

The most recent meeting of parties to CITES witnessed a split among African countries concerning the duty to protect elephants.²² Botswana now seems to be firmly in the “reduce the elephant population” camp.²³ Indeed, several southern African countries are threatening to leave CITES altogether in order to allow elephant hunting as their respective governments see fit.²⁴ How should the international community respond to such views? Can the matter of elephant protection really be left in the hands of state governments?

In the U.S., the Humane Society of America has found that at least 75% of Americans are opposed to the practice of trophy hunting, many strongly so.²⁵ Banning all trophy hunting and all trade in ivory would surely cause some difficulties, but the situation is urgent enough that those with influence in the field of conservation must demand a complete ban, and insist on unequivocal enforcement of that ban. Anything less than a total ban — managed trade, a case-by-case assessment of the need to cull, etc. — can only lead inexorably to the end of elephants on Earth.

²⁰ See Nikela Blog, *One Step Forward, Two Steps Back — Trump Administration Changes its Mind on Trophy Hunting Again*, HELPING PEOPLE SAVING WILDLIFE (Mar. 10, 2018), <https://www.nikela.org/one-step-forward-two-steps-back-trump-administration-changes-its-mind-on-trophy-hunting-again/> [https://perma.cc/VJB7-8E83]

(describing the 2018 Fish and Wildlife memo that would allow the renewed importation of “trophies” gained from hunting elephants and lions).

²¹ See Associated Press, *Trump Wildlife Board Stuffed with Trophy Hunters*, USA TODAY (2018), <https://www.usatoday.com/story/news/politics/2018/03/15/trump-wildlife-board-stuffed-trophy-hunters/430376002/> [https://perma.cc/P2VR-FK58].

²² See Mbongeni Mguni, *Southern African Nations Say They May Quit Global Wildlife Pact*, BLOOMBERG (Aug. 28, 2019) <https://www.bloomberg.com/news/articles/2019-08-28/southern-african-nations-says-they-may-quit-global-wildlife-pact>.

²³ See Meilan Solly, *Five Things to Know about Botswana’s Decision to Lift Ban on Hunting Elephants*, SMITHSONIAN.COM (May 24, 2019), <https://www.smithsonianmag.com/smart-news/five-things-know-about-botswanas-decision-lift-ban-hunting-elephants-180972281/> [https://perma.cc/5U69-CMDP].

²⁴ *Southern African Nations Threaten to Quit Wildlife Trade Monitor*, IAB SOUTH AFRICA, (Sept. 1, 2019) <https://www.news24.com/Africa/News/southern-african-nations-threaten-to-quit-wildlife-trade-monitor-2-190901> [https://perma.cc/BUW9-9Y9Q]; Antony Sguazzin et al., *Where Elephants Roam, Wildlife Pact Draws Scorn as ‘Senseless’*, BLOOMBERG (Sept. 5, 2019), <https://www.bloomberg.com/news/articles/2019-09-05/botswana-s-president-says-global-wildlife-pact-is-senseless> [https://perma.cc/EX9B-S2G4] (quoting President Masisi of Botswana as saying that the CITES process has become “hijacked” by conservationists, whereas it should be about an “orderly, legal means by which you can trade.”).

²⁵ See Press Release, Humane Society, *New Poll: Vast Majority of Americans Oppose Elephant and Lion Trophy Hunting*, THE HUMANE SOCIETY OF THE U.S. (Dec. 5, 2017), <https://www.humanesociety.org/news/new-poll-vast-majority-americans-oppose-elephant-and-lion-trophy-hunting> [https://perma.cc/39SE-ZKRH].

I. TOO TERRIBLE TO BEHOLD – THE DEATH OF THE GLOBAL SACRED

Many of the most urgent issues that could potentially be dealt with through stronger international laws are those from which we normally choose to “look away.”²⁶ As people continue to look away from the slaughter of elephants, the elephant population continues to shrink at a shocking pace.²⁷ Success stories in elephant conservation tend to be temporary and politically vulnerable.²⁸ No amount of wishful thinking will restore the elephant to its place in the world; instead, without more concrete action, the species will at some point cease to exist in the wild.²⁹ The practice of elephant killing should and could be stopped across the board. No one actually *needs* elephant ivory despite its value and popularity around the world; enforceable global rules could tell purchasers in those countries and elsewhere that they cannot buy ivory at the expense of an entire species.³⁰ Serious, strictly enforced criminal penalties could support that principle. Even in underdeveloped nations in Africa that are often sources of ivory, serious global cooperation could lead to effective enforcement of rules against poaching.³¹ The entire problem is one of highly organized forces of greed and exploitation against tens of thousands — even hundreds of thousands — of people who care to some degree, but choose to “look away.”³² Because the problem is incredibly distressing, it is easier for most people to remain in denial. That being the case, next to no political will exists for change, and no legal enforcement will be developed to come to the rescue.

As with other problems that require collective, multi-national responses, most people have a vague impression that someone else will do the work of developing an agreement that will finally save the elephant.³³ But nobody is actually doing this work. Poachers continue to poach, merchants continue to buy

²⁶ See Slovic, *supra* note 7; see also Brian Resnick, *A Psychologist Explains the Limits of Human Compassion*, VOX (Sept. 5, 2017), <https://www.vox.com/explainers/2017/7/19/15925506/psychic-numbing-paul-slovic-apathy>.

²⁷ See Siobhán O’Grady, *Thanks to Poachers, More African Elephants are Being Killed than Born*, FOREIGN POLICY (Mar. 3, 2016), <https://foreignpolicy.com/2016/03/03/thanks-to-poachers-more-african-elephants-are-being-killed-than-born/> [<https://perma.cc/ZS5N-2SJV>].

²⁸ See Paul Tessier/Stocksy, *Status Check for African Elephants*, NAT’L RES. DEF. COUNCIL (Dec. 22, 2016), <https://www.nrdc.org/stories/status-check-african-elephants> [<https://perma.cc/WET9-XGTT>].

²⁹ *Why Care? World Elephant Day*, *supra* note 6.

³⁰ See Liu Qin, *China’s Ivory Ban Shows Need for Asia-Wide Strategy*, CHINA DIALOGUE (Apr. 24, 2018), <https://www.chinadialogue.net/article/show/single/en/10603-China-s-ivory-ban-shows-need-for-Asia-wide-strategy> [<https://perma.cc/8T46-2R2S>].

³¹ See Emily Schenning, *Transboundary Wildlife Laws and Trafficking: The Plight of the African Elephant in Malawi and the Need for International Cooperation*, 30 VILL. ENVTL. L.J. 39 (2019).

³² See Femida Handy, *Advocacy by Environmental Nonprofit Organizations: An Optimal Strategy for Addressing Environmental Problems?* 28 INT’L J. OF SOC. ECON. 8, 648-66 (2001).

³³ See Slovic, *supra* note 7.

ivory, and eventually, elephants will, along with several species of rhino, no longer exist.³⁴ And while a debate over whether controlled killing will help to save the elephant continues in the pages of law journals, the slaughter goes on.³⁵

The slaughter of elephants falls within a category of problems so dire that human beings wish to turn away.³⁶ If we turn away, it is thought, someone else will enact a legal rule to make the problem disappear.³⁷ Ironically, this means that the worst things are capable of being solved by human cooperation, but remain unsolved precisely because they are too awful to contemplate.³⁸ Put another way, the most egregious abuses are the least likely to be confronted with the full force of the law, due in part to the tendency of human beings to avoid thinking about what is most painful.³⁹ Without thought and engagement leading to advocacy, such problems will never be solved.

Why do humans care about elephants? Why is the idea of killing an elephant so troubling and painful to watch? Elephants are among the category of creatures known as megafauna.⁴⁰ They are also considered a keystone species — one that is of vital importance in the ecological context it inhabits.⁴¹ But the reason elephants are beloved lies elsewhere. Elephants are well known for mourning

³⁴ See Dina Fine Maron, *How Strong is Africa's Last Elephant Stronghold*, NAT'L GEOGRAPHIC (June 13, 2019), <https://www.nationalgeographic.com/animals/2019/06/elephants-poached-in-botswana/> (noting that since Botswana recently lifted its elephant hunting ban, poaching has been on the rise). On the other hand, some commentators do point out that elephant poaching has fallen from a peak in 2011 to a lesser number now, from 10% of total elephant population to 4%. See Erik Stokstad, *Elephant Poaching Falls Dramatically in Africa*, SCIENCE MAGAZINE (May 28, 2019), <https://www.sciencemag.org/news/2019/05/elephant-poaching-falls-dramatically-in-africa> [<https://perma.cc/LYJ9-HGM9>].

³⁵ See Adam Cruise, *Is Trophy Hunting Helping Save African Elephants?*, NAT'L GEOGRAPHIC (Nov. 17, 2015), <https://www.nationalgeographic.com/news/2015/11/151715-conservation-trophy-hunting-elephants-tusks-poaching-zimbabwe-namibia/>.

³⁶ See Resnick, *supra* note 26. Also in that “most painful” category are such issues as child sexual exploitation, including child pornography, sex trafficking, as well as official torture and even climate change. See Slovic, *supra* note 7.

³⁷ See Slovic, *supra* note 7.

³⁸ *Id.*

³⁹ While human beings ignore dire problems afflicting their fellow humans and other animals, the idea of psychic numbing is shared in both cases. *Id.*

⁴⁰ See Ed Yong, *In A Few Centuries, Cows Could Be the Largest Land Animals Left*, THE ATLANTIC (Apr. 19, 2018), <https://www.theatlantic.com/science/archive/2018/04/in-a-few-centuries-cows-could-be-the-largest-land-animals-left/558323/> [<https://perma.cc/2AJZ-T8LY>]; Spektor, *supra* note 2.

⁴¹ See Martin Nunez and Romina DiMarco, *Keystone Species*, Berkshire Encyclopedia of Sustainability: Ecosystem Management and Sustainability (2012), <https://web.utk.edu/~mnunez/Keystones%20Nunez%20Dimarco.pdf> (defining keystone species as those “whose importance to an ecosystem’s structure, composition and function is disproportionately large relative to their abundance.”)

their dead and for altruism towards others, including those of other species.⁴² They show cooperation, deep understanding, and are world famous for their memories.⁴³ Their brains are large and sophisticated.⁴⁴ Indeed, elephants may be in many respects superior to human beings; while capable of violence, they tend towards gentleness under normal circumstances and are easily defeated by human aggression.⁴⁵ They are pre-eminently compassionate towards one another and live in female-dominated herds.⁴⁶ Their lives are a showcase of matriarchy that is often thought about in the human context, but very rarely encountered in reality.⁴⁷ Elephants are dignified individuals in every sense. They suffer as we do and are unable to fight back against guns, despite their great size. They may be, like human children, thought of as our better selves.⁴⁸

Despite all of these positive characteristics, poachers shoot these splendid beings from above out of helicopters, and hack their trunks off, sometimes while the elephants are still alive.⁴⁹ Orphaned elephants are legion.⁵⁰ The number of elephants killed weekly by poachers and other hunters is staggering.⁵¹ Additionally, elephants are even targeted by terrorists and other violent groups seeking easy sources of income.⁵² Elephants in this century hold up a mirror both to our limitless and pointless greed, as well as to our international inaction. This article posits that if actors in nation states could stop looking away from horrible realities like impending animal extinctions, and instead become more engaged with problem-solving using international law, they could play a part in stopping the worst abuses. This would take a willingness to move beyond legal pragmatism and tell nation states and wealthy individuals that they cannot poach

⁴² See Mireia Querol Rovira, *Grief in Animals: The Case of Elephants*, ALL YOU NEED IS BIOLOGY (Feb. 22, 2015), <https://allyouneedisbiology.wordpress.com/2015/02/22/grief-elephants/>; Nathan Lents, *Not So Different, Finding Human Nature in Animals*, COLUM. U. PRESS (2016).

⁴³ See *id.*

⁴⁴ See *id.*

⁴⁵ See Tarsh Thekaekara, *Can Elephants and Humans Live Together?* THE GUARDIAN (Mar. 6, 2017), <https://www.theguardian.com/environment/2017/mar/06/can-elephants-and-humans-live-together> [<https://perma.cc/DE7C-2R6J>].

⁴⁶ See *Kruger National Park: Elephant Hall*, S. AFRICAN NAT'L PARKS, <https://www.sanparks.org/parks/kruger/elephants/about/behaviour.php> [<https://perma.cc/DE7C-2R6J>].

⁴⁷ *Id.*

⁴⁸ See Andrea J. Heimert, *How the Elephant Lost His Tusks*, 104 YALE L.J. 6, 1472-1506.

⁴⁹ See Hance, *supra* note 3.

⁵⁰ See Joshua Rapp Learn, *Elephant Orphans Face Added Challenge: Bullying*, NAT'L GEOGRAPHIC (Oct. 4, 2018), <https://www.nationalgeographic.com/animals/2018/10/news-elephant-orphans-aggression-poaching-effects/>.

⁵¹ See Heimert, *supra* note 48.

⁵² See Bryan Christy, *How Killing Elephants Finances Terror in Africa*, NAT'L GEOGRAPHIC (Aug. 12, 2015), <https://www.nationalgeographic.com/tracking-ivory/article.html>.

or hunt with impunity if megafauna are to be preserved for future generations. We must look, and the law must reflect that fact-based lack of equivocation. The law must tell the world's people that they have no right to the elephant.

This article will review the current debate on elephant conservation, such as it is, and analyze the feeble state of action being taken to protect elephants worldwide. A starting premise is that efforts to save the elephant from extinction thus far have been weak, incomplete, and have no hope of making a dent in this international tragedy.⁵³ CITES, centered as it is around trying to limit the international trade in elephant and other endangered species body parts, is outmoded and conceptually detrimental.⁵⁴ Botswana, where a major proportion of African elephants reside, has, as noted above, just lifted its ban on elephant hunting.⁵⁵ The Trump Administration has given legitimacy back to trophy hunting of all kinds by considering, and then approving of, its revival.⁵⁶

Much has been written about the dire problem of elephant population loss; in several African countries, poaching, trophy hunting, and habitat constriction have decimated elephant herds.⁵⁷ While Asian elephants also fall victim to poachers, they are generally sought out for meat and hides, as their ivory is not of the same type.⁵⁸ Nevertheless, they, too, are being decimated in the wild. Scarcely any genuine expert in conservation believes the situation to be improving or even stabilizing.⁵⁹ Yet despite the significant amount of writing on the subject, there is oddly little consensus as to a solution.⁶⁰ This may be because too many authors avoid the obvious conclusion that killing elephants needs to be criminalized broadly with severe penalties for all those who engage in the act.⁶¹ Others assume that if the proposed solution is difficult to accomplish it

⁵³ See generally Annecos Wiersema, *Incomplete Bans and Uncertain Markets in Wildlife Trade*, 12 U. PA. ASIAN L. REV. 65 (2016).

⁵⁴ See Sharon Montazeri, *Protecting the Pachyderm: the Significance of Ivory Trade Regulation for African Elephant Conservation*, 22 CARDOZO J. INT'L & COMP. L. 121 (2013).

⁵⁵ See Solly, *supra* note 23.

⁵⁶ See Rachel Nuwer, *U.S. Lifts Ban on Some Elephant and Lion Trophies*, N.Y. TIMES (Mar. 7, 2018), <https://www.nytimes.com/2018/03/07/science/trump-elephant-trophy-hunting.html> [<https://perma.cc/Q2BN-MU9H>].

⁵⁷ See Cruise, *supra* note 35.

⁵⁸ WORLD WILDLIFE FUND, https://wwf.panda.org/our_work/wildlife/problems/illegal_trade/ (last visited Oct. 27, 2019).

⁵⁹ See Denis Galava, *Saving Africa's Elephants: No Easy Answers*, AFRICAN WILDLIFE FOUND. (May 1, 1997), <https://www.awf.org/news/saving-africas-elephants-no-easy-answers> [<https://perma.cc/JK3S-2NZB>].

⁶⁰ Sofia G. de la Rocha, *Tusk Tusk: A Comparative Analysis into the Effects of Ivory Trade Regulation and the International Art Market*, 49 CAL. W. INT'L L.J. 425, 449-458 (2019) (debating the efficiency of a total ban on ivory trade).

⁶¹ See Benjamin Dürr, *Conservationists Take Aim at Poachers*, AFRICA RENEWAL (2017), <https://www.un.org/africarenewal/magazine/may-july-2017/conservationists-take-aim-poachers> [<https://perma.cc/WCE8-CAJG>].

will be impossible to implement, which is a form of defeatism that has infected international law generally.

Because of this hesitation, the debate proceeds as follows: Is it best to regulate more stringently and raise penalties for the ivory trade?⁶² Or is it more sensible to decentralize and allow local communities to nurture and profit from their herds, setting aside the essentially futile international rules on trade in endangered species that have proven at best only partly effective?⁶³ The arguments go back and forth: No hunting is best.⁶⁴ Some hunting is best.⁶⁵ A moral approach is best.⁶⁶ A practical approach is best.⁶⁷ It is extremely difficult to know exactly which way to turn on this issue, but one thing is apparent: the elephant enjoys an iconic status in human consciousness and is considered by many to be the symbol of our own fundamental relationship with the mystery of life itself.⁶⁸ This overarching importance of the elephant as both species and symbol, coupled with the unmistakable fact that the elephants are disappearing, should alone drive the debate.

While some in Africa do not share the wider global affection reserved for elephants,⁶⁹ this tension does not mitigate humanity's obligation to protect elephants worldwide. Without taking the biological and moral importance of the elephant into account, legal analysis that relies on economics or efficiency will likely not have any appreciable effect on staving off population collapse. It would be wrong to ignore regional feelings about the elephant in favor of the views of people who live far away and are unaffected by the presence of these large and occasionally voracious creatures. However, all nations must be stewards of the natural resources they possess. Otherwise, there would be no basis for international environmental law because protected species are generally a nuisance from the point of view of those directly charged with preserving them.⁷⁰

⁶² de la Rocha, *supra* note 60.

⁶³ Edwards, *supra* note 14.

⁶⁴ Freese et al., *The Baby and the Bathwater: Trophy Hunting, Conservation and Rural Livelihoods*, 68 UNASYLVA 249 (2017).

⁶⁵ *Id.*

⁶⁶ Edwards, *supra* note 14.

⁶⁷ *Id.*

⁶⁸ Emily Schenning, *Transboundary Wildlife Laws and Trafficking: The Plight of the African Elephant in Malawi and the Need for International Cooperation*, 30 VILL. ENVTL. L.J. 39 (2019).

⁶⁹ See Max Bearak, 'I Hate Elephants': Behind the Backlash against Botswana's Giants, WASH. POST (June 7, 2019), <https://www.washingtonpost.com/world/2019/06/07/i-hate-elephants-behind-backlash-against-botswanas-giants/> [<https://perma.cc/6TS5-D927>].

⁷⁰ See Emma Marris, *To Keep the Planet Flourishing, 30% of Earth Needs Protection by 2030*, NAT'L GEOGRAPHIC (Jan. 31, 2019), <https://www.nationalgeographic.com/environment/2019/01/conservation-groups-call-for-protecting-30-percent-earth-2030/>.

While many writers have explained that for locally affected people, the elephant is more an annoyance than a mythic or romantic creature, a great deal of international concern, distress, and emotion is regularly expended on the status of the elephant.⁷¹ It may be disordered and confused, but the international anxiety is palpable.⁷² As described above, this stems in no small part from the fact that the elephant is capable of so many higher order behaviors that human beings recognize and value within themselves.⁷³

When considering the long-running tragedy of the elephant, it is hard to avoid the conclusion that international law is a clumsy and inadequate vehicle for achieving the most important transnational aims.⁷⁴ At this point in our history, if the international community cannot begin to save the elephant through enforceable laws and better management, what can it accomplish? If after so many decades of loss, we cannot even agree on a type of conservation most likely to achieve the desired ends, how many other important international issues might never be solved? At best, there is a striking disproportion between the value human beings place on their fellow creatures and the amount of attention that goes into devising best practices to save these creatures.⁷⁵ At worst, despite our collective affection for elephants, we will be found too passive and disorganized to demand more foolproof forms of conservation.⁷⁶

The latter part of this article will focus on two astonishing legal events: the Trump Administration's decision to reopen the door to trophy hunting — a barbarous and sadistic activity — and the recent decision of Botswana — a country where many of the world's remaining wild African elephants live — to end its ban on elephant hunting.⁷⁷ A common element linking these two occurrences is the outsized influence of the international trophy hunting

⁷¹ See Emily Hutchens, *The Law Never Forgets: An Analysis of the Elephant Poaching Crisis, Failed Policies, and Potential Solutions*, 31 WIS. INT'L. L.J. 934, 935-37 (2014).

⁷² See *id.*

⁷³ See Joshua M. Plotnick & Frans B. M. de Waal, *Asian Elephants (Elephas Maximus) Reassure Others in Distress*, 2 Peer J. 278 (2014).

⁷⁴ See Hutchens, *supra* note 71, at 935-37.

⁷⁵ See Pavithra Rao, *Elephants are the Latest Conflict Resource*, AFRICA RENEWAL (Dec. 2013), <https://www.un.org/africarenewal/magazine/december-2013/elephants-are-latest-conflict-resource>.

⁷⁶ See *id.*

⁷⁷ See Eli Rosenberg, *Trump Administration Quietly Makes It Legal to Bring Elephant Parts to the U.S. as Trophies*, WASH. POST (Mar. 6, 2018, 9:50 PM), <https://www.washingtonpost.com/news/animalia/wp/2018/03/06/trump-called-elephant-hunts-a-horror-show-his-administration-just-lifted-a-trophy-hunting-ban/>; Rachael Bale, *Botswana Lifts Ban on Elephant Hunting*, NAT'L GEOGRAPHIC (May 22, 2019), <https://www.nationalgeographic.com/animals/2019/05/botswana-lifts-ban-on-elephant-hunting/>.

advocates, and their corrupt relationships to political decision-makers.⁷⁸ Both of these actions make a mockery of our need to protect elephants and serve to blunt the feelings of a world becoming ever more desensitized to environmental atrocity and increasingly unable to enact meaningful international laws.

II. CATASTROPHES AND TREATIES

As the world teeters on the brink of mass extinction, irrecoverable climate change and general environmental disaster, the international community is simultaneously in the midst of a crisis of faith in international law. Many argue that the international community is experiencing “treaty fatigue,” insofar as nations are tired of signing onto hard-won treaties that in the end are not honored or enforced by signatories.⁷⁹ Such theories hold that the international community has enough treaties, and that creating more would be pointless or unattainable at best.⁸⁰ Even more disturbing, in an age of unfettered free trade, the worst of both worlds emerges: trade rules based on international agreements have failed to bring nations together politically and have failed to bring on board non-trade concerns, in addition to encouraging such foolish environmental practices as the planting of palm oil plantations, deforesting massive swaths of land, and dumping mountains of plastic into the sea.⁸¹ Given all this, perhaps the last gasp of legal argument remaining to save the elephant involves a blunt appeal to morality and humanity.⁸²

There are many learned articles and opinion pieces on the looming problem of extinction facing the African elephant, rhino species, lions, and other iconic species.⁸³ The most prevalent and prolific of the opinion makers argue that trophy hunting and other “management” techniques may actually save endangered species by encouraging local ownership of the valuable animal commodity.⁸⁴ As the argument goes, the funds brought in by elephant and other

⁷⁸ See Chris D’Angelo, *Group Lobbying to End Trophy Hunting Ban is Alarming Close with Ryan Zinke*, HUFFPOST (Nov. 23, 2017, 10:28 AM), https://www.huffpost.com/entry/ryan-zinke-safari-club_n_5a15c2dee4b025f8e93338bb.

⁷⁹ See Rachele Adams, *Delegitimizing Ivory: The Case for an Ivory Trade Ban Treaty*, 108 AM. J. INT’L L. 166, 168 (2014).

⁸⁰ See *id.*

⁸¹ See Alf Hornborg, *Why You Can’t Have Free Trade and Save the Planet*, THE CONVERSATION (Apr. 30, 2018, 12:43 PM), <https://theconversation.com/why-you-cant-have-free-trade-and-save-the-planet-94128>.

⁸² See Dana Sanchez, *Economics Bolster the Moral Argument for Saving African Elephants*, THE MOGULDOM NATION (Nov. 1, 2016), <https://moguldom.com/134750/an-economic-case-behind-the-moral-argument-for-saving-african-elephants/>.

⁸³ See Irene Banos Ruiz, *Wild Species Facing an Uncertain Future*, DEUTSCHE WELLE (Sept. 23, 2016), <https://p.dw.com/p/1K6dF>.

⁸⁴ See Michael Paterniti, *Trophy Hunting: Should We Kill Animals to Save Them?*, NAT’L GEOGRAPHIC (Oct. 2017), <https://www.nationalgeographic.com/magazine/2017/10/trophy-hunting-killing-saving-animals/#close>.

forms of trophy hunting will awaken local populations to the value of the animals, thus preventing these groups from allowing slaughter to continue in the short term.⁸⁵ But because eco-tourism is far more likely to provide significant benefits to the local community than trophy hunting, this argument seems as questionable as it is difficult to prove.⁸⁶

In addition, the assumptions underlying this argument are troubling. First the argument seems to rely on an assumption that African poverty is endemic and will never change, thus depicting local populations as inherently hostile to the idea that elephants should be preserved for their own sake.⁸⁷ Second, the idea that killing iconic animals is necessary in order to solve endemic poverty is absurd on its face. Why should elephants and rhinos be forced to suffer such harm in order to make up for poverty and under-development that itself stems largely from corruption, post-colonial trauma, economic exploitation, gross forms of endemic inequality, poor governance, and failure to collect tax revenues?⁸⁸ It is much more likely that the consciousness needed to save the elephant will also serve to improve the general sense of fair and sustainable economic development. If values are economic, how do they advance the cause of global beauty and wonder? It is unclear how treating the elephant as an economic resource can encourage an awareness of its importance to human beings and to the world's proper balance.⁸⁹

In fact, the only possible solution to this global disgrace is to re-establish the idea of a worldwide moral taboo and corresponding legal prohibition on the slaughter of iconic animal species.⁹⁰ To date, the supposedly practical argument has rested on the idea that international law mechanisms can broker some viable compromise such that economic incentives to preserve sufficient numbers of animals will dovetail with an orderly sale of animal parts on global markets — a version of the “legalize and regulate” argument so often heard concerning

⁸⁵ *See id.*

⁸⁶ *See* Michael Markarian, *Eco-Tourism Worth More to African Economies Than Trophy Hunting*, HUFFPOST (Nov. 2, 2015, 3:35 PM), https://www.huffpost.com/entry/eco-tourism-worth-more-to_b_8455186; Muchazondida Mkono, *Trophy Hunting is Not the Solution to Africa's Wildlife Conservation Challenges*, QUARTZ AFRICA (May 16, 2019), <https://qz.com/africa/1621198/trophy-hunting-cant-fix-africas-wildlife-conservation-challenge/>.

⁸⁷ *See* Jason G. Goldman, *Where Humans Suffer, So Do Elephants*, NAT'L GEOGRAPHIC (May 28, 2019), <https://www.nationalgeographic.com/animals/2019/05/poverty-and-elephant-poaching-in-africa/>.

⁸⁸ *See id.*

⁸⁹ *See* Michael Vardon et al., *Elephants and Economics: How to Ensure We Value Wildlife Properly*, THE CONVERSATION (Nov. 19, 2018, 5:54 PM), <https://theconversation.com/elephants-and-economics-how-to-ensure-we-value-wildlife-properly-107184>.

⁹⁰ *See* Teresa M. Telecky, *Hunting is a Setback to Wildlife Conservation*, 29 EARTH ISLAND JOURNAL 45, 45-46 (2019).

many other legal topics.⁹¹ But the basic problem is in the permission granted by humans to their own species to kill iconic animals, and given that reality, no amount of “regulation” can possibly lead to a slower, more considered approach to species management. The elevated status of lions, elephants and rhinos grows inherently from human perception of the magnificence of the animals.⁹² Elephants probably enjoy the most emotional reaction from ordinary people around the world because they are perceived to share many of our higher thoughts and feelings. The supposed compromise between hunting and preserving holds a fatal duality within.

I would argue that the principle “compromises” relied on under the guise of species management — managed trade under CITES and the phenomenon of managed trophy hunting — both serve to undermine the reasons for preserving the animals at all.⁹³ Allowing any trade in endangered animal parts sends a message that the killing itself is acceptable, as long as it is done in the appropriate numbers or manner.⁹⁴ Worse yet, the idea of allowing a controlled number of “trophy” killings provides a celebration of human ego over these animals, and places the trophy hunter in a special category of persons with sufficient power and determination to take out one of the great beasts.⁹⁵ Instead, such hunters should be considered pariahs, denied access to publicity and boasting rights. All arguments to the effect that such killing contributes to the maintenance of the species in question should be seen for what they are: thinly disguised justifications for the worst and most exploitative impulses. It is particularly troubling to see these motives spliced onto feigned concern for impoverished villagers in Africa and elsewhere, as if trophy hunting and trade in endangered species could be seen as a net positive in assisting the disadvantaged.⁹⁶

While economists often argue that local communities demand some kind of profit for tolerating the presence of iconic species, and that only controlled killing will lead to such a balance, it seems that these economists are frequently

⁹¹ See *SULI Briefing Paper – Informing Decisions on Trophy Hunting*, IUCN (Sept. 2016), <https://www.iucn.org/commissions/commission-environmental-economic-and-social-policy/our-work/specialist-group-sustainable-use-and-livelihoods-suli/resources-and-publications/suli-briefing-paper-informing-decisions-trophy>.

⁹² See Telecky, *supra* note 90.

⁹³ See CITES REPORT, NETWORK FOR ANIMALS, RUBBER-STAMPING ANIMAL CRUELTY – WHY CITES NEEDS REFORM (July 2016), <https://networkforanimals.org/wp-content/uploads/2016/09/Network-For-Animals-CITES-Report.pdf>.

⁹⁴ See *id.*

⁹⁵ See Wayne Pacelle, *American Public Roars After It Gets a Glimpse of International Trophy Hunting of Lions*, HUMANE SOC’Y: A HUMANE WORLD (July 29, 2015), <https://blog.humanesociety.org/2015/07/cecil-lion-killed-by-trophy-hunter.html>.

⁹⁶ See Economists at Large, *The \$200 Million Question: How Much Does Trophy Hunting Really Contribute to African Communities*, CONSERVATION ACTION, Feb. 2013.

quoting one another on this point.⁹⁷ In any event, it is difficult to determine whether local people support one kind of solution over another, or even the degree to which local people care more or less than the general population.⁹⁸ It is certainly the case that the world's people are often left to imagine what it looks like when a mother elephant is killed, or when a rhino has its horn cut off while still alive. These images are so frightening that most people choose not to know, and are considered too squeamish to be shown such images on a nightly newscast, for instance. And yet we are supposed to put confidence in the dry theories of law and economics theorists who argue that the appropriate "management" of iconic endangered species requires a certain amount of killing, which, if allowed, can then be managed.⁹⁹

International law is problematic in many ways. By definition, it is a negotiated set of compromises designed to solve global problems that transcend national boundaries in their effects.¹⁰⁰ Everything about international law presents either a glass half full or glass half empty reality because even determined critics of international law are likely to agree that compromise is much better than nothing when it comes to maintaining international order.¹⁰¹ Furthermore, for centuries it has been a challenge to even enforce these compromised rules in the face of transgressions by sovereign states.¹⁰² There are not many other subjects where this clumsy compromise between competing forces is more unsatisfactory than in the area of international environmental law.¹⁰³ Even at the domestic level, the constituency for environmental protection tends to be scattered and diffuse, whereas the forces seeking short-term profit from environmentally harmful acts is heavily resourced and organized.¹⁰⁴

Compounding these challenges, the Trump Administration dropped an unwelcome blow to conservation efforts in 2017, announcing that it would loosen rules against importation of "trophies" derived from hunting large

⁹⁷ See Karen E. Lange, *The Vanishing: How Trophy Hunting is Pushing Lions to the Brink of Extinction*, THE HUMANE SOC'Y (Jan. 1, 2016), <https://www.humanesociety.org/news/trophy-hunting-devastation>.

⁹⁸ See Vanda Felbab-Brown, *On the Vices and Virtues of Trophy Hunting*, BROOKINGS (Nov. 27, 2017), <https://www.brookings.edu/blog/order-from-chaos/2017/11/27/on-the-vices-and-virtues-of-trophy-hunting/>.

⁹⁹ See IUCN, *supra* note 91.

¹⁰⁰ See *What is International Law*, FINDLAW, <https://hirealawyer.findlaw.com/choosing-the-right-lawyer/international-law.html> (last visited Oct. 24, 2019).

¹⁰¹ See Rebecca L. Salk, Undergraduate Thesis, *Closing the Gap Between International Law and Morality: Strengthening the Responsibility to Protect*, U. MICH., May 2012, at 28.

¹⁰² See Anu Bradford & Omri Ben-Shahar, *Efficient Enforcement in International Law*, 12 CHI. J. INT'L. L. 375, 377 (2012).

¹⁰³ See Andrew Watson Samaan, *Enforcement of International Environmental Treaties: At Analysis*, 5 FORDHAM ENVTL. L. REV. 260, 262, 264-67 (2011).

¹⁰⁴ See Richard A. Clarke, *The Challenge of Going Green*, HARV. BUS. REV., July-Aug. 1994, at 37.

endangered species abroad, such as elephants and rhinos.¹⁰⁵ Awash in attacks on the global rule of law, the American public reacted strongly to this decision, protesting that to reactivate American trophy hunting would encourage the most barbaric elements in our society.¹⁰⁶ President Trump's two sons had been avid trophy hunters, with his elder son famously holding up an elephant's tail from a 2011 kill.¹⁰⁷ While President Trump then decided not to move forward with this order, he changed his mind yet again and eventually did eliminate the rule against importation of body parts resulting from trophy hunting.¹⁰⁸

Soon afterward, Botswana decided to eliminate its five-year ban on elephant hunting.¹⁰⁹ The conceptual dominoes have begun to fall and it is likely that, without major changes in leadership in the U.S. and China, for instance, the societal taboo against elephant killing (and the killing of other megafauna) will fade away.¹¹⁰ The famous case of Cecil the Lion, hunted down by an American dentist, served to demonstrate the strength of feeling of ordinary Americans regarding trophy hunting.¹¹¹ Nevertheless, it is difficult for most people to make their views on this and related topics known productively, and unlikely that megafauna conservation will be high on the priority list of elected representatives.¹¹²

Given this reluctance, further steps must be taken to ensure the protection of elephants and other trophy hunting targets. Do we need a new Endangered Species Treaty, one that is easier to understand and apply, and that calls out those who are all too happy to allow the world to be depleted of its most majestic creatures?¹¹³ Yes, if it includes provisions to the effect that culling such animals as a means to save them is a flawed idea that cannot ever be successful. An Elephant Protocol to an Endangered Species Treaty could state that all nations

¹⁰⁵ See Rosenberg, *supra* note 77.

¹⁰⁶ See *id.*

¹⁰⁷ See Meghan Keneally, *Trump Family's Hunting History Reexamined in Light of New Elephant Trophy Policy*, ABC NEWS (Nov. 17, 2017, 10:15 PM), <https://abcnews.go.com/US/trump-family-hunting-history-reexamined-light-elephant-trophy/story?id=51194214>.

¹⁰⁸ See *One Step Forward, Two Steps Back – Trump Administration Changes Its Mind on Trophy Hunting Again*, NIKELA BLOG (Mar. 10, 2018), <https://www.nikela.org/one-step-forward-two-steps-back-trump-administration-changes-its-mind-on-trophy-hunting-again/>.

¹⁰⁹ See Kimon de Greef & Megan Specia, *Botswana Ends Ban on Elephant Hunting*, N.Y. TIMES (May 23, 2019), <https://www.nytimes.com/2019/05/23/world/africa/botswana-elephant-hunting.html>.

¹¹⁰ See *id.*

¹¹¹ See Wyatt Smith, *Endangered Species Act or Extinction?: Protecting Foreign Species in the Aftermath of the Cecil the Lion Controversy*, 18 VT. J. ENVTL. L. 55, 55 (2016).

¹¹² See *id.*

¹¹³ See Damien M. Schiff, *The Endangered Species Act at 40: A Tale of Radicalization, Politicization, Bureaucratization, And Senescence*, 37 ENVIRONS ENVTL. L. & POL'Y 105, 106 (2014).

should criminalize the killing of elephants.¹¹⁴ No trade in ivory old or new should be allowed, as this makes it difficult to tell the lawful from unlawful activity.¹¹⁵ While certain controlled hunting programs might be cited to as exceptions in isolated instances of population rebound, as a general matter, the argument that a green light for hunting makes effective local preservation efforts more likely is inherently contradictory.¹¹⁶ Just as the early human rights treaties were blunt in their approach and language, demanding that all nations sign on to broad, comprehensive language, the same should now happen in the endangered species context.¹¹⁷

One can imagine a new international agreement that would condition access to global markets, or to certain global funds or loans, to compliance with a commitment to safeguard any listed animal under the control of any particular state, as identified within an annex or protocol to the treaty.¹¹⁸ Simply limiting “trade” in these animals is folly and doomed to failure.¹¹⁹ Any such agreement should demand that signatory parties ban hunting of any creature listed in the annex, based on its environmental significance or endangered status, or both. Such an agreement should also criminalize such conduct, should refuse to allow any tourism or related activities based on physical harm to such animals, should require constant monitoring and reporting of animal numbers, and should create an international commission with investigative powers.¹²⁰ The Botswana situation shows that leaving these determinations to individual nation states’ and their allies’ domestic laws is a dangerous mistake at odds with the purposes of conservation.¹²¹ Complicated, equivocal language will fail to achieve the purpose, which must be to prevent an ecological and moral catastrophe from taking place as elephant and other megafauna numbers crash before our eyes.¹²²

Of course, there remains the problem of treaty fatigue and the current lack of faith in international agreements as the means of redirecting and improving human behavior.¹²³ The age of naïve trust in the written words of a treaty is past;

¹¹⁴ See Myanna Dellinger, *Trophy Hunting – A Relic of the Past*, 34 J. ENVTL. L. & LITIG. 25, 27-28 (2018).

¹¹⁵ See Harleen Sehmi, *Closing Legal Markets for Illicit Ivory Will Save Africa’s Elephants*, AMERICAN WILDLIFE FOUNDATION (Apr. 5, 2019), <https://www.awf.org/blog/closing-legal-markets-illicit-ivory-will-save-africas-elephants>.

¹¹⁶ See Lange, *supra* note 97.

¹¹⁷ See Jacob Dolinger, *The Failure of the Universal Declaration of Human Rights*, 47 U. MIAMI INTER-AM. L. REV. 164, 167 (2016).

¹¹⁸ See David S. Favre, *An International Treaty for Animal Wildlife*, 18 ANIMAL L. 237, 254 (2012).

¹¹⁹ See Rachel Nuwer, *How Well Does CITES Really Prevent Wildlife Trafficking and Illegal Trade*, ENSIA (Oct. 4, 2018), <https://ensia.com/features/cites/>.

¹²⁰ See Favre, *supra* note 118.

¹²¹ See David McKenzie et al., *Botswanan Lifts Ban on Elephant Hunting*, CNN (May 23, 2019, 3:00 PM), <https://www.cnn.com/2019/05/23/africa/botswana-elephant-intl/index.html>.

¹²² See Schiff, *supra* note 113.

¹²³ See *id.*

nationalism, corruption and cynicism concerning international law are part of the current global outlook. Yet failure to return to broad principles of prohibition and legal taboos will doom the elephant to extinction. One nation-state acting in isolation cannot save the elephant, and no nation state is currently trying, either. Facile concepts of natural resource management are ineffective in the face of this kind of threat.¹²⁴ If treaties fail us, it is hard to imagine what else might work.

III. THE FUNDAMENTAL FLAW AT THE HEART OF CITES

No discussion of elephant conservation would be complete without an investigation of the workings of CITES, premised as it is on the controlled trade in endangered species.¹²⁵ In essence, the Convention invites member states to divide their endangered species into two groups: those severely at risk and those somewhat at risk, meaning those that are merely threatened with extinction.¹²⁶ Then, nations make it more difficult to trade in live animal specimens or body parts of those species, depending on the gravity of the situation in conservation terms.¹²⁷ Species may be proposed for addition or subtraction by member states, and these proposals must be approved by a 2/3 majority of those voting at the regular CITES meeting.¹²⁸ This article takes the position that CITES, while better than having no formal protections in place and with some historical successes to its credit, cannot work effectively, and in some respects works against wildlife conservation.¹²⁹ The concept behind CITES is deceptively attractive, in that it seems to be based on a rationale derived from management and sound economics.¹³⁰ In reality, though, trading in the parts of endangered animals, whether it is a little or a lot, can only whet the global appetite for more such body parts acquisition.

Some have the impression that the World Trade Organization (“WTO”) could play a role in controlling trade in endangered species.¹³¹ However, the remit of the WTO is fairly narrow in scope, and is generally focused on the issue of when and on what basis a nation state can *refuse to import* a particular good.¹³² In this

¹²⁴ See Favre, *supra* note 118.

¹²⁵ See Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 16 I.L.M. 390, 993 U.N.T.S. 243.

¹²⁶ See *id.*

¹²⁷ See *id.*

¹²⁸ See *id.*

¹²⁹ See Nuwer, *supra* note 119.

¹³⁰ See *id.*

¹³¹ See Elizabeth Granadillo, Note, *Regulation of the International Trade of Endangered Species by the World Trade Organization*, 32 GEO. WASH. J. INT’L. L. & ECON. 437, 440 (2000).

¹³² See *Principles of the Trading System*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Oct. 25, 2019).

regard, the EC-Seals case recently made headlines for its treatment of the international trade-animal welfare intersection. In particular, the EU was challenged for its ban on the marketing of seal products, justified on grounds of morality and animal welfare, a deeply held value across the EU. When the WTO trade bodies allowed the EU to argue that moral considerations could justify refusal to import seal-derived products, this was welcomed as a progressive development in international trade law.¹³³ While this is not a trivial matter, and while it allows states that maintain morality-based reasons for rejecting trade in animal parts, the WTO decision says little or nothing about positive conservation standards nations should attain, let alone the need to create a rule against trade in endangered species.¹³⁴ As positive endangered species law is far outside its scope, WTO law does not and cannot do so.

In the early years of the WTO, nations had their participation in global trade arrangements conditioned on various aspects of good global citizenship.¹³⁵ Therefore, the WTO could require nations to end illicit trade in ivory from their borders as a condition to entering the WTO. However, after twenty years of inaction, such coercive measures seem somewhat fanciful.¹³⁶ If anything, the enormous increase in the volume of international trade in goods since 1995 appears to have led to environmental disaster.¹³⁷ The over-use of the oceans to transport goods, the rapid deforestation occurring as nations seek to pump their goods into the global pathways of trade, the explosion in reliance on plastic — all of these are in one way or another connected with the rise in ever-freer trade.¹³⁸

As insiders with knowledge of the CITES process have made clear through detailed observations, the mechanisms of CITES — used to identify endangered species at different levels of risk — are rife with side deals and corruption.¹³⁹ The very existence of a mandated permitting process almost guarantees abuse of that process.¹⁴⁰ There is currently no international mechanism for enforcement outside the mere willingness of nation states to police the standards.¹⁴¹ To make

¹³³ See Qiaozhi Guanglin, *The Balance Between “Public Morals” And Trade Liberalization: Analysis of The Application of Article XX (A) of the GATT*, 14 FRONTIERS L. CHINA 86, 86-88 (2019).

¹³⁴ See *id.*

¹³⁵ See *id.*

¹³⁶ See *id.*

¹³⁷ See Nick Mabey & Richard McNally, *Foreign Direct Investment and the Environment: From Pollution Havens to Sustainable Development*, WORLD WILDLIFE FUND (Aug. 1999), <http://www.oecd.org/investment/mne/2089912.pdf>.

¹³⁸ See Robert Longley, *What Is Free Trade? Definitions, Theories, Pros and Cons*, THOUGHTCO. (Dec. 5, 2018), <https://www.thoughtco.com/free-trade-definition-theories-4571024>.

¹³⁹ See Nuwer, *supra* note 119.

¹⁴⁰ See *id.*

¹⁴¹ See *id.*

matters worse, existing processes are complicated and customs officials are unlikely to apply the various standards accurately.¹⁴² Worse still, bad faith actors have long infected the otherwise proper workings of the CITES process with their own corrupt motives.¹⁴³ Trophy hunting groups exert enormous influence over the internal CITES evaluation system.¹⁴⁴ While bureaucratically successful on its face, CITES suffers from almost complete lack of genuine international cooperation and is subject to the whims of national governments that may have little or no interest in animal conservation.¹⁴⁵ In stark contrast to international human rights law, the animals in question cannot speak for themselves, such that the general population has no idea whether the CITES process is functioning as it should or not.¹⁴⁶

At the most basic level, the *concept* underlying CITES cannot confront the extinction crisis the world now faces. Putting animals at risk into two distinct categories, with trade in body parts somewhat allowed in one category and hardly at all in another, creates obvious opportunities for violation. The clearly illegal is shielded by the ostensibly legal. Bad actors have space to act in bad faith. Also, trade in even the most endangered species within states' own borders is not dealt with by CITES at all, leaving nation states to essentially make their own rules.¹⁴⁷ CITES is based purely on the idea of permitting some trade in endangered creatures and their parts, in varying degrees of strictness depending on the level of endangerment.¹⁴⁸ The Convention is too bureaucratically complex to be successful, especially in countries where lack of enforcement, lack of interest, and strong traditions of corruption by officials are the norms.¹⁴⁹ In the case of elephants, only an outright ban on hunting based on a morally coherent prohibition against the taking of elephant life could possibly make a dent in the decline of elephant numbers.¹⁵⁰

As mentioned, CITES is built around the idea of two sets of vulnerable species: those in Appendix 1 include species "threatened with extinction which are or may be affected by trade."¹⁵¹ Furthermore, "[t]rade in specimens of these

¹⁴² See Mark Jones, *Has CITES Had Its Day?*, BBC NEWS (Apr. 6, 2010, 5:33 PM), <http://news.bbc.co.uk/2/hi/science/nature/8606011.stm>.

¹⁴³ See *id.*

¹⁴⁴ See Brendan Montague, *Trophy Hunting Lobbyists 'Pose as Conservationists'*, THE ECOLOGIST (June 9, 2019), <https://theecologist.org/2019/jun/06/trophy-hunting-lobbyists-pose-conservationists>.

¹⁴⁵ See Schiff, *supra* note 113.

¹⁴⁶ See Nuwer, *supra* note 119.

¹⁴⁷ See Elisabeth M. McOmber, *Problems in Enforcement of the Convention on International Trade in Endangered Species*, 27 BROOK. J. INT'L L. 673, 675 (2002).

¹⁴⁸ See *id.*

¹⁴⁹ See Nuwer, *supra* note 119.

¹⁵⁰ See Solly, *supra* note 23.

¹⁵¹ Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 16 I.L.M. 390, 993 U.N.T.S. 243.

species must be subject to particularly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances.”¹⁵² Species in Appendix II are “all species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival.”¹⁵³ For Appendix I species, export and import permits should only be granted when a national scientific authority determines that the permits will not be “detrimental to the survival of the species.”¹⁵⁴ Such determinations are subject to political influence. Appendix II species are only subject to an export permit regime.¹⁵⁵ Such a regime would prove confusing in practice and nearly impossible to effectively police and enforce.

There may be some use for the idea of regulated trade in certain limited contexts, but for large, ecologically significant animals, this kind of trade has no place. Particularly in reference to elephants — megafauna likely to disappear completely in the relatively near future — that are victims of horrific suffering at the hands of hunters and poachers, CITES offers a flawed concept that harms more than it could ever help. Linking the idea of legal trade to any degree at all with severely endangered large wild animals opens the door to exploitation by profiteers. In such a case, an absolute prohibition is the only correct approach.¹⁵⁶

Some may still believe that the WTO has a role to play in conservation efforts of this kind, but I argue that this is a mistaken view. As mentioned above, the WTO is limited to providing a forum for importing countries to justify their unwillingness to accept certain products, in this case body parts and ivory of an endangered species.¹⁵⁷ The WTO does not set standards for accepting or rejecting animal parts and has been generally supportive of the pro-trade point of view during conflicts over trade and environmental values.¹⁵⁸

It is of some significance that the WTO bodies have allowed a “public morals” justification as a reason not to import products made from baby seals into the EU market.¹⁵⁹ However, this is not very relevant to the conservation issue as it

¹⁵² *Id.*; CITES Appendices, <https://perma.cc/M6EW-X4WB>.

¹⁵³ CITES Appendices, <https://perma.cc/M6EW-X4WB>.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Note that other creatures, such as lions, should be included on this list of animals that must not be killed for any purpose. See Liz Langley, *What Are Africa's Big Five? Meet the Continent's Most Iconic Wildlife*, NAT'L GEOGRAPHIC (July 26, 2019), <https://www.nationalgeographic.com/animals/2019/07/africa-big-safaris-lions/>.

¹⁵⁷ See *Principles of the Trading System*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Oct. 25, 2019).

¹⁵⁸ See A.B. Thiermann & S. Bancroft, *Animal Welfare and International Trade*, 24 REV. SCI. TECH. OFF. INT. EPIZ. 2, 747-55 (2005).

¹⁵⁹ *Id.* at 749.

does not create any conservation mandates. The WTO may occasionally allow a nation to refuse import of an objectionable product, but does not prescribe any conservation standards to members. At most, the WTO sets aside its own free trade rules to allow nations to deviate from these in the event of an acceptably strong rationale for refusing the importation of certain products.¹⁶⁰

In general, it does not seem that “appropriate levels of trade” in body parts of endangered animals is the right conceptual basis for ensuring the survival of those species.¹⁶¹ It is simply too difficult to distinguish between the legal and the illegal, and the permitted trade trivializes the current biodiversity crisis.¹⁶² There cannot be an appropriate level of trade in the body of an elephant. The desire to show domination over megafauna and charismatic species is hardly dissimilar when it comes to trophy hunting and the managed trade idea underlying CITES. CITES is the somewhat more restrained and rational version of this impulse, but it also acknowledges that people wish to possess the body parts of animals considered valuable precisely because of their rarity.

IV. THE UNITED STATES AND THE TRUMP REGIME: PLAYING LEGAL GAMES

A. *A Government Captured by Fortune Hunters*

After the resignation of former head of the U.S. Department of Interior, Ryan Zinke, the Trump Administration replaced him with an even savvier enemy of the Endangered Species Act (“ESA”): longtime oil and gas lobbyist David Bernhardt.¹⁶³ Species considered worthy of protection by the U.S. are listed under the ESA, with responsibility for keeping the list “up to date” falling to the Fish and Wildlife Service.¹⁶⁴ Since the ESA is considered by friend and foe of the environment to be the big gun in the U.S. arsenal of species protection laws,¹⁶⁵ it is therefore not surprising that the Trump Administration, reliant on the support of far right conservatives who oppose the statute on issues relating to public land and wildlife, should turn its attention to the ESA and seek quick,

¹⁶⁰ See Steve Charnovitz, *The Moral Exception In Trade Policy*, 38 VA. J. INT’L L. 689.

¹⁶¹ See Nuwer, *supra* note 119.

¹⁶² See Brianna Marie, *Does Importing Endangered Species’ Body Parts Help Conservation? Discretion to Import Trophies Under the Trump Administration*, 19 SUSTAINABLE DEV. L. & POL’Y 18 (2019).

¹⁶³ See Oliver Milman, *Endangered Species Face ‘Disaster’ Under Trump Administration*, THE GUARDIAN (Mar. 6, 2019), <https://www.theguardian.com/environment/2019/mar/06/endangered-species-face-disaster-under-trump-administration>.

¹⁶⁴ See *Endangered Species Act of 1973*, 16 U.S.C. §§ 1521-1544 (2012).

¹⁶⁵ See CTR. FOR BIOLOGICAL DIVERSITY, *The Endangered Species Act: A Wild Success*, <https://perma.cc/35GK-R5FX> (last visited Oct. 25, 2019).

creative ways to weaken the statute's reach.¹⁶⁶ The gray wolf, for instance, is currently under consideration for delisting, despite the opposition of conservationists.¹⁶⁷ In the Trump Administration, agency heads have generally come straight out of industry or lobbying, without even a pretense of interest in a balanced and unbiased approach to the underlying issues.¹⁶⁸ A strong partiality for the oil and gas industry runs throughout all these nominations, with general disdain shown for arguments in favor of protecting endangered species or staving off climate change.¹⁶⁹

Indeed, since 2016, the Trump Administration's Department of Interior has treated the values behind the ESA with indifference, failing to take the advice of scientists with regard to the need to list at-risk species, and instead favoring the interests of extractive industry over birds and animals in key habitats.¹⁷⁰ With this devaluing of science as the basis for policy decisions, the dysfunction of the U.S. government becomes clear. Just as President Trump has ignored and denied science in the context of climate change, he has similarly denied conservation scientists a role in forming U.S. policy.¹⁷¹ This is despite the fact that the ESA *requires* that decisions on the treatment of endangered species be made on scientific grounds.¹⁷² With the same sort of macabre triumphalism shown by international trophy hunters, the Trump regime has made moves to lift prohibitions on the hunting of endangered wolf species, hibernating bears, and animals in protected areas of the United States, including remote corners of Alaska.¹⁷³ While this is at one level at the behest of mining and energy extracting

¹⁶⁶ See Lisa Friedman, *U.S. Significantly Weakens Endangered Species Act*, N.Y. TIMES (Aug. 12, 2019), <https://www.nytimes.com/2019/08/12/climate/endangered-species-act-changes.html> (last visited Oct. 25, 2019).

¹⁶⁷ See Noah Greenwald, *As World's Scientists Raise Extinction Alarms, Trump Guts Endangered Species Act*, THE HILL (May 8, 2019), <https://thehill.com/opinion/energy-environment/442781-as-worlds-scientists-raise-extinction-alarms-trump-guts-endangered>.

¹⁶⁸ See David Mora, *Update: We Found a "Staggering" 281 Lobbyists Who Have Worked in the Trump Administration*, PROPUBLICA (Oct. 15, 2019), <https://www.propublica.org/article/we-found-a-staggering-281-lobbyists-who-worked-in-the-trump-administration> [<https://perma.cc/2RPW-LRZQ>].

¹⁶⁹ See Daren Barbee, *Trump Cabinet Positions Fill Up with Oil, Gas Advocates*, HART ENERGY (Dec. 13, 2016), <https://www.hartenergy.com/exclusives/trump-cabinet-positions-fill-oil-gas-advocates-29451> [<https://perma.cc/RC6J-5JWV>].

¹⁷⁰ See Doug Most, *If the Endangered Species Act Dies, What Animals Will Die With It?*, BU TODAY (Sept. 18, 2019), <http://www.bu.edu/articles/2019/trump-administration-changes-to-endangered-species-act/> [<https://perma.cc/RPX8-PFMS>].

¹⁷¹ See Coral Davenport & Mark Landler, *Trump Administration Hardens Its Attack on Climate Science*, N.Y. TIMES (May 27, 2019), <https://www.nytimes.com/2019/05/27/us/politics/trump-climate-science.html>.

¹⁷² See *Endangered Species Act of 1973*, 16 U.S.C. § 1536 (2012).

¹⁷³ See Kitty Block, *Alaskans Say 'No' To Cruel Hunting Methods For Killing Hibernating Bears, Wolf Pups In Dens*, THE HUMANE SOC'Y OF THE U.S.: A HUMANE WORLD BLOG (June

industry, the approach seems to go beyond to catering to a sadistic yearning on the part of some to dominate and even wipe out certain animals for the pleasure of it.¹⁷⁴ The U.S. has a long history of such behavior, of course, famous among the examples being the millions of American bison slaughtered by settlers moving West in the 1800s.¹⁷⁵

As mentioned above, even wild horses are not exempt from this mindset, as it was announced in 2017 that the cap on slaughter of America's wild horses would be lifted, allowing tens of thousands to be killed.¹⁷⁶ The Trump Administration ultimately backed off on the plan after encountering a very vocal pushback from Americans across the political spectrum, while still complaining about the fact that there were too many horses grazing on Western lands.¹⁷⁷ This sort of decision does not seem to have any pretense of a rationale in conservation or other public policy, but is rather meant to desensitize or devalue the caution that normally accompanies species conservation and habitat preservation. If anything, the Trump Administration's approach indicates a basic lack of respect for, even contempt for, nature conservation as a collective value.¹⁷⁸

As a participant in CITES, the U.S. maintains its own list of species it considers endangered under the federal Endangered Species Act ("ESA").¹⁷⁹ Congress enacted the ESA in 1973 in order to preserve and protect animals and plants that are at risk of becoming extinct.¹⁸⁰ President Richard Nixon signed the ESA into law on December 28, 1973, stating that "nothing is more priceless and more worthy of preservation than the rich array of animal life with which our

29, 2018), <https://blog.humanesociety.org/2018/06/alaskans-say-no-to-cruel-hunting-methods-for-killing-hibernating-bears-wolf-pups-in-dens.html>.

¹⁷⁴ *Id.*

¹⁷⁵ See *The Buffalo War - The Buffalo: Yesterday and Today*, PBS, <https://www.pbs.org/buffalowar/buffalo.html>.

¹⁷⁶ See Karin Brulliard & Juliet Eilperin, *Wild Horses Could Be Sold For Slaughter Or Euthanized Under Trump Budget*, WASH. POST (May 26, 2017), <https://www.washingtonpost.com/news/animalia/wp/2017/05/26/wild-horses-could-be-sold-for-slaughter-or-euthanized-under-trump-budget/>.

¹⁷⁷ See Keith Ridler, *Trump Administration Takes Lethal Measure Off the Table for Controlling Wild Horse Herds*, ASSOCIATED PRESS (July 11, 2019), <https://coloradosun.com/2019/07/11/wild-horses-euthanasia-slaughter-trump-administration/>.

¹⁷⁸ See *Critics Charge New Trump Plan 'Recklessly Weakens Protections' For What Remains Of 'Illegally Reduces' Bears Ears Monument*, COMMON DREAMS (July 26, 2019), <https://www.commondreams.org/news/2019/07/26/critics-charge-new-trump-plan-recklessly-weakens-protections-what-remains-illegally>.

¹⁷⁹ See U.S. Fish & Wildlife Serv., *40 Years of Conserving Endangered Species*, ESA BASICS (Jan. 2013), https://www.fws.gov/endangered/esa-library/pdf/ESA_basics.pdf [https://perma.cc/SNF6-A978].

¹⁸⁰ *Id.*

country has been blessed.”¹⁸¹ The ESA served as a replacement statute for the Endangered Species Conservation Act of 1969 and was enacted to create specific conservation criteria for the U.S. to follow in its treatment of domestic species.¹⁸² It defined “endangered” and “threatened,” expanded on prohibitions for all endangered animals species, and implemented CITES protections.¹⁸³ The U.S. Fish and Wildlife Service, which is responsible for terrestrial and freshwater organisms, and the Commerce Department’s National Marine Fisheries Service, which deals with mainly marine wildlife, jointly maintain the terms of the ESA.¹⁸⁴ The endangered species list is updated when an animal or plant is placed on the federal lists of endangered and threatened wildlife and plants,¹⁸⁵ either through a petition or a candidate assessment process.¹⁸⁶ The far right has traditionally been hostile to the idea of protected species; our nation’s history is replete with examples of species extermination that act as proxies for ideological perspectives on environmentalism and multiculturalism.¹⁸⁷ The ESA is a frequent site for clashes between property rights and preservationist values.¹⁸⁸

Very recently, the Trump Administration further shocked environmentalists when it announced plans to fundamentally alter the manner in which the ESA is administered.¹⁸⁹ Rather than relying on purely scientific grounds, the new approach would include economic considerations.¹⁹⁰ Despite arguments that this would be a fairer and more predictable approach, it was abundantly clear that the main beneficiaries would be extractive industries eager to open new lands for exploration and profit.¹⁹¹ To the extent that the ESA has been both

¹⁸¹ See Alina Bradford, *Facts About the Endangered Species Act of 1973*, LIVE SCIENCE (May 11, 2016), <https://www.livescience.com/54707-endangered-species-act.html>.

¹⁸² See *id.*

¹⁸³ See *id.*

¹⁸⁴ See *Endangered Species Act Overview*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/endangered/laws-policies/> (last visited Jan. 7, 2020).

¹⁸⁵ See *Listing and Critical Habitat Overview*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/endangered/what-we-do/listing-overview.html> (last visited Jan. 7, 2020).

¹⁸⁶ See *id.*

¹⁸⁷ See Jeff Turrentine, *Pro-Extinction Policies do Not Sit Well With Americans, Whatever Their Stripe*, NAT’L RES. DEF. COUNCIL (July 27, 2018), <https://www.nrdc.org/onearth/pro-extinction-policies-do-not-sit-well-americans-whatever-their-stripe>.

¹⁸⁸ NAT’L RESEARCH COUNCIL, *MAKING ESA DECISIONS IN THE FACE OF UNCERTAINTY*, (Nat’l Academies Press, 1995), <https://perma.cc/9B3W-AJD4>.

¹⁸⁹ See Ula Chrobak, *Trump is Attacking the Endangered Species Act When We Need it Most*, POPULAR SCIENCE (Aug. 13, 2019), <https://perma.cc/E7YT-6SJV>.

¹⁹⁰ See Matt Stieb, *Obama’s Deputy Interior Secretary on the Gutting of the Endangered Species Act*, N.Y. MAGAZINE (Aug. 17, 2019), <http://nymag.com/intelligencer/2019/08/reckoning-with-trumps-gutting-of-the-endangered-species-act.html> [<https://perma.cc/889Z-Y4HQ>].

¹⁹¹ *Id.*

dramatically effective in saving certain iconic American species, and has been passionately defended by environmental groups, these moves shattered the uneasy peace between sharply competing visions of American values.¹⁹² A number of environmental groups have moved forward with lawsuits to challenge the compatibility of the Trump Administration's changes with the statute itself.¹⁹³

B. *On Trophyism and Triumphalism*

Trophy hunting, or the killing of big game species like elephants, rhinos, lions, and bears, goes beyond being a sport or an ordinary branch of hunting. Rather, trophy hunting involves the keeping of the animal or its hide, head, or other body parts as a souvenir, or "trophy."¹⁹⁴ The whole idea of a trophy is that it is something to display; in the case of animals, it is a captured creature to stand next to, smiling at its defeat.¹⁹⁵ Trophy hunting is not new, of course, and is generally associated with the mentality of imperialists traveling the world, hunting down exotic local species and memorializing the experience by standing next to the downed animal while holding a gun.¹⁹⁶

The 2012 photographs of President Donald Trump's two sons standing with their African "trophy" animals and the animals' body parts have become justly notorious.¹⁹⁷ The photographs, and trophy hunting itself, are the symbol of a kind of privileged arrogance that expresses itself in the destruction of what is most awe inspiring and even sacred. Quite separate and apart from ordinary hunting, trophy hunting exists solely for the thrill it provides its proponents, with many saying that it is the most "satisfying" form of hunting because of the size and exotic nature of the animals killed.¹⁹⁸ As a practice, it exists as a display of superior powers over the magnificent creatures brought down. It is brazenly triumphalist.¹⁹⁹ Unsurprisingly, trophy hunters have their own well-funded

¹⁹² *See id.*

¹⁹³ *See* Chrobak, *supra* note 189.

¹⁹⁴ *See* Mark Cardwardine, *An Introduction to Trophy Hunting*, DISCOVER WILDLIFE, <https://www.discoverwildlife.com/animal-facts/an-introduction-to-trophy-hunting/> [https://perma.cc/XUQ6-27P9].

¹⁹⁵ *See id.*

¹⁹⁶ *Id.*

¹⁹⁷ *See* Keneally, *supra* note 107.

¹⁹⁸ *See* Marc Bekoff, *Why Men Trophy Hunt: Showing Off and The Psychology of Shame*, PSYCHOLOGY TODAY (Mar. 28, 2017), <https://www.psychologytoday.com/us/blog/animal-emotions/201703/why-men-trophy-hunt-showing-and-the-psychology-shame> [https://perma.cc/X4SG-39KZ].

¹⁹⁹ *See e.g.*, RAISED HUNTING, paid sponsorship post with Ripcord, FACEBOOK (2019) <https://www.facebook.com/raisedhunting/posts/the-triumph-of-a-bear-hunt-is-unlike-any-other-lets-see-some-of-your-trophy-bear/125729721116493/> [https://perma.cc/XXJ4-3VFF] (a social media post by a pro-hunting Facebook page, with paid sponsorship to boost the post, inviting those who like the page to share photos in the comments of the post: "The triumph of a bear hunt is unlike any other. Lets see some of your trophy bear.").

lobbyists, who exert a great deal of influence in conservation circles.²⁰⁰ This influence leads to the specious arguments that the killing of more trophy animals will bring about higher levels of conservation, and similarly irrational efforts to direct public understanding of the supposedly beneficial role of big game hunting.²⁰¹ The more magnificent and endangered the creatures to be killed, the higher the price tag — though how much of such costs end up to the benefit of local communities is questionable at best.²⁰²

As mentioned above, President Trump has displayed some ambivalence towards the practice of trophy hunting.²⁰³ First, he removed an Obama-era executive order outlawing the importation of elephant body parts resulting from trophy hunting.²⁰⁴ Then, calling the practice a “horror show” after a public outcry, he reversed himself.²⁰⁵ After that, presumably under pressure from the trophy-hunting lobby closely identified with his former Secretary of the Interior, Ryan Zinke, President Trump proceeded to reverse his reversal and allowed the practice to begin again, with importation of trophies being allowed on a “case by case” basis.²⁰⁶ Since then, Americans have resumed trophy hunting in Africa and elsewhere, with some boasting killings of rare and large animals like giraffes.²⁰⁷

The trophy hunting issue goes well beyond elephants and plays a symbolic role in the Trump Administration’s view of the world and the continued domination of animals by people with weapons, whatever the stark realities of endangered species or global environmental disasters. Bears, horses, elephants, and lions — all are subject to the will of ambitious hunters.²⁰⁸ While the underpinnings of this practice might appear to focus on the individual pleasure derived from the slaughter of very large, impressive creatures, the larger message sent by allowing individuals to trophy hunt is that Americans do not need to consider the environmental or humane dimension of their actions. The

²⁰⁰ See Montague, *supra* note 144.

²⁰¹ See Ameena Schelling, *Hunters Say Trophy Hunting Helps Animals. Here’s Why They’re Wrong.*, THE DODO (Oct. 5, 2015), <https://www.thedodo.com/does-hunting-help-conservation-1389284014.html>.

²⁰² See Monica Serrano et. al, *The Price on Their Heads*, NAT’L GEOGRAPHIC (2012), <https://www.nationalgeographic.com/magazine/2017/10/trophy-hunting-killing-saving-animals/#/TrophyHunting-Price-WEB.png>.

²⁰³ See Keneally, *supra* note 107.

²⁰⁴ See Rosenberg, *supra* note 77.

²⁰⁵ See *id.*

²⁰⁶ See Rosenberg, *supra* note 77.

²⁰⁷ See Jake Bullinger, *How Trump’s Wildlife Board Is Rebranding Trophy Hunting As Good For Animals*, THE GUARDIAN (July 17, 2018), <https://www.theguardian.com/environment/2018/jul/17/trumps-wildlife-board-claims-trophy-hunting-saves-endangered-animals>.

²⁰⁸ See Liz Langley, *What Are Africa’s Big Five? Meet the Continent’s Most Iconic Wildlife*, NAT’L GEOGRAPHIC (July 26, 2019), <https://www.nationalgeographic.com/animals/2019/07/africa-big-five-safaris-lions/>.

rationale for trophy hunting has nothing at all to do with procuring food or establishing a return to nature, but rather rests on a celebration of the amoral killing of the creatures long considered to be the most “charismatic.”²⁰⁹

While its proponents make the internally contradictory argument that trophy hunting contributes to conservation, scientists make the case that these animals are being over-hunted and will become extinct.²¹⁰ The larger point here is that the acceptance of these slaughters makes conservation subservient to the need of some to triumph over the world’s largest and most exotic creatures. A debased version of this is found in American “shooting preserves” or “game parks,” where charismatic animals are farmed to allow “hunters” to find and kill them in an artificial version of the wild.²¹¹ The point is the shock value of the kill and the taste of victory. Because this practice tends to evoke such a strong negative reaction in some, the same proponents present false claims of the advantage to conservation of maintaining trophy hunting, because this variety of tourism is supposedly beneficial for local economies, and allegedly encourages locals to preserve the animals that make it possible.²¹²

Trophy hunting of this kind should be made unlawful at the international level.²¹³ Most expert commentary refutes the notion that trophy hunting will provide financial incentives that will in turn encourage local communities to value and protect elephants or any other megafauna species.²¹⁴ Elephant numbers in the wild have continued to fall drastically, and will likely do so until the wild elephants are gone.²¹⁵ Poachers and trophy hunters pursue either profit or thrills with little regard to, and often at the expense of, negative long-term consequences. Trophy hunting is a pernicious activity that adds nothing to conservation and adds a great deal to the suffering and trauma of these sensitive animals. A total ban on the hunting of or trading in certain listed animals is appropriate. African and Asian elephants should be prominent on any such list.

²⁰⁹ See Cruise, *supra* note 35.

²¹⁰ See Stephen Leahy, *Trophy Hunting May Drive Extinctions, Due to Climate Change*, NAT’L GEOGRAPHIC (Nov. 28, 2017), <https://www.nationalgeographic.com/news/2017/11/wildlife-watch-trophy-hunting-extinctions-evolution/>.

²¹¹ See *Captive Hunts Fact Sheet*, THE HUMANE SOC’Y OF THE U.S., <https://www.humanesociety.org/resources/captive-hunts-fact-sheet> [https://perma.cc/7EWF-GYAL] (last visited Jan. 7, 2020).

²¹² See Paterniti, *supra* note 84.

²¹³ See Jeffrey Flocken, *Trophy Hunting: ‘Killing Animals to Save Them Is Not Conservation’*, CNN (Jan. 4, 2018), <https://www.cnn.com/2015/05/19/opinions/trophy-hunting-not-conservation-flocken/index.html>.

²¹⁴ See *The \$200 Million Question*, *supra* note 96.

²¹⁵ See Karl Mathisen, *Elephants on the Path to Extinction*, THE GUARDIAN (Aug. 12, 2016), <https://perma.cc/4PXX-W88K>.

The need to preserve biodiversity is already well established,²¹⁶ and many people recognize the need to protect elephants globally.²¹⁷ While CITES claims to be providing such protection, the terms of CITES are both under-inclusive and under-enforced, and thus do not rise to the task of preventing animal slaughter. Between poachers and trophy hunters, elephants in the wild will disappear if the legal standards for protection are not urgently revised.

CONCLUSION

There are important reasons why humans should force ourselves to confront photos of dead and dying elephants and other mega-species senselessly killed by human beings. It is important not only to the species concerned, but to the future of the planet and our role as we coexist among other species. The contemporary trend is to blunt our senses and thus provide the circumstances for others to engage in senseless slaughter that highlights, even celebrates, human greed. There is no valid reason for trophy hunting. There is no reason to subject vulnerable species to even more abuse than they have endured thus far. There is no reason for African governments to remove bans on elephant hunting, and no reason for wealthier countries to allow the ivory trade to continue. None of these rationales is based on any vital interests of the parties concerned. The fears and animus of local communities come the closest, but the logic of that rationale demands the destruction of elephants, something that is clearly inconsistent with science, conservation or even global common sense.²¹⁸ There must be other ways to protect local economic activities and public safety from those elephants that pose a danger. Arguments in favor of trophy hunting are often couched in terms of the need to cull, the supposed trophy hunting-conservation link, and other outwardly palatable reasons that mask the true motivations: triumphalism and even sadism.²¹⁹ Seen in the context of our willful failure to confront climate change, it may be that within the highest levels of greed, there may well be indifference to the survival of life on earth. The rapid disappearance of wild elephants is the ultimate symbol of our collective failure to care enough.

When it comes to legal analysis, there is little if any point in reading the work of those who make a supposedly law and economics-based argument to the effect that conservation can be improved through more killing of charismatic animals, on the grounds that their value will be appreciated by local people if wealthy hunters are willing to kill them. CITES is based solely on the idea of

²¹⁶ See *Biodiversity: Why Do We Need To Conserve Biodiversity*, YOUNG PEOPLE'S TR. FOR THE ENV'T, <https://ypte.org.uk/factsheets/biodiversity/why-do-we-need-to-serve-biodiversity> (last visited Jan. 7, 2020).

²¹⁷ See STOP WILDLIFE TRAFFICKING, *Americans Support Wildlife Conservation, Know Very Little About Wildlife Trafficking*, <https://perma.cc/8BPR-XPDR>; see also THE HUMANE SOC'Y, *New poll: Vast Majority of Americans Oppose Elephant and Lion Trophy Hunting* (Dec. 5, 2017), <https://perma.cc/7QFB-34VR>.

²¹⁸ See Cruise, *supra* note 35.

²¹⁹ *Id.*

managed and controlled trade in the body parts of at-risk animals; this reasoning may have its place in certain contexts, where the significance of the species and nature of the risk are less, but certainly not front and center in the megafauna conservation debate.

The Washington Post recently ran an article featuring farmers in Botswana saying that they “hate” the elephants, recounting stories of people who have had crops destroyed and even lives threatened by the large animals.²²⁰ There are rarely if ever articles featuring the indigenous African movement to save elephants and the many heroes involved in that effort.²²¹ It is unfair to place responsibility for the well-being of impoverished villagers on the elephant, when neither national governments nor the international community have done much to try and solve these conflicts — either through innovative habitat adjustments or technology. Poaching, trophy hunting, and ivory sales are linked to international organized crime and terrorism.²²² The elephant is an environmentally crucial megafauna presence and it is not an overstatement to acknowledge that human beings are witnessing — and actively taking part in — elephant extinction. Whether the world can “afford” the elephant is surely the wrong question.

²²⁰ See Bearak, *supra* note 69.

²²¹ See Matthew L. Miller, *Good News For Elephants: How These Communities Reduced Poaching By 35 Percent*, THE NATURE CONSERVANCY: COOL GREEN SCIENCE BLOG (Nov. 30, 2015), <https://blog.nature.org/science/2015/11/30/good-news-elephants-community-reduce-poaching-35-percent/>.

²²² See Vanda Felbab-Brown, *Wildlife and Drug Trafficking, Terrorism, And Human Security*, BROOKINGS (Nov. 8, 2018), <https://www.brookings.edu/articles/wildlife-and-drug-trafficking-terrorism-and-human-security/>.