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NOTE: "One Order of Genocide and Two Sides of Extinction": Proposing an International Solution to Preventing the Destruction of the Elephant and **Rhinoceros** Species in Mozambique and Tanzania

**NAME:** BY SEAN PAN\*

**BIO:** \* J.D. Candidate 2016, University of California, Hastings College of the Law; B.S., University of California, Davis (2010). I want to thank Professors Bruce A. Wagman and Naomi Roht-Arriaza of the University of California, Hastings College of the Law, whose expertise in their individual fields of practice provided the essential insight, guidance and inspiration to complete this note.

**HIGHLIGHT:** This Note posits the notion that the massacre of the elephant and **rhinoceros** species in Mozambique and Tanzania resembles the type of monstrous conduct the international community generally brands as the crime of genocide. While it is folly to ignore genocide's historical application towards human victims, both the relentless manner in which these animals are killed along with their drastically diminished populations begs, at least, for international criminal charges and convictions. Additionally, modern legal precedent and historical practices suggest a broader application of the crime of genocide--one that should include other protected and threatened groups.

## Introduction

Just seventy years ago, Justice Jackson, prosecutor for the Nuremburg Trials, justified the prosecution of multiple Nazi party members for various international crimes in his opening statement. <sup>n1</sup> While it was "the first truly international prosecution of individuals," it stood the test of time by setting the benchmark for prospective international cases:

The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated ... Civilization asks whether law is so laggard as to be utterly helpless to deal with crimes of this magnitude ... It does not expect that you can make war impossible [but] it does expect that your judicial action will put the forces of international law, its precepts, its prohibitions and, most of all, its **[\*460]** sanctions, on the side of peace... . <sup>n2</sup>

The Nuremburg Court eventually indicted twenty-four Nazi leaders; and of those, eleven were sentenced to death. <sup>n3</sup> However, Justice Jackson's ability to influence the Court to convict the individuals for war crimes, crimes against humanity, and crimes against the peace, was not merely due to the proof of the substantive

elements of the crimes charged. <sup>n4</sup> Rather, it was a result of a policy decision: that threats against humanity - representing conduct "so grave or heinous" - should not be left unpunished. <sup>n5</sup>

Today, genocide is the "modern word for an old crime" and was created after Nuremberg to more accurately "describe what happened to the Jews and other so-called undesirable groups at the hands of [the] Nazis." <sup>n6</sup> The fact a new term was coined specifically to represent the atrocious and indiscriminate killing of specific groups is testament to the international community's unwillingness to leave these unforgivable acts unpunished. <sup>n7</sup>

But what is it that truly makes genocide so intolerable that the international community is willing to prosecute it in the manner and degree that has been established? Society has clearly chosen to forgive some acts and punish others, but those decisions are often without explanation. For example, when the United States bombed Hiroshima in World War II (WWII), "wiping out 90 percent of the city and immediately killing 80,000 people" along with the tens of thousands of other victims who would later die as a result of the radiation, the country was not charged with genocide or any other international crime for that matter. <sup>n8</sup> However, when the Nazis massacred the Jews in the concentration camps, they were labeled as war criminals and held responsible for a "Nazi genocide." <sup>n9</sup> History is **[\*461]** riddled with these inconsistencies, but due to the nature and degree of the conduct associated with genocide, it is given a special place in the universe of international crimes.

This Note posits the notion that the massacre of the elephant and **rhinoceros** species in Mozambique and Tanzania resembles the type of monstrous conduct the international community generally brands as the crime of genocide. While it is folly to ignore genocide's historical application towards human victims, both the relentless manner in which these animals are killed along with their drastically diminished populations begs, at least, for international criminal charges and convictions. Additionally, modern legal precedent and historical practices suggest a broader application of the crime of genocide - one that should include other protected (and threatened) groups.

To this end, I propose a new form of international prosecution through the crime of genocide that can help combat the mass destruction of the elephant and rhino species in Mozambique and Tanzania. In doing so, I hope to highlight the need for increased international legal enforcement in light of dwindling domestic and international safeguards. While this proposal suggests fundamental changes to our international court system, it may be the only remaining lifeline to save these animals from a rampant ivory trade, which is now "one of the fastest growing areas of international crime" and only behind "the black market trade in drugs and arms." <sup>n10</sup>

This Note is divided into three sections. Section I will provide a general background behind the black market ivory trade and its disastrous effect on the elephant and rhino populations in Mozambique and Tanzania. Section II will explain why increased international prosecution is necessary in light of ineffective domestic and international legal safeguards. Finally, Section III will describe the practicality of applying the international charge of genocide to poachers of the black market ivory trade.

## **[\*462]**

### I. The Sad Reality of the Black Market Ivory Trade in Mozambique and Tanzania

Today's illegal trade in ivory has induced a level of death and heinous conduct that is certainly comparable to instances of genocide. In fact, the results of such a profitable enterprise have nearly decimated entire elephant and rhino populations in Mozambique and Tanzania through poaching.

Studies in Mozambique, for example, revealed drastic losses of approximately 30,400 elephants from the 1970s to present day. <sup>n11</sup> Additionally, most experts agree that Mozambique's sparse population of rhinos are now either completely extinct or near the "brink of vanishing" from the region. <sup>n12</sup> Tanzania's deteriorating populations of elephants and rhinos are also a common trend. For instance, "between 1977-87, Tanzania lost over 50,000 elephants to poachers, [which was] more than 50 per cent of its population." <sup>n13</sup> Then, between 2002 and 2009, the elephant population plummeted again by 21,000. <sup>n14</sup> Rhino losses, on

the other hand, were even more alarming since they recorded a mere thirty-two rhinos left in existence in 1995.<sup>n15</sup>

**[\*463]** Despite the unimaginable losses in both species, heinous poaching methods continue to permeate the black market ivory trade. More often than not, poachers use increasingly cruel and sadistic methods of ivory extraction due to an indifference towards animal life. Some of these practices include hacking off ivory tusks while the animal is alive, or shooting infant elephants as a ploy to attract the rest of the herd.<sup>n16</sup> Many times, this results in distressing scenes of suffering: rhinos with their horns chain-sawed off, exposing "soft tissue injuries ... down into the remnants of [their] face, through the outer layer of bones ... [with] pieces of loose flesh ... semi-detached ... and blood bubbling inside skull cavities."<sup>n17</sup> Unfortunately, these unimaginable cruelties have become an all too common scene in the ivory trade.

The overwhelming reason for such dramatic losses and indifference to elephant and rhino fatalities seems to be based on the stunning value of ivory in the illegal trade. In the black market, elephant and rhino tusks are one of the "most expensive commodities on Earth" and dubbed as "white gold" by poachers.<sup>n18</sup> Often, elephant ivory can sell for \$ 400 per kilogram and rhino horns fetch up to \$ 65,000 a kilogram, making them an obvious source of income and "a one-way ticket to prosperity" for those poachers seeking a quick profit.<sup>n19</sup>

Another integral part of this process are the ivory consumers whose "demand from ... around the world ... fuels this grisly trade."<sup>n20</sup> Asian countries are now increasingly to blame since they revere ivory as a "status symbol" and ensure ongoing demand.<sup>n21</sup> This **[\*464]** is due to ivory's many revered functions in Eastern cultures (purportedly to cure cancer, alleviate asthma symptoms, separate poison from liquid, or even increase sexual libido), which makes them extremely desirable for consumers.<sup>n22</sup> As a result, China is now the "largest single destination for illicit ivory," "importing as much as fifteen tons each year, [or] the equivalent of fifteen hundred dead elephants."<sup>n23</sup> It is no surprise that this promise of wealth along with high consumer demand has quickly propelled the illegal ivory trade to one of the fastest growing areas of international crime, which is estimated by Interpol to be worth at least \$ 6 billion per year.<sup>n24</sup>

The obvious end-result is a lucrative black market ivory trade where "the laws of supply and demand have...led to a vicious circle" of elephant and rhino poaching in Mozambique and Tanzania.<sup>n25</sup> And while poaching is not the sole reason for this massacre, it remains the "overwhelming cause."<sup>n26</sup> Moreover, in a reality where "poachers are responsible for nearly 60-90 per cent of elephant deaths in Tanzania" and are a primary factor for the decrease in rhino populations, there is little hope in saving the species from extinction without more drastic and innovative measures to fight the illegal ivory trade.<sup>n27</sup>

The next section will explain why the illegal ivory trade continues to prosper and provide a safe haven for poachers. As such, I will analyze the lethal combination of ineffective domestic protections in Mozambique and Tanzania as well as the available yet underutilized international safeguards.

## **[\*465]**

### II. What Current Domestic and International Safeguards are In Place and Why They Continue to Fail

The existing domestic and international response to the black market ivory trade falls short for a variety of reasons.<sup>n28</sup> However, the overwhelming cause of the destruction is ultimately a dangerous mixture of ineffective local laws along with an international community that is unwilling to accept a larger prosecutorial role.<sup>n29</sup> I detail the current state of (A) domestic and (B) international efforts below.

#### A. The Domestic Response

It is clear that Mozambique and Tanzania face a formidable task in trying to stop the black market ivory trade; one that is certain to expound without effective intervention. Today, limited resources, weak penalties, and prevalent corruption at the "highest levels of local and regional government," have made legal enforcement nearly impossible in either country.<sup>n30</sup> In Tanzania, for example, there have been numerous instances of government-hired "game rangers providing critical information to poachers, [while] police officers

supply guns, Tanzanian Revenue Authority officers release containers of ivory for export, and ruling Chama Cha Mapinduzi (CCM) party functionaries offer high-level protection for trafficking operations." <sup>n31</sup> Mozambique has also revealed similar corruption through failing to prosecute cases and releasing offenders after a payment of bribes. <sup>n32</sup>

These instances of corruption have infiltrated the highest levels of local government and even those directly responsible for [\*466] enforcing its laws. <sup>n33</sup> As a result, domestic regulations are often overlooked or simply ignored. <sup>n34</sup> Even if poachers are caught and prosecuted, charges are generally viewed as negligible risks worth taking in the face of high profits from the illegal ivory trade. <sup>n35</sup> When combining this rampant corruption with limited funding for rangers and weak penalties, this ultimately results in an inability to enforce local laws. For this reason, domestic regulations in (1) Mozambique and (2) Tanzania continue to provide little deterrence to a growing black market ivory trade.

### 1. Mozambique's Domestic Safeguards

There are two main statutes that constitute the majority of wildlife protection in Mozambique: Law No. 10 of July 7, 1999, and Article 254 of the Mozambican Penal Code. <sup>n36</sup>

Law No. 10, and its various Articles, set the basic principles of protection, preservation, and sustainable use of forest and wildlife resources. <sup>n37</sup> Under the oversight of the Office of Council Ministers, it regulates Mozambique's forest and wildlife monitoring and management, and is the primary legal protection for elephants and rhinos. <sup>n38</sup>

Most notably, Article 20 limits the hunting of specific wild animals by establishing a quota system. <sup>n39</sup> This requires hunters to obtain a license of one of three varying degrees: a simple hunting (*caca por licenca simples*), sport hunting (*cac desportiva*), or commercial hunting license (*caca commercial*). <sup>n40</sup> Articles 21, 22, and 23, in turn, establish the appropriate instruments and hunting practices allowed under each type of license. <sup>n41</sup> Separate permits are [\*467] also required for the trade in ivory. <sup>n42</sup>

Several Articles under Law No. 10 also explicitly detail the means for legal enforcement. For example, only properly uniformed and identified inspectors of forest and wildlife are able to seize and arrest for violations. <sup>n43</sup> Additionally, they are able to run both stationary and mobile surveillance posts if properly marked. <sup>n44</sup> This also includes vehicle checkpoints that can be placed at random. <sup>n45</sup> Of particular note, is the Law's explicit requirement for collaboration and cooperation among citizens and local authorities to assist in the reporting of illegal activity. <sup>n46</sup>

Violations of Law No. 10's provisions can result in a variety of punishments by monetary fine. Generally, acts resulting from hunting or importing/exporting without a license result in minimal penalties from \$ 69.45 to \$ 3,472.27. <sup>n47</sup> The amount of the fine is largely left to the discretion of the decision maker, who can consider a variety of aggravating factors including the location and season of the illegal act and whether the courts are dealing with a first or multiple-time offender. <sup>n48</sup> Additionally, if the violation is committed against a protected species like the elephant or rhino, wrongdoers can expect the fine to be up to ten times the maximum under Article 41 of Law No. 10. <sup>n49</sup>

The Mozambican Penal Code, on the other hand, is derived from the state's criminal law and is the only way to impose jail time. <sup>n50</sup> Its regulations closely mimic Law No. 10 in requiring proper hunting licenses, but contrasts because it only speaks to hunting and not the actual trafficking of wildlife. In most cases, penalties due to violations of the Penal Code are extremely minimal, with misdemeanors as the most serious charge. Accordingly, most illegal poachers of elephants or rhinos generally expect no more than three days in prison and/or a small fine. <sup>n51</sup>

[\*468] Overall, both Law No. 10 and the Mozambican Penal Code provide little deterrence effect because there is little or no motivation for poachers to cease their profitable conduct. <sup>n52</sup> Since the cost of poaching only results in minimal monetary fines or mere misdemeanors under either regulation, most are willing to risk the punishment for the chance of making a much greater profit from the ivory trade. <sup>n53</sup> As already shown, hefty profits up to \$ 65,000 a kilogram for rhino horn, can easily justify a mere three days in

prison or even a slightly stiffer monetary penalty.<sup>n54</sup> In the end, the fact that poaching remains on the rise in Mozambique is a testament to the fact that poachers view these domestic laws as nothing more than a minor impediment.<sup>n55</sup> Adding this to Mozambique's shortage of funding for wildlife enforcement - often placing feeble numbers of park rangers, assigned to animal refuges the size of Norway, and against paramilitary poachers with automatic weapons - only guarantees ongoing failure to stem the tide of poaching.<sup>n56</sup> These lopsided odds, easy hunting grounds, and minimal legal repercussions have ultimately overwhelmed enforcement officers and ripened Mozambique as one of the major sources for illegal ivory.<sup>n57</sup>

## 2. Tanzania's Domestic Safeguards

Tanzania's penal system employs a similar legal framework. Currently, there are three main statutes in place to combat the black market ivory trade: the Animal Welfare Act No. 19 of 2008, The Wildlife Conservation Act No. 5 of 2009 (WCA), and the National Parks Act (NPA).<sup>n58</sup>

**[\*469]** The Animal Welfare Act No. 19 of 2008 recognizes three fundamental points: "that (i) an animal is a sentient being; (ii) animal welfare is an important aspect of any developed society which reflects the degree of moral and cultural maturity of that society; [and] (iii) animal welfare enhances livestock productivity and that a human being has a moral obligation to care, respect and protect an animal."<sup>n59</sup> While this Act focuses on a broad spectrum of topics regarding animal cruelty and welfare in the wild and in captivity, the primary sections relating to poaching are under sections "e" of Part III and segments "a" and "f" of Part IV.

Section "e" of Part III details the proper methods of killing livestock or wild animals.<sup>n60</sup> The Act requires that "animals shall be slaughtered through a method which involves instantaneous killing."<sup>n61</sup> Sections "a" and "f" of Part IV, on the other hand, deal with prohibited conduct. For instance, section "a" prohibits "cruelly beating, kicking, ill-treating ... torturing ... or terrifying an animal."<sup>n62</sup> Additionally, section "f" forbids the use of poisonous or injurious drugs on animals. A violation of any of these provisions results in either imprisonment for a term not exceeding one month or a fine not surpassing \$ 54.02.<sup>n63</sup>

Currently, Tanzania appoints livestock field officers to act as animal welfare inspectors in conducting random inspections.<sup>n64</sup> The chances, however, of them actually finding evidence while the poacher is still present at the crime scene is minimal. Because such highly sophisticated tracking techniques and efficient hunting methods allow poachers to travel and extract ivory quickly, confrontations with authorities are rare.<sup>n65</sup> As a result, the Animal Welfare Act is generally viewed as nothing more than legal text without a means for enforcement. This is evidenced by systemic illegal poaching practices that results in rhinos being taken down by poisonous darts only to wake up without a horn and "bleed to death **[\*470]** very painfully and slowly."<sup>n66</sup> These continued violations of the Animal Welfare Act by poachers demonstrate the minimal effect (if any) the Act has on the black market ivory trade.

The WCA, on the other hand, focuses on punitive measures for the hunting of protected animals and the prohibition of certain hunting techniques.<sup>n67</sup> In this regard, the killing of any protected animal is strictly prohibited in a game reserve, controlled area, or wetlands reserve without a permit or license.<sup>n68</sup> The WCA goes further to classify animals on a category from one to three; one being the most restrictive.<sup>n69</sup> The goal behind this is to limit licenses for those under stricter classifications. Currently elephants and rhinos are under Category I and afforded the highest protections.<sup>n70</sup> Therefore, penalties range from five to ten years imprisonment and/or a fine of \$ 315 to \$ 1,260.<sup>n71</sup>

Certain hunting measures and practices are also prohibited under the WCA. Section 65(1), for example, provides a detailed list of banned methods.<sup>n72</sup> This includes the use of automatic or semi-automatic firearms and poison.<sup>n73</sup> Poachers caught employing illegal hunting methods are punishable by one to three years imprisonment and/or a fine ranging from \$ 1260 to \$ 2,520.<sup>n74</sup>

Bans are also imposed against the "selling, buying, transporting, accepting, exporting, or importing of trophies" of protected animal species without a proper permit.<sup>n75</sup> Infringements of these provisions can result in two to five years imprisonment and/or a fine of twice the trophy's value.<sup>n76</sup>

Enforcement of the WCA is left to the Wildlife Authority, which includes a paramilitary unit responsible for

the "capturing and photographing of wildlife and securing of trophies." <sup>n77</sup> While they are [\*471] given broad discretion to search, seize, and arrest, jurisdiction excludes conservation areas and the national parks. <sup>n78</sup> These zones fall under the regulations of the NPA, which aside from the area of control, is identical to the WCA. <sup>n79</sup> Additionally, the NPA appoints the Trustees of the Tanzania National Parks to watch over the country's conservation areas and sixteen national parks, which span an area of over 42,000 square kilometers. <sup>n80</sup>

There is no doubt that poachers potentially face numerous charges under the WCA and NPA. Not only are they generally indifferent to the regulations' requirements for licenses and permits, but also often engage in prohibited hunting practices. <sup>n81</sup> This includes the use of heavy weaponry and poisonous darts to sedate elephants and rhinos. <sup>n82</sup> While there is recent evidence that Tanzania is increasing their efforts to enforce laws under the WCA, by hiring nine hundred additional staff members for the wildlife division, installing twenty-four hour security guards at national park entrances, and even implementing a shoot-on-sight policy for poachers, <sup>n83</sup> rhino and elephant poaching remains on the rise. <sup>n84</sup> This continuous growth in poaching can be attributed to Tanzania's sheer geographic size. In all, the country's game rangers and enforcement officers are expected to cover a 232,535 square kilometer area, which is roughly the size of the United Kingdom. <sup>n85</sup>

To put this in better perspective, one of Southern Tanzania's well-known reserves, the Selous Game Reserve, spans a 55,000 square kilometer area. <sup>n86</sup> While there are 285 wildlife rangers on full staff in that park to cover territory essentially the size of Rwanda, [\*472] only about 150 are ever working simultaneously. <sup>n87</sup> This makes it nearly impossible to catch poachers, and let alone, successfully out-gun their "brand-new automatic rifles that put the rangers' firepower to shame." <sup>n88</sup> And given the rare chance that a poacher is caught, it is nearly impossible to even bring him to trial since they "almost always [get] enough money to grease the palms of anyone who matters." <sup>n89</sup> Accordingly, these "weak penalties meted out to those caught ultimately only serve to further facilitate the trafficking of animals" by encouraging others to take advantage of loose protections and weak enforcement. <sup>n90</sup> Overall, Tanzania's legal system falls victim to many of the same problems in Mozambique because the task for domestic legal enforcement is simply too overwhelming in the face of weak penalties, permeating corruption and the lack of government funding.

As evidenced from the legal protections in both countries, the illegal ivory trade feeds on ineffective domestic laws. Unfortunately, the current international response has not done much to alleviate this concern since safeguards remain passive in nature and, are accordingly, largely underutilized by individual states.

## B. The International Response

Though the international community cannot be blamed for complete inaction, it has taken an unfortunate backseat approach to legal enforcement of both criminal violations and infringements of its own regulations. The result is an underutilized system because it relies completely on individual states, whom are already overrun by corruption. The Convention on International Trade in Endangered Species (CITES) is a primary example. While CITES is the key international method of curbing elephant and rhino poaching through licensing and the regulation of imports/exports, it fails to enact a unitary means to enforce its own procedures without individual state assistance. <sup>n91</sup> Similarly, the creation of numerous nongovernmental [\*473] organizations (NGOs) simply do not provide any meaningful method to prosecute high-level criminals or enforce stricter poaching laws domestically - which is the missing piece to this dilemma. For this reason, current international efforts, through the establishment of international conventions and NGO's, fall short of providing any permanent solution to the dwindling elephant and rhino populations in Mozambique and Tanzania.

CITES was enacted on July 1, 1975, and is one of the keystones of international law to help preserve elephants and rhinos. <sup>n92</sup> As its name suggests, CITES covers only international trade, not any trade or conduct within a country - though the parties to CITES usually enact parallel domestic laws (like the federal Endangered Species Act) intended to protect certain endangered species. <sup>n93</sup> The main goal of CITES, as stated in its Preamble, is to recognize "that wild fauna and flora in their many beautiful and varied forms [are] an irreplaceable part of the natural systems of the earth which must be protected for this and the generations

to come." <sup>n94</sup> In doing so, CITES attempts to assist individual states in the preservation of designated fauna and flora mainly by providing passive assistance through statistical monitoring and the limitation of imports/exports. <sup>n95</sup>

In this regard, two new programs were implemented specifically to monitor elephant populations and ivory seizures in participating states. "MIKE" or "Monitoring the Illegal Killing of Elephants," was one of these programs adopted during CITES' 41st annual meeting in 1999. <sup>n96</sup> In fulfilling MIKE's goal of measuring poaching in participating states, CITES designated resources to assist in the long-term management of elephant populations: by "... measuring levels and trends in the illegal hunting of elephants; ... determining changes in these trends over time; and ... determining the factors causing or associated with such changes, and ... assessing in particular to what extent observed trends are a result of any decisions taken by the Conference of the Parties to CITES." <sup>n97</sup> In providing **[\*474]** statistical analysis through aerial and ground surveys of both elephant populations and ongoing poaching activities, this measure hoped to provide critical information to individual states like Tanzania and Mozambique. <sup>n98</sup>

The Elephant Trade Information System (ETIS) was the other control measure implemented by CITES in 1997 to measure ivory seizures in various states. <sup>n99</sup> This differed from MIKE because the focus was on the "levels and trends in illegal trade, rather than the illegal killing of elephants." <sup>n100</sup> Both MIKE and ETIS are just some examples of CITES' efforts to curb poaching through research and passive efforts.

One of CITES' most impactful functions, however, involves the classification of the elephant and rhino species into one of three protected appendices for the purposes of limiting imports/exports internationally. <sup>n101</sup> Each appendix indicates the level of restrictiveness in regards to the import/export of the specific fauna and flora. <sup>n102</sup> This also includes specific limitations on the amount of ivory that Mozambique and Tanzania can import/export legally with a license. <sup>n103</sup>

Appendix I is the most restrictive. Generally, species categorized here are threatened with extinction and are subject to particularly strict regulation, and any transport of wildlife or fauna is only authorized in exceptional circumstances. <sup>n104</sup> Specifically, imports/exports will require a permit that will only be granted by the "Scientific Authority of the State" when "such [transportation] will not be detrimental to the survival of the species." <sup>n105</sup> Moreover, there is also a requirement for a reexport certificate that "may be granted only when the reexporting state is satisfied that the specimen was imported into that **[\*475]** state in accordance with the Convention." <sup>n106</sup>

Appendix II provides intermediate protection for all species that are currently not threatened with extinction but may become so without regulation. <sup>n107</sup> Though the limitations regarding export/reexport are similar to Appendix I, the rules regarding import are far less rigorous. In fact, no import permit is required and imports for commercial purposes are also allowed. <sup>n108</sup>

Lastly, Appendix III guarantees the least protection to "'all species which any Party identifies as being subject to regulation within its jurisdiction for the purposes of preventing or restricting exploitation.'" <sup>n109</sup> Unlike species categorized in Appendices I and II, the limitations for those under Appendix III are primarily derived from the laws of the exporting state. <sup>n110</sup>

Though "the African elephant, [or *Loxodonta Africana*], was first listed in Appendix III of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) in 1976 ... [it] ... moved to Appendix II the following year. In 1990, after nearly a decade during which African elephant populations dropped by almost 50%, the species was moved to Appendix I of CITES." <sup>n111</sup> In 1997, though some recovering populations in certain African regions were moved back to Appendix II with strict limitations on trade in ivory, elephants in Mozambique and Tanzania have remained under Appendix I protections. <sup>n112</sup> Moreover, the two species of rhino surviving in both countries, the black rhino (*Diceros bicornis*) and white rhino (*Ceratotherium simum*), have been categorized under Appendix I since April 2, 1977. <sup>n113</sup>

So while CITES has provided numerous modes of assistance to combat poaching through MIKE, ETIS, and import/export limitations, **[\*476]** it ultimately fails to provide an effective deterrent because its measures are passive in nature and enforcement is left to dwindling domestic state actors. This includes the states'



appointment of their own Management and Scientific Authorities to administer and implement CITES' import/export safeguards. Even MIKE and ETIS require states to appoint their own national representatives who, in turn, help implement their statistical analysis. This heavy reliance on individual states has certainly proved ineffective for countries like Mozambique and Tanzania who are already infested by rampant corruption and a clear lack of funding.

As evidenced by increased patterns of bribery at the highest levels of local government and rises in poaching, the African elephant's upgrade to Appendix I has done little for Mozambique and Tanzania. There, the statistical evidence showed that, though the shifting of African elephants to Appendix I in 1990 "relieved the pressure and key elephant populations began recovering ... it was soon undermined" by "the vast profits available from poaching."<sup>n114</sup> Recent reports from Mozambique supported such a claim when they started identifying increasing instances of local corruption, including the involvement of game rangers to assist poachers to find areas with high populations of elephants and rhinos.<sup>n115</sup> These instances of bribery often involved a simple payment of \$ 80, which was equivalent to a game ranger's salary for one month.<sup>n116</sup> Ultimately, enticing bribes and the evidence of corruption that erupted within Tanzania's own government are primary reasons local enforcement of CITES' regulations are often unsuccessful.

The poaching surge in Tanzania and Mozambique subsequent to CITES upgrading the elephant and rhino to Appendix I in 1990 also supports this claim. As evidenced by MIKE's own statistics, the frequency of poaching drastically increased from 2002 through 2011.<sup>n117</sup> This is illustrated through the utilized "PIKE" value, which [**\*477**] stands for "the proportion of illegally killed elephants."<sup>n118</sup> Under this test, the total number of illegally killed elephants discovered are divided by the overall number of elephant carcasses encountered at each site.<sup>n119</sup> The result yields a proportion with higher numbers representing increased frequencies of poaching.<sup>n120</sup> Accordingly, the earliest recorded PIKE value in Mozambique's Cabora Bassa region in 2002 measured a proportion of 0 and rose radically to .83 in 2011. Similarly, the 2002 PIKE value in Tanzania's Ruaha Rungwa region gauged a value of .1 and swelled to .94 in 2011.<sup>n121</sup> Tanzania was even identified as one of the largest sources of illegal ivory during this time, with close to twenty tons seized between 2010 and 2013.<sup>n122</sup>

Rhinos also faced a similar fate despite CITES' protections. For example, the black rhino was listed in Appendix I since April 02, 1977.<sup>n123</sup> At that time, they numbered over 10,000 in population.<sup>n124</sup> However, their numbers have decreased to an estimated 100 in 2011 and to near extinction today.<sup>n125</sup> Mozambique was no different and fell prey to increased rhino poaching that has left both white and black rhinos on the "brink of vanishing."<sup>n126</sup> Such rapid increases of poaching, despite the enactment of CITES' passive regulatory safeguards, verify its inability to combat this elusive ivory trade.

NGOs represent another form of international aid against the illegal trade in ivory. While many exist today, the most influential organizations are the International Union for Conservation of Nature (IUCN), the World Wide Fund for Nature (WWF), and the Trade Records Analysis for Fauna and Flora in International Commerce [**\*478**] (TRAFFIC). Similar to CITES and its numerous regulations, NGOs are unable to actively assist states in enforcing prosecution and the laws they endorse. While they are able to contribute precious resources in the study and analysis of elephants and rhinos, more is needed to actually prevent the rise of poaching.

The IUCN, for example, "focuses on valuing and conserving nature, ensuring effective and equitable governance of its use, and deploying nature-based solutions to global challenges in climate, food and development."<sup>n127</sup> One of their most effective tools in regards to the diminishing numbers of elephants and rhinos is the hosting of the World Conservation Congress every four years.<sup>n128</sup> This is a meeting of thousands of global leaders to talk about the world's most pressing environmental challenges, including the black market ivory trade.<sup>n129</sup> Such efforts to consolidate global leaders under one roof and foster more unified efforts to combat environmental challenges have led to the successful creation of several online databases, including the IUCN Red List of Threatened Species.<sup>n130</sup> This extensive online source provides detailed assessments and backgrounds of selected species threatened with extinction.<sup>n131</sup> Accordingly, partner states are able to access their databases and better gauge their elephant and rhino populations as well as local poaching trends.

The WWF has a similar function to the IUCN: to "conserve nature and reduce the most pressing threats to the diversity of life on Earth." <sup>n132</sup> Some of its most influential work involves its collaborative efforts with global business leaders, such as Coca Cola and Avon, to raise environmental awareness in the black market ivory trade. <sup>n133</sup> This includes the provisions of monetary funding and wildlife experts in order to better implement various conservation projects **[\*479]** around the world. <sup>n134</sup>

Lastly, TRAFFIC works "globally on trade in wild animals and plants in the context of both biodiversity conservation and sustainable development." <sup>n135</sup> It focuses on analyzing wildlife trends, developing consumer insight, and encouraging governments like Tanzania and Mozambique to change their poaching laws. <sup>n136</sup> Recent efforts concentrate on the poaching of rhinos and the illegal ivory trade. Since 2000, TRAFFIC has also partnered with the WWF and IUCN to highlight major concerns to CITES, launched intensive studies of poaching, and published expansive reports to the global community to raise awareness. <sup>n137</sup>

As evidenced, NGO's have provided monumental funding and resources in the fight against the black market ivory trade in Mozambique and Tanzania. However, all of them share one common shortcoming: Their efforts are passive and ultimately rely on individual states to implement them. Similar to the enforcement of CITES, strict reliance on individual state autonomy cannot resolve a growing and systemic ivory trade. Instead, as I will propose in the next section, we must encourage active international involvement through prosecution. As such, the international crime of genocide is just one device for imposing criminal punishments on poachers and high-level criminals in the black market ivory trade. Though this strategy stretches the use of a human crime towards an animal species, I believe the application of genocide recognizes fundamental morals that cannot be overlooked.

### III. A Novel Answer for a Novel Challenge: Applying Provisions Regarding Genocide to Poaching

The black market ivory trade has grown arguably immune to Mozambique and Tanzania's domestic safeguards as well as the current international protections in place. Absent a major change at the domestic enforcement level, the only option to prevent extinction **[\*480]** of elephants and rhinos may be an innovative international strategy to combat the scourge of poaching.

During this Section, I suggest an expansion of the role of the International Criminal Court (ICC), the international community's criminal prosecuting body, by suggesting the enforcement of the crime of genocide against elephants and rhinos. As such, I will demonstrate satisfaction of both (A) procedural and (B) substantive requirements to establish genocide of these species as a crime that can be prosecuted in the ICC. And while this may suggest a radical proposal, it is a necessary one to effectively punish those heinous acts resulting in the total or partial destruction of the elephant and rhino species.

#### A. Procedural Requirements

The ICC was a by-product of the Rome Statute of the ICC and was formally established in 2002 as a way to provide "a permanent international criminal court." <sup>n138</sup> Up to that point, the international community relied on ad hoc tribunals to resolve regional conflicts. <sup>n139</sup> Because they were often limited in jurisdiction and scope to specific situations, "there was general agreement that an independent, permanent criminal court was needed." <sup>n140</sup> Moreover, in light of more recent acts of genocide in Rwanda and the former Yugoslavia, a more stable prosecuting body was seen as necessary to efficiently investigate cases, prosecute crimes, and impose sentences. <sup>n141</sup>

Unlike other international organs, the ICC is solely responsible for "bringing cases against individuals accused of committing crimes as part of a situation." <sup>n142</sup> A situation generally "refers to a group of crimes within the Court's jurisdiction committed within a particular geographic and temporal context." <sup>n143</sup> This is generally triggered by one of three international bodies: a State Party to the **[\*481]** Rome Statute of the ICC, the ICC Prosecutor himself, or the Security Council. <sup>n144</sup> After there is an appropriate trigger from one of the three international bodies, the prosecutor must demonstrate the existence of jurisdiction and "admissibility" during a preliminary examination, in order to proceed to a full investigation and trial. <sup>n145</sup>

## 1. Jurisdiction

In the international context, this term carries a slightly different meaning. Here, there are three types of jurisdiction required: national/territorial, subject matter, and temporal jurisdiction.<sup>n146</sup> The prosecutor must satisfy all of them to move forward.

National/territorial jurisdiction is a requirement only if a State Party or the ICC Prosecutor refers the case; Security Council referrals are exempt from this requirement. In order to establish this jurisdictional aspect, the criminal conduct must either occur "on the territory" of the referring State Party or "the person accused of the crime" must be a national of the State Party.<sup>n147</sup> Nonparty states, however, can also accept the jurisdiction of the ICC by ad hoc declaration.<sup>n148</sup>

Jurisdiction *ratione temporis* or temporal jurisdiction, on the other hand, takes into account when the crime was committed.<sup>n149</sup> Generally, the "ICC only has jurisdiction for acts performed after the Rome Treaty came into effect on July 1, 2002" or subsequent to state ratification of the treaty.<sup>n150</sup>

Lastly, subject matter jurisdiction is "limited to the most serious crimes of concern to the international community as a whole." This includes: genocide, crimes against humanity, war crimes, and crimes of aggression.<sup>n151</sup>

**[\*482]** Here, all forms of jurisdiction can be satisfied for Mozambique and Tanzania in connection with elephant and rhino poaching. In regards to Mozambique, though they are not a party to the Rome Statute, national/territorial jurisdiction can be satisfied by the state's ad hoc declaration.<sup>n152</sup> Even if Mozambique refuses to voluntarily submit themselves to the Rome Statute, the Security Council can refer the situation on their behalf if they feel it is in the interest of international peace and security.<sup>n153</sup> In regards to Tanzania, because they are a state party to the Rome Statute, the ICC has national/territorial jurisdiction over events occurring in the state.<sup>n154</sup>

Jurisdiction *ratione temporis* is also satisfied for both states. Mozambique is limited to situations occurring after the Rome Statute's implementation on July 1, 2002, because they are not a State Party.<sup>n155</sup> However, because Tanzania has been a state party since August 20, 2002, the ICC will have jurisdiction for situations occurring after this date. Finally, as I will discuss in detail during the next subsection, subject matter jurisdiction is also satisfied because the crime of genocide is applicable to the situation in Mozambique and Tanzania.

All three forms of jurisdiction can be met here for both states.

## 2. Admissibility

Admissibility analysis is also part of the prosecutor's preliminary phase.<sup>n156</sup> There are two considerations during this phase: "complementarity" and "gravity."<sup>n157</sup>

Complementarity accounts for "whether genuine investigations **[\*483]** or prosecutions have [already] been undertaken by [domestic governments] with jurisdiction over the matter."<sup>n158</sup> The goal here is to avoid a duplicate international investigation when there is a pending domestic charge.<sup>n159</sup> Though there are a number of factors considered, the prosecutor can consider (1) whether the actor is undergoing a domestic proceeding for the same crime, (2) whether the domestic proceeding was delayed in a manner that was inconsistent with an intent to bring the individual concerned to justice, and (3) whether the proceeding was conducted independently or impartially.<sup>n160</sup>

The second component of admissibility measures "situational gravity," which is the seriousness of potential cases.<sup>n161</sup> Here, the prosecutor determines, by weighing both quantitative and qualitative elements, which "situations are sufficiently grave to bring before the court."<sup>n162</sup> Items of particular concern are "the number of direct and indirect victims, the extent of the damage caused by the crimes, and their geographical or temporal spread."<sup>n163</sup>

Here, situations regarding the black market ivory trade in Mozambique and Tanzania are mostly

admissible, depending on the individual circumstances. In regards to complementarity, while there are existing domestic proceedings, they are frequently ineffective or dismissed without a trial.<sup>n164</sup> As evidenced by those poachers who are arrested and released after a payment of bribes or fined without further investigation, domestic prosecutions of poachers involved in the black market ivory trade are increasingly rare.<sup>n165</sup> Therefore, as long as the Prosecutor can show instances of governmental [\*484] corruption, he can prove that existing domestic proceedings are not conducted with the principal intent of bringing justice. Accordingly, a demonstration of the absence of genuine legal proceedings will generally satisfy complementarity.

In addition, gravity is well-established through the sheer number of elephant and rhino deaths and the existence of heinous poaching practices. As shown in the first section, elephants and rhinos have been a primary target of systemic killing, leaving them maimed, crippled, or worse. With elephants estimated to disappear completely by 2020 and rhino populations barely intact in Mozambique and Tanzania, the black market ivory trade has left a deafening effect on their respective populations.<sup>n166</sup> Therefore, gravity can be established not only by showing the correlation between the decrease in elephant and rhino populations with poaching, but also the manner in which these slaughters are committed.

Therefore, admissibility is arguably satisfied as long as the specific circumstances warrant complementarity and gravity.

Ultimately, while every situation may vary in context and shift the satisfaction of the various jurisdictional and admissibility elements, most poachers and high-level criminals involved in the black market ivory trade are well within the ICC's procedural grasp.

## B. Substantive Elements

Today, the ICC relies on the narrow interpretation of Article 6 of the Rome Statute to define the substantive requirements for genocide:

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; or (e) Forcibly transferring children of the group to [\*485] another group.<sup>n167</sup>

Under this definition, the Prosecutor has three distinct requirements: to establish the protected class according to nationality, ethnicity, race, or religion; actionable conduct; and the specific intent to destroy the group in whole or in part.

However, the crime of genocide need not be derived from the strict textual interpretation of the Rome Statute because it is "not the sole authority on the crime's" definition.<sup>n168</sup> Contrarily, international law can be derived from a variety of sources: international conventions or statutes; custom; general principles of law recognized by civilized nations; and judicial decisions and teachings of qualified publicists or of various nations.<sup>n169</sup> Moreover, custom, or customary international law, has long-accepted a policy-based approach that focuses on the moral and social purposes of the law and not necessarily the strict textual meaning of a statute.<sup>n170</sup>

Customary international law remains one of the most "powerful" and "subliminal" foundations.<sup>n171</sup> In order to prove its existence, there must be evidence that the "rule has been followed as a 'general practice,' and has been 'accepted as law.'"<sup>n172</sup> Due to varying cultural and political differences between states, customary international law can vary drastically between countries. However, there are some customs that are so well-recognized that they are universally adopted as customary international law. These peremptory practices represent "a higher law" or jus cogens norm: one that is "universally condemned ... [making] perpetrators ... enemies of all people."<sup>n173</sup> Because they are so significant, the international community

allows universal jurisdiction or any State to prosecute for its violations. Additionally, in many cases, they can also override contradicting statutes, such as the Rome Statute.

Similar to Justice Jackson's plea for judicial action based on the overall betterment of mankind, I argue that the prohibition of [\*486] genocide is a jus cogens norm that is not meant to take on a narrow textual reading, like the one found in the Rome Statute of the ICC. Both state practice and state acceptance into law have certified this assertion through the customary prosecution of genocide in various countries through universal jurisdiction - an international practice only accepted for violations of jus cogens norms. "The International Court of Justice (ICJ), <sup>n174</sup> for example, made this clear when it [declared]...that the prohibition of genocide is ""binding on states, even without any contractual obligation." <sup>n175</sup> In essence, they encouraged the prosecution of genocide even when states had no jurisdiction or causal link to the individual committing the crime.

Numerous other precedents have also clarified genocide as a jus cogens violation through state practice and acceptance into law. Starting with *Israel v. Eichmann*, the Israeli Courts tried the defendant for genocide on the basis of universal jurisdiction derived from a violation of jus cogens norms. Then the US Courts also acknowledged the same principles in *Demjanjuk v. Petrovsky* when they agreed to extradite the defendant to another state for genocide by universal jurisdiction. Ultimately, when these courts adopted the principles of universal jurisdiction to prosecute for genocide, they recognized it as a jus cogens violation through state practice and acceptance into law. <sup>n176</sup>

But aside from the recognition of genocide as a violation of a jus cogens norm, its precise substantive requirements are also developed from international peremptory norms. In this regard, the international community adopts a broader application of genocide (as compared to the Rome Statute's definition) that can be shown through examples of customary state practice. As evidenced through the initial drafting attempts of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), that eventually led to the adoption of genocide's definition in the Rome Statute, the foundation of the crime rested on broader principles of humanity rather than a [\*487] focus on restricted protected groups. <sup>n177</sup> Accordingly, customary international law's understanding of genocide must "supersede [those] conflicting or less expansive treaty provisions" found in the Rome Statute. <sup>n178</sup>

As evidenced from the first attempts at establishing an accepted definition of genocide subsequent to the Nuremberg trials, it was clear that many preferred a broader application that focused on morality. <sup>n179</sup> In fact, after scholars and government representatives struggled to label the Nazis' targeted attacks against the Jews, it was not until jurist and Polish scholar, Raphael Lemkin, recommended the term of "genocide" to describe the concentrated "effort to eradicate human collectivities," that the international community finally began to use the term. <sup>n180</sup> "For Lemkin, the critical element of genocide was that while singular acts are aimed at individuals, the broader aim of genocide is to destroy entire ... collectivities." <sup>n181</sup> Rather than limit its application to certain protected groups, Lemkin focused on a policy rationale that the ""legal conscience of mankind ... [was] absolutely essential to coexistence in the international community." <sup>n182</sup>

During the General Assembly's 55th session, they also adopted a similar understanding of genocide that described a "broader" application. <sup>n183</sup> As evident from the Assembly resolution, they unanimously adopted Lemkin's formulation of genocide as customary international law by focusing on its "denial of the right of existence [that] shocks the conscience of mankind ... and is contrary [\*488] to the law and the spirit and aims of the United Nations." <sup>n184</sup> In accepting this interpretation of genocide, that did not delineate between protected groups, the General Assembly established state practice and acceptance of the definition of genocide as it was historically perceived by Lemkin - one that focused on overall humanity and the heinousness of eradicating entire groups instead of particular subjects.

Accordingly the 55th Session of the General Assembly arguably exhibited state practice and general acceptance into law since their opinions were often understood to carry the weight of the world's opinion. Through reiterating Lemkin's point that the international community needed to recognize genocide as a violation of a jus cogens norm due to its "great losses to humanity" that ran "contrary to moral law and the spirit and aims of the United Nations," they ultimately agreed to apply genocide broadly rather than limit its application to particular protected groups (nationality, ethnicity, race, or religion) as described in the Rome

Statute. <sup>n185</sup>

The 55th General Assembly's opinion has also been followed by other incidences of state practice as well. For example, after the mass killings in Khmer Rouge, when the Court failed to label the incident as genocide, there was an uproar from many international communities and scholars that demanded the incident be labeled as genocide. <sup>n186</sup> There, despite "nearly a quarter of the population" "reportedly killed during [the] ... purge," along with numerous examples of precise targeting, mass exterminations and torture, the Court never found incidents of genocide because the victims were killed on the basis of their political affiliation instead of one of the protected categories under the Rome Statute's definition. <sup>n187</sup>

Therefore, in opposition to the court, a large portion of the global community, including historians, sociologists, journalists, and laypersons took the same position as Lemkin and the 55th Session of the General Assembly. As such, they argued that the conduct and character of the atrocities in Khmer Rouge were the primary indicators of genocide and not the victims' protected class. Through [\*489] comparing the conduct in the Rwandan and Yugoslavian genocide, they hoped to convince the court of this point and dispel the mistake of focusing on a narrow textual reading of the Rome Statute's definition of genocide. <sup>n188</sup>

In the 1994 Rwandan civil unrest, for example, the unimaginable atrocities that led to the death of "between eight-hundred thousand and one million men, women and children" was labeled as genocide. <sup>n189</sup> Similarly, international courts depicted the Yugoslavia conflict from 1992 through 1995 as genocide because it resulted in the deaths of close to 100,000 people and involved some of the "most violent" events against certain ethnicities. <sup>n190</sup> In comparing the conduct and character of the mass killings in Khmer Rouge, which took the lives of nearly a quarter of the population, there was no reason why the conflict was any different. Accordingly, the focus on the overall inhumanity of the mass destruction rather than the specific classification of the victims' protected class was arguably the more accurate benchmark to define a crime of genocide.

Aside from numerous examples of state practice, accepting a broader definition of genocide, customary international law has also accepted a general policy-based argument that supports the Lemkin conception of genocide "where there is ambiguity or uncertainty" in the statute. This contention also supports the focus on moral and social purposes rather than the narrow interpretation of the Rome Statute.

In *Prosecutor v. Erdemovic*, the defendant was charged with numerous international crimes. In his rebuttal, he asserted duress as a complete defense to justify the voluntary slaughter of innocent victims. Because there was no clear international statute regarding duress as a complete defense, the court looked to various sources of domestic law to establish customary practice. In doing so, they found numerous state definitions and came to rely on the United States penal code. <sup>n191</sup> Under this understanding, duress remained a general [\*490] defense to all crimes, disregarding the innocence of the victim. Despite this, the court believed policy should be the primary consideration before relying on a strict textual application of the US law. As such, they focused on the "humanitarian, moral and social purposes of the law." <sup>n192</sup> Because international law was not meant to facilitate the slaughter of innocent people, they overruled the US interpretation and did not allow duress as a complete defense in international law.

Similar to the original Lemkin conception of genocide, the *Erdemovic* Court focused on the fundamental goals and policies of international law rather than strict textual interpretation. Accordingly, the "most elementary principles of morality" rather than the Rome Statute's definition of genocide can be applied as customary international law. Following this rationale, I argue that the massacre of elephants and rhinos can be prosecuted as a violation of the *jus cogens* norm to prohibit genocide. Because customary international law focuses on the "broader aim of destroying [an] entire ... collectivity," the combination of lethal poaching practices and mass exterminations is certainly enough to sustain an inference of genocide.

Any other argument not only discounts the *jus cogens* norm prohibiting genocide but also supports the inevitable collapse of Mozambique and Tanzania's economy and wildlife. Tourism, for instance, accounts for thirteen to seventeen percent of Tanzania's GDP (the largest source of foreign exchange) and directly employs over 400,000 people. <sup>n193</sup> Moreover, photographic safaris in the Selous generate an income of \$ 1.6 million. <sup>n194</sup> As such, the survival of the elephant and rhino species is as crucial to both states as is their own state stability. <sup>n195</sup>

Ultimately, customary international law's acceptance of Lemkin's understanding of genocide remains a hopeful proposition in the application of the crime as an international charge. Nonetheless, even [\*491] if the prohibition of genocide as a jus cogens norm falls short, I argue that the three genocidal elements under the Rome Statute can still be satisfied: (1) that elephants and rhinos are inclusive in the definition as a protected class; (2) the "mens rea, which gives genocide its specialty and distinguishes it from ... other crimes against international humanitarian law," and (3) genocidal conduct.<sup>n196</sup>

### 1. Elephants and Rhinos Fall Within Genocide's Protected Class

The first threshold requires the targeted victims to be classified as a national, ethnic, racial or religious group.<sup>n197</sup> Under the *Notenbhom* decision,

A national group was defined as a collection of people who were perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties; an ethnic group was generally defined as a group whose members shared a common language or culture; racial group [was] based on the hereditary physical traits ... identified with a geographical region, irrespective of linguistic, cultural, national, or religious factors; and a religious group was one whose members shared the same religion, denomination or mode of worship.<sup>n198</sup>

While the use of "people" generally excludes animals, courts are evolving and adapting a more unconventional application that is more inclusive of groups not specified by statute. Moreover, many courts are even revolutionizing their domestic laws, which have historically applied to human beings, to allow for animals as a protected category.

In the case of *Prosecutor v. Akayesu*, Akayesu was indicted and ultimately charged for the crime of genocide, among other [\*492] international crimes.<sup>n199</sup> His main role in the conflict, as bourgmestre (town chief) of Taba, led to over 2,000 Tutsis massacred as well as numerous other acts of sexual violence, beatings, and murders.<sup>n200</sup> Here, the major question was whether the targeting of Tutsis demonstrated directed violence against an "ethnic" group as classified under the Rome Statute. Even though the classification of "Tutsi" historically referred to an individual's lineage, the Tribunal held that it satisfied as an ethnical organization since understandings of group classifications can "shift over time ... [and] ... the group, the definition of the group to which one feels allied may, change over time."<sup>n201</sup> Moreover, it was more important that the classification represent a "stable and permanent group" than a strictly ethnical collection.<sup>n202</sup>

Additionally, in a 2014 landmark case, an Argentine court recognized the human qualities of an animal. Here, "Sandra, a 29-year-old Sumatran orangutan at the Buenos Aires Zoo," through counsel, challenged the legality of her detention or imprisonment.<sup>n203</sup> In this case, the court held that the ape had sufficient cognitive functions and should be granted human right freedoms.<sup>n204</sup> Other countries, like France have also followed suit. For example, in a recent 2015 victory by the French Animal Rights Organization, a bill was approved that essentially upgraded animals' privileges to those of human beings in many respects.<sup>n205</sup> Long recognized as property and nothing more than the equivalence of an "armchair" in French [\*493] law, these animals can now be subjects of shared custody in divorce proceedings or a source for pain and suffering damages in tort cases; concepts generally associated with humans victims in most other countries.

Here, both cases show the Court's willingness to recognize other protected groups outside the Rome Statute's limited definition of genocide. For one, the Akayesu standard, classifying groups by how stable and permanent they are, as opposed to the narrow and textual requirement of national, ethnic, racial, or religious categorization, can allow for the classification of the elephant and rhino as a steady and identifiable species. Furthermore, in regards to the more obvious discrepancy that animals are not inclusive in the textual definition of a targetable group for genocide, recent animal rights case, like Sandra the orangutan, shows proof to the contrary. And though Sandra's case involves a domestic proceeding, it certainly reflects the international perception of animals as more than mere property, but as individuals worthy of a protected legal status.

Accordingly, this element can be arguably satisfied. And while animal rights cases, like those in Argentina and France, remain as aberrational decisions, there is no doubt that Courts are making a progressive movement towards accepting animal victims in traditionally recognized human crimes.

## 2. Mens Rea

Mens rea describes the "criminal intent" of the defendant. <sup>n206</sup> In a case for genocide, it requires the intent to destroy the elephant and rhino species in whole or in part. <sup>n207</sup> Though different courts recognize that "it is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe," it is enough to intend the death of a significant portion of the group. <sup>n208</sup> Moreover, "a single perpetrator killing a single individual with a genocidal intent" will satisfy. <sup>n209</sup>

In Yugoslavia, a special tribunal led the prosecution of **[\*494]** Prosecutor v Jelisc in a case for genocide. <sup>n210</sup> Jelisc held a position of authority at Luka Camp in Brcko, a municipality in northeastern Bosnia and Herzegovina. <sup>n211</sup> There, he dubbed himself the Serb Adolf and killed Muslims at will. Though he was ultimately acquitted on procedural grounds, the Court agreed that all the elements for genocide were present. <sup>n212</sup> Focusing specifically on Jelisc's mens rea, the court inferred from his "announcements of his quota of daily killings" and the urge to "execute twenty to thirty persons before being able to drink his coffee each morning" as sufficient evidence of intent. <sup>n213</sup>

The present genocide against elephant and rhinos in Mozambique and Tanzania is no different. Similar to Jelisc, while gathering direct evidence of specific intent from poachers in the ivory trade is not always possible, "[it] can be inferred from such factors as 'the scale of atrocities committed' and 'the systematic targeting of victims on account of their membership of a particular group.'" <sup>n214</sup> Moreover, as long as "the conduct for which the suspect is allegedly responsible ... [took] place in the context of a manifest pattern of similar conduct directed against the targeted group," there is proof of intent. <sup>n215</sup> Accordingly, poachers of the black market ivory trade can be culpable due to objective proof of the patterns of killing and systemic targeting of elephants and rhinos.

## 3. Genocidal Conduct

The last element requires the existence of one of the five listed actions under Article 6 of the Rome Statute. This is easily satisfied with respect to the poaching at issue because, depending on the individual circumstances, most cases will involve either "killing members of the group," "causing serious bodily or mental harm to members of the group," or "deliberately inflicting on the group **[\*495]** conditions of life calculated to bring about its physical destruction in whole or in part." <sup>n216</sup> As shown in the first section, most poaching incidents involve either the serious maiming or death of the animal in order to extract ivory. Moreover, there is a deliberate targeting of elephants and rhinos because they are the only species that can grow ivory tusks.

Despite numerous precedent and historical practices regarding the broader application of genocide, it still remains a mere proposal to combat the black market ivory trade. I only hope, through the showing of both procedural and substantive elements, that it may prove to be a viable and innovative remedy to curb the extermination of a species in light of the current rise in poaching.

## Conclusion

The current state of the elephant and rhino populations in Mozambique and Tanzania begs for innovative measures to curb the black market ivory trade. The suggestion presented is merely one method to provide for international charges through the application of genocide. Ultimately, actively fighting this deadly trade through the criminal prosecution of poachers not only promotes justice but also ensures the survival of Mozambique and Tanzania as independent states. In the end, saving their elephant and rhino populations (the "keystone to the tourism industry ... and the largest source of foreign exchange") not only spares animal lives, but ensures the survival of their economies as well. We should not wait until it is too late to act.

## Legal Topics:



For related research and practice materials, see the following legal topics: GovernmentsAgriculture & FoodAnimal Welfare ActInternational Trade LawGeneral OverviewTortsStrict LiabilityHarm Caused by AnimalsGeneral Overview

## FOOTNOTES:

- n1. Beth Van Schaack & Ronald C. Slye, *International Criminal Law and its Enforcement* 101 (3rd ed. 2015).
- n2. *Id.*
- n3. *Id.* at 100.
- n4. *Id.* at 101.
- n5. See Van Schaack, *supra* note 1, at 101; Beth Van Schaack, Note: The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot, 106 *Yale L.J.* 2259, 2278 (1997).
- n6. Van Schaack, *supra* note 5, at 2262.
- n7. *Id.*
- n8. Bombing of Hiroshima and Nagasaki, *History.Com*, <http://www.history.com/to-pics/world-war-ii/bombing-of-hiroshima-and-nagasaki> (last visited Mar. 24, 2015).
- n9. The Nazi Genocide, <http://www.adolfhitler.dk/newpage8.htm> (last visited Mar. 24, 2015).
- n10. Ben Davies, *Black Market* 22, 27 (Adam Oswell, 2004).
- n11. See Environmentalists Call for Trade Sanctions Against Mozambique for Rhino and Elephant Poaching, *PR Newswire* (July 02, 2014), <http://www.prnewswire.com/news-releases/environmentalists-call-for-trade-sanctions-against-mozambique-for-rhino-and-elephant-poaching-265543811.html> (last visited Feb. 16, 2016); See Mozambique: Elephant Poaching "a National Disaster," *All Africa* (Sept. 22, 2014), <http://allafrica.com/stories/201409222278.html> (last visited Feb. 16, 2016).
- n12. Michelle Faul, Rhinos in Mozambique Likely Extinct, Expert Says; Elephants May Be Next, *Huffington Post* (May 2, 2013), [http://www.huffingtonpost.com/2013/05/02/rhinos-mozambique-extinct\\_n\\_3200840.html](http://www.huffingtonpost.com/2013/05/02/rhinos-mozambique-extinct_n_3200840.html) (last visited Feb. 16, 2016).
- n13. Environmental Investigation Agency, *Vanishing Point, Criminality, Corruption and the Devastation of Tanzania's Elephants 2* (2014), <http://eia-international.org/wp-content/uploads/EIA-Vanishing-Point-lo-res1.pdf> (last visited Feb. 16, 2016).
- n14. See Fumbuka Ng'wanakilala, Tanzania President Says Poaching Boom Threatens Elephant Population, *Reuters* (Feb. 13, 2014, 11:30 AM), <http://www.reuters.com/article/2014/02/13/us-tanzania-poaching-idUSBREA1C1CK20140213> (last visited Feb. 16, 2016); see Tanzania Renews Call For International Ban On All Ivory, Rhino Horn, *Mellowswan Foundation Africa Tanzania* (Oct. 19, 2014), <http://mellowswan-africa.org/tanzania-renews-call-for-international-ban-on-all-ivory-rhino-horn/> (last visited Feb. 16, 2016); see Elizabeth Gordon, What Can You Do About Elephant & Rhino Poaching, *Huffington Post* (Oct. 27, 2014), <http://www.huffingtonpost.com/elizabethgordon/what-you-can-do-about-elephant-rhino-poaching> (last visited Feb. 16, 2016).
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