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**Briefing Paper by Environmental Foundation Ltd for MC Mahawa 1052/17 case  
(Galgamuwa tusker)**

**1. Background**

The Asian Elephant (*Elephas maximus maximus*) is an endangered species,<sup>1</sup> who faces major threats as a result of poaching for ivory and habitat loss. The global trend of illegal ivory trade, of both African and Asian elephants have put many elephant populations at risk in the past decade. In some African range countries, the killing of elephants for tusks, dubbed blood ivory, to fuel illegal international markets in East Asia, has led to halving of elephant numbers.

In Sri Lanka, legislation provides for high conservation priority to elephants and their habitats. Sri Lankan elephants are recognized as a distinct subspecies, while Sri Lanka has the highest genetic diversity of Asian elephants.<sup>2</sup> However, in Sri Lanka only 6-7% of male elephant have tusks.<sup>3</sup> With a paucity of tuskers in the wild, it is pertinent that stringent actions be taken in connection to the targeted killing of the Galgamuwa tusker. The national law in Sri Lanka prohibits the commercial exploitation of wildlife resources.

The following briefing paper will highlight the key protections provided nationally and internationally for the prohibition on ivory trade.

**2. National Laws that Prohibit Illegal trade in Ivory**

The Fauna and Flora Protection Ordinance No.2 of 1937 as amended (FFPO) is the primary statute, which relates to the protection of elephants and tuskers in Sri Lanka. Under the FFPO, tusks are categorized as public property. Accordingly, violations in relation to elephant tusks are considered crimes against public property.<sup>4</sup> Sri Lanka in 1992 banned all trade in elephant ivory.

<sup>1</sup> The IUCN Red List of Threatened Species. Available at <http://www.iucnredlist.org/details/7140/0>

<sup>2</sup> Prithiviraj Fernando et al. *Current status of Asian Elephants in Sri Lanka* (2011). Available at [http://www.ccrsl.org/userobjects/2602\\_663\\_Fernando-11-SriLanka.pdf](http://www.ccrsl.org/userobjects/2602_663_Fernando-11-SriLanka.pdf)

<sup>3</sup> Santiapillai, C., Silva, A., Karyawasam, C., Esufali, S., Jayanithi, S., Basnayake, M., Unantenne, V. and Wijeyamohan, S. (1999), Trade in Asian elephant ivory in Sri Lanka. *Oryx*, 33: 176–180. doi:10.1046/j.1365-3008.1999.00041.x

<sup>4</sup> Section 24(4A)(a) of the FFPO.

The long title of the FFPO states that

“An ordinance to provide protection...for the **prevention of commercial and other misuse** of such flora and fauna for their conservation of the biodiversity of Sri Lanka...”

In keeping with the object and purpose enshrined in the long title, the FFPO contains several provisions that prevent tuskers from being subject to commercial and other misuse.

## **2.1. Killing of Tuskers**

Under section 12 of the FFPO, no persons shall kill, injure any elephant in any area outside a national reserve or sanctuary. Section 20 of the FFPO deems it an offence to “kill, injure or take any elephant or use any device of any description to harm an elephant...” Furthermore, the FFPO stipulates that any offence under the Act shall be a non-bailable offence.<sup>5</sup>

Even in relation to dead elephants, the FFPO states that it shall be an offence to “to take, dismember, remove, sell or purchase any carcass, of any dead elephant which is the property of the State...”<sup>6</sup> Section 28 of the interpretation part of the Ordinance defines “elephant” to mean a wild elephant which “includes a tusker.”

## **2.2. Being in possession of Tusks**

As stated above, under section 21 of the FFPO, removal of tusks from a dead elephant is prohibited. If one is in possession of an elephant tusk, the FFPO requires that such tusks must be registered. According to section 24 (1) of the FFPO, no person “shall have in his possession any tusk or tush or any part of a tusk or tush unless such tusk or tush has been registered with a prescribed officer.” Furthermore, the 1992 *Regulations for the Registration of Tusks and Tushes* stipulates the manner in which registration will be carried out.<sup>7</sup> Upon registration of a tusk, a person who has in his possession a tusk shall obtain a license in respect of such tusk.<sup>8</sup>

Section 24(3) deems it an offence to be in possession of a tusk which has not been registered. Moreover, such tusks which are not registered are “presumed to have been taken from the wild without lawful authority.”<sup>9</sup> The provision of the Public Property Act No.12 of 1982 shall accordingly be applied in respect of tusk which are presumed to be public property under this section.<sup>10</sup>

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<sup>5</sup> Section 20 (2) of the FFPO.

<sup>6</sup> Section 21 of the FFPO.

<sup>7</sup> Available at [http://www.dwc.gov.lk/?page\\_id=58](http://www.dwc.gov.lk/?page_id=58)

<sup>8</sup> section 24(A) of the FFPO.

<sup>9</sup> Section 24 (4A) of the FFPO.

<sup>10</sup> *Ibid.*

### **2.3. Prohibition on the Exportation of Tusks**

Commercial exploitation of elephant tusks is prohibited under the FFPO. Accordingly, exporting tusks is prohibited under section 19 and section 19A of the FFPO. No elephant, whether wild or tame may be exported from Sri Lanka without the authority of a special permit issued by the Director General. Furthermore, no person may export from Sri Lanka any tusk or part of tusk or any article containing ivory from a tusk.<sup>11</sup>

### **2.4. Special penalty for offences against elephants**

Section 58 A of the FFPO includes a special penalty for offences against elephants:

**58A.** Notwithstanding anything in any other provisions of this Ordinance, where any person is convicted of the offence of **killings hunting, shooting, injuring or taking**, or having in his possession or under his control, any wild elephant within a National Reserve or Sanctuary he shall be liable to be punished with a fine not less than two hundred and fifty thousand rupees and not more than five hundred thousand rupees or to imprisonment of either description for a term not less than five years and not exceeding ten years or to both such fine and imprisonment.

### **3.0. Applicable International Law that Prohibits Ivory Trade**

In an instance where there is sufficient evidence to prove that the elephant tusks were exported to another country, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) would apply. CITES is an international agreement, which ensures that international trade in specimens of wild animals does not threaten their survival. Sri Lanka acceded to CITES in 1979 which ensures that the Convention has binding effect. However, as a dualist country Sri Lanka has not enacted any enabling legislation which recognizes CITES domestically.

CITES lists elephants (1975) in Appendix I which include “species threatened with extinction which are or maybe affected by trade. Trade in specimens of these species must be subject to particularly strict regulations in order not to endanger further their survival and must only be authorized in exceptional circumstances.<sup>12</sup>” The United Nations Office on Drugs and Crimes issued a report in 2016 titled “World Wildlife Crime Report: Trafficking in Protected Species.<sup>13</sup>” The report elaborates on organized wildlife crime which includes transnational wildlife trafficking.<sup>14</sup> The report recognizes CITES as a trade agreement wherein national customs agents play a vital role in enforcement.

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<sup>11</sup> Section 19(A)(1) of the FFPO.

<sup>12</sup> Article 2 of CITES. Available at <https://www.cites.org/sites/default/files/eng/disc/CITES-Convention-EN.pdf>

<sup>13</sup> Available at [http://www.unodc.org/documents/data-and-analysis/wildlife/World\\_Wildlife\\_Crime\\_Report\\_2016\\_final.pdf](http://www.unodc.org/documents/data-and-analysis/wildlife/World_Wildlife_Crime_Report_2016_final.pdf)

<sup>14</sup> *Ibid* at page 23.

In 2012, Sri Lanka Customs stopped a transshipment of 359 African Elephant tusks. The bilateral agreement between CITES and Sri Lanka Customs was used to implement the Convention at our ports of entry and exit. This detection was a collaborative effort between INTERPOL, World Customs Organization and Sri Lanka Customs. INTERPOL further indicated that 3 additional shipments had been transshipped via Sri Lanka undetected that year. In keeping with the resolutions of the CITES Convention on the disposal of confiscated ivory, Sri Lanka destroyed the tusks in a public event.

In the Galgamuwa tusker case, there is evidence to implicate that few suspects had traded parts of tusk to Pakistan. In such an instance, CITES which applies to international trade becomes relevant. The framework of the FFPO stated above provides an adequate framework to implement CITES. Section 19A(3) of the FFPO in relation to prohibition on exporting tusks states that provisions of the Customs Ordinance shall apply. Similarly, section 40 of the FFPO prohibits export of mammals except under the authority of a permit issued in a prescribed form by a prescribed officer. Under which permits are issued only for scientific purposes.

If the investigations reveal that the suspects were engaged in illicit trading of ivory across the border, the Galgamuwa tusker case must be analyzed in the broader context of transnational wildlife trafficking.