



## **ON THE BURDEN OF PROOF**

It is often said that the best offense is a good defense. That is as true for politics as it is for sports. One of the best ways to erect a strong defense in matters political is to do any one of several things: change the subject, deflect attention, redefine the terms of reference or shift the burden of proof.

The last of these has happened with a proposed ban on all ivory trade, both international and domestic. The proposal has been formally presented to the 180 nations that will gather at the CITES 18th Conference of the Parties in Colombo, Sri Lanka. The nations of Bukina Faso, Cote d'Ivoire, Ethiopia, Gabon, Kenya, Liberia, Niger, Nigeria, and Syria claim that allowing some countries to trade ivory within their own borders opens the door for laundering illegally obtained ivory and encourages the poaching of elephants.

Opponents of such bans usually point to the total failure of prohibition in the United States in the 1920s. Because it was assumed that demand for alcohol would magically fade in the absence of availability, it actually provoked a significant increase in consumption, a major rise in organized crime, a jump in official corruption, and a burgeoning black market. The proponents of a ban on ivory trade ignore these incontrovertible facts. They believe that a ban on all domestic and international trade in elephant tusks will automatically put an end to poaching. It won't. In fact, it will likely increase poaching because prices will be higher, profits will be greater, and interest in a forbidden fruit will be increased

The proponents of the ban insist poaching will naturally wither when all sales become illegal. The problem is that there is absolutely no evidence of the validity for such an assumption. To the contrary, despite bans and trade restrictions over the past 40 years, the total number of elephants in Africa has been steadily diminishing. The point is that the natural deaths of elephants, deaths from human/animal conflicts, and elephants taken for their food value are all other reasons for the overall shrinking numbers of elephants.

So knowing these facts, the animal rights organizations that worked behind the scenes to help the nine countries research and phrase their resolution, *assert* without proof or detail, that

*...all domestic Ivory markets, legal or illegal, contribute to poaching.*

Paragraph 29 of their resolution CoP18 Doc. 69-5, goes on to add a clause that turns hundreds of years of Western jurisprudence on its head. The nine countries demand:

*The burden should be placed on those parties that claim the contrary to demonstrate it.*

In other words, because the proponents of this invasion of the sovereign rights of the nations of CITES *cannot* prove that *legal* and *illegal* domestic ivory markets contribute directly to the *poaching* of African elephants, they have decided to put the burden on their opponents to *prove* that it doesn't. Given this logic:

- Prosecutors in common law countries do not have to prove, beyond a reasonable doubt, that an accused committed a crime; rather, the accused has to prove that he or she did not.
- Under this evidentiary standard, the accused has to prove the negative — I didn't steal the apple from the stand, I didn't pick the fellow's pocket. As a result, law enforcement could accuse virtually anyone of anything — all cases magically closed within days — leaving it to the individual to subsequently amass the proof that he did not commit the crime of which he stands to be punished.
- Are the nations of the world, gathered in Sri Lanka to deal with trade in endangered species of flora and fauna, really prepared to declare to the world that they are legal scholars in mufti and of such impeccable wisdom that they are ready to reverse hundreds of years of jurisprudence?
- Are the legally trained delegates to CoP18 ready to state that the Latin maxim *semper necessitas probandi incumbit ei qui agit* —the necessity of proof always lies with the person who lays charges — is so hopelessly old fashion that it must be abandoned to help Western animal rights groups win at all costs?

Please. The sheer arrogance of the resolution is breathtaking. Rather than justifying why bans work with hard evidence, proponents of this resolution are demanding that those who oppose it prove it won't work. Forty years of failure is not good enough for them. It is an embarrassment that good countries have been put up to this. The incentive to do so must be staggering.

Any country that values orderly process, careful consideration of the facts, and the value of the rule of law must move to defeat this outrageous Resolution.

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