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Mike Graves

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CUSTOMARY IVORY LAW: INEFFICIENT PROBLEM SOLVING WITH CUSTOMARY INTERNATIONAL LAW

Mike Graves[†]

Abstract: For one of only two principal sources of international law, customary international law is surprisingly opaque. Scholars disagree not only on whether a particular norm has become a customary law, but also on what constitutes persuasive evidence of that fact. One popular theory advanced by Anthony D'Amato and others—that treaties can provide sufficient evidence of customary international law—attempts to clarify and simplify the process. It does so at the expense of accuracy. This error is particularly clear in the context of environmental law.

Customary international law, such scholars argue, protects a wide variety of creatures and natural resources. As evidence, they cite to treaties on conservation, noting their widespread international support. For the African elephant, this is, at best, a legal fiction. Sobering reports of elephant population declines throughout most of Africa indicate an uncertain future for the species. This article argues that these scholarly assertions are erroneously made based on a theory of customary law that gives excessive weight to treaties as evidence of custom.

The purpose of this article is to examine the conceptual and evidentiary problems inherent in relying on treaties to articulate customary international law. Primarily, it analyzes the habit of tribunals and scholars using treaties this way to artificially assert, and thereby create, customary international law to address global social problems. This phenomenon is especially clear in the context of the ivory trade. Using China as a case study, this article concludes that asserting customary international law where there is little evidence for it may ultimately hinder solutions to the very problems the advocates seek to resolve.

INTRODUCTION

Customary international law cannot save the elephant. Or rather, current popular theories of customary international law make it immaterial to the survival of the elephant. Increasingly, tribunals and scholars argue that treaties supplant other forms of evidence used to establish customary international law.¹ These arguments have produced a theory of custom formation that holds that treaties can provide sufficient evidence for both of the necessary elements of customary international law.² That is, a relevant

[†] Mike Graves is a J.D. Candidate at University of Washington School of Law, expected to graduate in June 2017. The author would like to thank Professor Melissa Durkee for her guidance and advice, and the staff of the Washington International Law Journal for their work.

¹ See *North Sea Continental Shelf (Ger./Den. and Ger./Neth.)*, Judgment, 1969 I.C.J. Rep. 3, ¶ 31 (Feb. 20); Oscar Schachter, *The Emergence of International Environmental Law*, 44 J. INT'L AFF. 457 (1991).

² Anthony D'Amato, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* (1971); see also Daniel Bodansky, *Customary (and Not So Customary) International Environmental Law*, 3 IND. J. GLOBAL LEGAL STUD. 105, 116 (1995-1996).

treaty on a particular legal norm provides both evidence of general practice and a nation's *opinio juris*.³ By providing evidence of both elements, consensus of particular norms appear artificially high based on widely signed multilateral treaties. This allows advocates to assert that a norm has risen to the level of customary international norm without regard for contrary empirical evidence that may weigh against that assertion.

The international legal regime protecting elephants has produced one such multilateral treaty. The Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) provides the African elephant with the highest level of protection available to endangered species.⁴ CITES also addresses several problems specific to elephant conservation by putting in place ivory trade regulations and creating a monitoring tool dedicated to elephant poaching.⁵ As of October, 2016, CITES had 183 signatory parties.⁶ Within the parameters of the treaty, the elephant garners massive international protections and ivory can only be traded under limited circumstances. From this perspective, the international community appears to have reached a consensus regarding elephant conservation.

Contrast this perspective with the empirical reality of the ivory trade in China. China is the largest importer of illegally harvested elephant ivory.⁷ Demand for carved ivory grows at the pace of China's middle and upper class.⁸ Yet China has been a signatory and full participant⁹ in the ivory

³ See *infra* Part I.b.

⁴ Convention on International Trade in Endangered Species of Wild Flora and Fauna, app. I, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES].

⁵ See REPORT ON MONITORING THE ILLEGAL KILLING OF ELEPHANTS, CoP17 Doc. 57.5 (Oct. 5, 2016) [hereinafter MIKE]; INTERPRETATION AND IMPLEMENTATION OF CONVENTION, SPECIES TRADE AND CONSERVATION, ELEPHANTS, MONITORING OF ILLEGAL TRADE IN IVORY AND OTHER ELEPHANT SPECIMENS, ETIS REPORT OF TRAFFIC, CoP16 Doc. 53.2.2 (Rev. 1) (Mar. 3–14, 2013) [hereinafter ETIS REPORT]. MIKE tracks the proportion of illegally killed elephants relative to natural deaths. Currently, roughly 60% of elephants found dead were killed illegally.

⁶ List of Contracting Parties, CITES, <https://cites.org/eng/disc/parties/chronolo.php> (last visited Jan. 14, 2017).

⁷ See *Made in China*, EIA GLOBAL (May 27, 2007), <http://eia-global.org/news-media/made-in-china-how-chinas-illegal-ivory-trade-is-causing-a-21st-century-afri>; Per Liljas, *The Ivory Trade is Out of Control, and China Needs to Do More to Stop It*, TIME (Nov. 1, 2013), <http://world.time.com/2013/11/01/the-ivory-trade-is-out-of-control-and-china-needs-to-do-more-to-stop-it/>; Dan Levin, *From Elephants' Mouths, an Illicit Trail to China*, N.Y. TIMES (Mar. 1, 2013), <http://www.nytimes.com/2013/03/02/world/asia/an-illicit-trail-of-african-ivory-to-china.html> (China's involvement in the ivory trade is well documented.).

⁸ See *Elephant Slaughter Escalates as Illegal Ivory Market Thrives*, ANIMAL WELFARE INST., <https://awionline.org/awi-quarterly/2013-winter/elephant-slaughter-escalates-illegal-ivory-market-thrives> (last visited Jan. 14, 2017) (Raw ivory sells for roughly \$80 USD per kilogram, typical elephants carry 10 kilograms of ivory. However, worked ivory is worth around \$1,800 per kilogram in China.); Jeffrey

control program of CITES since 1991.¹⁰ Given this international commitment, China's position on shutting down the trade of ivory should be clear, and yet, the ivory trade in the region continues unabated. China's position on ivory provides a good example of the tension inherent in relying heavily on treaties as proof of customary law.

China's actions telegraph two positions to the international community. First, by signing CITES and rescinding reservations regarding the ivory trade, China affirmed the treaty's position on ivory. Second, China's open role as the largest end-use market for ivory has persisted for decades.¹¹ Indeed, as recently as 2015, "the Chinese market has been more heavily implicated in illicit trade in ivory than any other country."¹² This seems to indicate a position antithetical to the ivory regulations created under CITES.¹³ Under customary international law (CIL), China's belief in the legality of the ivory market has significant consequences for the legal protection arguably afforded the elephant. Since the available evidence indicates two contradictory positions, China's *opinio juris* is, at best, unclear.

China's role in the ivory market make the nation an essential factor for determining whether elephants are protected under CIL. Significantly, China's role in the market, both as a consumer and facilitator for carved ivory products, suggests that China does not consider itself bound by international law to protect endangered species like the elephant despite its ratification of CITES. In spite of this, scholars have argued—based in part on widespread ratification of CITES—that international protection of endangered species has become part of CIL.¹⁴ This argument, relying significantly on CITES to justify the status of endangered species under CIL, obscures the actual state of ivory trade.

Gentleman, *Closing China's Ivory Market: Will It Save Elephants?*, N.Y. TIMES (Dec. 31, 2016), <https://www.nytimes.com/2016/12/31/world/africa/africa-ivory-china.html>.

⁹ See CITES, *supra* note 4, at art. 22.

¹⁰ List of Contracting Parties, CITES, <https://cites.org/eng/disc/parties/chronolo.php> (last visited Jan. 14, 2017).

¹¹ ETIS REPORT, *supra* note 5, at 14.

¹² *Id.*

¹³ See CITES, *supra* note 4, at app. II n.6 (exempting *Loxodonta Africana*).

¹⁴ See Gary D. Meyers, *Surveying the Lay of the Land, Air, and Water: Features of Current International Environmental and Natural Resources Law, and Future Prospects for the Protection of Species Habitat to Preserve Global Biological Diversity*, 3 COLO. J. INT'L ENVTL. L. & POL'Y 479 (1992); Michael J. Glennon, *Has International Law Failed the Elephant?*, 84 AM. J. INT'L L. 1 (1990).

China's message to the international community highlights the difficulty in international law of attributing intention to nations joining multilateral treaties. Signing a treaty like CITES is a political decision, often requiring no immediate legal action, but one which purports to indicate some consensus among the signatories. The continued existence of the ivory market shows that such a consensus is, at least in part, misleading. If the widespread ratification of CITES is not indicative of a nation's position regarding endangered species, international tribunals should be skeptical of such inferences. China's position indicates a conceptual tension between the function of multilateral treaties and the use of those treaties as evidence of emerging customary international law. Without adequate regard for both aspects of the state's position, the state of customary international law will not reflect reality.

In section one, this comment provides a basic overview of customary law and some of its conceptual difficulties. I argue that the element of CIL distinctly responsible for its ineffectual application is *opinio juris*. This section also examines the argument that treaties, specifically multilateral treaties, provide adequate evidence of a customary norm. Evidence has two main functions within CIL, it supports the existence of a current norm or indicates the development of a new norm. Multilateral treaties involve such complex interactions between parties that their use as evidence of CIL would seem to supply both of these functions. In section two, I argue that relying on a multilateral treaty to provide evidence of an emerging customary norm allows courts, scholars, and policy makers to overlook other relevant evidence. This results in the erroneous assertion of customary international law.

The argument that the protection of elephants has risen to the level of CIL is a poignant example of this error. Section three looks at the state of elephant populations and the different attempts CITES has made over the last thirty years to control the ivory trade. It then examines China's role in the ivory trade throughout that period. Finally, this comment looks at a scholarly article from 1990 which argued that protections of elephants as endangered species had at that time risen to the level of customary international law. Elephants have been considered endangered species for decades. The claim that CIL protects the elephant must reconcile itself with the success or failure of the international community's past attempts to control the ivory trade.

Asserting norms as customary international law without proper evidence obscures the actual state of problems facing the international community and slow progress that could otherwise have been made. International treaties protecting endangered species presents such a distorted picture. The decline in elephant populations stands in stark contrast to the claim that the international community wants to protect them. If the African elephant is truly worth protecting, we ought to be honest about the current international legal regime protecting the species.

I. CUSTOMARY INTERNATIONAL LAW AND EVIDENCE THAT IT EXISTS

CIL is typically defined as “international custom, as evidence of general practice accepted as law.”¹⁵ Generally, custom is created and sustained by the “constant and uniform practice of States [...] in circumstances which give rise to a legitimate expectation of similar conduct in the future.”¹⁶ The definition is typically broken down into two parts: 1) the objective, “constant and uniform practice of States”; and 2) the subjective, known as *opinio juris seu necessitatis*, that these actions are taken from a sense of legal obligation.¹⁷

Looking first at the objective element, state practice is a public action¹⁸ undertaken by a national entity.¹⁹ To be considered CIL, practice must be “constant and uniform” across states, such that variations from a particular state or group of states weighs against its status as customary international law.²⁰ “Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law,” the International Court of Justice held in the *North Sea Continental Shelf Case*, “State practice, that of States whose interests are specially affect, should have been both extensive and virtually uniform in

¹⁵ Statute of the International Court of Justice, art. 38(1)(b), June 26, 1945, 3 Bevens 1179.

¹⁶ *See infra* note 75, at 720.

¹⁷ Francois Geny “offered two elements of custom: usage (repeated practices) and *opinio juris seu necessitatis*, the latter meaning that the usage must amount to the “exercise of a (subjective) right of those who practice it.” David J. Bederman, *Acquiescence, Objection and the Death of Customary International Law*, 21 DUKE J. COMP. & INT’L L. 31, 44 (2010) (“[T]he combined objective and subjective inquiries for CIL formation (state practice and *opinio juris*) remain the crucial algorithm for establishing whether a norm really rises to the level of international custom.”).

¹⁸ *See* Committee on Formation of Customary (General) International Law, FINAL REPORT OF THE COMMITTEE: STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW, International Law Association, Part II(A)(3-6) (2000) [hereinafter ILA REPORT].

¹⁹ *Id.* at Part II(A)(5).

²⁰ *Id.* at Part II(C)(13).

the sense of the provision invoked.”²¹ CIL only forms when a sufficient number of distinctly affected states participate in a practice.²² When a state asserts that a practice is part of CIL, the objective element requires proof that there is actual widespread engagement in that practice.²³

For a practice to rise to the level of customary international law, states must not only uniformly act a certain way, they must also act from the belief that they are complying with a legal obligation.²⁴ This sense of legal obligation, *opinio juris*, allows international actors to distinguish between customary international law and acts taken by states out of a sense of comity, political expedience, or other norms.²⁵ “The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough.”²⁶ Without a legal justification for taking an action, a practice cannot become a customary international law.²⁷

At its most fundamental level, CIL as a legal system requires clear rules for determining the significance of state actions. However, while the rules governing CIL are simple to define, the unwritten nature of CIL makes it inherently open to changing circumstances. Unlike national laws or treaty obligations, the formation of customary international law is “by its very nature the result of an informal process of rule-creation.”²⁸ Norms are typically generated by a process of express or implied claim and response.²⁹

²¹ See *North Sea Continental Shelf (Ger./Den. and Ger./Neth.)*, Judgment, 1969 I.C.J. Rep. 3, ¶ 74 (Feb. 20). In *The North Sea Continental Shelf Case*, Denmark and the Netherlands disputed the Federal Republic of Germany’s argument that boundaries along the continental shelf were determined by CIL.

²² *Infra* note 75, at 720.

²³ D’Amato, *supra* note 2, at 20 (“We must look at what governments *do*. The objective facts of their behavior speak louder than any deductive theory.”).

²⁴ Professor James R. Crawford AC, SC, *The Identification and Development of Customary International Law*, Spring Conference of the ILA British Branch – Foundations and Futures of International Law, at 6 (May 23, 2014).

²⁵ D’Amato, *supra* note 2, at 75.

²⁶ See *North Sea Continental Shelf (Ger./Den. and Ger./Neth.)*, Judgment, 1969 I.C.J. Rep. 3, ¶ 77 (Feb. 20).

²⁷ *Id.* ¶ 77 (“[T]he acts must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.”).

²⁸ Crawford, *supra* note 24, at 4 (citing Mendelson, *The Formation of Customary International Law*, 272 *Hague Academy of International Law, Collected Courses* (1998), 155–410, esp. at 172–76).

²⁹ ILA REPORT, *supra* note 18, at 10 (attributed to example by Myres S. McDougal: if State A expressly claims the right to exclude foreign warships from passing through its territorial sea, and State B sends a warship through without seeking the permission of A, this is an implicit claim on the part of B that

Thus, courts articulate CIL in the context of a dispute between states over either the emergence of a new rule governing a novel situation or changing the current state of a law.³⁰ Rather than tracking the state of CIL, the function of this area of law, as well as the scope of scholarship exploring it, focus on the mechanisms of changes in the law and evidence of these changes.³¹

A. *The Problem of Opinio Juris*

Despite the significance of *opinio juris*, “most commentators acknowledge that *opinio juris* is a concept for which it is difficult to account with any consistency.”³² One such problem is the inherent circularity of the definition.³³ “It is said that CIL is only law if the *opinio juris* requirement is met. That is, it is only law if states believe it is law.”³⁴ To form a new customary law, a state would need to feel legally obligated to act according to a law that doesn’t exist yet. The quixotic struggle of articulating *opinio juris* further complicates what can be used as evidence of a nation’s subjective belief in its legal obligation.³⁵ Verbal acts³⁶ usually signify this belief.³⁷ However, courts may give physical acts more weight in determining CIL.³⁸ Inside the realm of personified state-action, it is difficult to imagine any other kind of evidence outside of verbal or physical acts. This ambiguity has led to various accounts of *opinio juris* that try to capture both its purpose and current usage.³⁹ Primarily, these accounts try to make sense of a state’s purported belief when it says one thing and does another.

A has no right to prohibit the passage. If A fails to protest against this infringement, this omission can, in its turn, constitute a tacit admission of the existence of a right of passage after all.)

³⁰ D’Amato, *supra* note 2, at 74.

³¹ Philip Allott, *Language, Method and the Nature of International Law*, 45 BRIT. Y.B. INT’L L. 103, 129 (1971).

³² Mark A. Chinen, *Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner*, 23 MICH. J. INT’L L. 143, 178 (2001); *see also* J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT’L L. 449, 450 (2000).

³³ Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT’L L. 115, 124 (2006).

³⁴ *Id.* (citing D’Amato, *supra* note 2, at 66).

³⁵ Emily Kadens & Ernest A. Young, *How Customary Is Customary International Law?*, 54 WM. & MARY L. REV. 885, 910 (2013).

³⁶ Such as diplomatic statements, policy statements, press releases, official manuals, etc. *See* ILA REPORT, *supra* note 18, Part II(A)(4).

³⁷ *Id.* Part II(A)(4) commentary at 14.

³⁸ ILA REPORT, *supra* note 18, Part II(A)(3) commentary at 13; *see also* D’Amato, *supra* note 2, at 20 (“The objective facts of their behavior speak louder than any deductive theory.”).

³⁹ *See, e.g.*, Guzman, *supra* note 33, at 146–48 (providing a rational choice analysis of *opinio juris*); Maurice H. Mendelson, *The Formation of Customary International Law*, 272 RE-CUEIL DES COURS 155, 250 (1998).

The *North Sea Continental Shelf Case* had two impacts on these accounts. It first acknowledged that a “norm-creating provision” of a treaty could create a rule that becomes “accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to”⁴⁰ that treaty.⁴¹ Treaty provisions articulating the parties’ belief about a particular CIL “crystallize”⁴² the norm, expressly codifying it into the language of the treaty. Second, it emphasized the need for extensive, rather than lengthy, state practice.⁴³ The dispositive factor is the number of states acting in that manner, not the duration of that practice.

Together, fundamentally norm-creating provisions adopted by a large number of the international community can “crystallize” customary international law.⁴⁴ The idea of a “fundamentally norm-creating character” of a treaty provision, however novel, indicates the perceived connection between treaty-making and future third-party international norms.⁴⁵ Treaties, as a result, have an increasingly “strict relationship” with CIL.⁴⁶ While this sheds little light on *opinio juris* as a concept,⁴⁷ it has led to the popular theory that treaties are sufficient to form customary international law.⁴⁸

⁴⁰ North Sea Continental Shelf (Ger./Den. and Ger./Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 71 (Feb. 20).

⁴¹ *Id.* ¶ 70–72.

⁴² *Id.*

⁴³ See Crawford, *supra* note 24.

⁴⁴ *Id.* at 4.

⁴⁵ ILA REPORT, *supra* note 18, Part IV(D) (describing the phrase “fundamentally norm-creating character” as without antecedents in international law and “somewhat Delphic about what it had in mind”). The International Law Association describes its goal as “the study, clarification and development of international law, both public and private, and the furtherance of international understanding and respect for international law.” About Us, INTERNATIONAL LAW ASSOCIATION, http://www.ila-hq.org/en/about_us/index.cfm (last visited Feb. 25, 2017).

⁴⁶ Crawford, *supra* note 24, at 3 (citing Tullio Treves, *Customary International Law*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 2).

⁴⁷ For example, a treaty claiming that it considers provision X as crystallizing customary international law assumes that the signatory states already felt a legal obligation to do X. Why these nations have this subjective belief is the question left unanswered.

⁴⁸ See, e.g., D’Amato, *supra* note 2; Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Peña-Irala*, 22 HARV. INT’L L. J. 53 (1981); R. R. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT’L 275, 278 (1966).

B. *Treaties Forming Custom*

This section examines the argument advanced in Anthony D'Amato's *The Concept of Custom in International Law*, and by other commentators,⁴⁹ that treaties can generate customary law. The basic theory outlined by D'Amato is simple.⁵⁰ CIL requires two elements: a quantitative element, namely practice, and a qualitative element, which D'Amato calls an articulation.⁵¹ Treaties, under this theory, provide evidence of both.

Treaties provide adequate evidence of practice because they supply the necessary commitment to act and generally imply subsequent implementation.⁵² At the moment of ratification, a signatory indicates that the state will act in a particular way. The state has agreed that the treaty expresses what it should do, and that variation from the treaty is presumptively illegal. "Whether or not they subsequently act in conformity with the treaty, the fact remains that they have so committed to act."⁵³ State practice can be wholly evinced by this commitment.

The qualitative element, articulation, requires only that a treaty specify exactly what signatories commit to do. Unlike the traditional account of CIL, D'Amato rejects state belief as *opinio juris* as an "anthropomorphic fallacy."⁵⁴ Rather, the qualitative element requires that "an objective claim of international legality be articulated in advance of, or concurrently with, the act which will constitute the quantitative elements of custom."⁵⁵ If the goal is to articulate a norm, then treaties certainly provide enough qualitative guidance. Most substantive provisions in "multilateral conventions contain formulations of norms of international law that meet all

⁴⁹ Gary L. Scott & Craig L. Carr, *Multilateral Treaties and the Formation of Customary International Law*, 25 DENV. J. INT'L L. & POL'Y 71 (1997); Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 397–400 (1985).

⁵⁰ To provide some context to its frequent citation, *The Concept of Customary International Law* was one of the first accounts to argue comprehensively that treaties can play such a large roll in custom formation. His account is consistently cited by commentators making a similar arguments and, to this key thesis, are relatively similar.

⁵¹ D'Amato, *supra* note 2, at 160.

⁵² *Id.*

⁵³ Anthony D'Amato, *Custom and Treaty: A Response to Professor Weisburd*, 21 VAND. J. TRANSNAT'L L. 459, 462 (1988).

⁵⁴ *Id.* at 464 ("Thus, there is no reason to call for any such subjective and wholly indeterminate test of belief when one is attempting to describe how international law works and how its content can be proved.").

⁵⁵ D'Amato, *supra* note 2, at 74.

the requirements of articulation.”⁵⁶ By setting out in writing a legal norm, the signatory necessarily acknowledges that norm as part of international law.

These two elements are “used as data to validate alleged norms of international law in claim-conflict situations.”⁵⁷ While he does not exclude the possibility of bilateral treaties creating custom,⁵⁸ D’Amato and other commentators focus primarily on multilateral conventions.⁵⁹ For R.R. Baxter, multilateral conventions benefit from clarity:

Since the treaty speaks with one voice rather than fifty, it is much clearer and more direct evidence of the state of the law than the conflicting, ambiguous and multi-temporal evidence that might be amassed through an examination of the practice of each of the individual States.⁶⁰

A multilateral treaty best articulates customary international law because it unifies a wide number of states under a single understanding of expected legal norms. As a source of data used by courts, multilateral treaties provides more information in a single source than any other kind of evidence.⁶¹

This account benefits primarily from the fact that international tribunals actually seem to rely heavily on treaties for evidence of custom.⁶² While “there is no *a priori* hierarchy between treaty and custom as sources of international law...in the application of international law, relevant norms deriving from treaty will prevail.”⁶³ However, this account goes further than

⁵⁶ *Id.* at 162. Although this may not be the case with bilateral treaties. *See* North Sea Continental Shelf (Ger./Den. and Ger./Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 71–72 (Feb. 20.).

⁵⁷ D’Amato, *supra* note 2, at 162.

⁵⁸ *Id.* at 164.

⁵⁹ Scott & Carr, *supra* note 49, at 72; Stephen Zamora, *Is There Customary International Economic Law?*, 32 GERMAN Y.B. INT’ L. 9, 19 (1989).

⁶⁰ Baxter, *supra* note 48, at 278.

⁶¹ D’Amato, *supra* note 2, at 164 (“A multilateral convention among ten states is the equivalent of forty-five similarly worded bilateral treaties among the same ten states.”).

⁶² *See* Legality of Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, at 256–58 (July 8); *The Paquete Habana*, 175 U.S. 677 (1900); North Sea Continental Shelf (Ger./Den. and Ger./Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 31 (Feb. 20); *Nottebohm (Liech. v. Guat.)*, Judgment, 1955 I.C.J. Rep. 4, at 4 (Apr. 6).

⁶³ Sands, *supra* note 73, at 96 (citing Conclusion 10 of Problems arising from a Succession of Codification Conventions on a Particular Subject, reprinted in 66 *Annuaire I.D.I.* 435, 441 (1996-II)).

reliance, arguing that a treaty by itself establishes custom.⁶⁴ “[A] treaty is itself a legal commitment. For that reason alone, it has an impact upon customary law.”⁶⁵

This represents a major shift from the International Law Association’s (“ILA”) view of custom outlined above, but it has intuitive appeal. For instance, the theory allows for the assertion that torture by a state violates customary international law,⁶⁶ that states have an international obligation to prevent injury to the environment of another,⁶⁷ that whales have a right to life,⁶⁸ and, relevantly, that endangered species are protected.⁶⁹ For human rights and environmental advocates, these assertions represent the ideal state of international law. However, it seems equally intuitive that evidence of widespread contrary practice can be found.⁷⁰ The apparent disparity between reality and asserted customary international law in these cases points towards a flaw in the argument.

II. CUSTOM CANNOT PLAY TWO ROLES WITHIN INTERNATIONAL LAW

When a treaty fails to solve a problem, asserting that CIL can resolve what the treaty could not is the next logical legal argument.⁷¹ Where the object and purpose of a treaty is particularly directed towards addressing such a problem,⁷² advocates have limited legal recourse. Advocates in this situation have only two real legal options: 1) seek to draft another treaty, or 2) assert that CIL now addresses the issue directly. CIL has the additional benefit of extending legal norms beyond treaty signatories to third party

⁶⁴ For a well cited example, see Convention on International Civil Aviation, Dec. 7, 1944, 15 U.N.T.S. 295.

⁶⁵ D’Amato, *supra* note 53, at 464.

⁶⁶ Anthony D’Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1128–29 (1982); see also *infra* Part V.

⁶⁷ PATRICIA W. BIRNIE & ALAN E. BOYLE, *INTERNATIONAL LAW AND THE ENVIRONMENT* 84–85 (1992).

⁶⁸ Anthony D’Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT’L L. 21 (1991).

⁶⁹ Glennon, *supra* note 14, at 30; see *cf.* Carr & Scott, *supra* note 49, at 313.

⁷⁰ Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L L. 757, 769 (2001) (stating modern custom is “descriptively inaccurate because it reflects ideal, rather than actual, standards of conduct.”).

⁷¹ See, e.g., Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTRALIAN Y.B. INT’L L. 82, 88–90 (1992).

⁷² “Recognizing, in addition, that international co-operation is essential for the protection of certain species of wild fauna and flora against over-exploitation through international trade.” CITES, *supra* note 4, at preamble ¶ 4.

states.⁷³ Advocates frequently “make claims about [customary international law] that are difficult to square with the observed behavior of states.”⁷⁴ The crux of this problem comes from the peculiar ontological status CIL has within international law. CIL reflects both current norms and developing norms. Indeed, “[d]espite the fact that customary law is one of the two principal sources of international law (the other being treaty law), there are inherent serious difficulties in setting out the rules on this subject.”⁷⁵

Relying on treaties as a sole source of evidence for CIL allows the aspirational nature of norm-creating treaties, especially prevalent in human rights and environmental treaties, to appear successful artificially. The problem with this account is a) that it conflates evidence of custom as custom itself, at the cost of clarity in the law; and b) as a result, the theory removes the onus for addressing global problems through alternative, more effective means while at the same time making it easier to assert newly formed custom. It asks little of the international community to acknowledge the binding effect of already ratified multilateral treaties, even if those treaties are not followed.

A. *The Dual Legal Function of Treaties is One Too Many*

The defect in D’Amato’s account is best seen in contrast with the current ILA definition of multilateral treaties as evidence of customary international law. The ILA makes a purposeful distinction between actions taken under a treaty obligation and those that arise from *opinio juris*.⁷⁶ Multilateral treaties most constitute evidence of CIL when they either explicitly crystalize the understanding of the parties regarding CIL, or when the treaty has been used to structure agreements between parties and non-parties.⁷⁷

There is no presumption that multilateral treaties provide evidence of a customary rule; if a nation acts only out of obligation to conform with a

⁷³ Vienna Convention on the Law of Treaties, art. 38, May 5, 1969, 1155 U.N.T.S. 331; ILA REPORT, *supra* note 18, Part I(1)(iii); *see also* Philippe Sands, *Treaty, Custom and the Cross-Fertilization of International Law*, 1 YALE HUM. RTS. & DEV. L.J. 85, 93 (1998).

⁷⁴ Guzman, *supra* note 33, at 118 (citing *Filartiga v. Peña-Irala*, 630 F.2d 876, 878 (2d Cir. 1980)) (arguing that torture is a violation of customary human rights); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. g. & rep. n.5 (AM. LAW INST. 1987).

⁷⁵ ILA REPORT, *supra* note 18, at 2.

⁷⁶ *Id.* at 46.

⁷⁷ *Id.*; *see, e.g.*, Convention on International Civil Aviation, *supra* note 64, art. X (codifying sovereignty over a nation’s territory).

treaty, the nation is not conforming to a new CIL.⁷⁸ Multilateral treaties provide evidence of new customary rules through state practice only insofar as the treaty promotes state practice outside of strict treaty obligation.⁷⁹ Actions towards non-party members provides evidence of CIL precisely because the treaty imposes no obligations between those states.⁸⁰ According to this account, treaties rarely codify custom unless the treaty makes that fact explicit, because “it would not be worth the parties’ effort to do so.”⁸¹

Multilateral treaties are an increasingly important⁸² source of evidence for CIL, but to say they therefore fully express CIL expands the scope of state obligations; a logical step incompatible with the ILA account. Strictly speaking, under the ILA view, if every state were to sign a treaty to do X practice, and then continuously did X, it could not become a customary international norm. There would be no legal obligation imposed external to the treaty.⁸³

The argument that treaties form custom collapses the distinction between these two obligations. A treaty must provide both evidence of practice and *opinio juris*. “Articulation” expresses an aggregated assertion of integrational law, both of customary law and the treaty. Equating the two sources of international law provides a conceptually tidy account of CIL and reduces the number of sources needed by tribunals and commentators to show custom.⁸⁴ Custom formation is logically distinct from evidence proving that custom. Evidence of something does not necessarily constitute the thing itself.⁸⁵ And yet, if treaties occupy a dual role in custom generation, treaty as evidence of custom must also form custom.

D’Amato’s explanation of the customary prohibition against torture in the face of significant evidence of contrary government practice highlights

⁷⁸ ILA REPORT, *supra* note 18, at 46.

⁷⁹ *Id.*; *see, e.g.*, Judgment of the International Military Tribunal for the Trial of Major War Criminals, UK Command Paper Cmd. 6964, at 65 (1946).

⁸⁰ ILA REPORT, *supra* note 18, at 47.

⁸¹ *Id.* at 26.

⁸² Rebecca Crootof, *Change Without Consent: How Customary International Law Modifies Treaties*, 41 YALE J. INT’L L. 237, 244 (2016) (citing Charlotte Ku, *Global Governance and the Changing Face of International Law*, in 2 ACAD. COUNCIL U.N. SYS. REP. & PAPERS 1, 5 (2001)) (“According to one study, eighty-six multilateral treaties were concluded in the century between 1648 through 1748-but more than two thousand such treaties were concluded in the twenty-five years between 1951 and 1975!”).

⁸³ *See* ILA REPORT, *supra* note 18, at 46.

⁸⁴ *See* North Sea Continental Shelf (Ger./Den. and Ger./Neth.), Judgment, 1969 I.C.J. Rep. 3 (Feb. 20); *The Paquete Habana*, 175 U.S. 677 (1900).

⁸⁵ *See* Immanuel Kant, CRITIQUE OF PURE REASON 26-33 (Norman Kemp Smith trans., abr. ed. 1934).

the error of confusing evidence of custom with custom.⁸⁶ The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁸⁷ purports to do just that, ban torture; *arguendo*, its ratification provides evidence for, and represents the formation of, a customary international law against torture. Yet states continue to torture. Rather than conclude that the issue is unresolved, D'Amato undervalues the value of this evidence that would undermine his account by giving an odd example to clarify his position.

Namely, the fact that governments do not admit to torture indicates the prohibition's status under CIL: states appoint commissions to investigate instances of torture, and they do not claim to torture legally.⁸⁸ He contrasts this with the state of torture during the medieval Spanish Inquisition, where states would certainly admit that torture was legal.⁸⁹ Essentially, the prohibition against torture survives contrary evidence because the treaty remains in effect and governments act as if they recognize the criminality of torture they are themselves committing. The Convention proves that there is a customary prohibition against torture and provides evidence of that custom to rebut contrary evidence. Except for the treaty, as a dual source of international law, the acts of states would not support this conclusion.⁹⁰

III. THE ROLE OF CUSTOMARY NORMS WITHOUT CONSEQUENCE

At the very least, the fact that a state in the example above can consistently violate a norm-creating provision of a treaty with impunity while at the same time providing evidence of that norm as customary law contradicts basic expectations of a legal rule.⁹¹ Responding to similar criticism, D'Amato seems to see this as one of the benefits of his approach.⁹² It allows scholars to assert that certain desirable norms, like the prohibition against torture, are legal obligations states must follow, regardless of their actual compliance.⁹³ What would be the alternative? What benefit could be

⁸⁶ D'Amato, *supra* note 53, at 464 (citing D'Amato, *supra* note 66, at 126).

⁸⁷ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

⁸⁸ D'Amato, *supra* note 53, at 467.

⁸⁹ *Id.*

⁹⁰ See Mark A. Weisburd, *Customary International Law and Torture: The Case of India*, 2 CHI. J. INT'L L. 81 (2001).

⁹¹ See Arthur Weisburd, *A Reply to Professor D'Amato*, 21 VAND. J. TRANSNAT'L L. 473, 477 (1988).

⁹² D'Amato, *supra* note 53, at 472.

⁹³ *Id.*

derived from undermining the claim that torture is internationally illegal?⁹⁴

For D'Amato, a world where nations must hide the fact that they torture is preferable to one where they do not. Arthur Weisburd provides a clear counterpoint to this argument, specifically regarding torture.⁹⁵ Rather than posit the existence of a customary norm against torture, Weisburd concludes that:

[A] large number of states are not ready to give up the authority to treat their citizens in a beastly fashion. Proclaiming that such action is illegal amounts to proclaiming that international law is ineffective, since the beastliness [sic] continues despite the denunciation.⁹⁶

Unsurprisingly, the contrast between these two views is clearest when a widely ratified, norm-creating, multilateral treaty has been empirically unsuccessful at resolving the problem it set out to solve.⁹⁷

IV. ELEPHANT PROTECTION UNDER CUSTOMARY INTERNATIONAL LAW

This next section compares the state of African elephant populations with the international protections afforded protected species under CITES. Specifically, it looks at China's involvement both as a signatory of CITES and as a state uniquely involved in the ivory trade.⁹⁸ This account seeks to show the disparity between the aspirations of the international community and the empirical reality of the elephant's legal status as a protected species.

A. *International State of the Ivory Trade Under CITES*

Since 2010, illegal killing has been responsible for over 60% of elephant deaths.⁹⁹ 2016 saw "the largest ever continent-wide wildlife survey, the Great Elephant Census," which found that 352,271 savanna elephants are left in the species range.¹⁰⁰ Largely the result of poaching, the

⁹⁴ Anthony D'Amato, *A Brief Rejoinder*, 21 VAND. J. TRANSNAT'L L. 489, 490 (1988).

⁹⁵ Weisburd, *supra* note 91, at 477.

⁹⁶ *Id.* at 487.

⁹⁷ Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L. J. 1935 (2002).

⁹⁸ CITES, *Monitoring of Illegal Trade in Ivory and Other Elephant Specimens*, Co.P16 Doc. 53.2.2 (Mar. 3, 2013) (considering China a "single country cluster with unique attributes as the premier end-use market.").

⁹⁹ See MIKE, *supra* note 5.

¹⁰⁰ Paul Steyn, *African Elephant Numbers Plummet 30 Percent, Landmark Survey Finds*, NAT'L GEOGRAPHIC (Aug. 31, 2016), <http://news.nationalgeographic.com/2016/08/wildlife-african-elephants-population-decrease-great-elephant-census/>.

elephant population has declined at a yearly rate of 8% since 2010.¹⁰¹ While shocking, these losses to illegal poaching are hardly new.¹⁰² Elephant poaching rates, which continue to exceed natural elephant population growth rates, remained virtually unchanged over the last six years.¹⁰³ Poaching continues despite the fact African Elephant (*Loxodonta Africana*) occupies the highest level of protection afforded by the Convention on International Trade in Endangered Species of Wild Fauna and Flora.¹⁰⁴

The parties of CITES have not been idle in combating the illegal poaching of elephants. Under CITES, species are listed in three appendixes, the first is reserved for “all species threatened with extinction which are or may be affected by trade.”¹⁰⁵ It allows export of a specimen with a permit when “a Scientific Authority of the State of export has advised that such export will not be detrimental to the survival of that species.”¹⁰⁶ Concerned that the ivory trade would continue unabated, in 1985 the parties created a quota and identifying system for managing the export of ivory.¹⁰⁷ Under the system, the Secretariat tallies the number of tusks exported to ensure the quota is followed, and sanctions the permit and import of ivory before a country can accept a shipment.¹⁰⁸ The parties saw this as a compromise for developing nations who wanted to use their natural resources and nations seeking to end illegal ivory harvesting.¹⁰⁹

This compromise was unsuccessful and throughout the 1980s the ivory trade boomed.¹¹⁰ Game wardens were consistently undermined by better-financed poachers.¹¹¹ A typical game warden is one of between 15 to 90 guards employed to guard anywhere from 1 to 3 million acres of land.¹¹²

¹⁰¹ *Id.*

¹⁰² See Konrad von Moltke, *Brand Name Ivory: An Alternative Way to Think About the Ivory Trade*, 2 J. INT'L WILDLIFE L. & POL'Y 79 (1999).

¹⁰³ Press Release, CITES, *Elephant Poaching rates Virtually unchanged in 2014* (Mar. 23, 2015), https://cites.org/eng/mike_figures2014).

¹⁰⁴ CITES, app. I, Mar. 3, 1973, 27 U.S.T. 1087; *but cf.* CITES, app. II, Mar. 3, 1973, 27 U.S.T. 1087 (exemptions for “Populations of Botswana, Namibia, South Africa and Zimbabwe.”).

¹⁰⁵ CITES, art. II(1), Mar. 3, 1973, 27 U.S.T. 1087.

¹⁰⁶ Glennon, *supra* note 14, at 11 (citing CITES, art. III (2)(a), Mar. 3, 1973, 27 U.S.T. 1087).

¹⁰⁷ *Id.* at 12.

¹⁰⁸ *Id.*

¹⁰⁹ Thaddeus McBride, *The Dangers of Liberal Neo-Colonialism: Elephants, Ivory and the CITES Treaty*, 19 B.C. THIRD WORLD L. J. 733, 736 (1999).

¹¹⁰ Glennon, *supra* note 14, at 20.

¹¹¹ See *id.* at 21 (The funding needed to stop poaching in Kenya's Tsavo National park alone would have been roughly \$1.6 million a day).

¹¹² John A. Hart & Kes H. Smith, TECHNICAL REPORT NO. 3: MONITORING OF ELEPHANT POACHING, ANTI-

Of this area, wardens patrol on average 25% of that total area.¹¹³ Poachers, on the other hand, are financed by complex criminal syndicates, have the benefit of poor, corrupt government officials, and a steady supply of illegal weaponry.¹¹⁴ Without addressing the porous borders of wildlife reserves or the import of illegal arms, the trade restrictions were ill-equipped to disincentivize organized crime from hiring locals to harvest ivory.

Ultimately the system had an insignificant effect on ivory production: it was voluntary and “other CITES parties had no legal basis under CITES for refusing entry to producer state’s ivory.”¹¹⁵ In response to the ineffective quota system, the parties voted to enact a total ban on ivory trade in 1989, at the objection of several Southern African nations.¹¹⁶ The ban lasted eight years ending at the 1997 Conference of the Parties (Co10) during which time elephant populations had increased over Southern Africa.¹¹⁷ After the total ban was rescinded, the opposite trend was predictable; twenty years later, evidence indicates that the illegal trade in ivory has progressively escalated since the ban.¹¹⁸ Wildlife is now one of the “top global sources of illegal wealth.”¹¹⁹

B. *China’s Opinio Juris Regarding Elephants as a Protected Species*

This escalation is even more apparent when narrowed to China’s role in the ivory trade.¹²⁰ Throughout these regulatory shifts, both state and private Chinese action continued to promote the flow of ivory from Africa into Asia.¹²¹ For instance, the 1989 ivory ban excluded ivory harvested

POACHING EFFORT, AND LAW ENFORCEMENT IN CENTRAL AFRICA, https://www.cites.org/eng/prog/mike/pi/lot/tech_rep3.shtml (Oct. 2001) (citing Table 1, part 2).

¹¹³ *Id.* (citing Table 2, part 2).

¹¹⁴ Adam Vaughan, *Kenya’s New Front in Poaching Battle: The Future is in the Hands of our Communities*, THE GUARDIAN (May 30, 2016), <https://www.theguardian.com/environment/2016/may/30/kenya-poaching-elephant-ivory-rhino-horn-future-communities> (three poachers took out 27 elephants in fifteen minutes).

¹¹⁵ Glennon, *supra* note 14, at 21.

¹¹⁶ Namely Botswana, Namibia, and Zimbabwe. See List of Contracting Parties, CITES, <https://cites.org/eng/disc/parties/chronolo.php> (last visited Jan. 14, 2017).

¹¹⁷ See McBride, *supra* note 109, at 745 (1999).

¹¹⁸ CITES, *Monitoring of Illegal Trade in Ivory and Other Elephant Specimens*, Co.P16 Doc. 53.2.2 (Mar. 3, 2013).

¹¹⁹ Sam Weru, WILDLIFE PROTECTION AND TRACKING ASSESSMENT IN KENYA 16 (2006) (Table 7).

¹²⁰ China was labeled a party of “primary concern” in the national ivory action plan proposed for the 65th meeting of the Standing Committee (Geneva, July 2014).

¹²¹ See *Made in China: How China’s Illegal Ivory Trade Is Causing a 21st Century African Elephant Disaster*, ENVTL. INVESTIGATION AGENCY (May 16, 2007), www.eia-international.org/cgi/news/news.cgi?t=template&a=398; See also Gary D. Meyers & Kyla Seligsohn

before 1989, called “pre-convention” ivory.¹²² During the 1990s, China allowed that exclusion to be applied retroactively for traders who “forgot” to register ivory as pre-convention ivory.¹²³ Half of all ivory seized in 1999 was destined for China.¹²⁴ Elephant Trade Information System Report (ETIS) singles out China as the country with the most heavily implicated market in the illicit ivory trade in terms of frequency and scale of seizures.¹²⁵ The report notes:

The number of ivory seizures that China has made over the three-year period 2009 to 2011 is nearly nine times greater than the three-year period 2006 to 2008[.] [...] [T]he number of seizures made by other countries which implicate China in the trade has also increased by nearly five-fold over the same period of time..¹²⁶

While the report also indicates that China has taken a comprehensive approach to law enforcement, it found no noticeable deterrent effect from China’s increased policing.¹²⁷

In September 24, 2015, President Xi Jinping issued a joint statement committing both countries to “nearly complete bans on ivory imports and exports...and to take significant and timely steps to halt the domestic commercial trade of ivory.”¹²⁸ Months later, in China the price of ivory halved.¹²⁹ However, reports of non-compliance with ivory trade regulations continued throughout this period.¹³⁰ Troublingly, one report indicated that

Bennett, *Answering 'The Call of the Wild': An Examination of US Participation in International Wildlife Law*, 7 PACE ENVTL. L. REV. 75, 114 (1989).

¹²² CITES, art. VII (2), Mar. 3, 1973, 27 U.S.T. 1087.

¹²³ ENVTL. INVESTIGATION AGENCY, *supra* note 121.

¹²⁴ *Id.*; see also Christopher Walker & Sarah Cook, *The Dark Side of China Aid*, N.Y. TIMES (Mar. 25, 2010), <http://www.nytimes.com/2010/03/25/opinion/25iht-edwalker.html>; Catherine Elkemann & Oliver C. Ruppel, *Chinese Foreign Direct Investment into Africa in the Context of BRICS and Sino-African Bilateral Investment Treaties*, 13 RICH. J. GLOBAL L. & BUS. 593, 616-17 (2015).

¹²⁵ CITES, *Monitoring of Illegal Trade in Ivory and Other Elephant Specimens*, Co.P16 Doc. 53.2.2 (Mar. 3, 2013).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Press Release, FACT SHEET: President Xi Jinping's State Visit to the United States, The White House (Sept. 25, 2015), <https://www.whitehouse.gov/the-press-office/2015/09/25/fact-sheet-president-xi-jinpings-state-visit-united-states>.

¹²⁹ See *Ivory Price Drop in China Signals Fall In Demand, Report Says*, THE GUARDIAN (Dec. 8, 2015), <https://www.theguardian.com/environment/2015/dec/08/ivory-price-drop-in-china-signals-fall-in-demand-report-says> (\$1,100 USD per kg from a record high of \$2,100 USD the year before).

¹³⁰ *Blending Ivory; China's Old Loopholes, New Hopes*, THE ELEPHANT ACTION LEAGUE (Dec. 30, 2015), <http://elephantleague.org/wp-content/uploads/2015/12/EAL-BLENDING-IVORY-Report-Dec2015.pdf>.

officials and traders continue to subvert the purpose of ivory regulations by misapplying the narrow “pre-convention” exception to the ivory ban.¹³¹

In its entirety, China’s response to the provisions of the CITES treaty has been divided. On the one hand officials and law enforcement have taken steps to limit the ivory trade, and made statements that these steps were taken out of a sense of legal obligation. However, the continued success of the illegal ivory market, and the state’s overall resistance to ivory regulation complicates China’s position. Importantly, China’s *opinion juris* regarding the protections afforded elephants in international law is not simple or consistent.

Under D’Amato’s theory articulated in section 1(b), China’s position would be clear and look entirely different. As a signatory of CITES, China would have committed to protecting endangered species like the elephant and upholding the restrictions on ivory trade. Indeed, relying solely on this fact would have entirely contradictory ramifications for CIL. It should be unsurprising then that advocates for the protection of endangered species adopt D’Amato’s theory of CIL.

C. *An Environmentalist Response to Persistent Ivory Poaching*

The death of the last elephant would represent an abject failure of the entire conservationist movement. Within the field of conservationist biology, elephants are considered a “charismatic megafauna”: large, popular species that act as flagships for conservation campaigns.¹³² If the international community cannot protect the elephant, an internationally loved yet commercially desirable species, other, less attractive animals will not fare better. The fate of the elephant as a species should be a good overall indicator of the international community’s ability to protect endangered species.

The connection between the elephant’s survival as an endangered species and the need for successful international action can be seen in Michael Glennon’s, “Has International Law Failed the Elephant?”¹³³ Despite CITES’ inconsistent ability to protect the elephant, as an endangered species, Glennon argued that this protection has risen to the level of

¹³¹ *Id.*

¹³² Examples include pandas, whales, polar bears, and gorillas. See Emma Marris, *Charismatic Mammals Can Help Guide Conservation*, NATURE (Dec. 24, 2013), <http://www.nature.com/news/charismatic-mammals-can-help-guide-conservation-1.14396>.

¹³³ See Glennon, *supra* note 14.

customary international law, based substantially on the widespread ratification of the treaty.¹³⁴ Paralleling D'Amato, he argues that treaties create CIL “when such agreements are intended for adherence by states generally and are in fact widely accepted.”¹³⁵ CITES is his primary example.¹³⁶ Glennon then references several factors that support CITES as appropriate evidence of his claim. The treaty is norm-creating, some non-parties comply with certain CITES documentary requirements, and it has not been rejected by a significant number of non-party states.¹³⁷ As additional evidence for the position that states are obligated to protect endangered species, Glennon names the World Charter for Nature¹³⁸ where the General Assembly proclaimed “that the population levels of all life forms, wild and domesticated, must be at least sufficient for their survival.”¹³⁹

Glennon’s assertion of CIL matches his normative goal: nations ought to use more legal and economic resources to stop the decline of elephant populations. For western states, that requires funding nations with elephant populations to support conservation.¹⁴⁰ However, his argument that elephants have this kind of legal protection internationally stands in stark contrast to the empirical reality discussed above. This is as clear now as it was in 1990. CIL does not protect elephants.

D. Customary International Norms Should Not Reflect Normative Aspirations

Glennon’s argument stems from a problematic account of customary international law that too easily grants the existence of norms based on treaties like CITES. Nor is Glennon alone in attempting to solve an environmental problem by resorting to CIL.¹⁴¹ For these advocates, declaring protective environmental norms as CIL will extend actual protection to the environment rather than reflecting the state of international law. As Glennon’s article has aged, this has not been the effect.

¹³⁴ *Id.*

¹³⁵ Glennon, *supra* note 14, at 30 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (AM. LAW INST. 1987).

¹³⁶ *Id.* at 31 (Glennon cites other treaties but singles out CITES).

¹³⁷ *Id.*

¹³⁸ G.A. Res. 37/7, World Charter for Nature (Oct. 28, 1982).

¹³⁹ *Id.* at I(2).

¹⁴⁰ *See* Glennon, *supra* note 14, at 35.

¹⁴¹ BIRNIE & BOYLE, *supra* note 67, at 84–85; Schachter, *supra* note 1, at 470; *see also* Pierre-Marie Dupuy, *Overview of the Existing Customary Legal Regime Regarding International Pollution*, in INT’L L. AND POLLUTION 61 (Daniel B. Magraw ed., 1991); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 601-04 (AM. LAW INST. 1987).

Rejecting Glennon's claim that elephants are protected by CIL does not require ignoring his normative argument, that elephant populations ought to be preserved.¹⁴² However, it begs the same question asked by D'Amato discussed above, why argue against protecting elephants? A world where CITES has created this international norm is better than one where it has not. This gets at the foundation of why custom exists: Is it aspirational or pragmatic? If it is the former, then D'Amato and Glennon are simply arguing that nations are aware that they should not torture people, or kill elephants for ivory, when a norm becomes part of CIL.

I argue that the international community is better off taking the pragmatic approach; CIL should reflect what nations do, not what we would like them to do. Just as arguing that CIL protects elephants does not actually protect the species, stating that there is no CIL protecting elephants will not suddenly begin a poaching spree.¹⁴³ A pragmatic approach to CIL benefits from acknowledging that the problem has not been served by the current legal scheme. Legal decision makers are the real target audience for writings on customary international law.¹⁴⁴ Societal problems are better addressed by "building consensus" in support of the authors position or "by coercing" bad actors to stop, neither of which are legal determinations.¹⁴⁵

Treaties-as-custom provides a simple solution for a complex problem. Blurring the role played by treaties in international law and custom formation does not resolve the problem of *opinio juris*, it ignores it.¹⁴⁶ For example, Weisburd argues that the stronger indication of CIL is the extent to which breach of that norm would result in legal consequences.¹⁴⁷ Among these consequences are the right to inquire into the facts of the alleged breach and, if established, the legal duty to repair the breach.¹⁴⁸ Here, *opinio juris*, that nations must not only feel legally obligated to act a certain way but also obligated to facilitate sanctions against breach of that norm, better

¹⁴² See Bodansky, *supra* note 2, at 116.

¹⁴³ Weisburd, *supra* note 91, at 478 ("Better formulation of position is not 'there is an existing rule permitting torture' but rather that 'there is no rule of international law forbidding torture.'").

¹⁴⁴ Bodansky, *supra* note 2, at 117 (citing Hans Baade, *Codes of Conduct for Multinational Enterprises: An Introductory Survey*, in LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISE 407, 413 (Norbert Horn ed., 1980) ("[W]henver the volume of learned comment outstrips the supply of 'hard' decisional law, and especially wherever scholarly discussion starts to feed on itself, it loses touch with reality.")).

¹⁴⁵ Weisburd, *supra* note 91, at 488.

¹⁴⁶ See Arthur Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L L. 1, 6 (1988).

¹⁴⁷ See Weisburd, *supra* note 91, at 480.

¹⁴⁸ *Id.*

clarifies the conceptual issues of what exactly *opinio juris* is. Tying *opinio juris* to a legal consequence corresponds to the intuitive belief that violating a legal norm should have a consequence. It also explains how custom is established. Since consequences actually flow from a norm rising to the level of customary international law, evidence of those consequences provide the evidence of nation's subjective intent.

V. CONCLUSION

Authors frequently point to the role of consent in a positivist international legal world as the foundation for enforcement.¹⁴⁹ This is especially true where, absent a written treaty, norms are imposed on states who seem to have never addressed the issue.¹⁵⁰ Internationally the rules of law are binding on states "from their own free will."¹⁵¹ One key facet of this positivist view is the idea that nations—absent some legislative body—do not, and will not, consider legally binding laws with which they do not agree.¹⁵²

Consent as a concept "raises an obvious barrier to the idea that multilateral treaties create customary international law and thereby obligate non-signatories to abide by their terms."¹⁵³ This obvious barrier is simply that nations who agree on some particular norm cannot then impose that norm on another unilaterally or instantaneously. As seen in the case of China and the ivory trade, this is not an abstract barrier to international enforcement of legal norms but an observed reality. Using simplified methods for determining custom does not overcome this fact.

This article attempts to take serious the idea that nations, who do not feel bound to protect the elephant, will not suddenly and enthusiastically fight syndicated poaching throughout Africa because the species becomes protected by CIL. Significantly, proclaiming custom with uncertain evidence diminishes the legal weight of CIL. Scholars should look to the

¹⁴⁹ Crootof, *supra* note 82; Michael J. Glennon, *How International Rules Die*, 93 GEO. L. J. 939, 941 (2005) (describing the "prevailing theory of validity in international law" as being based on "the classic positivist idea that states are obliged to follow only those rules to which they assent."); Duncan B. Hollis, *Why State Consent Still Matters-Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 BERKELEY J. INT'L L. 137, 174 (2005).

¹⁵⁰ Hollis, *supra* note 149, at 174.

¹⁵¹ *S.S. Lotus (Fr. v. Turk.)*, Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7); *see also* *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶ 269 (June 27).

¹⁵² *See generally* H.L.A. Hart, *THE CONCEPT OF LAW* (1961).

¹⁵³ Scott and Carr, *supra* note 49, at 75.

reciprocal nature of rights and obligation necessary of a legal norm when asserting custom.¹⁵⁴ “The creation of customary international law is not momentary. It emanates from an ‘intensive dialectical process’ between different actors of the international community.”¹⁵⁵ Cutting short that process, by asserting CIL where it may not exist, creates the false impression that the problem is solved. More elephants are illegally killed each year than are born,¹⁵⁶ the elephant does not have time under the present international protections to wait for the legal community to discover that they were wrong.

¹⁵⁴ See Weisburd, *supra* note 146, at 8.

¹⁵⁵ Allott, *supra* note 31, at 129.

¹⁵⁶ See MIKE, *supra* note 5.

