CUSTOMARY IVORY LAW: INEFFICIENT PROBLEM SOLVING WITH CUSTOMARY INTERNATIONAL LAW

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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.

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