

DELEGITIMIZING IVORY: THE CASE FOR AN IVORY TRADE BAN TREATY

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Introduction

In Romain Gary's novel *Roots of Heaven*, Morel, a French national in despair over the plight of Africa's elephants, resolves to promote an international convention that will ban all hunting of elephants. The setting is colonial Chad in French Equatorial Africa in 1953, and, evocative of the current crisis, the story relates that thirty thousand elephants had been killed that year alone. The theme of the use of international law to protect the elephant weaves throughout the narrative. Morel is obsessed with gathering signatures to his petition for the new treaty, to counter "the notoriously insufficient laws for the protection of the African fauna." The key international treaty at that time was the 1933 Convention Relative to the Preservation of Fauna and Flora in their Natural State.¹ This convention had been adopted at the urging of scientists anxious over the devastation of elephant (and other wildlife) populations, by colonial governments more concerned over the implications for the ivory trade. The convention regulated hunting for trade and for trophies, as well as subsistence hunting, and provided for the conservation of the elephant as part of a management plan for this very lucrative colonial trade. Admittedly, although its primary objective was the steadfast supply of elephants for their tusks, this treaty *did* stalwartly stand between traders, governments, and consumers on the one hand, and the final demise of elephants on the other.

But threats to the long-suffering elephant have become increasingly lethal since colonial times. Scientists now warn that the elephant is in danger of extinction, a victim of trafficking in ivory run by organized crime networks.² The current ivory poaching of epidemic proportions is part of the global trafficking in wildlife, one of the most lucrative illegal trades together with trafficking in drugs, arms, and human beings. The media is rife with reports of horrific mass killings of elephants illustrated by images of mutilated and dead elephants with their tusks ripped off their faces. Reports estimate that an elephant is being killed every fifteen minutes³ and scientists are warning that the number of elephants killed is now exceeding their birth rate.⁴ And as discussed below, existing international treaties are still "insufficient" to confront the unfolding catastrophe facing not only elephants but rhinos and other wildlife as well.

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¹ International Convention for the Protection of Fauna and Flora [with Protocol], Nov. 8, 1933.

² Varun Vira & Thomas Ewing, Ivory's Curse: The Militarization & Professionalization of Poaching in Africa, BORN FREE USA (Apr. 2014).

³ IWORRY: A CAMPAIGN BY THE DAVID SHELDRIK WILDLIFE TRUST.

⁴ Azzedine Downes & John Scanlon, Empowering Youth on World Elephant Day to Secure Wildlife's Future, INTERNATIONAL FUND FOR ANIMAL WELFARE [IFAW] (Aug. 12, 2016).

Convention on International Trade in Endangered Species (CITES)

International law's role in protecting the elephant was addressed by Michael Glennon in his seminal 1990 AJIL article "Has International Law Failed the Elephant?"⁵ Considering this question today, I argue that international law's key failing lies in historically treating the elephant as an object of trade, exemplified by the 1933 convention. Post-colonialism brought with it a new generation of biodiversity treaties,⁶ yet they too afford elephants little protection. CITES⁷—the only biodiversity treaty that directly addresses elephants—protects them solely in the context of *international trade*. Rooted in colonialism, CITES entrenched the elephant's status as a trade commodity by initially listing the species in Appendix II which allows their controlled trade, rather than in Appendix I which bans commercial trade. Only in 1989, after the poaching crises of the 1970s and 1980s had obliterated hundreds of thousands of elephants,⁸ did CITES upgrade the African elephant to Appendix I, meaning the virtual end of the (legal) ivory trade. Yet this victory for elephants was short-lived. Countries that had entered reservations to the listing of elephants in Appendix I persuaded CITES to allow two "one-off" sales of their ivory stocks, in 1999 and again in 2008, thus recreating a legal ivory trade. CITES has been harshly criticized for these decisions,⁹ and blamed for triggering the current massive onslaught of poaching. Beyond its role as the international regulator of the ivory trade, CITES has little power to tackle other threats to elephants. The convention does not address domestic ivory trade, nor does it prohibit trophy hunting; at the most it can ban the export of the trophies after the elephant has been killed. Nor does it restrict elephant culling, or subsistence hunting; again, it is limited to regulating the international trade in the tusks of the culled or hunted elephant now dead. While habitat loss is also a critical factor in the decimation of populations, CITES has no power to carve out eco-corridors for elephants. Regarding animal welfare issues, again, the few instances that CITES addresses these issues are solely in the context of trade, i.e., transport and confiscation of illegally traded specimens.

An ivory trade ban treaty

In light of these lacunas of international treaty law, how do we transform it from the "regulator" of the 20 century ivory trade to "protector" of elephants in the face of militarized and industrialized poaching of the early 21 century? In response to the catastrophe, scientists are calling for a ban on all trade in ivory.¹⁰ To make the ban binding, I propose incorporating it in a treaty designed to "delegitimize" ivory as a consumer product, by constructing a norm that only elephants possess a legitimate right to ivory. While national governments are limiting their rhetoric to illegal trade, New York and New Jersey have enacted laws prohibiting *all* ivory trade¹¹ in their states, and efforts are underway to pass similar legislation in Hawaii, California, Illinois, Florida, and Connecticut. These state laws are contributing to the norm construction of delegitimizing ivory to reduce consumer demand, a trend that will strengthen national and international political will to incorporate this norm in international law.

⁵ Michael J. Glennon, *Has International Law Failed the Elephant?*, 84 AJIL 1 (1990).

⁶ *The Biodiversity-related Conventions*, GREENFACTS.

⁷ CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA [CITES].

⁸ Varun Vira et al., *Out of Africa: Mapping the Global Trade in Illicit Elephant Ivory*, BORN FREE USA (Aug. 2014).

⁹ Alex Shoumatoff, *Agony and Ivory*, VANITY FAIR (Aug. 2011).

¹⁰ Elizabeth L. Bennett, *Legal Ivory Trade in a Corrupt World and Its Impact on African Elephant Populations*, 29 CONSERVATION BIOLOGY 54 (2015).

¹¹ Gil Aegerter, *Saving the Elephants? State Bans on Ivory Trade Gather Steam*, NBC NEWS (Aug. 12, 2014).

As the plight of the elephant goes far beyond the capacity of environmental treaties and institutions to tackle criminal wildlife trafficking, a more appropriate institution to house a new treaty would be the UN Office on Drugs and Crime; the treaty could be negotiated as a protocol under the UN Convention against Transnational Organized Crime. And if “the fight to end wildlife crime is a fight for humanity,”¹² another option to consider is human rights regimes; poaching impacts not only elephants but also spills over onto humans as well, as noted by recent decisions of the Security Council on the links between wildlife trafficking, national and global security, and human rights violations.

Moral aspects

If international law’s key failure lies in treating elephants as a trade commodity, the other side of the coin is that international law has ignored the moral aspects of killing elephants for the ivory trade or for trophy hunting. Scientists and NGOs testify as to the atrocities perpetrated against the victims and the suffering of the traumatized survivors: the tragedy of orphaned calves, bewildered elephants poignantly mourning the death of the matriarchs of the herd, the resulting breakup of families, and the loss of knowledge critical for elephant survival, such as migration trails and location of waterholes. Thus beyond issues of conservation, organized crime, security, and human rights, the elephant crisis is a moral issue of humans’ cruelty to animals. Moving in this direction, in the recent WTO decision in the Canada-EU seal dispute, the AB found that animal welfare concerns can justify trade restrictions under the “public morals” exception of Art. XX(a) to GATT. The AJIL Symposium on Sovereign as Trustees of Humanity¹³ offers further directions in the development of international law and animal ethics, by expanding states’ duties toward humanity at large to include other species. Moreover, considering the links between ivory poaching and human rights violations, the definition of humanity could develop to include other species. Harnessing the global moral outrage at the cruelty inflicted on elephants by addressing the moral issues involved would garner worldwide public support for a new treaty in a global coming together for animal rights.

Conclusion

Scientists have historically sounded the alarm as to the dangers threatening the elephant, and international law has responded through a series of treaties *regulating* trade in ivory. International law should now evolve to the next stage: *eliminating* all trade in ivory. Elephants are being slaughtered into extinction so that their tusks can be transformed into trinkets primarily for Chinese consumers. The fact that only elephants need ivory, and any human use is simply conspicuous consumption, arguably increases the chances of achieving international consensus for a treaty banning the trade. Admittedly, and drawing on the AJIL Unbound online Agora, *The End of Treaties?*,¹⁴ this is not the most opportune time to advocate a new treaty, and one obstacle to launching one for elephants will be lack of political will. Taking environmental law as an example, treaty-making has come to a virtual stop, a result of states’ “treaty fatigue” as well as criticism of existing agreements for their ineffectiveness in stemming the environmental crisis. Another example is the inability of states to reach a new agreement on climate change despite scientists’ warnings of the increasing threats.¹⁵ Of

¹² IFAW, *Criminal Nature: The Global Security Implications of the Illegal Wildlife Trade* (2008).

¹³ Christopher McCrudden, *AJIL Symposium: Comment on Eyal Benvenisti, Sovereigns as Trustees of Humanity*, OPINIO JURIS (July 25, 2013).

¹⁴ Emily Cumberland, *Call for Papers: “The End of Treaties? An Online Agora”*, 108 AJIL UNBOUND (Feb. 19, 2014).

¹⁵ *See Intergovernmental Panel on Climate Change [IPCC]*.

course a treaty banning all trade in ivory will not magically eradicate the poaching or stop the killing. But it will send an important message that the markets for ivory are finally shutting down.