

# 1. Introduction

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## 1.1 BACKGROUND AND AIM OF THE BOOK

The legal and moral significance of animals has generated a considerable corpus of scholarship.<sup>1</sup> The discourse in relation to the moral significance of animal interests is characterised by the juxtaposition of advocates of animal welfare on the one hand and animal rights on the other. In general, law responds to animal interests through welfare legislation, which regulates the ‘humane’ treatment of non-human animals in order to mitigate animal suffering. Domestic jurisdictions respond to animal welfare concerns through anti-cruelty legislation.<sup>2</sup> However, animal welfare legislation applies predominantly to domestic and agricultural animals. The situation in relation to the regulation of wildlife, both on the domestic and international plane, differs considerably from the approach to domestic and agricultural animals. Legal scholars have criticised the lack of wildlife welfare protection. The views in relation to the ignorance on wildlife range from despair expressed by one commentator who argued that ‘wild animal welfare law is sparse, bordering on the non-existent at the international level’<sup>3</sup> to glimmers of hope in the recognition that international environmental law is not wholly agnostic in relation to this issue.<sup>4</sup> It is, however, abundantly clear that wildlife law (of the majority of jurisdictions) as well as international wildlife law do not contain welfare protection as an objective but rather the focus of wildlife law is to pursue the sustainable use and conservation of wildlife

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<sup>1</sup> Werner Scholtz, ‘Injecting Compassion into International Wildlife Law: From Conservation to Protection?’ (2017) 6 TEL 2.

<sup>2</sup> Bruce A Wagman and Matthew Liebman, *A Worldview of Animal Law* (Carolina Academic Press 2011).

<sup>3</sup> Stuart R Harrop, ‘The Dynamics of Wild Animal Welfare Law’ (1997) 9 JEL 287.

<sup>4</sup> Michael Bowman, ‘Conflict or Compatibility? The Trade, Conservation and Animal Welfare Dimensions of CITES’ (1998) 1 JIWL 9.

law. This approach is indicative of the anthropocentric and instrumental ethic that underlies the disconnect between the objectives of animal welfare and conservation.

The ignorance of international environmental law, in particular international wildlife law, in this regard is not satisfactory and Bowman's remark that it 'is unquestionably legitimate, and arguably compulsory (under international law), to afford (animal welfare) due consideration in the development of policy regarding the exploitation of wild fauna of all descriptions'<sup>5</sup> affirms the importance of facilitating the progressive development of an ethical policy that ensures that wildlife may flourish in accordance with their intrinsic value. The inclusion of a chapter (chapter 20) on wildlife welfare in the latest edition of Lyster's seminal work on international wildlife law affirms the growing recognition of the importance of this topic.<sup>6</sup>

The sparse nature of an (international) wildlife welfare regulatory framework may be due to several factors, such as the social distance between wildlife and human beings and the difficulty of reaching international consensus on this contentious issue.<sup>7</sup> The devastating effects of anthropogenic activities, in particular habitat encroachment, continue to result in an increase in human-wildlife interaction. This reconfiguration in the human-wildlife relationship requires a revision of policy in relation to wildlife that caters for compassion, care and respect in order to respond to the potential for cruelty that accompanies this interaction in a constricted geographical space where potentially conflicting interests entail an imposition on the flourishing of wildlife.<sup>8</sup> The *status quo* does not suffice in the context of these changing circumstances and necessitates a legal response.

The entanglement of animal interests with transnational issues such as global environmental protection, the transboundary movement of species (irrespective of territorial borders) and the potential trade implications of animal welfare measures in the context of the comprehensive trade regime indicate that animal welfare has profound implications for international law, which require the attention of international law scholars, in

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<sup>5</sup> Michael Bowman, 'Normalizing the International Convention for the Regulation of Whaling' (2008) 29 *Michigan Journal of International Law* 459.

<sup>6</sup> Michael Bowman, P Davies and C Redgwell, *Lyster's International Wildlife Law* (2nd edn, Cambridge University Press 2010).

<sup>7</sup> Joan E Schaffner, *An Introduction to Animals and the Law* (Palgrave Macmillan 2011) 60.

<sup>8</sup> Stuart R Harrop, 'Climate Change, Conservation and the Place for Wild Animal Welfare in International Law' (2011) 23 *JEL* 450.

particular from the field of international environmental law. Therefore this book aims to respond to the identified need to develop international environmental law, in particular international wildlife law, which pursues not only conservation but also exhibits elements of compassion. The further development of wildlife welfare law possesses the potential to enrich international environmental law as it may contribute to the erosion of the anthropocentric nature of international environmental law through the development of measures that respond to the interests of sentient wildlife. Ultimately, the establishment of legal measures that give effect to the intrinsic value of wildlife will soften the shackles of human dominance that confine international environmental law.

## 1.2 BREAKDOWN OF CHAPTERS

A central theme in this book remains the value that humans attribute to individual animals. This determines the regulatory approach taken concerning wildlife. Thus, chapter 2 provides an ethical perspective and analysis of the importance and role of values in relation to wildlife. As such this chapter establishes the ethical context for subsequent contributions. Hence, Schaffner analyses four different types of values, which are consumptive, non-consumptive, intrinsic and existence values. Her discussion elaborates on the identification of entities in nature that exhibit the aforementioned respective values and she indicates that attributing intrinsic value to entities other than human beings remains controversial and depends on the ethical approach followed. In terms of the anthropocentric approach, intrinsic value is only recognised in human beings. Her discussion of the complexity of the measurement of value in entities affirms that intrinsic value is the most difficult to measure. However, it is important to allow for some measurement of intrinsic value in order to account for intrinsic value in the establishment of policy. The reflection on the manner in which international environmental law incorporates values indicates that law still tends to favour the instrumental value of animals. However, a variety of other values such as intrinsic value are also exhibited in conventions. Schaffner argues that promoting, especially, intrinsic value is imperative for improving protection for wild animals. Hence, she advocates a paradigm shift towards a non-anthropocentric ethic. Her discussion presents a number of proposals in order to facilitate the suggested paradigm shift that could result in the legal protection of wildlife welfare.

In chapter 3 Bowman approaches the research question of this book in an innovative and comprehensive manner. He argues that humans as

moral agents should be expected to treat sentient beings with a minimum measure of respect and consideration for their interests. Hence, it might be expected that the public international legal order should reflect this ethical approach to animal welfare issues. Ethical principles that underpin such a legal system would provide guidance upon the resolution of conflicting human and animal interests and this guidance should be based on sound scientific principles pertaining to the welfare needs of the specific life forms. Bowman, however, points to the absence of an ethical approach in the public international legal order, which resonates with the premise in this book concerning the ignorance of law in relation to wildlife welfare. This chapter identifies the need for scholars to respond to the identified *lacuna* in pursuit of an 'ethically acceptable system of normative regulation'. The sub-disciplines that have a bearing on the relationship between nature and human beings are human rights, environmental protection (in particular biodiversity conservation) and animal welfare. The separate and distinct development of these sub-disciplines resulted in a divide, in particular in relation to environmental protection and welfare. It is in this context that Bowman reflects on the relevance of bioethics, which is concerned with the moral implications of our understanding of living things. Bioethics provides sound scientific principles concerning the welfare needs of other living beings. The quest for a responsive normative regulation in accordance with this approach does not require a reconstruction of the current normative order as existing building blocks may be utilised. In this regard Bowman explores the relationship between human dignity and inherent worth (which provides the philosophical underpinnings of the human rights system) and intrinsic value (which plays a pivotal role in biodiversity conservation). His novel exploration situates the need for welfare regulation in a broader context of law reform through linkages between sub-disciplines of international law, in particular human rights law and international environmental law. As such chapter 3 also addresses the interplay between ethical norms and scientific principles that underlies the dualism that exists between conservation and welfare.

Chapter 4 focuses on the influence of the issue of values in relation to wildlife law. Riley argues that the regulation of wildlife stems from an instrumental classification of species in a dichotomy as useful or harmful, which results in the respective protection or destruction of species. She accordingly canvases the disconnect between animal welfare and wildlife law by reference to Australian law in New South Wales as well as colonial English law. This useful example supports the notion that domestic wildlife law frequently reflects the disconnect that is also evident in international wildlife law. Riley, however, points to several developments

that indicate a shift towards the consideration of the intrinsic value of wildlife in international law that may respond to the identified disconnect. Thus, the question arises whether the welfare paradigm may sufficiently promote the well-being of wildlife or whether new paradigms must be established. Here she advocates the importance of compassionate conservation which injects empathy into decision-making concerning the plight of wildlife.

The near absence of a welfare element in the regulation of conservation of wildlife and the need for wildlife law to address this matter constitutes the point of departure in chapter 5. White points to the development of an emerging norm of animal welfare protection and indicates that a shift in the normative focus of current law entails several regulatory implications. Thus, this chapter considers the potential contribution of the regulatory studies' literature to the development of the animal protection norm at an international level. This chapter focuses on key principles of effective standard-setting at the national level which emphasise responsive and reflexive regulatory standard-setting processes. As such White argues that it is important to pay attention to issues of governance and regulatory design, which have also been considered in the field of environmental studies.

Chapter 6 indicates that international environmental agreements hold several implications for the interests of animals. Bilchitz argues that these agreements tend to focus on the sustainable use and conservation of animals. Hence, he identifies two approaches to these key aspects of agreements. He refers to the traditional approach as the 'aggregative' approach, which entails a focus on collective environmental goals such as the long-term survival of a species, the health of ecosystems and the conservation of biodiversity. The so-called 'integrative' approach, on the other hand, requires an attitude of respect for the individuals that make up a species, an eco-system or the components of biodiversity. Bilchitz provides several arguments as to why the integrative approach is preferable and thereby indicates that conservation and sustainable use may not be interpreted to exclude the interests of animals. His approach to the vexing question in this book is that it is not possible to give effect to the aggregative notion of conservation without paying heed to the protection of individual animals owing to the fact that conservation already contains within it the need to accord respect to individual animals.

Chapter 7 presents an interesting *casus* for the application of a conservation approach that acknowledges the importance of the intrinsic nature of individual animals. The author considers the arguments for the 'sustainable utilisation through commercialisation' of rare species approach in the context of the extreme rate of poaching of rhinoceroses in South Africa.

The author indicates that current arguments in favour of the conservation–trade link ignore the associated welfare aspects of the sustainable use of rhinoceroses and argues for the recognition of the intrinsic value of these animals as well as the legal emergence of the importance of animal welfare in international and domestic wildlife law. The author subsequently assesses trophy hunting and the captive breeding of rhinoceroses in the context of sustainable use and conservation that is also guided by compassion and care. The convergence between conservation and compassion necessitates a different outlook on these issues and entails several profound consequences for the debate.

The last chapter (chapter 8) in this book considers the potential contribution of the World Trade Organization (WTO) law to the progressive development of wildlife welfare law. Sykes accedes that WTO law may not *prima facie* be considered to be a candidate for the reconciliation of the objectives of conservation and welfare in law as it is viewed as responsive to neither environmental protection (and wildlife conservation) nor animal welfare. Nevertheless the jurisprudence of the WTO has the potential to provide a valuable contribution in this regard. Conservation and welfare protection are also separate matters in WTO law that fall under different provisions. The trade–environment debate, and as such the balancing of trade with the conservation of natural resources, has been a concern of the WTO since the inception of the organisation whereas animal welfare is a more novel issue. Sykes indicates that links exist between welfare and conservation in the WTO context. Both are values that underlie non-trade policy objectives which are recognised in terms of the WTO normative framework. Furthermore, WTO jurisprudence has developed an analytical and interpretive framework in environmental cases which laid the groundwork for the WTO in *EC–Seals* to recognise the importance of animal welfare as a policy matter. The *EC–Seals* case is profound as it could be a first step in shifting animal welfare from the margin to the mainstream of international legal discourse. As such Sykes does not argue that WTO case law has achieved the integration of conservation and welfare pursuant to compassionate conservation, but rather that WTO law allows members to pursue protection of animals that incorporates welfare. This is a valuable perspective on the progressive development that this book advocates.

This relatively novel theme is gaining traction and it is anticipated that the chapters in this book may strengthen the importance of the wildlife welfare discourse so that it will not merely be considered as ‘peripheral

to environmental concerns within the global goal of sustainable development'.<sup>9</sup> Hopefully this book will stimulate further research on the pursuit of wildlife welfare measures in international environmental law.

Ultimately, the authors in this book present compelling arguments for international environmental law to embrace an approach that does not merely conserve for man's sake but protects wildlife with compassion and caring that erodes the anthropocentrism in international environmental law. Pursuing compassion in international environmental law is not only to the benefit of individual animals but is important for the earth and humanity as a whole.

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<sup>9</sup> Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3rd edn, Oxford University Press 2009) 600.