

‘Ethical and humane use’, intrinsic value and the Convention on Biological Diversity: Towards the reconfiguration of sustainable development and use

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The Convention on Biological Diversity (CBD) does not contain provisions that deal with wildlife welfare. However, its Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity require the promotion of ethical and humane use of components of biodiversity as well as the recognition of intrinsic values. This article considers the meaning and implications of ‘ethical and humane use’ for the CBD by discussing South African case law that recognizes the intrinsic value of animals in terms of biodiversity law. These judgments may contribute to the development of animal welfare as a general principle of international law, as well as influence foreign jurisdictions. The article further considers the link between values and sustainable use as well as sustainable development in the CBD, with a particular focus on wildlife. The article argues for an evolutionary interpretation of the concept of sustainable use, which progressively recognizes wildlife welfare.

1 INTRODUCTION

Decision VII/12 (the Sustainable Use decision)¹ adopted by the Conference of the Parties (COP) to the CBD² includes an operational guideline to practical principle 11 of the Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity, which requires the promotion of a ‘more efficient, ethical and humane use of components of biodiversity’.³ In addition, practical principle 10 states that international and national policies should take into account intrinsic values of biological diversity.⁴

The Sustainable Use decision represents the foremost decision on sustainable use of biological diversity. Its preamble recognizes that the Addis Ababa Principles provide parties with an important tool to achieve *inter alia* the objectives of conservation and sustainable use, and invites parties to implement the Addis Ababa Principles in accordance with Articles 6 and 10 of the CBD.⁵ The Addis Ababa Principles represent an advisory framework concerning the use of biodiversity components, and the guidelines provide functional advice on the implementation of the principles.⁶ The Addis Ababa Principles are included in an annex to a

¹ CBD ‘Decision VII/12, Sustainable Use’ UN Doc UNEP/CBD/COP/DEC/VII/12 (13 April 2004). This decision was supplemented by CBD ‘Decision X/32, Sustainable Use of Biodiversity’ UN Doc UNEP/CBD/COP/DEC/X/32 (29 October 2010). The CBD COP has adopted various decisions in the form of guidelines, principles and programmes concerning conservation and sustainable use. See V Koester, ‘The Convention on Biological Diversity and the Concept of Sustainable Development: The Extent and Manner of the Convention’s Application of Components of the Concept’ in M Bowman, P Davies and E Goodwin (eds), *Research Handbook on Biodiversity and Law* (Edward Elgar 2016) 273.

² Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79 (CBD).

³ Decision VII/12 (n 1) Annex II, practical principle 11. Principle 11 reads that users of biodiversity components should ‘seek to minimize waste and adverse environmental impact and optimize benefits from uses’.

⁴ *ibid* Annex II, practical principle 10(b).

⁵ *ibid* para 2. Article 6 contains general measures for conservation and sustainable use, whereas Article 10 relates to the sustainable use of components of biological diversity. See also Decision X/32 (n 1) para 2(b).

⁶ Decision VII/12 (n 1) Annex I, paras 8–9.

COP decision,⁷ which could be viewed as a normative interpretation of sustainable use in the CBD.⁸ The Sustainable Use decision does not define ‘ethical and humane use’ or intrinsic value. This article therefore aims to ascertain the meaning of ethical and humane use as well as intrinsic value with a view to determining the implications for the interpretation of sustainable use under the CBD. Sustainable use is not a static concept and requires a continuous evaluation and readjustment.⁹

Two progressive judgments of South African courts recently recognized the intrinsic value of individual animals in biodiversity law. The judgments are groundbreaking worldwide as they illustrate how intrinsic value can constitute the basis for a reinterpretation of sustainable development and use in biodiversity law. The impact of the judgments is not restricted to South Africa, as these decisions may also influence international law and foreign jurisdictions. Domestic courts and/or tribunals frequently cite foreign judgments and, in this manner, engage in ‘transjudicial communication’.¹⁰ As such, the aforementioned judgments may have an influence on foreign jurisdictions that deal with similar wildlife welfare issues in the context of biological diversity. The fact that South African biodiversity legislation is based on the CBD, increases the significance of the judgments for this discussion.¹¹ The aforementioned South African judgments may strengthen the proposal that wildlife welfare may emerge as a general principle of international law as general principles may be identified from national and/or international sources of law.¹² Thus, South African case law has the potential to strengthen the notion of ethical and humane use in both foreign and international biodiversity law. Section 2 therefore begins by analysing these judgments. The analysis in Section 2 provides valuable perspectives for the subsequent discussion of sustainable development and use in international biodiversity law.

Section 3 next gauges the relationship between sustainable development, sustainable use and intrinsic value in the CBD. Wildlife provides a useful example for this analysis. The CBD has a strong instrumental focus, which tends to ignore the intrinsic value of individual animals and results in a view of sustainable development and use that considers animals as economic resources. I argue that it is important to recognize the intrinsic value of individual animals as the basis for the development of a welfare normative framework, which promotes the humane treatment of wildlife. Humane treatment is a central element of the welfare approach and warrants a brief analysis in Section 4. Section 5 considers the implications of the concept of ethical and humane use for sustainable use and development in the CBD. I argue that the recognition of ethical and humane use in the Sustainable Use decision can form the

⁷ The formal legal status of these decisions is ambiguous. See J Sommer, ‘Environmental Law-Making by International Organisations’ (1996) 56 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 628; RR Churchill and G Ulfstein, ‘Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law’ (2000) 94 *American Journal of International Law* 623; and J Brunnée, ‘COPing with Consent: Law-Making under Multilateral Environmental Agreements’ (2002) 15 *Leiden Journal of International Law* 1.

⁸ See T Gehring, ‘Treaty Making and Treaty Evolution’ in D Bodansky, J Brunnée and E Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2007) 467, 491–495; and A Wiersema, ‘Conferences of the Parties to Multilateral Environmental Agreements: The New International Law-Makers’ (2009) 103 *American Society of International Law Proceedings* 74, 75.

⁹ L Glowka et al, ‘A Guide to the Convention on Biological Diversity’ (IUCN Environmental Law Centre 1994) 57.

¹⁰ AM Slaughter, ‘A Global Community of Courts’ (2003) 44 *Harvard International Law Journal* 191.

¹¹ The National Environmental Management: Biodiversity Act 10 of 2004 (NEMBA) serves as the domestic enactment of the CBD in accordance with section 231(4) of the Constitution of the Republic of South Africa, 1996. See NEMBA, *ibid* section 2(b).

¹² M Bowman, P Davies and C Redgwell, *Lyster’s International Wildlife Law* (Cambridge University Press 2010) 672. See also M Cherif Bassiouni, ‘A Functional Approach to General Principles of International Law’ (1990) 11 *Michigan Journal of International Law* 768, 772. South Africa adheres to the *stare decisis* principle.

basis for an evolutionary interpretation of sustainable development and sustainable use, which progressively recognizes wildlife welfare under the environmental element of sustainable development. Section 6 concludes.

2 COMPARATIVE PERSPECTIVES FROM SOUTH AFRICAN CASE LAW

Two recent progressive judgments in South Africa provide valuable insights in relation to the recognition of the intrinsic value of wildlife and the implications for sustainable use and sustainable development. The South African judgments are not merely of domestic interest, but must be viewed in a global context.

In *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development*,¹³ the applicant (National Society for the Prevention of Cruelty to Animals, NSPCA) challenged the constitutionality of section 7(1)(a) of the Criminal Procedure Act (CPA).¹⁴ The NSPCA argued that animal cruelty offences were committed under the Animal Protection Act¹⁵ during the religious sacrificial slaughter of two camels, and referred the matter to the National Prosecuting Authority (NPA) for prosecution. The NSPCA contended that the NPA refused to prosecute.¹⁶ The NSPCA sought to institute a private prosecution and applied for a *certificate nolle prosequi* (refusal to prosecute) in terms of section 7(1)(a) of the CPA, which a private person requires to institute a private prosecution. The NPA refused to issue the certificate as the NSPCA was a juristic person and not a private person. The issue landed before the Constitutional Court of the Republic of South Africa after the appeal of the applicant against a High Court decision was unsuccessful.

The part of the judgment that is of relevance is the reflection on animal welfare.¹⁷ The court cited Cameron JA's minority judgment in *Openshaw*,¹⁸ which recognized that animals are worthy of protection because they are sentient beings that are capable of suffering pain.¹⁹ The court also approvingly cited the *Lemthongtai* case that dealt with rhinoceros poaching and affirmed that 'constitutional values dictate a more caring attitude towards fellow humans, animals and the environment in general'.²⁰ This attitude of caring is not only applicable to companion animals, as the court reiterated that *Lemthongtai* related animal welfare to issues of biodiversity. Importantly, the court identified the intrinsic value of animals as the rationale for animal welfare.²¹ The court proceeded to explain that animal welfare is connected with section 24 of the Constitution (in particular section 24(b))²² and that this 'integrative approach links

¹³ [2016] ZACC 46 (NSPCA case).

¹⁴ Act 51 of 1977. Section 7(1)(a) states that: 'In any case in which a Director of Public Prosecutions declines to prosecute for an alleged offence - (a) any private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence; may ... either in person or by a legal representative, institute and conduct a prosecution in respect of such offence in any court competent to try that offence.'

¹⁵ Act 71 of 1962.

¹⁶ NSPCA case (n 13) paras 4ff.

¹⁷ *ibid* paras 54ff.

¹⁸ *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* (2008) (5) SA 339 (SCA) para 38.

¹⁹ NSPCA case (n 13) para 56.

²⁰ *ibid* para 57 (citing *S v Lemthongtai* [2014] ZASCA 131 para 20).

²¹ NSPCA case (n 13) paras 54–57.

²² Section 24 of the Constitution (n 11) states: 'Everyone has the right: (1) to an environment that is not harmful to their health or well-being; (2) and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (a) prevent pollution and ecological degradation; (b) promote conservation; and (c) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'

the suffering of individual animals to conservation'.²³ In accordance with the opinion of the court, the 'integrative approach' strengthens environmental protection efforts.²⁴ Thus, 'animal welfare and animal conservation together reflect two intertwined values'.²⁵

The *NSPCA* judgment was cited with approval in a recent decision of the Gauteng division of the High Court of South Africa that considered the process by which South Africa sets annual export quotas for trade in 'lion bone, bone pieces, bone products, claws skeletons, skulls and the like for commercial purposes which are derived from captive breeding operations in South Africa'.²⁶ The basis of the relief sought by the applicant was that considerations, such as animal welfare, were not taken into account in the determination of the 2017 and 2018 quotas. Furthermore, the applicant claimed that they were excluded from the decision-making process. Hence, the applicant argued that the decision-making process was irrational and should be declared unlawful in terms of the Promotion of Administrative Justice Act.²⁷ The Minister of Environmental Affairs was under an obligation to consult with the scientific authority, established in terms of section 60 of the National Environmental Management: Biodiversity Act (NEMBA), before setting an annual export quota.²⁸ Furthermore, the scientific authority had to make a non-detriment finding in relation to a specimen of species and base its findings on a scientific and professional review of available information and public consultation.²⁹ During a consultative meeting convened by the Director-General of the Department of Environmental Affairs (DEA), the representatives of the applicant raised their concerns about the welfare of lions held in captivity and argued that this should be taken into account during the establishment of the export quota.³⁰ The position of the DEA during the proceedings was that the scientific authority as well as the Minister was required to consider scientific information in determining the annual export quota and that welfare considerations were not of a scientific nature.³¹ Furthermore, they argued that the Minister and the DEA did not have the responsibility for regulating and enforcing wildlife welfare standards. Accordingly, the welfare of captive-bred lions was not of relevance in determining the annual quota.³² The Minister made it clear that in determining the annual export quota, she had to find a balance between social, economic and environmental factors and she suggested that the applicant had 'under the guise of environmental concerns over-emphasized the welfare factor to the exclusion of social and economic factors'.³³

It is not essential to provide an in-depth analysis of all aspects of the case, but rather to reflect on the references to intrinsic value and animal welfare. In the court's consideration of mootness, the judge explicitly coined the treatment of lions in captivity (the welfare aspect) as an environmental issue that invoked the environmental right included in section 24 of the Constitution.³⁴ Accordingly, the court also considered section 24 as the point of departure in determining the relevance of welfare considerations. The court rejected the argument of the

²³ *NSPCA* case (n 13) para 58.

²⁴ *ibid.*

²⁵ *ibid.*

²⁶ *National Council of the Society for Prevention of Cruelty to Animals v Minister of Environmental Affairs and Others* [2019] ZAGPPHC 337 (*Lion bones* case) para 1. See also *ibid* para 64 (citing the *NSPCA* case).

²⁷ Act 3 of 2000 (PAJA). See *Lion bones* case (n 26) para 31. In the alternative, the applicant argued that the decisions had to be reviewed in terms of the principle of legality as provided for in section 1(c) of the Constitution (n 11).

²⁸ NEMBA (n 11) section 59, read with Regulation 3(f) of the Convention of International Trade in Endangered Species of Wild Fauna and Flora (CITES) Regulations (GN R 173 in GG 33002 of 5 March 2010).

²⁹ NEMBA (n 11) sections 61(d), 62(2), 63 read with sections 99 and 100.

³⁰ *Lion bones* case (n 26) para 24.

³¹ *ibid* para 26.

³² *ibid.*

³³ *ibid* para 59.

³⁴ *ibid* para 41.

State respondents that the Minister did not have a welfare mandate as this resided with the Department of Agriculture, Forestry and Fisheries (DAFF) under the Animal Protection Act. In the view of the court, a difference existed between having a responsibility for welfare and taking these considerations into account in the determination of the quota.³⁵ The court also disputed the assertion that the welfare mandate is located exclusively with DAFF, as the State was responsible for the setting of standards for the breeding and keeping of lions in captivity in terms of the National Biodiversity Plan.³⁶ The court argued that welfare standards had to contribute to the setting of standards. The court proceeded to find that lions in captivity are part of the biodiversity challenge.³⁷ As such,

*their suffering, the conditions under which they are kept and the like remain a matter of public concern and are inextricably linked to how we instil respect for animals and the environment of which lions in captivity are an integral part of.*³⁸

The court found that the State should not have ignored welfare considerations of lions in captivity in setting the export quota and that the State's decision accordingly contravened section 24 of the Constitution.³⁹

It is important to reflect briefly on the salient aspects of the judgment. First, the court rightly rejects the stark dichotomy between science (conservation) and ethics (welfare), which characterizes the current welfare-conservation debate.⁴⁰ Science plays an important and complementary role in relation to welfare issues. Scientific research, for example, determines the extent of suffering that an animal experiences, whereas moral assumptions accordingly establish the moral duty to prevent suffering. The contentious debate concerning the acceptable duration of the suffering of an animal caught in a trap constitutes a good example of the interplay between science and ethics. Science is subjugated to moral judgments where the question concerning the accepted time until death or loss of consciousness arises.⁴¹ Second, this case refutes the welfare-conservation dichotomy⁴² in biodiversity law and gives credence to elements of ethical and humane use. Third, the decision has some important consequences for the interpretation and implementation of sustainable development and sustainable use. The court rejects the Minister's (over)emphasis of the economic and social 'factors' of sustainable development. The court affirms that the welfare factor is far from irrelevant as it forms part of the environmental concerns that must be balanced against the other factors. A proposed legislative amendment affirms the impact of wildlife welfare on sustainable use. The National Environmental Management Laws Amendment Bill of 2017 provides for an amendment of section 2(a)(ii) of the NEMBA, which affirms sustainable use as an objective of the Act.⁴³ The

³⁵ *ibid* para 66.

³⁶ *ibid* para 67.

³⁷ *ibid* para 70.

³⁸ *ibid* para 71.

³⁹ *ibid* para 74.

⁴⁰ K Sykes, 'The Appeal to Science and the Formation of Global Animal Law' (2016) 27 *European Journal of International Law* 497; and SR Harrop, 'From Cartel to Conservation and on to Compassion: Animal Welfare and the International Whaling Commission' (2003) 6 *Journal of International Wildlife Law and Policy* 79, 80–81.

⁴¹ SR Harrop, 'The International Regulation of Animal Welfare and Conservation Issues Through Standards Dealing with the Trapping of Wild Animals' (2000) 12 *Journal of Environmental Law* 333, 350.

⁴² IJ Campbell, 'Animal Welfare and Environmental Ethics: It's Complicated' (2018) 23 *Ethics and the Environment* 49. See also JB Callicott, 'Animal Liberation: A Triangular Affair' (1980) 2 *Environmental Ethics* 311.

⁴³ GN 245 in GG 4073 of 31 March 2017. The proposed amendment reads that the objectives of the Act are to provide for '(ii) the use of indigenous biological resources in a [sustainable] manner that is ecologically sustainable, including taking into account the well-being of any faunal biological resource involved'. Well-being is a broad term that may include the welfare of wildlife.

envisaged amendment infuses sustainable use with considerations for the well-being of wildlife. This recognition and injection of welfare-centric ethics ultimately realigns the skewed factors of sustainable development so that the anthropocentric elements do not dominate. This realignment has the potential to infuse South African environmental law with non-anthropocentric ethics, as sustainable development is not only an important objective of the environmental right in the Constitution, but of South African environmental law in general.⁴⁴ Fourth, the court's reference to the importance of respect for animals is reminiscent of the 'Harmony with Nature' approach. The United Nations adopted a number of resolutions and reports on 'Harmony with Nature', which devise and define the recognition of a non-anthropocentric paradigm that constitutes the basis for the relationship between Earth and humankind.⁴⁵ 'Harmony with Nature' suggests a departure from the approach that nature is a commodity to be exploited for the benefit of people, towards an embrace of the Andean concept of *Pacha Mama*.⁴⁶ Fifth, the decision clearly indicates that the recognition of intrinsic value implies a reconciliation of the holistic approach to conservation and sustainable use with the individual approach to the welfare concern for animals under the rubric of the environmental right in section 24 of the Constitution.⁴⁷ Lastly, it is important to note that section 24 is coined in an anthropocentric manner that focuses on sustainable development.⁴⁸ Section 24 makes no mention of intrinsic value, wildlife welfare or the need for compassion and respect. The purposive interpretation of the courts is promising, and serves as a clarion call for biodiversity law that considers the intrinsic value of individual animals.

3 INTRINSIC VALUE, SUSTAINABLE DEVELOPMENT AND SUSTAINABLE USE

The preceding analysis of South African case law indicates the need to recognize the intrinsic value of individual wildlife as the basis for the reconciliation of conservation and welfare in biodiversity law. Such an affirmation of intrinsic value ensures that wildlife welfare deserves consideration under the environmental element of sustainable development. This can result in a reconfiguration of sustainable use and sustainable development in biodiversity law. Thus, it is imperative to reflect on the role and implications of values, in particular intrinsic value, for international biodiversity law. Accordingly, this section now turns to a discussion on sustainable use, sustainable development and values in the CBD.

The preamble of the CBD reiterates that 'States are responsible for conserving their biological diversity and using their biological resources in a sustainable manner'.⁴⁹ The CBD goes on to define sustainable use⁵⁰ through a reference to intergenerational and intragenerational equity as the 'use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its

⁴⁴ Constitution (n 11) section 24(b) and preamble of the National Environmental Management Act 107 of 1998.

⁴⁵ <<http://harmonywithnatureun.org/>>. The vision of the Strategic Plan for Biodiversity 2011–2020 is a world living in harmony with nature. CBD 'Decision X/2, The Strategic Plan for Biodiversity 2011–2020 and the Aichi Biodiversity Targets' UN Doc UNEP/CBD/COP/DEC/X/2 (29 October 2010) Annex, para 11.

⁴⁶ P Villavicencio Calzadilla and LJ Kotzé, 'Living in Harmony with Nature. A Critical Appraisal of the Rights of Mother Earth in Bolivia' (2018) 7 Transnational Environmental Law 397.

⁴⁷ Constitution (n 11).

⁴⁸ W Scholtz, 'The Anthropocentric Approach to Sustainable Development in NEMA and the Constitution' (2005) 1 Journal of South African Law 69.

⁴⁹ CBD (n 2) preamble. See also UNGA 'Transforming Our World: The 2030 Agenda for Sustainable Development' UN Doc A/RES/70/1 (21 October 2015) Sustainable Development Goals 12.2, 14.2, 14.7, 14.c, 15.1, 15.2 and 15.b.

⁵⁰ The CBD's use of the term 'sustainable use' is inconsistent, as it refers to 'sustainable use of components of biodiversity', whereas other parts speak of 'sustainable use of biodiversity as well as biological resources'.

potential to meet the needs and aspirations of present and future generations'.⁵¹ This expression of sustainable use has a strong anthropocentric focus.⁵² The principle of sustainable use remains one of the key principles that is aimed at the operationalization of sustainable development and must be understood against this background.⁵³ The CBD may rightly be viewed as a sustainable development agreement that attempts to internationalize the concepts of conservation and sustainable use of nature.⁵⁴ However, the sustainable development mantra in international environmental law is controversial,⁵⁵ predominantly anthropocentric⁵⁶ and also seems ill-suited to provide a clear position in instances where there are trade-offs between (antithetical) environmental and economic considerations.⁵⁷ Economic interests frequently trump environmental considerations in the implementation of sustainable development.⁵⁸

An overly economic understanding of sustainable use remains limited in relation to biodiversity as such an approach results in the exclusion of non-instrumental values.⁵⁹ Values are important because humans protect what they value.⁶⁰ The sustainable use of components of biological diversity, such as wildlife, is based on the recognition of environmental values, which may be categorized as being either instrumental, inherent or intrinsic.⁶¹ Instrumental value lies in the utilitarian value of an object, such as the instrumental manner in which some humans value wild animals as a source of food. An object will have inherent value when it possesses value in itself and not for its utility. Inherent value might be derived from aesthetic, cultural or religious considerations. Instrumental and inherent value presupposes an external evaluation. Intrinsic value is the value which entities have of themselves, for themselves.⁶² In the latter instance, the value of the object is not dependent on any external beneficiary, which makes the identification of intrinsic value challenging.⁶³ Intrinsic value has two overlapping facets, which are the 'good-of-its-own' (phenotype) and a 'good-of-its-kind' (genotype) of

⁵¹ CBD (n 2) art 2 of the CBD. This definition is elaborated in more detail in subsequent provisions of the CBD. See *ibid* arts 6 and 10 as well as 8(c) and (i).

⁵² C Willmore, 'Sovereignty, Conservation and Sustainable Use' in E Morgera and J Razzaque (eds), *Biodiversity and Nature Protection Law* (Edward Elgar 2017) 31, 35. A recent CBD COP decision neatly illustrates this line of thinking, as it recognizes that the challenge of sustainable use of biodiversity is the balancing of the need to 'maximize human livelihoods against the necessity of conserving the underlying natural resource base'. CBD 'Decision VI/13, Sustainable Use' UN Doc UNEP/CBD/COP/6/20 (27 May 2002).

⁵³ P Sands and J Peel, *Principles of International Environmental Law* (4th edn, Cambridge University Press 2018) 222.

⁵⁴ P van Heijnsbergen, *International Legal Protection of Wild Fauna and Flora* (IOS Press 1997) 90. A different question is whether the agreement reflects the components of sustainable development. See Koester (n 1).

⁵⁵ See V Barral, 'Sustainable Development in International Law: Nature and Operation of a Legal Norm' (2012) 22 *European Journal of International Law* 377.

⁵⁶ See M Pallemarts, 'International Environmental Law From Stockholm to Rio: Back to the Future?' in P Sands (ed), *Greening International Law* (Earthscan 1993) 1, 12. See, however, M Bowman, 'The Nature, Development and Philosophical Foundations of the Biodiversity Concept in International Law' in M Bowman and C Redgwell (eds), *International Law and the Convention on Biological Diversity* (Kluwer 1996) 5, 19.

⁵⁷ JE Viñuales, 'The Rise and Fall of Sustainable Development' (2013) 22 *Review of European, Comparative and International Environmental Law* 3. For diverging views: A Boyle and D Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press 1999).

⁵⁸ Viñuales (n 57).

⁵⁹ CBD 'Decision V/24, Sustainable Use as a Cross-cutting Issue' UN Doc UNEP/CBD/COP/5/23 (22 June 2000) recognizes that the conservation of biodiversity is 'not captured and adequately recognized by current economic relations and patterns'. See, for an early call to action, S Johnston, 'Sustainability, Biodiversity and International Law' in Bowman and Redgwell (n 56) 51, 59.

⁶⁰ JE Schaffner, 'Value, Wild Animals and Law' in W Scholtz (ed), *Animal Welfare and International Environmental Law. From Conservation to Compassion* (Edward Elgar 2019) 8, 8.

⁶¹ Bowman (n 56) 14.

⁶² Schaffner (n 60) 12.

⁶³ *ibid*.

wildlife.⁶⁴ ‘Good-of-its-kind’ of any organism entails the aspects that are shared with all others of its kind, regardless of location and equates with the concept of species.⁶⁵ ‘Good-of-its-own’ is associated with factors such as nutrition and shelter which have an impact on the extent to which organisms flourish. The capacity to suffer forms part of the ‘good-of-its-kind’ of sentient species, as this provides a mechanism to protect themselves from harm. However, the capacity to suffer is also relevant for the ‘good-of-its-own’ as an individual organism has an interest to avoid pain. Although the ‘good-of-its-kind’ may be maintained by the survival of species, the role of individuals is important in relation to species that face extinction owing to the fact that each individual represents a medium to preserve the ‘good-of-its-kind’.⁶⁶

Wildlife provides a useful example for a discussion on values. In the context of wildlife, the argument may be made that the dominant anthropocentric justification of biodiversity law fails to encapsulate the essential value⁶⁷ of wildlife, due to its focus on the instrumental economic value of wildlife. Wildlife law focuses on the prevention of the extinction of species and, generally speaking, non-endangered species may be utilized in an instrumental (lethal or non-lethal) manner. Wildlife welfare is also not a concern of biodiversity law, and the CBD accepts the consumptive use of animal species if certain conditions are met.⁶⁸

The anthropocentric focus of sustainable use in terms of dominant instrumental values tends to ignore that humans are actually interwoven with biological resources and are not mere consumers of its fruits.⁶⁹ The instrumental approach subscribes to the view that (sentient) wild animals are resources that have to serve the economy and fails to acknowledge the essential value that wildlife possesses in its own right. This approach results in the prioritization of economic development over environmental protection.⁷⁰

Law must respond to the anthropocentric instrumental approach through a recognition of the needs of other species. Such a recognition must dispel the view that humans are consumers and animals are merely resources. The South African case law discussed in Section 2 indicates that the recognition of the moral worth of non-human species through an affirmation of their essential value will instil a more respectful attitude to other species. A respectful approach to wildlife could initiate a departure from the approach that nature is a commodity. The imperative to respond to the consequences of instrumentalism is a compelling reason to recognize the intrinsic value of individual organisms in biodiversity law.⁷¹ The CBD is not ignorant of intrinsic value, as it recognizes the latter in the preamble in addition to a range of instrumental values.⁷² The reference to intrinsic value has some bearing on the substantive provisions of the CBD, as biological diversity is to be conserved for reasons that relate to both instrumental and intrinsic value.⁷³ However, provisions on the sustainable use of biological resources clearly have an instrumental focus. The approach in the CBD is reminiscent of the dominance of instrumental values in international law, in particular international wildlife law,

⁶⁴ Bowman et al (n 12) 74.

⁶⁵ *ibid* 75.

⁶⁶ *ibid* 76.

⁶⁷ Schaffner (n 60) 21.

⁶⁸ See also A Gillespie, *Conservation, Biodiversity and International Law* (Edward Elgar 2011) 146.

⁶⁹ K Ash, ‘Why “Managing” Biodiversity Will Fail: An Alternative Approach to Sustainable Exploitation for International Law’ (2007) 13 *Animal Law* 209, 216.

⁷⁰ K Rawles, ‘Sustainable Development and Animal Welfare: The Neglected Dimension’ in J Turner and J D’Silva (eds), *Animals, Ethics and Trade. The Challenge of Animal Sentience* (Earthscan 2006) 208, 213.

⁷¹ Bowman (n 56) 28–31.

⁷² CBD (n 2) preamble states: ‘Conscious of the intrinsic value of biological diversity and of the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components.’ The CBD’s endorsement of intrinsic value relates to the broad category of biological diversity and not only biological resources as defined in its Article 2.

⁷³ M Fosci and T West, ‘In Whose Interest? Instrumental and Intrinsic Value in Biodiversity Law’ in Bowman et al (n 1) 52, 60.

whereas ‘intrinsic value seems more ornamental than influential to the substantive law ... and the intrinsic value of individual organisms has received little attention’.⁷⁴ It may, however, be argued that the relevance of intrinsic value (in addition to the array of instrumental values) for the conservation of biological diversity makes a compelling case to give more weight to this value in the CBD.⁷⁵ It is in this context important to take note of the argument of Bowman, Davies and Redgwell that ‘any sound ethical policy should additionally have regard to the extent to which individual organisms are permitted to flourish in accordance with their biological nature’.⁷⁶

4 HUMANE ETHICS AND SUSTAINABLE USE

The ‘sound ethical policy’ suggested by Bowman, Davies and Redgwell necessitates a normative wildlife welfare framework that should protect specimens and provide for the recognition of their moral concern.⁷⁷ This argument resonates with the approach in the *NSPCA* case, which focuses on the intrinsic value of individual animals as the basis for the recognition of the legal concern for their welfare.⁷⁸ The humane treatment of individual animals (or the prevention of unnecessary pain) constitutes the core aspect of the animal welfare approach and warrants attention.⁷⁹ ‘Humane’ suggests compassion that enables empathy with the pain of others.⁸⁰

The need for a humane approach has surfaced in certain areas of international environmental law.⁸¹ The whaling regime serves as an example. The shift in the initial conservation-related objectives of the Whaling Convention⁸² towards a focus on the question

⁷⁴ *ibid* 61.

⁷⁵ The preamble of the Convention on the Conservation of European Wildlife and Natural Habitats (adopted 19 September 1979, entered into force 6 June 1982) 1284 UNTS 209 also includes a reference to intrinsic value.

⁷⁶ Bowman et al (n 12) 672.

⁷⁷ *ibid*.

⁷⁸ Wildlife law remains primarily concerned with conservation, and largely ignores the fact that animals are sentient beings which are capable of pain and suffering. Several scholars have criticized the absence of a wildlife welfare normative framework and identified the need for welfare protection measures for individual animals. K Sykes, ‘Nations Like unto Yourselves: An Inquiry into the Status of a General Principle of International Law on Animal Welfare’ (2011) 49 *Canadian Yearbook of International Law* 3, 4 and W Scholtz, ‘Injecting Compassion into International Wildlife Law: From Conservation to Protection?’ (2017) 6 *Transnational Environmental Law* 463. See also R Adam and J Schaffner, ‘International Law and Wildlife Well-Being: Moving From Theory to Action’ (2017) 20 *Journal of International Wildlife Law and Policy* 1. My focus on (international) wildlife welfare does not imply that the international regulation of companion or farm animals is satisfactory. For a discussion, see A Peters, ‘Global Animal Law: What It Is and Why We Need It’ (2016) 5 *Transnational Environmental Law* 9.

⁷⁹ For a critical analysis, see P Sankoff, ‘The Protection Paradigm: Making the World a Better Place for Animals?’ in P Sankoff, S White and C Black (eds), *Animal Law in Australasia: Continuing the Dialogue* (2nd edn, Federation Press 2013) 8. A precise universal definition of animal welfare does not exist. Some commentators restrict the notion to physical well-being whereas others focus on the emotional response of animals. For a discussion, see RP Haynes, *Animal Welfare: Competing Conceptions and their Ethical Implications* (Springer 2010) 107. Article 7.1.1 of the OIE (World Organisation for Animal Health) Terrestrial Animal Welfare Code defines animal welfare as ‘the physical and mental state of an animal in relation to the conditions in which it lives and dies’. <https://www.oie.int/en/standard-setting/terrestrial-code/access-online/?htmfile=chapitre_aw_introduction.htm>. See also D Favre, ‘Humane Treatment of Wildlife’ in D Cao and S White (eds), *Animal Law and Welfare: International Perspectives* (Springer 2016) 305.

⁸⁰ A Gillespie, ‘Humane Killing: A Recognition of Universal Common Sense in International Law’ (2003) 6 *Journal of International Wildlife Law and Policy* 1, 4.

⁸¹ *ibid* 1–29.

⁸² International Convention for the Regulation of Whaling (adopted on 2 December 1946, entered into force 10 November 1948) 161 UNTS 72 preamble.

whether the ‘consumptive utilization of whales is acceptable’⁸³ is a remarkable progression. ‘Humane killing’ has become a central issue of discontent at the International Whaling Commission.⁸⁴ Whaling nations favour a conservation perspective and seek a lifting of the moratorium on commercial whaling, whereas anti-whaling nations oppose the killing on the basis of the intelligence of the charismatic megafauna as well as the brutality of their ‘harvesting’. The Convention on International Trade in Endangered Species of Wild Fauna and Flora is an oft-cited instrument that includes (incidental) provisions on the humane transportation of wildlife.⁸⁵ The Agreement on International Humane Trapping Standards between the European Union, Canada and the Russian Federation is yet another example of the consideration of the notion of ‘humane’ in relation to individual animals.⁸⁶ Soft law instruments also reflect a concern for the humane treatment of animals. The preamble of the Johannesburg Declaration on Sustainable Development, for example, strives for a ‘humane, equitable, caring global society’ and affirms humanity’s ‘responsibility to one another, to the greater community of life and to our children’.⁸⁷

The humane approach does not necessarily oppose wildlife usage or exploitation in favour of human interests, but rather mitigates animal suffering through a regulatory scheme.⁸⁸ The humane approach is therefore *prima facie* compatible with the notion of sustainable use in the CBD.

5 TOWARDS ETHICAL AND HUMANE USE

Currently the CBD does not reflect the notion of ethical and humane use as discussed in this article. Article 2 of the CBD pursues a form of sustainable use that is driven by the anthropocentric needs of current and future generations. The point of departure is use that does not result in a decline of resources that could be detrimental to intragenerational and intergenerational equity. The recognition of the moral worth of individual animals through their humane treatment invokes the need for a sound ethical policy that gives expression to the intrinsic value of wildlife as expressed through the interaction of the ‘good-of-its-own’ and the ‘good-of-its-kind’ of wildlife. Thus, the promotion of welfare of (individual) animals in biodiversity law is important for the (holistic) conservation and sustainable use of biological resources, such as wildlife species. A stronger focus on intrinsic value in the CBD and the pursuit of humane treatment invites the injection of non-anthropocentric ethics into biodiversity law. This does not mean that ethics is absent in biodiversity law. The injection

⁸³ PJ Stoett, *The International Politics of Whaling* (UBC Press 1997) 103.

⁸⁴ W Scholtz, ‘Animal Welfare and the Inhumanity of Whale Killing’ (2017) 20 *Journal of International Wildlife Law and Policy* 18; and M Fitzmaurice, *Whaling and International Law* (Cambridge University Press 2015) 153–183.

⁸⁵ Convention on International Trade in Endangered Species of Wild Fauna and Flora (adopted 3 March 1973, entered into force 1 July 1975) 993 UNTS 243 arts VIII(3), III(2)(c), III(4)(b), IV(2)(c), IV(5)(b), IV (6)(b), IV(2)(b) and VII(7)(c).

⁸⁶ Agreement on International Humane Trapping Standards between the European Union, Canada and the Russian Federation [1998] OJ L42/43.

⁸⁷ Johannesburg Declaration on Sustainable Development in ‘Report of the World Summit on Sustainable Development’ UN Doc A/CONF.199/20, (2002) Annex, preamble.

⁸⁸ This aspect of the welfare approach has attracted criticism from exponents of animal rights due to the fact that the welfare approach entails a balancing of animal interests against human interests. The outcome of the process is predetermined in favour of human interests as the latter are rights holders. In terms of this argument, ‘humane’ treatment essentially obscures the question whether the exploitation of animals is justified in the first place. My acceptance of the compatibility of animal welfare and sustainable use should not be understood as a dismissal of the animal rights approach. For a discussion on animal rights theory, see TL Beauchamp, ‘Rights Theory and Animal Rights’ in TL Beauchamp and RG Frey, *Oxford Handbook of Animal Ethics* (Oxford University Press 2013) 198; and F Francione, *Animals, Property, and the Law* (Temple University Press 1995) 6ff.

advocated for here rather presupposes the inclusion and recognition of ethics that recognizes the moral worth of individual wild animals and their interests through legal obligations to erode current anthropocentric dominance. I previously argued for the injection of a welfare-centric ethic⁸⁹ in law, which takes cognisance of environmental holism and individual welfare needs.⁹⁰ The *Lion Bones* judgment is exemplary of the manner in which a predominantly anthropocentric provision may be receptive to the welfare-centric ethic in recognition of intrinsic value and accordingly the pursuit of the ethical and humane use of individual animals.⁹¹

The reference to intrinsic value as well ethical and humane use in the Sustainable Use decision may support an evolutionary interpretation⁹² of sustainable use and consequentially sustainable development in the CBD by international adjudicative bodies and domestic courts.⁹³ An evolutionary interpretation can give recognition to animal welfare considerations. This is in line with the motivation of the parties for the adoption of the CBD as expressed through the reference to *inter alia* intrinsic value in the preamble. The inclusion of intrinsic value is an important consideration for the interpretation of the terms of the CBD.⁹⁴ The recognition of the concern for animal welfare as a general principle of international law could also strengthen this proposed interpretation.⁹⁵ The adoption of a COP decision, which clarifies the suggested evolutionary interpretation of sustainable use could be useful for the understanding of the implications and meaning of ethical and humane use as well as the role of wildlife welfare in the international biodiversity regime.

Ethical and humane use of wildlife does not imply that all forms of pain and suffering of individual animals must be prevented in all instances.⁹⁶ The acceptance of ethical and

⁸⁹ This approach requires an individual to have the capacity for ‘conscious experience’ to be able to possess interests. Interests are perceived as components of well-being. Well-being and the capacity for well-being are therefore the central concern of this ethical approach. Thus, to have an interest in something, the aforementioned something must make life better for the individual whose life it is. This approach therefore excludes non-sentient beings from the sphere of moral (and legal) obligations. This exclusion could be criticized as it entails a weak environmental ethic, which does not provide for a holistic approach to the environment. However, the welfare-centric ethic reconciles holism and individualism via a recognition of the interlinkages between the well-being of human beings, other sentient beings and their habitat. The welfare-centric ethic recognizes that the well-being of sentient beings depends on the health of non-sentient components of nature. See A Cochrane, *Animal Rights without Liberation: Applied Ethics and Human Obligations* (Columbia University Press 2012) 156.

⁹⁰ Scholtz (n 78) 473.

⁹¹ Exponents of the animal rights approach, such as Regan, may probably argue that a welfare-centric approach does not fully depart from anthropocentrism as it does not require abolition of animal use. See T Regan, *The Case for Animal Rights* (University of California Press 1983). See, however, Cochrane (n 89) 38–50. The welfare-centric ethic takes cognisance of wildlife welfare interests and serves as a basis for the creation of legal welfare obligations. In this manner, it invites non-anthropocentric values that erode anthropocentrism. My view is that the proposed injection does not necessarily exclude rights based-approaches, such as the ‘rights for nature’ approach. It rather caters for pluralist ethics, with a lesser focus on anthropocentrism. It is possible that the welfare-centric ethic may be a phase in the incremental development of a progressive departure from anthropocentrism through a rights-based approach. This discussion falls outside the ambit of this article.

⁹² For a discussion on evolutionary interpretation, see E Bjorge, *The Evolutionary Interpretation of Treaties* (Oxford University Press 2014). See also G Marceau, ‘Evolutive Interpretation by the WTO Adjudicator’ (2018) 21 *Journal of International Economic Law* 791.

⁹³ See G Abi-Saab et al (eds.), *Evolutionary Interpretation and International Law* (Hart 2019).

⁹⁴ For an authoritative analysis on the role of preambles, see J Klabbers, ‘Treaties and Their Preambles’ in M Bowman and D Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press 2018) 172.

⁹⁵ For a discussion, see Scholtz (n 78) 467. Bowman, Davies and Redgwell argue that animal welfare constitutes a ‘meta-principle’ that is relevant to the interpretation of norms via Article 31(3)(c) of the Vienna Convention on the Law of Treaties. Bowman et al (n 12) 681.

⁹⁶ As Callicott aptly remarks: ‘To live is to be anxious about life, to feel pain and pleasure in a fitting mixture, and sooner or later to die.’ See JB Callicott, ‘Animal Liberation: A Triangular Affair’ (1980) 2 *Environmental Ethics* 311, 333.

humane use therefore does not justify intervention in nature to address the suffering of wildlife through, for example, genetic engineering to exterminate predation.⁹⁷ It does, however, imply that wildlife cannot be used merely as means to satisfy human interests. Accordingly, human interference in relation to wildlife necessitates a sufficient justification.⁹⁸ Thus, the sustainable use of wildlife should occur on the basis of the (ethical) recognition of the intrinsic value (the genotype and phenotype) of individual animals.⁹⁹ Sustainable development in terms of the recognition of intrinsic value presupposes the reconciliation of the environmental, social and economic pillars in a context where the environmental element necessitates the recognition of the moral worth of individual animals. In my view, animal welfare should not be considered as a separate fourth element of sustainable development, as this approach perpetuates the divide between conservation and welfare contrary to the facets of intrinsic value.¹⁰⁰ Ultimately, sustainable development must recognize a concept of sustainable use and conservation that does not merely pursue humankind's interests, but also acknowledges the welfare interests of individual animals. The *Lion Bones* case provides a practical example of the manner in which the recognition of intrinsic value as well as ethical and humane use may reconfigure sustainable development in order to take cognisance of wildlife welfare. The aforementioned arguments may result in a clarification¹⁰¹ of the (pluralist) ethics underlying sustainable development in relation to biodiversity as the environmental pillar will not merely succumb to human economic needs in the implementation thereof.

My argument for an evolutionary interpretation of sustainable use and sustainable development is not radical, but rather marks a return to the views of the 18th General Assembly of the IUCN of 1990, which stated that '[e]thical, wise and sustainable use of some wildlife can provide an alternative or supplementary means of productive land use, and can be consistent with and encouraging conservation, where such use is in accordance with ... provision for the protection of wild animals from avoidable cruelty and suffering'.¹⁰²

6 CONCLUDING REMARKS

The reference to 'ethical and humane use' in conjunction with the inclusion of intrinsic value in the Sustainable Use decision could form the basis for an evolutionary interpretation of sustainable use (and sustainable development) in the CBD, which takes cognisance of welfare concerns. The progressive judgments of the South African courts on animal welfare and biodiversity indicate the manner in which the recognition of intrinsic value can constitute the basis for the reconfiguration of sustainable use as well as sustainable development in order to move towards ethical and humane use in biodiversity law. This reconfiguration allows for animal welfare to be considered under the environmental element of sustainable development. In this manner, the opposing concepts of conservation and welfare in biodiversity law can be

⁹⁷ G Easterbrook, *A Moment on the Earth: The Coming of Age of Environmental Optimism* (Viking 1996) 431.

⁹⁸ W Scholtz, 'Trading Rhinoceros Horn for the Sake of Conservation: Dehorning the Dilemma Through a Legal Analysis of the Emergence of Animal Welfare' in Scholtz (n 60) 235, 261.

⁹⁹ *ibid* 260.

¹⁰⁰ Rawles (n 70) 213 supports the recognition of animal welfare as a fourth element of sustainable development.

¹⁰¹ I Cheyne, 'Law and Ethics in the Trade and Environment Debate: Tuna, Dolphins and Turtles' (2000) 12 *Journal of Environmental Law* 293.

¹⁰² This is in stark contrast to later pronouncements by the IUCN on conservation that influenced various instruments of international environmental law. Exemplary is the IUCN Policy Statement on Sustainable Use of Wild Living Resources that reads that: 'Both consumptive and non-consumptive use of biological diversity are fundamental to the economies ... and use of wild living resources, if sustainable, is an important conservation tool because the social and economic benefits derived from such use provides incentives for people to conserve them.' 'IUCN Policy Statement on Sustainable Use of Wild Living Resources' (2000) <<https://portals.iucn.org/library/efiles/documents/Rep-2000-054.pdf>>.

reconciled. This ensures that the interests of individual animals are not subjugated to the economic interests of humans. I am mindful that the utilitarian nature of the welfare approach implies that this does not guarantee an optimization of the welfare interests of wildlife in all circumstances, but it does allow for an incremental erosion of anthropocentrism through the recognition of the welfare interests of sentient non-human entities and their intrinsic value. Wildlife welfare in biodiversity law remains fertile ground for further critical research and warrants the attention of scholars in order to contribute to the growing body of wildlife welfare scholarship. This article represents an attempt to address a facet of this fascinating and profound discourse and hopefully it will kindle further future contributions on the linkages between the conservation of biological diversity, sustainable use and wildlife welfare.

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