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International (Wild) Animal Rights and Biodiversity: Resolving Conflicts Between Holism And Individualism

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ABSTRACT

This article discusses the extension of international human rights principles to wild animals, which could potentially contribute to their international protection in the Anthropocene. However, the distinct and more distant relationship between humans and wild animals raises several questions. Tension exists between the holistic ethics of environmentalism in terms of the biodiversity regime *vis-à-vis* the focus on individual animals in terms of animal welfare/ethics. The obligation to eradicate alien invasive species in Article 8(h) of the Convention on Biological Diversity epitomises the tension. Thus, this article investigates potential international wild animal rights in the context of the tension between holism and individualism and introduces these rights as specific group-based rights which differ in substance from animal rights applicable to domesticated animals. The discussion proposes that non-exclusionary dignity may be used to determine the specific rights of wild animals, which has the potential for strengthening animal rights through transjudicial communication. Furthermore, the article addresses the tension between environmentalism and rights and argues that wild animal rights don't necessarily preclude the eradication of alien invasive species. Subsequently, the publication considers the substantive content of proposed wild animal rights and reflects on potential wild animal rights via a reference to existing non-binding declarations and domestic case law. The discussion highlights the relevance of the rights to freedom, to habitat or the environment, and the prohibition of cruel treatment and concludes with final remarks.

1. Introduction

The implications of anthropogenic activities on the environment, such as climate change, may continue to result in a shrinking of the wild due to

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habitat loss.¹ The loss and fragmentation of habitat may necessitate a constriction of species into a more geographically limited and controlled environment, which may lead to more intrusive *ex situ* conservation methods, such as captive breeding, and the imposition of control measures over wild animal species similar to how this is done in agriculture.² This surge in human–animal interaction and *ex situ* conservation measures in the absence of a welfare regulatory framework in international wildlife law has led to calls for the recognition of wild animal³ welfare in international wildlife law.⁴ The welfare model is based on the regulation of the ‘humane’ treatment of animals to mitigate animal suffering and weighs non-human animal interests against human interests to determine whether animal pain and suffering are ‘necessary’ or ‘justified’.⁵ The welfare approach is used to legally regulate the humane treatment of (predominantly) domestic animals as is evident from anti-cruelty legislation in the majority of domestic jurisdictions.⁶ Exponents of Animal Rights Theory (ART) criticize

¹SR Harrop, ‘Climate Change, Conservation and the Place for Wild Animal Welfare in International Law’ (2011) 23 *Journal of Environmental Law* 441, 450.

²The Convention on Biological Diversity (CBD) defines these measures in Article 2 as ‘the conservation of components of biological diversity outside their natural habitats’. *In situ* conservation means the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties: Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79. For an overview of the welfare issues concerning animals and agriculture see WG Pond et al (eds), *Animal Welfare in Animal Agriculture. Husbandry, Stewardship, and Sustainability* (Routledge 2011).

³The distinction between wild and domestic animals is not straightforward. See O Outhwaite, ‘Neither Fish, nor Fowl: Honeybees and the Parameters of Current Legal Frameworks for Animals, Wildlife and Biodiversity’ (2017) 29 *Journal of Environmental Law* 317. Palmer distinguishes between ‘constitutive wildness’ and ‘locational wildness’. Constitutive wildness refers to animals that are not domesticated whereas locational wildness refers to the wild–urban spectrum where wild animals are considered to live far away from human settlements: C Palmer, *Animals Ethics in Context* (Columbia University Press 2010) 63–65. Donaldson and Kymlicka propose a relational theory of political citizenship which distinguishes between domestic, wild, and liminal animals. Liminal animals are wild but live amid human settlement (such as raccoons): S Donaldson and W Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (Oxford University Press 2011) 101–258. Wild animals in this article refers to living, sentient animals that are not domesticated and includes wild animals in captivity, such as zoos, aquariums, or ranches. My understanding of wild animals focuses on the constitutive aspect, and it also includes liminal animals. An individual may claim ownership over a wild animal through possession, control, domestication, or confinement, or through killing the animal: see G Wandesforde-Smith and LA Hart, ‘Exploring the Borderlands Between Wild and Non-Wild Animals: Wildlife Law and Policy in Transition’ (2015) 18 *Journal of International Wildlife Law & Policy* 269, and JE Schaffner, *An Introduction to Animals and the Law* (Palgrave 2011) 22.

⁴W Scholtz (ed), *Animal Welfare and International Environmental Law: From Conservation to Compassion* (Edward Elgar 2019), and W Scholtz, ‘Injecting Compassion into International Wildlife Law: From Conservation to Protection?’ (2017) 6 *Transnational Environmental Law* 463.

⁵GL Francione, *Animals, Property and the Law* (Temple University Press 1995) 6. These are not the only approaches on the protection spectrum but are used as a tool for dividing the approaches. Theories of protection stretch across a continuum: TL Beauchamp, ‘Rights Theory and Animal Rights’ in TL Beauchamp and RG Frey (eds), *The Oxford Handbook of Animal Ethics* (Oxford University Press 2011) 201.

⁶For a comprehensive comparative overview on domestic jurisdictions that regulate animal welfare, see BA Wagman and M Leibman, *A Worldview of Animal Law* (Carolina Academic Press 2011) 3–60.

the welfare approach as they argue that welfarism condones the exploitation of animals in favour of human interests.⁷ Thus, they are in favour of awarding rights to animals to offer them more robust protection.⁸ Initially, ART scholars, such as Tom Regan, advocated a 'hands-off' approach to wild animals.⁹ Regan's approach has been rejected by authors who have engaged with the need to respond to direct as well as indirect harms, such as pollution or habitat encroachment, to wild animals. Thus, existing approaches to animal protection do not exclude wild animals.¹⁰

It is especially the extension of international human rights principles to animals which seems promising for their international protection, and which could potentially contribute to the robust protection of wild animal interests in the Anthropocene.¹¹ However, several questions arise concerning the awarding of rights to wild animals due to their distinct relationship

⁷ART has generated rich scholarship over the years, and it is not necessary to reiterate the debate: see T Regan, *Defending Animal Rights* (University of Illinois Press 2001) 3. However, see also R Garner, 'A Defense of Broad Animal Protectionism' in GL Francione and R Garner (eds), *The Animal Rights Debate: Abolition or Regulation?* (Columbia University Press 2010) 101–178 and GL Francione, 'An Alternative to Legal Welfarism?' in Francione (n5) 251–262. ART has been rejected on several grounds and it is not my intention to revisit the debate. For a discussion see S Donaldson and W Kymlicka, 'Universal Basic Rights for Animals' in SJ Armstrong and RG Botzler (eds), *The Animal Ethics Reader* (Routledge 2017) 51–64. For recent critical approaches to the employment of rights frameworks see I Offor, 'Second Wave Animal Ethics and (Global) Animal Law: A View from the Margins' (2020) 11 *Journal of Human Rights and the Environment* 268, and B Favre, 'Is There a Need for a New, an Ecological, Understanding of Legal Animal Rights?' (2020) 11 *Journal of Human Rights and the Environment* 297.

⁸The animal rights approach would not necessarily result in higher levels of protection as it might recognise only one or a few rights, whereas a welfare approach might provide comprehensive protection concerning an array of issues. It is therefore important not to confuse the formal distinction between the rights and welfare approaches with the substantive protection afforded by the respective approaches. My view concerning the fluidity between animal rights and welfare legislation is confirmed by Stucki's distinction between simple animal rights, which are 'weak legal rights whose substantive content is of a non-fundamental, ancillary character and/or that lack normative force due to their high infringeability'; and fundamental animal rights, which are 'strong legal rights along the lines of human rights that are characterised by the cumulative features of substantive fundamentality and normative robustness due to their reduced infringeability': S Stucki, 'Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights' (2020) 40 *Oxford Journal of Legal Studies* 533.

⁹T Regan, *The Case for Animal Rights* (2nd ed., University of California Press 2004) 361.

¹⁰See Donaldson and Kymlicka (n3) 158–160; E Paez, 'Wild Animal Ethics: A Freedom-Based Approach' (2023) 26 *Ethics, Policy and the Environment* 159. See, however, O Horta, 'Zoopolis, Interventions and the State of Nature' (2013) 1 *Law, Ethics and Philosophy* 113. See also C Faria, *Animal Ethics in the Wild: Wild Animal Suffering and Intervention in Nature* (Cambridge University Press 2023), and J Milburn, 'Welcoming, Wild Animals, and Obligations to Assist' (2021) 34 *Journal of Agricultural and Environmental Ethics* 33; J Hadley, 'Nonhuman Animal Property: Reconciling Environmentalism and Animal Rights' (2005) 3 *Journal of Social Philosophy* 305; S Cooke, 'Animal Kingdoms: On Habitat Rights for Wild Animals' (2017) 26 *Environmental Values* 53; P Cavalieri, *The Animal Question: Why Nonhuman Animals Deserve Human Rights* (Oxford University Press 2001). See, on the Anthropocene, PJ Crutzen, 'Geology of Mankind' (2002) 415 *Nature* 23, and J Purdy, *After Nature: A Politics for the Anthropocene* (Harvard University Press 2015). See also J Lorimer, *Wildlife in the Anthropocene: Conservation after Nature* (University of Minnesota Press 2015) and PC McCormack et al, 'Wilderness Law in the Anthropocene: Purism or Pragmatism?' (2021) 51 *Environmental Law Review* 383.

¹¹See A Peters, 'Rights of Human and Nonhuman Animals: Complementing the Universal Declaration of Human Rights' (2018) 112 *AJIL Unbound* 355. On protection see P van Heijnsbergen, *International Legal Protection of Wild Fauna and Flora* (IOS Press 1997) 43.

with humans. Tension exists between the holistic ethics of environmentalism in terms of wild animal conservation *vis-à-vis* the focus on individual animals in terms of animal welfare/ethics. It is important to bear in mind that the international biodiversity regime is still largely ignorant of the welfare of individual animals and is characterised by holism.¹² The obligation for the eradication of alien invasive species in Article 8(h) of the Convention on Biological Diversity (CBD) is exemplary of the holistic approach of the biodiversity regime. Would individual wild animal rights be reconcilable with the obligation to eradicate alien invasive species?

Hence, it is the aim of this article to critically discuss the possible extension of international human rights to wild animals in the context of the tension between environmental holism (in terms of the biodiversity regime) and the individualism underlying animal rights, as well as to reflect on potential examples of wild animal rights. My point of departure is that animals are sentient¹³ beings with intrinsic value.¹⁴ Sentient animals have the capacity for intrinsic interests in their well-being.¹⁵ This means that a situation may be to the benefit or detriment of the being itself, rather than merely improving or worsening the condition of an entity (such as a non-sentient entity). I subscribe to the idea that sentience has moral and legal significance and that animals are receptive to human rights.¹⁶

¹²See G Futhazar, 'Biodiversity, Species Protection, and Animal Welfare under International Law' in A Peters (ed), *Studies in Global Animal Law* (Springer 2020) 95–108.

¹³See Donaldson and Kymlicka (n3) 33. However, sentience is not an arbitrary boundary similar to race or species: see A Peters, *Animals in International Law* (Brill 2021) 502. The scientific consensus seems to be that vertebrate animals are sentient: see *The Cambridge Declaration on Consciousness*, available at: <https://fcmconference.org/img/CambridgeDeclarationOnConsciousness.pdf>. I recognise that perspectives on this matter may differ. For example, Maori's view of the river Whanganui as a living thing may mean that they perceive the river to have an intrinsic interest in its well-being: M Kramm, 'When a River Becomes a Person' (2021) 21 *Journal of Human Development and Capabilities* 307. A discussion of the rights for nature approach and an analysis of whether non-sentient being should be awarded rights falls outside the scope of this article: see CD Stone, *Should Trees Have Standing?: Law, Morality, and the Environment* (Oxford University Press 1996) 1–47.

¹⁴The term 'intrinsic value' refers to the fact that something has value in and of itself and in relation to animals it means that animals have value, independent of their value for humans. Intrinsic value also speaks to the general meaning of dignity: see J Kotzmann, 'Sentience and Intrinsic Worth as a Pluralist Foundation for Fundamental Animal Rights' (2023) 43 *Oxford Journal of Legal Studies* 405.

¹⁵For a discussion on the interest theory see J Raz, *The Morality of Freedom* (Oxford University Press 1986) 165–192. For a critical analysis of this theory see MH Kramer, 'Rights Without Trimmings' in MH Kramer (ed), *A Debate Over Rights: Philosophical Enquiries* (Oxford University Press 1998) 7–112. See also JP Mañalich Raffo, 'Animalhood, Interests and Rights' (2020) 11 *Journal of Human Rights and the Environment* 156. See, however, J Jowitt, 'Legal Rights for Animals: Aspiration or Logical Necessity?' (2020) 11 *Journal of Human Rights and the Environment* 173. For a discussion on non-sentient beings and interests see A Cochrane, *Animal Rights Without Liberation: Applied Ethics and Human Obligations* (Columbia University Press 2012) 36–38 and 41–42.

¹⁶It is not my aim to revisit the discourse on human rights and animals: see Stucki (n8) 533–560 and Kotzmann (n14) 419.

Thus, the first part of the article briefly introduces the notion of wild animal rights as specific group-based rights which differ in substance from animal rights applicable to domesticated animals. I argue that non-exclusionary dignity may be used to determine the specific rights of wild animals. Dignity is linked to the interests of wild animals and, therefore, to the intrinsic value of animals. Also, dignity affirms that (wild) animal rights could be the next phase in the development of human rights and presents a bedrock for strengthening animal rights through transjudicial communication. The next part of the article considers the implications of the relational difference between wild animals and domestic animals *vis-à-vis* humans against the background of the tension between the holist approach of species conservation in terms of biodiversity law and the concerns of individual animals in terms of the rights approach. The tension between environmentalism and rights manifests itself in the case of the obligation to eradicate alien invasive species. I argue that the recognition of wild animal rights doesn't necessarily preclude the eradication of alien invasive species. The subsequent part of the publication considers the substantive content of wild animal rights. I indicate that the recognition of wild animal rights does not require human intervention to end all cruelty, such as predation. Accordingly, I reflect on conceivable wild animal rights *via* a brief analysis of non-binding declarations and domestic case law concerning wild animals and rights. This part of the discussion illustrates the proposed shape of the responsibilities of humans in terms of rights towards wild animals, particularly in the context of *ex situ* conservation measures. The discussion highlights the rights to freedom, to habitat or the environment, and the prohibition of cruel treatment. I conclude the article with brief remarks.

2. Wild Animal Rights

2.1. Introduction

The overlap and linkages between human rights and animal interests constitute a valuable point of departure for the development of international animal rights.¹⁷ Core human rights concerning life, liberty, and freedom can be reformulated to further animals' interests, and as Sparks et al aptly remark, 'Animal Lawyers need not reinvent the wheel—rather they can seize and adapt the available normative and regulatory toolbox, by applying, for example, established principles of (human) rights

¹⁷T Sparks et al, 'Animal Rights: Interconnections With Human Rights and the Environment' (2020) 11 *Journal of Human Rights and the Environment* 149, 151.

formulation, adjudication, conflict resolution, or implementation to the animal context.¹⁸ Animal rights, rights of nature, and human rights are all bound by an adherence to the natural rights tradition.¹⁹ In this regard, several examples exist of the transposition of human rights to wild animals based on a natural law justification.²⁰

The extension of human rights to wild animals could have several possible benefits for the protection of wildlife. The global welfare implications of anthropogenic activities on wild animals necessitate their international protection and the extension of international human rights principles to wild animals could present an opportunity for their international protection.²¹ International wildlife rights could increase the scrutiny of their treatment and could open the door for the utilisation of human rights-like mechanisms, such as regular reporting to a Convention body, special rapporteurs, and complaint mechanisms, which could yield beneficial results for the treatment of wild animals.²² These mechanisms could offer protection to wild animals without the need to have recourse to the standing and representation of animals in adversarial judicial disputes. Granting international wildlife rights to animals would not only have procedural benefits but would also signal a paradigm shift, as it could elevate the moral standing of wild animals and level the playing field when the balancing of interests between humans and wild animals occurs. Thus, international wild animal rights could play an important role in the international protection of wild animals.

The extension of human rights to animals might be viewed as the next phase in the development of human rights, which could mark a departure from the speciesist exclusion of animals from the domain of human rights.²³ The potential emergence of new human rights is fuelled by what Stucki refers to as animal justice, as well as an ‘acute sense of ecological necessity’ in the Anthropocene where humanity faces anthropogenic climate change and biodiversity loss.²⁴ Stucki, however, agrees that ‘recognizing

¹⁸Sparks, *ibid* 150. For a discussion of potential legal models for animal rights see Peters (n13) 455–469.

¹⁹*Ibid*. For a discussion of the sometimes-uneasy relationship, see K Stilt, ‘Rights of Nature, Rights of Animals’ (2021) 134 *Harvard Law Review* 276.

²⁰See A Shanker and EB Kempers, ‘The Emergence of a Transjudicial Animal Rights Discourse and Its Potential for International Animal Rights Protection’ (2022) 2 *Global Journal of Animal Law* 1.

²¹Cavalieri (n10); Peters (n11) 355–360.

²²For a discussion on monitoring mechanisms see D Shelton, *Advanced Introduction to International Human Rights Law* (2nd ed., Edward Elgar 2020).

²³P Cavalieri, ‘Are Human Rights Human?’ in Arnstrong and Botzler (n7) 26–31.

²⁴S Stucki, *One Rights: Human and Animal Rights in the Anthropocene* (Springer 2023) 7. For an analysis of the nexus between animal and human rights: *ibid* 86–91. She proposes a novel ‘One Rights’ approach

animal rights as part of the human rights family' in the Anthropocene does not mean that animals and humans have (or even need) the same rights or that all animals have the same rights.²⁵ This means that 'certain animals may have some specific group-based or relational rights' similar to women or children who have specific rights. Hence, she argues that animals' rights must be differentiated in accordance with their specific capacities.²⁶ This implies that domesticated animals may have different rights from wild animals.²⁷ The fact that humans have 'created' domesticated animals and the proximity between humans and domesticated animals imply that humans have a direct influence through their actions on the well-being of companion animals and that they are holders of specific obligations for the well-being of companion animals by providing shelter and nutrition and refraining from their cruel treatment.

2.2. Animal/Human Animal Dignity

This implies that wild animal rights require tailored protective measures to respond to the differences between wild and domesticated animals. Bowman argues that the recognition of dignity for animals presents such a possibility.²⁸ According to Bowman, dignity confers an absolute entitlement.²⁹ This does not mean that rights based on dignity are absolute. Also, the application of dignity to animals does not imply that the content of dignity is the same for all life forms, such as humans and animals. The nature and content of dignity depend on the interests of the specific life form. More complex life forms likely require more elaborate and sophisticated protection based on their specific dignity. Thus, humans require a different protection regime from wild animals, just as cetaceans need differential protection compared to antelope. This indicates that the content of dignity and subsequently rights are tailored to the concrete and tangible well-being of individual animals in specific cases. As such, dignity constitutes both an ontological claim (concerning the status of individual animals) and a normative principle that determines the normative impli-

which creates a normative umbrella framework for old human rights and new animal rights. A detailed analysis falls outside the ambit of this discussion.

²⁵Ibid 113.

²⁶Ibid.

²⁷Ibid 114.

²⁸M Bowman, 'Animals, Humans and the International Legal Order: Towards an Integrated Bioethical Perspective' in Scholtz (n4) 38–147, 141.

²⁹Ibid 145.

cations of the ontological claim. This approach is reminiscent of the capabilities approach, which has been criticised for the fact that it would require separate lists of capabilities to be developed for animal species.³⁰ The capabilities of species do have an impact on the concrete interests of individual animals and as such the dignity of wild animals, but this is just one component that determines the interests and well-being of wild animals.³¹ The contextual and relational factors of individual animals also have an impact on the recognition of their dignity.

The discussion of dignity concerning animal rights is reminiscent of the prominence of human dignity concerning human rights. Human dignity has been central to the establishment of the current human rights regime and has been the foundation for the establishment of human rights.³² Some scholars have argued that dignity only belongs to humans based on their special traits, such as complex reasoning and language.³³ However, more recently the 'speciesist' notion of dignity has been questioned and several scholars have argued that dignity is not reserved exclusively for humankind.³⁴ As Nussbaum shows, 'animals have characteristic forms of dignity that deserve respect and give rise to a variety of duties to preserve and protect animal opportunities for functioning'.³⁵ Bowman is of the view that dignity applies to all complex life forms, such as animals, which have

³⁰For an overview of the capabilities approach see M Nussbaum, 'The Capabilities Approach and Animal Entitlements' in Beauchamp and Frey (n5) 228–251. For a critical analysis see A Schinkel, 'Martha Nussbaum on Animal Rights' (2008) 13 *Ethics and the Environment* 41. Part 4.2 of this article presents a concrete analysis of the role of dignity concerning wild animal rights, especially for primates and cetaceans.

³¹For critique against the capacities approach to dignity pertaining to animals: RE Loder, 'Animal Dignity' (2016) 23 *Animal Law* 1, 29.

³²See the Universal Declaration of Human Rights (UN General Assembly Resolution A), first and fifth recital of preamble, as well as Article 1. It is not my intention to reiterate the comprehensive body of scholarship on the matter. For a comprehensive discussion see P Gilbert, *Human Dignity and Human Rights* (Oxford University Press 2019) 113–228; Patrick Capps, *Human Dignity and the Foundations of International Law* (Hart 2010); A Gattini et al (eds), *Human Dignity and International Law* (Brill 2020). Scholars have criticized the vague and indeterminate nature of dignity, but it remains central to the recognition of human rights: see, for example, PA Rodriguez, 'Human Dignity as an Essentially Contested Concept' (2015) 28 *Cambridge Review of International Affairs* 743.

³³G Kateb, *Human Dignity* (Harvard University Press 2011) 3–6, and C Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Bloomsbury 2015) 8.

³⁴For a rebuttal of arguments in favour of exclusionary dignity: Kotzmann (n14) 422. For example, Article 3a of the Swiss Animal Welfare Act of 2005 presents a much-cited example of animal dignity as it defines dignity in the Act as the 'inherent worth of the animal that must be respected when dealing with it'.

³⁵Nussbaum (n30) 243. For an elaborate deconstruction of dignity see Bowman (n28) 112. For opposing arguments to non-human dignity see R Heeger, 'Dignity Only for Humans? A Controversy' in M Düwell et al (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press 2014) 541–545. For a critical exposition of arguments against 'animal dignity' see J Kotzmann and C Seery, 'Dignity in International Human Rights Law: Potential Applicability in Relation to International Recognition of Animal Rights' (2007) 26 *Michigan State International Law Review* 1, 30.

been recognised to have intrinsic value.³⁶ Ash argues against ‘exclusionary dignity’, which subscribes to speciesism and the subjugation of other species, and proposes a determination of dignity through a holistic or eco-centric point of view, which recognises that humans are part of biodiversity and stresses the importance of ecological integrity.³⁷ Dignity should therefore not be understood in speciesist terms as being merely exclusive to humans, but rather applicable to a wide range of species.³⁸ Loder also supports a more expansive form of dignity as she argues that

given an increasing understanding of common origins of life, evolutionary continuity shared physical neurobiological and genetic features, and ethological knowledge of animal lives ... animal dignity is a vital moral and legal idea that should be given specific content and brought to the forefront of dialogue on nonhuman animal treatment.³⁹

Human dignity emerged from a ‘long historical association with the superiority of humanity over the natural world’ but it is a concept that continues to evolve in response to new threats.⁴⁰ The recognition of dignity as a basis for the extension of international human rights to animals would be an evolutionary response to the ecological and welfare threats against animals.⁴¹ Using dignity as a basis for animal rights confirms that the recognition of these rights signifies the progressive development of human rights towards the recognition of the rights of non-human animals. Domestic case law and proposed instruments concerning the recognition of animal rights, and in particular wild animal rights, frequently cite dignity as a basis for the development of these rights, which implies that dignity can be seen as a shared global concept for the advancement of animal rights.⁴² Furthermore, a non-exclusionary approach to dignity would signal a paradigm shift towards the recognition of the intrinsic value of animals and ensure that in developing animal rights it is of a fundamental

³⁶Bowman (n28) 143.

³⁷K Ash, ‘International Animal Rights: Speciesism and Exclusionary Human Dignity’ (2005) 11 *Animal Law* 195.

³⁸It is possible to argue that a holistic approach to dignity does not apply exclusively to sentient beings. However, it would be difficult to argue that non-sentient beings have an intrinsic interest in their own well-being, and the recognition of the dignity of non-sentient beings would be irrelevant for purposes of this discussion, which focuses on the interest theory in relation to wildlife.

³⁹Loder (n31) 4.

⁴⁰D Lupin Townsend, ‘The Place of Human Dignity in Environmental Adjudication’ (2016) 3 *Oslo Law Review* 27.

⁴¹Kotzmann and Seery (n35) 37–38. For other approaches see M Rowlands, *Animal Rights: Moral Theory and Practice* (2nd edition, Springer 2009), and M Rowlands, *Can Animals Be Moral?* (Oxford University Press 2013).

⁴²See the discussion in part 4 of this article.

character and derives from the ‘inherent dignity and worth’ of animals.⁴³ Non-exclusionary dignity ‘signifies worth that demands recognition and respect’ for animals and human beings and entails a minimum threshold on a spectrum where one can encounter human and non-human animals.⁴⁴ As such, human dignity could therefore be viewed as an expression of the dignity of a specific human animal, which resides in our animal vulnerability and mortality.⁴⁵ Thus, dignity is not hierarchical per se (dignity of wild animals vs. dignity of humans), but rather situational, as it requires a legal balancing of the interests of the specific life form.

3. Environmentalism (Holism) vs Rights (Individualism) and Wild Animals

3.1. Wild Animal Rights and Alien Invasive Species

The case of invasive alien species illustrates the tension between environmental ethics (in terms of holist values) and welfare/rights ethics (in terms of individualist values).⁴⁶ Environmentalists are concerned about the threat which invasive animals pose to the biotic community and are in favour of the eradication of invasive species to avert species extinction.⁴⁷ Animal

⁴³UNGAR 41/120 established guidelines for the setting of standards in the field of human rights and para. 4(b) requires that human rights instruments should be of ‘Fundamental character and derive from the inherent dignity and worth of the human person’.

⁴⁴See on the content of dignity: J Donnelly, ‘Normative versus Taxonomic Humanity: Varieties of Human Dignity in the Western Tradition’ (2015) 14 *Journal of Human Rights* 1, 1. My appeal to dignity could import the critique concerning its vacuous nature. See, for example, C McCrudden, ‘Human Dignity and Judicial Interpretation of Rights’ (2008) 19 *European Journal of International Law* 655, 698; M Bagaric and J Allan, *The Vacuous Concept of Dignity* (2006) 5 *Journal of Human Rights* 257; and M Rosen, ‘Dignity: The Case Against’ in C McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) 143–154. He argues that ‘All that is left of dignity, it might be said, is the relatively empty shell provided by the minimum core.’ Carozza refutes the argument by his reference to the fact that the reinforcement of the content of the minimum core of human dignity is laudable to respond to the vulnerability of victims. It is possible to make the same argument concerning the vulnerability of animals: PG Carozza, ‘Human Dignity and Judicial Interpretation of Human Rights: A Reply’ (2008) 19 *European Journal of International Law* 931, 937. It would be possible to argue that non-sentient beings might also appear on the spectrum of my view of dignity. It is, however, not necessary to analyse the issue for purposes of this article.

⁴⁵M Nussbaum, *Frontiers of Justice Disability, Nationality, Species Membership* (Harvard University Press, 2007) 132. For a discussion see EB Kempers, ‘Animal Dignity and the Law: Potential, Problems and Possible Implications’ (2020) 41 *Liverpool Law Review* 173, 177.

⁴⁶See J Baird Callicott, ‘Animal Liberation: A Triangular Affair’ (1980) 1 *Environmental Ethics* 311. Callicott later attempted to reconcile the opposing ethics: J Baird Callicott, ‘Animal Liberation and Environmental Ethics: Back Together Again’ (1988) 4 *Between the Species* 163. See also M Hutchins and C Wemmer, ‘Wildlife Conservation and Animal Rights: Are They Compatible?’ in MW Fox and LD Mickley (eds), *Advances in Animal Welfare Science* (The Humane Society of the United States, 1986) 111–137. The classification animals as invasive is in itself contentious and some scholars have argued for an end to the use of the term. See, for example, MI Inglis, ‘Wildlife Ethics and Practice: Why We Need to Change the Way We Talk about Invasive Species’ (2020) 33 *Journal of Agricultural and Environmental Ethics* 299.

⁴⁷See on rarity and extinction: AS Gunn, ‘Why Should We Care About Rare Species?’ (1980) 2 *Environmental Ethics* 17. For a discussion of the dynamics of the discourse see IJ Campbell, ‘Animal Welfare and

rights ethics are concerned with the suffering of individual animals and oppose the eradication of invasive animals through destruction or culling because of their equal moral consideration. Proponents of conservation ethics consider the approach of the animal rights ethic ecologically naïve since they would not allow for the eradication of invasive species. Article 8(h) of the Convention on Biological Diversity contains a broad obligation on Parties to ‘prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species.’⁴⁸ The tension around the eradication of invasive alien animals, especially through lethal means, highlights the clashes between the concerns for the rights (and welfare) of individual animals *vis-à-vis* the holism associated with species protection in terms of biodiversity protection. The question arises of whether these positions are irreconcilable. The tension between holism and individual protection is also evident in the preamble of the CBD. The locus of intrinsic value in the CBD seems to be at the species level by way of the categorisation of wildlife in collectives.⁴⁹ Furthermore, invasive alien species impede biological diversity as envisaged in the CBD. It is possible to argue then that the obligation to eradicate invasive alien species in Article 8(h) should be read in the context of the intrinsic value of biological diversity of the whole and that the intrinsic value in the Preamble does not relate to individual representatives of alien species.

However, the issue is more complicated. Guiding Principle 12 of the Guiding Principles for the Prevention, Introduction And Mitigation of Impacts of Alien Species that Threaten Ecosystems, Habitats or Species states: ‘Techniques used for eradication, containment or control should be safe to humans, the environment and agriculture as well as ethically

Environmental Ethics: It’s Complicated’ (2018) 1 *Ethics and the Environment* 49.

⁴⁸Alien species refers to ‘a species, subspecies or lower taxon, introduced outside its natural past or present distribution; includes any part, gametes, seeds, eggs, or propagules of such species that might survive and subsequently reproduce’. CBD/COP/Decision VI/23, ‘Alien Species that Threaten Ecosystems, Habitats or Species’. The adoption of the Guiding Principles was controversial because it was adopted despite the objections of the Australian delegation. See UNEP/CBD/COP/6/20, paras. 294–324. Target 6 of the Kuning-Montreal Global Biodiversity Framework requires parties to commit to ‘reducing the rates of introduction and establishment of other known or potential invasive alien species by at least 50 per cent by 2030, and eradicating or controlling invasive alien species, especially in priority sites’. See CBD/COP/Decision XVI/4. It is not my intention to present a comprehensive analysis on the issue of alien invasive species and biodiversity. For a critical environmental analysis see V de Lucia, ‘Bare Nature. The Biopolitical Logic of the International Regulation of Invasive Alien Species’ (2019) 31 *Journal of Environmental Law* 109. De Lucia argues convincingly that the conceptual delineation of invasive alien species constitutes a form of ‘ecological racism’ which allows for the lawful eradication of these species.

⁴⁹I am cognisant of the complexity of intrinsic value in environmental ethics. My understanding of intrinsic value correlates with the first and second senses of intrinsic value as discussed by Jamieson. The first sense entails that what is of intrinsic value is of ultimate value, which means that intrinsic value can be contrasted with instrumental value. The second sense links moral standing to intrinsic value. See D Jamieson, *Ethics and the Environment: An Introduction* (Cambridge University Press 2008) 67–75. For a discussion on values and wild animals see JE Schaffner, ‘Value, Wild Animals and the Law’ in Scholtz (n4) 8–37.

acceptable to stakeholders.’⁵⁰ Principle 12 opens the door for the consideration of welfare concerns for individual invasive alien animal species and ‘demonstrates an increasing acceptance that an objective of wildlife regulation should be the achievement of animal welfare outcomes’ and that it is at least a legitimate concern of the CBD.⁵¹ Reading Principle 12 in the context of the operational guideline to Principle 11 of the Addis Ababa Principles and Guidelines for Sustainable Use bolsters this view, as it requires the promotion of a ‘more efficient, ethical and humane use of components of biodiversity’.⁵² As such, it is possible to argue that when Member States consider eradication techniques, they should also take cognisance of the welfare interests of (individual) invasive wild animals, and that Member States must opt for non-lethal measures, such as fertility control, where possible and mitigate the potential suffering of species.⁵³ This approach allows for the recognition of the interdependence between the welfare of individual animals and the well-being of habitats, species, and ecosystems.⁵⁴ This approach is also in line with the recognition of the interplay between the genotype and phenotype components of intrinsic value, which recognises that intrinsic value points to the moral worth of individual animals, which necessitates generic protective measures.⁵⁵ Thus, it would in my view be difficult to argue that the CBD’s recognition of intrinsic value excludes any consideration of the intrinsic value of individual alien species. Rather, it seems that the fact that invasive alien species pose a threat to the intrinsic value of the whole requires the consideration of different forms of protection for different wild animals, as is evident from the obligations in Article 8(h) concerning invasive alien species. As

⁵⁰*Ibid.* For a discussion on alien invasive species see A Gillespie, *Conservation, Biodiversity and International Law* (Edward Elgar 2011) 264–305.

⁵¹S Riley, ‘Wildlife Law and Animal Welfare; Competing Interests and Ethics; in Scholtz (n4) 148–179, 163; see also S Riley, ‘Listening to Nature’s Voice: Invasive Species, Earth Jurisprudence and Compassionate Conservation’ (2019) 1 *Asia Pacific Journal of Environmental Law* 117.

⁵²CBD/COP Decision VII/12.

⁵³An example is the research undertaken concerning fertility control on grey squirrels in the UK: https://squirrelaccord.uk/squirrels/fertility_control.

⁵⁴See Cochrane (n15) 156.

⁵⁵Bowman (n 28) 142. The ‘good-of-its-kind’ (genotype) 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. ‘Good-of-its-own’ (phenotype) 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 pain. 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 because each individual represents a medium to preserve the ‘good-of-its-kind’. See M Bowman, P Davies and C Redgwell, *Lyster’s International Wildlife Law* (2nd ed., Cambridge University Press, 2010) 672.

such, the CBD provides an opportunity for the reconciliation of the tension between holism and individualism.

3.2. Ending All Suffering and Colonising Nature?

The distance between wild animals and humans has been offered as a counterargument for awarding rights to wildlife.⁵⁶ For example, Livingston argues that rights are necessary for human environments which are characterised by ‘dominance hierarchies or other forms of power relationships’.⁵⁷ Thus, Livingston considers legal rights to be part of a prosthesis that serves as a substitute for abandoned biological ways of peaceful co-existence.⁵⁸ Domesticated species, captive non-domesticated species, and wild animals that are recreationally hunted are subject to human power relations and qualify for prosthetic rights.⁵⁹ He considers wildlife in national parks and ranches subject to the aforesaid power relations, whereas wild places that are not cordoned off have a different status as they are not subjugated to power relations with humans.⁶⁰ He argues that the extension of rights to all wild animals would result in the humanisation or domestication of the entire planet and as such make all living things part of the prosthetic legal system.⁶¹

This is contrary to the ideals of environmentalism, as all of nature would be moved under the control of humanity. Essentially, ‘All life would be a human farm’ and humanity would have coinciding obligations.⁶² It is important to note that he voiced his views in 1985, which was before the recognition of the age of the Anthropocene and full understanding of the detrimental impact of anthropogenic activities on the environment. The advent of the Anthropocene affirms the ostentatious colonisation of planet Earth by humanity and hews the notion of untouched wilderness. Uncontrollable pollution and habitat destruction are trademarks of the overbearing reach of mankind which have stained every corner of the

⁵⁶For a critical analysis of this approach: MA Michael, ‘Why Not Interfere with Nature’ (2002) 5 *Ethical Theory and Moral Practice* 89.

⁵⁷J Livingston, ‘Rightness or Rights?’ (1984) 22 *Osgoode Hall Law Journal* 309, 309.

⁵⁸*Ibid* 311.

⁵⁹*Ibid* 317.

⁶⁰*Ibid* 320.

⁶¹*Ibid* 319–320.

⁶²*Ibid* 320.

Earth.⁶³ The rise of the Anthropocene threatens the living conditions of many wild animals as their habitats are fragmented and contaminated through anthropogenic activities, which means that wild animals must adapt to anthropogenic activities and are ‘in a sense involved in a process of Anthropocentric domestication’.⁶⁴ Rather, in the context of the Anthropocene, human responsibility should expand as humans affect the natural and non-natural environment where wild animals are living.⁶⁵ This is not a form of colonisation but an expression of increasing responsibility.

The question is rather what the substantive content of obligations concerning wild animals entails. Different obligations exist concerning captive wild animals because of the control and influence of humans concerning these animals. This also does not mean that humans will control all aspects of the lives of wild animals through wild animal rights. Environmentalists have argued—via *reductio ad absurdum*—that animals cannot have rights because awarding them rights would require humans to end all suffering and, for example, predation.⁶⁶

However, the theoretical acceptance of wild animal rights does not result in an obligation of intervention to protect wild animals from all forms of cruelty in nature, such as predation. Recognising that wild animals are also subjects of life and deserving respectful treatment implies a requirement to be treated respectfully of their ‘nature, where this includes both characteristic facts about members of its kind and the traits it possesses as a unique individual’, but it does not warrant the prevention of predation through intrusive measures, as the intervention is not required for wild animals to flourish in accordance with their nature.⁶⁷ Policing or altering

⁶³I am neither negating nor discounting the existence of ‘nature’ or the ‘wild’ but rather recognise that anthropogenic intrusion has made it difficult to conceive of unspoiled areas. See H Wolke, ‘Wilderness: What and Why?’ in G Wuerthner et al (eds), *Keeping the Wild: Against the Domestication of Earth* (Springer 2014) 197–204, 199.

⁶⁴JAA Swart, ‘Care for the Wild in the Anthropocene’ in B Bovenkerk and J Keulartz (eds), *Animal Ethics in the Age of Humans: Blurring Boundaries in Human–Animal Relationships* (Springer 2016) 173–188, 174.

⁶⁵*Ibid* 181.

⁶⁶See M Sagoff, ‘Animal Liberation and Environmental Ethics: Bad Marriage, Quick Divorce’ (1984) 22 *Osgoode Halle Law Journal* 297.

⁶⁷J Everett, ‘Environmental Ethics, Animal Welfarism and the Problem of Predation: A Bambi Lover’s Respect for Nature’ (2001) 6 *Ethics and the Environment* 52, 54. Scholars reject a recourse to moral agency as an unsatisfactory response to predation in the context of animal rights. See, for example, D Jamieson, ‘Rights, Justice, and duties to Provide Assistance: A Critique of Regan’s Theory of Rights’ (1990) 100 *Ethics* 349. On moral agency see Regan (n9) 282–283. Simmons puts forward a pragmatic view which entails that intervention to end predation would result in disastrous ecological consequences because of the lack of knowledge of humans concerning complex ecological processes: A Simmons, ‘Predators, the Right to Life, and the Duty to Save Lives’ (2009) 14 *Ethics and the Environment* 15. Donaldson and Kymlicka argue against involvement, as this will curtail the individual and collective freedom of wild animals: (n3) 166.

nature to prevent predation would result in the active colonisation of nature in a paternalistic manner, which would distort the equilibrium in the biosphere due to an ignorance of the interwoven complexity of the elements of the whole.

The focus on the need to flourish in accordance with their nature as well as the relational perspective means that it is possible to imagine positive duties in instances where wild animals are kept in captivity or on ranches because of the relationship with humans and their ‘changed’ environment. A further possibility arises in terms of positive duties towards wild animals because of the effects of climate change on their habitats, but the difficulties concerning jurisdiction and causality in the case of human victims would pose insurmountable obstacles in the case of animals in the context of animal rights and climate change.⁶⁸ It is, therefore, that Milburn argues that ‘There is no general obligation to aid animals in need, but facts about our relationships with particular animals may generate special obligations to aid them when they are in need’.⁶⁹

4. Examples of Wild Animal Rights

4.1. Introduction

The discussion indicates that the substantive content of possible wild animal rights depends on the dignity of the animals. Dignity is important to satisfy the criterion of intrinsic value of a rights claimant who have interests and therefore rights.⁷⁰ The following question is, which intrinsic interests of wild animals require protection in accordance with their dignity, through specific wild animal rights? The two dimensions of intrinsic value and interests of wild animals may provide basic guidance concerning the first question. The ‘good-of-its-kind’ (genotype) of wild animals highlights the need to ensure the prevention of the extinction of species.⁷¹ The genotype component is more complex than it seems at first, as species

⁶⁸See C Palmer, ‘Climate Change, Ethics and the Wilderness of Wild Animals’ in Bovenkerk and Keulartz (n64) 131–150. On climate change, jurisdiction and causality see Vincent Bellinkx et al, ‘Addressing Climate Change Through International Human Rights Law: From (Extraterritoriality) to Common Concern of Humankind’ (2022) 11 *Transnational Environmental Law* 70. It is, however, not inconceivable to argue for duties of adaptative support towards wild animals: see A Pepper, ‘Adapting to Climate Change: What We Owe to Other Animals’ (2019) 4 *Journal of Applied Philosophy* 592.

⁶⁹Milburn (n10) 33. Several scholars have debated the moral grounds as well as extent of positive duties towards wild animals. It is not my intent to engage in this complex debate, but rather to indicate that our duties should not include the end of predation: see, for example, K Johannsen, ‘Positive Duties to Wild Animals: Introduction’ (2023) 26 *Ethics, Policy & Environment* 153, and B Jalagania, ‘Wild Animals and Duties of Assistance’ (2021) 34 *Journal of Agricultural and Environmental Ethics* 9.

⁷⁰Kotzmann and Seery (n35) 14–15.

⁷¹Bowman (n28)145.

do not represent a living organism with a point of view concerning their own good.⁷² However, individual animal members of species going extinct because of anthropogenic pressures are likely to suffer during the process of extinction.⁷³ The individual intrinsic interests concerning the ‘good-of-its-kind’ not to go extinct may be used to formulate a broadly conceived obligation for humans to prevent species extinction. The ‘good-of-its-own’ (phenotype) makes a compelling case to protect fundamental interests, such as protection against human-induced suffering, torture, and pain. These are basic interests that animals share with humans. The prohibition on cruel, inhuman, and degrading treatment remains the most consistent invocation of human dignity by international tribunals.⁷⁴ This aspect of human dignity resonates with the need to treat individual animals with respect and protect them against human-induced suffering. The exact content of the rights that protect fundamental interests may be tailor-made in accordance with an animal’s cognitive, sensory, and/or emotional life. The determination of the content of these rights may involve recourse to *inter alia* evolutionary biology and other scientific fields.⁷⁵ It is therefore important to consider specific interests that may give rise to concrete rights.

Human actions in the Anthropocene are bound to have an increasingly intrusive impact on how wild animals flourish. Dignity as a minimum requires wild animals to flourish in accordance with their biological nature. The introduction of external constraints on the possibility to flourish will affect the intrinsic interests of wild animals. One could consider a plethora of actions which could constitute constraints. Such actions could include captivity, hunting, trapping, and even habitat encroachment. These actions will also influence the ‘good-of-its-kind’ of wild animals.

The potential move to more invasive *ex situ* conservation approaches, such as captive breeding, in response to climate change and habitat fragmentation could be supported by the need to prevent extinction in terms of the ‘good-of-its-kind’ interests of wild animals at a species level. However, these approaches may harm the welfare of individual animals and may be contradictory to the need for wild animals to flourish in accordance with their biological nature. The example of *ex situ* conservation measures points once again to the complexity of the interplay between holism and individualism, as well as the potential tension between these aspects. The

⁷²See CM Korsgaard, *Fellow Creatures: Our Obligations to the Other Animals* (Oxford University Press 2018) 191–214.

⁷³Ibid 195.

⁷⁴PG Carozza, ‘Human Dignity’ in D Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 345–359.

⁷⁵Beauchamp (n5) 205.

Convention on Biological Diversity prioritises *in situ* over *ex situ* approaches.⁷⁶ It is important to ensure that more intrusive measures take cognisance of the dignity of wild animals to create a balance between the conservation of species and the welfare of individual animals. As such, the potential recognition of wild animal rights does not exclude recourse to *ex situ* measures *per se* but rather warrants a preference for *in situ* measures per the provisions of the Convention on Biological Diversity. *Ex situ* measures should be complementary (justifiable) measures and should take cognisance of the welfare concerns of individual animals.

4.2. Transposition of Human Rights Template

Currently, no legally binding international animal (or wild animal) rights instruments exist. The blueprint of international human rights law could provide a template for the establishment of international wild animal rights whereby a Universal Declaration is proclaimed, and subsequent developments may take place through the adoption of a series of further instruments, such as the International Covenant on Social and Economic Rights,⁷⁷ the International Covenant on Civil and Political Rights,⁷⁸ the Convention on the Rights of the Child,⁷⁹ and the Convention on the Elimination of All Forms of Discrimination Against Women.⁸⁰ International declarations containing proposals do not necessarily meet the threshold of soft law but are illustrative of how rights may be formulated for wild animals.⁸¹

For example, the Universal Declaration of Animal Rights (UDAR) provides an example of a framework declaration similar to the Universal Declaration on Human Rights.⁸² The rather obscure nature of UDAR does

⁷⁶See Article 9.

⁷⁷International Covenant on Economic, Social and Cultural Rights (adopted 6 December 1966, entered into force 3 January 1976) 993 UNTS 3.

⁷⁸International Covenant on Civil and Political Rights (adopted 6 December 1966, entered into force 23 March 1976) 999 UNTS 171.

⁷⁹UN Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

⁸⁰Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

⁸¹See D Thürer, 'Soft Law' in R Wolfrum, *Max Planck Encyclopaedia of Public International Law* (Oxford University Press, 2012), and J Friedrich, *International Environmental "Soft Law": The Functions and Limits of Nonbinding Instruments in International Environmental Governance and Law* (Springer 2013) 23.

⁸²For a discussion see J-C Nouët, 'Origins of the Universal Declaration of Animal Rights' in G Chapouthier and J-C Nouët (eds), *The Universal Declaration of Animal Rights: Comments and Intentions* (Ligue Française des Droits de l'Animal 1998) 9. See also Jean-Marc Neumann, 'The Universal Declaration of Animal Rights or the Creation of a New Equilibrium Between Species' (2012) 19 *Animal Law* 91, 98, and 102 (2012). The Argentinian *Puppy Mills* case cited the UDAR. See No 42.081/2022 (17 August 2022, Poder Judicial de la

not imply that it is irrelevant for the current discussion, as the text provides an example of an early attempt to codify animal rights. Article 4 is of particular importance in the context of the preceding discussion on *ex situ* conservation measures in the Anthropocene. The provision exudes a concern with the teleological functioning of wild animals, which have the right to ‘live and to reproduce in freedom in their natural environment’.⁸³ The shrinking and defragmentation of the habitat of wild animals in the Anthropocene may make it more difficult to comply with this provision and it may be necessary to tweak the reference to ‘natural environment’ to recognise how human activity has changed the environment. Article 4 has similarities with aspects of the right to liberty in human rights law. This entails that ‘the prolonged deprivation of the freedom of wild animals, hunting and fishing practiced (*sic*) as a pastime, as well as any use of wild animals for reasons that are not vital, are contrary to this fundamental right’.⁸⁴

This provision is *inter alia* concerned with the utilisation of wild animals in circuses, zoos, or aquarium exhibitions (such as Sea Life). The inclusion of ‘vital’ may dilute the protective nature of the provision as it does not clarify what is meant by vital or vital to whom. It is, however, my opinion that it is difficult to see how the incarceration of wild animals for the entertainment of people in circuses could be seen as vital and even the role of zoos concerning education, conservation, and research is now disputed. Article 5(3) has specific application to the breeding (and potential ranching) of wild animals and requires that ‘All forms of breeding and uses of the animal must respect the physiology and behaviour specific to species’. Captive breeding could contravene this provision as it could result in a form of factory farming for the body parts of animals, such as tigers and lions.⁸⁵

The provision affirms the need for captive breeding associated with *ex situ* conservation measures to pay careful attention to the welfare interests of wild animals. A reference to dignity is found in Article 5(4), which

Ciudad de Buenos Aires, Argentina). Available at: <https://www.nonhumanrights.org/wp-content/uploads/Argentina-Puppy-Mill-Case-Decision-in-English.pdf>.

⁸³Article 4(1).

⁸⁴Article 4(2).

⁸⁵The *High Level Panel of Experts for the Review of Policies, Legislation and Practices on Matters of Elephant, Lion, Leopard and Rhinoceros Management, Breeding, Hunting, Trading and Handling Report* of 2021 recommended that South Africa will not breed lions, keep lions in captivity, or use captive lions or their derivatives commercially because of *inter alia* welfare concerns. Available at: https://www.dffe.gov.za/sites/default/files/reports/2020-12-22_high-levelpanel_report.pdf. For critique against captive breeding practices: TG Kelch, *Globalization and Animal Law: Comparative Law, International Law and International Trade* (Kluwer Law International 2011) 236

reads that ‘Exhibitions, shows, and films involving animals must also respect their dignity’. In a similar vein, Article 3 requires a dead animal to be treated with dignity. Article 8(1) contains a prohibition on extinction as it states that ‘Any act compromising the survival of a wild species and any decision leading to such an act are tantamount to genocide, that is to say, a crime against the species’. Article 8(2) affirms the link between habitat, conservation and welfare, which is reminiscent of the welfare-centric approach.⁸⁶ Lastly, Article 9 provides for legal codification as it reads that the legal status of animals and their rights must be recognised by law.⁸⁷

It is in this context relevant to refer to declarations that specifically focus on charismatic fauna, such as whales and primates. The World Declaration on Great Apes of the Great Ape Project (GAP) by Peter Singer and Paola Cavalieri includes a right to life for great primates, individual freedom protection, and a prohibition on torture.⁸⁸ The right to life allows for an ‘exception for extremely specific situations, such as self-defence’. The provision protecting freedom reads that ‘Great primates cannot be deprived, in an arbitrary way, of their freedom. They have the right to live in their habitat.’ It also refers to dignity as it provides that ‘Great primates who live in captivity have the right to live with dignity’.

The Nonhuman Rights Project, under the guidance of the late Steven Wise, has followed a strategy whereby it has filed writs of *habeas corpus* to free great apes from captivity on the argument that they are autonomous beings held against their free will.⁸⁹ The individual protection of freedom resonates with the ‘good-of-its-kind’ component of the intrinsic value of primates and recognises the holistic link between habitat (preservation) and wild animal welfare, which is aligned with a welfare-centric ethic.⁹⁰ The prohibition on torture is qualified through the references to the ‘Intentional imposition of intense pain ... with no reason or to other’s benefits’. The qualifying phrases of ‘no reason’ or ‘other’s benefits’ could potentially open the door for ‘justified torture’, which would render the prohibition meaningless. The prohibition on torture should be absolute, as provided for in Article 2(2) of the Convention against Torture and

⁸⁶Article 8(2) indicates that ‘The massacre of wild animals, and the pollution and destruction of biotopes are acts of genocide’.

⁸⁷The Declaration of Animal Rights of ‘Our Planet. Theirs Too’ contains ideas that resonate with the UDAR as it relates to sentient beings and envisages a harmonious co-existence of all beings on planet Earth. Available at: <http://declarationofar.org>.

⁸⁸Available at: <https://www.projetogap.org.br/en/world-declaration-on-great-primates>. See also P Cavalieri and P Singer, *The Great Ape Project: Equality Beyond Humanity* (St Martin’s Press 1994).

⁸⁹GF Tague, *An Ape Ethic and the Question of Personhood* (Lexington Books 2020) 5.

⁹⁰Scholtz (n4) 472.

Other Cruel, Inhuman or Degrading Treatment or Punishment, which states that ‘No exceptional circumstances ... may be invoked as a justification of torture.’⁹¹

Whales represent charismatic *megafauna*, which have been the focal point of welfare concerns due to their intelligence.⁹² The argument for the progressive recognition of entitlement to the life of whales in international law, as proposed by D’Amato and Chopra,⁹³ is reiterated in the Preamble of the ‘Declaration of the Rights for Cetaceans’.⁹⁴ This Declaration was authored by the ‘Helsinki Group’, consisting of a group of academics, and was adopted during an academic conference. As such, it has no normative legal influence but once again represents an example of the potential utilisation of human rights for the protection of wild animals. The declaration recognises the right to life of every individual cetacean (Article 1) and prohibits captivity, cruel treatment, and removal from their natural environment (Article 2). Conditions in captivity cannot meet the biological needs of individual cetaceans and scientific evidence supports animal welfare concerns about cetaceans in captivity.⁹⁵ Article 3 protects their right to freedom and residence within their natural environment, whereas Article 5 guarantees the right of cetaceans to the protection of their natural environment. It is especially global warming and anthropogenic ocean change which pose an immense challenge to the conservation and welfare of cetaceans.⁹⁶ The need to protect the natural environment of cetaceans is an urgent priority, and Article 5 is reminiscent of the recent recognition of the international right to a healthy environment by the United Nations General Assembly.⁹⁷

Another interesting provision can be found in Article 6, which reads that ‘Cetaceans have the right not to be subject to the disruption of their

⁹¹Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, in force 26 June 1987) 1465 UNTS 85.

⁹²W Scholtz, ‘Killing Them Softly: Animal Welfare and the Inhumanity of Whale Killing?’ (2017) 20 *Journal of International Wildlife Law & Policy* 18.

⁹³A D’Amato and SK Chopra, ‘Whales: Their Emerging Right to Life’ (1991) 85 *American Journal of International Law* 21.

⁹⁴Available at: <https://www.cetaceanrights.org/conference.php>.

⁹⁵R Lott and C Williamson, ‘Cetaceans in Captivity’ in A Butterworth (ed), *Marine Mammal Welfare: Human Induced Change in the Marine Environment and Its Impacts on Marine Mammal Welfare* (Springer 2017) 161–181.

⁹⁶SC Amstrup and F Lehner, ‘Anthropogenic Ocean Change: The Consummate Threat to Marine Mammal Welfare’ in Butterworth (n95) 9–26. Pollution of the oceans is also an anthropogenic activity that has a negative effect on the welfare of cetaceans: MP Simmonds, ‘Of Poisons and Plastics: An Overview of the Latest Pollution Issues Affecting Marine Mammals’ in Butterworth (n95) 27–36.

⁹⁷UNGA Resolution 76/300 of 22 July 2022.

cultures'. Article 6 mirrors the proposals presented at COP 13 to the Convention on the Conservation of Migratory Species of Wild Animals⁹⁸ that link animal culture (the learning of wild animals through socially transmitted behaviours) of the Eastern tropical Pacific sperm whale and the nut-cracking chimpanzee with conservation.⁹⁹ Articles 5 and 6 open up the possibility to consider the potential relevance and implications of group rights, concerning culture and the environment, for wild animals.¹⁰⁰ Lastly, the declaration foresees international law and domestic law as the mechanisms that would give effect to the protection of the rights in the declaration (Article 7).

The aforementioned instruments have some overlapping provisions. An important aspect is how the instruments link the right to habitat or natural environment (and implicitly conservation thereof) with the individual needs of animals. Furthermore, the right to life has a clear link with the right of wild animals not to become extinct. The specific 'declarations' deal with charismatic megafauna and focus on pertinent concerns such as captivity and habitat encroachment. Wild Animals that suffer in captivity have an interest in being free. Freedom is vital for wild animals if they are to thrive in ways that are natural to them.¹⁰¹ The discussion provides examples of how animal rights, in particular wild animal rights, may be developed on the international plane through a universal animal rights declaration which provides generic rights for all animals and special relational rights for wild animals concerning, for example, habitat/environment and liberty. Subsequent instruments could give expression to the dignity of specific wild animals through provisions focused on their interests.

⁹⁸Convention on the Conservation of Migratory Species of Wild Animals (adopted 23 June 1979, entered into force 1 November 1983) 1651 UNTS 67.

⁹⁹In a 2017 edition of the *Journal of International Wildlife Law & Policy* I argued that the recognition of the humane treatment of whales as a general principle of international law may have implications for Aboriginal Subsistence Whaling (ASW). The recognition of wild animal rights makes this question even more relevant: see Scholtz (n92). For a discussion on aboriginal whale hunting see M Fitzmaurice, *Whaling and International Law* (Cambridge University Press 2015) 234–275.

¹⁰⁰A detailed analysis of the matter falls outside the ambit of this publication and is the focus of a forthcoming publication. I subscribe to the collective conception of groups and group rights whereby individuals jointly hold these rights as plural subjects. See P Jones, 'Group Rights and Human Rights' in C Holder and D Reidy (eds), *Human Rights: The Hard Questions* (Cambridge University Press 2013). For an analysis of group rights in international law see C Bisaz, *The Concept of Group Rights in International Law: Groups as Contested Right-Holders, Subjects and Legal Persons* (Brill 2012).

¹⁰¹For a discussion of wild animals in captivity, see MD Breed and J Moore, *Animal Behavior* (2nd edition, Academic Press 2016) 120.

4.3. Examples of Progressive Domestic Cases

Another interesting development in this regard has been the recognition of rights for wild animals, particularly wild animals in captivity, in domestic courts. Progressive domestic case law resonates with the key provisions of the aforementioned instruments. For example, *Chucho* and *Estrellita* recognise that animals should not be accorded the same rights as humans but that the rights must be determined by the specific species as the needs for legal protection will vary in accordance with characteristics and qualities.¹⁰² The Judge in the *Cecilia* case found that great apes are sentient beings and that they have ‘non-human rights’, which does not mean that they belong to the same category as humans or have the same rights.¹⁰³ Rather, animals must have fundamental rights ‘to protect the particular situation they encounter, following the evolutionary degree that science has determined they can reach’.¹⁰⁴

Dignity is also a recurrent theme in animal rights cases before domestic courts. For example, in *Animal Welfare Board of India v. Nagaraja and Ors*, the Supreme Court of India extended to animals Article 21 of the Indian Constitution, conferring the right to live a life of intrinsic worth, honour, and dignity.¹⁰⁵ The court found that the ‘Right to dignity and fair treatment is, therefore, not confined to human beings alone, but to animals as well’.¹⁰⁶ The *Nagaraja and Ors* decision is promising, and the recognition of non-human animal dignity by courts could strengthen transjudicial communication concerning wild animal protection and rights.¹⁰⁷ As such,

¹⁰²AHC4806-2017, Republic of Columbia, Supreme Court, Civil Cassation Chamber (26 July 2017) at 2.4.4. hereinafter *Chucho* case, <https://www.nonhumanrights.org/wp-content/uploads/Translation-Chucho-Decision-Translation-Javier-Salcedo.pdf>. No. 253-20-JH/22, Corte Constitucional del Ecuador (27 January 2022), para. 89.

¹⁰³Tercer Juzgado de Garantías, Mendoza, November 3, 2016, File No. P-72.254/15 [hereinafter *Cecilia* case], page 24 and 26.

¹⁰⁴*Cecilia* case, page 27.

¹⁰⁵Para. 62 of Civil Appeal No. 5387 of 2014. Available at: <https://indiankanoon.org/doc/39696860>.

¹⁰⁶Ibid. The High Court of Kerala ruled in *Balakrishnan v. Union of India* (2000) that the circus animals were ‘housed in cramped cages, subjected to fear, hunger, pain, not to mention the undignified way of life they have to live’. See Para. 13, available at: <https://www.elaw.org/content/india-balakrishnan-v-union-india-20000606cruelty-animals-circus-animals>. The Israeli Supreme Court referred to the dignity of animals in *Let the Animals Live v. Hamat Gader Spa Village Inc.* LCA 16844/96, para 41. See also Recurso Especial No 1.797.175 – SP (21 March 2019, Superior Tribunal de Justicia), hereafter the *Wild Parrot* case, <https://ecojurisprudence.org/initiatives/wild-animals-in-brazil>.

¹⁰⁷On transjudicial communication see A-M Slaughter, ‘A Global Community of Courts’ (2003) 44 *Harvard International Law Journal* 91. Carozza argues that the ‘concept of human dignity, in virtue of its purchase on universality, serves as a common currency of transnational judicial dialogue and borrowing in matters of human rights’. A more inclusive form of dignity could also form the basis for judicial dialogue concerning animal rights: see further Carozza (n44) 931–944.

the Kerala High Court in *Nair v. UoI* found that animals have rights and that they are entitled to a dignified life without cruelty and torture.¹⁰⁸

Various courts affirmed the right to live in the 'proper environment for their species'.¹⁰⁹ This right resulted in an order to transfer Cecilia to a sanctuary in Brazil, as well as a far-reaching order for the provincial legislature to provide the authorities with legal resources to cease the captivity in inappropriate conditions of zoo animals, such as the African elephant, the Asian elephants, lions, tigers, bears, and other exotic species that do not belong in the area of the province.¹¹⁰ The case does not seem to deem all forms of *ex situ* captivity problematic *per se* but has a specific focus on zoo animals held in inappropriate conditions. An Indian Court found that keeping birds in cages for trade purposes after cutting their wings amounts to an illegal confinement which violates the fundamental right of the birds to live freely in the open sky.¹¹¹ These cases affirm the right of wild animals to live freely in an environment which enables them to flourish. As such, a link exists between the freedom right of wild animals and an environmental right of wild animals, as well as an obligation on humans for the protection of the environment.¹¹² This was reiterated in the *Chucho* case, which recognised rights which entitle animals to live a natural life in a 'responsibly preserved habitat in the biotic chain'.¹¹³ The *Bhatt* judgment in a case dealing with animal cruelty reflected on the detrimental impacts of environmental degradation on animal rights.¹¹⁴

A few other cases also present animal rights and environmental protection as interlinked aspects. Judge Pinto de Albuquerque argued that the European Convention view animals 'as a constitutive part of an ecologically balanced and sustainable environment, their protection being incorporated in a larger framework of intra-species equity (ensuring healthy enjoyment of nature among existing humans), inter-generational equity

¹⁰⁸*N.R. Nair and others etc, etc, vs. Union of India and others* AIR (Kerala High Court 6 June 2000).

¹⁰⁹*Cecilia* case, *ibid.*

¹¹⁰*Cecilia* case, page 32.

¹¹¹Para 8.08 of *Abdulkadar Mohamad Azam Sheikh v. State of Gujarat & Two Others, Special Criminal Application Nos. 1635, 1636, 1670, 2600, 2601 and 2602 of 2010*, Available at: <https://indiankanoon.org/doc/440140>.

¹¹²*N.R. Nair and others et al vs. Union of India and others* AIR 2000 Kerala 340 (6 June 2000, Kerala High Court), hereafter *Nair case*, <https://indiankanoon.org/doc/936999>.

¹¹³*Chucho* case, para. 2.4.5.4.

¹¹⁴*Naryan Dutt Bhat vs. Union of India and Others* 2018 Uttaraanchal High Court, para. 84, <https://indiankanoon.org/doc/157891019>.

(guaranteeing the sustainable enjoyment of nature by future human generations) and inter-species equity (enhancing the inherent dignity of all species as “fellow creatures”), which he considers being ‘qualified *speciesism* which builds upon a responsible anthropocentrism.’¹¹⁵ The ‘animal rights’ referred to by Judge Pinto de Albuquerque do not amount to animal rights. It is, however, possible to argue that the necessity to pursue animal protection inherent in an environmental right, allows for ‘rights like’ protection for animals.¹¹⁶

The most promising aspect of these cases is that they allow for the reconciliation of holism in terms of environmentalism and rights for individual animals through an ecocentric interpretation of animal rights. The *Estrellita* judgment serves as perhaps the best example in this regard. The Court affirmed that the right of nature implies the protection of Nature in its totality but also its singular elements, such as a wild animal, because it is a basic level of ‘ecological organisation.’¹¹⁷ As such, a wild animal should be protected not only from an ‘ecosystemic perspective’ but from a perspective that ‘focuses on their individuality and intrinsic value.’¹¹⁸ The Court addresses the inherent tension between the individual rights and holism of environmentalism through the interspecies and ecological interpretation principles.¹¹⁹ The interspecies principle ‘guarantees the protection of animals with a concrete grounding in the characteristics, processes, life cycles, structures, functions and evolutionary processes that differentiate each species’. In addition to the interspecies principle, it is necessary to take into account ‘the biological interactions that exist between populations and individuals of each species’. An example of a biological interaction is that competition and interaction can result in death in cases, such as predation.¹²⁰ Thus, rights should be interpreted based on these principles.¹²¹ This means that individual animals must be viewed in terms of their place in a population, community, and ecosystem. The Court points out that authorities may, therefore, eliminate invasive alien species

¹¹⁵Partly Concurring and Partly Dissenting Opinion of Judge Pinto de Albuquerque, ECtHR, 26 June 2012, *Hermann v. Germany*, appl. no. 9300/07, [2012] 34–37.

¹¹⁶See also *National Society for the Prevention of Cruelty to Animals v. Minister of Justice and Constitutional Development* [2016] ZACC 46 [hereafter NSPCA case], paras. 54–57.

¹¹⁷See paras. 66 and 73 of Case No 253-20-JH/22 (27 January 2022, Corte Constitucional del Ecuador), <https://animal.law.harvard.edu> [hereafter *Estrellita*]. For a discussion of other cases, Stilt (n19) 279–283.

¹¹⁸*Ibid* para. 79.

¹¹⁹*Ibid* paras. 97–100.

¹²⁰*Ibid* para. 101.

¹²¹*Ibid* para. 102.

that may endanger the balance of the ecosystem.¹²² The Court identifies a primary right for wild animals not to become extinct through anthropogenic causes at a species level and *inter alia* the right ‘to the free development of their animal behavior’ at an individual level.¹²³ This right means that they should not be taken from their natural habitat to be transferred to human habitats where they are forced to adapt with the purpose of assimilating characteristics for the convenience or benefit of humans.

4.4. Appraisal of Instruments and Case Law

The analyses of instruments and case law provide valuable insights for the current discussion. The discussion affirms that animal rights do not imply that animals have the same rights as humans and that the distinct position of wild animals *vis-à-vis* domesticated animals implies that wild animal rights are group-based rights under the heading of animal rights. Furthermore, wild animal species require different rights in accordance with their situations and needs. Wild animal dignity provides a basis for the determination of the content of specific rights and creates a common foundation for the adjudication of animal rights cases through a global dialogue of domestic courts.

The most pertinent and promising wild animal rights are rights relating to freedom and the environment (or habitat), and the prohibition against torture or cruel treatment. I am in favour of recognising a right to a habitable environment for wild animals which as a minimum should entail that their environment should allow them to flourish in accordance with their needs. This right is, therefore, closely related to a right to freedom and not to be held in contravention of the needs and interests of wild animals. The recognition of a right to an environment (and an ancillary freedom right) for individual animals in conjunction with an obligation to prevent the extinction of wild animals requires a reconciliation of the need to protect individual animals with the need to take cognisance of holism. The *Estrellita* judgment indicates that it is possible to reconcile an ecosystem perspective with the individual rights and intrinsic value of animals. I do not think that it is viable to coin a generic right to life for all wild animals at the international level, but specific declarations for certain species may contain a prohibition on hunting.

¹²²Ibid para. 105.

¹²³Ibid para. 111 *et seq.*

A good example would be the case of whaling, where a prohibition on hunting could be included in an instrument. Thus, the recognition of wild animal rights would not result in obligations for humans to prevent predation. The case of invasive species may be more complex. My proposals imply that it might be possible in certain circumstances to consider the lethal extermination of such species where species could result in the extinction of other species due to food scarcity. However, wild animal rights would require this to be a last avenue and that culling should be conducted in accordance with the most humane methods.¹²⁴ The welfare needs of individual wild animals in accordance with their dignity will have to be balanced with their place in a population, community, and ecosystem.

The shrinking of the wild warrants careful consideration of the establishment of international wildlife rights in response to increasing *ex situ* conservation measures. This does not spell the end of all *ex situ* initiatives, but a more restrictive approach as measures must comply with the right to freedom and the environment. Thus, zoos, animal theme parks, and aquariums could find it difficult to justify the keeping of certain species in captivity.

5. Concluding Remarks

This discussion considers the application of international human rights principles to wild animals due to its potential to enhance the international protection of wild animals in the Anthropocene. Wild animal rights are not a separate category of rights but are specific group-based animal rights applicable to a specific category of animals. The implications of the recognition of wild animal rights require careful consideration due to the distant and more distinct relationship between humans and wild animals, which is changing in the Anthropocene. The application of human rights to wild animals invokes tension between holistic environmental ethics and individual animal rights ethics. I indicate that wild animal rights are reconcilable with holistic environmental ethics and that they do not require an end to predation or prohibition of the obligation to eradicate invasive species. I propose that specific protective measures could be developed

¹²⁴The balancing of communal and individual interests is not unknown to the interpretation and implementation of human rights. For a thought-provoking discussion see B Çali, 'Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions' (2007) 29 *Human Rights Quarterly* 251. This article focuses on the eradication of alien invasive species in terms of the CBD. Culling on the basis of other legal regimes or emergency situations, such as disease, poses a similar complex situation but my proposal is also applicable in relation to other cases. On culling see W Scholtz, 'Animal Culling: A Sustainable Approach or Anthropocentric Atrocity: Issues of Biodiversity and Custodial Sovereignty' (2005) 2 *Macquarie Journal of International and Comparative Environmental Law* 9.

for wild animals based on a form of non-exclusionary dignity, which recognises human and animal dignity not as binary components of dignity, but as an integrative concept which recognises the relational differences between humans and animals on a dignity spectrum.

Several examples of proposed non-binding instruments already exist that could give expression to the dignity of wild animals. I recognise that my *de ferenda* vision may require further future elaboration, but I hope that this article is another brick in the wall towards the dismantling of the speciesist nature of human rights and a progression towards the attainment of universal justice for animals and humans. It is only in this manner that the human rights project can ensure the ultimate freedom of humans and other animals, for a wise man remarked that ‘For to be free is not merely to cast off one’s chains, but to live in a way that respects and enhances the freedom of others.’¹²⁵

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¹²⁵Available at: <https://www.britannica.com/list/nelson-mandela-quotes>.