

Reflections on the Ethical Premises Underlying the Proposed UN Convention on Animal Health and Protection

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Abstract

This article examines the ethical underpinnings of the proposed UN Convention on Animal Health and Protection (UNCAHP), a framework treaty drafted by the Global Animal Law Association (GAL). The object of the draft treaty is, first, to establish for the first time an international animal protection regime comprehending *all* non-human animal species. It aims, secondly, to provide the animal pillar of the UN sustainable development agenda, which now encompasses only the human and nature aspects of life. These are challenging objectives, given the eclectic and fragmented way international law has previously tried to come to grips with animal ethics. The article, therefore, looks at UNCAHP from the perspective of animal ethics and asks how likely it is that, if the treaty were to be adopted, it would achieve its objectives in ways that are compatible with both with its own ambitions and the broader agenda of animal law.

1 Introduction

In today's world, animals are food for humans, research tools, workers, and sometimes, even entertainers. They suffer or die in transnational transit¹; they are trafficked worldwide by sophisticated, international, and well-organised criminal networks²; they endure fear, anxiety, and death for the sake of curing human diseases—sometimes, as paradoxical as it may sound, to cure diseases that originate from human's underregulated relationship with animals, as is probably the case with COVID-19.³ All these are the result of the anthropocentric illusion, which conceives

¹ Studies show that, in U.S. alone, nearly 4 million broiler chickens, 726,000 pigs, and 29,000 cattle die in transport every year. See Brindle, Kate, 'Farmed Animals in Transport: An Analysis of the Twenty-Eight Hour Law and Recommendations for Greater Animal Welfare'.

² United Nations Environment Programme, 'The Rise of Environmental Crime: A Growing Threat to Natural Resources, Peace, Development and Security' (2016) A UNEP-INTERPOL Rapid Response Assessment.; Peters states that that wildlife trafficking is the fourth or fifth largest illegal global trade following the smuggling of narcotics, arms, persons, tobacco, and counterfeit consumer goods. See Anne Peters, *Animals in International Law* (Brill Nijhoff 2021). 44-46

³ At the time of this writing, the origin of the SARS-CoV-2 virus is still controversial. Yet, more and more research demonstrate that the virus probably originated from bats or pangolins and was transmitted to

animals as inferior to humans, and treats them only as mere commodities to serve human needs and interests, following the Cartesian and Kantian separation between human and more-than-human worlds.⁴ In the face of today's crisis, however, this illusion is rapidly dissolving. The best natural and social sciences available today prove that human exceptionalism is no longer tenable⁵, and that the human exceptionalist policy making is even counterproductive to human interests.⁶ The extant failure of proposed (anthropocentric) global solutions to the climate and biodiversity crisis prove that legal efforts that focus solely on the interests of the human parts of the planet while formulating legislative programmes and envisioning a 'future' are not functional.⁷ Legal acknowledgment of the interdependency between the inhabitants of the planet is imperative: How humans treat the more-than-human worlds is determinative of today's climate and biodiversity crisis, and these crisis are determinative of all lives. Therefore, to both provide real protection to non-human beings and to effectively protect the planet, legal endeavours must be oriented towards protecting the independent needs and interests of the animals and nature, as well as those of humans. But the question is how?

International law's answer to this question has been to establish independent policy areas specifically focusing on the protection of the environment and animals. The body of international environmental law, emerged in the early 1970s, is the most concrete example of this, despite its effectiveness has always been under critical scrutiny.⁸ Animal protection, on the other hand, has not emerged as an independent policy area in international law. Although the literature on animal law has recognized for quite some time that interactions between people and animals create ecological, economical,

humans from them in wet markets in China. For one of the recent researches, see Micheal Worobey, 'Dissecting the Early COVID-19 Cases in Wuhan' [2021] Science <<https://www.science.org/doi/10.1126/science.abm4454>> accessed 1 December 2021.

⁴ Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of The Century* (Hart Publishing 2000). 240

⁵ Donna J Haraway, *Staying with the Trouble: Making Kin in the Chthulucene* (Duke University Press 2016). 30-31

⁶ Vito De Lucia, 'Rethinking the Encounter Between Law and Nature in the Anthropocene: From Biopolitical Sovereignty to Wonder' (2020) 31 *Law and Critique* 329. 335

⁷ Usha Natarajan and Julia Dehm, 'Where Is the Environment? Locating Nature in International Law' [2019] *Third World Approaches to International Law Review: Reflections* <<https://twailr.com/where-is-the-environment-locating-nature-in-international-law/>> accessed 21 February 2021. 6-8

⁸ For a critical analysis of the insufficiency of modern international environmental law regimes, see, Andreas Philippopoulos-Mihalopoulos, 'Towards a Critical Environmental Law' in Andreas Philippopoulos-Mihalopoulos (ed), *Law and Ecology: New Environmental Foundations* (Routledge 2011). 18-38

and political problems that are global in scope and demand a global solution⁹, there is still no comprehensive animal governance regime in international law.

Over time, the idea that an international treaty on animal protection would be helpful has become less controversial, there is still room for discussion about what the content of such an agreement ought to be and how it might, for example, set and enforce minimum standards for the treatment of animals. The question at stake here is: Which ethical approach to the animal question will most effectively enhance global protection for the animal inhabitants of the planet?

With this question in mind, this article examines the ethical premises underlying the draft United Nations Treaty on Animal Health and Protection (UNCAHP or the draft treaty).¹⁰ UNCAHP is an initiative of the Global Animal Law (GAL) Association, brought forward in 2018 to try to make the issue of animal well-being a part of United Nations (UN) agenda, because it highlights the interdependency between human, animal, and environmental health.¹¹ At a micro scale, UNCAHP would establish a specific, legal regime solely concerned with animal health, welfare, and protection, which does not now exist in international law. On a macro scale, UNCAHP provides an animal pillar for a UN sustainable development and health agenda that extends only to the human and nature aspects of life.¹²

The article is divided into three main parts, focussing in sequence on the ‘past, present, and future’ of animal governance in international law. The article first asks what it is about existing law that treaty advocates want to change (Part 2). It then sets the treaty proposal in the context of a broader, contemporary animal law movement (Part 3). If UNCAHP represents the future of what animal law might be able to accomplish, how might we assess the significance of the contribution it could make, particularly by setting the ethical tone of international animal governance (Part 4). And, finally, the

⁹ David Favre, ‘An International Treaty for Animal Welfare’ in Deborah Cao and Steven White (eds), *Animal Law and Welfare - International Perspectives*, vol 53 (Springer International Publishing 2016).; Anne Peters, ‘Global Animal Law: What It Is and Why We Need It’ (2016) 5 *Transnational Environmental Law* 9.

¹⁰ United Nations Convention on Animal Health and Protection (First Pre-Draft of the Global Animal Law Association) 2018.

¹¹ *ibid.* Preamble, para 7

¹² Sabine Brels, ‘Globally Protecting the Animals at the UN: Why and How?’ (2018) 45 *L’Observateur des Nations Unies* 188.; Elien Verniers and Sabine Brels, ‘UNCAHP, One Health, and the Sustainable Development Goals’ (2021) 24 *Journal of International Wildlife Law & Policy* 38.

article asks whether the ethical premises underlying the draft treaty are compatible with its objectives and with the broader agenda of animal law (Part 5).

2 The ‘past’ of animal governance in international law

Although the idea of using international law to protect animals is not a novelty, it has never been translated into a comprehensive, independent animal governance regime. In line with the Cartesian distinction of human and ‘the rest’ of the world, so far, animals are only addressed within the scope of international environmental law, where the protection of all non-human worlds is lumped together.

Today, the international hard law of wildlife and biodiversity conservation regimes provides certain protections to animals. But these regimes fall significantly short of providing genuine protection for all animals because, *inter alia*, they deal only with specific animal species and they focus on protecting species collectively rather than on the protection of individual animals.¹³ On the other hand, domesticated animals, including animals in the livestock industry, are completely overlooked in international law.¹⁴ So, except for several regional regulatory frameworks that exist almost exclusively within the scope of European law¹⁵, the governance of domesticated animals is left to domestic law and regulations. The closest thing we have to international instruments governing the treatment of domesticated animals are the non-binding, soft law rules of international organisations, most notably the World Organisation for Animal Health (OIE).

It is well-established in the literature of animal law that soft law rules issued by international organizations, like the OIE, do not provide sufficient and genuine protection for animals. Moreover, given the globalised nature of almost all human-animal interactions¹⁶, it is also the case that animal governance cannot be tackled effectively and as a practical matter by relying on domestic rules and regulations. This

¹³ Rachele Adam and Joan Schaffner, ‘International Law and Wildlife Well-Being: Moving from Theory to Action’ (2017) 20 *Journal of International Wildlife Law & Policy* 1. 3

¹⁴ Lewis Bollard, ‘Global Approaches to Regulating Farm Animal Welfare’ in Gabriela Steier and Kiran K Patel (eds), *International Farm Animal, Wildlife and Food Safety Law* (Springer International Publishing 2017) <https://doi.org/10.1007/978-3-319-18002-1_3>. 88-90

¹⁵ *ibid.* 90-94

¹⁶ Peters, *Animals in International Law* (n 2). 37-46

is what makes an international treaty such an attractive option.¹⁷ UNCAHP, as a treaty proposal, looks like a practical and realistic project for filling this gap. However, to properly assess the potential impact of UNCAHP on global animal protection, we must first understand how this gap in global animal protection has come about, and whether it is relevant to ethical considerations.

2.1 The evolution of ethics of animal governance in international law

The use of international law to conserve and protect some animal species is a relatively recent phenomenon, with origins in the last quarter of the nineteenth century.¹⁸ One of its earliest manifestations was the 1900 London Convention for the Preservation of Wild Animals, Birds, and Fish in Africa¹⁹, which was signed by the colonial powers that ruled most of Africa at the time.²⁰ The objectives of the London Convention were to prevent the indiscriminate slaughter of and to ensure some degree of preservation for various wild animal species throughout the contracting States' possessions in Africa; species considered at the time to be either useful to humans or harmless.²¹ The London Convention never entered into force. The idea, however, that international law was useful as a way of “protecting animals to kill them”²² persisted.

2.2 Utilitarian anthropocentrism: protecting animals to kill them

When colonial powers first sanctioned and even encouraged trophy hunting in Africa²³, they did not foresee that the animals could go extinct. A rapid and significant decline in game animal populations²⁴, however, soon showed the truth of Hemingway's

¹⁷ Favre (n 9). 91-92

¹⁸ Michael Bowman, Peter Davies and Catherine Redgwell, *Lyster's International Wildlife Law* (2nd edn, Cambridge University Press 2010). 3

¹⁹ Convention for the Preservation of Wild Animals, Birds, and Fish in Africa (Congo, France, Germany, Great Britain, Italy, Portugal and Spain) 1900 (188 Consolidated Treaty Series (1979) 418).

²⁰ Bowman, Davies and Redgwell (n 18). 262

²¹ 1900 London Convention. Preamble

²² Yoriko Otomo and Mario Prost, 'British Influences on International Environmental Law: The Case of Wildlife Conservation' in Robert McCorquodale and Jean-Pierre Gauci (eds), *British Influences on International Law, 1915-2015* (Brill Nijhoff 2016). 194

²³ Hunting was a fundamental aspect of European imperial culture and an essential component of its civilizing mission. Thus, although humans have always hunted wild animals, either for subsistence or simply for pleasure, hunting in the imperial context took on a new significance and became extreme. See Harriet Ritvo, 'Destroyers and Preservers - Big Game in the Victorian Empire' (2002) 52 *History Today* 33.

²⁴ Great Britain Colonial Office, *Africa. Correspondence Relating to The Preservation of Wild Animals in Africa* (1906).

observation that hunting could not be viable if there were no animals to hunt²⁵, and colonial states turned to international law as a means of conserving and protecting animals because they all shared an interest in continuing to exploit them.²⁶

Since 1900, the narrow utilitarianism of the London Convention has given way to broader range of interests in using law to protect and conserve animals.²⁷ First and foremost, beginning in 1960s and 1970s, in response to the realisation that human activity could seriously compromise the natural environment²⁸, the idea of protecting game animals has become part and parcel of a larger project to protect all wildlife and the biodiversity of which it is a component. The evolution of international wildlife and biodiversity conservation regimes is well-understood and need not be rehearsed here.²⁹ Three regimes are useful, however, in showing how the relationship of international law to animals and animal governance has changed over time. The 1972 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)³⁰ and the 1972 Convention on the Conservation of Migratory Species of Wild Animals (CMS)³¹ are good examples of attempts at global wildlife regulation.³² The 1992 Convention on Biological Diversity (CBD), which sets out a broader framework, is also worth noting.³³

All three of these regimes reflect the way international interest in animal protection has expanded beyond the narrowly utilitarian frame of reference used by colonial hunters. It is now a broad human interest that encompasses both present and future generations. And it is, further, an interest that now extends to “aesthetic, cultural and recreational” values.³⁴ The CBD, for instance, even goes so far as to recognize the

²⁵ Ernest Hemingway, *Green Hills of Africa: The Hemingway Library Edition* (Scribner Hardcover Edition, Scribner 2015). 10

²⁶ Peters, *Animals in International Law* (n 2). 62-63

²⁷ It should be noted, however, that the colonial legacy persisted in the evolution of international animal governance. See Mark Cioc, *The Game of Conservation: International Treaties to Protect the World's Migratory Animals* (Ohio University Press 2009).; Rachelle Adam, *Elephant Treaties: The Colonial Legacy of the Biodiversity Crisis* (University Press of New England 2014).

²⁸ Ileana Porras, 'Appropriating Nature: Commerce, Property, and the Commodification of Nature in the Law of Nations' (2014) 27 *Leiden Journal of International Law* 641. 660

²⁹ For an extensive reference work on this see Bowman, Davies and Redgwell (n 18).

³⁰ Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) 1973 (993 UNTS 243).

³¹ Convention on the Conservation of Migratory Species of Wild Animals (CMS) 1979 (1651 UNTS 28).

³² Bowman, Davies and Redgwell (n 18).

³³ Convention on Biological Diversity (CBD) 1992 (1760 UNTS 79).

³⁴ CITES. Preamble, para. 2; CMS. Preamble, para. 3; CBD. Preamble, para. 1

“intrinsic value” of biological diversity.³⁵ On the face of it, it can be argued that the recognition given to these values is more than just a “romantic”³⁶ rhetoric. It has much the same power to influence policy makers and public opinion as language that equates conservation with saving “mother earth”³⁷ or describes it as a way of making peace in the “war”³⁸ that is being waged against animals and nature. From this perspective, animal conservation and protection can be seen as a serious matter of ‘life or death’.

These references to non-utilitarian values in animal protection deem animals an object of protection for international law. But this is only partially true. Animals—and nature more broadly—are simultaneously “natural resources” for international law.³⁹ In this latter sense, animals are no longer objects of our protection; they become objects of appropriation, commodification, and exchange.⁴⁰ These two identities given to animals in international law give rise to two irreconcilable governance objectives: the protection and conservation of animals on the one hand and their efficient exploitation on the other.⁴¹ When those two objectives collide, however, the economic concerns prevail.⁴² Indeed, CITES, CMS and CBD all make straightforward references to animals’ utilitarian and economic value as well as to their aesthetic and cultural values. But their language implies that each regime will strike the balance differently. CMS, for example, describes wild animals as “an irreplaceable part of the Earth’s natural system which must be conserved *for the good* of mankind”.⁴³ CITES is more ambiguous, describing animals on the one hand as “tradable goods” but also acknowledging on the other hand that “wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth”.⁴⁴ Somewhat paradoxically, the treaty then extends meaningful protection only to those

³⁵ CBD. Preamble, para. 1

³⁶ Stephen Humphreys and Yoriko Otomo, ‘Theorizing International Environmental Law’ in Anne Orford and Florian Hoffman (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016). 811

³⁷ In this vein, acknowledging the Earth and the ecosystems as our “home”, UN General Assembly also designated 22 April as “International Mother Earth Day” in 2009. See International Mother Earth Day 2009 (A/RES/63/278).

³⁸ See United Nations Environment Programme, ‘Making Peace with Nature: A Scientific Blueprint to Tackle the Climate, Biodiversity and Pollution Emergencies’ (2021). 4

³⁹ See Declaration on the Granting of Independence to Colonial Countries and Peoples 1960 (A/RES/1514(XV)); “Permanent Sovereignty over Natural Resources” 1962 (A/RES/1803 (XVII)).

⁴⁰ Porras (n 33).

⁴¹ Natarajan and Dehm (n 7). 4

⁴² Humphreys and Otomo (n 36). 819

⁴³ CMS. Preamble, para. 1 (emphasis added)

⁴⁴ CITES. Preamble, para. 1

species that are threatened with extinction.⁴⁵ The CBD is also marked by similar discrepancies. The treaty, whose main objective is the *conservation* of biodiversity, only extends protection to those species that are not categorized as so-called invasive alien species or otherwise present a threat to ecosystems, habitats, or other species.⁴⁶ It means that the protection of the ‘intrinsic value’ of biodiversity as defined by the CBD is only relevant if it serves the purpose of “sustainable use of its components”.⁴⁷ If some components of biodiversity are not commodifiable, then they are not worthy of protection.

In line with animals’ international identification as natural resources, international law also provides differentiated protection to animals based on their spatial location. States have jurisdiction over animals as they do over other resources that are part of their natural endowment and animals can, therefore, only be effectively protected as a matter of state initiative.⁴⁸ Hence, international rules, like those embodied in CITES, CMS and CBD, can only have an impact on which states can make use of particular animals and to what extent. This means that the protection and conservation of animals within the jurisdiction of states is not one of the governance objectives of international law today. This is also the reason why there is a large regulatory gap in international law, particularly in relation to domesticated animals. They are the most (ab)used⁴⁹ animals, and they constitute 4% of all the animal biomass on the planet⁵⁰, but they are effectively unregulated by any hard law instrument.⁵¹ When it was originally established in 1924 to promote international cooperation between countries to control the spread of contagious diseases in livestock animals⁵², OIE was supposed to be the primary regulatory institution in this area. But because of its business-

⁴⁵ *ibid.* Appendix I, II and III

⁴⁶ Sophie Riley, ‘Wildlife Law and Animal Welfare: Competing Interests and Ethics’ in Werner Scholtz (ed), *Animal Welfare and International Environmental Law* (Edward Elgar Publishing 2019). 162

⁴⁷ CBD. Article 1

⁴⁸ Peters, *Animals in International Law* (n 2). 70-74

⁴⁹ I owe this term to Brels (n 12). 190

⁵⁰ This accounts for 1,6 times more than human’s biomass. These statistics become even more striking when it is considered that wild mammals and birds, including the world’s largest mammals, from elephants to whales, rhinos to polar bears, collectively only make up 0.38% of all animal biomass. See Hannah Ritchie, ‘Humans Make up Just 0.01% of Earth’s Life – What’s the Rest?’ (*Our World in Data*, 2019) <<https://ourworldindata.org/life-on-earth>> accessed 3 December 2021.

⁵¹ Peters, *Animals in International Law* (n 2)., 21-61

⁵² Article 4 of International Agreement for the Creation of an Office International des Epizooties, with Appendix: Organic Statutes of the Office International des Epizooties 1924 (57 LNTS 135).

friendly approach to the regulation of the livestock industry⁵³, OIE has never done much more than try to ensure that, when livestock animals are killed, they are killed “softly”.⁵⁴

2.3 ‘Evil’ regimes?

Is there a sense, then, in which existing international regimes for regulating interactions between animals and people can be considered evil, because they rest on questionable and unacceptable ethical premises? Or are they merely the product of a particular worldview and in particular the principle of ‘human exceptionalism’, based on the premises of the humanist Cartesian and Kantian ethical traditions, and the anthropocentrism derived from it.

Ingrained in human-exceptionalist ontology and epistemology, anthropocentrism either excludes animals completely from its moral and ethical calculus, as in the case of Cartesianism⁵⁵, or it deals with animals only secondarily. It is true that Cartesian dualism is the basis of Western-influenced, which is to say almost all, legal systems, including international law. However, the Cartesian exclusion of animals from moral and ethical consideration is today less relevant for the ethics of international law regimes than what Francione calls the old welfarism⁵⁶, which developed in the Enlightenment, based on Kantian ethics.⁵⁷

Kantian ethics regards animal welfare as a valid ethical concern and one that entails duties, such as treating animals humanely and not causing unnecessary suffering to animals. In Kantian ethics, however, the ethical consideration of animals and the discharge of duties towards them are secondary and indirect obligations, subordinate to the primary duty people have to fulfil their duties to humanity.⁵⁸ In other words, animals themselves are not moral subjects. Consequently, Kantian ethics sanctions the

⁵³ Favre (n 9). 96-97

⁵⁴ I owe this term to Kari Weil, ‘Killing Them Softly: Animal Death, Linguistic Disability, and the Struggle for Ethics’ (2008) 14 *Configurations* 87.

⁵⁵ Gilbert Simondon, *Two Lessons on Animal and Man* (Drew S Burk tr, 1st edn, Univocal Publishing 2015). 73-76

⁵⁶ Gary Francione, *Rain Without Thunder: The Ideology of the Animal Rights Movement*. (Temple University Press 2010). 32-46

⁵⁷ Caley Otter, Siobhan O’Sullivan and Sandy Ross, ‘Laying the Foundations for an International Animal Protection Regime’ (2012) 2 *Journal of Animal Ethics* 53. 62

⁵⁸ Immanuel Kant, *The Metaphysics of Morals* (Cambridge University Press 1991). 238, para. 443

use of animals for human purposes, unless it inconsistent with the primary obligations people have to discharge their obligations to humanity.⁵⁹

This sheds some light on the questions asked earlier about why there is a gap in international law in the governance of animals. Regarding the rationale for the regulatory gap in animal governance in international law start to become clear: The ethical thinking causing international law to ignore animals appears to be anthropocentric utilitarianism that excludes animals from the moral and ethical calculus, either directly or indirectly. Clearly, identifying any institution as ‘anthropocentric’ within the context of more-than-human worlds, including the animals, is not a groundbreaking argument. However, to assess the potential change sought by UNCAHP, one thing should be noted, albeit at the risk of stating the obvious: The crucial problem with current animal law regimes, both international and domestic, is not that they deny animal sentience or the value of animal life. It is rather that they consider animal experience to have less moral worth than that of humans. Within this ethical framework, therefore, the interests of animals are condemned to be *always* subordinate to the interests of humans. A key question for assessing the potential impact of a proposed new regulation such as the UNCAHP is therefore whether it aims to depart from this existing paradigm and recognise the ‘morally valuable sentience of animals’.

3 The ‘present’: ethics of global animal law movement

There is a long history of thinking about relationships between people and animals, about the place of animals in society, and about how humans do and should interact with animals. The question of whether animals should be part of human diets, for example, gave rise in antiquity to vegetarianism, which is a radical challenge to hierarchical forms of interaction between people and animals.⁶⁰ For most of human

⁵⁹ Christine M Korsgaard, ‘A Kantian Case for Animal Rights’ in Tatjana Višak and Robert Garner (eds), *The Ethics of Killing Animals* (Oxford university press 2016). 154

⁶⁰ There have been many thinkers in history who specifically dealt with the animal question. Of these, Pythagoras, Plutarch, and Porphyry are particularly worth mentioning, as they expressly favour justice for animals and support vegetarianism. Likewise, later, Spinoza and Leibniz also challenged Descartes’ meticulous separation of human from the rest of nature and defended a non-hierarchical form of interaction between human and animal. See. Derek Ryan, *Animal Theory: A Critical Introduction* (Edinburgh University Press 2015). 9

history, however, vegetarianism was at best marginal to the thinking that shaped political and legal institutions.

Harriet Ritvo argues that this began to change in the 1970s when what she calls the animal turn⁶¹ challenged the ingrained speciesism of the way scholars in the humanities, the social sciences and law had traditionally dealt with animal questions.⁶² The transformational moment for law, according to Katie Sykes, occurred when Peter Singer published *Animal Liberation*⁶³ and tried to reconcile utilitarianism with animal sentience.⁶⁴ In other words, the transformation in how we treat animals in law began with the goal of reforming liberal ethics' treatment of the animal question.⁶⁵

Bentham had originally argued that utilitarianism is fundamentally concerned with maximising pleasure and minimising pain.⁶⁶ This puts a premium on avoiding pain and suffering.⁶⁷ If sentient animals have analogous interests, they ought to be included in the moral and ethical calculus of utilitarianism so that causing unnecessary suffering to humans or to other animals become ethical concerns that should be equally avoided.⁶⁸ Utilitarianism is not immune, however, to the Cartesian separation of people from nature.⁶⁹ Although animals theoretically could have an *equal* footing with people in the utilitarian calculus, when human interests collide with those of animals, whether for secular or religious reasons, human interests prevail.⁷⁰ Beneath the surface, then, anthropocentrism is still at work in the utilitarian calculus.

What made Singer's work transformative, is that he was the first utilitarian to take animal sentience seriously.⁷¹ He drew an analogy between speciesism and other forms of oppression, such as racism and sexism. Singer argued that when human needs and

⁶¹ Harriet Ritvo, 'On the Animal Turn' (2007) 136 *Daedalus* 118.

⁶² *ibid.* 119

⁶³ Peter Singer, *Animal Liberation: The Definitive Classic of the Animal Movement* (40th Anniversary Edition, Open Road Media 2015).

⁶⁴ Katie Sykes, *Animal Welfare and International Trade Law: The Impact of the WTO Seal Case* (Edward Elgar Publishing 2021). 39

⁶⁵ Iyan Ofor, 'Second Wave Animal Ethics and (Global) Animal Law: A View from the Margins' (2020) 11 *Journal of Human Rights and the Environment* 268. 282

⁶⁶ Lori Gruen, *Ethics and Animals: An Introduction* (2nd edn, Cambridge University Press 2021). 34

⁶⁷ RG Frey, 'Utilitarianism and Animals' in Tom L Beauchamp and RG Frey (eds), *The Oxford Handbook of Animal Ethics* (Oxford University Press 2011). 174

⁶⁸ Gruen (n 66). 36

⁶⁹ Frey (n 67). 176-177

⁷⁰ *ibid.* 177

⁷¹ *ibid.* 172

interests collide with those of animals it is unacceptable to giving higher moral standing to people.⁷² It thus became necessary, in his view, to stop experimenting on animals in the interests of human health and to avoid any unnecessary suffering in animals to provide human food.⁷³ This insistence that animals' needs and interests ought to be taken seriously marked the advent in the animal movement of what Francione calls "new welfarism".⁷⁴

Singer's utilitarian case for animal liberation has been met with both approval and criticism. Some critics have argued that by making judgments about what is good for animals dependent on the human context in which the animals are used the utilitarian case for animal liberation short-changes the intrinsic value animals have as subjects of a life, and that law and policy should recognize animal rights *stricti sensu*.⁷⁵ In a similar vein and deepening the rights view, Korsgaard has argued that animals, just like human beings, cannot be treated as mere means.⁷⁶ Cavalieri takes the argument one step further by saying that if the criterion for being a rights holder is the capacity for intentional behaviour then human rights are not distinctively human. And they ought not to be distinguished as a legal and policy matter from the rights of animals who exhibit the same capacity for intentionality.⁷⁷

There is, then, more to animal liberation than finding value in the lives and experiences of animals on the basis various philosophical and ethical premises.⁷⁸ Taking their lives and experiences seriously requires that in the realms of animal law and policy the rights of animals cannot be abridged or restricted in the absence of legitimate and explicit justifications.⁷⁹

⁷² Singer (n 63). 35

⁷³ Peter Singer, 'Practical Ethics' in Susan J Armstrong and Richard George Botzler (eds), *The Animal Ethics Reader* (Third Edition, Routledge 2017). 35-37

⁷⁴ Francione (n 55). 32

⁷⁵ Tom Regan, 'The Case for Animal Rights' in Susan J Armstrong and Richard George Botzler (eds), *The Animal Ethics Reader* (Third Edition, Routledge 2017). 18

⁷⁶ Korsgaard (n 58). 157-162

⁷⁷ Paola Cavalieri, 'Are Human Rights Human?' in Susan J Armstrong and Richard George Botzler (eds), *The Animal Ethics Reader* (Third Edition, Routledge 2017). 28-29

⁷⁸ Offor (n 65). 272

⁷⁹ Anne Peters, 'Toward International Animal Rights' in Anne Peters (ed), *Studies in Global Animal Law*, vol 290 (Springer Berlin Heidelberg 2020). 113

3.1 “Animal welfare” as an emerging global concern

Because they have such profound legal, political, and economic implications, strong views about animal rights have had only a limited translation into legal frameworks.⁸⁰ New welfarism, hence, emerged as the basis of national laws against animal-cruelty. The animal welfare legislation database compiled by the GAL demonstrates that animal welfare in its basic sense has become a shared global concern: 124 out of 193 UN member states have at least some form of anti-cruelty legislation.⁸¹ At a regional level, the Council of Europe (CoE) and the European Union (EU) have addressed animal welfare issues through legally binding regulations.⁸²

In the absence of an overarching legal framework that pulls together national and regional initiatives, as well as disparate conservation treaties, the legal landscape is so fragmented and incoherent⁸³ that it can reasonably be said to constitute an animal welfare gap.⁸⁴ Some progress has been made in addressing the welfare of domesticated animals, most especially agricultural animals.⁸⁵ The OIE, as noted earlier, has been a principal actor in this regard by promoting international cooperation between states to control the spread of contagious diseases in livestock animals.⁸⁶ In 2002, the OIE began to describe itself as an organization with a mandate to improve animal welfare.⁸⁷ This led in 2017 to the development and release of an animal welfare strategy.⁸⁸

⁸⁰ In several exceptional cases in Argentina, Colombia, India, and Pakistan, the “rights” of individual animals are recognized. For an analysis in this regard see Saskia Stucki and Tom Sparks, ‘The Elephant in the (Court)Room: Interdependence of Human and Animal Rights in the Anthropocene’ (*EJIL: Talk!*, 9 June 2020) <<https://www.ejiltalk.org/the-elephant-in-the-courtroom-interdependence-of-human-and-animal-rights-in-the-anthropocene/>> accessed 19 June 2020.

⁸¹ ‘Legislation Database - Global Animal Law GAL Association’ <<https://www.globalanimallaw.org/database/index.html>> accessed 10 January 2022.

⁸² For an in-depth analysis of European law on animal welfare, see Peters, *Animals in International Law* (n 2). 193-253

⁸³ *ibid.* 533

⁸⁴ See Guillaume Futhazar, ‘Biodiversity, Species Protection, and Animal Welfare Under International Law’ in Anne Peters (ed), *Studies in Global Animal Law*, vol 290 (Springer Berlin Heidelberg 2020); Riley (n 46).

⁸⁵ Bollard (n 14). 96-97

⁸⁶ Article 4 of International Agreement for the Creation of an Office International des Epizooties, with Appendix: Organic Statutes of the Office International des Epizooties.

⁸⁷ Animal Welfare Mandate of the OIE 2002 (Resolution No XIV).

⁸⁸ ‘OIE Global Animal Welfare Strategy’ (The World Organization for Animal Health 2017) <<https://www.oie.int/app/uploads/2021/03/en-oie-aw-strategy.pdf>> accessed 8 December 2021.

It is hard, however, to see OIE's initiatives as anything other than a "mixed blessing".⁸⁹ Some observers think it is the most likely institutional home for a global animal protection regime, if one were to be adopted.⁹⁰ Others, like David Favre, are less impressed with the soft law standards OIE has tried to promulgate, because they do not put sufficiently concrete limitations on the use of animals. While they focus on doing *less* harm to animals, the livestock industries continue with business pretty much as usual. And one remedy for this is a comprehensive international agreement aimed at establishing enforceable standards for the protection of animals.⁹¹

3.2 The ethics of 'animal turn' in international law

Developments in the legal sphere is often characterised by a slower temporality comparing to those of in politics and humanities and social sciences. This is rather inevitable, given that law is, ideally, the final arbiter of events involving many institutions such as politics, the media, and the science.⁹² This has also been the case in terms of achieving concrete legal transformation regarding animals in international law. Notwithstanding, the animal turn in humanities and social sciences had strongly influenced the international law scholarship starting from as early as 1970s. Following the broader trend of animal turn, international law scholars have also, dominantly, engaged with the animal question through the solutions offered by and within the liberal tradition.⁹³ In this context, founded on the premises of the welfarist and rights views, several international initiatives, including treaty proposals, have been advanced since the 1970s. The momentum that started with these (unsuccessful) treaty proposals later developed into a new field of legal research called 'global animal law'.

⁸⁹ Peters, *Animals in International Law* (n 2). 93

⁹⁰ Otter, O'Sullivan and Ross (n 56). 65

⁹¹ Favre (n 9). 97

⁹² Andreas Philippopoulos-Mihalopoulos, 'Critical Environmental Law as a Method in the Anthropocene' in Andreas Philippopoulos-Mihalopoulos and Victoria Brooks (eds), *Research Methods in Environmental Law: A Handbook* (Edward Elgar Publishing 2017). 152

⁹³ Offor (n 65). 175-278

3.2.1 Proposed treaties

A Universal Declaration on Animal Rights (UDAR) was drafted by the International Animal Rights Association in 1977.⁹⁴ As its title suggests, it rests on and reflects a rights view of animal law.⁹⁵ It was perhaps ahead of its time, because rights-based views are still not represented in international instruments.⁹⁶ After being submitted to the United Nations Educational, Scientific, and Cultural Organisation (UNESCO) in 1990, the proposal languished and was never formally endorsed.⁹⁷ Two other rights based initiatives, the 1991 Declaration of the Rights of Great Primates and the 2010 Declaration of the Rights of Cetaceans met the same fate.

As might be expected, welfarist animal protection proposals have gained somewhat more traction in the international community. The first was a proposed International Convention on the Protection of Animals (ICAP), drafted by Clark, Favre, and Johnson in 1988.⁹⁸ ICAP did not turn into a binding agreement, but it found some reflection in another welfarist proposal, the Universal Declaration on Animal Welfare (UDAW)⁹⁹, that was put forward in 2000 by World Animal Protection, (formerly the World Society for the Protection of Animals). UDAW received support from several UN member States, from the OIE¹⁰⁰ and from the Food and Agriculture Organisation of the UN (FAO).¹⁰¹ But these were not enough to secure its adoption.

⁹⁴ The text of the draft is available online at International League of Animal Rights, ‘Universal Declaration on Animal Rights’ (1977) <http://jose.kersten.free.fr/aap/pages/uk/UDAR_uk.html> accessed 8 December 2021.

⁹⁵ MJ Bowman, ‘The Protection of Animals under International Law’ (1989) 4 Connecticut Journal of International Law 487. 496-497

⁹⁶ Stucki, on the other hand, argued that certain existing animal welfare regulations can be interpreted as “weak” legal rights. See Saskia Stucki, ‘Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights’ (2020) 40 Oxford Journal of Legal Studies 533.

⁹⁷ Sykes (n 64). 54

⁹⁸ The text of the draft is available online at ‘International Convention for the Protection of Animals’ (4 April 1988) <<https://www.animallaw.info/treaty/international-convention-protection-animals>> accessed 8 December 2021.

⁹⁹ The text of the 2011 draft is available at ‘Universal Declaration on Animal Welfare (UDAW)’ (*Web Archive*, 2011) <<https://web.archive.org/web/20190630172537/http://globalanimallaw.org/database/universal.html>> accessed 8 December 2021.

¹⁰⁰ Resolution No. XIV: Universal Declaration of Animal Welfare 2007.

¹⁰¹ See ‘Capacity Building to Implement Good Animal Welfare Practices’ (FAO 2008) Report of the FAO Expert Meeting <<https://www.fao.org/3/i0483e/i0483e00.htm>> accessed 8 December 2021.

3.2.2 Global animal law

The attempts to frame and adopt an international declaration did show, however, that there was substantial international interest in animal protection. They also helped to encourage legal scholars to investigate other aspects of human-animal relationships and to ask how the influence and impact of law on the wellbeing of animals could be expanded and enhanced on a global scale.¹⁰² Global animal law has now become an extensive enterprise that looks to enhance animal governance mechanisms¹⁰³ at international, regional, and domestic levels, using both hard and soft law as normative instruments.¹⁰⁴ The UNCAHP proposal is just one part of a very much larger global animal law project.

Most work in global animal law reflects the tension, noted earlier, between a welfarist and a rights view of what animal law should be trying to accomplish.¹⁰⁵ Anne Peters, for example, has argued forcefully that international animal law ought to grant explicit recognition to the fundamental rights of animals.¹⁰⁶ Peters draws analogies between the animal rights movement and the conceptual and normative struggles of human rights movements, arguing that international animal rights ought to be recognised as rights that confer strong and enforceable protection for the interests of individual animals.¹⁰⁷ She acknowledges that the rights of animals have only been recognised *stricti sensu* in a limited number of national legal systems and in only a few litigated cases. It is her view, nonetheless, that giving substantial and substantive recognition to animal rights through an international treaty is a more uncertain proposition. It is difficult in the first place, she thinks, to get animal rights on the political agenda of societies that have not yet been successful in establishing and safeguarding legal rights for disadvantaged and disenfranchised human groups. And while it may not be impossible to find the political will and majority sentiment to provide animals with meaningful protection at a national level, finding the political momentum to conclude

¹⁰² Peters, 'Global Animal Law' (n 9). 20-23

¹⁰³ Sykes (n 64). 34

¹⁰⁴ *ibid.* 36

¹⁰⁵ Offor (n 65). 271

¹⁰⁶ Peters, 'Toward International Animal Rights' (n 79). 111-113

¹⁰⁷ *ibid.* 111

an international treaty with the willing consent of a large number of states is a much taller order with a much more uncertain outcome.¹⁰⁸

4 The “future”: UNCAHP

Notwithstanding the reservations Peters and others have about the desirability and feasibility of a treaty, the Global Animal Law Association (GAL) under the leadership of its founders, Antoine Goetschel and Sabine Brels, have drafted and now advocate a treaty they believe has the potential to improve the legal protections for the welfare of *all* animals at the global level.¹⁰⁹ They combined what they learned from creating a global database of existing animal welfare legislation at national, regional, and international levels with a vision of what more could be done.¹¹⁰

The GAL website lists a long and impressive list of animal law experts from around the world who participated in various ways in the drafting of UNCAHP.¹¹¹ If the initiative is successful, the hope is that UNCAHP might be adopted by the UN General Assembly in 2029 and then take effect in the national jurisdictions of UN Member States.¹¹²

4.1 Locating UNCAHP in the picture of global animal law

The lead author of the UNCAHP draft treaty, Sabine Brels, has been a significant contributor to global animal law studies for some time. Her work has emphasized particularly the value of developing, discussing, and adopting a treaty under the auspices of the United Nations (UN).¹¹³ From this perspective, UNCAHP can be seen as an initiative that tries to merge the academic dimensions of animal law studies with the need for a practical treaty proposal. And indeed, the content of UNCAHP confirms that the draft tries to draw on lessons learned from both previous treaty proposals and academic debates, choosing in the last analysis an ethical stance on animal questions that leans in the direction of utilitarian welfarism, because that is the approach most likely to garner national, regional, and international support. There is a nod towards

¹⁰⁸ Peters, *Animals in International Law* (n 2). 587

¹⁰⁹ See ‘About Us - Global Animal Law GAL Association’ <<https://www.globalanimallaw.org/gal/index.html>> accessed 10 January 2022.

¹¹⁰ See ‘Legislation Database - Global Animal Law GAL Association’ (n 81).

¹¹¹ ‘About - UN Convention on Animal Health and Protection (UNCAHP)’ <<https://www.uncahp.org/>> accessed 1 December 2021.

¹¹² *ibid.*

¹¹³ Brels (n 12).

the limitations of the welfarist paradigm in the recognition of animal dignity and the precautionary principle.¹¹⁴ But the welfarist focus of the proposal is clear.

4.2 The ethical tone of UNCAHP: strengthened utilitarian welfarism

The utilitarian welfarism of UNCAHP can be seen by looking at its text. Firstly, UNCAHP describes its overall aim as the provision of better protection to *all* animals¹¹⁵, and accordingly to protect animals, their welfare, and their health.¹¹⁶ Correcting the misconception that reduces animal protection to animal conservation in existing international regimes, the term protection is given a special meaning in UNCAHP and defined as encompassing animal conservation as well as animal welfare.¹¹⁷

Secondly, UNCAHP explicitly endorses two guiding principles of animal law, namely the five freedoms¹¹⁸ and three Rs¹¹⁹, both of which are also endorsed in the welfarist regulations, including those adopted under OIE.

Thirdly, UNCAHP acknowledges in its preamble that “the interests and needs of non-human animals are to be *fully considered in every field of human endeavour*.”¹²⁰ The source of this ethical responsibility stems from the animals themselves and is clearly independent of any human needs and interests. There is reference to the 1982 UN World Charter for Nature, which states that “[e]very form of life is unique, warranting respect regardless of its worth to man,”¹²¹ a view reinforced by defining animals as “*sentient beings, possessing intrinsic value*,”¹²² meaning a proper value in themselves, “notwithstanding their instrumental value for human beings”.¹²³ In addition to echoing the sentience and intrinsic value language used in other welfarist proposals, UNCAHP introduces the concept of animal dignity, also found in Article 3 of the Swiss

¹¹⁴ Articles 3(3) and 3(5) of UNCAHP 1st Draft.

¹¹⁵ *ibid.* Preamble, para 6

¹¹⁶ *ibid.* Objective

¹¹⁷ *ibid.*

¹¹⁸ Five freedoms are (i) freedom from hunger, thirst, and malnutrition; (ii) freedom from fear and distress; (iii) freedom from physical and thermal discomfort; (iv) freedom from pain, injury, and disease; and (v) freedom to express normal patterns of behaviour. See *ibid.* Article 2(1)

¹¹⁹ There Rs, namely (i) reduction in numbers of animals, (ii) refinement of experimental methods and (iii) replacement of animals with non-animal techniques, are general principles applicable in animals used in science. See *ibid.* Article 2(2)

¹²⁰ *ibid.* Preamble, para 2 (original emphasis)

¹²¹ World Charter for Nature 1982 (A/RES/37/7).

¹²² UNCAHP 1st Draft. Article 3(1) (emphasis added)

¹²³ *ibid.* Article 3(4)

Animal Welfare Act.¹²⁴ According to Article 3(5) of UNCAHP, animal dignity stems from the inherent value of animals and must be respected in all interactions with them. Violations of dignity through pain, suffering or other harm must be explicitly justified on the basis of an overriding interest.

UNCAHP's use of animal dignity shows that it takes some colour from rights views of animal ethics.¹²⁵ One might say on this basis that UNCAHP goes beyond and even strengthens the ethical foundations of its own proposals when compared to those of others. In this respect, UNCAHP seems to recognise not only the mere 'sentience' but also the 'morally valuable sentience' of animals. At first glance, then, the proposed treaty already signals a significant shift in the current ethical paradigm.

The treatment of sentience in UNCAHP is not without problems, however. On the one hand, emphasising that animals as sentient beings, *just like humans*, argues in favour of giving them much the same moral standing in law as human beings. But that is at root an anthropomorphic justification because it essentially posits that animals are only worthy of respect for their wellbeing to the extent that they are *like humans*.¹²⁶ This, in turn, puts non-sentient animals outside the moral calculus built into a proposal like UNCAHP, and leads to discrimination between animal species based on their near human attributes and abilities. It would also seem to pave the way for experiments on animals to determine just how much like humans they really are.¹²⁷

Arguing for the protection of animal wellbeing from sentience thus carries risks. Recognising this risk, the UNCAHP first establishes that *all* non-human animals are covered by its protection framework¹²⁸, and the term 'animal' is used throughout the proposed treaty to include "all non-human animals".¹²⁹ Second, the UNCAHP defines animals as "sentient beings" in Article 3(1). Moreover, because the term 'animal' is given a special meaning in the context of the UNCAHP to include "all non-human

¹²⁴ For the non-official English translation of the Swiss Animal Welfare Act see 'Animal Welfare Act of Switzerland, No. 455' (*Fedlex*, 16 December 2005) <<https://www.fedlex.admin.ch/eli/cc/2008/414/en>> accessed 8 December 2021.

¹²⁵ On the concept of animal dignity see Eva Bernet Kempers, 'Animal Dignity and the Law: Potential, Problems and Possible Implications' (2020) 41 *Liverpool Law Review* 173.

¹²⁶ See Taimie L Bryant, 'Similarity or Difference as a Basis for Justice: Must Animals Be Like Humans To Be Legally Protected From Humans?' (2007) 70 *Law and Contemporary Problems* 207.

¹²⁷ Offor (n 65). 274

¹²⁸ UNCAHP 1st Draft. Objective, Use of Terms

¹²⁹ UNCAHP 1st Draft., Article 3(1)

animals”, the UNCAHP effectively establishes a legal presumption here that “*all* animals are sentient beings”. Third, to strengthen this legal presumption, the UNCAHP also recognises the precautionary principle¹³⁰, which requires that animals whose sentience is uncertain be given the benefit of the doubt.¹³¹ Through the precautionary principle, the UNCAHP seeks to ensure that fish and other invertebrates whose sentience may be in question are nevertheless included in the UNCAHP’s moral calculus and protected.

Although this three-legged safety net created by the UNCAHP seems to be well thought out, there is a danger that the protection that the UNCAHP, if adopted, would offer to animals would be selective, as the premise that *all* animals are sentient could easily be scientifically falsified. And it is significantly doubtful that the precautionary principle will be effective enough to prevent further scientific research to this end.

The ethical underpinnings of UNCAHP could also turn out to be problematic based on its recognition of the four fundamental interests animals are assumed to have, namely to live, to be free, to be well-treated and not harmed, and to be represented.¹³² What happens when these fundamental interests of animals collide with the interests of humans?

UNCAHP also acknowledges this risk and stipulates that the interests animals have in being well treated, for example, cannot be interfered with or diminished except in a case of self-defence where life is at risk. Setting the threshold for justifiable cruelty to animals at self-defence seems to reinforce the view that UNCAHP sets a high bar for protecting the wellbeing of animals, a view that appears to be consistent with the insistence in Article 6 of UNCAHP that it aims to end all unnecessary animal suffering and threats of extinction. Contracting parties would further be obliged to identify and promote alternatives to the use of animals to provide food, for example, and for other purposes.¹³³

¹³⁰ On the origins and evolution of the precautionary principle see Jonathan Birch, ‘Animal Sentience and the Precautionary Principle’ (2017) 2 *Animal Sentience*.

¹³¹ UNCAHP 1st Draft. Article 3(3)

¹³² *ibid.* Article 5

¹³³ *ibid.* Article 6(2)

There is no question, but that UNCAHP takes the interests of animals much more seriously from an ethical perspective than existing legal regimes. It tries in its choice of language and the obligations it mandates on contracting states to address some of the shortcomings of utilitarian welfarism. It even tries to make the case in Article 5(d) that animals have a justiciable interest in being represented at court, when their fundamental interests, as detailed in UNCAHP, are arguably interfered with, and diminished. Questions about whether and how the meaningful representation of animals in criminal, administrative, and civil proceedings might be accomplished in the diverse legal systems of parties that might contract to UNCAHP are legion.¹³⁴ There is no doubt that, if such representation came to pass, it would fundamentally alter the way human and animal interests are balanced in various parts of the world. Nevertheless, the question remains whether the interests of animals will ever take precedence over those of humans when the two collide and whether the framework provided by UNCAHP is sufficient in this respect.

4.3 The factors shaped the ethical tone of UNCAHP

There is an argument to be made that the balance of ethical considerations struck in the form and content of UNCAHP is justifiable on pragmatic grounds—it yields a proposal that has the best chance of serious consideration and eventual adoption in the context of the United Nations. It puts animal protection squarely on the agenda of the UN, it incorporates and endorses the animal welfare standards already developed by OIE¹³⁵, and it is consistent with the major ethical premises of existing animal protection regimes.¹³⁶ It replicates the definition of animal welfare that appears in OIE’s Terrestrial Code.¹³⁷ It defines animal welfare as a positive state individual animals can reach in coping with their environments, including an absence of physical and psychological suffering and the satisfaction of their biological, including physiological, ethological and social needs.¹³⁸ And by making reference to One Health

¹³⁴ On the issue of animal representation see Peters, *Animals in International Law* (n 2). 579-576

¹³⁵ UNCAHP 1st Draft. Preamble, para. 3

¹³⁶ *ibid.* Preamble, para. 4

¹³⁷ OIE Terrestrial Animal Health Code 2019. Chapter 7.1.

¹³⁸ UNCAHP 1st Draft. Objectives

and One Welfare concepts¹³⁹, it underlines the idea that the health and welfare of humans, animals, and the environment are intertwined and interconnected.

So, UNCAHP can in part be understood as an attempt to pull together and in effect codify efforts to improve the wellbeing of animals that have already been undertaken. Above and beyond that, however, UNCAHP can be understood as a considered and thoughtful response to growing public concern around the world about ways in which issues of animal health, welfare, and protection might best be addressed.¹⁴⁰ The drafters of UNCAHP have clearly tried to gather different stakeholders in the global animal movement under their roof. But do they strike the right balance between endorsing and building upon what has already been done and pushing for a radically different view of the animal law universe?

In this context, the relationship between the OIE and UNCAHP should be considered first. Making the OIE standards a part of UNCAHP can be seen, on the one hand, as a positive step. The standards have already been adopted—at least in principle—by 182 UN member states.¹⁴¹ Although they are soft law instruments, the OIE has long sought to give them practical effect by working closely with other relevant international and regional organisations, such as the World Trade Organisation (WTO)¹⁴², the Council of Europe (CoE)¹⁴³, and the European Union (EU).¹⁴⁴ It seems likely, then, that key stakeholders in the animal industry would be inclined to favour a hard law initiative that builds on the work already done by OIE; work with which they are familiar. And this might make the process of negotiating and adopting and eventually implementing UNCAHP easier than it would otherwise be.

On the other hand, OIE's business-friendly approach to animal wellbeing issues is unlikely to satisfy those who would like to see UNCAHP take a firmer and more radical ethical stance. On paper, OIE acknowledges an ethical responsibility towards

¹³⁹ *ibid.* Preamble, para. 7

¹⁴⁰ *ibid.* Preamble, para. 5

¹⁴¹ 'Members' (*The World Organization for Animal Health*) <<https://www.oie.int/en/who-we-are/members/>> accessed 8 December 2021.

¹⁴² Agreement between WTO and OIE 1998 (WT/L/272).

¹⁴³ Joint Declaration on Co-operation on Animal Welfare between CoE, EU, and OIE 2006.

¹⁴⁴ Memorandum of Understanding Between the European Commission and OIE Concerning Their General Relations 2011 (OJ C 241).

animals.¹⁴⁵ But as a practical matter the extent of this commitment is more limited than the new welfarism that lies at the root of UNCAHP. OIE's animal welfare strategy says, for example, that "[a]nimals may be kept as working animals, companion animals, for production of food, fibre and other animal products, for scientific and educational purposes and are transported and traded internationally," and that all these purposes are "legitimate".¹⁴⁶ The ethical responsibilities humans have towards animals only extend to ensuring that "any such use is humane, as defined through the OIE's international standards for animal welfare, in recognition of the sentience of animals."¹⁴⁷ The OIE Terrestrial Code further states that "[t]he use of animals in agriculture, education, and research, and for companionship, recreation, and entertainment, *makes a major contribution to the wellbeing of people.*"¹⁴⁸ This aligns OIE's approach to the animal wellbeing issues with the utilitarian anthropocentric view. So, as a matter of practical reality, are the ethical premises of UNCAHP and the OIE standards reconcilable?

5 Conclusion

The likelihood that an initiative like UNCAHP will be successful is heavily dependent on the international community's preparedness to act.¹⁴⁹ That is why it has been drafted to appeal to the broadest possible cross-section of UN members. This is also why it strikes such a fine balance between utilitarian and rights-based animal ethics. It seems to me that UNCAHP reads the current zeitgeist of animal law very well. It is sensitive to the emergence over the last few decades of animal welfare and animal wellbeing issues on the international stage and sees the possibility that this could produce support for a treaty proposal. It tries to build on the work international organizations have already done to advance animal welfare. It makes a careful, one might also say thoughtful, attempt to stay within the rubric of utilitarian welfarism that has guided such work. It does acknowledge that welfarism has limitations, particularly in coming to grips with the idea that many animals are sentient beings, that they have an inherent value as such, and that this entitles them to be treated with dignity.

¹⁴⁵ 'OIE Global Animal Welfare Strategy' (n 88). 2

¹⁴⁶ *ibid.*

¹⁴⁷ *ibid.*

¹⁴⁸ Article 7.1.2.(5) of OIE Terrestrial Animal Health Code (n 137). (emphasis added)

¹⁴⁹ Riley (n 46). 173

UNCAHP also tries through its endorsement and incorporation of the precautionary principle not to discriminate between animals that are clearly sentient and animals whose sentience is uncertain.

UNCAHP also makes an appropriate and timely connection between the world's search for better ways of dealing with animals and its search for better solutions to other, related problems. This is captured in the proposed treaty's embrace of the One Health and One Welfare concepts. All things considered, then, UNCAHP can reasonably be described as sensible and reasonable response to the limitations of the speciesist paradigm for regulating relationships between animals and people.

It does not seem to me, however, that UNCAHP will have much appeal to people who think about animal law outside the framework of liberal animal ethics.¹⁵⁰ The critical shortcoming of liberal theories is that while they seek a closer correspondence between people and animals in terms of their moral worth they are uncritical to *human* ideal.¹⁵¹ Indeed, while liberal theories point to similarities between the other forms of oppression such as racism and sexism, they tend to treat the cases against racism and sexism as 'closed cases'. However, it is naïve to claim that the sole recognition of the legal rights of people of colour and women has led to a real change.¹⁵² It is precisely because of the ideal *human* model—which is representative only of white, heterosexual, male individuals¹⁵³—that the case of 'human rights' is still an open one, and this continues to be the struggle of feminist, queer, and anti-racist movements today. Thus, attempting to elevate animals to the level of *humans* without critically examining who is 'human' and why human existing rights protection systems are failing runs the risk of merely trying to patch up the system rather than addressing the root of the problem. It can certainly help improve the condition of certain animals, especially those in the "empathetic proximity" of humans.¹⁵⁴ But when it comes to

¹⁵⁰ Robert Garner, 'Animal Rights, Political Theory and the Liberal Tradition' (2002) 8 *Contemporary Politics* 7.

¹⁵¹ Val Plumwood, *Feminism and the Mastery of Nature* (1st edn, Routledge 1993). 23

¹⁵² Catharine A MacKinnon, 'Are Woman Human?', *Are Women Human? And Other International Dialogues* (First Harvard Univ Press Paperback ed, Belknap Press of Harvard Univ Press 2007). 41-43

¹⁵³ Plumwood (n 151). 23

¹⁵⁴ Catherine Redgwell, 'Life, the Universe and Everything: A Critique of Antropocentric Rights' in Alan E Boyle and Michael R Anderson (eds), *Human Rights Approaches to Environmental Protection* (1st edn, Clarendon Press 1996). 81

animals that are not *human-like*, such initiatives do not even seem to be able to convince themselves why these animals deserve meaningful protection.

In my opinion, this is also the prominent shortcoming of the UNCAHP, which places the criterion of ‘sentience’ at the centre of the argument as to why animals deserve meaningful protection. Indeed, the UNCAHP is also aware of this and therefore adopts the three-legged safety net mentioned above to include non-sentient animals in its protection framework. Nevertheless, I am sceptical whether the legal assumption that ‘non-sentient animals are also sentient’ is the right way to protect all animals in the long term.

Another issue that makes the ultimate impact of UNCAHP in animal liberation questionable is the draft’s relationship to the OIE. It is clear from the organic relationship between the OIE standards and the UNCAHP that while UNCAHP ultimately aims to end the extinction and unnecessary suffering of animals, the draft treaty still operates at a level where animals are viewed as mere ‘objects’. It is true that the complementary tools offered by UNCAHP such as intrinsic value and animal dignity strengthen the position of animals in the moral calculus. However, in my opinion, as long as animals remain on the ‘object’ side of the Cartesian divide between humans and animals, their influence is inevitably limited.

Experience with existing animal laws supports this view. In EU law, for example, animals have been recognised as sentient beings since 1997.¹⁵⁵ But since they can still be traded more or less freely, this recognition has arguably done little more than change their status from mere merchandise to “sentient merchandise”.¹⁵⁶ Attempts to legislate in the name of animal dignity and the inherent value of animals have met the same fate. This is evidenced by the implementation of the Norwegian Animal Welfare Act of 2009, which legally recognised the ‘intrinsic value’ of animals. According to Trøite and Myskja the Act was little more than a symbolic gesture and produced no significant change in the way the animal industry in Norway normally conducts its operations.¹⁵⁷ The same outcome attended the legal recognition given to ‘animal

¹⁵⁵ Article 13 of the Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community 2007 (2007/C 306/01).

¹⁵⁶ Peters, *Animals in International Law* (n 2). 208

¹⁵⁷ See MF Trøite and BK Myskja, ‘58. Legal Protection of Animal Intrinsic Value – Mere Words?’, *Professionals in food chains* (Wageningen Academic Publishers 2018).

dignity’ in 2008 in the Swiss Animal Welfare Code.¹⁵⁸ It would be misleading to suggest that these laws have played no role in improving conditions for animals. However, if the goal is to ensure that the interests of animals are considered in the same way as those of humans, then the effect of these laws, which are based on the notion that animals are mere ‘objects’, is limited to mere “improvements”¹⁵⁹ and they are doomed to reproduce the *status quo*.

A final point to highlight in relation to the potential impact of UNCAHP on animal welfare is the algorithm used by UNCAHP to construct the interdependence argument. By combining efforts to promote One Health with efforts to promote One Welfare, the drafters of UNCAHP argued that they could overcome the limitations of the view that protecting animal health is important primarily for anthropocentric reasons—since, according to the One Health argument, protecting animal health primarily protects human health. According to the drafters, One Welfare puts more emphasis on ‘togetherness’ as it is about the mental and psychic health of humans and animals. The merging of these two concepts therefore reduces the risk of animals’ interests being pushed into the background, as is the case with One Health.¹⁶⁰

The interconnectedness argument implies that human and more-than-human lives are interconnected, and that the survival of the planet depends on building relationships that respect this reality. Still, using the interconnectedness argument can be tricky. If the argument is uncritical of the embedded hierarchies in the relationship between humans and animals, the emphasis on interconnectedness becomes no different from the Kantian case for animals: We should treat animals well because of the possible indirect consequences for humanity.¹⁶¹ In my view, this is similar to the argument often used to promote women’s participation in the labour force: Women’s participation in the labour force is a good thing, but only to the extent that their work promotes a greater social good. This, however, implies that women’s work is welcome as long as it is limited to occupations that society deems appropriate for women and not to jobs and

¹⁵⁸ See Gieri Bolliger, ‘Legal Protection of Animal Dignity in Switzerland: Status Quo and Future Perspectives’ (2016) 22 *Animal Law* 311.

¹⁵⁹ Robert Garner, *The Political Theory of Animal Rights* (1st edn, Manchester University Press 2005), 48-49

¹⁶⁰ Verniers and Breils (n 12), 48

¹⁶¹ Laurence H Tribe, ‘Ways Not to Think about Plastic Trees: New Foundations for Environmental Law’ (1974) 83 *The Yale Law Journal* 1315, 1330

occupations normally reserved for men.¹⁶² In this case, women are indeed employed, but labour market reforms continue to be hampered by an essentially sexist paradigm.

As this example shows, law reform might bend the rules without fundamentally altering the discriminative patterns on which it rests. So it seems to me that there is something to consider here for people who want to bend the rules of animal law by adopting an animal protection treaty without fundamentally altering the speciesism and utilitarianism that ultimately subordinate animal interests to those of people. I believe that this consideration should be the starting point if such an initiative, including the UNCAHP, is to be successful.

¹⁶² Plumwood (n 151). 21-22