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THE BEASTS IN THE JUNGLE:
ANIMAL WELFARE IN INTERNATIONAL LAW

by

Catherine Sykes

Submitted in partial fulfilment of the requirements
for the degree of Master of Laws

at

Dalhousie University
Halifax, Nova Scotia
August 2011

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The undersigned hereby certify that they have read and recommend to the Faculty of Graduate Studies for acceptance a thesis entitled “The Beasts in the Jungle: Animal Welfare in International Law” by Catherine Sykes in partial fulfilment of the requirements for the degree of Master of Laws.

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DEDICATION

For all the beasts that share my jungle, Charlie, Lucie, Tristan and Hikari.

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ABSTRACT

Animal welfare has emerged as a pervasive concern in modern international law. The purpose of this study is to situate the international legal principle protecting the welfare of animals within the broader framework of international law. The study uses a constructivist model to develop a theory of the place of animal welfare in the international legal regime that has due regard for cultural differences and the diversity of international society. The historical antecedents for an obligation to protect animal welfare in various global cultures are considered. The argument posits an internationally recognized principle of humane treatment of animals based on a test of necessity, in accordance with which the infliction of suffering on animals can only be justified by balancing means against ends. It proposes that Canadian criminal law on animal cruelty, particularly as it relates to animals raised for food, is inconsistent with this internationally recognized principle.

LIST OF ABBREVIATIONS USED

BCE	Before the Common Era
CBD	Convention on Biological Diversity
CBDR	Common but differentiated responsibilities
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CPAIT	Convention for the Protection of Animals during International Transport
CVMA	Canadian Veterinary Medical Association
EEC	European Economic Community
EU	European Union
GATT	General Agreement on Tariffs and Trade
ICFAW	International Coalition for Farm Animal Welfare
ICJ	International Court of Justice
ICRW	International Convention for the Regulation of Whaling
IFAW	International Fund for Animal Welfare
IWC	International Whaling Commission
MP	Member of Parliament
NGO	Non-governmental organization
OIE	World Organization for Animal Health (Office internationale des Epizooties).
UDAR	Universal Declaration of Animal Rights
UDAW	Universal Declaration on Animal Welfare
UNFCCC	United Nations Framework Convention on Climate Change
UK	United Kingdom
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
US	United States
WSPA	World Society for the Protection of Animals
WTO	World Trade Organization

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CHAPTER ONE INTRODUCTION

An English MP declares that the use of wild animals in circuses a “barbaric activity” with “no place in a civilised society.”¹ A Canadian self-styled pirate sea captain patrols the Antarctic to sabotage the operations of the Japanese whaling fleet, regarding himself and his crew as enforcers of international law.² Environmentalists and (some) defenders of Chinese culture clash over the prospect of bans on the possession and sale of sharks’ fins – used for making the traditional delicacy shark’s fin soup, and controversial because the standard harvesting method is to cut off the fin and throw the shark, lethally wounded but still alive, back in the water.³

All of these examples, and other stories like them, suggest that the way human beings treat other animals⁴ has become a significant issue in international and cross-cultural relationships. More controversially, they might be taken as instantiations of a debate about values that transcends particular cultures and nations, so that those who

¹ United Kingdom Parliament, *House of Commons Debates* (19 May 2011), Column 499 (Bob Russell), online: <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110519/debtext/110519-0001.htm#11051950000005>.

² Raffi Katchadourian, “Neptune’s Navy”, *The New Yorker* (5 November 2007) 58 [a profile of Paul Watson, leader of the environmental organization Sea Shepherd]. Sea Shepherd’s website has a page devoted to “Laws and Charters,” where it announces that “Sea Shepherd cooperates fully with all international law enforcement agencies and its enforcement activities complying with standard practices of law and policing enforcement.” <http://www.seashepherd.org/who-we-are/laws-and-charters.html>.

³ Jared Lindon, “Culture Clash Over Proposed Shark-Fin Ban”, *The National Post* (14 June 2011), online: <http://news.nationalpost.com/2011/06/14/culture-clash-over-proposed-shark-fin-ban/>.

⁴ It seems appropriate to acknowledge at the outset the difficulties of terminology in this area, in particular with the centrally important word “animal.” Some prefer to use “nonhuman animal,” to stress the biological fact that we humans are animals too and to question the ideological view that sets us on a different plane from all the rest of them. While I have some sympathy with that perspective, such encapsulations of argument in vocabulary tend (in my view) to make the argument less persuasive to all but the already converted, and so I have retained the more common usage. A difficulty of imprecision is raised by the compendiousness of the word “animal,” referring as it does to so many and such different creatures, from flea to elephant, from oyster to chimpanzee. Jacques Derrida has called attention to the dynamic of power and justice implicated by the naming of animals as a category, asserting that we do not have the right, confronted with the “heterogeneous multiplicity of the living,” to name “animal in general.” *The Animal That Therefore I Am*, ed Marie-Louise Mallet, translated by David Wills (New York: Fordham University Press, 2008) at 31.

violate them risk the opprobrium of a kind of international pariah status. Is there an overarching moral principle against the abuse of animals that is gaining universal recognition? Is “the protection of animals from suffering and cruelty” a “universal issue,” as has been argued?⁵ And, if so, is such a principle reflected, as one might expect it to be if it exists, in international law? Do international animal rights issues just boil down to a familiar story of the West proclaiming its own particular cultural values to be universal – hypocritically, too, as Westerners who decry the use of animals in circuses and criticize shark finning still blithely consume their factory-farmed hamburgers? Or can a case be made that there is a genuinely universal, even if not universally observed, norm of animal protection?

I propose that there is such a norm, and that it is reflected in international law, not only as specific instances of animal welfare standards in international treaties (of which there are many examples) but at a more general level, as a basic principle that international society has expressed fidelity to and aspires to honour. And I attempt to make this argument while doing justice to the complex issues of cultural diversity and ideological colonialism that it implicates.

There are three main contributory streams in this argument – in other words, three overarching goals of this thesis. The first is to pull together the wide array of international provisions and statements on animal welfare and situate them in a jurisprudential context. There is a substantial, indeed surprising (given that international law is often thought of as not having much to say about animals) abundance of such sources. There has been relatively little written to date that examines them in a

⁵ Amy B Draeger, “More Than Property: An Argument for Adoption of the Universal Declaration of Animal Welfare” (2007) 12 *Drake J Agric L* 277 at 297.

systematic manner. Michael Bowman *et al.*, the authors of the recently updated second edition of *Lyster's International Wildlife Law*, have remarked on an “absence of reference to this matter in standard and contemporary accounts of international law.”⁶ There are, however, signs that interest in such analyses is on the increase. Bowman *et al.* themselves have undertaken (and impressively discharged) the task of setting out a fairly comprehensive account of the welfare-related provisions of international wildlife law, along with arguments about the broader significance of animal welfare as part of international law.⁷ I seek here to expand on what they have done by broadening the scope of the analysis to include the other main category of supranational law on animal welfare: laws – mainly European – protecting domestic animals. In addition, I examine in more depth the cultural and intellectual background from which the laws protecting animal welfare have emerged. While I was in the process of writing this thesis, two prominent American animal lawyers, Bruce Wagman and Matthew Liebman, published *A Worldview of Animal Law*,⁸ a book-length comparative and international study of animal law. Wagman and Liebman cover a good deal of the territory described here, including some of the cultural background to animal protection. Their emphasis, however, is on surveying the global landscape of animal law, whereas mine is on developing an account of the juridical status of an animal welfare principle in international law.

The second strand is the argument that there is a general principle protecting animal welfare recognized in some form in international law but probably not yet fully

⁶ Michael Bowman, Peter Davies & Catherine Redgwell, *Lyster's International Wildlife Law*, 2d ed (Cambridge: Cambridge University Press, 2010) at 678. Bowman *et al.*, whose main focus is on the conservation of wild animal populations, devote a chapter to welfare issues in international wildlife law (*ibid* at 672-699).

⁷ *Ibid* at 672-699.

⁸ (Durham, NC: Carolina Academic Press, 2011).

developed as a binding legal norm. I call this principle the “principle of humane treatment.” It means that human beings have an obligation to treat animals humanely – that is, not to cause them *unnecessary* suffering. Animal welfare provisions in international law, and in the domestic law of almost all countries, repeat these words or similar formulae (nineteenth-century anti-cruelty statutes often used words like “wanton cruelty,” but in determining where acceptable behaviour ended and wanton cruelty began, courts have gravitated towards a concept of necessity).

The built-in standard of necessity means that a balancing of means and ends is called for. Human beings do use animals, kill them and cause them pain; that is not prohibited by the law, much less under international law. But the law does set limits to what can be legitimately done. Those limits are a function of the importance and validity of the human purpose at issue, the reasonableness and proportionality of the suffering imposed on animals considered in light of that purpose, and the possibility of achieving the goal through less cruel means. A proportionality test reflecting these principles was articulated by Lamer J.A. (as he then was) in *R. v Ménard*, interpreting the *Criminal Code* provision prohibiting cruelty to animals, when he held that “suffering which one may *reasonably avoid* for an animal is not necessary.”⁹ (One of the reasons people object to shark finning is that it seems so disproportionate, so unnecessary, to sacrifice a large animal for a relatively small piece of its body and to inflict such a slow and painful death on it.) When I refer to the principle of humane treatment here, it is used as a shorthand way of invoking this principle of proportionality and weighing means against ends.

⁹ (1978) 43 CCC (2d) 458 (Que CA), leave to appeal to SCC refused, [1978] 2 SCR viii [*Ménard*], at 466 [emphasis added]. See further discussion of the *Ménard* case in Chapter 7 below.

The third purpose is to answer a question that presents itself roughly as follows: Why bother trying to make the case that international law recognizes the principle of humane treatment, since almost every country in the world has already adopted a formulation along these lines in its domestic legislation, jurisprudence or both? In the Canadian criminal provision on cruelty to animals, for example, the most general offence is wilfully causing (or, in the case of an owner, permitting to be caused) “unnecessary pain, suffering or injury to an animal or a bird,”¹⁰ and probably the most authoritative pronouncement on the interpretation of this language remains Lamer J.A.’s opinion in *Ménard*.¹¹ So what is added if there is also a duplicative international standard?

Part of the answer is that animals are sometimes in situations, like transnational transportation, where international law could make more difference to their protection than the law of a particular nation. As Wagman and Liebman note, in an increasingly interconnected world such situations are on the increase; “the globalization of capital, cultural exchange, and technology has internationalized animal industries,”¹² increasing the importance of an awareness of the state of animal law in other nations and internationally. There are treaties regulating some of these border-crossing situations, but if no treaty provision applies in the particular circumstances then a generalized rule could be important.

But, more significantly, I argue that domestic law on animal cruelty – focusing here mainly on Canadian law – is not appropriately interpreted and applied when it comes to one group of animals in particular: animals raised to be eaten. Today most of those

¹⁰ *Criminal Code*, RSC 1985, c C-46, s. 445.1(1)(a).

¹¹ As discussed in Chapter Seven, the Supreme Court of Canada has not yet had occasion to interpret this provision.

¹² *Supra* note 8 at 11.

animals are raised (or, to use the kind of vocabulary preferred by the industry, produced or grown) in intensive confinement operations, also known as factory farms. Factory farming produces low-cost meat, milk and eggs fast, and does so by treating animals more like so many widgets – or a combination of widgets and widget-producing machines – than living, sensitive creatures. To keep costs down and convenience up, things are done to the animals as a matter of course that cause them great pain and suffering; indeed their lives are nothing but pain and suffering, punctuated by moments of even more extreme agony and terror.

My argument has a preoccupation with farm animals in part because the way we treat them is such a significant aspect of the human relationship with other animals. In terms of bare numbers, it is the most significant. David J. Wolfson and Mariann Sullivan¹³ have pointed out that in the United States, “[f]rom a statistician’s point of view, since farmed animals¹⁴ represent 98 percent of all animals (even including companion animals and animals in zoos and circuses) with whom humans interact..., all animals are farmed animals; the number that are not is statistically insignificant.”¹⁵ Statistically speaking, then, everything else about our interaction with animals – from kindness and love for our pets to wonder at the beauty of animals in the wild¹⁶ – is drowned out by the endlessly churning machinery of the factory farm. There is no

¹³ “Foxes in the Hen House: Animals, Agribusiness and the Law: A Modern American Fable” in Cass R Sunstein and Martha C Nussbaum, eds, *Animal Rights: Current Debates and New Directions* (Oxford: Oxford University Press, 2004) 205.

¹⁴ “Farmed animals” can be taken as a term effectively equivalent to “factory farmed animals”, since the overwhelming majority of farm animals in developed countries are in factory farms. Jonathan Safran Foer, *Eating Animals* New York: Little, Brown, 2009) at 109 cites the following statistics for the US: 99.9 percent of chickens raised for meat, 97 percent of laying hens, 99 percent of turkeys, 95 percent of pigs and 78 percent of cattle are now factory farmed.

¹⁵ Wolfson & Sullivan, *supra* note 13 at 206.

¹⁶ The numbers cited by Wolfson and Sullivan actually do not include wild animals, but the numbers of factory farmed animals are so vast (in the neighbourhood of 10 billion per year killed in the US, and climbing (*ibid* at 206)) that one would have to interact with a very large number of wild animals for them to become statistically significant.

logical or jurisprudential reason why the principle of humane treatment should not apply to the way these animals are treated. In practice, however, it does not.

The horrors that animals go through in modern intensive agriculture are no secret, and they have been documented thoroughly enough.¹⁷ The privations inflicted on the animals that feed us are barely imaginable: body parts (beaks, tails, teeth, horns, testicles) removed without pain management because they get in the way when animals are packed together in tiny amounts of space, to make it easier for humans to handle the animals, or because leaving the animals un mutilated could reduce the price their meat will fetch;¹⁸ boars' teeth broken off with bolt-cutters, without painkillers, before they are loaded on the truck to slaughter, because they are packed so tightly that otherwise they would stab one another with their tusks, reducing the value of the meat;¹⁹ ever higher numbers of

¹⁷ A far-from-comprehensive sampling of sources includes Safran Foer, *supra* note 14; Peter Singer, *Animal Liberation* revised ed (New York: HarperCollins, 2009) [first published 1975]; Gene Bauer, *Farm Sanctuary: Changing Hearts and Minds About Animals and Food* (New York: Touchstone, 2008); Jim Mason and Mary Finelli, "Brave New Farm?" in Peter Singer, ed, *In Defense of Animals* (Malden, Mass: Blackwell, 2006) 104; Erik Marcus, *Meat Market* (Boston: Brio Press, 2005); Mark Rowlands, *Animals Like Us* (London: Verso, 2002) at 100-110; and, from a Canadian perspective, Lesli Bisgould, Wendy King & Jennifer Stopford, *Anything Goes: An Overview of Canada's Legal Approach to Animals on Factory Farms* (Toronto: Animal Alliance of Canada, 2001), online: <http://www.animalalliance.ca/report%20-%20Anything%20Goes.pdf> and John Sorensen, *About Canada: Animal Rights* (Halifax, NS: Fernwood Publishing, 2010) at 37-58.

¹⁸ Marcus, *ibid* at 16-18, 30-31, 41-43; Safran Foer, *ibid* at 186; Singer, *ibid* at 101-102, 107, 121-122; Bauer, *ibid* at 133. The account of the castration of a calf reproduced in Marcus at 41-42 from Richard Rhodes's *Farm – A Year in the Life of an American Farmer* (New York: Simon & Schuster, 1989) is horrific; the calf's "eyeballs rolled up into its head until the whites were showing and then with the worst of the tearing its tongue came out, blue-gray and twisted, and flailed in a long, terrible bellow." Marcus estimates that dosing a calf with lidocaine before castration would cost about twenty-five cents, but "anesthetic is virtually never applied" because of this small cost. *Ibid* at 43.

¹⁹ Twyla Francois, "Investigation of Boar Bashing, Tooth Breaking and Snout Cutting at Ottawa Livestock Exchange (formerly Leo's Livestock Exchange Ltd) and Investigation of Slaughterhouses that Accept These Boars (Hebert et Fils and Viandes Giroux) (April – May 2007)," report prepared for Animals' Angels Ve, on file with author. This report describes the breaking of a boar's teeth as follows:

A boar was locked into the stall while a man attempted to lasso just the top part of his snout (excluding the mandible). This proved difficult and a second man had to poke a cane into the stall with the boar to force the boar's mouth open to be able to get the lasso on. Once lassoed the boar's head was roughly yanked upwards to force his mouth open. A man entered the pen with the incapacitated boar with a set of heavy-duty bolt cutters. These were placed on a bottom incisor (or tusk) of the boar. The boar immediately began

animals moving faster along the slaughterhouse line so that inevitably some animals are not successfully stunned or killed before moving along the line to be cut up or plunged into scalding tanks;²⁰ farrowing pigs packed so closely together that they would roll on and kill their piglets if not kept immobile in crates barely bigger than their bodies, unable to move and covered in pus-filled sores²¹; “layer” hens dying slow and agonizing deaths in their cages from prolapsed uterus.²²

None of this is necessary, on any ordinary understanding of the word. We could eat (and still eat animal products, although more expensively and in smaller amounts) without these things being done. Factory farming is inherently inhumane. And yet the *Criminal Code* has never been interpreted to prohibit these practices. I argue that this is contrary to the legal principle of humane treatment. To understand why this is so, it is instructive to consider the international context and the status of the humane treatment principle in international law.

The obligation to treat animals humanely is widely perceived as a characteristic of a decent society. It has a place in the company of the shared higher values that international law is often thought to express. The Council of Europe declared in 1961

to scream a high-pitched, intense scream. This scream did not stop until about a minute after the entire procedure. There was a great deal of laughing from the spectators as the boar struggled and screamed. The bolt cutters, placed on the tooth were then clamped closed while the man gave a twist of his wrist. This action together with the inappropriate device used (bolt-cutters) caused the tooth to shatter up into the gum line. The same procedure was conducted on the other lower tooth. During the breaking of the second tooth a piece of the snout was pinched between the bolt-cutters and torn away, ripping a chunk of snout off. We first thought the snout was cut by accident but were later told that no, it was in fact done on purpose to increase the pain the boar will experience to facilitate transporting them without the extra work of dividing them.” *Ibid* at 4.

²⁰ Singer, *supra* note 17 at 150-151; Marcus, *supra* note 17 at 33-34, 47-48;

²¹ Marcus, *ibid* at 28-30; Safran Foer, *supra* note 17 at 183-185.

²² Marcus, *ibid* at 20-21 (more than two million hens per year die in the United States from untreated uterine prolapse, and death takes at least two days). Marcus describes prolapse as “probably the worst thing” that can happen to a layer hen, which, considering the other things that happen to these animals, is very bad indeed.

that “the humane treatment of animals is one of the hall-marks of Western civilisation.”²³ Similar vocabulary is used in domestic discourse. In a 2001 Parliamentary debate on proposed amendments to the *Criminal Code*’s animal cruelty provisions, New Democratic Party MP Joe Comartin said that the bill targeted “behaviour that as a civilized country we are no longer prepared to tolerate.”²⁴ Some countries are perceived as treating animals relatively poorly, and they are criticized for failing to meet the standards of the international community; the word “barbaric” has been applied to the Chinese treatment of animals in circuses and to China’s general lack of animal welfare legislation,²⁵ as well as the Japanese continuation of whaling in the face of an international moratorium.²⁶

Words like “civilized” and “barbaric” evidently have resonance in popular debate about the legal protections afforded to animals, and they convey an understanding that these laws are based on broadly shared values. For international lawyers, however, these are also loaded terms with a troubled history, going back to the origins of the liberal ideal of international law. Martti Koskenniemi’s *The Gentle Civilizer of Nations* is the leading account of the birth of that ideal from a convenient marriage between idealistic theory

²³ Recommendation 287 (1961); Bowman et al, *supra* note 6 at 679; Egbert Ausems, “The Council of Europe and Animal Welfare” in Council of Europe, ed, *Ethical Eye: Animal Welfare* (Belgium: Council of Europe Publishing: 2006) [*Ethical Eye*] 233 at 233.

²⁴ *House of Commons Debates*, 37 Parl 1st Sess, No 126 (6 December 2001) at 7978.

²⁵ Pete Wedderburn, “Chinese circus animals: this barbaric cruelty must stop,” online: <http://blogs.telegraph.co.uk/news/peterwedderburn/100050156/chinese-circus-animals-cruelty-that-must-stop/> (last updated 10 August 2010). This blog post refers to an investigation of cruel treatment of Chinese circus animals by UK-based charity The Animals Asia Foundation (and embeds a video, narrated by Terry Waite – no stranger to international conflict – of footage compiled from the investigation). The Chinese government has now (as of January 2011) banned circus animal performances at state-owned zoos. Malcolm Moore, “China bans animal circuses” (18 January 2011), online: <http://www.telegraph.co.uk/news/worldnews/asia/china/8266563/China-bans-animal-circuses.html>.

²⁶ Lauren Williams, “Japanese whalers deny mother and calf slaughter” (2 February 2008), online: <http://www.dailytelegraph.com.au/news/national/japanese-whalers-deny-mother-and-calf-slaughter/story-e6freuzr-111115501063> (“Japan yesterday mounted an absurd defence of its barbaric whale slaughter by claiming there was no proof the two whales shown in yesterday’s shocking photograph [published by the Australian Daily Telegraph the previous day] were a mother and her calf”).

and imperialist power politics.²⁷ Even contemporary observers perceived the slippery character of the idea of “civilization” that underpinned the joint venture of colonialism and international law.²⁸ One French nineteenth-century critic of colonial expansion observed that “No word is more vague and has permitted the commission of more crimes than that of civilization.”²⁹

As Koskenniemi shows, the rise of international law in the nineteenth century saw high ideals put to the service of the colonial powers in their subjugation of other peoples – not just an instance of might making right, but of ideas about “right” making possible the realization of the ambitions of the mighty.³⁰ Any attempt to analyze international law as a normative framework has to ask the question, “whose norms”? Inevitably, this means confronting the legacy of international law’s entanglement with imperialism, which, as Jutta Brunnée and Stephen Toope observe, is connected “both to the mission and the deep structure of the law.”³¹

An argument that posits a general or universal standard of animal welfare inevitably runs up against these problems – the use and abuse of the concept of “civilization,” and the difficulties inherent in the very idea of norm-based international law. They are problems given expression, for example, in Japan’s rejection of the internationally prevalent antiwhaling norm, based in significant part the belief of many Japanese that whaling and whale-eating are a “distinct and unique” aspect of their culture

²⁷ *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2002).

²⁸ *Ibid* at 106.

²⁹ Charles Salomon, *L’Occupation des territoires sans maître* (Paris: A Giard, 1889) at 195 (“Nul mot n’est plus vague et n’a permis de commettre de plus grandes inquiétudes que celui de civilization”), cited in *ibid* at 106 (the translation is Koskenniemi’s).

³⁰ See, eg, *ibid* at 135 (noting that the language of “civilization” made it possible to explain and justify the colonization of non-Europeans).

³¹ *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010) at 77.

and that Western pressure to give it up is an expression of cultural imperialism and racism.³² A version of the same criticism with more general application is articulated by a fictional character, Thomas O’Hearn, in J.M. Coetzee’s novel *Elizabeth Costello*.³³ Elizabeth Costello, an eminent novelist, is invited to give a talk at an American college and delivers an emotionally charged lecture on the exploitation of animals. The following day Costello participates in a structured public debate with philosophy professor O’Hearn, where he begins by raising the issue of cultural relativism:

My first reservation about the animal-rights movement...is that by failing to recognize its historical nature, it runs the risk of becoming, like the human-rights movement, yet another Western crusade against the practices of the rest of the world, claiming universality for what are simply its own standards...[non-Western] cultures have their own norms for the treatment of animals and see no reason to adopt ours, particularly when ours are of such recent invention.³⁴

This is a common objection to arguments that the way we treat animals is anything more than an issue of personal preference or sentiment. The very idea is seen as peculiar to a specific cultural identity: Western, affluent, metropolitan – and feminine. A similar view was reflected in the Canadian Parliamentary debates on proposed changes to the animal cruelty provisions of the *Criminal Code* in 2001, with MPs from rural constituencies attacking the effete bourgeois sensibilities of the pro-animal camp. MP

³² Keiko Hirata, “Why Japan Supports Whaling” (2005) 8 J Int’l Wildlife L & Pol’y 129 at 141-142.

³³ (New York: Viking, 2003).

³⁴ *Ibid* at 105. This passage is used by Maneesha Deckha as the entry point for a discussion of postcolonialism and what she terms “animal justice” in “Animal Justice, Cultural Justice: A Posthumanist Response to Cultural Rights in Animals” (2007) 2 J Animal L & Ethics 189.

Inky Mark, for example, defended the exemption of farming practices from judgment on general standards of cruelty with an example from his own experience:

Over 20 years ago I raised weanling pigs. One has to castrate pigs when they are still small weanlings. If urbanites watched me castrating these little weanling pigs in a barn, what would they think about cruelty to animals? Their optics would certainly be different from my optics.³⁵

One of the main themes of my argument is that the issue of cultural relativism when it comes to standards for the treatment of animals is a real issue, but an invocation of that issue is not in itself an adequate response to the truly complex and significant moral issues at play. Take, for example, the moral implications of piglet castration – just one of the numerous mutilations commonly inflicted on farm animals, performed on very young piglets without anaesthetic.³⁶ (Male piglets are castrated because consumers are thought to prefer the taste of their meat to that of intact boars.) There is more that is troubling here than just the offended sensibilities of “urbanites”; to suggest that the issue can be reduced to a matter of metropolitan versus rural tastes, like a preference for Starbuck’s over Tim Horton’s coffee, is just a stratagem to deflect attention from shocking reality of the infliction such extreme pain on a young animal for reasons verging on the trivial.

In keeping with that theme, one thread in my argument is that the values of compassion, respect and fellow feeling for other animals are not of such “recent invention” after all, but in fact are old and deeply rooted in the many spiritual and

³⁵ *House of Commons Debates*, 37 Parl 1st Sess, No 126 (6 December 2001) at 7975.

³⁶ Lesli Bisgould, Wendy King & Jennifer Stopford, *Anything Goes: An Overview of Canada’s Legal Approach to Animals on Factory Farms* (Toronto: Animal Alliance of Canada, 2001), online: <http://www.animalalliance.ca/report%20-%20Anything%20Goes.pdf> at 40 (noting that industry codes of practice endorse castration of male piglets in the first few weeks of life without anaesthetic).

cultural traditions of the world. It is certainly true that human beings have always competed with animals in the struggle to survive – and have exploited them, often ruthlessly, for many thousands of years. It is also true that the modern concept of animal rights has its intellectual antecedents in part in a distinctively Western liberal rights discourse, and in the paternalistic social reform movements of the nineteenth century as well as the liberation movements of the late twentieth. But it is no less true that the seventeenth- and eighteenth-century Europeans who made connections between the “Rights of Man” and the moral claims of animals were influenced by quite different and much older ideas, especially by the spiritual traditions of the Indian subcontinent.

The multicultural geneology of ideas about human duties towards animals is important to a discussion of the place of animal protection in international law because it suggests a bedrock of shared values. Just as importantly, it indicates that the intellectual invention that really is recent, and a Western invention, is the conception of animals as divided from humans in a more radical way, as entities that do not share our capacity for feeling, suffering and happiness but are essentially mechanisms that respond to stimuli automatically. This is the concept of animals that is built into the structure of factory farming, where, as Ruth Harrison observed almost half a century ago, animals are “assessed purely for their ability to convert food into flesh, or ‘saleable products’” – in short, to the re-casting of animals as “animal machines,” the title of Harrison’s groundbreaking book.³⁷

The intensive, industrial approach to animal farming that Harrison’s book exposed in 1961 has since grown so much and become so predominant as to cause Jonathan Safran Foer to predict that in a generation or so the term “factory farm” is “sure

³⁷ *Animal Machines: The New Factory Farming Industry* (London: Vincent Stuart, 1964) at 1.

to fall out of use...either because there will be no more factory farms, or because there will be no more family farms to compare them to.”³⁸ These are practices that originated in Western, advanced economies and are spreading around the world, displacing traditional farming methods. They are profoundly incompatible with the principle, so long recognized by the world’s many civilizations, that animals should be treated humanely. In this sense the question of how we treat animals engages moral questions of significance to humanity in general, as do other transcendent issues like fundamental human rights, and human responsibilities to protect our environment – the type of normative questions with which modern international law is concerned.

The argument set out here draws on a theoretical framework developed by the Canadian international legal scholars Jutta Brunnée and Stephen Toope, which they call “interactional international law.”³⁹ Brunnée and Toope conceive of international law as a normative enterprise, against realist and rationalist scholars who see it as a simply the formal codification of the pursuit of self-interest by powerful nations. From the realist point of view, “the world is a jungle, and the law of the jungle is simple: the strongest win.”⁴⁰ Brunnée and Toope believe, however, that “there is law in the jungle,”⁴¹ law that commands fidelity because of its normative power. But they engage squarely with the difficulties of identifying internationally shared norms in a non-homogenous world; for them, “the greatest challenge facing international law” is “to construct normative

³⁸ *Supra* note 14 at 56.

³⁹ Brunnée and Toope’s framework is developed at length in their recent book *Legitimacy and Legality in International Law* (*supra* note 31). An earlier and shorter account is to be found in Jutta Brunnée and Stephen Toope, “International Law and Constructivism: Elements of an Interactional Theory of International Law” (2000-2001) 39 *Colum J Transnat’l L* 19.

⁴⁰ *Legitimacy and Legality in International Law*, *ibid* at 3.

⁴¹ *Ibid* at 5.

institutions while admitting and upholding the diversity of peoples in international society.”⁴²

To develop an account of international law that rises to that challenge, Brunnée and Toope focus on “thin” rather than “thick” normativity as the hallmark of international law; that is, legitimate international law is characterized not so much by the substantive values it expresses as by the “distinctive internal qualities” of law *as law* – that is, generally, a reasoned, non-arbitrary and transparent kind of social ordering, as distinguished from tyranny or the exercise of raw power (the law of the jungle).⁴³ Their theory incorporates Lon Fuller’s concept of law’s “internal morality,”⁴⁴ which Fuller described as a “procedural version of natural justice.”⁴⁵ In keeping with that emphasis, Brunnée and Toope’s account of how norms become legal obligations in the international arena is primarily procedural, postulating three essential elements: the emergence of social norms based on “shared understandings” or convergence of opinion on normative propositions;⁴⁶ the crystallization of rules that exhibit what Fuller called the “criteria of legality,”⁴⁷ and a process of building and sustaining legal norms through a “distinctive type of interaction” that conforms to the criteria of legality, which they term a “practice of legality.”⁴⁸

An application of this analytical framework to the considerable body of international treaty provisions and other, softer expressions of commitment to the principle of humane treatment points to the conclusion that this principle is in the process

⁴² *Ibid* at 21.

⁴³ *Ibid* at 56.

⁴⁴ Lon Fuller, *The Morality of Law*, revised ed (New Haven: Yale University Press, 1969) at 4.

⁴⁵ *Ibid* at 96.

⁴⁶ *Supra* note 31 at 43-44, 56.

⁴⁷ *Ibid* at 130; Fuller, *supra* note 44 at 46-91.

⁴⁸ Brunnée & Toope, *ibid* at 70.

of construction as a binding rule of international law. Indeed, the increasing pervasiveness of the humane treatment principle in international legal instruments over roughly the last half-century or so, its ancient roots in a diversity of world cultures, and the participation of a diversity of actors in refining and promoting it at the international level make it “particularly congenial to an interactional analysis” (as Brunnée and Toope say of one of the examples they examine, the international climate change regime).⁴⁹

Looking at the issue more broadly, human interaction with other creatures seems perhaps a uniquely congenial test case for a theory of international law as something defined in distinction to “the law of the jungle.” In relation to other animals, we are (currently, at least) the strongest, to the point of having near-absolute power. The law does much to enable the exploitation of animals, mainly by characterizing them as property and thus their protecting owners’ rights to use them for their own ends, as animal rights theorists like Gary Francione have argued.⁵⁰ Yet if international law (and law in general) is, as Fuller and Brunnée and Toope propose, defined in opposition to the tyranny of the strongest, then it stands to reason that some constraints on the extent and nature of that exploitation might be expected to be found in the law – and because the relationship between human beings and other animals concerns humans as a species, rather than any particular political or geographical aggregation of humans, those limits should be expressed in international law as well.

The American naturalist Henry Beston evocatively described other animals as standing in relation to human beings as “other nations,” rather than our kindred or as less

⁴⁹ *Ibid* at 17.

⁵⁰ See generally Gary Francione, *Animals, Property, and the Law* (Philadelphia: Temple University Press, 1995).

perfected approximations of ourselves.⁵¹ Although there has been relatively little sustained or systematic attention so far to the place of international law in shaping our dealings with these other nations, there are good reasons to undertake the endeavour.

I begin in Chapter Two with a general overview of the doctrinal framework of international law and a summary of the main elements of Brunnée and Toope's theory of interactional international law. Chapter Three examines the background and development of the social norm of humane treatment of animals (in the interactional law framework, such a social norm is the foundation of shared understandings, which can develop into legal norms) in the intellectual and spiritual traditions of the world. Chapter Four describes the development of the first national law criminalizing animal cruelty in England, a milestone achieved by a reform movement that rejected the notion proposed by humanist philosophers of animals as automata lacking consciousness or feelings, and also drew inspiration from the animal-protective values of other cultures and religions, especially the traditions of India.

⁵¹ Beston's best-known work, *The Outermost House* (New York: Owl Books, 1992) [first published 1928] was an account of a year living on Cape Cod. Watching the sudden coordinated changes of direction of groups of shorebirds, Beston sees evidence of a shared spirit and a refutation of the Cartesian theory of animals as automata or machines (at 24-25): "Are we to believe that these birds, all of them, are *machina*, as Descartes long ago insisted, mere mechanisms of flesh and bone so exquisitely alike that each cogwheel brain, encountering the same environmental forces, synchronously lets slip the same mechanic ratchet? Or is there some psychic relation between these creatures?" Beston goes on to appeal for "another and a wiser and perhaps a more mystical concept of animals. Remote from universal nature, and living by complicated artifice, man in civilization surveys the creature through the glass of his knowledge and sees thereby a feather magnified and the whole image in distortion. We patronize them for their incompleteness, for their tragic fate of having taken form so far below ourselves. And therein we err, and greatly err. For the animal shall not be measured by man. In a world older and more complete than ours they move finished and complete, gifted with extensions of the senses we have lost or never attained, living by voices we shall never hear. They are not brethren, they are not underlings; they are other nations, caught with ourselves in the net of life and time, fellow prisoners of the splendour and travail of the earth." Interestingly, Koranic teaching also describes animals as *ummas*, or "nations," where the nation is understood as "the essential (*umm* = essence) relationship among individuals, which necessitates awareness of others and responsibility towards them." Raoutsi Hadj Eddine Sari Ali, "Islam" in Council of Europe, ed, *Ethical Eye: Animal Welfare* (Belgium: Council of Europe Publishing; 2006) 145 at 145. Ali cites a beautiful passage of the Koran that resonates with Beston's language: "No creature is there crawling on the earth, no bird flying with its wings, but they are nations like unto yourselves. We have neglected nothing in the Book; then to their Lord they shall be gathered." Koran 6:38, cited in *ibid*.

Chapter Five is an aggregation of the evidence in current international law that supports an emerging international principle of humane treatment. This chapter summarizes the international law sources on animal welfare, both in treaties and in other expressions of commitment (such as draft treaties, resolutions of the United Nations General Assembly (UNGA), statements of international bodies like the Council of Europe, and resolutions and other pronouncements of conferences of treaty parties). Chapter Six then applies the interactional framework of analysis to the data surveyed in Chapter Five to assess the juridical status of the humane treatment principle.

Chapter Seven is where I come to an important practical implication of the argument: how the proposed international legal principle of humane treatment affects domestic law, within the doctrinal structure for the reception of international law in Canada. Although Canada is not party to any treaty commitment to uphold the humane treatment of animals in general (there being no such treaty in existence, at least to date), and although at this point a full-fledged binding norm of customary international law based on the humane treatment principle probably has not crystallized, the emergence of a well-developed and widely recognized norm of humane treatment is undoubtedly relevant to a domestic jurisprudence committed to respect for international standards.

If there is indeed law in the jungle, and if law is defined in part by its distinction from the tyranny of the powerful over the subjugated, then it should not be surprising that international law recognizes human obligations towards the other creatures over whose existences we wield such an incomprehensible measure of power – the dumb beasts, as the defenders of their interests used to call them in earlier days, who cannot speak for themselves. With that thought in mind, what might seem like a number of disparate and

fairly minor provisions dealing with animal welfare in various international contexts can be understood as manifestations of a deeper, and pervasive, normative commitment shared by international society.

CHAPTER TWO INTERNATIONAL LAW AND INTERACTIONAL LAW

2.1 ANIMAL WELFARE IN THE FRAMEWORK OF INTERNATIONAL LAW

This chapter sets out the framework for the substantive argument that follows: both the doctrinal framework of international law, and the theoretical framework of interactional international law.

Brunnée and Toope's interactional theory of international law¹ explains the creation of legal obligation as a reciprocal process based on consensus about basic principles that have a distinctively legal character, and that are applied in the course of cooperative practice, also of a distinctively legal kind. These key concepts in Brunnée and Toope's theory – shared understandings, the criteria of legality and the notion of a practice of legality – are discussed in Section 2.4. Brunnée and Toope's approach is a normative account of international law that nevertheless emphatically rejects the enlistment of international law to impose *a priori* normative propositions just because they are (or some think they are) good or desirable – a move that can too easily amount to the imposition of cultural or political preferences by the powerful on the less powerful.

The question of animal welfare in the international context highlights the potential for such problems to arise, because so much of what is implicated – food, farming, hunting, and generally the relationship between human beings with other creatures and the natural world – is deeply intertwined with national, regional and cultural values. Conflicts about the value of animal welfare on the international stage often trigger accusations of cultural imperialism, that the West is imposing its particular view of the

¹ *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010); "International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000-2001) 39 *Colum J Transnat'l L* 19.

matter on everyone else. While there can be an element of the cynical public relations exercise about such accusations, they are certainly not without persuasive force or justification. The tension between the desirability of universal standards and the need to respect cultural diversity underlines the importance of a theory of international law that sees the law as having a normative basis, but denies that normative principles can simply become law unless a mutual process of a mutual and specifically legal nature has taken place.

I argue that a basic principle of animal welfare can be identified that fits very well into Brunnée and Toope's framework. This is the principle of humane treatment: the obligation not to cause unnecessary suffering to animals – a legal formula that is repeated over and over again in the treaty provisions on animal welfare and when the issue is raised in international discussions.

Before proceeding to a discussion of the theory of interactional international law, I set out below an overview of the standard doctrinal categories of international law, as well as competing views on how normative values shape international legal doctrine.

2.2 SOURCES OF INTERNATIONAL LAW

Where international law comes from, and what makes it law, are fundamental and challenging questions. The international legal system, characterized by its “horizontality” – a non-hierarchical structure with no central decision-making authority² – has no constitution and no legislature.³ This state of affairs can be contrasted with

² Brunnée & Toope, *supra* note 1 at 9, observe that it is “trite” to describe international law as “horizontal in structure” and without “legislative or executive hierarchy.”

³ Ian Brownlie, *Principles of Public International Law*, 7th ed (Oxford: Oxford University Press, 2008) at 3 (noting that “[n]o such machinery [of constitutional law-making as in domestic law] exists for the creation of rules of international law.” See also HLA Hart, *The Concept of Law*, 2d ed (Oxford: Clarendon Press,

domestic law, where “the sources of law are well established and grounded in an authoritative ... constitutional and institutional framework.”⁴ As a result, the question of what gives a given norm the status of binding law is of particular importance to international lawyers, and is the source of much debate touching on the most basic issues concerning the nature and justificatory underpinnings of international legal obligations.

The Statute of the International Court of Justice (ICJ) includes the following list of authorities to be applied by the Court when it carries out its role of judging disputes in accordance with international law:⁵

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59,⁶ judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

International lawyers consider this inventory “not only as a statement of the sources of law the Court is to apply, but also as an accurate description of the sources of international law generally.”⁷

1994) [second edition first published 1961] at 3-4; for Hart, the fact that international law lacks these things made its status as a legal system a “questionable case.”

⁴ John H Currie, *Public International Law*, 2d ed (Irwin Law, 2008) at 80.

⁵ *Statute of the International Court of Justice*, as annexed to the *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7.

⁶ Article 59 of the Statute provides that decisions of the ICJ are not binding except between the parties and in respect of the particular case – *i.e.*, they do not, at least in theory, have precedential binding force (in contrast to the decisions of domestic courts in common-law systems). Given the considerable normative weight of ICJ judgments, in practice they have a degree of authority that can be meaningfully compared to *stare decisis*, although given the distinct nature of international legal ordering there is no simple equivalency.

The list of sources in Article 38(1) is probably not exhaustive. The ICJ itself has referred to other categories in its jurisprudence. A relatively early example was the ICJ's first adjudicated case, the *Corfu Channel* case, in which it invoked "elementary considerations of humanity" – a notion of particular interest here given that the central object of inquiry is a duty to behave humanely towards other animals.⁸ More recent examples can be found in the ICJ's 1997 judgment on the Gabčíkovo-Nagymaros dam project.⁹ Judge Weeramantry, then Vice-President of the Court, wrote a separate opinion¹⁰ that uses a variety of different terms, none of them exactly corresponding to the Article 38(1) categories, to describe the juridical status of the principle of sustainable development: as a "principle with normative value" crucial to the determination of the case,¹¹ an "integral part of modern international law,"¹² and a "principle which rests...on worldwide acceptance."¹³ The love of nature and recognition of the need to preserve it are "among those pristine and universal values which command international

⁷ Currie, *supra* note 4 at 95.

⁸ *The Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v Albania)* [1949] ICJ Rep 4 at 22. The case arose out of a series of early Cold War incidents in the Channel of Corfu. Two British ships, the *Saumarez* and the *Volage*, were severely damaged when they struck mines in Albanian territorial waters; forty-four men were killed and another forty-two injured. The ICJ held that Albania had a duty to warn the British ships of the danger, such obligation being "based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely, *elementary considerations of humanity*, even more exacting in peace than in war" [emphasis added]. Brownlie suggests that these elementary considerations of humanity "may be related to other legal principles that have already been recognized" and which "taken together, reveal certain criteria of public policy and invite the use of analogy" (*supra* note 4 at 27). Considerations of humanity are also relevant in issues of racial discrimination and national self-determination (*ibid*).

⁹ *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, [1997] ICJ Rep 7 [*Gabčíkovo* case]. This case, the ICJ's first ruling in an international environmental dispute, concerned a barrage dam project on the Danube initiated under a 1997 treaty between Czechoslovakia and Hungary. In 1989, Hungary unilaterally abandoned its part of the construction due both to economic constraints and to concerns about the environmental impact of the project. The ICJ ruled that Hungary was not entitled to abandon the treaty, which remained in effect, and that the parties had an ongoing obligation to fulfill its objectives; therefore, they were required to pursue a mutually agreed solution that would achieve this while maintaining the quality of the water of the Danube and protecting nature (*ibid* at 74-76). The dispute between the parties is ongoing.

¹⁰ Judge Weeramantry's opinion begins at [1997] ICJ Rep 88.

¹¹ *Ibid* at 85.

¹² *Ibid* at 86.

¹³ *Ibid* at 94.

recognition.”¹⁴ (Judge Weeramantry also strongly suggests that the right to sustainable development may qualify as customary international law¹⁵ or as a general principle of law.¹⁶) Such vocabulary suggests sources of law beyond those enumerated in Article 38(1), although arguably the statutory language is broad enough to incorporate them.¹⁷

Another important category – even if it is not, strictly speaking, law – is so-called “soft law” (sometimes called *lex ferenda*, the law as it will be, or should be, in the future), which is thought to indicate the direction in which the law is developing and expresses influential or aspirational norms.¹⁸ Evidence of soft law is to be found in draft treaties, the work of the International Law Commission, resolutions of the UNGA (which are not binding, but may function as declarations of principles that have or are taking on binding force), recommendations of international treaty-monitoring bodies,¹⁹ and materials emerging from international conferences such as “communiqués, reports, declarations or accords, . . . which can at least state broad agreements in principle.”²⁰ Although as a doctrinal matter soft law is analytically distinct from the formal sources of binding international law, as the law evolves the boundaries between the categories may become difficult to distinguish; there is often disagreement, for example, on whether a norm has reached the status of customary law or is merely soft law.

¹⁴ *Ibid* at 109.

¹⁵ *Ibid* at 95 (arguing that the principle, if not expressly and specifically supported by every nation, is generally accepted, and that general acceptance is sufficient to establish a principle of customary international law) and 104 (asserting that there is ample evidence of a degree of general recognition such as “to give the principle of sustainable development the nature of customary international law.”)

¹⁶ *Ibid* at 109-110 (contending that, by describing the sources of international law as including the general principles of law recognized by civilized nations, the Statute of the ICJ “expressly opened the door to the entry” of principles like sustainable development into “modern international law”).

¹⁷ Currie, *supra* note 4 at 97.

¹⁸ Currie, *ibid* at 117-120; Gib Van Ert, *Using International Law in Canadian Courts*, 2d ed (Toronto: Irwin Law, 2008) at 32-33. Brian D Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge: Cambridge University Press, 2010) at 56 describes soft law as an intermediate level of obligation, “between strictly binding rules, on the one hand, and nonbinding rules, on the other.”

¹⁹ Currie, *ibid* at 118-120; Van Ert, *ibid* at 33.

²⁰ Currie, *ibid* at 119.

As will be shown in Chapter Four, there are numerous provisions in international treaties that address animal welfare issues in particular contexts. Looking at these provisions together with expressions of commitment to animal welfare in the international arena, as well as the almost unanimous adoption by the world's nations of domestic legislation protecting animal welfare, the question naturally arises whether the treaty provisions are instances of a more general obligation. If such an obligation existed, and if it had achieved the status of binding law, it would have to be either customary law or a general principle of law.

2.2.1 Customary International Law

Customary international law is the body of rules and obligations that are binding on all states, independent of treaty commitments (although customary rules may be codified by treaty, and rules set forth in a treaty can become part of customary international law²¹). The constituent elements of customary international law are referred to in paragraph 38(1)(b) of the Statute of the ICJ: *practice* and *acceptance as law*.²² For the element of state practice to be met, there must be a consistent pattern of practice that is widespread among states (but not necessarily universal)²³ and endures

²¹ A convention can “embody or crystallize” a “pre-existing or emergent rule of customary law”; alternatively, one of the “recognized methods new rules of customary law may be formed” is by means of a treaty provision that is “norm-creating” and eventually generates a rule that is binding in general, including for states that are not party to the treaty. *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, [1969] ICJ Rep 3 at 41 [*North Sea Continental Shelf Cases*].

²² As Currie observes, “commentators have noted that paragraph 38(b)(1) is poorly drafted in that it reverses the relationship between customary international law and ‘general practice.’ Customary international law does not provide evidence of a general practice accepted as law. Precisely the opposite is true: a general practice accepted as law is evidence of a rule of customary international law.” *Supra* note 4 at 188.

²³ Brownlie, *supra* note 3 at 7-8; Currie, *ibid* at 189-190; *Gabcikovo* case, *supra* note 9 at 95. Just as the generality requirement does not mean unanimity, nor does the requirement of consistency mean that state practice must be “in absolutely rigorous conformity with the rule”; it is sufficient that “the conduct of States should, in general, be consistent with [the purported customary rule], and that instances of State

over some period of time.²⁴ Acceptance is generally understood as a “subjective element” of belief on the part of states that their practice “is rendered obligatory by the existence of a rule of law requiring it,” by contrast with acts “motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.”²⁵ This mental element is termed *opinio juris sive necessitatis*, or simply *opinio juris*.

The legal standard for determining the existence of customary international law is as simple to state – there must be evidence of the right kind of practice, and of *opinio juris* – as it is difficult to apply. In addition to the hard questions of distinguishing one side of the line the other (whether a practice is consistent and general enough, whether it is motivated by perceived legal obligation or mere courtesy) that commonly arise in the application of legal tests, there are deeper conceptual difficulties bound up in the very character of customary international law, which has aptly been called “enigmatic.”²⁶ The element of *opinio juris* involves the fiction of imputing subjective belief to a state, an abstract entity,²⁷ as well as the challenge of ranking the relative significance of mixed and complex motivations behind a practice.²⁸ The rule that custom is universally binding even if not based on universal practice or acceptance is in tension with the notion that

conduct inconsistent with a given rule should generally have been treated as breaches of that rule.” *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, [1986] ICJ Rep 14 at 98.

²⁴ The very word “custom” connotes a practice that has been settled for some length of time; and yet both practice and the customary law that it reflects change and evolve over time. The duration of a custom is not necessarily required to be very long; the ICJ held in the *North Sea Continental Shelf Cases* that a customary rule could arise “even without the passage of any considerable period of time,” but in that case participation in the practice would have to be “both extensive and virtually uniform.” *Supra* note 21 at 42-43. The implication is that to a certain extent the level of evidence needed to meet the duration requirement is in inverse proportion to that needed to meet the requirements of generality and uniformity on the other (as Currie argues; *ibid* at 194-195).

²⁵ *North Sea Continental Shelf Cases*, *supra* note 21 at 44.

²⁶ Lopard, *supra* note 18 at 8.

²⁷ Brunnee & Toope, *supra* note 1 at 47.

²⁸ Currie, *supra* note 23 at 196.

international law is created by the consent of states.²⁹ Customary rules are supposed to form as a practice becomes established among states and those states believe that it is a practice required by law, meaning that, in the initial stages at least, the states must hold that belief before the customary law has crystallized – that is, they must be wrong.³⁰

There is a basic circularity or paradox at the heart of the notion of “a system of law which governs the behaviour of its subjects while itself being subject to modification by such behaviour”³¹ and under which “conduct is legally required because it is regularly engaged in and *believed* to be legally required.”³²

Given these profound conceptual problems, and the disagreements among commentators about how the basic elements of customary international law are identified and justified, customary international law is open to the charge that it is malleable to the point of near-meaninglessness, a convenient hook for anyone to hang his or her favourite theory or policy on and claim that it has the status of binding international law.³³ Yet

²⁹ Currie, *ibid* at 199-201. It is accepted by the majority of scholars that the consent of states to be bound is a key basis of obligation in international law, although this theory has been challenged. See Lepard, *supra* note 18 at 7; Anthony A D’Amato, *The Concept of Custom in International Law* (Ithaca: Cornell University Press, 1971) at 187-199. A state can escape being bound by customary international law if it qualifies as a “persistent objector” to the practice (Brownlie, *supra* note 3 at 11). This exception is a narrow one with exacting criteria; see Currie, *ibid* at 199-201.

³⁰ Or, as Jack L Goldsmith and Eric A Posner put it, “the process of change is illegal, because some states must initiate a departure from the prior regularity that they were bound to follow as a matter of law.” *The Limits of International Law* (Oxford: Oxford University Press, 2005) at 25. See also Brunnee & Toope, *supra* note 1 at 47, discussing the difficulty under traditional doctrine of locating the “tipping point” at which a new practice becomes required.

³¹ Currie, *supra* note 4 at 187.

³² Currie, *ibid* at 186 [emphasis in original].

³³ Martti Koskenniemi argues that “modern legal argument lacks a determinate, coherent concept of custom. Anything can be argued so as to be included within it as well as so as to be excluded from it.” *From Apology to Utopia* (Helsinki: Finnish Lawyers’ Publishing Company, 1989) at 362-363. John Fried has labeled allegations of international law’s indeterminacy – to which customary law is especially susceptible – the “harlot” theory of international law: “International law is so vague and inchoate that, with some juggling and legalistic gymnastics it can be made to serve virtually every policy. It is full of loopholes; it can be bent to serve and justify almost any purpose of power politics.” John H E Fried, “International Law – Neither Orphan Nor Harlot, Neither Jailer Nor Never-Never Land” in Charlotte Ku & Paul F Diehl, eds, *International Law: Classic and Contemporary Readings* (Boulder: Lynne Rienner, 1998) 25 at 26-27.

customary international law remains a concept of great juridical significance and rhetorical power. It provides the framework that makes possible the notion of an international legal order, “the substratum of common legal rights and obligations of the entire community of states, upon which their more particularized legal relationships...are built.”³⁴ And some of the most intuitively compelling norms of modern international law, such as respect for human rights and stewardship of the environment, often develop or are identified first in the realm of customary international law.

2.2.2 General Principles of Law

The category of “general principles of law” referenced in paragraph 38(1)(c) is not as well developed as customary international law.³⁵ Brownlie observes that the drafters of the statute disagreed on the meaning of this term, and at least one of them intended that it should reference natural law.³⁶ The consensus among commentators is that “general principles” are concepts that are widespread in domestic law, especially private law, and can be looked to for “help and inspiration” in international law where an analogue would be useful but has not arisen through state practice, or where international rules and institutions have a similar nature and purpose to those existing under domestic private law and can be better understood with reference to them.³⁷ It has been suggested by some commentators that the category also includes general principles of *international*

³⁴ Currie, *supra* note 4 at 187. For example, the fundamental principles of sovereignty, equality between sovereign states, and that states must perform legal undertakings in good faith (or *pacta sunt servanda*) originate in customary international law (Goldsmith & Posner, *supra* note 30 at 21).

³⁵ Brownlie, *supra* note 3 at 17-18; Currie, *ibid* at 101.

³⁶ Brownlie, *ibid* at 16.

³⁷ *International Status of South-West Africa*, Advisory Opinion, [1950] ICJ Rep 128 at 148 [reviewing the general principles common to the institution of the legal trust in “[n]early every legal system” (*ibid* at 149) and drawing on them to elucidate the international legal nature and implications of the post-World War I mandate system]. See also Brownlie, *ibid* at 16; Currie, *supra* note 4 at 105; Van Ert, *supra* note 18 at 24.

law, in addition to the borrowing of principles from national legal systems.³⁸ The precise nature of “general principles,” whether they are limited to a practical gap-filling function or have a natural law component, remains less than clear; in particular the boundary between customary international law and general principles has been described as an “unresolved conceptual enigma.”³⁹

To modern eyes, the reference to “civilized nations” in paragraph 38(1)(c) is a curiosity. Brunnée and Toope observe that the formulation carried over from the constitutive statute of the ICJ’s predecessor, the Permanent Court of International Justice, and was based on the assumption that “such nations were limited to Europe (and a handful of ‘white’ colonies or dominions).”⁴⁰ John Currie argues, however, that any such intention would be “surprising” as it would undermine the principle of equality between states and suggest that one group of states, the “civilized” ones, could dictate the content of international law to the others.⁴¹ Currie regards the phrase “civilized nations” as anachronistic and without contemporary juridical significance.⁴²

A different approach is found in Judge Weeramantry’s opinion in the *Gabcikovo* case,⁴³ which treats the concept of “civilized nations” as a conduit for bringing in ideas from diverse legal traditions, as opposed to an exclusionary device (or an irrelevant historical curiosity). Judge Weeramantry connects the phrase “civilized nations” in paragraph 38(1)(c) to the reference to the provision in Article 9 of the Statute which states that the ICJ should ensure representation of “the main forms of civilization and of

³⁸ Brownlie, *ibid* at 18-19; Lepard, *supra* note 18 at 28, 166-167.

³⁹ Lepard, *ibid* at 29; see also *ibid* at 162-164.

⁴⁰ *Supra* note 1 at 78.

⁴¹ *Supra* note 4 at 102.

⁴² *Ibid* at 102-103.

⁴³ *Supra* note 9.

the principal legal systems of the world” (language that a Japanese representative – non-Western and non-white – fought to have included).⁴⁴ In Judge Weeramantry’s view, the inclusion of general principles of law recognized by civilized nations among the sources identified in the Statute of the ICJ “opened the door” to the inclusion in modern international law of legal concepts derived from the “ingrained values” of the world’s civilizations,⁴⁵ including ancient civilizations and traditional legal systems. Judge Weeramantry’s judgment itself draws on examples from his native Sri Lanka⁴⁶ as well as Tanzanian tribes,⁴⁷ Iran,⁴⁸ China⁴⁹ and the Inca civilization⁵⁰ to assist in developing a legal framework that balances economic development and environmental protection in the regulation of irrigation systems. Judge Weeramantry reads the phrase “civilized nations” as a reference to “the world’s several civilizations,”⁵¹ rather than being limited to the European or Western form of civilization.

Of particular importance among the “several civilizations” that Judge Weeramantry draws on is the Buddhist tradition of respect for other forms of life and *ahimsa* that has had such a profound influence on Sri Lankan culture.⁵² According to ancient Sri Lankan chronicles, as Judge Weeramantry recounts, in the third century BCE the king Devanampiya Tissa was converted to Buddhism by the son of the Indian

⁴⁴ *Ibid* at 97.

⁴⁵ *Ibid* at 109-110

⁴⁶ *Ibid* at 98-102.

⁴⁷ *Ibid* at 104.

⁴⁸ *Ibid* at 105.

⁴⁹ *Ibid*.

⁵⁰ *Ibid* at 106.

⁵¹ *Ibid* at 97.

⁵² Sri Lanka includes its own “several civilizations.” Buddhism is the predominant religion of the majority Sinhalese population and has been a powerful force in the nation’s moral and political traditions. Hinduism is the majority religion of Sri Lanka’s largest ethnic minority, the Tamils.

emperor Asoka.⁵³ The sermon that procured the king's conversion alluded to duties to animals, arguing that "even birds and beasts have a right to freedom from fear" and inspiring King Devanampiya Tissa to start sanctuaries for wild animals, "a concept which continued to be respected for over twenty centuries."⁵⁴ Judge Weeramantry observes:

The notion of not causing harm to others and hence *sic utere tuo ut alienum non laedas* was a central notion of Buddhism. "*Alienum*" in this context would be extended by Buddhism to future generations as well, and to other component elements of the natural order beyond man himself.⁵⁵

Bowman *et al.* identify distinctive roles that general principles of law can play in international law, by analogy to the analysis of sustainable development in the *Gabcikovo* case.⁵⁶ They point out that sustainable development is cast as imposing primarily procedural requirements, requiring decisions in this area to be "the outcome of a process which promotes sustainable development" or at least includes a review of proposed action in light of sustainable development considerations.⁵⁷ Substantively, as they see it, sustainable development is limited to "legal significance in the form of what has been described as a 'meta-principle', i.e. one relevant to the interpretation and amplification of norms established by other means," mainly through treaties, in the sense of informing the interpretation of treaty provisions in light of evolving standards and insights.⁵⁸ They

⁵³ *Ibid* at 101-102. See discussion of Asoka's laws protecting animals in Chapter Three.

⁵⁴ *Ibid* at 102.

⁵⁵ *Ibid* at 102

⁵⁶ Michael Bowman, Peter Davies & Catherine Redgwell, *Lyster's International Wildlife Law*, 2d ed (Cambridge: Cambridge University Press, 2010) at 680-682.

⁵⁷ *Ibid* at 680-681.

⁵⁸ *Ibid* at 681.

suggest that animal welfare may function in a similar manner to sustainable development as a general principle in this sense.⁵⁹

2.3 INTERNATIONAL LAW AND VALUES

Judge Weeramantry's invocation in the *Gabcikovo* case of "pristine and universal values"⁶⁰ implies that the protection of nature is based on normative or moral imperatives that find expression in the law. The relationship between the law and such objective, teleological values is, of course, one of the most complex and persistent in legal theory generally, and its importance is heightened in the international legal context given the non-obvious nature of the basis and authority of international law. The first jurists to turn their attention to international law (such as Grotius) were products of the tradition of natural law, believing that law followed universal principles inherent in the nature of human relations or determined by divine authority.⁶¹ But positivism, with its strong insistence on the separation of law and morality, has had a much stronger influence on modern international legal theory. The positivist orientation is reflected in key doctrines, such as the idea that international law is based on the consent of states. According to positivists, a principle does not become law merely because it is morally desirable, or even a universal value.⁶²

Modern international legal doctrine and scholarship are fittingly described as "eclectic," drawing on both the natural law and positivist traditions.⁶³ Both traditions are

⁵⁹ See further discussion of the juridical status of the principle of humane treatment of animals in Chapter Six.

⁶⁰ *Gabcikovo* case, *supra* note 9 at 109.

⁶¹ Currie, *supra* note 4 at 84-85.

⁶² See, e.g., Hart, *supra* note 4 at 185 (denying that "the criteria of legal validity" of laws must include "a reference to morality or justice"); 214 (asserting that rules "however morally iniquitous" can still be law).

⁶³ Currie, *supra* note 4 at 91.

accompanied by their own historical burdens, reflecting the embeddedness of international law in international relationships of power and conflict.

Positivism posits minimal extrinsic normative constraints (at least in the form of law) on states. As a result, the main shortcoming of positivism is that, in its pure form, it amounts to letting states be “lawmakers, judges, and executioners in their own cause.”⁶⁴ A conventionally positivist approach to international law in the period leading up to the First World War has been seen as giving states free rein in their “entirely subjective determinations of legality in their own, disastrously conflicting interests,” effectively creating a condition of international anarchy and setting the stage for disaster.⁶⁵

On the other hand, the idea of international law as the expression of universal moral values – the values of “civilization” – has its own ugly history. The emergence of international law as an autonomous discipline in the nineteenth century coincided with the ascendancy of European colonialism.⁶⁶ In that context, the notion that a normative framework developed by Europeans had universal validity was a useful one. International law took on the “transformative calling”⁶⁷ of proselytizing to the periphery of empire, a relationship neatly summed up in Martti Koskenniemi’s insight that international law was created as part of a “civilizing mission.”⁶⁸ Koskenniemi describes how idealistic jurists laid the intellectual groundwork for imperialism, providing it with both a justification and (in the form of European-defined concepts of sovereignty) a mechanism: “Historical optimism and imperial ambition shook hands,”⁶⁹ and

⁶⁴ *Ibid.*

⁶⁵ *Ibid* at 91.

⁶⁶ Brunnée & Toope, *supra* note 1 at 2-3.

⁶⁷ *Ibid* at 3.

⁶⁸ *The Gentle Civilizer of Nations* (Cambridge: Cambridge University Press, 2002) at 71.

⁶⁹ *Ibid* at 135.

international law “often seemed to be the mere handmaiden of the national interests of the ‘great powers.’”⁷⁰

The division between those inside and outside the fold of “civilization” is reflected in the “deep structure” of international law as it exists today.⁷¹ International law even (or perhaps especially) in its more idealistic mode retains more than just a flavour of the “civilizing mission” in modern form. Brunnée and Toope argue that contemporary liberal invocations of values that are supposedly shared universally by an international community (notably in international human rights discourse, neo-liberal market discourse and “the language of ‘democratic governance’”) “obfuscate the reality of deep cultural and social diversity across our globe; the values said to be represented by the community of states are actually culturally specific, western values.”⁷²

Thus, the place of values in international law is a critical question, and finding an answer means, in the worst case, navigating between a Scylla of international anarchy and a Charybdis of self-righteous hypocrisy and cultural imperialism. The attempt to situate animal welfare in the framework of international law is an instructive example of an attempt to grapple with this challenge. The idea that human law should provide protection to other living things that are not like us and that it is in our self-interest (at least as narrowly conceived) to exploit seems all but unthinkable without some notion of an objective normative obligation. Such an intuition is reflected in the language of Judge Weeramantry (“pristine and universal values”).⁷³ And on the other hand, any inquiry into the status of animal welfare in international law has to take into account allegations of

⁷⁰ Brunnée & Toope, *supra* note 1 at 3.

⁷¹ *Ibid* at 77.

⁷² *Ibid* at 79.

⁷³ In the same vein, it is also reflected the continuity perceived by the eighteenth-century thinkers discussed in Chapter Three between “universal” human rights and the rights of animals.

cultural imperialism and hypocrisy in international debates over the treatment of animals – epitomized in the caricatured, but not completely off-the-mark, image of urbanized Europeans and North Americans who criticize sealing, whaling and dog-eating but eat animal-derived foods produced in conditions of almost unimaginable cruelty. The contradictions and power relationships embedded in that position highlight the need to be cautious about holding up the humane treatment of animals as a “hallmark of Western civilization,” in the words of the Council of Europe,⁷⁴ or as a principle destined to spread from Europe to “universal acceptance.”⁷⁵

Two recent analyses by international law scholars can fairly be taken to represent opposite ends of the spectrum of thought about the role of objective values in international law: Jack Goldsmith and Eric Posner’s *The Limits of International Law*,⁷⁶ an account based on rational choice that excises external ethical considerations probably to an extent more radical than positivists like Hart would have envisioned (although their approach shares a kind of intellectual familial relationship with positivism); and Brian Leppard’s *Customary International Law*,⁷⁷ which accords ethical principles a central and foundational role. I will assess each of their accounts from the point of view of its capacity to contribute to understanding the emergence of an international legal principle requiring humane treatment of animals. This discussion leads into an analysis of Brunnée and Toope’s framework of interactional international law as a good fit with the factual history of growing attention to animal welfare issues by international institutions, and a

⁷⁴ Consultative Assembly of the Council of Europe Recommendation 287 (1961); see Chapter Four.

⁷⁵ As Per von Holstein argued it would be at the time of the adoption of the first European treaty specifically aimed at protecting the welfare of animals. “Protection of Animals by Means of International Law, with Special Reference to the Convention for the Protection of Animals during International Transport” (1969) 18 Int’l & Comp L Qly 771 at 771. See discussion in Chapter Four.

⁷⁶ *Supra* note 30.

⁷⁷ *Supra* note 18.

model that offers the potential to integrate this value into a version of international law that eschews strong *a priori* universalist claims and takes pluralism in international mores very seriously.

Goldsmith and Posner argue that international law arises exclusively from states' rational pursuit of their individual interests.⁷⁸ On this view, international law does not exert any external "normative influence" on the behaviour of states,⁷⁹ but functions mainly as a kind of process for communication and the eliciting of information (for example through the treaty negotiation process), providing ways for states to understand where their interests coalesce and to act more strategically in the furtherance of their aims.⁸⁰ Their rationalist approach shares with positivism a rejection of purportedly legal obligations based on external ethical principles, but they go further than the positivists, arguing that states do not have any obligation to comply with international law if it does not coincide with their interests: "when the instrumental calculus suggests a departure from international law, international law imposes no moral obligation that requires contrary action."⁸¹ They reject the notion of state consent both as a description of how international legal rules are made⁸² and as a prescriptive basis for identifying rules that should be obeyed.

Goldsmith and Posner's argument invites the familiar objections that can be raised against analyses of this type (that is, based on rational choice theory): they take as assumed the fundamental propositions that their theory depends on, such as the notion that states have unitary, identifiable interests, and such assumptions "effectively clear

⁷⁸ *Ibid* at 13.

⁷⁹ *Ibid* at 15.

⁸⁰ *Ibid* at 13-14

⁸¹ *Ibid* at 185.

⁸² *Ibid* at 189-190.

away almost all of the ways in which international law and legal institutions are most likely to be effective.”⁸³ The argument does relatively little to explain what international judges and lawyers actually do (or, perhaps Goldsmith and Posner might argue, what they think they are doing) which appears to be more than simply painting a legalistic veneer over a competition between state interests. The enterprise of international law is difficult to explain on that basis alone without dismissing much of international law doctrine and jurisprudence as irrelevant – as Goldsmith and Posner do, for example, with state consent, a doctrinal lynchpin. And, crucially for the present purpose, it offers little promise of describing or elucidating the emergence of animal welfare concerns on the international agenda. In some sense, incorporating obligations to safeguard the welfare of animals into the law involves the subordination of human interests generally to a countervailing ethical principle that is seen as compelling enough to override self-interest. One can certainly imagine how one state might use animal welfare considerations as a pretext to gain advantage over others, for example as a cover for trade barriers based on self-interest; but it is hard to see how a rationalist perspective would have a place for animal welfare as anything more than that type of convenient smokescreen, rather than a principle with any genuine authority.⁸⁴ Yet the persistent

⁸³ Paul Schiff Berman, “Seeing Beyond the Limits of International Law” (2006) 84 Tex L Rev 1265 at 1267.

⁸⁴ There is, to be sure, significant overlap between animal welfare and matters of concern to humans from a self-interested point of view, including food safety and the protection of the environment, because the intensive agricultural methods that cause the greatest suffering to animals can also involve higher risks of environmental degradation and threats to human health than traditional methods (or diets more reliant on plant foods) do. But these correlations are not perfect, and in any event, they may relate to the welfare of human beings generally, at the global rather than the state level, which Goldsmith and Posner argue, against cosmopolitan theories, is not and should not be the basis of obligation in international law (*supra* note 30 at 14). In any event, they do little to assist an inquiry into animal welfare as a principle with legal force of its own, rather than just a coincidental side effect of actions that support better human health, better environmental stewardship or some other desideratum based on human wellbeing.

presence of animal welfare concerns in both international treaties and domestic law calls for further explanation.

Lepard's ethics-based theory of customary international law is almost diametrically opposed to Goldsmith and Posner's rationalism. Lepard suggests that customary international law is ultimately rooted in ethical precepts, and above all in the "preeminent ethical principle" that he identifies as "unity in diversity" – a sort of bipolar principle that combines the unity of humans in "one human family" with respect for "differences of race, nationality, culture, religion and even opinion."⁸⁵ Ethical principles that are widely recognized and are related to this central principle of unity in diversity (because they protect or uphold its component values) are an important basis of customary international law obligations. Lepard proposes a new definition of the elements of customary law, according to which the sole element of custom is *opinio juris*, recast as a requirement "that *states generally believe that it is desirable now or in the near future to have an authoritative legal principle or rule prescribing, permitting, or prohibiting certain state conduct.*"⁸⁶ State practice has no independent role, but serves as "evidence that states believe that a particular authoritative legal principle or rule is desirable now or in the near future."⁸⁷ State practice (as in the traditional account of international law) need not be uniform or consistent, and indeed in certain areas with "a direct impact on the realization of fundamental ethical principles, including human rights," consistency in state practice "should not be treated as necessary evidence" of states' belief that there should be an authoritative legal principle or rule.⁸⁸

⁸⁵ *Supra* note 18 at 78.

⁸⁶ *Ibid* at 97-98 [emphasis in original].

⁸⁷ *Ibid* at 98 [emphasis in original].

⁸⁸ *Ibid*.

The promise of Lepard's approach is that it restores faith in the power of international law to further global cooperation in a context of mutual respect. This is in the spirit that Judge Weeramantry invoked in the *Gabcikovo* case when he described our era as one in which "international law subserves not only the interests of individual States, but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare."⁸⁹ Its shortcoming is that it downplays the way parochial interests and power differentials do shape international law. Power has an effect in determining which legal principles are called "desirable," and who gets to identify them. Lepard's framework for the formation of customary international law, which is rooted in states' perception that a rule should exist and does not require consistent practice in conformity with the rule (especially in the case of rules with a direct impact on "fundamental ethical principles"), would permit the imposition by some states on others of principles that the former have decided are fundamentally ethical – even if the former do not in practice act in accordance with those principles. The history of the joint venture between international law and imperialism suggests that power politics inevitably affect such a process. Furthermore, if customary law can arise from a principle that states think is desirable but do not always act on, its claim to have the status of law is weakened; as Brunnée and Toope note (in connection with the international norm prohibiting torture, but the observation holds more generally), "a widespread failure to uphold the law as formally enunciated leads to a sense of hypocrisy which undermines fidelity to law, and may ultimately destroy the posited rule."⁹⁰

⁸⁹ *Gabcikovo* case, *supra* note 9 at 118.

⁹⁰ *Supra* note 1 at 232.

In developing an analysis of how animal welfare fits into the framework of international law, and to what extent and on what basis it is a binding norm, I will draw extensively on a theory of international law that is neither as rationalist (or as skeptical of law's independent authority) as that of Goldsmith and Posner nor as idealistic as Leppard's. Brunnée and Toope's account of international law as interactional law recognizes the normative character of the law while squarely confronting the fact that power differentials do matter⁹¹ and rejecting any equivalency between international law properly understood and the "delivery of western 'culture' to rest of the world."⁹² Brunnée and Toope's description of how international law is created fits well with and illuminates the facts around the emergence of animal welfare as a consideration in international law. The section that follows is an overview of their account of interactional international law.

2.4 INTERACTIONAL LAW

Brunnée and Toope's theory of interactional international law draws on two principal influences: constructivist accounts of international relations and international law; and the legal theory of Lon Fuller, whose posited defining characteristics of a legal system as *legal* they find conducive to illuminating how the international legal system works (although Fuller himself wrote little about international law).⁹³

Constructivism "sees interaction as central to shaping human conduct"⁹⁴ and culture. Constructivists are not satisfied with rationalist accounts, such that of Goldsmith

⁹¹ *Ibid* at 93.

⁹² *Ibid* at 122.

⁹³ See the discussion of Fuller and international law in *ibid* at 33-34. Brunnée and Toope note that Fuller seemed to have little faith in the possibility of a rule of law at the international level, but they disagree and see his insights borne out in the context of international society.

⁹⁴ *Ibid* at 13.

and Posner, that would explain law solely as the product of interests. For constructivists, interests are “not simply ‘given’ and then rationally pursued, but...social construction of actors’ identities is a major factor in interest formation,”⁹⁵ and in part that process of construction happens through law. Legal rules do not simply operate to tell social actors what to do; the construction of law is a reciprocal process in which legal norms play a role in shaping the mores, preferences and priorities of individuals and states, and are also shaped by them.⁹⁶ Paul Schiff Berman sums up this idea of reciprocity: “We all take part in the construction of legal consciousness, even as we are also inevitably affected by the legal categories of the social structures around us.”⁹⁷

There are three main aspects to Brunnée and Toope’s argument. First, law arises out of common social norms based on what they call “shared understandings.”⁹⁸ The term “shared understandings” refers to a thin or modest version of normative consensus. Brunnée and Toope specifically reject any notion of a global society or universal fundamental values.⁹⁹ The pre-requisite for engagement in the international process of law-making can be as little as a collective understanding on the part of those involved on “what they are doing and why.”¹⁰⁰ But the process can give rise to, and expand, “normative convergence” on concrete issues.¹⁰¹

Shared understandings alone, however, do not equal law.¹⁰² Law is distinguished from social norms “because it arises only when shared understandings come to be

⁹⁵ *Ibid.*

⁹⁶ *Ibid* at 7; Berman, *supra* note 83 at 1268-1270, 1280-1295.

⁹⁷ Berman, *ibid* at 1284.

⁹⁸ *Supra* note 1 at 43-44, 56.

⁹⁹ *Ibid* at 79.

¹⁰⁰ *Ibid* at 13.

¹⁰¹ *Ibid* at 43.

¹⁰² *Ibid* at 56.

intertwined with distinctive internal qualities of law and practices of legality.”¹⁰³ The second prong of Brunnée and Toope’s argument is that “to count as interactional law, norms must meet a set of criteria of legality” (that is, Fuller’s criteria).¹⁰⁴ The third is that “interactional norms are built, maintained, and sometimes destroyed through a continuing practice of legality.”¹⁰⁵ This combination of a basis in shared understandings, adherence to the criteria of legality and ongoing construction through practices of legality give rise to legitimate and binding legal norms.¹⁰⁶

2.4.1 Fuller’s Criteria of Legality

Fuller believed that the law exhibits certain distinguishing characteristics, implicit in what he termed the “internal morality of law.”¹⁰⁷ The idea that a form of morality is inherent in the nature of law was the crux of Fuller’s famous disagreement with Hart and the legal positivists, who insisted on the separation of law and morals, the distinction between “law as it is and law as it should be.”¹⁰⁸ Fuller’s parable of Rex, the imaginary king who attempts to promulgate a new system of law for his kingdom but repeatedly fails to do so because his rules lack the basic attributes of law (are not publicly promulgated, when they are promulgated are impossible to understand, when they are clarified turn out to contradict one another, *et cetera*), shows that Rex’s attempts are not just bad law but not law at all.¹⁰⁹ Rex’s subjects, by failing to comply with his rules,

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid* at 130.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ Lon Fuller, *The Morality of Law*, revised ed (New Haven: Yale University Press, 1969) at 4.

¹⁰⁸ HLA Hart, “Positivism and the Separation of Law and Morals” (Holmes Lecture) (1958) 71 Harv L Rev 593.

¹⁰⁹ Fuller, *supra* note 107 at 33-38.

remain faithful to him as king but are not faithful to his law “because he never made any.”¹¹⁰

For Brunnée and Toope, Fuller’s legal theory is “a helpful lens through which to reflect on international law,”¹¹¹ and in particular on how obligations under international law, and fidelity to the system of international law, are formed. It points to a response to assertions that international law is not really law because it is not hierarchical or promulgated by a central authority and compliance is voluntary rather than enforced. Fuller’s theory says that these characteristics of authority, command and force are not what define domestic law, or any kind of law, either. (The edicts of King Rex might have exhibited all of those characteristics, but they still would not be law.) Thus Fuller’s account offers an opportunity to rehabilitate international law from its “poor cousin” status¹¹² and to identify the defining features of legal norms “[w]ithin a conception of law that is non-hierarchical, not defined by the use of force, and mutually constructed by actors who may be both governors and governed (creators and subjects of law).”¹¹³

Fuller’s criteria are: generality (a requirement that “there must be rules,” that each particular case cannot be determined on an *ad hoc* basis);¹¹⁴ promulgation, so that people know the rules they are supposed to observe;¹¹⁵ the principle that rules should generally be prospective and not retroactive;¹¹⁶ clarity;¹¹⁷ avoidance of contradictions;¹¹⁸ not

¹¹⁰ *Ibid* at 41.

¹¹¹ *Supra* note 1 at 7.

¹¹² *Ibid*.

¹¹³ *Ibid* at 25.

¹¹⁴ Fuller, *supra* note 107 at 46-49.

¹¹⁵ *Ibid* at 49-51.

¹¹⁶ *Ibid* at 51-62.

¹¹⁷ *Ibid* at 63-65.

¹¹⁸ *Ibid* at 65-70

requiring the impossible;¹¹⁹ relative constancy of the law through time (or avoiding such frequent changes that people cannot arrange their behaviour to conform to the rules);¹²⁰ and congruence between official actions and declared rules.¹²¹ Fuller emphasizes the practical necessity that all the criteria are not to be applied with the utmost stringency in all cases, but rather must be tailored to circumstances, adjusted in light of what he calls the “external moralities” (or substantive aims) of law, and traded off against one another as appropriate.¹²² The art of knowing “how, under what circumstances, and in what balance these things should be achieved is no less an undertaking than being a lawgiver.”¹²³

Fuller considers his posited internal morality of law to be “some variety of natural law,” but primarily “procedural, as distinguished from a substantive natural law,”¹²⁴ in that insistence on the internal morality of law does not significantly limit its external orientation or purposes. The “ultimate objectives” of a system that met these criteria “may be regarded as mistaken or evil,” but it would still be a system of law.¹²⁵ Fuller considers his “procedural version of natural justice,”¹²⁶ however, to be procedural in “a special and expanded sense,” so that a highly arbitrary or dishonest set of rules that says one thing but does another would not really be law, would not be “what it purports to be.”¹²⁷ In this sense what defines law is a matter of values to a certain extent, and in a

¹¹⁹ *Ibid* at 70-79.

¹²⁰ *Ibid* at 79-81.

¹²¹ *Ibid* at 81-91.

¹²² *Ibid* at 45.

¹²³ *Ibid* at 94.

¹²⁴ *Ibid* at 96.

¹²⁵ *Ibid* at 4.

¹²⁶ *Ibid* at 96.

¹²⁷ *Ibid* at 97.

limited way – values that are internal to and inherent in the nature of law itself, rather than external values that the law serves.

Brunnée and Toope describe Fuller’s position as a “‘weak’ variety of natural law, in that it contains only a very limited range of substantive commitments”¹²⁸ and a “thin conception of the rule of law.”¹²⁹ They find the agnosticism of Fuller’s theory with respect to stronger normative goals well suited to analyzing international law, because it “is congenial to diversity, but permits and encourages the gradual building up of global interaction.” It is only through such interaction, they contend, that “ambitious social norms” (such as rights claims and environmental commitments) can become law, for “[t]here is no possibility of simply imposing significant social change by fiat in the absence of some degree of social consensus, expressed in practice.”¹³⁰ This position is thus distinct from strong natural law or ethics-based theories like that of Lepard, but also – since it envisions the evolution of law from social norms precisely because of their normative character – from realist and constructivist approaches. It might be said that, although Brunnée and Toope are at pains to insist that interactional law is “independent of stronger moral or political commitments,”¹³¹ in effect their framework conveniently lends itself to bolstering the norms most cherished by liberal internationalists. But Brunnée and Toope do not shrink from arguing that some of those favourites, including the prohibition of torture and the substantive elements of the international climate regime, have at best questionable stature as binding international legal norms.

¹²⁸ *Supra* note 1 at 29.

¹²⁹ *Ibid* at 42

¹³⁰ *Ibid* at 32.

¹³¹ *Ibid* at 33.

2.4.2 A Practice of Legality

The third ‘ingredient’ for making international law in Brunnée and Toope’s account is a practice of legality – the application of norms in a way that satisfies the criteria of legality.¹³² It is through this ongoing practice that “legal norms are built, maintained, and sometimes destroyed.”¹³³ This process takes place within communities that Brunnée and Toope refer to (borrowing a constructivist concept) as “communities of practice,” but they do not mean anything like “the notion of community underlying older universalist claims of international law. A community of practice is constituted by mutual engagement [in the process of norm construction], not by shared values or goals.”¹³⁴ An illustrative case is the international climate change regime, where “various actors including states, NGOs and international organizations, pursue diverse values and interests”¹³⁵ within the context of a framework treaty, and work towards the development of procedural and substantive norms.

Brunnée and Toope’s account of the work of communities of practice draws on two subsidiary concepts: the stages of an international norm’s “life cycle,” as described by Martha Finnemore and Kathryn Sikkink,¹³⁶ and “epistemic communities.”¹³⁷

Finnemore and Sikkink describe three stages in a norm’s life cycle:¹³⁸ norm emergence, in which “[n]orm entrepreneurs [who may include such actors as states, NGOs and individuals] attempt to convince a critical mass of states (norm leaders) to

¹³² *Ibid* at 6-7.

¹³³ *Ibid* at 15.

¹³⁴ *Ibid* at 353.

¹³⁵ *Ibid*.

¹³⁶ “International Norm Dynamics and Political Change” (1998) 53:4 *Int’l Organization* 887.

¹³⁷ See Peter Haas, “Epistemic Communities” in Daniel Bodansky, Jutta Brunnée & Ellen Hey, eds, *The Oxford Handbook of International Law* (Oxford: Oxford University Press, 2007) 792.

¹³⁸ Finnemore & Sikkink, *supra* note 136 at 895.

embrace new norms,”¹³⁹ norm acceptance or a norm “cascade,” and finally internalization, where the norm attains a “‘taken-for-granted’ quality.”¹⁴⁰ The critical shift occurs in the change from emergence to acceptance, with a threshold or “tipping point” coming after norm entrepreneurs “have persuaded a critical mass of states to become norm leaders and adopt new norms.”¹⁴¹ This leads to a process of “socialization” where the states that have adopted the norm – the “norm leaders” – convince others to adhere to it as well, and more states adopt the norm:¹⁴² “What happens at the tipping point is that enough states and enough critical states endorse the new norm to redefine appropriate behavior for the identity called ‘state’ or some relevant subset of states (such as a ‘liberal’ state or a European state).”¹⁴³

Epistemic communities are “knowledge-based networks, most often focused on scientific, economic or technical matters” whose members “enjoy authority not merely due to their expertise, but also because of the perceived impartiality of their activities.”¹⁴⁴ Both of these mechanisms contribute to the spread and the deepening of shared understandings and their development into international law.

The concept of a practice of legality grounds Brunnée and Toope’s response to the conundrum of customary international law. They propose that customary law is formed when “a social norm, reflecting a shared understanding that meets the criteria of legality, is upheld through practice that is congruent with the norm.”¹⁴⁵ Thus, custom is grounded in *practice*, and the “artifice,” the “mystical” and effectively unprovable

¹³⁹ *Ibid* at 895.

¹⁴⁰ *Ibid* at 904.

¹⁴¹ *Ibid* at 901.

¹⁴² *Ibid* at 902.

¹⁴³ *Ibid*.

¹⁴⁴ Brunnée & Toope, *supra* note 1 at 59; see also Haas, *supra* note 137 at 793.

¹⁴⁵ Brunnée & Toope, *ibid* at 47.

element of *opinio juris* is dispensed with.¹⁴⁶ The practice in question must however be of a particular, “enriched” kind – a practice of legality.¹⁴⁷ This is in marked contrast to Lepard’s argument¹⁴⁸ that a customary norm can arise based solely on the “mystical” mental element, if states believe that a norm should exist – even if their practice is not congruent with it.¹⁴⁹

2.5 APPLYING THE FRAMEWORK TO THE HUMANE TREATMENT PRINCIPLE

The foregoing is necessarily a brief overview that does not do full justice to Brunnée and Toope’s conceptual framework of interactional international law. But it should be adequate to evaluate how far the posited principle of the humane treatment of animals has progressed in its development as an international legal norm, and thus how it fits into the framework of international law. Chapters Five and Six, respectively, examine the manifestations in positive international law of a commitment to humane treatment of animals (the data to be analyzed) and the juridical status of the principle of humane treatment (the product of applying the theory to the data). Before proceeding to these steps in the legal analysis, however, the focus of Chapters Three and Four is on cultural and philosophical manifestations of the idea that humans have duties towards animals – the evidence, that is, of “shared understandings” in the form of social mores – and on how that idea first came to be expressed in law.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ *Supra* note 18.

¹⁴⁹ See discussion in Section 2.3 above.

CHAPTER THREE SHARED UNDERSTANDINGS: HUMANITY AND ANIMALS

3.1 ANIMALS, CULTURE AND “UNIVERSAL VALUES”

This chapter is about the “shared understandings” underlying the norm of humane treatment of animals, their cultural and historical background – picking up the theme of cultural relativism and “universal values” in the human-animal relationship that was introduced in Chapter One. There is some fairly well entrenched received wisdom about the cultural status of animal-protective norms; like most received wisdom, it is not entirely wrong, but it reflects only part of a complex picture, and it is also contradictory. On the one hand, there is the view voiced by the character in Coetzee’s novel, Thomas O’Hearn: “animal rights” are a recent, Western invention regarded by the rest of the world as alien and perhaps a little bit insane. On the other, an alternative but equally familiar narrative casts the West as materialistic, rational and cut off from nature, in contrast to a somewhat romanticized picture of Eastern and indigenous cultures living in harmony with the natural world.¹

These points of view have something in common; they both see the emergence of the idea of animal rights in the West as a very new thing, in opposition to centuries of tradition. A famous example of this characterization of Western thought on animals is Peter Singer’s survey in *Animal Liberation* of Western “speciesism,” which Singer sees as beginning with Aristotle’s portrayal of nature as a hierarchical “great chain of being”

¹ See Rod Preece, *Animals and Nature: Cultural Myths, Cultural Realities* (Vancouver: UBC Press, 1999) [*Animals and Nature*]; “Animal Rights Advocacy - Right Ethics, Wrong Target” (2005) 4:2 *Logos*, online: http://www.logosjournal.com/issue_4.2/preece.htm [“Animal Rights Advocacy”]; *Brute Souls, Happy Beasts and Evolution: The Historical Status of Animals* (Vancouver: UBC Press, 2005) at 2-23.

with human beings at the top, and the other animals existing for the benefit of humans.² Singer argues that over the centuries this picture of how the world works was entrenched and reinforced by Judeo-Christian theology and European philosophy.³

There are, however, important, although not dominant, currents of thought that value animals and consider it a virtue to treat them with kindness, going a long way back in Western thought and spirituality. The traditions of the East include strains of reverence for all forms of life and a strong sense of an affinity rather than a discontinuity between humans and other creatures – ideas which had a marked influence on Western thinkers and in particular on the English reformers who campaigned for the legal protection of animals. At the same time, the use of animals for food, labour and religious sacrifice is as widespread as in the West. Recalling Judge Weeramantry’s allusion in the *Gabcikovo* case to “those pristine and universal values which command international recognition,”⁴ the value of animal protection may be in some sense universal, but it is not exactly pristine.

Western thought has its own tradition of mercy to animals, with a pedigree even older than Aristotle’s hierarchical ordering of life-forms in the great chain of being (and Aristotle was perhaps not such an inveterate speciesist as all that, depending on how one reads him⁵). As Preece argues, while the Western intellectual tradition that casts animals as mere instruments for human use is real, and has had a marked effect on the material

² (New York: Harper Perennial, 2009) [first published 1975] at 185-212. *See, also*, in a similar vein, Steven Wise’s account of the origins and development in Western philosophy and theology of the idea of a hierarchically structured “Great Chain of Being” and a world designed for exploitation by humans, in *Rattling the Cage: Toward Legal Rights for Animals* (Cambridge, Mass: Perseus Books, 2000) at 10-22.

³ Singer, *ibid.*

⁴ *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v Slovakia)*, [1997] ICJ Rep 7 at 109.

⁵ *See, eg*, Preece, *Animals and Nature*, *supra* note 1 at 68 (“It should be remembered that the Aristotle who is so disparaged by the animal liberationists for his denial of reason to other species is also the Aristotle who insisted that “there is something natural and beautiful’ in each animal. The implication was that animals are entitled to respect as the beings that they are”).

situation of animals, it has since ancient times coexisted with “a continuous concern ... for the interests of other species,”⁶ emphasizing what we have in common with other animals and promoting kindness and gentleness towards them. Matthew Scully, for example, has taken a different approach by basing his argument for compassionate treatment of animals in part on a “long tradition of benevolence to animals” in (predominantly Western) religious thought.⁷

In the sixth century BCE, Pythagoras taught the doctrine of metempsychosis or transmigration of souls from one being to another, including between species.⁸ Pythagoras is said to have held it to be wrong to cause suffering to animals and to have advocated vegetarianism, although no writings of his survive and little is known with any certainty of his life and teachings.⁹ Zeno of Citium, who founded the Stoic school in the early third century BCE, commended living in harmony with nature as a goal of a good life.¹⁰ Both Jewish and Christian teachings included precepts condemning cruelty to animals, and within both religions there were nonconformist vegetarian sects.¹¹ However, traditions valuing moral responsibility towards animals have probably had a stronger influence, on the whole, in non-Western cultures – especially in India.

⁶ Preece, *Animals and Nature*, *supra* note 1 at xix.

⁷ *Dominion: The Power of Man, the Suffering of Animals, and the Call to Mercy* (New York: St Martin's Press, 2002) at 14.

⁸ Tristram Stuart, *The Bloodless Revolution: A Cultural History of Vegetarianism from 1600 to Modern Times* (New York: W W Norton, 2007) at 41; Preece, *Animals and Nature*, *supra* note 1 at 77-78; Shevelov, *supra* note 1 at 169-175 (describing the influence of Pythagorean ideas on a limited number of thinkers and writers in seventeenth- and eighteenth-century England).

⁹ Rod Preece, *Sins of the Flesh: A History of Ethical Vegetarian Thought* (Vancouver: UBC Press, 2008) [*Sins of the Flesh*] at 76-79.

¹⁰ Preece, *Animals and Nature*, *supra* note 1 at xvii.

¹¹ Preece, *Sins of the Flesh*, *supra* note 9 at 117-145.

3.2 BEYOND THE WEST

The most ancient indigenous Indian religion, Jainism, is characterized by “an unparalleled concern for life,” recognizing a life-force not only in animals and plants but also in natural features like rocks, mountains and water.¹² In keeping with the doctrine of *ahimsa* – nonviolence or refraining from doing harm – Jains follow strictures based on deep respect for other lives, including eating a restrictive vegetarian diet.¹³ The Jains are a small minority in India.¹⁴ The religion has remained regionally confined, in part because Jains are supposed to limit the geographical scope of their activities, “thus renouncing potential harm one may cause in far-off places.”¹⁵ But the respect for life exemplified in Jain practices and beliefs has spread throughout India and beyond, due to its influence on Hinduism, Buddhism and Islam.¹⁶

Buddhism also values nonviolence, not taking life, and respect for animals.¹⁷ Because Buddhism was proselytized all over Asia, these ideas have woven their way into the cultural fabric of other great civilizations of the East.¹⁸ They also had some influence in the realm of government and law a millennium before the first Western laws against animal cruelty.

The Indian emperor Asoka (ca. 274-232 BCE), whose son Mahinda is said to have converted King Devanampiya Tissa to Buddhism,¹⁹ himself became a Buddhist convert after he led a violent war of conquest and then turned away from violence to

¹² Christopher Key Chapple, *Nonviolence to Animals, Earth and Self in Asian Traditions* (Albany: State University of New York Press, 1993) at 9-11.

¹³ *Ibid* at 11.

¹⁴ *Ibid*.

¹⁵ *Ibid* at 10.

¹⁶ *Ibid* at 9.

¹⁷ *Ibid* at 21-22.

¹⁸ *Ibid* at 26.

¹⁹ See discussion in Chapter Two.

embrace mercy and kindness.²⁰ Asoka embraced a philosophy of compassion and nonviolence generally, and in keeping with that commitment he “vociferously proclaimed” an ethic of animal protection.²¹ He is reputed to have “enjoined his subjects to treat animals with kindness and consideration.”²² Among Asoka’s edicts are a prohibition on killing a long list of wild and domestic animals including “she-goats, ewes and sows which have young or are in milk, and also their young less than six months old,” a rule against slaughtering any animals in his capital city, a rule forbidding the castration and branding of animals on certain days, and a rule that “cocks must not be made into capons” (i.e., castrated).²³

Buddhism on the whole has not forbidden eating meat to either laity or monks, although there is a tradition of vegetarianism among a minority of Chinese and Japanese Buddhists (mainly monks).²⁴ Preece points out that today in traditionally Buddhist countries, including Korea, China and Japan, it can be much more difficult to find vegetarian food than it is in North America.²⁵ In China, Buddhism and its ideal of nonviolence met some hostility from the more hierarchical Confucian philosophy.²⁶ But

²⁰ Richard McKeon, “Introduction,” in *The Edicts of Asoka*, edited and translated by N A Nikam and Richard McKeon (Chicago: University of Chicago Press, 1966) [*Edicts of Asoka*] v at ix; “Rock Edict XIII” in *ibid* at 27 (expressing the king’s “profound sorrow and regret because the conquest of a people previously unconquered involves slaughter, death and deportation”); Chapple, *supra* note 12 at 26.

²¹ Preece, *Sins of the Flesh*, *supra* note 9 at 69. See also Bruce A Wagman & Matthew Liebman, *A Worldview of Animal Law* (Durham, NC: Carolina Academic Press, 2011) at 153, arguing that Asoka’s directives “provided more protection for animals than in any current laws in any country, including India.”

²² Preece, *ibid*.

²³ “Rock Edict I” in *Edicts of Asoka*, *supra* note 20 at 55-57 (providing that “No living creature shall be slaughtered here... Many thousand living creatures were formerly slaughtered every day for curries in the kitchens of His Majesty. At present, when this edict on Dharma is prescribed, only three living creatures are killed daily, two peacocks and a deer... In the future, not even these animals shall be slaughtered”).

²⁴ Preece, *Sins of the Flesh*, *supra* note 9 at 68-69, 70-71; Chapple, *supra* note 12 at 26 (noting that “animal protection did not necessarily require vegetarianism on the part of the early Buddhists, nor is it observed universally by all Buddhist monks today”).

²⁵ *Ibid* at 3.

²⁶ Chapple, *supra* note 12 at 31-33.

Confucianism itself encompasses, at least to some extent, an ideal of living “within and subject to nature” (rather than placing human beings outside and above it).²⁷

Hinduism, like Jainism (and, according to Chapple, in part due to its influence), emphasizes the connectedness of life and extols *ahimsa* “as the best of all actions.”²⁸ The dietary rules for the Brahman or priestly caste require vegetarianism,²⁹ but both meat eating and animal sacrifice are generally condoned.³⁰ The general rules of *ahimsa* are in practice circumscribed by so many limitations that “it would be reasonable to conclude that the doctrine of *ahimsa* is not very different in practice from less seemingly altruistic doctrines elsewhere.”³¹ In modern India, this complex and multilayered reality is manifested in the facts that India has the world’s largest proportional population of vegetarians (about a third of the total population, with certain areas predominantly vegetarian³²) and at the same time animal sacrifice is still widely practiced – along with all the other more profane cruelties to humans and other animals that come with the struggle to survive where resources are scarce and unequally distributed. Preece observes that “[a]most everything about Hinduism is paradoxical, confused, and accordingly, unclear – which, of course, could be said with no less truth about a number of other religions as well, Christianity included.”³³

²⁷ Rod Preece & Lorna Chamberlain, *Animal Welfare and Human Values* (Waterloo: Wilfrid Laurier University Press, 1993) at 5.

²⁸ Chapple, *supra* note 12 at 17.

²⁹ *Ibid* at 26.

³⁰ *Ibid* at 16.

³¹ Preece, *Sins of the Flesh*, *supra* note 9 at 65.

³² *Ibid* at 2-3.

³³ *Ibid* at 57.

Islamic tradition manifests a strain of ethical concern for animals.³⁴ Human use of animals, including meat eating and ritual sacrifice, are clearly permitted, but Islamic scriptural sources portray animals “as having feelings and interests of their own” and humans as owing them “compassionate consideration.”³⁵ Contact with the Jain philosophy of *ahimsa* apparently also had some influence. In the sixteenth century, the Mughal Emperor Akbar, who ruled over most of northern and central India, studied with the Jain monk Hiravijaya Suri.³⁶ Impressed by the monk’s teachings on nonviolence, Akbar applied it in government, including in connection with animal protection.³⁷ Akbar reputedly “passed laws requiring the protection of mice, oxen, leopards, hares, fish, serpents, horses, sheep, monkeys, roosters, dogs, and hogs, either banning or limiting their slaughter,” and in his personal life, according to Chapple, “very nearly gave up eating meat and hunting.”³⁸

Preece argues that, generally speaking, the spiritual traditions originating in India are concerned with the internal, personal achievement of higher spiritual states (including individual observance of *ahimsa*) rather than changing social structures to require nonviolent conduct as a matter of law. Buddhism and Jainism mainly “encouraged each individual to develop a respect for all living things – or give alms to the monk to have him do it for you – but did little to create a societal order in which there was any requirement of ethical treatment for animals, any punishment for cruelty.”³⁹

³⁴ Raoutsi Hadj Eddine Sari Ali, “Islam” in Council of Europe, ed, *Ethical Eye: Animal Welfare* (Belgium: Council of Europe Publishing: 2006) 145 at 149 (noting that for Muslims “the rights of animals are part of an ethical system...embracing human rules of conduct vis-à-vis all creatures”).

³⁵ Richard C Foltz, *Animals in Islamic Tradition and Muslim Cultures* (Oxford: Oneworld Publications, 2006) at 27.

³⁶ Chapple, *supra* note 12 at 18.

³⁷ *Ibid.*

³⁸ *Ibid.* The modifying phrase “very nearly” is, of course, significant.

³⁹ Preece & Chamberlain, *supra* note 27 at 13.

There are counterexamples, including the edicts of Asoka, Akbar's laws, and other instances cited by M. Varn Chandola, who reports that some of the kings of the Indian state of Gujrat "were so profoundly influenced by Jainism that they not only prohibited the killing of animals but also set up special courts to prosecute cruelty to them."⁴⁰ Steven Wise has questioned whether the notion of dignity-based rights or equality for animals can find acceptance "in such societies as China, Japan and India, where equality is sometimes perjoratively characterized as a Western ideal."⁴¹ For Chandola, this contention represents a missed opportunity to draw from more deeply ingrained concepts of animal equality in Eastern traditions: "It is interesting how Professor Wise fails to make any mention of how it is only under Eastern philosophy that the principles of nonviolence or '*ahimsa*' have been equally applied to humans and animals alike."⁴²

Certainly, there is no unanimous agreement on a particular conception of human obligations to animals, for both ideas and practice in the philosophical systems and spiritual traditions of the rest of the world are as fraught with disagreement and replete with inconsistencies as the Western tradition. But there is plenty of evidence that when human beings have attempted to work out the principles of a good, well-lived life from within any cultural tradition, the decent treatment of animals comes up as one of the factors to be taken into account.

It is also clear that the spread of animal-protective norms is not simply a matter of the West unilaterally imposing values on other cultures. Contact with Indian ideas about

⁴⁰ "Dissecting American Animal Protection Law: Healing the Wounds With Animal Rights and Eastern Enlightenment" (2002) 8 Wis Env'tl LJ 3 at 25.

⁴¹ "Hardly a Revolution – The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy" (1998) 22 Vt L Rev 793 at 900, 890.

⁴² *Supra* note 40 at 28 n 252.

animals, reincarnation and vegetarianism undoubtedly had a significant effect in shaping the development of European notions about the protection of animals. There is a tradition, albeit unverified (and fairly implausible), that this flow of influence dates back to the time of Pythagoras, who was believed to have traveled to India and learned about metempsychosis and vegetarianism from Indian philosophers⁴³ – or, alternatively (and even less plausibly), that it was Pythagoras who taught the same ideas to the Indians.⁴⁴

Idealistic Europeans found much to admire and emulate in Indian ways of thinking, including compassion for animals. A particularly romantic example is John Oswald, a Scottish poet and political radical who was an officer in the British army in India, and resigned his commission in protest at the British soldiers' treatment of the Indian people.⁴⁵ Oswald traveled in India before returning to England, learning and adopting Hindu customs including abstaining from meat.⁴⁶ In 1791, Oswald published *The Cry of Nature*, a pro-vegetarian polemic in which he held up India as a model of humanity in contrast to the brutality of the West:

[T]he humane mind...turning her eyes to Hindostan, dwells with heart-felt consolation on the happy spot, where mercy protects with her right hand the streams of life, and every animal is allowed to enjoy in peace the portion of bliss which nature prepared it to receive.⁴⁷

⁴³ Stuart, *supra* note 8 at 41; Preece, *Sins of the Flesh*, *supra* note 9 at 77.

⁴⁴ Stuart, *ibid* at 54.

⁴⁵ Kathryn Shevelov, *For the Love of Animals The Rise of the Animal Protection Movement* (New York: Henry Holt, 2008) at 75-80.

⁴⁶ *Ibid.*

⁴⁷ *The Cry of Nature; or, an Appeal to Mercy and to Justice, on Behalf of the Persecuted Animals*, reprinted in Aaron Garrett, ed, *Animal Rights and Souls in the Eighteenth Century* (Bristol: Thoemmes Press, 2000) Vol IV at 81.

For some Europeans, learning about the moral belief systems of other cultures unsettled their faith in the supposed moral basis of European hegemony, as Tristram Stuart has observed of the effect of seventeenth century travelers' accounts:

Attempts to sustain the idea that European Christians had the best society often crumbled in the face of evident virtue and integrity in other peoples. International vegetarianism, which plugged directly into European discourses on diet and the relationship between man and nature, proved a serious challenge to Western norms. As readers back home assimilated the information in the travelogues, Indian vegetarianism started to exert influence on the course of European culture.⁴⁸

What Coetzee's Thomas O'Hearne decries as Western insistence "that we have access to an ethical universal to which other traditions are blind"⁴⁹ really represents a far more complicated interaction between different cultural values and one that at least to some extent subverts the narrative of Western civilization spreading outwards to enlighten the periphery.

3.3 THE BIRTH OF THE MACHINE: HUMANISM AND ANIMALS

Respect and compassion for animals are deeply held values manifested across a diversity of cultural, spiritual and philosophical traditions. But these were notions rejected by the father of modern Western philosophy, René Descartes, and his followers. The humanist or Cartesian conception of animals as analogous to machines has had a profound impact on our ways of thinking about animals. Arguably, it has contributed to a great deal of callousness towards them, although it is probably more likely that animal

⁴⁸ *Supra* note 8 at 59.

⁴⁹ *Elizabeth Costello*, (New York: Viking, 2003) at 105. See discussion in Chapter One.

cruelty, which was common enough before Descartes came along, would have continued undiminished even if he had never turned his mind to the nature of animals. All the same, Cartesian ideas about animals are significant because they provide a useful rationale for the way animals are treated, and echoes of the language that portrays animals as mechanical, non-sentient units are almost invariably found where cruel practices are sought to be justified or defended.

Humanism, in Cary Wolfe's words, "emphasizes empirical science and critical reason, rather than revelation and religious authority, as ways of learning about the natural world and our place within it, and of providing a ground for morality."⁵⁰ For humanists, then, it was not enough to rely on scripture or divine fiat as the justification for any phenomenon, including human domination of animals. The question called for examination by the light of reason.

In 1554, the Spanish medical philosopher Gómez Pereira published his most important work, *Antoniana Margarita* (named for his parents, Antonio and Margarita, to whom it was dedicated).⁵¹ Pereira was the product of a changing intellectual environment, one characterized by "distrust of tradition, preoccupation with method, and the establishment of critical questioning."⁵² In the *Antoniana Margarita*, he took on the question of what distinguishes human beings from other animals.⁵³

Pereira argued that human beings are unique because we alone have cognitive capacities and sensations. For Pereira, the possibility of animals' having feelings was

⁵⁰ *What Is Posthumanism?* (Minneapolis: University of Minnesota Press, 2010) at xiii-xiv.

⁵¹ Javier Bandrés & Rafael Llavona, "Minds and Machines in Renaissance Spain: Gómez Pereira's Theory of Animal Behavior" (1992) 28 *J Hist Behavioral Sci* 158 at 159. As far as I am aware, there is no English translation of the *Antonio Margarita*, and in general there is very little discussion of his work in English-language sources. My account of Gómez Pereira's theory of animal automatism relies on Bandrés and Llavona's article.

⁵² *Ibid* at 167.

⁵³ *Ibid*.

inadmissible because “to accept sensitivity in animals is to accept reasoning and intelligence in animals,”⁵⁴ and these were unique to humans.” Pereira thus had to account for “the complexity of animal behavior without resorting to cognitive processes.”⁵⁵ He met this challenge by setting out a model of animal behavior as “mechanical reactions towards the stimuli in their environment, with no implication of mental experience.”⁵⁶ The issue of justification was evidently paramount in Pereira’s mind; one of the arguments he advanced in support of his theory was “that if animals had sensations then we should have to admit that some human behavior towards them, such as in bullfights, is cruel and despicable.”⁵⁷

The theory that animals are especially intricate machines responding mechanically to stimuli is, of course, associated above all with Descartes, and little seems to be known of Gómez Pereira’s work outside Spain.⁵⁸ The resemblance between Pereira’s theories and ideas that Descartes expressed a century later was such that Descartes felt it necessary to deny that he had read the *Antoniana Margarita* or been influenced by Pereira’s ideas.⁵⁹ If anything, Descartes was slightly more equivocal than Pereira on the question of animal sensation. In the famous passage in the *Discourse on Method* where Descartes discusses the distinction between humans and animals, the

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid* at 160.

⁵⁷ *Ibid* at 160.

⁵⁸ E.P. Evans, the author of a remarkable account of criminal and ecclesiastical trials of animal defendants in the Middle Ages and beyond that was first published in 1906, who evidently was a scholar of admirable thoroughness, noted that the theory that animals are machines or automata “was not original with Descartes, but was set forth at length by a Spanish physician, Gomez Pereira...nearly a century before the publication of Descartes’ *Meditationes de prima philosophia* and *Principia philosophiae*, which began a new epoch in the history of philosophy.” *The Criminal Prosecution and Capital Punishment of Animals: The Lost History of Europe’s Animal Trials* (London: Faber and Faber, 1987) at 66.

⁵⁹ Bandrés & Llavona, *supra* note 51 at 164. The resemblance was not limited to the question of animal minds; Pereira’s discussion of the immortality of the human soul anticipates Descartes’ *cogito*: “According to Pereira, the soul knows itself through thought: ‘I know that I know, and whoever knows is, therefore I am.’” *Ibid.*

difference is not to do with sensory capacity but with reason. Descartes argues that humans are different in nature from animals because we have an immortal, or reasoning, soul.⁶⁰ Perhaps, like Pereira, he considered that attributing sensation to animals would necessarily lead to admitting their capacity for reason and would be incorrect for that reason, but he does not expressly say so.

Nor does Descartes actually describe animals as mechanical entities or automata. He uses the comparison to elaborate machines to illustrate his point about what is missing in animal nature: “were there such machines exactly resembling in organs and outward form an ape or any other irrational animal, we could have no means of knowing that they were in any respect of a different nature from these animals.”⁶¹ By contrast, a machine could be distinguished from a human being because (like animals, he argues) it would not be able to speak or to learn tasks using knowledge.⁶² Whether or not this means Descartes believed that animals literally were machines without the capacity to experience pain or other sensations, that view would be consistent with the strict division between matter and mind in his philosophy, and the designation of mind as an exclusively human attribute.

Certainly, the “standard reading” of Descartes on animals, as Peter Singer observes, is that he believed they were equivalent to mechanical devices and had no capacity to feel either pleasure or pain.⁶³ The Cartesian philosopher Nicolas Malebranche described the views of the Cartesian school on the matter without qualification: “The Cartesians do not think that animals feel pain or pleasure, or that they

⁶⁰ René Descartes, *Discourse on the Method of Rightly Conducting the Reason*, translated by John Veitch, 5th ed (Edinburgh: William Blackwood and Sons, 1873) [original French first published in 1637] at 100.

⁶¹ *Ibid* at 97.

⁶² *Ibid* at 97-98.

⁶³ *Supra* note 2 at 290 n 24.

hate or love anything, because they do not admit anything but the material in animals, and they do not believe that either sensations or passions are properties of matter in whatever form.”⁶⁴ Animals do not have intelligence or souls, Malebranche argued:

They eat without pleasure, cry without pain, grow without knowing it; they desire nothing, fear nothing, know nothing; and if they act in a manner that demonstrates intelligence, it is because God, having made them in order to preserve them, made their bodies in such a way that they mechanically avoid what is capable of destroying them.⁶⁵

For Malebranche, as for Pereira, the conclusion that animals did not experience sensations followed from the need to justify actions towards animals that would otherwise appear unjustifiable. Nicholas Jolley has argued that Malebranche’s theory of mind, which (departing from that of Descartes) distinguished between sensation and perception – seeing only the latter as involving the mind’s relationship to ideas and thus to God – could have formed the basis for a theory of basic animal consciousness involving the lower sensation only.⁶⁶ But Malebranche’s “reasons for toeing the Cartesian party line had less to do with the philosophy of mind than with theological considerations. According to Malebranche, the ascription of sensations to animals is inconsistent with the principle that under a just God the innocent will not suffer.”⁶⁷

Descartes, too, apparently turned his mind to the justificatory questions raised by human actions towards animals. In 1648 Descartes responded to the Cambridge Platonist

⁶⁴ *The Search After Truth*, translated by Thomas M Lennon and Paul J Olscamp (Columbus: Ohio State University Press, 1980) [original French first published in 1674-1675] at 493.

⁶⁵ *Ibid* at 494.

⁶⁶ “Malebranche on the Soul” in Steven Nadler, ed, *The Cambridge Companion to Malebranche* (Cambridge: Cambridge University Press, 2000), Cambridge Collections Online, Cambridge University Press, 10 March 2011, DOI:10.1017/CCOL0521622123.003 31 at 41-42

⁶⁷ *Ibid* at 42.

Henry More, who had written to him “to praise his work in general but to abominate his view of animals as automata,”⁶⁸ observing that “My opinion is not so much cruel to animals as indulgent to men...since it absolves them from the suspicion of crime when they eat or kill animals.”⁶⁹

The Cartesian animals-as-machines theory is often ascribed great influence on attitudes towards animals – perhaps more than is warranted. Preece contends that “no more than a handful in Britain appear to have subscribed to the doctrine;”⁷⁰ even in France its adherents were a minority; and in both countries the theory was “fodder for the wits”:

Noting Descartes’ analogy between a watch and an animal, Bernard Fontenelle declared that if he put a dog machine beside a bitch machine in short order he would have a pup machine but if he put two watches side by side and waited a whole lifetime no third watch would appear. That convinced him that dogs were worthier and more noble than watches. In England, Viscount Bolingbroke noted the same analogy and declared that, despite Descartes, he was sure his peasants would still be able to tell the difference between the town bull and the parish clock.⁷¹

Cartesian mechanism might have seemed absurd to some even in its heyday, but it provided a rational justification for the exploitation of animals in an age that sought explanations based in reason and justice. In response, the defenders of animals argued

⁶⁸ Preece, *Sins of the Flesh*, *supra* note 9 at 149.

⁶⁹ Letter dated February 5, 1649, cited in Singer, *supra* note 2 at 290 n 25, in *Descartes: Philosophical Letters*, translated and edited by Anthony Kenny (Oxford: Clarendon Press, 1970) 237 at 245.

⁷⁰ Preece, “Animal Rights Advocacy,” *supra* note 1.

⁷¹ *Ibid.*

for animals' moral standing and advocated for laws against cruelty, based in part on affirming (*contra* the mechanisms) that animals did indeed feel and suffer.

3.4 ANTI-CARTESIAN ANIMAL WELFARE LAW

The values of respect for animals, compassion for animals, and avoidance of harm – or at least unnecessary harm – to animals are deeply embedded in many cultures. It is a common thread running through the teachings and traditions of the world's many civilizations that it is a sign of virtue to pay attention to, and mitigate, the sufferings of other creatures. But people do not always (do not even usually) act in accordance with these values. Descartes and other humanist philosophers offered an elegant rationalization for this reality: if animals are intricate mechanisms like pocket-watches, then the moral issue disappears; the animal's reaction to a blow or other hurt is not the morally meaningful reaction of pain, but the morally null automatic response of a thing to laws of cause and effect. The legal concept of animal cruelty as something that can be identified, forbidden and punished is rooted in a rejection of that argument, and in a re-emphasis of the tradition of compassion for animals.

CHAPTER FOUR ANIMAL WELFARE IN THE NORM CYCLE: DOMESTIC LAW

4.1 "MARTIN'S ACT" AND THE ORIGINS OF THE HUMANE TREATMENT PRINCIPLE

Criminal law prohibiting cruelty to animals, in its modern form, began in the UK in 1822 with the passage of the first national statute prohibiting cruelty to animals: *An Act to Prevent the Cruel and Improper Treatment of Cattle*, often called "Martin's Act" for the MP Richard Martin, who introduced the bill and campaigned for its passage.¹ Today, almost every country in the world has legislation generally prohibiting cruelty to animals. The basic idea underlying these laws is that animals matter enough to be protected, and that, although human beings do use animals and cause them to suffer, there are limits on how far such use and such suffering can justifiably go – the limit expressed in the principle of humane treatment. In some countries, these higher-order principles have been raised to the constitutional level.²

The emergence and now solid entrenchment of the humane treatment principle at the domestic level is significant as the background to the development of a similar general principle in international law. It is evidence of a widespread, almost universal convergence of opinion among the nations of the world about where the boundary lies between acceptable and condemnable treatment of animals.

¹ 3 Geo IV, c 7. The story of Martin's work championing the cause of animals is recounted in Kathryn Shevelov, *For the Love of Animals The Rise of the Animal Protection Movement* (New York: Henry Holt, 2008). Martin's Act was the first animal welfare legislation passed by a national legislature. As David Favre and Vivien Tsang have documented, Maine adopted a statute making it an offense to "cruelly beat any horse or cattle" in 1821, the year before Martin's Act was passed. "The Development of Anti-Cruelty Laws During the 1800s" (1993) 1 *Detroit College L Rev* 1 at 8-9.

² See Section 4.4 below.

The historical and political context to the passage of Martin's Act provides an example of the "norm cycle" that Finnemore and Sikkink describe in action.³ The social reformers, politicians, clerics and intellectuals who laid the groundwork for the passage of Martin's Act were the norm entrepreneurs of their time. From the unconventional seventeenth-century noblewoman Margaret Cavendish, the Duchess of Newcastle, who published essays and poems attacking "the arrogance and downright stupidity of the beliefs most people in her day held about animals,"⁴ to the eighteenth-century clerics and philosophers who denounced the oppression of animals as one more form of the tyranny they sought to overthrow, they set in motion the life cycle of the norm of humane treatment. Their efforts succeeded in turning England from a country famous throughout Europe for brutal treatment of animals to the first nation to adopt a law criminalizing animal cruelty. They managed, in Finnemore and Sikkink's words, to "redefine appropriate behavior" towards animals.⁵ In their arguments they appealed to ideas that transcended the particularities of culture and nation, drawing both on distinctively Enlightenment notions of universal justice and on ideas adopted from other cultures – especially India.

This historical background also underlines an important point about the substantive content of the principle of humane treatment. Bernard E. Rollin has described animal cruelty law, especially in its early form in the nineteenth century, as reflecting a "minimalist, lowest common denominator ethic" that is "restricted to the prohibition of overt, intentional, willful, extraordinary, malicious, unnecessary cruelty," designed "to

³ Martha Finnemore & Kathryn Sikkink. "International Norm Dynamics and Political Change" (1998) 53 *Int'l Organization* 887. See discussion in Chapter Two.

⁴ Shevelow, *supra* note 1 at 18. Shevelow describes Cavendish's life and her advocacy for animals in *ibid* at 17-38, 52-54.

⁵ *Supra* note 3 at 90.

ferret out sadists and psychopaths.”⁶ But his description does not capture what the criminalization of cruelty to animals meant either to the lawmakers who passed Martin’s Act or to the judges who applied that law and its successors. The law was intended to prohibit cruel treatment of animals being used for socially accepted purposes – the beasts of burden who helped the farmers and workers move their loads, the animals driven to London’s brutal meat markets – and to practices that had been common in those contexts. And it applied to new farming practices developed to improve efficiency and profitability, when the price in animal suffering was deemed too high – anticipating, although on a much less enormous scale, the tension between those values in today’s factory farming.

In the chapter that follows, I survey a large number of specific instances where international law protects animal welfare, as the basis for an argument that these are building blocks of a generally applicable international obligation to respect the principle of humane treatment. The background of this principle’s emergence at the national level is also an important part of the picture because it illuminates where the humane treatment principle came from and what it means.

4.2 JUSTICE FOR ANIMALS

The English were once renowned for their callousness to animals,⁷ and England known as “that most carnivorous of all countries.”⁸ Popular amusements included

⁶ “The Ascent of Apes – Broadening the Moral Community” in Paola Cavalieri and Peter Singer, eds, *The Great Ape Project* (New York: St Martin’s Press, 1994) 206 at 206.

⁷ Shevelov, *supra* note 1 at 39-54.

⁸ John Oswald, *The Cry of Nature; or, an Appeal to Mercy and to Justice, on Behalf of the Persecuted Animals*, reprinted in Aaron Garrett, ed, *Animal Rights and Souls in the Eighteenth Century* (Bristol: Thoemmes Press, 2000) Vol IV at 81at 15.

baiting bulls and bears with dogs (with unfortunate results for bulls, bears and dogs⁹); bullrunning (which “involved humans chasing a frenzied bull throughout town, beating and jabbing him and cutting off bits of his flesh”¹⁰); cockfighting (there was even a cockpit in Westminster, a popular after-work pastime for members of Parliament¹¹); dogfighting; cockthrowing or cocktossing (“A cock was tethered by a yard-long cord to a stake at the center of a ring, and contestants took turns throwing cudgels at it, battering the animal and breaking its bones until someone finally succeeded in delivering a death blow”)¹² and of course the more aristocratic pursuit of hunting.

In more workaday activities – commerce and food production – animals were shown little mercy. The horses and donkeys used to draw hackney cabs, stagecoaches and carts were worked as hard as possible until they died; “often they were seen to be pulling their loads with broken bones protruding and open sores on their backs,”¹³ and were severely beaten to force them on. In slaughterhouses, “[w]ounded animals might be left to linger for days before they were killed” and it was normal to starve worn-out draft animals waiting for death at the knacker’s yard.¹⁴ Alexander Pope, in a letter to the *Guardian* in 1713, described English “gluttony” as “more inhuman” even than cruel sports: “Lobsters roasted alive, pigs whipt to death, fowls sew’d up, are testimonies of our outrageous luxury...I know nothing more shocking or horrid than the prospect of [a kitchen] covered with blood, and filled with the cries of creatures expiring in tortures.”¹⁵

⁹ Shevelov, *supra* note 1 at 39-41.

¹⁰ *Ibid* at 41-42.

¹¹ *Ibid* at 7.

¹² *Ibid* at 48.

¹³ *Ibid* at 133.

¹⁴ *Ibid* at 134.

¹⁵ “Against Barbarity to Animals,” *Guardian*, no. 61 (21 May 1713), reprinted in Garrett, *supra* note 8 at 262-263.

The movement that emerged to promote reform of such brutal practices saw reform as an imperative of justice. What made it a matter of justice was, first and foremost, the capacity of animals to suffer – and the avoidability of so much of the worst suffering inflicted on them. Jeremy Bentham’s statement of the argument, which expressly called for legislation to protect animals, is probably the best-known contemporary statement of these ideas today. Bentham argued that the purpose of both legislation and of private ethics is to produce “the greatest possible quantity of happiness.”¹⁶ Whose happiness counts in this quantum? Bentham observed that humans were generally thought of as counting but animals were not, “on account of their interests having been neglected by the ancient jurists, stand degraded into the class of things.”¹⁷ In a now-famous footnote¹⁸ to this passage, Bentham protested against the exclusion of animals’ happiness or suffering as a relevant matter for legislation, pointing out that “[u]nder the Gentoo and Mahometan [Hindu and Muslim] religions, the interests of the rest of animal creation seem to have met with some attention.”¹⁹

Bentham believed it was justifiable to kill animals for food,²⁰ but argued that humans should not “be suffered to torment them,” since they, like us, were sensitive beings who should not be “abandoned without redress to the caprice of a tormentor.”²¹ What basis was there for leaving animals on the wrong side of the line of moral consideration?

¹⁶ *Principles of Morals and Legislation* (New York: Hafner Publishing Co., 1961) [first published 1789] at 310.

¹⁷ *Ibid.* at 310 [emphasis in original].

¹⁸ Mainly because it became the foundation for Peter Singer’s argument (which, of course, went further than Bentham’s on the questions of eating and killing animals) in *Animal Liberation* (New York: Harper Perennial, 2009).

¹⁹ Bentham, *supra* note 16 at 310 n 1.

²⁰ *Ibid.*

²¹ *Ibid.*

Is it the faculty of reason, or, perhaps, the faculty of discourse? But a full-grown horse or dog is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day, or a week, or even a month, old. But suppose the case were otherwise, what would it avail? the question is not, Can they reason? nor, Can they talk? but, Can they suffer?²²

Bentham's argument implies that Pereira and Descartes (although possibly not Malebranche) came to a denial of animal sentience by asking the question backwards, starting with the premise that animals could not possess an attribute that their theories cast as uniquely human: rationality, intelligence, cognition, self-knowledge, a soul. The possibility of animal feeling had to be precluded because it implied animal rationality. Pereira and Descartes asked first, can they reason? And since the answer for them was no, then the question about suffering, in effect, answered itself.

Bentham was not alone in speaking up for animals and against the mechanists. Many other writers on the animal question in the eighteenth century appealed to the common-sense notion that animals feel pain. Kathryn Shevelov's account of the cultural and intellectual history leading up to the passage of Martin's Act describes various works of the period, many by members of the clergy, that condemned the abuse of animals by appealing to the capacity for pleasure and pain that we share with them.²³ "Pain is pain," wrote the Anglican vicar Humphry Primatt in 1776, whether it be inflicted on man or

²² *Ibid.*

²³ *Supra* note 1 at 149-163.

beast, and the creature that suffers it, whether man or beast, being sensible of the misery while it lasts, suffers Evil.”²⁴

Bentham’s concise encapsulation of the question in the three-word question “can they suffer?” has become a fulcrum for modern thinkers about animals – including Peter Singer, and also, in a very different philosophical orientation, Jacques Derrida. For Derrida, Bentham’s question changes

the very form of the question regarding the animal that dominated discourse within the tradition, in the language both of its most refined philosophical argumentation and of everyday acceptance and common sense. Bentham said something like this: the question is not to know whether the animal can think, reason, or speak, etc., something we still pretend to be asking ourselves... The first and decisive question would rather be to know whether animals can suffer.²⁵

In significant part, what makes the implications of this “first and decisive question” so significant is the obviousness of the answer, once attention is shifted from the now secondary questions that were foregrounded by the mechanists (can they reason? can they talk?) and that, as Derrida puts it, “we still pretend to be asking ourselves.”

There is a growing body of scientific evidence that contributes to our understanding of

²⁴ *A Dissertation on the Duty of Mercy and Sin of Cruelty to Brute Animals*, reprinted Garrett, *supra* note 8, Vol III at 8.

²⁵ *The Animal That Therefore I Am*, ed Marie-Louise Mallet, translated by David Wills (New York: Fordham University Press, 2008) at 27 [first emphasis added, subsequent emphases in the original]. See also Cary Wolfe’s discussion of the importance of Bentham’s question in Derrida’s writing on animals, as well as the surprising fact that the same insight which “serves in Singer’s work as the benchmark for the ethical consideration of animals” is so critical in Derrida’s quite different approach (*What Is Posthumanism?* (Minneapolis: University of Minnesota Press, 2010) at 81).

the details and mechanisms of physical pain in animals²⁶ (going back, indeed, to the vivisectionists of Descartes' day, who used dogs to display the workings of the central nervous system), as well as their capacity for experiencing various emotions, including joy and suffering.

For Bentham, the fact of animal suffering was an issue of justice that should be addressed by the law. "Why should the law refuse its protection to any sensitive being?" asked Bentham.²⁷ If animals experienced no suffering, the concept of cruelty, the duty to be humane, and the standard of unnecessary suffering would have no meaning, and the question of justification of human actions towards animals would disappear – precisely the erasure that Pereira, Descartes and Malebranche attempted. So it is that if the theory of animals as machines is rejected, the suffering of animals calls for a response based on "not just mere kindness but justice."²⁸

²⁶ So much so that this has ceased to be a serious question, at least as far as vertebrates are concerned, for scientists (Preece, for example, notes that scientists "in most cases...accept without question" that other species feel pain, suffer and have emotions (Animal Rights Advocacy - Right Ethics, Wrong Target" (2005) 4:2 Logos, online: http://www.logosjournal.com/issue_4.2/preece.htm). An interesting recent example of scientific investigation into animal emotions is a study on empathy in hens, which concluded that hens "possess at least one of the essential underpinning attributes of 'empathy': the ability to be affected by, and share, the emotional state of another." J L Edgar et al, "Avian maternal response to chick distress" (9 March 2011), Proceedings of the Royal Society B, online: <http://rspb.royalsocietypublishing.org/content/early/2011/03/03/rspb.2010.2701.full>. The study, which was funded by the UK Biotechnology and Biological Sciences Research Council Animal Welfare Initiative, involved monitoring the physiological and behavioural responses of adult hens while their chicks, and they themselves, were subjected to the mildly aversive stimulus of being sprayed with a puff of air from a compressed-air canister. The hens showed similar behavioural and physiological changes when the chicks were subjected to the air puff as when they themselves were. This indicated that the hens had the ability to share in the emotional state of another and provided a platform for further investigation of empathic responses in chickens. The researchers were unable to conclude based on this experiment whether the hens' responses constituted "a non-evaluative behavioural and physiological response (akin, for example, to 'interest' or 'heightened attention')" or one "accompanied by a valenced, emotional component (i.e. positive/reinforcing or negative/punishing)."

²⁷ Bentham, *supra* note 16 at 310 n 1.

²⁸ Wolfe, *supra* note 25 at 81 [emphasis in original].

4.3 UNNECESSARY CRUELTY AND “‘NORMAL’ ANIMAL USE”

As noted in Section 4.1 above, Bernard E. Rollin has argued that the legal prohibition of cruelty to animals reflects no more than a “lowest common denominator ethic” that only condemns outright sadism.²⁹ Such laws and such an ethic, he argues, are inadequate to deal with “the overwhelming majority of animal suffering at human hands,” which “is not the result of cruelty, but rather grows out of ‘normal’ animal use and socially acceptable motives.”³⁰ Factory farming is a case in point; farmers “may be motivated by the quest for efficiency, profit, productivity, low-cost food and other putatively acceptable goals, yet again, their activities occasion animal suffering in orders of magnitude traditionally unimaginable.”³¹

But is it really so easy to decouple the prohibition of ‘mere’ sadism, suffering inflicted without even a putatively acceptable goal, from the stronger standard of justice that Rollin calls for, which recognizes animals as mattering morally and, at a minimum, would require us to ask whether convenience, utility, efficiency and so on are sufficient grounds to cause animal suffering?³²

Martin’s Act itself clearly contemplated that prohibited cruelty could occur in the pursuit of socially accepted economic and business purposes. There was certainly a lot of cruelty to animals around of both gratuitously sadistic and more utilitarian varieties when the English movement for a law for the protection of animals began. Those who advocated for a law against animal cruelty did not focus on a distinction between suffering in the context of entertainment (for the sheer pleasure of people who enjoyed

²⁹ *Supra* note 6.

³⁰ *Ibid* at 207.

³¹ *Ibid*.

³² *See ibid* at 211.

watching animals being tortured) versus suffering in the context of business (as a side effect of extracting the maximum value in food or work from an animal). The 1822 statute was passed following prior failed attempts to legislate against animal abuse, including a bill that would have banned bullbaiting, first introduced in 1800,³³ and another, introduced in 1809, that would have banned animal cruelty generally and was “particularly directed at their treatment as they were being driven to market and in the slaughtering yards.”³⁴

Martin’s Act was limited in application to working animals, to “cattle.” The word had a broader meaning than it does now; the law applied to anyone who “shall wantonly and cruelly beat, abuse, or ill-treat any Horse, Mare, Gelding, Mule, Ass, Ox, Cow, Heifer, Steer, Sheep, or other Cattle.”³⁵ Early enforcement of the statute focused on Smithfield meat market (notorious for brutal treatment of animals)³⁶ and on draft animals; Martin himself initiated the prosecution of a vegetable seller for beating his donkey.³⁷ Costermongers who underfed their animals and beat them to keep them going, and knackers who avoided the expense of feeding animals before they were killed, were not necessarily sadists or psychopaths; the logic of their actions is the logic of efficiency and profit, just as much as it is in the case of modern industrialized farming.

³³ Shevelow, *supra* note 1 at 201-207.

³⁴ *Ibid* at 235.

³⁵ *Supra* note 1 s 1.

³⁶ Shevelow, *supra* note 1 at 273.

³⁷ *Ibid* at 260-263.

The parallel is clearer, indeed quite striking, in the 1889 case *Ford v Wiley*,³⁸ where the issue was the removal of horns from cattle.³⁹ The defendant, a Norfolk farmer, was accused of having the horns cut off his cattle, which he admitted to having done, but he argued that it was a normal agricultural practice, at least in his part of Norfolk.⁴⁰ The purpose of the operation was to make it possible to put a larger number of cattle in a yard, or a railway truck, without the risk that they would gore one another. There was evidence that dehorning “alters their character and makes them quiet.” The dehorned cattle could fetch a higher price by about twenty to forty shillings each.⁴¹ The Norfolk court decided this was a valid farming practice and dismissed the indictment, in spite of prosecution evidence given by thirteen veterinary surgeons, “presidents, professors, fellows, and members of veterinary colleges”⁴² that it was extremely painful: “Every tooth of the saw

³⁸ (1889), 23 QBD 203 [*Wiley*]. The case (which was cited by the Quebec Court of Appeal in the *Ménard* case) was decided under a successor to the 1822 statute, *An Act for the More Effectual Prevention of Cruelty to Animals*, 12 & 13 Vict c 92. By this time the law had been amended to make it an offence to “cruelly beat, ill-treat, overdrive, abuse, or torture...any animal” (not limited to cattle), and to cause or procure any of these to be done (so that, for example, an employer who ordered an employee to harm an animal could be prosecuted); the word “wantonly” had also been deleted.

³⁹ Dehorning cattle is standard practice in Canada today, although the trend seems to be towards early removal of the buds that eventually grow into horns, and selective breeding for “polled” or hornless animals. The agricultural industry promotional brochure “Farm Animals: Who Cares?” states that “[d]ehorning of beef and dairy calves is done for safety reasons, for humans and animals” (available at: <http://farmissues.com/issues/facts/web/pdf/FarmAnimalsWhoCares.pdf>). The Canadian Veterinary Medical Association (CVMA)’s “Position Statement on Castration, Tail Docking, Dehorning of Farm Animals (March 1996), available at: <http://canadianveterinarians.net/ShowText.aspx?ResourceID=48>), describes these procedures as “a routine part of livestock husbandry,” but recommends that they be performed in a humane fashion. The CVMA recommends “disbudding” within the first two weeks after birth, with the use of anaesthesia and analgesia, and the prevention of horn development through selective breeding. “Position Statement on Disbudding and Dehorning of Cattle” (November 2010), available at: <http://canadianveterinarians.net/ShowText.aspx?ResourceID=193>). In the 1930s, Alberta, British Columbia and Saskatchewan introduced “horn taxes” on sales of horned cattle to encourage dehorning. These provisions are still in place in Saskatchewan (*Horned Cattle Purchases Act*, RSA 1979, c H-6). Alberta’s *Horned Cattle Purchases Act*, RSA 2000, c H-11, was repealed in 2007 by the *Horned Cattle Purchases Act Repeal Act*, SA 2007, c 19, and British Columbia’s *Cattle (Horned) Act*, RSBC 1996, c. 44, was repealed in 2003 by the *Miscellaneous Statutes Amendment Act, 2003*, SBC 2003, c 7, s 8. Presumably, the taxes were no longer considered necessary due to the prevalence of early dehorning.

⁴⁰ *Wiley*, *supra* note 38 at 205.

⁴¹ *Ibid* at 220.

⁴² *Ibid* at 204.

as it tears through the structure causes excruciating pain, and the inflammation following the operation causes great and prolonged suffering.”⁴³

The Queen’s Bench Division overturned the judgment and held that Wiley should be convicted. The two judgments, of Lord Coleridge, C.J. and Hawkins, J., both insisted that a proportional test of necessity had to apply. “There must be a proportion between the object and the means,”⁴⁴ Coleridge C.J. opined; Hawkins J. further elaborated: “in each case...the beneficial or useful end sought to be attained must be reasonably proportionate to the extent of the suffering caused, and in no case can substantial suffering be inflicted, unless necessity for its infliction can reasonably be said to exist.”⁴⁵ If suffering is not necessary on this standard, if “we have neither the moral nor the legal right to inflict it, a conclusion not of sentimentalism but of good sense.”⁴⁶

The court held that the severe suffering caused by cutting off the animals’ horns could not be said to be necessary on this test:

There is no necessity and it is not necessary to sell beasts for 40s more than could otherwise be obtained for them; nor to pack away a few more beasts in a farm yard, or a railway truck, than could otherwise be packed; nor to prevent a rare and occasional accident from one unruly or mischievous beast injuring others. These things may be convenient or profitable to the owners of cattle, but they cannot with any show of reason be called necessary.⁴⁷

⁴³ *Ibid* at 211.

⁴⁴ *Ibid* at 215.

⁴⁵ *Ibid* at 219.

⁴⁶ *Ibid* at 215 (*per* Coleridge CJ).

⁴⁷ *Ibid* at 209 (*per* Coleridge CJ).

Hawkins J. objected in particular that the operation rendered the cattle more docile “by artificially altering the character and species of the animal altogether, and converting the horned animal into a polled one, and that by means of so torturing an operation that one shudders to think men can be found to perform it.”⁴⁸ In *obiter dicta*, Hawkins J. also expressed doubt about whether other similar painful alterations performed on farm animals, castration⁴⁹ and tail docking, were always “necessary.”⁵⁰

We might think, from the vantage point of an urbanized, technologically advanced society dealing with very complex problems of food production and distribution for a burgeoning population, that we face issues the Victorians could not have conceived of, and we tend to imagine the past as a simpler (and gentler) time in farming practices. But *Wiley* illustrates that all the competing considerations involved in modern factory farming were already present in the 1880s. The pressure to pack more animals into smaller space when raising and transporting them, for greater convenience, efficiency and profit, already existed then. Some of the methods for enhancing efficiency are the same ones that are still practiced today: dehorning, castration, tail-docking. New ones (debeaking young chickens, for example) have been adopted in response to the problems of increasingly intensive confinement. Other methods that have developed through modern technology, notably the genetic alteration of animals to increase their yields, go further than Hawkins J. might have imagined in “artificially altering the

⁴⁸ *Ibid* at 221.

⁴⁹ “I am far from saying that in my opinion, castration, which is a painful operation, though not of long duration, is in all cases justifiable. I could, were it necessary to do so, suggest many circumstances in which in my judgment it would be utterly unreasonable because unnecessary.” *Ibid* at 219.

⁵⁰ “Docking is another painful operation, which, no doubt, may occasionally be justified; but I hold a very strong opinion against allowing fashion, or the whim of an individual, or any number of individuals, to afford a justification for such painful mutilation and disfigurement.” *Ibid* at 219-220.

character and species of the animal.” The main thing that has changed is the scale and speed of the practices, rather than their essential nature.

The opinions of the judges in *Wiley* were not, of course, universally shared. In the case of *Lewis v. Fermor*,⁵¹ for instance, it was held that a veterinary surgeon who spayed five sows without anaesthesia could not be convicted under the statute – although the case seems to stand for the proposition that a mistaken belief that the operation was necessary could be a valid defence,⁵² rather than addressing directly the question of what necessity is under the law. What is clear is that the ethic of cruelty prevention expressed in the law included holding such practices up to judicial scrutiny and required justification for them, because they involved the infliction of suffering on animals. Farming practices were not left completely outside the purview of the legal standards simply because the motivation for doing them was efficiency, profit or convenience rather than pure sadism. It is not even clear where the line between the “normal,” socially accepted purpose and sadistic malice would be drawn, if it were determinative. Even bull-baiting and cockfighting were businesses providing a livelihood for those who ran them.

4.4 ANIMAL PROTECTION IN GLOBAL DOMESTIC LAW

Almost every country in the world now has some form of domestic law against animal cruelty. To survey the domestic animal law of the countries of the world in anything but the most cursory way would be a substantial digression from the focus of this thesis on international provisions, since there is such a vast number of different domestic enactments covering a wide variety of subject-matters, from the most general

⁵¹ (1887), 18 QBD 532.

⁵² The *Wiley* court understood this to be the holding, and dissented from it. *Supra* note 38 at 216, 224-225.

prohibitions on cruelty to legislation covering such specific situations as hunting, farming, companion animals, the use of animals for research, imports of animal products and the protection of wildlife.⁵³

A number of countries even have constitutional provisions recognizing the status of animals as sentient beings deserving legal protection. For example, the Brazilian Constitution provides that it is incumbent upon the government to “protect the fauna and the flora, with prohibition, in the manner prescribed by law, of all practices which represent a risk to their ecological function, cause the extinction of species or subject animals to cruelty.”⁵⁴ The Indian Constitution provides that every citizen has a duty “to have compassion for living creatures,”⁵⁵ and litigation under this provision has produced a number of strongly animal-protective court decisions.⁵⁶ The German Basic Law provides that “the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all

⁵³ Bruce A. Wagman & Matthew Liebman, *A Worldview of Animal Law* (Durham, NC: Carolina Academic Press, 2011) is an excellent overview of animal law and jurisprudence in domestic law around the world, as well as in international law. A briefer but also very useful summary of animal protection laws, organizations and enforcement practices in a large number of countries is in Neil Trent et al, “International Animal Law, with a Concentration on Latin America, Asia, and Africa” in Deborah J Salem & Andrew N Rowan, eds, *The State of the Animals III 2005* (Washington, DC: Humane Society Press, 2005) 65. The Animal Legal & Historical Center of the University of Michigan College of Law maintains a collection of laws from around the world (as well as some international materials) online at <http://www.animallaw.info/nonus/index.htm>. See also the discussion of the global growth of animal welfare law and burgeoning global public opinion that animal welfare is an important issue in Kate Cook & David Bowles, “Growing Pains: The Developing Relationship of Animal Welfare Standards and the World Trade Rules” (2010) *Rev European Community & Int’l Env’t L* 227 at 228-229.

⁵⁴ *Constitution of the Federative Republic of Brazil* (1988, as amended 1996), English version available online at <http://pdba.georgetown.edu/Constitutions/Brazil/english96.html>, Article 225(I)(VIII).

⁵⁵ *Constitution of India* (as modified up to 1 December 2007), English version available online at <http://lawmin.nic.in/coi/coiason29july08.pdf>, Article 51A(g).

⁵⁶ Wagman & Liebman, *supra* note 53 at 262-266, discuss the following cases: *People for Animals v State of Goa*, Writ Petition No 347 of 1996 (Bombay HC, Panaji Bench) found that traditional bullfighting was illegal; *Peela Ramakrishna v Gov’t of Andhra Pradesh*, Writ Petition No 4414 of 1987 (Andhra Pradesh HC, 12 May 1988) found that ox racing was a violation of public policy under the constitution as well as anti-cruelty law; *Nair v Union of India* (Kerala HC, 6 June 2000) No 155/1999 and *Balakrishnan v Union of India* (Kerala HC, 6 June 2000) upheld bans on the training and exhibition of certain animals in circuses; and *Mohd Habib v State of Uttar Pradesh* (Allahabad HC, 1 August 1997) declined to issue a declaration that the petitioners, who were butchers, had a fundamental right to kill animals pursuant to their profession.

within the framework of the constitutional order.”⁵⁷ The Swiss Constitution provides that the federal government shall legislate on the protection of animals and in particular on the keeping and care of animals, experiments on animals, the use of animals, imports of animals and animal products, trade in and transport of animals and animal slaughter,⁵⁸ and specifies that in legislating on the use of reproductive and genetic material from animals, plants and other organisms the government “shall take account of the dignity of living beings as well as the safety of human beings, animals and the environment.”⁵⁹

Trent *et al.* find that the highest degree of animal protection is in North America, Northern Europe, Australia and New Zealand.⁶⁰ The differences even within this highest stratum of protection can be significant, ranging from Austria, which has outlawed battery farming, fur farming, the use of wild animals in circuses, trade in live dogs and cats in shops, displaying dogs and cats publicly in order to sell them, and kill shelters,⁶¹ to the relatively weak laws of Canada and the US, which in particular provide very little protection for farm animals.⁶²

Animal protection laws are also relatively common in African, Caribbean and Latin American countries (in the case of countries formerly under British rule, reflecting

⁵⁷ *Basic Law for the Federal Republic of Germany*, Article 20a. The reference to animals was inserted by an amendment in 2002. See discussion in Claudia E Haupt, “The Nature and Effects of Constitutional State Objectives: Assessing the German Basic Law’s Animal Protection Clause” (2010) 16 *Animal L* 213.

⁵⁸ *Federal Constitution of the Swiss Confederation* (18 April 1999, as amended through 1 January 2011), English version available online at <http://www.admin.ch/ch/e/rs/1/101.en.pdf>, Article 80.

⁵⁹ Article 120(2).

⁶⁰ *Supra* note 53 at 65.

⁶¹ Martin Balluch, “How Austria Achieved a Historic Breakthrough for Animals” in Peter Singer, ed, *In Defense of Animals: The Second Wave* (Malden, MA: Blackwell, 2006) 157 at 161-162.

⁶² In the US, a handful of states have recently adopted laws which prohibit (or eventually will prohibit) some of the more extreme practices of confinement agriculture, such as the use of battery cages, veal crates and sow gestation crates (along the lines of prohibitions under EU law, discussed in Chapter Five), which have been introduced by means of ballot initiatives voted on directly by citizens. California’s Proposition 2, *The California Prevention of Farm Animal Cruelty Act*, passed on 4 November 2008; Arizona’s Proposition 204, *The Humane Treatment of Farm Animals Act*, passed on 7 November 2006; and Florida’s Amendment 10, *The Cruel and Inhumane Confinement of Sows Act*, passed on 5 November 2002.

their colonial legal legacy), but enforcement resources are limited and current governments may not consider such laws a priority.⁶³ Some of the Latin American nations have adopted conceptually innovative laws on the rights of nature and the environment that, while they do not squarely address animal welfare, are important expressions of a legal culture that is pushing forward new ideas about the legal status of beings other than the human kind. The new constitution of Ecuador, which was adopted by referendum in 2008, includes a chapter on the Rights of Nature, which provides *inter alia* that nature “has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution.”⁶⁴ In 2011, Bolivia adopted the Law of Mother Earth, enshrining eleven rights of nature including the right to life and to exist.⁶⁵

The progress of animal protection law in Asian countries reflects a gradual shift in cultural attitudes on animal welfare and the influence of international public opinion. The nations of Asia (other than Japan) are described as being at the “lowest [level] of animal protection,” along with Africa and most of the former Soviet Union countries,⁶⁶

⁶³ Trent et al, *supra* note 53 at 67-71, 74-76.

⁶⁴ An English version of Ecuador’s constitutionally enshrined Rights of Nature is available on the web site of the CELDF, which assisted in the drafting of the Rights of Nature section of the new constitution. Online: <http://www.celdf.org/article.php?id=185>.

⁶⁵ John Vidal, “Bolivia enshrines natural world’s rights with equal status for Mother Earth” *The Guardian* (10 April 2011), online: <http://www.guardian.co.uk/environment/2011/apr/10/bolivia-enshrines-natural-worlds-rights>.

⁶⁶ In the nineteenth century, Russia had an animal protection reform movement along similar lines to those that existed in the West (and also focusing on specifically Russian perspectives), and legislation making it a criminal offence to cause wanton torment to a domestic animal was passed in 1871. The situation changed after the 1917 Revolution, as the Communists considered animal protection concerns to be a bourgeois tool of social control. A draft animal cruelty law was introduced in the Duma of the Russian Federation in 1999, but was withdrawn from consideration in 2008 after years of ultimately fruitless deliberation. Amy Nelson, “The Body of the Beast: Animal Protection and Anticruelty Legislation in Imperial Russia” in Jane Costlow & Amy Nelson, eds, *Other Animals: Beyond the Human in Russian Culture and History* (Pittsburgh: University of Pittsburgh Press, 2010) 95.

by Trent *et al.*,⁶⁷ but animal welfare is, even if slowly and incrementally, establishing a place on the agenda in politics and public opinion. Malaysia, a former British colony, has had animal welfare legislation for more than 50 years.⁶⁸ In other Asian countries such laws are of more recent vintage.

The Philippines adopted a new Animal Welfare Act in 1998, which prohibits the torture of animals and killing them in an unnecessarily inhumane manner;⁶⁹ the Act also defines dogs as pets, rather than livestock, and thus outlaws eating dogs.⁷⁰ The Metro Manila area had already banned eating and slaughtering dogs in 1982,⁷¹ following an exposé by an English newspaper of cruel practices in the business of butchering dogs for food, which people around the world responded to with outrage.⁷² Similarly, the consumption of dog meat was banned in Seoul, South Korea in the run-up to the 1988 Olympics, in anticipation of international disapproval of the practice.⁷³ These reforms are interesting examples of international public opinion at work in the evolution of domestic animal-protection law, although there are doubts about how effectively the bans are enforced, and international pressure is arguably counterproductive in terms of ultimate results.⁷⁴

China is an especially significant case, in light of its great stature in international relations and trade. Given China's prominence on the world stage, its position on any

⁶⁷ *Supra* note 53 at 72.

⁶⁸ Cook & Bowles, *supra* note 53 at 228.

⁶⁹ Trent *et al.*, *supra* note 53 at 72.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*; Kyle Ash, "The Rights of Nonhuman Animals and World Public Order: A Global Assessment (1983-1984) 38 NYLS L Rev 377.at 421.

⁷² Ash, *ibid* at 409.

⁷³ Wagman & Liebman, *supra* note 53 at 33-34.

⁷⁴ Wagman & Liebman, *ibid* at 34, note that in Korea dog meat has taken on something of the aura that whale meat has in Japan; although only a minority of Koreans eat it, it is valued as a symbol of national distinctiveness in the face of international disapproval.

issue, including animal welfare, is inevitably influential; conversely, international public opinion and standards are exerting a growing influence on some areas of Chinese domestic policy, and this seems to be happening, gradually, with animal welfare. China is associated with some extremely cruel practices towards animals, including a fur farming industry in which animals are routinely skinned while alive and conscious⁷⁵ and live animal entertainments such as watching big predators tear apart live animals for food.⁷⁶ Although there is no general animal welfare law in China, the state of legal protection for animals is changing. It was announced in 2011 that the horrific circuses and live animal entertainments at Chinese state-owned zoos were banned.⁷⁷ A draft animal welfare act was reportedly considered in 2004⁷⁸ and in 2009.⁷⁹ There is also ample evidence of growing consciousness of animal welfare issues and support for such legislation among the Chinese people.⁸⁰

4.5 FROM DOMESTIC LAW TO INTERNATIONAL LAW

From its earliest days, anti-cruelty law at the domestic level has been aimed not only at the prohibition of gratuitous or sadistic cruelty, but at consistently honouring the principle of humane treatment: causing animals to suffer must be justified on a test of proportionality. Nor were whole classes of animals excluded from the purview of this

⁷⁵ Ros Clubb, “The Welfare of Animals Bred for Their Fur in China” in Jacky Turner and Joyce D’Silva, eds, *Animals, Ethics and Trade: The Challenge of Animal Sentience* (London: Earthscan, 2006) [*Animals, Ethics and Trade*] 180 at 186-189.

⁷⁶ Malcolm Moore, “China bans animal circuses” *The Daily Telegraph* (18 January 2011), online: <http://www.telegraph.co.uk/news/worldnews/asia/china/8266563/China-bans-animal-circuses.html>, describing “attractions where live chickens, goats, cows and even horses are sold to visitors who can then watch them be torn apart by big cats.”

⁷⁷ *Ibid.*

⁷⁸ Trent et al, *supra* note 53 at 73.

⁷⁹ Cook & Bowles, *supra* note 53 at 228.

⁸⁰ *Ibid* at 229; Song Wei, “Animal Welfare Legislation in China: Public Understanding and Education” in *Animals, Ethics and Trade*, *supra* note 99 101; Peter J Li, “The Evolving Animal Rights and Welfare Debate in China: Political and Social Impact Analysis” in *Animals, Ethics and Trade*, *supra* note 75 111.

test just because they were being used for a socially valued purpose; the *Wiley* case illustrates that things done to increase the profitability or ease of animal food production might not be justified, when the suffering involved is weighed against the marginal benefit. The law reflected a “shared understanding” that had international origins, as manifested in the cross-cultural influences in the historical background to the passage of Martin’s Act. The formal legal expression of this social norm was initially decidedly an artefact of the European and English-speaking world, with anti-cruelty legislation being adopted first in the UK and shortly thereafter in a number of US states,⁸¹ and exported to colonies under British rule. At this point, however, to label animal cruelty law as a Western phenomenon would fly in the face of the evidence, not only of the recognition of the principle of humane treatment (even as one of such importance as to merit constitutionalization) in so many countries, but also of the manifestations of commitment to the same principle at the international level, by countries all around the world, that have proliferated over the last half century or so. The next chapter is a survey of “[t]he pervasiveness of international concern for animal welfare, and the wealth of recent formal expressions of commitment to that objective.”⁸²

⁸¹ Favre & Tsang, *supra* note 1.

⁸² Michael Bowman, Peter Davies & Catherine Redgwell, *Lyster’s International Wildlife Law* (Cambridge: Cambridge University Press, 2010) at 160.

CHAPTER FIVE ANIMAL WELFARE IN INTERNATIONAL LAW

5.1 "A MATTER WHICH CAN BE SUBJECT TO INTERNATIONAL REGULATION"

There is no multilateral international treaty on animal rights or welfare – although there have been substantial steps towards the adoption of an international instrument setting out basic protections for animals.¹ But there is already a significant and growing body of references to animal welfare in international law of both hard and soft varieties. They are evidence that international society regards animals as an appropriate subject for regulation, and that certain standards for human conduct towards animals make up part of the international legal framework. As recently as half a century ago, it would probably be accurate to say that animal welfare was not on the agenda of public international law at all, and the notion that it could or should be might well have been considered eccentric. This has changed.

Two points about the increasing presence of animal-protective norms in international law bear noting because they are integral to the overall argument being put forward here. First, where animal welfare or the humane treatment of animals is addressed, it is fairly clear what it means at least at a certain level of generality: it means avoiding the infliction of unnecessary pain or suffering. Formulae that refer to a duty to safeguard animals from suffering as far as possible and to minimize the risk of injury, damage or cruel treatment are repeated across a number of different legal contexts. Second, there is no question of categorical exclusion of farm animals from coverage by this standard, that all practices used to raise animals for food are deemed *per se* to meet it by reason of that purpose, or that factory farming is not a concern. Indeed, the welfare of

¹ See discussion in Section 5.5 below.

farm animals is a matter of particular concern in some contexts, especially in European law.² There are even what can justifiably be identified as basic internationally accepted guidelines on what welfare, or the absence of unnecessary suffering, requires specifically in the case of farm animals. The concept of the “five freedoms” (freedom from hunger and thirst; from discomfort; from pain, injury and disease; to express normal behavior; and from fear and distress), which was developed with reference to farm animals and in response to the welfare challenges posed by the growth of intensive farming,³ has become established as a framework for understanding welfare, and the five freedoms have been endorsed by the World Organisation for Animal Health (OIE) as internationally recognized standards.⁴

In December 1968, the Council of Europe *Convention for the Protection of Animals during International Transport*⁵ was opened for signature and signed by its first nine signatories.⁶ The 1968 CPAIT was “animated by the desire to safeguard, as far as

² See discussion in Section 5.4 below.

³ The “five freedoms” have been identified by the UK Farm Animal Welfare Council as follows: 1. Freedom from Hunger and Thirst - by ready access to fresh water and a diet to maintain full health and vigour. 2. Freedom from Discomfort - by providing an appropriate environment including shelter and a comfortable resting area. 3. Freedom from Pain, Injury or Disease - by prevention or rapid diagnosis and treatment. 4. Freedom to Express Normal Behaviour - by providing sufficient space, proper facilities and company of the animal's own kind. 5. Freedom from Fear and Distress - by ensuring conditions and treatment which avoid mental suffering. Online: <http://www.fawc.org.uk/freedoms.htm>. The concept originated in the 1965 “Brambell Report” on animal welfare in intensive systems, which stated that “[a]n animal should at least have sufficient freedom of movement to be able without difficulty, to turn round, groom itself, get up, lie down and stretch its limbs.” *Report of the Technical Committee to Enquire into the Welfare of Animals kept under Intensive Livestock Husbandry Systems* (London: HMSO, 1965) (Chairman: Professor F W Rogers Brambell, FRS) at 13. The Brambell Report also recommended the establishment of the Farm Animal Welfare Council.

⁴ See discussion in Section 5.3 below.

⁵ 13 December 1968, 788 UNTS 195, Eur TS 65 (entered into force 20 February 1971) [1968 CPAIT]. A revised version of this Convention (CETS 193) was opened for signature on 6 November 2003 and entered into force on 14 March 2006; it currently has eleven parties and an additional eight signatories including the European Union (chart of signatures and ratifications available at <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=193&CM=1&DF=&CL=ENG>).

⁶ Belgium, Denmark, France, the Federal Republic of Germany, Greece, Iceland, Norway and Switzerland. Per von Holstein, “Protection of Animals by Means of International Law, with Special Reference to the

possible, animals in transport from suffering.”⁷ It set out requirements for various protections, including pre-loading veterinary inspections,⁸ adequate space,⁹ protection from inclement weather,¹⁰ and the provision of food and water at regular intervals.¹¹ Commenting on the forthcoming entry into force of the 1968 CPAIT, a scholar with the fittingly bovine name of Per von Holstein saw that development as presaging more general recognition at the international level of the obligation to ensure humane treatment of all animals:

The entry into force of this Convention will represent an important new step at [the] international level towards the assurance of the right of animals to be guaranteed humane treatment which is consistent with modern conceptions of animal welfare. There is, of course, a long way to go from the acceptance of certain rules for the international transport of animals by a limited number of European States to a universal acceptance of the necessity for general protection of animals. Nevertheless, it has been proved that the protection of animals is a matter which can be subject to international regulation, and it is henceforth the task of the public to press for a continuously extended protection in all countries of the world.¹²

Convention for the Protection of Animals during International Transport” (1969) 18 Int’l & Comp L Qly 771 at 771.

⁷ Third recital of the preamble to 1968 CPAIT.

⁸ Article 3.

⁹ Article 6.1.

¹⁰ Article 6.2.

¹¹ Article 6.4.

¹² *Supra* note 6 at 771.

Among the developments that von Holstein thought should come in the future – in addition to the spread of animal protection from Europe to “all countries of the world” – were the phasing out altogether of international transportation of live animals for slaughter (with modern freezing techniques and faster transportation, he reasoned, it should be possible to slaughter animals in the country of origin, and ship the meat)¹³ and the international regulation of factory farming:

[Factory farming] involves the production of animals, mostly calves, pigs and chicken[s], in conditions where they cannot move properly and are over-fed. It seems particularly useful to aim at an international solution which would make impossible the objection that the farmers of other countries are put in a more favourable competitive position. An international Convention governing the welfare of animals “on the farm” would form a highly desirable complement to the present one relating to welfare in transport. The ideal is to assure animal welfare continuously from birth to death.¹⁴

Von Holstein’s observations provide a useful point of departure for the discussion that follows of animal welfare as a subject-matter of public international law, regional law and global domestic law. Comparing the hopes that von Holstein expressed for the future to the situation today highlights both what has been achieved, and what has not.

¹³ *Ibid* at 774. In the event, the trend has been in the opposite direction, with more and more animals being transported for longer distances “owing to the fact that, for economic reasons, slaughterhouses are concentrated in certain parts of Europe” (Jacques Merminod, “International Transport and Animal Slaughter” in Council of Europe, ed, *Ethical Eye: Animal Welfare* (Belgium: Council of Europe Publishing: 2006) [*Ethical Eye*] 55 at 56). This situation is of course similar outside Europe.

¹⁴ *Ibid* at 775.

More than forty years later, there is still no widely adopted treaty regulating the welfare of farm animals, or of animals generally. Part of the reason for this may be that the regulation of these matters is in a practical sense often more obviously a domestic than an international matter,¹⁵ although in the case of farming an era of open international trade the harmonization of standards that von Holstein called for would be more important than ever in helping to ensure that national standards are not undermined by the availability of imports produced under more lax standards. There is, however, an unmistakable evolution towards recognition of the protection of animals from abuse as an overarching principle by the community of nations. The recognition of animal welfare as a concern in a variety of treaties and international law sources confirms von Holstein's contention that animal protection had been proven to be "a matter which can be subject to international regulation," and its presence in the domestic law of virtually all countries indicates progress on the "continuously extended protection in all countries of the world" that he called for.

5.2 INTERNATIONAL CONVENTIONS: WILDLIFE AND NATURE

Wild animals are perhaps a more obvious candidate for international regulation than domestic animals, since their settlement and migration patterns often straddle

¹⁵ This factor may also account for the fact that, in the case of agricultural animals, international regulations on animal welfare developed earliest in connection with transportation. A 1935 League of Nations treaty, the *International Convention concerning the Transit of Animals, Meat and Other Products of Animal Origin*, 6 December 1938, 193 LNTS 39, 45 (entered into force 6 December 1938) provided that animals being transported across borders should be "properly loaded and suitably fed" and should "receive all necessary attention, in order to avoid unnecessary suffering" (Article 5) (cited in Steve Charnowitz, "The Moral Exception in Trade Policy" (1997-1998) 38 Va J Int'l L 689 at 712). Charnowitz also refers to relatively early domestic laws aimed at ensuring humane treatment of animals being exported: in 1983, vessels exporting cattle from the U.S. were made subject to inspection to ensure that they met all requirements for safe and proper transportation and humane treatment of the animals; and in 1914 Britain restricted the export of horses unless a veterinarian certified that the horse could be worked without suffering. *Ibid* at 715.

national borders, and international cooperation on their treatment can be necessary to reduce the risk of different nations working at cross-purposes to one other's policies. A number of international treaties deal with the protection or conservation of wildlife, with a primary focus on conservation at the species level. A significant subset of these conventions also have provisions that seek to promote the welfare and minimize the suffering of individual animals.¹⁶

5.2.1 CITES

The 1973 *Convention on International Trade in Endangered Species of Wild Fauna and Flora*¹⁷ represents an international response to unregulated and lucrative international trade in wildlife, which posed a threat to the survival of over-exploited species.¹⁸ CITES strictly limits trade (broadly defined to mean “export, re-export, import and introduction from the sea”¹⁹) in species threatened with extinction, and regulates trade in other listed species. It has one of the largest memberships of any international conservation agreement, with 175 parties.²⁰

While the core concern of CITES is the conservation of species rather than the wellbeing of individuals, the text of the treaty has been described as “replete with provisions relating to the welfare of individual living specimens”²¹ (although,

¹⁶ See generally Michael Bowman, Peter Davies & Catherine Redgwell, *Lyster's International Wildlife Law* (Cambridge: Cambridge University Press, 2010) at 672-699 on recognition of welfare concerns in international wildlife law.

¹⁷ 3 March 1973, 993 UNTS 243, Can TS 1975 no 32 (entered into force 1 July 1975) [CITES], reprinted in Mark Austen & Tamara Richards, eds, *Basic Legal Documents on International Animal Welfare and Wildlife Conservation* (London: Kluwer Law International, 2000) at 16.

¹⁸ Austen & Richards, *ibid* at 16.

¹⁹ Article 1 (definition of “trade”).

²⁰ Convention on International Trade in Endangered Species of Wild Fauna and Flora, “What is CITES?” online: <http://www.cites.org/eng/disc/what.shtml>.

²¹ Michael Bowman, “Conflict or Compatibility? The Trade, Conservation and Animal Welfare Dimensions of CITES” (1998) 1 J Int'l Wildlife L & Policy 9 at 10 [Bowman, “CITES”].

unfortunately, in practice these obligations “have been routinely disregarded in the practices of many of the parties”²²). CITES prescribes a regime of permits and certificates based on specified conditions for the import, export and re-export of covered species. One condition for the issuance of such documentation is that a “Management Authority” designated by the relevant state must be “satisfied that [the specimen] will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment.”²³ The parties agree to ensure that living specimens “during any period of transit, holding or shipment, are properly cared for so as to minimize the risk of injury, damage to health or cruel treatment.”²⁴ The Convention also provides that, if specimens are confiscated in the enforcement of treaty requirements, they can be placed in a rescue center, which is defined as “an institution designated by the Management Authority to look after the welfare of living specimens.”²⁵

At the 1983 Conference of the Parties to CITES, the Gambian delegation tabled a draft resolution that the requirement that animals be “prepared and shipped” in a manner that minimizes the risk of cruel treatment should be understood to cover the manner in which the animal was taken from the wild, and thus that export permits should be refused where specimens were captured using cruel and painful trapping devices. This measure

²² *Ibid* at 59. See also the discussion of non-compliance and lack of enforcement in Section 6.3.

²³ Articles 3(2)(c) (export of Appendix I species); 3(4)(b) (re-export of Appendix I species); 4(2)(c) (export of Appendix II species); 4(5)(b) (re-export of Appendix II species); 4(6)(b) (introduction from the sea of Appendix II species); and 5(2)(b) (export of Appendix III species). In addition, while Article 7 of CITES provides for discretionary waivers from the normal documentation requirements for certain specimens being transported as part of a zoo, circus, menagerie, plant exhibition or traveling exhibition, such a waiver can only be granted if the Management Authority “is satisfied that any living specimen will be so transported and cared for as to minimize the risk of injury, damage to health or cruel treatment” (Article 7(7)(c)). Because this provision (in an apparent quirk of drafting) only applies to specimens for which other exemptions, to which no welfare safeguards apply, are available, it has been argued that the welfare requirement in Article 7(7)(c) can be circumvented. See discussion in Bowman, *supra* note 21 at 43-45.

²⁴ Article 8(3).

²⁵ Articles 8(4)(b) and 8(5).

was not adopted, as it was considered outside the scope of the Convention.²⁶ The deliberations of the Conference on this matter led to the drafting of the proposed *Convention for the Protection of Animals*, discussed in Section 5.5.2 below.

5.2.2 Biodiversity

The *Convention on Biological Diversity*²⁷ was opened for signature at the 1992 United Nations Conference on Environment and Development in Rio.²⁸ It “has been accepted by virtually every member of the international community”²⁹ and has 193 parties.³⁰ The Convention was adopted to promote a balance between development and preservation of biological diversity through sustainable and equitable use of resources.³¹ Given this focus, it is to be expected that the CBD is mainly concerned with preserving ecosystems, species and genetic diversity within species³² rather than the welfare of individual organisms. But the Convention evidences a commitment to respect for life (and in particular non-human life) that cannot be entirely separated from the ethical foundations of humane treatment of individual animals. The preamble to the CBD recognizes the “intrinsic value of biodiversity”³³ as well as its instrumental value for human purposes. It has been suggested that, since biodiversity is an abstract concept rather than a “self” capable of exhibiting such value” this language “should be

²⁶ Stuart R Harrop, “The International Regulation of Animal Welfare and Conservation Issues Through Standards Dealing With the Trapping of Wild Mammals” (2000) 12:3 J Env’t L 333 at 337-8; Bowman, “CITES,” *supra* note 21 at 27-28.

²⁷ 5 June 1992, 1760 UNTS 79, Can TS 1993 No 24 (entered into force 29 December 1993) [CBD].

²⁸ Bowman et al, *supra* note 16 at 592-3.

²⁹ Michael Bowman, “Normalizing the International Convention for the Regulation of Whaling” (2008) 29:3 Mich J Int’l L 293 at 354.

³⁰ List of parties available on the CBD website at <http://www.cbd.int/convention/parties/list/>.

³¹ The three main objectives of the Convention are the conservation of biological diversity; the sustainable use of the components of biological diversity; and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources (Article 1).

³² Article 2 (definition of “biological diversity”).

³³ First recital of the Preamble.

understood as a form of shorthand, signifying that intrinsic value resides in all those entities the diversity of which the Convention seeks to secure.”³⁴

The 2004 *Addis Ababa Principles and Guidelines for the Sustainable use of Biodiversity*,³⁵ adopted at the seventh Conference of the Parties and intended to be a framework for advising various stakeholders on carrying out the objectives of the Convention,³⁶ call for parties to “[p]romote more efficient, ethical and humane use of components of biodiversity.”³⁷

5.2.3 Antarctic Wildlife

The 1991 *Protocol on Environmental Protection to the Antarctic Treaty*³⁸ aims to enhance protection of the Antarctic environment and its ecosystems.³⁹ The Protocol calls for regulation of activities in the Antarctic to protect species of flora and fauna.⁴⁰ To this end, Annex II to the Protocol (*Conservation of Antarctic Fauna and Flora*) prohibits taking of or harmful interference with Antarctic mammals and birds except for specific scientific and educational purposes.⁴¹ Annex II provides that “[a]ll taking of native mammals and birds shall be done in the manner that involves the least degree of pain and suffering practicable.”⁴²

³⁴ Bowman et al, *supra* note 16 at 78.

³⁵ CBD Secretariat 2004 (available at <http://www.cbd.int/doc/publications/addis-gdl-en.pdf>).

³⁶ *Ibid* at 5, para 1.

³⁷ *Ibid* at 18 (operational guideline pursuant to Principle 11).

³⁸ 4 October 1991, 30 ILM 1455 (entered into force 14 January 1998), reprinted in Austen & Richards, *supra* note 17 at 40.

³⁹ Austen & Richards, *supra* note 17 at 40.

⁴⁰ Article 3(2)(b)(iv) and (v).

⁴¹ Article 3.

⁴² Article 3(6). See also discussion of the 1972 *Convention for the Conservation of Antarctic Seals* in Section 5.2.4 below.

5.2.4 Whales and Seals

The hunting of whales and seals has been a particular focus of humane concerns on the international stage, perhaps because they are charismatic and attractive; also, because they are large animals (especially whales) and are hunted in harsh environments, it is very difficult for humans to them kill quickly and without inflicting obvious and significant suffering, which can become a flashpoint for public opinion.⁴³ Special concern for whales and seals was reflected in a resolution unanimously adopted at the 1958 UN Conference on the Law of the Sea requesting states “to prescribe, by all means available to them, those methods for the capture and killing of marine life, especially of whales and seals, which will spare them suffering to the greatest extent possible.”⁴⁴

Anthony D’Amato and Sudhir K. Chopra have described the progression of international regulation of whaling through five stages, which they designate as free resource, regulation, conservation, protection and preservation.⁴⁵ The stages are on a spectrum from entirely self-regarding and human-centred to being animated by increasing recognition of and concern for the whales as important in themselves, or intrinsically valuable. Reflecting this progression, they see the first restraints imposed on at-will exploitation at the “regulation stage,” as motivated by the desire to maintain “abundant harvests” for the whaling industry in the face of declining whale populations;⁴⁶ the “conservation” stage as still “aimed at the health of the industry, and not at the health of

⁴³ With respect to whales, Bowman et al express doubt as to “whether the killing of such large creatures under such difficult circumstances can realistically be achieved in an acceptable, humane fashion.” *Supra* note 16 at 685.

⁴⁴ Resolution 5, on the Humane Killing of Marine Life, 1958 UN Conference on the Law of the Sea, Official Records 144, Doc A/CONF.13/L56, Vol II, Annexes at 109, cited in Bowman et al, *ibid* at 679.

⁴⁵ “Whales: Their Emerging Right to Life” (1991) 85 Am J Int’l L 21 at 23.

⁴⁶ *Ibid* at 30.

whales,” but with a longer-term perspective on industry viability;⁴⁷ the “protection” stage as initiating measures to promote the survival of whales themselves, at the species level;⁴⁸ and the “preservation” stage as demanding a complete ban on killing, regardless of whether the particular species is endangered.⁴⁹ Consistent with this shift towards viewing whales as warranting protection in their own right, the international institutions that regulate whaling have become progressively more preoccupied with welfare issues, in spite of objections by whaling nations that such considerations are outside the mandate of a regime that was set up to maintain stocks for the whaling industry.⁵⁰

Whaling is internationally regulated under the auspices of the 1946 *International Convention for the Regulation of Whaling*,⁵¹ which was adopted (replacing earlier conventions) during what D’Amato and Chopra identify as a period of transition from “conservation” to “protection.”⁵² The ICRW was intended to conserve stocks and promote “the orderly development of the whaling industry.”⁵³ To this end, it established the International Whaling Commission (IWC)⁵⁴ to set and distribute catch limits for various whale species and to oversee related matters such as regulating hunting seasons

⁴⁷ *Ibid.*

⁴⁸ *Ibid* at 32.

⁴⁹ *Ibid* at 45. D’Amato and Chopra argue that the logical next step in this philosophical and juristic progression would be the emergence in customary international law of an entitlement of whales “to a life of their own.” *Ibid* at 23.

⁵⁰ Alexander Gillespie, “Humane Killing: A Recognition of Universal Common Sense in International Law” (2003) 6 J Int’l Wildlife L & Policy 1 at 1. See also Stuart R Harrop, “From Cartel to Conservation and on to Compassion: Animal Welfare and the International Whaling Commission” (2003) 6:1-2 J Int’l Wildlife L & Policy 79 [Harrop, “Welfare and the IWC”], arguing that the IWC “has traced the changes in attitudes to animal protection from its formation to the present day” and can even be considered “progressive in that it examines questions of welfare and conservation often without reference to the anthropocentric ethos of sustainable development” (at 79), and describing objections by whaling nations (notably Japan) to the IWC’s concerning itself with these issues, based on denials that they are within its competence (at 95-96).

⁵¹ 2 December 1946, 161 UNTS 72 (entered into force 10 November 1948) [ICRW], reprinted in Austen & Richards, *supra* note 17 at 121.

⁵² *Supra* note 45 at 33.

⁵³ Seventh recital of the preamble to the ICRW.

⁵⁴ Article 3.

and methods and gathering of data on whale populations.⁵⁵ Neither the text of the Convention nor the Schedule refers expressly to welfare issues, but the IWC has authority to regulate the types and specifications of gear, apparatus and appliances which may be used in hunting,⁵⁶ a responsibility which implies the relevance of humane considerations.

Since the 1970s, the IWC has been actively involved in studying methods of killing whales, promoting the development of methods that reduce suffering and shorten the time to death, and recommending restrictions on the use of inhumane methods.⁵⁷ In 1981, the IWC banned the use of the cold-grenade harpoon (which does not explode on contact with the target) for commercial hunting and required the use of harpoons that exploded on impact, in order to decrease the time to death.⁵⁸ A Working Group on Whale Killing Methods and Associated Welfare Issues was established in 1982 to advise the IWC⁵⁹ and most recently reported at the 2009 meeting of the IWC.⁶⁰ In addition, a number of IWC workshops on killing and welfare issues have also been held at IWC meetings.⁶¹

Aboriginal hunting methods raise especially difficult welfare concerns, since “the very factor which minimizes their impact from a conservation perspective – primitiveness

⁵⁵ Schedule to the ICRW.

⁵⁶ Article 5(1)(f).

⁵⁷ Gillespie, *supra* note 50 at 6-7.

⁵⁸ Bowman et al, *supra* note 16 at 684.

⁵⁹ Bowman et al, *supra* note 16 at 684. In 1982, the IWC adopted a moratorium on commercial hunting of large cetaceans which came into force in 1986. The moratorium has been successively extended and remains in place today. However, whaling continues under the auspices of an exemption under Article 7 of the ICRW for scientific research, in aboriginal subsistence hunts that are not covered by the moratorium, and in hunts conducted by nations that have objected to the moratorium and are not bound by it (Norway and Iceland). The Working Group advises in connection with these hunts as well as welfare issues arising from stranding and entanglement of whales.

⁶⁰ Report of the Working Group on Whale Killing Methods and Associated Welfare Issues, Document IWC 61/Rep 6 (16 June 2009).

⁶¹ Harrop, “Welfare and the IWC,” *supra* note 50 at 92.

of technique – may inherently serve to aggravate welfare problems.”⁶² Aboriginal whalers have publicly stated their commitment to conducting hunts in a humane manner, within the constraints they face. In 2006, a meeting of aboriginal subsistence whalers was held the day before a workshop on whale killing methods and associated welfare issues at that year’s IWC meeting, and a statement was presented at the workshop on behalf of aboriginal subsistence whaling countries.⁶³ The aboriginal whalers expressed their agreed view that human safety was the first priority in a hunt, but “with safety assured, achieving a humane death for the whale is the highest priority” (but must be balanced with other considerations: the preservation of traditional practices and culture, and the limited economic resources of aboriginal communities).⁶⁴

Seal hunting has been a subject of international controversy since the 1960s. The largest seal hunt is the hunt of young harp and hood seals that takes place each year on the sea ice of Eastern Canada.⁶⁵ According to the account of the Canadian writer and naturalist Farley Mowat,⁶⁶ a fashion for seal fur products and the development of a process to treat the coats of newborn “whitecoat” harp seal pups so that the fur would bind to the skin spurred a boom in the market for the pelts and a surge in hunting.⁶⁷

In what Mowat calls “a singularly ironic twist of fate,” the seal hunt initially gained international notoriety through a film produced to promote tourism in Quebec that

⁶² Bowman et al, *supra* note 16 at 685.

⁶³ Statement of Aboriginal Subsistence Whaling Countries for IWC/58/WKM&AWI Workshop, Document IWC/58/Rep 7 Appendix 4 (13 June 2006).

⁶⁴ *Ibid.*

⁶⁵ Bruce A Wagman & Matthew Liebman, *A Worldview of Animal Law* (Durham, NC: Carolina Academic Press, 2011) at 96, state that the Canadian seal hunt “is the targets slaughter of marine mammals in the world.”

⁶⁶ *Sea of Slaughter* (Toronto: Seal Books, 1987) [first published 1984] at 386-427.

⁶⁷ *Ibid* at 388-399.

included footage of a seal hunt in the Magdalen Islands.⁶⁸ The graphic footage of sealers clubbing harp seal pups – “what may well be the most appealing young creature in the animal kingdom – and “close-ups of one of these attractive little animals – being skinned alive”⁶⁹ prompted outraged responses in Canada and around the world.⁷⁰ The Canadian seal hunt has been a focus of criticism by supporters of animal rights and animal welfare since that time.⁷¹

Humane concerns have been the main impetus for opposition to the seal hunt, with conservation issues generally playing a secondary role.⁷² There are competing accounts of the evidence, but it seems indisputable that at least some seals suffer prolonged deaths and/or are conscious when they are skinned.⁷³ It has been argued that

⁶⁸ *Ibid* at 392.

⁶⁹ *Ibid*.

⁷⁰ *Ibid* at 393.

⁷¹ Andrew Linzey, “An Ethical Critique of the Canadian Seal Hunt and an Examination of the Case for Import Controls on Seal Products” (2006) 2 J Animal L 87 at 89.

⁷² As Mowat notes (*supra* note 66 at 391), the high mortality levels in the 1960s reduced the harp and hood seal populations dramatically. Today, seal populations have rebounded, but opponents of the hunt argue that the reduction in the sea ice that seals rely on for whelping is a grave threat to their continued survival and that populations cannot withstand the additional stress of hunting (see, e.g., Humane Society of the United States, “Seals, Sea Ice and Climate Change,” online:

http://www.hsi.org/assets/pdfs/seals_sea_ice_climate_change_eng.pdf.

⁷³ A report by five independent veterinarians commissioned by the International Fund for Animal Welfare (IFAW), Rosemary L Burdon et al, *Veterinary Report: Canadian Commercial Seal Hunt, Prince Edward Island, 2001* (unpublished), online: http://www.antisealingcoalition.ca/resources/library/reports/file_95.pdf [Burdon Report], found that 58% of clubbed seals’ craniums exhibited “[e]xtensive fractures” that “would undoubtedly be associated with a level of unconsciousness” or “severe fractures” that “would be highly probable to be associated with a level of unconsciousness” while the remaining 42% had no fractures, minimal fractures or moderate fractures, indicating it was unlikely that the seals were unconscious when skinned (*ibid* at 7). The Burdon Report also concluded that shooting seals in open water (shooting being one of the permitted methods of killing, along with blows to the head using a club or *hacapik*, under Canada’s *Marine Mammal Regulations*, SOR/93-56 s 38(1)) “can never be humane” because it does not allow for rendering unconscious, testing for unconsciousness and exsanguinations to assure non-revival before the seal is gaffed or hooked (*ibid* at 5). Another veterinary report (Pierre-Yves Daoust et al, “Animal Welfare and the Harp Seal Hunt in Atlantic Canada” (2002) 43:9 Can Vet J 687 [Daoust Report]), found that only 1.9% of animals were considered to be alive and conscious when brought on board the sealing ship and examined directly, and only one seal out of 116 observed on video tapes (or 0.86%) appeared to be alive when hooked and brought on board. One reason for the discrepancy may be, as the Daoust report argues, that animals without extensive skull fractures could nevertheless have been rendered unconscious due to concussion; another, as IFAW scientific advisor David Lavigne argues (“Canada’s Commercial Seal Hunt is Not ‘Acceptably Humane’” (2005), online: <http://www.antisealingcoalition.ca/resources/library/reports/CanadasCommercialSealHuntNotAcceptablyHu>

cruelty is unavoidable in the seal hunt given the difficult conditions; hunters work on the ice or on ships, often in poor weather and visibility conditions and under pressure to gather skins quickly due to competition from other sealers.⁷⁴ Since seal hunting came to widespread public attention, moreover, it has been a matter of international public opinion and international policy. A European Economic Community ban in the 1980s on the import of skins of harp and hooded seal pups⁷⁵ eventually spurred the Canadian government to prohibit trading in “whitecoats” (young harp seals prior to beginning to moulting the white coat of newborns, generally at about 12-14 days old) and hooded seal “bluecoats” (young hooded seals prior to moulting their blue coat, generally at about 14 months old).⁷⁶

In 2009, the European Parliament and the Council of the European Union (EU) decided to prohibit the import of all products from commercial seal slaughter, “in response to concerns of citizens and consumers about the animal welfare aspects of the killing and skinning of seals and the possible presence on the market of products obtained

mane.pdf), is that Burdon *et al.* examined carcasses left on the ice by sealers who did not know that veterinarians would examine them (*ibid* at 1), while Daoust *et al.* made observations “directly from sealing vessels so that the sealers were unavoidably aware that observers were present” and examined seals brought to the vessel, rather than at the scene of the killing (*ibid* at 2). In any event, both reports indicate that at least some seals were skinned alive. Video footage shot by animal welfare organizations also supports the conclusion that death can be prolonged and preceded by great suffering; Linzey (*supra* note 71 at 105) describes Humane Society of the United States videotape of the 2005 hunt as showing “that seals are knifed opened without the blinking reflex or skull palpitation tests having been administered, repeated blows to the head and body of many seals (including one case in which a seal received more than 20 blows), animals left unattended in obvious states of suffering, one trying to drag itself over the ice with blood streaming from its nostrils, and some hooked seals dragged over the ice whilst almost certainly conscious.”

⁷⁴ Linzey, *ibid* at 97-99; Mary Richardson, “Inherently Inhumane: A Half-Century of Evidence Proves Canada’s Commercial Seal Hunt Cannot Be Made Acceptably Humane” (2007), submission to the European Food Safety Authority Animal Health and Animal Welfare Panel’s ad-hoc Working Group on the Humane Aspects of Commercial Seal Hunting, online:

http://www.antisealingcoalition.ca/resources/library/reports/inherentlyinhumane_richardson.pdf at 1.

⁷⁵ Council Directive (EEC) No 83/129/EEC of 28 March 1983 concerning the importation into Member States of skins of certain seal pups and products derived therefrom, [1983] OJ L 91/30, reprinted (as amended) in Austen & Richards, *supra* note 17 at 443; Mowat, *supra* note 66 at 411.

⁷⁶ *Marine Mammal Regulations*, *supra* note 73 s. 27.

from animals in a way that causes pain, distress, fear, and other forms of suffering.”⁷⁷

Canada has launched a dispute of the ban with the Dispute Settlement Body of the World Trade Organization (WTO).⁷⁸ This dispute may become a test case for whether animal welfare concerns can sustain an exemption from the general prohibition on import restrictions under the General Agreement on Tariffs and Trade (GATT)⁷⁹ (and other WTO agreements) pursuant to Article XX(a) of GATT, which permits a country to adopt reasonable measures to protect “public morals” or “human, animal or plant life or health.”⁸⁰

Against this background of international controversy over seal hunting in the North Atlantic, protections were established in international law for seals in the Antarctic region as part of the Antarctic Treaty System. In 1972, well before the 1991 *Protocol on Environmental Protection*,⁸¹ the *Convention for the Conservation of Antarctic Seals*⁸² was adopted, following the recommendation of the Antarctic Treaty Consultative Party

⁷⁷ Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products, [2009] OJ L 286/36 at 36.

⁷⁸ Dispute DS400, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds400_e.htm. Norway has also challenged the ban; see Dispute DS401, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds401_e.htm.

⁷⁹ 30 October 1947, 55 UNTS 194, entered into force 1 January 1948.

⁸⁰ Article XX(a)-(b). Canada’s complaint and the legal analysis under GATT are discussed in Robert Galantucci, “Compassionate Consumerism Within the GATT Regime: Can Belgium’s Ban on Seal Products Be Justified Under Article XX?” (2009) 39:2 California Western Int’l LJ 281 (Prior to the EU ban, both Belgium and then the Netherlands had banned importation of seal products) and Xinjie Luan & Julien Chaisse, “Preliminary Comments on the WTO Seals Products Dispute: Traditional Hunting, Public Morals and Technical Barriers in Trade” (2011) Colo J Int’l Env’t L & Pol’y 79. See also Kate Cook & David Bowles, “Growing Pains: The Developing Relationship of Animal Welfare Standards and the World Trade Rules” (2010) Rev European Community & Int’l Env’t L 227 (analyzing the potential justifications for animal-welfare based restrictions more generally); Edward M Thomas, “Playing Chicken at the WTO: Defending an Animal Welfare-Based Trade Restriction Under GATT’s Moral Exception” (2007) 34 BC Ent’l Aff L Rev 605 (arguing that import restrictions designed to support EU welfare standards for broiler chickens could survive a WTO challenge under the Article XX(a) public morals exception); and Charnovitz, *supra* note 15. For a contrary view, see Gary Miller, “Exporting Morality with Trade Restrictions: The Wrong Path to Animal Rights” (2008-2009) 34 Brook J Int’l L 999 (arguing that a 1998 U.S. ban on importation of cat and dog fur would not survive a WTO challenge).

⁸¹ *Supra* note 38.

⁸² 1 June 1972, 1080 UNTS 175, Can TS 1990 No 40 (entered into force 11 March 1978), reprinted in Austen & Richards, *supra* note 17 at 135.

Group.⁸³ The Convention includes an Annex of measures adopted by the parties and provides that the parties may adopt “other measures with respect to the conservation, scientific study and rational *and humane* use of seal resources.”⁸⁴ Section 7(a) of the Annex provides that the Scientific Committee on Antarctic Research of the International Council of Scientific Unions may make recommendations “with a view to ensuring that the killing or capturing of seals is quick, painless and efficient” and that the parties shall adopt rules giving due consideration to those recommendations. Section 7(b) prohibits taking seals from the water, except in limited purposes for research consistent with the objectives of the Convention, including “studies as to the effectiveness of methods of sealing from the viewpoint of the management and humane and rational utilization of the Antarctic seal resources for conservation purposes.”

5.2.5 Trapping

While animal welfare is an ancillary issue, albeit one of increasing importance, in international conservation law, the 1997 *Agreement on International Humane Trapping Standards*⁸⁵ has been described as “the first international [agreement] concerned exclusively with animal welfare.”⁸⁶ The *Agreement on Humane Trapping Standards*

⁸³ D’Amato & Chopra, *supra* note 45 at 37. D’Amato & Chopra describe this Convention as “momentous for Antarctic marine mammals since it acknowledged the importance of the Antarctic ecosystem” (*ibid*).

⁸⁴ Article 3(1) [emphasis added].

⁸⁵ 15 December 1997, European Community, Canada and Russian Federation, [1998] OJ L42/43 (entered into force for Canada 22 July 2008), reprinted in Austen & Richards, *supra* note 17 at 50. There is a parallel and substantially equivalent agreement between the European Community and the United States (*Agreed Minute between the European Community and the United States of America on humane trapping standards – Standards for the humane trapping of specified terrestrial and semi-aquatic mammals*, [1998] OJ L219/26). The United States did not enter into the main agreement because trapping is regulated at the state level (Austen & Richards, *ibid* at 51). The two agreements together are referred to here as the Agreement on Humane Trapping Standards.

⁸⁶ Stuart R Harrop, “The Agreements on International Humane Trapping Standards – Background, Critique and the Texts” (1998) 1:3 J Int’l Wildlife L & Policy 387 [Harrop, “Trapping”] at 387. See also Harrop, “Welfare and the IWC,” *supra* note 50 at 82 (noting that the Agreement on Humane Trapping Standards has a strong conservation component in addition to its focus on welfare).

emerged from a conflict, reminiscent of the current dispute over seal products, originating in the European Community's adoption of a ban on leg-hold traps in 1991.⁸⁷ The regulation also sought to ban the importation of fur products from outside the European Community, unless the country of origin had banned leg-hold traps or adopted trapping methods that complied with internationally agreed trapping standards.⁸⁸ Facing the threat of a WTO challenge, the European Community sought to negotiate a solution. The outcome was the *Agreement on Humane Trapping Standards*, which "seeks to balance trade and humanitarian concerns."⁸⁹ In the first recital of the preamble, the parties avow their "deep commitment to the development of international humane trapping standards." The Annex to the Agreement sets out the standards to be applied in certifying trapping methods as humane based on the assessment of the welfare of trapped animals. In general, trapping methods are only "humane" where "the welfare of the animals concerned is maintained at a sufficient level."⁹⁰

Since the *Agreement on Humane Trapping Standards* has a small number of parties and deals with only with a limited number of species in a specific context, it does not represent the translation into international law of the "universal acceptance of the necessity for general protection of animals" that von Holstein called for. In addition, international wildlife lawyer Stuart Harrop has cautioned that the standards are relatively weak and of the risk that they will become frozen in place as "lowest common denominator requirements," thus impeding the development of welfare standards for wild

⁸⁷ Council Regulation (EEC) No 3254/91 of 4 November 1991 prohibiting the use of leghold traps in the Community and the introduction into the Community of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards, [1991] OJ L308/1, reprinted in Austen & Richards, *supra* note 17 at 447.

⁸⁸ Harrop, "Trapping," *supra* note 86 at 388; Bowman et al, *supra* note 16 at 686.

⁸⁹ Bowman et al, *ibid* at 687.

⁹⁰ Section 1.3.1.

animals at the international and even national levels.⁹¹ The timeline for implementation of the standards extends over many years, which “may entail lengthy postponement of the elimination of ethically unacceptable techniques.”⁹² Nevertheless, the conclusion of an international agreement whose *raison d’être* is to promote animal welfare “has at least served to consolidate the place of animal welfare on the international agenda.”⁹³

5.3 WORLD ORGANISATION FOR ANIMAL HEALTH (OIE)

The World Organisation for Animal Health (Office International des Epizooties or OIE) was created in 1924,⁹⁴ with a mandate squarely in the realm of human, rather than animal, welfare: controlling outbreaks of disease among livestock⁹⁵ (such events being the cause of both economic loss and in many cases the spread of the infection to human populations). A need was seen for international cooperation in addressing these problems so that if an outbreak occurred in one country others would be informed and collective action could be taken to prevent the outbreak from spreading.⁹⁶ The creation of the OIE also meant that there was an internationally recognized organization to look to for scientifically based information on the best methods to combat animal diseases.⁹⁷ Today

⁹¹ Harrop, “Trapping,” *supra* note 86 at 391-4.

⁹² Bowman et al, *supra* note 16 at 688.

⁹³ *Ibid.*

⁹⁴ The constitutive instrument is the 1924 *International Agreement for the Creation at Paris of an International Office for Epizootics* (25 January 1924), 57 LNTS 135.

⁹⁵ Bowman et al, *supra* note 16 at 698. The OIE was formed following an outbreak of rinderpest (“cattle plague”) in Belgium in 1920, originating from cattle in international transit via the Belgian port of Antwerp. OIE, “History,” online: <http://www.oie.int/about-us/history/>.

⁹⁶ Bernard Vallat, “Foreword,” in *Proceedings of the Global Conference on Animal Welfare: An OIE Initiative* (Paris, 23-25 February 2004), online: http://www.oie.int/fileadmin/Home/eng/Conferences_Events/docs/pdf/proceedings.pdf [2004 Conference Proceedings].

⁹⁷ *Ibid.*

the OIE is the WTO reference organization for standards on animal health, and publishes codes and manuals on terrestrial and aquatic animal health and sanitary standards.⁹⁸

Beginning in 2001, animal welfare has become an integral aspect of the OIE's responsibilities. This aspect of the OIE's mandate originates in the strategic plan for 2001-2005, which identified animal welfare and food safety as two areas for OIE involvement. These two areas were adopted as strategic initiatives by the OIE General Assembly in 2001.⁹⁹ The OIE's animal welfare mandate was reaffirmed by the General Assembly in 2009.¹⁰⁰ The organization has a permanent Animal Welfare Working Group, which was inaugurated by the General Assembly in 2002.¹⁰¹ Two OIE-sponsored Global Conferences on Animal Welfare have been held, the first in Paris in February 2004¹⁰² and the second in Cairo in October 2008.¹⁰³

The OIE's *Terrestrial Animal Health Code* includes Guiding Principles on Animal Welfare,¹⁰⁴ which were first included in 2004.¹⁰⁵ The Guiding Principles acknowledge that the use of animals by humans "makes a major contribution to the wellbeing of people"¹⁰⁶ and that such use "carries with it an ethical responsibility to ensure the welfare of such animals to the greatest extent practicable."¹⁰⁷ The

⁹⁸ OIE, "International Standards," online: <http://www.oie.int/international-standard-setting/overview/>.

⁹⁹ A C David Bayvel, "The International Animal Welfare Role of the Office International des Epizooties: The World Organisation for Animal Health" in Jacky Turner and Joyce D'Silva, eds, *Animals, Ethics and Trade: The Challenge of Animal Sentience* (London: Earthscan, 2006) [*Animals, Ethics and Trade*] 248 at 248.

¹⁰⁰ Resolution No 23 (2009), online: <http://www.oie.int/doc/ged/D6124.PDF> [2009 Resolution].

¹⁰¹ OIE, "The OIE's Objectives and Achievements in Animal Welfare," online: <http://www.oie.int/animal-welfare/animal-welfare-key-themes/>.

¹⁰² 2004 Conference Proceedings, *supra* note 97.

¹⁰³ OIE, *supra* note 101.

¹⁰⁴ OIE, *Terrestrial Animal Health Code*, online: http://www.oie.int/index.php?id=169&L=0&htmfile=chapitre_1.7.1.htm [Terrestrial Code] Article 7.1.2.

¹⁰⁵ OIE, *supra* note 101.

¹⁰⁶ Article 7.1.2(5).

¹⁰⁷ Article 7.1.2(6).

“internationally recognized ‘five freedoms’” are identified as a valuable source of guidance in animal welfare.¹⁰⁸ With respect to the use of animals in scientific research, the “three Rs”¹⁰⁹ (reduction in numbers of animals, refinement of experimental methods and replacement of animals with non-animal techniques) are referenced as guiding principles.¹¹⁰ To date, the OIE has adopted seven animal welfare standards as part of the Terrestrial Code and two welfare standards as part of the *Aquatic Animal Health Code*.¹¹¹ These include standards on transportation, slaughter, use of animals in research and education, and farmed fish.¹¹² New standards on animals in livestock production systems are in development, with the first two priorities being broiler chickens and beef cattle.¹¹³

More generally, the OIE recognizes its role as significant to the evolution of the relationship between human beings and other animals. In the Foreword to the 2004 Conference Proceedings, OIE Director-General Bernard Vallat stated that “the OIE must also conduct a new mission that has not yet been undertaken at worldwide level, namely to convince all the decision-makers in its member countries of the need to take into account the human–animal relationship in favour of a greater respect for animals.”¹¹⁴ The important work that the OIE does in harmonizing scientifically based welfare standards is a practical pre-requisite to the development of a global approach to

¹⁰⁸ Article 7.1.2(2).

¹⁰⁹ The “three Rs” are primarily associated with W M S Russell and R L Burch, *The Principles of Humane Experimental Technique* (Potters Bar: Universities Federation for Animal Welfare, 1992) [first published 1959]. Russell and Burch summarize the principles as follows: “Replacement means the substitution for conscious living higher animals of insentient material. Reduction means reduction in the number of animals used to obtain information of given amount and precision. Refinement means any decrease in the incidence or severity of inhumane procedures applied to those animals which still have to be used” (*ibid* at 64).

¹¹⁰ Article 7.1.2(3).

¹¹¹ OIE, *supra* note 101.

¹¹² *Ibid.*

¹¹³ 2009 Resolution, *supra* note 100, at para 9.

¹¹⁴ *Supra* note 96.

regulating animal welfare. Bowman *et al.* observe that “[i]n order to develop a more coherent and co-ordinated regime, certain reforms appear desirable, including the establishment of an acceptable global forum for the elaboration and harmonization of appropriate welfare standards,” and that this requires “as a minimum, the identification of a suitable inter-governmental institution to undertake responsibility for this task.”¹¹⁵ With its adoption of a mandate for animal welfare, the OIE is stepping into this role.¹¹⁶

5.4 EUROPEAN ANIMAL WELFARE LAW

Europe has the most extensive and progressive corpus of animal welfare law at the supranational level. There are two sources: conventional law under the aegis of the Council of Europe, and EU legislation.¹¹⁷

5.4.1 Council of Europe

The Council of Europe, founded in 1949, has 47 member states, including all members of the EU.¹¹⁸ Its primary aims are “to defend human rights, parliamentary democracy and the rule of law,” and it also works to support “local democracy, education, culture and environmental protection.”¹¹⁹ The protection of animals has formed part of the Council’s agenda for more than forty years. In 1961, the Consultative

¹¹⁵ *Supra* note 16 at 698.

¹¹⁶ *Ibid.*

¹¹⁷ The discussion below surveys the most significant animal welfare aspects of European law, but is not exhaustive. Bowman *et al.* (*supra* note 16) discuss some of the less high-profile welfare protection measures arising in connection with wildlife protection, including a resolution under the 1991 *Agreement on the Conservation of Populations of European Bats*, 4 December 1991, UKTS 1994 No. 9, that research involving bats should “take account of the welfare of individual bats” (*ibid.* at 695) – thus demonstrating that animal welfare protection under European law is not reserved for conventionally popular or “cute” animals alone.

¹¹⁸ Council of Europe, “Who We Are,” online: <http://www.coe.int/aboutCoe/index.asp?page=quisommesnous&l=en>; David B Wilkins, “Outlawed in Europe: Animal Protection Progress in the European Union” in *Animals, Ethics and Trade*, *supra* note 99 at 219.

¹¹⁹ Wilkins, *ibid.*

Assembly of the Council of Europe, recommending the adoption of a treaty regulating the international transit of animals, declared that “the humane treatment of animals is one of the hall-marks of Western civilisation.”¹²⁰ Today, the Council’s web site affirms that “respect for animals counts among the ideals and principles which are the common heritage of its member States as one of the obligations upon which human dignity is based.”¹²¹

The Council of Europe responded to the Consultative Assembly’s 1961 recommendation by adopting first the 1968 CPAIT.¹²² The Council has subsequently adopted additional Conventions that together cover “virtually all the areas in which animals are directly used by humankind.”¹²³ The following Council of Europe Conventions deal with the protection of animals:

- *European Convention for the Protection of Animals Kept for Farming Purposes*,¹²⁴ which applies “in particular to animals in modern intensive stock-farming systems.”¹²⁵ The Convention generally provides that animals should be cared for in a manner that does not cause them “unnecessary suffering or injury.”¹²⁶ A Protocol¹²⁷ adopted in 1992 extends the scope of the Convention to the breeding of animals through genetic modification.

¹²⁰ Recommendation 287 (1961); Bowman et al, *supra* note 16 at 679; Egbert Ausems, “The Council of Europe and Animal Welfare” in *Ethical Eye*, *supra* note 13 233 at 233.

¹²¹ Council of Europe, “Introduction: Biological safety and use of animals by humans,” online: http://www.coe.int/t/e/legal_affairs/legal_co%2Doperation/biological_safety_and_use_of_animals/Introduction.asp#TopOfPage.

¹²² *Supra* note 5.

¹²³ Ausems, *supra* note 120 at 253.

¹²⁴ 10 March 1976, 1976 Eur TS 87 (entered into force 10 September 1978), reprinted in Austen & Richards, *supra* note 17 at 327 [*Farm Animals Convention*].

¹²⁵ Article 1.

¹²⁶ See, e.g., Article 4(1) (freedom of movement); Article 6 (provision of food and liquids); Article 7 (monitoring animals’ condition and state of health).

- *European Convention for the Protection of Animals for Slaughter*,¹²⁸ which commits the parties to adopting “slaughter methods which as far as possible spare animals suffering and pain.”¹²⁹
- *European Convention for the Protection of Vertebrate Animals Used for Experimental and Other Scientific Purposes*,¹³⁰ which seeks to protect such animals from procedures that may cause pain and suffering and to ensure that where unavoidable they are kept to a minimum.¹³¹
- *European Convention for the Protection of Pet Animals*,¹³² which enshrines as basic welfare principles that “[n]obody shall cause a pet animal unnecessary pain, suffering or distress”¹³³ and “[n]obody shall abandon a pet animal.”¹³⁴
- *European Convention for the Protection of Animals During International Transport*,¹³⁵ which was revised in 2003.

The impact of these Conventions is subject to certain limitations in practice, both because member states are not obligated to enter into or ratify them, and because those that have ratified them can choose to put their provisions into effect either through

¹²⁷ *Protocol of Amendment to the European Convention for the Protection of Animals Kept for Farming Purposes*, 6 February 1992, Eur TS 145 (entered into force 1 December 2009), reprinted in Austen & Richards, *supra* note 17 at 331.

¹²⁸ 10 May 1979, Eur TS 102 (entered into force 11 June 1982), reprinted in Austen & Richards, *ibid* at 334.

¹²⁹ Second recital of the Preamble.

¹³⁰ 18 March 1986, Eur TS 123 (entered into force 1 January 1991), reprinted in Austen & Richards, *supra* note 17 at 356; see also *Protocol of Amendment to the European Convention for the Protection of Vertebrate Animals Used for Experimental and Other Scientific Purposes 1998*, 22 June 1998, Eur TS 170, reprinted in Austen & Richards, *ibid* at 366.

¹³¹ Fifth recital of the Preamble.

¹³² 13 November 1987, Eur TS 125 (entered into force 1 May 1994), reprinted in Austen & Richards, *supra* note 17 at 349.

¹³³ Article 3(1).

¹³⁴ Article 3(2).

¹³⁵ *Supra* note 5.

legislation or, alternatively, through codes of practice or educational programs.¹³⁶ But they have had a significant influence on the development of European animal protection law, becoming “a reference in the European countries for the elaboration of relevant national legislations” and forming the basis for EU law in this area.¹³⁷

5.4.2 European Union Legislation

The EU is an economic and political union of 27 European states. The precursor to the EU, the European Economic Community (EEC), began as a customs union of six nations (France, Germany, Italy, The Netherlands, Belgium and Luxembourg) which was established under the *Treaty of Rome*¹³⁸ in 1957. In those early days, animals were relevant in EEC law only as agricultural products for trade.¹³⁹ Today, EU institutions are empowered to adopt legislation and to regulate in certain areas. There is an explicit basis in the constitutive treaties for the EU to make laws for the protection of animals. The 1997 *Treaty of Amsterdam*,¹⁴⁰ which amended the Consolidated *Treaty on European Union*,¹⁴¹ adopted a *Protocol on Protection and Welfare of Animals*¹⁴² that provides as follows:

THE HIGH CONTRACTING PARTIES,

DESIRING to ensure improved protection and respect for the welfare of animals as sentient beings,

¹³⁶ Wilkins, *supra* note 118 at 220.

¹³⁷ Council of Europe, *supra* note 121.

¹³⁸ 25 March 1957, 298 UNTS 3 (entered into force 1 January 1958).

¹³⁹ Wilkins, *supra* note 118 at 220.

¹⁴⁰ *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts*, 2 October 1997, [1997] OJ C 340/110, 37 ILM 56 (entered into force 1 May 1999).

¹⁴¹ [2010] OJ C 83/13.

¹⁴² *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts - Protocol annexed to the Treaty of the European Community - Protocol on protection and welfare of animals*, 1997 OJ C 340 [Amsterdam Protocol].

HAVE AGREED UPON the following provision which shall be annexed to the Treaty establishing the European Community,

In formulating and implementing the Community's agriculture, transport, internal market and research policies, the Community and the Member States shall pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.

The *Amsterdam Protocol* creates an obligation at least as a procedural matter¹⁴³ to consider animal welfare in creating policy on the specified areas (agriculture, transport, internal market and research policies). The mandate set out in the *Amsterdam Protocol* is now Article 13 of the *Treaty on the Functioning of the European Union*.¹⁴⁴

The EU has enacted a number of Directives that together make up one of the world's strongest legal regimes for animal protection.¹⁴⁵ Directives are binding on member states, but national authorities are free to choose the form and method used to implement them in domestic law.¹⁴⁶ The main area of legislation is farm animal welfare (although there are Directives on animal welfare in other contexts, including a new *Directive on the protection of animals used for scientific purposes*¹⁴⁷ adopted in 2010).

¹⁴³ Cf. Bowman et al, *supra* note 16 at 680-681, positing that animal protection may function in international law in general mainly as a procedural principle that requires due regard to be paid to welfare considerations when formulating or implementing policies.

¹⁴⁴ *Consolidated Version of the Treaty on the Functioning of the European Union*, [2008] OJ C 115/47.

¹⁴⁵ Critics have argued, however, that EU measures still do not go far enough in certain respects. See, e.g., Peter Stevenson, "European Union Law on the Welfare of Farm Animals" (2004) Compassion in World Farming Trust, online: http://www.ciwf.org.uk/includes/documents/cm_docs/2008/e/eu_law_2004.pdf at 23-28, arguing for the adoption of various reforms to enhance animal protection.

¹⁴⁶ *Ibid* at 4.

¹⁴⁷ EC, *Council Directive 2010/63/EU of 22 September 2010 on the protection of animals used for scientific purposes*, [2010] OJ, L276/33, which updated *Council Directive 86/609/EEC of 24 November 1986 on the*

The overarching principles of EU law on farm animal welfare are set forth in the *Directive concerning the protection of animals kept for farming purposes* [*Farm Animals Directive*].¹⁴⁸ The *Farm Animals Directive* reflects the provisions of the European *Farm Animals Convention*,¹⁴⁹ which all Member States had ratified. It covers all vertebrate animals “bred or kept for the production of food, wool, skin or fur or for other farming purposes”¹⁵⁰ (including fish, reptiles and amphibians).¹⁵¹ Member States are obligated to make provision to ensure that those responsible for the care of animals “take all reasonable steps to ensure the welfare of animals under their care and to ensure that those animals are not caused any unnecessary pain, suffering or injury,”¹⁵² and to ensure that conditions comply with more detailed specifications in the Annex to the Directive.¹⁵³

There is a basis to argue that the general requirement to prevent unnecessary suffering and the specific standards set forth in the Annex make questionable the legality of intensive farming methods (bearing in mind the explicit reference in the *Farm Animals Convention* to “modern intensive stock-farming systems”). For example, paragraph 7 of the Annex provides that animals must have freedom of movement that is not restricted in such a way as to cause unnecessary suffering or injury. Article 21 provides that no animal may be kept for farming purposes “unless it can reasonably be established, on the basis of its genotype or phenotype, that it can be kept without detrimental effect on its health or welfare.” Arguably, “this provision could be used to challenge the use of

approximation of laws, regulations and administrative provisions of the Member States regarding the protection of animals used for scientific purposes, [1986] OJ L358/1.

¹⁴⁸ EC, *Council Directive 98/58/EC of 20 July 1998 concerning the protection of animals kept for farming purposes*, [1998] OJ L221/23, reprinted in Austen & Richards, *supra* note 17 at 471.

¹⁴⁹ *Supra* note 124.

¹⁵⁰ Article 1.

¹⁵¹ Article 2(1) (definition of “animal”).

¹⁵² Article 3.

¹⁵³ Article 4.

genotypes which have been selected for such high levels of productivity that the animals suffer from serious health and welfare problems,” such as very fast-growing chickens used for meat.¹⁵⁴ It also raises questions about the “farming” of wild animals (e.g., for fur), which cannot be kept in captivity without detriment to their welfare.

In addition to the general provisions of the *Farm Animals Directive*, the EU has adopted specific rules prohibiting some of the worst aspects of factory farming:

- Laying hens: *Council Directive 1999/74/EC of 19 July 1999 laying down minimum standards for the protection of laying hens*¹⁵⁵ outlaws the most crowded “battery” cages starting 2002 for existing facilities and for all facilities from 2012,¹⁵⁶ and requires at a minimum that hens be provided with “enriched” cages with perches and nest areas.¹⁵⁷
- “Broilers” (chickens used for meat): *Council Directive 2007/43/EC of 28 June 2007 laying down minimum rules for the protection of chickens kept for meat production*¹⁵⁸ establishes maximum stocking densities and rules on lighting, ventilation, feeding, inspection and record-keeping.
- Calves: *Council Directive 2008/119/EC of 18 December 2008 laying down minimum standards for the protection of calves*¹⁵⁹ prohibits keeping calves in individual pens after the age of eight weeks,¹⁶⁰ establishes minimum dimensions for individual calf pens,¹⁶¹ and requires the feeding of an

¹⁵⁴ Stevenson, *supra* note 145 at 15.

¹⁵⁵ [1999] OJ L 203/53.

¹⁵⁶ Article 5(2).

¹⁵⁷ Chapter II.

¹⁵⁸ [2007] OJ L 182/19.

¹⁵⁹ [2009] OJ L 10/7.

¹⁶⁰ Article 3(1)(a).

¹⁶¹ *Ibid.*

appropriate diet including sufficient iron.¹⁶² These standards applied to new facilities from 1999¹⁶³ and all facilities from 2007.¹⁶⁴

- Pigs: *Council Directive 2008/120/EC of 18 December 2008 laying down minimum standards for the protection of pigs*¹⁶⁵ requires pigs to be kept in groups (*i.e.*, not in individual crates) except for sows in the first four weeks of pregnancy¹⁶⁶ or where the pig has to be kept apart from others because it is sick or aggressive (in which case it should be in a pen that is big enough to permit it to turn around)¹⁶⁷; requires that pigs have permanent access to suitable material “to enable proper investigation and manipulation activities,”¹⁶⁸ and prohibits routine tail-docking and shortening of teeth.¹⁶⁹

These provisions applied to existing facilities from 2003 and come into force for all facilities in 2013.¹⁷⁰

In addition, the EU has adopted relatively strong rules on animal slaughter¹⁷¹ and transportation.¹⁷²

¹⁶² Annex I, para 11.

¹⁶³ Article 3(1).

¹⁶⁴ Article 3(2).

¹⁶⁵ [2009] OJ L 47/5.

¹⁶⁶ Article 4.

¹⁶⁷ Article 8.

¹⁶⁸ Annex 1, para 4.

¹⁶⁹ Annex 1, para 8.

¹⁷⁰ Article 9.

¹⁷¹ EC, *Council Directive 93/119/EC of 22 December 1993 on the protection of animals at the time of slaughter or killing*, [1993] OJ L 340/21, reprinted in Austen & Richards, *supra* note 17 at 471; *Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing* [2009] OJ L 303/1.

¹⁷² EC, *Council Regulation (EC) 1/2005 of 22 December 2004, on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) No 1255/97*, [2005] OJ L 3/1.

5.4.3 Animal Protection as a European Ideal

Animal welfare has become more prominent in European law at the same time that European regional institutions have evolved from a primary focus on facilitating trade to reflect deeper values than economic interaction alone. As English biologist and writer Colin Tudge has said of the idea of Europe: “If it is just a marketing cartel, or just another power base, then so what?”¹⁷³ For Tudge, Europe, if it is to be a serious idea, must stand for “a serious version of civilisation – not the only version there is but an excellent one nonetheless: one that truly contributes to the world as a whole.”¹⁷⁴ The greatest attribute of this “version of civilisation” is to be found in “our treatment of those who are vulnerable, and cannot fight back if we treat them badly: vulnerable people, and all non-human species.”¹⁷⁵ From this point of view, European law protecting animals is not merely a matter of harmonizing rules to facilitate commerce, or arming bureaucrats with new checklists, but “to a significant extent...measures the worth of the European ideal.”¹⁷⁶

5.5 TOWARDS ENSHRINEMENT OF ANIMAL PROTECTION IN INTERNATIONAL LAW

Several initiatives have been undertaken for the adoption of a global instrument enshrining protections for animals, although none has yet come to fruition.

5.5.1 Universal Declaration of Animal Rights

In the 1970s, a *Universal Declaration of Animal Rights* (UDAR) was adopted by the International League for Animal Rights, which was eventually submitted to the

¹⁷³ “Conclusion – Animal Welfare and the Ideal of Europe,” in *Ethical Eye*, *supra* note 13 255 at 255.

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

United Nations Educational, Scientific and Cultural Organization (UNESCO) in 1990.¹⁷⁷ The text of the UDAR seems designed more to raise consciousness of animal protection issues than for endorsement by states as principles with legal force.¹⁷⁸ The rights proclaimed are broad and unqualified (for example, “No animal shall be subjected to bad treatment or cruel actions”¹⁷⁹). Important terms are undefined, including the key term “animal”¹⁸⁰ (although the second recital of the Preamble states that “every animal with a nervous system has rights”); an action that causes the death of “a lot of wild animals” is deemed to be genocide,¹⁸¹ but how many are “a lot” is not specified.

5.5.2 Convention for the Protection of Animals

A more pragmatic, and certainly more lawyerly, approach was a project undertaken by the International Committee for a Convention for the Protection of Animals to draft a multilateral animal protection treaty, beginning in the 1980s. This initiative originated in discussions among observer groups at the 1983 CITES Conference of the Parties.¹⁸² A draft *International Convention for the Protection of Animals* (Protection Convention) was eventually developed, using a multi-level approach similar to that commonly adopted for environmental treaties: “a series of broadly-stated substantive provisions and organizational and implementation arrangements; a series of

¹⁷⁷ Michael Bowman, “The Protection of Animals Under International Law” (1989) 4 Conn J Int’l L 487 at 496 [Bowman, “Protection”] 497; Kyle Ash, “The Rights of Nonhuman Animals and World Public Order: A Global Assessment (1983-1984) 38 NYLS L Rev 377 at 414-415; Valerio Pocar, “Animal Rights: A Socio-Legal Perspective” (1992) 19:2 J L & Soc’y 214 at 223. The text of the draft Declaration (as revised in 1989) is available online at http://jose.kersten.free.fr/aap/pages/uk/UDAR_uk.html.

¹⁷⁸ Bowman, “Protection,” *ibid* at 497, observing that the UDAR “as valuable both for drawing attention to the general problem of abuse of animals and for itemizing many of the principle areas of concern” but noting that a legal instrument modeled on it would be unlikely to be accepted by states.

¹⁷⁹ Article 3(a).

¹⁸⁰ Bowman, “Protection,” *supra* note 177 at 497.

¹⁸¹ Article 12(a).

¹⁸² Bowman, “Protection,” *supra* note 177 at 497.

related protocols addressing specific animal welfare issues in greater detail; and annexes or appendices itemizing particular care standards and proscribed devices.”¹⁸³

5.5.3 Universal Declaration of Animal Welfare

A more recent initiative, the *Universal Declaration on Animal Welfare* (UDAW),¹⁸⁴ was initially proposed in June 2000 by the World Society for the Protection of Animals (WSPA). By contrast with the draft Protection Convention and its Protocols, which prescribe with particularity standards for specific situations, the UDAW is an open and general outline of broad guiding principles. This is fitting for a Declaration that is proposed for endorsement as a nonbinding resolution by the UNGA. If the UDAW is adopted as a resolution, its principles may eventually be reflected in multilateral treaty commitments – perhaps along the more detailed and specific lines of the draft Protection Convention. It is modeled on “similar statements of ethics...embodied in the Universal Declaration on Human Rights and the Declaration of the Rights of the Child”¹⁸⁵ that became the foundation for international conventions. Like the UDAR and the Protection Convention, the UDAW manifests a view that animal welfare is an international issue regardless of whether animals are migrating or being transported internationally, and even if problematic treatment of animals occurs entirely within national borders.¹⁸⁶

¹⁸³ *Ibid.* The draft text of the Protection Convention and four Protocols (Companion Animal Protocol, Protocol for the Care of Exhibited Wildlife, Protocol for the Taking of Wild Animals and Protocol for the International Transportation of Animals) are available online at <http://www.animallaw.info/treaties/itconfprotanimal.htm>.

¹⁸⁴ The provisional draft text of the proposed UDAW as of 2005 is available at http://s3.amazonaws.com/media.animalsmatter.org/files/resource_files/original/en_draft.pdf.

¹⁸⁵ Wagman & Liebman, *supra* note 65 at 25.

¹⁸⁶ *Ibid.*

The Preamble in the provisional draft text of the UDAW recognizes “that animals are living, sentient beings and therefore deserve due consideration and respect.”¹⁸⁷ It sets forth four principles: the welfare of animals should be a common objective for states; there should be improved measures for animal welfare both nationally and internationally; appropriate steps should be taken to prevent cruelty to animals and to reduce their suffering; and standards should be developed for specific situations, including farm animals, companion animals, animals in scientific research, draught animals, wildlife animals and animals in recreation.¹⁸⁸ The Preamble also refers to the work of the OIE as an important source of global standards in animal welfare,¹⁸⁹ and to the “five freedoms,”¹⁹⁰ as well as the “three Rs” of animal experimentation¹⁹¹ as valuable guidance in developing welfare standards.¹⁹²

Of all the projects undertaken to date aiming at the adoption of an international instrument for animal protection, the UDAW is by far the closest to coming to fruition. So far, about 40 governments have announced their support for the adoption of a UDAW,¹⁹³ and the WSPA continues to work towards securing more endorsements (from individuals as well as governments). In 2003, the government of the Philippines hosted an intergovernmental conference to discuss the UDAW, which was attended by delegations from 22 countries. An intergovernmental steering committee for adoption of a UDAW was formed in 2005, and in 2007 the OIE gave its support in principle to the

¹⁸⁷ First recital of the Preamble.

¹⁸⁸ Principles 1-4.

¹⁸⁹ Fourth recital of the Preamble.

¹⁹⁰ *Supra* note 3.

¹⁹¹ *Supra* note 109.

¹⁹² Ninth recital of the Preamble.

¹⁹³ The WSPA stated that 40 governments have endorsed the UDAW in a news item posted on its web site in 2010 (“Support Grows in Latin America for a UDAW,” online: <http://news.animalsmatter.org/>).

initiative.¹⁹⁴ On November 6, 2009, Canadian MPs voted unanimously in favour of a motion calling on the government to support in principle the development of a UDAW.¹⁹⁵

Valerio Pocar observed in 1992, with reference to the UDAR and the Protection Convention (he was writing before the UDAW existed), that “[f]or the purposes of [the] argument [that animals theoretically have at least some legal rights], it would be sufficient merely to quote the existence of such movements, but their very real degree of success in influencing governments suggests that legal protection for animal rights is not merely theoretically possible but also politically feasible (and fashionable).”¹⁹⁶

5.5.4 The Rights of Nature in International Law

In connection with the evolution of an articulation of some form of animal rights or animal protection in international law, it seems relevant to discuss the parallel, and often related, emergence of a concept of rights belonging to the natural world. International instruments that seek to protect the rights of “nature,” whether or not they expressly refer to ethical concerns relating to the status and treatment of individual creatures, are thematically linked to the question of animal welfare in that they have to do with the relationship between human beings and the living things and biological systems with which we coexist.

The *World Charter for Nature*¹⁹⁷ was adopted by a resolution of the UNGA in 1982. Its main theme is that human consumption of and interaction with natural

¹⁹⁴ See timeline on the WSPA web site, online:

http://s3.amazonaws.com/media.animalsmatter.org/files/resource_files/original/en_routemap.pdf. See also discussion of the background and history of the UDAW in “Compromise and the Universal Declaration on Animal Welfare,” editorial, *Animal People* (July/August 2005) 3, online:

<http://www.animallaw.info/nonus/articles/auuseditorial2005universaldeclaration.htm>.

¹⁹⁵ *House of Commons Debates*, 40th Parl, 2nd Sess, No 109 (6 November 2009) at 1400; WSPA, “UDAW Campaign Reaches Critical Milestone,” online: <http://news.animalsmatter.org/page/2>.

¹⁹⁶ *Supra* note 177 at 224.

¹⁹⁷ Annex to GA Res 37/7, UNGAOR, 1982, Supp. No. 51, UN Doc A/37/51 at 17.

resources and systems should not result in irreversible destruction. Accordingly, the primary focus on the *Charter* is on conservation and sustainable development. It also enshrines the principle that “[e]very form of life is unique, warranting respect regardless of its worth to man, and, to accord other organisms such recognition, man must be guided by a moral code of action.”¹⁹⁸ The same principle is reflected in the 1991 revision of the World Conservation Strategy commissioned by the UN, *Caring for the Earth*, which asserts the responsibility of human beings “towards other forms of life with which we share this planet,” and affirms that “all the species and systems of nature deserve respect regardless of their usefulness to humanity.”¹⁹⁹

The draft *Universal Declaration of the Rights of Mother Earth*,²⁰⁰ which was drafted in 2010 at the World People’s Conference on Climate Change and the Rights of Mother Earth in Cochabamba, Bolivia and discussed at the UNGA in April 2011,²⁰¹ embodies the link between respect for other forms of life and biological phenomena in general, and specific protection for animals from unnecessary suffering. The Preamble affirms that “to guarantee human rights it is necessary to recognize and defend the rights of Mother Earth and all beings in her.”²⁰² Article 2(3) provides that “[e]very being has the right to wellbeing and to live free from torture or cruel treatment by human beings.”

¹⁹⁸ Third recital, subsection (a), of the Preamble.

¹⁹⁹ IUCN/UNEP/WWF, *Caring for the Earth: A Strategy for Sustainable Living* (Gland, Switzerland: IUCN/UNEP/WWF, 1991) at 13-14.

²⁰⁰ The draft text dated 22 April 2010 is available on the website of the Community Environmental Legal Defense Fund (CELDF) at <http://celdf.org/downloads/FINAL%20UNIVERSAL%20DECLARATION%20OF%20THE%20RIGHTS%20OF%20MOTHER%20EARTH%20APRIL%2022%202010.pdf>.

²⁰¹ Brandon Keim, “Nature to Get Legal Rights in Bolivia”, *Wired* (18 April 2011), online: <http://www.wired.com/wiredscience/2011/04/legal-rights-nature-bolivia/>.

²⁰² Fifth recital of the Preamble.

5.6 ANIMAL WELFARE, INTERNATIONAL LAW AND NORMATIVE CONSENSUS

The legal sources surveyed in this chapter constitute solid evidence of something approaching a world-wide consensus that the way human beings treat other animals is susceptible of legal regulation at the international level, and that such regulation should reflect at least a recognition that it is wrong for humans beings to inflict unnecessary suffering on animals. These sources also tend to negate any argument that the law limits its concern to gratuitous or sadistic cruelty, since the use of animals for rational human ends (especially farming, and also things like hunting and scientific experimentation) has been a primary focus of the some of the most important supranational law-making projects. The question that then arises is whether some general principle can be extrapolated from all of these particular examples that has status as a normative, persuasive or even binding principle of international law.

CHAPTER SIX THE JURIDICAL STATUS OF THE HUMANE TREATMENT PRINCIPLE IN INTERNATIONAL LAW

6.1 UNDER CONSTRUCTION

Animal welfare is recognized as a significant issue, and one appropriate for regulation, in international law. The standard expressed in the principle of humane treatment is pervasive in international legal instruments that deal with the matter. Does this mean that the protection of animal welfare, or the principle of humane treatment, has achieved the status of a generally binding international norm, in the form of customary international law or a general principle of international law?

Some legal scholars have argued based on “first principles” reasoning that the protection of animals has a place among the fundamental principles expressed in international law. Kyle Ash has argued that international law should develop to recognize the place of human beings on an evolutionary continuum with other creatures and the mutual interdependence of inhabitants of the biosphere, discarding an “exclusionary” concept of human dignity and redefining the basis of human rights to include other species.¹ Paola Cavalieri argues that the theoretical foundations of human rights law cannot justifiably be limited to the human species and should be extended to other animals.² Cavalieri concludes that this would require the abolition of the status of animals as “mere assets” and “the prohibition of all the practices that are today made possible by such status, from raising for food to scientific experimentation to the most varied forms of commercial use and systematic extermination.”³

¹ “International Animal Rights: Speciesism and Exclusionary Human Dignity” (2005) 11 *Animal L* 195.

² *The Animal Question: Why Nonhuman Animals Deserve Human Rights*, translated by Catherine Woollard (Oxford: Oxford University Press, 2001).

³ *Ibid* at 143.

But these positions undoubtedly do not reflect the current reality of international law. Indeed, it could be said that looking for a principle of protection for animals in international law is akin to trying to run before being able to stand up. Even domestic legal systems, although they almost invariably have express provisions protecting animal welfare, pay relatively little attention to the interests of animals. One of the disabilities animals face in domestic legal systems is that they do not have the status of legal persons.⁴ Considering that even individual human beings are not normally included in the category of “persons” under international law,⁵ the challenges of defending animal interests through international law seem all the more daunting.

Brunnée and Toope’s theory of interactional international law contemplates that law is “not an all-or-nothing proposition” and “it is possible to talk about law that is being constructed.”⁶ For example, they identify the international climate change regime

⁴ Under Canadian law, domestic animals are property, not “persons” (albeit property with respect to which the state circumscribes owners’ rights in significant ways by prohibiting cruel treatment). See *Ebers v McEachern*, [1932] 3 DLR 415 (PEI Sup Ct), holding that ranched silver black foxes were domesticated animals and therefore a subject of absolute property. The property status of animals is underlined by the fact that the animal cruelty provisions of the *Criminal* are found in Part XI of the *Code* (“Willful and Forbidden Acts in Respect of Certain Property”), along with arson and other miscellaneous offences relating to property such as interfering with the saving of a wrecked vessel (s. 438) and interfering with property boundary lines (s. 442). There have been several attempts by Parliament to amend the *Criminal Code* to move the animal cruelty provisions to a different location in the *Code*, a largely symbolic change that would reflect a focus on mistreatment of animals rather than damage to property. Moving the provisions out of the *Code*’s property provisions was vigorously opposed – no doubt for similarly symbolic reasons – by such groups as the Canadian Cattlemen’s Association, Chicken Farmers of Canada, the Alberta Farm Care Association and the Ontario Federation of Anglers and Hunters. See John Sorensen, “Some Strange Things Happening in Our Country’: Opposing Proposed Changes in Anti-Cruelty Laws in Canada” (2003) 12 Soc & Leg Studies 377.

⁵ States and, under appropriate conditions, international organizations possess international legal personality – that is, they have rights and duties under international law and the capacity to enforce rights by bringing legal claims. Ian Brownlie, *Principles of Public International Law* 7th ed (Oxford: Oxford University Press, 2008) at 57-58. Individual persons can be legal persons in international law “in particular contexts” (primarily in the area of human rights). *Ibid* at 65; see also *ibid*, Chapter 25.

⁶ Jutta Brunnée & Stephen Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010) at 23.

as an area of international law where procedural elements of the legal structure “largely meet the tests of legality” but substantive standards “remain works in progress.”⁷

Looking at the manifestations of animal welfare concerns in international law through the lens of Brunnée and Toope’s interactional analysis, and also in light of the doctrinal requirements for the various forms of binding international law, it appears that the humane treatment principle is a principle of international law in the process of being constructed; while it probably not fully crystallized as a generally binding norm, it is far enough along in the process to matter, and to have some practical influence on how international law is taking shape.

6.2 ANIMAL WELFARE IN THE INTERNATIONAL NORM LIFE CYCLE

It is striking how fittingly the interactional account describes the emergence of animal welfare in the international legal realm. The sources covered in Chapter Five are evidence of a process of law formation that strongly corresponds to this model: a normative standard that first arose from a basic consensus on bedrock principles, rooted in shared understandings common to the world’s many cultural traditions, and that has gradually expanded and deepened to more substantive and precise commitments in certain contexts. There is an abundance of evidence that the protection of animal welfare is, to borrow Judge Weeramantry’s words from his opinion in the *Gabcikovo* case, “an integral part of modern international law.”⁸

⁷ *Ibid* at 17.

⁸ *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v Slovakia)*, [1997] ICJ Rep 7 at 89.

The growing prominence of animal welfare in international law is due in part to the work of norm entrepreneurs (in Finnemore and Sikkink's phrase⁹) including international animal-focused NGOs like the International Fund for Animal Welfare and the WSPA, which has shepherded the development of the UDAW and persuaded national governments and other influential actors around the world to endorse it.¹⁰ An umbrella organization, the International Coalition for Farm Animal Welfare (ICFAW), was formed in 2001 to represent animal welfare NGOs from around the world at the OIE, providing the OIE with "an internationally based animal welfare body that it can consult during its decision-making process."¹¹ Their efforts are redefining the global ethical consensus on the moral significance of animal suffering and the rules that should be in place to mitigate it. Advances in animal protection at the domestic level also contribute to gradually moving the baseline of acceptable animal welfare standards.

The recently announced agreement between animal welfare organizations and the egg industry in the US to advocate federal legislation imposing welfare standards for egg production appears likely to result, eventually, in US nationwide standards similar to the EU law that requires hens to have "enriched" cages with perches and nest areas.¹² If these requirements – significantly better for the welfare of laying hens than the current prevalent practice in the US – do indeed end up being law in both the EU and the US, with their tremendous combined influence in international trade and politics, that would

⁹ Martha Finnemore & Kathryn Sikkink, "International Norm Dynamics and Political Change" (1998) 53 *Int'l Organization* 887.

¹⁰ See discussion in Section 5.5.3.

¹¹ David B Wilkins, "Outlawed in Europe: Animal Protection Progress in the European Union" in Jacky Turner & Joyce D'Silva, eds, *Animals, Ethics and Trade: The Challenge of Animal Sentience* (London: Earthscan, 2006) 219 at 224; ICFAW website, online: <http://www.icfaw.org/index.html>.

¹² William Neuman, "Egg Producers and Humane Society Urging Federal Standard on Hen Cages", *The New York Times* (7 July 2011) B6, online: http://www.nytimes.com/2011/07/08/business/egg-producers-and-humane-society-urging-federal-standard-on-hen-cages.html?_r=1&hp. See discussion of EU law in Section 5.4.2.

suggest that the role of “norm leadership” on farm animal welfare is being taken on by some of the most prominent international players. Furthermore, China’s moves in the direction of adopting a general animal welfare law¹³ indicates that the principle of humane treatment of animals is close to the tipping point at which a critical mass of states have adopted the principle and a cascade of acceptance follows on.

6.3 HUMANE TREATMENT AND THE CRITERIA OF LEGALITY

The principle of humane treatment of animals scores well when it is evaluated against Fuller’s criteria of legality. The criteria, again, are generality, promulgation, non-retroactivity, clarity, avoidance of contradictions, not requiring the impossible, constancy through time, and congruence between rules and actions.¹⁴ As shown in Chapter Five, the legal formula that unnecessary harm to animals should be avoided (or similar, equivalent formulations) appears in a great many international legal sources; it is generally applicable and widely promulgated. Nor are there discernible issues with respect to retroactivity, internal contradictions, or demanding the impossible. The principle that human ends must be balanced against the severity of harm imposed on animals is a clear enough concept, although, like any such balancing test, it involves the exercise of judgment in grey areas and it will not always be clear what is “necessary” in particular circumstances. But the idea that, at least, this is the justificatory test that applies to the treatment of animals is simple and clear, and is the basis for more specific standards like the “five freedoms” for farm animals – recognized internationally and endorsed by the OIE¹⁵ – that are also straightforward and well understood.

¹³ See Section 4.4.

¹⁴ See discussion in Section 2.4.1.

¹⁵ See discussion in Section 5.1.

Without question, however, there are significant issues when it comes to the criterion of congruence between stated rules and official actions. The problem of inconsistency and hypocrisy in international discourse about animals – where some countries condemn the cultural practices of others in the name of animal protection, while at the same time different but equally cruel actions are treated as unremarkable – has already been alluded to. The express animal welfare provisions of both international and national law are disregarded and underenforced to a significant extent. For example, Bowman discusses evidence of widespread failures to comply with CITES standards for the transportation of animals, as well as failure by states to maintain records as required under CITES of mistreatment and mortality during transportation so that any progress or lack thereof could be more effectively monitored.¹⁶ Trent *et al.* have discussed the lack of enforcement of domestic animal welfare law, particularly where resources for law enforcement are scarce.¹⁷ There is strong evidence – indeed, it is a matter of common sense and common knowledge – that much verbal fealty is paid to the idea of animal welfare, while in reality animals are subjected to the most horrific abuses as a matter of course in every country.

The effect of paying lip service to a principle while not taking concrete and practical steps to give it real effect is corrosive to its credibility as law. Brunnée and Toope discuss such a problem of congruence with respect to a norm that is far better established (at least at the rhetorical level) in international law than the humane treatment of animals: the norm against torture, which is widely regarded as *jus cogens* – among the

¹⁶ Michael Bowman, “Conflict or Compatibility? The Trade, Conservation and Animal Welfare Dimensions of CITES” (1998) 1 J Int’l Wildlife L & Pol’y 9 at 60-61.

¹⁷ Neil Trent et al, “International Animal Law, with a Concentration on Latin America, Asia, and Africa” in Deborah J Salem & Andrew N Rowan, eds, *The State of the Animals III 2005* (Washington, DC: Humane Society Press, 2005) 65; see discussion in Section 4.4 above.

most powerful norms of customary law that cannot be derogated from by treaty.¹⁸ As they observe, “[t]orture...is banned absolutely in all circumstances by international treaty and customary law, and this ban is said by many learned jurists to be *jus cogens*. Yet in practice, torture has been widely employed across the globe by states with all forms of government, including by liberal democracies.”¹⁹ It is not necessary for practice to be uniform for a binding norm to exist²⁰ – such an exacting test would almost never be met. But “a widespread failure to uphold the law as formally enunciated leads to a sense of hypocrisy which undermines fidelity to law, and ultimately destroy the posited rule.”²¹

If it is correct that the requirement to treat animals humanely is a norm under construction, the most important aspect of the work of construction that remains to be done for it to develop into a full-fledged international norm is in this area of consistency between what states say and what they do. This deficiency illustrates Brunnée and Toope’s central argument that if law is understood as being constructed through a reciprocal process (rather than handed down by authority) then “the hard work of international law” is always ongoing; it does not end with the completion of a treaty or the recognition of a rule by an international court.²² Brunnée and Toope warn that “it is necessary to redouble efforts to challenge the practice of torture in scores of states around the world,” and if this work is not successfully pursued “the formal existence of an absolute prohibition on torture could...become a dead letter.”²³ A similar observation could be made with respect to the humane treatment of animals, bearing in mind that it is

¹⁸ *Supra* note 6 at 220-270.

¹⁹ *Ibid* at 231.

²⁰ *Ibid* at 232.

²¹ *Ibid*.

²² *Ibid* at 8, 270.

²³ *Ibid* at 270.

not as well established in international legal doctrine as the torture prohibition. Only if there is continuing work to promote consistent recognition and meaningful enforcement of international animal welfare standards will they emerge as binding international law.

6.4 HUMANE TREATMENT AS CUSTOMARY INTERNATIONAL LAW?

Virtually all accounts of customary international law find the doctrinal test for the existence of a customary norm (the existence of state practice and *opinio juris*) wanting. The problem of indeterminacy (or, as Fried so evocatively put it, of harlotry) is paramount: it is not very hard to make a case either that almost any given principle meets the elements of customary international law, or that it does not. More importantly, Brunnée and Toope's approach illuminates that whether a norm is or is not formally "law" does not determine whether it commands the fidelity that attaches to international law. Checking off the formal criteria is neither a necessary nor a sufficient condition for the formation of binding law. (Indeed, Brunnée and Toope contend that so-called "soft" norms "may sometimes possess more obligatory force than norms derived from formal sources of law."²⁴)

As discussed in the previous section, the principle of humane treatment is not yet so firmly established nor so consistently honoured in the observance to support the view that it is a binding norm of customary law at this point. It is, however, some way along in the process of development as such a norm. Evaluating progress from the point of view of the test Brunnée and Toope propose – whether there is sufficient practice of the right nature, a practice of legality – suggests that it has a reasonable prospect of eventually

²⁴ *Ibid* at 51.

emerging as a customary norm, or perhaps as of an “elementary consideration of humanity,” like the imperative of mercy identified in the *Corfu Channel* case.²⁵

There is an increasingly sophisticated international practice of law and policy around animal welfare standards. In part this has come about through dialogue between the parties to existing treaty regimes that include protection for animal welfare, the notable example being CITES. Discussions at the 1983 Conference of the Parties, for example, engaged with animal welfare issues connected with the subject-matter of CITES and culminated in the drafting of the proposed *Convention for the Protection of Animals*, which is both a useful model for a how a multilateral treaty on animal welfare might be constructed if adopted in the future and an indication of the content of developing customary norms.²⁶ Brunnée and Toope observe that the process of treaty-making itself can be “a means by which parties simply enable particular forms of the practice of legality to play out within a regime.”²⁷

A form of treaty-making that seems almost purpose-built for enabling this kind of practice of legality is the framework convention establishing basic principles, with protocols addressing specific matters in keeping with the principles set out in the framework, as in the case of the *United Nations Framework Convention on Climate Change* (UNFCCC).²⁸ Structures of this kind are “deliberately focused upon the creation

²⁵ *The Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v Albania)* [1949] ICJ Rep 4 at 2. See discussion in Section 2.2.

²⁶ Stuart R Harrop, “The International Regulation of Animal Welfare and Conservation Issues Through Standards Dealing With the Trapping of Wild Mammals” (2000) 12:3 J Env’t L 333 at 337-8; Bowman, *supra* note 16 at 27-28; Michael Bowman, “The Protection of Animals Under International Law” (1989) 4 Conn J Int’l L 487 at 497. See discussion in Sections 5.2.1 and 5.5.2.

²⁷ *Supra* note 6 at 50.

²⁸ 9 May 1992, 31 ILM 849.

of decision-making rules and procedures; they are constitutive, rather than regulatory.”²⁹ Discussions and law-making enterprises by the parties to treaties that have introduced the protection of animal welfare into animal law, like CITES, have resulted in steps towards a more comprehensive animal protection regime. Notably, the drafters of the *Convention for the Protection of Animals* chose to use the model of a framework convention with protocols and annexes,³⁰ a structure which would be conducive to an ongoing practice of legality.

The OIE, in the discharge of its responsibility to advise on animal welfare issues,³¹ has the role of providing leadership based on scientific expertise, and its processes are designed to take account of the input of various stakeholders as well as the regional and cultural aspects of animal welfare issues.³² The guidelines and codes developed by the OIE therefore enjoy the advantages of information provided by an “epistemic community.”³³ The recommendations of an epistemic community are often seen as “politically untainted and, therefore, more likely to ‘work’, in the political sense that [they] will be embraced and followed by political authorities concerned about the need for appearing impartial.”³⁴ The particular practice of legality represented by the OIE’s work on animal welfare has the potential to establish welfare requirements based on a principle of humane treatment as internationally recognized standards backed up by the impartiality and credibility of an organization of experts.

²⁹ Brunnée & Toope, *supra* note 6 at 50.

³⁰ See discussion in Section 5.5.2.

³¹ See discussion in Section 5.3.

³² AC David Bayvel, “The International Animal Welfare Role of the Office International des Epizooties: The World Organisation for Animal Health” in Jacky Turner and Joyce D’Silva, eds, *Animals, Ethics and Trade: The Challenge of Animal Sentience* (London: Earthscan, 2006) 248 at 256-257.

³³ See discussion in Section 2.4.2.

³⁴ Peter Haas, “Epistemic Communities” in Daniel Bodansky, Jutta Brunnée & Ellen Hey, eds, *The Oxford Handbook of International Law* (Oxford: Oxford University Press, 2007) 792 at 793.

In the context of the international climate regime, some basic principles have emerged – for example, the overall objective of preventing dangerous climate change, the precautionary principle, and the principle of common but differentiated responsibility or CBDR – that are somewhere in the grey area between nonbinding shared understandings and binding law. The precautionary principle (which has been expressed in various formulations, but in essence means that potential adverse effects of a given action on the environment need not be scientifically certain for the action to be regulated) has been recognized by some authorities as a customary norm, but is not universally accepted as such.³⁵ The principle of common but differentiated responsibilities means that all states share responsibility for dealing with climate change, but the required actions are differentiated according to the states’ different stages of development, with developed states taking on a greater responsibility.³⁶ The “clear weight of opinion” is that CBDR is *not* customary international law, although it is pervasive in international environmental law.³⁷ Like animal welfare, CBDR suffers from a problem of mismatch between stated commitments and what states actually do; it is “highly questionable” whether developed states have lived up to their commitments under CBDR in the international climate change regime.³⁸ Nevertheless, CBDR has “shaped the practice of states within the climate regime.”³⁹

³⁵ Brunnée & Toope, *supra* note 6 at 51. The Supreme Court of Canada has hinted, without stating outright, that it accepts the precautionary principle as customary law, citing other authorities that have recognized it as such. *114957 Canada Ltée (Spraytech, Société d’arrosage) v Hudson (Ville)*, 2001 SCC 40, [2001] 2 SCR 241 [*Spraytech*] at para 32. The Court in *Spraytech* stated the principle as follows: “Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation” (*ibid* at para 31). There are many different formulations of the precautionary principle, which is based on a malleable concept.

³⁶ Brunnée & Toope, *ibid* at 151.

³⁷ *Ibid* at 152.

³⁸ *Ibid* at 193.

³⁹ *Ibid*.

In the international climate regime, these key principles “have been the lynchpins for regime development” in spite of not establishing binding obligations.⁴⁰ The principle of humane treatment is emerging as a principle that plays a similar role, shaping internationally recognized and observed standards for the treatment of animals. It may serve as the lynchpin for an international animal welfare regime that is yet to be constructed, and efforts like the draft Convention for the Protection for Animals and the UDAW represent progress in that direction – not yet fully realized, but steadily advancing.

6.5 A GENERAL PRINCIPLE CONCERNING ANIMAL WELFARE?

As discussed in Section 2.2.2 above, Bowman *et al.* suggest that animal welfare might have the status of a general principle of law.⁴¹ They suggest that such a principle would have a primarily procedural function, “so that, even in the absence of specific customary or treaty-based obligations, national (or indeed international) organs which fail to pay due regard to welfare considerations when formulating or implementing policies and projects might simply be called upon to reconsider.”⁴²

Bowman *et al.* propose such a general principle on the basis of on the “pervasiveness of international concern for animal welfare” and the high number of formal expressions of commitment to its protection.⁴³ Consideration of animal welfare is not – at least, not obviously – a precept of private law found in many domestic legal

⁴⁰ *Ibid* at 230.

⁴¹ Michael Bowman, Peter Davies & Catherine Redgwell. *Lyster’s International Wildlife Law*, 2d ed (Cambridge: Cambridge University Press, 2010) at 680-682.

⁴² *Ibid* at 681.

⁴³ *Ibid* at 680.

systems, as are the classic examples of general principles of international law.⁴⁴

However, Judge Weeramantry in the *Gabcikovo* case expressed the obligation to avoid harm to nature, including other animals, by creatively adapting the nuisance law maxim *sic utere tuo ut alienum non laedas*, so as to include “other component elements of the natural order beyond man himself,”⁴⁵ in a manner somewhat reminiscent of the expansion and deepening of the private-law concept of a legal trust in the *South-West Africa* case.⁴⁶ It may be that a procedural general principle as proposed by Bowman *et al.* – a kind of “animal welfare impact assessment” requirement – is developing or has developed in international law in tandem with a substantive requirement to adopt welfare standards consistent with the principle of humane treatment.

6.6 “PRINCIPLES OF INTERNATIONAL LAW AND POLICY”

The Supreme Court of Canada has referred in the *Spraytech* case to a category of “principles of international law and policy”⁴⁷ (in that case, referring to the precautionary principle) that should guide Canadian statutory interpretation. “International law and policy” is not always binding international law; some norms that fall into this category should probably be considered “‘influential authority’ which is reducible neither to binding authority nor to what we might call the permissive extreme of persuasive authority,” a type of authority whose “demands tend to take shape at the level of

⁴⁴ See discussion in Section 2.2.2.

⁴⁵ *Supra* note 8 at 102; see discussion in Section 2.2.2.

⁴⁶ *International Status of South-West Africa*, Advisory Opinion, [1950] ICJ Rep 128; see discussion in Section 2.2.2.

⁴⁷ *Supra* note 35 at para 30 (L’Heureux-Dubé J, noting that a municipal by-law limiting pesticide use was consistent with the precautionary principle).

values.”⁴⁸ The notion of such a category seems in harmony with Brunnée and Toope’s position that international norms can be in the process of being constructed, not fully established binding law but in the words of Judge Weeramantry in the *Gabcikovo* case, “more than a mere concept,”⁴⁹ although Brunnée and Toope themselves have accused the Supreme Court of Canada of diluting the obligatory nature of binding international law by blurring the distinction between binding and nonbinding rules.⁵⁰

The concept of international “policy,” as a measure of the general orientation of the law (as opposed to specific binding rules), is a good fit for the current status of the principle of humane treatment. In traditional doctrinal terms, this concept roughly corresponds to “soft law.” The importance of the notion of “international policy” is that Canadian domestic law should be interpreted and applied in a manner that furthers principles of international law and policy.⁵¹ Chapter Seven will examine how this canon of statutory interpretation operates in light of the growing stature of the principle of human treatment of animals in international law.

⁴⁸ Mayo Moran, “Authority, Influence and Persuasion: *Baker*, Charter Values and the Puzzle of Method” in David Dyzenhaus, ed, *The Unity of Public Law* (Oxford: Hart Publishing, 2004) [*Unity of Public Law*] 389 at 390-391 [emphasis in the original].

⁴⁹ *Supra* note 8 at 87.

⁵⁰ “[T]here appears to be a trend towards treating all of international law, whether custom or treaty, binding on Canada or not, implemented or unimplemented, in the same manner – as relevant and perhaps persuasive, but not as determinative, dare we say obligatory.” “A Hesitant Embrace: *Baker* and the Application of International Law by Canadian Courts” in *Unity of Public Law* 357 at 358.

⁵¹ Ruth Sullivan, *Sullivan on the Construction of Statutes* 5th ed (Markham: LexisNexis, 2008) at 539.

CHAPTER SEVEN THE HUMANE TREATMENT PRINCIPLE AND CANADIAN LAW

7.1 THE PRESUMPTION OF CONFORMITY OF CANADIAN LAW WITH INTERNATIONAL LAW

Canada is part of an increasingly integrated, interconnected world, in which matters that might once have seemed purely local or domestic can now have global aspects and implications. In keeping with that reality, Canadian jurisprudence has developed a stronger awareness that the interpretation and application of domestic law should where appropriate be informed by an awareness of the international context, of Canada's international legal commitments in both the formal and less formal senses, and more generally of the responsibilities implied by Canada's stature as a respected member of international society.

The interconnection of Canadian and international law is reflected in established doctrine on the domestic effect of international law. There is a rebuttable presumption that Canadian law conforms with Canada's international obligations.¹ Customary international law is automatically adopted into the common law of Canada and (like common law generally) is the law of Canada unless altered by statute.² "Soft law" does not have the same degree of legal force, but it may be used by Canadian courts as an interpretive aid or as a source of persuasion.³ For general principles of international law, Van Ert notes that "there is no established common law rule...to explain the interaction of domestic law and general principles"⁴ and that there does not seem to be any need for

¹ Gib Van Ert, *Using International Law in Canadian Courts* 2d ed (Toronto: Irwin Law, 2008) at 130.

² *R v Hape*, 2007 SCC 26, [2007] 2 SCR 292 [*Hape*] at paras 36-39. There was some ambiguity regarding the application of this rule in Canada until the Supreme Court made a definitive pronouncement on the matter in *Hape*. See Van Ert, *ibid* at 182-184, 194-208.

³ *Ibid* at 33, 285-286.

⁴ *Supra* note 1 at 279-280.

such a rule, since such principles are traditionally derived from the domestic legal systems of civilized nations and thus “are presumably already established in Canadian law without the need to receive them from international law,”⁵ but given the expansive and creative way that the concept of general principles can be used by modern scholars and jurists, this presumption may not in all cases dispose of the question of how general principles of international law affect domestic law.

It is an established canon of statutory interpretation that “the values and principles enshrined in international law...constitute a part of the legal context in which legislation is enacted and read” and that interpretations furthering those values and principles are to be preferred,⁶ encapsulating the various ways in which different categories of international law are brought to bear in Canadian domestic jurisprudence. As noted in Section 6.6 above, for this purpose the dividing line between “values and principles” that are merely persuasive, on the one hand, and binding international law, on the other, can sometimes be blurred. In cases like *Baker v Canada (Minister of Citizenship and Immigration)*⁷ and *Spraytech v Hudson*,⁸ the Court has used “principles of international law and policy”⁹ (the best interests of the child in *Baker* and the precautionary principle in *Spraytech*) to “inform the contextual exercise of statutory interpretation,”¹⁰ even if the binding status of those principles is unclear.

The principle of humane treatment of animals is well established as a value recognized in international law, even if it has not yet achieved the status of binding law.

⁵ *Ibid* at 279.

⁶ Ruth Sullivan, *Sullivan on the Construction of Statutes* 5th ed (Markham: LexisNexis, 2008) at 539.

⁷ [1999] 2 SCR 817 [*Baker*].

⁸ 114957 *Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Ville)*, 2001 SCC 40, [2001] 2 SCR 241 [*Spraytech*].

⁹ *Spraytech* at para 30.

¹⁰ *Baker*, *supra* note 7 at para 30 (cited in *Spraytech*, *ibid*).

Therefore, in keeping with the presumption that Canadian law is interpreted and applied in harmony with Canada's international commitments – today understood fairly broadly to include matters of policy and value, in addition to binding law – that principle has a role to play in the construal of domestic law where animal welfare is at issue. Most importantly, as argued in Section 7.2 below, it should inform the analysis of the *Criminal Code* sections prohibiting cruelty to animals.

7.2 UNNECESSARY PAIN, SUFFERING OR INJURY: THE CRIMINAL CODE

Section 445.1(a) of the *Criminal Code*, the most general animal cruelty offence in federal criminal law,¹¹ provides that anyone who “wilfully causes or, being the owner, wilfully permits to be caused unnecessary pain, suffering or injury to an animal or a bird” commits an offence. The formulation – it is causing *unnecessary* pain, suffering or injury that is prohibited – is consistent with the principle of humane treatment. The application of this standard requires the exercise of judicial reasoning and discretion to determine where the boundary is between permitted actions and that which is unnecessary and, therefore, prohibited.

In the discussion that follows, I highlight the difficulty in practice of applying this criminal prohibition to agricultural practices, and argue that the current state of the law in this respect is out of keeping with the correct interpretation of s. 445.1(a), and all the more so when the interpretation of the provision is informed by the international recognition of the principle of humane treatment. In a sense this emphasis might seem

¹¹ Sections 444, 445 and 445.1 include several additional offences relating to specific animals (cattle are covered by Section 444) and situations (for example, s. 445.1(b) relates to fighting and baiting of animals and birds).

out of place. The Canadian legal regime that governs how farm animals are treated is, in practice, outside the purview of federal criminal law. For the most part, modern decisions on the appropriate treatment of farm animals and what “unnecessary suffering” means in this context arise as part of the regulatory regime under the *Health of Animals Act*¹² and the regulations thereunder and to some extent under provincial animal welfare statutes.¹³ But it is precisely the near-disappearance of the welfare of farm animals as an issue in Canadian criminal law that the argument here seeks to highlight and to question. The *Health of Animals Act* regulates the transportation of animals to slaughter, but not methods of animal husbandry when they are on the farm, and most provincial animal welfare statutes have exemptions for farming practices.¹⁴ Federal criminal law has – at least on the face of it – the clearest generally applicable prohibition on animal cruelty, as well as the strongest penalties for violating the prohibition.¹⁵ Yet the criminal law is perceived as a closed avenue for the legal protection of farm animals because of the way it has been interpreted and applied in old, but still influential, case law. I argue that it is time to revisit that jurisprudence, and in particular to evaluate it in light of “principles of international law and policy” as they exist today.

¹² SC 1990, c 21. Decisions of the Federal Court of Appeal under the *Health of Animals Act* and the regulations thereunder deal with concepts similar to the standard of unnecessary suffering in s. 445.1(a) of the *Code* – and (by definition) apply those concepts to animals used in agriculture; see, eg, *Doyon v Canada*, 2009 FCA 152, 312 DLR 4th 153 [*Doyon*], interpreting the prohibition on imposing “undue suffering” on an animal during loading and transportation.

¹³ Provincial law is discussed in Section 7.3.

¹⁴ As argued in Section 7.3, there is a basis to argue that such exemptions should not excuse extremely cruel procedures or methods. As a practical matter, however, they significantly limit the usefulness of provincial animal welfare law as a tool for circumscribing cruelty in agricultural practices.

¹⁵ Significant monetary penalties are available for violations of the *Health of Animals Act* and the regulations thereunder. See *Doyon*, *supra* note 12 at para 23. Such penalties may function well as a deterrent to condemnable industrial practices, but no doubt the deterrent is less powerful than the prospect of possible incarceration.

There are three different approaches to construing the language of s. 445.1(a) that seem at least plausible. One could interpret the word “unnecessary” very strictly. That is, it would not be permissible to cause suffering, pain or injury to an animal except for a compelling reason (to avoid a greater harm or realize an objective of great importance) where there is no reasonable alternative that would avoid causing suffering. This will be referred to as Option One. A second possibility (Option Two) would involve a proportionality test involving an assessment of whether suffering is justified in light of the objectives in question and taking into account whether there are alternative methods of achieving them. Finally (Option Three), one could decide that animal suffering is “necessary” as long as it is caused in connection with *any* legitimate human objective, no matter how the objective compares in magnitude with the degree of suffering, and regardless of whether it would be reasonably possible to achieve close to the same ends with less suffering.

It can be taken as given that human beings have an interest in eating, and in eating the kind of food they like to eat (including meat, eggs and milk), and that is a legitimate interest for purposes of any of these three versions of a test of necessity. On Option One, even with that concession, it might be hard to conclude that causing animals to suffer for the purpose of making food is ever “necessary.” The Option One interpretation would limit “necessary” to situations like saving a life, so it would be alright to inflict suffering on an animal to turn it into food if there were nothing else to eat and no other way to do it, but not alright to regularly cause suffering to large numbers of animals when other options (like not eating meat) existed.

This might be a plausible reading out of context, but, almost undoubtedly, it is not what s. 445.1 of the *Criminal Code* means. For as long as this provision has been part of Canadian law (since the *Criminal Code* was adopted in 1892, with its origins dating back to the first animal protection laws passed in the U.K., in the nineteenth century¹⁶), people have made animals suffer for the purpose of eating them when the suffering was not “necessary” in the strictest sense. There is, of course, no evidence of legislative intent to outlaw farming animals for food. It would not be a reasonable contextual reading of the statute to take it as meaning “necessary” means “absolutely necessary, no other option.” Precisely this question was addressed directly by Lamer J.A. (as he then was) in the *Ménard* case: “In effect, even if it not be necessary for man to eat meat and if he could abstain from doing so, as many in fact do, it is the privilege of man to eat it.”¹⁷

Option Two seems more plausible. It is, basically, the version of the concept of “necessity” that Lamer J.A. endorsed in *Ménard*, construing s. 402(1)(a) of the *Criminal Code* – the predecessor of, and textually identical to, today’s 445.1(1)(a) – which was adopted in the *Criminal Code* revision of 1953:

One should...understand the expression “without necessity” as much in relation to the purpose sought as to the means employed, and that moreover *purpose and means be, in the determination of what is necessary, in relation to each other...*[T]he legality of a painful operation must be governed by the necessity for it, and even where a desirable and legitimate object is sought to be attained, the magnitude of the operation and the pain caused thereby must not so far outbalance the importance of

¹⁶ See discussion in Chapter Four.

¹⁷ *R v Ménard* (1978), 43 CCC (2d) 458 (Que CA) [*Ménard*] at 465.

the end as to make it clear to any reasonable person that the object should be abandoned rather than that *disproportionate suffering* should be inflicted...In my opinion, in 1953-54 the legislator defined “cruelty” for us as being from that time forward the act of causing...to an animal an injury, pain or suffering that could have reasonably been avoided for it taking into account the purpose and the means employed.¹⁸

The facts in *Ménard* were as follows. The accused operated a shelter where he housed stray dogs found on the street. He euthanized dogs that were not claimed within three days. The method of killing involved putting the animals in a small metallic chamber hooked up to an engine so that they died from breathing carbon monoxide. The evidence at trial was that it took about two minutes for the dogs to die and they were conscious for at least thirty seconds. Because the engine made the gas hot, inhaling it was painful, often causing burns inside the nose and throat, so the dogs suffered before they died. An alternative system had been developed to cool and filter the gas, which would reduce suffering. An expert witness testified that the new system was simple to install at a reasonably low cost. The accused had been told how to install the improved system and warned that he might face prosecution if he did not. The Quebec Court of Appeal upheld Mr. Ménard ’s conviction based on its conclusion that the animals’ suffering was “not inevitable taking into account the purpose sought and the means reasonably available.”¹⁹

This approach to the “necessary” standard as requiring a form of proportional evaluation of means and ends also has the virtue of fitting harmoniously with a

¹⁸ *Ibid* at 465-466 (emphasis added).

¹⁹ *Ibid* at 467.

framework for analyzing questions of necessity and justification that is deeply entrenched in modern Canadian jurisprudence. The most important example is, of course, the *Oakes* test for determining whether an infringement of a right protected by the *Charter of Rights and Freedoms*²⁰ is justified under s. 1 of the *Charter*, a test which involves assessing the importance of the objective, the connection between means and ends, whether there were reasonable alternative ways to achieve the objective, and proportionality between the effects and the objective²¹ – in other words, purpose and means considered in relation to each other.

Option Three, considering both the ordinary meaning of “unnecessary” and the interpretation in *Ménard* – is the least plausible interpretation of the three candidates. By a kind of default, however, this is effectively where the line between necessary and unnecessary suffering has been drawn for farm animals in Canadian jurisprudence. There is no Supreme Court decision and hardly any lower court decisions on cruelty in agricultural practices. In effect, a 1957 decision of the British Columbia County Court, *R. v. Pacific Meat Co.*,²² still stands today as the leading case. *Pacific Meat Co.* emphatically endorsed the interpretation that, in the context of food production, only something done for an invalid objective is “unnecessary”:

In my view, if someone *who was not employed in a slaughter house* was to shackle a hog as described in this case, and if such a person hoisted the

²⁰ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

²¹ *R v Oakes*, [1986] 1 SCR 103 at para 70. An important difference between the *Oakes* test and the concept of necessity in s. 445.1(1)(a) of the *Criminal Code* is, of course, the burden of proof: under s.1 of the *Charter*, the party responsible for infringing a right (the government) has the onus of showing that the infringement is “demonstrably justified,” while in a criminal case it must always be proved beyond a reasonable doubt that all the elements of the offence (including in the case of s. 445.1(1)(a) the infliction of unnecessary suffering) are made out.

²² (1957), 24 WWR 37, 27 CR 128, 119 CCC 237 [*Pacific Meat Co.*].

animal as herein described, *just to hear it squeal or for any other sadistic reason*, and if evidence was adduced that the hog in fact suffered pain in the process, then I would hold that such pain and suffering was “unnecessary” and that such a person would be guilty. But I am dealing with a case involving two human individuals whose regular employment involves the necessity of slaughtering hogs to provide food for mankind.²³

The accused were the operator of and two workers in a slaughterhouse where pigs were killed by a method described by the court:

Eighteen hogs were driven from an inner holding pen into a shackling pen, where the accused Reno Vencato placed an iron shackle around the lower portion of a hog's hind leg just above the first joint. The shackle had a chain attached to it. The end of the chain farthest from the shackle has a hook which is attached to a vertical hoist which lifts the hog up into the air a height of 15 to 18 feet, where it passes through a metal door equipped with hinges which only swing one way, so that if the hog's leg slips out of the shackle, the hog cannot fall out of the rectangular container and injure the shackler. The hog dangles in the air as it is hoisted and strikes against a metal wall. From the evidence it is not clear whether the hog is rendered unconscious by the impact or not... When the hog would be raised vertically 15 or 18 feet it passed from the rotating drum at right-angles horizontally along a rail, where the accused Robert Peterson (referred to as

²³ *Ibid* at para 11 [emphasis added].

the “sticker”) was standing. The “sticker’s” duty is to thrust a sharp knife into the throat of a hog in order to cut the main arteries.²⁴

In other words, the pigs were slammed into a metal wall as a method, apparently not very effective, of stunning them prior to their throats being cut. From the description, it is obvious that this must have been terrifying and painful. The evidence was that this was the process used in every slaughterhouse in Canada, and all but four of the slaughterhouses in the US, at the time.²⁵

In an interesting parallel with *Ménard*, the Crown introduced evidence of an alternative slaughter method used in Europe and in the four (apparently pioneering) US slaughterhouses.²⁶ Whether because the evidence itself was less thoroughly or convincingly presented than in *Ménard*, or due to the court’s unfavourable disposition to the argument, or both, the question of whether something is “necessary” when an alternative and more humane method could be employed (and is employed elsewhere) is not fleshed out in *Pacific Meat Co.* The judgment does not describe how the alternative method works; nor does it discuss whether it is more costly, or by how much. The court states that the evidence does not establish that the alternative causes any less suffering than the wall-slammng technique. But, on the stated test, it would not matter if it did. Pain or suffering would be unnecessary *only* if inflicted for a “sadistic reason” – possibly, only if it was done by someone who did not work in a slaughterhouse (perhaps on the logic that everyone who works in a slaughterhouse is going about the non-sadistic

²⁴ *Ibid* at para 2.

²⁵ *Ibid* at para 8.

²⁶ *Ibid* at para 11.

purpose of providing “food for mankind” and so by definition whatever they do is necessary).

In practice, there are “two sets of standards” for animals under Canadian law;²⁷ there is a system that regulates the treatment of farm animals, but the general criminal prohibition on unnecessary cruelty effectively does not apply to practices that prevail in the industry – on the logic of *Pacific Meat Co.*, no matter how much suffering they cause or how easily or cheaply they could be replaced. Convictions do sometimes happen in cases of neglect, when owners, sometimes struggling with financial or health pressures, fail to give proper care to their animals.²⁸ Unnecessary suffering is something that can happen on a failing farm, but apparently not on one that is functioning profitably. As the business enterprise of farming (the business of producing food for mankind) stops working, the context changes from a farm into just some land with some animals on it, and so those animals become creatures that the law can conceive of as suffering needlessly.

There are probably a number of reasons for the double standard in criminal law when it comes to farm animals and suffering, including the structure of enforcement mechanisms, with monitoring of the treatment of farm animals in large part being treated as a regulatory responsibility of agencies with a mandate emphasizing consumer

²⁷ TI Hughes, *Canadian Farm Animal Care Trust Annual Report 2008*, online: <http://www.canfact.ca/Newsletters/Annual%20Report%202008.pdf> at 8 (arguing that the treatment of veal calves would be illegal if done to dogs or cats).

²⁸ See, eg, *R v Pryor*, [2007] OJ No 5298, 76 WCB (2d) 352 (OCJ) (accused was attempting to run a horse breeding operation but “[did] not have the necessary financial resources to do so” (para 12) and horses were inadequately cared for); *R v Viera*, [2006] BCJ 1409 (BC Prov Ct) (accused lived on a mixed organic farm, was having “financial difficulties” after separation from his wife (para 13) and failed to provide proper care, food and water for horses, dogs, pigs and rabbits).

protection more than animal welfare.²⁹ Without doubt, one of the reasons is the long shadow cast by *Pacific Meat Co.* While the precedent stands, for the Crown to prosecute for farming practices that are widely followed would be akin to tilting at windmills. This is so even though the *Criminal Code* has no statutory “customary farming exemption” like those that are included almost all the provincial and territorial animal protection statutes³⁰ and in the laws of a number of US states.³¹

There is more than one reason to doubt the continued validity of the *Pacific Meat Co.* holding as a jurisprudential matter. It is inconsistent with the holding in *Ménard*, unless that holding is taken to be limited in application to animals other than those used for food – a questionable proposition given that the *Ménard* court cites the English precedent *Ford v Wiley*,³² which applied the test of unnecessary suffering to the accepted agricultural practice of cutting the horns off beef cattle.³³ It is also inconsistent with what appears to be the most natural construction of the statutory language.

One more reason to question the *Pacific Meat Co.* analysis, which is an important one in light of well settled doctrine on implementing domestic law to keep faith with international “law and policy,” is the international context of standards on animal welfare that has developed mainly since *Pacific Meat Co.* was decided. The common thread that runs through international law on animal welfare is the principle of humane treatment,

²⁹ The Canadian Food Inspection Agency (CFIA) monitors compliance with the *Health of Animals Act*, SC 1990, c 21, and various other federal statutes and regulations that include animal welfare standards. It is “[d]edicated to safeguarding food, animals and plants, which enhances the health and well-being of Canada’s people, environment and economy” (from the CFIA website, <http://www.inspection.gc.ca/english/toce.shtml>).

³⁰ See discussion in Section 7.3 below.

³¹ David J Wolfson & Mariann Sullivan. “Foxes in the Hen House: Animals, Agribusiness and the Law: A Modern American Fable” in Cass R Sunstein and Martha C Nussbaum, eds, *Animal Rights: Current Debates and New Directions* (Oxford: Oxford University Press, 2004) 205 at 212-220.

³² (1889), 23 QBD 203.

³³ See discussion in Section 4.3.

and it is applicable to animals in general, not restricted to animals other than those being used for a recognized human purpose like food production. Quite the contrary – many international initiatives, including the commitment to the “five freedoms” in the draft *Universal Declaration on Animal Welfare*³⁴ and in the OIE’s Guiding Principles on Animal Welfare,³⁵ as well as the burgeoning body of European animal welfare law,³⁶ show a particular concern for the welfare of farm animals. There is a strong basis to conclude, therefore, that if the interpretation of s. 445.1(a) of the *Criminal Code*, especially in its application to farming and food production practices, were to be considered in light of international standards, Canadian law in this area would shift significantly.

7.3 PROVINCIAL LAW: AGRICULTURAL PRACTICE EXEMPTIONS

Most of the Canadian provinces (and Yukon) have enacted animal protection legislation that prescribes standards for the treatment of animals and creates offences for causing animals distress and suffering or failing to care properly for an animal in one’s custody.³⁷ Because the prosecutorial burden of proof and intentionality requirements under federal criminal law are very high, and because provincial or territorial legislation generally provides for powers of inspection and seizure where there is reason to believe

³⁴ See discussion in 5.5.3.

³⁵ See discussion in Section 5.3.

³⁶ See discussion in Section 5.4.

³⁷ Alberta: *Animal Protection Act*, RSA 2000, c A-41. British Columbia: *Prevention of Cruelty to Animals Act*, RSBC 1996, c 372. Manitoba: *Animal Care Act*, SM 1996, c 69. New Brunswick: *Society for the Prevention of Cruelty to Animals Act*, SNB c S-12. Newfoundland and Labrador: *Animal Protection Act*, RSNL 1990 c A-10 (Newfoundland and Labrador’s proposed new animal protection statute (Bill 30, *An Act Respecting the Health and Protection of Animals*, 3d Sess, 46th GA, 2010, is not yet in force). Nova Scotia: *Animal Protection Act*, SNS 2008, c 33. Ontario: *Society for the Prevention of Cruelty to Animals Act*, RSO 1990, c O-36. Prince Edward Island: *Animal Health and Protection Act*, RSPEI 1988, c A-11.1. Quebec: *Animal Health Protection Act*, RSQ c P-42. Saskatchewan: *Animal Protection Act*, SS 1999, c A-21.1. Yukon: *Animal Protection Act*, RSY 2002, c 6. The Northwest Territories and Nunavut do not have animal protection legislation, other than provisions specific to dogs.

that animals are being abused or neglected, provincial law may in many cases offer the most practical route for enforcing animal protection standards.

Provincial law has traditionally offered little hope of providing farm animals with a degree of protection consistent with the principle of humane treatment. These statutes typically include exemptions for “accepted” practices including animal husbandry and slaughter.³⁸ The practical effect of these exemptions is generally thought to be that the statutory standards simply “do not apply to...animals in food production,”³⁹ no matter how cruelly they are treated. Mariann Sullivan and David J. Wolfson have written with respect to similar exemptions in the US that they “[hand] the industry an exemption that it can simply stretch to fit itself: any practice the industry chooses to employ regularly becomes automatically exempt from the law.”⁴⁰

It should be noted, however, that the language of these exemptions implies an objective standard. The Ontario law, for example, makes an exemption available for activities “carried on in accordance with reasonable and generally accepted practices of agricultural animal care, management or husbandry.”⁴¹ The text suggests, or at least does not foreclose, a conclusion that more is required than simply that a practice be widely adopted; it also has to be reasonable. Approaching the exercise of statutory interpretation

³⁸ For example, s 2(2) of Alberta’s *Animal Protection Act* exempts “reasonable and generally accepted practices of animal care, management, husbandry, hunting, fishing, trapping, pest control or slaughter.” Similar exemptions (with variations in the wording) are in s 24(2) of British Columbia’s *Prevention of Cruelty to Animals Act*, ss 3(2), 4(1) and 4(2) of Manitoba’s *Animal Care Act*, ss 21(4) and 22 of Nova Scotia’s *Animal Protection Act*, s 11.1(2) of Ontario’s *Society for the Prevention of Cruelty to Animals Act*, s 8(2)(a) of Prince Edward Island’s *Animal Health and Protection Act*, s 55.9.15 of Quebec’s *Animal Health Protection Act*, s 2(3) of Saskatchewan’s *Animal Protection Act* and s 3(3) of Yukon’s *Animal Protection Act*. Newfoundland and Labrador’s Bill 30 would create an exemption for actions occurring “in the course of an accepted activity” (s 18(3)).

³⁹ Lesli Bisgould, Wendy King & Jennifer Stopford. *Anything Goes: An Overview of Canada’s Legal Approach to Animals on Factory Farms* (Toronto: Animal Alliance of Canada, 2001), online: <http://www.animalalliance.ca/report%20-%20Anything%20Goes.pdf> at 4.

⁴⁰ “What’s Good for the Goose...The Israeli Supreme Court, Foie Gras, and the Future of Farmed Animals in the United States” (2007) *Law & Contemp Probs* 139 at 155.

⁴¹ *Society for the Prevention of Cruelty to Animals Act*, RSO 1990, c O-36, s 11.1(2)(a).

with an eye to the international context, and the extensive professions of commitment at the international level to welfare standards for farm animals, adds further support to that conclusion. What is a “reasonable and generally accepted practice” should be construed consistently with the principle of humane treatment.

7.4 ANIMAL ACTIVISM AND THE LAW: DEFENCES AND PROTECTIONS

The efforts of animal activists to reduce cruelty to animals can lead to conflicts between their legal interests and the interests of their opponents, such as farmers and hunters. These clashes point to balancing tests in the application of the law, including constitutional law, where the international status of the humane treatment principle could be a factor in determining which way the scales ultimately tip.

7.4.1 Constitutional Issues: Protest and Exposure

Advocates for animals have had considerable success in recent years in drawing attention to animal cruelty issues and influencing public opinion by exposing and protesting against controversial practices. One strategy that has been especially successful in terms of shaping public debate (and, indeed, the development of animal protection law) is undercover videotaping of farming operations and slaughterhouses. In some US states, the animal agriculture industry has responded by seeking statutory protections that would make it illegal to record images (and in some cases to make sound recordings) at agricultural facilities.⁴² In 2011, bills prohibiting such efforts – which have been christened “ag gag” bills – were introduced in Iowa,⁴³ Minnesota,⁴⁴ Florida⁴⁵ and

⁴²See Michelle Simon, “Big Ag’s Latest Attempt to Chill Free Speech” *Food Safety News* (7 July 2011), online: <http://www.foodsafetynews.com/2011/07/big-ags-latest-attempt-to-chill-free-speech/>.

⁴³ HF 589.

⁴⁴ HF 1369.

New York.⁴⁶ In each case the legislative session ended without the bill being passed, and it remains to be seen whether these proposed laws will make a reappearance in the future.

So far no law like these bills has been put forward in Canada. But given the effectiveness of video taken in factory farms and slaughterhouses to inspire public outrage and shape policy it is conceivable that the agricultural industry in Canada, as in the US, will look to protect its interests by advocating for legislative curbs on undercover videotaping by activists. Obviously such legislation would raise significant constitutional issues if enacted, whether in the US or in Canada. In Canada, the constitutional analysis would ultimately boil down to a consideration of whether such restrictions, which would be very likely to be held a *prima facie* violation of the right to freedom of expression under Section 2(b) of the *Charter*, would be deemed the kind of limitation permitted under Section 1 of the *Charter* (which provides that *Charter* rights are subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”). The analysis of whether a limitation on a *Charter* right is reasonable and justified is a balancing test – often a complex one involving the weighing of many factors. In this hypothetical case, if it were to arise, one of the considerations in the mix should be the status of the humane treatment principle in international society, which is evidence of the commitment of other “free and democratic” societies whose values Canada generally shares to the protection of animal welfare and the principle of humane treatment.

Similar issues are raised by laws that do already exist in this country: anti-hunter-harassment legislation.⁴⁷ These provisions, enacted “in ostensible response to the

⁴⁵ SB 1246.

⁴⁶ S5172-2011.

activities of animal liberationists who went into the woods in hunting season with the avowed goal of scaring quarry away from its pursuers,” were enacted beginning in the 1980s, first by US states and then by Canadian provinces.⁴⁸

Section 38 of Nova Scotia’s *Wildlife Act*,⁴⁹ for example, makes it an offence to “interfere with the lawful hunting or fishing of wildlife by another person, or with any lawful activity preparatory to such hunting or fishing, with the intention of preventing or impeding hunting or fishing or the continuation of the hunting or fishing,” to “disturb, or engage in an activity that will tend to disturb, wildlife with the intention of preventing or impeding its being lawfully hunted or fished,” and, rather remarkably, to “disturb another person who is engaged in the lawful hunting or fishing of wildlife or in any lawful activity preparatory to such hunting or fishing with the intention of dissuading that person from hunting or fishing or otherwise preventing the hunting or fishing.” In other words, it appears to be against the law in Nova Scotia to tell a hunter you disapprove of hunting if you do so in a disturbing way and with the intention of convincing the hunter not to hunt. The potential for a challenge on constitutional grounds is evident.⁵⁰ This, too, is an example of a potential constitutional issue where the presence of the humane treatment principle as part of “international law and policy” is relevant to the process of balancing the interests and values at stake in the limitation of a constitutional right.

⁴⁷ See Vaughan Black, “Rights Gone Wild” (2005) 54 UNBLJ 3 at 12.

⁴⁸ *Ibid.*

⁴⁹ RSNS 1989, c 504.

⁵⁰ Hunter harassment statutes in US states have been the subject of constitutional challenges. See Black, *supra* note 47 at 12.

7.4.2 The Defence of Necessity

“Animal liberationists” have from time to time been known to use another tactic: direct intervention to remove animals from situations where they might suffer harm, for example by taking rabbits from laboratories, removing dolphins from research facilities,⁵¹ or setting mink free from a fur farm.⁵² Such activities are either acts of liberation or rescue, from the point of view of the activist, or, from the point of view of the owner (since the animals are someone’s property), acts of theft or vandalism. In these cases the law seems fairly clearly to agree with the owner’s point of view; they are situations where an activist is willing to break the law in an act of civil disobedience that he or she perceives as justified by a higher principle (and even the activist might admit that a violation of the existing law has occurred in the pursuit of improvement and reform).

In the *LeVasseur* case, a young research assistant at a University of Hawaii marine research laboratory was charged with theft after he and a co-defendant removed two dolphins and released them into the ocean in a *Free Willy* moment. The defendant sought to connect his sense of moral justification to a statutory justification: the “choice of evils” defence. Hawaiian law provided a legal justification for “[c]onduct which the actor believes to be necessary to avoid an imminent harm or evil to himself or another” if “the harm or evil sought to be avoided by such conduct is greater than sought to be prevented by the law defining the offense charged.”⁵³ The court was not favourably disposed to this argument, holding that the word “another” was elsewhere defined to

⁵¹ *State v LeVasseur*, 613 P 2d 1328 (Hawaii CA, 1980) [*LeVasseur*].

⁵² *R v Yourofsky*, [1999] OJ 1901 (Ont Sup Ct) [*Yourofsky*].

⁵³ HRS § 703-302, cited in *LeVasseur*, *supra* note 51 at 1332.

mean “a person” and did not include dolphins,⁵⁴ and that LeVasseur’s crime was “at least as great an evil as a matter of law as that sought to be prevented.”⁵⁵ He received a five year suspended sentence with a special condition that he serve six months in jail.

In Canada, the same concept on which Hawaii’s “lesser of evils” is based is reflected in the common-law defence of necessity.⁵⁶ It is unlikely that a Canadian court would be much more receptive to a necessity defence in an animal rescue case than was the Hawaii Court of Appeal. The defence has been narrowly construed, it applies only where there “imminent peril or danger,” the accused has “no reasonable legal alternative to the course of action he or she undertook” and there is “proportionality between the harm inflicted and the harm avoided.”⁵⁷ Canadian courts are understandably wary of defendants who seek to define for themselves what constitutes greater and lesser harm, sometimes in opposition to what the law provides.

The sentencing decision in the *Yourofsky* case reflects this judicial circumspection about the possibility of escalating activist vigilantism.⁵⁸ The accused made a statement defending his actions as, essentially, the lesser of evils: “I ask this court, if it is not a crime to torture, enslave and murder animals, then how can it be a crime to free tortured, enslaved, and soon to be murdered animals?”⁵⁹ The judge responded: “To take the law into your own hands does nothing more than create anarchy” and showed disdain for Canada’s system of laws – laws which “regulate society for a peaceful existence among

⁵⁴ *Ibid* at 1333.

⁵⁵ *Ibid* at 1334.

⁵⁶ *Perka v The Queen*, [1984] 2 SCR 232; *R v Latimer*, 2001 SCC 1, [2001] 1 SCR 3 [*Latimer*].

⁵⁷ *Latimer*, *ibid* at para 28.

⁵⁸ *Supra* note 52.

⁵⁹ *Ibid* at para 7.

one another. Without such civility it has been stated that society would be required to live by the rule of the jungle.”⁶⁰

Nevertheless, it is conceivable, although not very likely, that a necessity or “lesser of evils” type of argument could have some traction here in the right type of case. The fact that there are limited state resources available for the enforcement of animal cruelty law – so that, in effect, individual intervention may be the only way that abuse will be stopped in some situations – could come into play here. It is also notable that the concept of necessity is much less narrowly construed when the shoe is on the other foot. In a 2008 administrative decision under the *Health of Animals Act*,⁶¹ the accused, Maple Lodge Farms, was responsible for four truckloads of chickens kept in a holding barn on a hot day, with the result that a total of 15,706 birds died from “the cumulative effects of the stresses occasioned by being taken off feed and water, being condensed in the already crowded barns for catching, being caught and carried upside down, being confined in crates, and the spike in heat and humidity.” This violation of the regulations (undue exposure to weather) was held to be excused by the common-law defence of necessity. One of the “reasonable legal alternatives” considered by the tribunal was the use of climate-controlled vehicles to transport the chickens. This was held not to be an alternative available to Maple Lodge at the time because “[n]o such vehicles were in use in North America.”

⁶⁰ *Ibid* at paras 19-20.

⁶¹ *A60291 Maple Lodge Farms Ltd. v. Canadian Food Inspection Agency* (12 February 2008), RTA #60291, online: <http://cart-crac.gc.ca/CART-CRAC/display-afficher.do?id=1274223783397&lang=eng>. The Canadian Food Inspection Agency applied for judicial review of the decision to the Federal Court of Appeal; and the charges were eventually settled by agreement on the part of Maple Lodge Farms that it would pay the penalties set out in the original notice of violation. See *Maple Lodge Farms v Canada (Canadian Food Inspection Agency)* (30 November 2010), 2010 CART 27, 28, 29 and 30 (CART), <http://cart-crac.gc.ca>.

In a hypothetical case involving removal of an animal from a situation that clearly violated both domestic animal cruelty law and international animal welfare standards, the international humane treatment principle could come into play in assessing the relative evils in question as a matter of law and might make acceptance of a necessity argument marginally more likely, if the court considered the principles at issue to be of a fundamental nature.

The possibility – small but genuine – of such a conclusion in the right kind of case is suggested by the Scottish High Court of Justiciary in *Lord Advocate's Reference No. 1 of 2000*.⁶² This judgment considered the legal validity of defences asserted by anti-nuclear protesters who were on trial for causing damage to a vessel that carried Trident nuclear missiles. The defendants were acquitted at trial; subsequently, the Lord Advocate of Scotland referred certain legal questions to the High Court for determination although its determinations would not alter the outcome of the trial. The accused argued essentially that their actions were justified because they were done to prevent something worse – the deployment of nuclear weapons, which they argued was prohibited under customary international law. Although the High Court rejected this argument on the basis that the circumstances of the case did not support a defence of necessity or any analogous argument, it did at least acknowledge that in principle the law might recognize this type of justification in more stark circumstances, noting that “interesting questions of law might no doubt arise, in relation, say, to a German citizen during the war who in breach of German law chose to kill his officer rather than obey him in committing a crime against humanity.”⁶³ Could analogous logic be applied to a defendant who refuses

⁶² 2001 SLT 507, [2001] Scot J 84 (HCJ).

⁶³ *Ibid* at para 90.

to commit, or acts to sabotage, a gross violation of principles of humanity towards animals? It would be a rare case indeed that would support such an outcome, but in the right case due regard for the international stature of those principles would be an important aspect of the analysis.

7.5 HUMANITY IN THE JUNGLE

The emergence of an internationally recognized principle requiring humane treatment of animals is of more than merely theoretical interest. It could make a real difference to the way the law relating to animals is interpreted and applied. This section has canvassed some of the situations where that might be the case, ending with what is admittedly an exercise in fairly remote speculation about where the abstract principle might lead. But the example the section begins with should be an easy case: the criminal law prohibiting cruelty to animals, which on its face means all animals, should be applied as if that is what it means. The international principle of humane treatment simply adds weight to the argument. If we believe that our system of laws is grounded in justice, as distinguished from the rules of the jungle, then our common obligations of humanity are relevant to understanding and giving full effect to all that that implies.

CHAPTER EIGHT CONCLUSION

There are many examples in international law of commitment to the protection of animal welfare. To date there has been relatively little work done towards analyzing this body of international law in a coherent way. I have set out here to develop an account that explains the “data” within the framework of international law, understood as an enterprise of mutual construction by international society.

Concern for the welfare of animals has often been dismissed as a parochial preoccupation of a specific type: based in modern, Western, urban culture and cut off from a more ancient connection with the unsentimental ways of nature. But, as I have argued here, that point of view is itself the product of a particular cultural moment and situatedness, and it disregards a deep and widespread ethic, manifest across the world’s various civilizations, that takes human obligations to animals seriously and posits limits on what human beings can justifiably do to our fellow creatures.

The first thoroughgoing denial of such limits was based on what really was a parochial and especially European way of thinking: the Cartesian denial of animal sentience. The idea that animals are reducible to elaborate, divinely conceived automata or machines probably would have seemed ridiculous to the Hindus, Buddhists, Muslims, indigenous peoples, and countless other cultures of the world with whose ancient traditions included respect for other animals as something like extended family members of human beings – as indeed it did seem ridiculous to many Europeans even in its heyday. But this is an idea that casts a long shadow over the treatment today, and profoundly influences the way that the law conceives of them. Many billions of animals every year are born, grown and killed in an environment that conceives of them only as

units of production or “animal machines,” as Ruth Harrison observed almost half a century ago,¹ and this system is condoned and even facilitated by the law.

My central argument is that the concept of legal protection for animals – both in international law, and, since its beginnings in the early nineteenth century, in domestic law – was originally founded on a rejection of the idea that animals are equivalent to machines, and continues to make sense only with an understanding that animals are sentient creatures. The law for the protection of animals is law that prohibits cruelty, and the notion of animal cruelty would be meaningless without the underlying premise that animals can feel and suffer.

And yet, the law – certainly, Canadian law – has in effect set up a separate compartment for certain animals, the animals that are raised and killed for food. In this distinctive realm, the law operates as if the animals were indeed nothing but machines. The standards that apply to other animals outside the food production system, the concepts of unnecessary suffering and unjustifiable cruelty, are not applied to these future meals, as their tails, teeth, toes and noses are cut and broken, their genitals ripped off, their skins and lungs blistered and burned by gasses emitted by their own waste, they are transported to slaughter in conditions so crowded, stressful and exposed to weather that they die by thousands, and finally those that are still alive are killed on the horrific production lines. All of this has so far been permitted by law, even though cruelty to animals is a crime. When it comes to farm animals, the law on animal cruelty is possessed by the ghost of the machine.²

¹ *Animal Machines: The New Factory Farming Industry* (London: Vincent Stuart, 1964).

² I am echoing the pithily disparaging phrase “the dogma of the Ghost in the Machine” that the philosopher Gilbert Ryle coined for the Cartesian notion of the split between mind and body, which in turn grounded

A jurisprudence that includes simultaneously a concept of prohibited cruelty to animals and a legally enabled intensive farming industry is inherently contradictory. But the fullness and, indeed, the untenability of this anomaly is more clearly understood when it is looked at in the light of international standards on the protection of animals. The principle of humane treatment of animals has become established and is taking on increasing importance in international law, and it represents a common rejection by the world's civilizations of the notion of animals as senseless machines. Even if the humane treatment principle has not yet become established as a binding norm of international law, it is already established as an element among the collective ideals of humanity, and it seems likely that the significance and juridical force of the principle will continue to grow. Perhaps, in the end, an international and cross-cultural shared understanding of our common obligations to other animals will finally exorcise the ghost of the Cartesian animal-machine.

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