FOR A NEW STATUS FOR WILD ANIMALS UNDER INTERNATIONAL LAW

« *The greatness of a nation and its moral progress can be judged by the way its animals are treated* »
Ghandi.

« *The loss of biodiversity is a silent killer, it's different from climate change, where people feel the impact in everyday life. With biodiversity, it is not so clear but by the time you feel what is happening, it may be too late* »[1]. It is not those strong words that Pasca Palmer the executive secretary of the UN Convention on Biological Diversity tried to raise awareness on the plight of wild animals as their numbers continue to plummet at alarming rates at the global scale. Wild animals, understood here as free animals living the wilderness –thus excluding domestic animals and wild animals living in captivity- are a significant element of biodiversity. According to the same source this trend should worsen in the next thirty years as a result of climate change[2], and growing human populations to the point where by 2050, it is expected that « *Africa could lose 50% of its birds and mammals, and Asian fisheries could completely collapse. The loss of plants and seal life, will reduce the Earth's ability to absorb carbon, creating a vicious cycle* »[3].

These worrying patterns are further acknowledged by the report « Planète Vivante » of 2018 made by World Wildlife Fund with the collaboration of the Zoological Society of London (ZSL)[4] which further reminds us that biodiversity which encompasses all living beings including wild animals is an « infrastructure » which supports all life systems on Earth and allow the proper functioning of natural systems such the atmosphere, oceans, forests, and watercourses which are a precondition to a thriving human existence on the planet[5]. In other words without biodiversity, humanity is doomed. This fact has not only been acknowledged by the scientific community but also by the international community through various international instruments. The Preamble of the Biodiversity Convention provides that the Parties recognize « the importance of biological diversity for evolution and for maintaining life sustaining systems of the biosphere ». The Ramsar Convention which is much older is yet even clearer by « recognizing the interdependence of Man and his environment »[6]. This was further acknowledged by the International Court of Justice in its advisory opinion on « The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn »[7]. Since 1972 and the holding of the Stockholm Conference on the environment as a result of stern scientific warnings, international law has emerged as a possible tool which could contribute among others in stemming the tides of biodiversity loss.

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[1] J. WATTS, « Stop biodiversity loss or we could face our own extinction, warns UN », *The Guardian*, 6 November, 2018.

[2] *Ibid* ;

[3] *Ibid* ;

[4] WWF. 2018. *Rapport Planète Vivante 2018: Soyons ambitieux*, Grooten and Almond, R.E.A (Eds). WWF, p. 24.

[5] *Ibid*.

[6] Convention on Wetlands of International Importance especially as Waterfowl Habitat, Preamble.

[7] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996,* § 29, p 241.

Many international instruments have been adopted since then at the international and regional level, which either directly seek to conserve wild animals species like the Convention on International Trade in Endangered Species of Wild Fauna and Flora (« CITES ») of 1975 or like the Convention on Migratory Species (« CMS ») of 1979 or indirectly through the conservation of habitats such as the Ramsar Convention of 1971 or the Convention on World Heritage of 1972. It is always difficult to determine how efficient are these instruments depending on which criteria is used. Since most of these treaties seek to conserve wild animals regardless of their mostly anthropocentric reasons to do so[8], one cannot deny the fact that they have failed in this respect as the loss of wild animals is ever increasing. Although international instruments designed to protect wildlife certainly lack bite, it will be shown that the deficiency of the international legal regime is mostly linked to the fact that wild animals are legally qualified as natural resources under international law. It will be shown that this status is problematic as it ignores wild animals' intrinsic qualities which are their sentience and transnational ecological function (I). It also conveys the erroneous belief that wild animals' primary function is to be exploited by man in utter disregard of the consequences that their decline will have on Earth ecosystem and eventually on humanity itself. The second part of the paper will thusl try to examine if an alternative status could apply or if wider recognition of wild animals' sentience with the rights attached at the international level could help reverse the odds (II)

I THE NON-RECOGNITION OF WILD ANIMALS AS LIVING BEINGS UNDER INTERNATIONAL LAW

1. The one-dimensional approach to wild animals under international law

At the heart of the problem lies the fact that wild animals are a subject matter of international law to be regulated by States as any other. Review of all relevant international instruments show that wild animals are qualified as mere natural resources. The revised African Convention on the Conservation of Nature and Natural Resources of 2017 uses the term of natural resources to designate indiscriminately ground, waters, flora and fauna[9]. Article 2 of the Convention on Biological Diversity provides that the term « biological resources » include genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity. Such a definition would obviously include wild animals as biotic components of an ecosystem. Article 77 of the United Nations Convention on the Law of the Sea (UNCLOS) of 1982 and article 2 of the Convention on the Continental Shelf of 1958 also provide that natural resources encompass minerals and non living resources in addition to living organisms. The WTO Appellate Body in the *Shrimp* case, provided that « it is pertinent to note that modern international conventions and declarations make

[8] Preamble of CITES provides: « *Recognizing that wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of natural systems of the earth which must be protected for this and the generations to come* (…). *Recognizing in addition, that international co-operation is essential for the protection of certain species of wild fauna and flora against over-exploitation through international trade* ».

[9] Article V(1) « Natural Resources means renewable resources, tangible and non tangible, including soil, water, flora and fauna and non renewable resources ».

frequent references to natural resources as embracing both living and non-living resources »[10].

This qualification seems inadequate as it fails to grasp that living resources ontologically differ from non-living resources and have no common characteristics with them outside of their exploitation by Man. The transnational ecological services that wild animals offer contrary to non-living resources and regardless of whether they are migratory species or not is completely obscured through the use of this status. Indeed non-migratory species may provide ecological services as they contribute locally to the maintenance of a section of an ecosystem which might range across several States. For example, if we take the example of the much unfairly maligned and non-migratory spotted hyena (*crocuta crocuta*) in the Serengeti-Mara savannah ecosystem which spreads over Kenya and Tanzania, their ecological role is mostly to control the numbers of herbivores, especially the migratory zebras (*equus quagga*) and wildebeests (*connochaetes taurinus*), Thompson's gazelles (*eudorcas nasalis*) and topis (*damaliscus lunatus*) which cross the border between the two countries in a cyclical way and get rid of the carrion and prevent the spread of potential epidemics which might spread and affect the whole ecosystem over the two countries[11]. As such; contrary to what common wisdom want us to believe, their role is invaluable. If the hyenas located in Tanzania would go extinct, it means that their ecological role would not be fulfilled on the Tanzanian section of the ecosystem. Yet although the hypothetical extinction of the hyenas only occurs in Tanzania, the Kenyan section of the ecosystem would still be affected as the flow of herbivores coming from Tanzania would not be controlled anymore which could lead to overgrazing in Kenya not to mention the potential spread of epidemics such as *rinderpest*[12] as carrion would not be disposed of in the Tanzanian section of the savannah ecosystem. The ecological role of wild species is thus completely obscured by their assimilation to non-living natural resources as their role goes beyond this restrictive qualification. Nor does the assimilation of wild species to non-living resources take their sentience into account, similarly to what happens in most national jurisdictions where sentience is only legally recognized for domestic animals. Finally, assimilation of wild species to non-living resources does not take into account the obvious materialized by their mobility. Wild animals indeed ignore borders and may move from one State to the other. This is a source of conundrum as the cornerstone principle of international law of permanent sovereignty over natural resources will apply to the same extent to living and non-living species and despite the fact it seems to have been designed mostly with non-living species in mind.

1.1 The ill-adapted principle of permanent sovereignty over living natural resources

Coined in the aftermath of the decolonisation era, the principle was meant to guarantee that the newly independent States would have complete freedom to exploit their natural resources, as they wished free from depredations from Western

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[10] WTO.,WT/DS58/AB/R at § 130.

[11] For more detailed information on the biology of the spotted hyena in the Serengeti-Mara ecosystem, see H. KRUUK, *The Spotted Hyena, A study of Predation and Social Behavior*, The University of Chicago Press, 1972.

[12] This is a real possibility. In 1896, rinderpest decimated wild herbivores and cattle in the whole East Africa region. See R. D. ESTES, *The Gnu's World: Serengeti Wildebeest Ecology and Life History*, University of California Press, Kindle edition,1992.

countries[13]. The principle of permanent sovereignty was expressly recognized by Resolution 1803 of the United Nations General Assembly (UNGA) and reaffirmed in Resolution 2625 and further enshrined in Principle 21 of the Stockholm Declaration, Principle 2 of the Rio Declaration and Article 3 of the CBD. According to this principle, the State has complete discretion to take all necessary measures to manage and exploit the resources localized on its territory, even to the point of exhaustion if it so wishes unless a norm of international law provides otherwise. Whether wild animals were encompassed in the scope of natural resources at the time the principle emerged is difficult to say and is a moot point anyway as it is beyond doubt that they are today. The problem remains that the principle is applied non-discriminatorily to both kind of resources in complete disregard of their different intrinsic characteristics. Non-living resources such as oil, minerals are static by definition and are always located within the borders of a given state, as such and except in the odd case where a mine or a oil well would be located exactly at the border of two States, there is not a shadow of a doubt that the sovereignty of the State in which the non-living resource is located applies permanently.

On the contrary, State's sovereignty on wild animals can only be temporary. This is especially true regarding migratory species but also for those non-migratory species which can move from one jurisdiction to the other at some point. It stems from these differing characteristics that exhaustion of living natural resources and non-living resources also entail different kind of consequences. Exhaustion of non-living resources is only detrimental to the State in which they are located whereas exhaustion of living resources is detrimental for neighbouring states where the species might move to at some point in their biological circle. This is mostly because wild species provide transnational ecological services without which the ecosystem of neighbouring states might be affected. Genetic diversity of neighbouring State's wildlife populations, might also suffer through genetic bottlenecks as populations of wild fauna in different part of their range become more and more isolated from one another[14].

Another flaw of this principle stems from the egalitarian nature of the international society. Since States as sovereign are equal among one another with jurisdiction to prescribe and jurisdiction to adjudicate within their territory, the conservation standards are prone to differ from one State to the other. Because ecosystems in which wild species dwell are interconnected and ignore borders, this means that absence or inadequate conservation of policies, lack or neglectful implementation might affect neighbouring countries sharing the same ecosystem and eventually the species as a whole. Such a scenario occurred within the framework of CITES in the 80s. Bolivia and Paraguay were extremely lenient if not inactive in tackling rampant poaching of spotted feline skins occurring on their territory, which also had an effect on the feline populations of neighbouring countries[15]. A resolution had to be passed on the initiative of the affected countries recommending the Parties

[13] On the history and evolution of the principle of permanent sovereignty over natural resources see N. SCHRIJVER, *Sovereignty over Natural Resources, Balancing Rights and Duties*, Cambridge University Press, 2008.

[14] The cheetah (*acynonix jubatus*) is a notorious example of a specie victim of genetic bottleneck, see A. SCHMIDT-KÜNTZEL, D. L. DALTON, M. MENOTTI-RAYMOND, E. FABIANO, P. CHARRUAU, W. E. JOHNSONS, S. SOMMER, L. MARKER, A. KOTZÉ, S. J. O'BRIEN, « Conservation Genetics of the Cheetah: Genetic History and Implications for Conservation », in Laurie MARKER, Lorraine K. BOAST, A. SCHMIEDT-KÜNTZEL ; *Cheetahs: Biology and Conservation*, Edited by Philip J. Nyhus, Academic Press, 2018, pp. 71-92.

[15] CITES Doc.3.5, Annex 4.

to the Convention to refuse the trade of the poached species with the violating countries until they properly address the situation[16].

Arie Trouwborst, Miha Krofel-John and John Linnel also demonstrated how the different standards of conservation might affect the conservation of a single species within its range through the example of the European golden jackal (*canis aureus moreoticus*). This subspecies of the golden jackal is a medium-sized canid and mesopredator[17] which made a reappearance in Europe and is now present among 26 countries[18]. Although the species is protected under Council Directive 92/43/EEC of 1992 (Habitat Directive) which seeks to preserve habitats and wild fauna on the territory of Member States[19], its conservation status differs radically from one jurisdiction to another. The golden jackal is listed under Annex V of the Directive which concerns species which might be subject to management measures froö Member States. Contrary to species listed on Annex IV of the Directive which enjoy strict protection (Articles 12 and 13) through prohibition of all forms of deliberate capture or killing of specimens, prohibition of deliberate disturbance and deterioration or destruction of breeding or resting sites, Annex V species are subjected to the management measures of the State in which they are located which is only mandated to ensure that taking in the wild as well as their exploitation is compatible with their being maintained at a favourable conservation status[20]. Such measures may include regulation of taking, regulation of trade, breeding among. The regime of Annex V thus provides a certain amount of discretion to States[21] which explains the varying conservation status of the golden jackal within its range. As a result, in 14 countries, the golden jackal can be hunted and in a few of those, without any regulation[22]. Another problem which arose is that in some countries such as Estonia and Latvia, the golden jackal has never occurred before and is thus considered as an invasive species. Lethal removal has been authorized although this appears to be contrary to the disposition of the Directive (Article 22(b)) which only allows regulation of invasive species if introduction is deliberate, in other words, the result of human action, which is not the case of the golden jackal in those countries[23]. These examples thus show the conservation status of one species can be affected at the global scale as the different sovereign States edict different set of norms to regulate ecological phenomenon in disregard of ecological interconnection and its results.

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[16] CITES, Resolution Conf 5.2 and Doc.5.46.

[17] A mesopredator is defined as any midranking predator in a food web, regardless of its size and taxonomy. Laura R. PLUGH, Chantal J. STONER, Clinton W.EPPS, William T.BEAN, William J.RIPPLE, A. S. LALIBERTE, J. S. BRASHARES, « The Rise of the Mesopredator », *BioScience*, Volume 59, Issue 9, 1 October 2009, pp. 779-791.

[18] A. TROUWBORST, M. KROFEL, J.D.C.LINNELL, « The Case of the Golden Jackal (*Canis aureus*) in Europe », *Biodivers Conserv*, 2015, 24: 2593-2610, p 2598. See also J. R. CASTELLO, *Canines of the World*, *Wolves, Wild Dogs, Foxes, Jackals, Coyotes, and Their Relatives*, Princeton University Press, 2018, pp. 134-135.

[19] Article 2 (1)of the Habitat Directive.

[20] Article 14(1) of the Habitat Directive.

[21] N. DE SADELEER, C BORN, *Droit international et communautaire de la biodiversité*, p. 560.

[22] A. TROUWBORST, M. KROFEL, J.D.C.LINNELL, « the case of the golden jackal (*canis aureus*) in Europe », *Biodivers Conserv* 24, 2015, 2593-2610, p. 2598.

[23] *Ibid*, p. 2602.

As Alexandre Kiss emphasized:

> « *En réalité, le caractère international, voire universel de l'environnement est inscrit dans les faits (...) tous les éléments de l'environnement sont solidaires, leur dégradation pose des problèmes qui sont nécessairement internationaux à partir d'un certain niveau.*[24] »

1.1.1 The dubious applicability of the prevention principle in the context of biodiversity loss

Permanent sovereignty over natural resources is not absolute and the corollary prevention principle has emerged in conjunction to it. This cornerstone principle of environmental law originally derives from the obligation for a State not to knowingly allow its territory to be used to acts contrary to the rights of other States set forth by the ICJ in the Corfu Channel Case[25]. This principle is reaffirmed under Principle 21 of the Stockholm Conference of 1972 and Principle 2 of the Rio Conference and by Resolutions 2996 (XXVII) and Resolution 22/228 of the UNGA and further enshrined under Article 3 of the CBD. It has been acknowledged by the ICJ that the principle of prevention defined as the obligation not to allow its territory to be used for acts contrary to the rights of other States implies that a State is

> « *obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State* »

This is a customary rule of international law. The Court described this obligation as an obligation of diligence implying procedural and substantial obligations from a State. Procedurally, the State must check whether there is a risk of transboundary harm through an Environmental Impact Assessment[26]. If the risk if confirmed, the State at risk must be notified in order to ensure coordination. Substance wise, at the core of the obligation is not to cause serious damage to the environment of the other State. In the Costa Rica v Nicaragua case, the Court considered that the serious damage to the environment, a wetland in the case at issue, was not demonstrated. Unfortunately, in its 2015 judgment; the Court did not provide any guidance and especially some criteria to determine what could constitute serious damage to the environment. The Court was merely satisfied that Costa Rica did not demonstrate damage to its wetland. It can be assumed that it can only be decided on a case-by-case basis. The only certainty is that some amount of damage to the environment of another State is not *per se* illegal provided that it does not go beyond a certain limit. Based on this jurisprudence of the Court, it is difficult to see how the prevention principle could effectively apply in the context of environmental damage due to depletion of wild species in a given State. Indeed, for the prevention principle to apply, a State in order to satisfy its obligation of diligence would have to make sure that the activities it wants to allow or regulate on its territory, which might affect wildlife populations located within its boundaries,

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[24] A.-C. KISS, *La notion de patrimoine commun de l'humanité* (Volume 175), Leiden-Boston, Brill, Nijhoff, 1982, p. 114.

[25] ICJ:, « *Corfu Channel case, Judgment of April 9th*, 1949, I.C.J Reports 1949, p. 4 », p. 22.

[26] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, *Judgment, I.C.J. Reports 2015,* p. 665 at §104.

will not be of such magnitude that it will also affect the environment of the neighbouring State (either through impairment of ecological services or loss of genetic viability of wildlife species in the neighbouring State) because of environmental interconnectivity. The first difficulty which arises is that activities which have a negative impact on wild fauna such as deforestation, hunting or trade are conducted over a certain amount of time and it might be years before any effect materializes on the ecosystem of neighbouring country. Besides; it might be extremely difficult even through an environmental impact assessment to determine the scope of the damage that the environment of neighbouring States might suffer and whether it will be serious enough to warrant notification. Ecological processes and ecological services offered by wildlife and their impact on a given ecosystem or environment are especially difficult to assess. Thus, implementation of their duty of diligence by States as far as erosion of biodiversity is concerned might prove impossible because of the complexity and transnational nature of the ecological processes involved.

In order to mitigate this problem, international instruments usually provide for a duty of cooperation between States[27], thus acknowledging that individual sovereign States cannot deal with transnational ecological processes as any decision they might take on the basis of their jurisdiction to prescribe might bear far reaching consequences on the environment of other States. Regulation of wild species is no exception as provided for by the Preamble of the Bonn Convention on Migratory Species of Wild Animals of 1979:

> « *convinced that conservation and effective management of migratory species of wild animals require the concerted action of all States within the national jurisdictional boundaries of which such species spend any part of their life cycle* ».

The Consultative Assembly of the Council of Europe also acknowledged this point:

> « *Traditionally, international law has been essentially concerned with the regulation of relations between states. In ocean space, however, the time has come to recognize as a basic principle of international law the overriding common interest of mankind in the preservation of the quality of marine environment and in the rational and equitable development if its resources lying beyond national jurisdictions. This does not imply disregard of the interests of individual states, but rather recognition of the fact that in the long term these interest can be protected only within the Framework of an international regime of close-cooperation*. »[28]

International conventions are thus another way to harmonize conservation measures and prevent their fragmentation at the global scale. Indeed a race to the bottom could ensue where States enact the least stringent regulations possible in order to avoid any hindrance to their development.

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[27] Article 5 of the Ramsar Convention, Article 5 of the CBD, Article 11 (a) of the Berne convention of 1979 on the Conservation of European wildlife and natural habitat.

[28] Quoted in Alexandre-Charles KISS, *La notion de patrimoine commun de l'humanité* (Volume 175), Leiden-Boston, Brill, Nijhoff, , 1982, p. 116.

1.1.1 Weak conventions fail to mitigate the normative fragmentation of the global conservation regime stemming from the principle of permanent sovereignty over natural resources

The efficiency of international conventions is questionable. First of all their scope is relatively limited as they either cover specific species such as the 1993 agreement on the Conservation of Polar Bears or a specific type of habitat or site such as the Ramsar Convention of 1971 or the Heritage Convention of 1972 which only focus one element of an ecosystem. The second methodology employed in international convention is the list system which only affords protection to the species listed which are usually the most threatened or endangered species such as with CITES, CMS, the Berne Convention of 1979 or even the Habitat Directive of 1992. To sum up only a small fragment of wildlife species are covered by international instrument. Since all the elements of an ecosystem and the biosphere are interconnected, protection of mere fragments is insufficient. Although the CBD is supposed to cover all elements of the biosphere and biodiversity in general, it is drafted in such weak language that the obligations provided for lack legal force. This is a common feature of most international wildlife conventions with a few notable exceptions such as CITES at the global level, the Berne Convention on the Conservation of European Wildlife Natural Convention of 1979 ("Berne Convention") or European Union (EU) regulation at the regional level. Taking back the example of the CDB, the obligations provided for have to be implemented «as far as possible and as appropriate», which leaves considerable discretion to States as regard implementation. It also allows them to be easily off the hook should they be in breach as they only need to show that they took all possible measures or that they deemed that some minimal measures were sufficient enough to satisfy their obligations under the Convention.

The CMS and most other international conventions on wildlife conservation operate along the same lines. Article III of the CMS pertaining to endangered migratory species listed on Appendix I provides that Parties that are Range States of migratory species « *shall endeavour: to conserve and where feasible restore habitats of the species* (…) ». As Alexandre Kiss reminds us, States are eventually the one in charge of implementation[29]. If international instruments leave too much room to States at the implementation stage, the efficiency of the Convention can be seriously undermined and its harmonization potential brought to naught not to mention that an instrument may also be significantly weakened by reservations and derogations which are provided for under most international conservation legal regimes[30]. According to the World Conservation Strategy weak conventions are dangerous and must be avoided as they give the illusion that

[29] A.-C. KISS, *La notion de patrimoine commun de l'humanité* (Volume 175), Brill, Nijhoff, Leiden-Boston, 1982, p.

[30] In most wildlife conservation conventions derogations to the regime set forth in the convention generally include takings for the protection of flora and fauna which might justify that some other elements be sacrificed, takings for scientific purposes, protection of crops, livestock, forests, fisheries, waters and other forms of properties, protection of public health and security, air security and overriding public interests. All these derogations are provided for under Article 9 the Berne Convention of 1979, the CMS allows in its Article III.5 c) taking of endangered migratory species for the needs of traditional subsistence users of such species. Article VII of CITES also provides for a specific set of exemptions to its stringent regime which normally requires for species threatened with extinction listed in Appendix I the delivery of import and export permits from the relevant State parties for the trade of such specimens or parts thereof to occur.

problems are being addressed whereas in reality they are not[31]. This partly explains why despite the many international instruments adopted to protect wild animals, numbers keep plummeting. This tends to be further demonstrated by the fact that in Europe where regional instruments such as the Berne Convention of 1979 or especially the EU regulations, the provisions of which are laid in no uncertain terms and binding on States, achieve the best results on the field. Indeed, impressive recovery of populations of big carnivores which had been extirpated in previous centuries has been directly attributed to European legal instruments[32].

Although at the international level, conventional organs and monitoring and non-compliance mechanisms have been created in order to ensure better implementation by States, control remain erratic as States' consent and intermediation is always at the heart of these systems. The reporting procedure which is also prevalent in the field of human rights is provided for under all major international wildlife conventions. Similarly to what happens in the field of human rights, States do not always take their reporting duties seriously as the Conference of Parties of several convention systems acknowledged[33][34]. This is extremely problematic, as the bodies of the convention need these reports to monitor implementation of the Convention and make recommendations when needed. The International Whaling Convention of 1946 managed to have a much more ambitious system where international observers are selected by the Whaling Commission, the executive body of the Convention[35] and sent to fisheries and ships. However, this kind of measure is facilitated by the fact that fishes are not always located within national jurisdictions and frequently occur in the high seas which is free from States' sovereignty. As such, it seems much easier to set up more stringent legal regimes and control in these areas beyond national jurisdictions as it is in the common interest of all States that resources in these zones be managed by international bodies.

Inspections are also possible under certain legal regimes concerning terrestrial wildlife but State consent is always necessary[36]. Some Conventions like CITES or the Berne Convention of 1979[37] through their institutional bodies have

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[31] Quoted by M. BOWMAN, « The Effectiveness of International Nature Conservation Agreements » in Land Use and Nature Protections: Emerging Legal Aspects, H. T. ANKER, E. M. BASSE, DJOF Publishing, 2000, p. 107.

[32] M. COURT, « Les grands carnivores européens sont en pleine forme », *Le Figaro*, 18 December 2014.

[33] UNEP/CDB/COP/7/21, Decision VII/25 « National Reports », p. 375

[34] Ramsar COP, Recommendation 4.3 « National Reports ». See also for the CMS, UNEP/CMS/Conf.8.5/add1 at §12.

[35] International Whaling Convention, Schedule, para. 21(c).

[36] CITES may set up task forces if some species are in dire straits. These task forces will specifically monitor the situation of the targeted specie on the field with the consent of the relevant State. The task force will then make a certain number of recommendations of measures for the State to adopt in order to ensure the conservation of the specie. Such task forces were set up for tigers and rhinoceros.

[37] The Berne Convention set up in 1984 the « case-file system » which allows civil society including private citizens to issue a complaint before for breaches of the Convention before the institutional apparel of the Convention which will process it. If grounded, they will seek information from the State concerned. Field assessment can even be made if the prior consent of the State. Based on the information received the executive organ of the Convention will decide if a file will be opened or not which will allow for different measure to be taken from reporting to field missions in order to make recommendation to the State in breach. The file will be closed only after the breaching Party finds itself in compliance with the Convention. This procedure has proven to be quite effective but for some exceptions such as the Laganas case in Greece which remained opened for 14 years.

instituted some more ambitious monitoring and non-compliance systems matched with sanction to ensure implementation[38]. However, CITES and the Berne Convention are rather the exceptions than the norm, most non-compliance procedures are conciliatory in nature and will try to bring back the State in compliance through negotiations, recommendations and persuasion.

It thus appears that neither international conventions which are supposed to harmonize wildlife conservation norms and practices nor the principle of prevention can adequately mitigate the negative effects that the principle of permanent sovereignty have over living natural resources. Because international law does not distinguish between non-living resources and living resources, wild animals may be exploited to unwise levels in utter disregard for their sentience and the common interest of humanity in their conservation. Although it is well established theoretically that sovereignty over natural resources is not absolute, practice sometimes suggest otherwise. It is vastly acknowledged by the scientific community that humanity has a vital interest in the preservation of rainforests in Brazil, South-East Asia and Central Africa. Yet, failure to adopt a binding convention on the protection of forests at the Rio summit in 1992 tends to demonstrate that no State is willing to lose control over its natural resources no matter the vital interests of the international community.

Several propositions have been made to translate into legal terms the common interest of humankind in the conservation of wild animals based on the ecological services that they provide regardless of State's jurisdictions. The concept of Common Heritage of Human Kind certainly comes to mind. Despite the fact that it captured adequately the common interest in conservation of wild species without calling into question the cornerstone principle of permanent sovereignty over natural resources, the concept was never widely accepted among States. After a brief examination on how the principle would have been suited to living resources such as wild animals, we will examine possible alternatives which could contribute to the strengthening of conservation efforts.

1.2. The alternatives to the qualification of natural ressources for wild aniöals

It has been demonstrated that the qualification of natural resources is too one-dimensional as applied to wild animals as it only takes into account the fact that they can be subjected to exploitation which is not even their first purpose. Indeed, the first function of wild animals is to contribute to the maintenance of ecosystems through their ecological functions. Second of all and contrary to non living resources,

[38] CITES set up two innovative compliance mechanism, one was the national legislation project initiated at the COP8 in 1992 when it appeared that several countries had not implemented core CITES provisions in their domestic legal system. See Resolution Conf. 8.4. In such situation, the executive organ of the Convention, the Standing Committee would make recommendation to the breaching Parties to prompt compliance. If proper enactment of CITES core provisions was still lacking, the Standing Committee of the Convention could make a recommendation to State parties to suspend trade with the State in breach until the proper legislation was adopted. The other procedure was the Significant Trade Review which focused on monitoring the level of those Appendix II species which might become threatened with extinction if their trade is not regulated. When it appeared that some of these species were subjected to unusually high level of trade, the Technical Committee of the Convention would recommend measures to the relevant States so that the level of trade remains sustainable for the species concerned. The threat of a recommendation of suspension of trade could and was applied if States were unwilling to comply. These two non-compliance proved to be quite effective and many States adopted or adapted their national legislation accordingly. For more details on these procedures, see R. REEVE, *Policing International Trade In Endangered Species, The CITES Treaty and Compliance*, Routledge, 2002, Kindle version, Empl. 4273 et seq. and Empl. 3655 et seq..

wild animals have sentience which is completely obscured by the concept of natural resources. Another concept is thus needed to take these characteristics into account. Since the idea of wild animals as natural resources is also prevalent in national jurisdictions, several authors have tried to determine to find a legal qualification which would better capture the different characteristics of wild animals and afford them a better protection.

Under most national jurisdictions, wild animals are considered *res nullius*. There are some notable exceptions where wild animals are considered property of the State. China[39] and Tanzania being notorious examples. This qualification is one of Roman law and has been prevalent ever since. As *res nullius*, the thing, animals belong to no one but are susceptible to be appropriated by anyone who would find them first. This legal status would thus favour the exploitation of wild animals by man as this status deprives them of any kind of protection, not even from cruel treatment. According to Martine Rémond-Gouillou, the qualification of *res nullius* is relevant only when the *thing* exists in abundance[40] which was probably the case in Roman times as thousands of animals were sacrificed in the games. Martine Rémond-Gouillou thus suggested that the legal qualification of *res communis* would be more adequate when a given resource became scarce[41].

1.2.1 Wild Animals as *res communis*

As *res communis,* there is no vested property rights in the thing which as a result cannot be appropriated nor altered or destroyed[42]. The notion of *res communis* is appropriately defined in Article 715 of the French Civil Code: « *il est des choses qui n'appartiennent à personne mais dont l'usage est commun à tous* ». As such, Man only has a right of use which it shares in equal proportion with the rest of humanity. Man can thus rip the rewards of the use of the thing but cannot alter its substance[43]. For Marie-Pierre Camproux-Duffrène, this qualification could perfectly apply to wild animals[44] as it avoids personification of the animal (an issue which will be dealt with later on) without the negatives of being considered property either[45]. However for several authors the qualification of *res communis* should only

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[39] Article 9 of the Chinese Constitution provides: « Mineral resources, waters, mountains, grassland, unreclaimed land, beaches, and other natural resources are owned by the state, that is, by the whole people, with the exception of the forests, mountains, grassland, unreclaimed land, and beaches that are owned by collectives in accordance with the law. The state ensures the rational use of natural resources and protects rare animals and plants. The appropriation of damage of natural resources by any organization or individual by whatever means is prohibited. ». For more details on Chinese wildlife law see Q. TIANBAO, Wildlife Laws in China in R. PANJWANI, *Wildlife Law, A Global perspective*, 2008, pp. 57-90, also D. CAO, *Animals in China*, Palgrave Macmillan Animal Ethics Series, 2015. ;

[40] M. REMOND-GOUILLOUD, « Ressources naturelles et choses sans maître », *Recueil Dalloz Sirey*, 1985, 5e cahier-chronique, pp. 27–34, p. 28.

[41] *Ibid*.

[42] M.-P. CAMPROUX-DUFFRENE, « Un statut juridique protecteur de la diversité biologique ; regard de civiliste », *Revue Juridique de l'Environnement*, numéro spécial, 2008. Biodiversité et évolution du droit de la protection de la nature, pp. 33–37, p. 34.

[43] *Ibid*, p. 35.

[44] M.-P. CAMPROUX-DUFFRENE, « Un statut juridique protecteur de la diversité biologique » ; regard de civiliste, *Revue Juridique de l'Environnement*, numéro spécial, 2008. Biodiversité et évolution du droit de la protection de la nature, pp. 33–37, p. 34.

[45]M.-P. CAMPROUX-DUFFRENE, « Plaidoyer civiliste pour une meilleur protection de la biodiversité. La reconnaissance d'un statut juridique protecteur de l'espèce animale », *Revue interdisciplinaire d'études juridiques*, 2008/1 (Volume 60), pp. 1-27, p. 5.

apply to the animal kingdom taken in their *genus* (« universalité de fait ») while the individual animal species within it would remain *res nullius*[46]. The rationale behind this system is that it would preserve the species taken in the generic sense from extinction while allowing its individual components to be appropriated for human uses. Another advantage of this legal status, is that it would allow for the shared management of theses resources by the international community[47]. The last consequence of this legal status, is that breach of the duty to conserve a species of animal as a genus would trigger liability and an obligation to compensate.[48]
The status of *res communis* is certainly an attractive proposition as far as it would prevent wild animals from being appropriated not to mention on obligation of shared use and thus management between the different users. This status is also preferable as it indirectly allows for more deference for the ecological role of wild animals although it is not its first function. Indeed, the fact that a generic species needs to be conserved for the use of all also ensures that the ecological functions it provides will be maintained. The shared management that such status entails also offers some measure of guarantee that the use of the *thing* will not be abusive, at least theoretically.

1.2.2 Wild animals as common heritage of humankind by affectation

The status of *res communis* is also one of international law and was a precursor to the concept of common heritage of humankind although the notions are not synonymous.[49] Originally the term was applied to the high sea and later on to extra-atmospheric space[50]. However, the term had negative connotation as too closely associated with the colonial era which explains why the concept of common heritage of humankind came to replace it[51]. Eventually all *res communis* became common heritage of humankind along which: oceanic floors, orbits and the Moon[52]. The concept of common heritage of humankind has a broader scope than *res communis* although the content of the notion remains to be defined. Yet, the concept is not completely nebulous as some salient features can be identified which according to Alexandre Kiss could include[53]:

- use for pacific ends only;
- non appropriation;
- existence of a management or administration system by all users;

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[46] *Ibid*, p. 6 and M. REMOND-GOUILLOUD, « Ressources naturelles et choses sans maître », *Recueil Dalloz Sirey*, 1985, 5e cahier-chronique, pp. 27–34.

[47] M. REMOND-GOUILLOUD, « Ressources naturelles et choses sans maître », *Recueil Dalloz Sirey*, 1985, 5e cahier-chronique, pp. 27–34, p. 29.

[48] M.-P CAMPROUX-DUFFRENE, « Plaidoyer civiliste pour une meilleur protection de la biodiversité. La reconnaissance d'un statut juridique protecteur de l'espèce animale », *Revue interdisciplinaire d'études juridiques,* 2008/1 (Volume 60), pp. 1-27, p. 11.

[49] A.-C. KISS, *La notion de patrimoine commun de l'humanité* (Volume 175), Brill, Nijhoff, Leiden-Boston, 1982, p. 120 et seq..

[50] *Ibid*, p. 121

[51] Y. OTOMOTO, Species, scarcity and the secular state, in *Law and the question of the animal*, Routledge, 2013 p 167.

[52] A.-C. KISS, *La notion de patrimoine commun de l'humanité* (Volume 175), Brill, Nijhoff, Leiden-Boston, 1982, p. 123.

[53] *Ibid*, p. 33.

- use of the resource must be wise and allow the regeneration or renewal of the resource and if the resource is not renewable, exploitation must take into account future needs;
- equitable share of the benefits or rewards among the different States.

Based on these principles, Alexandre Kiss was able to distinguish common heritage of humankind by nature[54] and common heritage of humankind by affectation. In the first category[55], he would include those former *res communis* which later became common heritage of humankind such as the high sea, the Moon and other celestial bodies or Antarctica while in the second category would cover elements of *res communis* which need to be protected as they offer invaluable ecological services and are irreplaceable elements of the biosphere without which life on Earth is not possible such as wild animals or sites protected and the Heritage Convention. The main difference between the two categories is that *res communis* by nature are located outside States' jurisdiction whereas common heritage by affectation are located within.

Yet it remains that for Alexandre Kiss the purpose of these two types of heritage are the « common good » of humanity beyond interests of States which are assimilated to trustees to this heritage [56] in which humanity has a vested right[57]. This was expressly acknowledged by Mr Benjamin Mkapa, former President of Tanzania which is famous worldwide for its wild animals galore: « *that Tanzania is richly endowed in natural resources is an accident of geography, it belongs to humanity as a whole* »[58]. The Yasuni initiative through which the President of Equator agreed to spare the diversity hotspot that is Yasuni National Park in which oils was discovered in exchange for compensation from the international community equivalent to 50% of the value which would have been drilled, is also a sign that some States are aware that they are mere trustees of their natural wealth for the benefit of humanity as a whole[59]. As far as wild animals are concerned, Kiss considered that the conference of parties of wildlife conventions, NGOS such as the IUCN and other international organs such as the commission provided for under Article 9 of the Convention on the Protection of Antarctica Seals of 1972 were the representatives of humanity through which wise management and use was done[60] and a further sign that those elements were common heritage of humankind.

Ultimately the goal of the concept of common heritage of human kind is to protect and transmit a common good[61]. This aspect materialized in international law through the principle of intergenerational equity acknowledged by Judge Weeramantry in the Nuclear case as a fast emerging principle of international law:

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[54] *Ibid*, p. 226.

[55] *Ibid*, p. 229.

[56] *Ibid*, pp. 230-231.

[57] *Ibid*, pp. 235-236.

[58] 3rd Report on Biodiversity Liaison Group, Gland, Switzerland, 10 May 2006, BLG 3/REP, 8 June 2005.

[59] [http: //yasuni-itt.gob.ec].

[60] A.-C. KISS, *La notion de patrimoine commun de l'humanité* (Volume 175), Leiden-Boston, Brill, Nijhoff, , 1982, pp. 143 et 182.

[61] *Ibid*, p. 174.

> « *It is to be noted in this context that the rights of future generations have passed the stage when they were merely an embryonic right struggling for recognition. They have woven themselves into international law through major treaties, through juristic opinion and through general principles of law recognized by civilized nations* »[62].

Judge Weeramantry used the 1979 London Ocean Dumping Convention, CITES and the World Heritage Convention to further make his point as according to him they enshrined « *the principle of protecting the natural environment for future generations and elevate the concept to the level of binding State obligations* »[63]. He further considered that the concepts of intergenerational equity and the common heritage of mankind are academically well established.

This principle which goes hand-to-hand with the principle of common heritage of humankind thus suggests that State has a responsibility to preserve natural resources for future generations at the global scale. Consequently, State sovereignty over wild animals resources located in its territory is anything but absolute as its loss has dire consequences beyond the borders of that State and affect humanity as a whole. In a way this principle works in a similar fashion as the principle of prevention aforementioned as it forces Stats to consider the interests of others and the common good. This idea is underlying in the provisions of Article 10 a) of the Word Charter for Nature (A/RES/37/7 AGNU): « *Living resources shall not be utilized in excess of their natural capacity for regeneration* ». It could thus be asserted that under the principle of intergenerational equity, extinction of wild fauna even in the event where it remains invariably located within the borders of a given State is a loss for humanity as a whole.

On these same grounds some academics consider wild animals as a global resource[64] understood as a resource located on the territory of a given State but the benefit of which is shared and necessary by the international community as a whole. Michael Glennon is a proponent of such a theory, using elephants as an example of a global resource as individuals other than the citizens of the State in which it dwells have an interest in its conservation regardless of the nature of this interest (ecological, commercial or even aesthetic)[65]. When such species are endangered, the same author considers that the State on the territory of which the endangered animal is located has a duty under customary law to protect it based on the quasi universal ratification of CITES and the World Charter for Nature[66]. This theory is certainly attractive and well grounded but it remains to be seen whether States would rally behind it.

Similarly, States have rejected the principle of common heritage of humankind by affectation or in other words as applicable to those elements of the biosphere located on their territory which include wild animals. This is especially

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[62]ICJ., *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, Dissenting Opinion of Judge Weeramantry, p. 455.

[63] *Ibid*.

[64] M.J. GLENNON, « Has International Law Failed the Elephant ? », *American Journal of International Law*, Volume 84, 1990, re-edition.

[65] *Ibid*, p. 34.

[66] *Ibid*.

unfortunate since the status of common heritage of humankind would have afforded in theory a better protection to wild animals as their use by the State in which they dwell would have had to be balanced with the interests of other States in their survival and would implied some necessary cooperation with those interested States to ensure wise use. It seems that this principle was misconstrued by States which feared that it would interfere with their sovereign rights or allow some form of eco-colonization. Failure at the Rio summit of 1992 to adopt a binding instrument on forests is certainly a sign of States' wariness when it commons to the notion of common heritage. In the Biodiversity Convention of 1992, the principle of common heritage of humankind was replaced by the notion of common concern of human kind. This concept does not seem to carry any legal implication and is a mere acknowledgment that the protection of biodiversity is a shared common objective.

Other alternatives thus need to be found. Some academics such as Marie-Claude Smouts suggested the qualification of global public goods defined by the economist Paul Samuelson as goods the users of which cannot be excluded nor be rivals such as peace, health and air[67]. According to the author, one of the advantages of this principle is that it prevents free rider behaviours as no one is denied access to the resource[68]. It keeps what made the Common Heritage of Human Kind attractive through the notion of common good and the creation of an international management authority while getting rid of its disadvantages which is the competition for appropriation of the resource and possible infringements on States' sovereignty. Although this concept potentially applies to the environment, it can be feared that its economic oriented undertones will obscure yet again that wild animals, because of their special characteristics, cannot be subjected to the same regime as non-living resources destined to mere exploitation. Marie-Claude Smouts acknowledges that the global public goods theory can be the result of selfish and utilitarian choices[69]. As such, this can be problematic as ecological services offered by wild fauna to the community as a whole might be ignored yet again for the sake of immediate profit.. Besides, an argument can be raised that living sentient being cannot be reduced to mere goods to be produced as their sentience also implies that they may have an other destination than to be produced or exploited.

1.2.2 The necessity to distinguish between non living resources and non living resources

It seems that a first priority would be to make a distinguishing between non-living resources and living resources based on their inherent and so obviously different characteristics. Whereas non-living resources would still fall under the regime of permanent sovereignty over natural resources, living natural resources could be subjected to a separate regime of shared natural resources. According to Martine Rémond-Gouillou, at the international level, the concept of « shared resources » expresses the need to cancel the negative effects of borders' partitioning when the resource is distributed between several national jurisdictions[70]. This regime is applied to most international waterways. Indeed, an international waterway is a shared resource in the sense that it goes through the territory of several States,

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[67] M.-C. SMOUTS, « Du Patrimoine commun de l'humanité aux biens public globaux », *Patrimoines naturels au Sud*, p. 67

[68] *Ibid*, p. 68.

[69] *Ibid*.

[70] M. REMOND-GOUILLOUD, « Ressources naturelles et choses sans maître », *Recueil Dalloz Sirey*, 1985, 5e cahier-chronique, pp. 27–34, p. 30.

offering along the way a vast array of ecological and economic services of a transnational nature, yet each State has jurisdiction on the section of the river which crosses its territory. Since other States have an interest in the benefits offered by an international waterway, the State on the territory of which lies a section of the waterway will have a certain number of obligations. It has to be said at the outset that there is to this date no unified regime of international waterways. Yet, several legal principles have been identified through international jurisprudence which have sometimes been codified in international conventions such as the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses which updated. Among the principles set forth under this convention one can find the principle of equitable and wise use which entails a duty of cooperation from States. The principle of prevention discussed above is also expressly provided for and mandates that States do not cause significant damage to other riparian States. Such principles are also found at the regional level in regional agreements designed to regulate international basins and waterways such as the Protocol on Shared Watercourses in the Southern African Development Community (SADC)[71]. According to the ICJ in the *Gabcikovo-Nagymaros* and *Pulp Mills* cases, these principles enjoy customary law status[72].

It is believed that an argument could be made that wild animals enjoy many characteristics with waterways. Migratory species cross several States on a periodical basis while most non migratory species have range which span over several national jurisdictions. As such, species provided that they are considered in the generic sense of the word or as a single ecological and genetic unit and not in their individuality are shared resources[73]. This is because they are present across several States and offer transnational ecological and economic services which go beyond the borders of the States which nonetheless has jurisdiction on the population of the species which are present on its territory As shared resources, the principle of prevention theoretically applies alongside the principle of equitable and wise use which requires that States cooperate in order to manage the living resource adequately which implies some measure of protection in order to prevent extinction which would affect all interested parties.

To this end regional commissions similar to those set up for the regulation of international waterways such the Rhine Commission could be instituted[74] or any other regional organ which would fulfil a similar function. This is not unheard of as far as wild animals are concerned. Indeed, the Appendix of the Coordination and Administration of the North American Waterfowl Management Plan provides for a Committee in order to discuss problems linked to the conservation of waterfowl based on the analysis of relevant scientific data and coordinate international action between the signatories (USA, Canada and Mexico). The 1994 Lusaka Agreement on Co-operative Enforcement Operations Directed at Illegal Trade of Wild Fauna

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[71] Article 3(5) provides for duty of cooperation, Article 3(7) provides for equitable use with adequate protection of the watercourse for the benefit of current and future generations while the principle of prevention is provided for under Article 3(10).

[72] ICJ.; *Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997* , p. 7, at §140 and *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14 at §101.

[73] C. DE KLEMM, « Conservation of Migratory animals through International Law », *Natural Resources Journal*, Vol. 12, 1972, p. 272.

[74] M. REMOND-GOUILLOUD, « Ressources naturelles et choses sans maître », *Recueil Dalloz Sirey*, 1985, 5e cahier-chronique, pp. 27–34, p. 30.

and Flora (Lusaka Agreement) is also worth mentioning. The seven signatories[75] effectively set up a Task Force in order to eliminate illegal trade of wild flora and fauna[76]. The Preamble of the agreement provides that the conservation of wild flora and fauna is crucial to ensure the functioning of biological diversity and that illegal trade is the result of transboundary transactions. The Task Force enjoyed a certain amount of success as their collaboration with the Kenyan and Tanzanian Wildlife Services enabled them to uncover 61 elephant tusks[77]. Cooperation between Kenya, Congo, Tanzania and Zambia also allowed the seizure of 556 elephant tusks, 13 zebra skins, bush meat, carved ivory and traps which led to the arrest of 25 suspects[78]. The following examples tend to demonstrate that the regime of shared resources would provide a certain amount of protection to wild animals against overexploitation through either legal or illegal means, while taking into account the ecological services that they offer. But more importantly, since shared resources implies shared management, the principle of permanent sovereignty would not be questioned or threatened under this status as it only requires that State cooperate pursuant to their customary duty to do so in such matters. Yet, despite its many advantages, the status of shared resources still falls short to address the most important characteristic of wild animals which is their sentience.

PART II TAKING WILD ANIMALS' SENTIENCE SERIOUSLY.

2. The denial of wild animals sentience under international law: an example of legal schizophrenia

The title of this second part echoes Gary's Francione is an echo of his article published in the Journal of Animal Law and Ethics entitled « Taking sentience seriously »[79] in which he made a strong argument that animals are morally relevant for the mere fact that there are sentient beings. Sentience is a characteristic shared by all wild animals that neither the qualification of *res* nor that of natural resource can apprehend. It has been argued up to now that wild animals should have the legal status of shared resources under international law as it could afford them more protection than the current international regime. The current international regime is anthropocentric in the sense that even when its purpose is to conserve it is always with the underlying idea that it is in the best interest of Man to do so be it for ecological (contribution to create a safe environment for human beings) and mostly for more prosaic reasons. If some instruments yet recognize the intrinsic value of wild animals[80], it rarely bears any legal consequence.

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[75] Congo, Kenya, Liberia, Tanzania, Uganda, Zambia, Lesotho ratified the Agreement while Swaziland, Ethopia and South Africa signed but did not ratify the Convention.

[76] Articles 2 and of the Agreement.

[77] E. MREMA, « Lusaka Agreement as a Mechanism for Enforcement of CITES », presented for the« Seventh International Conference on Environmental Compliance and Enforcement ».

[78] *Ibid*.

[79] G. L. FRANCIONE, « Taking sentience seriously » in C. PALMER, *Animal Rights*, Routledge, 2016, pp. 423-444.

[80] Preamble of the Convention on Biological Diversity: « Conscious of the intrinsic value of biological diversity…".

2.1 The philosophical reification of wild animals at the basis of the *summa divisio*

Philosophical and economic reasons mostly explain why wild animal's sentience is not yet matter of regulation at the international level. In western philosophical tradition dating back to Ancient Greece where Aristotle thought that animals were inferior beings whose sole existence was to be exploited by Man:

> « *In like manner we may infer that, after the birth of animals, plants exist for their sake, and that the other animals exist for the sake of man, the tame for use and food, the wild, if not all at least the greater part of them, for food, and for the provision of clothing and various instruments.* » [81]

Descartes also considered the animal as a machine, in other words a thing deprived of soul especially based on the fact that they do not speak[82]. Considering the influence the later had on western thought by emphasizing the role of reason and the impact it then had on the development of science which was a key element in the industrial revolution which was fuelled by the consumption of natural resources, one can then understand why it was in the interest of mankind to disregard wild animals' sentience. As David Boyd explained:

> « *Anthropocentrism and property "rights" provide the foundations of contemporary industrial society, underpinning everything from law and economics to education and religion. Economic growth is the principal objective for governments and businesses, and it consistently trumps concerns about the environment* »[83].

It is thus no surprise that eventually these views of the mind and economic mantras were translated into law. Grotius in Chapter II of Book II of « The Rights of War and Peace » entitled « Things which belong in common » said the following:

> « *[A]s to wild Beasts, Fish and Birds, we must observe too, that whoever has Dominion over the lands or Water in which they are, may prohibit the taking of these Sorts of Animals, and so hinder any Person from acquiring them by taking them, and the same Law is obligatory on Foreigners.* »[84]

Well before the principle of permanent sovereignty over natural resources was coined, Grotius already formulated it and considered that wild animals were susceptible to be appropriated as such by the sovereign on the territory of which they dwell. This reification of wild animals is also prevalent under most national jurisdictions. Whereas domestic animals and to a lesser extent zoo animals had many jurisdictions be recognized as sentient beings with some protection attached, wild animals living in the wild remain for the most part as mere things in the eyes of the law. The status of wild animals under French law is a vivid example of this.

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[81] ARISTOTLE, *Politics*, Part VIII/13, Batoche Books, 1999.

[82] R. DESCARTES, *Discours de la Méthode*, Ve partie. Oueivres et lettres, La Pléiade, 1637, pp ; 162-165.

[83] D. R. BOYD, *The Rights of Nature, a legal revolution that could save the world*, ECW Press, Kindle edition, 2017, p. 199.

[84] H. GROTIUS, *The Rights of War and Peace*, Book II, Chapter II, V, Liberty Fund, 2005.

2.2 The discriminatory recognition of sentience among the animal kingdom at the national level

2.2.1 Double standards

There is a clear divide between wild animals and domestic animals. Whereas domestic animals have been recognized as sentient beings by Law n° 2015-177 of February 16 2015, wild animals which are not even defined under French law[85]are regulated by the French Environmental Code (articles L.411-1 to L. 411-5). The two classes of animals are thus regulated by two very different regimes. Although recognized as sentient beings, domestic animals still remain regulated by property law. However, their sentience means that they are entitled to some benefits as provided for under the French rural code. For example, article L. 214-1 mandates owners to create the proper conditions compatible to the biological imperatives of the species under their guardianship because of their sentience. Domestic animals also enjoy the protection of criminal law against cruel treatments[86]. It seems that wild animals in France are deprived of such protection[87]. Draft laws recognizing sentience for wild animals met with strong resistance and were ultimately rejected[88]. The reason for such resistance can be explained by the fact that recognition of wild animals sentience could significantly impede some human activities involving the destruction of wild animals such as hunting and fishing[89] which are widely practiced in France and defended by powerful lobbies. Only threatened and protected species of wild animals are regulated under the law, species falling outside the scope of these regulation are qualified as pest and are thus deprived of any kind of protection[90]. As a result, the animal kingdom is regulated by two different kinds of laws, animal welfare law which applies to domestic animals and wild animals in captivity which based on their sentience and the law of the protection of endangered species which only apply to a specie as a whole in order to prevent its extinction.

It is possible to find the same kind of architecture at the international level where we can distinguish animal welfare laws regulating those animals under the control of man and very marginally wild animals, and international wildlife protection laws which protect endangered species. As explained by Sabine Brels, the former is mostly based on animal ethics while the second is grounded on environmental ethics[91]. As regards the animal welfare laws, the World Organisation for Animal Health (OIE) defines animal welfare as

> « *how an animal is coping with the conditions in which it lives. An animal is in a good state of welfare if it is healthy, comfortable, well nourished, safe, able to express innate behaviour, ant if it is*

[85] J.-M. COULON, J.-C. NOUËT, *Les droits de l'animal*, Dalloz, 2009, p. 84.

[86] C. MORALES FRENOIS, *Le droit animal*, L'Harmattan, 2017, p. 19 et seq..

[87] *Ibid*, p. 17.

[88] K. MERCIER, *Le droit de l'animal*, LGDJ, 2017, pp. 37-38.

[89] *Ibid*.

[90] C. MORALES FRENOIS, *Le droit animal*, L'Harmattan, 2017, p. 303.

[91] S. BRELS, *Le droit du bien-être animal dans le monde, Évolution et universalisation*, L'Harmattan, 2017, pp. 42-43.

> *not suffering from unpleasant states such as pain, fear, and distress.* »[92]

Although welfare law does not prevent the use and even the killing of animals they ensure that the animals are treated humanely during their span of life. These standards apply mostly to animals under the control of men and an international body of legislation has been enacted at the international and regional level. The World Organisation for Animal Health (OIE) is probably the most relevant organization here and has issued a certain number of norms and standards at the international level among which the Terrestrial Animals Health Code. At the regional level, one can find the European Convention for the protection of animals during international transport of 1968, the European convention for the protection of animals for slaughter, the European convention of animals kept for farming purposes. Within the EU, one can find the Community Action Plan on the Protection and Welfare of animals 2006-2010, Directive 2007/43/EC laying down minimum rules for the welfare of chickens kept for meat production, Directive 98/58/EC for the Protection of animals kept for farming purposes, several regulations for the Protection of animals during transport, Directives 86/609/EEC and 88/166/EEC on the Protection of animals during transport, Directive 99/22/EC for the Keeping of wild animals in zoos. As can sometimes been deducted from the titles of such legislation, domestic and captive animals are the main recipients of such legislation.

Wild animals living nature are rarely touched upon as they are not in contact with Man. One could say that CITES provides in many provisions that live specimen must be « shipped as to minimise the risk of injury, damage to health or cruel treatment »[93] however this implies that the specimen is already within the hands of Man and is not living in the wild anymore. Yet, wild animals can be subjected to cruel treatment in the wild, they can be maimed by cruel hunting practices, tortured, have their breeding sites destroyed, the list being non-exhaustive. Isabelle and Jean-Francois Lagrot, a couple of veterinarians have described how a forest elephant (*loxondonta cyclotis*) was tortured by poachers in the equatorial forest of Cameroon for the need of bush meat[94]. Noose traps or snare used to trap small game for the need of the bush meat industry leaves many animals maimed and in unnecessary pain until they die of septicaemia[95]. Some methods of hunting practiced in South Africa such as « can hunting » can be qualified as barbaric, where a wild animal (usually a lion) is trapped in an enclosure to allow a hunter to kill it while it lack any mean to escape[96]. This certainly calls for an end of this legislative and illogical schizophrenia and for the recognition that wild animals are sentient beings who could benefit from welfare laws even if they leave in the wild. Already some significant steps have done both at the national and international level.

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[92] Chapter 7.1 of the Terrestrial Animals Health Code.

[93] Article III(2)(c), III4(b), Article IV(2)(c), Article V(2)(b).

[94] I. et J.-F. LAGROT, *Tristes Afriques, chasse et massacre en foret africaine,* le cherche midi, 2005, p. 267 et seq..

[95] The author has been a witness and photographed a spotted hyena in the Serengeti National Park, Tanzania, the neck of which was caught in a poacher's snare.

[96] R. PEIRCE, *Cuddle me, kill me*, Struik Nature, 2018.

2.2.2 The slow and limited recognition of wild animals' sentience: an emerging trend

Sentience of wild animals has sometimes been legally recognized. Such is the case of Costa Rica which is extremely progressive. Not only does it ban the use of wild animals in circus (2002) and zoos (2013) but it also adopted at unanimity the revision of its hunting legislating effectively banning all forms of hunting[97]. Several other Latin American countries such as Bolivia, Mexico and Peru have prohibited the use of wild animals in circus[98]. In the Netherlands, the law provides that « *the intrinsic value of wild animals means that animals possess a value in themselves, thus their interests are not automatically subjected to human interests* »[99]. This legal provision is not cosmetic as it was effectively applied to ban fur farming[100] which is a major industry in the Netherlands. India is also a country which is usually far ahead in terms of wildlife protection thanks to its long history of conservation dating back from the Maurya and Buddhist King Ashoka in 3rd century BC but also because of its cultural and religious heritage especially as far as Jainism, Hinduism and Buddhism are concerned. Article 51-A(g) The Constitution of India provides that « *It shall be the fundamental duty of every citizen in India (...) to protect, and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures* ». The Prevention of Cruelty to Animals Act applies to both wild and domestic animals[101].

At the international level, there are some positive signs for change and some encouraging steps have been made where they were least expected. Indeed, a dispute was brought before the WTO Panel by Canada and Norway against the EU under the General Agreement on Tariffs and Trade (GATT 1994). Norway and Canada alleged that Regulation (EC) No. 1007/2009 of the European Parliament and of the Council, of 16 September 2009 on trade in seal products was discriminatory as it banned all seal products from these two countries while allowing an exception for seal products from substance hunting from Greenland indigenous communities. The EU replied that the ban was legally grounded on article XX (a) of the GATT which allows exception to the international trade regime to protect public morality. In a landmark decision, the panel confirmed that this was indeed a valid ground and that animal welfare can be a legitimate objective under article XX (a): « *We consider, and the parties do not dispute, that the protection of such public moral concerns is indeed a important value or interest* »[102] and that the ban does contribute to the EU's objective by reducing, to a certain extent, the global demand for seal products and by helping the EU public avoid being exposed to seal products on the EU market that may have been derived from seals killed inhumanely[103].

EU still lost the case though as the Panel found that its regulation was discriminatory in the sense that it allowed Greenland indigenous seal products

[97] S. BRELS, *Le droit du bien-être animal dans le monde, Évolution et universalisation*, L'Harmattan, 2017, p. 108-109.

[98] *Ibid*.

[99] *Ibid*, p. 132.

[100] *Ibid*.

[101] R. PANJWANI, *Wildlife Law, A Global Perspective*, ABA Publishing, 2008, p. 101.

[102] WTO., WT/DS400/R at §7.634.

[103] *Ibid*, at §7.637.

although they killed seals with methods as cruel as that of the claimants which was the reason why their products were banned in the first place[104]. On appeal before the Appellate Body of the WTO, it was further confirmed that Article XX (a) could indeed be a valid legal basis to address animal welfare concerns[105] but also confirmed the discriminatory nature of the EU regulation[106]. If this jurisprudence opens a door for better consideration of the welfare of wild animals at the international level, one must not forget that wild animals are the indirect beneficiaries of such case law. The primary beneficiaries remain EU citizens. However, this means that public pressure will now play a bigger role in preventing the trade of the most emblematic and appealing specimens of wild fauna such as whales, elephants the exploitation of which the western public finds more and more objectionable. Pictures of the normally popular King Juan Carlos of Spain pausing with elephants he felled or tales of the hunts of former French President Giscard d'Estaing in Republic Central Africa at the time of Bokassa caused worldwide outcry. WTO, through Article XX (a) thus allows the public to play the role of watchdog at the international level on the way wild animals are being handled (at least the most emblematic ones).

If recognizing sentience could be a way to treat wild animals in a more humane way and acknowledge their inherent worth, it also brings us to the question whether it would be possible for wild animals to be rights holder under international law. If the WTO jurisprudence paves the way for the international recognition of the sentient nature of wild animals, isn't it implied that they at least have at least one right to be « exploited » in a humane way?

2.3 Wild animals/ from sentient beings to right holders?

The question of whether animals can be holders of rights has sparked heated debates both at the philosophical and legal level. In order to address this issue legally, it seems necessary to have a preliminary overview of the different philosophical trends which support it. As some authors said:[107]

> « *Like culture, the law cannot exist outside of ethics and the philosophical considerations of our treatments of animals logically center on the ethics of our relationship with them. (...) it is a necessary framework for discussing what could or should be done by legal systems wrestling with how to treat animals.* »

2.3.1 The philosophical foundations for animal rights

The idea to grant rights to animals is usually associated with Peter Singer, Tom Regan, Steven Wise and Gary Francione. Although their theories may vary to some degree, they are mostly inspired by the utilitarian theories of Jeremy Bentham and John Stuart Mill. Jeremy Bentham's theory is based on the premise that the maximisation of pleasure is desirable within society whereas pain should be minimised. Eventually, a balance must be found where the aggregation of the sum of

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[104] *Ibid*, at §7.275.

[105] WTO., WT/DS400/AB/R at §5.202

[106] *Ibid* at §5.317

[107] B. A. WAGMAN, M. LIEBMAN, *A Worldview of Animal Law*, Carolina Academic Press, 2011, pp. 14-15.

pleasures should outweigh that of the pain[108]. Since animal can feel pain, Man should avoid creating unnecessary pain to an animal. Again a balance of interest must be made. Under this theory, animal exploitation remains possible provided that animals are treated humanely. This theory served as a basis for Peter Singer in his book entitled « Animal Liberation »[109] to call for an end of industrial farming or animal experimentation since they create unnecessary suffering of animals.

Another idea at the heart of Singer's theory is that animals and men are equal. Thus, if one is not ready to inflict the kind of suffering animals are subjected to a human being, then we should not inflict it on an animal[110]. As such, Singer considers animals as part of an oppressed group and compares their plight to that of several civil rights movements like black people in America or that of women worldwide. Claims from mankind of superiority is thus seen as speciesism[111]. Although acknowledging that men and animals differ in their abilities, it is only in terms of degree. Peter Singer often uses the examples of the mentally deficient, infant humans and people with irreparable brain damage show less awareness, self-consciousness, intelligence and sentience than many animals qualified here as « *non-humans* »[112]. This narrative, especially the comparison with civil rights movements and that between the cerebral faculties of some animals with -what Mary Anne Warren- calls the « non-paradigm humans »[113], is shared also by Tom Regan and Gary Francione.

For Tom Regan, animals should have rights because they are « subject of a life » which means that a « conscious creature having an individual welfare that has importance to us whatever our usefulness to others »[114]. For Regan, it is in this respect that animals and Man are equals. This could lead according to Regan to the total abolition of the use of animals in science, the total dissolution of commercial animal agriculture, the total elimination of commercial and sport hunting and trapping[115]. Abolition is also a recurrent them in the writings of Gary Francione which could have potentially the most influence on the law. Indeed Francione criticizes the property status of animals which denies their inherent value and any interests that they may have[116]. In a way, it works along the same lines as the status of natural resources for wild animals which is oblivious of their sentience and ecological functions. Taking a strong inspiration from Bentham's thesis, Francione's claims are also a direct criticism of Kant theory about animals.

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[108] T. REGAN, « The Case for Animal Rights », in C. Palmer, *Animal Rights*, Routledge, Kindle edition, 2016, p. 24.

[109] P. SINGER, *Animal Liberation*, Penguin Random House UK, Electronic version, 2015.

[110] P. SINGER, «All Animals Are Equal » in C. Palmer, *Animal Rights*, Routledge, Kindle edition, 2016, pp. 1-15

[111] *Ibid*, p. 14-15.

[112] *Ibid*, p. 13.

[113] M. A. WARREN, « The Rights of the Nonhuman World » in Clare Palmer, *Animal Rights*, Routledge, Kindle edition, 2016, p. 42.

[114] T. REGAN, « The Case for Animal Rights », in Clare Palmer, *Animal Rights*, Routledge, Kindle edition, 2016, p. 26.

[115] *Ibid*, p. 16

[116] G. L. FRANCIONE, « Taking Sentience Seriously », in Clare Palmer, *Animal Rights*, Routledge, Kindle edition, 2016, p. 431.

In a nutshell, under Kant's perspective, reciprocal rights and obligations are at the basis of humane society[117]. Thus, in order to enjoy reciprocity, one must understand what is owed to the other. Animal supposedly do not show this kind of predisposition. This explains why according to Kant, animals cannot be moral agents and cannot have rights[118]. Yet, subjecting animals to cruel treatment is unjustified not so much for the sake of animals but for the sake of humanity itself[119]. Francione, on the contrary believes that mere sentience is sufficient in itself to grant rights to animals.

Yet utilitarian theories are not without flaws. One criticism that can be made is that its egalitarian perspective could lead to absurdities, especially under Regan's perspective. Since all lives are equal as they all have intrinsic value, one can never under any circumstances take away the life of any animal. This can be counterproductive on an ecological point of view. The case of invasive species which are a threat to ecosystems is a good example in this respect. The case of Burmese pythons (*Python bivittatus*) which were introduced in the Everglades where they now prosper and compete with alligators (*Alligator mississippiensis*) immediately jumps to mind. In this scenario, it would be impossible to cull the pythons to save the Everglades ecosystem as they are as much a subject of a life as the alligators or any other bayou dweller.

Martha Nussbaum points to five other flaws: first of all pleasure and pain are subjective concepts, second they are not the only elements that matter in animal lives, third, animals can adapt, fourth, utilitarianism still allows for some lives to be exploited as means to the ends of others, fifth the aggregative nature of utilitarianism makes it vulnerable in terms of numbers[120]. Instead she proposes what she calls the capability approach. At the centre of it is the notion of dignity of a form of life which has deep needs and abilities which it should have the ability to fulfil[121]. As a results political principles should be shaped to give the chance for each animal to have a flourishing life[122]. The advantage of the approach according to Martha Nussbaum is that there is no aggregation of pleasure and pain and no life can be used as means to another life's ends[123]. There are of course many other discourses in the field of animal ethics to justify that the granting of rights but the utilitarian approach has been so far the one which has been translated into the legal field through animal welfare laws aforementioned. Unfortunately, much of these ethics theories concerned mostly domestic animals as they are the one subject to the most intense forms of cruelty through industrial farming. Wild animals were only considered so far as they were used in scientific experiments or kept in captivity in zoos and circuses.

[117] C. M. KORSGAARD, « Interacting with Animals: A Kantian Account », in T. L. BEAUCHAMP, R.G. FREY, *The Oxford Handbook of Animal Ethics*, Oxford University Press, 2014, p. 104.

[118] *Ibid*. p. 105.

[119] *Ibid*. p. 100.

[120] M. NUSSBAUM, « The Capabilities Approach and Animal Entitlements » in T. L. BEAUCHAMP, R.G. FREY, *The Oxford Handbook of Animal Ethics*, Oxford University Press, 2014, p. 235.

[121] M. NUSSBAUM, « Beyond compassion and humanity, Justice for Nonhuman Animals » in M. C. NUSSBAUM, *Animal Rights: Current Debates and New Directions*, Oxford University Press, 2004, p. 306.

[122] *Ibid*, p. 308.

[123] *Ibid*.

2.3.2 On the desirability of wild animal rights

Yet, the debate over whether wild animals could have rights has permeated the legal field. Ann Peters believes that rights for animals are needed as they can be enforced in court at the national level[124]. She also asserts that having rights is better than being the recipient of standards of conduct[125]. As such, her views are in contrast with that of Richard Posner, Richard Epstein[126] and Pierre-Jérôme Delage. For Richard Posner, granting rights to wild animals is dangerous in the sense that it reduces humanity to animality[127]. Pierre-Jérôme Delage concurs and argues further that it would open the door to dehumanization tendencies that have occurred in the past and which let to mass atrocities as certain groups of people might be expelled from the human community[128]. Instead, he is a rather a proponent of criminalization of bad behaviour against animals and even proposes an incrimination at the international level prohibiting behaviours that would violate their survival as a genus[129]. An counter-argument could be made that granting rights to animals would not necessarily mean downgrading mankind to animality or downgrade concerns for humankind[130]. Besides, as Christopher Stone emphasized in his famous article « Should Trees Have Standing? » Granting rights to the environment does not mean granting any kind of rights or human rights to animals[131]. They would need to be adapted to their needs.

2.3.3 The substance of wild animal's rights

As far as wild animals are concerned, an argument could be made that three substantive rights would be relevant: first of all the right to life. Several reasons could justify this right. Wild animals are usually not sought after for food consumption except for some indigenous community for who an exception could certainly be made as for all rights. Products made from their part can be made from those specimens which are raised in captivity for such purposes (crocodile farms for leather) otherwise there are bans on most products made out of wild animals especially if they are endangered (fur, ivory, rhino horn, tiger parts, etc.). A right to life would also prohibit all kind of sport and trophy hunting which is an unnecessary scourge on the life of animals not to mention that it would reinforce all existing

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[124] A. PETERS, Liberté, Egalité, Animalité, *Transnational Environmental Law*, 5:1, Cambridge University Press 2016, pp. 25-53

[125] *Ibid*.

[126] R. A. EPSTEIN, « Animal as Objects, or Subjects, of Rights » in C. R. SUNSTEIN, M. C. NUSSBAUM, *Animal Rights: Current Debates and New Directions*, Oxford University Press, 2004, p. 152.

[127] R. POSNER, « Animal Rights: Legal, Philosophical, and Pragmatic Perspectives » in C. R. SUNSTEIN, Martha C. NUSSBAUM, *Animal Rights: Current Debates and New Directions*, Oxford University Press, 2004, p. 63.

[128] P.-J. DELAGE, *La condition animale: essai juridique sur les juste places de l'homme et de l'animal*, Editions Mare et Martin, 2016, p. 75 et p. 712.

[129] *Ibid*, p. 67.

[130] A. PETERS, « Liberté, Egalité, Animalité », *Transnational Environmental Law*, 5:1, Cambridge University Press, 2016, pp. 25-53.

[131] C. D. STONE, « Should Trees Have Standing ? Toward Legal Rights for Natural Objects », *Southern California Law Review* 45, 1972, pp. 450-501, p. 455.

prohibition against poaching. A second right would be the right to live in an undisturbed habitat which would be especially relevant since habitat loss is the main threat affecting wild animals. A third right would be the right not to be subjected to cruel treatment or torture. Some legislation exists at the regional level to prevent cruel trapping devices[132] or indiscriminate means of capture of birds[133]. A fourth right could be the right not to be kept in captivity. These suggested rights are provided for in the Universal Declaration of Animal Rights of 1978 which is of course not binding as it was drafted by an NGO (Fédération Française de Protection Animale)[134] and also in the non-binding World declaration on great primates[135] proposed by the Great Ape Project led by Steven Wise and Paola Cavalieri.
At the national level, some countries have recognized a right to life for all animals including wild animals. This is the case of the Costa Rican wildlife law of 1998 which provides that « all living things have the right to live, independently of actual or potential economic value »[136]. Other countries have recognized the intrinsic value of biodiversity among which Canada, Bangladesh, Japan, Tanzania, New Zealand, and the European Union[137]. National courts have sometimes followed suit. In this respect the case of Indian Courts is particularly noteworthy.

In a decision of 2012, where petitioners sought to compel the government of India to save the Asiatic wild buffalo (*Bubalus arnee*), the Supreme Court held that « *laws are man-made, hence there is likelihood of anthropocentric bias towards man. Rights of wild animals often tend to be of secondary importance, but in the universe man and animal are equally placed.* »[138]In addition to its revolutionary aspect, this decision is interesting in the sense that the equality between man and animal is based on the fact that they have common origins. This is reminiscent of the deep ecology motto which provides that human beings exist as one equal part of the Earth as we are part of the same ecosystem[139]. One of these school of thought is known as Earth Jurisprudence which challenges the supremacy of mankind over natural elements based on a common origin and being part of the same universe[140].

The Supreme Court of India took another landmark decision this time in relation to the Asiatic Lion (*Panthera leo persica*). Although we traditionally associate lions with the savannahs of Africa, there is an Asiatic subspecies which used to roam all

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[132] Council Regulation (EEC) No 3254/91 prohibiting the use of leghold trap.

[133] Article 8 of Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009.

[134] B. RAMDANE. « L'animal et le droit: à propos de la Déclaration universelle des droits de l'animal » In *Revue Juridique de l'environnement*, n°1, 1999, pp. 9-22.

[135] http://www.projetogap.org.br/en/world-declaration-on-great-primates/.

[136] D. R. BOYD, *The Rights of Nature, a legal revolution that could save the world*, ECW Press, Kindle edition, 2017, Empl. 1355.

[137] *Ibid*.

[138] *Ibid*. Empl. 1411.

[139] T. BERRY, « Rights of the Earth: We need a New Legal Framework Which Recognises the Rights of All Living Beings », in *Exploring Wild Law*, *The Philosophy of Earth Jurisprudence*, Peter Burdon, Wakefield Press, Kindle edition 2011, Empl 4672 et seq..

[140] See in general on this theme Cormac CULLINNAN, *Wild Law A Manifesto for Earth Justice*, Greenbooks, Kindle edition, 2011.

over western Asia[141]. It survives today in a small patch of forest in the State of Gujarat and is on the verge of extinction[142]. A project was initiated to relocate some specimens in Madhya Pradesh where some land was made available[143]. Some local NGOS filed suit for the relocation project to be implemented as the Government of Gujarat thought that the lions enjoyed better protection in Gujarat[144]. The Court confirmed its ecocentric perspective and rejected the anthropocentric approach: « *humans are part of nature and non-humans have intrinsic value* »[145]. The Supreme Court ordered that a committee be established to pursue the implementation project[146].

Ecocentric perspectives such as the ones expressed by the Indian courts or by Latin American countries are still in their infancy. In most jurisdictions the *summa divisio* between persons and things and thus animals remain. As a result some lawyers such as Steven Wise who is also a utilitarian have deducted that granting personhood to animals would be the key for them to vindicate their rights at the national level. In order to circumvent the issue of standing before American courts, the later used the writ of Habeas Corpus to have chimpanzees freed from zoos or labs[147]. However he constantly faced a major hurdle to prove that chimpanzees were persons based on their well-known cognitive abilities on which Jane Goodall shed light[148]. However, it seems that for those countries where the *summa divisio* is so entrenched, demonstrating personhood is maybe not the best strategy as suggested by Jens David Ohlin. Indeed, the later made the argument that the concept of personhood is not necessary to be granted human rights[149] and thus rights. Several reasons are set forth: first of all the meaning of the word remains unclear and difficult to define both as it is an interdisciplinary concept[150], it is a cluster concept which can regroup contradictory notions[151], it works well for adult humans but becomes problematic quite quickly for marginal cases such as brain dead patients or even animals who possess sufficient cognitive abilities to be considered as such[152]. Ann Peters seems to concur that personhood is not needed to have rights. Instead, she argues that rights are based on interests as it would mean

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[141] S.H. PRATER, *The book of Indian Animals*, Oxford University Press, 4th edition, 1993, p. 67 and M.K. RANJITSINH, *Indian Wildlife*, Brijbasi, 1995, pp. 45-47.

[142] *Ibid*.

[143] *Ibid*,p. 55.

[144] D. R. BOYD, *The Rights of Nature, a legal revolution that could save the world*, ECW Press, Kindle edition, 2017, Empl. 1457.

[145] *Ibid*.

[146] *Ibid*.

[147] S. WISE, *Introduction to Animal Law Book*, p. 12

[148] J. GOODALL, R. WRANGHAM, *In the Shadow of Man*, Mariner Books, 2010. See also A. WHITEN, J. GOODALL, W.C. Mc GREW, T. NISHIDA, V. REYNOLDS, Y. SUGUYAMA, C.E.G. TUTIN, R.W. WRANGHAM, C.BOESCH, « Cultures in chimpanzees », in *Animal Ethics Reader*, S. J. ARMSTRONG, R. G. BOTZER, 2008, p 165 et seq.

[149] J. D. OHLIN, « Is the Concept of the Person Necessary for Human Rights ? », *Cornell Law Faculty Publications*, 2005, p. 434. P. 213.

[150] *Ibid*, p. 214.

[151] *Ibid*, p. 213.

[152] *Ibid*, pp. 220-229.

that human beings without the requested cognitive abilities to make a choice would not have rights[153].

The problem of personhood would not appear at the international level since those rights could not be vindicated before an international forum. However, nothing prevents States to grant through an international agreement the aforementioned rights to wild animals as mere recipient of these rights to be enforced on their respective territory through their national courts. In order to afford a better and more neutral protection, a treaty granting basic rights to wild animals could even use the same technique as seen in human rights treaties where an additional protocol would institute a commission or a panel which could hear individual complaints provided that the State agreed to the jurisdiction of such body by ratification of the Protocol. Naturally, the representation of wild animals would have to be made through a guardian which could be an accredited individual or NGO as defined by the treaty. States being sensitive to shaming, such an arrangement could prove an important incentive to protect their wildlife and acknowledge their sentience.
According to Olivier Dubos and Jean-Pierre Marguénaud:

> « *Placer les animaux dans le champ d'application du droit international et des droits européens parait donc devoir les élever à un niveau supérieur correspondant à celui de ces sources externes du droit en raison de la primauté du droit international. Une protection renforcée et un éloignement des bêtes de la catégorie des choses où elles sont traditionnellement enfermées pourraient résulter de cette aspiration vers le haut.* »[154]

Ann Peters concurs and believes that these rights should be addressed at the international level for three reasons[155]:

> « *Firstly, from the perspective of fairness and justice, such rights are incumbent on animals independently of their place of birth and abode. Secondly, international rights would serve as a benchmark for domestic law. International instruments would potentially allow for some monitoring of or at least facilitate the formulation of criticism against domestic practices which do not satisfy the international standard. Thirdly, the endorsement of animal rights in only one state would probably lead to the outsourcing of the relevant industry.* »

Ann Peters' suggestion has to be put in conjunction with an emerging belief among several international lawyers that there is a binding custom that the killing of certain animals is morally and legally wrong[156]. Katie Sykes refers to the opinion of Anthony D'Amato and Sudhir Chopra according to which there was a binding custom prohibiting the killing of whales as a result of the strengthening of the

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[153] A. PETERS, « Liberté, Egalité, Animalité », *Transnational Environmental Law*, 5:1, Cambridge University Press 2016, pp. 25-53, p. 46.

[154] O. DUBOS, J.-P. MARGUÉNAUD, « La Protection internationale et européenne des animaux », Pouvoirs 2009/4 n° 131, pp. 113-126

[155] A. PETERS, « Liberté, Egalité, Animalité », *Transnational Environmental Law*, 5:1, Cambridge University Press 2016, pp. 25-53, p. 46, p. 51.

[156] K. SYKES, « The Appeal to Science and the Formation of Global Animal Law », *The European Journal of International Law*, Vol 27 no 2, Oxford University Press, 2016, p. 502.

international whaling regime[157]. They concluded that this custom created an entitlement to whales of a right to life[158]. Judge Cançado Trindade expressed the same idea in his separate opinion in the Whaling in the Antarctic case[159]:

> « *The present case on Whaling in the Antarctic has brought to the fore the evolving law on the conservation and sustainable use of living marine resources, which, in turn, has disclosed what I perceive as its contribution to the gradual formation of an opinion juris communis in the present domain of contemporary international law*. »

If granting a right to life to these highly evolved wild animals on the basis of their cognitive abilities could be a first step, an argument could be put forward that it should eventually apply to all mammals, birds, reptiles and even cephalopods. If we take mammals, Gus Mills has demonstrated the high intelligence of both brown and spotted hyenas[160]. He has even demonstrated that in the Kalahari, different clans of hyenas could have different cultures and habits. They can be also take strategic decisions. In many instances a single spotted hyena preferred to share a carcass with a leopard rather than calling some reinforcements to chase it away, as they knew that they would have to share the meat with the members of their clan. Better to share with one than a whole clan. They are also known to cache food and remember where they hid it showing great memory in the process. Reptiles such as crocodilians have also shown some important cognitive abilities[161] not to mention octopus which have extremely complex brains[162]. Man only begins to understand the complexity of the human brain, let alone that of animals. As science will shed more light on the cognitive abilities of wild animals the more they will be entitled to protection. In a time where human rights are more and more questioned, challenged and even breached, maybe the idea of granting rights to animals is just not ripe. However, in the time being, a first step could be to operate a dichotomy between living natural resources and non-living ones so that at least the ecological services that wild animals provide which are so crucial for mankind can operate. This first step could be combined with the recognition that wild animals as sentient beings to ensure that they would not be subjected to cruel treatment. As Kant would say, Human Beings would also be the ones to benefit from such tiny steps forward.

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[157] *Ibid*.

[158] *Ibid*.

[159] ICJ.; *Whaling in the Antarctic (Australia v. Japan ; New Zealand intervening), Judgment, I.C.J. Reports* 2014, p. 226, Separate Opinion of Judge Cançado Trindade at § 89.

[160] G. MILLS, *Kalahari Hyenas, Comparative Behavioral Ecology of Two Species*, The Blackburn Press, 1990 and from the same author, *Hyena nights & Kalahari Days*, Jacana Media, 2010 and J. D. SKINNER & C. T. CHIMIMBA, *The Mammals of the Southern African Subregion*, pp. 360-378.

[161] Gordon GRIGGS, David KIRSCHNER, *Biology and Evolution of Crocodylians,* Comstock Publishing Associate a division of Cornell University Press, 2015, pp. 173-207.

[162] Peter GODFREY-SMITH, *Le Prince des profondeurs, l'intelligence exceptionnelle des poulpes*, Flammarion, 2016.

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