

## SYMPOSIUM FOREWORD

# *Global Animal Law: What It Is and Why We Need It*

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### **Abstract**

The symposium collection in this issue of *TEL*, consisting of four articles including this framing article, seeks to conceptualize and flesh out a new branch of law and legal research: global animal law. The starting hypothesis is that contemporary animal law must be global or transnational (that is, both transboundary and multilevel) in order to be effective. In times of globalization, all aspects of (commodified) human–animal interactions (from food production and distribution, working animals and uses in research, to breeding and keeping of pets) possess a transboundary dimension. Animal welfare has become a global concern, which requires global regulation. This foreword introduces the three symposium articles, sketches out the research programme of global animal law and links its emergence to the ongoing ‘animal turn’ in the social sciences, including political philosophy.

**Keywords:** Animal welfare, Globalization, Transnational law, World Organisation for Animal Health (OIE), Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), World Trade Organization (WTO)

### 1. INTRODUCTION

This foreword lays the conceptual foundations for the three main articles in the symposium collection, with the aim of fleshing out a new branch of law and legal research: global animal law. The need for scholarly and lawmaking efforts in this field has arisen because animal welfare (a multifaceted concept explained in Section 2 below) has become a global concern (Section 3). Despite emerging global awareness, regulation that improves animal welfare is so far largely missing, especially at the international level (Section 4). Effective regulation to improve animal welfare would need to be global in structure and scope (Section 5). The accompanying field of research is global animal law (Section 6).

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‘Liberté, Égalité, Animalité: Human–Animal Comparisons in Law’, by Anne Peters,<sup>1</sup> recalls that the socially constructed boundary between animals and humans has been shifting and seems blurry. It highlights the analytical and practical tension present in the acknowledgement of a continuum between humans and animals, and the extant legal gap between the wealth of (international) law serving human needs and rights on the one hand and the glaring international regulatory deficit concerning animal welfare on the other. This legal gap (notably the difference concerning the ascription of ‘rights’) stands in contrast to the historic parallels and intertwining of the legal discourse on humans and animals. The acknowledgement of these entanglements might be analytically and normatively helpful in employing the potential of law to help in combating and ending violence against animals.

The article by Katie Sykes, ‘Globalization and the Animal Turn: How International Trade Law Contributes to Global Norms of Animal Protection’,<sup>2</sup> shows how international trade law is currently making an important and constructive contribution to the formation of global norms relating to animals. This is happening in two ways. Firstly, international trade law allows states to invoke animal protection as a potentially legitimate exception to free trade obligations. Secondly, international trade law enhances international cooperation in the implementation and enforcement of conservation obligations, for example, through the new Trans-Pacific Partnership’s Environment Chapter and through provisions concerning wildlife trafficking and protection of endangered species.

The final article, ‘Towards Universal Principles for Global Animal Advocacy’, by Thomas Kelch,<sup>3</sup> points out that, as a result of the globalization of animal uses, animal law must also respond globally. In order to cross cultural boundaries, a common language needs to be fashioned. The article suggests a methodology for generating these universal principles for animal advocacy and legal policy proposals based on Feminist Care Theory, the fundamental notion of which is the concept of caring.

## 2. ANIMAL WELFARE AS A CONCEPT

As the symposium articles will illustrate, the concepts of animal welfare and animal rights are used in various senses in legal scholarship and in legal practice, and are sometimes placed in contrast to each other. The idea of animal rights in the sense of strong moral and legal entitlements is explored in the first article of this symposium collection.<sup>4</sup>

Animal welfare first emerged as a scientific concept.<sup>5</sup> It relates to the living and dying conditions of animals as they are kept, traded, and killed by humans, based on

<sup>1</sup> A. Peters, ‘Liberté, Égalité, Animalité: Human–Animal Comparisons in Law’ (2016) 5(1) *Transnational Environmental Law*, pp. 25–53.

<sup>2</sup> K. Sykes, ‘Globalization and the Animal Turn: How International Trade Law Contributes to Global Norms of Animal Protection’ (2016) 5(1) *Transnational Environmental Law*, pp. 55–79.

<sup>3</sup> T. Kelch, ‘Towards Universal Principles for Global Animal Advocacy’ (2016) 5(1) *Transnational Environmental Law*, pp. 81–111.

<sup>4</sup> Peters, n. 1 above.

<sup>5</sup> D. Fraser, *Understanding Animal Welfare: The Science in its Cultural Context* (Wiley-Blackwell, 2008).

the assumption that humans are, in principle, morally entitled to do all this with animals. The objective of refining and applying a concept of animal welfare is to mitigate animal suffering while preserving their economic use by humans. Starting in the 1960s, the British Farm Animal Welfare Council developed the ‘five freedoms’ for animals: namely, freedom from hunger and thirst; freedom from discomfort; freedom from injury, pain, and disease; freedom to express normal behaviour; and freedom from fear and distress.<sup>6</sup> Today, animal welfare is usually related to three overlapping dimensions: the animal’s basic health and functioning; its affective state; and its natural living. These three dimensions have been addressed both in international standards<sup>7</sup> and in domestic animal protection laws.<sup>8</sup>

In the disciplines of veterinary medicine, which initially shaped the scientific concept of animal welfare (animal behaviour research, stress physiology, nutrition, and genetics), much energy has been devoted to identifying the proper criteria and to operationalize numerical scoring elements to assess and ‘measure’ the welfare of livestock or laboratory animals.<sup>9</sup> Recently, the ethical dimension of the concept has come to the foreground. Animal welfare and the accompanying ethics of ‘welfarism’ are today often posited as the counterpart to the idea of animal rights.<sup>10</sup> The welfarist ethic has been defined by one of its proponents, political scientist Robert Garner, as the position that animals should not suffer but do not have a right to life.<sup>11</sup> Concomitantly, ‘animal welfare does not challenge the property status of animals’.<sup>12</sup> Key concepts are therefore not ‘rights’ but ‘the principle of animal welfare and the associated idea of unnecessary suffering’.<sup>13</sup> The practical consequence of welfare ethics is that ‘[u]sing animals, *per se*, therefore, is not the problem. It is what they are used for that is the key’.<sup>14</sup>

### 3. ANIMAL WELFARE AS A GLOBAL CONCERN

Animal welfare as a scientific, legal, and ethical concept has developed in response to concerns about the well-being of animals. This concern has spread globally, as will be shown in this section. The reasons for the formation and expression of a worldwide

<sup>6</sup> ‘Report of the Technical Committee to Enquire into the Welfare of Animals Kept under Intensive Livestock Husbandry Systems’ (Brambell Report); Chairman, Prof. F.W. Rogers Brambell, FRS (HMSO, 1965), s. 13.

<sup>7</sup> For the World Organization for Animal Health (OIE) standards see n. 37 below.

<sup>8</sup> See, e.g., Art. 3 Swiss Animal Protection Statute (*Tierschutzgesetz*) 16 Dec. 2005, as of 1 May 2014, SR 455.

<sup>9</sup> See, critically, Fraser, n. 5 above, esp. pp. 239–40, who highlights that the different criteria invoked do not always agree with each other, or are even incommensurate. ‘Welfare’ is not a purely ‘scientific’ concept but is underlain with values (*ibid.*, p. 252).

<sup>10</sup> The welfarist position has been developed most extensively by Robert Garner: see R. Garner, *Animals, Politics, and Morality*, 2<sup>nd</sup> edn (Manchester University Press, 2004); R. Garner, ‘Animal Welfare: A Political Defense’ (2006) 1(1) *Journal of Animal Law and Ethics*, pp. 161–74.

<sup>11</sup> G.L. Francione & R. Garner, *The Animal Rights Debate: Abolition or Regulation?* (Columbia University Press, 2010), p. 120.

<sup>12</sup> *Ibid.*, p. 168.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*, p. 129.

public opinion in favour of improving animal welfare are manifold. In some regions, concern for food safety and consumer health predominate;<sup>15</sup> in other regions ethical considerations, or simply compassion, may prevail;<sup>16</sup> mostly it seems to be a mixture of motives. Emerging from these social attitudes and concomitant business interests, the idea of avoiding harm or at least cruelty to animals has been endorsed in numerous domestic legal systems, notably in European countries.<sup>17</sup>

It is an open question whether that idea is already a ‘universal value’ or a truly global social norm.<sup>18</sup> Some legal scholars even argue that the wealth of domestic codifications on animal welfare have already given rise to a ‘general principle of law’ in the sense of Article 38 of the Statute of the International Court of Justice (ICJ),<sup>19</sup> which would make it a formal source of international law.<sup>20</sup> Although this debate is as yet unsettled, the relevance of the topic and the need for regulation has indeed been recognized globally, both by scholars<sup>21</sup> and by governments and international organizations. For example, the 180 member states of the World Organisation for Animal Health (OIE) formally recommended that the OIE ‘support the development and implementation of OIE regional animal welfare strategies, and consider the development of a global animal welfare strategy’.<sup>22</sup> These recommendations are seen by the United Nations (UN) Food and Agriculture Organization (FAO) as ‘strong evidence of the growing consensus on the importance of animal welfare standards’.<sup>23</sup>

<sup>15</sup> B. Kuemlangan, ‘Preface’, in J. Vapnek & M. Chapman (eds), *Legislative and Regulatory Options for Animal Welfare, for the Development Law Service FAO Legal Office: FAO Legislative Study 104* (Food and Agriculture Organization of the United Nations, 2010), p. v: ‘Animal welfare concerns also garner more attention as consumers recognize the links between animal health and animal welfare, and animal welfare and human well-being’.

<sup>16</sup> On the argument that moral principles are based on feelings of compassion, sympathy, and empathy, see Kelch, n. 2 above.

<sup>17</sup> See the partly concurring and partly dissenting opinion of Judge Pinto de Albuquerque in the European Court of Human Rights (ECtHR), *Herrmann v. Germany* (Grand Chamber), appl. no. 9300/07, 26 June 2012, p. 36: ‘One of the hallmarks of international and European law in contemporary times [is] the protection of animal life and welfare’.

<sup>18</sup> *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, Panel Report, WTO Docs WT/DS400/R and WT/DS401/R, 25 Nov. 2013 (EC – Seal Products), para. 7.420 leaves this open. In the affirmative see M. Bowman, P. Davies & C. Redgwell, *Lyster’s International Wildlife Law*, 2<sup>nd</sup> edn (Cambridge University Press, 2011), p. 678: ‘There are therefore ample grounds for recognising concern for animal welfare both as a principle widely reflected in national legal systems and as a universal value, in the broader sense’.

<sup>19</sup> San Francisco, CA (US), 26 June 1945, in force 24 Oct. 1945, available at: <http://www.icj-cij.org/documents/?p1=4&p2=2>.

<sup>20</sup> K. Sykes, ‘“Nations Like Unto Yourselves”: An Inquiry into the Status of a General Principle of International Law concerning International Welfare’ (2011) 49 *Canadian Yearbook of International Law*, pp. 3–49 (arguing that that there is an (emerging) legal principle of animal welfare protection). See also Bowman, Davies & Redgwell, n. 18 above, p. 680.

<sup>21</sup> E.g., S. White, ‘Into the Void: International Law and the Protection of Animal Welfare’ (2013) 4(4) *Global Policy*, pp. 391–8, at 392 (diagnosing ‘the growing national and international significance of animal welfare as an area of policy and legal concern’). In this symposium collection, Katie Sykes identifies the issue of ‘animal protection’ as a global concern, referring both to animal welfare and the conservation of animal species: Sykes, n. 3 above, Section 2.

<sup>22</sup> OIE, Third OIE Global Conference on Animal Welfare: Implementing the OIE Standards – Addressing Regional Expectations, Kuala Lumpur (Malaysia), 6–8 Nov. 2012, ‘Recommendations’, Recommendation No. 9, p. 4, available at: [http://www.oie.int/fileadmin/Home/eng/Conferences\\_Events/docs/pdf/recommendations/kuala\\_aquatic/A\\_Recommendations\\_Animal\\_Welfare\\_conference.pdf](http://www.oie.int/fileadmin/Home/eng/Conferences_Events/docs/pdf/recommendations/kuala_aquatic/A_Recommendations_Animal_Welfare_conference.pdf).

<sup>23</sup> Vapnek & Chapman, n. 15 above, p. 83.

The Dispute Settlement Body of the World Trade Organization (WTO) has opined that ‘various actions concerning animal welfare at the international as well as national levels suggest ... that animal welfare is a globally recognized issue’.<sup>24</sup> However, regulation in respect of animal welfare is still largely absent, at both the domestic and international levels. In times of globalization, regulation at the domestic level is insufficient to address animal welfare and, to be effective, needs to be complemented by international rules.

#### 4. THE ABSENCE OF ANIMAL WELFARE IN INTERNATIONAL LAW

At present, although various international law instruments address the protection of endangered species,<sup>25</sup> habitat protection,<sup>26</sup> and biological diversity,<sup>27</sup> very little attention is given to the welfare of animals, let alone animal rights.

Domestic, European and international law comprise three quite different sets of law: one relating to wild animals; another relating to farm animals; and a third relating to animals used in experiments. Legal provisions on animal welfare are dispersed, and are often applicable to members of a particular species only. International wildlife law generally deals with the protection of species (‘good-of-its-kind’) as opposed to the flourishing of individual organisms (‘good-of-its-own’).<sup>28</sup> Although animal welfare and animal conservation may stand in conflict at times, both ideas may also be viewed as ‘manifestations of the same overarching principle in different contexts’, as Katie Sykes argues in this symposium collection.<sup>29</sup> Still, isolated welfare norms remain incidental in international legal regimes, which have as their primary objective the regulation of the harvesting and trading of animals, conservation, and biodiversity. Examples in *Lyster’s Wildlife Law* include provisions in the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)<sup>30</sup> on the issuing of export permits and the transport of living specimens, which oblige state parties ‘to minimize

<sup>24</sup> *EC – Seal Products*, n. 18 above, para. 7.420. The Panel examined this question in order to be able to confirm that ‘the objective of addressing the public moral concerns on seal welfare falls within the scope of legitimate objectives within the meaning of Article 2.2 of the TBT Agreement’. For an analysis of the WTO reports, see Sykes, n. 3 above, pp. 65–6.

<sup>25</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Washington, DC (US), 3 Mar. 1973, in force 1 July 1975, available at: [https://www.cites.org](https://www.cites.org;).; Convention on the Conservation of Migratory Species of Wild Animals (CMS), Bonn (Germany), 23 June 1979, in force 1 Nov. 1983, available at: <http://www.cms.int>. On whales see the ICJ case, *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)*, Judgment of 31 Mar. 2014. On elephants see M. Glennon, ‘Has International Law Failed the Elephant?’ (1990) 84(1) *American Journal of International Law*, pp. 1–43; R. Adams, *Elephant Treaties: The Colonial Legacy of the Biodiversity Crisis* (University Press of New England, 2014); A. Nollkaemper, ‘Framing Elephant Extinction’ (2014) 3(6) *ESIL Reflections*, pp. 1–4; A. Peters, ‘Novel Practice of the Security Council: Wildlife Poaching and Trafficking as a Threat to the Peace’, *EJIL Talk! Blog of the European Journal of International Law*, 12 Feb. 2014, available at: <http://www.ejiltalk.org/author/anne-peters>.

<sup>26</sup> E.g., European Union (EU) Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora [1992] OJ L 206/7.

<sup>27</sup> Convention on Biological Diversity (CBD), Rio de Janeiro (Brazil), 5 June 1992, in force 29 Dec. 1993, available at: <https://www.cbd.int>.

<sup>28</sup> Bowman, Davies & Redgwell, n. 18 above, p. 672.

<sup>29</sup> Sykes, n. 3 above, p. 67.

<sup>30</sup> N. 25 above.

the risk of injury, damage to health or cruel treatment’,<sup>31</sup> and a provision in the 1991 Protocol on Environmental Protection to the Antarctic Treaty, which requires that the taking of animals on the Antarctic landmass be accomplished ‘in the manner that involves the least degree of pain and suffering practicable’.<sup>32</sup>

In contradistinction to treaty law, most welfare provisions are contained in secondary law emanating from international organizations, bodies, and conferences of the parties. For example, the Standing Committee of the Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention)<sup>33</sup> recommends that methods to eradicate an alien species should be ‘as selective, ethical and without cruelty as possible, consistent with the aim of permanently eliminating the invasive species’.<sup>34</sup> The International Whaling Commission (IWC) has espoused whale welfare as an issue,<sup>35</sup> but this has been contested by some state parties as overstepping the Commission’s mandate. As a result, attempts to define guiding principles of whale welfare are currently stalled.<sup>36</sup>

The main international standard setter for animal welfare has been the OIE. Since 2005, it has adopted in total eleven sets of welfare standards. Eight of these sets have been collectively incorporated into its Terrestrial Animal Health Code,<sup>37</sup> and three further standards into its Aquatic Animal Health Code.<sup>38</sup>

A key shortcoming of secondary law standards is that typically they are not legally binding,<sup>39</sup> but rather constitute guidelines or recommendations addressed to the

<sup>31</sup> Arts III(2) lit. (c) and VIII(3) CITES, *ibid.*

<sup>32</sup> Art. 3(6), Annex II, Protocol on Environmental Protection to the Antarctic Treaty: Conservation of Antarctic Fauna and Flora, Madrid (Spain), 4 Oct. 1991, in force 14 Jan. 1998, available at: [http://www.ats.aq/documents/recatt%5Catt009\\_e.pdf](http://www.ats.aq/documents/recatt%5Catt009_e.pdf).

<sup>33</sup> Bern (Switzerland), 19 Sept. 1982, in force 1 June 1982, available at: <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/104>.

<sup>34</sup> Bern Convention Standing Committee, Recommendation No. 77 (1999) on the Eradication of Non-Native Terrestrial Vertebrates, 3 Dec. 1999, Preamble, available at: <https://wcd.coe.int/ViewDoc.jsp?id=1489673&Site=>.

<sup>35</sup> IWC, Resolution 2004-3, ‘Resolution on Whale Killing Issues’ (in which the IWC ‘expresses concern, in light of its mandate and long-standing commitment to address welfare issues’).

<sup>36</sup> The updated Discussion Paper ‘Addressing Welfare within the IWC: Intersessional Working Group on Welfare Summary Recommendations’, Doc. IWC/65/WKM&AWI05Rev 2, 17 Sept. 2014, p. 1, indicates that the ‘proposal for a definition and guiding principles of welfare has been removed. It is instead recommended that further discussions take place between interested Parties intersessionally on whether there are any opportunities to develop a shared understanding of non-hunting welfare aspects related to human activities’.

<sup>37</sup> OIE, Terrestrial Animal Health Code (2015), available at: <http://www.oie.int/international-standard-setting/terrestrial-code/access-online> (Art. 7.1.1 ‘Definition’: ‘*Animal welfare* means how an *animal* is coping with the conditions in which it lives. An animal is in a good state of welfare if (as indicated by scientific evidence) it is healthy, comfortable, well nourished, safe, able to express innate behaviour, and if it is not suffering from unpleasant states such as pain, fear, and distress. Good animal welfare requires disease prevention and appropriate veterinary treatment, shelter, management and nutrition, humane handling and humane slaughter or killing. Animal welfare refers to the state of the animal; the treatment that an animal receives is covered by other terms such as animal care, animal husbandry, and humane treatment’; see also Art. 7.1.2 ‘Guiding Principles for Animal Welfare’, Art. 7.1.3 ‘Scientific Basis for Recommendations’, and Art. 7.1.4 ‘General Principles for the Welfare of Animals in Livestock Production Systems’).

<sup>38</sup> Available at: <http://www.oie.int/international-standard-setting/aquatic-code>.

<sup>39</sup> The IWC’s regulations (as opposed to its recommendations) which amend the schedule are an exception: Art. V of the International Convention for the Regulation of Whaling (ICRW), Washington, DC (US), 2 Dec. 1946, in force 10 Nov. 1948, available at: <http://iwc.int/private/downloads/1r2jdhu5xtuswws0ocw04wgcw/convention.pdf>.

organization's member states. The OIE's standards on live animal transport are exemplary of this weakness in that, as David Favre observes, they 'include no numbers, no prohibitions, no required inspections, and no limitations on operations. Rather, the standards read like a checklist of issues that should be considered if you are going to engage in live animal transport. While this list is useful for policy makers, it is not an actual standard that limits or prohibits practices that are harmful to animal welfare'.<sup>40</sup>

European countries especially – both at the national level and through the European Union (EU) and the Council of Europe (CoE) – have enacted legal norms governing the treatment of animals (keeping of farming animals;<sup>41</sup> transport;<sup>42</sup> slaughter;<sup>43</sup> pets<sup>44</sup>), mainly since the 1980s. Moreover, the European Court of Human Rights is developing case law on the interface between human rights and animal law,<sup>45</sup> although this body of law is only regional in scope.

Clearly, the piecemeal offering of international and regional law does not form a coherent and 'thick' body of law. The provisions are fragmented, often qualified, often inconsistent, unenforceable, and moreover unknown to most lawyers, law enforcers and legal scholars alike. The sparse works of legal scholarship in this field confirm this diagnosis. Caley Otter and her co-authors' 'examination of the most prominent international animal regulatory instruments reveals that a transnational animal protection regime does not exist at present'.<sup>46</sup> Steven White deplores the 'lack of a coherent legal regime', and 'that there is currently a gap in the international legal protection of animal welfare'.<sup>47</sup> Michael Bowman and his

<sup>40</sup> D. Favre, 'An International Treaty for Animal Welfare' (2012) 18 *Animal Law Review*, pp. 237–79, at 252.

<sup>41</sup> CoE (Framework) Convention for the Protection of Animals Kept for Farming Purposes, Strasbourg (France), 10 Mar. 1976, in force 10 Sept. 1978, available at: <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/087>; and its Protocol for Adaptation to Biotechnologies, Strasbourg (France), 6 Feb. 1992, available at: <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/145>. Within the EU, see Directive 98/58/EC concerning the Protection of Animals Kept for Farming Purposes [1998] OJ L 221/23; Directive 1999/74/EC laying down Minimum Standards for the Protection of Laying Hens [1999] OJ L 203/53; Directive 2008/120/EC laying down Minimum Standards for the Protection of Pigs [2009] OJ L 47/5; Directive 2007/43/EC laying down Minimum Rules for the Protection of Chickens Kept for Meat Production [2007] OJ L 182/19.

<sup>42</sup> CoE Convention for the Protection of Animals during International Transport, Paris (France), 13 Dec. 1968, in force 20 Feb. 1971, available at: <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/065>; and its Additional Protocol to allow EU Membership, Strasbourg (France), 10 May 1979, in force 7 Nov. 1989, available at: <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/103> (which since its entry into force forms an integral part of the Convention); as amended by Revised Convention, Chisinau (Moldova), 6 Nov. 2003, in force 14 Mar. 2006, available at: <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/193> (open for signature also for the EU and non-Member States of the CoE).

<sup>43</sup> CoE Convention for the Protection of Animals for Slaughter, Strasbourg (France), 10 May 1979, in force 11 June 1982, available at: <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/102>.

<sup>44</sup> CoE Convention for the Protection of Pet Animals, Strasbourg (France), 13 Nov. 1987, in force 1 May 1992, available at: <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/125>.

<sup>45</sup> E.g., ECtHR, *Tierbefreier e.V. v. Germany*, appl. no. 45192/09, Judgment, 16 Jan. 2014.

<sup>46</sup> C. Otter, S. O'Sullivan & S. Ross, 'Laying the Foundations for an International Animal Protection Regime' (2012) 2(1) *Journal of Animal Ethics*, pp. 53–72, at 68.

<sup>47</sup> White, n. 21 above, pp. 391–2.

co-authors find ‘that the welfare of individual animals (whether wild or domesticated) is emerging as a significant and pervasive concern of the international community, albeit one which has not yet attracted the level of attention or consistency of response’,<sup>48</sup> and continue to observe that ‘the problem has thus far been addressed in an ad hoc and piecemeal fashion, predominantly at the regional level and without the benefit of clear theoretical foundations’.<sup>49</sup> The symposium articles also display a scattered and patchy picture of legal norms relating to animal welfare.

## 5. THE GLOBAL NATURE OF THE PROBLEM REQUIRES GLOBAL REGULATION

Various sectors of societies worldwide, including the business and trade sectors, have taken cognizance of animal welfare as an issue which requires regulation. Legal and political science scholarship also recognizes the current legal gap and the need to close it.<sup>50</sup>

The point is now that any practical or academic treatment of the issue can no longer sensibly remain confined to the sphere of the nation state – to national law, national politics, and national economics. The imperative of global (as opposed to purely national) regulation stems from a number of ideational and material factors which are not dependent on the existence of a postulated but contested global principle that animals should be treated decently. The reason is rather that virtually all aspects of (commodified) human–animal interactions (ranging from food production and distribution, working animals, animal use in research, to breeding and keeping of pets) possess a transboundary dimension. Therefore the welfare of animals, which is inevitably affected by these interactions, is a global issue *per se* calling for a global response.<sup>51</sup> The globalization of the issue of animal welfare arises from six, partly overlapping, grounds.

Firstly, increasing attention to welfare aspects by consumers in their purchasing decisions on products involving or using animals has an impact on both the relevant industries and governments.<sup>52</sup> Consumers in industrialized countries increasingly expect lawmakers (for varying reasons, including anthropocentric motives such as human health and fitness<sup>53</sup>) to take animal welfare seriously.

<sup>48</sup> Bowman, Davies & Redgwell, n. 18 above, p. 698.

<sup>49</sup> *Ibid.*

<sup>50</sup> See the references in nn. 46–48.

<sup>51</sup> Cf. T.G. Kelch, *Globalization and Animal Law: Comparative Law, International Law, and International Trade* (Wolters Kluwer, 2011); M. Park & P. Singer, ‘The Globalization of Animal Welfare: More Food Does not Require More Suffering’ (2012) 91(2) *Foreign Affairs*, pp. 122–33.

<sup>52</sup> For a discussion of consumer choices made in the context of shopping decisions, which are often ‘subject to self-deception and biases’, see Kelch, n. 2 above, Section 3.3 and text at nn. 132–46.

<sup>53</sup> Cf. Vapnek & Chapman, n. 15 above, p. 83 (‘Regardless of the ethical concerns, many countries may choose to enact and enforce animal welfare legislation in the interest of increasing production and trade in animal-based foods for both international and domestic markets’).

The resulting political pressure affects not only the regulation of domestic production but also that of the importation of foreign animal products. A current example is the EU's seal products regime which the EU promotes largely by highlighting the 'expressions of serious concerns by members of the public and governments sensitive to animal welfare considerations'.<sup>54</sup>

Concomitantly, businesses that seek to export their animal products to states in which consumers are more attentive to animal welfare need to pay more attention to the issue if they wish to retain their market share. This also holds true for the regulators in the countries of export if they wish to support their trading industries. In this context, a recent FAO report notes:

Animal welfare is not a new subject for regulation in most developed countries, owing to a sophisticated consumer base and greater exposure to animal welfare issues. Growing international trade is generating more interest in animal welfare elsewhere in the world, in particular in countries seeking to increase trade with Europe.<sup>55</sup>

A follow-up question is how much can be left to so-called indirect regulation through the invisible hand of the market, and where 'command-and-control' regulation is needed. As a matter of principle, the meeting of offer and demand on a market can bring about appropriate product and production standards only when consumers are comprehensively informed before making their purchasing choices. This is typically not the case in the animal-related industry. On the contrary, as Thomas Kelch points out, the animal-use industry consciously and massively seeks to foster human ignorance about the treatment and characteristics of animals.<sup>56</sup> This means that the first stage of regulation should aim for transparency, consumer information, certification, and labelling.

Secondly, and closely related, global regulation is necessary to prevent evasion of the law. The animal-processing industry (for food and pharmaceuticals) is a global industry and thrives on global trade. Even if one country attempts to improve welfare standards – for example, for the caging of livestock, for slaughter, or for animal experimentation – it cannot do so unilaterally if it wants to remain effective because the affected industrial sectors can escape stricter regulation by relocating.<sup>57</sup> Such relocation, or 'leakage', to cheap and low-standard countries then renders high national animal-protection standards meaningless. A concrete example of such evasion is the transfer of the slaughter of horses from the United States (US) to Mexico, where welfare standards are much lower. After closure of the last horse slaughter facilities in the US in 2007, exportation of horses for slaughter to Canada

<sup>54</sup> Regulation (EC) No. 1007/2009 on Trade in Seal Products [2009] OJ L 286/36; Preamble, Recital 1: 'Seals are sentient beings that can experience pain, distress, fear and other forms of suffering'; Recital 4: 'The hunting of seals has led to expressions of serious concerns by members of the public and governments sensitive to animal welfare considerations due to the pain, distress, fear and other forms of suffering which the killing and skinning of seals, as they are most frequently performed, cause to those animals'.

<sup>55</sup> Kuemlanger, n. 15 above, p. v.

<sup>56</sup> Kelch, n. 2 above, p. 102.

<sup>57</sup> A. Peters, 'The Competition between Legal Orders' (2014) 3(1) *International Law Research*, pp. 45–65.

and Mexico has increased dramatically (by 660% to Mexico), with unintended negative effects on the horses' welfare, notably during transportation.<sup>58</sup> Another pertinent field is biomedical research. In 2010, an international group of researchers, research funding institutions, and representatives of pharmaceutical and biomedical industries adopted the Basel Declaration,<sup>59</sup> with the (implicit) objective of persuading regulators and the public to renounce overly strict regulation of biomedical research involving animals. The accompanying statements underscored the importance of preserving Switzerland as a site for biomedical research, which might be jeopardized if research regulation became too strict. The organizers, at least implicitly, raised the danger of outsourcing the industry, which in turn would lead to significant losses of tax income for Switzerland. If regulators bow to such pressures, and when individual countries try to keep or regain economically significant industrial sectors by supplying an attractively permissive legal environment, there is a danger of a downward spiral of standards, a race to the bottom, to the detriment of animal welfare.<sup>60</sup>

Thirdly, nation states with high protection standards which are conscious of the global competition among states over mobile industries face various policy options.<sup>61</sup> The obvious response might be to lower national standards (resulting in the race to the bottom referred to above), but an alternative path is to campaign for uniform international standards in order to prevent other states from exploiting their lower standards as an (unfair) competitive advantage. Uniform international standards can level the playing field for businesses in high-standard states by subjecting all businesses to one and the same (high) standard.<sup>62</sup> This mechanism needs to be explored with regard to animal welfare standards. The EU, which has relatively more stringent animal welfare standards than most of its global trading partners, has

<sup>58</sup> US Government Accountability Office, Report to Congressional Committees, 'Horse Welfare: Action Needed to Address Unintended Consequences from Cessation of Domestic Slaughter', GAO-11-228, June 2011, available at: <http://www.gao.gov/new.items/d11228.pdf>.

<sup>59</sup> Adopted on the occasion of the first Basel Conference, 'Research at a Crossroads', Basel (Switzerland), 29 Nov. 2010, available at: <http://www.basel-declaration.org>. The official wording is a 'call for more trust, transparency and communication on animal research'.

<sup>60</sup> Cf. Favre, n. 40 above, p. 248 ('Unrestrained economic competition will always impose the most inhumane conditions on the animals within the system, as they tend to be the cheapest management practices').

<sup>61</sup> For a reform proposal to raise welfare standards for farmed animals in Germany which takes into account the danger of a migration of the industry beyond the state boundaries, together with a number of suggestions on how to prevent such migration, see: Wissenschaftlicher Beirat für Agrarpolitik beim Bundesministerium für Ernährung und Landwirtschaft, *Wege zu einer gesellschaftlich akzeptierten Nutztierhaltung: Gutachten* (Bundesministerium für Ernährung und Landwirtschaft, 2015).

<sup>62</sup> D.D. Murphy, *The Structure of Regulatory Competition* (Oxford University Press, 2004); R. Baldwin, M. Cave & M. Lodge, *Understanding Regulation: Theory, Strategy, and Practice*, 2<sup>nd</sup> edn (Oxford University Press, 2012), Ch. 17 'Regulatory Competition and Coordination', pp. 356–69. The textbook example for this process is anti-corruption. In the 1980s, in response to the Watergate scandal, the US adopted strict national anti-corruption laws. When the domestic requirement to comply with these high standards put US firms at a disadvantage in the new markets which had opened up in Eastern Europe following its transformation in the 1990s, the US pressured for and succeeded in establishing an international anti-corruption regime (the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 21 Nov. 1997, available at: [http://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf)), which constrains the business of all state parties.

proposed that the WTO should directly address such standards.<sup>63</sup> The EU's motivation is to prevent 'its animal welfare standards [from being] undermined and ... it could suffer negative trade effects, since agricultural products produced to meet high EU animal welfare standards would run the risk of being edged out of the market by cheaper imports produced under lower standards'.<sup>64</sup> However, the proposal to adopt a WTO-wide animal welfare standard thus far has not found favour with WTO members.

Fourthly, animal welfare is embedded in a complex set of issues, most of which are of a global nature. The industrialization of meat, dairy, and fur production has massive environmental, climatic, social, and ethical consequences on a global scale. What is at issue are sustainability, the extinction of species, poverty, and malnutrition – all of which are global problems. This embeddedness itself is an additional reason why animal welfare can only be tackled globally.

A fifth – and pragmatic – reason is that international animal welfare standards would provide a benchmark for local, national, and international legislation. At present, animal welfare and rights activists face the daunting and repetitive task of battling for new laws in multiple, isolated national jurisdictions. An international benchmark would allow them to devote their scarce resources on implementation of that acknowledged standard.<sup>65</sup>

The sixth consideration is that with regard to existing international regimes, notably trade agreements, new international rules on animal welfare could serve as an interpretative guideline. The relevant provision of the Vienna Convention on the Law of Treaties (VCLT)<sup>66</sup> requires that 'there shall be taken into account ... any relevant *rules of international law* applicable in the relations between the parties' (Article 31(3)(c)).<sup>67</sup> Only international, rather than domestic, rules could perform this important function as a catalyst for a more animal-friendly reading of existing international trade agreements.

It follows from these six considerations that legal rules for improving animal welfare can be effective only if they are enacted globally: on both the domestic and the international levels, and in the form of state or interstate regulation and non-state

<sup>63</sup> WTO Committee on Agriculture, 'European Communities Proposal: Animal Welfare and Trade in Agriculture', WTO Doc. No. G/AG/NG/W/19, 28 June 2000.

<sup>64</sup> Vapnek & Chapman, n. 15 above, p. 17.

<sup>65</sup> Favre, n. 40 above, p. 239.

<sup>66</sup> Vienna (Austria), 23 May 1969, in force 27 Jan. 1980, available at: [https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&cmdsg\\_no=XXIII-1&chapter=23&Temp=mtmsg3&clang=en](https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&cmdsg_no=XXIII-1&chapter=23&Temp=mtmsg3&clang=en).

<sup>67</sup> The precondition of Art. 31 VCLT and its underlying principle – that the rule be 'applicable in the relations between the parties' – were construed infamously narrowly by the WTO Panel in *EC – Biotech*. The Panel noted that the Cartagena Protocol, on which the European Community as respondent had relied for interpreting the pertinent WTO Agreements, was in fact 'not applicable', because the Protocol had not been ratified by a number of WTO members, including the complaining parties to the dispute (Argentina, Canada, and the US): *EC – Measures Affecting the Approval and Marketing of Biotech Products*, Panel Reports, WTO Docs WT/DS 291–293/R, 29 June 2006, paras 7.49–7.95, notably para. 7.75. The WTO Appellate Body in the *Airbus* case moved away from the *Biotech* approach: *European Communities and certain Member States – Measures affecting Trade in Large Civil Aircraft*, Appellate Body Report, WTO Doc. WT/DS316/AB/R, 18 May 2011, paras 839–55. The better and now prevailing view is that it is not necessary for all states in the organization/treaty to also be parties to the other treaty to make the latter usable, if they are not involved in the dispute.

standards. The ‘global’ quality of such regulation will be explained in the final section of this foreword.

## 6. THE SCOPE AND TASKS OF GLOBAL ANIMAL LAW

Generally speaking, global law refers to a regulatory mix combining a host of different types of norm. Besides the various ‘levels’ of national, international, and regional or sub-state law, the regulatory network consists of norms made by states and by private actors, thus including standards emerging from industry, often in collaboration with governmental agencies. Finally, it includes both hard and soft law, ranging from codes and international conventions to declarations sponsored by non-governmental organizations (NGOs), which often act transnationally.

An alternative label would be ‘transnational law’ in the sense developed in the inaugural editorial of this journal.<sup>68</sup> In fact, what Heyvaert and Etty describe as transnational environmental law is exactly the above-mentioned mixture of law as ‘the product of a rich combination of local, regional and transboundary communications and pressures’, of ‘engagement with multilevel governance’, including ‘private action in the public interest’, and ‘cross-regime’ processes.<sup>69</sup>

It is commonplace that normative orders relating to various issues can be described as ‘global’ or ‘transnational’ in that sense. We are speaking of a ‘global administrative law’, and of a ‘transnational environmental law’. The label ‘global’/‘transnational’ and the conceptualization therein allow us to grasp the characteristics of these branches of the law better, and thus to adequately analyze, criticize, and develop the law.

These considerations are also relevant for animal law. Animal law can best be applied and analyzed when legal practitioners and scholars are mindful, simultaneously, of the various ‘levels’ of the law and the various types of norm.

Although the corpus of domestic, international, and local law; of state-made and privately generated norms; of hard and soft law relating to the treatment and welfare of animals is thin, it has reached a critical mass which justifies representing it as a cross-cutting matter or even as a legal field of its own, under the overarching heading of global animal law.

What should and could a scholarly discipline of global animal law deliver? It could erect a conceptual basis and contribute to the practical development of the field by furnishing appropriate legal arguments and concepts. Further research could stimulate law reform by identifying legal gaps. To that end, the dispersed international (universal and regional, notably European) norms (hard and soft) on animal welfare must first be identified, mapped, and analyzed. Secondly, international and European litigation (such as before the Court of Justice of the EU (CJEU), the European Court of Human Rights (ECtHR), the ICJ, and the WTO Dispute Settlement Body) and legal reform projects in the entire field call for comment and critique.

<sup>68</sup> V. Heyvaert & T.F.M. Etty, ‘Introducing Transnational Environmental Law’ (2012) 1(1) *Transnational Environmental Law*, pp. 1–11.

<sup>69</sup> *Ibid.*, pp. 4–6.

Finally, this research would examine the practical necessity, the moral justification, and the political prospects and strategies for consolidating and strengthening the corpus of international animal welfare norms specifically. The research programme would thus be descriptive-analytical-conceptual, and have an impetus of legal policy. The articles making up this symposium collection seek to contribute to the new discipline of global animal law, applying different methods and zooming in on specific sub-questions.

Besides the articles in this symposium collection, recent scholarship in international law and international relations has discovered the issue of animal welfare, with significant implications for legal policy.<sup>70</sup> Proposals have surfaced to intensify and redirect standard setting by the OIE, which boasts of having identified animal welfare as a priority in the OIE Strategic Plan 2001–05. In fact, the OIE seeks to ‘take the lead internationally on animal welfare and, as the international reference organization for animal health, to elaborate recommendations and guidelines covering animal welfare practices, reaffirming that animal health is a key component of animal welfare’.<sup>71</sup> However, it is doubtful whether the OIE is well suited to develop a detailed and coherent animal welfare and protection regime.<sup>72</sup> The reason is that this organization’s mandate is the prevention of the transboundary transmission of animal diseases through the exportation of livestock, with the ultimate aim of protecting human health.<sup>73</sup> To this end, the OIE has traditionally entertained close relationships with the animal trade and livestock industries.<sup>74</sup> Animal protection or welfare is not its core objective, but only a ‘side show’ by which it seeks to respond to new consumer expectations.

Another effort, pursued by a coalition of numerous NGOs, is the campaign for the adoption of a Universal Declaration on Animal Welfare (UDAW) under the auspices of the UN, possibly under its Economic and Social Council (ECOSOC).<sup>75</sup> The UDAW campaign seeks to attract support by states and by individual petitions. The format of a UN declaration would follow the model of the Universal Declaration on Human Rights of 1948, which is not a binding treaty but formally is simply a resolution of the UN General Assembly.<sup>76</sup>

A different scholarly proposal is to promote the adoption of a new binding umbrella treaty on animal welfare, supplemented by specific protocols (on, for

<sup>70</sup> Otter, O’Sullivan & Ross, n. 46 above; White, n. 21 above.

<sup>71</sup> ‘The OIE’s Achievements in Animal Welfare’, 10 Sept. 2014, available at: <http://www.oie.int/animal-welfare/animal-welfare-key-themes>.

<sup>72</sup> See also Otter, O’Sullivan & Ross, n. 46 above, p. 65.

<sup>73</sup> See the Organic Statutes of the OIE (which is an Appendix and integral part of the International Agreement for the Creation of an Office International des Epizooties in Paris, Paris (France), 25 Jan. 1924, available at: <http://www.oie.int/about-us/key-texts/basic-texts>), Art. 4: ‘The main objects of the Office are: a. To promote and co-ordinate all experimental and other research work concerning the pathology or prophylaxis of contagious diseases of livestock for which international collaboration is deemed desirable’.

<sup>74</sup> Otter, O’Sullivan & Ross, n. 46 above, pp. 65, 67–8.

<sup>75</sup> Cf. M. Gibson, ‘The Universal Declaration of Animal Welfare’ (2011) 16(2) *Deakin Law Review*, pp. 539–67, with the draft text in the appendix.

<sup>76</sup> New York, NY (US), 10 Dec. 1948, UNGA Resolution 217A, available at: <http://www.un.org/en/universal-declaration-human-rights>.

example, companion animals and on the care of exhibited wildlife),<sup>77</sup> which is a regulatory technique typically used in international environmental law. Overall, recent practical and scholarly developments might ‘offer some hope for the rationalization and consolidation of the at present rather desultory and disjointed state of welfare provision’<sup>78</sup> in international law.

Research into global animal law must include a comparative perspective and not be limited to international law *stricto sensu*, because the relevant body of hard international law is very fragmented and thin. The research thus involves both ‘horizontal’ comparisons (among different national legal regimes) and ‘vertical’ legal comparisons (among national, European, and international legal regimes).

Any legal research relating to animals needs to take into account and must be linked to international economic law, international environmental law, international human rights law, and the law of development. The identification of the cross-cutting theme of ‘animal welfare’ in these different sub-areas of law would allow for a better analysis of that theme. Tagging the theme as ‘global animal law’, moreover, could function as a brace which counters the fragmentation of international law in these areas.

The legal protection of animals, their status, and their potential rights ultimately depend on human attitudes towards animals, and these are influenced by habits, religion, the wealth of a society, its state of industrialization, and other cultural factors. Research into global animal law must therefore be particularly sensitive to problems of Eurocentrism, of legal imperialism, and of a North–South divide. It should not naively export European values but should seek an overlapping consensus. This consensus could be strengthened and further developed with arguments which can be transmitted transnationally, and which have the potential to become universal. For example, Thomas Kelch argues in this symposium collection that Feminist Care Theory could constitute an appropriate foundation for creating universal moral principles relating to animals.<sup>79</sup> At this point, scholarship needs to trust in the transformative power of public discourses, and also feed them.

These discourses should be informed by findings of natural science on the sentience of animals. For this reason, research into global animal law generally needs to be interdisciplinary to the extent that it must draw on insights of philosophy (ethics), biology (zoology), anthropology (human–animal studies), history, cultural studies, economics, as well as other disciplines.

In conclusion, animal welfare is an issue which awaits global (transnational) regulation, notably because it is impossible to unilaterally implement high domestic animal welfare standards in the face of the threat by relevant industries of relocating to production sites with lower animal welfare standards. This constellation calls for global animal law as a branch of international law and as a scholarly discipline.

However, it is possible to push beyond pragmatic and conventional research boundaries, and consider the global improvement of animal welfare as a matter of

<sup>77</sup> Favre, n. 40 above.

<sup>78</sup> Bowman, Davies & Redgwell, n. 18 above, p. 699.

<sup>79</sup> Kelch, n. 2 above.

global justice.<sup>80</sup> The ideas developed for human rights and global justice also ‘provide strong support for the claim that the interests of nonhuman animals should be respected and protected internationally’.<sup>81</sup> The core idea of global justice (as applied to humans) is that the place of birth or the nationality of a person is morally irrelevant to what a human being is owed for reasons of fundamental justice. Therefore, the protection of basic interests should not be dependent on different national legislative enactments but must be guaranteed globally in a uniform way. Oscar Horta applies this reasoning to animals:

After all, basic justice is owed to all those who possess the morally relevant features – and hence to both Swedes and Somalis. But if this is the case for humans, then it must apply to nonhuman animals too. ... [I]f nonhuman animals possess the morally relevant features – that is, sentience – then being born in Sweden or in Somalia should be equally irrelevant for the award of basic rights to them. Why? Because this fact has nothing to do with what the theories of wellbeing claim is valuable for us, which is what can constitute the basis for the attribution of rights.<sup>82</sup>

Such reasoning requires us to take the leap from animal welfare to animal rights. The legal conceptualization of rights for animals is much more demanding and faces doctrinal, political, and moral objections.<sup>83</sup> Still, it is likely that this question, as others in the new field of research into global animal law, will become ever more pressing. After all, global animal law is a manifestation and a driver of the broader ongoing ‘animal turn’<sup>84</sup> in the social sciences and humanities.<sup>85</sup>

<sup>80</sup> O. Horta, ‘Expanding Global Justice: The Case for the International Protection of Animals’ (2013) 4(4) *Global Policy*, pp. 371–80; see also M.C. Nussbaum, ‘Beyond “Compassion and Humanity”’, in C.R. Sunstein & M.C. Nussbaum (eds), *Animal Rights: Debates and New Directions* (Oxford University Press, 2004), pp. 299–319, at 319 (‘Truly global justice requires not simply that we look across the world for other fellow species members who are entitled to a decent life. It also requires looking around the world at the other sentient beings with whose lives our own are inextricably and complexly intertwined’).

<sup>81</sup> Horta, *ibid.*, p. 372.

<sup>82</sup> *Ibid.*, p. 375. See also Favre, n. 40 above, p. 244 (‘A horse is a horse regardless of what country it lives in, and it is not appropriate that it can receive high care in some places and no concern in others. For the wellbeing of the animals we need to seek a more universal view about how to treat animals’).

<sup>83</sup> Peters, n. 1 above.

<sup>84</sup> Seminally, H. Ritvo, ‘On the Animal Turn’ (2007) 136(4) *Daedalus*, pp. 118–22; Sykes, n. 3 above. The ‘animal turn’ is an increasing scholarly interest in animals in new terms and under new premises, focusing on the relationships between humans and other animals, and on the role and status of animals in (human) society: A. Peters, S. Stucki & L. Boscardin, ‘The Animal Turn: What Is It and Why Now?’, *Verfassungsblog.de*, 14 Apr. 2014, available at: <http://www.verfassungsblog.de/en/the-animal-turn-what-is-it-and-why-now>.

<sup>85</sup> For ethnography see D.J. Haraway, *When Species Meet* (University of Minnesota Press, 2008); E. Kirksey & S. Helmreich, ‘The Emergence of Multispecies Ethnography’ (2010) 25(4) *Cultural Anthropology*, pp. 545–76; T. Ingold, ‘Anthropology Beyond Humanity’ (2013) 38(3) *Suomen Antropologi, Journal of the Finnish Anthropological Society*, pp. 5–23. For political theory see S. Donaldson & W. Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (Oxford University Press, 2011); S. Ahlhaus & P. Niesen, ‘What is Animal Politics? Outline of a New Research Agenda’ (2015) 40 *Historische Sozialforschung*, pp. 7–31.