



# *Why conservation and sustainability require protection for the interests of animals*

Book or Report Section

Accepted Version

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(2019) Why conservation and sustainability require protection for the interests of animals. In: Scholtz, W. (ed.) Animal Welfare and International Environmental Law: From Conservation to Compassion. New Horizons in Environmental and Energy Law Series. Edward Elgar, pp. 207-234. ISBN 9781788113939 doi: <https://doi.org/10.4337/9781788113946>  
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Published version at: <https://www.elgaronline.com/view/edcoll/9781788113939/9781788113939.00011.xml>

To link to this article DOI: <http://dx.doi.org/10.4337/9781788113946>

Publisher: Edward Elgar

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# WHY CONSERVATION AND SUSTAINABILITY REQUIRE PROTECTION FOR THE INTERESTS OF ANIMALS<sup>1</sup>

David Bilchitz

## 1. Introduction

International law has had very little to say about the direct protection of animals and their interests. Animal protection legislation initially developed in domestic systems and focused on prohibiting unnecessary cruelty to animals.<sup>2</sup> No treaty exists at the international level which, similarly, prohibits such actions.<sup>3</sup> Nevertheless, there are a number of international agreements which have important implications for animals. These range from trade agreements which can affect the ability of individual countries to place restrictions on the treatment of animals in relation to imported products;<sup>4</sup> to environmental law agreements which address issues relating to endangered species<sup>5</sup> and the protection of biological diversity.<sup>6</sup>

The focus of this chapter will be on these latter environmental law agreements which often do not expressly require much protection for the interests of individual animals. Underlying these agreements, the focus in relation to animals appears to be on three important notions: the 'conservation' of a species, preserving biodiversity and the 'sustainable utilisation' of animals.

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<sup>1</sup> This chapter draws heavily from an article I published initially under the title 'Exploring the Relationship Between The Environmental Right in the South African Constitution and Protection for the Interests of Animals' (2017) 134 *South African Law Journal* 740. The focus of the latter piece was on the environmental right in the South African constitution. The focus of this chapter is on international environmental law: the core concepts, however, are similar as the South African constitution and legislative framework has drawn from the international sphere. The argument I make is a philosophical one (with some empirical engagement) and thus would apply universally.

<sup>2</sup> See, for instance, Mike Radford, *Animal Welfare Law in Britain* (OUP 2001) for an account of the development of animal protection legislation in the United Kingdom.

<sup>3</sup> See, for an overview of the situation of animals in international law, Anne Peters 'Global Animal Law: What It Is and Why We Need It' (2016) 5 *Transnational Environmental Law* 9 and, for a recent proposal, relating to a treaty David Favre 'An International Treaty for Animal Welfare' in Deborah Cao and Steven White *Animal Law and Welfare – International Perspectives* (Springer 2016) 92-93.

<sup>4</sup> See Pamela Frasch et al. *Animal Law in a Nutshell* (2016 West Academic Publishing) and Donald D Broom 'International Animal Welfare Perspectives, Including Whaling and Inhumane Seal Killing as a W.T.O Public Morality Issue' in Deborah Cao and Steven White *ibid.*

<sup>5</sup> See, for instance, Convention on International Trade in Endangered Species of Wild Fauna and Flora ('CITES'), 3 March 1973 <<http://www.cites.org>> accessed 25 October 2018.

<sup>6</sup> Convention on Biological Diversity ('CBD'), 5 June 1992 <<http://www.cbd.int>> accessed 25 October 2018.

This chapter will first seek to identify two different approaches to interpreting these key concepts underpinning the current international environmental law regime which relates to animals, with a focus on the notions of 'conservation' and 'sustainable use'. These ideas have been regarded as having particular relevance to animals in the wild which, as a result, is the focus of examples in this chapter.<sup>7</sup> Two approaches shall be identified to interpreting these ideas. The 'aggregative' approach – which has perhaps been the way in which these notions have traditionally been understood - focuses on broad collective environmental goals such as the long-term survival of a species, the health of ecosystems or conserving biodiversity. The 'integrative' approach, on the other hand, requires the adoption of an attitude of respect to the individuals that make up a species, an eco-system or the components of biodiversity.

In the second part of the chapter, several arguments will be provided as to why the integrative perspective is preferable. These arguments aim to show that the aggregative approach is in fact self-defeating in its own terms and that, only an integrative approach, can in fact succeed in achieving the very collective goals the aggregative approach advocates. That means, in turn, that concepts like 'conservation', and 'sustainable use' are not to be understood in a manner that excludes the interests of individual animals but must be interpreted to include respect for individual creatures. Notions at the heart of international environmental law thus are not separate from those engaged in ethical theory relating to the interests of animals but integrated with those concerns. This paper thus ultimately sets itself the ambitious purpose of connecting two sets of discourses that often talk past one another. I contend, ultimately, that the goals currently contained within international environmental law must be integrated with a direct focus on the protection of individual animal interests intrinsically if the very purposes of those laws are to be attained.

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<sup>7</sup> The reasoning and coverage of these notions may also extend to certain features of the human use of domesticated animals but a full consideration of those issues lies beyond the scope of this paper.

## 2. Two notions of conservation and sustainable utilisation

### 2.1. *Conservation, Biodiversity and Sustainable Use in International Agreements*

The first major treaty addressing questions relating to the conservation of wildlife is the Convention on International Trade in Endangered Species of Wild Fauna and Flora (henceforth 'CITES').<sup>8</sup> The Convention essentially focuses on regulating the trade in wild species of fauna and flora: those that are critically endangered are granted a higher level of protection than those that are not. The flavor of the Treaty can be gained by considering the preamble which focuses on protecting wild fauna and flora 'for this and the generations to come': this sentence gives expression to the notion of 'sustainability' which involves, at least partially, ensuring that environmental resources are available for future generations. The Preamble further expresses a consciousness of the 'ever-growing value of wild fauna and flora from aesthetic, scientific, cultural, recreational and economic points of view': the value of fauna and flora here thus seems to be understood to be largely instrumental to human purposes and thus is largely anthropocentric in nature. There is no clear recognition, at least, of the inherent value of such fauna and flora. Importantly, there is also no differentiation between fauna and flora which are simply lumped together. The Preamble goes on to mention that 'people and States are and should be the best protectors of their wild fauna and flora': the focus here is on the notion of 'protection' – which is perhaps linked to the notion of 'conservation' though it is not entirely clear what is meant by this notion.<sup>9</sup>

The focus throughout the Convention is on the unit of a species rather than individuals and regulating the trade in such species. The language of the Convention is indicative of conceiving of fauna and flora as 'objects' of value through referencing them as being simply 'specimens'. Some of the most important provisions relate to

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<sup>8</sup> See CITES, note 5 above.

<sup>9</sup> See Werner Scholtz 'Injecting Compassion into International Wildlife Law: From Conservation to Protection' (2017) 6 *Transnational Environmental Law* 482 for a suggestion of a difference between these two ideas.

the factors to be considered when granting export or import permits. One key factor involves ensuring, for instance, that an export will not be 'detrimental to the survival of that species'.<sup>10</sup> Interestingly, there are also moments where the welfare concerns enter into the treaty: indeed, one of the relevant factors in deciding whether to grant an export permit for fauna and flora listed on Appendix 1 involves considering whether any 'living specimen will be so prepared and shipped so as to minimize the risk of injury, damage to health or cruel treatment'.<sup>11</sup> A similar provision exists concerning fauna and flora in Appendix 2.<sup>12</sup> These provisions clearly – at least in relation to the notions of 'health' and 'cruel treatment' – do differentiate between fauna and flora and include a recognition of the potential to harm animal welfare though there is no clear definition of what constitutes cruel treatment.<sup>13</sup> The focus of the treaty itself remains, however, on regulating and restricting the trade in animals to procure species survival. It is interesting though that a welfare dimension is recognized as critical in this regard and, in a sense, this treaty can be seen to foreshadow some of the arguments for the integrative approach which will be discussed below.

A second important convention with implications for animals is The Convention on Biological Diversity (henceforth 'CBD').<sup>14</sup> The objective of this Convention is stated as being 'the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources'.<sup>15</sup> The notions of conservation and sustainable use are utilized throughout the convention but only sustainable use is defined. The latter notion is specified as involving 'the use of components of biodiversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations'.<sup>16</sup> The focus of this definition thus seems to be on the manner and rate of usage in a way that ensures the continuation of biological diversity. The notion of

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<sup>10</sup> See, for instance, Article III(2)(a)

<sup>11</sup> Article III (2) (c).

<sup>12</sup> Article IV (2) (c).

<sup>13</sup> Favre, note 3 above at 93. Scholtz, above note 9 describes welfare as being 'incidental to conservation measures' in CITES.

<sup>14</sup> See CBD, note 6 above.

<sup>15</sup> Article 1.

<sup>16</sup> Article 2.

biological diversity is also key which is defined to mean the ‘variability among living organisms from all sources’.<sup>17</sup> Once again, all living organisms are grouped together with little recognition of the differences between sentient creatures and other forms of life.

The focus of the Convention thus appears to be on ensuring species survival and the diversity of life forms but appears not to focus on any individual animal or plant. Clearly, for diversity over all to flourish, there must be individuals of a particular species that exist. Similarly, species survival seems to require and rely upon individuals: it is thus strange that this treaty tends to focus on broad, abstract notions such as biological diversity and species without engaging with the protections on offer to the individuals underlying them. There is a critical relationship between collective notions such as ‘species’ and ‘biological diversity’ and the individuals underlying them. In the next two sections, I attempt to outline two different conceptions of this relationship which affect how the notions of ‘conservation’ (or protection) and ‘sustainable use’ are to be understood.

## ***2.2. Two approaches to interpreting conservation***

Conservation is defined by the Merriam Webster dictionary as a ‘careful preservation or protection of something’.<sup>18</sup> The OED defines it as follows: ‘it involves the ‘preservation, protection or restoration of the natural environment and of wildlife’.<sup>19</sup> In relation to animals, a key question that has arisen – which has strong practical effects - concerns whether conservation should be focused on preserving a species or protecting individual animals.

We can identify at this point two approaches to interpreting the notion of conservation: the choice between them has far-reaching implications for the protection international treaties such as the CITES and the CBD offer to individual animals. The ‘aggregative’ approach focuses on achieving broad collective

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<sup>17</sup> Ibid.

<sup>18</sup> Merriam Webster Dictionary <<http://www.merriam-webster.com/dictionary/conservation>> accessed 25 October 2018.

<sup>19</sup> Oxford Dictionary <<http://www.oxforddictionaries.com/definition/english/conservation>> accessed 25 October 2018.

environmental goals such as the long-term survival of a species, the health of ecosystems or maintaining biodiversity (which on the face of it is what these treaties seek to achieve). One of the key questions for such a view concerns the reasons we have to value these collective goals. Two main justifications exist in this regard which affect the manner in which this approach is conceived and applied. The first seeks to conserve on the basis of an anthropocentric utilitarian ethic that seeks to achieve the greatest benefits for the greatest number of human beings.<sup>20</sup> Conservation, on this view, might be good because many humans enjoy seeing a wide range of animals in existence (we might term this an 'aesthetic' purpose);<sup>21</sup> or perhaps – in a related manner – it might be good for the tourist industry and bring economic benefits to humans (we might term this an 'economic' purpose).<sup>22</sup> As we saw, some of these have been specified by CITES and conceptualized in this manner. The second version seeks to conserve in order to achieve the greatest benefit for the environmental system as a whole.<sup>23</sup> That justification is not concerned so much about human welfare alone but ensuring the overall continuity and integrity of wider eco-systems. Both versions will allow for sacrifices of individuals for their wider collective goals and focus on broad notions such as the biodiversity and the continuity of a species rather than the lives of any particular individuals.<sup>24</sup>

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<sup>20</sup> To illustrate the contrast, I reference a rather simple version of utilitarianism in describing the aggregative view: if the wider argument of this paper is correct, then a form of indirect or rule utilitarianism would also endorse the integrative view.

<sup>21</sup> The aggregative view cannot see conservation as preserving animals who are valuable in themselves and so the reasons to conserve must relate to some kind of 'aesthetic' value of having different species if they are not particularly valuable for their concrete uses to human beings: for such a justification, see Lilly-Marlene Russow 'Why Do Species Matter?' in Paul Pojman and Louis P Pojman *Environmental Ethics* (Wadsworth 5 ed 2008) 269-276. Attempts to defend the value of collectivities such as species and other aspects of nature independent of the human mind have generally not been regarded as plausible: see Dale Jamieson, 'Animal Liberation is an Environmental Ethic' in Dale Jamieson (ed), *Morality's Progress: Essays on Humans, Other Animals, and the Rest of Nature* (Oxford University Press, 2002) 202.

<sup>22</sup> See Lorreta Feris 'Constitutional Environmental Rights: an Under-utilised Resource' (2008) 24 *SAJHR*, 32-33 who explores such an anthropocentric approach more generally.

<sup>23</sup> Such an 'ecocentric' view goes back to Aldo Leopold's land ethic articulated in *Sand County Almanac* (Oxford University Press 1949) at 224-225, a central statement of which is that '[a] thing is right when it tends to preserve the integrity, stability and beauty of the biotic community. It is wrong when it tends otherwise'. See also, J Baird Callicott 'Animal Liberation: a Triangular Affair' (1980) *Environmental Ethics* 311.

<sup>24</sup> There is a real question as to why 'wholes' are valuable and, whichever reasons we give, the problem mentioned in the text will arise. See Joseph R DesJardins *Environmental Ethics* (Wadsworth 4 ed 2006) 189-194: see, the suggested solution to this problem in the argument in 3(c) below. Scholtz, note 9 above 478 suggests that conservation is itself largely identical with the aggregative approach and that a competing principle of animal welfare needs to be introduced in international law to reconcile the two. The argument in this paper, however, suggests that we cannot actually give effect to an aggregative notion of conservation without attending to the protection of individuals – as



The 'integrative' approach, on the other hand, requires the adoption of an attitude of respect for the individual animals that make up a species, an eco-system or the components of biodiversity. In so doing, it also recognizes the importance of relationships between individual animals and the environment in which they live, which includes their connection with human beings. It insists that respect for individuals and their value is an essential component in ensuring the survival of the species as well as the protection of the environment more generally.<sup>25</sup>

Thus, a practical illustration of the difference between these two approaches concerns their attitude to the trophy hunting of large mammals. Those who advocate for the aggregative view often argue that trophy hunting has benefits for humans as well as the environment as a whole: by bringing in large amounts of revenue to the country, it is argued that this practice can help fund conservation efforts in relation to a range of species.<sup>26</sup> Moreover, it is argued that such practices create an incentive for people to protect the species in question as they benefit financially from the wildlife in the country.<sup>27</sup> An integrative view would reject the idea that the treatment of individual animals with utter disrespect – as is evidenced by the willingness of trophy hunters to kill highly evolved creatures for pleasure - can advance the goal of species conservation. It would involve the key idea that enhancing respect for individuals is essential to preserving the species as a whole.

### ***2.3. Two approaches to interpreting sustainable use***

Before providing arguments as to which of these two alternative interpretive approaches should be adopted at the international level, it is important to recognize that a choice between two such identical approaches is required in interpreting the

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such, the notion of conservation already contains within it the need for according respect to individual animals.

<sup>25</sup> The focus of this paper is on the protection for the interests of animals and the respect owing to them. The integrative view thus, as expressed herein, is compatible both with biocentric approaches to the environment as well as those that emanate from recent work in animal welfare/rights theory. The biocentric approach would extend the domain of ethical concern more widely than animal rights theory does: for a description of the two approaches and their differences, see DesJardins *ibid.* chapter 5 and 6.

<sup>26</sup> Alistair S Gunn 'Environmental Ethics and Trophy Hunting' (2001) 6 *Ethics and the Environment* 87.

<sup>27</sup> *Ibid.*

notion of sustainable use as well. To understand this idea, we first need briefly to engage with the notion of 'sustainable development' from which it has emerged.

The idea of sustainable development is drawn from international environmental law. It was initially utilized in the Brundtland Report of 1987 which defined sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.<sup>28</sup> This definition recognizes the potential for development to harm the environment which will impact on the future of humans (and other life) on the planet. It outlined a 'type of development that integrates production with resource conservation and enhancement, and that links both to the provision for all of an adequate livelihood base and equitable access to natural resources'.<sup>29</sup> Sustainable development thus involves an integrated type of thinking that links economic development (particularly focused on those who are poor) with environmental considerations. In 1992, States joined together in issuing the Rio Declaration on Environment and Development which represented a large international consensus on these broad ideas. Principles 3 and 4, for instance, include the notions of intra- and inter-generational equity and recognize the twin importance of environmental protection and socio-economic development. One key facet of sustainable development is the acceptance of limits, on environmental protection grounds, on the use of and exploitation of natural resources.<sup>30</sup> This idea has been framed as a 'principle of sustainable use – the aim of exploiting natural resources in a 'sustainable', 'prudent', 'rational', 'wise' or 'appropriate manner'.<sup>31</sup> What do these notions mean?

Once again, there are, at least, two alternative possibilities to interpreting this notion (which map onto the alternative notions of conservation identified above). The first 'aggregative' view is focused, as its name suggests, on the 'aggregates' or 'collective goals' and ensuring that any uses of animals do not imperil the long-term survival of the species or the biodiversity of the environment. Since the focus in this context is

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<sup>28</sup> See Chapter 2, para 1 of the United Nations World Commission on Environment and Development, 'Our Common Future' UN Doc A/42/427 <<http://www.un-documents.net/ocf-02.htm>> accessed 15 October 2018.

<sup>29</sup> *Ibid*, Chapter 1 para 47.

<sup>30</sup> Phillip Sands *Principles of International law* (2003) 266.

<sup>31</sup> *Ibid* 253.

on the 'use' of natural resources and enhancing human development, the more likely justification for a concern with collective goals in this context is the anthropocentric one. Thus, the deep justification for a concern with sustainable use would ultimately lie in the goal of achieving the greatest overall benefit to the greatest number of human beings overall.<sup>32</sup> Thus, such an approach would practically support trophy hunting of large mammals on the grounds that the killing of some lions, leopards and buffalo can provide incentives for people to conserve the rest of these creatures as they become a source of livelihood and wealth. The approach would support the idea that there have to be limits on the number of animals killed; otherwise, in the longer-run, these economic benefits for humans would not be achieved due to depletion or extinction of these animals. A further argument contends that profits from these activities should also be ploughed back into conservation activities that can aid long-term sustainability.<sup>33</sup> This approach essentially either rejects the notion that individual animals have worth and interests in their own right that are deserving of respect or regards their lives and welfare as having very minimal value compared to the importance of their overall use for human purposes. The interests of animals are thus subordinate to the economic benefits humans may achieve from their existence.

The major question facing such an approach is whether it in fact provides a viable interpretation of the notion of 'sustainable use'. Indeed, the aggregative view seems to place most of the weight on the notion of 'use'. Ultimately, for instance, animals are to be understood entirely instrumentally: they matter in so far as they help advance the uses humans may have for them now or in the future. The notion of 'sustainability' here is a simple qualification on the notion of use such that present 'uses' do not prevent or impair future 'uses'.

An alternative integrative approach to understanding 'sustainable use', on the other hand, gives equal weight to the composite term, 'sustainable' and 'use'. Sustainability here qualifies and colours the notion of use itself such that certain uses become impermissible. The Oxford English Dictionary defines sustainable primarily

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<sup>32</sup> Indeed, see the discussion above of the anthropocentric nature of the right above in, for instance, Feris, note 22 above 32-34.

<sup>33</sup> For all these arguments, see Gunn, note 26 above.

as involving being 'able to be maintained at a certain rate or level'.<sup>34</sup> In this context, this definition illustrates the relationship between sustainability and the notion of conservation, and suggests the importance of maintaining animals of a particular species in existence. The integrative approach recognizes that the ability to guarantee the survival and continuation of animals from different species depends upon cultivating attitudes in human beings towards them which are respectful of their interests. This approach recognizes the deep inter-relationship between individuals and the rest of the ecological system; in so doing, it maintains that there is a necessary connection between the adoption by humans of attitudes and behaviours of respect for individual animals – in the manner they are interacted with and treated – and the very long-term sustainability with which they will be used.<sup>35</sup>

The integrative understanding recognizes that there is a legitimate sense in which we may use all those things that are in the 'environment'. Indeed, the idea of 'use' alone is not necessarily objectionable in that, even in the human context, there are uses we make of other people that are legitimate. We can utilize the services of an electrician, for example, provided we pay for them and we may depend on a shopping teller at a super-market to acquire our groceries. These forms of use are morally and legally acceptable as they do not undermine the respect we owe to other human beings and are consistent with it. They accord, for instance, with the famous second formulation of the categorical imperative provided by Immanuel Kant: 'so act that you use humanity, whether in your own person or the person of any other, always at the same time as an end, never merely as a means'.<sup>36</sup> This principle does not preclude using others for achieving one's ends but forbids reducing them merely to instruments for our own ends.<sup>37</sup>

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<sup>34</sup> Oxford Dictionary <https://en.oxforddictionaries.com/definition/sustainable>> accessed 25 October 2018.

<sup>35</sup> The reasons for the connection between respect and sustainability is developed in the next section of the article.

<sup>36</sup> Immanuel Kant *Practical Philosophy* (ed. Mary J Gregor, Cambridge University Press 1999) 80. Kant, of course, only recognized indirect moral duties towards animals. The reasoning I have utilized in the text draws on features of his ethical system to articulate an understanding of sustainable use which is Kantian in inspiration. Some of the arguments below engage with the indirect duty view in a novel manner and also demonstrate the importance of 'respect' for a viable consequentialist ethic that is not self-defeating

<sup>37</sup> For this understanding of Kant's principle in the South African context, see Stu Woolman 'Dignity' in Stu Woolman et al *Constitutional Law of South Africa* (Juta 2008) 36-39.

The integrative approach understands the notion of 'sustainable use' in relation to animals in a similar manner. Usage of animals is legitimate provided it meets certain conditions. It is to be understood along the lines of the Kantian qualification above: that, as we saw, individual animals may be used as a means, but never treated, *merely* as a means. Sustainable use enshrines, on this approach, a conception whereby any use is legitimate only if it is done in a manner compatible with respect for the entity in question that is being used. It would thus reject the idea that the killing of animals such as lions for mere pleasure or entertainment constitutes a form of 'sustainable use'. Similarly, removing baby elephants from their mothers and subjecting them to cruel forms of training to force them to allow people on their backs would not qualify as being a 'sustainable use'.<sup>38</sup>

I have identified two different approaches to interpreting the notions of conservation and sustainable use. The question that arises is which should be the preferred approach to interpreting these ideas as they appear in international environmental law treaties. Deciding upon this question, as we saw, must have regard to the purposes of the particular provisions in question. In the next part of the paper, I will provide several arguments as to why the integrative approach is preferable. The arguments, ultimately, seek to show that the aggregative approach is self-defeating on its own terms: to achieve the very purposes and goals it sets itself, it is necessary to develop an attitude of respect and concern for the lives and welfare of individual animals.

### **3. Why the integrative approach is necessary for achieving the goals of the aggregative approach**

#### ***3.1. The indirect duty view and the relationship between human and animal well-being***

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<sup>38</sup> See International Fund for Animal Welfare 'Baby Elephants Snatched from Wild Herds – who is Issuing the Permits?' <<http://www.ifaw.org/united-states/news/baby-elephants-snatched-wild-herds-who%E2%80%99s-issuing-permits>> accessed 25 October 2018.

The aggregative view, as we saw, suggests that what ultimately matters is overarching collective goals; individuals are understood in a manner that is purely instrumental to the achievement of these goals. If the goals in the aggregative approach, however, can only be achieved through adopting a view whereby individuals are respected in their own right, then it would essentially collapse into the integrative view.

An important line of argumentation, in this regard, which needs to be considered is a school of thought which supports what is termed an 'indirect duty view' of obligations towards animals. The view usually starts from an understanding that direct moral obligations are only owed to humans alone. Kant's ethical system, for instance, only considers rational agents to be the subject of direct obligations and his understanding of what constitutes a rational agent would appear to include only human beings. At the same time, Kant is of the view that human beings do have certain 'indirect' obligations towards animals: treating animals cruelly, it is argued, develops dispositions in individuals that lead them to treat humans badly.<sup>39</sup> Animals must thus be treated decently in order to avoid harming humans.<sup>40</sup>

Robert Nozick famously challenged this line of reasoning by wondering why it is inevitable that cruel treatment of animals leads to cruel treatment of human beings. He writes:

'If I enjoy hitting a baseball squarely with a bat, does this significantly increase the danger of my doing the same to someone's head? Am I not capable of understanding that people differ from baseballs, and doesn't this understanding stop the spillover? Why should things be different in the case of animals?'<sup>41</sup>

The response to this argument is of course to recognize that animals are not baseballs.<sup>42</sup> The fact that animals are not inanimate objects but sentient creatures means that harming them requires a particularly hard-hearted and deadened

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<sup>39</sup> Immanuel Kant *Lectures on Ethics* (trans L Infeld Harper and Row 1963) 239.

<sup>40</sup> Kant (ibid 240) states: 'he who is cruel to animals becomes hard also in his dealing with men...Tender feelings towards dumb animals develop humane feelings towards mankind'.

<sup>41</sup> Robert Nozick *Anarchy State Utopia* (Basic Books 1974) 36.

<sup>42</sup> I have addressed this argument previously in David Bilchitz 'Moving Beyond Arbitrariness: the Legal Personhood and Dignity of Non-human Animals' (2009) 25 *South African Journal on Human Rights*, 46-48.

character that is consistent with similar treatment to humans.<sup>43</sup> There is thus a sufficient similarity between humans and animals such that a failure to respect the interests of animals often leads to a failure to respect the interests of humans. This argument is not just fancy a priori ethical reasoning: empirical research has recently found a clear correlation between circumstances in which there is animal abuse and those in which there is domestic violence towards women and children.<sup>44</sup> There are also a number of empirical studies showing that violent activities of serial killers began with cruel behavior towards animals as well as cruelty to animals being associated with a higher risk of committing criminal offences.<sup>45</sup> Post-traumatic stress disorder and violent and aggressive behaviours have also been shown in those working in abattoirs.<sup>46</sup>

These studies show that behaving in a way that demonstrates utter disrespect towards animal life is not neatly compartmentalized; it translates and connects with a whole set of other behaviours in relation to human society as well. Recent research demonstrates, for instance, how the hunting industry maintains highly racialized and discriminatory practices and has perpetuated apartheid-era property and land relations in South Africa.<sup>47</sup> Indeed, the research also shows the exploitation of poor black workers who are often required to deal with wild animals with minimal safety measures, and extremely limited pay.<sup>48</sup> These recent findings in an industry based

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<sup>43</sup> The sentience of animals refers to the fact that they have subjective conscious experiences of the world: see, for instance, M Dawkins 'The Scientific Basis for Assessing Suffering in Animals' in Peter Singer (ed) *In Defense of Animals* (Blackwell 2000).

<sup>44</sup> Randall Lockwood 'Animal Cruelty and Violence Against Humans: Making the Connection' (1999) 5 *Animal Law* 85; Charlotte Lacroix 'Another Weapon for Combatting Family Violence: Prevention of Animal Abuse' (1998) 4 *Animal Law* 7; Amie J Dryden, 'Overcoming the Inadequacies of Animal Cruelty Statutes and the Property-based View of Animals' (2001) 38 *Idaho L Rev* 185.

<sup>45</sup> Lockwood *ibid* at 82-83. See also Anne Peters 'Liberte, Egalite, Animalite: Human-Animal Comparisons in Law' (2016) *Transnational Environmental Law* 16.

<sup>46</sup> See, for instance, Jennifer Dillard 'A Slaughterhouse Nightmare: Psychological harm suffered by slaughterhouse employees and the possibility of redress through legal reform' (2007) 15 *Georgetown Journal on Poverty Law and Society* 391 and, in the South African context Karen Victor and Antoni Barnard 'Post-traumatic stress of Employees working as Slaughterers' <<http://uir.unisa.ac.za/bitstream/handle/10500/18454/PTSD%20Slaughtering%20Poster%20A%20Barnard%202003.pdf?sequence=1>> accessed 14 November 2016.

<sup>47</sup> Nomalanga Mkhize 'Game Farm Conversions and the Land Question: Unpacking Present Contradictions and Historical Continuities in Farm Dwellers' Tenure Insecurity in Cradock' (2014) 32 *Journal of Contemporary African Society* 207-219; Femke Brandt and Marja Spierenburg, 'Game Fences in the Karoo: Reconfiguring Spatial and Social Relations' (2014) *Journal of Contemporary African Society* 1-18.

<sup>48</sup> Femke Brandt 'Trophy Hunting in South Africa: Risky Business for Whom' *Daily Maverick* (17 November 2015) <<http://www.dailymaverick.co.za/opinionista/2015-11-17-trophy-hunting-in-south->

on showing utter disrespect to non-human animals – by killing them for entertainment - bears out the key underlying assumptions of the indirect duty perspective: there is an intimate relationship between disrespectful treatment of other creatures and similar behavior towards humans. As such, on purely anthropocentric grounds, there are reasons to question whether the aggregative approach can achieve its own goals of advancing collective human well-being through an instrumentalisation of animal life that has a negative impact on human behavior towards other humans.

Moreover, the violence involved in killing for entertainment in trophy-hunting essentially accepts and normalizes violence towards animals for no particular reason. Consider, again, South Africa which, unfortunately, has some of the highest rates of domestic violence against women and children in the world; it also has an exceptionally high rate of violent crime more generally.<sup>49</sup> Whilst one must be cautious in drawing simplistic direct causal relations between trophy hunting of animals, for instance, and the high rate of violence against humans, at the same time, the promotion and sanctioning of violence against highly sentient creatures for entertainment, at a minimum, does nothing to counter the general violent ethos in the society. The aggregative approach may thus in fact contribute to undermining overall human welfare through failing to recognize the interconnections between cruel and exploitative attitudes and behaviours towards animals and similar approaches towards humans. The integrative approach, on the other hand, recognizes the value and respect owing to individual animals and is not committed to a strict separation between the human and the animal; as such, it is able to recognize better the interconnections between the attitudes and behaviour towards animals and the impact of these on humans.

### **3.2. The ‘anthropocentric’ aggregative approach, self-interest and the longer term**

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[africa-risky-business-for-whom/?utm\\_source=Daily+Maverick+Mailer#.VqCRDLZ97IV](#)> accessed 14 July 2016.

<sup>49</sup> See 2015 Crime Stats for South Africa: Everything You Need to Know *Business Tech* (29 September 2015) <<http://businesstech.co.za/news/government/99648/2015-crime-stats-for-south-africa-everything-you-need-to-know/>> accessed 14 July 2016.



The indirect duty view, however, also suggests a further problem for the aggregative approach in its disregard of individuals for the achievement of collective goals. As we saw, the indirect duty view is based upon the idea (borne out by empirical evidence) that there is a connection between our cruel and disrespectful actions to animals and those towards humans. However, if this is true, we could argue a fortiori that there must be a connection between disrespectful actions towards some individual animals of a particular species and similar actions towards other individual animals of the same species. Now, the aggregative view, of course seeks to preserve a range of species and biodiversity so long as it advances general human well-being or the good of the environment as a whole. If some individuals can be treated without regard for their welfare or interests simply for these collective goals, then that view translates into a more general approach towards individuals of that species (and other species). In other words, the aggregative view develops a series of dispositions and attitudes to see not just some individual animals but all of them as purely instrumental to the achievement of a greater collective goods. I now provide reasons why developing such attitudes towards animals is likely to lead to threats to the very goals – such as long-term species survival - sought to be achieved by the aggregative approach.

As we saw, the anthropocentric justification for the aggregative view focuses on ensuring that the self-interest human beings have in the use of other creatures is maintained over the longer term. It thus legitimates self-interest as the ground upon which we interact with other creatures (and the environment more generally). At the same time, it essentially requires individual human beings to adopt a long-term view that is happy to forego some profit and self-interest in the present for benefits that will accrue to them in the future. Thus, to ensure that humans can profit from hunting in future, it is necessary to limit the number of animals that are killed in the present so that there is a supply of animals for continued use.

There are several problems with this approach, the first of which involves the creation of a serious collective action problem: for every individual, according to this ethic, self-interest is the lens through which the animal world is viewed and there is very limited reason not to use an animal in a way that advances their self-interest; at the same time, collectively, if everyone adopts this approach, the number of animals

available for everyone to use will decrease, the eco-system will be affected and the future availability/survival of animals be affected. This problem is perhaps the key reason an aggregative view would seek to use the law to circumscribe the over-utilisation by some people of animals to advance their economic goals. Yet, the problem is that, inherent in this approach, is its elevation of self-interest as the key driving feature in our interaction with other creatures. As such, every individual has a strong incentive to try and free-ride: if one can gain benefits from animals whilst others comply with the law, one will be able to advance oneself without affecting the aggregate availability of animals for future use. If many people adopt this free-riding approach, the survival and availability of the species as a whole will be affected. In countries with a relatively poor and developing ability to enforce laws, encouraging a self-interested ethic towards animal life is likely to impinge upon a serious resolution of this collective action problem.<sup>50</sup>

Consider the following real-life situation. Environmental legislation and regulations in South Africa allow for trophy hunting but often requires permits for hunting and places quotas on the number of animals that can be hunted.<sup>51</sup> These laws give expression to an 'aggregative' approach to conservation and sustainable use: very little importance is placed on individual animals and the entire system of quotas and permits, for instance, is designed to ensure the species as a whole will not be destroyed and that there will be sufficient animals available in the future for humans to utilize. The Biodiversity Act, for instance, following the CBD expressly states that its goal is to 'provide for the protection of species that are threatened or in need of protection in the wild' and that it seeks to ensure 'the utilization of biodiversity is

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<sup>50</sup> South Africa has only relatively recently created teams of environmental management inspectors and now creates annual reports on their work which clearly highlight the developing ability to enforce such laws: see Department of Environmental Affairs National Environmental Compliance and Enforcement Report (2014-15) ('NECER Report') <[https://www.environment.gov.za/sites/default/files/reports/201415\\_necer\\_report.pdf](https://www.environment.gov.za/sites/default/files/reports/201415_necer_report.pdf)> accessed 17 November 2016.

<sup>51</sup> Chapter 4 of the National Environmental Management: Biodiversity Act 10 of 2004 addresses species that are regarded as threatened or protected and provides for a permitting system to be introduced to perform any restricted activity (which includes hunting). Regulations have been issued the national level which provide further regulation around threatened and protected species: see the Threatened or Protected Species Regulations GG 38600 (15 March 2015). Hunting is also regulated more generally by a number of provincial statutes which require permits and create time periods in which hunting can take place: see, for instance, section 31 and 32 of the Limpopo Environmental Management Act 7 of 2003.

managed in an ecologically sustainable way'.<sup>52</sup> The Act does not ban restricted activities such as hunting but seeks to regulate them in order to achieve these goals. The crisis in South Africa relating to rhino poaching illustrates the problem of instrumentalising animals and then seeking to keep their use within manageable constraints.

The story of the current crisis in fact commences with the legal hunting of rhino which, as has been described, is provided for within South African legislation. Vietnam is one of the main markets for rhino horn (which is believed to have medicinal qualities) and from 2003 to 2010, there was a clear increase in the number of rhino trophies exported from South Africa to Vietnam.<sup>53</sup> The number of applications to hunt rhino from Vietnam increased substantially in 2009-2010 with virtually all export permits going to Vietnamese nationals.<sup>54</sup> This practice has been referred to as 'pseudo-hunting' as it does not appear to have been individuals coming as tourists to the country who wished to hunt for entertainment; it seems rather that the horns were being utilized to feed a growing commercial market in Vietnam and China.<sup>55</sup> However, the demand for rhino horn outstripped the supply that was based on the limited quotas the South African government allowed in relation to legal hunting. Illegal poaching of rhinos, therefore, increased in order to meet the demand of the markets in Asia.

This trend can be traced in the reports of the South African government which show that prior to 2007, the average number of rhinos poached were nine per year.<sup>56</sup> From 2008, the numbers began to rise to 83, with an exponential increase thereafter: 448 rhinos being poached in 2011 to the point where record levels of over 1215 rhinos were killed in 2014 in South Africa.<sup>57</sup> The very future existence and survival of rhinos has now been placed in peril and strong limits recently have been placed on the

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<sup>52</sup> Section 51.

<sup>53</sup> Department of Environmental Affairs 'The Viability of Legalising Trade in Rhino Horn in South Africa' <[https://www.environment.gov.za/sites/default/files/docs/rhinohorntrade\\_southafrica\\_legalisingreport.pdf](https://www.environment.gov.za/sites/default/files/docs/rhinohorntrade_southafrica_legalisingreport.pdf)> accessed 27 November 2016

<sup>54</sup> Ibid 46-47.

<sup>55</sup> Ibid 20.

<sup>56</sup> Ibid 18. Most rhino experts do not believe that tightened regulations by the government increased poaching (ibid 43).

<sup>57</sup> See NECER report, note 50 above 56.

legal hunting of rhino.<sup>58</sup> Moreover, the role of rhinos in the wider eco-system is essentially threatened. What seemed like a 'sustainable use' on the aggregative view essentially sanctioned self-interested behaviour which could not be contained and, in fact, the killing of rhinos multiplied eventually to threaten the very future of the species. Despite strong law enforcement measures, the South African government has not been able to stem the tide of poaching.<sup>59</sup> Indeed, the recent case of *S v Lemthongtha*<sup>60</sup>, which relates to this pseudo-hunting, provides evidence that law enforcement officials should have known that the permitting system was being misused. The instrumental approach towards rhinos promoted by the aggregative approach thus impacts upon the attitudes of law enforcement officials and the manner in which they approach their duties with animals being simply dispensable resources. Very strong evidence has recently emerged of a similar pattern in relation to elephants: the once-off legal sale of ivory in 2008 saw a massive increase in the illegal killing of elephants as the stigma of ivory was lifted and elephants became simply conceptualized as a 'resource' for acquiring ivory.<sup>61</sup>

Those committed to the aggregative view would claim that there is a strong difference between legally hunting a rhino which takes place within strictly controlled quotas and poaching rhino which imperils the species. Yet, both views rest on an understanding of conservation and sustainable use that essentially renders individual rhinos pure instruments for other ends (particularly human self-interest). Since there is economic profit to be gained and these animals are simply instrumental to human purposes, it is hard to see, from an individual point of view that is focused on present self-interested gain, why such an individual should desist from poaching where trophy hunting is allowed. Particularly, in the socio-economic context of Africa, the incentives for people to poach who lack the very basic necessities of life – which, in the case of rhino horn are extremely high – become significant. Where animal life is

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<sup>58</sup> Tony Carnie 'Changes to Law Will Limit Rhino Hunts' (06 August 2013) <<http://www.iol.co.za/scitech/science/environment/changes-to-law-will-limit-rhino-hunts-1.1558174>> accessed 18 January 2016.

<sup>59</sup> 1175 rhinos were poached in 2015, a slight decrease on 2014 but very high: see Save the Rhino 'Poaching Statistics' <[https://www.savetherhino.org/rhino\\_info/poaching\\_statistics](https://www.savetherhino.org/rhino_info/poaching_statistics)> accessed 27 November 2016.

<sup>60</sup> [2014] ZASCA 131.

<sup>61</sup> See the recent study by Solomon Hsiang and Nitin Sekar 'Does Legalization Reduce Black-market activity? Evidence from a Global Ivory Experiment and Elephant Poaching Data' (NBER Working Paper no 22314, June 2016) <<http://www.nber.org/papers/w22314>> accessed 10 July 2016.

regarded as dispensable and instrumental to profit in the context of legal hunting, why should a different approach be taken by those who are economically deprived? Wide-spread economic disparities exist around hunting and it appears difficult to provide a convincing answer – where self-interest is the predominant motive with which the animal world is approached – why wealthy Americans should be entitled to kill animals at will and wealthy South African game farm owners reap these benefits and poor individuals who are trying to provide a basic living for their families are prohibited from benefiting economically from animals who in this conception are simply regarded as ‘resources’ to be exploited. An ethic that simply reduces animals to instruments is essentially contingent upon that ethic providing people with a self-interest in preserving some animals in the longer-term for future uses. Where humans do not widely share views about the importance of long-term species survival or find greater use in the destruction of these creatures (or their habitat), then it is unclear on what justification there is to limit current uses as the greatest benefit for humans can, in their view, be achieved through unconstrained use.

Apart from indulging self-interest and struggling to deal with the collective action problem, the above example highlights the related problem that the aggregative view – when justified in anthropocentric terms - also cannot address the fact that human beings have limited life-spans and tend to be more interested in their proximal futures than distant outcomes. As such, an ethic that focuses on ‘use’ will always tend to imperil the sustainability thereof given the demands of the present being more pressing than those of the future.<sup>62</sup> This point is of importance to a range of environmental issues from the tendency of people to overuse marine resources to emissions of greenhouse gases.<sup>63</sup> Moreover, some of the initial successes claimed in terms of the aggregative approach by pro-hunting lobbyists have had disastrous effects when situations change and people land up in situations of crisis where conserving animals becomes less important.

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<sup>62</sup> See Robert Heilbroner ‘What has Posterity Ever Done for Me?’ in Pojman and Pojman, note 21 above 347-8 who sees this attitude as rational, though wrong.

<sup>63</sup> See, for instance, Judith Brett ‘Why Climate Change Defeats our Short-term Thinking’ (2014) *The Monthly* <<https://www.themonthly.com.au/issue/2014/february/1391173200/judith-brett/why-climate-change-defeats-our-short-term-thinking>> accessed 27 November 2016.

Consider, for example, Zimbabwe's attempt to implement an aggregative view of sustainable use through its CAMPFIRE policy (Communal Areas Management Programme For Indigenous Resources'). In a 2001 article, Gunn wrote that the programme seemed to be successful on its own terms: it generated USD 2.5 million, 90 percent of which came from big game hunting licenses. Some of this money was ploughed back into conservation activities and community development.<sup>64</sup> At the same time, Zimbabwe was hailed as a conservation success: whilst 1 percent of elephants were killed per year in hunting operations, the total number of elephants increased substantially over time in Zimbabwe, from 32000 in 1960 to 70 000 in 1993.<sup>65</sup> However, during the late 1990s, President Robert Mugabe undertook a disastrous series of reforms around land which plunged the country into economic crisis. Conditions in Zimbabwe deteriorated with fewer hunters and tourists coming to the country. By 2003, over 80 percent of the animals in Zimbabwe safari camps had died.<sup>66</sup> With animals no longer so valuable in monetary terms, people began to kill them indiscriminately for poaching and subsistence purposes with one report speaking about the wildlife being 'decimated' by the economic crisis.<sup>67</sup> This example suggests that an ethic of pure self-interest around the use of animals is ultimately not sustainable and fails to conserve them for future generations. It renders their survival contingent upon particular conditions existing that render them more useful to human beings alive than dead, and, in circumstances in which people value their uses in the longer-term. When people land up badly off due to economic conditions, the self-interested ethic fails to offer any protection with short-term thinking and rampant destruction becoming the name of the game.

I have argued thus far that the aggregative approach to sustainable use and conservation undermines its own collective goal of achieving the long-term survival of a species and maintaining biodiversity. Even if there is no absolute certainty that some of these effects will eventuate, there are clear risks created through this

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<sup>64</sup> Gunn, note 26 above 87.

<sup>65</sup> Ibid 88.

<sup>66</sup> Nash Jenkins 'Who is Really Responsible for the Killing of Zimbabwe's Lions and Other Wildlife?' *Time* (29 July 2015) <available at <http://time.com/3976344/cecil-lion-zimbabwe-walter-palmer/>> accessed 25 October 2018.

<sup>67</sup> Nick Wadhams 'Zimbabwe Wildlife Decimated by Economic Crisis' *National Geographic News* (1 August 2007) <http://news.nationalgeographic.com/news/2007/08/070801-zimbabwe-animals.html>> accessed 25 October 2018.

approach. In terms of the general principles of environmental law adopted in the Rio declaration, a precautionary approach should therefore be adopted which tries to mitigate these risks.<sup>68</sup>

To achieve the very goals of the aggregative approach (and to mitigate its risks), it is necessary to adopt an alternative view which refuses to reduce animals to mere resources to be used at will and recognizes that individual animals are deserving of respect for their interests in their own right.<sup>69</sup> If such an ethic is promoted in society and enshrined in the manner in which the law approaches animals, it will not be permissible to kill animals for any trivial reason such as entertainment (hunting); in turn, therefore the law would send a clear message that the pure instrumentalisation of animals is unacceptable and a consistent message would be conveyed that no form of killing for pure profit is sanctioned. Whilst there are good reasons to think that the aggregative approach imperils long-term species survival or at least places this at risk, a respect-based ethic of conservation and sustainable use would not contain in itself the tension that legitimates self-interest and then attempts to place it within constraints. Instead, this ethic would recognize the inherent value and respect to be accorded to the life of individual animals: as such, just as in the case of our relations with our humans, self-interest would not be accepted as an ethic that can guide our relationships with them. Since individuals cannot just be disposed of at whim, inherently, this approach would lead to the survival of a range of species. Since their lives matter intrinsically, human beings may only use them under limited conditions, an idea that is built into this ethic itself. Moreover, an ethic that promotes respect for animals must also respect their fundamental interests and the conditions required for their flourishing. An integrative approach thus is concerned both with animals as well as their relationship with humans and the environment in which they

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<sup>68</sup> The precautionary principle deals with decision-making in circumstances without full scientific certainty and was included in Principle 15 of the Rio Declaration on Environment and Development <<http://www.unep.org/documents.multilingual/default.asp?documentid=78&articleid=1163>> accessed 01 December 2016.

<sup>69</sup> This could be supported by a more complex version of utilitarianism in relation to the environment. Instead of adopting a view that allows the benefits of humans (or the environment as a whole) to run roughshod over individual interests, it would require a rule to be adopted that individuals are deserving of respect in their own right and their interests must be protected. That rule would in the longer run achieve better the utilitarian purposes and is an expression of the general argument that is often made for rule utilitarianism over act utilitarianism: see, for instance Richard Brandt *Morality, Utilitarianism and Rights* (1992).

live. Conservation and the long-term survival of the species - which includes for permissible uses in the future - will therefore follow as a consequence of the respect individual animals are afforded.

This section of the argument focused on the anthropocentric justification for the aggregative view and the benefits humans gain through their relation with animals. One of the underlying issues that has surfaced, however, concerns the relationship between the attitudes and behaviours adopted towards particular animals and those towards the species, a matter that is considered in the next section.

### ***3.3. The 'holistic' aggregative approach and the relationship between individuals and collective concepts***

One of the key features of the aggregative view is the notion that what matters is really the big picture: ensuring species survival, and that ecosystems and biodiversity are maintained for future generations. It may of course be questioned as to why these features of the world should be valued: if the answer is framed in terms of human self-interest, then that view, once again, becomes subject to many of the objections discussed in the last sub-section and, as we saw, the very achievement of that self-interest in such collective notions may require the adoption of attitudes not founded purely on human self-interest. If the justification is not captured in anthropocentric terms, then there is a puzzle as to why these collective goods are valuable at all.<sup>70</sup>

Even if we can provide some justification for ascribing value to such entities as species, a number of further questions arise: first, what is the relationship between the valuing of a species and the value of individuals that make up the species?; secondly, if we have reasons to value collective entities such as species, can this provide a sufficient justification for overriding the interests of individuals if there is a clash? Let us turn to an exploration of these questions.<sup>71</sup>

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<sup>70</sup> This is one of the difficulties for ecocentric ethical systems that focus on collectivities rather than individuals: see, for instance, DesJardins, note 24 above 186-189 and Russow, note 21 above 270-276.

<sup>71</sup> The relationship between collective notions such as a species and individuals has been the subject of much discussion and debate within environmental ethics: see, for instance, Callicott (note 23 above)



A key question in this context concerns the nature of the collective goals or concepts and their relationship with the individuals who make them up. I shall focus in this chapter on the notion of the species. The notion of how to define a species has in fact been controversial and developed across time.<sup>72</sup> There remain several concepts of what constitutes a species but the most commonly utilized one is of a 'biological species' which is defined by the famous evolutionary biologist Mayr as 'a reproductive community of populations (reproductively isolated from others) that occupies a specific niche in nature'.<sup>73</sup> The development and diversity involved in specifying the concept of the species highlights the fact that the notion is itself a human concept to describe particular features of the environment.<sup>74</sup> There is something rather strange about placing strong normative value upon a collective notion whose very contours have only relatively recently become clearer.

The notion of a species is designed like many other forms of taxonomy to classify certain features of the world around us. It is a concept which picks out particular characteristics of individuals and groups them in a particular way: biologically, the feature that is most accepted is of different types of creatures (and plants) that can inter-breed. It is very hard to see from this definition that there is any moral importance to this idea. The key issue from a normative point of view, however, appears to be that those that can inter-breed have particular characteristics that distinguish them from others who can inter-breed. Species survival is thus about ensuring the preservation of individuals with a particular set of characteristics.<sup>75</sup>

When we talk, for instance, of an endangered species, we mean that there are very few individuals with those characteristics that are left. The survival of a species may not be dependent on the survival of any particular individual animal: yet, it is individuals who must survive for the species to continue. This point highlights that a species cannot exist separately to individuals who make it up. It would also be hard

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and Jamieson (note 21 above). I engage further below with situations where collective and individual considerations may clash.

<sup>72</sup> This interesting area is explored in chapter 6 of Ernst Mayr *The Growth of Biological Thought: Diversity, Evolution and Inheritance* (Belknap Press 1982).

<sup>73</sup> *Ibid* 273.

<sup>74</sup> Similar points can also apply to other collective concepts such as ecosystems over which there has been much debate in the field of ecology: for an overview, see , note 24 above at 162-168.

<sup>75</sup> See Russow, note 21 above 275.

to see how one can be interested in preserving the characteristics of individuals without the individuals per se.

As a result of these points, it is clear that the goal of ensuring the survival of a species must necessarily include the goal that some individuals with those particular characteristics survive. It is hard to see how one can de-emphasize the survival of individuals where they are integral to the survival of the species. It also remains difficult to see how one can promote respect for the broad concept of a species surviving without respecting the individuals that make it up. As such, those concerned with the survival of species must care about the fate of, at least some individuals that make up the species. The aggregative view, as we saw, however, places little or no value on individuals and adopts a purely instrumental approach towards individuals. Such an approach is self-defeating for two reasons: first, given the relationship between the species and the individuals that make it up, it remains hard to see conceptually how the aggregative approach can attribute anything other than instrumental value to the species itself. Secondly, the aggregative view seems likely to undermine the protection of a range of species on a practical level: as we have already seen, an attitude of pure instrumentalisation is a general one which is not confined to certain individuals within any species: it applies across the board. The attitudes to and behaviours displaying disregard of individuals promoted by the aggregative view are, therefore, likely to translate into a problem in relation to species survival and examples, for instance, where this has arisen around elephants and rhinos have already been provided.

The integrative view, on the other hand, recognizes that there is a close relationship between a focus on individuals and a focus on collective notions such as species and the one cannot be divorced from the other. By promoting respect for individuals and a recognition of our moral and legal obligations towards them, the view automatically forces human beings to have a stake in the survival of individuals with particular characteristics, the species. Moreover, respect involves attention to the interests of animals, the habitat in which they live and the environment more generally. As such, the integrative view in fact adopts a more expansive holistic view than the aggregative approach: it requires understanding the relationships between

animals, humans and the rest of the environment and thus requires not only a focus on the individual but the broader features of the environment as a whole.

It may be objected, however, that matters are not so simple and that there are often conflicts that may arise between a focus on individuals and collective goals: it seems intuitively plausible that it may be necessary to capture (and perhaps even on some occasions humanely kill) an individual animal which suffers from a serious disease and poses a threat to an entire population or species. The aggregative view essentially seeks to resolve these problems by allowing the collective simply to override any concerns with the individual and, in doing so, it does not accord any particular value to the interests of individuals in and of themselves and, as we saw, renders them purely instrumental to wider goals. It is for this reason that one of the strong charges against eco-centric views that focus only on the collective has been one of 'environmental fascism': reminiscent of fascism in the human context, it simply allows collective notions – which, as we have seen, have questionable moral relevance – to override claims by individuals.<sup>76</sup>

An integrative approach, on the other hand, has the resources, more successfully, to recognize and address conflicts that may arise between individuals themselves and between individuals and the collective. It is founded on a commitment to respect for individuals and thus requires a consideration of animal interests in their own right. This will mean that their interests are not subordinate immediately to collective goals or the justifications underlying them (whether that be collective human utility or the interests of the environment as a whole). It does not, however, require the interests of individuals to be conceived of as absolute. Instead, what will be required is a method of reasoning that recognizes a clash of interests and values and attempts to resolve them in the best way possible.

This is not a situation that is unknown to law: indeed, clashes between the interests of humans are central to much of law. Particular modes of reasoning have been adopted – in particular, the proportionality enquiry – which seek to assist in the

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<sup>76</sup> See, for instance, Tom Regan *The Case for Animal Rights* (University of California Press 1983) 362 and, more generally, for a discussion of this charge DesJardins, note 24 above 189-194.

adjudication of competing interests without losing a sense of the value of each individual.<sup>77</sup> A proportionality enquiry could thus also be used as means to balance competing interests where these arise between humans, animals and other features of the environment.<sup>78</sup> Thus, a diseased animal that is posing a threat to an entire population is of course a valuable being on the integrative view and could not simply be sacrificed for the collective. It would be necessary to evaluate the threat posed to other individuals and determine whether there is any less drastic intervention available (such as separation and quarantine) than the lethal one. Only if that were not possible would it be permissible to kill such an animal in the most humane way possible: such a result would be seen as a tragic choice on the integrative view rather than something to be celebrated.<sup>79</sup>

## 5. Conclusion: reconciling environmentalism and animal interests

In this chapter, I have sought to consider two possible approaches to interpreting the notions of 'conservation' and 'sustainable use' which play a central role in certain key international environmental law treaties. I have argued for an integrative approach which involves inculcating an attitude of respect towards every individual animal which makes up the environment or eco-system. Individuals have intrinsic value which limits the uses that can be made of them. The reduction of creatures to mere

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<sup>77</sup> For two classic treatments and deeper justifications for the notion of proportionality and its uses in law, see Robert Alexy *a Theory of Constitutional Rights* (trans J Rivers, Oxford University Press 2002) and Aharon Barak *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press 2011). For a positive application of the principle of proportionality which protected animal interests even in the face of the profitable human industry of foie gras production, see *Noah (Israel Association for the Protection of Animals) v Attorney General* HCJ 9231/01 [2002-3].

<sup>78</sup> In so doing, the proportionality enquiry will ultimately require some kind of focus on achieving the best holistic solution for, at least, humans and other animals. The overarching perspective adopted is distinct from the aggregative approach in its holistic version, in that value is placed on individuals and the overarching enquiry seeks to achieve what is best from a perspective that values the equal importance of inherently valuable creatures. For such a complex consequentialism which tries to take into account distributions of goods and the protection of individual rights in the evaluation of outcomes, see Thomas Scanlon 'Rights, Goals and Fairness' in Jeremy Waldron (ed) *Theories of Rights* (Oxford University Press 1984) 142 and Amartya Sen 'Rights and Agency' in Samuela Scheffler (ed) *Consequentialism and its Critics* (Oxford University Press, 1988).

<sup>79</sup> For the role and importance of recognising tragedy in moral and legal reasoning, see Martha Nussbaum 'The Costs of Tragedy: The Moral Limits of Cost-Benefit Analysis (2000) 29 *The Journal of Legal Studies* 1005.

playthings for humans must itself be understood to threaten the survival of those beings and the conservation of biodiversity as a whole. Only such an ethic – it has been argued - really provides good reasons for conservation or sustaining the environment at all. The integrative approach, as its name suggests, also offers an opportunity to integrate concerns that are intimately connected – those relating to individuals and the holistic environment in which they exist – rather than attempting an awkward and unnatural separation. In doing so, it also does not deny conflicting interests may arise but rather recognizes these clashes occur within a framework that can take account of and seek to balance both protecting animal interests and achieving environmental goals around conservation and sustainability. I have thus sought to provide reasons for why the integrative approach to interpreting the notions of conservation and sustainable use should be preferred to the aggregative view: indeed, these arguments in large measure, seek to show that the aggregative view requires and presupposes the adoption of the integrative approach to achieve its own goals.

The argument in this paper may also merit further research into its implications for other features of the environment. Animals, as I utilize the term, are a special case as they are beings in the environment who have a conscious experience of the world. Their sentient nature has widely been recognized to place strong ethical obligations upon human beings in their relations with them and, as rendering them, primary bearers of value.<sup>80</sup> A respect-based ethic clearly makes sense in relation to sentient creatures. Yet, it may be argued, that similar reasoning to that employed in this paper may be necessary in relation to other components of the environment too. In other words, whilst the floral kingdom, mountains, oceans and rivers lack a consciousness of their own, it could be argued that they will be preserved adequately for future generations only by inculcating an attitude of respect towards them that is not premised on their being purely instrumental to our own self-interested goals. That is a more complicated argument to make out and I leave it for further research.<sup>81</sup>

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<sup>80</sup> For reference to this idea, see Jamieson (note 21 above) 204 and David Bilchitz *Poverty and Fundamental Rights* (Oxford University Press 2007) 10

<sup>81</sup> The complexity of such a position can be seen by the attempt by Jamieson, note 21 above at 203-211) to argue that other features of the environment have an 'intrinsic' value even though it is derivative; and the response by Roger Crisp 'Animal Liberation is not an Environmental Ethic: a response to Dale Jamieson' (1998) 7 *Environmental Values*, 478 where he accuses Jamieson of 'valuing as ends mere

The point of this chapter, however, is to establish that even in the absence of such direct interventions, achieving the purposes behind the environmental right requires the adoption of legally-enshrined attitudes that exhibit respect for the lives and welfare of individual animals. Concepts such as conservation, biodiversity and sustainability recognize the deep interconnection between ourselves and the features of the world around us within a holistic system: one prong in achieving those noble goals is developing a deep respect for the individual animals that form an integral component of the rich tapestry of the environment within which we live.

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means'. This paper perhaps suggest a way out of this conundrum of requiring an attitude of respect to features of the environment which may, nevertheless, only have derivative or instrumental value. Why we should do so is suggested by some of the lines of argument in this paper but a fuller exploration lies beyond the scope of this paper.