

SYMPOSIUM ON GLOBAL ANIMAL LAW, PART II: THE CASE FOR GLOBAL LEGAL
ANIMAL STUDIES

CAN EXTRATERRITORIAL JURISDICTION HELP OVERCOME REGULATORY GAPS OF
ANIMAL LAW? INSIGHTS FROM TROPHY HUNTING

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Cross-border trade, industry outsourcing, and increased animal migration are becoming pressing issues for numerous states and fundamentally challenge our conceptions of animal law as territorial. Instead of proposing that nations try to solve these problems by coming to agreement on low and mostly ineffective standards, this essay opens an unexplored and promising avenue for animal law: extraterritorial protection. Using the example of trophy hunting, the essay reveals the many established jurisdictional options that can help animal law to overcome regulatory gaps, and showcases how animal issues can thereby gain visibility on the international plane.

Regulatory Challenges of Trophy Hunting

In 2015, the world was outraged to hear about the death of [Cecil](#), a black-maned lion killed by an American game hunter in Zimbabwe. Cecil was a resident of the Hwange National Park, where he was a star attraction for many visitors and part of a long-term national study on lion movement. Cecil was lured out of the park by carcasses tied to a car, and then shot with a bow and arrow by Walter Palmer, a citizen of the United States who had paid US\$ 50,000 to kill Cecil. Severely wounded, Cecil managed to run from the hunters for over forty hours before they fired the fatal shot. After these events became known, Palmer was subjected to what some journalists described as “a global storm of internet indignation,” and “an online witch-hunt.”¹

Trophy hunters kill animals for their heads, horns, paws, or skin, in so-called sport or recreational hunting.² This type of hunting is practiced in many states, but has been the target of public outrage especially in the United States. According to the [Humane Society International](#), the United States has imported 1.26 million wildlife trophies between 2005 and 2014.³ Most trophies originated in Canada and South Africa; a smaller number came from Argentina, Botswana, Mexico, Namibia, New Zealand, Tanzania, and Zambia. Trophy hunters are known to pay large sums to kill exotic animals and take possession of their dead bodies. For an African lion, trophy hunters pay between US\$ 13,500–49,000 and for an African elephant, between US\$ 11,000–70,000. Among the animals

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¹ Christina Capocchi & Katie Rogers, [Killer of Cecil the Lion Finds out That He Is a Target Now of Internet Vigilantism](#), N.Y. Times (July 29, 2015).

² The term trophy hunting does not reveal whether it is legal at the place where the animal is killed; poaching, in contrast, clearly denotes illegal wildlife killing.

³ Humane Soc'y Int'l, [Trophy Hunting by the Numbers: The United States' Role in Global Trophy Hunting](#) (2016).

hunted and imported into the United States, 32,500 were members of the African “Big Five”: 5,600 African lions, 4,600 African elephants, 4,500 African leopards, 330 Southern white rhinos, and 17,200 African buffaloes.

Although the United States prohibits the importation of some trophies under the Endangered Species Act (ESA), trophy hunting remains legal in over twenty African countries and the illegal trade of trophies to the United States continues unabated. Arguably, importing states could work much more effectively towards halting the increasing endangerment and threatening of wild species if they regulated the activity at an earlier stage, including acts of planning, hunting, shooting, and preparing an animal for exportation. Prima facie, however, prescriptive jurisdiction over trophy hunting seems to lie with Zimbabwe, if we take Cecil’s case. Some might therefore conclude that an international treaty would be the most effective solution to prohibit hunting animals that belong to endangered or threatened species. But states profoundly disagree on the optimal regulatory measures needed to thwart trophy hunting. Moreover, states in Zimbabwe’s position are unlikely to approve prohibiting practices that generate considerable income revenue for them.

An Unexplored Alternative: Extraterritorial Jurisdiction

The more reasonable and effective response to such global problems in animal law is extraterritorial jurisdiction. Whereas the potential legality of extraterritorial application of national standards is recognized in criminal, human rights, environmental, labor, antitrust, securities, and banking law, scholars have neither addressed nor resolved whether cross-border concerns for animals deserve legal protection under international law through extraterritorial jurisdiction.

The [doctrine of jurisdiction](#) distinguishes territorial, indirect extraterritorial and direct extraterritorial jurisdiction.⁴ Territorial jurisdiction regulates domestic affairs, for example, by prohibiting trophy hunting on domestic territory. Indirect extraterritorial laws also regulate domestic affairs, but have an ancillary effect on foreign territory. Among those norms are import restrictions of trophies intended to protect a society from participating in despised practices through consumption; these norms may (or may not) *en passant* protect animals abroad. Finally, a state exercises direct extraterritorial jurisdiction when it regulates a state of fact abroad. It can do so by invoking such principles of international law as the active personality, the passive personality, the subjective territoriality, or the effects principle of jurisdiction. Here, I outline these means of direct extraterritorial jurisdiction for animal law beginning with *lex lata* possibilities.

Lex Lata Options for Regulating Trophy Hunting *Active Personality Principle*

Under international law, the active personality principle of jurisdiction gives states the right to prescribe actions of their nationals (and residents) abroad, specifically the hunting of certain or all animals, where that hunting is also prescribed by the state domestically. The principle is the most accepted and universally used basis for extraterritorial jurisdiction. The contemporary trend of an unlimited active personality jurisdiction justifies extraterritorial jurisdiction to avoid impunity for crimes that are either not qualified as criminal by foreign states, or that are not enforced by them. Because [double criminality](#) for trophy hunting is not required under international law,⁵ this principle could be a highly effective means to close regulatory gaps of cross-border issues in animal law.

⁴ WERNER MENG, [EXTRATERRITORIALE JURISDIKTION IM ÖFFENTLICHEN WIRTSCHAFTSRECHT](#) 10–13 (1994); Walter Rudolf, [Territoriale Grenzen der staatlichen Rechtsetzung](#), 11 [BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT](#) 7, 9–10 (1973).

⁵ Ilias Bantekas, [Criminal Jurisdiction of States Under International Law](#), in [MAX PLANCK ENCYCLOPEDIA FOR PUBLIC INTERNATIONAL LAW](#) 13 (Rüdiger Wolfrum ed., 2011).

Objective Territoriality Principle

If acts or omissions occur only partially in the territory of one sovereign, the principle of objective territoriality gives the state in which the act was completed the right to exercise its jurisdiction over the entire act or omission. Since a constituent component of trophy hunting is display of the trophy at home, it is reasonable to argue that the act of trophy hunting is completed by the act of importation to the United States. States increasingly rely on the subjective and objective territoriality principles to combat business crime, corruption, and cross-border financial crimes, so nothing should inhibit states from doing the same in cases of cross-border animal law crimes.

Ordre Public Exception in Private International Law

By paying large sums to hunt animals abroad, foreign nationals are concluding a private contract with park rangers domiciled in the target country. If either of the parties does not fulfill her contractual obligations, the other party can sue. According to the general contracts rule, the courts of the state where an obligation should have been performed have jurisdiction. The contract over trophies may be twofold, encompassing both the act of killing the animal and importation of the trophy to the hunter's home country. According to the [Brussels regime](#), which is representative of the rule in most private international law systems, a sales contract's place of performance is the place where the goods should have been delivered,⁶ that is, the United States in Cecil's case. Even if a U.S. court took jurisdiction, however, it is likely that the court would apply foreign law, because Article 4(1) of the Rome I Regulation gives parties the choice of law or applies the law of the seller's domicile, in our case Zimbabwe. Under U.S. law, a court has a larger margin of appreciation to enter the claim and apply its own law, based on its distinct "most significant relationship" doctrine, which precludes party choice. If foreign law is applied nonetheless, it likely leads to the result that trophy hunting is considered legal. However, if the result of applying foreign law would grossly contravene a home state's public policy, it can deny application of foreign law based on the *ordre public* exception. Indicators for the assumption that the United States should be able to invoke this exception in Cecil's case are that [74 percent](#) of the population opposes canned hunting, i.e., hunting an animal raised on game ranches in a confined area.⁷ Another precondition for the public order exception is that hunting endangered animals be prohibited under domestic law, which the United States fulfills by Section 9(a)(B) of the Endangered Species Act.

Lex Ferenda Options

As just explained, several *lex lata* options are available to states that wish to combat trophy hunting, but these options do not cover all jurisdictional interests of states. In the following, I take a critical positivist approach to exploring *lex ferenda* options to protect animals more effectively across the border. I present novel applications of the effects principle and the universality principle, with this end in mind.

Effects Principle

Based on the effects principle, a state can exercise jurisdiction over activities outside its territory if these activities create or will create substantial effects on domestic territory. The effects principle, mostly used in antitrust law,

⁶ [Regulation \(EU\) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters](#), art. 7(1)(b), 2012 O.J. (L 351) 1.

⁷ [New Poll Reveals Majority of Americans Oppose Trophy Hunting Following Death of Cecil the Lion](#), HUMANE SOCIETY OF THE UNITED STATES (Oct. 7, 2015).

covers economic effects, but the principle is increasingly applied to other types of effects, like environmental effects (environmental pollution, loss of biodiversity, etc.)⁸ or reputational effects (relied on generally in cases of [human rights violations](#),⁹ and more specifically in the context of [corruption and sex tourism](#)).¹⁰

This variant of the effects principle could in the future profitably be used to regulate trophy hunting across borders. A home country can prohibit its hunters from hunting wildlife abroad, if it suffers reputational damages due to these practices. The reputational effect sustained by the home country must be substantial (shared by a majority of citizens), direct, and reasonably foreseeable to the violator. Home states sometimes justify applying domestic animal law to trophy hunting abroad on the ground that foreign states induce extraterritorial effects when they create safe havens for trophy hunting, and thereby facilitate reputational damage to the home states. The argument is that the behavior of hunters must thus be regulated abroad to inhibit this extraterritorial effect. The [New Zealand Animal Welfare Act](#) similarly reads “[t]he purpose of this Part is to *protect the welfare of animals being exported* from New Zealand and to *protect New Zealand’s reputation* as a responsible exporter of animals.”¹¹

Universality Principle

Under international law, the universality principle endows states with prescriptive jurisdiction over egregious crimes, regardless of where or by whom they were committed. Its legitimacy emanates from the fact that certain universal crimes are so serious and threatening that all sovereigns [share an interest](#) in preventing or stopping them.¹²

The universality principle could be made fruitful to combat the most egregious crimes against animals—the ones already strongly condemned by the international community. An absolute majority of states expressly recognizes that animals are sentient beings to which we owe moral and potentially legal duties. Anticruelty laws of many states are based on the idea that it is abhorrent to cause physical and psychological harm to animals or deprive them of basic needs. An overwhelming majority of states also has enshrined the obligation to treat animals humanely and to spare them unnecessary suffering. These laws serve as proof of a universal conscience that animals be properly treated: the [general principle of animal welfare](#) in international law.¹³ Experts predict this principle will develop into a norm of customary international law, concomitant with rising global concerns for animals and the ongoing juridification of animal law.¹⁴ If this proves true, states could criminalize animal cruelty and unnecessary suffering that undermine fundamental values of humanity and are condemned by the world community, wherever and by whomever they are committed.

⁸ Directorate-General for External Policies, Policy Department, *The Extraterritorial Effects of Legislation and Policies in the EU and US*, requested by the European Parliament’s Committee on Foreign Affairs 5 (European Union 2012).

⁹ See e.g., [Kiobel v. Royal Dutch Petroleum](#), 133 S.Ct. 1659, 1671 (2013) (Breyer, J., concurring).

¹⁰ Jennifer A. Zerk, [Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas](#) 207–08 (Corp. Soc. Responsibility Initiative Working Paper 59, 2010).

¹¹ (Emphasis added) [Animal Welfare Act 1999](#), s 38 (N.Z.).

¹² *Arrest Warrant* (Dem. Rep. Congo v. Belg.), 2002 ICJ Rep. 81 (Feb. 14) ([Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal](#)).

¹³ Charlotte E. Blattner, *An Assessment of Recent Trade Law Developments from an Animal Law Perspective: Trade Law as the Sheep in the Wolf’s Clothing?*, 22 ANIMAL L. REV. 277, 302 (2016); MICHAEL BOWMAN ET AL., [LYSTER’S INTERNATIONAL WILDLIFE LAW](#) 678–79 (2d ed. 2010); Katie Sykes, *Sealing Animal Welfare into the GATT Exceptions: The International Dimension of Animal Welfare in WTO Disputes*, 13 WORLD TRADE REV. 471 (2014); Neil Trent et al., *International Animal Law, with a Concentration on Latin America, Asia, and Africa*, in 3 THE STATE OF THE ANIMALS 65, 77 (Deborah J. Salem & Andrew N. Rowan eds., 2005).

¹⁴ BOWMAN ET AL., [supra note 13](#), at 680; Sykes, [supra note 13](#), at 479–80.

The universality principle also covers crimes that are not necessarily the most heinous, but are detached from states' jurisdictions (like piracy). States could prosecute crimes against animals, if those crimes manifestly escape jurisdictional authority of most states. Especially if animal exploitation coincides with organized crime, as is often the case with trophy hunting and illegal wildlife trade, states should expand their universal jurisdiction to ensure that those crimes will not go unpunished.

Trophy Hunting is Only the Tip of the Iceberg

Trophy hunting is only one of the many instances that make apparent the current insufficiency of international animal law. Targeted exploitation of lower animal welfare standards abroad also occurs where nationals cross borders to commit zoophilic acts, for example. Consider Denmark, a country that legally ran animal brothels for years. According to journalists, Denmark was internationally known as “a [hotspot for animal sex tourists](#),”¹⁵ where “[foreigners visit the country specifically to go to ... brothels that sexually exploit animals](#).”¹⁶ A 2006 report issued by the Danish Ethical Council revealed that 17 percent of the Danish veterinarians suspected an animal they treated had been subjected to sex with a human.¹⁷ In response, Denmark in 2015 prohibited sexual intercourse and other sexual relations with animals. However, animal sex tourism has shifted to Finland, Hungary, and Romania, where sexual abuse of animals is still legal.

Likewise, multinational corporations, which own most of the world's domesticated animals, are highly mobile and do not shy away from moving production to states with lower animal welfare standards if home states introduce or announce stricter animal protection standards. In fact, in the coming years, a wave of [agricultural outsourcing](#) is anticipated, due to significant farmland acquisitions of developed countries in developing countries.¹⁸ Additionally, animal production chains are dispersed over the territories of many states, enabling multinationals to profit from low standards. Shrimps, for example, are fished in the North Sea, driven to North Africa, peeled in Morocco, and then shipped back to Central Europe. Biomedical and pharmaceutical institutions and their supplying facilities are also [vulnerable to relocation](#).¹⁹ Today, actions that affect animal production and protection are so globally entangled that jurisdictional connections cannot be traced to a single state.

States that adopt stricter animal protection laws are often penalized in a “race to the bottom.” For example, in the United States, banning horse slaughter state- and nation-wide was a long-fought issue. In 2006, the United States forbade the government to fund federal inspectors of horsemeat. Without federal meat inspections, institutions that slaughtered horses could not run their businesses legally. Within a year of the ban, horse exports from the United States to Mexico increased by [312 percent](#) as a consequence.²⁰ In other words, the entire horse slaughter industry of the United States was effectively outsourced to Mexico, and this reignited social concerns about

¹⁵ [Denmark Passes Law to Ban Bestiality](#), BBC NEWSBEAT (Apr. 22, 2015).

¹⁶ [At Last! Denmark Bans Bestiality](#), PETAUK (Apr. 2015).

¹⁷ Det Dyreetiske Råd Udtalelse om menneskers seksuelle omgang med dyr [Danish Ethical Council, Opinion on Sexual Intercourse with Animals] 21 (Nov. 2006).

¹⁸ This is expected to be the third wave of industry outsourcing following the first wave of manufacture outsourcing of the 1980s and the second wave of information outsourcing of the 1990s: [Outsourcing's Third Wave](#), THE ECONOMIST (May 21, 2009).

¹⁹ For example, Rice, CEO of a U.S. pharmaceutical corporation, stated in 2006: “[a]nimal testing ... does not have the political issues it has in the US or Europe or even India, where there are religious issues as well. So now big pharma is looking to move to China in a big way.” (Jehangir S. Pocha, [Outsourcing Animal Testing: US Firm Setting Up Drug-Trial Facilities in China: Where Scientists Are Plentiful but Activists Aren't](#), BOSTON GLOBE (Nov. 25, 2006)).

²⁰ R. Scott Nolen, [U.S. Horse Slaughter Exports to Mexico Increase 312%](#), AVMA News (Jan. 15, 2008).

animal welfare. The only way states can fundamentally alter this disconcerting development is to make use of extra-territorial jurisdiction.

Concluding Remarks

By and large, animals lack a voice in the formation of law and have no opportunity to escape oppressive jurisdictional authority. Most states use their territorial primacy to attract foreign investment by bereaving animals—who are at the mercy of this single regulator—of protection and welfare. This practice is increasingly criticized by citizens witnessing the “[globalization of animal cruelty](#).”²¹ Because the emergence of an international treaty in animal law is currently unlikely, extraterritorial animal law, if applied based on jurisdictional principles, bears the potential of revolutionizing international animal law, just like extraterritorial human rights law has revived and fundamentally altered the human rights discourse.

²¹ Steven White & Deborah Cao, *Introduction: Animal Protection in an Interconnected World*, in *ANIMAL LAW AND WELFARE: INTERNATIONAL PERSPECTIVES* 1, 2 (Deborah Cao & Steven White eds., 2016).