

Animals in war: At the vanishing point of international humanitarian law

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Abstract

Animals are the unknown victims of armed conflict. They are regularly looted, slaughtered, bombed or starved on a massive scale during such hostilities. Their preservation should become a matter of great concern. However, international humanitarian law (IHL) largely ignores this issue. It only indirectly, and often ambiguously, provides animals with the minimum protection afforded to civilian objects, the environment, and specially protected objects such as medical equipment, objects indispensable for the survival of civilian population or cultural property. This regime neither captures the essence of animals as sentient beings experiencing pain, suffering and distress, nor takes into account their particular needs during wartime. To address these challenges, two strategies are possible: the first strategy would be to apply existing IHL more effectively to animals, if necessary by creative interpretation in line with the animals' needs. This strategy comprises two options: animals could be included into the categories of combatant/prisoners of war or of civilians. Animals would thus benefit from many guarantees

given to human beings in armed conflict. Alternatively, and perhaps more realistically, animals could be equated with “objects” under IHL, while the relevant rules would be reinterpreted to cater for the fact that animals are living beings, experiencing pain, suffering and distress. The second strategy, which could be envisaged as a long-term objective, would be to adopt a new international instrument specifically aimed at granting rights to animals, notably in relation to prohibiting the use of animals as weapons of war.

Keywords: animals, endangered species, medical equipment, eco-centric protected zones, animal soldiers, prisoners of war, animal rights.

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Introduction

Over the last fifty years warfare has had devastating consequences on many species of animals. Located in fragile ecosystems and precarious habitats – such as certain areas of the Central African Republic, Colombia, the Democratic Republic of the Congo, Iraq or Mozambique – a number of these species, including buffalos, hippopotamuses and elephants have been the direct victims of armed conflicts and, as a consequence, are vanishing at a particularly rapid rate.¹ During this period, many vulnerable animals have been poached by armed groups or State armed forces, which take advantage of the chaos raised by war to engage in the trafficking of expensive animal products.² Livestock and companion animals, highly dependent on human care, have regularly been slaughtered, looted, bombed or starved on a massive scale.³ Millions of animals have served in the military around the world in various capacities.⁴ For instance, horses, donkeys, mules, elephants and camels have been employed to carry heavy loads – such as food, water, ammunition or medical supplies – to soldiers located in war zones. Elephants, dogs and rats have been trained to detect anything from explosives and booby traps to humans buried in rubble.⁵ Dolphins and sea lions have been

- 1 Thor Hanson, Thomas M. Brooks, Gustavo A. B. Da Fonseca, Michael Hoffmann, John F. Lamoreux, Gary Machlis, Cristina G. Mittermeier, Russell A. Mittermeier and John D. Pilgrim, “Warfare in Biodiversity Hotspots”, *Conservation Biology*, Vol. 23, No. 3, 2009, p. 578.
- 2 James McDonald, “How War Affects Wildlife”, *JSTOR Daily*, 23 January 2018, available at: <https://daily.jstor.org/how-war-affects-wildlife/> (all internet references were accessed in February 2022).
- 3 Anne Peters, “Animals in International Law”, in Hague Academy of International Law, *Collected Courses of The Hague Academy of International Law: Recueil des Cours*, Vol. 410, Brill, Leiden, 2020, p. 339.
- 4 See, generally, Jilly Cooper, *Animals in War*, Corgi Books, London, 2000; Rainer Pöppinghege (ed.), *Tiere im Krieg: Von der Antike bis zur Gegenwart*, Brill, Leiden, 2009; Eric Baratay, *Bêtes de tranchées: Des vécus oubliés*, CNRS éditions, Paris, 2013; Ryan Hediger (ed.), *Animals and War: Studies of Europe and North America*, Brill, Leiden, 2013.
- 5 Michael Ray, “Fightin’ Fauna: 6 Animals of War”, *Encyclopedia Britannica*, no date, available at: <https://www.britannica.com/list/fightin-fauna-6-animals-of-war>. On the use of military dogs in the United States, see Sarah D. Cruse, “Military Working Dogs: Classification and Treatment in the U.S. Armed Forces”, *Animal Law*, Vol. 21, 2014–2015, available at: [https://www.animallaw.info/sites/default/files/Military%](https://www.animallaw.info/sites/default/files/Military%20Working%20Dogs.pdf)

used to find or lay underwater mines, to locate enemy combatants, or to seek and destroy submarines using kamikaze methods.⁶ In so doing, all these animals have regularly been exposed to the dangers of war.

Despite their vulnerability in these situations, animals have been largely ignored by international humanitarian law (IHL), which remains overwhelmingly anthropocentric.⁷ Indeed, coded into the categories of property, at best as specially protected objects, or as part of the environment, they are only the incidental beneficiaries of minimal IHL rules that apply to these categories.⁸ Therefore, under this body of law, animals neither enjoy an explicit legal status that would—in recognition of their sentience—directly and explicitly protect them *qua* status, nor are they granted any rights. In this regard, IHL appears to be increasingly at odds with the evolution of the status that animals have progressively—albeit incompletely—acquired during the last decades in many jurisdictions around the world as being living beings suffering and feeling pain in comparable ways to humans. IHL also fails to recognize that armed conflicts have disastrous effects on animals and particularly on certain species whose survival is threatened by the conduct of hostilities. We will come back to these points below.⁹

A preliminary question needs, however, to be addressed: Why should lawmakers and law-apppliers be concerned about the silence of IHL on animals? Why should IHL deal with this issue? Skeptics might point to the fact that animals are killed on a massive scale in peacetime, for human use and consumption under full protection of the law. Would it not be absurd to protect animals in war while upholding the lawfulness of constantly and severely harming animals, for example in factory farming? Our response is that this superficial normative inconsistency should be resolved in the direction of upgrading, not keeping down the animals' protection. The severe shortcomings of the legal regimes governing food and agriculture should not be allowed to stymie a legal evolution in other fields. Moreover, the killing of animals for human food (and in much smaller quantities for research) is considered to pursue, as a matter of principle, legitimate objectives. “Unnecessary” suffering in the context of farming, animal experiments, and other uses of animals is increasingly prohibited.¹⁰ Although the

[20Working%20Dogs.pdf](#). See, generally, Imperial War Museums, “12 Ways Animals Have Helped the War Effort”, no date, available at: <https://www.iwm.org.uk/history/12-ways-animals-have-helped-the-war-effort>.

6 Ceiridwen Terrill, “Romancing the Bomb: Marine Animals in Naval Strategic Defense”, *Organization & Environment*, Vol. 14, No. 1, 2001. See also John M. Kistler, *Animals in the Military: From Hannibal's Elephants to the Dolphins of the US Navy*, ABC-CLIO, Santa Barbara, 2011, pp. 311–26.

7 Jérôme de Hemptinne, “The Protection of Animals during Warfare”, *American Journal of International Law Unbound*, Vol. 111, 18 September 2017, p. 272, available at: <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/protection-of-animals-during-warfare/DA9EA3AF4F252F1DC0ECAF8016B6406>.

8 A. Peters, above note 3, pp. 344–9 on the protection of domestic animals as livestock and of wild animals against pillage and plunder.

9 See the section “Changing attitudes” below.

10 Global Animal Law, Database, available at: <https://www.globalanimallaw.org/database/national/index.html>, status as of 1 January 2022. Importantly, there has been a steep increase of legislation since 2020. On 1 January 2020, the database listed only 101 States. In the past two years, twenty-three States adopted animal protection legislation.

standards prescribed in animal welfare laws around the world are extremely low, they nevertheless acknowledge the animals' interests and explicitly seek to minimize animal suffering. IHL has not yet reached this first stage. Another argument in favour of bringing animals' interests to bear (at all) in IHL is the structural similarity between animals' welfare law and IHL: both bodies of law do not outlaw violence. Rather, they are characterized by an inbuilt tension between the allowance of "necessary" violence and its moderate containment on the grounds of "humane" considerations. Both bodies of law possibly inadvertently also legitimize violence.¹¹ This resemblance should facilitate extending the scope of IHL also to (non-human) animals.

In order to reach this objective, two strategies could be pursued: the first strategy would be to apply existing IHL more effectively to animals, if necessary, by creative interpretation more in line with animals' interests and needs. The second option would be to adopt a new international instrument specifically aimed at granting rights to animals.¹² Pursuing the first strategy, we see two ways of applying existing IHL norms more effectively. Animals could be placed in categories so far reserved under IHL for humans, such as combatant and prisoner of war or civilian. We will, however, observe that this raises more problems than it resolves. Alternatively, animals could remain in the category of objects, but benefit from IHL rules (e.g. on the environment, on cultural objects and on protected zones) that could be interpreted in a dynamic manner to take account of the fact that animals are sentient beings, experiencing pain, suffering and distress. This approach would not only significantly reinforce the animals' welfare, but also reflect the evolution of the status and protection that animals have acquired in various jurisdictions around the world. The second strategy would be to grant animals fundamental rights. However, this legal approach would be far more complicated and ambitious. For reasons of legal certainty (and facing the paucity of judicial fora available for controlling compliance with IHL), animal rights under IHL could hardly be brought about by judicial law-making. Rather, such a new paradigm could only be introduced by a new international instrument.¹³ And, for this to happen, States would need to overcome high conceptual barriers relating to the legal personality of animals and would have to accept curtailing their powers to conduct war against enemy fighters in the interest of non-human living beings.¹⁴ Obviously, this would be a particularly challenging endeavour. Even outside the context of war, several civil society attempts to bring States to adopt an international convention on animal welfare

11 Saskia Stucki, "Animal Warfare Law and the Need for an Animal Law of Peace: A Comparative Reconstruction", *American Journal of Comparative Law*, Vol. 71, 2023 (forthcoming).

12 Jérôme de Hemptinne, Anne Peters and Robert Kolb, "Towards Effective Legal Protection of Animals in Wartime: Key Findings and Concluding Recommendations", in A. Peters, J. de Hemptinne and R. Kolb (eds), *Animals in the International Law of Armed Conflict*, Cambridge University Press, Cambridge, forthcoming.

13 Heike Krieger and José Martínez Soria, "The Protection of Animals in Wartime: Rationale and Challenges", in A. Peters, J. de Hemptinne and R. Kolb (eds), *ibid.*

14 J. de Hemptinne, A. Peters and R. Kolb, above note 12.

have so far not been successful.¹⁵ Nevertheless, an IHL-specific convention would not necessarily face more resistance than a general convention on animal welfare, because it would much less affect the everyday lives of consumers and the vested interests of the animal–industrial complex.

In this contribution, we will first explore how and under which conditions animals are protected under IHL as it stands. We will then examine how this body of law could be better applied and interpreted to take account of the fact that animals are sentient beings experiencing pain, suffering and distress. We will finally envisage the possibility of adopting a new convention providing fundamental rights to animals which would recognize and safeguard their needs, interests and arguable dignity during wartime.

The protection of animals in IHL as it stands

Adopted at a time when legal entitlements for animals did not attract significant attention, IHL rules are essentially geared towards the safeguarding of human interests and, thus, largely ignore the welfare of animals.¹⁶ IHL only indirectly and ambiguously addresses the animal question through the protection of objects, the environment, medical transports and equipment, objects indispensable for the survival of civilian population, and cultural property. Additionally, those animals which are located in protected zones benefit from further important safeguards.¹⁷ Let us briefly examine how these different sets of rules concretely play out.

Animals as objects

At first glance, animals do not easily fall under the category of objects referred to in IHL conventions.¹⁸ Indeed, the historic intention of these instruments was probably to

15 A group led by David Favre suggested an umbrella treaty (“International Convention for the Protection of Animals”) with four protocols (a Companion Animal Protocol, a Protocol for the Care of Exhibited Wildlife, a Protocol for the Taking of Wild Animals, and a Protocol for the International Transportation of Animals). See David Favre, “An International Treaty for Animal Welfare”, *Animal Law Review*, Vol. 18, 2012. The text of the convention is available at: <https://www.animallaw.info/treaty/international-convention-protection-animals>. Sabine Brels and others proposed a “UN Convention on Animal Health and Protection”. See Sabine Brels, “Globally Protecting Animals at the UN: Why and How?”, *L’Observateur des Nations Unies*, Vol. 45, 2018, p. 193. The text of the convention is available at: <https://www.globalanimallaw.org/downloads/Folder-UNCAHP.pdf>.

16 Jérôme de Hemptinne, “Challenges Regarding the Protection of Animals During Warfare”, in Anne Peters (ed.), *Studies in Global Animal Law*, Springer, Heidelberg, 2020, pp. 174–5.

17 For reasons of space, the protection of animals in occupied territory will not be addressed in this contribution. For an analysis of this question, see Marco Longobardo, “Animals in Occupied Territory”, in A. Peters, J. de Hemptinne and R. Kolb (eds), *Animals in the International Law of Armed Conflict* above note 12.

18 The law itself, however, does not exclude this qualification. Notably “livestock” is mentioned in Article 54 (2) of the Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I). The provision is situated in Chapter III of AP I, entitled “Civilian Objects”, and Article 54 carries the official heading: “Protection of objects indispensable for the survival of the civilian population”. So livestock is here listed under “objects”.

protect inanimate objects, thereby excluding living beings.¹⁹ However, our basic premise that animals need and deserve a better protection in war animates argumentative strategies to close the gap in protection. We therefore suggest a broader understanding of the open IHL concept of “object”. The main explanation is that, for a number of reasons explored below, animals cannot be easily assimilated to the category of “protected persons” under IHL which would allow them to benefit from the protection offered by the status of “civilian” under the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV)²⁰ or, when they “belong” to armed forces, to benefit from the status of “combatant/prisoner of war” under the 1949 Convention Relative to the Treatment of Prisoners of War (GC III).²¹ The only available other IHL category is “object”. The open meaning of the word as used in the relevant provisions allows drawing animals as “living” objects under their coverage, in order to avoid animals as falling in between the two categories. This interpretation of the IHL term “object” (in French and Spanish “*bien*”) is also consistent with the legal qualification of animals as moveable things (*res*) in many national legal systems around the world.

In their quality as objects, animals can only be targeted – after all necessary measures of precaution have been taken²² – in the following three constellations: when they are used as weapons of war,²³ when they qualify as military objectives,²⁴ or when the harm they suffer constitutes proportionate incidental damage resulting from attacks on military objectives.²⁵ However, when animals are harmed as collateral damage, the proportionality calculation becomes a complex endeavour. The outcome of the assessment largely depends on the value attributed to animals.²⁶ In most societies, such a value judgement is contingent upon what animals offer to humankind: working tool, food, clothing, etc.²⁷ It is,

19 Marco Roscini, “Animals and the Law of Armed Conflict”, *Israel Yearbook on Human Rights*, Vol. 47, 2017, p. 46.

20 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV).

21 Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III).

22 AP I, Arts 57 and 58.

23 It could be argued that animals which are armed – for instance, strapped with explosives and then sent to attack the enemy – could be qualified as “weapons” or “means and methods of warfare” under IHL. The employment of animals as weapons is not *per se* illegal. Chris Jenks argues that this should, however, be subject to legal reviews to determine whether weaponized animals are able to distinguish between military objectives and civilian objects (or persons) and whether their use could cause superfluous injury. It remains unclear to what extent the injury to animals themselves when employed as war weapons should be factored into such an assessment. See Chris Jenks, “Animals as War Weapons”, in A. Peters, J. de Hemptinne and R. Kolb (eds), *Animals in the International Law of Armed Conflict*, above note 12.

24 AP I, Art. 52(2). This rule applies both in international and non-international armed conflicts. See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rules 7–10.

25 AP I, Arts 51(5)(b) and 57. This rule applies in both international and non-international armed conflicts. See ICRC Customary Law Study, *ibid.*, Rule 14.

26 J. de Hemptinne, above note 16, p. 179. For an extensive analysis of the concept of proportionality in the context of the protection of the environment, see generally Michael N. Schmitt, “Green War: An Assessment of the Environmental Law of Armed Conflict”, *Yale Law Journal*, Vol. 22, 1997, pp. 55–61.

27 de Hemptinne, above note 16, p. 179.

nonetheless, increasingly accepted that animals possess a value in their own right and, as a consequence, that their interests should no longer be automatically subordinated to those of human ones.²⁸ Also, an even greater intrinsic value should be attributed to species which are in danger of extinction. Further complicating matters, the status of animals varies widely from one culture to another and inevitably changes over time.²⁹ To conclude, the moderately progressive interpretation of the term “object” as also covering animals (living objects) bears the potential to improve those living objects’ protection (only) if the ensuing balancing exercises are adapted to their vulnerability.

Animals as part of the environment

IHL also protects animals indirectly and globally as general components of the environment in which they live.³⁰ The concept of environment encompasses wildlife and its habitats, as well as the relationship that these elements have with the ecological system in which they exist. The International Committee of the Red Cross (ICRC) Guidelines on the protection of the environment in armed conflict specify that, for purposes of IHL, the environment encompasses not only natural elements *stricto sensu*, but also “elements that are or may be the product of human intervention, such as foodstuffs, agricultural areas, drinking water and livestock.”³¹ Accordingly, all animals, including farm and companion animals, are part of the environment. As a result, every animal located in a given natural area or site, as well as their habitat, are duly protected by the laws of warfare and, in particular, by three sets of rules relating to the environment as such.³²

First, the general principles governing the conduct of hostilities in order to protect civilian objects – i.e. the principles of distinction,³³ proportionality³⁴ and precaution³⁵ – are applicable to the environment as a whole, which is traditionally considered to be civilian in character.³⁶ Accordingly, specific elements of the environment can become military objectives, but only under restrictive conditions

28 *Ibid.*

29 *Ibid.*

30 A. Peters, above note 3, pp. 354–9.

31 ICRC, *Guidelines on the Protection of the Environment in Armed Conflict: Rules and Recommendations Relating to the Protection of the Natural Environment under International Humanitarian Law, with Commentary*, ICRC, Geneva, 2020, Preliminary Considerations, para. 16 (p. 18 emphasis added), available at: www.icrc.org/en/document/guidelines-protection-natural-environment-armed-conflict-rules-and-recommendations-relating.

32 Jérôme de Hemptinne, “Animals as Part of the Environment”, in A. Peters, J. de Hemptinne and R. Kolb (eds), *Animals in the International Law of Armed Conflict*, above note 12.

33 AP I, Arts 48, 51(2) and 52(2); Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II), Art. 13(2).

34 AP I, Arts 51(5)(b) and 57.

35 AP I, Arts 57 and 58.

36 See ICRC Environmental Guidelines, above note 31, para. 18; ICRC Customary Law Study, above note 24, Rule 43. See also International Law Commission (ILC), Draft Principles on the Protection of the Environment in Relation to Armed Conflict (2019), reproduced in United Nations (UN) General Assembly, Report of the International Law Commission: Seventy-first session (29 April–7 June and 8 July–9 August 2019), UN Doc. A/74/10, UN, New York, 2019, Chapter VI. Protection of the environment in relation to armed conflicts, Principles 13 and 14, pp. 250–6, in particular pp. 252–3.

set forth in Article 52(2) of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (AP I). In principle, no component of the natural environment is a military objective by its nature.³⁷ Notably wildlife (as opposed to trained domestic animals) can never be treated as a military objective by virtue of its use or purpose, even if the trading of endangered species might contribute to sustaining military activities.³⁸

Moreover, the environment always remains protected against excessive collateral damage: an attack against a military objective which may be expected to cause incidental damage to the environment that would be excessive in relation to the concrete and direct military advantage anticipated is prohibited.³⁹ Given that the protection of the environment (and animals which form part of it) has become much more important—as shown by the numerous environmental conventions and soft law instruments adopted on the matter over the last four decades—the damage caused to the environment (and animals) should be attributed a particularly heavy weight in the proportionality calculation that is needed to determine what is “excessive”.⁴⁰ When balancing the anticipated military advantage against the expected environmental harm, account must also be taken of, not only the attack’s direct effects, but the attack’s indirect effects (known as “reverberating” or “knock-out effects”) on the environment.⁴¹ This creates an obligation upon the belligerents to assess the indirect effects (damage) caused by an attack on an area which does not host many animals, but whose destruction affects the ecological balance on a wide scale and will therefore cause the disappearance of animals situated elsewhere.⁴² However, only “foreseeable” damage (direct and indirect) would count as excessive and thus be unlawful.

Second, other IHL rules that seek to prevent or limit certain damage to the environment (such as those which regulate the usage of specific weapons or combat techniques) also play a role in this context. These comprise rules on specially protected objects (such as works and installations containing dangerous forces⁴³ and objects indispensable to the survival of the civilian population),⁴⁴ rules on pillage⁴⁵ and those prohibiting incendiary weapons or the use of herbicides as a method of warfare.⁴⁶ In the same vein, a specific convention prohibits the

37 Cordula Droege and Marie-Louise Tougas, “The Protection of the Natural Environment in Armed Conflict – Existing Rules and Need for Further Legal Protection”, *Nordic Journal of International Law*, Vol. 82, 2013, p. 28.

38 *Ibid.*, p. 29.

39 See ICRC Environmental Guidelines, above note 31, paras 114–22.

40 J. de Hemptinne, above note 32.

41 ICRC Environmental Guidelines, above note 31, para. 117.

42 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts – Recommitting to Protection in Armed Conflicts on the 70th Anniversary of the Geneva Conventions*, ICRC, Geneva, 2019, p. 68. See also ICRC Environmental Guidelines, above note 31, para. 18.

43 AP I, Art. 56.

44 AP I, Art. 54.

45 GC IV, Art. 33(2).

46 Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons, 10 October 1980, 1342 UNTS 171 (entered into force 2 December 1983).

destruction of the environment as a form of weapon.⁴⁷ In contrast to the IHL-based protection of domestic animals as property or even as “objects indispensable to the survival of the civilian population” and of wildlife by the rules against pillage⁴⁸ which under strict conditions may apply directly to animals, the environmental rules provide only indirect safeguards for animals. We will come back below to the protection of objects indispensable to the survival of the civilian population.⁴⁹

Third, more importantly, Articles 35(3) and 55 of AP I prohibit using means and methods of warfare that are intended, or may be expected, to cause “long-term, widespread and severe damage” to the environment. The difference between this specific form of protection and the general protection of the environment referred to above is that the special rule is absolute.⁵⁰ If widespread, long-term and severe damage is inflicted, it will always be unlawful – independently of any inquiry into whether this behaviour or result could be justified on the basis of military necessity or whether incidental damage was excessive.⁵¹ Although the *travaux préparatoires* of Articles 35(3) and 55 of AP I indicate that each of the three conditions contained in the special norms was extensively discussed during the negotiations of AP I, only the term “long-term” was clarified as meaning “years” or “decades”.⁵² There is no indication of what the terms “widespread” and “severe” were intended to signify exactly. Traditionally, “widespread” has been understood to refer to “several hundred square kilometres”, and “severe” means “serious disruption of the ecosystem”.⁵³ However, this interpretation should be revisited in light of today’s importance of environmental values, given the progressive understanding that the environment must be protected as such, and in view of the awareness of the dramatic consequences that wars have on the whole ecosystem and wildlife in particular.⁵⁴ What might not have appeared to be a widespread, long-term and severe damage forty years ago when AP I was adopted may now be considered to be so.⁵⁵ For instance, it is increasingly accepted by scientists that destroying biodiversity spots or areas known to be populated by endangered species or by a great diversity of

47 Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques, 10 December 1976, 1108 UNTS 151 (entered into force 5 October 1978).

48 See A. Peters, above note 3, pp. 344–9.

49 See below, section “Animals as objects indispensable”.

50 ICRC Customary Law Study, above note 24, Rule 45; ICRC Environmental Guidelines, above note 31, para. 49.

51 ICRC Customary Law Study, above note 24, Rule 45.

52 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987 (APs Commentary), para. 1452.

53 C. Droege and M.-L. Tougas, above note 37, p. 32. See also J. de Hemptinne, above note 32.

54 Djamchid Montaz, “Les règles relatives à la protection de l’environnement au cours des conflits armés à l’épreuve du conflit entre l’Irak et le Koweït”, *Annuaire français de droit international*, Vol. XXXVII, 1991, pp. 209–10; Michael Bothe, Carl Bruch, Jordan Diamond and David Jensen, “International Law Protecting the Environment during Armed Conflict: Gaps and Opportunities”, *International Review of the Red Cross*, Vol. 92, 2010, p. 576. See also J. de Hemptinne, above note 32.

55 Michael Bothe, “The Protection of the Environment in Times of Armed Conflict”, *German Yearbook of International Law*, Vol. 34, 1991, p. 57.

fauna can have serious repercussions for the environment as a whole, even if the area concerned is relatively small.⁵⁶

However, Articles 35(3) and 55 of AP I formally apply only in international armed conflicts. In contrast, the legal framework for non-international armed conflicts (Article 3 common to the four Geneva Conventions and AP II) does not contain any provision dealing specifically with the environment. Moreover, it is not fully clear, although “likely in due course” according to the ICRC, that the customary rule prohibiting widespread, long-term and severe damage to the natural environment in international armed conflicts also applies in non-international armed conflict.⁵⁷ We will return to this point below.

Beyond the mentioned principles governing the conduct of hostilities that potentially apply to natural resources and animals and beyond the few provisions that specifically protect them, IHL does not address any other environmental matters, for instance, the conservation and the preservation of wildlife. These gaps can and should be filled by international environmental treaties which continue to apply during armed conflicts.⁵⁸ Their content and nature vary widely. Some conventions pursue a sectorial approach protecting particular species, such as the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),⁵⁹ the 1979 Convention on the Conservation of Migratory Species of Wild Animals,⁶⁰ the 2001 Agreement on the Conservation of Albatrosses and Petrels⁶¹ or the 1946 International Convention on the Regulation of Whaling.⁶² Others, which are more holistic in nature – such as the 1992 Convention on Biological Diversity,⁶³ the 2003 African Convention on the Conservation of Nature and Natural Resources (revised),⁶⁴ or the 1982 Convention on Wetlands of International Importance, Especially as Waterfowl

56 ICRC Environmental Guidelines, above note 31, para. 58. See also Daniella Dam-de Jong, *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations*, Cambridge University Press, Cambridge, 2015, p. 230.

57 ICRC Customary Law Study, above note 24, Rule 45.

58 ILC, *Effects of Armed Conflicts on Treaties. Titles and Texts of the Draft Articles on the Effects of Armed Conflicts on Treaties Adopted by the Drafting Committee on Second Reading*, 11 May 2011, A/CN.4/L.777, Arts 3, 6 and 7. For a discussion of the substantive, personal and territorial scope of application of the international conventions on the environment, see J. de Hemptinne, above note 32. See also the work of the ILC on the matter: ILC, *Effects of Armed Conflicts on Treaties. Titles and Texts of the Draft Articles on the Effects of Armed Conflicts on Treaties Adopted by the Drafting Committee on Second Reading*, 11 May 2011, A/CN.4/L.777, Arts 3, 6 and 7.

59 Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973, 993 UNTS 243 (entered into force 1 July 1975).

60 Convention on the Conservation of Migratory Species of Wild Animals, 23 June 1979, 1651 UNTS 333 (entered into force 1 November 1983).

61 Agreement on the Conservation of Albatrosses and Petrels, 19 June 2001, 2258 UNTS 257 (entered into force 1 February 2004).

62 International Convention on the Regulation of Whaling, 2 December 1946, 161 UNTS 72 (entered into force 10 November 1948).

63 Convention on Biological Diversity, 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993).

64 African Convention on the Conservation of Nature and Natural Resources signed on 15 September 1968 and revised on 11 July 2003.

Habitat (Ramsar Convention)⁶⁵ – focus not only on environmental protection and conservation, but more broadly on issues of common interest for humanity, such as sustainable development, biological diversity, or the impact of climate change on ecosystems. Each treaty regime can supplement IHL basic rules in the conservation and preservation of wildlife. Moreover, as recalled above, IHL provisions on the protection of the environment are themselves rather broad and vague. They leave wide discretion on how to read and apply them concretely.⁶⁶ Environmental treaties can here play a complementary role by giving a meaning and substance to IHL norms and concepts which remain ambiguous, such as the concept of environment, the criteria of long-term, widespread and severe damage, or the requirement of proportionality.⁶⁷ As shown above, these terms should be construed in conformity with fundamental environmental standards and values that have progressively emerged from the numerous international conventions and soft law instruments adopted during the last decades. This means that, through a “harmonious interpretation”, relevant IHL provisions protecting wildlife could be interpreted and applied by reference to the normative context in which they operate, a context co-shaped by international environmental law.⁶⁸

Animals as means of medical transport, search and rescue

Many animals which possess a highly developed sense of smell, such as dogs, are employed to search on the battlefield for missing combatants or civilians in need of medical assistance.⁶⁹ Often, these animals receive sophisticated training to find such persons and to bring them medical equipment, food and water. Other animals – such as horses, mules, donkeys or camels – exercise similar search-and-rescue activities in inaccessible areas. In many cases, these animals are simply employed to transport the wounded and sick, medical personnel or equipment.⁷⁰

When exercising such medical functions, “medical animals” could, in theory, benefit from IHL “special” safeguards, adapted to the need for medical care, beyond the general protection afforded to civilian objects. When employed as a means of transportation, animals could fall within the category of medical

65 Convention on Wetlands of International Importance Especially as Waterfowl Habitat, 2 February 1971, 996 UNTS 245 (entered into force 21 December 1975).

66 Jorge E. Viñuales, “Le concept de ‘régime special’ dans les rapports entre droit humanitaire et droit de l’environnement”, *Research Paper 12, The Graduate Institute Center for International Environmental Studies*, Geneva, 2012, p. 13. See also Mara Tignino, “Droit international de l’environnement”, in Raphael van Steenberghe (ed.), *Droit international humanitaire: un régime spécial de droit international*, Bruylant, Brussels, 2013, p. 293; J. de Hemptinne, above note 32.

67 J. E. Viñuales, *ibid.*, p. 14.

68 See Ayşe-Martina Böhringer and Thilo Marauhn, “Animals as Endangered Species”, in A. Peters, J. de Hemptinne and R. Kolb (eds), *Animals in the International Law of Armed Conflict*, above note 12.

69 E. Baratay, above note 4, pp. 111–13. M. Tignino, above note 66, p. 253; See Jérôme de Hemptinne, “Animals as Means of Medical Transportation, Search and Rescue”, in A. Peters, J. de Hemptinne and R. Kolb (eds), *Animals in the International Law of Armed Conflict*, above note 12.

70 See Australian Government, Department of Veterans’ Affairs, “Animals in the Military during World War I”, no date, available at: <https://anzacportal.dva.gov.au/wars-and-missions/ww1/military-organisation/animals-in-military>.

transport.⁷¹ Such an approach is consistent with the definition of “medical transports” in Article 8(g) of AP I: “any means of transportation, whether military or civilian, permanent or temporary, assigned exclusively to medical transportation” by a competent authority of a party to the conflict. By referring to “any means of transportation”, this legal definition is open-ended. According to an authoritative commentary, no means of transportation “is excluded, from the *oxdrawn cart* to the supersonic jet, or any future means of transportation; the absence of an exhaustive list leaves the field open for the latter”.⁷² This suggests that the definition does not only cover inanimate carriers. Quite to the contrary, with the word “assigned”, the legal definition is purpose- or use-oriented. Article 8(g) of AP I thus implicitly acknowledges that, like any other means of transportation, animals need protection in this context, not because of their intrinsic characteristics, but because of their assignment to medical purposes. In other words, animals could and should receive the safeguards offered by the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field⁷³ and by GC IV on account of the medical functions of transportation they perform.

When used by medical personnel for search or rescue activities, it could be argued that animals constitute material or equipment of medical units⁷⁴ and, as such, benefit from the reinforced protection afforded to mobile or fixed medical units to which they belong.⁷⁵ At first sight, animals seem to be excluded from this regime. The term “medical equipment” is normally understood to comprise only inanimate objects. This seems to be confirmed by the 2016 ICRC Commentary on GC I which states that “medical equipment includes drugs, bandages, medical instruments, stretchers and other supplies needed for the care of the wounded and sick”.⁷⁶ But this list, too, is open-ended: despite the limited examples it provides, the commentary does not restrict the provision’s scope of application to inanimate objects. One could again argue that the ICRC’s approach is “purpose/use-oriented”. This would entail that, like any means of medical transportation, animals deserve protection – independently of being natural living beings – because of the medical functions assigned to them in warfare.

In both situations – when used as means of medical transportation or as medical material or equipment⁷⁷ – animals must not be attacked, nor harmed in

71 J. de Hemptinne, above note 69. See, generally, GC I, Arts 35–7; GC IV, Arts 21–3.

72 APs Commentary, above note 52, para. 384 (emphasis added). It could be contended that the term “transports” covers only inanimate vehicles. For example, the Commentary on GC I (2nd ed., ICRC, Geneva, 2016, Art. 35, para. 2372) (2016 ICRC Commentary on GC I) lists, among other things, automobiles, trucks, trains, motorcycles, small all-terrain vehicles and inland boats. At first sight, animals seem to be excluded from this regime. For a discussion of this question, see J. de Hemptinne, above note 69.

73 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I).

74 GC I, Art. 33.

75 J. de Hemptinne, above note 69.

76 2016 ICRC Commentary on GC I, above note 72, para. 2384.

77 Transports of wounded and sick and transports of medical equipment are protected in the same way as mobile medical units. See GC I, Arts 33(1) and 35(1).

any way, nor may their medical functioning be impeded, even if they do not momentarily bear any wounded and sick persons or medical equipment.⁷⁸ Moreover, animals benefit from all rules on precautions in attacks and on the effects of attacks.⁷⁹ It is only if and when animals are employed for military purposes – for example, to transport able soldiers or munitions, to serve as “living bombs” or to detect explosives – that they may lose such a protection.⁸⁰ In these circumstances, they may become legitimate military targets and may thus be directly attacked and even killed by the adversary. However, “medical animals” can only lose such a protection after a warning has been issued and set, whenever appropriate, a reasonable time limit, and only after such warning has remained unheeded.⁸¹

Common Article 3 of the Geneva Conventions does not explicitly protect means of medical transportation, search and rescue in non-international armed conflicts. But such a protection is implicit in the legal requirement that the wounded and sick be searched for, collected and protected against pillage and ill-treatment, and that they receive adequate care.⁸² It is a necessary implication of the legal obligation to fully guarantee for the care of the wounded and sick that the means of medical transportation, search and rescue must be respected and protected at all times, and may not be attacked.⁸³ Such a specific rule on the protection of medical units and transports is explicitly set forth in AP II.⁸⁴ The principle should be extended to animals used for medical purposes, in all types of armed conflict.⁸⁵

Animals as objects indispensable to the survival of the civilian population

When they are “indispensable to the survival of the civilian population”, certain animals, such as livestock, benefit from reinforced safeguards in both international and non-international armed conflicts.⁸⁶ They are protected, not only against any attack, but also against any destruction, removal, or being rendered useless.⁸⁷ Moreover, even when they become legitimate military objectives, animals lose protection only when they are used exclusively as

78 AP I, Art. 21. See also ICRC Customary Law Study, above note 24, Rule 29.

79 Alexander Breitegger, “The Legal Framework Applicable to Insecurity and Violence Affecting the Delivery of Health Care in Armed Conflicts and other Emergencies”, *International Review of the Red Cross*, Vol. 95, 2013, p. 108.

80 GC I, Arts 21 and 22; AP I, Art. 13. See also ICRC Customary Law Study, above note 24, Rules 28 and 29.

81 GC I, Art. 22; AP I, Art. 13. See Marco Sassòli, *International Humanitarian Law, Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, Cheltenham, 2019, para. 8.29.

82 Katja Schöberl, “Buildings, Material, and Transports”, in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, p. 829. See also AP II, Arts 7 and 8.

83 Antoine Bouvier, “The Use of the Emblem”, in A. Clapham, P. Gaeta and M. Sassòli (eds), *The 1949 Geneva Conventions, ibid.*, p. 863.

84 AP II, Art. 11(1).

85 J. de Hempinne, above note 69.

86 AP I, Art. 54 (literal quote of the title of the provision); AP II, Art. 14; ICRC Customary Law Study, above note 24, Rule 54. See also M. Sassòli, above note 81, para. 8.353.

87 AP I, Art. 54(2).

sustenance for the opposing armed forces or, if not as sustenance, in direct support of military action.⁸⁸ This special protective regime is, however, subject to two important limitations. First, the regime is clearly designed to prevent the starvation of human beings and not to protect animals *per se*, as the reference to the “survival of the civilian population” (heading of AP I, Art. 54) makes clear.⁸⁹ Furthermore, as stated by Article 54(2) of AP I, only those attacks against animals that are conducted with the “specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party” are prohibited. The forbidden motives of destruction comprises not only the motive of causing starvation, but also “any other motive”,⁹⁰ such as to drive a human population away. This means that a range of purposes or motives is prohibited by this rule. Nevertheless, these are limited: the killing of animals for legitimate purposes (other than just depriving the population of the animals’ value) is allowed.⁹¹ The second limitation of the rule is that the protection offered is not absolute. Any belligerent may derogate from the mentioned prohibitions “where required by imperative military necessity” for the defence of its national territory against invasion, even if only within territory under its own control.⁹² As noted by Marco Sassoli, “[i]n such limited circumstances, a scorched earth policy to delay the enemy’s advance is therefore not prohibited.”⁹³

Animals as cultural property

It could be argued that certain animals should fall under the category of “tangible cultural heritage or property” and benefit from the detailed and multi-layered IHL principles protecting such property. These are set out mainly in the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict,⁹⁴ in its two Protocols,⁹⁵ in the Additional Protocols,⁹⁶ as well as in IHL customary principles.⁹⁷ Concededly, non-human living beings do not easily fit into the category of cultural property—as into any other category of IHL. The mentioned IHL instruments understand cultural property as property “of great importance to the heritage of every people”.⁹⁸ The legal definitions list human-

88 AP I, Art. 54(3) in the two variants lit. (a) and lit. (b).

89 M. Roscini, above note 19, p. 59; Sandra Krähenmann, “Animals as Specially Protected Objects”, in A. Peters, J. de Hemptinne and R. Kolb (eds), *Animals in the International Law of Armed Conflict*, above note 12.

90 AP I, Art. 54(2).

91 M. Roscini, above note 19, p. 59.

92 AP I, Art. 54(5).

93 M. Sassoli, above note 81, para. 8.354.

94 Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954, 249 UNTS 240 (entered into force 7 August 1956) (1954 Hague Convention).

95 (First) Protocol for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954, 249 UNTS 358 (entered into force 7 August 1956); Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 26 March 1999, 2253 UNTS 172 (entered into force 9 March 2004).

96 AP I, Art. 54; AP II, Art. 16.

97 ICRC Customary Law Study, above note 24, Rules 38–41.

98 See, e.g., 1954 Hague Convention, above note 94, Art. 1(a).

made objects (such as buildings and other monuments of historic or architectural significance, archaeological sites and works of art).⁹⁹ Neither the major international instruments safeguarding cultural property mentioned above nor the Commentaries to the Additional Protocols make any reference to animals. This is not surprising since, as already mentioned, these conventions were adopted at a time when the protection of animals was not on top of the agenda of many States. Nonetheless, the enumerations in the relevant instruments are not exhaustive. The legal concept of “property” generally also covers animals. The necessary cultural value may also attach to animals which are used by humans for traditional food, in traditional sports, for religious rites (sacrifices), or enjoy a totemic or holy status (e.g. as heraldic animal, as a national symbol, and the like). Moreover, animals at the brink of extinction have a significant value for humanity as a whole.

Against this background, Sandra Krähenmann has argued that, today, the terms of cultural heritage or property can be interpreted in a progressive manner to include some categories of animals, namely endangered and endemic species:¹⁰⁰

Though it may seem as a stretch, arguably the evolution of cultural heritage law to progressively recognise the interrelationship between humanity and nature could inform the interpretation of the notion of cultural property under IHL in the sense that endangered animals may be cultural property, namely objects of “historical or archaeological interests”, similarly to cultural landscapes that have been included as archaeological sites.¹⁰¹

This interpretation is reinforced by the consideration that drawing a clear dividing line between the cultural heritage (that would be specially protected under IHL) and the natural heritage, including fauna and flora (that would be left outside such a protection) seems rather artificial. It is now increasingly accepted that the cultural heritage and the natural heritage are often intertwined, reflecting the constant interactions between humans and their environment.¹⁰² Interestingly, the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention) acknowledges the duty to identify and safeguard certain places that constitute part of the common heritage of humankind, including the habitat of threatened species of animals “of outstanding universal value from the point of view of science or conservation”.¹⁰³ Even if it does not directly protect the endangered animals as such, the World Heritage Convention indirectly recognizes their importance and value by safeguarding their habitats. In any case, animals that inhabit the surrounding of cultural heritage sites will always indirectly benefit from the special protection afforded by IHL to these sites.

99 *Ibid.*

100 S. Krähenmann, above note 89.

101 *Ibid.*

102 *Ibid.*

103 Convention for the Protection of the World Cultural and Natural Heritage of 16 November 1972, 1037 UNTS 151, Art. 2 (entered into force 17 December 1975).

The many different regimes protecting cultural property that could apply to specially protected animals cannot be studied in detail in this contribution.¹⁰⁴ In a nutshell, the application of such regimes to animals – which arguably form part of the world cultural heritage or which are located in protected sites – would, in theory, provide them with significant additional customary law-based safeguards in both international and non-international armed conflicts. Attacking cultural property or using it for military purposes is strictly prohibited in these circumstances, unless imperatively required by military necessity.¹⁰⁵ Moreover, this type of property is protected against seizure, destruction,¹⁰⁶ theft, pillage and vandalism.¹⁰⁷ In addition to complying with the general rules on the conduct of hostilities, belligerents must take special care in military operations to avoid any damage to cultural property.¹⁰⁸ In practice, however, it will often be difficult for parties to an armed conflict and, in particular, for armed groups, to guarantee an effective protection to the natural heritage sites. Effective protection is all the more difficult because the sites are often very large and usually host a high number of animals, including protected species, constantly moving from one area to another.¹⁰⁹

Finally, the cultural importance of certain animals could be recognized and protected by IHL and international criminal law less under the technical category of “cultural property” but as part of human–animal culture. During warfare, inhumane acts might be committed on animals for the specific reason that they entertain religious, cultural, historical or sociological ties with a given group of individuals (such as sacred cows in Hinduism). This has been acknowledged by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Kupreškić* trial judgment. The judges highlighted in this case that “the killing of the livestock [of Muslims was] clearly intended to deprive the people living there of their most precious assets”. They also noted that “livestock had for their owners not only economic value, but also and probably even more importantly, emotional, psychological and cultural significance. [...] Also the livestock, in addition to their economic value, took on a symbolic significance (for instance because Croats had pigs and Muslims did not).”¹¹⁰ The ICTY judges even found that the cumulative effects of plunder of Bosnian Muslim dwellings, on discriminatory grounds, including plunder of livestock, could amount to the crime of persecution.¹¹¹ That said, persecution as a form of crime against humanity will only be present in limited circumstances: when such acts against

104 For a thorough analysis of the protection of cultural property, see Roger O’Keefe, *The Protection of Cultural Property in Armed Conflict*, Cambridge University Press, Cambridge, 2006.

105 See ICRC Customary Law Study, above note 24, Rules 38 and 39.

106 *Ibid.*, Rule 40.

107 *Ibid.*

108 *Ibid.*, Rule 38.

109 S. Krähenmann, above note 89.

110 ICTY, Trial Chamber, *Prosecutor v. Zoran Kupreškić and others* (IT-95-16-T), judgment of 14 January 2000, para. 336 (footnote omitted).

111 ICTY, Trial Chamber, *Prosecutor v. Dario Kordić & Mario Čerkez* (IT-95-14/2-T), judgment of 26 February 2001, para. 205. “Plunder” is penalized in Article 3(e) of the Statute of the ICTY.

these animals are committed “as a part of a widespread or systematic attack against any civilian population, with the knowledge of the attack”.¹¹²

To conclude, the cultural value of animals in various contexts allows them to be drawn under the protective umbrella of IHL and international criminal law¹¹³ under limited conditions.

Animals in protected zones

In both international and non-international armed conflicts, IHL foresees several types of protected zones, such as neutralized zones for non-combatants and wounded combatants, non-defended localities, or demilitarized zones within conflict situations, located in or outside combat areas.¹¹⁴ The common purpose of these zones is to increase the protection of particularly vulnerable persons who are not – or no longer – taking part in hostilities and who are not performing any work of military character, by sheltering them from the dangers arising out of combat operations or by placing certain areas beyond the reach of these operations.¹¹⁵ Of course, this system requires that all belligerents guarantee that such zones are free of military objectives and are not defended by military means. The belligerents must also agree beforehand on the zones’ recognition and identification. While the creation of protected zones was not originally foreseen to benefit non-human beings, “the impetus to establish zones to protect animals and their habitats from the ravages of war is growing in momentum”.¹¹⁶ For instance, in its recent Environmental Guidelines, the ICRC has suggested the establishment of protected zones in national parks, natural reserves and endangered species’ habitats,¹¹⁷ and drafted a model pledge for removing fighting away from areas of major ecological importance or fragility.¹¹⁸

The creation of protected zones could increase the protection of animals in two respects. It could directly benefit animals located in these zones which will not be impacted by the conduct of warfare.¹¹⁹ It could also indirectly benefit animals, since their habitat will flourish when not disrupted by hostilities.¹²⁰ Nevertheless, the absence of combat operations in certain areas might be a double-edged sword: It might attract a high number of human populations seeking refuge in these zones, and the human presence might impact the normal feeding and

112 International Criminal Court Statute, 17 July 1998, Art. 7(1)(h).

113 See Marina Lostal, “De-objectifying Animals: Could they Qualify as Victims before the International Criminal Court?”, *Journal of International Criminal Justice*, Vol. 19, No. 3, 2021.

114 GC I, Art. 23; GC IV, Arts 14 and 15; AP I, Arts 59 and 60. See Trevor Keck, “What You Need to Know About ‘Safe Zones’”, *ICRC Blog*, 27 February 2017, available at: <https://intercrossblog.icrc.org/blog/what-you-need-to-know-about-safe-zones>.

115 T. Keck, *ibid.*

116 Matthew Gillett, “Animals in Protected Zones”, in A. Peters, J. de Hemptinne and R. Kolb (eds), *Animals in the International Law of Armed Conflict*, above note 12.

117 ICRC Environmental Guidelines, above note 31, para. 14.

118 *Ibid.*, para. 61.

119 Niccolò Pons, “Animals”, in Dražan Djukić and Niccolò Pons (eds), *The Companion to International Humanitarian Law*, Brill, Leiden, 2018, pp. 171–2.

120 M. Gillett, above note 116.

foraging behaviour of animals.¹²¹ The zoning might also reinforce industrial and economic activities, such as deforestation, thereby causing significant prejudice to wildlife.¹²² In conclusion, the creation of protected ecological zones might generate (despite possible drawbacks) additional benefits for animals and thus complement the belligerents' obligations to respect and protect all animals, including wildlife, under the other regimes and principles of IHL.

Interpretation and application of IHL in line with animals' needs

Changing attitudes and new domestic law categories

By treating animals as mere civilian or cultural objects, as part of the environment or of protected zones, or as medical equipment and means of transport, IHL is out of sync with the evolution of the status and protection that animals have progressively acquired around the world over the last decades.¹²³ Currently, 124 States of the world possess some kind of animal protection legislation.¹²⁴ For sure, these laws do not prohibit the killing of animals on a massive scale for human consumption. However, they prohibit—as a minimum—cruelty against animals, and in many States regulate the keeping, transport and slaughter in order to reduce suffering. The discrepancy between legal protection in peacetime and complete neglect in war should be overcome. In many other matters, the evolution of the law outside the context of armed conflict (ranging from human rights to environmental law) had significant consequences on the development of IHL. Similarly, the increasing concern for animal welfare could and should impact the way animals are treated in war.¹²⁵ Generally speaking, public awareness of the need to improve animal conditions in those circumstances is growing.¹²⁶ As emphasized by Marco Roscini, attitudes are shifting, especially towards animals like dogs or horses which have entertained close emotional bonds with soldiers for centuries:

A legislative proposal submitted to the US Congress, the US Canine Members of the Armed Forces Act, provided, for instance, that military working dogs should not be considered as “equipment” but should be reclassified as canine members of the armed forces. In some cases, at least unofficially, dogs have been given a military rank and wear a sign distinctive of their rank on their body armour.¹²⁷

121 *Ibid.*

122 Joshua H. Daskin and Robert M. Pringle, “Warfare and Wildlife Declines in Africa’s Protected Areas”, *Nature*, Vol. 553, No. 7688, 2018, p. 328.

123 Sabine Brels, *Le Droit du bien-être animal dans le monde: évolution et universalisation*, L’Harmattan, Paris, 2017.

124 Global Animal Law, above note 10.

125 J. de Hemptinne, above note 7, p. 273.

126 Jérôme de Hemptinne, Tadesse Kebebew and Joshua Niyo, “Animals as Combatants and as Prisoners of War?”, in A. Peters, J. de Hemptinne and R. Kolb (eds), *Animals in the International Law of Armed Conflict*, above note 12.

127 M. Roscini, above note 19, p. 44.

The decoration of animals who have distinguished themselves on the battlefield¹²⁸ and of establishing war memorials commemorating animal soldiers also illustrate the intention of some armies to treat certain “combatant animals” differently from mere commodities.¹²⁹ Concededly, these symbolic practices fall short of a trend of respecting animals in war more generally, and they are accompanied by other practices that manifest disregard for animal interests. For example, in the 1970s, the US dogs that had been donated to fight in the Vietnam war were not repatriated but left on the ground.¹³⁰ Also, in 2003, a US-American Department of Defense Order prohibited soldiers in the Iraq war from bringing home stray animals they had adopted during their serving time.¹³¹ Such inconsistencies are typical for the human laws dealing with animals.

A growing concern for animals’ intrinsic value is also manifest in the new legal qualification of animals as “not things” in several jurisdictions around the world. In some legal orders they are even explicitly qualified as “sentient beings”.¹³² In parallel, scholars have developed new legal categories for animals such as “living property”,¹³³ “animal personhood”,¹³⁴ “quasi property”,¹³⁵ “legal beingness”,¹³⁶ or as explicitly lying between person and thing.¹³⁷ This evolution could impact the development of the laws of warfare along two paths that run in the same direction. First, and more radically, animals could be removed from the category of object as envisaged under IHL and be included into the categories of combatant/prisoners of war or of civilians and thereby benefit from the guarantees extended to human beings. Second and more pragmatically, animals might still be equated with “objects” in the sense of IHL, while the rules

- 128 See BBC News, “War-wounded Military Dog Awarded Charity Medal”, 5 April 2016, available at: <https://www.bbc.co.uk/news/uk-england-london-35957766>.
- 129 Karsten Nowrot, “Animals at War: The Status of ‘Animal Soldiers’ under International Humanitarian Law”, *Historical Social Research*, Vol. 40, 2015, p. 140.
- 130 Janet M. Alger and Steven F. Alger, “Canine Soldiers, Mascots, and Stray Dogs in U.S. Wars: Ethical Considerations”, in Ryan Hediger (ed.), *Animals and War: Studies of Europe and North America*, Brill, Leiden, 2013.
- 131 See critically, DanaMarie Pannella, “Animals are Property: The Violation of Soldiers’ Rights to Strays in Iraq”, *Case Western Reserve Journal of International Law*, Vol. 43, 2010.
- 132 Treaty on the Functioning of the European Union, Art. 13; Czech Act No. 89/2012 of 3 February 2012, § 494; French Code Civil, amendment by Art. 2 of Loi n° 2015-177 of 16 February 2015, Arts 515–4; Portuguese Código Civil, Decreto-Lei n° 47344, Diário do Governo n° 274/1966, Série I de 1966-11-25, consolidado, versão à data de 2018-11-05; Colombia, Art. 201.-B “Animais”; Código Civil, Amendment by Law no. 1774 of 6 January 2016, Art. 655(3); Spain, Art. 333bis, inserted into the Civil Code by Law 17/2021 of 15 December 2021 “BOE” núm. 300 of 16 December 2021, available at: <https://www.boe.es/eli/es/l/2021/12/15/17/con>. See in detail, A. Peters, above note 3, pp. 400–3 with further references. The quality as “sentient being” should always form a barrier to the application of those legal rules on “things” that do not do justice to the sentience of animals.
- 133 David Favre, “Living Property: A New Status for Animals Within the Legal System”, *Marquette Law Review*, Vol. 93, No. 3, 2010.
- 134 Carolin Raspé, *Die tierliche Person*, Duncker & Humblot, Berlin, 2013.
- 135 Angela Fernandez, “Not Quite Property, Not Quite Persons: A ‘Quasi’ Approach for Nonhuman Animals”, *Canadian Journal of Comparative and Contemporary Law*, Vol. 5, 2019.
- 136 Maneesha Deckha, *Animals as Legal Beings: Contesting Anthropocentric Legal Orders*, University of Toronto Press, Toronto, 2021.
- 137 Eva Bernet Kempers, “Neither Persons nor Things: The Changing Status of Animals in Private Law”, *European Journal of Private Law*, Vol. 29, No. 1, 2021.

governing them could be reinterpreted to better take account of the fact that animals are living beings, experiencing pain, suffering and distress. Let us examine these two avenues in turn.

Animals as combatants and prisoners of war or as civilians?¹³⁸

When determining the groups of individuals that can benefit from the status of combatants and prisoners of war in international armed conflicts, the Geneva Conventions and AP I only refer to “persons”.¹³⁹ The Commentary on Article 43 of AP I explicitly states that “[t]he expression ‘armed forces’ means ‘members of the armed forces’, *i.e.*, *persons*, [...]” and adds that “[i]n itself it [...] does not allow, for example, the use of *animals* trained to attack, who are incapable of distinguishing between an able-bodied enemy and an enemy who is ‘hors de combat’”.¹⁴⁰ The concept of “civilians” in Article 50(1) of AP I also refers to persons.¹⁴¹ Although the word “person” normally refers to humans, the law also knows moral or “artificial” persons such as corporations. It is therefore not out of the question to broaden the meaning of “person” also in IHL so as to encompass non-human persons. In contrast to animals, corporations are man-made and governed by human beings. However, this is irrelevant for their “artificial” personhood which was highly controversial at its inception in the second half of the nineteenth century and still is in several respects, for example with regard to the criminal liability of corporations.¹⁴² Moreover, the rationale of the category of “person” might suggest its extension to animals. The need for the status as “protected person” arises from the increased vulnerability of persons in specific constellations.¹⁴³ More specifically, the assumption is that they are under an increased risk of abuse in the hands of the enemy. The radical vulnerability of animals in armed conflict is comparable to that of humans. Arguably, animals are also under heightened risk of being abused in the hands of members of the opposing party to the conflict, because these humans are not as emotionally bonded to the animals as their normal trainers and handlers.¹⁴⁴

Finally, and most importantly, the legal term “person” in IHL does not seem to carry a particular philosophical and doctrinal baggage. It is thus set apart from the debate in moral philosophy and in legal scholarship on animal personhood. In the broad and intense moral and legal debate on the possible legal personality of animals, the quality of “person” is mostly seen as a precondition for

138 This analysis is mainly drawn from J. de Hemptinne, T. Kebebew and J. Niyo, above note 126.

139 For non-international armed conflicts, the preamble of AP II mentions the “*human person*” three times.

140 APs Commentary, above note 52, para. 1672. Article 43 of AP I does not mention the word “person”, though.

141 AP I, Art. 50(1). According to the provision, “[a] civilian is any *person* who does not belong to one of the [other] categories of persons [...]” (emphasis added).

142 John C. Coffee, “‘No Soul to Damn: No Body to Kick’: An Unscandalized Inquiry into the Problem of Corporate Punishment”, *Michigan Law Review*, Vol. 79, No. 3, 1981.

143 Heike Krieger, “Protected Persons”, in Anne Peters and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of International Law*, Oxford University Press, Oxford, 2015, para. 1.

144 A. Peters, above note 3, p. 385.

having rights, and as synonymous with legal capacity. In those fields, the recognition of animal personhood is central to the struggle over animal rights.¹⁴⁵ In contrast, being a “person” in the sense of IHL is not associated with having rights in this branch of law. On the contrary, the traditional view is that “persons” benefit from protective standards under IHL but are not themselves rights-holders (“*titulaires*”).¹⁴⁶ It is therefore conceptually possible to broaden the concept of “person” under IHL (and even “protected persons”) so as to encompass “animal persons”.¹⁴⁷

At the same time, the rigid categories of persons under IHL are ill-adapted to the needs of animals. Granting them a combatant and a prisoner-of-war status raises several difficulties. First, under customary international law, combatants belonging to armed forces who, at the time of falling into the power of the enemy, fail to individually distinguish themselves from the civilian population – by not wearing a uniform or a distinctive sign – lose their combatant status and, thus, forfeit their prisoner-of-war status.¹⁴⁸ The criterion of distinction could also make sense for animals: If the adversary is able to distinguish those animals that participate in hostilities from those that do not, the adversary would know which animals can be targeted or placed in custody.¹⁴⁹ On the other hand, the animals are not able to comply by themselves with the obligation to wear a distinctive sign. This consideration suggests that “animal soldiers” should not lose their protection just because they do not satisfy a requirement of distinction over which they have no control whatsoever.¹⁵⁰ In result, the requirement of distinction cannot reasonably apply to animals.

Second, in order to benefit from the combatant and prisoner-of-war status, an individual must be part of a group of regular or irregular State armed forces which must itself belong to a party to an international armed conflict.¹⁵¹ However, ascribing membership in armed forces to “animal soldiers” might turn out to be problematic since, unlike most human beings, animals do not voluntarily join armed forces. Even humans who are drafted or forcibly conscripted are in a position different from animals, because they are at least aware of the dangerous conditions under which they will be forced to operate.¹⁵²

145 Gary L. Francione, *Animals as Persons: Essays on the Abolition of Animal Exploitation*, Columbia University Press, New York, 2008.

146 Ziv Bohrer, “Divisions over Distinctions in Wartime International Law”, in Z. Bohrer, J. Dill and H. Duffy, *Law Applicable to Armed Conflict, Max Planck Trialogues on the Law of Peace and War*, Vol. 2 (Anne Peters and Christian Marxsen series eds), Cambridge University Press, Cambridge, 2019, p. 175 and pp. 182–6.

147 A. Peters, above note 3, pp. 383–5.

148 ICRC Customary Law Study, above note 24, Rule 106. See also Laura Olson, “Status and Treatment of Those Who do not Fulfil the Conditions for Status as Prisoners of War”, in A. Clapham, P. Gaeta and M. Sassòli (eds), *The 1949 Geneva Conventions*, above note 82, p. 915.

149 J. de Hemptinne, T. Kebebew and J. Niyo, above note 126.

150 *Ibid.*

151 Sean Watts, “Who Is a Prisoner of War?”, in A. Clapham, P. Gaeta and M. Sassòli (eds), *The 1949 Geneva Conventions*, above note 82, pp. 891–7. See also J. de Hemptinne, T. Kebebew and J. Niyo, above note 126.

152 Be it as it may, status under IHL is determined by factual (objective) conditions: membership of the armed forces and a belonging to a party to an international armed conflict. In contrast, the individual mental state, that is, cognition and volition to be a member or participate in the armed conflict, is immaterial. Considerations on the mental state of actors should not exclude them – animals or humans – from

Furthermore, these animals cannot willingly disengage from active duty like human members of armed forces: They remain entirely dependent on the goodwill of the soldiers who exercise authority over them.¹⁵³

Third, if treated as combatants, “animal soldiers” may be targeted at all times when belonging to armed forces. However, as pointed by Jérôme de Hemptinne, Tadesse Kebebew and Joshua Niyo:

[w]hile human beings willingly and deliberately join armed forces, perfectly cognisant that this situation could lead to lethal consequences, animals have no freedom of choice in this regard. They are not aware of the exact role that they play in the conduct of hostilities and are unable to react autonomously to any military action undertaken by adverse military forces against them. Moreover, they do not benefit from any immunity of prosecution that is available to those human beings who have the legal right to participate in hostilities, because they are not subjected to criminal prosecution anyway.¹⁵⁴

This ultimately means that animals do not need the combatant status, but would rather be burdened by it.

Fourth, when animals fall into the hands of the enemy, the application of the full regime of protection envisaged in GC III and AP I to them would be unrealistic and unnecessary.¹⁵⁵ Many existing rules on prisoners of war would not be directly relevant to animals, for instance, the rules on discipline, clothing, ranks, religious and intellectual activities, interrogation, financial resources and remuneration, representation, retention of civil capacities, escape or sanctions.¹⁵⁶ Besides, in situations where armed forces are already unable to protect the well-being of human detainees, providing “animal soldiers” with the guarantees contained in GC III and AP I would certainly not constitute a priority for these forces.¹⁵⁷

Fifth, the overarching rationale of the internment regime of prisoners of war, as well as the related matter of release and repatriation, do not fit for animals. The internment of prisoners of war is mainly justified by the legitimate goal to prevent combatants from future involvement in hostilities.¹⁵⁸ However, animals do not threaten to get involved once they are not under the patronage of their handlers. It is unlikely that they could by themselves re-join their armed forces in order to participate again in combat efforts.¹⁵⁹ The main reason that may justify, in exceptional circumstances, the animals’ “internment” is to guarantee their own survival, by providing them with the necessary medical

protection under GC III and AP. See A. Peters, above note 3, p. 377. See also J. de Hemptinne, T. Kebebew and J. Niyo, above note 126.

153 J. de Hemptinne, T. Kebebew and J. Niyo, above note 126.

154 *Ibid.* See also A. Peters, above note 3, pp. 337 and 394.

155 J. de Hemptinne, T. Kebebew and J. Niyo, above note 126.

156 *Ibid.*

157 *Ibid.*

158 Marco Sassòli, “Release, Accommodation in Neutral Countries, and Repatriation of Prisoners of War”, in A. Clapham, P. Gaeta and M. Sassòli (eds), *The 1949 Geneva Conventions*, above note 82, p. 1040.

159 J. de Hemptinne, T. Kebebew and J. Niyo, above note 126. See also A. Peters, above note 3, pp. 377–8.

care and means of subsistence, and by protecting them from the danger of hostilities.¹⁶⁰ Hence, decisions to “liberate” animals should be based on different considerations, such as an evaluation of their capacities to feed themselves in the difficult circumstances of war, or on the possibility of returning them to their countries of origin without creating danger. The material costs for the army generated by the loss of an animal on whose military training considerable resources had been spent is a different consideration that does not fit into the prisoner-of-war regime. It was therefore lawful and legitimate that the Taliban did not return the British army dog that had been captured by them in Afghanistan, as long as they continued to feed and shelter the animal adequately.¹⁶¹

For these five reasons, qualifying animals as proper combatants when they take part in hostilities, and as prisoners of war when they fall in the hands of the enemy, would be neither appropriate nor meaningful.¹⁶² Since the term of “civilian” in IHL is defined *ex negativo* as “any person who does not belong to one of the categories of persons” who are entitled to prisoner of war status,¹⁶³ its applicability to animals is problematic, too.¹⁶⁴

An animal-friendly interpretation of IHL rules on objects

The second, less radical, and arguably more adequate developmental strategy would be to interpret and apply the many existing IHL norms that could potentially offer protection to animals during warfare in a “progressive manner” so as to better account for the animals’ nature as “sentient beings” that deserve to be treated as such in all circumstances.¹⁶⁵ As “sentient being” is already a legal term in several legal orders of the world, it could in the future potentially become a *sui generis* category of IHL.¹⁶⁶ It is conceded that such a (r)evolutionary reading of IHL norms cannot yet point to any general practice of States, accompanied by *opinio iuris* that would give rise to new customary rules. Also, as far as the interpretation of the IHL conventions is concerned, no subsequent State practice manifesting agreement has so far emerged.¹⁶⁷ On the other hand, as argued above and applying the principle of systemic integration, a progressive interpretation may legitimately be based on “other relevant rules of international law applicable

160 J. de Hemptinne, T. Kebebew and J. Niyo, above note 126. See also A. Peters, above note 3, p. 377.

161 Shashank Bengali and Hashmat Baktash, “Taliban Says Captured British Military Dog is Healthy”, *Los Angeles Times*, 7 February 2014, available at: <https://www.latimes.com/world/worldnow/la-fg-wn-taliban-captive-british-dog-20140207-story.html>.

162 J. de Hemptinne, T. Kebebew and J. Niyo, above note 126. See also A. Peters, above note 3, pp. 394–5.

163 See wording of AP I, Art. 50(1); and ICRC Customary Law Study, above note 24, Rule 5.

164 However, see A. Peters, above note 3, pp. 380–3.

165 J. de Hemptinne, A. Peters and R. Kolb, above note 12. For a novel approach of “animal-adequate interpretation”, see Peter V. Kunz, “Tieradäquate Auslegung als methodische Erweiterung”, *Zeitschrift des Bernischen Juristenvereins*, Vol. 157, No. 5, 2021.

166 See above note 132 and K. Nowrot, above note 129.

167 See Vienna Convention on the Law of Treaties (VCLT) of 23 May 1969, 1155 UNTS, Art. 31(3)(a) and (b) on treaty interpretation.

in the relations between the parties”,¹⁶⁸ as found, e.g., in animal species conservation treaties.¹⁶⁹ The evolution of IHL in the direction of greater concern for animals might also benefit from the dynamism instilled into this legal field by the Martens clause whose contemporary version is codified in Article 1(2) of AP I.¹⁷⁰ The “principles of humanity” and “the dictates of public conscience” mentioned here “both suggest construing the relevant norms, wherever they lack clarity or precision, and wherever doubt arises in their application to the facts, in the direction of outlawing acts that cause suffering”.¹⁷¹ Such an interpretation is especially plausible because the contemporary, more ecological version of the Martens clause, as proposed by the ICRC and the International Law Commission (ILC), protects not only civilians and combatants but also “the environment” as such¹⁷² – which comprises animals.¹⁷³

Using this evolutionary approach, we identify six main principles of IHL that apply to animals as objects, part of the environment, means of medical transport, search and rescue, objects indispensable for the survival of the civilian population, and cultural property, as well as to those animals that are located in protected zones.¹⁷⁴ It should be noted at the outset that certain States and non-State actors might not be capable of respecting and implementing all these principles in the difficult circumstances of war, especially when they are not controlling the territory in which they are fighting. Moreover, belligerents will normally prioritize the alleviation of suffering of human beings. Therefore, the application of the recommended principles will always be tempered and limited to what it is actually feasible. The suggested principles are also flexible enough to guarantee that human interests prevail over animal interests when they are in conflict – which is not inevitably the case.

168 VCLT, *ibid.*, Art. 31(3) lit. (c).

169 J. de Hemptinne, A. Peters and R. Kolb, above note 12; A. Peters, above note 3, p. 390. The primary rationale of the species conservation treaties is the avoidance of extinction and concomitant loss of genetic material, and not the reduction of animal suffering. These two goals sometimes stand in tension but are in other respects aligned in that they seek to protect lives. See Guillaume Futhazar, “Biodiversity, Species Protection, and Animal Welfare Under International Law”, in A. Peters (ed.), *Studies in Global Animal Law*, above note 16.

170 The Martens clause is also enshrined in the termination clauses of the four Geneva Conventions (GC I, Art. 63; GC II, Art. 63; GC III, Art. 142; GC IV, Art. 158) (GC II: Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950)). In combination with common Article 3 of the Geneva Conventions, these clauses lead to the application of the Martens clause in non-international armed conflicts. See, on the relevance for animals, A. Peters, above note 3, pp. 385–8.

171 A. Peters, above note 3, p. 388.

172 ICRC Environmental Guidelines, above note 31, Rule 16; ILC, Draft Principles, above note 36, draft principle 8*bis*.

173 See ICRC Environmental Guidelines, above note 31, and main text of this contribution.

174 These principles are mainly drawn from J. de Hemptinne, A. Peters and R. Kolb, above note 12.

First principle: Animals should be utilized for military purposes only in exceptional circumstances and always be provided with adequate care that meets their needs

Belligerents should not use animals to carry out functions which are directly or indirectly related to the conduct of hostilities, except when absolutely necessary for essential tasks that cannot be accomplished by human beings in specific circumstances; tasks such as searching, rescuing or transporting wounded soldiers. When using animals for these rather medical tasks, belligerents should provide them, to the greatest practicable extent, with satisfactory conditions of nutrition, safety and health. They should not employ animals outside these exceptional circumstances to perform actual military tasks, such as carrying able-bodied soldiers or weapons. Belligerents should, whenever feasible, return animals that have fallen into their hands to their homeland—except if they would be badly treated in their homeland—or retain these animals to perform the mentioned medical duties only.

Second principle: During warfare, animals should, whenever feasible, be treated as sentient beings experiencing pain, suffering and distress

This principle has a number of concrete implications in different contexts. First, whenever feasible in concrete situations, belligerents should consider capturing rather than “destroying” animals used for military purposes. Second, belligerents should never use means and methods of warfare which by their nature will cause superfluous injury to or unnecessary suffering of identifiable animals. Third, in the proportionality calculation, animals should be accorded a value in their own right and, as a consequence, their interests should no longer be automatically subordinated to those of humans. In other words, when evaluating collateral damage, belligerents should ensure, to the greatest practicable extent, that the consequences of an attack on animals are not only a factor of “minor weight” in the balancing exercise.

Third principle: The rules codified in Articles 35(3) and 55 of AP I which prohibit using means and methods of warfare that are intended, or may be excepted, to cause long-term, widespread and severe damage to the environment should also be applied in non-international armed conflicts and fully protect wildlife

The norms protecting the environment are currently limited to international armed conflicts and not unequivocally applicable in non-international armed conflicts. This limitation reflects the reluctance of States to accept heavy constraints on the way they conduct hostilities against rebels on their national territories. This restriction creates an unjustified legal lacuna.¹⁷⁵ IHL as it stands still assumes a

¹⁷⁵ J. de Hemptinne, above note 32.

world in which dividing lines between international and non-international armed conflicts are clear. In contrast, the safeguarding of the environment and in particular wildlife is grounded in theoretical and practical assumptions that differ from IHL. From a theoretical perspective, the environment is progressively being ascribed a universal normative value which is – strictly speaking – incompatible with the constraints imposed by the sovereignty of States.¹⁷⁶ Concomitantly, it is increasingly recognized that environmental concerns are no mere domestic affair of individual States. One legal consequence is that certain essential or rare natural resources, including endangered species, receive an absolute protection in all circumstances, wherever they are.¹⁷⁷ On a more pragmatic level, belligerents in non-international armed conflicts – be they governmental forces or armed groups – can damage natural resources like any other belligerents, and this has repercussions on wildlife. As also observed by the ICRC, “major damage to the environment rarely respects international frontiers”.¹⁷⁸ Even when such damage is caused within the boundaries of a non-international armed conflict, it usually affects the ecological balance on a wide scale.¹⁷⁹ This is especially true where protected areas, habitats and, more generally, interconnected ecosystems extend beyond the frontiers of the State embroiled in a non-international armed conflict – which is typical.¹⁸⁰ Therefore, the rules on the protection of the environment and, in particular wildlife, should be interpreted and applied whenever feasible in a manner that transcends the territorial and political boundaries on which IHL is historically grounded.¹⁸¹

Fourth principle: When captured by the enemy, animals should be treated to the greatest practicable extent as sentient beings experiencing pain, suffering and distress

Upon capture, belligerents should ensure, to the greatest practicable extent, that the interests and arguable dignity of animals which have been involved in hostilities be respected by providing conditions satisfying their needs of nutrition, safety and health. All forms of cruel treatment, torture or mutilation should be strictly prohibited. Whenever possible, animals should not be located in the vicinity of dangerous areas or installations, nor should they be placed in regions where essential resources, like water, are not available and cannot be provided. Whenever possible, they should not be “interned” close to war zones, where they run the risk of being killed or injured. Since captured animals will rarely represent a military threat to the security of the adversary, they should, as far as possible, be freed if they can survive by themselves, be returned to their

176 Markus Vordermayer, “The Extraterritorial Application of Multilateral Environmental Agreements”, *Harvard International Law Review*, Vol. 59, No. 1, 2018, p. 110.

177 *Ibid.*

178 ICRC Customary Law Study, above note 24, Rule 45.

179 J. de Hemptinne, above note 32.

180 *Ibid.*

181 *Ibid.*

hometown, or be detained with the soldiers accompanying them (if treated with due respect in these circumstances).

Fifth principle: Endangered species and species endemic to particular areas should benefit from the protection that is afforded to cultural property

The fairly narrow concept of cultural property in IHL should be expanded through an evolutionary interpretation in the light of other international law instruments relating to the protection of both cultural and natural heritage.¹⁸² This would allow the drawing of some wildlife categories, namely endangered species and species endemic to particular areas, under the umbrella of cultural property.¹⁸³

Sixth principle: The creation of protected zones to shelter animal populations should be encouraged in peacetime whenever necessary

Eco-centric protected zones for particularly vulnerable areas or environmental hotspots, in which endangered species are often located, should be created in peacetime.¹⁸⁴ Moreover, a network of such zones should be established in a systematic manner through reliance on other pre-existing multilateral conventions, such as the World Heritage Convention and the Convention on Biological Diversity.¹⁸⁵ Finally, decisions to establish such zones should take into account the possible negative consequences for animals, such as attracting persons seeking refuge, thereby putting the well-being of animals at risk.

These six principles may not yet be firmly established in IHL as it stands but they can be extrapolated in a mode of legitimate interpretation of the relevant treaties and customary law. The key motivation and justification for the progressive interpretation is the need to pay full regard to welfare requirements of animals stemming from their nature as sentient beings affected by war.¹⁸⁶ Today, respect for animal sentience and animal welfare is not a social value that would be alien to the corpus of IHL but a value that already forms part of the principles of humanity and of public conscience that lie at the heart of the contemporary laws of war.¹⁸⁷ Based on this insight, the idea is to perform a kind of animal mainstreaming in the reading and application of the relevant rules which is in line with the canons of interpretation, relying on the open wording, the object and purpose of the rules, and their normative context.¹⁸⁸ These principles should be acknowledged and disseminated in order to guarantee a

182 S. Krähenmann, above note 89.

183 *Ibid.*

184 M. Gillett, above note 116.

185 *Ibid.*

186 For the legal obligation to “pay full regard” to animal welfare requirements, see Treaty on the Functioning of the European Union, Art. 13.

187 See AP I, Art. 1(2).

188 See VCLT, above note 167, Art. 31.

minimum level of protection for vulnerable animals in international and non-international armed conflicts.

A convention granting fundamental rights to animals

The progressive animal-friendly interpretation of the relevant IHL rules that takes into account the animals' nature as sentient being (as opposed to inanimate objects), as suggested above, is already dynamic and slightly pushes the law beyond its current state. Moving further, an additional level of protection could be envisaged: animals could be treated as bearers of rights adapted to their needs. It is a legal fact that human rights (and the idea of rights more generally) have progressively led to an attribution of certain rights to human beings in armed conflicts and have contributed to the "individualization" of IHL.¹⁸⁹ In a similar manner, the nascent case law on animal rights ("subjective" rights as opposed to "objective" welfare and protective standards) in peace times could play a role.¹⁹⁰ This case law is still very thin and limited to a few countries in Latin America and Asia, and has so far not led to legislative reform. It may nevertheless inspire a corresponding form of "animalization" of IHL which could significantly improve the legal situation of animals during warfare, both symbolically and practically.¹⁹¹ On a symbolic level, animal rights would emancipate animals from the guardianship of humans and affirm their intrinsic value grounded on their proper interests, such as the interest in not being subjected to unnecessary suffering.¹⁹² On a practical level, animal rights would change the dynamic of trade-offs that belligerents are forced to undertake under IHL when they cannot fully reach competing goals—for instance, satisfying their military imperatives while at the same time respecting humanitarian concerns, including those relating to the welfare of animals. If animals were treated as distinct legal persons possessing rights (as "*titulaires*"), and not just as beneficiaries of legal standards of protection, the burden of legal explanation and justification would shift, and the trade-off would have to change significantly. Without rights to life and liberty, animals may be captured, detained and killed if no special rule prohibits this. In a rights framework, the legal analysis must take the rights as its starting point. The rights mark a *prima facie* protection. The protection by rights is not

189 Anne Peters, "The Direct Rights of Individuals in the International Law of Armed Conflict", in Dapo Akande, David Rodin and Jennifer Welsh (eds), *The Individualisation of War*, Oxford University Press, Oxford, 2022.

190 Supreme Court of India, *Animal Welfare Board of India v. Nagaraja and others*, Civil appeal no. 5387, 7 May 2014; Tercer Juzgado de Garantías Mendoza (Argentina), *Chimpanzee "Cecilia"* Case no. P-72.254/15, 3 November 2016; Colombian Supreme Court of Justice, *Chucho Case* AHC4806-2017, Radicación n° 17001-22-13-000-2017-00468-02, 26 July 2017 (overturned by Constitutional Court of Columbia, *Chucho Case* T-6.480.577 – Sentencia SU-016/20, 23 January 2020); Islamabad High Court, *Islamabad Wildlife Management Board (through its Chairman) v. Metropolitan Corporation Islamabad (through its Mayor & 4 others)*, W.P. no. 1155/2019, 21 May 2020; Constitutional Court of Ecuador, *Mona Estrellita*, Sentencia No. 253-20-JH/22, 27 January 2022.

191 A. Peters, above note 3, pp. 440–52.

192 *Ibid.*, p. 445.

absolute. However, most human behaviour involving animals (also in war) would then constitute interference with those rights. This interference must be specifically explained and justified in certain procedures. When the justification fails, the right is violated. The key of the justificatory procedure is balancing. The rights-based balancing is not free-floating but well-structured.

In other words,

rights confer a legal position which is elevated above the ordinary balancing of conflicting goods. When animals only benefit from protective rules, their welfare is but one interest among others. Balancing the animals' interests against human interests typically ends up prioritising the human interests, even trivial ones. Arguably, this type of balancing is structurally biased against animals. In contrast, animal rights would allow a fair balancing in which the proper value of fundamental interests (such as the interest to live) could be integrated.¹⁹³

When applying certain IHL rules, for example on the conduct of hostilities or on detention, when attacking or apprehending animals involved in war, belligerents would be forced to specifically justify restricting animals' substantive rights to life or to liberty and would have to take due account of the substantive importance ("weight") of these rights.

Such a shift of the argumentative burden and of the "weights" on the balance is already highly controversial in peace times. When States are faced with significant challenges in war, curtailing their powers to increase the protection of non-human beings by granting them concrete rights might appear illusory. But, ultimately, any progress in this field will depend on the nature of these rights. Among potential animal rights, one right deserves particular attention: the right not to be used to carry out military functions, except when absolutely necessary for essential tasks that cannot be accomplished by humans, such as tracing and recovering wounded soldiers or civilians.¹⁹⁴ Indeed, it does not seem unrealistic that a consensus to formally recognize such an animal right not to be used as a means of warfare could soon be reached. Only a few States still weaponize animals, and the public is generally strongly opposed to this practice. Moreover, technological progress, such as the use of drones, has reduced the need to employ animals as weapons.

This evolution could be crucial for the fate of animals in war. Indeed, it would constitute a first concrete step towards formally recognizing the right to life of animals during warfare. Banning, once and for all, the usage of animals as weapons of war could also trigger a wider reflection on the granting of other rights to animals which are at the heart of their dignity, such as the right to receive medical care when wounded or sick, the right not to be submitted to any

193 Anne Peters, "Toward International Animal Rights", in A. Peters (ed.), *Studies in Global Animal Law*, above note 16, p. 111; Anne Peters, "Animal Rights", in Christina Binder, Manfred Nowak, Jane A. Hofbauer and Philipp Janig (eds), *Elgar Encyclopedia of Human Rights*, Edward Elgar, Cheltenham, 2022.

194 See in favour of an absolute ban on using animals in war, A. Peters, above note 3, p. 396.

cruel and degrading treatment, the right to be preserved from military attacks of enemy forces, and the right to be provided with satisfactory conditions regarding nutrition, safety and health.

Outlook

IHL, the law of war, is, as Hersch Lauterpacht famously wrote, “at the vanishing point of international law”.¹⁹⁵ The same applies – *mutatis mutandis* – to animal law. Bringing both together, as we suggest in this paper, seems to cumulate the difficulties to the extreme. However, we submit that we can and should pursue a “realistic utopia” for animals globally, proceeding “from the international political world as we see it” and extending “what are ordinarily thought to be the limits of practicable political possibility”.¹⁹⁶ Citing Lauterpacht again, we affirm that “the lawyer must do his duty regardless of dialectical doubts – though with a feeling of humility”,¹⁹⁷ and based not only on his and her bounded rationality but also – and especially when it comes to the laws of war – on *feelings* of compassion, outrage about injustice, and solidarity that in turn inform our moral judgment¹⁹⁸ – feelings and morality we share with our fellow beings, the non-human animals.¹⁹⁹

195 Hersch Lauterpacht, “The Problem of the Revision of the Law of War”, *British Yearbook of International Law*, Vol. 29, 1952, p. 382.

196 John Rawls, *The Law of Peoples*, Harvard University Press, Cambridge, MA, 1999, § 1, quotes at pp. 83 and 11. See also Antonio Cassese, *Realizing Utopia*, Oxford University Press, Oxford, 2012.

197 H. Lauterpacht, above note 195, p. 381.

198 Susan A. Bandes, Jody Lynee Madeira, Kathryn D. Temple and Emily Kidd White (eds), *The Edward Elgar Research Handbook on Law and Emotion*, Edward Elgar, Cheltenham, 2021; Nele Verlinden, “To Feel or Not to Feel: Emotions and International Humanitarian Law”, in Mats Deland, Mark Klamberg and Pål Wrange (eds), *International Humanitarian Law and Justice: Historical and Sociological Perspectives*, Routledge, London, 2018.

199 Frans B. M. de Waal, *Good Natured: The Origins of Right and Wrong in Humans and Other Animals*, Harvard University Press, Cambridge, MA, 1996; Mark Bekoff and Jessica Pierce, *Wild Justice: The Moral Lives of Animals*, Chicago University Press, Chicago, IL, 2009.