

Animals in Wartime

A Legal Research Agenda

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1 CONTEXT AND PURPOSES OF THE RESEARCH

Wildlife populations remain the unknown victims of armed conflicts throughout the world.¹ Although they rarely disappear completely, these populations usually decline, often significantly, during warfare.² Over the last fifty years, a number of species have been vanishing at a particularly rapid rate in this context, with disastrous repercussions on the food chain and the ecological balance of fragile ecosystems and protected areas such as national parks.³ This is not surprising since 80 per cent of armed conflicts occurring during this period have taken place in countries such as Afghanistan, Burundi, the Central African Republic, Colombia, the Democratic Republic of the Congo, Iraq, Kenya, Mozambique, Nepal, Rwanda, Uganda or Vietnam, all of which contain areas of high global species diversity,⁴ where the maintenance of wildlife habitats is precarious. A few figures drawn by the International Committee of the Red Cross (ICRC) from the situation in Mozambique illustrate this tendency. During the fifteen-year civil war in this country, '[t]he Gorongosa National Park lost more than 90% of its animals. The African buffalo went down from 14,000 to 100 individuals, and the hippo population from 3,500 to 100. The elephant population declined from 2,000 to 200.'⁵ Moreover, belligerents have taken advantage of the chaos raised by war in order to poach protected species and to engage in the trafficking of expensive animal products. While generating billions of dollars each year – which are in part reinvested into warfare and the acquisition of weapons – such poaching and trafficking activities allow armed groups to grow and reinforce their authority over local populations and

¹ See ICRC, 'Natural Environment: Neglected Victim of Armed Conflict' (5 June 2019), available at <https://bit.ly/3HDUcWk>, accessed 22 February 2022.

² See, for example, Joshua H. Daskin and Robert M. Pringle, 'Warfare and Wildlife Declines in Africa's Protected Areas', *Nature* 553 (2018), 328–32. These authors emphasise that 'war can also relax pressure on wildlife when people avoid combat zones or are tactically disarmed, or when extractive industries decline' (ibid., at 328).

³ Thor Hanson et al., 'Warfare in Biodiversity Hotspots', *Conservation Biology* 23 (2009), 578–87, at 578.

⁴ Ibid.

⁵ ICRC, 'Natural Environment' (n. 1).

disputed territories.⁶ Sometimes government forces are themselves responsible for poaching and trafficking, complicating the issue further.⁷ All this fuels a cycle of violence and ultimately threatens peace and security in the concerned areas.⁸

Livestock and companion animals, which are highly dependent on human care, are also direct victims of hostilities. They are regularly confined and left to starve or let loose without the ability to feed themselves.⁹ Often they are pre-emptively eliminated by their owners or wantonly killed by the enemy 'in order to deprive populations presumed to be loyal to the opposing party of their livelihood'.¹⁰ For instance, during the Iraqi occupation of Kuwait in the early 1990s, more than 80 per cent of Kuwaiti livestock (cattle, sheep, and goats) died.¹¹ Zoo animals are also particularly vulnerable; they are slaughtered, looted, bombed, or starved on a massive scale.¹²

On a different front, certain armed forces have trained, and continue to train, some animals – principally marine mammals such as bottlenose dolphins and California sea lions – to perform military tasks like ship and harbour protection or mine detection and clearance.¹³ They also use animals as tools in military research and experiments to develop sophisticated weapons, to improve surgical techniques employed for the treatment of wounded soldiers, or to test resistance to physical assaults and adverse warfare conditions.¹⁴ Millions of horses, mules, donkeys, camels, dogs, elephants, oxen, and birds serve in various other ways – either as means of medical transport, in search and rescue operations, or as communication and logistics tools – thereby becoming particularly vulnerable targets.¹⁵ Companion animals and mascots are also valued for their contribution in lifting the morale of the troops, and in so doing become exposed to the dangers of war.

⁶ See James McDonald, 'How War Affects Wildlife', *JSTOR Daily* (23 January 2018), available at <https://daily.jstor.org/how-war-affects-wildlife/>, accessed 22 February 2022.

⁷ Ibid.

⁸ Anne Peters, 'Elephant Poaching and Ivory Trafficking as a Threat to the Peace', *American Journal of International Law Unbound* 108 (2014), 162–5.

⁹ Anne Peters, 'Animals in International Law', *Collected Courses of The Hague Academy of International Law: Recueil des Cours* Vol. 410 (Leiden: Brill 2020), 95–544, at 339.

¹⁰ Ibid.

¹¹ John Loretz, 'The Animal Victims of the Gulf War', *Physicians for Social Responsibility Quarterly* 1 (1991), 221–5, at 224.

¹² Peters, 'Animals' (n. 9), 339, with references.

¹³ Terrill Ceiridwen, 'Romancing the Bomb: Marine Animals in Naval Strategic Defense', *Organization & Environment* 14 (2001), 105–13. See also John M. Kistler, *Animals in the Military: From Hannibal's Elephants to the Dolphins of the US Navy* (Santa Barbara: ABC-CLIO 2011), 311–26.

¹⁴ Ian Mumaghan, 'Animal Tests in Military Defence', *About Animal Testing* (14 November 2017), available at www.aboutanimaltesting.co.uk/animal-tests-military-defence.html, accessed 22 February 2022. See Bílková, Chapter 17, 'Military Experimentation', in this volume.

¹⁵ See generally Jilly Cooper, *Animals in War* (London: Corgi 2000); Rainer Pöppinghege (ed.), *Tiere im Krieg: Von der Antike bis zur Gegenwart* (Leiden: Brill 2009); Eric Baratay, *Bêtes de tranchées: Des vécus oubliés* (Paris: CNRS éditions 2013); Ryan Hediger (ed.), *Animals and War: Studies of Europe and North America* (Leiden: Brill 2013). See de Hemptinne, Chapter 11, 'Medical Transport, Search and Rescue', in this volume.

In view of the foregoing, shielding animals and the ecosystems in which they live from the direct and indirect effects of warfare should be a matter of great concern. However, international humanitarian law (IHL), being deeply anthropocentric, largely ignores this preoccupation. Such silence raises significant questions that can no longer be left unanswered. For instance, does IHL's focus on humans mean that animals are not legally protected in armed conflicts? Or should they be treated as objects¹⁶ and thus governed by the principles of distinction,¹⁷ proportionality,¹⁸ and precaution¹⁹ that commanders and soldiers alike must respect when launching on-the-ground attacks against military objectives? To which animals should these principles apply? Do they apply differently to living creatures rather than inanimate objects? Could animals be treated like those specially protected objects that already receive additional protection by IHL norms, such as means of medical transport and those used in search and rescue operations,²⁰ or as objects that are indispensable for the survival of civilian populations?²¹ Or could animals even be regarded as a part of civilian populations? And, if so, how do these legal regimes reinforce their protection? When used for military purposes, could animals be treated as combatants and legitimately targeted by adversaries? If yes, when and under what conditions and principles? How could the prohibition on unnecessary suffering or the Martens clause play out? In the case of unjustified attacks against protected species, what sanctions could be imposed? Are these sanctions enough? Should the poaching and trafficking of endangered species during armed conflicts be qualified as war crimes or as crimes against humanity? In the last scenario, would the ICC have jurisdiction over these crimes? And how could the cooperation of states prosecuting and trying the authors of such crimes be improved?

More fundamentally, the protection of animals must be examined in light of the fact that the dividing line between humans and animals has been significantly eroded on biological and ethical grounds over the last decades. The next logical question is thus how to determine whether both humans and animals could be protected in a similar manner against superfluous injury or unnecessary suffering.²² Consequently, should domestic laws that prohibit and punish cruelty to animals influence their treatment under IHL? Would conferring some rights and/or legal personality to animals – as opposed to merely imposing duties upon belligerents – strengthen their protection in the context of IHL?²³ In that case, which animals

¹⁶ See, for example, Art. 52(3) of AP I.

¹⁷ See, for example, Art. 52 of AP I.

¹⁸ See, for example, Art. 51(5)(b) and 57(2)(a)(iii) of AP I.

¹⁹ Art. 57 of AP I.

²⁰ See, for example, Art. 8(h) of AP I; Art. 11 of AP II.

²¹ Art. 54 of AP I; Art. 14 of AP II.

²² Art. 35(2) of AP I. For an extensive analysis of the application of such a prohibition to animals, see Marco Roscini, 'Animals and the Law of Armed Conflict', *Israel Yearbook on Human Rights* 47 (2017), 35–67, at 51–6.

²³ Anne Peters, 'Rights of Human and Nonhuman Animals: Complementing the Universal Declaration of Human Rights', *American Journal of International Law Unbound* 111 (2018), 255–360, at 356.

deserve legal personality and/or rights and what types of rights should be granted to them?

Furthermore, animals seem to be collectively protected by the general legal framework on the preservation of the environment against ‘widespread, long-term and severe’ damages caused by war.²⁴ But how should this regime concretely apply to animals? Do these meagre rules offer sufficient protection, especially in non-international armed conflicts? How do the several existing international treaties that protect the environment, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Convention on the Conservation of Migratory Species of Wild Animals,²⁵ and the Convention on Biological Diversity²⁶ apply during hostilities? Are they compatible with the core legal norms governing armed conflicts, namely the GCs and their APs? Do these conventions apply extraterritorially, for instance, when states conduct military operations abroad? Do they impose environmental legal obligations upon non-state armed groups? In so doing, under what conditions? Should certain areas of high biodiversity be spared from the conduct of hostilities as part of the cultural heritage of humanity and thus be protected by the World Heritage Convention?

Despite (or because of) the fundamental, operational, and theoretical challenges that the protection of animals raises, such questions have never been thoroughly studied.²⁷ Most of the work in this area consists of general publications related to the protection of the environment in armed conflict²⁸ – which sometimes indirectly address certain issues related to the protection of animals – and specific studies on the safeguarding of endangered species. The current state of research in this field is in sharp contrast to the increasing level of legal analysis and domestic litigation actively being conducted concerning the status and protection of animals in peacetime. As a result, a clear lacuna exists in the academic literature.

To fill this gap, our book aims at achieving the following four goals. First, it seeks to create an inventory of the international legal framework available for the

²⁴ Art. 35(3) and 55(1) of AP I.

²⁵ Convention on the Conservation of Migratory Species of 23 June 1979, 1651 UNTS 333.

²⁶ Convention on Biological Diversity of 5 June 1992, 1760 UNTS 79.

²⁷ Among the rare publications in this domain, see, for example, Karsten Nowrot, ‘Animals at War: The Status of “Animal Soldiers” under International Humanitarian Law’, *Historical Social Research* 40 (2015), 128–50; Roscini, ‘Animals’ (n. 22), 35–67; Jérôme de Hemptinne, ‘Challenges Regarding the Protection of Animals During Warfare’, in Anne Peters (ed.), *Studies in Global Animal Law* (Heidelberg: Springer 2020), 173–83.

²⁸ See, for example, Michael Schmitt, ‘Green War: An Assessment of the Environmental Law of Armed Conflict’, *Yale Law Journal* 22 (1997), 1–110; Yoram Dinstein, ‘Protection of the Environment in International Armed Conflict’, *Max Planck Yearbook of United Nations Law* 5 (2001), 523–49; UNEP, *Protecting the Environment during Armed Conflict: An Inventory and Analysis of International Law* (Geneva: UNEP 2009); ICRC, *Strengthening Legal Protection for Victims of Armed Conflict*, 31st International Conference of the Red Cross and Red Crescent (Geneva: ICRC 2011). See also the ICRC Environmental Guidelines.

protection of animals in armed conflict. Second, our research examines to what extent this legal regime is adequate in specific situations (in occupied territories, protected zones, sea warfare and disaster situations) or in specific practices (when animals are used as tools in medical experiments). Third, the book evaluates to what extent the enforcement of the current legal framework adequately protects animals in terms of the repression of illegal conduct, reparation and rehabilitation. A special emphasis is placed on the regime established for wildlife trafficking and on the enforcement powers of the UN Security Council in this regard. Fourth, the research outlines several measures aiming at increasing the protection of animals during warfare and the enforcement available in this situation.

2 MAIN CHALLENGES

Delicate cross-cutting challenges need to be briefly addressed at the outset. They revolve around the following issues: the silence of IHL on the protection of animals (Section 2.1), the difficulty in identifying animals that are protected in times of war (Section 2.2), the inaptitude of IHL to adequately protect animals (Section 2.3), and the ambivalent nature of the violence inflicted upon animals in wartime (Section 2.4).

2.1 *The Silence of International Humanitarian Law*

Despite the fact that animals are among those affected by armed conflicts, IHL does not clearly and explicitly protect them. As will be discussed in Parts II and III of the book, animals are only indirectly addressed as objects, specially protected objects, weapons of war, means of medical transport and rescue or as part of the environment. A historical reason for IHL's silence on the welfare of animals is that the conventions regulating armed conflicts were adopted at a time when legal entitlements for animals did not attract significant attention. Enacted in response to World War II and during the period of decolonisation, IHL has been essentially geared towards the safeguarding of human beings. The conventions continue to represent an overwhelmingly anthropocentric body of law that has 'a strong utilitarian flavour'.²⁹ Even the few provisions restricting attacks against the environment were designed with a view to preserving the interests of human beings instead of the environment per se.³⁰ The Christian roots of IHL might also explain this anthropocentric attitude and the difficulty that this body of law has in conceptualising the protection of the environment and animals independently of human interests.³¹ Against this background, three related objections might be voiced against our proposal to improve the legal protection of animals by means of IHL. The first

²⁹ Schmitt, 'Green War' (n. 28), 6.

³⁰ Ibid., 69.

³¹ See the references in n. 63.

fundamental question is why lawmakers and law-appliers should at all be concerned about the silence of IHL on animals? Why *should* IHL deal with this issue? 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? Second, it is often argued that alleviating the extreme suffering of human beings during hostilities would be impaired should animal protection be put at the forefront. Devoting time, energy and money to protect animals would therefore prevent these resources being used for worthier, human-focused causes.³² A third, connected criticism is often raised: promoting animal welfare or even rights during armed conflicts would devalue the rights of human beings in these circumstances.³³

Let us briefly respond to these three objections.³⁴ First, we wish to point out that the severe shortcomings of the legal regimes governing food and agriculture should not be allowed to stymie a legal evolution in other fields. International humanitarian law can no longer ignore the evolution that the status and protection of animals has undergone in some jurisdictions around the world.³⁵ In the same way that the rise of human rights and increased awareness of environmental challenges after World War II have influenced and shaped the development of IHL, the increasing concern for animal welfare during the last decades should also progressively impose limits on belligerents' actions. This should apply even more so when it is considered that wars have disastrous effects on wildlife and, in particular, on protected species whose numbers significantly decrease because of hostilities.

Second, and contrary to what is often claimed, safeguarding animals does not necessarily interfere with, or run contrary to, the protection of human beings; the two often run in parallel without impacting negatively on each other. In any case, it will be shown that certain IHL principles – such as the principle of proportionality – are flexible enough to guarantee that human interests prevail over animal interests if one is forced to choose between the two. In other words, when human concerns conflict with those of animals, these principles allow human matters to take precedence.

Third, care for animals in no way inevitably downgrades the rights of humans.³⁶ On the contrary, promoting animal welfare may increase respect

³² This argument is recalled in Anne Peters, 'Liberté, Egalité, Animalité: Human-Animal Comparisons in Law', *Transnational Environmental Law* 5 (2016), 25–53, at 35.

³³ Ibid.

³⁴ This response builds on de Hemptinne, 'Challenges' (n. 27), 175–6.

³⁵ See Global Animal Law Database, available at www.globalanimallaw.org/database/national/index.html, accessed 22 February 2022.

³⁶ Peters, 'Liberté, Egalité, Animalité' (n. 32), 36.

for all life.³⁷ Indeed, in practice, leaders of animal protection movements have been typically active in combating other forms of social injustice (such as child abuse and violence against women).³⁸ An alignment (as opposed to a competition) of concerns is also possible in attempts to denounce injustices that occur in war zones.

2.2 *The Identification of Protected Animals*

Which animals should be cared for in times of war? In principle, all living creatures that are not human beings should receive some sort of protection under IHL. However, the level, type and nature of the protection these creatures receive vary widely from one animal to another, depending on a multitude of factors. These factors include the roles animals play during warfare (for example as weapons of war, means of medical transportation and rescue, or as objects of medical experimentation); the circumstances in which they are placed (for example when they are targeted or detained); the areas in which they live (for example in invaded or occupied territories, land or sea, protected or unprotected zones); or the animals' specific nature (for example whether they are endangered or considered vermin). Some safeguards – such as those protecting the environment as a whole – apply generally to the entire wildlife population. In light of this variety of contexts, our introductory chapter will not provide a general legal definition of animal that could apply in each and every situation in war. This issue is left to the individual authors, as such definitions depend on the specific legal question and protective regime examined.

2.3 *The Inaptitude of International Humanitarian Law to Protect Animals*

International humanitarian law neither explicitly addresses animals nor is it particularly well equipped to protect their interests. Indeed, the Geneva Conventions (GCs) and their additional protocols (APs) presuppose temporal and spatial boundaries between war and peace that are not easy to draw when the protection of animals is at stake. These legal instruments assume a world in which dividing lines are clear. In contrast, effective safeguards for animals would need to follow a different logic. Wildlife is usually not confined to the territories of the belligerents and its destruction generally affects the ecological balance on a wider scale. Thus, measures to ensure their protection should potentially extend beyond the territorial borders of the parties to the conflict. Furthermore, the negative impact of war on animals does not necessarily stop with the end of active hostilities. However, IHL conventions do not contain reasonable standards for ensuring long-term measures in the interest of animals.

Moreover, most of the provisions regulating the protection of individuals and the conduct of hostilities are aimed at achieving a compromise between two diverging or

³⁷ Gary Francione, *Introduction to Animal Rights: Your Child or the Dog?* (Philadelphia: Temple University Press 2000), 174.

³⁸ Peters, 'Liberté, Egalité, Animalité' (n. 32), 12.

even antagonist interests, considerations of military necessity on the one hand and humanitarian preoccupations on the other. This balancing exercise is particularly complex when animals are at stake. Indeed, the status of animals varies widely from one culture to another (also within belligerent factions) and inevitably changes over time. A proper assessment requires the kind of environmental knowledge that even well-equipped state forces often do not possess, given that the damage inflicted on animals tends to manifest itself in the long run and is often the indirect result of the destruction of certain habitats.³⁹

Furthermore, IHL's protective regime cannot be easily transposed to animals. For instance, the rules governing the protection of objects in the GCs and APs⁴⁰ are mainly designed for inanimate objects. Even if this regime were extended to animals, assimilating them with pure objects is far from ideal in many respects; it does not properly take into account that animals are sentient beings that experience pain and distress, and it does not accommodate the many different functions that animals can serve during warfare and the rights and duties that such functions normally entail. In this context, applying the rules designed for the protection of individual persons remains a valid option. But this regime is also ill-structured for duly safeguarding the interests of non-human living creatures. The various categories of 'protected persons' – combatants *hors de combat* and prisoners of war on the one side and civilians on the other – cannot, as such, be opened up so as to comprise animals. For reasons that will be further explored throughout the book, animals do not easily fit into this rigid system.⁴¹ As pointed out by Marco Roscini, 'if they were considered combatants, animals would have not only the rights, but also the obligations associated with this status'.⁴² Clearly animals are not able to respect these obligations autonomously, which, among other things, require the capacity to identify persons who directly participate in hostilities – and are therefore targetable – or to make proportionality calculations.⁴³ Moreover, the definition of 'civilians' mentioned in Article 50(1) of AP I only refers to 'persons'.⁴⁴ This term is normally, though not compellingly, understood to comprise only humans and thereby excludes other living creatures.

Lastly, it should be noted that the special rules on the protection of the environment per Articles 35(3) and 55(1) of AP I – which encompasses wildlife⁴⁵ – have no parallel in the written rules governing non-international armed conflicts, be they common Article 3 of the four GCs or AP II. Moreover, this protection is subject to particularly strict requirements; the damage forbidden under IHL must be cumulatively 'widespread, long-term and severe'. Reflecting the reluctance of governments

³⁹ de Hemptinne, 'Challenges' (n. 27), 179. For an extensive analysis of the concept of proportionality in the context of the protection of the environment, see Schmitt, 'Green War' (n. 28), 55–61.

⁴⁰ See, for example, Art. 52(2), 51(5)(b), and 57 of AP I.

⁴¹ See de Hemptinne, Kebebew and Niyo, Chapter 10, 'Combatants and Prisoners of War?', in this volume.

⁴² Roscini, 'Animals' (n. 22), 44–5.

⁴³ Nowrot, 'Animals at War' (n. 27), 140.

⁴⁴ Roscini, 'Animals' (n. 22), 45.

⁴⁵ *Ibid.*, 61.

to accept tight constraints on their military conduct against rebel groups, the narrow scope of the rules creates a significant gap in protection. Nonetheless, special safeguards offered by IHL to the environment would be essential for a comprehensive protection of animals and the ecosystem in which they live.

2.4 *The Ambivalent Nature of the Violence on Animals*

In peacetime, while acts of violence against human beings are in principle forbidden, the slaughter of animals – in conformity with certain methods and procedures – is widely accepted and practised throughout the world. It might therefore appear paradoxical that in situations of armed conflict, where acts of violence against certain individuals (mainly combatants and civilians who directly participate in the hostilities) are admitted and expected, acts of violence against animals should be strictly constrained.⁴⁶ This apparent ‘paradox of violence’ must be evaluated in light of the following factors which all point to similarities (rather than to a contrast) in the legal regimes of peace and of war for animals. Due to the increased human sensibility about animal welfare, acts of cruelty against animals (as opposed to ‘normal’ killing) are now increasingly prohibited and sanctioned in peacetime.⁴⁷ In other words, the peacetime regime knows lawful and unlawful violence against animals. The same could be said for wartimes: acts of violence against animals during warfare can be lawfully committed when animals become military targets or when the harm inflicted on them constitutes a proportionate collateral damage. A modified wartime regime on animals would form a parallel dual regime with a distinction between lawful and unlawful killing.

The situations of peace and of war are similar also with regard to the forms of violence against animals. Only superficially, the violence allowed in peacetime is of a different nature than violence authorised during armed conflicts. The former aims at satisfying specific economic needs – for instance, food production, or medical, pharmaceutical, and chemical testing. In contrast, the latter is in principle dictated by military considerations, whereby animals are targeted for military purposes. Nevertheless, this delineation between different types of violence is not that straightforward; the slaughtering of animals for human uses also occurs in wartime, while certain forms of violence, which are usually committed in the chaotic circumstances of war (such as poaching and the trafficking of species) can also take place during peacetime.⁴⁸ More fundamentally, as Saskia Stucki has demonstrated, the regulation of both forms of violence (by IHL on the one hand and by the laws promoting animal welfare on the other) share the common objective to ‘humanise’ a violent situation.⁴⁹ While the former aims at reducing the

⁴⁶ de Hemptinne, ‘Challenges’ (n. 27), 175–6.

⁴⁷ See above n. 35.

⁴⁸ de Hemptinne, ‘Challenges’ (n. 27), 175–6.

⁴⁹ Saskia Stucki, ‘(Certified) Human Violence? Animal Welfare Labels, The Ambivalence of Humanizing the Inhumane, and What International Humanitarian Law Has to Do with It’, in Anne Peters (ed.), *Studies in Global Animal Law* (n. 27), 121–31, at 127.

suffering of humans caused by armed conflicts, the latter is designed to minimise the suffering of animals resulting from economic exploitation; and both bodies of law start from the same premise: putting an end to these types of violence by completely prohibiting them would be unrealistic since they are both part of the human condition.⁵⁰ All mentioned resemblances should facilitate extending the scope of IHL also to (non-human) animals. And if we want to avoid that rules seeking to 'humanise' innately inhumane situations become purely cynical, we should do the utmost to design them in a way that facilitates their application and enforcement.

3 NORMATIVE BACKGROUND

The legal approaches towards animals fall into three paradigms: animal species conservation regimes (Section 3.1), animal welfare norms (Section 3.2), and animal rights (Section 3.3). Current 'hard' international treaties mainly apply the first paradigm, as they are almost exclusively concerned with the conservation of a small subset of animal species.⁵¹ In contrast, animal welfare – defined as 'the physical and mental state of an animal in relation to the conditions in which it lives and dies'⁵² – pertains to the individual animal. Thus far, animal welfare is directly addressed only in 'soft' international law, and only very rarely in an ancillary fashion in conservation regimes.⁵³ Animal rights are the legal entitlements of animals protecting their fundamental interests against encroachment, as opposed to merely benefitting animals in their quality as objects of protective rules. As a groundwork for the detailed doctrinal work done in the following chapters, the three paradigms will now be briefly introduced in turn.

3.1 *Animal Species Conservation*

The conservation of species seeks 'the safeguarding of ecological processes and genetic diversity besides management of natural resources in order to ensure their maintenance by sustainable utilization'.⁵⁴ The point of departure for all wildlife conservation treaties

⁵⁰ Compare Theodor Meron, 'The Humanization of Humanitarian Law', *American Journal of International Law* 94 (2000), 239–78, at 240.

⁵¹ 'Conservation' is the most frequent term in the international treaties, used interchangeably with 'preservation' and 'protection'. The main reference work is Michael Bowman, Peter Davies, and Catherine Redgwell, *Lyster's International Wildlife Law* (2nd ed., Cambridge: Cambridge University Press 2010). For more on international conservation law, see Rosalind Reeve, *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (London: Earthscan 2002); Ed Couzens, *Whales and Elephants in International Conservation Law and Politics: A Comparative Study* (London: Routledge 2014).

⁵² Organisation Internationale des Epizooties (OIE) terrestrial code, Sec. 7 'Animal Welfare' (29th ed., 2021), chapter 7.1. 'Introduction to the Recommendations for Animal Welfare', Art. 7.1.1. 'General Considerations'. The meaning and measurement of animal welfare is controversial and depends, inter alia, on the disciplinary approach.

⁵³ Peters, 'Animals' (n. 9), 503–5.

⁵⁴ Pieter van Heijnsbergen, *International Legal Protection of Wild Fauna and Flora* (Amsterdam: IOS Press 1997), 52.

(and indeed their rationale) is the value of wildlife *for humans* ‘from aesthetic, scientific, cultural, recreational and economic points of view’, as the preamble of CITES puts it. Moreover, from an international law (and sovereignty-oriented) perspective, terrestrial wild animals are natural resources.⁵⁵ The qualification of ‘resource’ manifests the purely economic perspective espoused by international lawmakers and law-appliers. As natural resources, wild animals form part of a state’s ‘permanent sovereignty over natural resources’.⁵⁶ Wildlife also falls under a people’s right to self-determination over natural resources.⁵⁷ This status as a resource under the sovereignty of the territorial or range state and for the disposal of its people is only mitigated – but not eliminated – for those few species covered by conservation treaties. Even under the purview of these regimes, the tension between conservation and human interests constantly comes up in the regular meetings or conferences of the parties to these treaties.

In this context, scholars have suggested classifying wild animals as a ‘common concern’,⁵⁸ a ‘global resource’,⁵⁹ or a ‘global public good’.⁶⁰ These concepts are valuable as answers to problems of global distributive justice and intergenerational fairness; however, the aspiration of justice is still limited to humans and not directed toward the animals themselves. The principal legal consequence of all these categories remains identical: states are (at most) obliged to manage the animals (as

⁵⁵ See Principle 2 of the Declaration of the UN Conference on the Human Environment (Stockholm) of 16 June 1972, 11 ILM 1416. According to this principle, ‘[t]he natural resources of the earth, including the air, water, land, flora, and *fauna* and especially representative samples of natural ecosystems, must be safeguarded *for the benefit of present and future generations* through careful planning or management, as appropriate’ (emphases added). In treaty law, see Art. XX(g) of the General Agreement on Tariffs and Trade (GATT), 55 UNTS 194. It states that ‘nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: ... (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.’ This provision has been interpreted by the WTO appellate body to cover live animals (WTO AB, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body of 12 October 1998, WT/DS58/AB/R, para. 131). See also Art. V(1) of the Revised African Convention on the Conservation of Nature and Natural Resources of 11 July 2003, 1001 UNTS 3. It states that: “Natural Resources” means renewable resources ... including soil, water, flora, and fauna.’ See also Art. 77(4) of the UNCLOS: according to this provision, ‘[t]he natural resources referred to in this Part consist of ... *living organisms belonging to sedentary species*, that is to say, organisms which, at the harvestable stage, are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil’ (emphasis added).

⁵⁶ UN General Assembly Resolution 1803 (XVII) of 14 December 1962, ‘Permanent Sovereignty over Natural Resources’. This principle has the status of customary law. See ICJ, *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, judgment of 19 December 2005, ICJ Reports 2005, para. 244.

⁵⁷ Common Art. 1(2) of the International Covenant on Civil and Political Rights of 19 December 1966, 99 UNTS 171; Art. 21 of the African Charter on Human and Peoples’ Rights of 27 June 1981, 1520 UNTS 217.

⁵⁸ Kemal Baslar, *The Concept of the Common Heritage of Mankind in International Law* (Leiden: Martinus Nijhoff 1998), 313; Patricia Birnie, ‘UNCED and Mammals’, *Marine Policy* 17 (1993), 501–14, at 514.

⁵⁹ Michael Glennon, ‘Has International Law Failed the Elephant?’, *American Journal of International Law* 84 (1990), 1–43, at 34.

⁶⁰ See, for biodiversity as a global public good, Edith Brown Weiss, ‘Establishing Norms in a Kaleidoscopic World: General Course on Public International Law’, *Recueil des Cours de l’Académie de droit international de La Haye* 396 (2018), 37–415, at 112.

living resources) in a cooperative and sustainable way. Importantly, even that novel legal status does not prevent the killing of animals as long as it is sustainable. Moreover, the focus is still almost exclusively on the protection of species as collective groups and not on the welfare of animals as suffering individuals.⁶¹ Finally, all legal labels treat animals as things as opposed to persons.

3.2 Animal Welfare

The second paradigm is animal welfare (or animal protection). The objective of animal welfare is pursued by the laws of many countries (and some international law), which recognise humans' legal duties towards animals.⁶² The underlying ethical ideas of responsibility, care, and compassion in human–animal relationships are rooted in a gamut of belief systems, ranging from animist creeds in hunter-gatherer communities to scientific insights about the interdependence of all forms of life in fragile ecosystems. They are fleshed out in various philosophical and religious traditions encompassing Christian thought,⁶³ the feminist ethics of care,⁶⁴ and others. Duties of care towards nature or natural resources are embodied in various juridic concepts anchored in the legal traditions of the world, ranging from 'commons' to 'public trust'.⁶⁵ Humans are conceived as 'trustees', 'stewards', 'custodians', or 'guardians' over nature and natural resources, including animals – as animals are here conceptualised within the category of nature. The commonality is that all these juridic institutions impose

⁶¹ Sophie Riley, 'Wildlife Law and Animal Welfare: Competing Interests and Ethics', in Werner Scholtz (ed.), *Animal Welfare and International Environmental Law* (Cheltenham: Edward Elgar 2019), 148–79.

⁶² See, besides the literature mentioned in the following footnotes, David Favre, *Animal Law, Welfare, Interests, and Rights* (3rd ed., New York: Wolters Kluwer 2019); Thomas G. Kelch, *Globalization and Animal Law: Comparative Law, International Law and International Trade* (2nd ed., Alphen aan den Rijn: Kluwer Law International 2017); Margot Michel, Daniela Kühne, and Julia Hänni (eds.), *Animal Law – Tier und Recht: Developments and Perspectives in the 21st Century* (Zürich: Dike 2012); Anne Peters, Saskia Stucki, and Livia Boscardin (eds.), *Animal Law: Reform or Revolution?* (Zürich: Schulthess 2015).

⁶³ New Christian thinking attempts to reinterpret the 'dominion' of man over nature and animals (Genesis 1:28) in the direction of stewardship. See the Encyclical Letter *Laudato Si* of the Holy Father Francis 'On Care for Our Common Home' (2015). For scholarship on this issue, see Frank Pasquale (ed.), *Care for the World: Laudato Si and Catholic Social Thought in an Era of Climate Crisis* (Cambridge: Cambridge University Press 2019). On animals specifically, see Matthew Scully, *Dominion: The Power of Man, the Suffering of Animals, and the Call to Mercy* (New York: St Martin's Griffin 2002); Mark Somos and Anne Peters, 'Christianity, Global Environmental Protection, and Animal Law', in Rafael Domingo and John Witte, Jr. (eds.), *Christianity and Global Law* (London: Routledge 2020), 365–83.

⁶⁴ Carol Gilligan, *In a Different Voice* (Cambridge: Harvard University Press 1982); Josephine Donovan and Carol J. Adams (eds.), *The Feminist Care Tradition in Animal Ethics* (New York: Columbia University Press 2007).

⁶⁵ See, for the United States, Joseph L. Sax, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention', *Michigan Law Review* 68 (1970), 475–566.

legal obligations (duties) on humans and on states but do not give rise to corresponding animal rights.

The paradigm of guardianship and not of animal rights also underlies constitutional law as it stands.⁶⁶ While post–World War II constitutions typically mention the ecological task of the state, only ten constitutions prescribe animal protection, call for compassion, or prohibit animal cruelty: India (1976), Brazil (1988), Slovenia (1991), Switzerland (1992), Luxembourg (1999), Germany (2002), Ecuador (2008), Austria (2013), Egypt (2014) and Russia (2020).⁶⁷ To conclude, human stewardship and functional equivalents prevent humans from treating animals with wanton cruelty but do not acknowledge animal rights. Stewardship and care are thus a corollary to animal thinghood.

This thinghood is prevalent in the domestic laws of most countries which explicitly or implicitly qualify animals as things. This category was inherited from Roman private law (*ius civile*), which drew a fundamental distinction between *personae* (persons) and *res* (things). Things can be possessed by persons as property.⁶⁸ It can thus be said that animals have been legally coded into property.⁶⁹ Moreover, things/objects/property – and thus also animals in the traditional legal framework – can (in law) only be the beneficiaries of protective rules. Such protective rules create duties for their addressees but do not generate rights for the beneficiaries.

In the past decades, the civil law codes of several states have modified the traditional legal status of animals into two variations. The historically first variant is the purely negative statement that animals are not things, which has been articulated in various European states ranging from Austria (1988) to the Netherlands (2013). The second and more progressive legal variant is the positive qualification of animals as ‘sentient beings’. The EU coined this concept in 1992. Since 2008, Article 13 of the Treaty on the Functioning of the EU requires that ‘the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals’.⁷⁰

The new legal labels of ‘not things’ or ‘sentient beings’ have so far hardly generated tangible legal consequences. In the end, what matters is not the status but the legal

⁶⁶ See Jessica Eisen, ‘Animals in the Constitutional State’, *International Journal of Constitutional Law* 15 (2017), 909–54. For the suggestion of the further development of a constitutional principle of care for animals, see *ibid.*, 941.

⁶⁷ Jessica Eisen and Kristen Stilt, ‘Protection and Status of Animals’, in Rainer Grote, Frauke Lachenmann, and Rüdiger Wolfrum (eds.), *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford: Oxford University Press 2017), with further references.

⁶⁸ The legal concepts of ‘thing’ and ‘property’ are not identical but their application to animals amounts to the same result, their commodification and rightlessness. The US-American debate revolves more around the term ‘property’.

⁶⁹ To use Katharina Pistor’s phrase in *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton: Princeton University Press 2019). It is legal coding which turns the animal, a living being, into capital and gives it the capacity to generate wealth for its owner.

⁷⁰ Treaty on the Functioning of the EU of 26 October 2012.

rules that subsequently apply. The recent trend to remove animals from the category of things does not in itself improve their legal protection. Appreciable and clear legal effects result only from an explicit statement that animal sentience forms a legal limit to subjecting animals to the regime of things, such as in the civil codes of the Czech Republic,⁷¹ Portugal,⁷² and Spain.⁷³

3.3 *Animal Rights*

The third paradigm of animal rights as entitlements does not form part of international law. Animal rights are also largely unknown in domestic law. They have been acknowledged only by some courts in India, Argentina, Colombia, and most recently in Pakistan and Ecuador.⁷⁴

Importantly, the discussion on the *legal* rights of animals is informed but also confused by the philosophical controversy about the *moral* rights of animals.⁷⁵ Legal and moral rights are overlapping categories: distinct but frequently intertwined. In moral and ethical debates, the animal rights position is opposed to animal welfarism. Welfarism is the paradigm that favours incremental reforms in order to improve the conditions in which animals are kept and used.⁷⁶ Roughly speaking, this idea builds on utilitarian philosophical tenets.⁷⁷

⁷¹ Czech Republic: Civil Code, section 494. According to this provision, '[a] living animal has a special significance and value as a living creature endowed with senses. A living animal is not a thing, and the provisions on things apply, by analogy, to a living animal only to the extent in which they are not contrary to its nature' (official translation by the Ministry of Justice).

⁷² Portugal: Portuguese Código Civil, Decreto-Lei n.º 47344, Diário do Governo No. 274/1966, Série I de 1966-11-25, Consolidado, Versão à data de 2018-11-05: 'Livro I PARTE GERAL, Título II Das relações jurídicas, SUBTÍTULO I-A – Dos animais.' Art. 201-B 'Animais': 'The animals are living beings endowed with sentience and object of legal protection due to their nature'; Art. 201-D: 'Subsidiary Regime: 'In the absence of special rules, the rules applicable to things are applied to animals to the extent that they are not incompatible with their nature.' (our translation).

⁷³ Art. 333*bis*, inserted into the Spanish Civil Code by Law 17/2021 of 15 December 2021 'BOE' núm. 300 of 16 Dec. 2021 (BOE-A-2021-20727, available at www.boe.es/eli/es/l/2021/12/15/17/con).

⁷⁴ Islamabad High Court, *Islamabad Wildlife Management Board v. Metropolitan Corporation Islamabad*, judgment of 21 May 2020, WP No. 1155/2019; Const. Court of Ecuador, *Mona Estrellita*, Sentencia No. 253-20-JH/22, 27 January 2022.

⁷⁵ See Paola Cavalieri, *The Animal Question: Why Nonhuman Animals Deserve Human Rights* (Oxford: OUP 2001); Cass R. Sunstein and Martha C. Nussbaum (eds.), *Animal Rights: Current Debates and New Directions* (Oxford: Oxford University Press 2004); Sue Donaldson and Will Kymlicka, *Zoopolis* (Oxford: Oxford University Press 2011); Christine Korsgaard, *Fellow Creatures* (Oxford: Oxford University Press 2019).

⁷⁶ Robert Garner, *Animals, Politics, and Morality* (2nd ed., Manchester: Manchester University Press 2004); Robert Garner, 'Animal Welfare: A Political Defense', *Journal of Animal Law and Ethics* 1 (2006), 161–70.

⁷⁷ See the famous footnote in Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford: Clarendon 1789), 310–11, fn. 1 entitled 'Interests of the inferior animals improperly neglected in legislation'. Seminally in the twentieth century, Peter Singer, *Animal Liberation: Towards an End to Man's Inhumanity to Animals* (Wellingborough: Thorsons 1975).

Political scientist Robert Garner characterises welfarists as ‘those who accept human moral superiority’,⁷⁸ and he defines their ethics as the position that although animals should not suffer, they nevertheless have no right to life.⁷⁹ Concomitantly, ‘animal welfare does not challenge the property status of animals’.⁸⁰ Key concepts for welfarists are therefore not ‘rights’ but ‘the principle of animal welfare and the associated idea of unnecessary suffering’.⁸¹ The practical consequence is that ‘[u]sing animals, per se, therefore, is not the problem. It is what they are used for that is the key’.⁸²

Moral philosophers in the opposing camp more or less hold that animals ought not only to be treated well but moreover that they ought to be accorded rights.⁸³ In consequence, ‘the rights view challenges the very conception of animals as legal property’.⁸⁴ The quest for the abolition of the property status of animals (‘abolitionism’) has been notably developed by Gary Francione.⁸⁵ Abolitionists disparage the welfarists as at best merely accommodating longer chains for their slaves.⁸⁶ In the end, the philosophical debate over moral rights for animals has somewhat stalemated. Mainstream philosophy still resides where Robert Nozick characterised it more than forty years ago: ‘utilitarianism for animals, Kantianism for people’.⁸⁷ The legal debate on animal rights mirrors this philosophical divide, but it remains as yet underdeveloped and has only recently percolated to the level of international law.⁸⁸

To sum up, these three paradigms (animal conservation, animal welfare, and animal rights) could theoretically be employed on the various regulatory levels (national, regional, and international governance). In practice however, international law is almost exclusively concerned with the first approach, with species conservation. We now turn specifically to international law and identify the problems created by its focus on species conservation.

⁷⁸ Robert Garner, ‘A Defense of a Broad Animal Protectionism’, in Gary Francione and Robert Garner, *The Animal Rights Debate: Abolition or Regulation?* (New York: Columbia University Press 2010), 103–73, at 112.

⁷⁹ *Ibid.*, 120.

⁸⁰ *Ibid.*, 168.

⁸¹ *Ibid.*

⁸² *Ibid.*, 129.

⁸³ Tom Regan, *The Case for Animal Rights* (updated with a new preface, Berkeley: University of California Press 2004, 1983), 329.

⁸⁴ *Ibid.*, 394.

⁸⁵ Gary Francione has elaborated and defended this position since 1995 (*Animals, Property, and the Law* (Philadelphia: Temple University Press 1995)). See, for a good summary, Gary Francione, *Animals as Persons: Essays on the Abolition of Animal Exploitation* (New York: Columbia University Press 2008): ‘Animals: Property or Persons?’, 25–66.

⁸⁶ See, for a middle position, Alasdair Cochrane, *Animal Rights Without Liberation: Applied Ethics and Human Obligations* (New York: Columbia University Press 2012), 210.

⁸⁷ Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books 1974), 39.

⁸⁸ Anne Peters, ‘Toward International Animal Rights’, in Anne Peters (ed.), *Studies in Global Animal Law* (n. 27), 109–20.

3.4 Three Problems of International Law

The current state of ‘hard’ international law poses three specific problems for animals. The first problem is the animal welfare gap in international law.⁸⁹ A range of international treaties regulate the conservation of certain animal species and their habitats. Extant international law instruments have so far not addressed the welfare of wild animals in their purview, or at best have done so in an incidental, ancillary, and fragmented fashion.⁹⁰ In contrast to wildlife, agricultural animals have been directly addressed only in ‘soft’ international law and by EU law. The result of the focus of ‘hard’ international law on wildlife is a ‘disconnect’ between animal welfare and international regulation because animal welfare is not part of the ‘sustainable use narrative’ of wild animals as natural resources.⁹¹

The second related problem is worse than a mere lack of regulation. ‘Hard’ international law’s concentration on species protection, namely the ‘good-of-its-kind’ as opposed to the individual animal’s ‘good-of-its-own’,⁹² has not only neglected but even undermined the welfare efforts for wild animals. The reason is that species conservation is often antagonistic to the concern for individual animal welfare. In conservation science, the interests of individuals are frequently traded off against perceived benefits that accrue to higher levels of organisation (populations, species, and ecosystems); and ‘the conservation of species and populations often trumps all other values, including the welfare of individuals.’⁹³ This focus on species (and even more the focus on ecosystems) is holistic and anti-individualist. It has therefore been denounced as ‘environmental fascism’.⁹⁴

Thirdly, a number of international rules have so far rather stymied animal welfare and protection efforts. The best-known examples of the pernicious effects of international law, applied both by international institutions and states, are in international trade law and international financial law. The ‘dark side’ of the law has been addressed by critical animal studies,⁹⁵ but detailed and critical legal analysis of

⁸⁹ We owe this term to Guillaume Futhazar, ‘Biodiversity, Species Protection, and Animal Welfare under International Law’, in Anne Peters (ed.), *Studies in Global Animal Law* (n. 27), 95–108, at 104.

⁹⁰ See, for international animal law beyond a merely conservationist perspective, Katie Sykes, “‘Nations Like unto Yourselves’: An Inquiry into the Status of a General Principle of International Law on Animal Welfare”, *The Canadian Yearbook of International Law* 49 (2011), 3–49; Sabine Brels, *Le Droit du bien-être animal dans le monde: évolution et universalisation* (Paris: L’Harmattan 2017); Peters (ed.), *Studies in Global Animal Law* (n. 27); Peters, ‘Animals’ (n. 9).

⁹¹ Riley, ‘Wildlife Law and Animal Welfare’ (n. 61), 159, 171.

⁹² See, for these terms, Bowman, Davies, and Redgwell, *Wildlife Law* (n. 51), 74.

⁹³ Paul C. Paquet and Chris T. Darimont, ‘Wildlife Conservation and Animal Welfare: Two Sides of the Same Coin’, *Animal Welfare* 19 (2010), 177–90, at 184.

⁹⁴ Regan, *Animal Rights* (n. 83), 362.

⁹⁵ See, for a critical theory of animal liberation specifically in the tradition of the Frankfurt school, Susann Witt-Stahl (ed.), *Das steinerne Herz der Unendlichkeit erweichen: Beiträge zu einer kritischen Theorie für die Befreiung der Tiere* (Aschaffenburg: Alibri 2007); John Sanbonmatsu (ed.), *Critical Theory and Animal Liberation* (Lanham: Rowman & Littlefield 2011). See for other strands of critical approaches to the animal issue, the Brill book series *Critical Animal Studies*, edited by Helena

the negative impact of international law on animals is largely missing. Especially, the rules of IHL have so far not been scrutinised from a critical perspective. But IHL is no different from all man-made law, which has up to now been, and will probably always be, profoundly ambivalent regarding animals. As a standard introduction to the field puts it: 'Individual instances of gratuitous intentional cruelty against certain animals are banned, while institutionalized abuse of animals is allowed and often promoted under the law.'⁹⁶ Under cover of law, humans have waged what Dinesh Wadiwel has called a 'war against animals'.⁹⁷

4 STRATEGIES FOR DEVELOPING THE LAW

To face the above-mentioned challenges while making best use of the legal strategies available within the existing normative framework, several options will be explored throughout this book. Potential new directions for developing international law on armed conflict will now be identified (Section 4.1). Strategies that are already underway and which could – and should – be reinforced will also be examined (Section 4.2). That said, developing IHL to increase animal protection requires a critical sensibility (Section 4.3).

4.1 Available Legal Forms

As a matter of principle, the development of international law on the protection of animals in armed conflict could come about through treaty, secondary treaty law, custom, and 'soft' law. A first approach could be to enrich this legal framework by new norms specifically tailored to the needs of animals. In this vein, scientists have recently proposed a fifth Geneva Convention incorporating special wildlife safeguards.⁹⁸ There are strong arguments in favour of adopting such a new IHL instrument. However, this strategy appears to be unrealistic since, as emphasised above in this chapter, states will not be in a position to reach a consensus any time soon on a topic that is not at the forefront of their agendas.

Another, more modest, solution to enhance the protection of animals would be to turn towards existing international instruments beyond IHL at both regional and international levels. These instruments, which were designed for peacetime, could

Pedersen and Vasile Stănescu. See also *The Journal for Critical Animal Studies* (which since 2003 has been available at <http://journalforcriticalanimalstudies.org/>, accessed 22 February 2022); Anthony J. Nocella II, John Sorenson, Kim Socha, and Atsuko Matsuoka (eds.), *Defining Critical Animal Studies: An Intersectional Social Justice Approach for Liberation* (New York: Peter Lang 2014). See, for critical legal animal studies, Yoriko Otomo and Edward Mussawir, *Law and the Animal: A Critical Jurisprudence* (London: Routledge 2013).

⁹⁶ Joan E. Shaffner, *An Introduction to Animals and the Law* (London: Palgrave Macmillan 2011), 192.

⁹⁷ Dinesh J. Wadiwel, *The War Against Animals* (Leiden: Brill 2015).

⁹⁸ See, for example, Sarah M. Durant and José C. Brito, 'Protect Environment from Armed Conflicts', *Nature* 571 (2019), 478.

be activated by demonstrating that they are – as a matter of principle – applicable also during armed conflict. They could also be interpreted in a dynamic fashion. In the same manner that international human rights law has gradually improved and expanded the protection for human beings in armed conflicts (and has shaped the interpretation of IHL rules),⁹⁹ international environmental law could progressively reinforce certain safeguards provided by IHL or influence the interpretation of existing IHL norms when applied to animals. However, the exact applicability of the conventions governing the protection of the environment and in particular wildlife in international and non-international armed conflicts should be tested first. Potential normative conflicts between this regime and IHL norms need to be tackled. Indeed, when two bodies of law deal with the same issue, they could ‘either converge and apply harmoniously, or one or more of their norms could conflict with one another’.¹⁰⁰ Concretely, the needs of animals and of those of human individuals who may also be harmed by the injuries inflicted on animals will need to be balanced against the military interests of the belligerents, who may gain an advantage by conducting attacks in areas where these animals are located.¹⁰¹ However, as already stated in Section 2.3, this balancing exercise is not an easy task when animals are involved. It must also be kept in mind that some of the most sophisticated provisions contained in environmental conventions impose heavy duties upon belligerents, which might be difficult for poorly organised armed groups to abide by.

An alternative solution could be to develop environmental and wildlife regimes through secondary lawmaking by the relevant treaty bodies. This pathway seems more accessible because it does not require the formal unanimity of the state parties but could proceed by consensus (the absence of formal votes) or majority voting. That being said, the bodies must avoid *ultra vires* action which would trigger a backlash against the concerned regime.

Another option is to rely on international customary norms and general principles of law. Generally speaking, a customary norm and a general principle of law on animal welfare seem to be evolving, building on the recognition that ‘animal welfare is a globally recognised issue’, as a WTO panel famously found in the *Seal Products* case.¹⁰² Such general norms are particularly relevant in the situation of armed conflicts, especially in non-international armed conflicts, which lack codified principles, for instance on the protection of the environment. In this context, it is necessary to investigate whether the rules that potentially provide protection to

⁹⁹ See, for example, Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (Oxford: Oxford University Press 2012).

¹⁰⁰ Jeanique Pretorius, ‘Protecting the Environment in Non-international Armed Conflicts Means Looking Beyond International Humanitarian Law Alone’, *Conflict and Environment Observatory* (15 March 2019), available at <https://bit.ly/3zqpWeu>, accessed 22 February 2022.

¹⁰¹ Ibid.

¹⁰² WTO, Panel Reports, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R and WT/DS401/R (25 November 2013), para. 7.420.

animals in international armed conflicts can be transposed to non-international armed conflicts via customary international law.

Finally, it is important to keep in mind that the body of 'hard' law governing animal protection at the international level remains fragmented and fairly thin. Therefore, it should be explored to what extent memoranda, principles, declarations, resolutions, recommendations, or codes of practice issued by international organisations, states, or non-governmental organisations and which possess no legally binding force are relevant for establishing new standards applicable to animals during warfare.

4.2 Exploiting the Available Paradigms

Making use of all applicable legal forms or 'sources', the three paradigms mentioned in Section 3 could be activated for wartime. The general concepts of conservation and sustainable development, animal welfare considerations, and even animal rights could form parameters for the interpretation, application, and reinforcement of the current international normative framework that directly or indirectly protect animals.

First, an overarching conservation approach enshrined in many international conventions that protect the environment could be followed. Although they are significantly tainted by anthropocentric values, these conventions are useful for reinforcing the protection of animals during armed conflicts. Thanks to them animals are protected, not only directly and individually as 'civilian objects' or as 'property' but also indirectly and globally as components of the environment in which they live. As we will see in Chapter 7, combining such a direct and indirect approach to the protection of animals is all the more justified during warfare given that military operations usually affect the ecosystem in its entirety, with general repercussions on all its elements, including wildlife.¹⁰³

Second, the welfarist approach might help to safeguard the interests of certain groups of animals. For instance, the preoccupation with avoiding unnecessary suffering being inflicted on animals is particularly relevant for the protection of animals used by armed forces for specific purposes, such as weapons of war, means of medical transport, in search and rescue operations and for medical experiments. Animal welfare considerations should also be duly taken into account when defining adequate standards for the protection of endangered or captive animals, especially those located in occupied territories or in protected zones. These considerations will need to be adapted to the specific needs of belligerents and the imperatives of military necessity.

The third mentioned paradigm, animal rights, could reinforce the protection of all groups of animals afflicted by war, be they wild, livestock, or militarised animals.

¹⁰³ de Hemptinne, Chapter 7, 'Part of the Environment', in this volume.

This paradigm is currently more theoretical than practical. Already hotly contested for peacetime, its application in the context of war, which is generally more hostile towards rights-based paradigms (even for humans), is unlikely in the near future.

4.3 Critical Sensibility

The development of an animal-friendly IHL demands a critical sensibility. Thus, with regard to improving the fate of animals, we acknowledge that a number of '[c]entral dilemmas [persist] in the use of law by humans'.¹⁰⁴ But we submit that these dilemmas do not condemn legal scholars and practitioners to resignation. Legal analysis can contribute to identifying animal suffering and can make normative proposals for legal reform. International law is not only a 'hollow hope'¹⁰⁵ but can be turned into a force for the good of animals.

Although human interests, human indifference, and human complacency have worked together to harm animals on a large (even global) scale, the insight that human and animal interests are often aligned is growing and actively promoted – for example by the African Union.¹⁰⁶ Moreover, various arguments of global justice, both for deprived groups of humans and for animals, are gaining ground and bolster attempts at transforming animal use practices.¹⁰⁷

The proactive promotion of more demanding animal welfare standards needs to be wary of legal imperialism and of the imposition of western preferences on the rest of the world. This is all the more important as the overwhelming number of armed conflicts take place outside Europe and the western hemisphere. Norm entrepreneurship must therefore proceed in a respectful and culture-sensitive way, without licencing and reifying a collection of cruelties as representative of a 'culture' not worth protecting.¹⁰⁸

Our overall claim is that we can – and should – pursue a 'realistic utopia' for animals afflicted by war, proceeding 'from the international political world as we see it' and extending 'what are ordinarily thought to be the limits of practicable political possibility'.¹⁰⁹ Treating animals well, in recognition of their value as fellow sentient beings, potentially acknowledging fundamental animal rights (or even animal citizenship), is no longer an individual moral choice but 'a societal issue that has to be resolved politically by legislative means'.¹¹⁰ Triggering a new legal policy on

¹⁰⁴ Catharine A. Mac Of Mice and Men: innon, 'A Feminist Fragment on Animal Rights', in Sunstein and Nussbaum (eds.) (n. 75), 263–276, at 272.

¹⁰⁵ Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (2nd ed., Chicago: The University of Chicago Press 2008).

¹⁰⁶ African Union: Inter-African Bureau for Animal Resources, *Animal Welfare Strategy for Africa* (AWSA) (2017).

¹⁰⁷ Oscar Horta, 'Expanding Global Justice: The Case for the International Protection of Animals', *Global Policy* 4 (2013), 371–80.

¹⁰⁸ Paula Casal, 'Is Multiculturalism Bad for Animals?', *Journal of Political Philosophy* 11 (2003), 1–22.

¹⁰⁹ John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press 1999), §1, 83 and 11. See also Antonio Cassese, *Realizing Utopia* (Oxford: Oxford University Press 2012), xvii–xxii.

¹¹⁰ Garner, 'Broad Animal Protectionism' (n. 78), 169.

animals in armed conflict is the overarching objective of this research. With this objective, the book examines how the emerging global consensus on animal welfare can be stabilised by appealing to legal, economic, and ethical arguments. To this end, it is not necessary that all authors work in exactly the same paradigm.

5 OVERVIEW OF THE BOOK

The outcomes of the research, mainly conducted by specialists in the fields of public international law, IHL, international criminal law, and animal law, is divided into five main parts that are sub-divided into twenty-two chapters. Having evoked (in this chapter) the context, purposes, structure, methods, challenges, and scope of the research, Part I addresses the rationale for the protection of animals in times of war from historical and ecological perspectives as well as the numerous challenges that the task of protection raises. Parts II, III, and IV constitute the core of the research. Divided into sixteen chapters, they map, analyse, and evaluate the protective and enforcement regimes applicable to animals during warfare as they currently exist. These parts also make recommendations for improving these regimes so as to satisfy the main goals of the research identified in Section 1 of this chapter.

In order to guarantee the coherence of the analysis, to facilitate the readability of the book, and to ultimately reinforce its utility, all chapters in Parts II, III, and IV follow a similar pattern of analysis where it was feasible. First, an introduction briefly presents the specific context in which the protection of animals is addressed. Second, the scope of application of each legal regime is studied. This comprises a critical examination of the applicability of the regime's rules, notably the legal arguments allowing or precluding their 'transfer' to animals. Third, the contents and limits of the relevant legal regime, as applied to animals, are critically presented. Fourth, a general examination of the consequences that may flow from the violation of each and every regime is undertaken. Each chapter's fifth and final section makes recommendations adapted to the specific needs of animals in the context analysed. A short bibliography concludes each chapter.

Part I lays out the historical and ecological foundations for the protection of animals during warfare. Clemens Wischermann (Chapter 2) considers this topic from a *historical perspective*. He focusses on the twentieth century, with special consideration paid to the two World Wars. The author advocates a new type of historiography which integrates perspectives of human–animal studies. This includes a novel appreciation of animal war memorials. Ultimately, the question whether the war experience has the potential to transform human–animal relations cannot yet be answered. In Chapter 3, Joshua Daskin and Robert Pringle analyse the topic from an *ecological angle*. They formulate the broad hypothesis that armed conflicts generally slow down rates of habitat conversion (clearcutting, agriculture, extractive industry, development, etc.) and thus negatively impact wildlife and exacerbate exploitative harvesting (poaching, bushmeat hunting, wildlife trafficking, etc.). To conclude Part I, Heike

Krieger and José Martínez Soria (Chapter 4) present the *rationale and challenges* for the protection of animals in wartime. They demonstrate that the protection of animals in this context is based on diverse, even contradictory assumptions, which prompt diverging regulatory approaches (namely economic considerations versus a political theory of animal rights). These contradictions and divergences create challenges and limits for effective protection measures that may further be aggravated by practical and political obstacles.

Part II concentrates on the many different forms of protection that could be granted to animals in international and non-international armed conflicts. Marco Roscini (Chapter 5) first explores whether animals can qualify as *property* or as *objects* for the purpose of IHL. The author shows that leaving animals outside the legal categories of IHL persons and objects has undesirable normative consequences. The extant criteria to determine whether animals would be targetable or not would be inapplicable to animals. This legal situation would leave animals unprotected. Sandra Krähenmann (Chapter 6) concentrates her attention on IHL's *specially protected objects* regimes from which animals could gain some safety. She examines the rules on 'cultural property' and on 'objects indispensable to the survival of the civilian population'. She critically analyses the safeguards offered to these items by IHL and discusses whether animals can be fitted into the said legal categories. In Chapter 7, Jérôme de Hemptinne shows that animals, as part of the *environment*, benefit from the protection afforded by IHL principles and provisions that provide direct and indirect environmental safeguards. He also reveals that these principles and provisions remain weak and largely unclear, especially in the context of non-international armed conflicts. For this reason, the author argues that they need to be read in conjunction with the growing body of international norms, standards, and mechanisms that prevent and redress environmental harm during peacetime. Ayşe-Martina Böhringer and Thilo Marauhn (Chapter 8) ask to what extent the peacetime labelling of animals as *endangered species* can be relevant in times of armed conflict in light of CITES, other treaty-based instruments, and UN Security Council resolutions dealing with wildlife trafficking. They examine the main problems emerging from armed conflict situations for nature conservation and, in particular, for the protection of fauna and their habitat. Chapter 9, by Chris Jenks, proposes a study of animals as *war weapons*. It emphasises that, while the historical use of animals as weapons and weapons platforms has generally been disastrous for these animals, it is still not expressly prohibited by IHL. In light of this, the author argues that an international instrument whereby states agree not to use animals in this manner is needed. Chris Jenks also considers that the use of animals as weapons should be factored into the current autonomous weapons discussion so that states are naturally incentivised to discontinue using weapons that do not yield the desired results. Jérôme de Hemptinne, Tadesse Kebebew, and Joshua Niyo (Chapter 10) examine to what extent 'animal soldiers' could obtain *combatant status* when involved in hostilities and *prisoner of war* status when falling into enemy hands

and, thus, be protected by AP I and GC III. They show that, while these status have not been envisaged to apply to animals, elements of the protection provided by these conventions could help design by analogy a protective regime for 'animal soldiers'. In Chapter 11, Jérôme de Hemptinne emphasises that some general principles enshrined in IHL conventions regarding the protection of *medical transports, equipment, and personnel* could potentially provide minimum safeguards for animals used as a means of medical transportation or for search and rescue operations. He also demonstrates that this regime is in many respects inappropriate for the protection of animals. The application of *sui generis* principles, tailored to the specific needs of sentient beings, should thus be conceived in light of recent developments on the welfare and rights of animals in peacetime. Chapter 12 by Katharine Fortin addresses the role and status of *veterinary personnel*. Her chapter shows that unlike medical personnel, veterinary personnel do not generally have a special status under IHL. As a result, veterinary personnel belonging to armed forces are often considered as combatants and do not usually benefit from any special protections, in stark contrast to their medical colleagues. The author argues that veterinary personnel only exceptionally fall within the scope of Article 24 of GC I, namely when de facto used as medical personnel and dealing exclusively with the care of the wounded and sick in war. For non-international armed conflicts, the author analyses the circumstances in which veterinary personnel fall within the concept of a 'fighter' and when they are deemed to directly participate in hostilities.

Part III is devoted to specific situations in which animals may find themselves during hostilities and to which a special regime is attached. Marco Longobardo (Chapter 13) deals with the legal framework applicable to animals in *occupied territories*. The law of occupation is not exclusive and allows the concurrent application of other rules. Thus, the chapter examines three legal 'strata': the specific IHL of occupation, the local legislation of the occupied territory, and other applicable rules binding upon the occupying power. The assessment whether animals are effectively protected in situations of occupation must take note of all three strata, also in their interplay. In Chapter 14, Matthew Gillett recalls how, and under what conditions, certain *zones are protected* in both international and non-international armed conflicts. He then determines to what extent animals can directly and indirectly benefit from this protection. As the prohibition on attacking protected zones encompasses the zones as a whole, animals located in these zones will generally be incidentally protected due to the reduced likelihood of harm through collateral damage, and from the rehabilitation and flourishing of the environment in such zones. Etienne Henry (Chapter 15), examines the fate of animals in *sea warfare*: animals can be injured or killed either when they take part in hostilities or when they suffer the random consequences of attacks on military objectives. Additionally, some animals have historically been treated as objects susceptible to appropriation (as 'absolute contraband') in prize law. With a few exceptions, the law applicable to naval

warfare is silent on the treatment of animal life. The state of the law is uncertain because publicly available state practice in this area is scarce. But recent doctrinal and domestic legal trends point towards a greater recognition of the life and dignity of animals in sea warfare as well. In Chapter 16, Giulio Bartolini examines international law related to animals in *disaster situations*. He tackles two main issues, namely the international regulation of certain categories of animals that might support international relief activities (i.e. rescue dogs), and the integration of animal concerns in national and international disaster management perspectives. Veronika Bílková (Chapter 17) emphasises that despite the increasing number of animals employed in *military defence experimentation* each year, this aspect of animal involvement in armed conflicts is unregulated and largely secret. She then explores to what extent the usual national and EU laws on laboratory animals can apply during situations of armed conflict. She argues that these laws would need to be adapted to the particular vulnerability of animals in wartime, notably for protecting them against unnecessary suffering.

Part IV deals with the enforcement regime. It starts with a contribution by Manuel J. Ventura (Chapter 18) on the *repression of international crimes* which analyses all cases before the various international criminal tribunals in which criminal activity concerning animals have featured as part of the factual allegations or findings. To date, international criminal law has not paid any real attention to international crimes that affect the animal population. The contemporary animal rights movement and domestic court judgments granting legal personality to certain animals raise the question whether existing crimes sufficiently encapsulate and penalise harmful acts against animals. Marina Lostal (Chapter 19) examines enforcement regimes from the perspective of *reparation and rehabilitation measures*. While animals cannot receive reparation, they have already featured in some programmes as reparation assets. The chapter argues that animals could become indirect beneficiaries of reparation. In Chapter 20, Karsten Nowrot analyses the special regime for *wildlife trafficking* and gives an overview of the international treaty-based framework. He then addresses the challenges for the enforcement of these treaties, with a particular emphasis on the additional problems created by ongoing armed conflict. Finally, he suggests some responses with a view to making the overall normative framework more effective in the interests of the animals concerned. In Chapter 21, Britta Sjöstedt focuses on the multiple *roles played by the UN* in preserving animal interests. She examines the measures of the UN Security Council on targeted sanctions against poachers and wildlife product traffickers, commodity sanctions, and the illegal exploitation of natural resources. She also reviews the ‘greening practice’ of the UN Security Council and the securitisation of the environment and wildlife.

In Part V, the editors summarise the rules and legal instruments identified *de lege lata* and the principles and mechanisms *de lege ferenda* as outlined in the preceding chapters. They conclude by proposing building blocks for a more comprehensive legal regime that adequately protects animals in wartime.

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