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SYMPOSIUM ON GLOBAL ANIMAL LAW (PART I)

# THE PROTECTION OF ANIMALS DURING WARFARE

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In times of war, the first instinct is to relieve the suffering of human beings. Environmental and animal interests are always pushed into the background. However, warfare strongly affects natural resources, including animals, which makes animal issues a matter of great concern. Certain species have been vanishing at a rapid rate because of wars, often with disastrous effects on the food chain and on the ecological balance. Indeed, belligerents rarely take into account the adverse consequences of their military operations on animals. They even take advantage of the chaotic circumstances of war in order to poach protected species and to engage in the trafficking of expensive animal products. While generating billions of dollars each year, such poaching and trafficking allows armed groups to grow and to reinforce their authority over disputed territory. States have also trained, and continue to train, certain animals—principally marine mammals such as bottlenose dolphins and California sea lions—to perform military tasks, like ship and harbor protection, or mine detection and clearance. Millions of horses, mules, donkeys, camels, dogs, and birds are obliged to serve on various fronts (transport, logistics, or communications) and become particularly vulnerable targets.

However, being deeply anthropocentric, international humanitarian law (IHL) largely ignores the protection of animals. That said, some general principles could potentially provide minimum safeguards to animals during armed conflict. Moreover, a progressive interpretation of these principles, in light of developments in the welfare and rights of animals in peacetime, could significantly reinforce this protection. After having discussed the reasons underlying the silence of IHL on the protection of animals (I), this essay will outline the particular challenges that this issue creates in the context of the distinction between international armed conflicts (IACs) and noninternational armed conflicts (NIACs) (II). Finally, it will consider the main difficulties stemming from the rules governing the conduct of hostilities (III), and from the protective regime offered by the 1949 Geneva Conventions (GCs) (IV).

## *The Silence of IHL*

Despite the fact that animals are among those affected by armed conflicts, IHL does not directly deal with the question of their protection. As we will see below, animals are only indirectly addressed as civilian objects or as part of the natural environment. Three reasons might explain IHL's lack of interest in the welfare of animals. First, the main conventions regulating armed conflicts were adopted at a time when legal entitlements for animals did not attract significant attention. Indeed, even the few IHL provisions restricting attacks against the natural environment were designed with a view to preserving the interests of human beings instead of the environment per se.[1] Second, on a more pragmatic level, it is often argued that alleviating the extreme suffering of human beings during

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[1] *See generally* Michael N. Schmitt, *Green War: An Assessment of the Environmental Law Of Armed Conflict*, 22 YALE L.J. 69 (1997).

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hostilities would be impaired should animal protection be put at the forefront. Lastly, we should not underestimate the fact that, in peacetime, while acts of violence against human beings are, in principle, forbidden, the slaughtering of animals is widely accepted and practiced throughout the world. In this context, it might appear paradoxical that, in situations of armed conflict, where acts of violence against certain individuals, mainly combatants, are admitted and expected, acts of violence against animals might be strictly constrained.

Let us briefly respond to these three arguments. First, IHL cannot ignore the evolution of the status and protection that animals have acquired in many jurisdictions around the world. In the same way that the strengthening of human rights and the increased awareness of environmental challenges after the Second World War have impacted on the development of IHL, the increasing concern for animal welfare during the last decades should also progressively impose limits on belligerents' actions. This is even more so when we consider that, as recalled in the introduction, wars have disastrous effects on wildlife and, in particular, on protected species whose survival is directly threatened by hostilities. Second, contrary to what is often claimed, safeguarding animals does not necessarily interfere, or run contrary to, the protection of human beings. The two can often run in parallel without impacting negatively on each other. In any case, we will see that certain IHL principles—such as the principle of proportionality—are flexible enough to guarantee that human values prevail over animal interests when one is forced to choose between the two. Third, the apparent "paradox of violence" outlined above must be evaluated in light of the following factors. Due to the increased importance of animal welfare, acts of cruelty against animals are now widely restricted and sanctioned in peacetime. Conversely, acts of violence against animals during warfare could, in theory, be legally committed when animals become military objectives. Moreover, the forms of violence allowed in peacetime are of a fundamentally different nature from those authorized during armed conflicts. Indeed, the former aims at satisfying human needs (for instance, food production or medical, pharmaceutical, and chemical testing). In contrast, the latter is, in principle, dictated by military considerations. This delineation between different types of violence is, however, 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 trafficking of species—can also take place during peacetime.

### *The Distinction Between IACs and NIACs*

In IACs, animals could, in theory, benefit from the protection offered by certain IHL rules contained in the GCs and in the 1977 Additional Protocol I (AP I). Animals should also benefit from the fact that states possess developed institutional machinery, well-organized military forces, and sophisticated technologies that should improve the respect of these rules. The situation is, however, different in NIACs owing to legal and practical difficulties.

From a legal perspective, it should be recalled that only minimal conventional rules apply to NIACs. That said, the recent development of customary IHL has narrowed the differences in regulation between IACs and NIACs. For instance, it is now widely accepted that the general rules governing the protection of civilian objects—namely, the principles of military necessity, distinction, and proportionality—apply to all types of armed conflicts. This is also true of the rules protecting property and objects indispensable to the survival of the civilian population from wanton destruction. This evolution is crucial, because, as we will see below, all of these rules could be interpreted as providing minimum protection for animals. In contrast, it is unclear whether the special protection accorded to the environment by Articles 35(3) and 55(1) of AP I—which encompasses wildlife[2]—applies in NIACs within the state where such a conflict is taking place.[3] It could, however, be argued that the environment should always be safeguarded in NIACs when damages caused to it also affect other states. In this context, since wildlife is usually

[2] Marco Roscini, *Animals and the Law of Armed Conflict*, 47 Isr. Y.B. Hum. Rts. 61 (2017).

[3] International Committee of the Red Cross, Customary International Law Database, *Rule 44*.

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not confined to the territory of a single state and since its destruction generally affects the ecological balance on a wide scale, one could reasonably argue that the provisions protecting the environment contained in AP I should always protect wildlife, including within the territory of a state which experiences a NIAC.

From a practical perspective, armed groups often have limited abilities to conform to highly sophisticated norms, in particular those protecting animals. Indeed, assessing the legality of incidental damage caused to animals is beset with difficulties. It requires environmental knowledge that even well-equipped state armed forces often do not possess. Furthermore, the logic which underlies IHL—according to which the legitimate aim of belligerents is to weaken the military potential of the adversary[4]—will often be called into question when armed groups are motivated by other goals, such as poaching protected species and engaging in the trafficking of animal products. Thus, in the context of NIACs, ensuring the respect of complex IHL rules protecting the basic needs of animals will often be very difficult to achieve in practice.

*The Conduct of Hostilities*

Civilian objects are protected during the conduct of hostilities unless and for such time that they are military objectives. Moreover, according to the principle of proportionality, collateral damage on civilian objects is permissible but only to the extent that it is not excessive in relation to the concrete and direct military advantage anticipated as the result of an attack. These basic principles raise three main delicate questions in relation to animals. First, could animals be treated as civilian objects for the purpose of IHL? Second, if the first question is answered in the affirmative, how should one undertake the balancing exercise required by the principle of proportionality when animal interests are at stake? Third, do the rules on the conduct of hostilities adequately protect animals as "inanimate objects"?

With respect to the first question, it could be contended that the notion of objects" is limited to "inanimate objects" and that animals are thus left unprotected.[5] It is true that, aside from a few multilateral treaties protecting endangered species, the welfare of animals has always been poorly regulated at the international level.[6] As noted previously, this is especially valid for IHL, which is, by tradition, geared essentially towards the safeguarding of human beings. That said, the context in which IHL conventions have been adopted has significantly changed over the last decades. There is today a general rise in public awareness of the necessity to improve the protection of animals whose lives are threatened by modern warfare. For obvious reasons, animals cannot be assimilated into the category of "protected persons" under IHL, thereby benefiting from the protection offered by the status of "combatant/prisoner of war" or of "civilian." Indeed, as rightly 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."[7] Clearly, animals are not able to respect these obligations, which, among other things, require the capacity to distinguish persons who participate in the hostilities from those who do not or to make proportionality calculations.[8] Moreover, the definition of "civilians" mentioned in Article 50(1) of AP I only refers to "persons."[9] Thus, in order to avoid any gap in protection, animals cannot but fall within the category of objects as envisaged in IHL conventions. After all, this is consistent with the fact that, in most legal systems, animals have traditionally

[4] Marco Sassòli, *Challenges Faced by Non-State Armed Groups as Regards the Respect of the Law Governing the Conduct of Hostilities*, *in* CONDUCT OF HOSTILITIES: THE PRACTICE, THE LAW AND THE FUTURE 172 (E. Greppi ed., 2014).

[5] Roscini, *supra* note 2, at 46.

[6] Anne Peters, *Global Animal Law: What It Is and Why We Need It*, 5 TRANSNAT'L ENVTL. L. 13–16 (2016).

[7] Roscini, *supra* note 2, at 44–45.

[8] Karsten Nowrot, *Animals at War: The Status of "Animal Soldiers" under International Humanitarian Law*, 40 HIST. SOC. RES. 140 (2015).

[9] Roscini, *supra* note 2, at 45.

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been considered as being "moveable objects." In light of this, animals could only be targeted in times of war when used for military purposes and when targeting them offers a definite military advantage.

As to the second question, armed forces must make a proportionality calculation when launching an attack on civilian objects that might impact on animals. This calculation is a complex endeavor since it requires balancing incomparable elements: the military advantage of an attack, and the effect on civilian objects resulting from that attack. Such an exercise becomes increasingly difficult when animals may become collateral damage.[10] Indeed, it depends on the value attributed to animals. In most societies, such a value judgment is contingent upon what animals offer to humankind: working tool, food, clothing, etc. It is, however, increasingly accepted that animals should also acquire value in their own right and, as a consequence, that their interests should no longer be automatically subordinated to those of human ones. A greater intrinsic value is sometimes attributed to animals whose extinction is implicated. To further complicate matters, the status of animals varies widely from one culture to another and inevitably changes over time. Moreover, a second dimension must be a factor in the proportionality test: animal considerations must be weighed against human considerations (as opposed to military advantage).[11] For instance, when soldiers responsible for an attack are at risk, should these soldiers assume an increased risk in order to guarantee the protection of dogs or horses located around a military target? What should they do differently, if anything, if these animals are endangered species such as pandas or white rhinoceroses?

Without pretending to solve these issues here, three principles should guide belligerents in this regard. First, all measures should be taken to avoid any collateral damage to endangered species. This rule is grounded on the absolute necessity of sparing vulnerable animals from hostilities and other human activities that threaten them, as illustrated by the Convention on International Trade in Endangered Species of Wild Fauna and Flora, which prohibits unpermitted trading. Second, all measures should be taken to avoid collateral damage to animals that are necessary for the survival of the civilian population. This second rule is grounded on Article 54 of AP I that grants special status to these types of "objects." Third, the welfare of all other animals, including wild animals, should be duly taken into account when undertaking a proportionality assessment, as long as soldiers launching an attack could reasonably foresee damage that could be caused to these animals. Indeed, it would be unreasonable to impose upon belligerents a duty to limit animal casualties that are, for instance, so small that they are impossible to identify. In principle, when human interests conflict with animal interests, human life or suffering should prevail over those of animals.

The third question—the treatment of animals as objects—is reductive. In many jurisdictions around the world, animals are formally recognized as "sentient beings." Of course, no state would be ready to create a new category of living beings that could limit their capacities to fight other belligerents. That said, in the same manner that human rights have progressively offered a series of protections to human beings in armed conflicts, animal rights could progressively influence the way certain existing IHL principles are interpreted and applied to animals. Three examples illustrate this proposition. First, IHL prohibits the use of means and methods of warfare that cause superfluous injury or unnecessary suffering.[12] This prohibition only refers to the effect of weapons on combatants. Their impact on animals would never be taken into account so long as animals are regarded as "inanimate objects." Such an approach should, however, be reassessed if it is formally acknowledged that, for the purposes of IHL, animals, like any living beings, experience emotions, including pain and distress, which could be negatively affected by the use of these weapons. Second, animals can often be used to perform military tasks, thereby making a contribution to military activities. In the same manner that the fundamental principle of

[10] For an extensive analysis of the concept of proportionality in the context of the protection of the environment, *see generally* Schmitt, *supra* note 1, at 55–61.

[11] *Id.* at 58–61.

[12] For an extensive analysis of the application of such a prohibition to animals, *see generally* Roscini, *supra* note 2, at 51–56.

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"human dignity" prohibits the use of inhumane methods and means of warfare against combatants, a similar concept of "animal dignity" could offer an avenue for expanding the safeguards offered to animals involved in hostilities, thereby preventing the use of indiscriminate techniques or unnecessary suffering.[13] Third, should animals be treated as sentient beings or be afforded legal personality, animal welfare should also carry heavier weight in the proportionality calculation than any inanimate objects in times of armed conflict.

*The Protection of Individuals*

The rules protecting vulnerable persons in armed conflicts were not designed for animals. Two important exceptions must, however, be mentioned. First, Article 60 of AP I confers protection to "demilitarized" zones between belligerents.[14] This provision allows that an agreement on a demilitarized zone be tailored to each specific situation. It thus follows that the protection of areas of high global species diversity could be enhanced if belligerents were to agree to formally classifying them as "demilitarized zones." To this end, a Draft Convention on the Prohibition of Hostile Activities in Protected Areas was developed in order to grant territorial protection to areas of great environmental importance. It is also worth mentioning here the importance of the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage in which states recognize 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." The second exception pertains to the laws governing occupation. Article 53 of Geneva Convention IV prohibits the destruction by the occupying power of private and public properties, except in cases of absolute military necessity. This provision could provide minimum protection to certain animals when considered to be items of private or public property.

The acquisition by animals of the status of "sentient beings" should also contribute to further development of the protection of animals when they fall into the hands of belligerents. Three main avenues could be explored in this regard. First, animals, in particular protected species, should receive adequate care when wounded during hostilities, and be evacuated as soon as possible from combat zones. Second, animals involved in hostilities and apprehended should be granted basic "humane" treatments tailored to their specific needs. For instance, they should never be killed without reason. They should receive food and adequate protection and, if they can survive by themselves, be released in areas far away from the battlefield. Third, the obligations of occupying powers vis-à-vis animals should be clarified in IACs and expanded to NIACs where the trafficking of expensive animal products often occurs. In this regard, the provisions allowing the occupying power to use occupied property without damaging or destroying it, as contained in the 1907 Hague Convention IV, may offer guiding principles for dealing with similar situations in NIACs.[15]

As we can see, the protection of animals during warfare generates many complex questions. The international community should address these issues at a time when—as a matter of fact—animals are increasingly suffering from the extreme violence of modern warfare and when—as a matter of law—their status as "sentient beings" has been acquiring wider recognition at national level.

[13] On this basis, it could be argued that the use of animals during warfare must be prohibited at all times.

[14] United Nations Environment Programme, Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law 20 (2009).

[15] *Id.* at 19.

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