

FORGOTTEN VICTIMS OF WAR: ANIMALS AND THE INTERNATIONAL LAW OF ARMED CONFLICT

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The present article analyses the protection of animals in times of armed conflict. The primary objective of this article is to explore the relationship between animal law and international humanitarian law and to find out to what extent rules of animal welfare law can be applied during armed conflict and how international humanitarian law can protect animals. For this purpose, the article firstly provides an overview of legal scholarship, as well as a summary of existing international humanitarian law norms protecting animals. The article also discusses if existing models of protection of non-human victims of war, such as natural environment and cultural heritage, analogously, can be applied to include animals under the protection of international humanitarian law. Furthermore, possible scenarios of animal victimhood during wars are outlined and finally, the article offers several practical suggestions on how animal welfare law can become part of the international law of armed conflict.

KEYWORDS: *animals, armed conflict, animal welfare, international humanitarian law*

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I. INTRODUCTION

In his 1964 painting entitled “War,” the Franco-Russian artist, Marc Chagall, depicts images of victims of war and the misery they experience.¹ The painting shows a white horse alongside the last remaining helpless people in a city at the mercy of an “all-consuming inferno” ravaging houses.² Chagall sensitively portrays the suffering of all victims, including animals, who experienced war.³ This painting later became a source of inspiration for another artist, the Balkan film director Emir Kusturica, who animated the scene from Chagall’s image in his acclaimed 1995 war drama, ‘Underground.’⁴ One of the scenes in the movie shows people escaping burning buildings and a

¹ Marc Chagall, *War, 1964*, MARC CHAGALL, <https://perma.cc/2ZR7-GN9H> (accessed Feb. 11, 2022).

² *Id.*

³ *Id.*

⁴ See *Keys for Underground*, KUSTU, <https://perma.cc/Q97F-2ZZ9> (accessed Feb. 11, 2022) (explaining the symbolism in the movie ‘Underground’).

white horse running through the flames and disappearing.⁵ The movie also re-enacts 'Operation Retribution,' the air raid of Belgrade in 1941 led by the German Axis Powers, which, among other military objectives, also targeted the city's zoo, killing several animals, and forcing countless others to flee, leaving them unaccounted for.⁶ These are a few examples that demonstrate how wars also have non-human victims, such as animals, and often those non-human victims are forgotten or overlooked by legal instruments, and have only been noticed in works of art.

International Humanitarian Law (IHL)⁷ has been advancing by providing better protections for victims of armed conflict(s).⁸ Since the beginning of its development, IHL has been expanding, covering a wide range of issues related to armed conflict with a primary objective to diminish as much as possible the suffering and negative consequences of war and violence.⁹ Initially, IHL protected armies of states and soldiers; it achieved this through the conventions and regulations adopted throughout the Hague Peace Conference during 1899-1907.¹⁰ Later, IHL provided enhanced protection for civilians and other categories of persons via the Geneva Conventions of 1949 and the Additional Protocols of 1977.¹¹ Moreover, IHL also provided special protection for immovable and movable cultural heritage under the 1954 Hague Convention and its additional protocols,¹² and specifically outlawed the use of military techniques that cause modification of the natural environment through the so-called ENMOD Convention of 1976.¹³ Protection of the natural environment has become the subject of additional international instruments, namely the International Law Commission (ILC), which included this topic under its agenda and has already concluded draft guiding principles on the protection of the en-

⁵ Intimatycal, *Underground, 1995 Kusturica* at 0:51-1:25, YouTube (Aug. 6, 2014), <https://www.youtube.com/watch?v=EIEEXv9M8Kfc> (accessed Aug. 10, 2021).

⁶ *Operation Retribution 1941*, ARTOUR, <https://perma.cc/F4QS-S9AG> (accessed Feb. 10, 2022).

⁷ The term International Humanitarian Law (IHL), the Law of Armed Conflict (LOAC), and *jus in bello* are referred to interchangeably in this article.

⁸ See YORAM DINSTEIN, *CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 21 (3rd ed. 2016) (describing the origins and stages of development of IHL).

⁹ *Id.*

¹⁰ THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 26-30 (Dieter Fleck et al. eds., 3rd ed. 2013) [hereinafter Fleck].

¹¹ *Id.*; The Oxford Guide to International Humanitarian Law 3-9 (Ben Saul & Dapo Akande eds., 2020) [hereinafter Saul & Akande].

¹² 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, First Protocol (1954) to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and Second Protocol (1999) to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict [hereinafter Hague Conventions].

¹³ Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques (ENMOD), UN Treaty Series, vol.1108, p.151, registration no.17119.

vironment during armed conflict.¹⁴ Furthermore, states also tried to enhance the protection of children during armed conflict through the adoption of an additional protocol to the Convention on the Rights of the Child, which completely outlaws recruitment of children in armed forces or other military or paramilitary groups.¹⁵

A close glimpse into the development of IHL makes it obvious that humanitarian law is not static: it evolved, transformed, expanded, and enlarged over time.¹⁶ With a predominantly human-centered approach¹⁷ (logically derived from the nomenclature assigned to the title of this branch of law),¹⁸ IHL strived to absorb more and more legal elements with a primary purpose to ensure that tragic losses in armed conflicts are minimized.¹⁹

As mentioned above, human beings are in the spotlight of rules of warfare and their protection is crucial for the effectiveness of IHL norms.²⁰ However, the natural environment, buildings, and infrastructure have also become the subject of its protection, not necessarily due to their significance for human survival, but merely because they intrinsically have material value which requires protection from the harmful consequences of war.²¹

The expansion of the scope of protection under the Law of Armed Conflict (LOAC) indicates that this area of law follows the development of other fields of law or practice. It is flexible and absorbs new norms and approaches to keep the scope of protection in line with modern developments and new realities.²² For example, when soldiers were primarily protected during war and civilians were disregarded, the LOAC concentrated on the needs of armies.²³ The practice from WWII, however, showed that civilians also suffered dreadfully, and thus a special convention (the Fourth Geneva Convention) was drafted and adopted to fully reflect the needs of civilians during armed conflicts.²⁴ The same applies to the protection of cultural heritage: after seeing that treasured artifacts and artwork were looted, smuggled,

¹⁴ International Law Commission, Report on the Work of the Seventy-First Session (2019), 209–296, A/74/10 (Dec. 10, 2019).

¹⁵ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, U.N. Doc A/RES/54/263 (Feb. 12, 2002).

¹⁶ Mark Klamberg, *Evolution of Rules and Concepts in International Humanitarian Law: Navigating Through Legal Gaps and Fault Lines*, in INTERNATIONAL HUMANITARIAN LAW AND JUSTICE: HISTORICAL AND SOCIOLOGICAL PERSPECTIVES 81 (Mats Deland et al. eds., 2019).

¹⁷ Jerome de Hemptinne, *The Protection of Animals During Warfare*, 111 AJIL UNBOUND 272, 272 (2017).

¹⁸ Development of the term IHL is linked to the humanitarian dimension of this branch of law. See Fleck, *supra* note 10, at 13.

¹⁹ Klamberg, *supra* note 16, at 81–82.

²⁰ de Hemptinne, *supra* note 17.

²¹ See *infra* Section 3.

²² Klamberg, *supra* note 16, at 81–82.

²³ DINSTEIN, *supra* note 8, at 8–9.

²⁴ See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949.

trafficked, lost, or destroyed during and after WWII, nations decided to enhance protection for cultural heritage by adopting a special convention (the 1954 Hague Convention).²⁵ Before the natural environment and wildlife became a concern for the international community, IHL was silent on these issues, but soon after the emergence of international environmental law, IHL adapted to this reality by including special provisions for the protection of the environment in the First Additional Protocol to the 1949 Geneva Conventions (AP I) and by adopting another special convention (ENMOD).²⁶ The same applies to human rights, generally, and the rights of the child, particularly. Before human rights were considered as a sphere that should be regulated strictly by domestic law, IHL was not focused on human rights provisions, but after the elevation of human rights as part of international law, IHL adjusted and today there is no doubt about the application of human rights standards in armed conflicts.²⁷ Similarly, unless the rights of the child received special protection in international law, IHL did not have any provisions regarding child soldiers, but soon after the adoption of a separate convention—the Convention on the Rights of the Child (CRC)—on that matter, IHL also followed with a ban on conscription of children via the adoption of an optional protocol to the CRC.²⁸

While the anthropocentric nature of IHL primarily brings human victims in the focus of protection, animals²⁹ can also be seen as collateral victims to the devastating consequences of war. Although, IHL does not explicitly protect animals, sometimes safeguarding animal lives or health is tightly linked to human survival and in this way, it provides guarantees for animal protection as well.³⁰

Animals played a crucial role in wars throughout the ages: animals were employed for transportation, combat operations, feeding soldiers, mailing messages, etc.³¹ Yet, they could not find space for protection under international law of armed conflict. IHL appears to leave animals aside and forsaken, likely because the legal value of nonhuman animal beings has been subject to controversies among the international community, and the consensus as to whether to acknowledge

²⁵ Fleck, *supra* note 10, at 30, 32.

²⁶ *Id.* at 338–40.

²⁷ See generally Noëlle Quénivet, *The History of the Relationship Between International Humanitarian Law and Human Rights Law*, in *INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW: TOWARDS A NEW MERGER IN INTERNATIONAL LAW* (Roberta Arnold & Noëlle Quénivet eds., 2008) (describing the relation between IHL and international human rights law).

²⁸ See Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, Feb. 12, 2020.

²⁹ The term “animal” referred to in this article should be understood as referring only to non-human animal beings.

³⁰ Marco Roscini, *Animals and the Law of Armed Conflict*, 47 *ISR. Y.B. ON HUM. RTS.* 35, 61–62 (2017).

³¹ Ryan Hediger, *Introduction*, in *ANIMALS AND WAR* 1, 5, 7, 11 (Ryan Hediger, ed. 2013) (discussing the history of animals used in warfare).

animal welfare as something that needs to be cared for is still not manifestly evident.³²

Fortunately, the law of animal welfare (commonly referred to as animal law) already has attracted the attention of many international actors and is being shaped as an autonomous branch of international law through a transnational legal process, which gives this branch of law global character and thus makes it global law.³³ In this state of development of global animal law, IHL certainly cannot turn a blind eye to the norms of animal welfare and must find a way to incorporate rules of animal law into its realm.

This Article seeks to study the relationship between animal law and IHL and outlines a response to the questions of to what extent rules of animal welfare law (AWL) can be applied in times of armed conflict and how IHL can itself protect animals via the use of a wide interpretation of existing laws and customs of war.

For this purpose, the next part of this Article briefly provides an overview as to what extent existing IHL norms protect animals, which categories of animals can be considered as protected under the IHL, and analyzes whether this protection is adequate to reflect current realities.

The third part of this Article focuses on nonhuman victims of war other than animals, how IHL expanded its protective scope to cultural heritage and natural environment, and whether the same model, analogously, can be applied to include animals under the protection of IHL.

The fourth part discusses possible scenarios of animal victimhood during wars and in this regard also references practical applications using previous armed conflicts whereby the conflict brought suffering to animal populations. It also discusses standard minimum rules of the AWL, which potentially could be transposed into IHL to safeguard protection for animals.

The final part contains several practical suggestions on how AWL can become part of the LOAC.

II. APPLICABLE IHL RULES PROVIDING ANIMAL PROTECTION IN ARMED CONFLICT

A. LEGAL SCHOLARSHIP

In absence of wide coverage of the animal protection rules in IHL, legal scholarship gained momentum in extensively discussing the is-

³² See DAVID FAVRE, *FUTURE OF ANIMAL LAW* (2021) (describing the origins, developments, and future of acknowledging animal welfare).

³³ See Anne Peters, *Global Animal Law: What It Is and Why We Need It*, 5 *TRANS-NAT'L ENV'T L.* 9, 9, 12, 20 (2016) (describing the need for the globalization of animal law); see also Saba Pipia, *Emergence of Global Animal Law as a Separate Branch of International Law*, 16 *ANIMAL & NAT. RES. L. REV.* 171, 174 (2020) (describing the need to address animal welfare in international law); KATIE SYKES, *ANIMAL WELFARE AND INTERNATIONAL TRADE LAW* 37–40 (2021) (describing the international nature of animal protection).

sue of animal protection in armed conflict. During the time of the drafting of this Article, there have been several publications that exclusively deal with the protection of animals in times of war.³⁴ Perhaps the most important publication in this regard is the seminal article by Professor Marco Roscini, discussing all possible avenues in the applicable IHL norms that could be used to provide some degree of protection for animals.³⁵ In particular, the article analyzes general rules of the law of armed conflict, which restrict killing and the injury of animals, and rules specifically protecting animals in armed conflict.³⁶

Furthermore, Dr. Jerome de Hemptinne analyzes the protection of animals during warfare by differentiating the degree of protection in international and non-international armed conflicts and in light of the rules governing the conduct of hostilities and protection of individuals.³⁷ His work was initially published as an article and later re-published as a book chapter in *Studies in Global Animal Law*.³⁸

Another important publication was introduced in this specialized area by Professor Karsten Nowrot, whose article was the first ever contribution dealing with a specific issue of animals in armed conflict.³⁹ His research evaluated aspects related to the issue of possible incorporation of “animal soldiers” into the scope of application of international humanitarian law and analyzed conceptual challenges arising out of the connection between the potential recognition of animals as international legal subjects and those having the status of combatants under the law of armed conflict.⁴⁰

The most recent publications also included one of the chapters in a book by Professor Anne Peters, in which she extensively analyzed the place of animals in IHL. Namely, the author provided a comprehensive review of incidental protection of animals under IHL, and also studied animals as part of the environment, animal protection in light of basic principles of IHL, and animals as actors in war.⁴¹ Furthermore, Peters, together with Hemptinne and Professor Robert Kolb, edited a forthcoming book, *Animals in the International Law of Armed Conflict*, which, apart from conventional matters related to the protection of animals in war, also covers very insightful topics such as animals in occupied territory, repression of international crimes affecting animals, and animals as a means of military experimentation, among other topics.⁴²

³⁴ These publications are referred to in the following discussion.

³⁵ Roscini, *supra* note 30, at 36–37.

³⁶ *Id.* at 37.

³⁷ de Hemptinne, *supra* note 17.

³⁸ See generally Jerome de Hemptinne, *Challenges Regarding the Protection of Animals during Warfare*, in *STUDIES IN GLOBAL ANIMAL LAW* 173 (Anne Peters ed. 2020).

³⁹ Karsten Nowrot, *Animals at War: The Status of ‘Animal Soldiers’ Under International Humanitarian Law*, 40 *HIST. SOC. RSCH.* 128, 129–30 (2015).

⁴⁰ *Id.* at 128.

⁴¹ ANNE PETERS, *ANIMALS IN INTERNATIONAL LAW* 334–420 (2021).

⁴² *ANIMALS IN THE INTERNATIONAL LAW OF ARMED CONFLICT* (Anne Peters, Jerome de Hemptinne & Robert Kolb, eds. forthcoming July, 2022).

Lastly, another publication by Dr. Saskia Stucki provides a novel approach comparing animal welfare law and international humanitarian law.⁴³ Though her work does not specifically deal with the protection of animals in armed conflict, the contribution is indeed worth mentioning while speaking about animals in war, because the author puts forward a unique analogy comparing animal welfare law and international humanitarian law—two seemingly unrelated bodies of law that are both marked by the contradiction of humanizing the inhumane.⁴⁴

This Article seeks to further complement legal scholarship on the matter of animal protection during armed conflicts by discussing existing IHL rules which potentially could be applied to animals during armed conflict, but also by providing original ideas on (1) which norms of AWL can be applied during armed conflicts;⁴⁵ (2) how IHL and the AWL can interact with each other;⁴⁶ (3) why rules protecting the natural environment and cultural heritage during armed conflicts can be useful for promoting animal protection in war;⁴⁷ and (4) options for how AWL norms can be transferred into IHL.⁴⁸

B. IHL SOURCES APPLICABLE TO ANIMAL PROTECTION DURING WARFARE

IHL is strictly anthropocentric.⁴⁹ The word “humanitarian” in the title of this branch of law defines its nature and makes this law exclusively focused on humans.⁵⁰ That explains why IHL is mute on the protection of animals in armed conflict. All sets of rules provided under IHL are intended to protect humans and to minimize damage potentially inflicted during wars.⁵¹ Therefore, it is not expected that the current state of development of IHL supports the idea that animals should be protected during armed conflicts because they are sentient beings and not because their victimhood could affect humans.

⁴³ Saskia Stucki, *Beyond Animal Warfare Law: Humanizing the ‘War on Animals’ and the Need for Complementary Animal Rights*, MAX PLANCK INST. FOR COMPAR. PUB. L. & INT’L L. 1, 2 (2021).

⁴⁴ *Id.* at 3.

⁴⁵ See *infra* Section 4.2 (describing the five freedoms of animal welfare as the starting point for incorporation of AWL into IHL during armed conflicts).

⁴⁶ See *infra* Section 4.3 (explaining the balance between AWL and IHL and how to integrate the two through the application of military and humanitarian principles).

⁴⁷ See *infra* Section 3.3 (discussing the expansion of IHL to protect nonhuman animals in a manner similar to the expansion of IHL to protect natural environment and/or cultural heritage in armed conflict).

⁴⁸ See *infra* Section 5.2 (arguing that AWL norms can be transferred to IHL by expanding existing IHL rules and “by the initiation of a new legal instrument, which would specifically focus on the protection of animals in armed conflict”).

⁴⁹ de Hemptinne, *supra* note 17.

⁵⁰ PETERS, *supra* note 41, at 334.

⁵¹ Roscini, *supra* note 30, at 36.

Given the absence of regulations in IHL aiming explicitly to protect animals in armed conflicts,⁵² scholars attempted to find out general rules, the interpretation of which would allow the extension of the protective scope of IHL to animals as well.⁵³ For this reason, most of the authors listed examined first and foremost the Hague Regulations,⁵⁴ the Geneva Conventions⁵⁵ and their additional protocols,⁵⁶ and other specific conventions, such as the Chemical Weapons Convention,⁵⁷ the Protocol on Prohibitions on the Use of Mines, Booby-Traps and Other Devices,⁵⁸ the Biological Weapons Convention,⁵⁹ and the ENMOD Convention.⁶⁰

In addition to the aforementioned treaties, customary IHL norms⁶¹ can also be applied to determine the scope of protection of animals in armed conflict, as well as case law from various international courts and tribunals, scholarly writings, and soft law as secondary sources for interpretation.⁶²

⁵² *Id.* at 36.

⁵³ See *infra* Section 2.1.

⁵⁴ Hague Convention Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907 [hereinafter Hague Regulations].

⁵⁵ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85.; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287.

⁵⁶ Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Jun. 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

⁵⁷ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 1975 U.N.T.S. 45.

⁵⁸ Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II to the 1980 CCW Convention as Amended on 3 May 1996), May 3, 1996, 2048 U.N.T.S. 93.

⁵⁹ Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Oct. 4, 1972, 1015 U.N.T.S. 163.

⁶⁰ ENMOD Convention, *supra* note 13.

⁶¹ See generally JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: VOLUME I: RULES (2005) (outlining general rules to address the customary nature of all types of warfare and potential harms to animals); JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: VOLUME II: PRACTICE – PART 1 xxiii (2005) (describing practices to correspond with the rules stated in Volume I: Rules).

⁶² See Statute of the Court, I.C.J., art. 38(1) (indicating the logic of sources of international law); JAMES CRAWFORD, BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 19–20 (9th ed. 2019) (detailing the sources of international law as given in Article 38 of the Statute of the Permanent Court of International Justice).

C. IHL RULES INDIRECTLY PROTECTING ANIMALS

Under the existing IHL rules, depending on their features, animals can be considered as enemy property, as part of the natural environment, as fighters, or as military objects, and thus can avail a certain degree of protection under different IHL instruments.

If we assume that animals are incorporated in the category of property,⁶³ several IHL rules apply to them as public or private property. The Hague Regulations provide that private or public property shall enjoy protection against attack unless such attack is necessary for military considerations.⁶⁴ In addition, the Regulations also outlaw pillage in occupied territories,⁶⁵ but allow requisition of private property (including animals) if military needs of the army of occupations require.⁶⁶

Another approach suggests that animals can be considered as subjects of law, namely combatants, and thus eligible to be protected by IHL. Nowrot submits that “the general inability of animal soldiers to obey the obligations under international humanitarian law autonomously does not in principle hinder their recognition as combatants and the granting of the protective rights associated with this legal status.”⁶⁷ Nevertheless, it seems “appropriate and advisable from a legal policy perspective not to transfer and extend the current concept of (human) combatants . . . to animal soldiers but rather create a new separate category of animal combatants under international humanitarian law.”⁶⁸ Arthur Hodin also posits that the recognition of animals as combatants would allow animals to enjoy distinct status and operative protection under IHL. But, as long as combatants have not only the rights but also the obligations associated with the status, a clear distinction should be made between human combatants and animal combatants. This distinction would not extend the current concept of combatants, but instead create a new category of animal combatants under IHL.⁶⁹ However, it should be remembered that combatants are granted special privileges and protections under IHL only because

⁶³ See David Favre, *Animals as Living Property*, in THE OXFORD HANDBOOK OF ANIMAL STUDIES 66 (Linda Kalof ed., 2017) (describing the status of animals as “living property”).

⁶⁴ Hague Regulations, *supra* note 54, at art. 53.

⁶⁵ *Id.* Art. 47.

⁶⁶ See *id.* Art. 53; see also Marco Longobardo, *Animals in Occupied Territory*, in ANIMALS IN THE INTERNATIONAL LAW OF ARMED CONFLICT, *supra* note 42, (detailing that the protections offered to public and private property sometimes extend to animals in occupied territories through international law).

⁶⁷ Nowrot, *supra* note 39, at 142–143.

⁶⁸ *Id.* At 143.

⁶⁹ Arthur Hodin, *The Legal Status of Animals in International Humanitarian Law*, ACADEMIA LETTERS 1, 2 (2021).

they are supposed to fulfill obligations imposed on them under IHL.⁷⁰ If the combatant does not comply with its obligations, they lose protections granted for combatants.⁷¹ Therefore, the ability to fulfill the obligations in good faith is the main requirement to the granting of combatant status. Thus, discussing the special category of animal combatants which would allow animals to enjoy protections but disregard obligations serves little purpose as it runs contrary to the spirit of the combatant status. Animals may not be considered as combatants, but they can still make a contribution to the conduct of hostilities. As Dinstein suggests, “human beings are not the only living species” who can be legitimate targets, as “certain types of animals—ranging from cavalry horses and pack mules to explosives-sniffing dogs and even marine mammals (primarily dolphins) trained for military uses. . .” qualify as military objectives and may be attacked.⁷²

Another option is that animals can be considered as ‘objects’ for the purposes of the application of the principle of distinction. AP I provides that:

Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage.⁷³

But can animals truly be considered as *objects* for the purposes of this provision? Professor Roscini suggests that the notion of objects is limited to inanimate objects and that animals are thus left unprotected.⁷⁴ This view is further supported by the Commentaries to the AP I, which explicitly indicate that ‘objects’ are tangible and visible things.⁷⁵ As animals are living and movable creatures, they under no circumstances should be considered as *things* and thus incorporated under the meaning of *objects*, having a civilian or military nature.

Wildlife animals are protected under IHL norms, which protect the natural environment.⁷⁶ IHL protects species of wild fauna “not only directly as a component of the natural environment, but also indirectly by preserving their habitats and ecosystems in which they live.”⁷⁷ Those rules are discussed in detail in the next chapter of this Article. Unjustified incidental damage to the environment, civilians, and civilian objects, in relation to the anticipated military gain consti-

⁷⁰ See Marco Sassoli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar Publishing 248 (2019) (describing the rights, privileges, and responsibilities of combatants).

⁷¹ AP I, *supra* note 56, at art. 44(3-4).

⁷² DINSTEIN, *supra* note 8, at 106.

⁷³ AP I, *supra* note 56, at art. 52(2).

⁷⁴ Roscini, *supra* note 30, at 46.

⁷⁵ Commentaries to the AP I (1987), art. 52, para. 2010.

⁷⁶ PETERS, *supra* note 41, at 362.

⁷⁷ Roscini, *supra* note 30, at 61–62.

tutes a violation of the principle of proportionality and is punishable under international criminal law.⁷⁸ The notion of “environment” itself is very broad and includes species of wild fauna and flora as well as entire ecosystems.⁷⁹ In international criminal law, protection from environmental harm is largely mediated through core crimes. Crimes against the environment are not recognized as a separate category of crime,⁸⁰ but the inclusion of environmental damage into the principle of proportionality largely was a manifestation of the idea that the law does not only protect human beings but also the world around them and thus its well-being.⁸¹ However, the work is ongoing to define the new international crime of ecocide, the notion of which might also include massive destruction of animals during armed conflicts.⁸² Wild species are protected under environmental protection clauses because they are considered integral parts of the natural environment and biodiversity and not because they deserve protection on their own—it is primarily a conservation purpose that prevails over the welfare of wild animals, but other categories of animals (companions or farm animals) are certainly left beyond the scope of protection.

Livestock animals are further protected as objects indispensable to the survival of the civilian population. Article 54 of AP I spells out livestock as a potential object necessary for human survival and prohibits attack, destruction, removal, or rendering it useless.⁸³ The motive of these actions is, however, of vital importance. This provision has “no application to attacks that are carried out for a specific purpose other than denying sustenance to the civilian population or the adverse party.”⁸⁴ This interpretation suggests that the named provision protects livestock like farm animals not *per se*, but rather “because and when they are indispensable to the survival of the civilian

⁷⁸ Rome Statute of the International Criminal Court art. 8²(2)(b)(iv), July 17, 1998, 2187 U.N.T.S. 5 [hereinafter Rome Statute].

⁷⁹ *Report of the International Law Commission on the Work of its Forty-Third Session Article 26: Willful and Severe Damage to the Environment*, [1991] 2 Y.B. Int'l L. Comm'n, 107, U.N. Doc. A/CN.4/SER.A/1991/Add.1; see also Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment art. 2, par. 10, June 21, 1993, CETS no.150 (defining the term “environment” for the purpose of the Convention to include “natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; property which forms part of cultural heritage; and characteristic aspects of the landscape”).

⁸⁰ CARSTEN STAHN, *A CRITICAL INTRODUCTION TO INTERNATIONAL CRIMINAL LAW* 109 (2019).

⁸¹ THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT. A COMMENTARY 9 (Oto Triffterer & Kai Ambos eds., 2015).

⁸² See Stop Ecocide Foundation, *Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text* (2021), <https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d1e6e604fae2201d03407f/1624368879048/SE+Foundation+Commentary+and+ore™ext@ev+6.pdf> (accessed Feb. 14, 2022) (explaining work being done to define ecocide and implement it into the Rome Statute of the International Criminal Court).

⁸³ AP I, *supra* note 56, at art. 54(2).

⁸⁴ WILLIAM H. BOOTHBY, *THE LAW OF TARGETING* 110 (2012).

population" affected by the armed conflict.⁸⁵ The same article prohibits starvation as a method of warfare.⁸⁶ Therefore, the protection of livestock animals, as essential objects for human survival, read in conjunction with the prohibition against starvation, indicates that the objective of this rule is to protect the civilian population and not animals.

Additionally, Professor Roscini notes that some protections of animals also indirectly result from the application of other rules of the law of armed conflicts, such as (1) protection of works and installations containing dangerous forces; (2) protection of means of medical transportation if animals are used for such purpose; (3) provisions allowing protected persons to exercise their religious practices in societies which practice religion where animals are considered sacred; and (4) treaties prohibiting or restricting the use of certain weapons can also provide some level of animal protection in armed conflict.⁸⁷

As demonstrated in this section, IHL indeed contains a set of rules which indirectly protects animals. However, IHL does not see animals as sentient beings that inherently deserve protection, but considers them as part of some other domains, like property or the natural environment. Therefore, this Article aims to demonstrate that as extensive as existing IHL rules may seem, there is still room for development, and in particular, development related to the incorporation of animal welfare rules into IHL based on the premise that animals should be granted protection independently and not as parts of something else.

D. CRITICAL EXAMINATION OF THE MARTENS CLAUSE

The Martens Clause first appeared in the preambles of the 1899 and 1907 Hague Conventions, which state that "in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."⁸⁸ This rule was affirmed by AP I as well, which contains the same provision with slightly modified wording: "in cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and the dictates of public conscience."⁸⁹ Therefore, the Martens Clause asserts that "the principles of international law apply in all armed conflicts, whether or not a particular case is

⁸⁵ Roscini, *supra* note 30, at 59.

⁸⁶ AP I, *supra* note 56, at art. 54(1).

⁸⁷ Roscini, *supra* note 30, at 56–57.

⁸⁸ Hague Convention II with Respect to the Laws and Customs of War on Land (With Annexed Regulations), Preamble, July 29, 1899; Hague Convention IV With Respect to the Laws and Customs of War on Land (With Annexed Regulations), Preamble, Oct. 18, 1907.

⁸⁹ AP I, *supra* note 56, at art. 1(2).

provided for by treaty law, and whether or not the relevant treaty law binds as such the Parties to the conflict.”⁹⁰

The Martens Clause has been subject to various interpretations in both legal doctrine and practice.⁹¹ Some argue that it applies only for interpretation of international principles and rules, others contend that the Clause influenced the sources of international law and thereby played an important role in the expansion of the sources of IHL. Finally, some suggest that the Martens Clause has had an impact on the creation of sociopolitical norms.⁹²

Assuming that animal protection in armed conflicts is not covered by any IHL instruments, it can be subsumed under the Martens Clause, but the issue is that the Martens Clause explicitly refers to the protection of civilians and combatants.⁹³ Therefore, unless animals qualify either as civilians or fighters, it is not plausible that they be treated pursuant to the principle of humanity and the dictates of public conscience. Peters sees the Martens Clause as an “inspiration to bring dynamism into IHL and as an entry point for changing societal attitudes.”⁹⁴ It is further suggested that a progressive reading of this Clause allows wide interpretation of IHL rules in the light of other norms of international law, notably animal conservation treaties.⁹⁵ This dynamism gives rise to further evolutions and thus allows application of the Martens Clause specifically for the protection of the environment and animals, to reflect on the radically strengthened ‘public conscience’ in those domains.⁹⁶ Based on these considerations, Peters concludes that the “Martens Clause opens a window for outlawing the wanton killing of livestock, the destruction of the habitat of wild animals, and even the employment of animals as combatants, beyond the prohibitions already found in the law as it stands.”⁹⁷

International humanitarian law has always focused primarily on the protection of persons.⁹⁸ It does not provide for specific rules protecting animals as such in times of armed conflict.⁹⁹ They neither fall within the definition of *civilian person* under Article 50(1) of AP I, nor within the definition of ‘civilian object’ under Article 52(2) of the same Protocol, which appears to encompass only inanimate things.¹⁰⁰ Nor

⁹⁰ Claude Pilloud, et al., *Protocol I, in COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949* 39 (Yves Sandoz, Christophe Swinarski & Bruno Zimmerman eds., 1987).

⁹¹ SEARCHING FOR A ‘PRINCIPLE OF HUMANITY’ IN INTERNATIONAL HUMANITARIAN LAW 6 (Kjetil Mujezinovic Larsen, Camilla Guldahl Cooper & Gro Nystuen eds., 2013).

⁹² *Id.*

⁹³ AP I, *supra* note 56, art. 1(2).

⁹⁴ PETERS, *supra* note 41, at 408.

⁹⁵ *Id.*

⁹⁶ *Id.* at 409.

⁹⁷ *Id.*

⁹⁸ Manuel J. Ventura, *Repression of International Crimes Affecting Animals, in ANIMALS IN THE INTERNATIONAL LAW OF ARMED CONFLICT*, *supra* note 42.

⁹⁹ *Id.*

¹⁰⁰ Roscini, *supra* note 30, at 45–46.

do animals qualify as 'combatants,' hence they do not enjoy the general protection provided under AP I. This legal gap is only partially filled by provisions which protect animals that might be indispensable for the survival of the civilian population, and provisions, which prohibit attacks if the damage to the fauna is widespread, long-term, and severe, but in both cases, the protection of animals would be linked to that of a humanitarian and environmental concerns.¹⁰¹ Even the Martens Clause, which was introduced into IHL with a primary objective to fill any gaps in the future, appears to be inapplicable to animals (unless interpreted progressively) because its wording explicitly refers to the protection of civilians and combatants.

III. APPLICABLE IHL RULES PROTECTING OTHER NON-HUMAN VICTIMS, WHICH ARE NOT NECESSARILY LINKED TO THE SURVIVAL OF HUMAN POPULATIONS

As explained in the introduction, IHL is anthropocentric, meaning it protects persons and everything that is associated with them.¹⁰² Therefore, IHL instruments are designed in a way that puts the entire focus on the survival of human victims and minimizing their suffering. Notwithstanding the human-centered nature of this branch of law, there can be found at least two other potential non-human victims of war, which are also protected under IHL, not necessarily for the needs of persons affected by armed conflict, but because they constitute valuable elements without regard to their collateral importance vis-à-vis human survival. Namely, the protection availed by IHL to the natural environment and cultural heritage can be considered a shift from a human-centered paradigm in IHL by extending the protective scope to elements that are not strictly associated with persons in armed conflicts. The objective of this chapter is to analyze applicable rules of IHL protecting the natural environment and cultural heritage and to analyze whether IHL already envisions a pattern of protection of non-human victims not associated with human survival in armed conflicts. This analysis will support the idea that animals could also potentially be protected under IHL, not because they represent necessary value to human survival in war, but because they deserve protection based on the intrinsic importance of their lives. If proven that IHL already protects nature and cultural property for their significance, it will strengthen the argument that animals should also be spared from suffering and extermination during war because what matters is their survival.

Whereas existence of any specific rules for the protection of the environment during armed conflict before the second half of the twentieth century is subject of debate,¹⁰³ global warming and other envi-

¹⁰¹ Marco Roscini, *Targeting and Contemporary Aerial Bombardment*, 54 INT'L & COMPAR. L. Q. 411, 432-433 (2005).

¹⁰² See *supra* Introduction.

¹⁰³ BOOTHBY, *supra* note 84, at 195.

ronmental matters have become increasingly important peacetime concerns for the international community. Therefore, protection of nature emerged as an issue in the law of armed conflict too.¹⁰⁴ As a result, environmental issues were incorporated in core IHL treaties, namely AP I, the text of which “was influenced by new priorities and concerns”¹⁰⁵ and the so-called ENMOD Convention, which “does not explicitly prohibit damage to the environment but reflects the idea that the environment itself should not be used as an instrument of war.”¹⁰⁶ Therefore, it is clear that peacetime development of environmental law paved the way for the adoption of special IHL rules related to the protection of the environment during armed conflicts.

Unlike the natural environment, the protection of cultural property in armed conflict—which means its protection from damage, destruction, and all forms of misappropriation—has been a matter of legal concern since the rise of modern international law.¹⁰⁷ Indeed, cultural property enjoyed IHL protection under the Hague Regulations,¹⁰⁸ which constitute customary IHL. However, unprecedented destruction, pillage, and looting of pieces of art during the Second World War elevated the protection of cultural property to a new level.¹⁰⁹ Even though the Hague Regulations provided basic protection for cultural heritage artifacts, the international community intensified its work to promote a new special convention for the protection of cultural property in times of armed conflict. Adopted in 1954, the Hague Convention provided remarkable protection for movable or immovable property constituting cultural heritage.¹¹⁰ Additionally, provisions related to the protection of cultural property can be found in AP I¹¹¹ and AP II.¹¹²

A. NATURAL ENVIRONMENT

“Few legal disciplines have evolved as rapidly as international environmental law, which is variously described as a ‘special field,’ a ‘new branch,’ or an emergent ‘autonomous special area’ of international law.”¹¹³ International environmental law was largely developed

¹⁰⁴ *Id.*

¹⁰⁵ REVISITING THE GENEVA CONVENTIONS: 1949-2019 23–24 (Md Jahid Hossain Bhuiyan & Borhan Uddin Khan eds., 2020).

¹⁰⁶ GEN. COUNS. OF DEP’T OF DEF. OF THE US, 2311.01E, DoD LAW OF WAR MANUAL 377 (updated Dec. 2016).

¹⁰⁷ See Fleck, *supra* note 10, at 212 (outlining that the environment has been an area of concern since the 1970s, and was included in the 1977 Additional Protocol to the Geneva Convention).

¹⁰⁸ Hague Regulations, *supra* note 54, at art. 56.

¹⁰⁹ Fleck, *supra* note 10, at 454–55.

¹¹⁰ Hague Convention, *supra* note 12.

¹¹¹ AP I, *supra* note 56, at art. 53.

¹¹² AP II, *supra* note 56, at art. 16.

¹¹³ Peter H. Sand, *The Evolution of International Environmental Law*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 30 (Daniel Bodansky, Jutta Brunnée & Ellen Hay eds., 2008).

in the second part of the twentieth century with the adoption of soft and hard law instruments, such as the Stockholm¹¹⁴ and Rio declarations,¹¹⁵ and many multilateral treaties emerged both between the Stockholm and Rio summits and thereafter.¹¹⁶

These global developments of environmental law were not left unnoticed by IHL, which swiftly updated its instruments to incorporate new approaches for environmental protection in armed conflicts. AP I prohibits the employment of methods or means of warfare that are intended or may be expected to cause widespread, long-term, and severe damage to the natural environment and additionally imposes an obligation to take proper care in warfare to prevent such damage.¹¹⁷ Moreover, the Rome Statute extended the scope of the principle of proportionality¹¹⁸ by recognizing disproportionate attacks against the natural environment as war crimes.¹¹⁹

Apart from core IHL treaties, such as AP I and the Rome Statute, a special autonomous treaty was developed, the 1976 ENMOD Convention, which contained innovative and progressive regulations prohibiting using the environment itself as a weapon.¹²⁰ Back then, most of the techniques prohibited under ENMOD were future-oriented and did not reflect existing capabilities, and most importantly, did not codify existing customary law.¹²¹ This exemplifies that incorporation of new norms in IHL does not necessarily require that those norms be well-established and developed in peacetime law.

Customary IHL also upholds the notion that the general principles on the restraints on the conduct of hostilities apply to the natural environment in international armed conflicts as well as in non-international armed conflicts.¹²² Furthermore, in discussing the legality of the use of nuclear weapons, the International Court of Justice (ICJ) also acknowledged that “environmental factors should be properly taken into account in the context of the implementation of the principles and rules of law applicable in armed conflict.”¹²³ Recently, the International Law Commission (ILC) also adopted a set of draft

¹¹⁴ U.N. Conference on the Human Environment, *Report of the United Nations Conf. on the Human Environment*, U.N. Docs., A/CONF.48/14/Rev.1 (1972).

¹¹⁵ U.N. Conference on Environment and Development, *Report of the United Nations Conference on Environment and Development*, U.N. Docs., A/Conf.151/26/Rev.1 (Vol. I) (1992).

¹¹⁶ Sand, *supra* note 1133, at 35.

¹¹⁷ AP I, *supra* note 56, at art. 35(3), 55(1).

¹¹⁸ See AP I, *supra* note 56, at art. 51(5) (regarding the principle of proportionality).

¹¹⁹ Rome Statute, *supra* note 78 art. 8²(2)(b)(iv).

¹²⁰ Fleck, *supra* note 10, at 215.

¹²¹ *Id.*

¹²² ICRC, *Rules of Customary International Humanitarian Law Rules 43-45*, CUSTOMARY IHL DATABASE, <https://perma.cc/8N3M-YA4J> (accessed Feb. 13, 2022).

¹²³ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Reports 226, para. 33 (July 8, 1996).

principles on the protection of the environment in relation to armed conflicts.¹²⁴

The objective of this subsection is not to dive into details of what types of protection IHL provides for the natural environment. Instead, the objective is to find out if IHL protects environment because of its importance for the nature or because this is necessary for human survival in times of armed conflict.

While Article 55(1) of AP I includes reference to the health and survival of the population, Article 35(3) lacks such reference. However, this does not imply that the environment itself is not protected by the provisions, but rather Article 55(1) reinforces Article 35(3).¹²⁵ Moreover, the term "population" is used without the adjective "civilian" as in many other provisions of AP I, which indicates that this term was inserted deliberately to cover not only humans, but all populations without distinction.¹²⁶ Commentaries to AP I explicitly indicate that Article 35 provides for protection of the environment itself.¹²⁷ The prohibition continues to apply even in the absence of any direct threat to the population of an enemy state because it is the natural environment itself that is protected, and the environment is deemed common property subject to preservation for everyone's use.¹²⁸

One more indication that the protection of the environment is not linked to human survival is the interpretation of the term *environment* itself; *Travaux préparatoires* of AP I show that, initially, delegates intended to put the term "human living environment" in the final text of the Protocol, but this proposal was rejected.¹²⁹ Thus, the concept of the natural environment should be understood in its broadest sense, "which does not consist merely of the objects indispensable for human survival but also includes forests and other vegetation, as well as fauna, flora, and other biological or climatic elements."¹³⁰ Armed conflicts disrupt lives of not only humans but also all other living organisms.¹³¹ Therefore, it is obvious that the environment should be protected during armed conflicts "not necessarily because of its significance for humans but rather for its importance in and of itself."

Recognition of the legal status of the natural environment as a heritage of humankind in armed conflict is vital for prevention of its damage, misuse or targeting as a military objective.¹³² IHL prohibits

¹²⁴ See generally Draft Principles on Protection of the Environment in Relation to Armed Conflicts, *supra* note 14.

¹²⁵ Fleck, *supra* note 10, at 215-16.

¹²⁶ Commentary of 1987 on Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, U.N. Doc A/74/10 (1987), art.55, para. 2134

¹²⁷ *Id.* At art. 35, para. 1441.

¹²⁸ *Id.* At art. 35, para. 1462.

¹²⁹ *Id.* At art. 35, para. 1444.

¹³⁰ *Id.* At art. 55, para. 2126.

¹³¹ *Id.* At art. 35, para. 1462.

¹³² Dieter Fleck, *The Protection of the Environment in Armed Conflict: Legal Obligations in the Absence of Specific Rules*, in *WAR AND THE ENVIRONMENT: NEW APPROACHES*

any attack directed against the natural environment unless a certain part of it constitutes a military objective and that part is attacked.¹³³ All components of the natural environment furthermore benefit from the proportionality rule and the duty of both an attacker as well as defender to take feasible precautionary measures to avoid or minimize incidental effects on civilian objects,¹³⁴ which under IHL terms consist of each element of the flora, fauna, and stones as well as the earth's surface, water, and air.¹³⁵

Protection of the environment is still a new feature for contemporary international law.¹³⁶ Respect for the environment, even in peacetime, has only become a matter of concern after the 1970s.¹³⁷ Today, it is elevated in the conscience of humankind.¹³⁸ That is how the environment found its place in IHL as well. IHL already provides a precedent for improving itself by incorporating new approaches and developments on a global level concerning the protection of the natural environment not necessarily linked to the survival of the civilian population affected by the armed conflict.

In addition, treaties and customary law that protect the natural environment in peacetime continue to apply in times of armed conflict according to the *lex specialis* rule.¹³⁹ Applying this model to animal welfare law would suggest that, given the globalization of animal law and elevation of animal welfare concerns on an international level,¹⁴⁰ it already opens a window of opportunity to be incorporated in IHL instruments as well. At the same time, any rules of international animal law that are applicable in peacetimes will automatically be applied in times of war unless some special IHL rules prevail.

B. CULTURAL HERITAGE

In armed conflicts, belligerents threaten not only the physical integrity of persons they consider as 'enemies' but also their cultural identity, including by trying to obliterate their tangible and intangible cultural heritage.¹⁴¹ Cultural heritage covers objects whose value transcends geographical boundaries, and which are unique and are in-

TO PROTECTING THE ENVIRONMENT IN RELATION TO ARMED CONFLICT 45, 47 (Rosemary Rayfuse ed., 2014).

¹³³ ICRC, *Rules of Customary International Humanitarian Law, Rule 43(a)*, Customary IHL Database (accessed Feb. 14, 2022).

¹³⁴ Sassòli, *supra* note 70, at 570.

¹³⁵ *Id.* At 569.

¹³⁶ Pilloud, et al., *supra* note 90, at 662.

¹³⁷ The adoption of the Stockholm Declaration at the UN Conference on the Human Environment can be seen as a major benchmark in this regard. U.N. Conference on the Human Environment, *Stockholm Declaration on the Human Environment*, U.N. Doc. A/48/14, at 2 and corr.1 (Dec. 15, 1972).

¹³⁸ Pilloud, et al., *supra* note 90, at 662.

¹³⁹ Sassòli, *supra* note 70, at 572; *see also* Saul & Akande, *supra* note 11, at 231–232.

¹⁴⁰ *See* Peters, *supra* note 33; *see also* Pipia, *supra* note 33; SYKES, *supra* note 33.

¹⁴¹ Sassòli, *supra* note 70, at 561.

timately associated with the history and culture of people.¹⁴² The inviolable nature of cultural property in armed conflict has been recognized for centuries.¹⁴³

Basic protection of cultural property results from Article 56 of the Hague Regulations, which extends the protection of private property to what might be called cultural property.¹⁴⁴ It also prohibits “seizure of, destruction or willful damage done to . . . historic monuments [and] works of art and science.”¹⁴⁵ Additionally, the protection of cultural property during armed conflict and military occupation is recognized as an integral part of customary IHL.¹⁴⁶

As a result of the horrors of the Second World War, the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, the first international treaty with a worldwide vocation focusing exclusively on the protection of cultural heritage in the event of armed conflict was adopted under the auspices of UNESCO, including a separate optional protocol (the First Protocol), whose purpose is to prevent the exportation of cultural property and to provide for the restitution of illegally exported objects.¹⁴⁷

Furthermore, AP I provides special protection for cultural objects and places of worship¹⁴⁸ and AP II extends such protection to non-international armed conflict as well.¹⁴⁹ Commentaries to these articles indicate that initially it was not planned to include these provisions in the texts of additional protocols, but later it was decided to insert provision of this type and thereby revealing concern for the cultural heritage of humanity.¹⁵⁰ The inclusion of the protection of cultural objects in the Protocols underlines the significance of preservation of heritage of humankind.¹⁵¹

IHL makes clear that cultural property objects are civilian objects and as such enjoy general protection under IHL and must not be attacked unless they are subjected to military use, in which case they may become military objectives. However, when not subjected to military use, they are entitled to special protection.¹⁵²

¹⁴² Pilloud, et al., *supra* note 90, at 646.

¹⁴³ GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 721 (2nd ed., 2016).

¹⁴⁴ Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, art. 56 Oct. 18, 1907 (“The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.”).

¹⁴⁵ *THE 1949 GENEVA CONVENTIONS: A COMMENTARY* 1478 (Andrew Clapham et al. eds., 2015).

¹⁴⁶ ICRC Rules of Customary International Humanitarian Law, rules 38–41.

¹⁴⁷ Saul & Akande, *supra* note 11, at 198.

¹⁴⁸ AP I, *supra* note 56, at art. 53.

¹⁴⁹ AP II, *supra* note 56, at art. 16.

¹⁵⁰ Pilloud, et al., *supra* note 90, at 640.

¹⁵¹ Sylvie-S. Junod, *Protocol II*, in *COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949*, *supra* note 90, at 1466.

¹⁵² Saul & Akande, *supra* note 11, at 197.

Moreover, IHL obliges parties to respect cultural property by “refraining from any use of the property and its immediate surroundings for purposes that are likely to expose it to destruction or damage in the event of armed conflict.”¹⁵³ The wording makes this provision more than a prohibition on the use of the cultural property for hostile purpose; the reference to “its immediate surroundings” and to any use “for purposes which are likely to expose it to destruction or damage” means that the prohibition extends to its *de facto* or passive use in any manner likely to draw fire on it.¹⁵⁴ This stringent protection granted to the cultural property once again demonstrates the significance of its value for humankind and not only for the population, which are affected by the armed conflict.

That cultural property should be protected has been eloquently clarified in the Preamble of the 1954 Convention,¹⁵⁵ which states that “damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world.”¹⁵⁶

Professor Marco Sassoli underlines the fact that tangible cultural property is targeted, destroyed, or alienated in armed conflicts mainly because of the relationship the enemy has with such property and not because of the tangible material of which it consists, nor even its aesthetic value, which, at any rate, only exists because of what human beings perceive.¹⁵⁷ Therefore, what is protected under international cultural heritage law are the interests of humankind and emotional, mental, or cultural bonds that the human population has towards cultural heritage which may frame identity—not the tangible cultural property itself.

Cultural heritage enjoys special protection under the IHL due to its significance for the entire humankind and not for the certain group of civilians, which might be affected by the armed conflict. Cultural property becomes important based on feelings from humans; therefore, by safeguarding cultural heritage, it is primarily human interests that receive protection. Nevertheless, wartime protection of cultural heritage is not necessarily linked to the survival of the population, which suffers consequences of war, neither does it constitute an absolute need for maintenance of ordinary civil life and safety in occupied territory.¹⁵⁸ Rather, the importance of such protection is dictated by the special implications cultural heritage has in a global world and by extraordinary sensitive or spiritual ties between humankind and cultural heritage.

¹⁵³ 1954 Hague Convention, *supra* note 12, at art. 4(1).

¹⁵⁴ Fleck, *supra* note 10, at 492.

¹⁵⁵ Saul & Akande, *supra* note 11, at 196.

¹⁵⁶ 1954 Hague Convention, *supra* note 12, at preamble, para. 2.

¹⁵⁷ Sassoli, *supra* note 70, at 562.

¹⁵⁸ See Hague Convention IV with Respect to the Laws and Customs of War on Land art. 43, Oct. 18, 1907, 36 Stat. 2277 (stating that restoration and maintenance of ordinary civil life and safety is a primary responsibility of the occupying power).

Given the growing trend of recognizing animal welfare as a matter of global concern and the importance of animals in human lives, the model of cultural heritage protection can also be applied to animal welfare law, and indeed, the cultural heritage regime created under IHL “can teach important lessons with respect to regime design relating to, *inter alia*, listing, individual and State responsibility, and the design and functioning of a bureaucracy.”¹⁵⁹

C. APPLYING ENVIRONMENTAL PROTECTION AND CULTURAL HERITAGE PROTECTION MODELS TO THE PROTECTION OF ANIMALS IN WAR

As it can be observed, IHL is not a static field of law. Its constant reformation is a living process, which catches up with modern developments on an international level and tries to modify itself to reflect all new approaches. The contemporary state of development of IHL clearly demonstrates that it pursues and absorbs developments of various branches of international law during peacetime, thus always opening a window for further expansion and incorporation of new rules.

Development of rules related to the protection of the natural environment and cultural heritage in armed conflicts exemplifies that previously unexplored concepts find their place in IHL and *jus in bello* norms provide protection for victims of war other than humans. One more example of how IHL pursues developments of international law can be the protection of children in armed conflict. Shortly after the international community agreed to have a separate set of rules for the protection of the rights of the child,¹⁶⁰ a special IHL rule was developed¹⁶¹ prohibiting the involvement of children in armed conflicts and thus preventing their conscription into armies and direct participation in hostilities, thus shifting public perceptions of children’s participation in armed conflict.¹⁶² “The relationship of the child with armed conflict has changed from one regulated by ethics and morality to one constructed by law and public policy.”¹⁶³ The same model can also be applied to the protection of animals. What is regulated by ethical and moral norms in war can become law during peacetime. Currently, IHL is also in the process of modification as to incorporate norms related to new technologies, artificial intelligence, and autonomous weapon systems.¹⁶⁴ Some authors even suggest that robots, animals, and the en-

¹⁵⁹ Lucas Lixinski, *Environment and War: Lessons from International Cultural Heritage Law*, in *WAR AND THE ENVIRONMENT: NEW APPROACHES TO PROTECTING THE ENVIRONMENT IN RELATION TO ARMED CONFLICT* 157, 177 (Rosemary Rayfuse ed., 2014).

¹⁶⁰ See generally Convention on the Rights of the Child, Nov. 20, 1989, UN Treaty Series, vol. 1577, p. 3, no. 27531.

¹⁶¹ United Nations Gen. Assembly, *supra* note 15.

¹⁶² Mark Drumbl, *Children in Armed Conflict*, in *THE OXFORD HANDBOOK OF CHILDREN’S RIGHTS LAW* 657, 657 (Jonathan Todres & Shani M. King eds., 2020).

¹⁶³ *Id.*

¹⁶⁴ See Christof Heyns, *Autonomous Weapons Systems*, INT’L COMM. OF THE RED CROSS: HOW DOES LAW PROTECT IN WAR, <https://casebook.icrc.org/case-study/autono->

vironment likewise should have rights.¹⁶⁵ Therefore, it is obvious that the time has come to acknowledge an animal turn in IHL and provide adequate protection of animals in times of armed conflict because (1) they constitute important value and deserve protection and (2) growing animal welfare concerns among societies globally indicate that humans experience special emotional, physical, and psychological bonds towards animals.

If we assume that IHL protects or might protect (1) the natural environment because it is important for the entire planet; (2) cultural heritage because it is important for all humankind; (3) robots in the future—there is simply no room left for any arguments why animals should be left out of IHL purview. Animals are important for both the planet and humankind, and they are sentient beings,¹⁶⁶ which means that they can experience physical and emotional suffering inflicted by the consequences of war. As such, IHL can no longer turn a blind eye to this reality and should open the gates of its realm to enable special protection of animals during armed conflicts. This process can be similar to the process of protection with regard to the natural environment or cultural property.

IV. BRINGING ANIMAL WELFARE RULES INTO IHL

A. SITUATIONS IN WHICH ANIMALS CAN POTENTIALLY SUFFER DURING ARMED CONFLICT

The fact that animals *per se* are not protected under IHL does not mean that they are not affected during armed conflict. They are ignored victims of war, but they experience emotional and physical suffering, pain, and distress. Animals can be targeted, used as weapons, and also used with auxiliary functions, such as transportation. They may not have any direct link to the ongoing armed conflict, but still experience anguish and tragedy which would have been avoided during peacetime. Indeed, wars caused the decline in animal populations more than any other factor.¹⁶⁷

The history of war proves that before the mechanization of warfare, armies often conscripted large numbers of animals into service to support their efforts: horses, donkeys, oxen, bullocks, and elephants carried men, material, and supplies; pigeons carried messages; camel-mounted troops have been employed in desert campaigns, and cavalry horses often led the charge on the front line; dogs have been particularly widely used by the military and remain so today—their roles

mous-weapon-systems (accessed Feb. 10, 2022) (reporting on autonomous weapons systems).

¹⁶⁵ JOSHUA C. GELLERS, *RIGHTS FOR ROBOTS: ARTIFICIAL INTELLIGENCE, ANIMAL AND ENVIRONMENTAL LAW* 1 (2021).

¹⁶⁶ David Bilchitz, *Why Conservation and Sustainability Require Protection for the Interests of Animals*, in *ANIMAL WELFARE AND INTERNATIONAL ENVIRONMENTAL LAW: FROM CONSERVATION TO COMPASSION* 207, 233 (Werner Scholz ed., 2019).

¹⁶⁷ Ventura, *supra* note 98, at 2–3.

have included tracking, guarding, delivering messages, laying telegraph wires, detecting explosives, and digging out bomb victims; rats have also been used to detect mines, while dolphins and sea lions continue to be trained to protect harbors from sea mines and divers; some reports even documented cats being used to hunt rats, canaries being used to detect poisonous gas and, in World War I, glow worms being used for illumination at night for reading.¹⁶⁸

In addition, zoo animals have also been affected by the hostilities in occupied territories.¹⁶⁹ Indeed, zoo animals can be particularly vulnerable during hostilities.¹⁷⁰ The illicit gains from poaching and trafficking in wildlife fauna amount to billions of U.S. dollars each year and are partly used to purchase weapons, ammunition, and equipment, and thus finance more war.¹⁷¹ Furthermore, wars caused rapid decline in population of certain species, often because of food shortage and environmental degradation.¹⁷² When war approaches, livestock and companion animals, which are completely dependent on human care, are typically abandoned for starvation in confinement or let loose and unable to feed themselves.¹⁷³ Sometimes, even owners exterminate them. For instance, immediately after the beginning of the Second World War, over 400,000 pets were killed in Britain in four days following a government public information campaign about their safety and expected food shortages.¹⁷⁴ Additionally, animals can also be used for military research and experimentations to develop and test weapons,¹⁷⁵ and finally, dogs, cats, and other animals have served as companions to raise morale and provide comfort to soldiers at the front.¹⁷⁶

The starting point here is that animals could be the most vulnerable potential victims of war because they cannot flee conflict zones, they are not alerted beforehand about the danger, they do not understand it, and they normally cannot travel and settle down elsewhere.¹⁷⁷ They suffer from the destruction of their habitat and severe pollution caused by armed conflict.¹⁷⁸ Therefore, even in circum-

¹⁶⁸ Janice Cox & Jackson Zee, *How Animals Are Harmed by Armed Conflicts and Military Activities*, CONFLICT & ENV'T OBSERVATORY (Mar. 18, 2021), <https://perma.cc/6GZR-P6VW> (accessed Feb. 10, 2022). See Sarah D. Cruse, *Military Working Dogs: Classification and Treatment in the U.S. Armed Forces*, 21 ANIMAL L. 249 (2015) (providing detailed analysis on the use of military dogs in the United States).

¹⁶⁹ Longobardo, *supra* note 66.

¹⁷⁰ John M. Kinder, *Zoo Animals and Modern War: Captive Casualties, Patriotic Citizens, and Good Soldiers*, in ANIMALS AND WAR: STUDIES OF EUROPE AND NORTH AMERICA 45, 59 (Ryan Hediger ed., 2013).

¹⁷¹ PETERS, *supra* note 41, at 337.

¹⁷² de Hemptinne, *supra* note 38, at 173.

¹⁷³ PETERS, *supra* note 41, at 338.

¹⁷⁴ HILDA KEAN, *THE GREAT CAT AND DOG MASSACRE: THE REAL STORY OF WORLD WAR TWO'S UNKNOWN TRAGEDY* 47–48 (2017).

¹⁷⁵ PETERS, *supra* note 41, at 340.

¹⁷⁶ Roscini, *supra* note 30, at 35.

¹⁷⁷ PETERS, *supra* note 41, at 335–36.

¹⁷⁸ *Id.*

stances where animals are not a military target of an attack, animals still find themselves in the most helpless and frightening situation, eventually ending with a large decrease in their populations. The data on the impact of war on animals over the past century shows that animal fatalities were no less than that of humans.¹⁷⁹

In addition to the abovementioned 'classical' use of animals in war, the historical record documents some unusual precedents of animal abuse during armed conflicts. Namely, during the siege of Leningrad from 1941 to 1944,¹⁸⁰ when hundreds of thousands of people starved to death, animal rights were merely a fantasy. An article published in 2020 by the Saint Petersburg University¹⁸¹ shows that starvation frequently forced people to engage in unusual activity—pet hunting.¹⁸² Eating pets became habitual, and people firstly turned to cats, dogs and pigeons.¹⁸³ Eating animals could be lifesaving and some people indeed avoided starvation and death by depriving animals' lives.¹⁸⁴ Certainly, starvation may make people very assertive and force them to break legal, conventional, moral, and ethical rules concerning animals. This pattern may be evident especially during siege combat operations when starvation is used as a method of warfare¹⁸⁵ and civilians and combatants alike in the besieged territory have a shortage of food, so they resort to eating pets or hunting down wildlife animals to survive.¹⁸⁶

B. BASIC RULES OF ANIMAL WELFARE, WHICH CAN BE APPLIED DURING ARMED CONFLICT

After finding that animals indeed can be victims of armed conflict requiring protection, it is necessary to determine which norms of animal welfare law can be transferred to IHL to provide basic protection for animals during war.

The bottom line here is the approach that guarantees humane treatment of animals both in peacetime and in armed conflicts.¹⁸⁷ In peacetime, it can be enforced by domestic legislation, while during

¹⁷⁹ Cox & Zee, *supra* note 168.

¹⁸⁰ *Siege of Leningrad*, ENCYCLOPEDIA BRITANNICA (Sept. 1, 2021), <https://www.britannica.com/event/Siege-of-Leningrad> (accessed Feb. 13, 2021) ("Siege of Leningrad, also called 900-day siege, prolonged siege (September 8, 1941–January 27, 1944) of the city of Leningrad (St. Petersburg) in the Soviet Union by German and Finnish armed forces during World War II. The siege actually lasted 872 days.")

¹⁸¹ V.L. Piankevich et al., *People and Pets in Besieged Leningrad*, 65 VESTNIK OF SAINT PETERSBURG UNIV. HIST. 158 (2020).

¹⁸² *Id.* at 158.

¹⁸³ *Id.* at 162.

¹⁸⁴ *Id.* at 173.

¹⁸⁵ AP I, *supra* note 56, at art. 54(1) (prohibiting starvation of civilians as a method of warfare); Rome Statute, *supra* note 118 art. 8²(2)(b)(xxv) (prohibiting starvation of civilians as being a war crime).

¹⁸⁶ Piankevich et al., *supra* note 181, at 161, 165.

¹⁸⁷ In the present Article, the term "humane treatment" refers to basic anti-cruelty rules, which prevent animals from suffering.

war, the only avenue that allows enforcement of humane treatment of animals via IHL is the Martens Clause.¹⁸⁸ Following the progressive reading of the Clause as discussed in the second chapter of this Article, it is suggested that as long as cases of animal protection are not prescribed under the IHL, they remain under the protection and authority of the principles of international law derived from established custom, the principles of humanity, and the dictates of public conscience.

But what are those principles in relation to animals? While customary nature of the AWL is disputed, and the principle of humanity is designed to primarily serve the welfare of human beings,¹⁸⁹ the reference to "the dictates of public conscience," as a general notion not essentially limited to one specific meaning, can justify the application of the Martens Clause to animals.

The so-called five freedoms of animal welfare¹⁹⁰ can be viewed as basic principles of animal wellbeing, which provide humane treatment of animals and can qualify as "dictates of public conscience." These five freedoms are globally recognized as the gold standard in animal welfare, encompassing both the mental and physical well-being of animals, they include: freedom from hunger and thirst; freedom from discomfort; freedom from pain, injury, and disease; freedom to express normal and natural behavior; and freedom from fear and distress.¹⁹¹

Even though it is not fully clear whether the residual nature of the Martens Clause can be interpreted broadly to encompass the protection of animals in armed conflict, the need to bring AWL basic rules into the IHL is evident. And as some authors explain, the moment has come for the international law of armed conflict to catch up with the overall changing awareness of animals as sentient beings whose suffering matters.¹⁹² The protection of animals in war does not always and inevitably interfere with the protection of humans, and the two often runs in parallel.¹⁹³

de Hemptinne describes some situations of animal protection during armed conflict, in which standard minimum rules of humane treatment can be offered to animals through provision of adequate care and evacuation.¹⁹⁴ Furthermore, 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 be fed and cared for, and in case of survival, released.¹⁹⁵ At the same time, de Hemptinne observes that the form of

¹⁸⁸ See *supra* Section 2.4 (detailing how the Martens Clause can be applied to provide protection for animals in war).

¹⁸⁹ International Law Commission, *supra* note 14, at 249.

¹⁹⁰ Pipia, *supra* note 33, at 172.

¹⁹¹ *Id.*

¹⁹² PETERS, *supra* note 41, at 344.

¹⁹³ *Id.*

¹⁹⁴ de Hemptinne, *supra* note 38, at 181.

¹⁹⁵ *Id.*

such treatment guarantees that human interests prevail over animal interests when they are in conflict.¹⁹⁶

Therefore, these five freedoms should be applied as points of departure when speaking about which norms of AWL can potentially be imported into the IHL. They provide very basic protection for animals during warfare, not because of their significance for humans, but because of the animals' importance in themselves. These rules underline that animals deserve compassion from humans—belligerents and civilians alike—and that public conscience dictates that these elementary rules should always be taken into consideration. However, it will be far from reality to argue that animal welfare norms have absolute character during armed conflict; they can be subject to limitations upon necessity, which is discussed in the subsequent section.

C. INTERPLAY BETWEEN IHL AND AWL

Before going into details about how these two branches of law, AWL and IHL, can interact with each other, it should be noted that, unlike peacetime, armed conflict is an emergency. Therefore, exigencies of war may require parties to the conflict to divert from legal, ethical, or moral norms, which would normally be applicable in peacetime. Perhaps the most apparent and simple example of this emergency is that rules of war permit the killing of a person under certain conditions,¹⁹⁷ which might sound very cruel and immoral during peacetime, but is the accompanying circumstance of war. Unfortunately, wars always bring casualties and damage, but the objective of the IHL is to limit, to the maximum extent, injuries and harm by offering the best possible protection to individuals while balancing between the principles of humanity and military necessity.¹⁹⁸

The principles of humanity and military necessity are in the spotlight of IHL, and any attempt to transfer AWL norms into IHL should go through the limitations derived from the application of these principles. That said, AWL norms should be upheld unless the application of these norms has detrimental effects on the welfare of humans or the military needs of the belligerent. In other words, the interests of the human population and the military necessity of armies prevail over animal protection objectives. Necessities of war may indeed justify a departure from the applicable rule.¹⁹⁹ This is not something new in IHL—as mentioned above, human welfare and military demands stand in the center of the legal framework applicable during armed

¹⁹⁶ *Id.*

¹⁹⁷ Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, INT'L COMM. OF THE RED CROSS (2009), <https://perma.cc/DW2S-UQ7U> (accessed Feb. 11, 2022).

¹⁹⁸ Sassoli, *supra* note 70, at 435.

¹⁹⁹ ANDREW CLAPHAM, WAR 306 (2021).

conflict.²⁰⁰ Therefore, everything else can be protected after the rights and interests of humans and armed forces are secured.

Consider using horses or mules for transporting weapons or other military material for the army or food or other supplies for the civilian population affected by war. In ordinary circumstances, overuse of animals would not be permitted, but if unavoidable exigencies of emergency demand, for the sake of human survival or military needs, animals can be overused without violating the law. However, if the same horses and mules are not used for transportation but are held for other purposes by a belligerent, they may not deliberately neglect them, but must provide adequate food, space, and veterinary care if necessary. The same approach will apply to hunting wildlife or pets—in peacetime, hunting down wildlife fauna or companion animals or birds is prohibited, but if proved that this is necessary to prevent famine and thus spare the population from the food crisis, laws of war would allow such derogation. Rules of bioethics may also be suspended in armed conflict if the use of animals in experimentation is necessary for the urgent needs of the civilian population or combatants. This list of examples is not exhaustive, and many other cases illustrate how AWL norms can be applied during armed conflicts.

Relations between the IHL and other branches of law are often characterized according to the principle *lex specialis derogate legi generali*, which implies that the specific rule applies with priority over a general rule.²⁰¹ Authors suggest that the *lex specialis* principle is applicable between the IHL and the human rights law, the environmental law,²⁰² or the law of the seas.²⁰³ The relation between the IHL and the AWL can also be governed by the *lex specialis* principle, but it should be underscored that the *lex specialis* principle does not regulate the relation between two branches, but between two rules. As suggested by Professor Sassoli, the *lex specialis* principle determines which rule prevails over another in a particular situation and each case must be analyzed individually.²⁰⁴ Several factors must be weighed to determine which rule is ‘special’ in relation to a certain problem.²⁰⁵ Specialty, in the logical sense, implies that the norm that applies to a certain set of facts must give way to the norm that applies to that same set of facts as well as to an additional fact that is present in a given situation.²⁰⁶ Between two potentially applicable rules, the one that has the larger “common contact surface area” with the situation applies.²⁰⁷ That said, some situations involving animals in armed conflict are governed exclusively by AWL, like the provision providing

²⁰⁰ DINSTEIN, *supra* note 8, at 8–9.

²⁰¹ *Id.* at 31–33.

²⁰² Sassoli, *supra* note 70, at 433, 572.

²⁰³ Saul & Akande, *supra* note 11, at 232.

²⁰⁴ Sassoli, *supra* note 70, at 439.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

for adequate veterinary care, space, and food for animals for transportation or other purposes by armies of belligerents. Other situations, however, are fully regulated by the IHL, like the case in which wild animals are used as weapons or otherwise constitute military objectives, which can be attacked notwithstanding the AWL norms prohibiting such attacks.

Another avenue to put AWL in practice during armed conflict is to enforce it through national legislation. None of the IHL rules provide inapplicability of domestic legislation during war. Therefore, countries that have adopted complex animal welfare rules²⁰⁸ can continue to apply them in their territories unless the application of such laws is suspended by the government by declaring martial law or a state of emergency. In any case, even assuming that belligerents might apply their domestic legislation in dealing with animals in armed conflict, IHL would still allow them to divert from some animal welfare rules if this is necessary for the wellbeing of its civilian population or military needs of its army.

V. FINDINGS AND FUTURE DEVELOPMENTS

A. MAIN FINDINGS

Recent studies estimated that humans represent, in terms of mass, only 0.01% of all life on earth.²⁰⁹ We simply cannot hide from the fact that animals are living creatures around us, and our impact has been significant on their lives, largely in a negative way.²¹⁰ One of the reasons for this harmful effect on animals is, of course, armed conflict, which is caused by humans. The primary responsibility for wars rests on humans and therefore humans must provide adequate protection for animals during armed conflicts. The concept of animal welfare follows the logic that animals should be free from human-made suffering.²¹¹ Armed conflict is indeed human-made suffering and humans have to bear responsibility for the distress, that wars can bring to animal populations.

The objective of this Article is not to go into detail and elaborate on precise rules of animal protection during armed conflict. This Article primarily focuses on the examination of the current state of IHL in relation to animal protection. Furthermore, it provides analysis on

²⁰⁸ See Katie Sykes, *Nations Like Unto Yourselves: An Inquiry into the Status of a General Principle of International Law on Animal Welfare*, 49 CAN. Y.B. INT'L L. 3 (2011) (detailing national legislations on animal welfare).

²⁰⁹ This number is estimated in a recent study from the Weizmann Institute of Science and the California Institute of Technology, which carried out global biomass census and accounted all living species including plants, animals, bacteria etc. Guillaume Futhazar, *Biodiversity, Species Protection, and Animal Welfare Under International Law*, in STUDIES IN GLOBAL ANIMAL LAW 95, 95 (Anne Peters ed., 2020).

²¹⁰ Jozef Keulartz & Bernice Bovenkerk, *Animals in Our Midst: An Introduction*, in ANIMALS IN OUR MIDST: THE CHALLENGES OF CO-EXISTING WITH ANIMALS IN THE ANTHROPOCENE 1, 1 (Bernice Bovenkerk & Jozef Keulartz eds., 2021).

²¹¹ Futhazar, *supra* note 209, at 96–97.

whether IHL protects non-human victims of war and if so, then can animals also be protected in the same manner. Finally, the Article proposes standard minimum rules that can potentially be employed for the protection of animals during armed conflict.

Consequently, this Article suggests that animals are indeed forgotten in the law of armed conflict. They may benefit from a certain degree of protection as property, objects, or elements of biodiversity but not as animals *per se*. Additionally, stages of development of IHL demonstrate that it is a living process and the IHL can catch up with contemporary developments in the international arena. IHL has already provided protection for nonhuman victims of war, which are not necessarily linked to the survival of humans, such as natural environment and cultural heritage, and these precedents can fairly be applied in relation to animal protection. Ultimately, the present Article suggests that the so-called five freedoms of animal welfare should be used as a starting point while discussing the transfer of AWL norms into the IHL.

B. WAY FORWARD

Transfer of the AWL norms into the IHL can happen through two routes. The first is by broadening the scope of the existing IHL rules, namely the principle of proportionality or the Martens Clause. The second is by initiating a new international legal instrument, which would specifically focus on the protection of animals in armed conflict.

i. Proportionality

Expansion of the proportionality rule²¹² has already happened in practice by incorporating the natural environment as potential collateral damage under the war crimes clause of the Rome Statute.²¹³ This clause was drawn from the AP I,²¹⁴ which does not explicitly mention the natural environment as potential incidental loss triggering application of the proportionality rule, but the Rome Statute broadened its scope.²¹⁵ The same approach can also be applied to animals. Therefore, the principle of proportionality can be modified to enable review of the legality of the attack causing incidental damage to animals in light of gained/anticipated military advantage.

If modified, the wording of the proportionality rule could read as follows:

It is prohibited to intentionally launch an attack, which may be expected to cause incidental loss of life or injury to civilians, or damage to civilian objects, or physical or emotional suffering of animals, or widespread, long-

²¹² See AP I, art. 51.5.(b); Rome Statute, *supra* note 78 art. 8²(2).(b)(iv) (enshrining the principle of proportionality).

²¹³ Rome Statute, *supra* note 78.

²¹⁴ WILLIAM SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 263 (2nd ed., 2016).

²¹⁵ See Rome Statute, *supra* note 78.

term and severe damage to the natural environment, or a combination thereof, which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

ii. Martens Clause

The Martens Clause has also been modified by the ILC in its Draft Principles document,²¹⁶ which specifically mentions the natural environment instead of civilians or combatants, as is the case with the traditional understanding of this Clause provided under the Hague Conventions and the AP I.²¹⁷ Even though, as explained above,²¹⁸ Peters suggested progressive reading of the Martens Clause, which would widely interpret its scope of protection to encompass animals as well, it would be better if the Clause were modified and explicitly mentioned animals together with civilians, combatants, and the environment.

Consequently, another variant of the Martens Clause with respect to animals can be formulated as follows:

In cases not covered by international agreements, animals remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity, and the dictates of public conscience.

iii. International treaty

Regarding new legal instruments, specific rules protecting animals in armed conflict could be adopted through either hard or soft law documents. A designated treaty can be initiated to deal with the animal protection issues during armed conflict.²¹⁹ This might be either a separate treaty, like ENMOD or 1954 Hague Convention, or optional protocol to a future universal animal welfare treaty,²²⁰ like optional protocol to the CRC on the prohibition of involvement of children in armed conflicts. Notably, work is currently underway to initiate a universal animal welfare treaty,²²¹ and the proposed structure indeed of-

²¹⁶ Draft Principles on Protection of the Environment in Relation to Armed Conflicts, *supra* note 14, at 212.

²¹⁷ Hague Convention, *supra* note 12; AP I, *supra* note 56.

²¹⁸ See *supra* Section 2.4.

²¹⁹ Roscini also suggests this development. Roscini, *supra* note 30, at 46.

²²⁰ See FAVRE, *supra* note 32, at 99 (recognizing that there is no universal animal treaty).

²²¹ See Bill Clark et al., *International Convention for the Protection of Animals*, ANIMAL LEGAL & HIST. CTR. (Apr. 4, 1988), <https://perma.cc/P6FX-RMM9> (accessed Feb. 11, 2022) (The proposed treaty structure includes a general convention as a main text and optional protocols focusing on specific topics or sub-topics of animal welfare. An earlier version of the treaty has been revised and works are ongoing to initiate new, updated text.); see *MSU Law Professor David Favre Leads ABA Call for New International Animal Welfare Treaty*, MICH. STATE UNIV., <https://perma.cc/R3TS-CWU3> (accessed Feb. 11, 2022) (recognizing Professor David Favre from Michigan State

fers a possibility of having optional protocols for specific animal welfare issues.

The proposed treaty ideally should: (1) provide a definition of *animal* and make it as wide as possible to incorporate not only wild fauna but also other categories of animals, such as companion or farm animals;²²² (2) ensure that animals shall not be objects of attack unless they meet the criteria of the military objective under the applicable rules of IHL²²³ and thus become legitimate targets; (3) forbid the use of animals in support of the military efforts and attacks against animals by way of reprisals; (4) uphold the general obligation of the parties²²⁴ to the conflict to take all the feasible measures in warfare to protect animals against hunger and thirst, discomfort, pain, injury and disease, fear and distress and inability to express normal and natural behavior. This protection would include a prohibition to the use of methods and means of warfare, which are deliberately intended or may be expected to cause physical or emotional suffering of animals; (5) feature that, rules of protection of animals in armed conflict are subject of limitations derived from the principles of humanity and military necessity, which means that interests of human populations, their survival, or military needs of belligerent armies take precedent over the animal protection during war.

iv. ILC Document

Finally, soft law instruments focusing on animal protection in armed conflicts can be adopted under the auspices of the ILC, like it is doing now in relation to the protection of the natural environment.²²⁵ This avenue would allow legal experts to discuss and agree on a detailed set of rules for the protection of animals, which would not have binding nature by the time of adoption but could serve as a basis for the formation of future mandatory instruments for parties to the conflict.

University, who was a pioneer in animal law by proposing the draft Convention on the Protection of Animals).

²²² If a treaty is adopted as an optional protocol to the wider treaty on animal welfare, which itself defines "animal," then there will not be need to propose separate definition of "animal" for the purpose of the protocol.

²²³ AP I, *supra* note 56, art. 52(2) ("Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.").

²²⁴ "This obligation should be imposed on all parties to the conflict, not only on states, in the same manner as the Article 3 common to the GCs imposes obligation on all parties, which include States and non-State Parties to the conflict alike." Commentary of 2016 to Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, Article 3: Conflicts Not of an International Character, para. 504.

²²⁵ Draft Principles on Protection of the Environment in Relation to Armed Conflicts, *supra* note 14.

The substantive scope of the potential ILC document can be somewhat the same as the one of the proposed treaties discussed above. But one added value of the ILC document is that usually, the Commission adopts legal rules together with commentaries,²²⁶ which provide detailed interpretation of adopted provisions and further clarify their scope of application. This would facilitate practical use of animal protection rules in the future.

v. Resolution adopted by the International Conference of the Red Cross and Red Crescent

The International Conference of the Red Cross and Red Crescent (ICRC) is another possibility for the adoption of soft law documents.²²⁷ So far, the ICRC is the largest global humanitarian forum that unites humanitarian actors and adopts non-binding IHL-related resolutions. This forum can mandate the International Committee of the Red Cross (ICRC) to instigate consultations on animal protection in armed conflict and produce and submit outcome documents for adoption by the Conference. Notably, such precedent already occurred, when the Conference asked ICRC to work on, *inter alia*, another unregulated topic in IHL—detention in non-international armed conflict.²²⁸

ICRC resolutions are usually accompanied by background documents, which reflect the process of consultations between all stakeholders on the matter of resolution.²²⁹ If the Conference invites ICRC to embark on this process, ideally, special background documents together with the draft resolution should be submitted to the Conference for its review. In addition to the substantial parts, which would provide detailed rules on animal protection in armed conflicts, the text of the prospective resolution should also include clauses encouraging domestic implementation of animal protection rules during the armed conflict by states through incorporation of these rules in their national legislation and practices.

It is understood that incorporation of animal welfare rules into IHL cannot happen immediately, because this is a long process of find-

²²⁶ See e.g., Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries, Sept. 6, 2001, U.N. Doc. A/56/10; Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, With Commentaries Thereto, Sept. 9, 2006, U.N. Doc. A/61/10; Draft Articles on the Protection of Persons in the Event of Disasters, With Commentaries, Sept. 3, 2016, U.N. Doc. A/71/10.

²²⁷ See *International Conference of the Red Cross and Red Crescent*, ICRC (Nov. 17, 2015), <https://perma.cc/7SP4-VQPH> (accessed Feb. 11, 2022) (detailing the International Conference of the Red Cross and Red Crescent).

²²⁸ 31st International Conference of The Red Cross and Red Crescent, *Strengthening Legal Protection for Victims of Armed Conflicts*, par. 6, 31IC/11/5.1.1 (Dec. 1, 2011); see also *Strengthening International Humanitarian Law*, ICRC (Nov. 3, 2015) <https://perma.cc/YJK5-ANV4> (accessed Feb. 11, 2022) (detailing the consultation process).

²²⁹ See e.g., *Documents*, RCRC CONFERENCE (2019), <https://perma.cc/4T3W-5NYV> (accessed Feb. 11, 2022) (showing the most recent resolutions adopted by the ICRC).

ing consensus, identifying the rules which can be applied for animal protection during armed conflict, determining which mode of law-making can be used (hard or soft law) and so on. This Article aims to contribute to the debate and propose some practical solutions which potentially can be used by decision-makers globally.