



**MAX PLANCK INSTITUTE**

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## **BEYOND ANIMAL WARFARE LAW**

**Humanizing the “War on Animals” and the Need for Complementary Animal Rights**

Saskia Stucki

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## ABSTRACT

This article puts forward a novel analogy between animal welfare law and international humanitarian law – two seemingly unrelated bodies of law that are both marked by the aporia of humanizing the inhumane. Based on a comparative analysis with the law of war, this article argues that animal *welfare* law is best understood as a kind of *warfare* law which regulates violent activities within an ongoing “war on animals,” and needs to be complemented by a *jus contra bellum* and peacetime animal rights.

## KEYWORDS:

animal rights, animal welfare law, international humanitarian law, law of war, human rights, global animal law, comparative law

# Beyond Animal Warfare Law:

## Humanizing the “War on Animals” and the Need for Complementary Animal Rights

Saskia Stucki\*

*War is peace* – George Orwell, 1984

### INTRODUCTION

*Here is a hand-to-hand struggle in all its horror and frightfulness; Austrians and Allies trampling each other under foot, killing one another on piles of bleeding corpses, felling their enemies with their rifle butts, crushing skulls, ripping bellies open with sabre and bayonet ... it is a sheer butchery; a struggle between savage beasts, maddened with blood and fury ... Brains spurt under the wheels, limbs are broken and torn, bodies mutilated past recognition – the soil is literally puddled with blood, and the plain littered with human remains ... But nothing stopped the carnage, arrested or lessened it. There was slaughter in the mass, and slaughter man by man. Henri Dunant, A Memory of Solferino*

*... the men upon the floor were going about their work ... one by one they hooked up the hogs, and one by one with a swift stroke they slit their throats. There was a long line of hogs, with squeals and lifeblood ebbing away together ... It was all so very businesslike*

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... And yet somehow the most matter-of-fact person could not help thinking of the hogs; they were so innocent ... They had done nothing to deserve it; and it was adding insult to injury, as the thing was done here, swinging them up in this cold-blooded, impersonal way, without a pretense of apology, without the homage of a tear ... but this slaughtering machine ran on ... It was like some horrible crime committed in a dungeon, all unseen and unheeded, buried out of sight and of memory. Upton Sinclair, *The Jungle*

This article puts forward a novel analogy between *animal welfare law* (AWL) – the body of law governing the protection, and alleviating the suffering, of animals caught in situations of exploitative use – and *international humanitarian law* (IHL) – the body of law governing the protection, and alleviating the suffering, of humans caught in situations of war and other armed conflict. It likens the *humane* impetus informing AWL in its attempt to humanize innately violent and inhumane practices of exploitative animal use to the *humanitarian* thrust undergirding IHL in its endeavor to humanize innately violent and inhumane practices of warfare. While the protection of animals under the laws of war has recently begun to get some scholarly attention,<sup>1</sup> and a few authors have entertained the idea of transferring concepts from the context of war to animals or of deploying the very concept of war to capture the violent character of contemporary human-animal relations,<sup>2</sup> this article explores uncharted territory. It advances a new conception of AWL as a kind of warfare law – as it were, an “animal warfare law.”

At first glance, reframing *animal welfare law* as an (analogical) *warfare law* may strike some readers as a bold, purely rhetorical, or polemic move. Surely, one might think, the breakdown of civilization unfolding on the battlefield in the exceptional state of war cannot,

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<sup>1</sup> See THE PROTECTION OF ANIMALS IN WARTIME (Robert Kolb, Anne Peters & Jérôme de Hemptinne eds., forthcoming); Marco Roscini, *Animals and the Law of Armed Conflict*, 47 *ISR. Y.B. HUM. RTS.* 35 (2017); Karsten Nowrot, *Animals at War: The Status of “Animal Soldiers” under International Humanitarian Law*, 40 *HISTORICAL SOCIAL RESEARCH* 128 (2015); Jérôme de Hemptinne, *The Protection of Animals During Warfare*, 111 *AJIL UNBOUND* 272 (2017).

<sup>2</sup> See Alasdair Cochrane & Steve Cooke, “*Humane Intervention*”: *The International Protection of Animal Rights*, 12 *JOURNAL OF GLOBAL ETHICS* 106 (2016); DINESH JOSEPH WADIWEL, *THE WAR AGAINST ANIMALS* (2015).



and must not, be compared with the routinized procedures orderly executed in the abattoir – arguably the “paradigmatic space” of modern industrialized civilization.<sup>3</sup> Yet, this article neither contends that a literal war is being waged against animals, nor does it purport that AWL actually *is* a warfare law. What it claims is that irrespective of whether one regards the *factual* phenomenon of “human violence towards animals as warlike,”<sup>4</sup> the *normative* regime governing it is, in significant respects, warfare law-like. As this article will show, the seemingly far-fetched (and certainly unorthodox) comparison between AWL and IHL is analytically sound, given the striking similarities to be discovered between these two bodies of law. Notably, both are marked by the aporia of humanizing the inhumane. Both legal regimes seek to balance the necessity of instrumental violence and countervailing humane considerations, which is most clearly expressed in the shared principle of unnecessary suffering. And with regard to both AWL and IHL, critical voices stress that the legal regulation of violence may not only serve to humanize, but also legitimize and perpetuate the very institutions that invariably inflict suffering on human and nonhuman animals. It is in the light of these parallelisms that this article formulates its key conceptual claim: that existing AWL is best understood as a kind of warfare law which regulates and restrains violent activities within an ongoing “war on animals.”

Moreover, far from being a mere intellectual figment, the novel concept of animal warfare law engenders instructive insights and much-needed impulses for rethinking, reconstructing, and complementing the corpus juris of animal-protective law.<sup>5</sup> The current state of legal animal protection, and of the scholarly discourse surrounding it, is inadequate.

On the one hand, existing animal protection law falls gravely short of fulfilling its eponymous

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<sup>3</sup> Alejandro Lorite Escorihuela, *A Global Slaughterhouse*, 2 HELSINKI REVIEW OF GLOBAL GOVERNANCE 25, 27 (2011).

<sup>4</sup> WADIWEL, *supra* note 2, at 3.

<sup>5</sup> In common parlance, “animal protection” and “animal welfare” are often used synonymously, because the two concepts have been largely coextensive so far. By contrast, I will use “legal animal protection” (“animal protection law,” “animal-protective law”) as an umbrella term that covers any kind of legal protection for animals, including animal *welfare* law and animal *rights*. “Animal-protective law,” as understood here, thus comprises all legal norms aimed at protecting individual animals and their intrinsic value and interests.

purpose (literally to protect animals), as evidenced by the billions of animals suffering and perishing in factory farms, slaughterhouses, laboratories, fur farms, zoos, or wildlife markets. This is primarily a failure of AWL, which is the principal (and virtually the only) animal-protective regime as a matter of positive law. The fact that contemporary animal protection law is monopolized by, and largely coextensive with, AWL is problematic, because the latter is but a deeply imperfect body of law whose function is limited to marginally humanizing the profoundly inhumane institution of animal exploitation. On the other hand, AWL seems to remain without a viable alternative thus far, because its main competing approach – the animal rights (AR) approach – is widely discarded as quixotic and impracticable. Within the predominant *welfare/rights-dualism*, which casts AWL and AR as opposing and mutually exclusive paradigms for the legal protection of animals, we have arrived at an impasse, because neither approach seems sufficient on its own. Unfortunately, legal scholarship has been unable to show a workable way forward toward reforming animal-protective law in a manner that is not too peripheral (and thus not meaningful enough) or too radical (and thus not feasible enough).

This article’s comparative analysis of AWL and IHL offers a fresh outlook that helps overcome both the normative shortcomings of current animal protection law as well as the discursive stagnation of an “increasingly stale debate”<sup>6</sup> defined and confined by its dualistic framing. First, the analogy with the law of war yields a refined and more realistic understanding of the ambivalent nature, distinctive function, and inherent limits of AWL as an ugly but necessary warfare law. Second, the analogy allows us to pinpoint the insufficiency of contemporary animal protection law as (also) a structural problem, as it reveals a significant normative lacuna. To the extent that the existing corpus of animal-protective law is solely (or principally) composed of AWL qua warfare law, it only provides for protection

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<sup>6</sup> Jessica Eisen, *Beyond Rights and Welfare: Democracy, Dialogue, and the Animal Welfare Act*, 51 U. MICH. J.L. REFORM 469, 527 (2018).



*within*, but not *from* or *beyond* the war on animals. This marks a crucial difference to IHL, which is designed as an exceptional wartime regime that is flanked and contained by an ordinary law of peace, notably the *jus contra bellum* and human rights (HR). This human-protective triad (*jus in bello*–*jus contra bellum*–human rights) offers a useful blueprint to fill the identified animal-protective gap. Accordingly, so goes this article’s key normative argument, animal warfare law needs to be complemented and contained by two (so far lacking) animal-protective bodies of law: a kind of *jus contra bellum* that works to prevent warlike human-animal relations and an AR regime that governs peaceful human-animal relations. Ultimately, this article thus advances a new, *tripartite framework* for legal animal protection, comprising three distinct yet complementary bodies of law: AWL (as a pragmatic wartime regime), a *jus contra bellum* (operating as a bridge between wartime and peacetime), and AR (as an aspirational peacetime regime). This tripartite model incorporates both AWL and AR into a pluralistic and expanded corpus of animal protection law and, simultaneously, reconfigures their traditionally dichotomized relationship as one of complementarity rather than incompatibility. In doing so, this article abandons the orthodox welfare/rights-dualism in favor of a more nuanced, both ambitious and realistic, *complementarity-based* model for legal animal protection – one in which AWL and AR can have a meaningful and mutually enriching coexistence.

The structure of the article proceeds as follows. *Part I* will briefly outline the traditional welfare/rights-dualism, the discursive impasse it has created, and the promise of a complementarity-based approach. *Part II* will then lay the foundations for remodeling the corpus of animal-protective law in the image of the human-protective laws of war and peace, by substantiating the underlying analogy between AWL and IHL. The comparative analysis will show that AWL bears some of the main hallmarks of the law of war, on the basis of which AWL will be reframed as a warfare law. *Part III* is concerned with thinking through

the conceptual implications that follow from the analogy with the law of war. Notably, it highlights the lack, and the pressing need for the formation, of a counterbalancing animal law of peace. The final sections will outline the shape of a *jus contra bellum*, whose rationale is to prevent rather than merely regulate war, and a complementary AR regime, operating both within and beyond the war on animals.

## I. ANIMAL WELFARE LAW AND ANIMAL RIGHTS: FROM DICHOTOMY TO COMPLEMENTARITY

### A. *The Traditional Welfare/Rights-Dualism*

Animal protection – the basic idea that animals are due some form of protection – is today a generally accepted moral, political, and legal concern. On the level of *domestic* law, numerous countries across the world have enacted animal welfare or anti-cruelty provisions, and a small but growing number of states have constitutionally enshrined animal-protective objectives.<sup>7</sup> In Europe, there exists an additional layer of *regional* international and *supranational* animal protection law.<sup>8</sup> In the European Union in particular, the protection of animals has quasi-constitutional status<sup>9</sup> and is recognized as “a legitimate objective in the public interest.”<sup>10</sup> Moreover, we can observe the progressive formation of a global animal law, that is, of animal protection as an object of *international* law.<sup>11</sup> Overall, the “pervasiveness of international

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<sup>7</sup> See BRUCE A. WAGMAN & MATTHEW LIEBMAN, *A WORLDVIEW OF ANIMAL LAW* (2011); Jessica Eisen & Kristen Stilt, Protection and Status of Animals (December 2016), in MAX PLANCK ENCYCLOPEDIA OF COMPARATIVE CONSTITUTIONAL LAW (Rainer Grote, Frauke Lachenmann & Rüdiger Wolfrum eds.).

<sup>8</sup> Comprising the Council of Europe’s five animal welfare conventions and the European Union’s numerous directives and regulations relating to animal welfare.

<sup>9</sup> Consolidated Version of the Treaty on the Functioning of the European Union (OJ C 326, 26.10.2012, p. 47–390), Art. 13.

<sup>10</sup> *Zuchtvieh-Export GmbH v. Stadt Kempten*, Case C-424/13, para. 35 (ECJ, 23 April 2015).

<sup>11</sup> Anne Peters, *Global Animal Law: What It Is and Why We Need It*, 5 TEL 9, 11–13 (2016).

concern for animal welfare” suggests that animal protection may be emerging as a general principle of law.<sup>12</sup>

While animal protection is solidifying globally as a legal concern, and whereas virtually all animal lawyers agree that the current state of the law is painfully inadequate, there is strong disagreement among scholars about how best to design and meaningfully improve the legal protection of animals. This question continues to be debated within the welfare/rights-framework.<sup>13</sup> Broadly speaking, the *welfare* approach – which informs existing AWL – holds that humans are entitled to use and kill animals for manifold purposes, but in doing so, they should treat animals humanely and avoid inflicting unnecessary pain or suffering.<sup>14</sup> Under the welfare paradigm, human use of animals is not generally disallowed, but the instrumental violence it entails is tempered through legal *regulation* that imposes certain restrictions on harmful animal use. By contrast, the alternative *rights* approach holds that animals are the bearers of inviolable (moral and ideally legal) rights which “prohibit them being harmed or sacrificed for the benefit of humans.”<sup>15</sup> The AR approach is typically coextensive with an *abolitionist* position, in that it opposes harmful animal use altogether and thus ultimately requires “the end of institutionalized animal exploitation.”<sup>16</sup>

Given their differing objectives – regulation versus abolition of animal exploitation – welfare and rights approaches are traditionally cast as competing and mutually exclusive

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<sup>12</sup> MICHAEL BOWMAN, PETER DAVIES & CATHERINE REDGWELL, *LYSTER’S INTERNATIONAL WILDLIFE LAW* 680 (2<sup>nd</sup> ed., 2010); 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).

<sup>13</sup> Of course, the discursive landscape is more diverse and includes other approaches in between, and beyond, welfare and rights. Nonetheless, “the opposition (or ‘continuum’) between rights and welfare continues to serve as the dominant framework.” Eisen, *supra* note 6, at 493.

<sup>14</sup> See generally Robert Garner, *Animal Welfare: A Political Defense*, 1 J. ANIMAL L. & ETHICS 161 (2006).

<sup>15</sup> Will Kymlicka & Sue Donaldson, *Rights*, in *CRITICAL TERMS FOR ANIMAL STUDIES* 320, 320 (Lori Gruen ed., 2018); on the idea of animal rights, see *seminally* TOM REGAN, *THE CASE FOR ANIMAL RIGHTS* (2<sup>nd</sup> ed., 2004).

<sup>16</sup> Gary L. Francione, *Animal Rights and Animal Welfare*, 48 RUTGERS L. REV. 397, 397–98 (2013); some AR accounts allow for non-exploitative and non-violent forms of (symbiotic or benevolent) animal use, and are thus not abolitionist in an absolute or “extinctionist” sense. See notably SUE DONALDSON & WILL KYMLICKA, *ZOOPOLIS: A POLITICAL THEORY OF ANIMAL RIGHTS* 10, 49, 77–82 (2011) (arguing for ending human exploitation of animals *and* reconstructing “those relationships in ways that are respectful, compassionate, and non-exploitative”); ALASDAIR COCHRANE, *ANIMAL RIGHTS WITHOUT LIBERATION: APPLIED ETHICS AND HUMAN OBLIGATIONS* (2012).

paradigms for the legal protection of animals.<sup>17</sup> This dichotomy has contributed to an increasingly stagnant and unproductive scholarly discourse, much of which revolves around defending one position and discarding the other.<sup>18</sup> Moreover, the *either-or* choice between AWL or AR has created an impasse, since *neither*, on its own, seems to offer an adequate single foundation for animal protection law. On the one hand, AWL has been abundantly criticized for being, at best, largely ineffective in achieving any significant improvements as “the suffering and exploitation of animals continue unabated,”<sup>19</sup> or, at worst, for being counterproductive in that it stabilizes the underlying system of animal exploitation. On the other hand, the AR paradigm is widely held to be “a political non-starter,”<sup>20</sup> as it aims for “an impractical and unattainable goal,”<sup>21</sup> the achievement of which seems “unrealistic at present.”<sup>22</sup> Given that AR will likely remain “utopian in the foreseeable future,”<sup>23</sup> its proponents are frequently charged with engaging in some form of “fundamentalism”<sup>24</sup> by prioritizing an idealistic agenda over tangible reforms that could benefit the billions of animals who suffer and die in the present.<sup>25</sup> In short, with AWL being too unambitious and compromising to offer sufficient legal protection for animals, and AR being too ambitious and

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<sup>17</sup> On the welfare/rights-dualism, *see generally* GARY L. FRANCIONE & ROBERT GARNER, *THE ANIMAL RIGHTS DEBATE: ABOLITION OR REGULATION?* (2010); Anne Peters, Introduction: Animal Law – A Paradigm Change, *in* ANIMAL LAW: REFORM OR REVOLUTION? 15, 21–24 (Anne Peters, Saskia Stucki & Livia Boscardin eds., 2015); Joyce Tischler, *The History of Animal Law: Part I (1972-1987)*, 1 J. ANIMAL L. & POLICY 1, 28 (2008) (noting a “dichotomy that was present from the inception of animal law: ... rights versus welfare, abolition versus regulation”).

<sup>18</sup> *See* Eisen, *supra* note 6, at 527.

<sup>19</sup> Elizabeth L. DeCoux, *Speaking for the Modern Prometheus: The Significance of Animal Suffering to the Abolition Movement*, 16 ANIMAL L. 9, 14 (2009).

<sup>20</sup> DONALDSON & KYMLICKA, *supra* note 16, at 4–5.

<sup>21</sup> Jonathan R. Lovvorn, *Animal Law in Action: The Law, Public Perception, and the Limits of Animal Rights Theory as a Basis for Legal Reform*, 12 ANIMAL L. 133, 142 (2006).

<sup>22</sup> FRANCIONE & GARNER, *supra* note 17, at 168.

<sup>23</sup> Will Kymlicka, *Social Membership: Animal Law Beyond the Property/Personhood Impasse*, 40 DALHOUSIE L. J. 123, 125 (2017).

<sup>24</sup> FRANCIONE & GARNER, *supra* note 17, at 103.

<sup>25</sup> *See* Lovvorn, *supra* note 21, at 139; Regina Binder, Animal Welfare Regulation: Shortcomings, Requirements, Perspectives, *in* ANIMAL LAW: REFORM OR REVOLUTION? 67, 83 (Anne Peters, Saskia Stucki & Livia Boscardin eds., 2015) (noting that abolitionism “ultimately leads to the consequence that animals living in the present are forgotten for merely purist reasons or utopian visions”).

uncompromising to offer a politically feasible alternative, we are faced with the dilemma of a sorely inadequate status quo and no viable way forward.<sup>26</sup>

### *B. Moving Beyond the Impasse: The Complementarity Approach*

This article seeks to break through the confines of the welfare/rights-dualism by remodeling and expanding the corpus of animal-protective law on a pluralistic, complementarity-based foundation. Departing from the orthodox dualism, it submits that there can be a meaningful, indeed fruitful, cross-pollination and co-existence between AWL and AR. While maintaining a clear conceptual distinction between AWL and AR, this article redefines their traditionally dichotomized relationship as one of complementarity rather than incompatibility. By incorporating and reconciling both existing approaches, it aims to show a workable avenue for the dialectical progression of animal protection law. The virtue of the complementarity approach is that it allows us to retain the respective strengths of both the welfare paradigm (e.g. the pragmatic alleviation of suffering) and the rights paradigm (e.g. the provision of a normative ideal), while simultaneously recognizing and overcoming their respective weaknesses and the impasse created by their dualistic opposition.

The complementarity approach is modeled on the relationship of IHL and HR – two historically dichotomized legal regimes that have come to be understood as distinct but complementary bodies of law. As Ben-Naftali has noted in that context, the idea that IHL and HR “are complementary, rather than alternative regimes, has represented a paradigmatic shift in the international legal discourse, replacing the former convention which maintained that the two are mutually exclusive.”<sup>27</sup> This article advocates a similar paradigmatic shift in animal law discourse. It submits that AWL and AR are best understood not as competing and

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<sup>26</sup> In a similar vein, Kymlicka, *supra* note 23, at 125; DeCoux, *supra* note 19, at 18.

<sup>27</sup> Orna Ben-Naftali, Introduction: International Humanitarian Law and International Human Rights Law – Pas de Deux, *in* INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW 3, 4 (Orna Ben-Naftali ed., 2011).

mutually exclusive paradigms for the legal protection of animals, but rather, as distinct yet complementary legal regimes that both share a basic commitment to animal protection and both serve different functions.

While the well-established model of complementarity between IHL and HR provides a useful lens through which to rethink the nature and relationship of AWL and AR, this argument from analogy evidently hinges on the comparability of, primarily, AWL and IHL (and, secondarily, of AR and HR).<sup>28</sup> To what extent, and in what respects, AWL and IHL are comparable will be explored in the next part.

## II. ANIMAL WELFARE LAW AND INTERNATIONAL HUMANITARIAN LAW: AN (UNLIKELY) COMPARISON

This part undertakes a comparative analysis of AWL and IHL. The goal is not to provide an exhaustive account of every aspect of (dis)similarity, but rather, to highlight the most salient points of comparability which may prompt us to rethink AWL as a warfare law. The overarching theme of this comparison is the shared aporia of humanizing the inhumane.<sup>29</sup> Both AWL and IHL govern innately violent and inhumane institutions, and seek to make them more humane by managing the instrumental violence and suffering that is invariably

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<sup>28</sup> This article focuses on the comparability of AWL and IHL. This is because these two bodies of law are seemingly unrelated and have not been parallelized as yet, whereas the parallels between human and animal rights appear more intuitive and have already received some scholarly attention. *See* Alasdair Cochrane, *From Human Rights to Sentient Rights*, 16 *CRITICAL REVIEW OF INTERNATIONAL SOCIAL AND POLITICAL PHILOSOPHY* 655 (2013) (characterizing HR and AR as “part of the same normative enterprise.” *Id.*, at 656); PAOLA CAVALIERI, *THE ANIMAL QUESTION: WHY NONHUMAN ANIMALS DESERVE HUMAN RIGHTS* (2001) (casting AR as “the necessary dialectical derivation of ... human rights theory.” *Id.*, at 143); DONALDSON & KYMLICKA, *supra* note 16, at 19–49 (viewing “animal rights as a logical extension of the doctrine of human rights.” *Id.*, at 44); Anne Peters, *Liberté, Égalité, Animalité: Human-Animal Comparisons in Law*, 5 *TEL* 25 (2016); Will Kymlicka, *Human Rights Without Human Supremacism*, 48 *CAND. J. PHILOS.* 763 (2018); Conor Gearty, *Is Human Rights Speciesist?*, in *THE LINK BETWEEN ANIMAL ABUSE AND HUMAN VIOLENCE* 175 (Andrew Linzey ed., 2009).

<sup>29</sup> On the “contradictions inherent in the humanization of the law of war,” *see generally* Theodor Meron, *The Humanization of Humanitarian Law*, 94 *AM. J. INT’L L.* 239, 240–41 (2000); on AWL’s ambivalence of humanizing the inhumane, *see generally* SASKIA STUCKI, *GRUNDRECHTE FÜR TIERE* 140–49 (2016).

inflicted upon human and nonhuman animals. Both AWL and IHL are instantiations of a “humane law”<sup>30</sup> that, on a favorable reading, is motivated by a humanizing impetus to restrain the violent activities it governs, or, on a more critical reading, legitimizes, facilitates, and perpetuates the very violence it regulates. As will be illustrated in the following sections, this deeply ambivalent dynamic is operative in both bodies of law, and as a result, both legal regimes have formed in remarkably similar ways.

#### A. *Subject Matter Comparability: The “War on Animals”*

First, some remarks are in order on the subject matter comparability, that is, whether the institutions governed by AWL and IHL are at all comparable. Clearly, these two bodies of law deal with different factual phenomena. IHL is the branch of law regulating the conduct of warfare and armed hostilities. Its subject matter, and the trigger of its applicability *ratione materiae*, is armed conflict, generally understood as the resort to armed force between states or intense armed violence between armed groups.<sup>31</sup> AWL is the branch of law dealing with human-animal relations in a broad sense, and more specifically, regulating human conduct toward and the treatment of animals. Given that the contemporary human-animal relationship is primarily an exploitative one – foremost characterized by the use of animals for human purposes and by instrumental violence against animals as a corollary of such utilization<sup>32</sup> – it seems fair to say that the main subject matter of current AWL is “animal exploitation.”<sup>33</sup>

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<sup>30</sup> See JEAN PICTET, *DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW* 3 (1985).

<sup>31</sup> See ICTY, *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para. 70.

<sup>32</sup> For an overview of harmful animal use practices, see F. BAILEY NORWOOD & JAYSON L. LUSK, *COMPASSION, BY THE POUND: THE ECONOMICS OF FARM ANIMAL WELFARE* (2011); DAVID L. CLOUGH, *ON ANIMALS, VOLUME II: THEOLOGICAL ETHICS* (2018); *THE PALGRAVE INTERNATIONAL HANDBOOK OF ANIMAL ABUSE STUDIES* (Jennifer Maher, Harriet Pierpoint & Piers Beirne eds, 2017).

<sup>33</sup> For lack of a better term, I use the phrase “animal exploitation” as a shorthand for the totality of social practices of harmful animal use for commercial (or other, e.g. scientific or personal) reasons.



Does animal exploitation amount to something akin to a war – a “war on animals”? Certainly, it does not seem to conform with any legal or conventional understandings of war as the use of armed force in pursuit of political goals.<sup>34</sup> To give but the most obvious examples, exploited animals are neither an organized armed group nor actively engaged in reciprocal violent hostilities, and animal exploitation primarily follows an economic rather than (geo-)political calculus. Whilst we must be cognizant of such definitional and factual differences, the institutions of war and animal exploitation do share some material commonalities. Both are constituted through violent activities (i.e. such harming the victim’s bodily integrity), notably, the use of weapons (i.e. tools designed or used to inflict bodily harm) against, the injuring, killing, and captivity of combatants and animals, respectively.<sup>35</sup> Essentially, AWL and IHL deal with phenomena of *collectively organized and institutionalized violence*. Whereas war is a well-known form of collective violence,<sup>36</sup> this may be less apparent with regard to animal exploitation. Yet, contemporary animal use practices are constituted, pervaded, and perpetuated by “widespread mass orchestrated violence against animals.”<sup>37</sup> Collective violence against animals manifests itself most directly as physical violence, but such individual acts of violence are framed, facilitated, and legitimated by a wider web of structural and cultural violence.<sup>38</sup> Institutionalized violence against animals is embedded in everyday, routinized practices of animal use,<sup>39</sup> which is best exemplified by agricultural animal production and its paradigmatic spaces of factory farms

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<sup>34</sup> For various definitions of war, see INGRID DETTER, *THE LAW OF WAR* 5–6 (3<sup>rd</sup> edn., 2013).

<sup>35</sup> See Tom Regan, *Animal Exploitation – The War Analogy*, <https://regan.animalsvoice.com/animal-exploitation-the-war-analogy-2/>.

<sup>36</sup> See, e.g., Barry S. Levy & Victor W. Sidel, *Collective Violence: War*, in *OXFORD TEXTBOOK OF GLOBAL PUBLIC HEALTH* 1288 (Roger Detels, Martin Gulliford, Quarraisha Abdool Karim & Chorh Chuan Tan eds., 6<sup>th</sup> edn., 2015).

<sup>37</sup> WADIWEL, *supra* note 2, at 30.

<sup>38</sup> See WADIWEL, *supra* note 2, at 29–36 (noting that violence against animals “operates on an inter-subjective, institutional and epistemic level.” *Id.*, at 31); on this three-layered typology of violence, see generally Johan Galtung, *Violence, Peace, and Peace Research*, 6 *J. PEACE RES.* 167, 168–69 (1969); Johan Galtung, *Cultural Violence*, 27 *J. PEACE RES.* 291 (1990).

<sup>39</sup> See Erika Cudworth, *Killing Animals: Sociology, Species Relations and Institutionalized Violence*, 63 *SOCIOL. REV.* 1, 13–15 (2015); MARGO DEMELLO, *ANIMALS AND SOCIETY: AN INTRODUCTION TO HUMAN-ANIMAL STUDIES* 217–18 (2012).

and assembly-line slaughterhouses, where animals experience a wide variety of harms incidental or inherent to the production process. While the former type of incidental harm arises from *abuse* committed by “rogue” workers (notably “overt and often egregious instances of animal cruelty” such as beating, kicking, or extreme neglect), the latter type of inherent harm is simply entailed by standard *use*, and its pervasive infliction “is an irreducible feature of industrial farming systems even when workers are simply following standard procedures.”<sup>40</sup> These systemic harms regularly include intensive confinement and overcrowding; invasive procedures (often performed without anesthesia) such as tail-docking, dehorning, debeaking, and branding; reproductive control, e.g. castration and artificial insemination; chronic health problems arising from unnatural feeding, breeding, keeping, and stress; and the deprivation of animals’ ability to exercise species-specific behaviors such as foraging, grooming, nesting, and caring for offspring. Eventually, every kind of (economically sound) animal production culminates in the ultimate harm: a forcible and untimely death by the cutting of major blood vessels, gassing, shooting, maceration, or electrocution. Globally, a staggering seventy billion land animals are slaughtered every year.

Against this grim backdrop, there may thus be some merit to the view that the systemic practices of violence shaping the contemporary human-animal relationship could be framed as constituting a (metaphorical or actual) war on animals. Numerous commentators have likened the institution of animal exploitation, the institutionalized violence it invariably comprises, and the “animal-industrial complex”<sup>41</sup> sustaining it, to the institution of war (or concentration camps).<sup>42</sup> Indeed, given that our mainstay relationship with animals is “primarily hostile” and

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<sup>40</sup> Matthew C. Halteman, *Varieties of Harm to Animals in Industrial Farming*, 1 J. ANIMAL ETHICS 122, 122, 126 (2011).

<sup>41</sup> The term “animal-industrial complex” alludes to a system of institutionalized animal exploitation akin to the “military-industrial complex.” See BARBARA NOSKE, HUMANS AND OTHER ANIMALS: BEYOND THE BOUNDARIES OF ANTHROPOLOGY 22 (1989).

<sup>42</sup> See JACQUES DERRIDA, THE ANIMAL THAT THEREFORE I AM 101 (translated by David Wills, 2008) (speaking of “the Judeo-Christian-Islamic tradition of a war against the animal”); JONATHAN SAFRAN FOER, EATING ANIMALS 33 (2009) (“We have waged war ... against all of the animals we eat. This war is new and has a name: factory farming”); CHARLES PATTERSON, ETERNAL TREBLINKA: OUR

“combative or at least focused upon producing harm and death,” and considering the “monstrous deployment of violence and extermination” involved, Wadiwel argues that we should treat “our systems of violence towards animals precisely as constituting a war.”<sup>43</sup>

More pertinently however, whether or not one deems it apposite to speak of a war on animals on a *factual* level, the way in which the law responds to the institution of animal exploitation is similar to how it deals with the institution of war. That is, regardless of whether the social phenomena of war and animal exploitation as such are comparable, the following sections will show that the *normative regimes* governing these violent activities are alike. Hereinafter, I will therefore use the phrase “war on animals” in a manner that remains agnostic as to its factual validity. Instead, it serves as a heuristic device for referring to the subject matter of AWL in a manner that connotes an analogy with (the law of) war, and thereby invites us to rethink AWL as an (analogical) warfare law. In this sense, then, the “war on animals” denotes the totality of violent activities that are constitutive of the contemporary, exploitative human-animal relationship.

### *B. Historical Formation and Rationale: Restraining a Preexisting Violent Institution*

As indicated in the previous section, both AWL and IHL govern innately violent institutions, and the law’s regulatory response to the respective forms of institutionalized violence has developed in comparable ways. In terms of their historical formation, both IHL and AWL have emerged in reaction to a preexisting institution that – if left unchecked – is capable of producing boundless violence and brutality. While there have long existed, to some extent, rules regarding the conduct of war and the treatment of animals, the modern codifications of IHL and AWL since the 19<sup>th</sup> century were prompted by similar material and social conditions;

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TREATMENT OF ANIMALS AND THE HOLOCAUST (2002); David Sztybel, *Can the Treatment of Animals Be Compared to the Holocaust?*, 11 ETHICS AND THE ENVIRONMENT 97 (2006).

<sup>43</sup> WADIWEL, *supra* note 2, at 3, 5–6.

notably, by the exacerbating violence associated with modernized and industrialized warfare and animal use practices on the one hand, and advanced humanitarian and humane sensitivities on the other hand.<sup>44</sup>

The development of modern IHL started with the first Geneva Convention (1864), whose adoption is commonly attributed to the humanitarian efforts of Henri Dunant after witnessing the horrendous suffering of wounded soldiers on the battlefield of Solferino.<sup>45</sup> Important catalysts for the codification of IHL over the course of the 19<sup>th</sup> and 20<sup>th</sup> century were, inter alia, the fact that warfare had become more cruel and destructive due to advanced weapons technology; a great increase in the number of war victims as a consequence of the enlargement of armies and more effective weaponry; and, simultaneously, a growing humanitarian tenet that mandated restraining the inhumane effects of war.<sup>46</sup> The development of modern AWL in the 19<sup>th</sup> and 20<sup>th</sup> century was stimulated by similar factors, notably, the fact that animal use had become more cruel and destructive in the wake of the Industrial Revolution due to advanced husbandry technologies;<sup>47</sup> an exploding number of animal victims as a consequence of larger livestock populations on factory farms and more effective killing methods in assembly-line slaughterhouses; and, simultaneously, a growing humane concern for animals that generated the pressure to curb the inhumane effects of animal use.<sup>48</sup>

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<sup>44</sup> The predecessors of both modern IHL and AWL were primarily based on non-humanitarian (e.g. chivalry and reciprocal self-interest) and anthropocentric (the protection of public sensitivities and the moral character of humans) motives. Only in the course of the 19<sup>th</sup> century did humanitarianism and non-anthropocentric motives become more prominent factors in the configuration of IHL and AWL. See G.I.A.D. Draper, *The Relationship Between the Human Rights Regime and the Law of Armed Conflicts*, 1 ISR. Y.B. HUM. RTS. 191, 191 (1971) (noting that the law of war “ingested restraints and prohibitions with humanitarian purpose relatively late in its long history”); Thomas G. Kelch, *A Short History of (Mostly) Western Animal Law: Part I*, 19 ANIMAL L. 23, 62 (2012) (noting that 18<sup>th</sup> century animal laws were motivated by “concern that human use and abuse of animals damages human society”); Thomas G. Kelch, *A Short History of (Mostly) Western Animal Law: Part II*, 19 ANIMAL L. 347, 349 (2013) (noting a shift in modern animal laws since the 19<sup>th</sup> century toward having “as their foundation the protection of animals for their own sakes”).

<sup>45</sup> J. HENRI DUNANT, UN SOUVENIR DE SOLFERINO (1862).

<sup>46</sup> See Dietrich Schindler, *International Humanitarian Law: Its Remarkable Development and its Persistent Violation*, 5 J. HIST. INT’L L. 165, 166 (2003).

<sup>47</sup> See *seminally* RUTH HARRISON, ANIMAL MACHINES: THE NEW FACTORY FARMING INDUSTRY (1964).

<sup>48</sup> See Nigel Pleasants, *Structure and Agency in the Antislavery and Animal Liberation Movements*, in *EATING AND BELIEVING: INTERDISCIPLINARY PERSPECTIVES ON VEGETARIANISM AND*

IHL and AWL were formed in a historical context when war and animal exploitation were accepted as a given, and accordingly, the legitimacy or at least factual existence and necessity of these institutions is presupposed, foundational, and part and parcel of the respective legal regimes.<sup>49</sup> The foundations of IHL were laid at a time “when there was no disgrace in beginning a war,” and war was considered an unavoidable and legitimate instrument of national policy based on the jus ad bellum doctrine.<sup>50</sup> Likewise, AWL proceeds from the assumption that humans have a right to use animals, and thus simply presupposes the existence and legitimacy of animal use.<sup>51</sup> From the outset, neither IHL nor AWL are thus abolitionist in nature, that is, neither aims at prohibiting the very institution that is foundational for the respective body of law. Rather, they are regulationist in that they make these institutions rule-governed and place certain “restraints on collective violence.”<sup>52</sup>

Within these parameters, the rationale of both legal regimes is to humanize the respective institution as much as possible by containing and mitigating the violence and suffering it produces. The main purpose of IHL, as expressed in the basic principle of limitation,<sup>53</sup> is to avoid “total war” (not war as such), by putting “some limitation on the

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THEOLOGY 198, 208–9 (Rachel Muers & David Grumett eds., 2008) (noting that “the very economic system that intensified [animals’] utilization to an industrial level of exploitation has also ... generated the enabling conditions of morally driven institutional criticism”).

<sup>49</sup> See Alejandro Lorite Escorihuela, *Humanitarian Law and Human Rights Law: The Politics of Distinction*, 19 MICH. ST. J. INT’L L. 299, 361–62 (2011) (noting that IHL is “foundationally agnostic about war ... This indifference about whether war should or should not exist is how humanitarian law legitimates war; it essentially receives it as a fact and then proceeds to regulate it as a social activity”).

<sup>50</sup> Louise Doswald-Beck & Sylvain Vité, *International Humanitarian Law and Human Rights Law*, 33 INT’L REV. RED CROSS 94, 95 (1993).

<sup>51</sup> See Jason Wyckoff, *Toward Justice for Animals*, 45 J. SOC. PHILOS. 539, 540–41 (2014) (noting that AWL is based on the “resource paradigm,” that is, a “cluster of beliefs, assumptions, and practices that take animals to be resources that humans may use in order to generate benefits for themselves”).

<sup>52</sup> Allan Rosas & Pär Stenbäck, *The Frontiers of International Humanitarian Law*, 24 J. PEACE RESEARCH 219, 220 (1987); Henry Shue, *Laws of War*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* 511, 515–16 (Samantha Besson & John Tasioulas eds., 2010) (noting that the “goal is to make war a rule-governed practice ... It is not the purpose of these rules to end the practice, or to maintain it. The practice is simply presupposed”); on the regulatory rather than prohibitive approach pursued in AWL, see GARY L. FRANCIONE, *ANIMALS, PROPERTY, AND THE LAW* 92 (1995).

<sup>53</sup> Hague Convention (IV) respecting the Laws and Customs of War on Land (18 October 1907), Art. 22.

barbarity of the war and to assure a minimum of humanity in warfare.”<sup>54</sup> Similarly, the formative purpose of AWL is not to do away with animal exploitation as such, but rather, to avoid its worst excesses by regulating the modalities of permissible violence against animals and mitigating (to some extent) the suffering caused.<sup>55</sup> The quintessential purpose and formidable task of both IHL and AWL is to make the invariably violent and inhumane institutions of war and animal exploitation more humane – or less inhumane.<sup>56</sup>

### C. *Dialectical Tension Between Necessary Violence and Humane Considerations*

As a result of their historical formation around a presupposed institution, and the underlying rationale of mitigating (rather than eliminating) the respective form of institutionalized violence, both IHL and AWL are constituted by a built-in tension between two antithetical forces: the instrumental necessity of violence and countervailing dictates of humanity.

IHL is generally characterized as a body of law that exists at an “equilibrium point” between the “two diametrically opposed stimulants” of *military necessity* and *humanitarian considerations*.<sup>57</sup> The principal objective of IHL is to minimize human suffering “without undermining the effectiveness of military operations.”<sup>58</sup> This trade-off finds paradigmatic expression in the preamble of the 1907 Hague Convention (IV), which is “inspired by the

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<sup>54</sup> ROBERT KOLB & RICHARD HYDE, AN INTRODUCTION TO THE INTERNATIONAL LAW OF ARMED CONFLICT 172 (2008) (further noting that the principle of limitation “rejects the idea of total war.” Id., at 45).

<sup>55</sup> AWL is primarily “reactive, attempting to mitigate the harms of pre-existing practices.” Kymlicka, *supra* note 23, at 128; this reactive dynamic of mitigation rather than prevention was noted by the Israeli High Court of Justice in a case concerning the force-feeding of geese. The court remarked that the stated “purpose of the Regulations is to ‘prevent the geese’s suffering.’ Clearly these regulations do not prevent suffering; at best they minimize, to some extent, the suffering caused.” HCJ 9232/01, Noah v. Attorney General para. 17 (2003) (Isr.).

<sup>56</sup> *cf.* Draper, *supra* note 44, at 194 (“If one considers the nature of the activity that the law of war seeks to regulate ... then one must admit that its task is formidable indeed. How to kill your fellow human beings in a nice way, has been described by some cynics as the endeavor of the law of war”); Shai Lavi, *Humane Killing and the Ethics of the Secular: Regulating the Death Penalty, Euthanasia, and Animal Slaughter*, 4 UC IRVINE L. REV. 297, 321 (2014) (noting the disparity in AWL between “the resolution to overcome pain and suffering, which exists side-by-side with inhumane conditions that remain unchallenged and are often taken for granted”).

<sup>57</sup> YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 8–9 (3<sup>rd</sup> edn., 2016).

<sup>58</sup> DINSTEIN, *supra* note 57, at 9.

desire to diminish the evils of war, *as far as military requirements permit*.”<sup>59</sup> Similar language can be found in AWL, for example, in the Swiss Animal Welfare Act, which aims to ensure the welfare of animals “*as far as circumstances of the intended purpose permit*.”<sup>60</sup> As exemplified by this provision, AWL embodies a similar tension between the *necessities of animal use* and conflicting *humane considerations*. Accordingly, the principal objective of AWL is “to mitigate animal suffering while preserving their economic use by humans.”<sup>61</sup>

On the one hand, both IHL and AWL accommodate the *instrumental necessity of violence* that is associated with the very activities they regulate. In the case of IHL, this permissive element is straightforwardly captured by the term “military necessity” (or “necessities of war”),<sup>62</sup> which broadly covers all “actions necessary for military purposes.”<sup>63</sup> By contrast, AWL operates with a more elusive and expansive notion of necessity that is not limited to one particular objective, but arises from a multitude of animal uses. These “necessities of animal use” pertain to all actions necessary for achieving any such purposes. On the other side, both IHL and AWL incorporate counterbalancing *considerations of humaneness*. Humanitarian restraints on warfare are motivated by the principle of humanity, which is famously epitomized by the Martens clause.<sup>64</sup> Such “elementary considerations of humanity”<sup>65</sup> require belligerents “to behave in a civilised and humane way”<sup>66</sup> at all times and demand the “humane treatment of persons” in all circumstances.<sup>67</sup> Similarly, AWL is

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<sup>59</sup> Hague Convention (IV) respecting the Laws and Customs of War on Land (18 October 1907) (emphasis added).

<sup>60</sup> Swiss Animal Welfare Act (*Tierschutzgesetz*, 16 December 2005, SR 455), Art. 4(1)(b) (emphasis added).

<sup>61</sup> Peters, *supra* note 11, at 11.

<sup>62</sup> Henri Meyrowitz, *The Principle of Superfluous Injury or Unnecessary Suffering: From the Declaration of St. Petersburg of 1868 to Additional Protocol I of 1977*, 34 INT’L REV. RED CROSS 98, 107 (1994).

<sup>63</sup> Doswald-Beck & Vit e, *supra* note 50, at 98.

<sup>64</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I) art. 1(2), June 8, 1977, 1125 UNTS 3 (stipulating that “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 from the dictates of public conscience”).

<sup>65</sup> *Corfu Channel (UK v. Alb.)*, Merits, 1949 ICJ REP. 4, 22 (Apr. 9).

<sup>66</sup> KOLB & HYDE, *supra* note 54, at 62.

<sup>67</sup> Ant nio Augusto Can ado Trindade, Some Reflections on the Principle of Humanity in Its Wide Dimension, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND HUMANITARIAN LAW 188, 189 (Robert Kolb & Gloria Gaggioli eds., 2013).



permeated by the *principle of humane treatment*, which imposes certain ethically mandated restraints on the conduct of animal users and generally requires the humane treatment of animals. Comparable to the principle of humanity, the humane treatment of animals is generally viewed as a “universal value,”<sup>68</sup> among the “shared values of humankind,”<sup>69</sup> “one of the hallmarks of international and European law in contemporary times,”<sup>70</sup> “one of the hallmarks of Western civilisation,”<sup>71</sup> or a “rule of civilization.”<sup>72</sup>

IHL and AWL, as a whole, are the result and reflective of a balance between these two conflicting objectives, and neither body of law will ever be entirely in the service of one.<sup>73</sup> Indeed, pragmatic compromises are essential for rendering these rules practicable and acceptable to the obliged actors. Commentators on IHL frequently remark that an unrealistic “degree of humanitarianism excessive to the nature of warfare” would put problematic pressure on the law of war, and would likely lead to widespread non-compliance during armed conflict rather than preventing the inhumane reality of wars altogether.<sup>74</sup> For similar reasons, AWL strives for a compromise that seeks to negotiate an acceptable, or at least politically feasible, balance between the facilitation of human *use* of animals and the prevention of animal *abuse*.<sup>75</sup>

Notwithstanding, specific norms in IHL and AWL may strike a different abstract balance between necessity and humaneness. Broadly speaking, in both bodies of law we can categorize four groups of norms across the balancing spectrum. (1) *Prohibitions of violence*

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<sup>68</sup> BOWMAN, DAVIES & REDGWELL, *supra* note 12, at 678.

<sup>69</sup> Sykes, *supra* note 12, at 47.

<sup>70</sup> *Hermann v. Germany* (Grand Chamber), appl. no. 9300/07 (Eur. Ct. H. R., 26 June 2012) (Judge Pinto de Albuquerque, partly concurring and partly dissenting), p. 36.

<sup>71</sup> Consultative Assembly of the Council of Europe, Recommendation 287 (1961).

<sup>72</sup> *Reece v. Edmonton*, 2011 ABCA 238 (Can., Alta., Ct. App.) (Fraser, J., dissenting), para. 56.

<sup>73</sup> See Page Wilson, *The Myth of International Humanitarian Law*, 93 INTERNATIONAL AFFAIRS 563, 576 (2017) (noting that the goal of the law of war lies in “achieving a balance ... It does not mean giving effect to the law in the most humanitarian way possible”); RENÉ PROVOST, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW 136 (2002).

<sup>74</sup> G.I.A.D. Draper, *Humanitarian Law and Human Rights*, 1979 ACTA JURIDICA 193, 206 (1979); Meron, *supra* note 29, at 241 (noting that “‘Excessive’ humanization might exceed the limits acceptable to armed forces ... and thus erode the credibility of the rules”).

<sup>75</sup> See Garner, *supra* note 14, at 169–70 (noting that it is “far more sensible politically to focus on reforms improving the treatment of animals which do not compromise significant human interests”).

*that serves no legitimate purpose*: in IHL, some wanton actions are simply prohibited because they do not have any operational value and are thus not carried by any military necessity at all, for example, “sadistic acts of cruelty ... and other private rampages by soldiers.”<sup>76</sup> Similarly, AWL regularly comprises a range of prohibitions of wanton acts of animal cruelty that serve no legitimate purpose, such as the infliction of pain and suffering to gratify “sadistic pleasures.”<sup>77</sup> (2) *Prohibitions of excessive or intolerable violence*: in IHL, some acts may have a certain military value but are nonetheless prohibited due to overriding humanitarian considerations, such as the prohibition of the use of poison or the ban on anti-personnel mines.<sup>78</sup> Similarly, AWL frequently prohibits some acts, regardless of their utility, in view of overriding humane considerations. Examples include prohibitions of force-feeding,<sup>79</sup> of male chick maceration,<sup>80</sup> or of certain cruel procedures such as castration without anesthesia or the debeaking of chickens,<sup>81</sup> or “pain cap” provisions that prohibit extremely painful animal experiments.<sup>82</sup> (3) *Norms expressing an actual compromise*: most rules of IHL represent a “true compromise” in that both military and humanitarian needs are accommodated and limited to some extent.<sup>83</sup> Similarly, the bulk of AWL lays down rules that seek to calibrate a feasible compromise between the necessities of animal use and humane considerations, and thus make concessions to both economic and animal welfare needs. Examples include minimum space requirements for keeping, or stunning requirements for slaughtering, farmed animals, or mandatory cost-benefit analyses for animal experiments. (4) *Overriding necessity*: lastly, some IHL provisions allow for military needs to override the

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<sup>76</sup> Doswald-Beck & Vité, *supra* note 50, at 99; DINSTEIN, *supra* note 57, at 8.

<sup>77</sup> See Frank Hurnik & Hugh Lehman, *Unnecessary Suffering: Definition and Evidence*, 3 INTERNATIONAL JOURNAL FOR THE STUDY OF ANIMAL PROBLEMS 131, 133 (1982).

<sup>78</sup> See Doswald-Beck & Vité, *supra* note 50, at 99.

<sup>79</sup> E.g. Swiss Animal Welfare Ordinance (*Tierschutzverordnung*, 23 April 2008, SR 455.1), Art. 20(e); German Animal Welfare Act (*Tierschutzgesetz*, 24 July 1972, BGBl. I S. 1206, 1313), § 3(9); Supreme Court of Israel, *Noah v. Attorney General*, 11 August 2003, HCJ 9232/01.

<sup>80</sup> E.g. Swiss Animal Welfare Ordinance, Art. 20(g).

<sup>81</sup> E.g. Swiss Animal Welfare Ordinance, Art. 20(a).

<sup>82</sup> E.g. Directive 2010/63/EU of the European Parliament and of the Council on the Protection of Animals Used for Scientific Purposes (22 September 2010), Art. 15(2).

<sup>83</sup> See Doswald-Beck & Vité, *supra* note 50, at 100.

normally applicable humanitarian rule in particular situations, if the military objective makes it absolutely necessary.<sup>84</sup> Similarly, some AWL norms contain exemptions that allow for derogations from the general rule in exceptional cases, such as the escape clauses in Article 55 EU Directive 2010/63 which allow for certain generally prohibited animal experiments if they are deemed necessary for exceptional reasons.<sup>85</sup>

#### *D. The Principle of Unnecessary Suffering*

The law's endeavor to reconcile both the necessity and humanization of violence is most clearly embodied in the principle of unnecessary suffering – a cardinal principle shared by AWL and IHL. The general rule prohibiting unnecessary suffering (and permitting, conversely, necessary suffering)<sup>86</sup> contains a built-in balancing requirement between the necessity or utility of violence and humane considerations, the outcome of which determines the permissibility of causing suffering *in concreto*. Violations of this principle can amount to a serious offense in both areas of law, punishable as a *war crime*<sup>87</sup> or, respectively, as *animal cruelty*.<sup>88</sup>

In IHL, the principle of unnecessary suffering is one of the key principles “constituting the fabric of humanitarian law.”<sup>89</sup> This basic rule prohibits the use of means and methods of

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<sup>84</sup> See Doswald-Beck & Vité, *supra* note 50, at 100.

<sup>85</sup> However, except for such norms that contain a built-in necessity justification, the rules of AWL and IHL generally do not allow for derogations based on a necessity exception. This is because these rules are already the outcome of a deliberative compromise that has exhaustively factored in and weighed the conflicting requirements of necessity and humaneness. See KOLB & HYDE, *supra* note 54, at 44.

<sup>86</sup> That is, the “legally acceptable level of suffering.” See F. Lundmark, C. Berg & H. Röcklinsberg, “Unnecessary Suffering” as a Concept in Animal Welfare Legislation and Standards, in *THE ETHICS OF CONSUMPTION: THE CITIZEN, THE MARKET AND THE LAW* 114, 115, 117 (H. Röcklinsberg & P. Sandin eds., 2013).

<sup>87</sup> Art. 8(2)(b)(xx) of the Rome Statute of the International Criminal Court.

<sup>88</sup> Most anti-cruelty provisions refer to some variation of “unnecessary suffering” as a qualifying element of criminalized behavior. See, e.g., UK Animal Welfare Act (8 November 2006, c 45), Art. 4; Canadian Criminal Code (R.S.C., 1985, c. C-46), Section 445.1(1); South African Animal Protection Act of South Africa (No. 71 of 16 June 1962), Section 2(1)(r).

<sup>89</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ REP. 226, 257 (July 8), para. 78.

warfare “of a nature to cause superfluous injury or unnecessary suffering.”<sup>90</sup> The International Court of Justice has defined unnecessary suffering as “harm greater than that unavoidable to achieve legitimate military objectives” or that uselessly aggravates the suffering of combatants.<sup>91</sup> The necessity test encompasses the established elements of proportionality (legitimate goal, suitability, necessity, and proportionality *stricto sensu*), and notably requires a case-by-case balancing between the military needs and the expected suffering of combatants. The qualifying term “unnecessary” thus signifies *useless* “suffering that has no military purpose” or *excessive* suffering that is not justified by military utility, because it is either not unavoidable for, or “out of proportion to the military advantage sought.”<sup>92</sup>

The principle of unnecessary suffering is equally fundamental to AWL, where it is “widely recognized as a valid moral principle”<sup>93</sup> and typically forms the basis for anti-cruelty provisions. Notwithstanding its centrality, the concept of unnecessary suffering is rarely, if ever, legally defined, and the line between unlawful unnecessary and lawful necessary suffering remains somewhat fluid and flexible.<sup>94</sup> As a legal term, unnecessary suffering is generally understood as the infliction of *gratuitous* suffering that serves no legitimate purpose, or *disproportionate* suffering that “goes beyond what is necessary for ‘appropriate’ exploitation.”<sup>95</sup> Similar to IHL, the necessity test logically implies some sort of proportionality analysis, with the components of legitimate purpose, suitability and necessity

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<sup>90</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I) art. 35(2), June 8, 1977, 1125 UNTS 3.

<sup>91</sup> Legality of the Threat or Use of Nuclear Weapons, 1996 ICJ REP., para. 78.

<sup>92</sup> JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I: RULES 240 (2005); Meyrowitz, *supra* note 62, at 105–7.

<sup>93</sup> Hurnik & Lehman, *supra* note 77, at 131–32.

<sup>94</sup> On the vagueness of “unnecessary suffering,” see Hurnik & Lehman, *supra* note 77, at 132; Lundmark, Berg & Röcklinsberg, *supra* note 86, at 115.

<sup>95</sup> FRANCIONE, *supra* note 52, at 146; Mike Radford, “Unnecessary Suffering”: The Cornerstone of Animal Protection Legislation Considered, CRIM. L. REV. 702, 705 (1999); Hurnik & Lehman, *supra* note 77, at 134.

(unavoidability) of the means used to achieve the end, and a proportional balance between the harms and benefits.<sup>96</sup>

On the first, legitimate purpose stage of the necessity test, the “measure of the unnecessary character of suffering” is different in AWL and IHL, as Roscini points out. Whereas “the latter balances it against considerations of military necessity, the former refers to situations where the suffering is not required by a legitimate form of animal exploitation.”<sup>97</sup> That is, IHL accepts as legitimate purpose only military objectives and thus limits “necessity” to the necessities of war. In AWL, by contrast, “the list of ‘legitimate’ uses is virtually endless,”<sup>98</sup> and the determination of “necessity” thus takes place within a much broader frame of reference. Only a few, clearly reprehensible and socially deviant acts of animal cruelty will fail to meet the legitimate purpose threshold, whereas the remaining large pool of legitimate animal use purposes inevitably produces a plethora of animal use necessities.

Even so, aside from AWL accommodating a more extensive cluster of legitimate purposes than IHL, the further course of the necessity test follows a similar logic in both legal regimes. Notably, it does not evaluate, but simply posits, the legitimacy of the accepted legitimate purposes, and is thereby limited to an assessment of mere *instrumental necessity*. In AWL, the operative notion of necessity is clearly not one of final or strict necessity (pertaining to a necessity of the ends themselves), but rather, an instrumental means-end necessity that only measures whether an act is necessary to achieve a given end (which may be, and often is, unnecessary per se).<sup>99</sup> This somewhat distorts the meaning of unnecessary

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<sup>96</sup> See David Bilchitz, *When Is Animal Suffering “Necessary”?*, 27 SOUTHERN AFRICAN PUBLIC LAW 3, 17–18 (2012).

<sup>97</sup> Roscini, *supra* note 1, at 56.

<sup>98</sup> Peter Sankoff, *The Protection Paradigm: Making the World a Better Place for Animals?*, in ANIMAL LAW IN AUSTRALASIA: CONTINUING THE DIALOGUE 1, 18 (Peter Sankoff, Steven White & Celeste Black eds., 2<sup>nd</sup> edn., 2013).

<sup>99</sup> *cf.* John Rossi & Samuel A. Garner, *Is “Necessity” a Useful Concept in Animal Research Ethics?*, in THE ETHICAL CASE AGAINST ANIMAL EXPERIMENTS 120, 122 (Andrew Linzey & Clair Linzey eds., 2017); this is also described as “restricted necessity,” that is, one that “takes the end as given – that is, not subject to evaluation – and asks only whether the course of action suggested is an indispensable means to that

suffering from the outset, considering that the overwhelming portion of accepted animal use purposes as such are, arguably, unnecessary and that therefore “virtually all human violence against animals is unnecessary in the strict sense.”<sup>100</sup> As rightly noted by Francione and Charlton, what is actually measured is the *necessity of unnecessary suffering* and, accordingly, the legal notion of unnecessary suffering only captures “*unnecessary unnecessary suffering*.”<sup>101</sup> This separation of final and instrumental necessity is even clearer in the law of war, where the assessment of the legitimacy of war (and the military objectives it produces) is outsourced to the jus ad bellum and thus determined by norms extraneous to IHL.<sup>102</sup> Because the rules of jus in bello are however normatively independent and also apply to illegal or illegitimate wars, IHL can face a similar conundrum posed by the (instrumental) necessity of (per se) unnecessary suffering – or the “paradox of permitting the impermissible.”<sup>103</sup>

### *E. The Dark Side of Humanization: The Legitimation of Violence*

As a corollary of their ambivalent configuration, both AWL and IHL have attracted similar criticisms alluding to the dark side of law’s attempt at regulating and humanizing violence: its permissive, legitimizing, and reinforcing effect.

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end.” See US CONGRESS OFFICE OF TECHNOLOGY ASSESSMENT, ALTERNATIVES TO ANIMAL USE IN RESEARCH, TESTING, AND EDUCATION 80 (1986).

<sup>100</sup> Will Kymlicka & Sue Donaldson, *Animal Rights, Multiculturalism, and the Left*, 45 J. SOC. PHILOS. 116, 126 (2014); Mariann Sullivan & David J. Wolfson, *What’s Good for the Goose ... the Israeli Supreme Court, Foie Gras, and the Future of Farmed Animals in the United States*, 70 LAW & CONTEMP. PROBS. 139, 141 (2007) (noting that “it is difficult to argue that anything we do to farmed animals is more necessary than anything else, since none of it is actually necessary at all”).

<sup>101</sup> Gary L. Francione & Anna E. Charlton, *Animal Rights*, in THE OXFORD HANDBOOK OF ANIMAL STUDIES 25, 38–39 (Linda Kalof ed., 2017).

<sup>102</sup> The jus ad bellum comprises the “legal rules that determine whether going to war is permissible in the first place.” See RUTI TEITEL, HUMANITY’S LAW 4 (2011).

<sup>103</sup> Christopher Kutz, *The Difference Uniforms Make: Collective Violence in Criminal Law and War*, 33 PHILOSOPHY & PUBLIC AFFAIRS 148, 157 (2005) (further noting the puzzle of how there can be “permissibly violent means of pursuing impermissible ends?”); MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 21 (3 edn., 2000) (noting that it is “perfectly possible for a just war to be fought unjustly” and for an unjust war to be fought justly, but that this logical independence is “nevertheless puzzling”).

A common theme running through both critical discourses is that the law has established, under the guise of humanization, a permissive regime that does not generally prohibit the use of (even extreme and lethal) violence, but rather, extensively allows for such violence which is deemed “necessary.” Departing from the “humanitarian myth” – the dominant narrative “that the laws of war operate to restrain or ‘humanize’ war” – critical voices contend that IHL permits “virtually any form of military conduct” as long as it is directed toward achieving clear military objectives.<sup>104</sup> Moreover, despite “noble rhetoric to the contrary,” it is frequently argued that IHL has been “formulated deliberately to privilege military necessity at the cost of humanitarian values” and thus codifies the “priority of military over humanitarian concerns.”<sup>105</sup> Critics of AWL repudiate the “humane myth” by showing how the very laws that are supposed to prevent animal cruelty do, in fact, permit virtually any infliction of suffering as long as it is part of standard animal use practices.<sup>106</sup> Furthermore, it is argued that AWL has been “cleverly drafted to give greater protection to the interests of ... animal users, than to animals” and entrenches, cloaked in humane language, the primacy of economic and other instrumental considerations over animal welfare concerns.<sup>107</sup> Generally, critics observe a marked discrepancy in how the law deals with individual, socially deviant violence against animals (which is typically criminalized) and the institutionalized violence against animals that is typical of animal use (which is legally condoned).<sup>108</sup> This differential treatment of individual and collective violence is resemblant of

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<sup>104</sup> Roger Normand & Chris af Jochnick, *The Legitimation of Violence: A Critical Analysis of the Gulf War*, 35 HARV. INT’L. L. J. 387, 387, 389 (1994).

<sup>105</sup> Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT’L. L. J. 49, 50–51 (1994); Amanda Alexander, *A Short History of International Humanitarian Law*, 26 EJIL 109, 113 (2015) (noting how critics describe “a history in which military ... needs have consistently trumped humane values”).

<sup>106</sup> See Francione & Charlton, *supra* note 101, at 39.

<sup>107</sup> Sue Kedgley, Why It Is Difficult to Make Meaningful Progress in Animal Welfare Law Reform, in ANIMAL LAW IN AUSTRALASIA: CONTINUING THE DIALOGUE 330, 340 (Peter Sankoff, Steven White & Celeste Black eds., 2<sup>nd</sup> edn., 2013).

<sup>108</sup> See JOAN E. SCHAFFNER, AN INTRODUCTION TO ANIMALS AND THE LAW 192 (2011) (noting that “Individual instances of gratuitous intentional cruelty against certain animals are banned, while institutionalized abuse of animals is allowed and often promoted under the law”).



the “collective exculpation” pervading the law of war, whose special rules “demarcate a zone of impunible violence” which would ordinarily be prohibited under criminal law.<sup>109</sup>

According to critics, both IHL and AWL serve to facilitate and legitimize violence by shrouding harmful practices “in a veneer of legality.”<sup>110</sup> In the case of IHL, there is a general assumption that a legally fought war is proper and humane, which makes it easy to mistake “legal warfare for humanitarian warfare.”<sup>111</sup> As a result – and even though IHL may simply “legalize inhumane military methods”<sup>112</sup> and “may so little constrain the use of force that adherence to humanitarian rules will do more to legitimate than contain force”<sup>113</sup> – mere compliance with these rules “lends unwarranted legitimacy to customary military practices” and provides belligerents with “a powerful rhetorical tool to protect their controversial conduct from humanitarian challenges.”<sup>114</sup> Much the same criticism has been leveled against AWL, which tends to conflate *legal* animal use practices with *humane* conduct and “good animal welfare.”<sup>115</sup> As a result, even though these laws “are so favorable to the interests of those ostensibly restrained by them,” they provide animal users “with ample coverage to inflict horrendous suffering while wearing the mantle of complying” with laws that purport to protect animals.<sup>116</sup>

Overall, while IHL and AWL serve the laudable goal of humanizing an inhumane institution, humanization can ironically also enhance its acceptability, have an affirming and legitimizing effect, and might thereby even prolong the residual violence entailed by the

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<sup>109</sup> Kutz, *supra* note 103, at 152.

<sup>110</sup> Sankoff, *supra* note 98, at 28; Kedgley, *supra* note 107, at 340 (noting that AWL “effectively legitimises the ongoing, institutionalised ill-treatment of many factory-farmed animals”); Normand & Jochnick, *supra* note 104, at 387 (noting that the laws of war “have served to legitimize, rather than to restrain, wartime violence”).

<sup>111</sup> DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* 235 (2004).

<sup>112</sup> Jochnick & Normand, *supra* note 105, at 50.

<sup>113</sup> KENNEDY, *supra* note 111, at 297.

<sup>114</sup> Jochnick & Normand, *supra* note 105, at 58.

<sup>115</sup> Katrina Sharman, *Farm Animals and Welfare Law: An Unhappy Union*, in *ANIMAL LAW IN AUSTRALASIA: CONTINUING THE DIALOGUE* 61, 77 (Peter Sankoff, Steven White & Celeste Black eds., 2<sup>nd</sup> edn., 2013).

<sup>116</sup> Taimie L. Bryant, *Denying Animals Childhood and its Implications for Animal-protective Law Reform*, 6 *LAW, CULTURE AND THE HUMANITIES* 56, 61–62 (2010).

institution as such.<sup>117</sup> Both legal regimes therefore perpetuate a somewhat paradoxical and reactive dynamic of imperfectly humanizing while simultaneously facilitating, reinforcing, and consolidating the very institutions that are the cause of the suffering they aim to mitigate, and that render humans and animals in need of these particular legal protections in the first place.<sup>118</sup>

#### *F. Rethinking Animal Welfare/Warfare Law*

The comparative analysis has illustrated that existing AWL shares some of the main hallmarks of the law of war. On this basis, I submit that animal *welfare* law is best understood as a kind of *warfare* law that governs violent activities within the war on animals. *Animal warfare law* is defined by the following characteristics: it regulates the factually preexisting and normatively presupposed, inherently violent and inhumane institution of animal exploitation; in doing so, it seeks to restrain (rather than prohibit) institutionalized violence against animals and to mitigate (rather than eliminate) the suffering produced; it is shaped by diametrically opposed considerations of humaneness and non-humane instrumentality, and continuously negotiates and redefines the permissibility of violence associated with contemporary practices of animal use by prohibiting “unnecessary” suffering while concomitantly permitting, legitimizing, and reinforcing the residual “necessary” violence.

Rethinking AWL as a warfare law furnishes a refined and more realistic understanding of its ambivalent nature, specific legitimacy, pragmatic function, and inherent limits. By its very nature, AWL operates in ambivalent, both violence-restrictive and violence-permissive ways, and is as much about ensuring minimum standards of *welfare for* animals as it is about

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<sup>117</sup> See Meron, *supra* note 29, at 241; DONALDSON & KYMLICKA, *supra* note 16, at 2 (noting that “ameliorist reforms serve to legitimate, rather than contest, the system of animal exploitation” and provide “false reassurance that things are getting better, when in fact they are getting worse”).

<sup>118</sup> See Claire E. Rasmussen, *Are Animal Rights Dead Meat?*, 41 SW. L. REV. 253, 260 (2012) (noting that AWL can “provide a tangible benefit to animals even as it can reinforce particular relationships of power that necessitate the legal intervention in the first place”); Piers Beirne, *For a Nonspeciesist Criminology: Animal Abuse as an Object of Study*, 37 CRIMINOLOGY 117, 129 (1999) (noting that the law functions as a “major structural ... mechanism in the consolidation of institutionalized animal abuse”).

facilitating efficient *warfare against* animals.<sup>119</sup> Placing AWL in conceptual proximity to IHL clearly dispels widely held humane myths about AWL, such as exaggerated humane expectations or the unwarranted overemphasis of its humane achievements.<sup>120</sup> In reality, rather than being the pinnacle of humaneness, AWL governs the worst kind of human behaviors toward animals and represents a legal regime that is most akin to IHL – one specifically designed to govern “the most profound catastrophe of human society”<sup>121</sup> and the “the maximum regime for inhumanity.”<sup>122</sup>

Moreover, the comparison with the law of war acutely spotlights, and puts into proportion, the sheer scale and intensity of instrumental violence sanctioned by AWL. Whereas IHL is fundamentally based on a distinction between combatants and civilians,<sup>123</sup> and designates combatants as the *only* lawful targets of intentional injuring and killing, a comparable principle of distinction is lacking in AWL – *all* animals are the lawful targets of instrumental violence.<sup>124</sup> It is worth pausing over this disparity. It means that AWL indiscriminately exposes passive (mostly docile, harm- and helpless) animals to the same quality of violence that IHL firmly reserves for active combatants who are engaged in armed

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<sup>119</sup> The term “animal welfare law” is misleading, as it suggests that humane concern for animal welfare is the only or dominant purpose guiding its configuration, while omitting the equally operative non-humane objectives. *cf.* Kymlicka, *supra* note 23, at 126–27 (noting that “We have animal use laws, not animal protection laws”); this point is well-noted with respect to IHL, whose terminology may wrongly suggest that humanitarianism is its sole objective. For this reason, some commentators prefer to use the terms “law of armed conflict” or “law of war.” *See* Doswald-Beck & Vité, *supra* note 50, at 98; Wilson, *supra* note 73, at 571.

<sup>120</sup> In a similar vein, critical analyses of IHL dispel “widely held myths about the humanitarian accomplishments of the present laws of war” (Jochnick & Normand, *supra* note 105, at 95) and cast it “not as a history of compassion and civilization but, rather, as a history of oppression” (Alexander, *supra* note 105, at 113).

<sup>121</sup> Christian Tomuschat, *Human Rights and International Humanitarian Law*, 21 EJIL 15, 16 (2010).

<sup>122</sup> Draper, *supra* note 44, at 196.

<sup>123</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I) art. 48, June 8, 1977, 1125 UNTS 3.

<sup>124</sup> The differential treatment of companion animals and other, exploited animals (notably livestock and lab animals) may come closest to a distinction between “civilians” and “combatants” in AWL. Companion animals typically receive a factually and legally privileged treatment over other animals. Some legal norms attach such privileges directly to a certain species, for example, cats and dogs. Mostly, however, such differential treatment is context-dependent and arises from the different categorizations of animals according to their designated use. For example, many harms that are lawfully inflicted on farmed or lab animals would not be deemed lawful in a companion animal setting. On the differential treatment of animals, *see* SIOBHAN O’SULLIVAN, ANIMALS, EQUALITY AND DEMOCRACY 5 (2011); Joan E. Schaffner, *Comment: A Rabbit, is a rabbit, is a rabbit... Not under the Law*, *Global Journal of Animal Law* 1/2013.

hostilities. Put differently, in terms of the heightened level of legally allowed violence, the treatment AWL accords to exploited animals resembles the treatment that IHL accords to enemy combatants. The law thus essentially treats animals – who are more like “civilians” in terms of their non-involvement in hostilities – like putative or “quasi-combatants.”

The demystification of AWL as a warfare law need, however, not delegitimize it altogether. Contrary to the assertions of some critics, AWL is not wholly inutile, dispensable, or detrimental to the protection of animals. Rather, the analogy with the law of war yields a pragmatic defense of the particular legitimacy of AWL as an *ugly but necessary* wartime regime. As noted by Meron, to “genuinely humanize humanitarian law, it would be necessary to put an end to all kinds of armed conflict. But wars have been a part of the human condition ... and regrettably they are likely to remain so.”<sup>125</sup> The same holds true for AWL, which is set against the real-life backdrop of worst-case scenarios preexisting in factory farms, slaughterhouses, and research laboratories. To the extent that, and for as long as, the war on animals remains an (*ugly*) social reality, legal regulation – in lieu of an unrealistic wholesale prohibition – appears *necessary* in order to provide some protection and relief, however imperfect, to the billions of animals suffering and killed at present.<sup>126</sup> Given its distressing point of departure, AWL, much like IHL, must adopt a *pragmatic* (rather than idealistic)<sup>127</sup> “something is better than nothing” approach that seeks “to salvage what realistically can be

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<sup>125</sup> Meron, *supra* note 29, at 240; *see also* Shue, *supra* note 52, at 516.

<sup>126</sup> Binder, *supra* note 25, at 83 (noting that even though “animal welfare regulation is far from perfect, it is also far from pointless ... Legal provisions that aim to reduce pain and suffering may seem marginal and even flawed ... but they may well make all the difference for an animal whose well-being is presently at stake”).

<sup>127</sup> On IHL, *see* DINSTEIN, *supra* note 57, at 10 (noting that “All segments of this body of law are animated by a pragmatic (as distinct from a purely idealistic) approach”); Alexander, *supra* note 105, at 113 (characterizing IHL as “a litany of compromise and pragmatism”).

protected.”<sup>128</sup> As Draper rightly asserts, if “war is a factual phenomenon, such considerations cannot be denied their place.”<sup>129</sup>

Yet, its humanizing function notwithstanding, we must also be cognizant of the limitations inscribed into the very fabric of AWL qua warfare law. After all, despite its humane ethos, AWL remains a law about killing and injuring animals, albeit in a “civilized” manner – just as IHL, “for all its humanitarian ethos,” is still “a discipline about killing people, albeit in a civilized sort of way.”<sup>130</sup> Indeed, given the nature of the activities these norms seek to regulate and the hostile environment in which they operate, the parameters of humanization are markedly narrow, and both bodies of law are “necessarily imperfect.”<sup>131</sup> Notably, since IHL and AWL are not only foundationally agnostic toward but existentially contingent on war, they cannot – nor do they aspire to – completely eliminate all suffering, violence, and inhumaneness that is invariably produced by war. As Shue so vividly puts it: “In wars terrible actions are taken ... to prevent them all we must prevent all wars. The prevention of wars is a morally urgent task, but it is not the task of the laws of war. The purpose of the laws of war is to constrain the ‘shit’ when the ‘shit’ happens.”<sup>132</sup> Therefore, in order to prevent the war on animals rather than merely humanize warfare against animals, we need to look beyond existing animal warfare law.

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<sup>128</sup> *Mutatis mutandis*, Tomuschat, *supra* note 121, at 16; *cf.* Garner, *supra* note 14, at 172 (arguing that “getting something of what you want is better than nothing”).

<sup>129</sup> Draper, *supra* note 44, at 196; *see also* WALZER, *supra* note 103, at 46 (“War is so awful that it makes us cynical about the possibility of restraint, and then it is so much worse that it makes us indignant at the absence of restraint”).

<sup>130</sup> Marko Milanović, Norm Conflicts, International Humanitarian Law, and Human Rights Law, *in* INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW 95, 98 (Orna Ben-Naftali ed., 2011).

<sup>131</sup> WALZER, *supra* note 103, at 45.

<sup>132</sup> Shue, *supra* note 52, at 516.

### III. THE FORMATION OF A JUS CONTRA BELLUM AND PEACETIME ANIMAL RIGHTS

The comparison of IHL and AWL has uncovered remarkable similarities between the legal regimes governing belligerent intra-human relations and violent human-animal relations. These parallelisms put AWL into a new light, and invite us to rethink it along the lines of IHL. Indeed, as the previous section concluded, existing AWL is best understood as a warfare law that regulates violent activities *within* an ongoing war on animals. While AWL serves an important, yet ambivalent humanizing function by alleviating animal suffering as long as the reality of animal exploitation factually persists, it is also clear that such a warfare law cannot suffice. Neither can it prevent war as such, nor does it offer an adequate peacetime regime for governing human-animal relations *beyond* the war on animals. The analogy with the law of war thus has important implications for reconstructing and complementing the corpus of animal-protective law. Notably, repositioning AWL as a pragmatic wartime regime highlights the lack, and the pressing need for the formation, of two complementary animal-protective bodies of law: a jus contra bellum (whose rationale is to prevent wartime and create peacetime conditions) and animal rights as a more idealistic peacetime regime.

#### A. *Locating the Animal-Protective Gap*

The impotence of IHL and AWL to transcend (and prevent) the factual realities they seek to regulate marks a strong commonality, but also points to a crucial difference between these two bodies of law. From the outset, IHL is designed as an exceptional, second-best legal regime that is only applicable in, and specifically tailored to, the unfortunate event of war.<sup>133</sup> By contrast, because the war on animals is the ubiquitous norm rather than an exception, the

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<sup>133</sup> See Draper, *supra* note 44, at 198; Wilson, *supra* note 73, at 575–76.

law regulating it (AWL) is not an exceptional but rather the default and only animal-protective regime. That is, while IHL is embedded in international law's explicit understanding that peace (and the law of peace) is the norm and war (and the law of war) is the exception, existing animal protection law is constructed on the implicit assumption that the war on animals is the normal and ever-present condition. Hence, any (analogical) distinction between a state of war and peace is unknown to animal law. For animals – to put it in Orwellian terms – war *is* peace.<sup>134</sup> Animal warfare law is thus easily mistaken for an ordinary law of peace, because the war on animals has yet to be exceptionalized and a proper peacetime regime has yet to form.

It is at this point that the analogy with the law of war breaks down. That the comparison reaches its limit here, however, precisely accentuates the problematic fact of AWL's animal-protective monopoly. Unlike IHL, whose imperfect and violence-permissive nature is to some degree counterbalanced by two complementing bodies of law – the *jus contra bellum* and human rights – AWL currently reigns in a normative vacuum. Considering the equally imperfect and violence-permissive nature of AWL, it seems fair to postulate that this lack of counterbalancing animal-protective norms ought to be redressed. As Draper has aptly noted with regard to IHL, “If war is an evil, then let it be confined and let the law governing it reflect that position.”<sup>135</sup> By extension, if animal exploitation is inherently violent and inhumane, then let the law governing (and enabling) it be, at least, contained. That is, AWL should be relegated to a position similar to that occupied by IHL: a second-best, (ideally)<sup>136</sup> exceptional wartime regime that is flanked by war-prohibitive and peacetime norms.

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<sup>134</sup> This famous phrase from Orwell's dystopian novel 1984 refers to a constant state of war which is misrepresented, misunderstood, or disguised as peace. It seems apposite in the case of animals, as “war – rather than peace – is the norm,” yet this war is “coded in the guise of peace.” Dinesh Joseph Wadiwel, *The War Against Animals: Domination, Law and Sovereignty*, 18 GRIFFITH L. REV. 283, 290 (2009).

<sup>135</sup> Draper, *supra* note 44, at 197.

<sup>136</sup> Repositioning AWL as an *exceptional* wartime regime is evidently a normative proposal, considering the factual ubiquity and persistence of the war on animals.



## *B. Toward a Jus Contra Bellum: From Regulating to Preventing the War on Animals*

As we have seen, AWL suffers from inherent limitations which render it insufficient as the *only* animal-protective body of law. While AWL may be a well-fitting regime – one specifically designed – for tempering the war on animals, its existential nexus to war means that AWL is neither capable of preventing it, nor does it have a vision (or even a conception) of peace. In order to compensate for this blind spot, we need to shift from a “merely factual” to a “normative” approach<sup>137</sup> – one that does not simply posit the war on animals as an (ugly) fact, but simultaneously provides for a normative mandate to build and maintain peace with animals. Such an expanded scope of animal-protective law should not only encompass the regulation of lawful conduct *in* war, but more fundamentally, address the legality and legitimacy *of* the war on animals. What is needed, consequently, is for the existing *jus in bello* to be complemented by a set of norms that work to prevent the war on animals in the first place – as it were, a kind of *jus contra bellum* for animals.

### *1. The distinction between jus in exploitation and jus ad exploitation*

In international law, there exists a clear distinction between the law relating to the legality and prevention *of* war (*jus ad/contra bellum*) and the law regulating the modalities of warfare, that is, lawful conduct *in* war (*jus in bello*).<sup>138</sup> A comparable bifurcation in animal law translates to a distinction between a “*jus ad/contra exploitation*” and a “*jus in exploitation*”<sup>139</sup> – two separate branches of law, each dealing with different aspects (the “if” and “how”) of the war on animals. While the latter pertains to the modalities of lawful exploitative conduct, the

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<sup>137</sup> See, *mutatis mutandis*, AEYAL GROSS, THE WRITING ON THE WALL: RETHINKING THE INTERNATIONAL LAW OF OCCUPATION 3–4 (2017).

<sup>138</sup> See Robert Kolb, *Origin of the Twin Terms jus ad bellum/jus in bello*, 37 INT’L REV. RED CROSS 553, 558 (1997).

<sup>139</sup> *cf.* GROSS, *supra* note 137, at 3–4 (calling for a distinction between “*jus ad occupation*” and “*jus in occupation*”).

former regime takes a step back and looks at the legality of (particular instantiations of) animal use as such. A *jus ad exploitation* would be tasked with determining, and limiting, the ends which may be legitimately pursued by means of exploiting animals, and would specify the conditions in which animals may be permissibly subjected to instrumental violence.

Complementing the existing *jus in exploitation* (AWL) with a distinct *jus ad exploitation* would redress a key shortcoming of contemporary animal-protective law. AWL, as noted before, merely assesses the instrumental necessity of harming animals for achieving any given animal use purpose, but does not typically concern itself with reviewing the legitimacy or necessity of these animal use purposes as such. That is, AWL does not generally question, but simply presupposes, the ends to which animals are used and killed. While isolated provisions may, in some cases, disallow certain fringe forms of animal use (such as animal testing for cosmetic purposes,<sup>140</sup> fur farming,<sup>141</sup> sexual acts with animals,<sup>142</sup> or animal fighting<sup>143</sup>), a coherent external set of norms that engage with the issue of when and for what reasons animal use is permissible is lacking. The *jus in bello*/*jus ad bellum*-distinction offers an apt conceptual framework for filling this normative gap.

Since existing AWL is premised on the assumption that humans are entitled to use and harm animals for countless purposes, the *jus ad exploitation* is currently – if discernible at all – rather sweeping and quite literally composed of an (almost unlimited) “right to exploit.” At the inception of modern IHL, resort to war was also considered a generally legitimate instrument of national policy, and accordingly, the *jus ad bellum* at that time accepted a

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<sup>140</sup> E.g. Regulation (EC) No. 1223/2009 of the European Parliament and of the Council on Cosmetic Products (30 November 2009), Art. 18.

<sup>141</sup> E.g. Austrian Animal Welfare Act (*Tierschutzgesetz*, BGBl. I No. 118/2004), §25(5); UK Fur Farming (Prohibition) Act (23 November 2000, c 33); Dutch *Wet Verbod Pelsdierhouderij* (4 January 2013, No. BWBR0032739).

<sup>142</sup> E.g. German Animal Welfare Act, § 3(13); Swiss Animal Welfare Act, Art. 16(2)(j).

<sup>143</sup> Swiss Animal Welfare Act, Art. 26(1)(c).

state's (nearly unfettered) "right to wage war."<sup>144</sup> This changed, in fact reversed, over the course of the 20<sup>th</sup> century, in the wake of "the scourge of war, which twice in our lifetime has brought untold sorrow to mankind."<sup>145</sup> Notably, the 1928 Kellogg-Briand Pact (outlawing aggressive war) and the 1945 U.N. Charter (generally prohibiting the use of force, Article 2(4)) brought about the "gradual outlawry of war as a legal institution."<sup>146</sup> The now largely obsolete concept of *jus ad bellum* has since evolved to a *jus contra bellum*, and "permission has been transformed into prohibition."<sup>147</sup>

## 2. *The transformation of jus ad exploitation into jus contra exploitation*

Just as the horrors of two world wars have led to a prioritization of "the prevention of war rather than the mere regulation of the way that wars are conducted,"<sup>148</sup> so too may we eventually reach a turning point as regards the horrors of factory farming and its dire consequences for public health (e.g. antibiotic resistance, zoonoses, and chronic diseases) and the environment (e.g. climate change, water pollution, and deforestation).<sup>149</sup> To be sure, today's societal attitudes toward the institutions of war (which is generally perceived as an evil that should be avoided) and animal use (which is generally viewed as natural and

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<sup>144</sup> See KOLB & HYDE, *supra* note 54, at 9; DETTER, *supra* note 34, at 175; Jeff McMahan, *Laws of War*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* 493, 495–96 (Samantha Besson & John Tasioulas eds., 2010).

<sup>145</sup> Charter of the United Nations, preamble (24 October 1945, 1 UNTS XVI).

<sup>146</sup> Carsten Stahn, "Jus ad bellum", "jus in bello" ... "jus post bellum"? – *Rethinking the Conception of the Law of Armed Force*, 17 EJIL 921, 923 (2006).

<sup>147</sup> KOLB & HYDE, *supra* note 54, at 13.

<sup>148</sup> McMahan, *supra* note 144, at 496.

<sup>149</sup> See FAO, *LIVESTOCK'S LONG SHADOW: ENVIRONMENTAL ISSUES AND OPTIONS* (2006); Marco Springmann, H. Charles J. Godfray, Mike Rayner & Peter Scarborough, *Analysis and Valuation of the Health and Climate Change Cobenefits of Dietary Change*, 113 PROC. NAT'L ACAD. SCI. U.S.A. 4146, 4146 (2016) (noting that "Recent analyses have highlighted the environmental benefits of reducing the fraction of animal-sourced foods in our diets and have also suggested that such dietary changes could lead to improved health"); Richard Coker et. al., *Towards a Conceptual Framework to Support One-Health Research for Policy on Emerging Zoonoses*, 11 THE LANCET INFECTIOUS DISEASES 326, 326 (2011) (noting that "nearly three-quarters of emerging and re-emerging diseases of human beings are zoonoses"); A. Cascio, M. Bosilkovski, A.J. Rodriguez-Morales & G. Pappas, *The Socio-Ecology of Zoonotic Infections*, 17 CLINICAL MICROBIOLOGY AND INFECTION 336, 336 (2011) (highlighting the human-related factors contributing to the resurgence of zoonoses, such as "hunting or pet owning, and culinary habits, industrialization sequelae such as farming/food chain intensification").

justifiable) differ, but this can change over time. Indeed, the existential threats posed by animal exploitation may very well provide the material conditions and pressure for progressively shifting the social consensus – and the corresponding legal paradigm – toward a prioritization of prevention rather than mere regulation. In due time, animal protection law might undergo a similar gradual process of transforming the formerly permissive *jus ad exploitation* into a more restrictive and generally prohibitive *jus contra exploitation*.

Admittedly, under present social and economic conditions, it is hard to envision such a *jus contra exploitation*, and, concomitantly, to reimagine the institution of animal exploitation as abolishable (as has historically been the case with other violent institutions, most notably, war and slavery).<sup>150</sup> First steps in that direction – rudiments of which are already identifiable in current law – will likely take the form of incremental prohibitions that abolish specific types of animal use, such as fur farming, the use of animals in circuses, or prospectively even meat production.<sup>151</sup> Furthermore, the general prohibition/legitimate exceptions-structure outlined by the U.N. Charter’s prohibition of the use of force could serve as a useful model for surmising the eventual shape and content of a *jus contra exploitation* proper. Along those lines, it would be principally based on a general prohibition of the war on animals, that is, of institutionalized animal exploitation and the collective violence through which it is enforced. This translates to a general prohibition of all practices of violence-based exploitative animal use, most notably those associated with animal farming, animal experimentation, and other animal-use industries.<sup>152</sup>

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<sup>150</sup> cf. SAMUEL MOYN, *HUMANE: THE MAKINGS OF AMERICA’S ENDLESS WAR* (forthcoming, 2021); Pleasants, *supra* note 48, at 203.

<sup>151</sup> cf. Gary L. Francione, *Animal Rights: An Incremental Approach*, in *ANIMAL RIGHTS: THE CHANGING DEBATE* 42 (Robert Garner ed., 1996) (advocating an “incremental approach” by prohibiting specific types of animal use); the EU Directive on animal testing gestures toward such an incremental abolitionist objective when noting that it “represents an important step towards achieving the final goal of full replacement” of animal experiments. Directive 2010/63/EU of the European Parliament and of the Council on the Protection of Animals Used for Scientific Purposes (22 September 2010), Recital 10.

<sup>152</sup> Note that a prohibition of the war on animals would not necessarily involve prohibiting non-violent and non-exploitative forms of animal use (*see supra* footnote 16). Furthermore, individual (socially deviant) acts of violence against animals remain below the threshold of constituting a war on animals (which was defined as

Even a stringent *jus contra bellum* retains room for justifiable exceptions. In the case of intra-human wars, legitimate reasons for resorting to armed force are self-defense (Article 51 U.N. Charter) and authorization by a Security Council mandate (Article 42 U.N. Charter), as well as some other, accepted or controversial legitimizing factors.<sup>153</sup> Likewise, a *jus contra exploitation* must reasonably allow for certain exceptions that render resort to collective violence against animals permissible as *ultima ratio* (if less forcible means would be inadequate). Of course, as is to be expected, there will be considerable disagreement over what counts as legitimizing reasons, and new exceptions will likely emerge from practice, as seen with regard to the evolving notion of exceptions to the prohibition of war.<sup>154</sup> Nonetheless, some exceptions seem to suggest themselves quite readily. For instance, the *jus contra exploitation* should accommodate some analogous notion of self-defense, that is, the permissibility of necessary defensive (as opposed to aggressive) collective violence against animals, for example against pests, carriers of zoonotic diseases, or invasive alien species.<sup>155</sup> Further exceptions may include existential necessity (in the sense of there being no other means of survival and subsistence, e.g. for certain indigenous peoples)<sup>156</sup> or some form of “humanitarian intervention” for animals.<sup>157</sup>

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a phenomena of collective violence), and would therefore not trigger any war-related rules (neither *jus contra exploitation* nor *jus in exploitation*). Rather, they would fall under the purview of a peacetime criminal law, to the extent that it protects against private animal rights violations.

<sup>153</sup> For an overview of the numerous legitimizing factors and exceptions, which somewhat “undermine the general prohibition” of war, see DETTER, *supra* note 34, at 71, 92ff.

<sup>154</sup> See generally OLIVIER CORTEN, *THE LAW AGAINST WAR* (2010).

<sup>155</sup> cf. Elizabeth Anderson, Animal Rights and the Values of Nonhuman Life, in *ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS* 288 (Cass R. Sunstein & Martha C. Nussbaum eds., 2005) (noting that humans are “in a permanent state of war” with pests, because these creatures “implacably behave in ways hostile to human interests”); Guillaume Futhazar, *The Conceptual Challenges of Invasive Alien Species to Non-human Rights*, 11 *J. HUM. RIGHTS ENVIRON.* (2020).

<sup>156</sup> cf. Maneesha Deckha, *Animal Justice, Cultural Justice: A Posthumanist Response to Cultural Rights in Animals*, 2 *J. ANIMAL L. & ETHICS* 189 (2007).

<sup>157</sup> cf. Oscar Horta, *Animal Suffering in Nature: The Case for Intervention*, 39 *ENVIRONMENTAL ETHICS* 261 (2017).

### 3. *The transition from (a ubiquitous) war to (areas of) peace*

Lastly, it must be conceded that even if there was such a thing as a *jus contra bellum* for animals, it may not necessarily or completely succeed in eradicating the factual reality of animal exploitation. This is abundantly clear in the case of intra-human wars. The general prohibition of war does not mean that in reality (legal or illegal) wars cease to exist, and therefore has little bearing on the continuing need for regulating warfare in the factual event of war.<sup>158</sup> Transferring the notion of a normative independence of *jus in bello* and *jus contra bellum* to animal law, it follows that AWL (the *jus in exploitation*) remains applicable not only in violent situations that are allowed by, but also in cases of illegal animal use that violate the rules of *jus ad/contra exploitation*. Far from replacing AWL, a *jus contra bellum* for animals would thus first and foremost mark a departure from treating animal exploitation as a legitimate human privilege, and toward understanding it as a factual phenomenon that is dually governed by *jus contra exploitation* and, in the event of a permission or failure of the former regime, by *jus in exploitation*.

While a *jus contra bellum* will therefore not eliminate the need for a *jus in bello* altogether, the former does however – insofar as it (partially) fulfills its preventative purpose – push back the real-life triggers for the material applicability of the latter. Just as the “applicability of existing humanitarian law ... presupposes the existence of an ‘armed conflict’,”<sup>159</sup> so too is AWL only applicable in exploitative wartime situations, whereas non-exploitative peacetime relations are beyond its ambit. This, then, is the critical function of a *jus contra bellum* for animals: it facilitates a gradual transition from the ubiquitous war on animals to carving out and safeguarding zones of peace, and thereby paves the way for the formation of a more aspirational animal law of peace.

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<sup>158</sup> See Doswald-Beck & Vité, *supra* note 50, at 106 (noting that IHL “remains necessary because unfortunately the legal prohibition of the use of force has not in reality stopped armed conflicts”); DETTER, *supra* note 34, at 176.

<sup>159</sup> Rosas & Stenbäck, *supra* note 52, at 224.

### *C. Toward a Complementary Animal Rights Regime*

To the extent that a *jus contra bellum* succeeds in preventing (instances of) the war on animals and in building (instances of) peace with animals, this opens up space for thinking about what law ought to govern peaceful human-animal relations. Just as human rights (HR) are at the core of the human-protective law of peace, an animal-protective law of peace should be centered around fundamental animal rights (AR). This final section will briefly outline the shape of such a peacetime AR regime (one which has yet to form and consolidate), and then proceed to discuss its relationship and interplay with AWL in wartime.

#### *1. Contours of animal rights in peacetime*

First, some remarks are necessary on the notion of peace with animals. If peace is the absence of war, peacetime for animals would mean the absence of exploitative, violence-based human-animal relations or, conversely, the presence (or aspiration) of non-exploitative, justice-based human-animal relations. Peaceful human-animal relations would notably be based on respect for the life, intrinsic value, and well-being *of* animals rather than on instrumental interests *in* animals, and would generally require humans to abstain from harmful animal use practices.<sup>160</sup> Certainly, considering the ubiquity and persistence of the war on animals, the vision of peace does not resonate well with present social realities, and devising peacetime AR might therefore strike us as an essentially utopian concoction.<sup>161</sup> Even so, it is instructive to prepare a conception of an animal law of peace, in order to tentatively signpost the lines along which animal-protective law should be developed moving forward.

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<sup>160</sup> For a vision of a justice-based interspecies society, see DONALDSON & KYMLICKA, *supra* note 16.

<sup>161</sup> However, an aspirational dimension is inherent in both AR and HR, which – even if positivized – always retain a certain degree of normative idealism. See David Bilchitz, *Fundamental Rights as Bridging Concepts: Straddling the Boundary Between Ideal Justice and an Imperfect Reality*, 40 HUM. RIGHTS Q. 119 (2018); Philip Harvey, *Aspirational Law*, 52 BUFF. L. REV. 701 (2004).

Peacetime AR, as envisaged here, may be conceptualized both in contradistinction to the antithetical model of AWL as well as along the lines of the analogical model of HR. In contrast to the pragmatic wartime regime instituted by AWL, which regulates violent human-animal relations and unambitiously seeks to avoid worst-case scenarios, a more idealistic peacetime regime would govern harmonious human-animal relations and ambitiously aspire to realize best-case scenarios. Moreover, the established concept of HR offers a helpful framework for designing analogical peacetime AR. For present purposes, I will not revisit the conceptual issue of whether animals *could* have human rights-like fundamental rights, nor the normative issue of whether animals *should* have such rights, as these questions have been addressed in scholarship.<sup>162</sup> Suffice it to say that some of the fundamental rights that are traditionally labeled “human” rights could be readily rethought as animal rights. As D’Amato and Chopra put it, “the phrase ‘human rights’ is only superficially species chauvinistic. In a profound sense ... some other sentient mammals are entitled to human rights or at least *humanist rights* – to the most fundamental entitlements that we regard as part of the humanitarian tradition.”<sup>163</sup>

Even so, unlike (moral) HR, which have been institutionalized in international and constitutional law, any presumptive (moral) AR suffer from a near-complete lack of legal institutionalization. While some AR may be gradually – and somewhat haphazardly – emerging from isolated acts of judicial recognition,<sup>164</sup> a proper AR law has yet to form and

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<sup>162</sup> See generally Saskia Stucki, *Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights*, 40 Oxf. J. Leg. Stud. (2020).

<sup>163</sup> Anthony D’Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT’L L. 21, 27 (1991); see further WILLIAM A. EDMUNDSON, AN INTRODUCTION TO RIGHTS 153–58 (2<sup>nd</sup> edn., 2012) (suggesting that the expression “human rights” should perhaps be retired, “just as the phrase ‘the rights of man’ has given way to gender-neutral equivalents.” Id., at 158); Raffael N. Fasel, “*Simply in Virtue of Being Human*”? A Critical Appraisal of a Human Rights Commonplace, 9 JURISPRUDENCE 461 (2018).

<sup>164</sup> See Tercer Juzgado de Garantías de Mendoza 3 November 2016, Expte Nro P-72.254/15 (granting the constitutional right of habeas corpus to a captive chimpanzee); Corte Suprema de Justicia 26 July 2017, AHC4806-2017 (MP: Luis Armando Tolosa Villabona) (granting the constitutional right of habeas corpus to a captive bear); Supreme Court of India 7 May 2014, civil appeal no 5387 of 2014 (recognizing a range of fundamental animal rights); Islamabad High Court 21 May 2020, W.P. No. 1155/2019 (affirming that animals have natural and legal rights).



consolidate. It is interesting to note, however, that humans were historically not considered holders of international individual rights, neither under general international law nor under IHL.<sup>165</sup> While the laws of war conferred various protections on individuals, these provisions were “not necessarily seen as creating a body of rights to which those persons were entitled.” Only in the course of the 20<sup>th</sup> century, the language of rights arrived and “paved the way for recognition of individual rights.”<sup>166</sup> Even prior to the institutionalization of international HR, there was thus a shift in IHL from mere state obligations to (some) corresponding rights of protected persons.<sup>167</sup> Similarly, the legal protections bestowed upon animals are presently viewed as merely imposing obligations on humans, but not as conferring rights on animals. Nonetheless, some simple rights are arguably beginning to arise from AWL,<sup>168</sup> and could pave the way for the more comprehensive recognition of fundamental animal rights.<sup>169</sup>

A peacetime AR regime may eventually include a range of different rights, which could potentially extend to certain relational citizenship, social membership, participatory political or (non-exploitative) labor rights. For now, though, I will focus on the most basic, first generation animal rights, such as the right to life, bodily integrity, freedom of movement, and freedom from torture and inhumane treatment. Even such a limited set of fundamental AR would be squarely incompatible with the war on animals, as respect for these rights would rule out “virtually all existing practices of the animal-use industries.”<sup>170</sup> Phrased differently,

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<sup>165</sup> See ANNE PETERS, BEYOND HUMAN RIGHTS: THE LEGAL STATUS OF THE INDIVIDUAL IN INTERNATIONAL LAW 194–201 (2016).

<sup>166</sup> Meron, *supra* note 29, at 251.

<sup>167</sup> Nevertheless, IHL continues to protect individuals primarily not through rights but through “standards of treatment.” See PROVOST, *supra* note 73, at 16, 33; Lorite Escorihuela, *supra* note 49, at 359 (noting that individual rights remain “a very secondary regulatory tool” in IHL).

<sup>168</sup> See e.g. Supreme Court of India 7 May 2014, civil appeal no 5387 of 2014, para. 27 (holding that AWL “deals with duties of persons ... which is mandatory in nature and hence confer corresponding rights on animals. Rights so conferred on animals are thus the antithesis of a duty”).

<sup>169</sup> On the distinction between simple and fundamental animal rights, see Stucki, *supra* note 162; on an interpretation of AWL as conferring “interest-theory rights” on animals, see VISA A.J. KURKI, A THEORY OF LEGAL PERSONHOOD 62–71 (2019); on international animal rights, see Anne Peters, Toward International Animal Rights, in STUDIES IN GLOBAL ANIMAL LAW 109 (Anne Peters ed., 2020).

<sup>170</sup> DONALDSON & KYMLICKA, *supra* note 16, at 40; REGAN, *supra* note 15, at 348–49 (noting that AR require the “total dissolution of the animal industry as we know it”).

AR, much like HR, are “fundamentally hostile to war.”<sup>171</sup> War, by its very nature, presents a situation that severely impacts core fundamental rights, such as the right to life and bodily integrity, which are undermined by a “license to kill” and injure.<sup>172</sup> Because peace is therefore the underlying condition for full respect of AR and war their quintessential negation, AR must share in the *jus contra bellum*’s “general project of preventing war.”<sup>173</sup>

## 2. *Complementarity of animal welfare law and animal rights in wartime*

Insofar as the war on animals will likely remain, to some degree, a factual reality for the foreseeable future, the question arises whether *peacetime* AR would be applicable in *wartime* situations. If so, what kind of relationship would exist between AWL (as the designated wartime regime) and AR (as a primary peacetime regime)? As we have seen, AR, like HR, are designed for and premised on peacetime conditions. Given their hostility to war, extending the reach of peacetime AR to war would appear to be incongruous and futile. This may incline us to think that AWL and AR best adhere to a clear-cut division of labor, the former governing exploitative, violent situations and the latter non-exploitative, peaceful relations. However, a comparative look to the relationship of IHL and HR suggests another possibility. Their historical development from separation to co-applicability may serve as an instructive model for redefining the relationship between AWL and AR as one of complementarity rather than incompatibility.

In international law, the clear distinction between the states of war and peace has traditionally corresponded with a clear separation of the law of war and the law of peace into

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<sup>171</sup> *Mutatis mutandis*, Lorite Escorihuela, *supra* note 49, at 361.

<sup>172</sup> *Mutatis mutandis*, Tomuschat, *supra* note 121, at 16; Doswald-Beck & Vité, *supra* note 50, at 105.

<sup>173</sup> *Mutatis mutandis*, Lorite Escorihuela, *supra* note 49, at 361; Resolution XXIII “Human Rights in Armed Conflicts” adopted by the International Conference on Human Rights, Tehran, 12 May 1968 (noting in its preamble that “peace is the underlying condition for the full observance of human rights and war is their negation”).

“their respective and proper spheres.”<sup>174</sup> According to the formerly prevailing separation doctrine, IHL (as exceptional wartime regime) and HR (as ordinary peacetime regime) were thought of as mutually exclusive branches of law, with either the one or the other applying.<sup>175</sup> Indeed, in terms of their historical origin and underlying rationale, IHL and HR are markedly different. IHL originated at a time when international HR did not yet exist.<sup>176</sup> HR law has been elaborated for ordinary times of peace and deals with limitations on government conduct vis-à-vis its citizens, whereas IHL is specifically tailored to extraordinary situations of war and restrains the conduct of belligerents vis-à-vis protected persons.<sup>177</sup> HR law and IHL thus address “vastly different realities” and envisage significantly different relationships.<sup>178</sup> Whereas HR concern the “relationship between the government and the individual in order to define the basis for a just society,” IHL deals with violent, hostile relationships.<sup>179</sup> Yet, notwithstanding their historical distinctness, IHL and HR have come to exhibit a “large measure of convergence and parallelism” based on the shared idea of humanity and a shared objective of protecting individuals in all circumstances.<sup>180</sup> Today, the confluence of the two regimes “enjoys the status of the new orthodoxy.”<sup>181</sup> Notably, it is now generally accepted that HR continue to apply in times of war, albeit in a restricted and modified manner.<sup>182</sup> That is, to the extent of the former’s non-derogability, HR and IHL are co-applicable in situations

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<sup>174</sup> Draper, *supra* note 74, at 206.

<sup>175</sup> See Stahn, *supra* note 146, at 921–23; Tomuschat, *supra* note 121, at 16.

<sup>176</sup> See Tomuschat, *supra* note 121, at 17.

<sup>177</sup> See Dan Kuwali, “Humanitarian Rights”: How to Ensure Respect for Human Rights and Humanitarian Law in Armed Conflicts, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND HUMANITARIAN LAW 343, 347 (Robert Kolb & Gloria Gaggioli eds., 2013).

<sup>178</sup> See PROVOST, *supra* note 73, at 7, 116; Draper, *supra* note 74, at 204.

<sup>179</sup> Doswald-Beck & Vité, *supra* note 50, at 102; Draper, *supra* note 74, at 205.

<sup>180</sup> Theodor Meron, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument*, 77 AM. J. INT’L L. 589, 593–94 (1983).

<sup>181</sup> Ben-Naftali, *supra* note 27, at 5.

<sup>182</sup> See Legality of the Threat or Use of Nuclear Weapons, 1996 ICJ REP., para. 25; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ REP. 136, 178 (July 9), para. 106; Cordula Droegge, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 ISR. L. REV. 310, 320 (2007).

of war, although the latter remains *lex specialis*.<sup>183</sup> Over time, the relationship of IHL and HR has thus developed from mutual exclusivity to complementarity.<sup>184</sup>

One of the main objectives of this inquiry was to extrapolate a similar development for the evolving relationship between AWL and AR. Although a proper AR regime does not yet exist, at least in theory AWL and AR are treated as incompatible and mutually exclusive animal-protective regimes. Indeed, in terms of their historical origin and underlying rationale, AWL and AR are markedly different. AWL originated at a time when the concept of AR – let alone any AR law – had not yet emerged. While AWL is specifically formulated to govern the given realities of prevailing animal use practices, AR are devised for peacetime and aspire to establish and safeguard ideal conditions for a just interspecies society. Consequently, AWL and AR address vastly different realities, and the quality of the relationships they govern differs significantly. Whereas the human-animal relationship reflected in AWL is an exploitative one that is “resolutely based on hostility” and violence, the model projected by AR is one that fosters harmonious, justice-based human-animal relations.<sup>185</sup> Yet, notwithstanding their historical and conceptual distinctness, both AWL and AR share a basic commitment to animal protection, and in their own ways serve the shared purpose of protecting individual animals and their intrinsic value and interests.<sup>186</sup> A certain measure of

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<sup>183</sup> See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 ICJ REP., para. 106; Helen Duffy, Trials and Tribulations: Co-Applicability of IHL and Human Rights in an Age of Adjudication, in LAW APPLICABLE TO ARMED CONFLICT 15 (Ziv Bohrer, Janina Dill & Helen Duffy, 2020).

<sup>184</sup> Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (UN Doc. CCPR/C/21/Rev.1/Add. 1326 May 2004), para. 11 (stating that “both spheres of law are complementary, not mutually exclusive”).

<sup>185</sup> *Mutatis mutandis*, PROVOST, *supra* note 73, at 8; cf. Wadiwel, *supra* note 134, at 283 (noting that at present, “legalised violence and domination form the obvious backdrop for relationships”).

<sup>186</sup> Modern AWL is, at least implicitly, based on the recognition of animals’ intrinsic value, as it protects animals for their own sakes. Moreover, some legal orders explicitly recognize the intrinsic value or dignity of animals, most notably: Federal Constitution of the Swiss Confederation (18 April 1999, SR 101), Art. 120(2), Swiss Animal Welfare Act, Art. 1; Liechtenstein Animal Welfare Act (*Tierschutzgesetz*, 23 September 2010, LGBl-Nr 2010.333), Art. 1; Dutch Animals Act (*Wet dieren*, 19 May 2011, BWBR0030250), Art. 1.3(1); Directive 2010/63/EU of the European Parliament and of the Council on the Protection of Animals Used for Scientific Purposes (22 September 2010), Recital 12; Constitutional Court of South Africa (8 December 2016, CCT 1/16 [57]) (noting that “the rationale behind protecting animal welfare has shifted from merely safeguarding the moral status of humans to placing intrinsic value on animals as individuals”).

convergence between the two legal regimes may thus be anticipated, once AR are institutionalized. Moreover, if the universality premise of AR is accepted – that fundamental AR accrue to animals simply in virtue of being animals<sup>187</sup> – then it becomes difficult to maintain that the applicability of these unconditional rights should be context-dependent, that is, contingent on peaceful conditions and suspended in exploitative situations.<sup>188</sup> Ideally, there ought to be a continuum of norms that protect fundamental AR in all situations, in peacetime *and* (to the extent possible) in wartime.<sup>189</sup>

For this reason, and with a view to harmonizing and enhancing the protection of animals, AWL and AR are best conceptualized as *distinct yet complementary* animal-protective regimes. Complementarity, as used here to define the relationship between AWL and AR within a common corpus of animal-protective law, has two meanings. In a first, general sense, it indicates the possible *co-existence* of AWL and AR as conceptually distinct wartime and peacetime regimes, each primarily tasked with governing a different subject matter area (exploitative and non-exploitative human-animal relations, respectively). Moreover, in a narrower sense, complementarity denotes the possible *co-applicability* of AWL and AR within the war on animals, meaning that both animal-protective bodies of law are simultaneously applicable in wartime.<sup>190</sup> In this second, more specific sense, complementarity is meant to assert that exploitative situations are not exclusively (albeit primarily) governed by AWL, and signals that AR continue to operate during wartime (albeit with limitations and modifications). Under this complementarity-based model, AWL would thus *only* be applicable in and triggered by wartime conditions, whereas AR would be both

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<sup>187</sup> On the universality (in the sense of innateness) of AR, *see* DONALDSON & KYMLICKA, *supra* note 16, at 40–49.

<sup>188</sup> *See, mutatis mutandis*, Milanović, *supra* note 130, at 101.

<sup>189</sup> *See, mutatis mutandis*, Meron, *supra* note 180, at 589.

<sup>190</sup> *Mutatis mutandis*, Droege, *supra* note 182, at 337 (noting that the concept of complementarity is meant “to affirm the possibility of simultaneous application of both bodies of law”).

*fully* applicable in peacetime conditions as well as *partially* co-applicable in wartime conditions.<sup>191</sup>

However, an important qualification needs to be made with regard to the co-applicability of AR in wartime. Because AWL (qua designated wartime regime) would sensibly remain the *lex specialis*, peacetime AR must be infused in a context-sensitive rather than an unqualified manner.<sup>192</sup> This means that AWL will necessarily inform the interpretation of AR in wartime, in order to adapt their content to the adverse context of war. As does the human right to life, for instance, the animal right to life would inevitably take a different shape in war and peace. While in peacetime, the right to life may be highly restrictive as to the legality of killing animals for reasons that are not strictly necessary and proportionate, its violation in wartime will continue to be determined in accordance with AWL, which is markedly more permissive toward widespread practices of slaughtering, culling, eradicating, or putting down animals.<sup>193</sup> This example illustrates that while the promise of complementarity is that it will enhance the protection of animals in exploitative situations, there is also a price to be paid. In order to extend the reach of AR to wartime conditions, they must be watered down to make their application possible and practicable. However, as Milanović stresses in the context of HR, care must be taken that AR are not diluted too much, as this would “defy the whole purpose of the exercise.”<sup>194</sup>

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<sup>191</sup> The facts on the ground determine which legal regime is (primarily) applicable: wartime conditions (i.e. exploitative, violence-based, harmful animal use) trigger the applicability of AWL, whereas the absence of war restores the full applicability of the peacetime AR regime.

<sup>192</sup> See, *mutatis mutandis*, Michael J. Matheson, *The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons*, 91 AJIL 417, 423 (1997); Milanović, *supra* note 130, at 97 (noting that “human rights norms cannot be applied in a business as usual kind of way” to situations of war).

<sup>193</sup> On the comparable problem of killing under diverging HR and IHL norms, *cf.* Droege, *supra* note 182, at 344–47; Legality of the Threat or Use of Nuclear Weapons, 1996 ICJ REP., para. 25.

<sup>194</sup> *Mutatis mutandis*, Milanović, *supra* note 130, at 97.

### 3. The “humanization” of animal welfare law through animal rights

The potential risk of a water-down effect raises the question whether it is advisable to insert peacetime rights into warfare law. What practical or transformative consequences may be expected to ensue from the joint application of AWL and AR? Of course, at this juncture, the future effects of an interplay between AWL and AR can only be conjectured. Nonetheless, based on an extrapolation from the interplay between IHL and HR, I will end this inquiry by outlining the potential impact that AR might have on AWL.

One of the most important transformative effects commonly attributed to HR has been the *humanization* of IHL, that is, the normative transformation of the law of war into a humanitarian and human rights-oriented law.<sup>195</sup> Notably, the “penetration of human rights law into IHL” was a major force in shifting the balance between the (historically dominant) principle of military necessity and the (originally weaker) principle of humanity more toward humanitarianism.<sup>196</sup> Just as “the law of war has been changing and acquiring a more humane face,”<sup>197</sup> AWL not a static body of law and thus potentially susceptible to the transformative and humanizing influence of AR. A similar process of “humanization”<sup>198</sup> (in the sense of *humane-ization*) could gradually turn AWL from a predominantly human interest-centered, animal use-oriented law into a more humane, animal-centered, welfare- and animal rights-oriented law. This would notably entail recalibrating the balance between animal use and

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<sup>195</sup> See Schindler, *supra* note 46, at 170 (noting that in the aftermath of World War II, the increased “attention paid to human rights led to the gradual transformation of the law of war into a human rights-oriented law”); Ben-Naftali, *supra* note 27, at 4 (noting that taking HR to armed conflict “is a humanistic project. Its promise is the humanization of IHL”).

<sup>196</sup> Vera Gowlland-Debbas & Gloria Gaggioli, The Relationship Between International Human Rights and Humanitarian Law: An Overview, *in* RESEARCH HANDBOOK ON HUMAN RIGHTS AND HUMANITARIAN LAW 77, 78 (Robert Kolb & Gloria Gaggioli eds., 2013); THEODOR MERON, THE HUMANIZATION OF INTERNATIONAL LAW 69 (2006) (noting that “the history of the law of war has been that of the shifting balance between ‘the requirements of humanity’ and ‘military necessity’”).

<sup>197</sup> Meron, *supra* note 29, at 239.

<sup>198</sup> For lack of a better term, I use “humanization” in an analogical sense to describe a transformative process in AWL comparable to the humanization of IHL. The term “animalization” would be ill-fitting, given its negative connotation of (animalistic) “dehumanization.” *cf.* Nick Haslam, *Dehumanization: An Integrative Review*, 10 PERSONALITY AND SOCIAL PSYCHOLOGY REVIEW 252 (2006).

animal welfare in a manner that curbs the current primacy of instrumental necessities and gives more (albeit not full) weight to humane considerations.

This shifting balance may result, for one thing, from more *humane reinterpretations* of existing AWL norms in the light of AR. For instance, the indeterminate and flexible legal concept of unnecessary suffering is certainly open to a more restrictive interpretation informed by AR. As Garner contends, a more humanely interpreted principle of unnecessary suffering could potentially proscribe many, if not most, practices of instrumental violence against animals that are currently deemed necessary and permissible.<sup>199</sup> Likewise, existing AWL provisions that protect the life or dignity of animals could be interpreted more strictly as to the justification of infringements.<sup>200</sup> Furthermore, the shifting balance may manifest in more *humane reformulations* of AWL so as to better accommodate and safeguard respect for AR. Over time, more ambitious normative elements stemming from AR law (such as the right to life and dignity) may be incorporated into AWL, and where existing AWL already rudimentarily provides for such protections, this common ground between AWL and AR can be further strengthened and expanded on. Ultimately, the convergence of AWL and AR norms could create a shared set of basic humane standards for the treatment of animals, encompassing, for example, the prohibition of torture, mutilation, and the arbitrary deprivation of life and freedom.<sup>201</sup>

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<sup>199</sup> See ROBERT GARNER, A THEORY OF JUSTICE FOR ANIMALS: ANIMAL RIGHTS IN A NONIDEAL WORLD 89 (2013); Radford, *supra* note 95, at 703 (noting that the notion of unnecessary suffering is “open to re-interpretation”).

<sup>200</sup> For example, the German Federal Administrative Court (13 June 2019, BVerwG 3 C 28.16) recently reinterpreted the general prohibition of killing animals “without reasonable cause” (German Animal Welfare Act, § 1) to include, in principle, the practice of culling male chicks in the egg industry. By holding that economic necessity does not amount to a justification for the mass killing, the court shifted the balance from economic to humane considerations. (yet, the Court allowed the practice to continue ad interim, until an economically viable alternative is available).

<sup>201</sup> Similar to Common Article 3 of the 1949 Geneva Conventions, which is the textbook example of convergence between IHL and HR, and contains the most universally recognized humanitarian principles. See Kuwali, *supra* note 177, at 347.



Lastly, however, we must acknowledge and reiterate the “inherent limitations to the process of humanization.”<sup>202</sup> While the aspirational normative agenda imposed by a parallel AR regime promises to effectuate more humane reinterpretations and reformations of AWL, this article has poignantly demonstrated that AWL, by its very nature, will *never be fully humanized*. The most we can hope for is that AWL pays “deference to political realities while simultaneously seeking to transcend them.”<sup>203</sup> For the rest, a legal roadmap to full(er) humanization must provide for a general abolition of the war on animals, the relegation of AWL to an exceptional wartime regime, and the fruition of AR as the principal peacetime regime.

## CONCLUSIONS

The legal protection of animals has so far been monopolized, and governed virtually exclusively, by AWL. This has proved to be problematic, for it leaves a significant animal-protective gap. As the analogy with the law of war has illustrated, AWL functions as a kind of warfare law that regulates and humanizes the ubiquitous war on animals, but fails to provide a normative mandate for protecting animals *from* and *beyond* the presupposed war. In order to fill this legal lacuna, this article advocated restructuring and complementing the corpus of animal-protective law in the image of the human-protective triad *jus in bello* – *jus contra bellum* – human rights. It proposed and outlined the shape of an expanded, *tripartite animal protection law*, consisting of three distinct yet complementary legal regimes: (1) AWL, as a pragmatic wartime regime governing *only* exploitative human-animal relations; (2) a *jus contra bellum*, working to prevent the war on animals and simultaneously creating the peacetime conditions under which AR can flourish; and (3) AR, as an aspirational peacetime

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<sup>202</sup> Meron, *supra* note 29, at 275.

<sup>203</sup> *Mutatis mutandis*, Ben-Naftali, *supra* note 27, at 10.

regime governing, primarily, harmonious human-animal relations and co-applicable, to a lesser degree, in exploitative situations. Jointly, the interplay of these three complementary regimes is able to create a comprehensive corpus of law relating to the protection of animals in war and peace. Indeed, considering that AR (originally conceived for justice-based, harmonious relations) is as conceptually ill-suited to manage the ugly reality of war as AWL (originally conceived for violence-based, exploitative situations) is incapable of transcending it, such a complementarity-based approach compellingly suggests itself as the best way of operationalizing a more concerted legal protection of animals in, from, and beyond war.

The tripartite framework developed here offers a more nuanced, both ambitious and realistic model for legal animal protection. By pushing the boundaries of the simplistic welfare/rights-framework, it opens new horizons for both animal law scholarship and reform. For one thing, the novel outlook on the nature and limits of AWL as a wartime regime, and its relationship of complementarity to AR as a peacetime regime, gives much-needed impulses to overcome the rigidity of the traditional welfare/rights-dualism. The relationship of IHL and HR serves as a powerful reminder that complementarity can become the new orthodoxy as formerly dichotomized legal regimes converge, and thus presents a convincing model for shaping the evolving relationship of AWL and AR. Furthermore, the complementarity approach is able to defuse two persistent concerns voiced on both sides of the welfare/rights-debate. First, this article dismantled the frequently held view that AWL is a mere tool in the service of exploiting animals. While this article has certainly stripped AWL of its humane luster, it has shown that AWL is neither completely useless nor illegitimate. As a wartime regime, AWL is ugly but necessary – but also insufficient as the *only* (or principal) animal-protective body of law. On the other side, the idea of AR has so far been unable to shake off its stigma of quixotic idealism. By framing AR primarily as a peacetime regime, this rights idealism (as is also inherent in HR) can be positively reclaimed and asserted as a necessary

component of an aspirational animal law of peace. Moreover, understanding AR as complementary, rather than as an outright alternative, to AWL makes their legal institutionalization more palatable in the foreseeable future. The complementarity approach may therefore convince both AWL proponents of the added value of instituting idealistic AR, and AR proponents of the factual necessity of retaining pragmatic AWL regulation, by facilitating a mutually enriching co-existence of these two legal regimes.

In terms of legal reform, this article projects that the evolution of animal protection law will not map onto the binary logic of the welfare/rights-dualism, in which AR figures as a temporal successor and replacement of AWL. Rather, the more likely and practicable trajectory will be one that echoes the development of IHL and HR – one in which AWL and AR co-exist and co-evolve side by side, since both continue to address different realities and serve different functions. Indeed, in view of the incipient emergence of judicially recognized AR, the envisioned scenario in which the legal protection of animals is dually governed by AWL and AR may be imminent. The complementarity approach thus offers a plausible account for explaining and guiding the (rudimentary) parallelism of AWL and AR as it is already unfolding in legal practice. Complementarity precisely means that despite the existence of AWL, and the persistence of institutionalized animal exploitation, AR can develop in parallel as an additional, more ambitious layer of animal-protective law. At the same time, the analogy with the law of war emphatically suggests that animal law reform should prioritize establishing and expanding on prohibitive elements, which create and safeguard the very conditions under which AR can be (more fully) realized. The formation of a proper *jus contra bellum* and of an animal law of peace will thus be pivotal, whereas (only) to the extent that these war-preventative efforts fail or prove to be futile, there continues to be a simultaneous need for further improving and “humanizing” the second-best AWL.

Lastly, this article advocates a paradigm shift in animal law – a departure from the old (and deadlocked) ways of thinking about animal protection, welfare, and rights, and an invitation for scholars to embark on new avenues and explore a multitude of animal-protective instruments, in order to furnish a more complex and diversified toolbox for legal animal protection. This article marks but a first step in rethinking animal law through a cross-comparative lens, and opens up many new vistas for future research. For example, the analogy with the law of war may prompt further reflection on the adaptability and utility of other war-related concepts, such as “peacebuilding,” “transitional justice” or “jus post bellum,” the state of “belligerent occupation” (e.g. in cases of human encroachment on wildlife habitat), or the possibility of “humanitarian intervention” (e.g. in cases of systematic violations of animal rights) or “liberation wars.” Moreover, other, somewhat related analogies deserve closer attention and further exploration. Notably, comparative analyses with slave law (the legal regulation of slavery prior to its abolition)<sup>204</sup> and death penalty law (requiring that capital punishment be executed in a humane manner not causing unnecessary pain and suffering)<sup>205</sup> promise to yield fruitful insights for animal law.

The common theme linking these diverse areas of law is the legal regulation and humanization of institutionalized violence. While this article started out by noting the common intuition that the mass slaughter of humans in exceptional times of war and of animals in ordinary times of (ostensible) peace must not be compared, this view now appears thoroughly misplaced. Rather, it may very well be the case that human wars and the war on animals are not only comparable in terms of their legal framing, but, on a deeper level, connected through interlocking mechanisms of violence.<sup>206</sup> Cultivating a cross-comparative

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<sup>204</sup> cf. MARJORIE SPIEGEL, *THE DREADED COMPARISON: HUMAN AND ANIMAL SLAVERY* (1988); JOSHUA KERCSMAR, *ANIMAL DOMESTICATION AND THE ORIGINS OF AMERICAN SLAVERY* (forthcoming).

<sup>205</sup> cf. Lavi, *supra* note 56.

<sup>206</sup> cf. Lorite Escorihuela, *supra* note 3, at 28 (noting that the “slaughterhouse makes genocide and colonial rule practically possible”).

mindset toward the legal regulation of collective violence might, then, have a cross-fertilizing and mutually reinforcing effect on the progressing humanization of both animal-protective and human-protective laws. Until such time when slaughterhouses and battlefields may be a thing of the past, and humanizing the inhumane will no longer be necessary.

**Cover: Imbalanced World, 1996, Veronika Dell'Olio (photo: Miriam Aziz)**

“Essential to our concept was the establishment of a connection to the work and objectives of the institute. In view of the diversity of the research tasks concerned, we have attempted to highlight an overarching idea that can be understood as the institute’s mission. We see this as the ideal of peaceful relations between peoples on the basis of an internationally validated notion of justice.... The depicted sculpture...[symbolizes] an imbalanced world in which some peoples are oppressed while others lay claim to dominance and power. The honeycomb form of the circular disks denotes the [international] state structure. Glass parts ... [represent] the individual states .... [The division] of the figure ... into two parts [can] be interpreted as the separation of the earth into two unequal worlds. The scissors-shaped base, on the one hand, makes the gap between them clear, on the other hand, a converging movement of the disks is conceivable.... The sculpture [aims] at what is imagined – the possibility of the rapprochement of the two worlds.”  
[transl. by S. Less]

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