

Chapter 11

(Certified) Humane Violence? Animal Production, the Ambivalence of Humanizing the Inhumane, and What International Humanitarian Law Has to Do with It



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Abstract The chapter draws a comparison with the self-certifying of production methods as ‘humane’ or animal-friendly in the labelling of animal products—that is, according to companies’ own self-imposed codes of conduct. It likens the idea of humanizing animal slaughter, factory farms, and other forms of production to the notion of humanizing warfare. Like international humanitarian law (IHL), animal welfare law is marked by the tension inherent in its attempt to humanize innately inhumane practices. Given these parallels, the analysis of animal welfare law might benefit from existing insights into the potential and limits of IHL. Both areas of law endorse a principle of ‘humanity’ while arguably facilitating and legitimizing the use of violence, and might thereby ultimately perpetuate the suffering of living beings. The implicit justification of violence percolating from the IHL-like animal ‘protection’ laws could only be outweighed by complementing this body of law with a *ius contra bellum* for animals.

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1 Introduction: The Industrialization and Humanization of Animal Production

The contemporary human-animal relationship is highly ambivalent. It is characterized by both the exacerbating exploitative use of animals and a progressing moral concern for the life, integrity and welfare of animals. With regard to the agricultural use of animals (which is the quantitatively most significant area of animal use and accounts for more than sixty billion land animals slaughtered globally each year), these two poles stand in particular contrast. On the one hand, agriculture has been increasingly industrialized and intensified over the course of the Twentieth Century. The modern system of industrialized animal production (or the ‘animal-industrial complex’)¹ is marked by a high degree of rationalization, automatization, efficiency, mass production and profitability, and has turned animals into mere production units—biomachines that convert feed into meat, milk and eggs. On the other hand, the transformation of agriculture to industrialized animal production has raised grave ethical concerns, and societal discomfort at the systemic disregard for the welfare of farmed animals has grown. Most people cringe at the sight of footage showing the horrifying conditions prevailing in factory farms and slaughterhouses, and the vast majority of society subscribes to the basic moral principle that inflicting unnecessary pain and suffering on animals is wrong (a dictum also underlying the nearly universal prohibition of animal cruelty and which is so ingrained it could be considered a ‘rule of civilization’).²

While the growing moral concern for animals has not stopped or reversed the process of industrialization of animal production, the juxtaposition of these two antithetical forces generates a strong dialectical tension. One way of reconciling and harmonizing these two conflicting impetuses is the idea of ‘humane production’—i.e. the idea of humanizing animal production. This idea informs, for one, mandatory animal welfare laws which set minimum standards to be respected in agricultural practices. The idea of humanizing animal production is embodied even more clearly in voluntary animal welfare (or humane) labels that react to consumers’ demands for higher welfare standards beyond that which is minimally required by law.

The latter phenomenon is the starting point of this enquiry.³ Critics typically view humane labels as instances of ‘humane-washing’. While this critique is important, I believe it falls short. As will be shown, the contradiction and limitations inherent to humane labelling merely epitomize a deeper ambivalence that characterizes animal

¹See generally Noske, *Humans and Other Animals* 1989, 22; Twine, ‘Addressing the Animal-Industrial Complex’ 2013.

²As noted by the dissent in a Canadian appeal decision regarding an elephant in a city-run zoo. See Court of Appeal of Alberta, *Reece v. Edmonton (City)*, Judgment of 4 August 2011, 2011 ABCA 238, para. 56; see also Hurnik/Lehman, ‘Unnecessary Suffering’ 1982, 131-132.

³This chapter does not deal with the issue of the compatibility of animal welfare labels with international trade law. For this, see, e.g., Kelch, ‘WTO Tuna Labeling Decision’ 2012; on animal welfare and the General Agreement on Tariffs and Trade, Sykes, ‘Sealing Animal Welfare’ 2014.

welfare law in general: the aporia of humanizing an innately inhumane institution. To my knowledge, there is only one other area of law that is confronted with such a similar ambivalence: international humanitarian law. Learning from the laws of war, it will be argued, may offer valuable new insights for a better understanding and the advancement of animal welfare law.

2 Humane Labelling and Humane-Washing

The term ‘animal welfare labelling’ or ‘humane labelling’ covers a wide range of government or private animal welfare labels (e.g. ‘Certified Humane’, ‘Animal Welfare Approved’, ‘Free Range’) on animal-based food products that signal to consumers that such products were produced in compliance with high welfare standards and that the animals involved in the production process were treated humanely.⁴ As paradigmatically expressed by the Animal Welfare Institute (an advocate for humane farming practices), the underlying idea of ‘humane production’ is that each phase of a farmed animal’s life (breeding, raising, transport and slaughter) ‘offers the opportunity for cruelty or compassion’, and that for ‘each aspect of industrial production, alternative methods that are both humane and economical are possible.’⁵ The overall goal, as for example stated by Humane Farm Animal Care which administers the ‘Certified Humane Raised and Handled’ label, is ‘to [improve] the lives of farm animals in food production from birth through slaughter’ and to establish ‘kinder and more responsible farm animal practices.’⁶ Humane labels also cater to a growing niche-market of ethical consumers willing to pay higher prices for animal friendly products, and are thus believed to be a win-win-win situation for producers, consumers and animals.⁷

While the goal of improving the lives of farmed animals is laudable and it seems trivially true that anything is better than nothing, critics contend that humane labelling at best entails marginal rather than substantial improvements in farmed animal welfare. Many humane labels are notoriously vague, unregulated and unenforced, with no meaningful content or oversight and self-imposed welfare standards that often do not (significantly) go beyond reiterations of the legally

⁴For an overview of animal welfare labelling in the EU, see Passantino/Conte/Russo, ‘Animal Welfare Labelling’ 2008, 396-399; Veissier/Butterworth/Bock/Roe, ‘European Approaches’ 2008, 284 et seq.; for the US context, see Wiseman, ‘Localism, Labels, and Animal Welfare’ 2018, 75 et seq.; Leslie/Sunstein, ‘Animal Rights Without Controversy’ 2007, 125 et seq.

⁵Animal Welfare Institute, ‘Farm Animals’, available at: <https://awionline.org/content/farm-animals>.

⁶Humane Farm Animal Care, ‘Our Mission’, available at: <https://certifiedhumane.org>.

⁷On the ‘marketization’ of farm animal welfare, see generally Buller/Roe, ‘Modifying and Commodifying’ 2014, (noting, *inter alia*, the performativity of ‘doing animal welfare’, which has become ‘a broad array of technics, practices and materialities to meet reasoning present in the “market”, rather than in the sole interest of improving animal welfare.’ *ibid.* 142).

required minimum or reflections of standard agricultural practices.⁸ According to critics, humane labels are therefore mostly misleading and primarily amount to a marketing strategy, or as Marc Bekoff puts it, ‘feel-good scams’ that enable consumers to buy a clean conscience.⁹

This line of criticism is best captured by the term ‘humane-washing’.¹⁰ Like greenwashing, humane-washing is a type of whitewashing, which is a metaphor for communications that gloss over or obscure unpleasant, negatively connoted facts. Based on common definitions of greenwashing,¹¹ humane-washing can be defined as the dissemination of false or deceptive information by companies so as to promote the perception that its products are animal-friendly, or as ‘symbolic information emanating from within an organization without substantive actions’, measurable as the discrepancy between *saying* (‘humane talk’) and *being* humane (‘humane walk’).¹² This, then, is the core of the humane-washing critique: that what is presented by humane labels as humane is in fact not humane.

3 The Inherent Contradiction and Limits of Humanizing Animal Production

While I principally agree with the criticism of humane-washing, I believe that it does not go quite far enough. The issue is not just that what is presented as humane is in fact not humane, but that it cannot be. Put differently, it is not just that humane labels promise something which they factually do not deliver—it is that they envisage something that is actually impossible. As will be shown in this section, the problem thus runs deeper than humane-washing. The contradiction of calling inhumane

⁸For example, in a report titled ‘Humanewashed’, the Animal Welfare Institute concluded that the animal welfare programs certified by the USDA Process Verified Program as ‘humane’ were not materially different from conventional production methods. See Rachel Mathews, ‘Humanewashed: USDA Process Verified Program Misleads Consumers About Animal Welfare Marketing Claims’, March 2012, available at: <https://awionline.org/sites/default/files/uploads/documents/fa-humanewashedreportonusdapvp.pdf>.

⁹Marc Bekoff, ‘Stairways to Heaven’ 2016; see also Wrenn, ‘Abolitionist Animal Rights’ 2012, 443-445; on the ‘free-range’ egg label, see Parker/Brunswick/Kotey, ‘The Happy Hen’ 2013, (concluding that ‘free-range’ egg labels ‘are generally either misleading or deceptive and that the notion of “free-range” has been industrialized and watered down so much as not to meet significant animal welfare, environmental, and public health concerns’, *ibid.* 182).

¹⁰See, e.g., Bekoff/Pierce, *Animals’ Agenda* 2017, 50 et seq.; or ‘hogwashing’, which LaVeck describes as ‘the practice of generating the public appearance of having compassion for animals while continuing to kill millions of them for profit.’ See LaVeck, ‘Compassion for Sale?’ 2006.

¹¹See, e.g., Becker-Olsen/Potucek, ‘Greenwashing’ 2013, 1318.

¹²Walker/Wan, ‘Harm of Symbolic Actions’ 2012, 231.

farming practices ‘humane’ is not merely an intentionally deceptive marketing strategy,¹³ but lies in the very nature of the project of humanizing animal production.

In absolute terms, animal production is inherently inhumane and can, *eo ipso*, not be (fully) humanized. According to the dictionary, to ‘humanize’ is ‘to make humane’, which means ‘marked by compassion, sympathy, or consideration’ for animals.¹⁴ By contrast, even ‘humane production’ methods regularly involve severe forms of violence against animals, such as confinement, tail docking, dehorning, castration and debeaking without anaesthesia, forced impregnation of milk cows and the separation from their calves, and the mass maceration or gassing of male chicks.¹⁵ Minimally, every kind of (economically sound) animal production will inevitably culminate in the ultimate act of violence: the involuntary and premature death of an animal, e.g. by the cutting of major blood vessels. The US Humane Methods of Slaughter Act gives a glimpse at what ‘humane slaughter’ looks like: it means to be ‘rendered insensible to pain by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut’ (the reality is even grimmer, as many animals are slaughtered in a state of consciousness due to improper stunning).¹⁶ These routine acts of violence can hardly be considered ‘humane’ in any real sense of the word, all the more considering that they are also quite unnecessary.¹⁷ The only way ‘humane’ can be negotiated with regard to animal production is in relative terms. In this sense,

¹³This discrepancy naturally produces the kind of doublespeak that also resonates in the criticism of humane-washing. For example, in an early critique of animal welfare labels, LaVeck traces how industry stakeholders (in collaboration with professionalized animal organizations) have appropriated, redefined, eroded and commodified the key language of the animal advocacy movement – compassion and humaneness – and channelled it into a new ‘happy meat’ discourse. What has emerged is a ‘brave new world’ in which ‘a mechanized system designed to move animals quickly and efficiently, to take their lives, to drain their blood, and to cut them into pieces on a scale never before imagined, is proudly described as a “stairway to heaven” by a slaughterhouse designer.’ See LaVeck, ‘Compassion for Sale?’ 2000, (referring to Temple Grandin, who calls her humane slaughterhouse ramp and restraining systems ‘stairways to heaven’).

¹⁴See Merriam Webster Dictionary, ‘humanize’ and ‘humane’, available at: <https://www.merriam-webster.com/dictionary/humanize> and <https://www.merriam-webster.com/dictionary/humane>.

¹⁵For an overview of standard practices in modern industrialized animal production, see, e.g. Norwood/Lusk, *Compassion, by the Pound* 2011, 94 et seq. *et passim*.

¹⁶US, Humane Methods of Slaughter Act, 7 U.S.C. § 1901 et seq., section 2 letter (a); on the failures of the Humane Methods of Slaughter Act, see DeCoux, ‘Speaking for the Modern Prometheus’ 2009, 19 et seq.

¹⁷A plant-based diet is perfectly healthy at least in modern industrialized societies. See generally Melina/Craig/Levin, ‘Position of the Academy of Nutrition’ 2016, 1970-1980; as noted by Kymlicka and Donaldson, ‘virtually all human violence against animals is unnecessary in the strict sense. Since humans can lead flourishing lives without eating meat, or wearing leather, or visiting caged animals in zoos or circuses, none of the suffering involved in these practices is necessary.’ Kymlicka/Donaldson, ‘Animal Rights’ 2014, 126; on the notion of necessity in the context of animal suffering, see generally Francione, *Introduction to Animal Rights* 2007b, 9 and 55 et seq.

humanization is merely an approximation, meaning ‘more humane’ compared to pre-existing ‘worst-case scenarios’ that are even more inhumane.¹⁸ Within the bounds of this relative standard, then, the (slightly) less inhumane becomes ‘humane’, a (slightly) less horrible life becomes a ‘good life’, and a (slightly) less miserable animal becomes a ‘happy animal’, or ‘happy meat’.¹⁹

Now, the same holds true for animal welfare regulation at large. Generally, the law plays an ambivalent role in governing the human-animal relationship, setting the parameters for both the protection and exploitation of animals. More specifically, as I have argued at length elsewhere, contemporary animal welfare law (AWL) is structurally constituted by the ambivalence of humanizing the inherently inhumane and violent institution of animal exploitation.²⁰ In view of its historical formation, AWL has emerged as a secondary function of and as reaction to the pre-existing practices of animal use and the ethical issues they raise. The normative purpose of AWL is not to do away with this institution as such, but rather to humanize it in relative terms (i.e., make it more humane, or less inhumane) by regulating the modalities of permissible violence against animals and thereby mitigating, to some extent, the suffering caused.²¹ In doing so, animal welfare regulation perpetuates a somewhat paradoxical and reactive dynamism of imperfectly humanizing while legalizing, facilitating and reinforcing the very institution that inevitably exerts violence against animals and makes them vulnerable and in need of protection in the first place.

4 Animal Welfare Law and International Humanitarian Law: A Brief Comparison

Viewed in this light, to the extent that AWL may be characterized as a body of law whose quintessential function is to approximatively humanize a profoundly inhumane institution, it bears a striking *prima facie* resemblance with another, quite unrelated body of law. Namely, there is—to my knowledge—only one other area of

¹⁸See Bekoff/Pierce, *The Animals’ Agenda* 2017, 50-51 (further noting that ‘humane’ is ‘one of the most overused and meaningless [words] in our current vocabulary’).

¹⁹The term ‘happy meat’ encapsulates the ‘belief that it is possible to raise and kill animals in such a way as to remove the ethical problems’ associated with the notion of ‘animal machines’ and factory farming. See Cole, ‘From “Animal Machines” to “Happy Meat”’ 2011, 84.

²⁰See Stucki, *Grundrechte für Tiere* 2016b, 140-149.

²¹This reactive dynamism of mitigation rather than prevention was identified clearly by the Israeli High Court of Justice in a case concerning the production of foie gras. Commenting on the ‘problematic language’ of the relevant regulation, 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.’ Supreme Court of Israel (sitting as the High Court of Justice), *Noah v. Attorney General*, Verdict of 11 August 2003, Appeal No. 9232/01, para. 17 (judgment of Justice A. Grunis).

law that operates with such a deeply ambivalent dynamic: international humanitarian law (IHL), that is, the legal regime governing war and other armed conflict. While the idea of comparing AWL and IHL might seem far-fetched, there exist significant parallels between these two legal regimes, which I will briefly highlight in this section. With a view to future research, I believe these parallels merit closer attention, and exploring them will not only be analytically interesting, but may also be helpful for furnishing a more accurate understanding of the nature and limits of AWL.

To start with, IHL, much like AWL, is marked by the inherent contradiction of humanizing an innately inhumane and violent institution: war and other armed conflict. As noted by Theodor Meron, in order to ‘genuinely humanize humanitarian law, it would be necessary to put an end to all kinds of armed conflict. But wars have been part of the human condition. . .and regrettably they are likely to remain so.’²² In recognizing the (unfortunate) reality of war, the purpose of IHL is not the (manifestly utopian) absolute elimination of the calamities of war by prohibiting warfare as such, but its rendering more humane, however imperfectly, by reducing the human suffering caused in its course.²³ However, despite its terminology (which would seem to suggest otherwise), humanitarianism is not the sole objective, but just one among other conflicting purposes of IHL.²⁴ Notably, IHL is constituted by a dialectical tension between two diametrically opposed forces—*military necessity* versus *humanitarian/human welfare considerations* – and aims at a compromise by ‘minimizing human suffering without undermining the effectiveness of military operations.’²⁵ Similarly, AWL (whose terminology might also misleadingly suggest that its sole legislative purpose is animal welfare, whereas the latter is just one among other conflicting purposes) reflects a compromise between two diametrically opposed factors, notably *economic* and other instrumental *necessities* on the one hand and *humane/animal welfare considerations* on the other hand.²⁶

Interestingly, both AWL and IHL further operate with the key principle of ‘unnecessary suffering’. In the context of IHL, the basic rule prohibiting the use of means and methods of warfare of a nature to cause superfluous injury or unnecessary suffering intends to lower the cruel effects of weapons on combatants.²⁷ The International Court of Justice has defined unnecessary suffering as ‘harm greater

²²Meron, ‘Humanization of Humanitarian Law’ 2000, 240.

²³See also Tomuschat, ‘Human Rights’ 2010, 16 (noting that IHL ‘is designed to ensure a minimal protection even during the most profound catastrophe of human society, namely war’ and seeks ‘to salvage what realistically can be protected notwithstanding the clash of arms’).

²⁴On the misleading terminology of international *humanitarian* law, see Wilson, ‘Myth of International Humanitarian Law’ 2017, 563-579, *passim* (challenging the conventional narrative that equates what was traditionally the ‘law of war’ or ‘law of armed conflict’ with the modern term of ‘international humanitarian law’).

²⁵Dinstein, *Conduct of Hostilities* 2016, 8-9.

²⁶See Stucki, *Grundrechte für Tiere* 2016b, 141-146.

²⁷Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, art. 35(2); on

than that unavoidable to achieve legitimate military objectives’,²⁸ that is, suffering that has no military purpose. Similarly, in the context of AWL, the term ‘unnecessary suffering’ is typically applied to inflictions of wanton and gratuitous suffering that ‘goes beyond what is necessary for “appropriate” exploitation’ and that serves no legitimate (e.g., economic) purpose.²⁹

Ironically, while IHL serves the compelling goal of humanizing armed conflict, it also enhances its acceptability, has a certain affirming and legitimizing effect, and may thus even prolong the residual violence entailed by the institution of war as such.³⁰ A similar point is made in the context of AWL, which, as critics contend, may effectively serve to legitimize and reinforce exploitative animal use by making it more socially acceptable.³¹ (The legitimacy of the institution as such is logically implicit, given that if it were considered illegal and profoundly illegitimate, the law would prohibit rather than simply regulate the institution, as for example in the case of slavery). Overall, IHL, much like AWL, thus embodies the ambivalence of humanizing, while simultaneously facilitating and consolidating, the very institution that is the cause of the violence and suffering it aims to mitigate.

the principle of unnecessary suffering, see generally Meyrowitz, ‘Principle of Superfluous Injury’ 1994.

²⁸ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, 226, para. 78.

²⁹Francione, *Animals, Property, and the Law* 2007a, 146; on the notion of ‘unnecessary suffering’ in applied animal welfare law, *ibid.*, 17 et seq. and 142 et seq.; for example, German courts have held that the killing of around 45 million male chicks annually due to their economic uselessness – a standard practice in the egg industry – constitutes a ‘necessary’ and thus lawful infliction of harm on animals. This justifying ‘necessity’ is a purely economic necessity and accrues from the fact that economically viable alternatives to chick culling are not available so far. See, notably, OVG Münster, Judgments of 20 May 2016, Case No. 20 A 488/15 and 20 A 530/15 (the temporary legality of killing male chicks was confirmed by the Federal Administrative Court, Judgments of 13 June 2019, Case No. 3 C 28.16 and 3 C 29.16); on the German ‘male chick’-judgments and the underlying notion of ‘necessity’, see Stucki, ‘Die Nutzung kommt vor dem Schutz’ 2016a.

³⁰See Meron, ‘The Humanization of Humanitarian Law’ 2000, 241; on the limits and legitimizing effects of IHL in the context of occupation, see generally Gross, *Writing on the Wall* 2017.

³¹See, e.g., Donaldson/Kymlicka, *Zoopolis* 2011, 2 (noting that the marginal improvements achieved through animal welfare reforms at best ‘distract attention from the underlying system of animal exploitation, and at worst, they provide citizens with a way to soothe their moral anxieties, providing false reassurance that things are getting better, when in fact they are getting worse. (...) these ameliorist reforms serve to legitimate, rather than contest, the system of animal exploitation’); Francione, *Rain Without Thunder* 1996), 36-37 (stating that animal welfare regulation ‘seeks to reform institutions of animal exploitation and make them more “humane” and explicitly reinforces the moral orthodoxy of human hegemony over nonhumans’); Bourke, ‘Use and Misuse of “Rights Talk”’ 2009, 133 (noting that ‘animal welfare legislation is often used not just to protect animals but also to regulate, and indeed facilitate, the ongoing use of animals’); Wrenn, ‘Abolitionist Animal Rights’ 2012, 446.

5 Outlook: From a ‘Jus In Bello’ Towards a ‘Jus Contra Bellum’ for Animals

As this brief comparison indicates, there exist some remarkable parallels between the structure, function and effects of AWL and IHL. Even though these parallelisms will require further exploration and reflection, the comparison between IHL and AWL casts a new light onto AWL and allows for some thought-provoking conclusions. First of all, it suggests that the institutional and systemic practice of violence predominantly shaping the contemporary human-animal relationship could be conceptualized as constituting something akin to a ‘war against animals’.³² Secondly, and accordingly, AWL may be best understood as a kind of ‘jus in bello’ that governs and regulates violent activities within this ‘war’ on animals. Thirdly, while AWL—so understood—serves an important, yet contradictory, limited, and even legitimizing humanizing function by alleviating suffering as long as the reality of ‘war’ factually persists, such a ‘jus in bello’ can neither justify the ‘war’ as such nor does it suffice.

Drawing from Aeyal Gross, this calls for a shift from a ‘merely factual’ to a ‘normative’ approach,³³ one that does not merely posit the ‘war’ on animals as an (ugly) fact, but acknowledges its normative dimension. This expanded perspective should address questions not just specifically relating to the appropriate conduct in ‘war’, but more fundamentally relating to the legitimacy of the ‘war’ as such. Most crucially, what is needed first and foremost, and what is lacking so far in the case of animals, is for the ‘jus in bello’ to be complemented by a higher-priority set of norms that work to prevent a state of ‘war’ in the first place—as it were, a kind of ‘jus contra bellum’ for animals.

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³²This is indeed proposed by Wadiwel, *War against Animals* 2015; Wadiwel further suggests that this ‘is a war that operates under the guise of peace, constructed more often than not within the rule of law. This war does not appear to be a war’. Wadiwel, ‘War against Animals: Domination, Law and Sovereignty’ 2009, 285.

³³Cf. Gross, *The Writing on the Wall* 2017, 3-4 (calling for a distinction between ‘jus in occupation’ and ‘jus ad occupation’).

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