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Animal Warfare Law and the Need for an Animal Law of Peace: A Comparative Reconstruction†

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. Through the comparative lens of the international laws of war and peace, this Article argues that existing animal welfare law is best understood as a kind of warfare law that regulates violent activities within an ongoing "war on animals." It further submits that this animal warfare law needs to be complemented and counterbalanced by an animal law of peace, consisting of a jus animalis contra bellum *and peacetime animal rights.*

War is peace.

–George Orwell, *1984*[1]

Introduction

Here is a hand-to-hand struggle in all its horror and frightfulness; Austrians and Allies trampling each other under

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† https://doi.org/10.1093/ajcl/avad018

1. George Orwell, Nineteen Eighty-Four 5 (1949).

> 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.
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> –J. Henry Dunant, A Memory of Solferino[2]

> [T]he 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 . . . 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.
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> –Upton Sinclair, *The Jungle*[3]

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 inherently violent and inhumane practices of animal exploitation to the *humanitarian* thrust undergirding IHL in its endeavor to humanize inherently violent and inhumane practices of warfare. While the protection of animals under the laws of war has recently received some scholarly attention,[4] and

2. J. Henry Dunant, A Memory of Solferino 10–11 (Red Cross: District of Columbia Chapter trans., Jarrold & Sons 1947) (1862).

3. Upton Sinclair, The Jungle 40–41 (1906).

4. *See* Animals in the International Law of Armed Conflict (Anne Peters, Jérôme de Hemptinne & Robert Kolb eds., 2022); 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 Hist. Soc. Res. 128 (2015).

other authors have utilized the notion of war to capture the violent character of contemporary human–animal relations,[5] this Article explores uncharted territory. Through a comparison with the law of war, this Article advances a new understanding of existing animal *welfare* law as a kind of *warfare* law—an animal warfare law—that regulates violent activities within a ubiquitous "war on animals." Moreover, it argues that this violence-permissive animal warfare law needs to be complemented and counterbalanced by the formation of a violence-repressive animal law of peace.

At first glance, the unorthodox comparison between AWL and IHL may strike some readers as bold, purely rhetorical, or polemical. Surely, one might think, the breakdown of civilization occurring on the battlefield in the exceptional state of war cannot, and must not, be equated with the routinized procedures orderly executed in the abattoir—arguably the "paradigmatic space" of modern industrialized civilization.[6] Yet, this Article neither claims that a literal war is being waged against animals, nor does it purport that AWL actually *is* a warfare law. Rather, it argues that AWL functions, in significant respects, *like* a warfare law. The analysis will show that, while clearly different legal regimes, AWL and IHL are structurally and functionally comparable in that they have formed in similar ways to serve a similar function—that of regulating, restraining, and humanizing violence—in the different institutional settings of war and animal exploitation.[7] Indeed, a comparison reveals striking similarities between AWL and IHL, tracing back to the shared aporia of humanizing the inhumane.[8] Both bodies of law govern inherently violent and inhumane institutions, and seek to make them more humane by managing the instrumental violence and suffering that is invariably inflicted upon humans and animals. Both legal regimes are instantiations of a "humane law"[9] 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.[10]

5. *See notably* Dinesh Joseph Wadiwel, The War Against Animals (2015).

6. Alejandro Lorite Escorihuela, *A Global Slaughterhouse*, 2 Helsinki Rev. Glob. Governance 25, 27 (2011).

7. *Cf.* Ralf Michaels, *The Functional Method of Comparative Law*, *in* Oxford Handbook of Comparative Law 345, 348 (Mathias Reimann & Reinhard Zimmermann eds., 2d ed. 2019) (noting that the functional method deems different legal regimes "comparable if they are functionally equivalent, i.e., if they fulfil similar functions.").

8. On the "contradictions inherent in the humanization of the law of war," see 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 Saskia Stucki, Grundrechte für Tiere 140–49 (2016).

9. *Cf.* Jean Pictet, Development and Principles of International Humanitarian Law 3 (1985).

10. *Cf.* Samuel Moyn, Humane: How the United States Abandoned Peace and Reinvented War (2021).

Moreover, far from a mere intellectual exercise, rethinking AWL through the comparative lens of IHL generates instructive insights and innovative impulses for reconstructing and complementing the corpus juris of animal protection.[11] The current state of animal protection law and discourse is deficient. On the one hand, AWL, which is the only (or primary) animal-protective regime as a matter of positive law, is sorely insufficient in protecting animals against the harms of institutionalized violence and exploitation. On the other hand, the accompanying legal discourse is shaped by an increasingly unproductive dichotomy between pragmatic animal welfare regulation and idealistic animal rights (AR), and has not yet furnished workable solutions for reforming animal protection law beyond the rigid welfare/rights dualism. As traditional approaches have failed, this Article embarks on a comparative journey in search for external answers in other areas of law that may have produced better solutions to a similar problem: namely, the regulation (and parallel prevention) of institutionalized violence.[12] Indeed, the comparison with IHL is uniquely suited to this end, as there exist hardly any other modern bodies of law that have as their object not the *abolition* and prohibition, but rather, the *regulation* and governance of brute and lethal collective violence.[13] At the same time, and unlike AWL, IHL is counterbalanced by other branches of international law—the law of peace—that seek to prevent the very violence of war in the first place (*jus contra bellum*) and govern the protection of humans in times of peace, notably through human rights (HR). It is this legal simultaneity of both *regulating* and *preventing* the violence of war, and of protecting humans in both *wartime* and *peacetime*, which animal-protective law, in its structurally deficient and underdeveloped state, stands to learn from the international laws of war and peace. This Article thus exploits the comparative method as a "fertile source of development,"[14] by transplanting the triadic structural design of IHL/*jus contra bellum*/HR into a reconstructed, tripartite corpus of animal protection law, consisting of AWL, a *jus animalis contra bellum*, and AR.

11. In common parlance, "animal protection" and "animal welfare" are often used interchangeably. By contrast, I will use "legal animal protection" ("animal protection law," "animal-protective law") as an umbrella term that covers all forms of legal protection for animals, including animal *welfare* law and animal *rights*.

12. *Cf*. René Provost, International Human Rights and Humanitarian Law 2 (2002) ("[C]omparative analysis is the possibility of finding in one system answers which may be borrowed and adapted to solve challenges faced by another legal system").

13. Historically, one might think of slave law and torture law. *Cf*. Marjorie Spiegel, The Dreaded Comparison: Human and Animal Slavery (1988); Adam Clulow & Jan Lauwereyns, *Animal Research, Safeguards, and Lessons from the Long History of Judicial Torture*, 10 J. Animal Ethics 103 (2020).

14. Alan Watson, Legal Transplants: An Approach to Comparative Law 95 (1974) (describing legal transplants as "the moving of a rule" from one legal regime to another. *Id*. at 21.).

The structure of the Article proceeds as follows. Part I outlines the problem with contemporary animal protection law and discourse, and the promise of comparison. The ensuing comparative argument operates on two levels. Part II undertakes the first-level comparison of AWL and IHL, and concludes by reframing AWL as a warfare law. Part III deals with the second-level comparative reconstruction of animal-protective law—and construction of the missing animal law of peace—along the structural lines imported from the international laws of war and peace.

I. Animal Protection, Animal Welfare Law, and Animal Rights: The Traditional Landscape

Legal comparison generally serves the function of enhancing the understanding of, and finding better solutions to, problems faced in one's own area of law. Here, the insights drawn from a comparison with the law of war promise to address two key problems of contemporary animal protection law.

A. The Problem with Contemporary Animal Protection Law and Discourse

1. The Normative Inadequacy of Monopartite Animal Protection (Welfare) Law

Today, the protection of animals—the basic idea that animals are due some form of normative protection—is a generally accepted moral and political imperative, and is solidifying globally as a legal concern. On the level of *domestic* law, most countries across the world have some sort of animal-protective provisions or statutes, and a small but growing number of states have constitutionalized animal-protective objectives.[15] In Europe, there exists an additional layer of *regional* international and *supranational* animal protection law.[16] In the European Union in particular, animal protection has quasi-constitutional status[17] and is recognized as "a legitimate objective in the public interest."[18] Moreover, we can observe the progressive formation of a global animal law, that is, of animal protection as an object

15. *See* Bruce A. Wagman & Matthew Liebman, A Worldview of Animal Law (2011); Jessica Eisen & Kristen Stilt, *Protection and Status of Animals*, *in* Max Planck Encyclopedia of Comparative Constitutional Law (Rainer Grote, Frauke Lachenmann & Rüdiger Wolfrum eds., 2016), https://oxcon.ouplaw.com/display/10.1093/law-mpeccol/law-mpeccol-e71.

16. Comprising the Council of Europe's five animal welfare conventions and the European Union's numerous directives and regulations relating to animal welfare.

17. Consolidated Version of the Treaty on the Functioning of the European Union art. 13, May 9, 2008, 2008 O.J. (C 326), 47.

18. Case C-424/13, Zuchtvieh-Export GmbH v. Stadt Kempten, ECLI:EU:C:2015:259, ¶ 35.

of *international* law.[19] Overall, the "pervasiveness of international concern for animal welfare" suggests that animal protection may be emerging as a general principle of law.[20]

Animal protection law, as understood here, potentially encompasses any kind of legal norm or regime aimed at protecting individual animals and their intrinsic value or interests. In actuality, however, the legal protection of animals has traditionally been, and continues to be, monopolized by AWL as the (only) designated body of law charged with operationalizing this animal-protective mandate. Contemporary animal protection law, while not synonymous, is thus largely coextensive with AWL. This monopartite structure is problematic, because AWL is but a deeply imperfect animal-protective regime whose function is limited to marginally humanizing the profoundly inhumane institution of animal exploitation. As a result, existing animal protection (*qua* welfare) law falls gravely short of fulfilling its eponymous purpose (literally to protect animals), as evidenced by the billions of animals suffering, languishing, and perishing in factory farms, slaughterhouses, laboratories, fur farms, or wildlife markets.

2. The Discursive Impasse of the Welfare/Rights Dualism

While virtually all animal lawyers agree that current animal protection law is painfully inadequate and in need of substantive reform, there is strong disagreement on *how* best to design and meaningfully improve the legal protection of animals. This question continues to be debated within the dualistic welfare/rights framework.[21] 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.[22] 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

19. Anne Peters, *Global Animal Law: What It Is and Why We Need It*, 5 TRANSNAT'L ENV'T. L. 9, 11–13 (2016).

20. MICHAEL BOWMAN, PETER DAVIES & CATHERINE REDGWELL, LYSTER'S INTERNATIONAL WILDLIFE LAW 680 (2d 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).

21. 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." Jessica Eisen, *Beyond Rights and Welfare: Democracy, Dialogue, and the Animal Welfare Act*, 51 U. MICH. J.L. REFORM 469, 493 (2018).

22. *See generally* Robert Garner, *Animal Welfare: A Political Defense*, 1 J. ANIMAL L. & ETHICS 161 (2006).

harmed or sacrificed for the benefit of humans."[23] 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."[24]

Given their differing objectives—regulation versus abolition of animal exploitation—welfare and rights approaches are traditionally cast as opposing and mutually exclusive paradigms for the legal protection of animals.[25] This dichotomy has made for an "increasingly stale debate," much of which revolves around defending one position and discarding the other.[26] Moreover, the either/or choice between AWL and AR has led to an impasse, since neither seems to offer an adequate monistic foundation for animal-protective 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,"[27] or, at worst, for being counterproductive in that it stabilizes the underlying system of animal exploitation. On the other hand, the competing AR paradigm is widely discarded as quixotic and impracticable, as it aims for an "unattainable goal"[28] whose achievement seems "unrealistic at present."[29] Given that AR will likely remain "utopian in the foreseeable future,"[30] its proponents are frequently charged with engaging in some form of "fundamentalism"[31] by prioritizing an idealistic agenda

23. Will Kymlicka & Sue Donaldson, *Rights*, *in* CRITICAL TERMS FOR ANIMAL STUDIES 320, 320 (Lori Gruen ed., 2018); on the idea of animal rights, see especially TOM REGAN, THE CASE FOR ANIMAL RIGHTS (2d ed. 2004).

24. 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* SUE DONALDSON & WILL KYMLICKA, ZOOPOLIS: A POLITICAL THEORY OF ANIMAL RIGHTS 49, 77–82 (2011) (arguing for ending human exploitation of animals *and* reconstructing "those relationships in ways that are respectful, compassionate, and non-exploitative": *id.* at 10); ALASDAIR COCHRANE, ANIMAL RIGHTS WITHOUT LIBERATION: APPLIED ETHICS AND HUMAN OBLIGATIONS (2012).

25. On the welfare/rights dualism, see 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 eds., 2015); Joyce Tischler, *The History of Animal Law: Part I (1972–1987)*, 1 J. ANIMAL L. & POL'Y 1, 28 (2008) (noting a "dichotomy that was present from the inception of animal law: . . . rights versus welfare, abolition versus regulation").

26. *See* Eisen, *supra* note 21, at 527.

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

28. 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).

29. FRANCIONE & GARNER, *supra* note 25, at 168.

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

31. FRANCIONE & GARNER, *supra* note 25, at 103.

over tangible reforms that could benefit the billions of animals who suffer painful lives and deaths in the present.[32]

In short, with AWL being too unambitious and compromising to offer sufficient legal protection for animals, and AR being too ambitious and uncompromising to offer a politically feasible alternative, we are faced with the dilemma of a sorely inadequate status quo and no workable way forward.[33] Traditional approaches have failed to develop palatable solutions for reforming animal-protective law in a manner that is not too peripheral (and thus not meaningful enough) or too radical (and thus not realistic enough).

B. The Promise of Comparison: Transplanting Triadic Complementarity

The comparison with the law of war promises to offer a fresh perspective, one that is both able to explain and overcome the normative shortcomings of current animal protection law, as well as transcend the discursive impasse of a debate defined and confined by its dualistic framing. First, analyzing AWL through the comparative lens of IHL facilitates a better understanding of the nature, function, and limits of AWL as something akin to an ugly but necessary warfare law that pragmatically governs the violent reality of animal exploitation (the "war on animals").

Second, rethinking AWL as a warfare law clarifies that contemporary animal protection law suffers from a structural problem related to its monolithic composition. Because the existing corpus of animal-protective law is merely composed of AWL *qua* warfare law, it only provides for protection *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 prohibition of the use of force (*jus contra bellum*) and peacetime HR. The comparison thus highlights the lack, and the pressing need for the formation, of a counterbalancing animal law of peace, and provides a blueprint for constructing this missing part of animal-protective law. Notably, it indicates that animal protection law needs to be armed with two additional legal regimes that are functionally equivalent to the *jus contra bellum* and HR. Accordingly, this Article proposes a tripartite framework for legal animal protection, consisting of three separate bodies of law: AWL (as a

32. *See* Lovvorn, *supra* note 28, at 139; Regina Binder, *Animal Welfare Regulation: Shortcomings, Requirements, Perspectives*, *in* ANIMAL LAW: REFORM OR REVOLUTION?, *supra* note 25, at 67, 83 (noting that abolitionism "ultimately leads to the consequence that animals living in the present are forgotten for merely purist reasons or utopian visions").

33. In a similar vein, see Kymlicka, *supra* note 30, at 125; DeCoux, *supra* note 27, at 18.

pragmatic wartime regime), a *jus animalis contra bellum* (facilitating the transition from wartime to peacetime), and AR (as an aspirational peacetime regime).

Third, the relational comparison with IHL and HR—two historically dichotomized legal regimes that have come to be understood as complementary—unlocks the potential of complementarity for the traditionally dichotomized relationship between AWL and AR. As Orna Ben-Naftali notes, 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."[34] This Article advocates a similar paradigmatic shift in animal legal discourse. Departing from the orthodox dualism, it submits that AWL and AR are best understood not as competing and mutually exclusive paradigms for the legal protection of animals but, rather, as distinct yet complementary bodies of law that both share a basic commitment to animal protection and serve different functions as wartime and peacetime regimes. Indeed, the tripartite model developed here precisely allows us to incorporate both AWL and AR into a pluralistic and expanded corpus of animal-protective law and, simultaneously, to reconfigure their relationship as one of complementarity rather than incompatibility.

In synthesis, the overarching goal of this comparison is to reconstruct animal protection law on a complementarity-based, triadic model borrowed from the international laws of war and peace. In doing so, this Article seeks to present a more nuanced, both ambitious and realistic, pluralistic approach to the legal protection of animals in war and peace—one in which there can be a meaningful and mutually enriching co-existence between AWL and AR. The remainder of this Article seeks to redeem the promise of rethinking and remodeling animal protection law in the manner outlined here. Because the comparative reconstruction hinges on the underlying comparability of AWL and IHL, the argument unfolds through a two-level comparison. The first-level comparison is a direct comparison between AWL and IHL, and lays the groundwork for reframing AWL as warfare law and for the ensuing construction of an animal law of peace. The second-level comparison is a relational cross-comparison of the law of war and its adjacent legal regimes—*jus contra bellum* and HR—with AWL and its (missing and to-be-created) counterparts—a *jus animalis contra bellum* and peacetime AR.

34. 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).

II. Animal Warfare Law: An (Unlikely) Comparison Between Animal Welfare Law and International Humanitarian Law

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 between these two legal regimes, but rather, to substantiate their structural and functional comparability in terms of the regulation, and humanization, of violence.

A. Object of Regulation: The Violence of War and Animal Exploitation (the "War on Animals")

To begin with, the comparison of IHL and AWL must be grounded in a sufficient similarity between their objects of regulation. One common denominator is that both bodies of law govern social institutions that, by their very nature, involve extreme violence. While this is immediately obvious with regard to the law of *war*, it may be less so in the case of animal *welfare* law.

In terms of their formal object of regulation, IHL and AWL deal with markedly different factual phenomena. IHL is the branch of international law regulating the conduct of warfare and armed hostilities. Its object of regulation can be plainly identified as war (or armed conflict), generally understood as the resort to armed force between states or intense armed violence between organized armed groups.[35] By contrast, AWL—on a literal and ahistorical reading—might be (mis)understood to be the branch of law dealing with human–animal relations, and regulating them in a manner that serves the primary purpose of animal welfare. In fact, quite the reverse is true. This is because contemporary human–animal relations take place in, and are framed by, an overall exploitative context that is a priori premised on the usability and disposability of animals for diverse human purposes.[36] The actual object of regulation, as received by existing AWL, is thus animal exploitation (or, if you will, animal welfare as a secondary function *within* the institutional setting of animal exploitation), understood here as an umbrella term

35. *See* Prosecutor v. Tadic, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia, Oct. 2, 1995); for various definitions of war, see Ingrid Detter, The Law of War 5–6 (3d ed. 2013).

36. This is not to say that *all* human–animal relationships are necessarily exploitative, as for instance in the borderline case of companion animal use. Even such human–animal friendships are, however, neither free from (the potentiality of) violent domination, nor does their existence subvert the primacy of exploitation as the formative mode of human–animal relations. *See* Wadiwel, *supra* note 5, at 61, 202*ff*.

covering all social practices of purely or preponderantly instrumental and harmful animal use.[37]

Now, are these objects of regulation at all comparable, and if so, in what respect? On the one hand, war and animal exploitation are clearly disparate social institutions that concern different actors, victims, activities, and objectives. On the other hand, and notwithstanding their many conspicuous differences, we may recognize a common feature pervading the very fabric of both institutions: violence.[38] Warfare and animal exploitation generally involve large-scale violent activities, notably, the use of weapons (i.e., tools designed or used to inflict bodily harm) against, the injuring, killing, and confinement of combatants and exploited animals.[39] More specifically, the violence entailed by war and animal exploitation is of a distinctive kind, in that it is inherent, instrumental, collective, and institutionalized.

First, violence is not merely incidental or marginal, but rather, it is an *inherent* and constitutive part of both institutions. Simply put, if war entailed "no bloodshed, no human suffering . . . war would not be war."[40] The same is true of animal exploitation. Violence is embedded in everyday practices of exploitative animal use, which cannot do without, minimally, constraining or controlling, hurting or depriving, or eventually killing animals.[41] This is best exemplified by agricultural animal production and its paradigmatic spaces of factory farms and assembly-line slaughterhouses, where animals experience a wide range of systemic harms.[42] These regularly include intensive confinement and overcrowding; invasive procedures (often

37. The somewhat hazy concept of animal exploitation can be summarized as the (*instrumental*) utilization of animals as means to human ends (notably for subsistence, commercial, scientific, or other purposes) in a (*harmful*) manner that disregards the inherent value, interests, or welfare of animals. *See, e.g.*, Federico Zuolo, *Cooperation with Animals? What Is and What Is Not*, 33 J. AGRIC. & ENV'T ETHICS 315, 326 (2020); RUTH J. SAMPLE, EXPLOITATION: WHAT IT IS AND WHY IT'S WRONG 57, 59 (2003); Christine M. Korsgaard, *Exploiting Animals: A Philosophical Protest*, 117 AV MAG. 14, 14 (2009).

38. (Direct) violence is the intentional use of physical force or power that inflicts on humans or animals somatic or psychological harm, pain, suffering, injury, death, deprivation, or constraints on the freedom of movement. *See* WORLD HEALTH ORG. [WHO], WORLD REPORT ON VIOLENCE AND HEALTH 5 (Etienne G. Krug, Linda L. Dahlberg, James A. Mercy, Anthony B. Zwi & Rafael Lozano eds., 2002) [hereinafter WHO REPORT]; Elizabeth Cherry & James M. Jasper, *Animals, Violence Toward*, *in* ENCYCLOPEDIA OF VIOLENCE, PEACE, AND CONFLICT 64 (Lester Kurtz ed., 2d ed. 2008).

39. *See* Tom Regan, *Animal Exploitation: The War Analogy*, TOM REGAN, https://regan.animalsvoice.com/animal-exploitation-the-war-analogy-2 (last visited May 5, 2023).

40. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 9 (3d ed. 2016).

41. For an overview of contemporary animal use and its inherent harms, see F. BAILEY NORWOOD & JAYSON L. LUSK, COMPASSION, BY THE POUND: THE ECONOMICS OF FARM ANIMAL WELFARE (2011); 2 DAVID L. CLOUGH, ON ANIMALS: THEOLOGICAL ETHICS (2018); THE PALGRAVE INTERNATIONAL HANDBOOK OF ANIMAL ABUSE STUDIES (Jennifer Maher, Harriet Pierpoint & Piers Beirne eds., 2017).

42. *See* Matthew C. Halteman, *Varieties of Harm to Animals in Industrial Farming*, 1 J. ANIMAL ETHICS 122, 122, 126 (2011) (noting that systemic harm is "an irreducible feature of industrial farming systems").

performed without anesthesia) such as tail-docking, dehorning, debeaking, and branding; reproductive control, for example, castration and artificial insemination; chronic health problems arising from unnatural feeding, breeding, keeping, and stress; the deprivation of animals' ability to exercise species-specific behaviors, such as foraging, grooming, nesting, and caring for offspring; and, finally, slaughter (i.e., the cutting of major blood vessels, gassing, shooting, maceration, or electrocution).

Second, this is a form of *instrumental* violence that is not an end in itself, but rather, used as a necessary means to attaining some other (e.g., military, political, economic) practical gain. Certainly, non-instrumental violence (motivated, e.g., by anger or sadism) can also be a frequent occurrence in war and animal exploitation, for example, when rogue soldiers and farm workers use excessive force against, or ill-treat, enemy combatants and farmed animals. Although non-instrumental violence may very well be encouraged by the disinhibiting context of war and animal exploitation, it is nonetheless an incidental epiphenomenon, as it is not strictly entailed by these institutions and their practical objectives as such. Moreover, while the former type of inherent, instrumental violence conforms with standard military or industry procedures and thus represents normal conduct or use, the latter type of superfluous or gratuitous violence goes beyond the instrumental violence necessary for proper warfare or animal utilization and thus counts as misconduct or abuse.[43]

Third, both war and animal exploitation are phenomena of *collective* violence that is carried by a supra-individual motive and mandate, and executed by individuals who act as (public or private) "organizational functionaries" within a group or on behalf of others.[44] While warfare is a well-known form of collective violence,[45] animal exploitation, too, operates through "widespread mass orchestrated violence"[46] and involves organized social action, such as the division of labor between animal breeders, factory farmers, and slaughterers, which are ultimately commissioned by consumers.[47]

Fourth, and lastly, these two particular forms of collective violence are also widely *institutionalized*, in that they are routinized

43. *See* Peter Rowe, *Military Misconduct During International Armed Operations: "Bad Apples" or Systemic Failure?*, 13 J. CONFLICT & SEC. L. 165 (2008); Halteman, *supra* note 42, at 122–24.

44. *See* GREGG L. BARAK, VIOLENCE AND NONVIOLENCE 25, 77 (2003); WHO REPORT, *supra* note 38, at 6, 215.

45. *See* 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., 6th ed. 2015).

46. WADIWEL, *supra* note 5, at 30.

47. *See* MARGO DEMELLO, ANIMALS AND SOCIETY: AN INTRODUCTION TO HUMAN–ANIMAL STUDIES 238–39 (2012) (noting that society not only tolerates but essentially commissions wide-scale industrial violence against animals).

and accepted or authorized by society at large.[48] Unlike individual (deviant) violence, which is considered socially unacceptable and is typically penalized, acts of institutionalized violence are embedded in, normalized, and legitimated by a wider web of structural and cultural violence.[49] Notably, the violence of war and animal exploitation is framed, regulated, and sanctioned by law—specifically, by IHL and AWL.

Hence, we arrive at the basis of comparison (the *tertium comparationis*) between AWL and IHL: both govern inherently violent institutions which are constituted and enforced through the massive deployment of collectively organized violence as a necessary means to their respective (political or economic) ends. Numerous commentators have likened animal exploitation, the institutionalized violence it invariably comprises, and the "animal-industrial complex"[50] sustaining it, to war (or concentration camps).[51] Indeed, given that our mainstay relationship with animals is "primarily hostile" and "combative or at least focused upon producing harm and death," and considering the "monstrous deployment of violence and extermination" involved, Dinesh Wadiwel argues that we should treat "our systems of violence towards animals precisely as constituting a war."[52] However, one need not agree with the view that animal exploitation amounts to, or actually is, a war against animals. Comparability does not imply that the institutions of war and animal exploitation are in every aspect similar; it suffices that they are (partially) comparable in terms of the quality and intensity of violence. For the purposes of this comparison, I will thus simply refer to animal exploitation as an analogical "war on animals." In this figurative rather than literal sense, the "war on animals" serves as a rhetorically useful term for referencing AWL's

48. *See* Rajni Kothari, *Institutionalization of Violence*, *in* ENCYCLOPEDIA OF VIOLENCE, PEACE, AND CONFLICT 1026, 1028 (Lester Kurtz ed., 2d ed. 2008) (noting that "perhaps the simplest forms of institutionalization of violence lie in its routinization—violence as a 'daily affair'"); Erika Cudworth, *Killing Animals: Sociology, Species Relations and Institutionalized Violence*, 63 SOCIO. REV. 1, 13–15 (2015).

49. On this three-layered typology of (direct, structural, and cultural) violence, see generally Johan Galtung, *Violence, Peace, and Peace Research*, 6 J. PEACE RSCH. 167, 168–69 (1969); Johan Galtung, *Cultural Violence*, 27 J. PEACE RSCH. 291 (1990).

50. Analogous to the "military-industrial complex." *See* BARBARA NOSKE, HUMANS AND OTHER ANIMALS: BEYOND THE BOUNDARIES OF ANTHROPOLOGY 22 (1989).

51. *See* JACQUES DERRIDA, THE ANIMAL THAT THEREFORE I AM 101 (David Wills trans., Fordham University Press 2008) (speaking of "the Judeo-Christiano-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 TREATMENT OF ANIMALS AND THE HOLOCAUST (2002); David Sztybel, *Can the Treatment of Animals Be Compared to the Holocaust?*, 11 ETHICS & ENV'T 97 (2006).

52. WADIWEL, *supra* note 5, at 3, 5*ff*.

object of regulation—animal exploitation—in a manner that both accentuates its violent character and associates it with the law of war.

B. Historical Formation and Rationale: Taming a Preexisting Violent Institution

The following subsections will explore the comparable ways in which the law's regulatory response to the violent institutions of war and animal exploitation has developed.

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,[53] the modern codifications of IHL and AWL were prompted by similar material and social conditions, notably 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. The development of modern IHL started with the first Geneva Convention (1864), whose adoption is commonly attributed to the humanitarian efforts of Henry Dunant after witnessing the horrendous suffering of wounded soldiers on the battlefield of Solferino.[54] Important catalysts for the codification of IHL over the course of the nineteenth and twentieth centuries 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.[55] The development of modern AWL in the nineteenth and twentieth centuries was stimulated by similar factors, notably, the fact that animal use had become more

53. The predecessors of modern IHL and AWL were primarily based on non-humanitarian and anthropocentric motives, for example, chivalry and reciprocal self-interest in the former case and the protection of public sensitivities and the moral character of humans in the latter case. Only in the course of the nineteenth 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 eighteenth-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 nineteenth century toward having "as their foundation the protection of animals for their own sakes").

54. J. Henry Dunant, Un souvenir de Solferino (Geneva, Imprimerie Jules-Guillaume Fick 1862).

55. *See* Dietrich Schindler, *International Humanitarian Law: Its Remarkable Development and Its Persistent Violation*, 5 J. Hist. Int'l L. 165, 166 (2003).

cruel and destructive in the wake of the Industrial Revolution due to advanced husbandry technologies;[56] 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.[57]

Furthermore, IHL and AWL have 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 and part and parcel of the respective legal regimes.[58] 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.[59] AWL, inheriting the prevailing "resource paradigm,"[60] operates under the assumption that humans have a right to use animals, and thus simply presupposes the existence and legitimacy of animal use.[61] From the outset, neither IHL nor AWL are therefore 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."[62]

56. *See* Ruth Harrison, Animal Machines: The New Factory Farming Industry (1964).

57. *See* Nigel Pleasants, Structure and Agency in the Antislavery and Animal Liberation Movements, *in* Eating and Believing: Interdisciplinary Perspectives on Vegetarianism and Theology 198, 208–09 (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").

58. *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.").

59. Louise Doswald-Beck & Sylvain Vité, *International Humanitarian Law and Human Rights Law*, 33 Int'l Rev. Red Cross 94, 95 (1993).

60. Jason Wyckoff, *Toward Justice for Animals*, 45 J. Soc. Phil. 539, 540 (2014) (describing the predominant "resource paradigm" as a "cluster of beliefs, assumptions, and practices that take animals to be resources that humans may use in order to generate benefits for themselves").

61. *See* Peters, *supra* note 19, at 10–11 (noting that AWL seeks to improve "the living and dying conditions of animals as they are kept, traded, and killed by humans, based on the assumption that humans are, in principle, morally entitled to do all this with animals").

62. Allan Rosas & Pär Stenbäck, *The Frontiers of International Humanitarian Law*, 24 J. Peace Rsch. 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).

The main purpose of IHL, as expressed in the basic principle of limitation,[63] is to avoid "total war" (not war as such), by putting "some limitation on the barbarity of the war and to assure a minimum of humanity in warfare."[64] 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 alleviating (to some extent) the suffering caused.[65]

Both AWL and IHL receive a factually preexisting, inherently violent institution as object of regulation, and then proceed to moderate and restrain it. In both cases, the normative intervention is driven by the regulatory objective of humanization. Consequently, the formidable task—and somewhat contradictory rationale—of IHL and AWL is to (imperfectly) humanize the inhumane institutions of war and animal exploitation.[66]

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

The historical formation of IHL and AWL around a presupposed violent institution, combined with the corrective rationale of humanization, creates a fundamental 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*.[67] The principal objective of IHL is to minimize human suffering "without undermining the effectiveness of military operations."[68] This trade-off finds paradigmatic expression in the preamble of the 1907 Hague Convention (IV), which is "inspired by the desire to diminish

63. Hague Convention (IV) Respecting the Laws and Customs of War on Land, art. 22, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277.

64. 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).

65. AWL is primarily "reactive, attempting to mitigate the harms of pre-existing practices." Kymlicka, *supra* note 30, at 128; this reactive dynamic of mitigation rather than prevention was aptly 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, 57(6) PD 212, ¶ 17 (2003) (Isr.).

66. *Cf*. Draper, *supra* note 53, 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 U.C. 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").

67. Dinstein, *supra* note 40, at 8–9.

68. *Id.* at 9.

the evils of war, as far as military requirements permit."[69] 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."[70] As exemplified by this provision, AWL has a built-in tension between the *necessities of animal use* and conflicting *humane considerations*. The principal objective of AWL is "to mitigate animal suffering while preserving their economic use by humans."[71]

On the one hand, both legal regimes accommodate the *instrumental necessity of violence* that is associated with the very activities they regulate. In IHL, this permissive element is plainly captured by the term "military necessity" (or "necessities of war"),[72] which broadly covers all "actions necessary for military purposes."[73] 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 hand, both legal regimes incorporate counterbalancing *considerations of humaneness*. Humanitarian restraints on warfare are motivated by the principle of humanity, which is famously epitomized by the Martens clause.[74] Such "elementary considerations of humanity"[75] require belligerents "to behave in a civilised and humane way"[76] at all times and demand the "humane treatment of persons" in all circumstances.[77] Similarly, AWL is 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,"[78] among

69. Hague Convention (IV) Respecting the Laws and Customs of War on Land, *supra* note 63.

70. Tierschutzgesetz [TSchG] [Animal Welfare Act] Dec. 16, 2005, SR 455, art. 4(1)(b) (Switz.).

71. Peters, *supra* note 19, at 11.

72. Henri Meyrowitz, *The Principle of Superfluous Injury or Unnecessary Suffering: From the Declaration of St. Petersburg of 1868 to Additional Protocol 1 of 1977*, 34 Int'l Rev. Red Cross 98, 107 (1994).

73. Doswald-Beck & Vité, *supra* note 59, at 98.

74. 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 U.N.T.S. 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").

75. Corfu Channel (U.K. v. Alb.), Merits, 1949 I.C.J. Rep. 4, 22 ¶ 2 (Apr. 9).

76. Kolb & Hyde, *supra* note 64, at 62.

77. Antônio Augusto Cançado 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).

78. Bowman, Davies & Redgwell, *supra* note 20, at 678.

the "shared values of humankind,"[79] "one of the hallmarks of international and European law in contemporary times,"[80] "one of the hallmarks of Western civilisation,"[81] or a "rule of civilization."[82]

Both IHL and AWL, as a whole, reflect a balance between these two conflicting objectives, and neither body of law will ever be exclusively in the service of one.[83] Indeed, pragmatic compromise is essential for rendering those 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.[84] 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.[85] Even so, specific rules may strike a different abstract balance between the necessity of violence and humaneness. Broadly speaking, in both bodies of law we can categorize four groups of norms across the balancing spectrum:

(1) *Prohibition of violence 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."[86] 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."[87]

(2) *Prohibition of excessive or intolerable violence*: in IHL, some acts may have a certain military value but are nonetheless prohibited due to overriding humanitarian considerations,

79. Sykes, *supra* note 20, at 47.

80. Hermann v. Germany, App. No. 9300/07, at 36 (Grand Chamber June 26, 2012), https://hudoc.echr.coe.int/eng?i=001-111690 (Pinto de Albuquerque, J., partly concurring and partly dissenting).

81. Eur. Consult. Ass., *International Transit of Animals*, 13th Sess., Rec. 287 (1961).

82. Reece v. Edmonton, 2011 ABCA 238, ¶ 56 (Can.) (Fraser, J., dissenting).

83. *See* Page Wilson, *The Myth of International Humanitarian Law*, 93 Int'l Affs. 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"); Provost, *supra* note 12, at 136.

84. G.I.A.D. Draper, *Humanitarian Law and Human Rights*, 1979 Acta Juridica 193, 206; Meron, *supra* note 8, at 241 (noting that "'[e]xcessive' humanization might exceed the limits acceptable to armed forces . . . and thus erode the credibility of the rules").

85. *See* Garner, *supra* note 22, 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").

86. Doswald-Beck & Vité, *supra* note 59, at 99; Dinstein, *supra* note 40, at 8.

87. *See* Frank Hurnik & Hugh Lehman, *Unnecessary Suffering: Definition and Evidence*, 3 Int'l J. Stud. Animal Probs. 131, 133 (1982).

such as the prohibition of the use of poison or the ban on anti-personnel mines.[88] Similarly, AWL frequently prohibits some acts regardless of their utility, in view of overriding humane considerations. Examples include prohibitions of force-feeding,[89] of male chick maceration,[90] or of certain cruel procedures such as castration without anesthesia or the debeaking of chickens,[91] or "pain cap" provisions that prohibit extremely painful animal experiments.[92]

(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.[93] 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 farmed animals and stunning requirements for slaughtering them, or mandatory cost-benefit analyses for animal experiments.

(4) *Overriding necessity*: lastly, some IHL provisions allow for military needs to override the normally applicable humanitarian rule in particular situations, if the military objective makes it absolutely necessary.[94] 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 of EU Directive 2010/63 which allow for certain generally prohibited animal experiments if they are deemed necessary for exceptional reasons.[95]

D. The Principle of Unnecessary Suffering

The law's endeavor to reconcile the necessity and humanization of violence is operative in both IHL and AWL, and is most clearly

88. *See* Doswald-Beck & Vité, *supra* note 59, at 99.

89. *See, e.g.*, TIERSCHUTZVERORDNUNG [TSCHV] [ANIMAL WELFARE ORDINANCE] art. 20(e), Apr. 23, 2008, SR 455.1 (2008) (Switz.); Tierschutzgesetz [TierSchG] Animal Welfare Act, July 24, 1972, BUNDESGESETZBLAT, Teil I [BGBL. I] at 1206, 1313, § 3(9) (Ger.); HCJ 9232/01, Noah v. Attorney General, [2002–2003] IsrLR 215 (Isr.).

90. *See, e.g.*, ANIMAL WELFARE ORDINANCE, art. 20(g) (Switz.).

91. *See, e.g.*, *id.* art. 20(a).

92. *See, e.g.*, Directive 2010/63/EU of the European Parliament and of the Council of Sept. 22, 2010 on the Protection of Animals Used for Scientific Purposes, art. 15(2), 2010 O.J. (L 276) 33.

93. *See* Doswald-Beck & Vité, *supra* note 59, at 100.

94. *See id.* at 100.

95. 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 64, at 44.

expressed in the shared principle of unnecessary suffering. The general rule prohibiting unnecessary suffering (and permitting, *e contrario*, necessary suffering)[96] 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[97] or, respectively, as animal cruelty.[98]

In IHL, the principle of unnecessary suffering is one of the key principles "constituting the fabric of humanitarian law."[99] This basic rule prohibits the use of means and methods of warfare "of a nature to cause superfluous injury or unnecessary suffering."[100] 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.[101] The necessity test encompasses the established elements of proportionality, 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."[102]

The principle of unnecessary suffering is equally fundamental to AWL, where it is "widely recognized as a valid moral principle"[103] 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.[104] As a legal

96. 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).

97. Rome Statute of the International Criminal Court art. 8(2)(b)(xx), July 17, 1998, 2187 U.N.T.S. 3.

98. Most anti-cruelty provisions refer to some variation of "unnecessary suffering" as qualifying element of criminal behavior. *See, e.g.*, Animal Welfare Act 2006, c 45, art. 4 (U.K.); Criminal Code, R.S.C. 1985, c. C-46, § 445.1(1) (Can.); Animal Protection Act 71 of 1962, § 2(1)(r) (S. Afr.).

99. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, 257 (July 8), ¶ 78.

100. 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 U.N.T.S. 3.

101. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. Rep. 257 ¶ 78.

102. 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 240 (2005); Meyrowitz, *supra* note 72, at 105–07.

103. Hurnik & Lehman, *supra* note 87, at 131–32.

104. On the vagueness of "unnecessary suffering," see Hurnik & Lehman, *supra* note 87, at 132; Lundmark, Berg & Röcklinsberg, *supra* note 96, at 115.

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."[105] Similar to IHL, the necessity test logically implies some sort of proportionality analysis, with the components of legitimate purpose, suitability and necessity (unavoidability) of the means used to achieve the end, and a proportional balance between the harms and benefits.[106]

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 Marco 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."[107] 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,"[108] 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).[109] This somewhat distorts the meaning of unnecessary suffering from the outset,

105. Francione, *supra* note 62, at 146; Mike Radford, *"Unnecessary Suffering": The Cornerstone of Animal Protection Legislation Considered*, 1999 Crim. L. Rev. 702, 705; Hurnik & Lehman, *supra* note 87, at 134.

106. *See* David Bilchitz, *When Is Animal Suffering "Necessary"?*, 27 S. Afr. Pub. L. 3, 17–18 (2012).

107. Roscini, *supra* note 4, at 56.

108. 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., 2d ed. 2013).

109. *Cf.* John Rossi & Samual 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 end." *See* U.S. Cong. Off. Tech. Assessment, Alternatives to Animal Use in Research, Testing, and Education 80 (1986).

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."[110] As rightly noted by Gary Francione and Anna Charlton, what is actually measured is the necessity of unnecessary suffering and, accordingly, the legal notion of unnecessary suffering only captures "*unnecessary* unnecessary suffering."[111] 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.[112] 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."[113]

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 the legal regulation of violence: it may not only serve to humanize, but also legitimize and reinforce the very institutions that invariably inflict suffering on humans and animals.

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

110. Will Kymlicka & Sue Donaldson, *Animal Rights, Multiculturalism, and the Left*, 45 J. Soc. Phil. 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").

111. Gary L. Francione & Anna E. Charlton, *Animal Rights*, *in* The Oxford Handbook of Animal Studies 25, 38–39 (Linda Kalof ed., 2017).

112. 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).

113. Christopher Kutz, *The Difference Uniforms Make: Collective Violence in Criminal Law and War*, 33 Phil. & Pub. Affs. 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 (3d ed. 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").

clear military objectives.[114] 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."[115] 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.[116] Moreover, 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.[117] Critics further highlight 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).[118] This differential treatment of individual and institutionalized violence is resemblant of 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.[119]

According to critics, both IHL and AWL facilitate and legitimize violence by shrouding harmful practices "in a veneer of legality."[120] 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."[121] As a result—and even though IHL may simply "legalize inhumane military methods"[122] and "may so little constrain the use of force that adherence to humanitarian rules

114. 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).

115. 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 EUR. J. INT'L L. 109, 113 (2015) (noting how critics describe "a history in which military . . . needs have consistently trumped humane values").

116. *See* Francione & Charlton, *supra* note 111, at 39.

117. 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., 2d ed. 2013).

118. *See* JOAN E. SCHAFFNER, AN INTRODUCTION TO ANIMALS AND THE LAW 192 (2011) (noting that "[i]ndividual instances of gratuitous intentional cruelty against certain animals are banned, while institutionalized abuse of animals is allowed and often promoted under the law").

119. Kutz, *supra* note 113, at 152.

120. Sankoff, *supra* note 108, at 28; Kedgley, *supra* note 117, at 340 (noting that AWL "effectively legitimises the ongoing, institutionalised ill-treatment of many factory-farmed animals"); Normand & Jochnick, *supra* note 114, at 387 (noting that the laws of war "have served to legitimize, rather than to restrain, wartime violence").

121. DAVID KENNEDY, THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM 235 (2004).

122. Jochnick & Normand, *supra* note 115, at 50.

will do more to legitimate than contain force"[123]—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."[124] Much the same criticism has been leveled against AWL, which tends to conflate *legal* animal use practices with *humane* conduct and "good animal welfare."[125] 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.[126]

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 institution as such.[127] 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.[128]

F. Rethinking Animal Welfare Law as a Warfare Law

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 cast a new light on AWL, and invite us to rethink it as a structural and functional analogue of IHL in terms of the legal regulation of violence. Indeed, as this Article submits, AWL is best understood as a kind of warfare law that regulates violent activities within the war on animals. This animal welfare/warfare law is marked by the following

123. KENNEDY, *supra* note 121, at 297.

124. Jochnick & Normand, *supra* note 115, at 58.

125. 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., 2d ed. 2013).

126. Taimie L. Bryant, *Denying Animals Childhood and Its Implications for Animal-Protective Law Reform*, 6 LAW CULTURE & HUMAN. 56, 61–62 (2010).

127. *See* Meron, *supra* note 8, at 241; DONALDSON & KYMLICKA, *supra* note 24, 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").

128. *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").

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) collective violence against animals and to mitigate (rather than eliminate) the suffering caused; it is shaped by diametrically opposed considerations of humaneness and non-humane instrumentality, and continuously negotiates and redefines the permissibility of violence associated with animal use practices by prohibiting "unnecessary" suffering while concomitantly permitting, legitimizing, and reinforcing the residual "necessary" violence.

Reframing AWL as a warfare law furnishes a refined and more realistic understanding of its ambivalent nature, particular 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 facilitating efficient *warfare* against animals.[129] 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.[130] 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"[131] and the "the maximum regime for inhumanity."[132]

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,[133] 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

129. The term "animal *welfare* law" is thus 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 30, at 126–27 (noting that "[w]e 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 59, at 98; Wilson, *supra* note 83, at 571.

130. 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 115, at 95) and cast it "not as a history of compassion and civilization but, rather, as a history of oppression" (Alexander, *supra* note 115, at 113).

131. Christian Tomuschat, *Human Rights and International Humanitarian Law*, 21 Eur. J. Int'l L. 15, 16 (2010).

132. Draper, *supra* note 53, at 196.

133. 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 U.N.T.S. 3.

the lawful targets of instrumental violence.[134] It is worth pausing over this disparity. It means that AWL indiscriminately exposes passive (mostly docile, harmless, and helpless) animals to the same quality of violence that IHL firmly reserves for active combatants who are engaged in armed 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 AWL as an ugly but necessary wartime regime. As noted by Theodor 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."[135] 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.[136] Given its distressing point of departure, AWL, much like IHL, must adopt a *pragmatic* (rather than idealistic)[137] something-is-better-than-nothing approach that seeks "to salvage what realistically

134. The differential treatment of companion animals and other, exploited animals (notably farmed 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. *See* Siobhan O'Sullivan, Animals, Equality and Democracy 5 (2011); Joan E. Schaffner, *A Rabbit, Is a Rabbit, Is a Rabbit . . . Not Under the Law*, 1 Glob. J. Animal L. (2013), http://ojs.abo.fi/ojs/index.php/gjal/article/view/1294.

135. Meron, *supra* note 8, at 240; *see also* Shue, *supra* note 62, at 516.

136. Binder, *supra* note 32, 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.").

137. On IHL, see Dinstein, *supra* note 40, at 10 (noting that "[a]ll segments of this body of law are animated by a pragmatic (as distinct from a purely idealistic) approach"); Alexander, *supra* note 115, at 113 (characterizing IHL as "a litany of compromise and pragmatism").

can be protected."[138] As G.I.A.D. Draper rightly asserts, if "war is a factual phenomenon, such considerations cannot be denied their place."[139]

Yet, we must 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."[140] 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."[141] Notably, since IHL and AWL are not only foundationally agnostic toward but existentially contingent on a violent institution, they cannot—nor do they aspire to—completely eliminate all violence and inhumaneness that inheres in it.[142] While the legal regulation of violence serves an important, yet ambivalent humanizing function by alleviating suffering in the presupposed institutional setting of war and animal exploitation, it does not address or repress the causes of said violence.[143] As Henry 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.[144]

Therefore, in order to prevent the war on animals rather than to merely regulate and humanize warfare against animals, we need to look beyond existing animal warfare law.

III. Beyond Animal Warfare Law: Constructing an Animal Law of Peace

> Humanity is waging war on nature. . . . Making peace with nature is the defining task of the coming decades.
>
> –António Guterres, U.N. Secretary-General[145]

138. *Mutatis mutandis* Tomuschat, *supra* note 131, at 16; *cf.* Garner, *supra* note 22, at 172 (arguing that "getting something of what you want is better than nothing").

139. Draper, *supra* note 53, at 196; *see also* Walzer, *supra* note 113, 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.").

140. Marko Milanović, *Norm Conflicts, International Humanitarian Law, and Human Rights Law*, *in* International Humanitarian Law and International Human Rights Law, *supra* note 34, at 95, 98.

141. Walzer, *supra* note 113, at 45.

142. The paradigmatic notion of "humane war" or "humane slaughter" therefore remains oxymoronic. *Cf.* Heather Browning & Walter Veit, *Is Humane Slaughter Possible?*, 10 Animals 799 (2020).

143. Justin Marceau calls this "palliative animal law"—a palliative intervention that provides some pain relief, but masks rather than cures the underlying causes of animal suffering. *See* Justin Marceau, *Palliative Animal Law: The War on Animal Cruelty*, 134 Harv. L. Rev. F. 250, 262 (2021).

144. Shue, *supra* note 62, at 516.

145. António Guterres, U.N. Secretary-General, *Foreword* to Making Peace with Nature: A Scientific Blueprint to Tackle the Climate, Biodiversity and Pollution Emergencies 1, 4 (2021).

Repositioning AWL as a warfare law has important implications for reconstructing the corpus of animal-protective law. By its very nature, AWL can only provide for narrow protection *within*, but not *from* or *beyond* the war on animals. Its function is limited to regulating wartime violence, but neither can it prevent the violent war on animals as such, nor does it offer an adequate peacetime regime for governing non-exploitative, non-violent human–animal relations. For animal-protective law to discharge the latter two tasks, animal warfare law needs to be complemented by an animal law of peace.

A. The Normative Vacuum in Animal-Protective Law

Given the violence-permissive nature and impotence of IHL and AWL to transcend and prevent the violent realities they seek to regulate, any violence-repressive function of creating and governing peaceful relations must be located in other branches of law. In the case of IHL, these counterbalancing tasks are outsourced to adjacent legal regimes of the international law of peace, notably the *jus contra bellum* (which generally prohibits war) and human rights (which is the primary human-protective regime in times of peace). Comparable counterparts are inexistent in the case of AWL, which reigns in a normative vacuum.

This marks a crucial structural difference, not between IHL and AWL per se, but as regards their relational position vis-à-vis neighboring legal regimes—or lack thereof. From the outset, IHL is designed as an exceptional, second-best regime that is only applicable in, and specifically tailored to, the unfortunate event of war.[146] By contrast, because the war on animals is the ubiquitous norm rather than an exception, the law regulating it (AWL) is not an exceptional but rather the default and only animal-protective regime as a matter of positive law. That is, while IHL is contained by and embedded in international law's explicit understanding that (the law of) peace is the norm and (the law of) war is the exception, current 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, war *is* peace.[147] 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.

146. *See* Draper, *supra* note 53, at 198; Wilson, *supra* note 83, at 575–76.

147. 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).

The (dis)analogy with the law of war precisely accentuates the problem with AWL's animal-protective monopoly, and the need for a counterbalancing animal law of peace. Notably, it suggests that animal protection law needs to be armed with two additional legal regimes that are functionally equivalent to the *jus contra bellum* and human rights. Within such a tripartite corpus of animal protection law, AWL could then be relegated to a position similar to that occupied by IHL in international law: a second-best, (ideally) exceptional wartime regime that is flanked by war-prohibitive and peacetime norms.[148]

B. The Formation of a Jus Animalis Contra Bellum

As we have seen, AWL suffers from inherent limitations that 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, animal-protective law needs to shift from a "merely factual" to a "normative" approach[149]—one that does not simply posit the war on animals as an ugly fact, but simultaneously provides for a mandate to build and maintain peace with animals. Such an expanded scope 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 animal warfare law to be complemented by a set of norms that work to prevent the war on animals in the first place—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*).[150] A comparable bifurcation in animal-protective law would translate to a distinction between "*jus ad/contra*" exploitation and "*jus in*" exploitation—two separate branches of law, each dealing with different aspects (the "if" and "how") of the

148. As Draper, *supra* note 53, at 197, 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."

149. *Mutatis mutandis* Aeyal Gross, The Writing on the Wall: Rethinking the International Law of Occupation 3–4 (2017).

150. *See* Robert Kolb, *Origin of the Twin Terms* Jus ad Bellum/Jus in Bello, 37 Int'l Rev. Red Cross 553, 558 (1997).

war on animals. While the latter pertains to the modalities of lawful exploitative conduct, the former regime takes a step back and looks at the legality of (particular instantiations of) animal exploitation as such. The *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 exploitative violence.

Complementing the existing *jus in* exploitation (AWL) with a distinct *jus ad* exploitation would redress a crucial shortcoming. 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 objectives 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 exploitation (such as animal testing for cosmetic purposes,[151] fur farming,[152] sexual acts with animals,[153] or animal fighting[154]), a coherent external set of rules that engages 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 state's (nearly unfettered) "right to wage war."[155] This changed, in fact reversed, over the course of the twentieth century, in the wake of "the scourge of war, which twice in our lifetime has brought untold sorrow to mankind."[156] 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."[157]

151. *See, e.g.*, Regulation (EC) No. 1223/2009 of the European Parliament and of the Council of 30 November 2009 on Cosmetic Products, art. 18, 2009 O.J. (L 342) 59.

152. *See, e.g.*, Tierschutzgesetz [TSchG] [Animal Welfare Act], Bundesgesetzblat, Teil I [BGBl. I] No. 118/2004, § 25(5) (Austria); Fur Farming (Prohibition) Act 2000, c. 33 (U.K.).

153. *See, e.g.*, Tierschutzgesetz [TierSchG] Animal Welfare Act, July 24, 1972, BGBl. I at 1206, 1313, § 3(13) (Ger.); Tierschutzgesetz [TSchG] [Animal Welfare Act] Dec. 16, 2005, SR 455, art. 16(2)(j) (Switz.).

154. Animal Welfare Act, art. 26(1)(c) (Switz.).

155. *See* Kolb & Hyde, *supra* note 64, at 9; Detter, *supra* note 35, at 175; Jeff McMahan, Laws of War, *in* The Philosophy of International Law, *supra* note 62, at 493, 495–96.

156. Charter of the United Nations pmbl., Oct. 24, 1945, 1 U.N.T.S. 16.

157. Carsten Stahn, *"Jus ad Bellum," "Jus in Bello" . . . "Jus Post Bellum"?—Rethinking the Conception of the Law of Armed Force*, 17 Eur. J. Int'l L. 921, 923 (2006).

The now largely obsolete concept of *jus* ad *bellum* has since evolved to a *jus* contra *bellum*, and "permission has been transformed into prohibition."[158]

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,"[159] so too may we eventually reach a turning point as regards the horrors of animal exploitation and its dire consequences for public health (e.g., antibiotic resistance and zoonotic pandemics) and the environment (e.g., climate change and biodiversity loss).[160] 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 justifiable) differ, but this can change over time. Indeed, the existential threats posed by animal exploitation may very well provide the material conditions and pressures for progressively shifting the social consensus—and the corresponding legal paradigm—toward a prioritization of prevention rather than mere regulation.[161] In due time, animal-protective law may thus undergo a similar gradual process of transforming the formerly permissive *jus ad* exploitation into a more restrictive and generally prohibitive *jus contra* exploitation.

Under present social and economic conditions, it is hard to envision such a *jus contra* exploitation, and to reimagine the institution of animal exploitation as abolishable (as has historically been the case with other violent institutions, notably war and slavery).[162] First steps

158. Kolb & Hyde, *supra* note 64, at 13.

159. McMahan, *supra* note 155, at 496.

160. *See* Food & Agriculture Org., 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 "[r]ecent 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 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 & 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").

161. *See* Saskia Stucki, One Rights: Human and Animal Rights in the Anthropocene 76*ff.* (2023).

162. *Cf.* Pleasants, *supra* note 57, at 203; Parvathi Menon, *Edmund Burke and the Ambivalence of Protection for Slaves: Between Humanity and Control*, 22 J. Hist. Int'l L. 246 (2020).

in that direction 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 even meat production.[163] Furthermore, the general prohibition/legitimate exceptions-structure outlined by the U.N. Charter's prohibition of the use of force may serve as a useful model for surmising the eventual shape and content of a *jus contra* exploitation proper. Along those lines, the *jus contra* exploitation would be principally based on a general prohibition of the war on animals, that is, of institutionalized animal exploitation and the instrumental violence it entails. It would generally prohibit all practices of violence-based, exploitative animal use, most notably those associated with animal farming, animal experimentation, and other animal-use industries.[164]

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 of the U.N. Charter) and authorization by a Security Council mandate (Article 42 of the U.N. Charter), as well as some other, accepted or controversial legitimizing factors.[165] 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, there will be considerable disagreement over what counts as legitimizing reasons, and new exceptions will likely emerge from practice, as is the case with regard to the evolving notion of exceptions to the prohibition of war.[166] 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

163. *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, *supra* note 92, recital 10.

164. Note that a prohibition of the war on animals would not include non-violent and non-exploitative forms of animal use. Furthermore, individual (socially deviant) acts of violence remain below the threshold of constituting an act of war against animals (which was defined as a phenomenon of collective violence), and would therefore not trigger any war-related rules (neither *jus contra* exploitation nor *jus in* exploitation). Rather, these would fall under the purview of a peacetime criminal law, to the extent that it protects against private animal rights violations.

165. For an overview of the numerous legitimizing factors and exceptions, which somewhat "undermine the general prohibition" of war, see DETTER, *supra* note 35, at 71, 92*ff*.

166. *See generally* OLIVIER CORTEN, THE LAW AGAINST WAR (2010).

against pests, carriers of zoonotic diseases, or invasive alien species.[167] 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) or some form of "humanitarian intervention" for animals.[168]

3. The Transition From (a Ubiquitous) War to (Areas of) Peace

It must be conceded that even if there were 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.[169] Transferring the notion of a normative independence of *jus in bello* and *jus contra bellum*, it follows that AWL (*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,'"[170] AWL is 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

167. *Cf.* Elizabeth Anderson, *Animal Rights and the Values of Nonhuman Life*, *in* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 277, 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. RTS. ENV'T 224 (2020).

168. *Cf.* Oscar Horta, *Animal Suffering in Nature: The Case for Intervention*, 39 ENV'T ETHICS 261 (2017).

169. *See* Doswald-Beck & Vité, *supra* note 59, 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 35, at 176.

170. Rosas & Stenbäck, *supra* note 62, at 224.

animals to carving out and safeguarding zones of peace, and thereby paves the way for the formation of a more aspirational law of peace.[171]

C. *The Formation of Complementary Animal Rights*

To the extent that a *jus contra bellum* succeeds in preventing (instances of) the war on animals and creating (instances of) peace with animals, it 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 subsection will briefly outline the shape of such a peacetime AR regime, 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, non-violent human–animal relations. Peaceful human–animal relations, such as cooperation and friendship, would notably be based on regard for the life, intrinsic value, and well-being *of* animals rather than on mere instrumental interests *in* animals, and would generally require humans to abstain from harmful animal use practices.[172] Considering the ubiquity and persistence of the war on animals, this vision of peace does not seem to resonate well with present social realities, and devising peacetime AR might therefore strike us as an essentially utopian concoction.[173] Nonetheless, it is instructive to prepare a conception of an animal law of peace, in order to signpost the lines along which animal-protective law should be reconstructed.

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171. Whereas the *jus ad bellum* is "traditionally perceived as the body of law which provides grounds justifying the transition from peace to armed force" (Stahn, *supra* note 157, at 926), in the case of animals—where war is the ubiquitous condition—it is the other way round: the (partial) prohibitions imposed by a *jus ad/contra* exploitation provide grounds for a (partial) transition from war to peace.

172. Even in peacetime, there is room for animal use, as long as it is pursued by non-violent means. For animal use to reach the threshold of war, it needs the qualifier of being exploitative, i.e., overly harmful or instrumental. For a discussion of non-exploitative types of human–animal relationships, see Zuolo, *supra* note 37, at 327–28; Korsgaard, *supra* note 37, at 15 (noting that it is not exploitation if humans interact with animals in ways that animals would presumably consent to and that are mutually beneficial and fair).

173. 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. RTS. Q. 119 (2018); Philip Harvey, *Aspirational Law*, 52 BUFF. L. REV. 701 (2004).

Peacetime AR 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. The established concept of HR offers a helpful framework for designing comparable 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.[174] Suffice it to say that some of the fundamental rights that are traditionally labeled "human" rights could be readily rethought as animal rights.[175] As Anthony D'Amato and Sudhir 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."[176]

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,[177] a proper AR law has yet to form and consolidate.[178] It is interesting to note, however, that humans were historically not considered holders of international individual rights, neither under general international law nor under

174. *See generally* Saskia Stucki, *Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights*, 40 Oxford J. Legal Stud. 533 (2020); Alasdair Cochrane, *From Human Rights to Sentient Rights*, 16 Critical Rev. Int'l Soc. & Pol. Phil. 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); Conor Gearty, *Is Human Rights Speciesist?*, *in* The Link Between Animal Abuse and Human Violence 175 (Andrew Linzey ed., 2009).

175. *See generally* Stucki, *supra* note 161.

176. 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 (2d ed. 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).

177. *See* Tercer Juzgado de Garantías de Mendoza, 3/11/2016, "Cecilia," Expte Nro P-72.254/15 (Arg.) (granting the constitutional right of habeas corpus to a captive chimpanzee); Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala de Casación Civil, 26 julio 2017, M.P.: Luis Armando Tolosa Villabona, AHC4806-2017 (Colom.) (granting the constitutional right of habeas corpus to a captive bear); Animal Welfare Bd. of India v. A. Nagaraja (2014) 7 SCC 547 (India) (recognizing a range of fundamental animal rights); Islamabad Wildlife Mgmt. Bd. v. Metropolitan Corp. Islamabad, (2021) PLD (Islamabad) 6 (Pak.) (affirming that animals have natural and legal rights).

178. *But see* Raffael N. Fasel & Sean Butler, Animal Rights Law (2023).

IHL.[179] 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 twentieth century, the language of rights arrived and "paved the way for recognition of individual rights."[180] 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.[181] Similarly, the legal protections bestowed upon animals are presently viewed as merely imposing obligations on humans, but not as conferring rights on animals.[182] Nonetheless, some simple rights are arguably beginning to arise from AWL,[183] and could pave the way for the more comprehensive recognition of fundamental animal rights.[184]

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 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."[185] Phrased differently, AR, much like HR, are "fundamentally hostile to war."[186] 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.[187] Because peace is therefore the underlying condition for full respect of AR and

179. *See* ANNE PETERS, BEYOND HUMAN RIGHTS: THE LEGAL STATUS OF THE INDIVIDUAL IN INTERNATIONAL LAW 194–201 (2016).

180. Meron, *supra* note 8, at 251.

181. Nevertheless, IHL continues to protect individuals primarily not through rights but through "standards of treatment." *See* PROVOST, *supra* note 12, at 16, 33; Lorite Escorihuela, *supra* note 58, at 359 (noting that individual rights remain "a very secondary regulatory tool" in IHL).

182. *See* PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 91 (7th ed. 1997) (noting that "international law regarded individuals in much the same way as municipal law regards animals").

183. *See, e.g.*, *Animal Welfare Bd. of India*, (2014) 7 SCC ¶ 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").

184. On the distinction between simple and fundamental animal rights, see Stucki, *supra* note 174, at 551–52; 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).

185. DONALDSON & KYMLICKA, *supra* note 24, at 40; REGAN, *supra* note 23, at 348–49 (noting that AR require the "total dissolution of the animal industry as we know it").

186. *Mutatis mutandis* Lorite Escorihuela, *supra* note 58, at 361.

187. *Mutatis mutandis* Tomuschat, *supra* note 131, at 16; Doswald-Beck & Vité, *supra* note 59, at 105.

war their quintessential negation, AR must share in the *jus contra bellum*'s "general project of preventing war."[188]

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 peacetime regime)? As stated, 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 demonstrates that complementarity between antithetical wartime and peacetime regimes is possible. 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 division of the law of war and peace into "their respective and proper spheres."[189] 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.[190] 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.[191] 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.[192] HR law and IHL thus address "vastly different realities" and envisage significantly different relationships.[193] Whereas HR concern the

188. *Mutatis mutandis* Lorite Escorihuela, *supra* note 58, at 361; G.A. Res. 2444 (XXIII), Human Rights in Armed Conflicts (May 12, 1968) (noting in its preamble that "peace is the underlying condition for the full observance of human rights and war is their negation").

189. Draper, *supra* note 84, at 206.

190. *See* Stahn, *supra* note 157, at 921–23; Tomuschat, *supra* note 131, at 16.

191. *See* Tomuschat, *supra* note 131, at 17.

192. *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, *supra* note 77, at 343, 347.

193. *See* Provost, *supra* note 12, at 7, 116; Draper, *supra* note 84, at 204.

"relationship between the government and the individual in order to define the basis for a just society," IHL deals with violent, hostile relationships.[194] 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.[195] Today, the confluence of the two regimes "enjoys the status of the new orthodoxy."[196] Notably, it is now generally accepted that HR continue to apply in times of war, albeit in a restricted and modified manner.[197] That is, to the extent of the former's non-derogability, HR and IHL are co-applicable in situations of war, although the latter remains *lex specialis*.[198] Over time, the relationship of IHL and HR has thus developed from mutual exclusivity to complementarity.[199]

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 presents a useful model for shaping the evolving relationship of 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 animal exploitation, 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, non-violent, justice-based human–animal relations.[200] Yet, notwithstanding their historical and

194. Doswald-Beck & Vité, *supra* note 59, at 102; Draper, *supra* note 84, at 205.

195. 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).

196. Ben-Naftali, *supra* note 34, at 5.

197. *See* Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. Rep. 226, 240 ¶ 25 (July 8); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, 178 ¶ 106 (July 9); Cordula Droege, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 Isr. L. Rev. 310, 320 (2007).

198. *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. Rep. 136, 178 ¶ 106 (July 9).

199. Hum. Rts. Comm., General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 11, UN Doc. CCPR/C/21/Rev.1/Add. 1326 (May 2004) (stating that "both spheres of law are complementary, not mutually exclusive").

200. *Mutatis mutandis* Provost, *supra* note 12, at 8; *cf.* Wadiwel, *supra* note 147, at 283 (noting that at present, "legalised violence and domination form the obvious backdrop for relationships").

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.[201] A certain measure of convergence between the two regimes may thus be expected once AR are institutionalized. Moreover, if the universality premise of AR is accepted—that fundamental rights accrue to animals simply in virtue of being animals[202]—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.[203] 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.[204]

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.[205] 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

201. 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. *See, e.g.*, BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 120, para. 2 (Switz.); Tierschutzgesetz [Animal Welfare Act], Sept. 23, 2010, LGBl-Nr 2010.333, art. 1 (Liech.); Wet van 19 mei 2011 (Wet dieren) [Animals Act], Stb. 2011, 345, art. 1.3(1) (Neth.); Directive 2010/63/EU, *supra* note 92, recital 12; *NSPCA v. Minister of Justice* 2017 (1) SACR 284 (CC) para. 57 (S. Afr.) (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").

202. On the universality (in the sense of innateness) of animal rights, see DONALDSON & KYMLICKA, *supra* note 24, at 40–49.

203. *See, mutatis mutandis* Milanović, *supra* note 140, at 101.

204. *See, mutatis mutandis*, Meron, *supra* note 195, at 589.

205. *Mutatis mutandis* Droege, *supra* note 197, at 337 (noting that the concept of complementarity is meant "to affirm the possibility of simultaneous application of both bodies of law").

AR would be both *fully* applicable in peacetime conditions as well as *partially* co-applicable in wartime conditions.[206]

However, an important qualification needs to be made with regard to the co-applicability of AR in wartime. Because AWL (as designated wartime regime) would sensibly remain the *lex specialis*, peacetime AR must be infused in a context-sensitive rather than an unqualified manner.[207] 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 more permissive toward widespread practices of slaughtering, culling, eradicating, or putting down animals.[208] 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 Marko Milanović stresses in the context of HR, care must be taken that these rights are not diluted too much, as this would "defy the whole purpose of the exercise."[209]

3. The "Humanization" of Animal Welfare Law Through Animal Rights

The potential risk of a watering-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.

206. 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.

207. *See, mutatis mutandis* Michael J. Matheson, *The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons*, 91 Am. J. Int'l L. 417, 423 (1997); Milanović, *supra* note 140, at 97 (noting that "human rights norms cannot be applied in a business as usual kind of way" to situations of war).

208. On the comparable problem of killing under diverging HR and IHL norms, cf. Droege, *supra* note 197, at 344–47; Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. Rep. 226, 240 ¶ 25 (July 8).

209. *Mutatis mutandis* Milanović, *supra* note 140, at 97.

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.[210] 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 toward more humanitarianism.[211] Just as "the law of war has been changing and acquiring a more humane face,"[212] AWL is not a static body of law and thus potentially susceptible to the transformative and humanizing influence of AR. A similar process of "humanization"[213] (in the sense of humane-ization) could gradually turn AWL from a predominantly human interest-centered, exploitation-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 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 Robert 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.[214] 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

210. *See* Schindler, *supra* note 55, 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 34, at 4 (noting that taking HR to armed conflict "is a humanistic project. Its promise is the humanization of IHL").

211. Vera Gowland-Debbas & Gloria Gaggioli, *The Relationship Between International Human Rights and Humanitarian Law: An Overview*, *in* Research Handbook on Human Rights and Humanitarian Law, *supra* note 77, at 77, 78; 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'").

212. Meron, *supra* note 8, at 239.

213. 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 & Soc. Psych. Rev. 252 (2006).

214. *See* Robert Garner, A Theory of Justice for Animals: Animal Rights in a Nonideal World 89 (2013); Radford, *supra* note 105, at 703 (noting that the notion of unnecessary suffering is "open to re-interpretation").

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.[215]

Lastly, however, we must acknowledge and reiterate the "inherent limitations to the process of humanization."[216] 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."[217] 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 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* this 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: (i) AWL, as a pragmatic wartime regime governing *only* exploitative human–animal relations; (ii) a *jus animalis contra bellum*, working to prevent the war on animals and simultaneously creating the peacetime conditions under which AR can flourish; and (iii) AR, as an aspirational peacetime regime governing, primarily, harmonious human–animal relations and co-applicable, to a lesser degree, in exploitative situations. Jointly, the interplay of these three bodies of law is able to create a comprehensive system of animal protection in war and peace. Indeed, considering that AR (originally conceived for non-violent, harmonious relations) is as conceptually ill-suited to manage the ugly reality of war as AWL (originally

215. 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 192, at 347.

216. Meron, *supra* note 8, at 275.

217. *Mutatis mutandis* Ben-Naftali, *supra* note 34, at 10.

conceived for violence-based, exploitative situations) is incapable of transcending it, this pluralistic approach compellingly suggests itself as the best way of operationalizing a more concerted legal protection of animals in, from, and beyond war.

The complementarity-based, 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 dualism, it opens new horizons for both animal law scholarship and reform. This Article shows a workable avenue for the dialectical progression of animal protection law by incorporating and reconciling both existing, and competing, animal-protective approaches. While maintaining a clear conceptual distinction between AWL (as a wartime regime) and AR (as a peacetime regime), this Article redefined their traditionally dichotomized relationship as one of complementarity rather than incompatibility. The virtue of complementarity 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.

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 an outright alternative, to AWL makes their legal institutionalization more palatable. 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 international law of war and peace 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 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 comparative 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 "humane intervention"[218] (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) or death penalty law (requiring that capital punishment be executed in a humane manner not causing unnecessary pain and suffering)[219] promise to yield fruitful insights for animal law.

The underlying theme linking these diverse areas of law is the legal regulation, and humanization, of institutionalized violence. While this Article began 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

218. *See* Alasdair Cochrane & Steve Cooke, *"Humane Intervention": The International Protection of Animal Rights*, 12 J. GLOB. ETHICS 106 (2016).

219. *Cf.* Lavi, *supra* note 66.

comparable in terms of their legal framing, but, on a deeper level, connected through interlocking mechanisms of violence.[220] Cultivating a cross-comparative 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.

220. *Cf.* Lorite Escorihuela, *supra* note 6, at 28 (noting that the "slaughterhouse makes genocide and colonial rule practically possible"); Stucki, *supra* note 161, at 69*ff*.