

Voiceless and Silenced: Animals in Armed Conflict

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By: Andrada Marinescu

Dogs returning from military service in Afghanistan suffer from post-traumatic stress disorder, just like human soldiers. Camels were seen abandoned and fleeing from burning oil wells in the 1991 Gulf War. Dolphins were recruited by the United States to detect underwater mines in Iraqi ports. The war crimes regime in international criminal and humanitarian law suffers from anthropocentric bias, resulting in a legal framework which systemically inflicts violence against non-human animals.

Animal sentience has been observed for at least 250 years. Bentham broke important ground by tying the moral status of animals to their capacity for suffering: “the question is not *Can they reason?* or *Can*

they talk? but, *Can they suffer?*" (Bentham, 1789). Long-standing scientific evidence of animal sentience not only bloomed, but also holds central significance for animal welfare movements. Even more, the recognition of animals' capacity to experience pain and suffering is near-universal and has grounded animal welfare movements globally. A long string of states and regions have expressly recognized animal sentience in their legislation and continue to do so. These include the European Union, Canada, the UK, Finland, France, Germany, Greece, India, Lithuania, New Zealand, Norway, Poland, Slovenia, Switzerland, Turkey, Ukraine, the Netherlands, Argentina, and Pakistan, among others.

Despite this, Western society perpetually reconstructs anthropocentric biases, often with the goal and effect of dehumanizing target groups. Anthropocentrism is the belief system whereby human interests are superior to all else and at the expense of all else. Its roots in Western belief systems are preeminent through imperialist ideology, which relies on dehumanizing rhetoric to colonize, marginalize, and encourage violence against groups of humans, animals, or the environment alike. For example, the dehumanizing effect of likening Indigenous peoples to wildlife was weaponized by Western settlers in pursuit of their religious, cultural, and ethnic cleansing of Indigenous peoples. Similar rhetoric is also prevalent in armed conflicts when opposing troops and sometimes whole populations are associated with animals in a derogatory sense, promoting greater violence and discouraging ethical considerations.

Despite strides to dismantle anthropocentric hierarchies, such belief systems are embedded in Western legal doctrines, to which international humanitarian and criminal law are not an exception. A particular culmination of this bias is the legal framework of war crimes, as established by the *Rome Statute of the International Criminal Court* ("*Rome Statute*"). This is evidenced through a disproportionately human-centered prohibition on excessive attacks, a total silence on the use of animals as weaponry, and the barring of animals from victimhood.

In the face of widespread recognition of animal sentience, including capacity for pain and suffering, such biases amount to systemic harm against animals as the cost of strictly protecting and prioritizing human interests. Systemic harm occurs where discriminatory harmful treatment and outcomes are intrinsic and inbuilt within the structure of a society, permeating institutions, belief systems, and everyday interactions. In the context of war crimes, systemic harm and violence presents itself as the tacit empowerment of the promoters of armed conflict to exploit and discard animals in pursuit of military goals, without consideration for the life and dignity of the animals or our shared planet.

Systemic Violence to Animals Through the War Crimes Regime

There are at least three ways through which the Rome Statute's war crimes regime enables systemic violence against animals. First, through a human-centered prohibition on excessive attacks. Second, by the omission of a prohibition against the use of animals as weapons in war. Third, by excluding animals from the International Criminal Court's ("ICC") definition of "victim" solely because they are not humans.

Animals and the Prohibition on Excessive Attacks

The prohibition on excessive attacks, found in Article 8(2)(b)(iv) of the *Rome Statute*, is an essential provision of the war crimes regime. At its core, it seeks to prevent excessive collateral damage caused by military attacks. However, it creates a disproportionate concern for damage to civilians and civilian objects, in line with anthropocentric bias.

For one, the threshold of "widespread, long-term and severe damage" to attain protection of the natural environment is extremely high. The fact that the *Rome Statute* does not offer a definition for such descriptors also creates greater opportunities for arguments against the provision applying, in the rare chance that such a threshold can be met. By contrast, the threshold of harm for prohibited damage to civilians and civilian objects is disproportionately lower, only requiring that "incidental loss of life or injury" is satisfied.

Further, the protection of the natural environment in this provision is dramatically weaker when compared to its protection outside of the *Rome Statute*. In both IHL treaties and customary law, the same threshold of "widespread, long-term and severe" damage to the environment is categorically prohibited. By contrast, the *Rome Statute* includes a major caveat of proportionality – the damage must also be disproportional to the concrete and direct overall military advantage anticipated. The inclusion and flexible nature of the proportionality caveat causes significantly diluted protection to the environment within the international criminal context.

By contrast, animals routinely make up the collateral damage of military attacks, both as direct victims of attacks and indirectly through damage to their fragile ecosystems. Peters and de Hemptienne identify this as the case for buffalos, elephants and hippopotamuses in vast areas such as Colombia, the Central African Republic, Iraq, and Mozambique. Similarly, livestock and companion animals frequently experience incidental harm where the armed conflict prevents their human owners from caring for them. A recent example of this has been the widespread abandonment of domestic cats and dogs in the aftermath of Russian attacks in Ukraine.

Despite an advanced state of knowledge about animal suffering and sentience, such knowledge is not reflected in this foundational provision of the war crimes regime. In creating such a high threshold for damage, both objectively and in relation to anticipated advantage of a military attack, this provision reconstructs the anthropocentric hierarchy through which humans and their military endeavors are placed well above the natural environment and animals.

Animals as Weapons of War

A second way through which animals experience systemic violence in armed conflict is by their use as weapons of war. Between fear-inciting guard dogs, the riding of elephants for visual advantage, warhorses, thirty-inch giant pouched rats, and marine mammals such as dolphins and sea lions, the history of animal weaponry in war has been tactical and ruthless to the animal experience. Yet, international criminal law does not contain any provision prohibiting, or even restricting, their

exploitation as weaponry.

When animals are used as weapons, they are subject to harm in a dual way. Not only are animals directly exposed to violence and distress through their military functions, but they are also lawfully targeted as military objectives. Pursuant to IHL and the ICRC, when someone is serving a military function such as scouting, spying, acting as decoys, or as couriers at military checkpoints, they are "directly partaking in hostilities" and are therefore considered lawful military objects permitted to be directly attacked (*Additional Protocol I to the Geneva Conventions*, article 51(3)). A preeminent example of this occurrence in modern warfare is the use of canine units, most famously Cairo, the Belgian Malinois, for assisting US Navy SEALs in executing Osama Bin Laden during the military operation "Neptune Spear". Another is the US's Navy Marine Mammal Program, which trained dolphins and sea lions for sea mine detection.

Looking ahead, Colin Salter points out that modern science is seeing a trend towards the possible use of animals as biotechnical weapons, also known as "cyborgs". These are animals and insects implanted with technological parts which enable humans to remotely direct their movement. This could be used to surveil enemy installations, transmit data about enemy ordnance and movements, and detect or deploy mines. There has also been a shift towards using animals as tools in laboratory experiments to advance military technology. This includes animals being subjected to "live tissue trauma training", where they are inflicted with similar wounds as those anticipated by soldiers in order to research treatment methods for injured human soldiers.

In each of these ways, animals exploited as weaponry are subject to unexpected and invariably violent deaths. Within this context, the complete lack of protection for animals is tantamount to outright denial and ignorance of animal sentience and capacity for suffering. This is especially evident when considering that many practices used against animals would categorically be grave breaches of the *Geneva Conventions* and constitute war crimes if committed against humans (i.e., torture or inhuman treatment, including biological experiments; willfully causing great suffering, or serious injury to body or health). In result, the anthropocentric bias in the war crimes regime could not be clearer.

Barring Animals From Victimhood at the ICC

A third source of systemic violence to animals in armed conflict is through the ICC's definition of "victim", as set out in Rule 85(a) of the ICC's Rules of Procedure and Evidence ("RPE"). There, "victim" is defined as "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court." As Marina Lostal elaborates, the result of such a definition is the "unequivocal" barring of animals from qualifying as victims before the ICC.

Such exclusion is significant in light of the ICC's general principle, as set out in Rule 86. The principle directs the chambers and organs of the ICC to consider the needs of all victims in performing their functions. This would include the number of victims and the extent of harm suffered when determining damages, reparations, and extent of liability. If animals were recognized as victims, the ICC could

account for their experience of pain and suffering within the narrative of the case, rather than ignore their sentience. Even though such representation might not resemble the evidence-gathering standards of human testimonies, fact-finding practices could objectively account for harm and suffering caused by attacks or weapons resulting in excessive and prolonged injury or starvation.

Ironically, animals frequently appear in trial and reparations proceedings before the ICC, but only in their value as the property of humans. Most notably, in the *Katanga* case, regarding the war crime of pillaging, animals were direct victims of the crime. The attack targeted the Hema, being "herders by tradition," by pillaging their cattle which would have been bred to establish livestock supply (para 712). The Trial Chamber considered the value of cattle lost, including the totemic value of cows to the Hema, and awarded cows to those who had lost a close relative in the attack (para 928). In sum, animals were considered as objects of attack, as quantum for calculating damages, and as proposed means of redress.

Animals were also featured in the *Lubanga* case where, uniquely, animals were awarded as reparations despite the case not bearing any other connection to animals (para 161). Similarly, in the *Al Mahdi* case, which centered on the war crime of attacking historic places of worship in the world heritage town of Timbuktu, Mali, animals were set out to be ceremonially sacrificed pursuant to the draft reparations (para 267).

Evidently, the ICC is capable of ascribing some degree of legal subjectivity to animals. Despite this, animals are arbitrarily precluded from recognition and standing going to their harm and suffering as victims. The ICC stops short of affording recognition beyond their value to and ownership by humans, and never in their own right. Again, the anthropocentric bias is constructed to uphold the perceived superiority of humans.

Possible Approaches to Improving Protection for Animals

Achieving an amendment to the war crimes regime, especially one with such reverberating effects on the ICC, would not be a realistic goal for our global community. Rather, hope can be found through the "ecocide" movement or an inclusive interpretation of the natural environment.

The "ecocide" movement contemplates a new international crime designed to repudiate and deter the most egregious environmental wrongdoing, as put by Darryl Robinson. Its framework would target wrongdoing with knowledge of substantial likelihood or severe and widespread or long-term damage to the environment (Independent Expert Panel for the Legal Definition of Ecocide, 2021). Thus, the crime would not only take an environment-centered approach, directly antithetical to anthropocentric bias, but would also soften the threshold of damage to the environment. Such an achievement would allow great strides towards recognizing animal sentience in international criminal law.

Another approach might be establishing an inclusive interpretation of the "natural environment" in the meaning of Article 8(2)(b)(iv) of the *Rome Statute*. To pursue this, advocacy groups could call on a Working Group, such as the UN Environment Programme, to draft a persuasive interpretation with

emphasis on animal sentience. The goal would be to set out a definition which grants animals greater weight and value in the balancing exercise between damage to the environment and military advantage. This would also be an opportunity to start deconstructing anthropocentric bias and its colonial legacy by inviting Indigenous communities into the conversation. As described by Brigthen, many Indigenous communities instill a greater appreciation and concern for the natural environment and animals than in Western cultures, and often understand animals as equal social beings to humans.

Conclusion

The war crimes regime in international criminal law is fundamentally anthropocentric. This is a product of Western dehumanizing rhetoric and ideology, weaponized to promulgate acts of colonization and conquest, and ignorant of animal sentience. Coupled with a war crimes legal framework which constructs obstacles to animal and environmental protection and is silent on animal weaponry or victimhood, systemic violence is an inevitable reality for animals. As allegorized by Hersch Lauterpacht, if international humanitarian law is at the vanishing point of international law, then it must be that animal rights are at the vanishing point of the war crimes regime and international humanitarian law.

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