ANIMALS IN THE INTERNATIONAL LAW OF ARMED CONFLICT

Animals are the unknown victims of armed conflicts. Wildlife populations usually decline during warfare, with disastrous repercussions on the food chain, on fragile ecosystems and precarious habitats. Armed forces and groups take advantage of the chaos raised by war to engage in the poaching and trafficking of expensive animal products. Livestock, companion and zoo animals, highly dependent on human care, are slaughtered, looted, bombed or starved on a massive scale. Some animals also serve in the military around the world in various capacities and are regularly exposed to the dangers of war. The book is the first legal analysis of these issues. It examines how the concepts and rationales of international humanitarian law can be applied for a better protection of animals. The contributions inter alia discuss the protection of animals as objects, as part of the environment, as combatants or as prisoners of war, a specific status for veterinarian personnel, the recognition of biodiversity hotspots as specially protected zones and the potential of enforcement mechanisms. The concluding chapter draws together novel interpretations and reform proposals.

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Forewords

ROBERT KOLB

History is evolutionary; human conscience is evolutionary; perceptions are evolutionary. The fate of animals in their relationships with humans (the 'other' animal) illustrates the point very well. For centuries, in the mould of Roman law, animals were considered simple objects. In the nineteenth century, in many European states, some protective legislation was envisioned or realised in order to spare these living creatures from cruel treatment. But 'cruel' treatment was defined in a very narrow manner. Appalling conditions in industrial contexts and in the holding of animals in farms or by the Church continued undisturbed. Some authors applauded this however modest protective legislation. For them, the main point was that animals are able to suffer and that for that fact, they must be protected. The visionary Jeremy Bentham was amongst these persons.[1] Others cautioned against these legislations and combated them with full and fierce energy. For some Catholic churchmen, always prone to know the ultimate truth, all protection of animals against suffering is an aberration based on a perversion of the natural Divine order of creation. To them, animals are abysmally inferior to humanity. If they were to be protected, compassion would be extended to them, and thus they would heretically be raised to the level of mankind. Luigi Taparelli wrote on these lines.[2] Still today, protection of animals is a theme in Europe but not in many other parts of the world. The treatment of animals, for example in China, continues to be monstrous.

Let us jump to more recent times. When I was in school, in the 1970s–1980s, the common doxa was that animals have no intelligence, no reasoning and no individualised feeling. They were driven merely by instincts. Some dumb conscience was accessible to them, but not more. Again, today most of us would not subscribe to such views. My mother had more than one dog in her life. With these remarkable

[1] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford: Clarendon 1789), chapter VIII, § 1.
[2] Luigi Taparelli, *Saggio teoritico di diritto naturale* (6th ed., Palermo 1857), 59–60.

creatures, I had experiences which directly contradicted the merely instinct theory. In one situation I walked to a place where I had not been for more than one year. The dog immediately ran to a sort of hole in a fence and robustly smelled around. I was first puzzled by the attitude, but then remembered that the last time I had been there, the dog had seen a cat disappearing through that hole. Unless there were new smells, there is much to make us believe that the dog had a memory of the past event. And that event was more than one year old. Other situations. The same dog, apparently adoring cats, one day saw one trying to escape. Instead of running behind it, the dog changed direction and ran through another way, which I quickly determined to be a short cut. I concluded that the dog had reasoning. I shall not speak of all the other analytical qualities of these animals, spanning from feeling imminent earthquakes to anticipating epileptic crises.

Let us jump to some remote future. What will be the collective thinking on that question? May I guess that our successors might judge us very severely for a great blind spot in our perceptions? Might they not think that the way in which we continue to treat so many animals in the world (who of us would like to be treated thus?) was akin to a silent 'zoocide'? Might they not condemn our pharisaic and hypocritical stance in moralising about innumerable subjects and forgetting so many living creatures in their plight? However that may be, Max Planck, the great physician, was right to suggest that science advances from one burial (of a theory) to the next. The same can be said of human perceptions. New ideas can gain ground only when the tenants of the older schools retire and younger colleagues bring fresh winds. That may not always be a 'progress' but sometimes it is – as it will probably continue to be in the extension of respect and protection for animals. It has sometimes been said that life is a process in which one learns a great lesson of modesty. From childhood, formatted by almost endless narcissism, the human being progressively lives complexity and reduces its importance to an infinitesimal grain in a huge machine. This process is utterly necessary in the context of animals. The arrogance of human superiority perorations has to give way to a more nuanced and modest view. Nature is not beneath us, it is above us.

The present book, with its many particular studies, attempts to be a modest contribution in the direction of framing a new mental setting. It addresses a blind spot in the context of animal protection, namely the place of animals in the context of armed conflicts. At first sight this is an odd subject matter. In armed conflicts, violence – so the argument goes – wreaks havoc everywhere; animals are not here the priority, to say the least. We believe that this view, as for the ones mentioned above, is short-sighted. The question is intriguing, the legal regulation defective, the usefulness of some reflection not manifestly absent. Moreover, the reader will not be wearied for the hundredth time with child soldiers or the definition of combatant. They will rather break new ground, feel perhaps like an explorer of new continents. I wish a pleasant journey!

MAKANE MOÏSE MBENGUE

On 15 August 1893, an arbitral tribunal established by the United States and Her Majesty the Queen of the UK rendered an award in the dispute commonly known as the *Bering Fur Seals* case. The dispute arose between the two countries – including Canada on the UK side – due to an attempt by the United States to control the hunting of seals off the Alaskan coast following its claimed authority over all the Bering Sea waters in 1881. Despite the UK's refusal to recognise the US claim, the United States still ordered in 1886 the seizure of all vessels found sealing in the Bering Sea. Most of the vessels which were seized were Canadian ships sailing from British Columbia and manned by British subjects. In the *Compromis d'arbitrage*, the United States and the UK asked the tribunal to deal, inter alia, with the following question: 'Has the United States any right, and if so, what right of protection or property in the fur-seals frequenting the islands of the United States in Behring Sea when such seals are found outside the ordinary three-mile limit?'

The divergences between the United States and the UK regarding the appropriate answer(s) to this question were revealing of the legal uncertainty that characterised the status of animals under the international law applicable at that time. The United States, which was inviting the tribunal to engage in judicial legislation, considered that it had a right of property over the fur seals under international law. The UK adopted a more conservative approach and invited the tribunal to be deferential to customary international law and to guarantee the freedom of nations to kill wild animals. Two learned observers provided a more detailed account of those divergences in articles published right after the tribunal rendered its award: Russel Duane[3] and J. Stanley Brown.[4]

Duane, an American citizen, explained that:

> Since no wild animal at all similar to the fur-seal ever figured before in an international dispute, it became necessary for our Government, in the absence of precedents of this character, to turn to the common law for some principle which would sustain our claim to ownership in the sea herds. Accordingly, it was argued in our behalf that seals in international law were analogous to such animals as bees, or carrier pigeons, at the common law, which, as Blackstone said, continued to be the property of their custodian even when flying at a great distance from home (*animus revertendi*).[5]

Brown, also an American citizen, went further and remarked that:

> The able representatives of the United States took the position that the Tribunal was bound by no precedents and possessed, by virtue of its origin, a creative as well as

[3] Russell Duane, 'The Decision of the Behring Sea Arbitrators', *The American Law Register and Review* (October 1893), 901–21.

[4] J. Stanley Brown, 'Fur Seals and the Bering Sea Arbitration', *Journal of the American Geographical Society*, vol. 26, No. 1 (1894), pp. 326–72.

[5] Duane, 'The Decision' (n. 3), 910.

> a judicial function. They urged upon the Tribunal the taking of high ground and the settlement of the question upon broad and comprehensive principles. They pointed out that man by means of invention was rapidly extending his dominion over the water as he had over the land, and by employing methods which were not even dreamed of when many existing municipal and international laws were enacted, threatened the very existence of many creatures useful to man.[6]

As already indicated, the UK considered that the tribunal possessed but one function – that its duty was to declare the law and not to make it, but that, whatever its function might be as an international body, it was not vested with the power to make international law. Brown, with vivid passion (and hidden disagreement), depicted the UK position as follows:

> They demanded that the question of property right be settled from the standpoint that the seals were wild animals – *ferae naturae* – which man could only reduce to possession by killing. They insisted that the law relating to wild animals, regardless of its origin, had been accepted by nations as the years ran on; it was very old law, and very good law, but whether good or bad it was the law, and from its teachings as enunciated by them the Tribunal must not allow itself to be enticed away by the seductive citations and insidious argument of learned counsel on the other side. There must be no making of laws to suit new conditions; the old standbys must be adhered to rigidly whether applicable or not. They urged that the seals were wild animals . . . and if the world, or a part of it, desired to turn out in boats and to destroy the industry by shooting the seals in the water, they had a perfect right to do so, for a wild animal was free to all. No matter if seal mothers roaming the sea for food did fall before the guns and spears of the pelagic hunters and their helpless pups starve on the rookeries, the hand of the slaughterer must not be stayed, for the United States had no rights any one was bound legally to respect when the seals were three miles off-shore, while, as for humanitarian considerations, they had no place in the controversy[7].

Despite the progressive nature of the US arguments – and its pioneer concerns for the right of future generations to have the fur-seals being preserved – the majority of the tribunal decided and determined that the United States had not any right of protection or property in the fur-seals frequenting the US islands in the Behring Sea, when such seals were found outside the ordinary three-mile limit of the territorial sea (this was of course long before the development and codification of the law of the sea as reflected in the UNCLOS which extends the territorial sea to twelve nautical miles). Brown criticised in a subtle manner the solution retained by the tribunal as being 'true to the conservatism of the Old World'[8] and as adhering to 'the potency of venerable legal relics'.[9]

[6] Brown, 'Fur Seals' (n. 4), 361.
[7] Ibid., 363–4.
[8] Ibid., 364.
[9] Ibid.

This being said, while the tribunal rejected the US contention, it is rather difficult to conclude that the tribunal was so conservative. Indeed, the tribunal enacted some conservation regulations to preserve the fur-seals – perhaps some of the first conservation measures in the history of international law. In particular, the tribunal ruled that '[t]he Governments of the United States and of Great Britain shall forbid their citizens and subjects respectively to kill, capture or pursue at any time and in any manner whatever, the animals commonly called fur seals, within a zone of sixty miles around the Pribilov Islands, inclusive of the territorial waters' (Article 1) and that '[t]he use of nets, fire arms and explosives shall be forbidden in the fur seal fishing' (Article 6).

And this is why the story of the *Bering Fur Seals* case still deserves to be told today – it reveals that the international law relating to the protection of animals has started to be crafted since the end of the nineteenth century. At the same time, it highlights how modern international law has developed and progressed to better encompass the protection and conservation of animals within the 'elementary considerations of humanity'[10] that are applicable in times of peace. Indeed, the protection of animals can no longer be guided by purely commercial and utilitarian (not to say Benthamian) purposes, as it was in reality the case in the *Bering Fur Seals* case. Animals are part of life and every form of life is unique. They warrant respect regardless of their worth to human beings. They deserve even more that respect in times of armed conflicts where human barbarism might endanger their very existence and survival. This is where the progressive development of international law is needed. The recipes for such a development are offered in this beautiful volume.

ANDRÉ NOLLKAEMPER

The protection of animals in armed conflict may not for all appear to be a topic that is high on the shortlist of the most pressing problems of our time. In 2020, attention and research efforts are drawn towards grander themes such as climate change, global pandemics and global inequality. Yet, the protection of animals in armed conflict is a topic for all times. Whoever takes the time to study images, stories and historical accounts of warfare will soon realise that the suffering of animals during armed conflicts is a constant and disturbing phenomenon that occurs in all wars. There is little doubt that in a few generations from now, observers will look back to how animals were treated in those circumstances and wonder how we collectively enacted, maintained and applied laws that so fundamentally disregarded the suffering of animals in times of peace and war.

When looking at the treatment of animals during wartime from the perspective of international law, a superficial assessment could lead one to conclude that there is no shortage of laws that can be relied upon for articulating standards of conduct

[10] To paraphrase the ICJ, *Corfu Channel* case, judgment of 9 April 1949, ICJ Reports 1949, 22.

relevant to the protection of animals in these circumstances. Relevant rules are not only to be found in the laws specifically drafted for armed conflicts – IHL – but also in the wide-ranging body of law relating to the protection of wildlife, species and more generally the environment as it applies in times of peace. We can recall in this regard that the ILC in Article 3 of its Draft Articles on the Effects of Armed Conflicts on Treaties (Draft Articles), drawing on the earlier work of the *Institut de Droit International*, recognised that '[t]he existence of an armed conflict does not *ipso facto* terminate or suspend the operation of a treaties (a) as between States parties to the conflict; [and] (b) as and between a State party to the conflict and a State that is not'.[11] There thus is a general principle of continuity. In particular, in the Annex to the Draft Articles, the ILC expressly identified treaties relating to the protection of the environment as treaties that are not susceptible of termination, withdrawal or suspension of operation in the event of an armed conflict.[12] To the continued applicability of treaties drafted for peacetimes, we can add a wide-ranging body of authorities that recognise the obligations of states in times of armed conflict relating to the protection of the environment, that – at least implicitly – includes the protection of animals. Thus, Principle 24 of the 1992 Rio Declaration provides that '[w]arfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.'[13] And the ILC Draft Principle 3(4)(1) on the Protection of the Environment in Relation to Armed Conflicts stipulates that 'States shall, pursuant to their obligations under international law, take effective legislative, administrative, judicial and other measures to enhance the protection of the environment in relation to armed conflict.'[14]

However, saying that the 'international law of peace' applies in times of armed conflict, does not, in itself, significantly help animals. The question is to what extent international law provides actual protection. One can recall in this context that the ICJ in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* noted that 'the issue is not whether the treaties relating to the protection of the environment are or are not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict'.[15] The answer to the latter question clearly was in the negative, as the ICJ added that it 'does not consider that the treaties in question

[11] ILC, Effects of Armed Conflicts on Treaties. Titles and texts of the draft articles on the effects of armed conflicts on treaties adopted by the drafting committee on second reading, 11 May 2011, A/CN.4/L.777, Art. 3.

[12] Ibid., Annex (g).

[13] Declaration on Environment and Development (Rio Declaration), A/CONF.151/26 (1992).

[14] ILC, Draft Principles on the Protection of the Environment in Relation to Armed Conflict (2019), reproduced in UN General Assembly, Report of the ILC, seventy-first session (29 April–7 June and 8 July–9 August 2019), A/74/10, Chap. VI, Draft Principle, 3(4)(a).

[15] ICJ, *Legality of the Use or Threat of Nuclear Weapons*, advisory opinion of 8 July 1996, ICJ Reports 1996, para. 30.

could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment'. Building on this, we can observe that the well-documented shortcomings of international law in relation to the protection of animals in peacetime simply will perpetuate themselves in times of war. To mention only one example: the bias towards the protection of endangered species in a wide variety of treaties may be well justified on scientific (biodiversity) grounds. But it is odd to suggest that an animal that happens to belong to a particular species is somehow intrinsically worth more than animals that happen to be part of another (more common) species. In any case, this does nothing to protect cattles that are so often war victims and would not have done anything to protect those horses whose suffering can be observed in footages of World War I. Above all, thinking about international law on the protection of animals in times of armed conflict highlights the emptiness and the undeveloped nature of international law on the protection of animals in times of peace.

Three further observations can be made that shape, and to some extent limit, the actual protection offered by international law to animals. The first is that whatever body of international law that does apply to the protection of animals in armed conflict often hides animals within larger concepts that may obscure them from sight and recognition. This is particularly true when animals are only incidentally protected by provisions of international law which focus on the environment in general rather than on animals per se. Therefore, for example, in the aforementioned 2019 ILC Draft Principles, the obligation to take effective legislative, administrative, judicial and other measures to enhance the protection of the environment in relation to armed conflicts does in some form apply to animals. Indeed, the ILC Special Rapporteur on the subject defined 'environment' in this context as including 'natural resources, both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors, and the characteristics of the landscape'.[16] Likewise, the ICJ's pronouncement, in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, that '[r]espect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality',[17] would seem to apply also to animals.

From one angle, seeing animals as part of the wider concept of environment is significant. It forces us to think about the broader scope of, and the many elements that make up, the environment in their interconnectedness. At the same time, talking about the protection of animals in terms of safeguarding the environment is an abstraction. The obligation to protect the environment does not easily or clearly translate into an obligation that is helpful for individual horses or cows that suffer in warfare. Thus, I strongly believe that any progress in the legal protection of animals – whether in times of peace or war – requires that they be explicitly recognised and

[16] ILC, Preliminary Report on the Protection of the Environment in Relation to Armed Conflicts by Marie G. Jacobsson, Special Rapporteur, 30 May 2014, A/CN.4/674, para. 86.
[17] ICJ, *Nuclear Weapons* (n. 15), para. 30.

protected for what they are: as individual animals and as species. Accordingly, the initiative to conceptualise, systematise and develop international law applicable to animals into a 'global animal law', deserves much support.

My second point is that the familiar critique of IHL as a body of law that both protects and legitimises, applies fully to the plight of animals in armed conflicts. The ICJ's statements, in the mentioned advisory opinion, on necessity and proportionality in the pursuit of legitimate military objectives,[18] can be read in two ways. While from one angle international law does in principle offer protection to animals, the reverse is also true. When harmful activity is necessary and proportionate, international law shields it and offers a relatively free space for states to act towards animals in ways that would not be permissible in peacetime. This of course is not a novel insight, but it does drive home the point that the protection of animals in armed conflict will be limited and determined by considerations that will pull in quite different directions.

The third and final point relates to compliance with IHL. The larger issue here is how difficult it is to transpose a body of law written for the protection of human beings to the protection of animals. Implementation of, and compliance with, this body of law is largely driven by considerations of reciprocity and self-interest. That may often (though certainly not always) work for protecting individual human beings, but it is not obvious at all when we attempt to extend this shield to animals. How does reciprocity work when the interests at stake are not interests that affect humans directly? Indeed, we do not – as a whole – tend to concede animals' interests much weight in our daily lives. The protection of animals during armed conflict will inevitably be shaped and limited by the protection we accord to animals in peacetime.

This leads to the larger point that in order to understand how international law protects animals in war, we will have to move beyond questions of applicability and interpretation, and examine how this body of law is applied in actual practice and consider the underlying driving mechanisms. It seems to me that it is from this angle that the present study has a lot to offer for advancing our understanding, and thereby paving the way for a strengthening of this body of law that is long overdue. The editors of this volume are therefore to be commended for putting the topic of the protection of animals during warfare on the agenda and for seeking to advance our understanding of the limits and the promise of law in offering such protection.

[18] Ibid.

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Abbreviations

AP I	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977, 1125 UNTS 3
AP I Commentary	Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: ICRC 1987)
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977, 1125 UNTS 609
APs	AP I and AP II
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora of 3 March 1973, 993 UNTS 243
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECCC Law	Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia of 27 October 2004
ENMOD	Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques of 10 December 1976, 1108 UNTS 151
EU	European Union

FAO	United Nations Food and Agriculture Organisation
GC I	Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31
GC II	Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85
GC III	Convention Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135
GC IV	Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287
GCs	GC I, GC II, GC III and GC IV
1907 Hague Convention (IV)	Hague Convention (IV) Respecting the Laws and Customs of War on Land of 18 October 1907
Hague Regulations	Regulations Respecting the Laws and Customs of War on Land annexed to the 1907 Hague Convention (IV)
ICC	International Criminal Court
ICC Statute	ICC Statute of 17 July 1998, 2187 UNTS 90
ICJ	International Court of Justice
ICL	International criminal law
ICRC	International Committee of the Red Cross
ICRC Commentary GC I (2016)	ICRC, *Commentary on Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Geneva: ICRC 2016), available at https://ihl-databases.icrc.org/ihl/full/GCI-commentary
ICRC Commentary GC III (2020)	ICRC, *Commentary on Geneva Convention (III) Relative to the Treatment of Prisoners of War* (Geneva: ICRC 2020), available at https://ihl-databases.icrc.org/ihl/full/GCI-commentary
ICRC Customary Law Database	ICRC Customary International Law Database, available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/home

ICRC Environmental Guidelines	ICRC, *Guidelines on the Protection of the Environment in Armed Conflict: Rules and Recommendations Relating to the Protection of the Natural Environment under International Humanitarian Law, with Commentary* (Geneva: ICRC 2020), available at https://bit.ly/3zwb64D
ICTR	International Criminal Tribunal for Rwanda
ICTR Statute	Statute of the ICTR adopted by United Nations Security Council Resolution 955 on 8 November 1993 and lastly modified by Resolution 1901 on 16 December 2009
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICTY Statute	Statute of the ICTY adopted by United Nations Security Council Resolution 827 on 25 May 1993 and lastly modified by Resolution 1877 on 7 July 2009
IHL	International humanitarian law
ILC	International Law Commission
NATO	North Atlantic Treaty Organisation
NGO	Non-governmental organisation
Pictet Commentary on GC I	Jean Pictet (ed.), *Geneva Convention (I) for the Amelioration of the condition of the Wounded and Sick in Armed Forces in the Field: Commentary* (Geneva: ICRC 1952)
Pictet Commentary on GC III	Jean Pictet (ed.), *Geneva Convention (III) Relative to the Treatment of Prisoners of War: Commentary* (Geneva: ICRC 1960)
Pictet Commentary on GC IV	Jean Pictet (ed.), *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War: Commentary* (Geneva: ICRC 1958)
SCSL	Special Court for Sierra Leone
SCSL Statute	Statute of the SCSL of 16 January 2002, 2178 UNTS 145
UN	United Nations
UN Charter	Charter of the UN of 26 June 1945, 1 UNTS XVI
UNCLOS	UN Convention on the Law of the Sea of 10 December 1982, 1833 UNTS 397
UNEP	UN Environmental Programme

UNESCO	UN Educational, Scientific and Cultural Organisation
UNTS	UN Treaty Series
Vienna Convention on the Law of Treaties	Vienna Convention on the Law of Treaties of 23 May 1969, 1155 UNTS
World Heritage Convention	Convention for the Protection of the World Cultural and Natural Heritage of 16 November 1972, 1037 UNTS 151
WTO	World Trade Organisation
WWF	World Wildlife Fund

PART I

The Need for Protecting Animals in Wartime

Part I of the book lays out historical and ecological foundations for the legal protection of animals during warfare and the main difficulties. It is divided into four chapters. After recalling cross-cutting issues (Chapter 1), it considers the topic from historical (Chapter 2) and ecological (Chapter 3) perspectives. Part I finally introduces the main rationales for, and challenges in, the protection of animals in wartime (Chapter 4).