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Animals at War: The Status of "Animal Soldiers" under International Humanitarian Law

Karsten Nowrot*

Abstract: »Tiere im Krieg: Der Status von ‚Tier-Soldaten‘ im humanitären Völkerrecht«. In February 2014 the Taliban revealed the capture of a British military working dog in Afghanistan and posted a video of their captive on the internet. Taking this recent incident as a starting point, the contribution aims to evaluate some aspects relating to the issue of a possible incorporation of "animal soldiers" into the scope of application of international humanitarian law. For this purpose, the analysis proceeds in four main steps. In the first part, it is argued that international humanitarian law – although so far largely neglected in the respective discourses – is for a variety of reasons a particularly suitable research object from the perspective of a political theory of animal rights. Subsequently, a brief overview will be given of the current status – or rather non-status – of animals in the realm of the *ius in bello*. The third part addresses and discusses some of the chances resulting from as well as in particular also conceptual challenges arising in connection with a potential recognition of animals as international legal subjects having the status of combatants under the law of armed conflict. Finally, I sketch the probabilities of and possible conditions for a successful implementation of this approach in practice.

Keywords: Animal rights, public international law, international humanitarian law, international legal personality, armed conflict, combatants, animal citizens, political theory of animal rights.

1. Introduction

In February 2014 the world received news of a truly remarkable incident in Afghanistan which, amongst others, Pentagon officials considered as highly likely to be unprecedented. The Taliban revealed via Twitter the capture of a British military working dog and posted a video of their captive on the internet. The dog, a Belgian Malinois, was apparently wearing some kind of body armor and carried, among other things, certain electronic devices, a pistol, two rifles and a flashlight. Initially, many viewers of the video probably considered this announcement rather as some kind of bad joke. However, a few days later a

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spokesperson for the international military coalition in Afghanistan confirmed that a military dog had indeed gone missing in action during a combat operation with coalition troops in the country's eastern Laghman province during December 2013. Taliban spokesman Zabiullah Mujahid assured the public that the canine "was not injured and is not being mistreated." Quite to the contrary, he was being held in a "safe place" and enjoyed a diet of chicken and beef kebabs specifically prepared for him by his captors. Furthermore, Mujahid indicated the possibility of the animal becoming involved in a future prisoners of war exchange between the coalition forces and the Taliban (see, e.g., Londono 2014; Soltis and Wires 2014).

In reaction to this video and statement, one newspaper commentator rather wryly observed that it appeared somewhat reassuring that the Taliban at least for once seemed willing to comply with their international legal obligations as enshrined in the 1949 Geneva Conventions relating to the Protection of Victims of Armed Conflicts (Arnu 2014). Although most certainly not devoid of a considerable amount of irony, aside from this specific incident, in general terms it could be considered as one small indication for the practical relevance and timeliness of the topic "animals in armed conflicts and international humanitarian law." It is submitted that, far beyond this recent – and to some observers probably rather odd – episode, the international normative regime applicable in armed conflicts belongs to those comparatively rare areas of law that appear to be particularly suitable for illustrating vividly the potential practical importance of approaches that have been discussed for quite some time. Such approaches move towards not only recognition of legal entitlements for animals generally but also possible innovation arising from the recent fiercely debated political theory of animal rights. This is based on an extended understanding of citizenship as prominently advocated by Sue Donaldson and Will Kymlicka (see especially Donaldson and Kymlicka 2011; as well as, e.g., *ibid.* 2013, 2014; however, as an example of a rather critical account, see also Planinc 2014; and for an excellent introduction, Ahlhaus and Niesen 2015, in this HSR Forum).

Against this background, and mindful that the specific relevance of this legal field in the context of animal rights theory is undoubtedly not immediately obvious to everybody, the present contribution aims to evaluate and clarify the in principle age-old "social" phenomenon of animals as active participants in international and non-international armed conflicts within the normative framework of international humanitarian law.¹ Thereby, it will not be possible to address comprehensively all of the respective questions and challenges in the course of this comparatively short contribution. Rather, this article largely confines itself to some preliminary thoughts and comments on a number of aspects relating to a

¹ Although obviously from the perspective of international humanitarian law at least equally relevant and challenging, the issue of a possible legal status and protection of certain types of animals as "civilians" or non-combatants will not be further elaborated on here.

possible incorporation of what could be characterized as “animal soldiers” into the personal scope of international humanitarian law’s application (for a general view on the scope of this area of law’s application see, e.g., Kleffner 2013). This topic has so far only rarely been subjected to closer evaluation in animal rights literature (for a rather brief account see, e.g., Schäfer and Weimer 2010, 116 et seq.).

For this purpose, the following analysis proceeds in four main steps. In the second part of this contribution, it will be argued that and indicated why international humanitarian law – although until now largely neglected in the discourses on animal rights – is for a variety of reasons a quite valuable research object, in particular from the perspective of the recently discussed political theory of animal rights (2). Subsequently, a brief overview will be given on the current status – or rather non-status – of animals in the realm of the *ius in bello* (3). The fourth section addresses and discusses some of the main chances resulting from, as well as in particular also a number of conceptual challenges arising in connection with, the possible recognition of animals as international legal subjects having the status of combatants under the laws of armed conflict (4). Finally, in the concluding part, a sketch will be given of the probabilities of and possible conditions for successfully implementing this approach in practice. In this connection, an attempt will be made to establish something like a plausible connection between the issue of potential animal rights under international humanitarian law on the one hand and new as well as future technological developments in the realm of autonomous weapon systems on the other (5).

2. Some Underlying Reasons for the Importance of International Humanitarian Law in the Context of a Political Theory of Animal Rights

In order to illustrate and support further the perception argued for in this contribution, of international humanitarian law as a particularly noteworthy legal regime from the perspective of a political theory of animal rights, attention should at least briefly be drawn to four main aspects. First, it seems appropriate, adopting a kind of factual-oriented perspective, to recall that animals have in principle for millennia not only belonged to the countless “civilian” victims of armed conflicts but are also actively involved in acts of war as – taking recourse to the terminology of international humanitarian law – so-called combatants (generally on the distinction between combatants and non-combatants see, e.g., Ipsen 2013; von Arnould 2014, 500 et seq.). The variety of animal species deployed as “soldiers” in armed conflicts ranges from horses, elephants, dogs, bats, camels, seals and pigeons to dolphins (Mühling 2014), bees, donkeys, belugas, oxen and cormorants, to mention but a few examples (see for

example Moore and Kosut 2013, 32 et seq.; Kinder 2013, 65 et seq.; Buciak 2009; Janssen 2009; Pöppinghegel and Proctor 2009; Troy 2009; Cooper 2000, 19 et seq.; Kistler 2011, 3 et seq.). In principle this finding still holds true. In addition to the services of dogs in Afghanistan mentioned earlier, let it suffice to draw attention to the fact that even the military operation “Neptune Spear” in Pakistan, which resulted in the elimination of Osama Bin Laden in May 2011, was carried out by United States Navy SEALs with the assistance of a dog named Cairo, again a Belgian Malinois.²

A second aspect worth noting from something like a cultural-psychological perspective is, on the one hand, the recurrently shared observation that joint participation in armed conflicts not infrequently results in the forming of rather close emotional bonds between human soldiers and their animals. They find their visible expression for example in the countless well-known stories about animals risking their lives to save human “comrades” in critical situations; but there are also comparable tales about human soldiers doing the same for their canines, horses and other animals assigned to assist them on the battlefield (see for example Frankel 2014; Leinonen 2013, 134 et seq.; Cooper 2000). These exceptionally close and in a notable way species-transcending relationships are most certainly first and foremost also a product of the extreme conditions prevailing in situations of armed conflicts. It might not be an exaggeration to state that the respective combat situations are specifically characterized by something like a partial leveling of the otherwise still dominant categorical distinction between humans and animals, and thus the overcoming of well-known “cultural and economic obstacles to animal rights” (Donaldson and Kymlicka 2011, 5). Admittedly, this partial leveling takes place in a particularly brutal way, bearing in mind that, in armed conflicts, all of the different participating species are equally confronted with a real possibility of violent death.

On the other hand, albeit closely connected to the foregoing consideration, in the context of armed conflicts it is even possible to observe in practice a kind of formal convergence of status between human combatants and “animal soldiers” to an extent that is until now almost unheard of in other areas of social life. Attention might be drawn in this regard to the existence of war memorials either specifically devoted to certain animals or at least also featuring animals as active combat participants in a number of countries. On 21 July 1994, on the fiftieth anniversary of the invasion of Guam, the Marine War Dog Memorial was unveiled at the United States Marine Corps War Dog Cemetery on the

² On the outstanding importance of this factor see for example Hediger (2013, 1: “What does it really mean that a dog was deemed critical to the operation of this extremely rigorous, strictly trained military unit engaging the United States’ perhaps most important early 21st century mission? [...] The presence of the dog on the Osama Bin Laden mission, like the use of animals in other wars, also indicates human limitations and human reliance upon other species. A dog accompanied the SEALs because he or she could do things no human, and not even any human-made machine, could do”).

island, dedicated to the twenty-five dogs killed “liberating Guam in 1944.” To mention but one further example, the Animals in War Memorial was unveiled in London on 24 November 2004 (concerning these examples as well as generally on this practice see, e.g., Kean 2013; Johnston 2012). Furthermore, and indeed mirroring this formal status approximation even more obviously, there is the previous and current practice of decorating “animal soldiers” that have distinguished themselves in battles in some countries like the United Kingdom and the former German Empire. Medals and decorations have been awarded in this connection for example to horses, dogs, pigeons and cats.³ In addition, the United States Congress adopted a law in December 2012 aimed at the protection and support of retired military dogs by, inter alia, streamlining the adoption process and authorizing a system of veterinary care for retired canines. Finally, it seems also worth noticing in the present context that in particular dogs are occasionally – and at least unofficially – given higher military ranks “that make them senior to their handlers, a practice designed to ensure that the humans treat the animals with deference. They have a rank patch on their body armor” (Londono 2014).

A third notable aspect, illustrating from an overarching normative and conceptual perspective the specific relevance and suitability of international humanitarian law in the present context, is the observation that the active participation of animals in armed conflicts might very well be regarded as a central inspirational and guiding social reference field.⁴ This is especially with regard to a conceptual re-orientation of a political theory of animal rights that emphasizes the importance of citizenship in the sense of an extended understanding of this concept based on the novel idea of “animal citizenship” (see in particular Donaldson and Kymlicka 2011, 50 et seq., 101 et seq.; as well as, e.g., Kymlicka and Donaldson 2014). Taking into account that citizenship is – also in the context of a political theory of animal rights (Kymlicka and Donaldson 2014, 205 et seq.; Donaldson and Kymlicka 2011, 13, 116, 122; Ahlhaus and Niesen 2015, in this HSR Forum) – typically and rightly understood as a legal status involving not only rights but also certain responsibilities towards the respective political community and its members, one of the important civic obligations traditionally recognized first and foremost also in free democratic societies is the ordering idea of general conscrip-

³ On this practice see for example with regard to the former German Empire Pöppinghege (2009, 238); as well as for the United Kingdom Johnston (2012, 368-9: “The British decorate animals. The Dickin Medal, named after the founder of the People’s Dispensary for Sick Animals, Maria Dickin, functions as the animal version of the Victoria Cross. Animals receive plaudits for bravery, courage, and devotion to duty. The Medal reads ‘For Gallantry, We also Serve,’ suggesting patriotic oneness between human and animal. World War II saw 49 medals awarded”).

⁴ Generally on the recourse to and importance of reference fields as a dogmatic approach in jurisprudence see, e.g., Schmidt-Aßmann (2013, 8 et seq.); Voßkuhle (2012, paras. 43 et seq., each with further references).

tion.⁵ If there is any area of life where certain types of animals are – already for a very long time and also in the public perception as a whole – “called on” to assist in the protection of a (human) political community in a quasi-civic manner, it is in the course of their active participation in international and non-international armed conflicts⁶ and thus in the material scope of application of international humanitarian law. The undeniable fact that these services are frequently provided by the animals in question without or even against their will, probably does not categorically distinguish them from the majority of human combatants’ respective attitude.

A final aspect worth considering in the present context adopts something like a strategic or implementation-oriented perspective. The *ius in bello* also presents itself as a particularly suitable research and reference field for a political theory of animal rights, because in light of current and future technological developments this area of public international law is highly likely – and considerably more urgent and accentuated than other legal fields – to be confronted with the practical relevant issue whether to enlarge its scope of applications to actors other than humans and those traditional subjects of law comprising of humans (see *infra* under 5.). Already against this background, it appears not too far-fetched to presume that the legal policy fora and discourses on international humanitarian law are, compared to those in other areas of law, currently and in the foreseeable future considerably more receptive towards seriously discussing questions concerning the possible recognition of a legal status for animals.

3. *De lege lata*: The Status of “Animal Combatants” in the Current Laws of Armed Conflict

When taking a closer look at the structure and content of international humanitarian law according to the current political theory of animals’ rights, it is of value to start with a brief stock-taking of its present normative framework in general and its applicability to animals in particular. Such an approach will help not only to identify the main regulatory approaches currently dominating in respective legal practice, but most certainly also to lay the foundations for a progressive development in this area of law aimed at implementing some of the

⁵ On this perception see for example the decision of the Federal Constitutional Court of Germany in BVerfGE 48, 127 (161); as well as from the literature, e.g., Stern (1994, 1029: “civic duty par excellence”); Heun (2013, 1315: “republican civic obligation”); Götz (1983, 23: “a fundamental obligation of citizens”) (translations by the author); generally on the concept of fundamental civic duties from the perspective of constitutional law see for example Randelzhofer (2006); Hofmann (2011).

⁶ Generally on the distinction between international and non-international armed conflicts and its relevance in the *ius in bello* see, e.g., Fleck (2013, 603 et seq.); Klabbers (2013, 207 et seq.); Shaw (2014, 864 et seq.).

conceptual ideas that have more recently been articulated in the realm of animal rights theory.

To start off with a summary of the results, the findings with regard to the current state of international humanitarian law are with a view to a political theory of animal rights rather disillusioning. Despite the history of wartime activities also being characterized by environmental damages (Vöneky and Wolfrum 2011, paras. 2 et seq.), the international legal protection of the environment itself under conditions of international and non-international armed conflicts is on the basis of treaty law, as well as customary international law, widely perceived to be rather poorly developed.⁷ There are indeed only comparatively few rules in the modern laws of war that directly protect the environment against the harmful consequences of armed conflict. Prominent examples for such obligations are the respective normative rules of behavior stipulated in Articles 35 (3) and 55 (1) of the First Additional Protocol to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (1977 GC Protocol I) of 8 June 1977 as well as in the Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques of 10 December 1976 (1976 ENMOD Convention), all of which taken together prohibit methods and means of combat which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment (on this aspect as well as more generally on the protection of the environment under international humanitarian law see, e.g., Oeter 2013, 211 et seq.; Thürer 2008, 77 et seq.; Boothby 2009, 86 et seq.; Dinstein 2001). And even with regard to these and other relevant provisions, it needs to be emphasized in the present context, that the regime of international humanitarian law does not in general protect the environment per se but is first and foremost intended to avoid negative consequences for the affected (human) civilian population indirectly caused by damage to the environment.⁸ This is vividly illustrated by the additional requirement as enshrined in Article 55 (1) of the 1977 GC Protocol I stipulating that damage to the natural environment is only of relevance for the purposes of this provision if it is intended or may be expected also to “prejudice the health or survival of the population.” Furthermore, this primarily anthropocentric perspective is, for example, also mirrored in the following statement made by the International Court of Justice in its advisory opinion on the legality of the threat or use of nuclear weapons of 8 July 1996: “The Court also recognizes that the environment is not an abstrac-

⁷ On this perception see for example Beyerlin and Marauhn (2011, 419: “Pertinent treaty obligations are relatively weak”); Vöneky and Wolfrum (2011, para. 49: “Customary international law has not yet developed rules on the conduct of armed activities which provide for an adequate protection of the environment. Treaty law is equally inadequate”); Vöneky (2001, 76); von Arnould (2014, 516).

⁸ On this perception see for example (Spieker 2008, 766: “it might be unavoidable to recognise the human being as reference point in the context of IHL”); von Arnould (2014, 516).

tion but represents the living space, the quality of life and the very health of human beings, including generations unborn.”⁹

Even if one takes into account that, during armed conflicts, states are also increasingly expected to observe their obligations entered into on the basis of international treaties relating generally to the protection of the environment,¹⁰ such a broadening of the legal analysis does not reveal more promising results, at least from the perspective of a political theory of animal rights. It is undoubtedly the case that the development of international environmental law has particularly in recent decades been characterized by the conclusion of numerous bilateral, regional and multilateral conventions relating to the protection of animals (see, e.g., Kiss and Shelton 2004, 399 et seq.; Beyerlin and Marauhn 2011, 181 et seq.; Bowman 1989). Furthermore, it is incontrovertible that these international agreements have the potential to exercise important normative steering functions especially in the context of international and non-international armed conflicts (Vöneky 2001, 105 et seq.). However, it should be recalled that all of these various treaties and conventions are also shaped by the same anthropocentric perception or mirror at best so-called “welfarist” or “ecological” regulatory approaches and motivations; attitudes that are considered to be neither effective nor appropriate from the perspective of political animal rights theory (for a vivid example of this criticism see Donaldson and Kymlicka 2011, 3 et seq.; Ahlhaus and Niesen 2015, in this HSR Forum).

In light of these findings, it seems unavoidable to conclude that the innovative ordering idea of animals as subjects of law – and thus also as bearers of certain legal rights and/or obligations – has to date found notable recognition neither in the normative framework of international environmental law nor in the global regime of international humanitarian law. In particular the scope of application of the *ius in bello* – as strongly indicated by its more recent labeling as international “humanitarian” law – has always been and continues to be exclusively human-oriented. Consequently, despite the fact that certain animals are quite frequently allowed or required to “participate directly in hostilities” in the sense of Article 43 (2) of the 1977 GC Protocol I, they are not granted the rights and do not have the obligations deriving from the legal status of combatants under international humanitarian law. Although it is precisely this status of combatants that has more recently again become subject to a quite intensive and controversial discussion among practitioners and scholars of international humanitarian law (see generally, e.g., Gasser and Melzer 2012, 80 et seq.; Ipsen 2013), the possibility of an international legal status for “animal soldiers” is not

⁹ ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ-Reports (1996, 226; 242, para. 29).

¹⁰ On the respective discussion in international legal practice and literature see, e.g., Beyerlin and Marauhn (2011, 417 et seq.); Vöneky (2001, 76 et seq.); ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ-Reports (1996, 226; 242, paras. 30 et seq.).

addressed therein and thus irrelevant as far as these recent debates are concerned. Indeed, the only explicit reference to animals in general within the current framework of international humanitarian law is hidden in Article 7 (1) lit j of the 1996 Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects of 10 October 1980, prohibiting the use of booby-traps and other devices which are in any way attached to or associated with “animals or their carcasses.” In addition, certain categories of animals – including a confirmation of their current status as mere objects of law – are mentioned for example in Article 4 of the Annex to the Convention (IV) Respecting the Laws and Customs of War on Land of 18 October 1907 (IV. Hague Convention of 1907) stipulating that prisoners of war have the right to keep all their personal belongings, “except arms, horses, and military papers,”¹¹ and in Article 54 of the 1977 GC Protocol I addressing the “protection of objects indispensable to the survival of the civilian population” and, in this regard, prohibiting *inter alia* the destruction and removal of “livestock.”¹²

4. *De lege ferenda*: Chances and Challenges of Extending the Personal Scope of Application of International Humanitarian Law to “Animal Soldiers”

The stock-taking in the foregoing section has clearly demonstrated that animals – despite their active participation in combat situations alongside human soldiers – are nevertheless a long way from enjoying any legal status or other normative recognition in the current regime of international humanitarian law. In other words, they are *de lege lata* no subjects of the *ius in bello*. However, this finding is also hardly surprising, in particular when considering the still very dominant perception of legal rules as being not only an exclusively man-made steering phenomenon¹³ but also an entirely human-oriented ordering instrument. They are thus first and foremost considered as steering mechanisms

¹¹ For a related provision see also, e.g., Article 18 of the 1949 Geneva Convention (III) Relating to the Treatment of Prisoners of War of 12 August 1949.

¹² See in this connection also for example Article 14 of the Second Additional Protocol to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of Non-International Armed Conflicts (1977 GC Protocol II) of 8 June 1977.

¹³ On this perception see for example Loughlin (2010, 111: “There can be no law outside of the laws that humans give themselves”); Loughlin (2010, 312: “One compelling reason derives from the fact that law in the modern era is universally acknowledged to be a human creation”); von der Pfordten (2011, 156: “law is necessarily a kind of human action”); Domingo (2010, 123 et seq.); as well as already Jellinek (1913, 162 et seq.).

that are solely addressed to human beings as well as organizations created by human beings, among them states, associations and international organizations (see, e.g., Ehlers 2013, 472; Kaufmann 2004, 96; as well as from the realm of legal practice for example Verwaltungsgericht Hamburg, *Neue Zeitschrift für Verwaltungsrecht* 1988, 1058; Verwaltungsgericht Frankfurt/Main, *Neue Juristische Wochenschrift* 2001, 1296). The Latin saying *hominum cause omne ius constitutum*, frequently attributed to the Roman jurist Aurelius Hermogenianus (Pennitz 2004), that for different reasons has not always shaped the character and orientation of public international law,¹⁴ is at least in the context of this contribution obviously still exercising a dominating influence on our understanding and perception of law.

Nevertheless, in case one is willing to disengage oneself from such an exclusively human-oriented pre-understanding of the concept of law¹⁵ as well as to consider the possibility of extending the circle of potential subjects of (international) law based on an inclusion of other actors like animals – and there appear to be in principle some good reasons for such a partial reconceptualization¹⁶ – there might be a way forward. It could indeed be argued that recognizing an international legal status of “animal soldiers” based on extending the personal scope of application of international humanitarian law should be regarded as a valuable opportunity for contributing to the accomplishment of a fundamental concern of animal rights theory – namely to reconstruct the relationships between humans and animals “in ways that are respectful, compassionate, and non-exploitative” (Donaldson and Kymlicka 2011, 10) – under the extreme circumstances of armed conflicts.

The recognition of an international legal status as combatants would allow those animals, that for example have been wounded and are therefore incapable of defending themselves or that have fallen into the power of an adverse party,

¹⁴ On the increasing importance of this maxim in the current international legal order see, e.g., International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Dusko Tadic*, Decision of the Appeals Chamber of 2 October 1995, reprinted in: *International Legal Materials* 35 (1996, 32; 63, para. 67: “A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne ius constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well”); Klabbers, Peters and Ulfstein (2009, 155: “Constitutionalism, [...], postulates that natural persons are the ultimate unit of legal concern. Global constitutionalists abandon the idea that sovereign states are the material source of international norms. In consequence, the ultimate normative source of international law is – from a constitutionalist perspective – humanity, not sovereignty”); as well as Peters (2014); and Teitel (2011, 3 et seq.), each with numerous further references.

¹⁵ Generally on the importance of respective pre-understandings in the context of legal norms and their interpretation see for example Esser (1972, 21 et seq.).

¹⁶ On the respective discussion in the literature see, e.g., Raspé (2013, 62 et seq.); Donaldson and Kymlicka (2011, 4 et seq., 19 et seq.); Ladwig (2010); Richter (2007, 344 et seq.), each with further references. Specifically from the perspective of public international law see also already D’Amato and Chopra (1991).

to benefit from the rather comprehensive and effective protection under international humanitarian law for so-called “enemies hors de combat” in the sense of Article 41 of the 1977 GC Protocol I (generally on this protection regime see, e.g., von Arnould 2014, 519 et seq.; Ipsen 2014, 1229 et seq.). Beyond that and in compliance with one of the central guiding principles of international humanitarian law as for example codified as the so-called “Martens clause”

- in the Preamble of the IV. Hague Convention of 1907, in Article 63 (4) of the 1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949,
- in the Preamble of the Second Additional Protocol to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of Non-International Armed Conflicts (1977 GC Protocol II) of 8 June 1977 as well as
- in Article 1 (2) of the 1977 GC Protocol I,¹⁷

“animal soldiers” would, to the same extent as human civilians and combatants, even in those circumstances and with regard to those issues that are until now not covered by applicable international agreements “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” (Article 1 (2) 1977 GC Protocol I). Consequently, assuming that these animals would be granted the status of combatants, the treatment they are legally entitled to receive in armed conflicts would also have to be guided and determined by the overarching purpose of realizing and maintaining the principles of humanity (to be understood in a considerably broader sense) as one of the normative core requirements of today’s *ius in bello*.¹⁸

Even in light of these notable opportunities, a respective extension in the scope of international humanitarian law’s application to animals as active participants in armed conflicts would certainly also give rise to a number of chal-

¹⁷ See for example the respective stipulation in the Preamble of the Convention (IV) Respecting the Laws and Customs of War on Land of 18 October 1907 (IV. Hague Convention of 1907): “Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.” Generally on the content and relevance of the Martens Clause in international humanitarian law see also, e.g., Meron (2000); Cassese (2000); Rensmann (2008).

¹⁸ On the perception that the principle of humanity constitute one of the central ordering ideas of the laws of armed conflict see for example Thürer (2008, 66: “This principle is at the heart of international humanitarian law”); von Arnould (2014, 481); as well as ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ-Reports (1996, 226; 257, para. 79: “It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and ‘elementary considerations of humanity’ [...] that the Hague and Geneva Conventions have enjoyed a broad accession”).

lenges. Aside from the currently rather uncertain prospects for reforming the *ius in bello* (see also *infra* under 5), the following evaluation in this section largely confines itself to an identification and discussion of two overarching difficulties that need to be taken into account and to be adequately addressed in the present context. Firstly, there is the need to clearly define which types of animals should realistically be granted a respective status. Secondly, the question arises of how to adequately address the rather limited capacity of animals to observe consciously the respective obligations normally arising for combatants under the laws of war based on considerations of “humanity.”

The first challenging aspect concerns the question of which animal categories actively participating in armed conflicts should legitimately and realistically be included in the scope of application of international humanitarian law. There is almost general agreement in philosophical-political discourses that for a variety of reasons not all types of animals – or at least not all categories to the same extent – appear to be suitable to become addressees of respective legal rights (see, e.g., Donaldson and Kymlicka 2011, 6; Ladwig 2010, 131 et seq.). However, the individual answers given in scholarly contributions differ considerably. Furthermore, the respective criteria to be applied in this regard are not infrequently defined in rather vague terms. To mention but one example, Sue Donaldson and Will Kymlicka argue for the granting of legal entitlements to all animals “possessing a subjective existence – that is, to all animals that have some threshold level of consciousness or sentience” (Donaldson and Kymlicka 2011, 6).

However, from the perspective of legal practice and the science of law as a primarily practice-oriented discipline,¹⁹ the continued use of such an ambiguous terminology and consequently an unclear determination in the scope of international humanitarian law’s application is obviously incompatible with one of the rule of law’s overarching central purposes, namely the protection and promotion of legal certainty (generally, e.g., von Arnould 2006; specifically in the present context Raspé 2013, 308). Rather, a possible future animal-oriented reformation of international humanitarian law would first and foremost essentially require a normative specification – admittedly only within the limited guidance that the “vagueness of legal language” can provide in this connection (Alexy 1989, 1; see also, e.g., Hart 1997, 126) – of the animal categories that are granted the legal status of combatants. The present contribution deliberately abstains from making detailed suggestions in this regard. Nevertheless, it is submitted that considerations relating to the feasibility and acceptability of such reformation suggest that the respective ambitions should at least initially be confined to including in the scope of the *ius in bello* some suitable candidates such as military dogs on which a necessary international consensus might be comparatively easier to reach.

¹⁹ On this perception see, e.g., Alexy (2002, 9); Voßkuhle (2010, 340); Jestaedt (2014, 3 et seq.).

The second overarching challenge relates to the observation that recognition as combatants under international humanitarian law involves not only the enjoyment of certain rights and privileges but also – at least indirectly – an imposition of certain legal obligations. In order to implement and promote the principle of humanity in armed conflicts effectively, state parties to the respective international agreements are required to enact domestic legislation providing for penal sanctions to cover certain grave breaches of the *ius in bello*. Respective obligations are stipulated for example in:

- Articles 49 and 50 of the 1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949,
- Articles 129 and 130 of the 1949 Geneva Convention (III) Relating to the Treatment of Prisoners of War of 12 August 1949,
- Articles 146 and 147 of the 1949 Geneva Convention (IV) Relating to the Protection of Civilian Persons in Time of War of 12 August 1949 as well as in
- Articles 85 and 86 of the 1977 GC Protocol I

(generally on the enforcement of international humanitarian law see, e.g., Detter 2013, 419 et seq.; Vöneky 2013; Gaeta 2014; Bothe 2013, 640 et seq.). In addition, attention should be drawn in this regard to relevant developments in the realm of international criminal law (see for example Werle and Jeßberger 2014, 327 et seq.; Detter 2013, 452 et seq.; von Arnould 2014, 532 et seq.).

Against this background the question arises whether and, in the affirmative, how these legal requirements are to be enforced *vis-à-vis* animal combatants. In the context of animal rights theory, whether or not animals truly have the capacity to be legitimate addressees of moral obligations has been the subject of fierce debate for some time (see, e.g., Raspé 2013, 71 et seq.; Ladwig 2010, 135 et seq.). More specifically, the same seems currently to be valid with regard to the discussions on a political theory of animal rights (Donaldson and Kymlicka 2011, 116 et seq.). Even if one applies the last-mentioned theoretical framework to animals at war, considers their participation in armed conflicts as a kind of manifestation and realization of conscription, and thus their civic obligation to contribute to the protection of a political community (see *supra* under 2.), and, as a consequence, perceives these animals in principle also as addressees of certain legal obligations, one particular challenge cannot seriously be denied. A sober evaluation – to put it mildly – gives rise to certain doubts of whether or not the average animal combatant can seriously be regarded as being endowed with the capacity to understand and autonomously obey the various legal obligations incumbent upon active participants in armed conflicts under international humanitarian law.²⁰

²⁰ Generally on the perception that animals lack the capacity to observe "man-made legal obligations" see also Raspé (2013, 287 et seq.).

What implications should we draw from these findings? Well, not necessarily the quite far-reaching consequence that animals are in light of these “deficits” for overarching structural and legal dogmatic reasons also not entitled to the protection and privileges deriving from the legal status of combatants. In order to illustrate and support this thesis further, three main aspects are worth highlighting in the present context. First, it appears appropriate to recall that the domestic law of states – in the same way as for example the international legal regime on the protection of human rights – rightly takes for granted the legal personality and subjectivity in general, as well as the capacity to be bearer of human and other fundamental rights in particular, also of those human beings which are – due to respective stipulations in the normative realms of contractual capacity, of the responsibility for torts and of criminal responsibility – only to a limited extent addressees of legal obligations. This approach finds its justification in the fact that these human beings are – in this respect from a factual perspective to a certain extent comparable to animals – not, not yet, or no longer endowed with the capacity to understand and autonomously fulfill certain legal rules of behavior. As also frequently emphasized in the discussions on animal rights themselves, these characteristics apply, among others, to small children and persons with severe intellectual disabilities (Donaldson and Kymlicka 2011, 22 et seq.; Ladwig 2010, 135 et seq.; Raspé 2013, 289 et seq.).

Admittedly, many readers are likely, at least at first sight, to consider the two last-mentioned groups of human beings as rather inappropriate and unconvincing examples in the present context, taking into account that the recruitment and use of children as well as mentally handicapped persons as soldiers in armed conflicts is fortunately and for absolutely convincing reasons forbidden under public international law. With regard to children, the respective prohibition can be found, inter alia, in Article 77 (2) of the 1977 GC Protocol I, Article 4 (3) of the 1977 GC Protocol II and in the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict of 25 May 2000 (generally, e.g., Happold 2005, 54 et seq.). A related prohibition concerning persons with severe intellectual disabilities can be derived, for example, from Article 11 of the Convention on the Rights of Persons with Disabilities of 13 December 2006 as well as from the state parties’ protective duties towards sick members of the armed forces under Article 12 of the of the 1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 and under Article 10 of the 1977 GC Protocol I. In light of these findings, one might be tempted to argue that the use of animals in armed conflicts could and should also be subjected to a comprehensive ban under the *ius in bello*. However, such a perception is not only incompatible with current state practice, but it also appears doubtful whether an unconditional and comprehensive prohibition would be consistent with the central concern of the new political theory of animal rights, namely to recog-

nize domesticated animals as emancipated fellow citizens of human political communities (Donaldson and Kymlicka 2011, 101 et seq.).

The analysis has so far revealed beyond reasonable doubt that domestic legal systems generally do not consider the ability to observe legal obligations as a necessary prerequisite for the recognition of legal personality of the actor at issue. Furthermore, to mention a second notable aspect, it is worth recalling that the same applies to general public international law. Admittedly, the existence of a kind of inseparable connection between the status of actors as a bearer of international legal entitlements on the one hand and its position as an addressee of international normative obligations on the other hand has occasionally been argued for in the legal literature (see, e.g., the references provided by Nowrot 2012, 7 et seq.). However, at least on the basis of the currently still prevailing dogmatic approach to international legal subjectivity, that relies exclusively on the granting by states of specific rights and/or obligations under international law to the actor in question,²¹ the assumption of a necessary interrelationship between rights and obligations appears to be impermissible (Nowrot 2012, 15 et seq., with further references). Consequently, also public international law is far from alien to the concept and possibility of legal subjects that are only beneficiaries of normative entitlements without being at the same time compelled to observe certain international obligations. A well-known and much debated example is the current status of private corporations in the frameworks of international human rights law and international investment law (Nowrot 2012, 8 et seq., with further references).

A third and final main aspect worth drawing attention to in the present context is the observation that a legal recognition of animals as combatants, without at the same time establishing a corresponding obligation for them to observe the requirements of the *ius in bello*, would also not lead to any new and additional enforcement deficits with regard to international humanitarian law. Rather, any violations of the laws of war committed by or at least with the assistance of animal soldiers will, in the same way as it is already currently the case, continue to be attributed to those human combatants who have deployed the animals and are thus also responsible for supervising them appropriately. At least in this respect, the attribution of responsibility with regard to animal conduct will, in either case, also in the future continue to be based on the same legal principles as those already currently applying to the use of weapons or the recourse to other methods and means of combat.

In particular in light of this last-mentioned consideration it is submitted that the general inability of animal soldiers to obey the obligations under international humanitarian law autonomously does not in principle hinder their recognition as combatants and the granting of the protective rights associated with

²¹ Generally thereto, e.g., Jennings and Watts (1992, 16); Focarelli (2012, 238); Klabbbers (2003, 367).

this legal status. Nevertheless, the continued necessity of comprehensively²² attributing the activities of animal soldiers to the respective human combatants undoubtedly constitutes a clear distinction between animals and humans. In light of these differences, it appears appropriate and advisable from a legal policy perspective not to transfer and extend the current concept of (human) combatants “lock, stock, and barrel” to animal soldiers but rather create a new separate category of animal combatants under international humanitarian law.

5. Outlook: Unmanned Aerial Vehicles Might Clear the Way or On a Possible “Window of Opportunity”

The analysis above has focused primarily on the chances of and challenges arising in connection with the possible inclusion of animal soldiers into the scope of application of international humanitarian law. In this regard, it has been demonstrated that no fundamental conceptual and dogmatic objections exist that would prevent a respective animal-oriented reformation of the *ius in bello*. Nevertheless, a realistic assessment of this issue should finally not dodge the equally thorny questions as to the chances in practice for such a more or less fundamental reorientation of international humanitarian law.

In principle, such an assessment of the conditions for and chances of successfully realizing this approach towards animal rights in practice is most certainly possible and relevant for all of the different areas of law. That said, the outcome might nevertheless differ considerably, depending on the individual field of law in question. As already indicated (see supra under 2), a valid argument can indeed be made in this regard that the field of international humanitarian law could in the medium-term perspective have – from the point of view of animal rights theory – something like a pioneering function in legal practice. In order to avoid the danger of becoming outmoded by newly invented methods and means of combat and thereby considerably limiting its normative steering functions and claim to effectiveness,²³ the normative regime of the *ius in bello* is particularly dependent upon the competence to anticipate, and to provide a timely legal framework for, future technological developments in the area of

²² It should not be left unmentioned that the dogmatic structure of international humanitarian law is already currently – in the relations between human combatants – in principle not alien to the approach of attributing the responsibility for the conduct of subordinate soldiers in accordance with the so-called principles of “command responsibility” as for example stipulated in the Articles 86 (2) and 87 of the 1977 GC Protocol I. However, in contrast to the relationship between human and animal soldiers, this attribution between human beings of different military ranks is far from comprehensive. Generally on the concept of command responsibility see, e.g., Dinstein (2010, 271 et seq.).

²³ Generally on the perception that law is inherently striving for an effective enforcement see, e.g., Radbruch (1964, 13); Kirchhof (1987, 45); Tietje (2001, 267 et seq.).

weaponry.²⁴ Against this background, it seems appropriate to draw attention to the widely shared expectation that international humanitarian law and its law-making actors are in the foreseeable future highly likely to be confronted with the question of how to legally cope with a number of other categories of “non-human combatants,” particularly in the form of autonomous combat systems. Admittedly, the present generation of unmanned combat aerial vehicles, also known for example as combat drones and currently almost omnipresent in the respective public discussions, is by no means an autonomous weapon system but is usually operating under real-time human control exercised by an operator in a remote terminal. This factor is also precisely one of the reasons why the use of current combat drones in armed conflicts is not per se a violation of international humanitarian law (see, e.g., Nowrot 2013, 8 et seq., with further references). However, there are indications that within the next two or three decades technical developments are likely to permit the creation of entirely autonomous combat systems for air, land and sea warfare.²⁵

It hardly needs to be emphasized that the use of such autonomously operating weapon systems – often plainly called “killer robots” – in armed conflicts gives rise to a considerable number of challenging questions from the perspective of international humanitarian law (for an overview see, e.g., Nowrot 2013, 19 et seq., with further references). Nevertheless, in the present context of animal rights, the only relevant issue concerns the question of how the *ius in bello* will be progressively developed in order to address these new technological developments. On the one hand, it would certainly be possible to prohibit proactively the possession and use of autonomous combat systems on the basis of respective international agreements and thus make them join the class of outlawed weapons, which include anti-personnel mines and blinding laser weapons (generally on prohibited weapons under international humanitarian law Dinstein 2010, 67 et seq.; Boothby 2009, 106 et seq.; Detter 2013, 243 et seq.). Indeed, respective initiatives aimed at or at least considering a future prohibition of lethal autonomous weapons systems have recently emerged for example at the European²⁶ as well as the global level.²⁷

²⁴ Generally on this perception see for example already ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, ICJ-Reports (1949, 174, 178: “Throughout its history, the development of international law has been influenced by the requirements of international life”).

²⁵ See, e.g., McDonnell (2012, 315: “there now is ‘massive spending’ to develop completely autonomous weapons that take ‘humans out of the loop’”); Boor (2011, 103); Conde Jiminián (2011, 90); as well as Singer (2009, 123 et seq.).

²⁶ See for example European Parliament Resolution of 27 February 2014 on the Use of Armed Drones (2014/2567(RSP)), para. 2 lit. d (“ban the development, production and use of fully autonomous weapons which enable strikes to be carried out without human intervention”).

²⁷ For respective activities at the global level see, e.g., United Nations Security Council, Report of the Secretary-General on the Protection of Civilians in Armed Conflict, UN Doc. S/2013/689 of 22 November 2013, para. 29; United Nations General Assembly, Report of the

On the other hand, in the not unlikely case that the relevant countries are unable to reach an agreement on a comprehensive prohibition of these “robots,” one might also consider, in the interest of a continued effectiveness of the *ius in bello*, the possibility and feasibility of a new accentuation of the legal principles mentioned above dealing with the attribution of responsibility for war crimes (see *supra* under 4). This could also include modifying and enlarging the scope of international humanitarian law’s application in order to engage directly and legally with at least some of these autonomous systems on the basis of a new and more inclusive understanding of the concept of legal subjectivity.²⁸ It is precisely under such circumstances, one could argue, that the international community might also be more willing to discuss a possible legal status for animal soldiers within a more comprehensive reformation of the laws of war in general and the scope of this normative regime’s application in particular.

These ideas and considerations are likely to be regarded by many readers as rather utopian, including those that are favorably disposed towards a prompt realization of animal rights in practice. Against this background, and in response to these sceptics, the present contribution concludes with two final remarks. First, realistically assessing the current chances of implementing the animal rights concept in legal practice clearly suggests the need for some kind of what might be labeled “external innovation impulse” in order to bring the issue of animal rights successfully onto the agenda of the relevant lawmaking actors in the international system. This applies first and foremost also to a respective reformation of the *ius in bello*. Second, albeit closely related to the foregoing consideration, despite all enthusiasm for the ordering idea of (political) animal rights shown by its supporters, it appears necessary and appropriately sobering to recall that also this project is still considered by most people to be quite utopian. In light of these findings it might very well be true that it is precisely the approach, argued for in this section, of linking the two so far rather unrelated visions of animal rights on the one hand and so-called “robot rights” on the other hand that has a certain potential to generate in the future a new legal reality in the realm of international humanitarian law.

Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc. A/HRC/23/47 of 9 April 2013, paras. 26 et seq.; Meeting of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Report of the 2014 Informal Meeting of Experts on Lethal Autonomous Weapons Systems (LAWS), CCW/MSP/2014/3 of 11 June 2014.

²⁸ On the debates in the literature concerning a possible legal subjectivity of autonomous systems see generally for example Kersten (2015); as well as specifically in the present context of armed conflicts Singer (2009, 403 et seq.); Krishnan (2009, 138 et seq.).

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