

De-objectifying Animals

Could they Qualify as Victims before the International Criminal Court?

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Abstract

The legal framework of the International Criminal Court does not contain any provision concerning animals. This stands in contrast with the frequency with which they appear in both trial and reparations proceedings. The silence of the legal framework is problematic insofar as the 'animal turn movement', which questions the classical understanding and treatment of animals as objects, has permeated into both the international and domestic legal spheres. This article wishes to initiate a discussion on the treatment of animals before the Court by examining whether they could qualify as victims under Rule 85(a) of the Rules of Procedure and Evidence. While the short answer to this question is an unequivocal 'no', the conclusion reached is not the purpose of the analysis. The analysis shows that animals cannot qualify as 'victims' because they are not human beings. Yet, they comfortably meet the other two criteria, namely, (a) suffering harm, which (b) results from the commission of crimes within the Court's jurisdiction. Thus, this article argues that — at least — granting animals the same treatment as human beings is no more objectionable as a matter of legal principle than granting them the status of 'things'. This calls for a prompt discussion of the regulation of animals within the Court.

1. Introduction

The short answer to the question posed by this article — whether animals can qualify as victims before the International Criminal Court (ICC or Court) — is a

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resounding ‘no’. The conclusion, however, is not the purpose of this analysis. Animals cannot qualify as victims under the *lex lata* because they are not human beings. Yet, they comfortably meet the other two criteria for victim status, namely, suffering harm as a result of the commission of crimes within the jurisdiction of the Court. Even though the adscription of rights to humans based purely on their species membership may be regarded as ‘speciesism’, this article is not meant as a piece of animal rights advocacy. The more sobering legal point that this article wants to raise is that, while animals are certainly not human beings, they are not objects either. However, it seems that the Court has to act as if they were.

In recent years, the way animals are treated has become a matter of public morality with legal implications.¹ In contrast, the ICC legal framework continues to reduce animals to things, thereby concealing their particular vulnerability to core crimes and rendering their suffering invisible and legally irrelevant. This is a problem not least because of the Court’s truth-telling function and role in counteracting those atrocities that deeply shock the conscience of humanity.

Ultimately, this article is another building block in the quest to establish an intermediate legal category standing between things and persons for non-human animals. It does so by teasing out the potential legal status of animals within the Court. Section 2 shows the extent to which animals figure in ICC proceedings and explains why the legal framework’s silence on their treatment is problematic. Section 3 describes the key implications of being labelled a victim. Section 4 examines whether animals could qualify as ‘natural persons’ in the sense of Rule 85(a) of the Rules of Procedure and Evidence (RPE). Section 5 analyses what harm animals may suffer in connection to the crimes under the jurisdiction of the Court; and, in Section 6, whether they would do so with the requisite causal link. Section 7 considers extrinsic impediments to the recognition of animals as victims.

2. The *Status quo* of Animals before the Court: Problems and Horizons

The Rome legal framework does not contain any provisions concerning animals. To date, they have been treated as mere objects following the entrenched binary conception that divides the legal world: persons and objects. In that world, only the former are bearers of rights and entitlements. The legal framework’s silence contrasts sharply with the frequency with which animals figure in cases: they have sometimes appeared as objects affected in the course of crimes (e.g. pillage) and, most prominently, they have played a part in every

1 See e.g. WTO, European Communities — Measures Prohibiting the Importation and Marketing of Seal Products, Panel Report, WTO Docs WT/DS400/R and WT/DS401/R, 25 November 2013 (EC — Seal Products) (‘WTO Seal Products Panel Report’), § 7420.

single reparations proceeding, even when the criminal conduct at hand had nothing to do with them.

For example, in the *Lubanga* case, which otherwise did not bear any connection with animals, one proposed measure included animal husbandry of ‘goats, chickens or pigs’.² With respect to female child soldiers, the legal representative of victims (LRV) requested that rehabilitation measures take into account: ‘[T]he property that the girls’ parents could have received as a bride price when the girls were married. In their culture and customs, when a young girl gets married, her bride price includes animals that are intended to be bred in order to establish a supply of livestock from which the family can draw to marry their sons.’³

The reason why animals have become a recurring theme in reparations is because the specific remedies chosen for each case need to be meaningful to the victims, that is, they need to carry actual reparative value for them. Many situations before the ICC are located in areas such as the Sahel or West Africa where animals are a key part of the cultural and economic context, as expressed by an LRV: ‘Cattle plays an important role in the family and societal relations of the victims . . . : animals allow to provide for the family, . . . a dowry at a wedding, and to guarantee an inheritance for one’s children. [Owning animals] represents an important form of social status.’⁴

Animals have featured more prominently in the *Katanga* case. The trial centred on an attack in the town of Bogoro (DRC) targeted against the Hema ethnic group. The ascribed trait of the Hema group as ‘herders by tradition’⁵ was a motivating factor for Mr Katanga’s actions. In his own words: ‘[T]he Hema . . . are graziers. They are herders. So, as regards them . . . it was said that we would be driven from our land for it to become pasture for the animals. So, that was it.’⁶

An important part of the attack against the town of Bogoro, therefore, involved pillaging animals belonging to the Hema. Mr Katanga was convicted for the war

- 2 Draft Implementation Plan for collective reparations to victims Submitted to the Amended Reparations Order of 3 March 2015 in the case against Thomas Lubanga Dyilo, *Lubanga* (ICC-01/04-01/06-3177-AnxA), Trust Fund for Victims, 3 November 2015, § 161.
- 3 Observations of Team V02 on the draft implementation plan for reparations submitted by the Trust Fund for Victims (TFV) to Trial Chamber II on 3 November 2015, *Lubanga* (ICC-01/04-01/06-3195-tENG), Legal Representatives of Victims, 1 February 2016, § 23(b). Similar reasoning was briefly acknowledged by Trial Chamber VI: see e.g. Reparations Order, *Ntaganda* (ICC-01/04-02/06-2659), Trial Chamber VI, 8 March 2021, § 237 (recalling the submission by the Appointed Experts that, in the context of ‘customary justice in the DRC, . . . in Ituri, most rural victims are familiar with a system of compensation quantified by a specific number of cows, with loss of life being negotiated with a minimum of ten cows and the burning down of a house or another property typically starting with six cows’).
- 4 Propositions des victimes sur des modalités de réparation dans la présente affaire (Article 75 du Statut et norme 38-1-f du Règlement de la Cour), *Katanga* (ICC-01/04-01/07-3720), Legal Representatives of Victims, 8 December 2016, § 19 (own translation from French).
- 5 Decision on Sentence pursuant to Article 76 of the Statute, *Katanga* (ICC-01/04-01/07-3484-tENG-Corr), Trial Chamber II, 23 May 2014, § 724.
- 6 Judgment pursuant to article 74 of the Statute, *Katanga* (ICC-01/04-01/07-3436-tENG), Trial Chamber II, 7 March 2014, § 712.

crime of pillage, sentenced to 12 years of imprisonment⁷ and his liability for reparations to the victims set at 1 million USD.⁸ In arriving at this sum, the Trial Chamber took into account the market value of cattle eliminated and ordered, *inter alia*, support for new income-generating activities for the affected community.⁹ These activities were proposed to include vocational training for animal husbandry, provision of small livestock and veterinary kits.¹⁰ The use of animals did not end there. Since cows are a totemic figure in the Hema culture, the LRV said that those individuals who had suffered the loss of a close relative should receive 'one cow with 4 teeth and a corresponding veterinary kit'.¹¹ As a result, in *Katanga*, animals figured at three different levels: as objects of the attack, as heads for calculation of damage, and as a suggested means voluntarily brought forward by the Court to redress the harm suffered by human victims.

In the *Al Mahdi* case, which revolved exclusively around attacks against historic buildings and places of worship in the world heritage town of Timbuktu (Mali), an early draft implementation plan of reparations proposed a ceremonial sacrifice of ten bulls in order to restore the sacred nature to the destroyed religious buildings, to then distribute the sacrificial meat among the poor.¹² This initiative was later abandoned in an updated plan for reparations which is currently being implemented. The updated plan includes the setting up of an economic resilience facility to overcome the harm caused by the loss of pilgrimage and tourism. Part of this economic resilience facility — funded with 1 million EUR — foresees small trade with livestock as well as the farming of cattle and fish.¹³ Just as with *Lubanga*, animals are a part of the reparations programme even though the charges and ensuing conviction against Mr Al Mahdi did not concern them at all.

That animals have entered and remained in the realm of international criminal justice *qua* objects and without qualification is problematic. This is because the 'animal turn movement', which questions the classical understanding and treatment of animals as objects,¹⁴ has permeated into both the international and domestic legal spheres, both of which may be relevant to the ICC by reason of

7 *Ibid.*, §§ 950, 957.

8 Order for Reparations pursuant to Article 75 of the Statute, *Katanga* (ICC-01/04-01/07-3728-tENG), Trial Chamber II, 24 March 2017 ('*Katanga* Reparations Order'), § 118.

9 *Ibid.*, §§ 218, 300, 306.

10 Public Redacted Document, Draft implementation plan relevant to Trial Chamber II's order for reparations of 24 March 2017 ICC-01/04-01/07-3728, *Katanga* (ICC-01/04-01/07-3751-Red), Trust Fund for Victims, 25 July 2017 ('*Katanga* Draft Implementation Plan'), § 128.

11 *Ibid.*, § 96. The number of teeth in cattle is used to determine the age of animals.

12 Public redacted version of 'Corrected version of Draft Implementation Plan for Reparations. With public redacted Annex I, ...', *Al Mahdi* (ICC-01/12-01/15-265-Corr-Red), Trust Fund for Victims, 18 May 2018 ('*Al Mahdi* Draft Implementation Plan'), § 267. This initiative was later abandoned in an updated version of the plan.

13 Lesser public redacted version of 'Updated Implementation Plan' submitted on 2 November 2018 ..., *Al Mahdi* (ICC-01/12-01/15-291-Red3), Trust Fund for Victims, 14 October 2019 ('*Al Mahdi* Updated Implementation Plan'), § 127; approved by Decision on the Updated Implementation Plan from the Trust Fund for Victims, *Al Mahdi* (ICC-01/12-01/15-324-Red), Trial Chamber VIII, 4 March 2019 ('*Al Mahdi* UIP Decision'), § 84.

14 H. Ritvo, 'On the Animal Turn', 136 *Daedalus* (2007) 118–122, at 121.

Article 21(2) and/or (3) of the Rome Statute. There is now an increasing mass of international and domestic rules which no longer considers animals as objects and, instead, affords them some degree of special consideration. For example, a World Trade Organisation (WTO) Panel affirmed in 2014 that ‘animal welfare is a globally recognized issue’.¹⁵ Animal sentience is acknowledged by the European Union in the Treaty on the Functioning of the European Union (TFEU) — whose members are all parties to the Court (and constitute approximately a fifth of all ICC States Parties). Thus, EU members are required to take animal sentience into account when formulating and implementing the Union’s agriculture, fisheries, transport, internal market, research and technological development, and space policies.¹⁶ The World Organization for Animal Health (OIE) has issued several international standards on animal welfare which address, for example, animal transport and their slaughter.¹⁷ Courts in Argentina and Pakistan have recognized legal rights of animals.¹⁸ In their civil codes, a number of States now proclaim that animals are not things but sentient beings¹⁹ and afford them, for instance, ‘legal requirements and rules of common law, reasonable restrictions, obligations and principles of law, as well as public order and morality’.²⁰ In 2018, strategic litigation against arbitrary confinement of animals in the USA led to a judicial opinion which referred to the binary division between persons and things as ‘a deep dilemma of ethics and policy that demands our attention’.²¹

In light of the principle *iura novit curia*, according to which the Court knows the law, the systemic silence on the treatment of animals in the ICC legal framework should be revisited. At a minimum, this should warrant a *prise de conscience* that the categorization of animals as mere ‘things’ which can be used and abused no longer constitutes the legal *status quo* worldwide.²² Preferably, it should lead to a discussion of the place and treatment that animals ought to be afforded in the framework of the ICC. This article wishes to initiate that stocktaking and discussion by examining whether animals can qualify as victims themselves, under Rule 85(a), and drawing some tentative conclusions as to how their interests could they be accommodated if they were.

15 WTO *Seal Products* Panel Report, *supra* note 1, § 7420.

16 Art. 13, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01 (‘TFEU’).

17 World Organisation for Animal Health, *Terrestrial Animal Health Code*, Section 7, Chapters 1–14.

18 Poder Judicial de Mendoza — Tercer Juzgado de Garantías, ‘Presentación efectuada por A.F.A.D.A. respecto del chimpancé ‘Cecilia’ — Sujeto no humano’ (3 November 2016) Expediente n° P-72.254/15 (‘Cecilia Case’); Islamabad High Court, *Islamabad Wildlife Management Board through its Chairman v. Metropolitan Corporation Islamabad through its Mayor & 4 others* (25 April 2020) W.P. No.1155/2019 (‘Islamabad Wildlife Management Board Case’).

19 See e.g. Austria: Art. 285, *Allgemeines Bürgerliches Gesetzbuch* (Civil Code); Germany: Art. 90, *Bürgerliches Gesetzbuch* (Civil Code); Switzerland: Art. 641a, Civil Code; France: Art. 515-14, Civil Code; Netherlands: Art. 2a, Section 1, Title 1, Book 3, *Burgerlijk Wetboek* (Civil Code); Czechia: Section 494, Civil Code; Catalunya (Spain): Art. 511–1(3), Civil Code.

20 Netherlands: Art. 2a, Section 1, Title 1, Book 3, *Burgerlijk Wetboek* (Civil Code).

21 New York Court of Appeals, *Nonhuman Rights Project, Inc., on Behalf of Tommy, v. Patrick C. Lavery, & c., et al.*, Judicial opinion of Judge J. Fahey in the Motion No. 2018-268, 8 May 2018, at 5.

22 S. Brels, *Le droit de bien-être animal dans le monde: évolution et universalisation* (L’Harmattan, 2017), at 13.

It is important to note that this analysis does not look into the further question whether animals could instead fit into Rule 85(b) RPE (concerning victim status of institutions and organizations, i.e. legal persons).²³ This is because the requirements to qualify as victims under this provision are rather different, and would need an entirely different legal analysis — which is a subject for future exploration.

3. The Relevance of Qualifying as a Victim

The Court operates under a general principle according to which '[a] Chamber in making any direction or order, and other organs of the Court in performing their functions ... shall take into account the needs of all victims and witnesses'.²⁴ Yet, the concept of 'victim' is only defined in Rule 85 RPE, according to which:

- a. 'Victims' means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;
- b. Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

Being considered a victim in the sense of Rule 85 RPE has far-reaching implications, three of which are recalled here.

First, victims can influence the conduct of proceedings and the truth-telling function of the trial. This is because their entitlement to participate in proceedings, foreseen in Article 68(3) of the Rome Statute, implies that their legal representatives will be allowed to: make opening and closing statements; obtain access to evidence;²⁵ question witnesses, experts and the accused;²⁶ challenge or lead evidence;²⁷ and make submissions on sentencing.²⁸ Admitting animals as victims would thus offer a means by which their suffering and, if

23 Using the term 'legal person', see *Katanga* Reparations Order, *supra* note 8, § 36.

24 See Rule 86 ICC RPE.

25 See C. Walter, 'Victims' Rights and Obligations as Regards the Case File: Access, Disclosure and Filing Submissions', in K. Tibori-Szabó and M. Hirst (eds), *Victim Participation in International Criminal Justice* (T.M.C. Asser Press, 2017) 148–171, at 149–152. See also e.g. Decision on victims' participation in trial proceedings, *Ntaganda* (ICC-01/04-02/06-449), Trial Chamber VI, 6 February 2015, §§ 55–56; PRV on Decision on Victim Participation at Trial and on Common Legal Representation of Victims, *Al Mahdi* (ICC-01/12-01/15-97-Red), Trial Chamber VIII, 8 June 2016, §§ 42–43.

26 Rule 91(3)(a) ICC RPE. See P. Haynes, 'Victims' Lawyers in the Courtroom: Opening and Closing Statements, Questioning Witnesses, Challenging and Presenting Evidence', in Tibori-Szabó and Hirst, *supra* note 25, 243–281, at 247.

27 Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, *Lubanga* (ICC-01/04-01/06-1432 OA9 OA10), Appeals Chamber, 11 July 2008, § 101; Decision on Victims' Participation, *Lubanga* (ICC-01/04-01/06-1119), Trial Chamber I, 18 January 2008, § 108.

28 On this practice, see Haynes, *supra* note 26, at 277.

appropriate, the impact on their habitat would become part of the case's narrative.

Second, the number of victims and the extent of harm they suffered is one of the factors that trial chambers will take into account to determine the scope of the convicted person's liability for reparations,²⁹ and having a new body of victims admitted through Rule 85(a) RPE would only increase this final determination.

Finally, who is considered the direct victim of a crime would also influence who can qualify as an indirect victim and, in this way also, affect the overall scope of victimization. The Appeals Chamber has explained that natural persons in the sense of Rule 85(a) RPE includes: 'direct' victims, that is, those whose harm results from the commission of the crime; and 'indirect' victims,³⁰ who suffered harm as a result of that endured by the direct victims, such as family members or those who suffered harm helping or intervening on behalf of victims to try and prevent the commission of the crime.³¹ According to the ICC, the concept of family 'may have many cultural variations, and the Court ought to have regard to the applicable social and familial structures'.³² While this cosmopolitan view was meant to encompass the non-nuclear notion of family predominant in Africa, today it may be no less applicable to considering companion animals as family members.³³

If animals were accepted within the remit of Rule 85(a), this would imply that they could be considered indirect victims for harm occasioned to their human owners and *vice versa*. The category of indirect victims of 'those who suffered harm helping or intervening on behalf of victims' would also encompass wildlife workers, anti-poaching personnel, and persons who engage in disaster relief operations. In other words, admitting animals into the definition of victims would not only benefit animals *per se*, but also extend the scope of eligible human victims.

Therefore, accepting animals as victims would profoundly affect the narrative of cases, the work of the Court — particularly the four sections dedicated

29 See M. Brodney and M. Regué, 'Five Procedural Takeaways from the ICC's 18 July 2019 *Lubanga* Second Reparations Judgment', *EJIL: Talk!*, 13 September 2019, available online at <https://www.ejiltalk.org/five-procedural-takeaways-from-the-iccs-18-july-2019-lubanga-second-reparations-judgment/> (visited 9 March 2021).

30 Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012 with Amended Order for Reparations (Annex A), *Lubanga* (ICC-01/04-01/06-3129 A A2 A3), Appeals Chamber ('*Lubanga* First Appeal Judgment on Reparations'), Annex A (ICC-01/04-01/06-3129-AnxA A A2 A3) ('*Lubanga* Reparations Principles'), § 6.

31 *Ibid.*, § 7.

32 *Ibid.*

33 See e.g. C.P. Kindregan, Jr., 'Pets in Divorce: Family Conflict over Animal Custody', 26 *American Journal of Family Law* (2013) 227–232, at 227; J. Burchette, 'The 10 Biggest Inheritances Ever Left to Pets', *Everplans*, available online at <https://www.everplans.com/articles/the-10-biggest-inheritances-ever-left-to-pets> (visited 9 March 2021); M. Specia and G. Pianigiani, 'Paid Leave When Your Dog Is Sick? Si. Italian Employer Says', *The New York Times*, 12 October 2017, available online at <https://www.nytimes.com/2017/10/12/world/europe/italy-paid-dog-care-leave.html> (visited 9 March 2021).

to victims³⁴ — the notion and scope of justice pursued by the ICC and, possibly, the perception of the Court's work outside its walls.

4. The First Requirement: Are Animals Natural Persons?

A. What is a Natural Person?

The condition for victimhood at the ICC that is bound to meet most resistance when applied to animals is also the first one: victims must be 'natural persons', a concept that is neither defined by either the Rome Statute nor its related instruments (such as the Rules of Procedure and Evidence, or the Regulations of the Court).

The 'natural' criterion distinguishes concrete beings from certain abstract entities (e.g. institutions, artificial intelligence creations) and, in this sense, 'animals, who are concrete beings, must be considered natural'.³⁵ As to 'personhood', many may think this concept refers to the biological condition of being a human being. However, personhood is 'used to explain why one entity (a person), has an enhanced moral status as compared with another (a non-person)'.³⁶ The central question then becomes: what is it in human beings that justifies their higher moral status and, thus, their entitlement to personhood to the exclusion of other natural entities?

Some schools of thought are grounded on the notion of human exceptionalism according to which there are certain characteristics peculiar to humans that render them unique and worthy of personhood.³⁷ The German Ethics Council is an example of this trend as it regards 'human's capacity for language and culture, self-awareness and capacity for moral reasoning and moral behaviour as the basis of the special position ('*Sonderstellung*') of humans'.³⁸ The problem is that human exceptionalism has been constantly disproven by science. The use of language, ethical engagement, the capacity to solve social problems, express emotions, develop a culture, and even have a sense of humour have been observed in several animal species.³⁹ The reaction of human exceptionalism to such puzzling scientific discoveries has been to raise the bar of the personhood test accordingly.⁴⁰ This is a short-sighted strategy as it

34 These are: the Office of Public Counsel for Victims (OPCV), the Victims Participation and Reparations Section (VPRS), the Victims and Witnesses Protection Section (VWS), and the Trust Fund for Victims (TFV).

35 D. Chauvet, 'Four Kinds of Nonhuman Animal Legal Personification', 8 *Global Journal of Animal Law* (2020) 1–22, at 4–5.

36 C. Foster and J. Herring, *Identity, Personhood and the Law* (Springer, 2017), at 22.

37 L. Palazzani, 'Person and Human Being in Bioethics and Biolaw', in V.A.J. Kurki and T. Pietrzykowski (eds), *Legal Personhood: Animals, Artificial Intelligence and the Unborn* (Springer, 2017) 105–112, at 110.

38 A. Peters, *Animals in International Law* (Heidelberg, unpublished manuscript, 2019), at 336.

39 L. Gruen, *Ethics and Animals: An Introduction* (Cambridge University Press, 2011), at 5–43. See also S. Donaldson and W. Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (Oxford University Press, 2011), at 26.

40 Donaldson and Kymlicka, *ibid.*, at 24–27.

entails excluding certain humans from the notion of persons such as ‘infants, the senile, the mentally disabled’ etc.⁴¹ Given the ethically unacceptable consequences of this line of reasoning, the school of human exceptionalism is now naked to the criticism of institutionalizing speciesism.

Another personhood theory is based on the notion of social contract and the capacity to be a right holder and a duty bearer. This seems to be the understanding of the International Law Commission: ‘[I]n the legal sense . . . a “person” is any being, object, association or institution which the law endows with the capacity of acquiring rights and incurring duties. A legal system may confer legal personality on whatever object or association it pleases.’⁴²

The social contract theory was used by the Supreme Court of New York to deny personhood to Tommy,⁴³ a chimpanzee kept alone inside a cage for years. The social contract theory would lead to the scenario where certain human beings, such as those mentally impaired or infants, would be denied personhood — and, potentially, rights such as the right to life — on account of their inability to be duty-bearers. It also denies personhood to animals such as Tommy, who is condemned to continue alone and caged, since the law regards him as a thing and thus no different from a table — a classification that, according to the affidavit written by a group of renowned philosophers in Tommy’s support, ‘is morally obscene’.⁴⁴

A third school of thought is anchored on the idea that personhood should be based on the possession of certain mental capabilities,⁴⁵ regardless of ascription to any particular species. It places emphasis on consciousness, cognition or practical rationality. The proponents of this theory of personhood — including Peter Singer — are amenable, and even favourable, to the idea of extending the category of personhood to animals that exhibit such characteristics. However, once again, this theory would seem to exclude some human beings such as infants, juveniles and adults in vegetative states, or those with a severe mental impairment.

This all goes to show that the notion of person before the law ‘is fraught with deep ambiguity and significant tension’ that is ‘likely to become more acute with technological and economic progress’⁴⁶ — and, one may add, with the animal turn movement. This explains the lack of ‘consistency and

41 *Ibid.*, at 27.

42 International Law Commission, Draft Articles on Diplomatic Protection with commentaries, *Yearbook of the International Law Commission*, 2006, Vol. II, Part Two, at 43, cited in Peters, *supra* note 38, at 336.

43 Supreme Court of New York, *People of the State of New York ex rel. the Non-Human Rights Project, Inc., on behalf of Tommy v. Patrick C. Lavery, Individually and as an Officer of Circle L. Trailer Sales, Inc., et al.*, 2014 WL 6802767 (4 December 2014).

44 K. Andrews et al., ‘Chimpanzee Rights: The Philosophers’ Brief’, available online at <https://philpapers.org/archive/ANDCRT-2.pdf> (visited 9 March 2021).

45 Foster and Herring, *supra* note 36, at 23–25.

46 N. Naffine, ‘Who are Law’s Persons? From Cheshire cats to responsible subjects’, 66 *The Modern Law Review* (2003) 346–367, at 346.

uniformity among legal systems in the conferment of legal personality'.⁴⁷ In the absence of a clear reason of principle, therefore, the line drawn between persons and non-persons would seem to remain a matter of choice.

B. The Choice of the International Criminal Court

The ICC has clearly espoused the human exceptionalism theory as shown by the contextual, systemic interpretation and subsequent practice around the notion of 'person'. For example, when the preamble of the Rome Statute mentions victims, it does so by making reference to 'children, women and men'.⁴⁸ Other norms of the legal framework refer to persons as a shorthand to indicate 'human being'. Article 1 of the Statute claims that the Court 'shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern'; Article 26 refers to jurisdiction over 'persons', and Rule 123 RPE relates to measures to ensure the presence of the 'person' concerned at the confirmation hearing.

Moreover, the ICC was not created in a vacuum, but rather is an offspring of international humanitarian law (IHL) which treats animals just as 'property'.⁴⁹ Its human-centric approach is, perhaps, evident in its very name (i.e. *humanitarian*). For example, the Martens clause, in any of its original or subsequent binding formulations, restricts its scope of application to human persons.⁵⁰ That said, a change may be on its way since the International Law Commission's *Draft Articles on the Protection of the Environment* in relation to armed conflicts extend the scope of the clause to the environment, a notion that includes fauna.⁵¹ As things stand now, however, the practice of the ICC indicates an exclusively human focus. The early jurisprudence of the ICC was indeed unequivocal:

The ordinary meaning of the term 'natural person', as it appears in Rule 85 (a), is in French '[un] être humain tel qu'il est considéré par le droit; la personne humaine prise comme sujet de droit, par opposition à la personne morale', or, in English, 'a human being'.⁶⁸ A natural person is thus any person who is not a legal person.⁵²

47 ILC Draft Articles on Diplomatic Protection, *supra* note 42, at 43, cited in Peters, *supra* note 38, at 336.

48 Preamble (second recital) ICCSt.

49 Art. 54(2) of Additional Protocol I refers to 'livestock' in the prohibition of attacks against objects indispensable to the survival of the civilian population. For a comprehensive review of the treatment of animals in IHL, see M. Roscini, 'Animals and the Law of Armed Conflict', 47 *Israel Yearbook on Human Rights* (2017) 35–67.

50 See e.g. Preamble, 1907 Hague Regulations; Preamble (fourth recital), Additional Protocol II.

51 Draft Art. 8bis, 'Proposed Draft Principles [on the protection of the environment in armed conflict]', Annex II to the *Second report on protection of the environment in relation to armed conflicts* by Marja Lehto, *Special Rapporteur*, UN Doc. A/CN.4/728, 27 March 2019 ('Second Report of Special Rapporteur on Protection of the Environment in Armed Conflict').

52 PRV of the Decision on the application for participation in the proceedings VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, *Situation in the Democratic Republic of the Congo* (ICC-01/04-101-tEN-Corr), Pre-Trial Chamber I, 17 January 2006, § 80 (some footnotes omitted, emphasis added).

Contrary to what this passage claims, its internal footnote 68 does not support the notion that a natural person equals a 'human being'. It refers to *Black's Law Dictionary* which instead says: '[s]o far as legal theory is concerned, a person is any being whom the law regards as capable of rights and duties. Any being that is capable is a person, *whether a human being or not*.'⁵³

Fundamentally flawed at its core or not, this interpretation has remained unchallenged at the Court. One could counter-argue that there is room to exit the exclusively anthropocentric approach, insofar as the Rome Statute includes crimes against cultural property and the environment. However, even then, the practice of the ICC has proven to be exclusively human-focused. In the *Al Mahdi* case, the only one so far which might be said not to be directly focused on crimes against human beings, the OTP made interventions that were unapologetically anthropocentric: '[attacks against buildings dedicated to religion and historic monuments] destroy the roots of an entire people and profoundly and irremediably affect its social practices and structures ... [this] is *precisely why* such acts constitute a crime under Article 8(2)(e)(iv) of the Rome Statute.'⁵⁴

Moreover, the ICC Prosecutor went on to cast an exclusively anthropocentric motivation over all crimes within the jurisdiction of the Court: '[T]he Rome Statute prohibits and punishes the most reprehensible criminal acts: ... These crimes can be perpetrated in various forms, but *they all have one common denominator: They inflict irreparable damage to the human persons* in his or her body, mind, soul and identity.'⁵⁵ Likewise, it is notable that the most widely accepted route for the ICC to address environmental crimes — beyond the relatively limited scope of article 8(2)(b)(iv) of the Rome Statute — also depends upon an anthropocentric analysis.⁵⁶

In sum, as things stand now, everything indicates that the ICC framework was written with the assumption that persons equal human beings. The next sections show that, notwithstanding animals' inability to be human beings, they can suffer harm as a result of crimes under the jurisdiction of the Court.

53 *Ibid.*, footnote 68 (emphasis added).

54 Transcript of the Confirmation of Charges Hearing, *Al Mahdi* (ICC-01/12-01/15-T-2-Red2-ENG), 1 March 2016, at 13, lines 18–22 (emphasis added).

55 *Ibid.*, at 12, lines 10–14 (emphasis added).

56 See e.g. E. T. Cusato, 'Beyond Symbolism: Problems and Prospects with Prosecuting Environmental Destruction before the ICC', 15 *Journal of International Criminal Justice (JICJ)* (2017) 491, at 498–500, 505–507; L. Prospero and J. Terrosi, 'Embracing the "Human Factor": is there new impetus at the ICC for conceiving and prioritizing intentional environmental harms as crimes against humanity?' 15 *JICJ* (2017) 509, especially 510 ('although existing international criminal law may remain essentially anthropocentric, it need not be entirely blind at least to some of the consequences of environmental harms. Indeed, the time is propitious to embrace the "human factor" in such harms, and to recognize the dependency of humanity upon its environment').

5. The Second Requirement: Can Animals Suffer Harm in the Sense of Rule 85(a) RPE?

An important feature of the ICC that fundamentally sets it apart from human rights courts is that victims' entitlement to partake in proceedings and potentially benefit from reparations does not stem from the breach of a human right, or any right for that matter, but from the sufferance of harm alone.⁵⁷ The concept of harm denotes any type of injury, damage or loss, and is normally categorized into three types: physical, moral and material.⁵⁸ Additionally, the ICC has recognized a fourth type of harm, namely, the deprivation of a fundamental right 'which could include, for example, the loss of educational opportunities, or the loss of social status'.⁵⁹ Since the existence of harm, and not of rights, is the pre-condition to obtain reparations, the question that ensues is: can animals suffer harm? And, if so, what types?

A. Can Animals Suffer Physical Harm?

Rule 85(a) RPE refers to the *suffering* of harm, as opposed to the *experience* of harm, thereby denoting some kind of subjective feeling. Thus, the law does not seem to dissociate the notion of 'pain' from that of 'harm',⁶⁰ probably because it never had to. While the way one deals with pain changes in every individual,⁶¹ we know that the suffering of pain is a universal experience shared across the human species. However, when animals come into play, the distinction between pain and harm becomes cardinal because their sentience is, although decreasingly so,⁶² still said to be in doubt.

The question that may thus ensue is this: does the Rome framework require the experience of pain for something to count as physical harm? The answer appears to be in the negative. The International Association of the Study of Pain defines pain as '[a]n unpleasant sensory and emotional experience associated with, or resembling that associated with, actual or potential tissue

57 See e.g. Reparations Order, *Al Mahdi* (ICC-01/12-01/15-236), Trial Chamber VIII, 17 August 2017 ('*Al Mahdi* Reparations Order'), § 42.

58 *Lubanga* First Appeal Judgment on Reparations, *supra* note 30, § 10.

59 See H. Dumont, 'Requirements for Victim Participation', in Tibori-Szábo and Hirst, *supra* note 25, 45–80, at 56. See also Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, *Lubanga* (ICC-01/04-01/06-1432), Appeals Chamber, 11 July 2008, § 92.

60 B.A. Rich, 'Pain and the Law', in J. Corns (ed.), *The Routledge Handbook of Philosophy of Pain* (Routledge, 2017) 403–413, at 404.

61 See P. Wall, *Pain: The Science of Suffering* (Columbia University Press, 2002).

62 For example, since the adoption of the 2012 Cambridge Declaration on Consciousness where a group of prominent scientists drafted and signed the declaration stating that a considerable amount of animals, vertebrates and invertebrates, are conscious and thus, are sentient and able to experience what happens to them. The Declaration is available online at <http://fcmconference.org/img/CambridgeDeclarationOnConsciousness.pdf> (visited 9 March 2021).

damage'.⁶³ This implies that, while pain may follow from harm (e.g. tissue damage), it is a separate phenomenon. For example, a person who has suffered damage to the spinal cord and has become paralyzed will not feel pain if their leg is stabbed, but would undoubtedly suffer physical harm.⁶⁴

If the dissociation of pain from physical harm holds true, then harm must be capable of independent and objective assessment. As such, and since animals possess bodies, they may be liable to suffer physical harm, just as humans do, in the form of lesions or wounds, such as mutilation, injuries from bullets, starvation, mistreatment, burns and, ultimately, death.

B. Can Animals Suffer Moral Harm?

Suffering moral harm refers to 'mental or emotional distress, including emotions such as anxiety and fear'.⁶⁵ The causes of suffering are manifold such as being subject to aggressive behaviour, being a witness to it, or 'loss of loved ones',⁶⁶ particularly family members.

It is being increasingly proven that animals possess personalities,⁶⁷ and that such personalities are 'remarkably similar to those found in our own species'.⁶⁸ Certain animals have emotions and empathy.⁶⁹ Thanatology research has shown that several species (e.g. rats, primates, elephants, giraffes and cetaceans) understand the death of their conspecifics and react by burying the corpse,⁷⁰ or by other complex behaviour such as staying near the deceased for extended periods of time, repeatedly visiting the place where the death occurred, or avoiding it altogether.⁷¹ Grief has been observed in geese, lion

63 See International Association for the Study of Pain, 'IASP Announces Revised Definition of Pain', 16 July 2020, available online at <https://www.iasp-pain.org/PublicationsNews/NewsDetail.aspx?ItemNumber=10475> (visited 9 March 2021).

64 S. Blackwell, *Consciousness: An Introduction* (2nd edn., Routledge, 2010), at 50, 168.

65 C. McCarthy, *Reparations and Victim Support in the International Criminal Court* (Cambridge University Press, 2012), at 96. See also International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, available online at https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (visited 9 March 2021) ('ILC Draft Articles on State Responsibility'), at 92.

66 ILC Draft Articles on State Responsibility, *ibid.*, at 92.

67 F. De Waal, *Are We Smart Enough to Know How Smart Animals Are?* (W.W. Norton & Company, 2016), at 4.

68 T. Weinstein, J. Capitanio, and S. Gosling, 'Personality in Animals', in O.P. John, R.W. Robins, and L.A. Perwin (eds), *Handbook of Personality: Theory and Research* (Guilford Press, 2008) 328–348, at 344.

69 G.M. Burghardt, 'Insights found in Century-Old Writings on Animal Behaviour and some Cautions for Today', 164 *Animal Behaviour* (2020) 241–249, at 242; M. Bekoff, *The Emotional Lives of Animals: A Leading Scientist Explores Animal Joy, Sorrow, and Empathy, and Why They Matter* (New World Library, 2007), at 4–5.

70 J. R. Anderson, 'Responses to Death and Dying: Primates and other Mammals', 61 *Primates* (2020) 1–7, at 2; See also S.Z. Goldenberg and G. Wittemyer, 'Elephant Behavior toward the Dead: A Review and Insights from Field Observations', 61 *Primates* (2020) 119–128.

71 J.R. Anderson, 'Comparative Evolutionary Thanatology of Grief, with Special Reference to Nonhuman Primates', 18 *Japanese Review of Cultural Anthropology* (2017) 173–189, at 179–180.

mothers, dolphins, orphaned elephants, gorillas⁷² and chimpanzees, who would occasionally even let themselves die.⁷³ Moreover, studies suggest that the notion of family membership is not only experienced by the animal who fulfills the role of mother, daughter, sibling and the like, but a trait that can be externally recognized by their social group.⁷⁴

Research continues to accrue hinting at a complex inner world in animals, even though this happens on a piecemeal basis and from a rather sceptical scientific stance where the widespread working assumption is that animals *lack* self-awareness. As a result, '[w]hat we observe is not nature in itself, but nature exposed to our method of questioning'.⁷⁵ Yet, by now there is 'compelling evidence that at least some animals likely feel a full range of emotions, including fear, joy, happiness, shame, embarrassment, resentment, jealousy, rage, anger, love, pleasure, compassion, respect, relief, disgust, sadness, despair, and grief'.⁷⁶

At least the last three types, when established to the requisite standard of proof, are recognized forms of moral harm.⁷⁷

C. Can Animals Suffer Material Harm?

Animals cannot own property in the legal sense of the word, but they can effectively possess things. The question is therefore whether the ICC requires actual ownership as a precondition to suffer material harm. The *Katanga* Trial Chamber used terms such as 'own' and 'belonging'⁷⁸ to refer to the material harm ensuing from the war crime of pillage. It may be that this vocabulary was just a shorthand expression to refer to a *de facto* state of affairs, and not to actual 'ownership' in the sense of formal legal title. This is consistent with the fact that the ICC understands harm independently from the deprivation of rights. It is also in line with the jurisprudence of the Inter-American Court of Human Rights — where claims for reparations are otherwise grounded on the breach of rights — where property may stand for the 'use and enjoyment of possessions'.⁷⁹

Therefore, if animals were taken seriously as a category of victims, it could be argued that their form of using and possessing land is legally relevant, even in the absence of a formal title. This is because, when animals are divested of

72 M. Bekoff, 'Animal Emotions: Exploring Passionate Natures', 50 *BioScience* (2000) 861–870, at 866.

73 J. Goodall, *Through a Window: My Thirty Years with the Chimpanzees of Gombe* (Mariner Books, 1990), at 224–225.

74 Anderson (2017), *supra* note 71, at 180. See also Z. Goldsborough et al., 'Do Chimpanzees (*Pan troglodytes*) Console a Bereaved Mother?' 61 *Primates* (2019) 93–102.

75 Heisenberg cited in De Waal, *supra* note 67, at 7.

76 Bekoff (2000), *supra* note 72, at 861.

77 McCarthy, *supra* note 65, at 116.

78 *Katanga* Reparations Order, *supra* note 8, §§ 85, 90.

79 IACtHR, *Case of Ituango Massacres v. Colombia*, Merits, Reparations and Costs, 1 July 2006, § 174. See also IACtHR, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Merits, Reparations and Costs, 31 August 2001, § 151.

their shelter or source of nourishment, they suffer similar consequences to humans who have lost their land, houses and access to food. Moreover, given that animals exclusively depend on their habitat or caregivers for their survival, being deprived of their means to live represents, in essence, an acute and exceptional form of material harm.

D. Can Animals Suffer Fundamental Deprivation of Rights?

There is no international treaty granting rights to animals, not even a treaty according them universal standards of welfare. At the domestic level, a strategic litigation movement initiated in the USA is attempting to have the fundamental right to liberty granted with respect to a series of animals (e.g. apes, elephants and cetaceans) through *habeas corpus* writs. So far, the litigation has been unsuccessful in the United States. Yet, in Colombia, in 2017, a judge first granted the *habeas corpus* writ to a bear (Chucho) and ordered his transfer to a habitat with ‘full and dignified conditions in semi-captivity’.⁸⁰ The order was quashed in 2020 by the Colombian Constitutional Court, on the grounds that the fundamental right not to be unlawfully deprived of one’s own liberty was meant for human beings.⁸¹ But in Argentina, a Court did grant — and actually enforced — the writ in relation to Cecilia, a chimpanzee that was declared to be a non-human legal person and transferred to a sanctuary in Brazil.⁸² In Pakistan, the Islamabad High Court ruled in April 2020 that, ‘[a]fter surveying the jurisprudence developed in various jurisdictions it has become obvious that there is consensus that an “animal” is not merely a “thing” or “property”.’⁸³ It held that ‘life’ is the premise of the existence of a right and that ‘like humans, animals also have natural rights which ought to be recognized’.⁸⁴

Despite these developments, the existence of animal rights remains controversial, isolated and limited to cases heard before courts, as opposed to legislative acts with a broader scope of application.⁸⁵ For now, animals do not hold fundamental rights in any international or otherwise recognized level that would come close to meeting the requirements of Article 21(2) or (3) of the

80 República de Colombia — Corte Suprema de Justicia, Sala de Casación Civil “HC4806–2017 Radicación n° 7001-22-13-000-2017-00468-02 (26 July 2017), available online at <http://static.iris.net.co/semana/upload/documents/radicado-n-17001-22-13-000-2017-00468-02.pdf> (visited 9 March 2021), at 34.

81 Corte Constitucional de Colombia, ‘Comunicado n° 03: Expediente T-6.480.577 – Sentencia SU-016/20’ (23 January 2020), available online at <https://www.corteconstitucional.gov.co/comunicados/Comunicado No. 03 del 23 de enero de 2020.pdf> (visited 9 March 2021), at 2.

82 *Cecilia* Case, *supra* note 18, at 41.

83 *Islamabad Wildlife Management Board* Case, *supra* note 18, at 58.

84 *Ibid.*, at 60. For a commentary on the judgment, see S. Stucki and T. Sparks, ‘The Elephant in the (Court)Room: Interdependence of Human and Animal Rights in the Anthropocene’, *EJIL: Talk!*, 9 June 2020, available online at <https://www.ejiltalk.org/the-elephant-in-the-courtroom-interdependence-of-human-and-animal-rights-in-the-anthropocene/> (visited 9 March 2021).

85 S. Stucki, ‘Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights’, 40 *Oxford Journal of Legal Studies* (2020) 533–560, at 535.

Rome Statute. As such, animals cannot yet be said to suffer legally cognizable harm as a result of their denial.

6. Third Requirement: Causal Link with the Commission of a Crime within the Jurisdiction of the Court

The third element of Rule 85(a) RPE requires the harm to be ‘a result of the commission of any crime within the jurisdiction of the Court’. The causal standard required involves the confluence of the ‘but/for’ and ‘proximate cause’ tests.⁸⁶ This means that, *but for* the crime, the harm would not have occurred; and that the crime is sufficiently ‘closely connected’⁸⁷ to the harm so as to make it legally appropriate to deem it to be the cause of such injury. The chain of causation would be broken when an event could not have been reasonably foreseen by the person committing the initial act.⁸⁸

The following paragraphs illustrate those Rome Statute crimes which could cause harm to animals, directly or indirectly, and evaluate whether these instances could meet the causal link to the standard required. The examples focus on crimes which clearly have the potential to affect animals. Even though intended to be as comprehensive as possible, it remains illustrative to the extent that other scenarios could undoubtedly arise in which Rome Statute crimes lead to the suffering of animals.

A. War Crimes

For the present purpose, the extensive list of war crimes in the Rome Statute can generally be divided into four categories: crimes against property, crimes against specially protected objects, crimes concerning unlawful methods of warfare, and crimes against persons (understood as human persons). Each category poses a distinctive risk to animals.

1. Harm Arising to Animals from War Crimes Against Property

Under IHL, animals are regarded as ‘property’, so they fall under Article 23(g) of the 1907 Hague Regulations according to which it is prohibited to ‘destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war’, and Article 28 according to which ‘[t]he pillage of a town or a place, even when taken by assault, is prohibited’. Similar prohibitions are incorporated in the 1949 Geneva Conventions with

⁸⁶ *Lubanga* Reparations Principles, *supra* note 30, § 59.

⁸⁷ Decision on the Matter of the Transgenerational Harm Alleged by Some Applicants for Reparations Remanded by the Appeals Chamber in its Judgment of 8 March 2018, *Katanga* (ICC-01/04-01/07-3804-Red-tENG), Trial Chamber II, 19 July 2018, § 16

⁸⁸ *Ibid.*, § 17. See also *Al Mahdi* Reparations Order, *supra* note 57, § 44.

regard to certain protected property, and civilian objects are also protected from attack by the 1977 Additional Protocols.

These prohibitions have found ample application in the ICC list of war crimes. For example, the wording of Article 23(g) of the 1907 Hague Regulations is clearly reflected in Articles 8(2)(b)(xiii) and 8(2)(e)(xii) of the Rome Statute, according to which '[d]estroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war' is a war crime in both international and non-international armed conflicts. Other war crimes applicable to international armed conflict, derived from this background in IHL, include the crime of 'extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly' (Article 8(2)(a)(iv)); 'intentionally directing attacks against civilian objects, that is, objects which are not military objectives' (Article 8(2)(b)(ii)); '[a]ttacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives' (Article 8(2)(b)(v)).

One practical example which encapsulates most of the elements of the crimes against property, except that of pillage, is the bombing of the town of Guernica (Spain) in 1937, in the context of the Spanish Civil War. The bombing, which led to a fire that lasted for days, destroyed 85% of the town, killed more than 1600 persons and injured more than 800.⁸⁹ Since the collective psyche generally does not consider animals as victims of war, the effect of the Guernica attack on animals was neither reported then, nor discussed nowadays. However, Picasso's masterpiece *Guernica* — which notably features a bull, a horse and a bird — serves as a poignant reminder of the fact that animals were no less victimized by the indiscriminate attack.

Indeed, the immediate impact of the bombs likely caused the death of stray, farmed and domesticated animals living in the town. Others may have died or been injured as a result of the ensuing fire, particularly animals locked in their barns. The town of Guernica is also surrounded by forests and is close to what is today a natural protected area, the Urdaibai estuary, home to a vast array of migratory birds. It would seem plausible that the devastation of the town of Guernica extended to its natural border area, affecting the habitat these birds and other species use to subsist, leading to their physical suffering in the best of cases, and to their death in the worst. All of these effects would satisfy the but/for and proximate case test: the immediate death of some animals happened as a direct result of the impact of the bombing. The destruction of the infrastructure and surrounding area which could have affected tied animals and the habitat in which wild ones lived, took place as a result of the use of *Luftwaffe* incendiary bombs. Therefore, in Operation *Rügen*, animals — *qua* civilian

89 E. Jara, 'El Bombardeo de Guernica en 1937, la Masacre que Inspiró a Picasso', *Historia: National Geographic*, 22 June 2018, available online at https://historia.nationalgeographic.com.es/a/bombardeo-guernica-1937-masacre-que-inspiro-a-picasso_12702/1 (visited 9 March 2021).

property — were both among the ‘civilian objects’ that rendered this attack a violation of IHL, and a constituency which suffered direct harm as a result of it.

In contrast, in the case of the crime of pillage (Articles 8(2)(b)(xvi) and 8(2)(e)(v)), the type of harm that animals suffer — and the extent to which they suffer it — is open to question and would depend on the circumstances. In the *Katanga* case, nothing indicated that animals pillaged were subsequently killed, and it rather seems that they were merely (re-)appropriated by a different owner. For domesticated animals that were already owned by someone (most likely as a food source), the change of ownership from one person to another may not cause more harm to the animal than the one it is already enduring being treated as an object. Therefore, in such cases of pillage, it would be difficult to argue that animals suffer any type of relevant harm as a result of the crime.

On the other hand, when the change of ownership clearly worsens the animal’s circumstances, then there could be harm meeting the but/for and proximate cause test. This would be the case in instances of poaching⁹⁰ — at least for the poaching of wild animals which can, nevertheless, be said to be ‘owned’ for the purpose of the Rome Statute. There, the harm caused to wild animals would vary depending on whether the poaching entailed their removal from their natural habitat or their killing. In the first case, the harm could be physical if the living conditions lead the animal to its demise, and also moral if that animal’s *type* can experience the harm for having been subtracted from its environment and social group. In the second case, the harm to animals would be their death and perhaps even the threat of extinction of species, which is a type of collective harm with which no Court dealing with humans has yet had to address, beyond even genocide.

2. Harm Caused to Animals by War Crimes Against Specially Protected Objects

Animals can suffer direct harm as a result of war crimes targeted at specially protected objects, such as medical units and personnel, cultural property and the environment. For example, the war crime of intentionally directing attacks ‘against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions’ (Articles 8(2)(b)(xiv), 8(2)(e)(ii)), and directing attacks against ‘personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping’ mission (Articles 8(2)(b)(iii), 8(2)(e)(iii)) may harm animals if they are used as means of transport in medical or humanitarian convoys.

⁹⁰ For example, elephants and rhinos are poached in the Democratic Republic of Congo (DRC) and Central African Republic (CAR) by armed groups such as the Lord’s Resistance Army and the Janjaweed. See C. Haenlein, T. Maguire and K. Somerville, ‘Poaching, Wildlife Trafficking and Terrorism’, in C. Haenlein and M.L.R. Smith (eds), *Poaching, Wildlife Trafficking and Security in Africa: Myths and Realities*, 86 Whitehall Papers (Royal United Services Institute, 2016), 58–76.

Likewise, the war crime of 'directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives' (arts. 8(2)(b)(ix) and 8(2)(e)(iv)) may harm animals if the building serves as their shelter. This would be the case for cultural and/or religious sites where animals are worshipped, such as the Karni Mata Temple in India — perhaps known more widely as the Temple of Rats — where around 25,000 black rats live and are revered. Although this war crime specifically refers to 'buildings', a reading more in line with the concept of 'cultural heritage' should encompass ancestral lands that are home to different animals' species.⁹¹ '[B]uildings dedicated to ... education ... science' could also be interpreted as including zoos and sanctuaries in their own right since they are built for such purposes. Nature reserves, to the extent that they can be considered places dedicated to an educational and/or charitable purpose, could also potentially fall within the scope of this war crime. This means that zoos, sanctuaries and natural reserves could enjoy a distinct status in addition to their status as civilian objects, making an attack against them a war crime of its own.

Directing an attack against, say, a zoo, would cause the immediate death and injury of different animals housed inside. It would also cause the decease, injury or flight of their keepers, an eventuality that would expose zoo animals to starvation and disease. In this example of a direct attack against the zoo, the but/for and proximate standard test would be met. In contrast, and unfortunately, zoo animals often die in this way when they are abandoned in the midst of armed conflicts.⁹² However, this suffering is mostly due to the lack of management and cannot be linked to an actual war crime, rendering their harm invisible to Rule 85(a) RPE.

Moving on to the only war crime expressly concerned with the environment (Article 8(2)(b)(iv)), it is important to note that, uniquely, this incorporates the causation of damage as part of its elements: 'Intentionally launching an attack in the knowledge that such attack will cause ... widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.'

This is a way of embedding the but/for and proximate test in its definition given that animals (i.e. fauna) are part of the notion of environment.⁹³ Damage to the environment of the kind and degree required by this war crime

91 See e.g. the concept of 'cultural landscapes' in the context of the Convention concerning the Protection of the World Cultural and Natural Heritage.

92 This has been reported in Yemen, Syria and Libya, to name a few. See e.g. N. Daly, 'War-Torn Yemen is Letting its Zoo Animals Starve to Death', *National Geographic*, 21 December 2016, available online at <https://www.nationalgeographic.com/animals/article/wildlife-watch-taiz-zoo-animals-starving-leopard-war> (visited 9 March 2021).

93 See International Law Commission, 'Draft Code of Crimes Against the Peace and Security of Mankind', 43 *Yearbook of the International Law Commission* (1991), at 107, § 4; Second Report of Special Rapporteur on Protection of the Environment in Armed Conflict, *supra* note 51, §§ 186–187.

would necessarily lead to the demise of animals in terms of immediate death, starvation, lack of shelter etc. However, the definition of this war crime requires a very high threshold of harm (i.e. widespread, long-term, severe and excessive) which, coupled with the fact that it only applies in international armed conflicts, makes the application of this war crime a distant reality.

The latest version of the International Law Commission's *Draft Articles on the Protection of the Environment in Armed Conflict* signals an incipient departure from such stringent conditions. The Draft Articles do this in two major ways: first, by stating that 'no part of the natural environment may be attacked, unless it has become a military objective' (principle 13). This means that any such attacks may be considered unlawful regardless of the degree of harm caused. Given that 'animals' are part of the environment, the Draft Articles could also function as a watershed to prohibit the directing of attacks against animals as such, unless they are military objectives. Second, the Draft Articles extend the scope of protection of the Martens Clause to the environment (principle 12):

In cases not covered by international agreements, the environment remains 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.

While the direction and pace of international agreements concerning animals is uncertain and slow, the dictates of public conscience with respect to the environment may be swiftly changing. This may offer some prospects of enhanced protection in the not-too-distant future.

3. *Harm Caused to Animals by War Crimes Involving Unlawful Methods of Warfare*

The Rome Statute lists a number of war crimes derived from the prohibition of using means and methods of warfare which are calculated to cause unnecessary suffering or superfluous injury.⁹⁴ These include the war crime of employing 'poison or poisoned weapons' or 'asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices' (Articles 8(2)(b)(xvii) and 8(2)(e)(xiii), 8(2)(b)(xviii) and 8(2)(e)(xiv), respectively); and that of

employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate ... provided that such weapons ... are included in an annex to this Statute ...⁹⁵

The former war crimes would likely speak to the use of chemical weapons such as Agent Orange that the United States utilized in South Vietnam. On that occasion, the US Army intended to 'eradicate the forest cover and food supply of the NLF forces'⁹⁶ with the but/for and proximate result that 'the

94 ICRC, IHL Customary Law database, Rule 70, available online at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule70 (visited 9 March 2021).

95 Art. 8(2)(b)(xx) ICCSt.

96 B. Leebaw, 'Scorched Earth: Environmental War Crimes and International Justice', 12 *Perspectives on Politics* (December 2014) 770–788, at 776.

ground was littered with decaying jungle birds and paralyzed dying monkeys. Clusters of dead fish shimmered like buttons on the surface of slow-moving streams'.⁹⁷

The rather long definition of Article 8(2)(b)(xx) — which applies to international armed conflicts only — is hobbled by the failure of ICC States Parties to designate any weapons for inclusion in the required annex. Yet in theory this crime could, for example, encompass the use of landmines. The devastating effect of these weapons on animals is already known. Landmines have 'eradicated gazelles from parts of Libya, pushed snow leopard to the brink of extinction in Afghanistan, and killed one of the few remaining male silver-backed mountain gorillas in Rwanda'.⁹⁸ The direct harm that animals suffer from this is the same as humans, that is, death and physical injury in the form of wounds and mutilation.

4. Harm Caused to Animals by War Crimes Against Human Persons

Finally, crimes against human persons may be 'double-edged sword' as far as animals are concerned. On the one hand, domesticated animals suffer indirectly when their carers are killed, injured or displaced, and become unable to look after for them. On the other hand, it has been reported that some animals thrive because 'certain conservation opportunities do occur'⁹⁹ in armed conflicts. What follows is a list of selected war crimes against humans with an obvious detrimental effect on animals.

The war crime of starvation (art. 8(2)(b)(xxv)), which involves depriving the civilian population of 'objects indispensable to their survival', may harm animals in three distinct ways. First, by making them liable to be killed as a potential source of food in order to starve civilians, or as part of 'scorched earth' strategies risking the starvation of civilians, a practice followed in World War II. Second, by being starved due to the lack of resources to feed living beings in general, akin to the events in the Yemen's Taiz Zoo where 265 animals were left starving in December 2016, forming a broader context to the starvation of the civilian population.¹⁰⁰ Last, by becoming a source of food when customarily they were not. For instance, in 2013, a Syrian imam issued

97 F.A. Wilcox, *Scorched Earth: Legacies of Chemical Warfare in Vietnam* (Seven Stories Press, 2011), at 1–2.

98 A. Gangwar, 'Impact of War and Landmines on Environment', paper presented at the conference *Landmines—Challenges to Humanity and Environment*, organized by the Indian Institute of Peace, Disarmament and Environmental Protection and Global Green Peace, 20 April 2003, available online at <http://lib.icimod.org/record/11218/files/1409.pdf> (visited 9 March 2021), at 2.

99 T. Hanson, 'Biodiversity Conservation and Armed Conflict: A Warfare Ecology Perspective', 1429 *Annals of the New York Academy of Sciences* (2018) 50–65, at 50; T.R. Lookingbilland, P.D. Smallwood, *Collateral Values: The Natural Capital Created by Landscapes of War* (Springer, 2019).

100 Daly, *supra* note 92.

a *fatwa* allowing the starving local population to eat cats, dogs and donkeys¹⁰¹ — a practice which otherwise is forbidden by Islamic law.

The crimes of wilful killing and murder or directing attacks against the civilian population (Articles 8(2)(a)(i), 8(2)(b)(i), 8(2)(c)(i) and 8(2)(e)(i)), and causing the incidental injury or death of the civilian population in a way that is clearly excessive to the concrete military advantage anticipated (Article 8(2)(b)(iv)), are the archetypal violations of, respectively, the principles of protection, distinction and proportionality. They would most certainly lead to the indirect victimization of animals to the extent they are dependent on the care of the direct victims, including death by starvation or disease of many others as a sufficiently proximate cause.

The crime of forcibly displacing the civilian population from their homes or communities is foreseen in Articles 8(2)(a)(vii) and 8(2)(e)(viii), albeit with different wording, and is applicable in international and non-international armed conflicts, respectively. Essentially, they may be regarded as the same crime. There are two imaginable ways in which animals can suffer indirect victimization as a result. One, affecting domesticated and farmed animals, would consist in leaving them behind, abandoned to roam the streets in the best of cases, or tied/caged in the worst, unable to fend for themselves.¹⁰² Another could affect wild populations of animals in a way similar to what happened in the context of the Rwandan conflict. Refugees were relocated to the Virunga National Park, a world natural heritage site located in the DRC. It was reported that there were human settlements at walking distance from the park, and that ‘every day an estimated 30,000 adults and children forage[d] in the park with their machetes, emerging with loads averaging 40 pounds’.¹⁰³ Precisely because of the threats to the habitat posed by refugees, the Park was inscribed on the List of World Heritage in Danger in 1994,¹⁰⁴ where it has remained ever since. That refugees would not only occupy but also damage this national park was foreseeable as there had already been warnings of this possibility.¹⁰⁵

B. Crimes Against Humanity

Some of the underlying acts of crimes against humanity are similar to war crimes. For example, murder and extermination (Articles 7(1)(a) and (b)),

101 S. Abedine, H. Gorani, and L. Smith-Park, ‘Syria: Reported Fatwa Allows the Hungry to Eat Cats and Dogs’, CNN, 13 October 2013, available online at <https://edition.cnn.com/2013/10/16/world/meast/syria-unrest/index.html> (visited 9 March 2021).

102 P. Beirne and C. Kelly-Huber, ‘Animals and Forced Migration’, 49 *Forced Migration Review* (2015) 97–98, at 97.

103 R. Bonner, ‘Flood of Rwandan Refugees is Destroying Ecological Treasure’, *New York Times*, 15 November 1994, available online at <https://www.nytimes.com/1994/11/15/science/flood-of-rwanda-refugees-is-destroying-ecological-treasure.html> (visited 9 March 2021).

104 UNESCO, World Heritage Committee, ‘Inscription on the List of World Heritage in Danger: Virunga National Park (Zaire)’, Decision CONF 003 IX, 12-17 December 1994.

105 UNESCO, World Heritage Committee, ‘Report of its 18th session’, WHC-94/CONF.003/16, 31 January 1995, at 21.

causing the death of human persons, would have similar effects on animals as described above in the context of war crimes. Therefore, this section only addresses two crimes against humanity that could cause a distinctive form of harm to animals: persecution and other inhumane acts.

1. Harm Caused to Animals through Persecution

The crime of persecution (Article 7(1)(g)) requires that the perpetrator severely deprives the (human) victim of their fundamental rights in a discriminatory manner by reason of religion, nationality, race, culture, ethnicity, gender or any other grounds that are universally recognized as impermissible under international law.¹⁰⁶ Animals often play an understated but key role in the cultural and/or religious identity of groups. For example, Hindus may regard cows as sacred, Muslim and Jewish religions forbid the consumption of pork and mandate specific rites and practices for killing animals which can be consumed, some Christians obey a calendar which dictates what animals should be eaten, or not eaten, at different times of the year; Western cultures consider eating cats and dogs unthinkable; and indigenous cultures may revere some native animals, and regard their killing as offensive or sacrilegious. For this reason, attacking certain animals, or forcing humans to consume certain animals, could potentially qualify as persecution if the act is considered to deprive the human person of their right to freedom of thought, conscience and religion, and to take part in their cultural life,¹⁰⁷ if performed with the requisite discriminatory intent.

The International Criminal Tribunal for the former Yugoslavia (ICTY) aptly noted the cultural significance of animals in the *Kupreškić* case. Therein, it held that the killing of animals from Muslim families was more than simply depriving the population from its property:

the house and livestock had for their owners not only economic value, but also and probably even more importantly, emotional, psychological and cultural significance ... [the livestock] in addition to their economic value, took on a symbolic significance (for instance because Croats had pigs and Muslims did not).¹⁰⁸

The harm caused to animals in these instances is not a mere but/for consequence and proximate cause of the crime of persecution, but a material element of its *modus operandi* which entails their killing, sometimes done cruelly.¹⁰⁹

2. Harm Caused to Animals through Other Inhumane Acts

'Other inhumane acts' (Article 7(1)(k)) need to be of similar character to any of the other underlying acts of crimes against humanity, and to be carried out

106 Art. 7(1)(g) ICC Elements of Crimes, § 3.

107 See Art. 18 ICCPR; Art. 15(1)(a) ICESCR.

108 Judgment, *Kupreškić*, (IT-95-16-T), Trial Chamber, 14 January 2000 ('*Kupreškić* Trial Judgment'), § 336. See also Roscini, *supra* note 49, at 46.

109 *Kupreškić* Trial Judgment, *ibid.*, § 210.

'intentionally causing great suffering, or serious injury to body or to mental or physical health'.¹¹⁰ It could be imagined, for example, that intentionally destroying the ancestral land constituting the cultural and spiritual heritage of an indigenous group, and/or killing their sacred animals, could cause severe mental suffering and be considered an inhumane act. Killing, torturing or harming anyone's animals could also lead to serious mental suffering of the human person if s/he is deeply attached to the animal from a functional and/or emotional point of view. This would be most obvious in persons with disabilities who require the assistance of animal helpers, such as guide dogs, but it could also be the case with standard persons who simply regard their companion animals as family members.

Moreover, the very concept of 'humanity' — at the heart of 'crimes against humanity' — may also bear some consideration. Such crimes may simply be interpreted as crimes against large numbers of persons, or potentially so, which therefore affect humanity itself by reason of their scale or highly organized character. This is perhaps the initial and instinctive view, based on the requirements for such crimes to be part of a 'widespread' or 'systematic' attack. But, alternatively, 'humanity' may also refer to the collective human consciousness and its shared understanding of what is considered to exceed the boundaries of acceptable behaviour, even when it is deviant ('ordinary' crimes). While of course crimes against humanity require that the 'civilian population' is attacked, as a matter of the *lex lata*, the deep offence to human values, which we are particularly forced to consider when we explore the notion of 'other inhumane acts',¹¹¹ may lead us to consider how the law could or should one day develop. For example, it might be regarded as no less reprehensible to intentionally harm or destroy animals or species that are valued by humanity as a whole, or at least a significant segment of it. For example, extermination of animals considered vulnerable to extinction, such as pandas, silverback mountain gorillas and the like. What is the damage to our humanity if we kill those whom we should cherish?

C. Genocide

In particular, two of the underlying acts of genocide may cause indirect harm to animals. 'Killing members of the group' (Article 6(a)) and 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part' (Article 6(c)). The former could lead to the disease and/or death of domesticated and farmed animals, for the same reasons explained above. The arrest warrant in *Al Bashir*¹¹² is an example of the latter case. The warrant includes the count of genocide on the basis of depriving the population from accessing sources of water. According to the OTP, villagers

110 Art. 7(1)(k) ICCSt.; Art. 7(1)(k) ICC Elements of Crimes, § 2.

111 Peters, *supra* note 38, at 293.

112 Warrant of Arrest for Omar Hassan Ahmad Al Bashir, (ICC-02/05-01/09-1), Pre-Trial Chamber I, 4 March 2009.

dug communal wells to 'facilitate access to water by both human and animals'.¹¹³ These were 'repeatedly destroyed, polluted or poisoned ... so as to deprive the villagers of water needed for survival'.¹¹⁴ That animals suffered from the same deprivation of water as a direct result of the poisoning of wells is a mere logical consequence of the criminal conduct specified.¹¹⁵

D. The Crime of Aggression

The ways in which the crime of aggression (Article 8*bis*) may be committed are manifold but, with the exception of blockades, they essentially require the use of force against the sovereignty, territory or political independence of a State by another State,¹¹⁶ in the form of invasion, bombardment, attack by armed forces, or acts of armed forces.¹¹⁷ In addition, for these acts of aggression to meet the threshold of a crime under the Rome Statute, they need to constitute a 'manifest violation' of the UN Charter by means of their character, gravity and scale. This means that crimes of aggression would tend to assume a large scale and, in turn, provoke extensive destruction. As far as animals are concerned, if such attacks affect areas where they live or that they use to sustain themselves, the harm they would endure would be comparable to the one described above in war crimes against property, but possibly in greater proportions.

The invasion of Kuwait by Iraqi forces in 1990, which is a classic example of the act of aggression, entailed the setting on fire of more than 700 oil wells. This led to environmental degradation of air and land quality, terrestrial and marine habitats and biodiversity, in a way that 'was immediate, severe and long-lasting'.¹¹⁸ The UN Security Council found that Iraq was 'liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources',¹¹⁹ and established a commission for the purpose of reparations,¹²⁰ which awarded Kuwait considerable sums of money to remedy the 'significant and

113 Summary of Prosecutor's Application under Article 58, *Situation in Darfur, Sudan* (ICC-02/05-152), Office of the Prosecutor, 14 July 2008 ('*Al Bashir* AWA Summary'), § 31.

114 *Ibid.*

115 The Prosecution also alleged that animals were stolen in the attempt to destroy the group's means of survival: *Al Bashir* AWA Summary, *supra* note 113, § 14.

116 Art. 8*bis* ICC Elements of Crimes, § 3.

117 See Art. 8*bis*(2)(a)–(g) ICCSt.

118 L. Menhinick, 'What the Environmental Legacy of the Gulf War Should Teach Us', *Oxford Research Group: Breaking the Cycle of Violence*, 18 March 2016, available online at <https://www.oxfordresearchgroup.org.uk/blog/what-the-environmental-legacy-of-the-gulf-war-should-teach-us#:~:text=More%20than%20700%20oil%20wells,km%20of%20Kuwait's%20deserts> (visited 9 March 2021).

119 SC Res. 687 (1991), § 16.

120 *Ibid.*, § 9(b)(i). This commission would be known as the United Nations Compensation Commission (UNCC).

widespread environmental damages, including loss of habitats and disturbance to ecological equilibria'.¹²¹

In sum, this section has shown that animals can suffer direct and indirect harm as a result of the commission of each core crime within the jurisdiction of the ICC. Even with this limited review, it has documented how animals have already suffered already harm as a result of the commission of core international crimes in the context of the former Yugoslavia, Rwanda, Syria or Sudan.

7. Extrinsic Impediments to the Recognition of Animals as Victims

There are compelling reasons to consider animals as victims in the sense of Rule 85(a) RPE, but for the legal obstacle — which is absolute, at least for now — that they are not human beings. However, there are also extrinsic considerations of a legal and political nature that suggest it would be premature to recognize animals as victims without careful thought and, ultimately, deliberate amendment to the Court's legal texts by the Assembly of States Parties.

At the present time, extending the scope of 'natural persons' to include animals, as a mere act of judicial interpretation, would have profound and potentially ludicrous consequences for the functioning of the Court. Myriad articles of the Statute, as well as other rules in the Court's legal framework, use the term 'person' as a shorthand for human being. Perhaps most notably, Article 25 on 'individual criminal responsibility' states that the Court shall have jurisdiction over 'natural persons'. If it was accepted that the term 'natural persons' includes animals in order to extend the protection of the law over them, then it would seem — absurdly — that they might also be subject to criminal trial?¹²² Similarly, the term 'persons' is omnipresent in the Statute's definition of crimes. If persons were to include animals, without further qualification, it would lead to the no less absurd scenario where the killing of animals during wartime would be criminalized as murder, and could potentially amount to a crime against humanity in peacetime. For all these reasons, notwithstanding the strong arguments in principle for animals to be considered 'natural persons' within Rule 85(a) RPE, this is best achieved by an amendment to the legal framework. Among other benefits, this would create a distinction between the concept of 'natural persons' in the context of victims, and

121 UNCC, 'Follow-up Programme for Environmental Awards: State of Kuwait', available online at <https://uncc.ch/state-kuwait> (visited 9 March 2021) (offering an overview of the damages paid in relation to the environment and the purpose of the environmental programmes).

122 This is not without historical precedent. See e.g. M. Simon, 'Fantastically Wrong: Europe's Insane History of Putting Animals on Trial and Executing them', *Wired*, 24 September 2014, available online at <https://www.wired.com/2014/09/fantastically-wrong-europes-insane-history-putting-animals-trial-executing/> (visited 9 March 2021).

the concept of 'natural persons' for the purposes of investigation and prosecution, and for the definition of crimes.

Outside these strictly legal arguments, other factors also indicate that treating animals as victims within the scope of Rule 85(a) RPE should be the result of a conscious, deliberative process. In particular, affording such privileged treatment to animals would most certainly be perceived by some as trivializing human suffering, and potentially an affront to those victims that fall outside the scope of situations and cases. It would be incomprehensible in some cultures and areas where the ICC operates, where animals are more traditionally seen as objects. And it might be instrumentalized by States which are vocal in expressing their opposition to the Court,¹²³ in order to attack, undermine and ridicule the Rome Statute. In short, and sadly, it is not enough that animals might with some degree of plausibility be argued to be capable of victimhood of international crimes. Reform in this area cannot come until the international community more broadly is ready to treat the idea with the seriousness it deserves.

8. Conclusion

The somehow outlandish question guiding this article has sought to put the spotlight on the fact that animals are sentient and suffer harm as a result of crimes within the jurisdiction of the ICC. It has furthermore shown that animals are already repeatedly brought into reparations schemes. The complete silence of the ICC's legal framework with regards to animals is therefore bound to become more uncomfortable the longer it is maintained. Relevant changes in international and domestic legal thinking on the position of animals may be limited, but they are neither isolated nor anecdotal: they announce a marked departure from the established *status quo*.

If animals were ever to be admitted as victims at the ICC, they would acquire the right to participate (through legal representatives) in proceedings when their interests are affected (Articles 68(3)). In practical terms, this could mean that application forms for participation and/or reparations would be filled by a human being or organization acting on their behalf, similar to the practice when a human victim is a minor or someone with impaired capacities. It would be for the Trial Chamber at hand to decide whether animal victims should be represented by the same lawyer(s) appointed for the human victims of the case. The victim animals' lawyer would be in charge of conveying, for example, that their habitats had been destroyed, their ecosystem disrupted, the extent of misery endured by farmed and city animals, and so on. For this purpose, the use of experts (e.g. ethologists, zoologists, marine biologists, veterinarians) would be appropriate to conduct scoping studies on harm.

123 See e.g. 'International Criminal Court officials sanctioned by US', *BBC News*, 2 September 2020, available online at <https://www.bbc.com/news/world-us-canada-54003527> (visited 9 March 2021).

Victim animals would also be entitled to receive reparations (Article 75). The Court could avail itself of thematic advisers through the usual recruitment channels, *amici curiae*, and/or appoint experts in the reparations phase pursuant to Rule 97(2) of the RPE in order to determine reparations for the benefit of animals. One could imagine that these could lead to collective rehabilitation programmes in the form of reforestation, the construction of animal shelters and sanctuaries, the provision of veterinary services, or the awarding of resources to zoos and natural reserves affected by the crimes. However, as far as Rule 85(a) RPE goes, it is admitted that this is a rather distant scenario.

The reduction of animals to objects at the ICC may lead to practical complications along the way. Making use of animals in reparations proceedings, in the absence of welfare standards, could expose the Court to instances of animal mistreatment. In the context of freezing property and assets belonging to the accused,¹²⁴ the lack of a regulatory framework regarding the treatment of animals could become a problem if the Court realizes that the accused in question owns animal derivatives, such as tusks and rhino horns, or live animals. This scenario could very well be the case for someone like Joseph Kony, given the LRA's involvement in poaching,¹²⁵ or even Saif al-Islam Gaddafi, who was known for having a private zoo containing lions, ostriches and camels.¹²⁶

All of this reinforces the need to address the animal question at the ICC, and sooner rather than later. It is frankly acknowledged that, for many, equating animals to victims may be stretching the boundaries of this legal notion. But, at our present stage of scientific discovery, so too is the default assumption that we must keep them in the same category as tables.

124 Art. 57(3)(e) ICCSt.

125 See e.g. Warrant of arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005, *Kony and Otti* (ICC-02/04-01/05-53), Pre-Trial Chamber II, 27 September 2005; Haenlein, Maguire and Somerville, *supra* note 90, at 71–74.

126 See e.g. Decision on the 'Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENSUSSI', *Situation in the Libyan Arab Jamahiriya* (ICC-01/11-01/11-1), Pre-Trial Chamber I, 27 June 2011. See also L. Harding, 'Gaddafi's Son Abandons his Lions in Fight for Tripoli', *The Guardian*, 30 August 2011, available online at <https://www.theguardian.com/world/2011/aug/30/gaddafi-son-abandons-lions-tripoli> (visited 9 March 2021).