

Rape, sexual violence and forced pregnancy: The expressions and consequences of reproductive violence committed during the war against nonhuman animals.

Introduction

In an article published in *Critical Animal Studies* in 2013, Cusack described in detail the sexual violence dairy cows are subject to on dairy farms. Her article provides a critique of feminists' consumption of dairy as well as a critical review of the terms rape, husbandry, and bestiality. The official definition of animal husbandry describes it as the science of breeding farm animals; a branch of agriculture involved in the production of farm animals and, the management and care of domesticated animals. For Cusack (2013) however, animal husbandry – which stems from the normative consumption of dairy - is a euphemism for “...rape and sexual slavery/trafficking” (p.25). It involves repeated non-consensual penetration, either with hands or objects, of the nonhuman animal, and non-consensual insemination for the purposes of reproduction (Cusack, 2013. See also Bourke, 2020).

In this article I build upon and extend the work of Cusack in several ways. First, I argue that we are currently engaged in a war against nonhuman animals. Second, I describe the violence(s) that take place on factory farms as War Crimes and Crimes against Humanity. The specific War Crimes and Crimes against Humanity that I focus on include, rape, sexual violence and forced pregnancy. These are listed in International Humanitarian Law (IHL) and International Criminal Law (ICL). I frame these acts, their aims, and their outcomes as the expressions and consequences of reproductive violence. It is the latter – the consequences of reproductive violence, in the form of forced pregnancy – that forms the basis of this piece. Here, drawing on Kelty-Huber (2015), reproductive violence refers to “the systematic exploitation; physical and mental violence, and trauma experienced by female farmed animals”

whose reproductive systems are controlled within the animal-industrial complex (p.4). Third, extending beyond the dairy industry, I include the experiences of sows who are also subject to these War Crimes and Crimes against Humanity. In terms of female farmed nonhuman animals, the reproductive bodies of egg-laying hens are also exploited and manipulated within the animal-industrial complex. However, given our focus on forced pregnancy, their experiences will not be reviewed here. For a detailed exploration of their experiences see PETA *21 Things the Egg Industry Doesn't Want You to See* (see also Compassion in World Farming n.d., *The Life of Laying Hens*).

Outline of the article

The article proceeds as follows. First, it outlines the relevant key arguments presented in my recent monograph, *The War Against Nonhuman Animals: A Nonspeciesist Understanding of Gendered Reproductive Violence*. One, we are currently engaged in a war against nonhuman animals; two, during this war, War Crimes and Crimes against Humanity - in the form of rape, sexual violence and forced pregnancy - are committed against human and nonhuman animals and three, as sentient beings, nonhuman animals should be granted passive legal personhood status. Following this the article addresses the three cumulative elements contained within the crime of forced pregnancy: The unlawful confinement of the victim, the forcible impregnation of the victim and the intention of the perpetrator. It demonstrates how cows and sows meet all three criteria contained within the International Criminal Court (ICC) definition of forced pregnancy.

The first element of forced pregnancy is discussed in relation to deprivation of liberty and the inability of nonhuman animals to challenge the legal status of their confinement. Additionally, the crime of sexual slavery, which also occurs during their unlawful confinement, is reviewed.

The second element focuses on the subject of consent. It draws on the literature pertaining to human and veterinary medicine as well as experiential research on nonhuman animals. When deliberating the issue of consent readers are reminded of the coercive environment and the forced nature of the impregnation, as well as the visible distress exhibited by nonhuman animals subject to this crime. The article closes by highlighting that forced pregnancy is not exclusively genocidal in nature, it can involve ‘*other grave violations of international law.*’ For cows and sows this involves rape and sexualized violence. The latter is discussed in relation to the forced separation of mother and child. In sum, the article reviews forced pregnancy in relation to the following ICC Statute: *Other Serious Violations of the Laws and Customs Applicable in Armed Conflicts not of an International Character* (See Dörmann with Doswald-Beck & Kolb, 2009). It argues that dairy cows and sows are victims of the War Crimes and Crimes against Humanity contained within this statute.

The war against nonhuman animals

In *The War Against Nonhuman Animals*, I argue that we need to view the reproductive violence and slaughter of nonhuman animals within the framework of non-international armed conflict [REDACTED] Below I will provide a summary of the contents of the book before proceeding with the focus of this piece.

Drawing inspiration from Dinesh Wadiwel’s 2015 book, *The War Against Animals* (2015), I offer practical and operational guidelines on how we might protect nonhuman animals from the violence(s) of war. I do so by offering an original analysis of non-international armed conflict as outlined in IHL. For Wadiwel (2015) the war against nonhuman animals is biopolitical in nature. It is a war that centers around life and death, as industrialized killing requires industrialized reproduction. While both elements are addressed in this article, our

focus is mainly on the latter, specifically the expressions and consequences of reproductive violence for female farmed nonhuman animals (in the book I also include the experiences of bulls and male calves, thereby offering a gendered analysis of these crimes).

Explaining the war against nonhuman animals (Wadiwel (2015) states:

The scale by which we kill and harm animals would seem to confirm that our mainstay relationship with animals is combative or at least focused upon producing harm and death. Factory farming and industrialized slaughter technologies...enable a monstrous deployment of violence and extermination.
(pp.5-6)

War, according to Wadiwel's thesis is a "phenomenon of mass or corporate organized violence that aims at total domination" (Wadiwel, 2015, p. 16). We can trace this interpretation of war to the military theorist Carl von Clausewitz who, in his book, *On War*, described war as "an act of violence to compel our opponent to fulfil our will" (von Clausewitz, 1968, p,1). Within this analysis the focus is on the *objective* of the violence (compelling the enemy to fulfil our will) rather than the *means* used to wage war. If we accept this interpretation of war then, as Wadiwel (2015) suggests, we can conclude that we are engaged in a war against nonhuman animals. I accept both perspectives outlined above: The war against nonhuman animals is biopolitical in nature and it involves complete domination of nonhuman animals. However, I move beyond rhetorical reasoning and consider how we might use key international instruments within IHL to protect nonhuman animals from War Crimes and Crimes against Humanity [REDACTED] The violence(s) that I review in the book - rape, sexual violence and forced pregnancy - are examples of War Crimes and Crimes against Humanity. As noted,

they are listed in IHL and ICL. IHL protects those who are not (or no longer) taking part in the conflict. It aims to alleviate the impact of armed conflict by restricting the means and methods of warfare (International Committee of the Red Cross [ICRC], 2004). It is also referred to as the law of war or the law of armed conflict (ICRC, 2004). The four Geneva Conventions (1949), the Additional Protocols (1977) and the ICC (formed in 1998) fall within the jurisdiction of IHL (Dallman, 2009). And finally, ICL prohibits serious international crimes and holds individuals criminally responsible for their involvement in, among other acts, the commission of War Crimes and Crimes against Humanity (ICRC, 2012). We will start by unpacking the latter.

Crimes against Humanity refer to a range of acts that are committed “as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” This includes, but is not limited to “rape, forced pregnancy... or any other form of sexual violence of comparable gravity” (see Element g of Article 7 of the Rome Statute of the International Criminal Court, 1998, p.4). War Crimes include rape, forced pregnancy and “any other form of sexual violence also constituting a grave breach of the Geneva Conventions” (see element b of Article 8 of the Rome Statute of the International Criminal Court, 1998, p. 8). War Crimes “must always take place in the context of an armed conflict, either international or non-international” (UN Office on Genocide Prevention and the Responsibility to Protect – War Crimes n.d., para 1 under Elements of Crime). The Geneva Conventions and the Additional Protocols apply to both cases of armed conflict (ICRC, 2008). They “focus on the protection of persons not or no longer taking part in hostilities” (UN Office on Genocide Prevention and the Responsibility to Protect -War Crimes n.d., para 1). The central thesis of my monograph is that nonhuman animals should be considered persons in need of protection from War Crimes and Crimes against Humanity. I arrive at this conclusion by revising the current definition of

non-international armed conflict. Unlike international armed conflicts, which comprise two or more opposing states, non-international armed conflict includes governmental forces and nongovernmental armed groups (ICRC, 2008). Elaborating on the criteria that needs to be met for a non-international armed conflict, Kathleen Lawand (of the ICRC) notes: "...fulfilment of these criteria is determined *on a case-by-case basis, by weighing up a number of factual indicators*" [emphasis added] (ICRC, 2012). Elements that are taking into consideration include, the intensity, duration, and gravity of the violence; the type of government forces, the weapons used, and the number of casualties incurred (see ICRC, 2012).

On average it will take just over 33 mins to read this article. During that time approximately 403,532 nonhuman animals were killed for food in the UK and approximately 3, 496, 662 in the US (see the Animal Kill Clock). The Animal Kill Clock also includes real-time data for the total number of nonhuman animals killed in these countries, as well as Canada and Australia (Anima Kill Clock). Based on this information and the criteria that needs to be met for non-international armed conflict (see above), I believe we should revise the existing definition of non-international armed conflict. To accommodate the situation of nonhuman animals I propose the following reformulation of non-international armed conflict: *The war against nonhuman animals involves violence committed by government and non-governmental groups against non-armed, non-combatants (nonhuman animals) within a state.* The focus is on the goal of the violence (compelling the enemy to fulfil our will) rather than the *means* used to wage war [REDACTED]

Too often nonhuman animals who die during wars waged by humans are treated as collateral damage. However, as Nocella (2015) argues, nonhuman animals are also "the casualties of an unspoken and unseen war that humans wage, and are winning, against nonhuman animals" (p.

129). Existing research on the relationship between nonhuman animals and war has focused on the following issues: The use of nonhuman animals as vehicles to transport weapons and humans (Sorenson, 2015); the use of nonhuman animals as test subjects to test weapons and train humans to be violent (Goodman, Gala & Smith, 2015; Roscini, 2017); the exploitation and use of nonhuman animals as weapons (Morrón, 2015); the killing of nonhuman animals during war (Itoh, 2010) and finally, the aftermath and impact of war on nonhuman animals (Andrzejewski, 2015). In my own work I claim that *war itself* is being waged against nonhuman animals. In other words, nonhuman animals are not the incidental victims of war, rather, they are the targets of the war.

Currently, IHL protects nonhuman animals during armed conflict when they are classified as property. Article 53 of the Geneva Convention - *The Protection of Civilian Persons in Time of War* - prohibits destruction to personal property of ‘protected persons.’ This includes nonhuman animals (Roscini, 2017, p. 8). In other words, the destruction of nonhuman animals, who are considered the private property of protected persons, is classified as a War Crime and a breach of the Geneva Conventions (Roscini, 2017). Further protections are put in place for the civilian population. For example, Article 48 of the 1977 Additional Protocols states that: “In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants” (United Nations Protocol Additional to the Geneva Conventions 1977, p.264). It is my belief that nonhuman animals should be treated as civilians/noncombatants during war, and that existing protections within IHL should be applied to them as ‘protected persons’ not the *property* of ‘protected persons.’ In order to accept that we are currently engaged in a war against nonhuman animals, and that nonhuman animals should be protected from the violence(s) of this war, nonhuman animals must be recognized as sentient beings. Extending

this argument further I posit that nonhuman animals should be afforded legal personhood status

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Animal sentience and legal personhood

In the second chapter of the book, I review the literature on animal sentience, speciesism and legal personhood before making the case that nonhuman animals should be granted passive legal personhood status. I will assume that many readers of this journal will be familiar with this literature, therefore an overview of the main points will suffice.

In her chapter, *The Rights of Sentient Beings: Moving Beyond Old and New Speciesism*, Dunayer (2013) provides a blueprint for a non-speciesist law. Among other things, this law would “accord all sentient beings a legal right to liberty – physical freedom and bodily integrity” (Dunayer, 2013, p.37). As a result, nonhuman animals would be released from captivity. To put it bluntly: It would be illegal to hold nonhuman animals captive. After reviewing the *Animal Protection Index* and the scientific and philosophical literature on animal sentience and the status of nonhuman animals (see Corbey & Lanjouw; Francione, 1997; Low et al., 2021; Regan, 1986; Singer, 1975; Wise, 2000), I proceed on the following basis: All vertebrate and invertebrate nonhuman animals with brains and nervous systems should be regarded as sentient beings. Based on this they should all be granted legal personhood. Legal personhood in the context of our discussion here means treating nonhuman animals as civilians

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This means that protections afforded noncombatants targeted during war should apply to nonhuman animals. Let us pause here to unpack this in more detail.

Treating nonhuman animals as legal persons rather than legal ‘things’ would mean that we “...stop using animals for food, entertainment, or clothing, or any other uses that assume that

animals are merely resources, and that we ultimately prohibit the ownership of animals” (Francione, 2004, p.42). There are disagreements on the subject of granting nonhuman animals legal personhood. These are often centered around following issues: ‘Equal consideration’, ‘consciousness,’ ‘autonomy and self-determination’ and the ‘sameness argument.’ Briefly, debates emerge as to whether the interests of humans and nonhuman animals should be given equal consideration, as both experience pain (Beirne with O’Donnell & Janssen, 2018; Black, 2019; Francione, 2004); whether the presence of core consciousness and practical autonomy among nonhuman animals is enough to grant them legal personhood (Benvenuti, 2016. See also Favre, 2010; Wise, 2013); and finally, whether those nonhuman animals, that are most similar to humans, should be granted the same legal protections as humans. It is my contention that this work raises more questions than it answers. Sharing the views of Kurki (2019; 2021) and Fernandez (2019), I contend the current project for granting nonhuman animals legal personhood is overly ambitious. Drawing on Kurki (2019; 2021) I believe it is possible (indeed, necessary) to ascribe nonhuman animals certain incidents of passive legal personhood, specifically the right not to be harmed, the right to personal freedom, liberty, and bodily integrity [REDACTED] In sum, if we grant nonhuman animals legal personhood, then we can apply IHL to nonhuman animals who are subject to rape, forced pregnancy and other acts of sexual violence during non-international armed conflict.

As I argue in the book, debates about granting nonhuman animals legal personhood need to be placed within a broader discussion about humanity and what it means to be human. And part of this means acknowledging the precarious and exclusionary nature of humanity. Throughout history who and what counts as human, and by extension, who is considered a legal person; with access to rights and protections, has (and continues to be) contested. Indeed, the category human is discursively constructed along racial, gendered and speciesist lines. Put another way:

discussions about what it means to be human are inseparable from discussions about racism, sexism, and speciesism. Commenting on the issue of race Syl Ko (2015/2020, p. 23) notes: “The domain of the ‘human’ or ‘humanity’ is not just about whether or not one belongs to the species *homo sapiens*. Rather...the ‘human’ or what ‘humanity’ is, [is based on] *the ideal way of being homo sapiens*...This means that the conceptions of ‘humanity/human’...have been constructed along *racial* lines. And with reference to gender Weheliye (2014, p. 135) states: “[m]an represents the western configuration of the human as synonymous with the heteromasculine, white, propertied, and liberal subject that renders all those who do not conform to these characteristics as exploitable nonhumans, literal legal no-bodies.”

One final point raised in the book that is worth repeating here: granting legal personhood to nonhuman animals requires reconfiguring what it means to be human. In this context the legal category ‘person’ is not to be conflated with the biological category ‘human.’ However, we cannot have one without the other. We cannot seek legal personhood for nonhuman animals without challenging human exceptionalism and the inherent racism, sexism, and speciesism that it is built upon ██████████ Allied to this, and in the context of what we are discussing here, a case can be made for reframing crimes against humanity as crimes against sentient beings. This would mean acknowledging that any being who has the ability to suffer and feel pain can become the target and victim of certain crimes against humanity. In the next section we will unpack forced pregnancy in relation to the ICC Statute *Other Serious Violations of the Laws and Customs Applicable in Armed Conflicts not of an International Character*.

Forced pregnancy during the war against nonhuman animals.

“Forced pregnancy is pregnancy-orientated rape, combined with the use of unlawful detention to achieve the birth of a child” (Jessie, 2006, p. 330). This is the definition used to describe an

act of intrahuman reproductive violence. Below I will review each element of forced pregnancy – the rape, the forced impregnation and the birth of the child – in relation nonhuman animals. I will demonstrate that during the war against nonhuman animals dairy cows and sows – as passive legal persons - are victims of these crimes.

The ICC defines forced pregnancy as: “[T]he unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law” (Rome Statute of the International Criminal Court, 1998, p.5). To reiterate: Forced pregnancy is a War Crime and a Crime against Humanity in non-international armed conflict. Furthermore, the ICC Statute shifts the legal framework of these crimes from focusing on the violation of the victims’ honor, to addressing harms related to bodily integrity and the negation of the victims’ sexual and reproductive agency. As Boon (2001) notes: The statute provides “a new paradigm for the international criminalization of sexual crimes - one based on broader principles of human dignity, autonomy, and consent” (pp.630-31). While it is possible to see how nonhuman animals benefit from the shift in focus from honor to bodily integrity - as noted above, under non-speciesist law, nonhuman animals would be entitled to “liberty, physical freedom and bodily integrity” (Dunayer, 2013, p.37) - the issue of consent, however, is harder to apply to the situation of nonhuman animals.

I will dissect the issue of consent in due course, first I want to address the three cumulative elements contained within this War Crime and Crime against Humanity. First, “...the victim must be unlawfully confined by the perpetrator...” Second, “...the victim must have been forcibly made pregnant.’ And third, “the perpetrator acted with one of two specific intents: [T]o affect the ethnic composition of a population, *or* to carry out other grave violations of

international law” [Emphasis added] (Amnesty International, 2020, pp.8-9. See also Boon, 2001). We will review each of these in more detail below.

1. Unlawful confinement

Forced pregnancy, as outlined above, requires that a woman be both forcibly made *and* kept pregnant, often through confinement. Under IHL (specifically, Rule 99, *Deprivation of Liberty*), “arbitrary detention and unlawful deprivation of liberty of protected persons during...non-international armed conflicts...amount[s] to unlawful confinement for the purposes of prosecuting the crime of forced pregnancy” (Amnesty International, 2020, p. 13). Additionally, from a procedural perspective, the International Committee of the Red Cross (ICRC) outlines the following: “[A]ll persons deprived of their liberty for reasons related to a non-international armed conflict must be given the opportunity to challenge the legality of the detention” (as cited in Henckaerts, J.M & Doswald-Beck, 2009, p. 352). In addition, under ICL, unlawful confinement in the context of forced pregnancy can also be established if the detained person is a victim of other crimes that involve unlawful confinement, for example, sexual slavery. To reiterate: Under non-speciesist law (Dunayer, 2013), the confinement of nonhuman animals is illegal. Based on this I make the case that nonhuman animals meet the first criteria of the ICC definition of forced pregnancy. This is based on my reformulation of non-international armed conflict [REDACTED] It is worth pausing here to unpack the three main procedural elements of the ICRC (outlined above) in more detail:

- i. ***Nonhuman animals are not able to challenge the legal status of their confinement.***

Given that nonhuman animals are unable to communicate with humans (in a way that is required/deemed sufficient in these circumstances) they cannot challenge their unlawful

confinement under IHL. We know that factory farm animals are held captive in overcrowded facilities where they are deprived of their liberty. In the UK it is estimated that over 2,000 farms use zero grazing. This means that cows, for example, are permanently kept inside or held in yards that have restricted grazing systems (Chiorando, 2021). According to the Humane League (2021) 70% of cows are kept on factory farms. They state:

Most factory-farmed cows never get to step foot outside during their production years, confined instead to indoor sheds that are often filthy and crowded. They're denied the ability to graze, lie comfortably, nurse their young, or live in socially complex herds with their offspring. (para 7)

In a similar vein, sows are confined indoors in gestation crates during their pregnancy. The crates are so small they are unable to turn around. Before they give birth, the sows are then placed in a farrowing crate. As Animal Aid (n.d.) report: “Farrowing crates are barren, metal and concrete cages, just a few inches longer and wider than the sow herself” (para 3). The sow “cannot step forwards or backwards or even turn around for the duration of her restraint” (para 3). As a result of selective breeding practices – which, for the purposes of meat consumption, results in faster-growing pigs - sows are now larger which exacerbates their confinement (Humane Society of the United States, 2009).

ii. ***They are noncombatants during this war.***

While it is important to take issue with the framing of nonhuman animals as the property of protected person during war, existing law does recognize nonhuman animals as civilian objects that should not be targeted during armed conflict.

- iii. *The detained person is a victim of other crimes that involve unlawful confinement.*

Nonhuman animals are victims of sexual slavery during their unlawful confinement. Sexual slavery is defined in the ICC Elements of Crime (2013) as:

The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature. The conduct took place in the context of and was associated with an armed conflict not of an international character. (p.6)

Based on her first-hand experience of dairy farms and auction yards in the US, Kathryn Gillespie - author of *The Cow with Ear Tag #1389* (2018) and *Sexualized Violence and the Gendered Commodification of the Animal Body in Pacific Northwest US Dairy Production* (2014) – provides a detailed account of the commodification of bovine bodies with the dairy industry. Details of her research are recounted here. Female calves are forcibly impregnated through artificial insemination at 15 months old and they give birth at 24 months. If the calf is female, she is raised on the dairy farm where she was born, sold to another dairy farm or raised elsewhere by a heifer-growing contractor (Gillespie, 2014). As Gillespie explains (2014): The calf is fed discarded or substitute milk “...and [is] weaned at 6–8 weeks of age after which she would be group housed until she reached a reproductive age. Just before weaning, she would be dehorned, vaccinated, and have any extra teats removed” (p.1326). The cycle of reproductive violence begins around 60-90 days after the cow gives birth. At this point she is

artificially inseminated and is milked throughout her pregnancy. Milking ceases 60 days prior to her giving birth. This process is repeated for years until there is a decline in her fertility, her milk production or until she suffers from lameness and/or mastitis (Brown, 2016). These physical ailments are attributed to the cycle of reproductive violence outlined above (Gillespie, 2014). “At this point, Gillespie (2014) continues, “the farmer would make a careful calculation of her profitability as a milk producer weighed against the cost of maintaining her” (p.27). Once the cow is considered ‘spent,’ she is sold for slaughter then used within the meat industry (for additional accounts of the intensification of dairy farming and its impact on the physical and mental wellbeing of dairy cows the see Clay, Garnett & Lorimer, 2020; Compassion in World Farming, n.d.; Humane League, 2021; PETA, n.d.; Shahbandeh, 2022).

At this stage it is worth noting that global milk production increased by 59% between 1988 and 2018. According to projections reported by the Organization for Economic Co-operation Development (OECD) and the Food and Agricultural Organization of the United Nations, in their *Agricultural Outlook 2021-2030* report (2021), global milk production will grow by 1.7% per year between 2021-2030 (OECD and the Food and Agricultural Organization of the United Nations, 2021). It is the fastest growing commodity within agribusiness. Cow’s milk accounts for over 80% of the milk that is produced (see Shahbandeh, 2023). This production of milk is the result of the repeated rape and forcible impregnation of dairy cows (Brown, 2016; Cusack; Gillespie, 2014, 2018; Mackenzie, 2019). The acts of reproductive violence outlined above are of a sexual nature and take place in the context of the war against nonhuman animals. As such, I argue that these acts fall within the definition of sexual slavery. We will now consider the second element of forced pregnancy: The forcible impregnation of a woman.

2. The forcible impregnation of a woman

In this section we will review the terms ‘forcibly impregnation’ and the term ‘woman’ addressing the latter first. A recent analysis of the ICC Statute determines that the term ‘woman’ should be replaced with the term ‘pregnant persons’ in order to include all individuals capable of becoming pregnant. As pointed out by Amnesty International (2020), while the Statute uses the term ‘woman’ there is no evidence to suggest that this was intended “to exclude other pregnant persons from the scope of the crime, including girls of any age or transgender or intersex persons who are biologically capable of becoming pregnant” (pp. 14-15). They go on to state: “If the essence of the crime is the denial of autonomy over a pregnancy by means of unlawful confinement... then the crime must be applied to all pregnant persons subjected to such treatment. To do otherwise would be discriminatory” (pp.14-15). They further argue that the definition must be used in line with “internationally recognized *human rights*” that should not discriminate on the basis of “age, gender or other status” [Emphasis added] (Amnesty International, 2020, p.14-15.). To avoid discriminating against nonhuman animals I count speciesism as the ‘other status’ that should be taken into consideration here. Based on my contention that nonhuman animals should be granted legal personhood, I would argue that they too, by virtue of being biologically capable of becoming pregnant, are ‘pregnant persons.’ As such, they are victims of this crime (this also applies to reproductive coercion). To exclude them is discriminatory. Based on this understanding, nonhuman animals meet this element of the second criteria of the definition of forced pregnancy. To be clear: I am not equating the situation/experiences of nonhuman animals with transgender or intersex individuals, I am simply arguing that they can be counted as pregnant persons [REDACTED]

With regard to the term forcible impregnation, in a footnote in the *Introduction to Crimes against Humanity, the ICC Elements of Crime* (2013), notes the following:

The term ‘forcibly’ is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment. (p.3)

Furthermore, the definition does not require that a person be forcibly impregnated through rape, the issue is that the victim has been impregnated against their will, through (for example) artificial insemination (Amnesty international, 2020). I make the case that dairy cows and sows are forcibly impregnated through artificial insemination, which counts as an act of rape. We will return to this shortly.

What it is evident from the War crimes and Crimes against Humanity outlined above, is the non-consensual nature of these acts. In the ICC’s *Rules of Procedure and Evidence*, Rule 70 - *Principles of Evidence in Cases of Sexual Violence* - acknowledges that certain situations preclude the victim’s ability to give genuine and voluntary consent. This includes cases where the victim has been subject to force, threat of force, or coercion (see the ICC Rules of Procedure and Evidence, 2019). Furthermore, and of relevance to our discussion here, silence or lack of resistance cannot be read as evidence of consent.

Consent

To aid our discussion on consent I will draw on the literature pertaining to human and veterinary medicine as well as experimental research on nonhuman animals. What follows is

an overview of the various debates that have arisen on the issue of whether or not nonhuman animals are capable of providing consent. We will start with medical ethics. Beauchamp and Childress (2013) outline four principles within the field of medical ethics: Autonomy, beneficence (doing good), non-maleficence (preventing harm) and justice (fairness) (Beauchamp & Childress, 2013, p. 104 as cited by cited by Ashall et al., 2018, p. 249). Research is considered ethical if it involves informed consent. Individuals capable of autonomous decision-making are believed to possess the ability to provide consent. Beauchamp and Childress (2013) suggest that to act autonomously one must be able to act intentionally, with understanding, and without controlling influences that determine their action (Beauchamp & Childress, 2013, p. 104 as cited by cited by Ashall et al., 2018, p. 249). Put simply, informed consent respects an individual's right to make autonomous decisions regarding their own body (Ashall et al., 2018). In the context of human medicine, consent is defined as: "...a voluntary, uncoerced decision, made by a sufficiently competent or autonomous person...In this sense, consent requires action by an autonomous agent based on adequate information" (Mancini & Nannoni, 2022, p. 3).

While some similarities can be drawn between human and veterinary medicine – both require informed consent – in the case of the latter, consent is provided by a third-party on behalf of the nonhuman animal patient. As Ashall et al. (2018) explain: Consent with veterinary settings upholds the idea that the nonhuman animal is the property of the owner and therefore consent protects the rights of the owner and not "the legal or moral rights enjoyed by the animal 'patient' themselves" (p.250). In this instance if the veterinarian acts without consent it would be treated as an act of damaging property. The difference between this, and cases where doctors act without the consent of their human patients, is that in the case of nonhuman animals, they are unable to consent for themselves. Consent is provided by their owner who seeks to act in

their best interests (Ashall et al., 2018). Interestingly, as Ashall et al., (2018) point out, while “non autonomous humans still possess rights over their own body which cannot be overruled by third party consent, the same situation is not true for animals” (p.252). With nonhuman animals, consent is provided by mediators for example, their owners in the case of pets or ethical review bodies in the case of other nonhuman animals (Mancini & Nannoni, 2022, p.3). Indeed, as Kantin and Wendler (2015) note, in the context of human research subjects, regardless of their ability to consent, their preferences are taken into account.

In terms of human research subjects, welfare-based preferences or agency-based preferences often inform the motivation surrounding their participation (Kantin & Wendler, 2015). The first addresses the impact the research will have on a person’s quality of life, while the latter is based on an individual’s ability to engage in intentional action based on their assessment of the situation. It is generally accepted that the welfare-based interests of nonhuman animals involved in research should be taken into consideration. Conversely, apart from a few cases (for example, those with advanced cognitive capabilities, such as Chimpanzees), determining the presence of agency-based preferences among nonhuman animals is difficult. This is because, on the whole, nonhuman animals will not possess the required level of understanding of the situation to make an informed decision. Furthermore, research carried out on nonhuman animals raises the following contradiction: The recognition that nonhuman animals can feel pain but are incapable of consenting (or otherwise) to the procedures that cause them pain (Mancini & Nannoni (2022). Russell and Burch’s (1959) principles of replacement (replacing or refraining from the use of nonhuman animals); reduction (using the minimum number of nonhuman animals) and refinement (the prioritizing of animal welfare) – the 3Rs - go some way to addressing this tension (as cited by Mancini & Nanoni, 2022, p.2). However, as Mancini and Nannoni (2022) highlight, the 3Rs ethical framework is premised on two main

assumptions: First, nonhuman animals are the objects of research rather than the subjects. And second, nonhuman animals are unable to consent to the procedures they are subject to. Departing from this position Mancini and Nannoni (2022) believe we should treat “animals as active participants in research, capable of consenting or dissenting to experimental procedures, and as stakeholders in the research process, based on the relevance of the research to their own interests” (p.2). They put forward guidelines for animal-centered research that merges the 3Rs with Beauchamp and Childress’ four principles. This facilitates a shift from viewing nonhuman animals as the instruments of research to regarding them as subjects who participate on a voluntary and autonomous basis. In an earlier publication Mancini (2017) outlined four core principles that should underpin animal-centered research: Relevance to part-takers, impartial treatment of part-takers, part-takers’ welfare prioritization and part-takers’ consent. The first three are fairly straightforward. The first stipulates that nonhuman animals should only take part in research that is beneficial to them. The second, requires that all those involved in the research should be afforded equal protection, while the third prioritizes the welfare of participants at all times (see Mancini, 2017). The fourth principle, consent, requires further deliberation.

When undertaking animal-centered research Mancini (2017) believes that researchers have a duty to obtain the consent of nonhuman animals in two ways: Through mediated and contingent consent. The former would be provided by a third-party who are able to discern and have a vested interest in protecting the welfare needs of the nonhuman animal. The latter, which is based on the consent of the nonhuman animal, requires that researchers ensure that participants can freely choose whether or not to engage in the research (Mancini, 2017). Mancini (2017) goes on to explain: “If a participant is enabled to choose the pace and modality of their

engagement with, or withdrawal from, the research process at any time...their response can provide a measure of their consent to engaging with a specific research set-up” (p. 227).

I am not entirely convinced by Mancini’s (2017) notion of mediated and contingent consent. Here I believe it is useful to draw on the work of Kantin and Wendler (2015) as well as Healy and Pepper (2021) to arrive at a more applicable interpretation of consent vis-à-vis nonhuman animals. To reiterate: It is widely accepted that nonhuman animals are sentient beings, what is more contentious is the claim that they are agentic beings (Healey & Pepper, 2021). For Healy and Pepper (2021) self-determination is bestowed to individuals who have the authority and ability to decide on a course of action. Their choice requires obligations of non-interference from others (Healey & Pepper, 2021). The authors (2021) concede that nonhuman animals have claims to self-determination, but they do not believe that animals can provide consent. In their article they attempt to work through this dilemma. Of relevance to our discussion here is the discussion they offer in response to the following question: “If animals sometimes have rights to self-determination, but cannot give or withhold consent, then when, if ever, is it permissible for us to touch other animals, hold them, bathe them, confine them, or engage them in work or in sport?” (p. 1223).

Curiously, Healey and Pepper’s analysis (2021) is informed by a rather complex and, to my mind, rather anthropocentric understanding of consent, which also differs from the definition outlined above in relation to medical treatment. The authors regard consent as a type of normative power. Here it is worth quoting them at length:

The power of consent enables agents to waive claim-rights of theirs, thereby releasing others from duties they owe to them. Thus, valid consent will

generally make an impermissible course of action permissible...An important feature of the power of consent (like other normative powers) is that the power is exercised intentionally...Specifically, to exercise the power of consent an agent must intend to waive a right and thereby give another permission. If consent requires the intentional giving of permission, it is very unlikely that we can obtain consent from animals. (p. 1231)

In lieu of animals being able to provide consent, as per their interpretation of consent, Healey and Pepper (2021) believe that animals can still communicate their preferences to us. This is through assent or dissent. Taking the notion of assent further, Kantin and Wendler (2015) argue that assent can only be obtained if researchers can communicate with nonhuman animals and that the nonhuman animal, based on a sufficient level of understanding of the situation, is able to make an informed decision as to whether they want to take part or not. They rightly observe that in most cases these criteria will not be met. Simply put, dissent is the opposite of assent. It is active resistance to a course of action that can involve either verbal or behavioral objection. For Kantin and Wendler (2015) dissent does not require a person to fully understand what is taking place, their lack of understanding may in fact be the cause of their dissent. For this reason, they believe that dissent among nonhuman animals is more achievable than assent as the latter requires a certain level of understanding.

So where does this leave us with regard to the War Crimes and Crimes against Humanity discussed in this article, specifically in relation to the unlawful confinement and forcible impregnation of sows and dairy cows? I identify the following key questions in the work of the four authors discussed above: Should we obtain the assent or dissent of nonhuman animals and when is it necessary to do so? (Healy & Pepper; Kantin & Wendler, 2015).

For Healey and Pepper (2021, p. 1236) assent, like consent, must be obtained in all situations where nonhuman animals have a right to self-determination. While they concede that the full range of situations where this applies is “indefinitely varied,” and “beyond the scope of their paper,” they do note, however, that the “weightier the interests at stake, the more demanding the validity conditions are likely to be.” In sum they believe that humans must be sure that the nonhuman animal they are engaging with understands the implications of what is required of them and that they freely consent to taking part in the interaction. And for Kantin and Wendler, the fact that nonhuman animals are unable to attain the requisite level of understanding of the research setting should not preclude researchers from soliciting their preferences. As noted above, the precedence with human research subjects is to consider the preferences of all participants regardless of their cognitive capabilities. Indeed, even in cases where human subjects are unable to provide consent, researchers are still required to obtain consent. Therefore, “the inability [of nonhuman animals] to provide informed consent does not provide a justification for failing to take into account their preferences regarding whether they participate in research” (Kantin & Wendler, 2015, p. 460).

My response to these questions is informed by the literature reviewed above as well as the terminology included in the following ICC documents: *Elements of Crime* (2013) (specifically footnote 5 which addresses the term forcibly) and *Principles of Evidence in Cases of Sexual Violence* (see ICC, 2019 Rules of Procedure and Evidence).

With regard to the literature on consent, I identify the following as noteworthy: Nonhuman animals are treated as property in medical settings; the welfare of nonhuman animals is, to a certain degree, taken into account within research settings; and finally, there is an agreement

that anthropocentric notions of consent must be adapted to fit the situation of nonhuman animals, with notions of assent and dissent offering the most applicable alternatives. Following Kantin and Wendler (2015) I believe that, on the whole (but not always), it is easier to determine whether a nonhuman animal dissents rather than assents to a certain course of action. However, to truly dissent from said course of action one must have full knowledge/understanding of what it is they are dissenting from.

I would argue that things become less contentious when we consider the language of the aforementioned ICC documents. As a reminder: In terms of forcible impregnation, the phrase forcibly, is not solely based on physical force. It can, among other things, include a person taking advantage of a coercive environment. I would suggest that the notion of forcibly impregnating persons capable of becoming pregnant (and by extension, holding them captive) overrides debates about whether a nonhuman animal is capable of assenting or dissenting. Furthermore, the fact cows, for example, are restrained while they are artificially inseminated to my mind belies the notion of consent. That said, if a cow does not dissent from forced pregnancy, as the evidence presented above demonstrates, she clearly dissents from having her child removed from her. Therefore, to return and elaborate on the point made above, assent or dissent for any kind of (violent) act, can never be fully given because the full extent of the crime can never be grasped by the nonhuman animal.

Finally, the *Principles of Evidence in Cases of Sexual Violence* notes that silence cannot be read as evidence of consent (see the ICC Rules of Procedure and Evidence, 2019). Although here I suggest contemplating the following by Catharine MacKinnon: “Who asked the animals?” And: “Do animals dissent from human hegemony [and dominance]?” In response MacKinnon states: “I think they often do. They vote with their feet by running away. They bite

back, scream in pain, withhold affection, approach warily, fly and swim away” (MacKinnon, 2004, p. 270 as cited in Painter, 2016, p. 332).

We now turn to the third and final element of the ICC definition of forced pregnancy: The intention of the perpetrator.

3. The intention of the perpetrator

According to Jessie (2006, p. 336) “[t]he ultimate goal of forced pregnancy campaigns is to destroy, in whole or in part, a national, ethnical, racial or religious group. Forced pregnancy campaigns...” This statement by Jessie requires qualification. Forced pregnancy, like rape, *can* constitute the crime of genocide however, as per the ICC definition of forced pregnancy, the intention can also be based on “carrying out other grave violations of international law” (Rome Statute of the ICC, 1998, p.5). It is the latter (*other grave violations of international law*) that I want to focus on. The ‘core’ crimes listed under International Law include the crime of Genocide, War Crimes, Crimes against Humanity, and the Crime Aggression. As we have established, rape, sexual slavery, or any other form of sexual violence are listed as War Crimes and Crimes against Humanity. Under article 7 of the Rome Statute, Crimes against Humanity also refer to: “Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health” (Rome Statute of the International Criminal Court, 1998, p.5). Based on this I propose the following revised definition of forced pregnancy:

The unlawful confinement of a person forcibly made pregnant, with the intent of carrying out inhumane acts that cause great suffering, or serious injury to

body or to mental or physical health. Rape, sexual slavery, and other forms of sexual violence are used in the commission of this act. All of which are grave violations of International Law.

Emphasis needs to be placed on the word *can*. To put it another way, forced pregnancy is not exclusively genocidal in nature, it can involve other crimes that violate international law. As we have dealt with the issue of sexual slavery, I will limit the discussion below to rape and sexualized violence. Both are listed under ‘*other grave violations of international law*.’

The ICC Elements of Rape

In her article Cusack (2013) draws on the revised FBI Uniform Crime Reporting definition of rape when describing what takes place on factory farms. In my own work, based on my belief that we are currently engaged in a war against nonhuman animals, I propose we draw on the definition of wartime rape outlined in the ICC. In the ICC’s *Elements of Crimes* (2013), the following definition of rape is provided:

The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim...with a sexual organ, or...with any object or any other part of the body. The invasion was committed by force, or by threat of force or coercion...or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent. (p.5)

Invasive non-consensual methods of penetration (both vaginal and rectal) are used to impregnate dairy cows (Cusack, 2013; Mackenzie, 2019). This includes the use of the ‘rape rack.’ This device forcibly restrains the cow with chains while she is forcibly impregnated artificially or by a bull (Bourke, 2020; Cusack, 2013; Shuchat, 2016). This procedure is referred to as recto-vaginal rape (Vandermark, Salisbury & Boley 1951 as cited in Cusack, 2013, p. 27). The process involves the worker inserting one arm into the rectum of the cow, in order to locate the cervix, while using the other arm to insert the artificial insemination gun into the cow’s vagina. During this time the cow is restrained by the rape rack. The rod-like gun contains bull semen. It is forced into the cow until it reaches her cervix where the semen is injected into her uterus (Shuchat, 2016. See also Gillespie, 2014). Sows (female pigs) are exploited in a similar way to dairy cows during routine animal husbandry practices. At around 6 months-old they are repeatedly impregnated through artificial insemination with an insemination rod.

Sexualized violence – the separation of mother and calf

Halbmayr (2010, p. 30) posits that “violent acts can be understood as sexualized if they are directed at the most intimate part of a person and, as such, against that person’s physical, emotional, and spiritual integrity.” In the book I argue that the experiences of dairy cows can be placed within this framework of sexualized violence, specifically the impact on the physical, emotional, and spiritual integrity of these nonhuman animals [REDACTED]

Within the first 12 hours of being born 97% of calves are taken from their mothers (Brown, 2016). This forced separation causes the cow great distress, and they will cry and bellow for days, sometimes weeks, after their calves have been removed from them (Cusack, 2013; Gillespie, 2014; Joy, 2020 Shuchat, 2016). Industrialized capitalism informs this forced

removal of the calf from its mother: Once the calf is removed from its mother the milk can be retained for human consumption. Indeed, the milk produced for human consumption far outweighs the milk cows would produce for their calves (Humane League, 2021). For example, “[i]n the US, the average dairy cow produces more than 7.5 gallons of milk per day. If she was producing just enough to feed her calf, a dairy cow would only produce about one gallon of milk per day” (Compassion in World Dairy Farming, n.d. para 3). To put it another way: Despite the decrease in the number of cows on dairy farms in the US in 2017, compared with 1950 (an estimated 12 million fewer), milk production has increased from “116 billion pounds of milk per year in 1950 to 215 billion pounds in 2017” (see PETA and their article *Cow’s Milk: A Cruel and Unhealthy Product* para 5).

I interpret this forced separation as an assault on motherhood. For Aoláin (2000) the separation of children from their mothers is a gender-based violation and an assault on the mother’s bodily integrity. It is my contention that dairy cows experience this destruction of motherhood. Furthermore, I would frame this assault as a form of reproductive coercion, where the involuntary separation of mother and calf deprives the mother of her personhood and her intersubjective relationship with her calf [REDACTED]. In a similar vein, sows are also separated from their piglets after giving birth. Typically, the weaning process takes around 3 months; however, piglets are often removed after as little as three weeks. Once removed the sow is forcibly impregnated again (Animal Aid, n.d.). As with cows, this separation of mother and baby causes great distress to both the sow and the piglet.

To meet the increased demand in milk, I argue that grave violations of international law (as outlined above) are carried out during the war against nonhuman animals. The intensification of dairy farming means that cows are subject to genetic manipulation, as well as antibiotic and

hormonal treatment. Their natural diets of grass are substituted with diets that are unnatural high in protein to fulfil the demand for dairy (PETA - *Cow's Milk: A Cruel and Unhealthy Product*). A similar trend takes place within the meat industry. With regard to gestation and farrowing crates (discussed earlier), these are, as the Humane League (2022) point out, “standard in the multi [billion-dollar] pork industry, which views mother and baby pigs as mere products -a way to make the most profits at the pigs’ expense” (para 13). In sum, these measures, that are put in place to facilitate the industrialized reproduction of nonhuman animals within the animal industrial complex, underscores the intention of the perpetrator.

Conclusion

The war against nonhuman animals is based my reformulation of non-international armed conflict. It involves *violence committed by government and non-governmental groups against non-armed, non-combatants (nonhuman animals) within a state*. In this article I focused on the following acts of violence: Rape, sexual violence and forced pregnancy. The article argues that these War Crimes and Crimes against Humanity (that is, the expressions and consequences of reproductive violence) are committed against person’s capable of becoming pregnant: Dairy cows and sows. As presented in this piece, in order to protect nonhuman animals from this species war we must recognize them as sentient beings and as a group who should be afforded legal personhood status. It was demonstrated that, as non-combatants/civilians during this war, female nonhuman animals – who are exploited due to their reproductive capabilities – meet the three criteria outlined in the ICC definition of force pregnancy. The unlawful confinement, the forcible impregnation and the intention of the perpetrator were discussed in relation to the following ICC statute: *Other Serious Violations of the Laws and Customs Applicable in Armed Conflicts not of an International Character*. Emphasis was placed on both the nature (deprivation of liberty) and implications (sexual slavery) of the unlawful confinement; the

forcible and non-consensual nature of the violence(s) inflicted; and lastly, the aim of these acts was considered in relation to ‘*other grave violations of international law*:’ Rape and sexualized violence. The latter was discussed in relation to the forced separation from mother and child.

Currently nonhuman animals are classified as the *property* of ‘protected persons’ during war. We must replace this classification and treat nonhuman animals as protected persons’ in their own right. Once we have done this, we can apply IHL to the situation of nonhuman animals to restrict the means and methods used during this war. My hope is that the arguments presented here (and elsewhere, see [REDACTED] brings us a step closer towards developing a non-speciesist understanding of reproductive violence which, in turn, moves us closer to ending the war against nonhuman animals.

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