

GGE on LAWS - 2019 1st Week
Challenges to IHL - Item 5 (a)

Statement by Brazil

"Mr. Chair,

International Humanitarian Law is at the heart of the CCW. The Convention is predicated on the principle that the "right of parties to an armed conflict to choose methods and means of warfare is not unlimited". The decision to negotiate and adopt a humanitarian convention with a flexible framework to deal with specific weapons systems was taken under the premise that the cardinal principles of IHL - such as precaution, distinction, proportionality, military necessity and humanity - always apply, but may need to be further articulated and specified, in a legal manner, to ensure compliance. As technological development quickly accelerates and is weaponized, this need becomes ever more patent.

The use of autonomous technologies in weapons systems raises several challenges to the current understanding of IHL and IHL compliance, most evident from the fact that current law has been developed with the assumption that the human is the primary and final agent in the application of force. As per its own nature, the legal requirements of IHL can only be interpreted and made effective by a human being. The underlying question is then what kind of functions are most sensitive and what level of control is necessary for the human judgement on the lawful application of force to be effective.

This is most evident within the targeting cycle, including the decision to engage. The idea that particular structures, vehicles or persons can be determined as lawful targets and attacked on the basis of generic models or parameters, without meaningful human participation, is highly problematic. The application of IHL is very much context based and predicated on value judgements which have at its core the inherent worth of human life. A combatant can be incapacitated or surrender at a moment's notice; the assessment of proportionality between the intended military goal and risks posed to civilians in an operation cannot be ascribed to computational calculations; the risk of unacceptable discriminatory bias embedded in datasets used to inform machine decision-making is all too real to be discarded or considered a minor glitch to be corrected by trial and error.

A commander will always be ultimately accountable for violations of IHL during military operations under its purview. This notwithstanding, the causal relation between the decisions and acts of the commander and operators and its effects on the battlefield must remain credible, lest we risk a dilution of the very concept of accountability as legal answerability over one's actions and choices. In other words, factual responsibility must remain commensurate with legal accountability, otherwise the human commander or operator ends up as a mere legal scapegoat in case anything goes wrong, instead of an agent which takes consequential decisions, for good or bad, and responds for them. This WOULD RAISE ISSUES CONCERNING THE

APPLICATION OF THE PRINCIPLE OF NO LIABILITY WITHOUT FAULT IN CRIMINAL LAW, PRESENT IN ALL LEGAL TRADITIONS, and could easily give rise to legal disputes and challenges in actual legal procedures and litigation.

IHL fully applies to all weapons systems, including those with autonomous functions. IHL is not, however, as any body of law, frozen in time and indifferent to historical changes and technological developments. Concerns over cruel treatment of combatants and unacceptable harm to civilians gave rise to IHL as we know it today. Those ethical and moral concerns underpinning the legal edifice erected by our predecessors have been neatly incorporated into the legal mechanism known as the Martens Clause, whereby the "dictates of the public conscience and the principle of humanity" remain explicit sources of international law to deal with new developments and realities in how nations conduct armed conflict. The Martens Clause is, therefore, of extreme relevance when we discuss the ethical and humanitarian impact of incorporating autonomy features in weapons systems, and is a most valuable guide for elaborating new law for new phenomena.

Brazil acknowledges the importance of weapons reviews in order to support compliance with IHL in the use of novel weapons systems, both under Article 36 of Protocol II to the Geneva Conventions and as a corollary of customary international law. We support exchanges of good practices on national implementations measures relevant to the issue at hand and see value in continuing the conversation, multilaterally as well as in a bilateral and plurilateral basis. National implementation measures are, however, not enough to answer the wide gamut of questions raised by these new technologies, which demand effective international treatment. Brazil believes the best response and optimal result of the GGE is the negotiation of an additional protocol on LAWS with a positive obligation to ensure meaningful human control over all weapons systems.

We are of the view, in this regard, that the CCW is the most appropriate forum to deal with the issue of LAWS and has all the tools to address the challenges raised by it in a comprehensive manner, including legal, moral and military perspectives."