

Lethal Autonomous Weapons Systems, Human Rights and Ethics

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There is a position, held by some, that is opposed to addressing the matter of Lethal Autonomous Weapons Systems, Human Rights and Ethics at an early stage and, a fortiori, to negotiating a Treaty that would regulate the use of Lethal Autonomous Weapons Systems (LAWS). One of the arguments is that International Humanitarian Law already contains the necessary and appropriate means and norms¹ and that these systems, although not yet deployed, would not per se, be inconsistent with International Humanitarian Law and International Human Rights Law².

During the discussions in 2014, chaired by France, and in a series of studies and papers, it has been put forward that LAWS do not necessarily pose an immediate threat to Human Rights and to International Humanitarian Law. The case is being made that developing and deploying systems that use lethal force without direct human intervention would be acceptable, given that the decision of its use will not be influenced by emotions proper to human nature, such as fear, hate, empathy or mercy.

On the other hand, it has been argued that the human capacity of choice between right and wrong, on which the principle of humanity in International Humanitarian Law is based, is one of the necessary basic rules that govern and should continue to govern the conduct of hostilities. This principle includes the possibility and the willingness to reduce the capacity to use armed violence, as well as to limit its detrimental effects on security and health. Thus understood, the principle of humanity encompasses humanitarianism, morality, development, human rights and the security of the individual. It constitutes one of the core principles of International Law, in general, and of International Humanitarian Law, in particular.³

In line with the above argumentation, it is reasonable to think that the proportionality principle may be placed in jeopardy with the use of lethal force by autonomous machines, inasmuch as the prevailing legal interpretations of the said principle are explicitly grounded on concepts such as “common sense”, “good faith” and the “rule of the reasonable military commander”.⁴

Therefore, an issue in the debate has to do with human beings and their rights in the context of technologies that surpass the boundaries of human capacities and aspirations.

¹ Human Rights Watch and Harvard Law School International Human rights clinic; Losing Humanity: the case against killing robots, November 2012, p. 4 and AUTONOMOUS WEAPON SYSTEMS: TECHNICAL, MILITARY, LEGAL AND HUMANITARIAN ASPECTS EXPERT MEETING GENEVA, SWITZERLAND 26 to 28 MARCH 2014. ICRC Report, pages 20 - 22.

² Cf for instance Michael N. Schmitt; Autonomous Weapon Systems and International Humanitarian Law: A Reply to the Critics. University of Exeter Law School; Harvard Law School (PILAC); Naval War College - Stockton Center for the Study of International Law, December, 2012

³ Robin M. Coupland; The principle of humanity, what it means and how it influences international law. IRCC Review, December 2001. Vol. 83N^o 844

⁴ Christof Heyns; Report of the Special Rapporteur on extrajudicial, summary and arbitrary executions, 23rd Session of the HRC, 2013 (A/HRC/23/47/para. 72.

To help address this issue, it is clear that, in our ongoing debate, the Martens Clause⁵ - based upon *“the usages established between civilized nations, the laws of humanity and the requirements of the public conscience”*, is an analytical and legal resource applicable to LAWS, along with all subsequent legal and political developments of the International Humanitarian and Human Rights Law. This holds true at least at these initial stages of the analysis and diplomatic reflections we are undertaking.

Already back in 1996, the International Court of Justice, in its advisory opinion on the legality of the threat or use of nuclear weapons, referred to the Martens Clause stating that “it has proved to be an effective means of addressing the rapid evolution of military technology”. This is a valid criterium that should necessarily be applied to an emerging technology, whose consequences are hard to predict, although it would need to be considered in varying degrees with regard to nuclear weapons and to this new type of weapons.

Along these lines and with a prospective political vision from a Human Rights perspective, the Special Rapporteur on Extrajudicial, summary or arbitrary executions, Mr. Christof Heyns, makes the point in his report that “it should be recalled that aeroplanes and drones were first used in armed conflict for surveillance purposes only, and offensive use was ruled out because of the anticipated adverse consequences. Subsequent experience shows that when technology that provides a perceived advantage over an adversary is available, initial intentions are often cast aside. Likewise, military technology is easily transferred into the civilian sphere. If the international legal framework has to be reinforced against the pressures of the future, this must be done while it is still possible”.⁶

In that same debate, and as mentioned by Mr. Heyns⁷, Human Rights have been considered as an additional element, with the focus being on IHL. Nevertheless there are arguments that consider that Human Rights are applicable and should be respected in the case of use of force at any time. They are complementary to IHL in case of armed conflict and, where there is no such conflict, Human Rights norms should apply exclusively. This has also been underscored by the International Court of Justice, which considers that both branches of International Law are to be taken into consideration for the protection of the human being and that the protection offered by human rights conventions does not cease in case of armed conflict.⁸

⁵ The Martens Clause is part of armed conflicts since it was first included in the Preamble of the 1899 Hague Convention II, Laws and Customs of War on Land: “Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience”. The clause is based upon – and owes its name to – a declaration read by Professor von Martens, the Russian delegate to the 1899 Hague Peace Conferences.

⁶ Christof Heyns; Report of the Special Rapporteur on extrajudicial, summary and arbitrary executions, 23rd Session of the HRC, 2013 (A/HRC/23/47) par. 29

⁷ Christof Heyns; Autonomous weapons systems and human rights law, presentation made at the informal expert meeting organized by the state parties to the Convention on Certain Conventional Weapons 13 – 16 May 2014, Geneva, Switzerland.

⁸ Advisory opinion of the International Court of Justice on the legal consequences of the construction of a wall in the Occupied Palestinian Territories, July 2004, A/ES-10/273 para 106.

After the Meeting of Experts in 2014 and on the basis of analysis made by specialized centers, it has become clearer that the battlefield use of LAWS would potentially affect Human Rights, including the right to life, the right to dignity, the right to freedom and security and the prohibition of torture and other forms of cruel, inhumane or degrading treatment.⁹

It should be noted that Human Rights are based on the principle of universality and timelessness, as established in the Universal Declaration of Human Rights and reiterated at the Vienna World Conference on Human Rights in 1993, which agreed that all States have the duty, independently of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms as the birthright of all human beings.

The report of the Meeting of Experts by French Ambassador Jean-Hugues Simon-Michel¹⁰ raises the issue of the ethical and sociological aspects of the interrelationships between machines and humans and of the social acceptability of autonomous technologies. The question arising therefore is: *What will be the impact of the development of lethal autonomous technologies on human dignity and on the ethics that underlie the dilemma of delegating to a machine the right to decide on the life and death of a human being, who is protected by norms, customs and human conscience?*

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⁹ Cf. inter alia, Geneva Academy of International Humanitarian Law and Human Rights; Autonomous Weapon Systems under International Law, ACADEMY BRIEFING No. 8, November 2014, p. 11.

¹⁰ Report of the Chairman of the Meeting of Experts on LAWS (CCW/MSP/2014/3), p. 4 and 5.