The concept of “meaningful human control”

The perspective of weapons that may in the future take decisions about the use of force without human intervention poses a challenge to international humanitarian law. The concept of “meaningful human control” was brought up in this context, which should not be seen as introducing a new legal norm, but as evaluating LAWS on the basis of the existing standards in international humanitarian law. The use of these weapons has to be assessed on the basis of existing norms and principles of international humanitarian law, from which the necessity of a certain “human control” can be derived.

The basis for the lawfulness of new weapons can be found in Article 36 of the First Additional Protocol to the Geneva Conventions which stipulates the obligation of every state party “to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party”. This obligation covers obligations under treaties and customary international law, inter alia the prohibition of indiscriminate attacks as well as the prohibition to cause avoidable injury and unnecessary suffering.

New weapons need to comply inter alia with the following three fundamental IHL principles, namely the principle of proportionality, distinction and precaution.

Under the proportionality principle, the evaluation of military advantage has to be assessed against the potential incidental loss of civilian life, injury to civilians or damage to civilian objects that may be expected from an attack and that must not be excessive in relation to the concrete and direct military advantage. It is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her could have expected excessive casualties to result from the attack. Proportionality thus requires a distinctively human judgement (“common sense”, “reasonable military commander standard”). The assessment must be based on information reasonably available not only at the time of the planning of the attack, but need to remain valid throughout the weapon’s use.

The principle of proportionality requires therefore an immediate temporal link between the assessment and the factual deployment of the weapon. LAWS usually are programmed well before the weapon actually attacks. Such a correct evaluation under the proportionality principle can be a particularly challenging or impossible task in populated areas where the situation changes rapidly. Under these circumstances it would be impossible to weigh anticipated military advantage against the expected collateral harm. Whether an attack complies with the rule needs to be assessed on a case-by-case basis, depending on the
specific context and considering the totality of circumstances and should be done in a temporal proximity to the attack.

IHL further prohibits attacks on persons hors de combat under the principle of distinction. Although the ability of LAWS to comply with this rule will depend on its recognition technology and the environment in which it is used, it seems problematic to leave the assessment of whether an individual is hors de combat to a robotic weapon. It does not seem realistic that LAWS could distinguish whether someone is wounded or whether a soldier is in the process of surrendering or interpret human behavior as would be necessary.

Furthermore, the principle of precaution, requiring that an attack must be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that it would violate the rule of proportionality, is also challenged by LAWS. Even if humans take feasible planning precautions, their plans will need to remain relevant when the system makes the decision to launch an attack. This seems unlikely to be realistic in dynamic environments and in the absence of human override.

The underlying unity of international humanitarian law is grounded on the basic values of humanity shared by all civilizations. The idea of humanity plays a crucial role and is reflected in the Martens clause, which is a binding rule under IHL and demands the application of “the principle of humanity” in armed conflict. In the context of LAWS, an interesting parallel is sometimes drawn to landmines, which were banned because of the delegation of the decision to initiate lethal force from humans.

The assessment of compliance with the existing standards and rules under IHL has to be taken in a contextual manner in the light of concrete circumstances. Circumstances in the battlefield are shifting and human control of a weapon is a necessary prerequisite. IHL does require that combatants can make an objective assessment of the facts when applying force and targeting an objective. This assessment must be made on a case-by-case basis, in view of the concrete circumstances.

In this context, the concurrence and inter-action of the three principles of proportionality, distinction and precaution can be seen as the basis for what can be considered under IHL as a requirement to consider until when human control needs to be maintained. Such a concept implies that States have to use particular restrain before deciding about the development and the deployment of new weapons, even if the evaluation of each of these principles on their own may not necessarily lead to a negative compliance assessment.