

14. *Jus nascendi*, Robotic Weapons and the Martens Clause

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The development of new military technologies is one of the most pressing motivations for new law, *jus nascendi*, in International Humanitarian Law (IHL). The legality and potential regulation of robotic and autonomous weapons, alongside and sometimes in conjunction with cyberwarfare, have raised serious questions and sparked a growing debate in the international community. The issue of lethal autonomous weapons has been taken up by the states party to the Convention on Conventional Weapons at the United Nations,¹ where questions have been raised as to whether autonomous robotic weapons, which choose and attack targets independent of human control, could conform to existing IHL or might require special regulation. These discussions have also questioned whether lethal autonomous weapons may be morally unacceptable even if they conform to the law. While we are considering the various reasons and means for regulating autonomous weapons, I believe it is important to consider where new international law emanates from, particularly in response to new technologies.

I have addressed some of the specific reasons for prohibiting the use of autonomous weapons elsewhere.² This chapter will consider the legal framework and means by which new law could come into place for new robotic technologies, as well as some of the philosophical issues that arise in this process. Indeed, a great deal of energy has been spent trying to understand how,

¹ See reports of the 2014 and 2015 United Nations Meetings of Experts in Geneva, <http://www.unog.ch/80256EE600585943/%28httpPages%29/6CE049BE22EC75A2C1257C8D00513E26?OpenDocument>.

² Peter Asaro, *On Banning Autonomous Lethal Systems: Human Rights, Automation and the Dehumanizing of Lethal Decision-making*, 94 INT'L REV. RED CROSS 687 (2012), available at <https://www.icrc.org/eng/resources/documents/article/review-2012/irrc-886-asaro.htm>.

when, and why new law might be necessary for autonomous weapons. A clearer understanding of the general situation will advance not only the debate regarding autonomous weapons, but might also inform discussions on regulating other robotic technologies.

The question of regulating new technologies lies at the intersection of three different kinds of emergence: the emergence of new technological capabilities, the emergence of new norms, and the emergence of new laws. Much of the debate over regulating potentially disruptive technologies lies in what the appropriate relationship of these should be, in terms of both priorities and in timing. A common historic pattern is for laws to wait for norms to coalesce around the use of new technologies, *i.e.*, long after their development. A less common approach is preemptive – where agreement can be reached about a new norm *before* a technology exists, and laws can be established that preempts the development and/or use of a category of technology. Resolving this question depends upon determining whether suitable grounds exist for establishing a norm in the absence of the technology and the practices surrounding its use.

This chapter argues that there is already an emerging norm concerning meaningful human control over the targeting of weapons and the use of violent force, and, as such, there is a basis for putting in place new laws that preempt autonomous weapons. Before making this argument, however, I want to examine the nature of emergent IHL and the potential moral basis for its articulation.

The law itself might be viewed by the casual observer as largely stable and unchanging, though, in fact, it is dynamic in various ways. While interpretations and jurisprudence may evolve over time, the fundamentals of the law itself appear rather more stable. Of course, within nations new legislation is regularly adopted, but this is largely a matter of state policy and not an

exact correlate to the introduction of new customary and treaty law in the international context. But even in international law, there is new and emergent customary and treaty law, and the dynamics of the practice and application of law leads to emergent jurisprudence and transformations in norms. In IHL, new technological developments are a key factor in these dynamics.

The concept of *jus nascendi* is of interest in the context of regulating emerging technologies in general, and robot law and regulatory policy in particular. The emergence of new technologies can and does challenge many of our existing assumptions and traditional interpretations of the law. The potential of robots to become agents in the world challenges long-held assumptions built into the law that only humans can act as agents in the legal and moral sense.³ Robots thus present many cases and examples in various domains of law for which we must reconsider and refine our view of the law and its applicability. In the most extreme cases, this may mean revising existing law or writing law anew. This is most obvious in the laws designed to regulate new industries that might produce robotic products for applications from robot surgery, nursing and personal assistants, to robotic self-driving cars and surveillance drones.

Apart from these new consumer industries, the area in which the question of new law and new regulation is most pressing, and the robotic application domain where vast amounts of research and development is currently being directed, is in the development of robotic weapons. While these technologies could find use among civilian police forces and individuals, the

³ Of course, the law recognizes human organizations and institutions – such as corporations, trusts, non-profits, and states themselves – as legal entities with certain legal responsibilities. However, the law still largely views these organizations and institutions through the agency of their employees, trustees, officers, and executives. This is to say that the law still largely assumes that individual humans are making decisions and taking actions, even when they are acting in official capacities.

primary aim of current research and development by states is toward sophisticated military weapons with increasing degrees of automation and information processing. Insofar as IHL governs the use of weapons in the conduct of hostilities during international armed conflicts, I will consider how the emergence of robotic weapons forces us to consider the emergence of new norms and new law in that domain. The norms surrounding the use of robotic and autonomous weapons in law enforcement, personal security, or in criminal activity are also of concern, but beyond the scope of this study. It is hoped that a better understanding of the emerging norms in IHL might also inform these other domains of law.

One particularly challenging aspect of new technologies is their potential for disruption. New technologies by their nature disrupt practices and behaviors. While the computerization of offices during the second half of the twentieth century may not have fundamentally changed the business that those offices conducted (though it arguably did), it did radically transform the day-to-day activities and practices of the people who conducted that business.⁴ Had computerization not done so, it would likely have failed to achieve the gains in productivity that the introduction of such technologies sought. The same can be said of the automation of factories in the nineteenth century,⁵ leading to the introduction of the first numerically controlled machines and industrial robots.⁶

The increased automation and computerization of warfare, weapons, and the use of violent force lie at the heart of the growing concern over robotic weapons. Automation and robotic

⁴ Shoshana Zuboff, *IN THE AGE OF THE SMART MACHINE: THE FUTURE OF WORK AND POWER* (1988).

⁵ Siegfried Giedion, *MECHANIZATION TAKES COMMAND* (1955).

⁶ David F. Noble, *AMERICA BY DESIGN: SCIENCE, TECHNOLOGY AND THE RISE OF CORPORATE CAPITALISM* (1977).

technologies are poised to revolutionize the practices of modern warfare. But what, if anything, can or should the law do to shape the coming revolution? This question leads us directly to the related questions of how new law ought to be formed, how an emerging technology might necessitate new law, and what the emergent norms ought to be in these processes. It is these questions that the current chapter seeks to address.

1. *JUS NASCENDI* IN INTERNATIONAL HUMANITARIAN LAW

The means by which new IHL comes into being are diverse but inter-related. IHL arises from the recognition of customary law, interpretive guidelines on existing law, the doctrines and policies of states, the precedents of courts and tribunals, judicial opinions and decisions, international declarations, treaties, and the interactions among all of these in establishing, clarifying, crystallizing, and codifying principles and norms. It will be helpful to review some of the basic concepts and forms that international law takes before considering how this might evolve in response to the development and use of military robotics.

Traditionally, international law is seen as coming from various sources and in varying degrees of abstraction – customs and norms,⁷ general principles and laws, written treaties and conventions, and jurisprudence. Customs and norms represent the traditional behaviors and expectations that can be observed in the decisions and actions of states and from which general principles and laws may be derived. When it comes to written laws, it is sometimes argued that

⁷ While the terms “customs” and “norms” have a technical meaning in law, I find it useful in discussing nascent law to take a broader view of these terms, including their anthropological senses. In legal anthropology, customs and norms constitute a broad range of socially observable rules of conduct, while laws are those rules that carry sanctions imposed by a controlling authority (see Leopold Pospisil, *The Attributes of Law*, in *LAW AND WARFARE: STUDIES IN THE ANTHROPOLOGY OF CONFLICT* 25–41 (Paul Bohannon ed., 1967)). Compared with most national legal systems, international law remains a primitive system of law, absent central authorities for legislation, enforcement, and adjudication, despite having some limited international bodies and codifications, peace-keeping forces, and courts.

treaties primarily aim to codify customary law, putting into writing the norms of behavior already recognized and adopted by states through a process of declaring, crystallizing, and codifying. While this may be true of a broad range of international law, there are clear instances in IHL where written law has emerged specifically because the widespread behavior of states ran counter to shared moral sensibilities and collective interests. The Geneva Conventions of 1949 and the establishment of the United Nations stand as clear examples where the behaviors of states had failed to establish acceptable norms (as manifest in the horrors of World War II), and new prescriptive international law and regulating bodies were deemed necessary.

While customs and norms may be latent in the actions of states, they are often not described or formulated in a serious way until they become a matter of legal and political concern. Similarly, the derivation of underlying principles, including the writing of conventions, is usually motivated by some matter of diplomatic or legal concern. Among the proximate motivations to create new law we might identify various causes, including, but not limited to: the emergence of new behaviors by states or nonstate actors, the recognition or exploitation of ambiguities or inconsistencies in the existing law, or the emergence of new technologies that transform the capabilities, behaviors or effects of actions taken by states so dramatically that they undermine basic assumptions of customary or treaty law. In each case, the existing law can be seen as falling short in its purpose to protect the collective interests of states.

Underlying the whole of body of law, and particular expressions of law, we find morality. There are, of course, differing views on the relation of law and morality, as well as various legal and moral philosophies. But there is a widely held belief that the law at least aims to express shared norms, and that many legal norms coincide with moral norms. Stronger views hold that

the motivation and legitimacy of laws, and shared norms, derive from their basis in morality. It would be well beyond the scope of this chapter to address the various perspectives on this foundational question in the philosophy of law. Fortunately, in the IHL context there is a longstanding legal clause that explicitly refers to morality – the Martens Clause.

2. THE MARTENS CLAUSE

The Martens Clause is sometimes invoked in disarmament contexts because it refers explicitly to the public conscience. It thus offers a more explicit role for public opinion and the representatives of civil society in the moral assessment of IHL. Many legal scholars, however, wish to resist an overly broad reading of the clause and seek to limit its scope to a merely perfunctory recognition of customary law. Regardless of one's views on legal positivism, naturalism, and integrity, it seems reasonable to view the law as a human construct that seeks to enact social values. The Martens Clause is not the only point where social and moral values weigh upon IHL – protecting human values is in some views the whole point of IHL. Nor is the Martens Clause merely an acknowledgment that customs and practice can embody norms, even if they are not written down. A careful reading of the Clause and its history reveals something more interesting and complex than either of these accounts of it.

The Martens Clause first appeared in the Preamble to the Hague Convention II on The Laws and Customs of War on Land in 1899. It has been restated in various forms in at least three other conventions, most recently in the 1977 Additional Protocols to the Geneva Conventions.⁸ Originally proposed by Russian delegate to the Hague convention and jurist F.F. de Martens, its

⁸ Theodor Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience*, AM. J. INT'L L. 78–89 (2000).

introduction was motivated by concerns over extending humanitarian law to armed partisans in occupied territories.⁹ According to Meron,

The clause has ancient antecedents rooted in natural law and chivalry. It is articulated in strong language, both rhetorically and ethically, which goes a long way towards explaining its resonance and influence on the formation and interpretation of the law of war and international humanitarian law.¹⁰

In its various formulations it became more explicitly clear that it expressed the notion that ethical consideration for the principles of humanity and the public conscience should provide a foundation for both customary and conventional law. In its most recent formulation, the Martens Clause states: “Recalling that, in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience.”¹¹

A commonly held interpretation of the clause is that acts are not legal, or permissible, simply because they are not explicitly prohibited by the law. In recognition of the fact that many aspects of customary law are not explicitly written down, one cannot assume that something is legal simply because there is nothing in a given treaty or convention that prohibits it. This is a rather minimalist interpretation of the clause, however.

At the same time that it recognizes the status of customary law, the Martens Clause also acknowledges that morality in general, and the “principles of humanity and the dictates of the public conscience” in particular, are legitimate sources for new IHL. This is an acknowledgment of two parallel moral foundations for the protection of the human person within existing and

⁹ *Id.*

¹⁰ *Id.*

¹¹ Additional Protocol II to the Geneva Conventions.

emerging norms and customs. There are various ways we might unpack the concepts of the “principles of humanity” and the “dictates of the public conscience,” and it is worth examining some of these.

The “principles of humanity” might be articulated as the principles derived from the UN Declaration of Human Rights. Alternatively, it might be interpreted to mean a more abstract set of moral principles that underwrite our conception of humanity, and were partially (and perhaps imperfectly) codified in the UN Declaration of Human Rights. That is to say that there is no specific, written principle of humanity or set of principles, but these are evident in shared norms, and the Declaration of Human Rights explicitly sought to articulate them in a codified document. As such, those principles exist antecedently and independently of the document, but are also reinforced through that codification. The principles of humanity may not be a proper principle of law, but rather a set of moral principles that carry legal implications. As with other general moral principles, the principles of humanity are probably best thought of as a hybrid of shared beliefs, sentiments, and attempts to derive principles from norms of belief and behavior, or codify them as declarations and conventions. It also implies that the rights enumerated in the Declaration of Human Rights might be incomplete or require further clarification in the future.

The “dictates of public conscience” might also be articulated in various ways. It is sometimes cast as being roughly equivalent to “public opinion,” but this is dissatisfying for several reasons. First, we must confront what we know about public opinion from the social sciences, as well as its being subject to manipulation by strategic communications and propaganda. But we must also recognize the morally relevant differences between public opinion and public conscience.

As a matter of expertise, the public is not always well informed on complex issues, such as international law, and likely does not hold any antecedent opinion on arcane matters with complex legal implications. This is not to say that only the well-informed or those trained in international law should participate in determining the public conscience on such matters. Indeed, since legal opinion can already be assumed to be relevant, what motivated the authors of the Martens Clause to include this phrase was to emphasize the moral, rather than legal, basis for norms. The point is that the dictates of public conscience cannot be reduced to legal opinions, and that moral conscience should not require special expertise.

Treating the public conscience as public opinion ignores what we know about public opinion from the social sciences and communications research. Some have argued that public opinion holds unfair prejudices against autonomous weapons due to the negative portrayal of killer robots in science fiction books and film.¹² While researchers have undertaken careful and objective studies of public opinion on killer robots and autonomous weapons,¹³ it is not clear that this is really the same thing as the public conscience that the authors of the Martens Clause had in mind. While at best public opinion might confirm what a more careful reflection on matters of conscience reveals, at its worst, public opinion can be subject to manipulation and propaganda.

In presenting the public with pointed questions and simplified examples in the attempt to elicit their opinion, as is done in survey research, methodology can powerfully shape the

¹² Charli Carpenter, *The SkyNet Factor: Four Myths about Science Fiction and the Killer Robot Debate*, WASH. POST, Sept. 3, 2014, <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/09/03/the-sky-net-factor-four-myths-about-science-fiction-and-the-killer-robot-debate/>.

¹³ Charli Carpenter, *How Scared Are People of “Killer Robots” and Why Does It Matter?* OPEN DEMOCRACY, July 4, 2014, <https://www.opendemocracy.net/charli-carpenter/how-scared-are-people-of-%E2%80%9Ckiller-robots%E2%80%9D-and-why-does-it-matter>.

expression of opinion in a single study. It is well known that the choice of words, and even the order of presenting questions, can have significant impacts on the responses. Critical studies of public opinion have demonstrated the concept itself to be a social construct that serves primarily to coordinate political communications.¹⁴ The communications industry has deployed the social sciences so as to deliberately construct publics whose opinions can be easily categorized and influenced. This has become an art and science for public relations professionals, and its influential power can be seen clearly in commercial advertising, as well as in contemporary U.S. electoral politics. In its most extreme forms we call this manipulation propaganda,¹⁵ but even in its milder forms it belies the fact that public opinion is not only dynamic, but malleable and controllable to some extent. As such, we ought to question public opinion's capacity to serve as the moral foundation for new law, even as we continue to use it as a source for insight into the public conscience.

More fundamentally, "conscience" has an explicitly moral inflection that "opinion" lacks. This implies not merely holding an opinion or belief on a moral issue, but actually feeling compelled by, or believing in, a specific moral obligation or duty. That is to say, one may feel the weight of moral conscience even when one acts or believes against it (we may even feel it most acutely when violating it, as regret). Thus, moral conscience is not simply a result of a moral deliberation – the choice of action, or ultimate belief or opinion about which action is

¹⁴ Nikolas Rose & Thomas Osborne, *Do the Social Sciences Create Phenomena: The Case of Public Opinion Research*, 50 BRIT. J. SOC. 367 (1999).

¹⁵ Edward Bernays, PROPAGANDA (1928).

appropriate. Moral conscience includes the felt forces of duty and obligation, and the moral sentiments attached to the processes of moral deliberation in their totality.

As such it is a disservice to reduce the “dictates of public conscience” to mere public opinion, even if we might use the tools of the social sciences to develop insights into the contents of the public conscience. That content should also be elicited through public discussion, as well as academic scholarship, artistic and cultural expressions, individual reflection, collective action, and additional means, by which society deliberates its collective moral conscience. Indeed, the best place to look for emerging norms and the dictates of public conscience are in the public forums in which states and individuals attempt to grapple with, and articulate that conscience. That is one reason why it is so crucially important that the representatives of civil society have a voice in those forums, and that those voices represent a broad array of national and individual perspectives.

3. A NASCENT PRINCIPLE – MEANINGFUL HUMAN CONTROL

Three key sets of concerns have emerged from the discussion of whether to regulate autonomous weapons systems. The first set comprises the concerns over the risks to civilians that such weapons pose.¹⁶ The second set of concerns includes the implications for human rights and human dignity from the use of such systems.¹⁷ The third set relates to the concerns over how

¹⁶ See Noel Sharkey, *Saying “No!” to Lethal Autonomous Targeting*, 9 J. MIL. ETHICS 369 (2010); Markus Wagner, *Taking Humans Out of the Loop: Implications for International Humanitarian Law*, 21 J.L. INFO. & SCI. (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1874039; Human Rights Watch, *Losing Humanity: The Case Against Killer Robots*, HUM. RTS. WATCH REP. (November 19, 2012), available at <http://www.hrw.org/reports/2012/11/19/losing-humanity-0>.

¹⁷ See Human Rights Watch, (2014) *Shaking the Foundations: The Human Rights Implications of Killer Robots*, HUM. RTS. WATCH REP. (May 12, 2014), available at <http://www.hrw.org/reports/2014/05/12/shaking-foundations>; Christof Heyns, (2014) Report of the Special

autonomous weapons might transform the use of violent force in warfare in terms of both the psychological responsibility taken by humans in decisions to use force and the legal accountability for intended and unintended consequences for the use of such systems.¹⁸ Each set of concerns is warranted, as autonomous weapons systems potentially pose serious risks to civilians, to human rights and dignity, and to the psychology, norms, and laws governing accountability. And while each set of concerns implies a need for scrutinizing the development and use of autonomous weapons systems, they do so somewhat differently and suggest different types of norms.

On its surface, the concerns over the risks to civilians holds autonomous weapons out to be analogous to landmines or cluster munitions in terms of the potential of these weapons to have significant and unintended impacts on civilians and civilian property. This concern leads many to cast the central question as whether or not autonomous weapons can be used in conformity with existing IHL requirements. In particular, there is a concern as to whether autonomous weapons can conform to Article 51 of the 1977 Additional Protocol I of the Geneva Conventions of 1949, and its requirements that weapons systems must be capable of being used in a discriminate and proportionate manner. That is, if a new weapon is *intrinsicly* incapable of discriminate and proportionate use, this ought to be recognized in the weapons review required by Article 36 of AP II, and it ought not to be fielded or used. Since any weapon could potentially be used in an indiscriminate or disproportionate manner, that potential is not sufficient to prohibit its use. If

Rapporteur on Extrajudicial, Summary Or Arbitrary Executions, §4, The Use of “Less Lethal” and Unmanned Weapons in Law Enforcement, U.N. DOC. A69/33938 (July 31, 2014).

¹⁸ See Robert Sparrow, *Killer Robots*, 24 J. OF APPLIED PHIL. 62 (2007); Asaro, *supra*; Human Rights Watch, *Losing Humanity*, *supra*.

there are circumstances in which the use would be indiscriminate or disproportionate, their use ought to be restricted to only those contexts and circumstances where they can be used in compliance with IHL. Thus, if an autonomous weapon was *intrinsically* incapable of being discriminate and proportionate, it would be prohibited in IHL; otherwise, it might be permissible if it were used in situations and contexts where its effects were discriminate and proportionate.

Unguided missiles are an example of weapons that can be assessed as discriminate or indiscriminate, depending on the circumstances. Lacking guidance systems, most experts believe such missiles cannot be used discriminately in populated areas.¹⁹ They are not prohibited altogether, however, as there are contexts in which they might be used where they do not pose any risk to civilians because there are no civilians in the vicinity of the targeted area. Of course, in a highly restricted environment, meeting sufficient conditions, (e.g., a large enough area occupied exclusively by enemy combatants and their equipment) then it may be possible to claim that any weapon could be used with some degree of discrimination and proportionality. This was, in fact, the argument made in defense of the acceptability of cluster munitions – they could be used in certain ways in certain situations in which they do not have indiscriminate or disproportionate effects. That argument was countered with evidence from the actual use of these

¹⁹ See: International Committee of the Red Cross, *Customary IHL*, Rule 12 “Definition of Indiscriminate Attack” and Rule 71 “Weapons that are By Nature Indiscriminate,” available at https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule12 and https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule71; Maya Brehm, Unacceptable Risk: Use of Explosive Weapons in Populated Areas through the Lens of Three Cases before the ICTY, PAX REPORT (October 2014), available at <http://www.paxvoorvrede.nl/media/files/pax-rapport-unacceptable-risk.pdf>.

weapons, which demonstrated the persistent effects of unexploded munitions on civilians and the ongoing dangers that they posed long after an attack and even long after the conflict.²⁰

Many of the critics of disarmament proposals directed at autonomous weapons argue that the risks to civilians are unknown, and that there may be benefits to civilians in terms of lowered risk if such technologies are allowed to be developed.²¹ These critics are right to identify the importance of the norms and conventions that require the discriminate and proportionate use of force, and the protection of civilians. They are wrong, however, insofar as they attempt to limit the concerns over autonomous weapons to only these norms and to interpret them as strictly implying a utilitarian calculus of risk minimization – which is only one aspect of their intent and interpretation. Moreover, this view fails to consider how emerging technologies might destabilize norms in potentially harmful ways, particularly in terms of accountability.

There also is an extreme view that the only purpose of IHL is to try to reduce the risk to civilians in war. But the various provisions of IHL that apply only to combatants – from rules regulating surrender and prisoners of war to the treatment of sick, injured, and even deceased combatants – make such a view untenable. A slightly less extreme view holds that the goal of

²⁰ Brian Rappert et al., *The Role of Civil Society in the Development of Standards around New Weapons and Other Technologies of Warfare*, 96 INT'L REV. RED CROSS 765 (2012).

²¹ See RONALD C. ARKIN, *GOVERNING LETHAL BEHAVIOR IN AUTONOMOUS ROBOTS* (2009); WILLIAM BOOTHBY, *WEAPONS AND THE LAW OF ARMED CONFLICT* (2009); Gary Marchant et al., *International Governance of Autonomous Military Robots*, COLUM. SCI. & TECH. L. REV. (Dec. 30, 2010), available at <http://ssrn.com/abstract=1778424>; Kenneth Anderson & Matthew C. Waxman, *Law and Ethics for Robot Soldiers*, POL'Y REV. (April 28, 2012), available at <http://ssrn.com/abstract=2046375>; Michael N. Schmitt & Jeffrey S. Thurnher, *Out of the Loop: Autonomous Weapon Systems and the Law of Armed Conflict*, HARV. NAT'L SECURITY J. 231 (2013); Marco Sassoli, *Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to be Clarified*, INT'L L. STUD. / NAVAL WAR COLLEGE 90, 308 (2014); Kenneth Anderson et. al. *Adapting the Law of Armed Conflict to Autonomous Weapons*, INT'L L. STUD. (2014).

IHL is to protect an essential core of humanity, even among the great inhumanity of war – which brings us back to the “principles of humanity” in the Martens Clause. A broader view holds that IHL has many aims, not all of which are reducible to risk minimization or preserving the principles of humanity, but that those aims must not supersede the principles of humanity.

Moreover, as I have argued before,²² existing IHL imposes specific requirements on decision-makers, who are at least implicitly human. It is at best ambiguous what it would mean to replace that decision-making with nonhuman computers and programs – even though they are the creations of humans. There may, in fact, be moral and legal prohibitions on delegating such decision-making to automatic systems. At the very least, existing customs and norms, as well as written conventions governing decisions to use violent force all assume human decision-making. These norms, and the interpretation of existing laws, are called into question when human decision-making is replaced with automated processes. The norms that govern the requirements of taking responsibility for command decisions, and holding individuals and states responsible for the consequences of their decisions, are certainly a matter of concern in the development and use of autonomous weapons. In order for the decisions to use force to count as legal decisions or moral decisions, they must be the considered judgments of a human in a given situation, assessing the available information. An automated process designed in advance, based on sensor data, is neither a legal judgment nor a moral judgment. Similarly, rules of engagement are not decisions to engage or use force – rather they are guidance to human decision-makers who will ultimately make those decisions and carry the responsibility for them.

²² Asaro, *supra*.

When thinking about new law, it is helpful to consider the nature of norms and how they inform law. This is somewhat challenging when considering new technologies, especially those that have the potential to greatly disrupt existing practices. Philosophers view norms as concepts that imply obligations toward actions – permissions or prohibitions on certain actions. In the social sciences, including legal anthropology,²³ social norms are conceived as patterns of social behavior that, in virtue of being reliably observable patterns, manifest an underlying set of shared beliefs about the acceptability of certain forms of behavior. International law combines the concept of a belief to act according to obligation together with these observable patterns of behavior. Thus, the standard view of customary law is that customs must be recognized in the consistent actions of a significant number of states based on beliefs that there is an obligation to so act, and not be rejected or ignored by a significant number of states, or specially interested states.

More specifically, Article 21 of the Rome Statute of the International Court of Justice reflects what are widely considered to be the four formal sources of international law: conventions, customs, general principles, and, as a subsidiary source, judicial decisions.²⁴ Article 53 of the

²³ Pospisil, *supra*.

²⁴ Article 21 reads:

1. The Court shall apply:

- (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
- (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
- (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

Vienna Conventions on the Law of Treaties further distinguishes a special class of norms as peremptory norms – those that cannot be derogated.²⁵ Of course, there is no definitive list of which norms are peremptory, nor is there a definitive list of general principles or of customs. Conventions are generally conceived of as written codifications of customs and general principles. As such, they do attempt to define norms and principles, though they recognize their own limitations in doing so, as the Martens Clause itself makes clear. Treaties are seen as instruments that impose restrictions on the behavior of states that would not otherwise be restricted under custom or convention, but are limited in that they still cannot derogate peremptory norms.²⁶

In its most abstract form, technology is simply a system of skills, tools, and practices.²⁷ The introduction of any new techniques, skills, or technological tools necessarily implies a transformation in practices, whether at the level of individual tasks or at the levels of task

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.” Available at http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

²⁵ Among the generally accepted peremptory norms are prohibitions on genocide, torture, slavery, and piracy.

²⁶ Thus, a group of states could not form a treaty organization to permit themselves to conduct genocide, torture, slavery, or piracy – or at least such a treaty would not be accepted as removing those states from respecting the international norms prohibiting these.

²⁷ In ancient Greek, *techne* meant the performance of a craft, what in modern English we might call technique. Of course the performance also requires the use of the body and tools, and in modern English we often use “technology” to refer to sophisticated tools. Yet with sophisticated technologies, such as computers, we are really concerned with their performance, which entails the practice of skills as well as the functionality of the tools. Thus, we should think of technologies as consisting of the function of material tools and the skilled practices of people in conjunction, as well as their systematic organization.

management or institutional organization. The question is whether these transformations conform to existing norms, or challenge those norms. More precisely, there are four possibilities:

(1) Existing norms may continue to govern practices after the introduction of a new technology, largely unchanged.

(2) Existing norms may be diminished or dissolved after the introduction of a new technology.

(3) New norms may emerge to govern the practices after the introduction of a new technology.

(4) Existing norms may be transformed or reconceived.

When considering the norms governing new technologies, we are presented with a chicken-and-egg problem. If we have not yet implemented a new technology, we cannot observe what the new norms are (if we limit norms to already-recognized and accepted behavior). We can examine existing norms and try to determine if the use of a new technology would challenge or violate those norms. If so, we might try to regulate that technology and try to ensure that the norm remains in effect. Or we might find that it does not violate those norms, and so we should not need to regulate it, and the existing norms ought to be sufficient until proven otherwise. But there are further possibilities. We might find, after a technology is adopted, that new sets of practices emerge, followed by new norms.²⁸ We may also find that the capabilities of a new technology actually manifest situations in which we recognize norms that had always been tacitly assumed, but never articulated or codified because it was previously unnecessary.

²⁸ Among these are “best practices” and other forms of soft law.

Rather than framing the current debate over autonomous weapons as a utility calculation that weighs the potential risks of a new technology against its potential benefits, it would be better to view it as a question of how we might best regulate this new class of technologies, which might take many forms and have various sorts of capabilities that challenge existing norms. That is, while autonomous weapons do pose many obvious risks, it would be difficult to regulate or mitigate these based on capabilities that are as yet unknown. Rather, it makes sense to focus on the norms that will be challenged or violated by this new technology and to try to determine how best to protect those norms from being undermined, or strengthen them rather than allow them to be diminished by emerging practice. Because of the new capabilities these technologies will bring, it is also important to consider what nascent norms may be in place that have not previously been recognized or articulated because the need had not previously arose.

In the case of autonomous weapons, what is really new is the automatic selection of targets and decisions to use violent force against those targets. While Sharre²⁹ and others have pointed out that there are various weapons systems already in use that have simple implementations of these capabilities, it is not at all obvious that the practices and norms governing the use of current systems will adequately scale to the sophistication and complexity that robotic and autonomous weapons systems appear poised to achieve in the coming years and decades. Anderson and Waxman³⁰ agree that new practices and norms must emerge to govern these new technologies, but would rather see this left to the processes of self-regulation and the dissemination of best

²⁹ Paul Scharre, ROBOTICS ON THE BATTLEFIELD, PART I: RANGE, PERSISTENCE AND DARING, Center for New American Security Report, 47 (May 2014), *available at* http://www.cnas.org/sites/default/files/publications-pdf/CNAS_RoboticsOnTheBattlefield_Scharre.pdf.

³⁰ Anderson & Waxman, *supra*.

practices and soft law. So the debate is not whether new norms will emerge, but where they should come from, how they should be articulated, who should articulate them, and whether and where they should be codified.

In discussing these issues in various fora over the past few years, what seems increasingly clear is that there are some nascent norms and principles regarding autonomous weapons that are widely shared and that are beginning to take shape. What emerged from the discussions at the Experts Meeting convened by the Convention on Certain Conventional Weapons at the United Nations in Geneva in May of 2014,³¹ was a growing convergence toward a new norm or principle, that of “meaningful human control.” There remains some disagreement and confusion, at least in terminology, over the various definitions of automatic, autonomous, and the nature of intention, agency and responsibility in highly automated and autonomous systems. Yet despite this terminological disagreement, there was broad-based agreement that military attacks and the use of violent force in war should always be kept under meaningful human control. What exactly constitutes meaningful human control, and how to evaluate whether a given weapons system conforms to a possible requirement for it, are matters that remain to be articulated.

However, it seems quite clear that we have something that looks very much like an emergent principle. It is difficult to call this a norm proper, even though it is the case that states currently do act so as to keep weapons under meaningful human control. It is less clear whether they actually believe that they have a shared obligation to do so. That belief and obligation might emerge in the future as practices develop around new autonomous weapons technologies. But it

³¹ See the Convention on Certain Chemical Weapons website on Lethal Autonomous Weapons, [http://www.unog.ch/80256EE600585943/\(httpPages\)/6CE049BE22EC75A2C1257C8D00513E26?OpenDocument](http://www.unog.ch/80256EE600585943/(httpPages)/6CE049BE22EC75A2C1257C8D00513E26?OpenDocument).

is also possible that such a norm might not emerge in practice in the absence of regulations or guidelines. The real risk here, from a moral and legal perspective, is that practices based in political and military expediency might give rise to weak norms – or no norms at all – and the use of weapons without any meaningful human control may become acceptable as a *de facto* norm. In that case, we might find ourselves in a world where the risk of unintended consequences (or the ability to strategically obscure one’s intentions) in using such weapons is substantial, while the responsibility and accountability for such use by states and individuals is limited or easily avoidable in practice.

It has been argued that no professional militaries would want to use such weapons because they would have unpredictable results.³² But this is rather speculative, as such systems are not yet available, and the behavior and beliefs of states and their militaries may change as new technologies begin to enable new kinds of operations, tactics, and strategies. Once states begin to see some advantage to using such weapons, they may be reluctant to impose any regulations, and in the event of widespread use there may be little basis in customary law to rein them in. Even if a handful of countries with advanced professional militaries were to observe a stricter set of norms, if a significant number did not then a norm might fail to be established.

As an analogy, it is helpful to look at the concept of “superfluous injury and unnecessary suffering” in IHL. This phrase first appeared in the St. Petersburg Declaration of 1868. Prior to its statement, it was only vaguely recognized as a norm that had not been articulated clearly before. That is, militaries already recognized that one should not intentionally cause injury or

³² Sharre, *supra*.

suffering beyond what was necessary to achieve a military objective. So while it is permissible to kill or wound in order to achieve an objective, causing additional injury or increased suffering that serves no military purpose ought to be avoided. It could be argued that the norm had existed all along, but it was the introduction of new technologies – exploding and incendiary bullets, in that case – that inspired the articulation and codification of this normative principle.

In some sense, the prohibition on the use of these new types of bullets, and the recognition of this nascent norm, emerged together. In another sense, the recognition of the norm and its underlying principle were fomented by unease at what these new weapons represented for the future of warfare. That is, we might consider that there was something in the moral sensibility and conscience of the delegates to the St. Petersburg meeting that the use of such weapons is morally wrong, but also that they may not have been able to state clearly exactly what was wrong about them before attempting to find the appropriate language for their moral sense. It took some effort to work through what their moral conscience was, and to express this in words, as well as to reach consensus on how to codify this in law, and to articulate the prohibitions on weapons that it implied.

Thus, the principle of meaningful human control would appear to be something that has historically been taken for granted – assumed but never stated. Weapons always required humans to decide when and where to use them. While booby traps and mines challenged this implicit assumption to some extent, their use was not sufficient to motivate the articulation of this new principle, though it did spawn various practices, norms, and even treaties. Autonomous weapons pose a much greater challenge to our previous assumptions about the determination of targets and decisions to use violent force. As such, they have motivated a discussion and reflection on

the principles of humanity and the dictates of public conscience. It is from this reflection that the principle of meaningful human control has emerged. And indeed, given the uncertainty over how such systems might be developed in the future, it is all the more important to clarify the fundamental principles.

Meaningful human control, as it has thus far been articulated, contains several elements.³³ First, it is fundamentally humanist in its insistence on explicitly human control of targeting and firing decisions. If any new principle might be convincingly derived from the “principles of humanity” as expressed in the Martens Clause, surely it would be a principle that ensures human control over the violence of war, political and strategic decision-making,³⁴ and war itself.³⁵

It is not yet clear what constitutes “control” of a weapon exactly. So it seems that more discussion of this would be prudent. While a strict definition is not necessary, a shared understanding should be a goal of further discussion. Consider, again by analogy, the principle that prohibits “superfluous injury and unnecessary suffering.” These seem fairly clear as a matter of principle – injuries and suffering that go beyond military necessity. Yet as a matter of practice, or judging individual weapons, it is far from clear how one might apply this principle to a new

³³ The phrase “meaningful human control” was coined by Richard Moyes, and its initial articulation first appeared in the briefing papers of the UK-based NGO Article 36. See Article 36, *Killer Robots: UK Government Policy on Fully Autonomous Weapons* (April 2013), available at http://www.article36.org/wp-content/uploads/2013/04/Policy_Paper1.pdf; Article 36, *Structuring Debate on Autonomous Weapons Systems* (November 2013), available at <http://www.article36.org/wp-content/uploads/2013/11/Autonomous-weapons-memo-for-CCW.pdf>; Article 36, *Key Areas for Debate on Autonomous Weapons Systems* (May 2014), available at <http://www.article36.org/wp-content/uploads/2014/05/A36-CCW-May-2014.pdf>.

³⁴ Heather Roff, *The Strategic Robot Problem*, 13 J. MIL. ETHICS 211 (2014).

³⁵ Mark Gubrud, *The Principle of Humanity in Conflict*, ICRAC BLOG (November 19, 2012), available at <http://icrac.net/2012/11/the-principle-of-humanity-in-conflict/>.

weapon under review. How does it apply to pain-inducing weapons that do little physical damage, for instance? In practice, of course, states have developed norms in the application of the principle, shoring it up with more explicit treaties or guidelines as necessary. At the very least, control implies that the effects and potential consequences of using a weapons system must be reliable and predictable to an extent that the human can exert some form of control over it. It also implies that the performance of the system must conform to the intentions of the operator such that it is possible to distinguish when a system is under control, and when an operator has lost control.

Another key aspect of meaningful human control is the “meaningful” part. While it is difficult to define exactly what meaningful control consists of, the concept itself is clear and it seems a reasonable standard, if not an obvious one. In part, it aims to prevent weapons systems that use humans instrumentally as approval mechanisms. For example, ordering a soldier to press a “fire” button every time a light comes on would imply that a human is technically “in control” of the weapon system even if they effectively have no meaningful control over what the system is targeting, or how and when it is using lethal force against those targets. But it also implies more than this, in that meaningful control also entails taking responsibility for the use of the weapon system, and being accountable for the consequences of that use.

In order to ensure that a system retains human control, and thereby upholds the principles of humanity and does not trivialize human actions in the process, the requirement for control to be meaningful is necessary. For the killing of a human to be meaningful, it must be intentional. That is, it must be done for reason and purpose. Philosophically, intentionality requires understanding the meaning and significance of an act. While autonomous systems may be programmed to act in

a certain way, given a certain set of conditions, they cannot understand the significance of their acts. This is in part why they cannot make legal or moral judgments. But this also relates to the question of human dignity. If a combatant is to die with dignity,³⁶ there must be some sense in which that death is meaningful. In the absence of an intentional and meaningful decision to use violence, the resulting deaths are meaningless and arbitrary, and the dignity of those killed is significantly diminished.

Meaningful human control also offers some positive guidance on how systems ought to be designed to interface with humans. It obliges engineers and designers to consider how the use of violent force is a form of symbolic and intentional action, as well as a functional performance. As such, an interface ought to provide its user with the potential to make meaning and take meaningful actions, as well as to perform tasks. Under Human Rights Law, there would also be a duty upon states to ensure that such weapons could not violate human rights outside of armed conflict – by ensuring that meaningful human control is maintained. Moreover, it couples the making of meaning with control over the system – to the extent the system is automatic, the meaning of its activities are dependent upon higher-order levels of organization, which may not be able to address what is significant in a given situation. Meaning-making is a distinctly human capacity, and artificial systems will lack such capabilities for the foreseeable future. The use of anthropomorphizing language can often confuse the real capabilities of systems, which is why it is imperative that we make principles like meaningful human control clear.

³⁶ While combatants are not entitled to a dignified death under IHL, arguably every human remains entitled to dignity under Human Rights Law, even if they are liable to be killed as enemy combatants.

4. CONCLUSION

I hope that I have shown not only that we should view international law as an evolving and dynamic system, but also that its evolution ought to be shaped by moral considerations. The Martens Clause ought to be viewed not only as a recognition that written law does not fully displace customary law, but also as an invitation to moral reflection on the role of the principles of humanity and the dictates of public conscience in articulating and establishing new IHL. Its legacy as an explicit recognition of the role of moral consideration in the application of IHL, as well as in the formulation of new law, should not be overlooked or underestimated.

And finally, I presented an example of an emerging normative principle concerning the development and use of autonomous weapons – the principle of meaningful human control. While it is in some sense nascent or latent in existing beliefs and practices, it is also in some sense emergent in the ongoing debates that are themselves a response to the expectations for and capabilities of emerging technologies.

It is my hope that the current debate over the regulation of autonomous weapons can progress beyond speculative assessments of the capabilities and risks of robotic technologies. Instead, we should focus on the threats posed to fundamental norms of responsibility and accountability, and to the threats to human rights and human dignity that these new technologies represent. And we should draw upon the principles of humanity and dictates of public conscience as we move forward in articulating new normative principles and *jus nascendi*, including meaningful human control over the use of violent force in armed conflict.