de Carvalho, P.R.B. (2020) 'Of Killer Robots and Dictates of Public Conscience: Why Autonomous Weapons Systems Will Forever Change Warfare and How Ethics Could Serve to Ban Them Under International Law.' *Leviathan*, 10 (1), 25-28.

LEVIATHAN

Of Killer Robots and Dictates of Public Conscience: Why Autonomous Weapons Systems Will Forever Change Warfare and How Ethics Could Serve to Ban Them Under International Law

Law student ***Pedro Rogerio Borges de Carvalho*** *addresses the inclusion of autonomous weapons systems in modern conflicts and how a decades old clause could prevent their takeover.*

Due to breakthroughs in robotics and ever-increasing spending on military-grade autonomous weaponry - reaching into billions of dollars since the mid-2000s (Scharre 2018, 17) - autonomous weapons systems (AWS) are no longer mere fic-tion. For instance, South Korea has had a stationary armed sentry robot defending its border against North Korea since 2007 - SGR-A1, designated by researchers in military robotics a fully autonomous weapon, was reported to be capable of shoot-ing targets on its own (Scharre 2018, 99).

Although most AWSs currently deployed are semi-autonomous (with humans making the final decision to pull the trigger), fully autonomous AWSs able to select and attack targets without human intervention (Davison 2017, 5) are considered by analysts to be an unavoidable future de-velopment (Scharre 2018, 96) that will fundamentally change warfare and international relations, leading to widespread legal, moral and strategic implications. As a pre-emptive ban or even regulation under arms control treaties seems unlikely, the best alternative for opponents of AWS development is the Martens Clause - a customary norm that draws from a foundational piece of international law which, in theory, allows for regulation of warfare on grounds of public ethics and conscience.

Discussions of AWSs in international forums are primarily driven by calls for a ban or moratorium on their development and deployment. Ban advocates' arguments fall into three categories: the first consists of pragmatic legal arguments relating to the technical impossibility of AWS compliance with

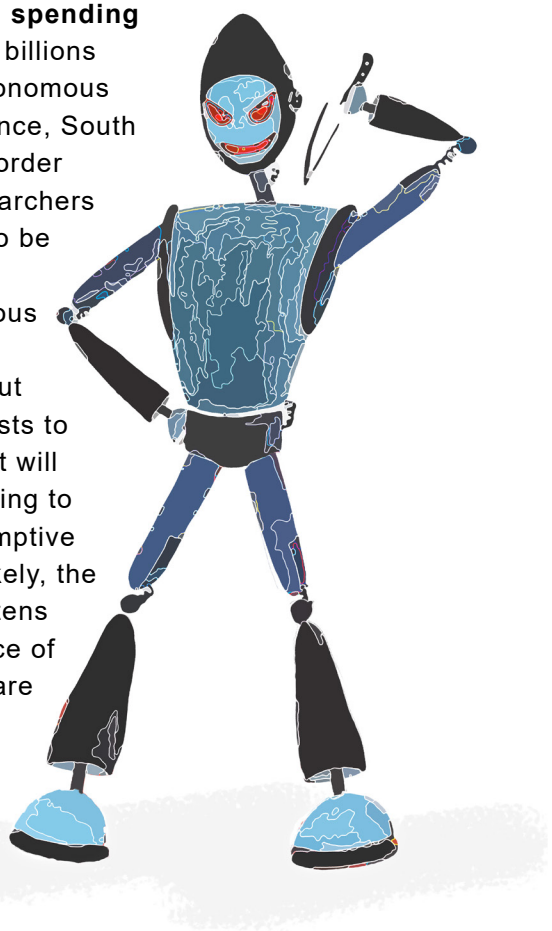

Illustration: Ananya Ambekar

international humanitarian law (IHL), which governs the conduct of warfare - forwarding, for instance, that AWSs are currently incapable of accurately discriminating between combatants and non-combatants, and of assessing military necessity and proportionality in deciding whether to launch an attack (Scharre 2018, 76). The second category of ethical arguments - notably involving the concept of 'human dignity' - questions the morality of delegating to machines the decision to take human lives, arguing that to do so would be unethical even if AWSs could be made compliant with IHL. The final category of consequentialist arguments addressing how AWS could impact international security and stability on a macro scale (Sharkey 2019, 75) - e.g. it is submitted that possession of swarms of AWS could undermine strategic stability based on Mutual Assured Destruction (Scharre 2018, 268).

UN Secretary-General António Guterres, addressing the Group of Governmental Experts under the Convention on Certain Conventional Weapons, stated that 'machines with the power and discretion to take lives without human involvement are politically unacceptable, morally repugnant and should be prohibited by interna-tional law.' (UN News 2019) A majority of these Experts forwarded this view, with 26 states supporting a ban or strict regulation. However, 12 other States, including Australia, Israel, Russia, the UK, and the US, opposed prohibition or any regulation of lethal AWS (Gayle 2019). Indeed, it is said that the current situation of the campaign against autonomous weapons is analogous to how the (successful) campaigns to ban chemical weapons and cluster munitions proceeded, (Sparrow 2016, 111) but in light of the current stalemate in the consensus-based negotiations, it is unlikely that 'killer robots' will be banned in the foreseeable future. Against this un-friendly background, could the Martens Clause provide adequate legal basis for AWS ban advocates?

The Martens Clause Argument

The Martens Clause was originally proposed by the Russian delegate to the first Hague Peace Conference, Fyodor Martens, and included the preamble to the 1899 Hague Convention on The Laws and Customs of War on Land. The clause, its core content preserved, was restated in several international instruments in subsequent years. The most relevant of these is Article 1(2) of the 1977 Additional Protocol I to the Geneva Conventions of 1949, relating to the Protection of Victims of International Armed Conflicts. Regarded as customary international law, (ICJ 1996) this provision establishes that, in cases not covered by the Protocol or other international agreements, civilians and combatants remain under the protection and authority of the principles of international law that are derived from established custom (customary norms of IHL), principles of humanity, and the dictates of public conscience.

In other words, the Martens Clause provides that even if a given means of warfare is not explicitly forbidden by a treaty, it must still be dynamically assessed under the 'principles of humanity' and the 'dictates of public conscience'- principles of in-ternational law with direct legal applicability - in order to be considered lawful (Meron 2000, 86). Thus, the Clause places limits (albeit open and equivocal) upon the discretion of states in choosing means of warfare. It constitutes, as the International Court of Justice recognized, 'an effective means of addressing the rapid evolution of military technology.' (ICJ 1996)

Each of the two substantively moral concepts highlighted under the Martens Clause have a distinctive character, though one somewhat disputed and inexact. Principles of humanity forbid the infliction of unnecessary suffering in peace and war (ICJ 1996; ICJ 1949). Dictates of Public Conscience comprise the relevant opin-ions both of governments and the governed (Meron 2000, 84). Public conscience incorporates a feeling of duty, and as such cannot be reduced to public opinion, although objective public opinion research and other tools of social sciences may be used to clarify the leanings of public conscience (Asaro 2016, 375).

A connection between the dictates of public conscience and human rights has been elicited in the Nuclear Weapons case before the ICJ. Australia submitted that 'international standards of human rights must shape conceptions of humanity and have an impact on the dictates of public conscience', (ICJ 1996) which Judge We-eramantry expressly accepted (ICJ1996). It is thus relevant, upon assessing the public conscience regarding AWS, to realize that authorities often use human rights as a basis for their

deep discomfort with the idea of lethal weapon systems acting beyond human control (Davison 2017, 9). Christof Heyns, addressing the Human Rights Council as a special rapporteur, argued that, in addition to being a dis-armament issue, AWSs pose 'far-reaching potential implications for human rights, notably the rights to life and human dignity.' (Heyns 2013)

Heyns contends that delegating the decision of life and death of a human being to a machine incapable of moral reasoning is in and of itself a violation of human dignity (Heyns 2016, 10-11). Such arguments are at times criticised as 'inflationary', (Birnbacher 2016, 110-112) designed to exacerbate anxieties around the idea of autonomous, lethal machines (Bhuta, Nehal et al. 2016, 355). Nevertheless, they have proven effective in directing momentum to the 'Campaign to Stop Killer Robots', an international coalition of 129 NGOs seeking to preemptively ban fully AWSs (Killer Robots, 2019). Moreover, arguments based on human dignity could achieve legal significance under the Martens Clause. Human dignity is centrally enshrined in the Universal Declaration of Human Rights - but if the principles of humanity could be accepted as stemming from the Declaration, as written by Peter Asaro,(Asaro 2016, 373) then it could be argued that by violating human dignity, AWSs violate principles of humanity under the Martens Clause.

Litigating at the ICJ: Nuclear Weapons Then, Killer Robots Now

The Nuclear Weapons Advisory Opinion is useful for understanding how the judicialisation of AWS politics could develop. Faced with the question of whether the threat or use of nuclear weapons was permissible under international law, the ICJ could not conclude definitively whether it would be unlawful in extreme self-defence circumstances (ICJ 1996). The opinion was rendered in 1996, long after the bombings of Hiroshima and Nagasaki and the end of the Cold War, when the threat of nuclear obliteration had governed the world. In spite of the overwhelming elements presenting dictates of public conscience against nuclear weapons and in spite of acknowledging the importance of the Martens Clause, the Court did not rely on it to settle the case. Given the sheer scarcity of practice, which was contrastingly abundant in the case of nuclear weapons, it seems unwise to forecast success for a public conscience argument against fully autonomous weapons systems before the ICJ in the near future

Nevertheless, the Martens Clause could prove to be the only alternative for those aiming to achieve significant restriction on the development of AWS in coming years. Whether it could be effective in a legal dispute hinges on how international politics will define the dictates of public conscience. What is certain is that the Martens Clause, acting as a powerful instrument for humanitarian discourse, is already shaping politics.

This article has been edited by Triin Sulengo (International Editor) & Abigail Adams (Chief Regional Editor), peer reviewed by Andra Enuica and Samantha Kichmann (Chief Peer Reviewer), copy edited by Melody Zhang, Harriet Steele, Grace-Frances Doyle and Ben Malcomson (Chief Copy Editor), checked and approved by the following executives: Robert Jacek Włodarski (Editor-in-Chief) and Emily Hall (Deputy Editor-in-Chief), and produced by James Hanton (Chief of Production).

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