Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects

Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems
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Statement Austria

5(a) - An exploration of the potential challenges posed by emerging technologies in the area of Lethal Autonomous Weapons Systems to International Humanitarian Law;

Mr. Chair,

Austria aligns itself with the EU statement delivered. In our national capacity I wish to add the following remarks.

Autonomous weapon systems raise unique issues and challenges for IHL compliance from a legal and ethical perspective. In fact, the CCW’s engagement on LAWS the sixth year of expert meetings stands testimony to the high level of concern about the risk that such weapon systems entail.

The underlying basis of our GGE’s work is the reaffirmation that IL and IHL in particular, applies to LAWS and that the choice of means of warfare is not unlimited. The human element is critical to IL and IHL compliance. Now the key question is to determine the type and degree of human control necessary to ensure compliance with IL, IHL, the core principles of IHL and customary IL such as the dictates of public conscious. Legal obligations, responsibility and accountability can by definition not be outsourced to machines. International legal norms are based on humans. States and humans are subject of law, not machines.

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 and human judgement are a necessary prerequisite.

There are at least two dimensions to IL and IHL inparticular compliance:

First, the legality of a weapon per se and second, the question of lawful use of a certain weapon.

First, the legality of a weapon per se. Means and methods or war are not unlimed. During the development of new technologies states must ensure that any potential weapon would
per se be capable to respect basic principles such as distinction, proportionality and precautions in attack. If a weapon is by its mere design not compatible with IL it must not be developed. In Austria’s view weapons with autonomy in critical functions are a case in point.

IL recognizes the concept of weapons that are indiscriminate by nature due to their unacceptable humanitarian harm. If a weapon is potentially lethal or not is not an established criterion under IL. My delegation sees no value in introducing such a new category at this point. To be clear, a weapon that delivers lethal effects, might very well be used in compliance with IHL.

Second. As we are exploring the limits of the acceptable, the second dimension, the question of possible lawful use of a certain weapon system deserves particular attention:

What are the key challenges that autonomous weapons systems without meaningful human control over critical functions would pose to IHL. IHL compliance is highly context-dependent, which is particularly sensitive when it comes to emerging technologies with autonomy in critical functions. Any use of new weapon needs to comply inter alia with the three fundamental IHL principles, namely the principle of proportionality, distinction and precautions in attack. Allow me in this context to recall Austria’s 2015 working paper on meaningful human control.

**Proportionality** requires a distinctively human judgement. The assessment must be based on information reasonably available not only at the time of the planning of the attack, but needs 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 (and use?) of the weapon. A correct evaluation under the proportionality principle can be a particularly challenging or impossible task for example 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 well in advance. Whether an attack complies with this principle 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.

The **principle of distinction** requires to distinguish between combatants and civilians. While it is difficult to assess future technological progress in this regard, my delegation has substantial concerns on data accuracy, bias and availability of data in conflict situations. It is
important to reiterate that from a legal and ethical perspective it is more than problematic to leave the selection of targets and decision to attack to a machine and we cannot envisage how such system would be compatible with IL. Under the principle of distinction the respect for the adequate assessment of a person hors de combat is equally problematic and requires human judgement.

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. There needs to be a possibility for humans override of the system.

In the context of LAWS, ethical considerations are of particular importance to my delegation. The appropriate legal framework is provided for inter alia by the dictates of public conscience and the principles of humanity, as referred to in the Geneva Conventions but also in the CCW preamble. IHL is grounded on the basic values of humanity shared by all civilizations. The Martens clause demands the application of “the principle of humanity” in armed conflict.

Ensuring meaningful human control requires a multidimensional approach which also relates to the level of predictability and reliability required to ensure human control and the necessary required human legal and situational judgement. Yesterday my delegation referred to the question of unpredictability of machine learning algorithms. We agree with the ICRC’s view that “setting boundaries – or operational constraints – in the operation of an autonomous robotic system – for example, on the task, time-frame of operation, scope of movement over an area, and operating environment – can contribute to increasing predictability”. Predictability and reliability are crucial for IHL compliance as both contribute to estimate the expected effects and results of a particular weapon use.

These substantial ethical and legal challenges and concerns brought Austria to the conclusion that LAWS without meaningful human control over critical functions would be fundamentally incompatible with IL.

Lastly, we wish to address the issue of national weapon reviews, also referred to as Article 36 weapon reviews. The objective of these reviews is explicitly mentioned in our last year’s guiding principles.¹ There seems to be convergence of views on the importance and the

¹ See Possible Guiding Principle (d):
merits, but also limitations of article 36. Weapon reviews constitute a critical national implementation mechanism to establish the legality of a weapon, means or method of warfare. However, article 36 itself does not give a clear legal standard, it merely assesses if – from a national perspective – a certain weapon development would be permitted under international law.

Due to military secrecy and military development, which is usually seeking for a competitive advantage, concrete results and national internal reasoning of a specific article 36 review are usually not shared with the broader international community. This is closely linked to the challenge of how do States interpret existing norms (including IL, IHL and the dictates of public conscience). If there is no explicit international special norm, States would most likely differentiate in their assessment, if a weapon system is compatible with IL. Our discussions on where exactly the minimum requirements for human control are, demonstrate the spectrum of different interpretations of the existing law. In the past, in such cases where states felt the need to further clarify international law, more specific regulations were adopted. Under the CCW, the Protocol IV is a case in point, where states given the potential gravity of such weapons being developed, recognized that blinding laser weapons should be prohibited preemptively. In the context of LAWS, there is an imminently needed to international clarify the minimum human control acceptable in an autonomous weapon system. A specific international legal norm is thus needed.

To sum up, the development and use of an autonomous weapon system has to be assessed on the basis of IL, principles of IHL, in particular the principles of distinction, proportionality and precautions in attack and finally in a broader, overarching perspective in its relation to public conscience and the principle of humanity. From this legal analysis the necessity to retain meaningful human control is derived. We will have the opportunity to address this human element later today.

In accordance with States’ obligations under international law, in the study, development, acquisition, or adoption of a new weapon, means or method of warfare, determination must be made whether its employment would, in some or all circumstances, be prohibited by international law.