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In the Absence of Mercy: The Role of the Right to Dignity in the Debate of the Legality of Autonomous Weapon Systems

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**Abstract for Master’s Thesis**

Subject: Public International Law, Master’s Degree Programme in International Human Rights Law	
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Title: In the Absence of Mercy: The Role of the Right to Dignity in the Debate of the Legality of Autonomous Weapon Systems	
Supervisor: Mikaela Heikkilä	
Abstract: <p>Autonomous Weapon Systems (AWS) are one of the emerging technologies within warfare, seen to pose challenges in complying with international humanitarian law (IHL), and human rights law. Others see the development of AWS in warfare as a means of saving civilians and making conflict more comprehending to the means and methods of warfare, as the use of AWS cuts off the human element of emotions, such as stress and panic, which can in turn increase the number of casualties during armed conflict. Considering these strong arguments on both sides, examining the legality within international law through an in-depth analysis is therefore necessary.</p> <p>This thesis will examine the legality of AWS within international law, especially within IHL and human rights law, how the use affects the right to dignity and whether this can be considered a strong enough normative right for establishing a regulation on the use of AWS, based on the argument. This thesis first examines the AWS use in light of the IHL framework and the principles of distinction, proportionality and precautions of attack. In addition, the Article 36 of Additional Protocol I, obligating legal reviews on new weapons, and the Martens Clause’s relevance in the AWS debate is examined. After establishing an understanding of AWS compliance to IHL, the use of AWS in light of human rights law is scrutinized. Then the thesis turns to discussing dignity, both in its social and legal perspectives. Dignity is a much debated concept, which on one hand is seen to be the core of all human rights, and a vacuous concept, lacking content in the legal context on the other. To reach a profound understanding of the normative character of dignity, the history of shaping the concept is first scrutinized. Then, its role is examined within treaty law and state practice, after which the concept is applied to the debate of the legality of AWS.</p> <p>Through the above-described examination, this thesis concludes that AWS use is in its current state not likely capable of respecting the international law framework when it comes to the IHL principles of distinction, proportionality and precautions of attack, that govern the feasible means and methods of warfare. Human rights law poses even stricter requirements on the use of force during armed conflict, and the use of AWS is thus likely to pose violations on human rights law, as the rule of the use of force only being practiced by a human would require human involvement in the process. Considering dignity in its normative concept, the use of AWS is additionally likely to violate the right to dignity. What is desired from negotiations when drafting regulation is to include the element of meaningful human control in the decision-making loop, when the use of AWS is concerning lethal decisions. This thesis concludes that the use of AWS without the element of meaningful human control is resulting in violating the dignity of those targeted. This demonstrates the urgent need of regulation for the use of AWS, where dignity could play a distinct role in illustrating the core issue with leaving the human outside of lethal decisions. This thesis suggests that a cross-cutting framework, including both IHL and human rights law, could be the most powerful tool in order to showcase the potential power that dignity could have when regulating a complex system of method of warfare.</p>	
Keywords: AWS, machines, IHL, human rights law, dignity, human dignity, right to dignity, humanity, meaningful human control	
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## Abbreviations

AI	artificial intelligence
AWS	autonomous weapon systems
CCW	1980 United Nations Convention on Certain Conventional Weapons
GGE on LAWS	Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IHL	International humanitarian law
IHRC	The International Human Rights Clinic of Harvard Law School
IHRL	International human rights law
NGO	non-governmental organization
UN	United Nations
UNDHR	Universal Declaration of Human Rights
UNGA	United Nations General Assembly
UN HRC	United Nations Human Rights Council
UN Special Rapporteur	United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions
SKR	Stop Killer Robots
The Charter	The Charter of the United Nations

# 1. Introduction

## 1.1. Introduction

Regulation on the use of weapons can be traced all back to the Second Lateran Council in 1139, where Pope Innocent II commenced his first efforts to ban the use of the crossbow, which since its development had had an extraordinary impact on the battlefield.<sup>1</sup> Political and ethical considerations were the main drivers for change, and on the ethical side it was threatening honourable fighting due to being regarded as a killing weapon.<sup>2</sup> This ancient event provides a suitable reference point in the history of technology, war, and law. Pope Innocent II's attempt failed, demonstrating, and emphasizing the continuing challenges within warfare and development of effective technologies on the battlefield. It can be said that we today are facing a new era of technical development on the battlefield at an extraordinary speed, posing serious challenges for the legal regulation of armed conflict, and thus for the whole legal framework of international law.<sup>3</sup> At the same time, distancing oneself from harm, although being the source of causing it, is not a new phenomenon and remains as an inherent feature of human beings. The desire to cause harm but at the same time being without suffering from it has broadly contributed to the development of weapons through the years. Today, autonomous weapon systems (hereinafter AWS) are seen as the epitome of that motive, and states have allocated enormous budgets for the development of these weapons.<sup>4</sup>

With these increased developments and technical advancements on the battlefield, the discussions about AWS have become relevant and topical within states and the international legal community. The revolution on robotics has been described as the next main revolution within military arrangements alongside gunpowder and the nuclear bomb.<sup>5</sup> The current conversations on AWS have been described as mirroring that what took place for aerial bombardment during the Hague Conference,<sup>6</sup> and is further honoured in memory in Declaration IV, 1 of the 1899 Hague

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<sup>1</sup> Yahil Shereshevsky, 'International humanitarian law-making and new military technologies' (2022) 104 *International Review of the Red Cross*, 2131, 2132, referring to William Boothby, 'Weapons and the Law of Armed Conflict' (2009) Oxford University Press 9

<sup>2</sup> Shane R. Reeves and William J. Johnson, 'Autonomous Weapons: Are You Sure Those Are Killer Robots? Can We Talk about It?', (2014) 2014 *Army Lawyer*, 25, 27

<sup>3</sup> Rain Liivoja, 'Technological Change and the Evolution of the Law of War' (2015) 900 *International Review of the Red Cross*, 1157, 1173

<sup>4</sup> Thompson Chengeta, 'Dignity, Ubuntu, Humanity and Autonomous Weapon Systems (AWS) Debate: an African Perspective' (2016) 13 *Brazilian Journal of international Law* 460, 461

<sup>5</sup> A/HRC/23/47, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns (9 April 2013), para. 28, referring to Peter Singer, 'Wired for War' (Penguin Group (USA) Incorporated, 2009), 179 and further, notably 203.

<sup>6</sup> Reeves and Johnson, (n 2) 28

Convention.<sup>7</sup> Because AWS reduces the need for manpower and automates the process of killing, militaries value them highly as their use lowers the risk of their own soldiers' lives.<sup>8</sup> Autonomous weapons have been described as an immediate cause of humanitarian concern,<sup>9</sup> posing both legal and ethical concerns within several fields of international law. AWS differ from remotely controlled weapons by being able to operate without human control, thus having complete autonomy. Most recently, the United Nations Secretary-General and the President of the International Committee of the Red Cross called in a joint appeal on the 5<sup>th</sup> of October 2023 on States to establish new prohibitions and restrictions on AWS,<sup>10</sup> described as a landmark joint call'.<sup>11</sup>

The use of the US Predator, Reaper, and other drones in Afghanistan since 2007,<sup>12</sup> were the early signs benchmarking that human soldiers are distancing from their targets. The military of the future is predicted to be increasingly unmanned,<sup>13</sup> and the international legal community, as well as the ICRC has called for a ban on fully autonomous weapons and the establishment of a legally binding international instrument to regulate the use of AWS.<sup>14</sup> Christof Heyns, who served as the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions from 2010 to 2016, has proposed adopting a new legal norm or internationally legally binding regulation for AWS, 'before it is too late' as they still are in the phase of development. He has also suggested a moratorium on the use of AWS before such regulation has been established.<sup>15</sup> So far, it is known that some form of AWS has already been used in the Libya war in 2020.<sup>16</sup> Suspicions about the use

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<sup>7</sup> Hague Declaration (IV,1), to Prohibit, for the Term of Five Years, the Launching of Projectiles and Explosives from Balloons, and Other Methods of Similar Nature. The Hague, 29 July 1899

<sup>8</sup> Bonnie Docherty, Human Rights Watch (HRW) & Harvard International Human Rights Clinic (IHRC) 'Losing Humanity: The Case against Killer Robots' (2012), 3

<sup>9</sup> International Committee of the Red Cross (ICRC), 'What is an autonomous weapon?', 26.7.2022, <https://www.icrc.org/en/document/what-you-need-know-about-autonomous-weapons> accessed 14.8.2023

<sup>10</sup> 'Note to Correspondents: Joint call by the United Nations Secretary-General and the President of the International Committee of the Red Cross for States to establish new prohibitions and restrictions on Autonomous Weapon Systems', 5<sup>th</sup> October 2023, available at <https://www.un.org/sg/en/content/sg/note-correspondents/2023-10-05/note-correspondents-joint-call-the-united-nations-secretary-general-and-the-president-of-the-international-committee-of-the-red-cross-for-states-establish-new> accessed 5.10.2023

<sup>11</sup> Stop Killer Robots 'Landmark joint call from UN Secretary-General and ICRC President', 5.10.2023, available at <https://www.stopkillerrobots.org/news/landmark-joint-call/> accessed 14.11.2023

<sup>12</sup> Hugh Gusterson 'Drone warfare' (2017) 1898 *AIP Conference Proceedings* 050005, 050005-2

<sup>13</sup> Docherty, HRW & IHRC (n 8) 6

<sup>14</sup> International Committee of the Red Cross (ICRC), 'Autonomous weapons: ICRC urges states to launch negotiations for new legally binding rules', Statement, 5.6.2023 <https://www.icrc.org/en/document/statement-international-committee-red-cross-icrc-following-meeting-group-governmental> accessed 11.8.2023

<sup>15</sup> Heyns (n 5) 'Summary' and paras 35, 111, 114, 116, 118. The term 'UN Special Rapporteur Heyns' will hereinafter be used with reference to the correct version, the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions

<sup>16</sup> United Nations Security Council, S/2021/229 Letter dated 8 March 2021 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council, para. 63

in the current war that Russia is waging in Ukraine have also been raised.<sup>17</sup> In addition, one of the most crucial concerns with the use of AWS is the so-called generalized target profile when the weapon system is selecting targets. The weapon system chooses the target and environment factors such as location and time without a human operator in any of the stages of the process, and as a result the attack is unpredictable, raising legal, ethical and moral concerns.<sup>18</sup> Malfunctioning of military robots have already taken place, *inter alia* in 2007, when a robot cannon during a training session precipitously started firing on its own, resulting in that nine South African soldiers died and fourteen got wounded.<sup>19</sup>

The development of AWS has been observed by scientists, researchers, academia, and the civil society, both arguing for the benefits and the risks that comes within. Discussions on state level have taken place through the Group of Governmental experts (GGE on LAWS), organised within the Convention of Conventional Weapons.<sup>20</sup> The leading opinion seems to be opposing rapid development of such systems, as it currently is happening without any binding rules created, and calling for establishing a framework for what could be agreed and accepted of a use of AWS.<sup>21</sup> The main reason for objection of the rapid development is the fact that an increase of autonomy in weapon systems contributes to a shift from humans not only being able to be physically absent from the battlefield, but also psychologically, as computers through AWS are able to determine when and against whom force is released.<sup>22</sup> With the physical absence from the battlefield, humans would not only be more distanced from the decisions to kill, but also from the execution itself.<sup>23</sup> Therefore, some argue that humanity in the battlefield will be lost. On the other hand, the argument for increased development of AWS and unmanned systems in general is their capacity to protect personnel out of harm's way, as a machine is taking over the process. In addition, shifting from remotely controlled weapons releasing force to autonomously operating weapons gives an advantage because AWS can

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<sup>17</sup> Morgan Meaker 'Ukraine's War Brings Autonomous Weapons to the Front Lines' (24.2.2023) *Wired UK*, available at <https://www.wired.co.uk/article/ukraine-war-autonomous-weapons-frontlines> accessed 24.10.2023

<sup>18</sup> ICRC, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, 33rd International Conference of the Red Cross and Red Crescent, Geneva, October 2019, 29

<sup>19</sup> Noah Shachtman 'Robot Cannon Kills 9, Wounds 14', <https://www.wired.com/2007/10/robot-cannon-ki/> (18.10.2007) accessed 2.10.2023

<sup>20</sup> See, for example, the 'Report of the 2023 session of the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems' CCW/GGE.1/2023/CRP.2, (6<sup>th</sup> of May 2023), 3

<sup>21</sup> Bonnie Docherty, HRW & IHRC 'Heed The Call: A Moral and Legal Imperative to Ban Killer Robots' (2018) 30-31, 38, 44-45

<sup>22</sup> Christof Heyns, 'Autonomous weapons systems: living a dignified life and dying a dignified death' in Nehal Bhuta, Susanne Beck, Robin Geiß Hin-Yan Liu and Claus Krefß (eds.) *Autonomous Weapon Systems: law, ethics, policy* (Cambridge University Press 2016) 4

<sup>23</sup> Heyns (n 5) para. 27



be quicker at engaging determined targets, as they are able to process information faster than humans can.<sup>24</sup>

As there is no explicit rule within international law stating that the use of force must be personal, or explicitly be released by a human being, one can argue that only an implicit rule, an assumption within international law that humans are the only ones to determine when to use force during armed conflict, exists.<sup>25</sup> It is clear that the environment that AWS would have to operate in during armed conflict can possibly result in AWS facing unanticipated situations, where they may act in an unintended manner.<sup>26</sup> The potential risks posed by AWS and the lack of humans and humanity in the whole process from development to enforcement provides a clear reason for examining AWS and their usage closely within international law, and especially from the perspective of the right to dignity. This argument is supported by the fact that when the human is taken out of the decision-making process, so are the elements of humanity. Humanity in turn is strongly linked to human dignity. Legal scholars argue that the international community would need to establish an international ban on AWS.<sup>27</sup> The ban would be based on protecting human rights norms as well as other norms protecting the individual.<sup>28</sup>

When examining the use of AWS and the right to dignity, the fundamental question is about that it matters not just *if* a person is killed or injured, but also *how* one is killed or injured has a vital importance. The autonomy in weapon systems leading to life-and-death decisions is regarded as inhumane and, and most importantly, could be argued to violate the right to human dignity. At a first glance, the way of how a human dies might not provoke interest or bigger significance. It is, however, according to the UN Special Rapporteur Heyns, a fact that the deployment of autonomous weapon systems undermines the human dignity of those targeted, albeit being regarded as lawful targets under international humanitarian law (IHL). The killing can further be seen as devaluating the human into an object, at its rawest form regarded as a system with zeroes and ones in digital scopes of weapons. Heyns has moreover argued that from such a system there is no way out, nor is there

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<sup>24</sup> Thomas K. Adams, 'Future Warfare and the Decline of Human Decisionmaking,' (2001) 31 *Parameters* 57, 57-58

<sup>25</sup> Christof Heyns, 'Autonomous weapons systems: living a dignified life and dying a dignified death' in Bhuta et al (n 22) 8

<sup>26</sup> Paul Scharre, 'Why unmanned' 61, *Joint Force Quarterly* (2011)

<sup>27</sup> See for example Peter Asaro 'On banning autonomous weapon systems: human rights, automation, and the dehumanization of lethal decision-making' (2012) 94 *International Review of the Red Cross* 687 and Docherty, HRW & IHRC (n 21)

<sup>28</sup> Peter Asaro 'On banning autonomous weapon systems: human rights, automation, and the dehumanization of lethal decision-making' 886 (94) *International Review of the Red Cross* (2012) 687, 694

any hope left, because AWS determines the release of force in advance, before a pressing emergency takes place.<sup>29</sup> Considering this, the use of AWS challenges the fundamental beliefs concerning human life and dignity.<sup>30</sup> Considering the legality of AWS in the context of the right to dignity is therefore essential.

## 1.2. Research Question, Delimitations, and the Structure of the Thesis

The thesis will examine the questions “Is the use of AWS considered legal under international law?” and “What is the role of the right to dignity in international law, and within the context of the legality of AWS?”. This entails examining to what extent the use of AWS can comply with the two branches of international law, namely IHL and international human rights law. Once established IHL and human rights law has been examined in this regard, the right to dignity will be considered as a possible legal norm, to highlight a possible added value for identifying reasons and a framework for developing a regulation of AWS. For the development of AWS to be controlled, a more human rights-centred response and approach is said to be necessary. This can be done by looking at the legality of AWS through the lens of both the principle and social value of dignity, as well as the right of dignity. Therefore, this thesis will further try to answer what role the right to dignity can have in the determination of the legality of the use of AWS.

For a relevant analysis on the legality of AWS to be made, both in the light of IHL, human rights law and especially the right to dignity, it is necessary to restrict the research subject to force that is used on *humans* by AWS. The discussion is restricted in such way because the fundamental idea that lies behind the concept of human dignity, and why such right is so important to protect, is that a dignified life of a human and its value thereof, is the cause worth protecting.<sup>31</sup> Also, human dignity in its established use of a principle is applicable to individuals. This is because the concept of human dignity is tied to the concept of basic rights, such as the right to life, that is a right held by individuals. The connection between human dignity and individual rights is essential for maintaining the coherence of the concept of dignity.<sup>32</sup> That is further a reason why the concept of dignity is suitable for the analysis on legality of AWS used on human beings. The right to dignity is recognised as a

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<sup>29</sup> Christof Heyns 'Human Rights and the Use of Autonomous Weapons Systems (AWS) during Domestic Law Enforcement' (2016) 38 *Human Rights Quarterly* 350, 370

<sup>30</sup> Heyns (n 5) 20

<sup>31</sup> Christof Heyns 'Autonomous Weapon Systems and human rights law' (2014) 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, 7

<sup>32</sup> Dieter Birnbacher 'Are Autonomous Weapon Systems a threat to human dignity?' in Bhuta et al (n 22) 108

human right in *inter alia* the African Charter of Human Rights, and the German constitution.<sup>33</sup> The right to dignity is nevertheless seen as a fundamental determinant of international law, both through human rights as well as IHL.<sup>34</sup>

To answer the research question, the thesis will first examine how AWS use complies with IHL, including for example the principles of necessity, proportionality, and precautions in attack, Article 36 of Additional Protocol I of the 1949 Geneva Conventions as well as the Martens Clause. Further, the chapter will analyse compatibility of the use of AWS with human rights law, through first establishing a discourse of both IHL and human rights to be used in armed conflict. Then, the use of AWS is considered against the relevant human rights, In chapter 3, human dignity in its social as well as legal dimension is explored. While it is argued that human dignity is a vacuous concept, and at the same time the core foundation for all human rights, it is necessary to examine closer its legal position within international law, focusing on the role of dignity in treaty law and state practice. Here, focus to *inter alia* the constitution of South Africa and the notion of ubuntu is made. Ubuntu as a concept has been important in the establishing of the right to dignity in the constitution, and it has remarkable value in the society, being the equivalent to humanity.<sup>35</sup> In addition, dignity in state practice is scrutinized from a European perspective.

The thesis then eventually turns to examining dignity's role in the AWS debate in chapter 4. In this regard, the use of AWS will be examined in light of human dignity as a normative concept. Moreover, the notion of meaningful human control in the use of AWS will be analysed, with a focus on dignity, where also the notion of Ubuntu in the context of the right to dignity is analysed. Then, the thesis considers a theoretical framework of regulation for AWS by emphasizing the importance of meaningful human control and *inter alia* analysing the Martens Clause. Further, a cross-cutting approach for the regulation is suggested. Lastly it is examined whether the regulation would constitute *lex lata* or *lex ferenda*. Finally, the thesis concludes with chapter 5, where conclusions and findings are made, and a short look into the future on the topic is given.

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<sup>33</sup> African Charter of Human and Peoples' Rights (Banjul Charter), adopted 27<sup>th</sup> of June 1981, entered into force 21 of October 1986, UNTS 1520, article 5 and the Basic Law for the Federal Republic of Germany, as last amended by the Act of 19 December 2022 (Federal Law Gazette I 2478), Article 1, available at [https://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html](https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html) last accessed 10.11.2023

<sup>34</sup> Dan Saxon '*Fighting Machines: Autonomous Weapons and Human Dignity*' (Cambridge University Press 2022)

<sup>35</sup> See Chengeta (n 4) 460-502 Chengeta explains that in South Africa, ubuntu was a guiding star during the transition from apartheid to majority rule.

### 1.3. Material and Method

Human dignity as a concept is largely known and used, but has many sides that can cause confusion, and is largely criticized for its character, at worst subject of sharp disagreement.<sup>36</sup> On one hand, it is viewed as a concept serving for the justification and basis for all human rights.<sup>37</sup> On the other, it is argued to be an ambiguous concept lacking content.<sup>38</sup> Dignity can be viewed as a social value, as a constitutional value and lastly as a constitutional right. Thus, it touches legal, ethical, moral and philosophical spheres, all important in the context of the legality of the use of AWS.

The method of the thesis is twofold. In order to answer the first part of the research question, namely the legality of AWS, a legal doctrinal method is used, applying primary sources of international law. Among the primary sources, customary international humanitarian law will be used, as well as treaty law, mainly the International Covenant on Civil and Political Rights (ICCPR).<sup>39</sup> In addition, the 1949 Geneva Conventions and their two 1977 Additional Protocols will be examined.<sup>40</sup> Secondary legal sources will also be examined throughout, including documents from international organisations' legal position papers on the use of AWS. Soft law, such as the International Committee of the Red Cross' (ICRC) guiding principles and position papers on AWS will also be examined.<sup>41</sup> Although non-binding in their nature, the ICRC guidelines are recognized as an authoritative source, aimed to be implemented by states in the context of armed conflict, and exist to guide states in adhering to international humanitarian law.<sup>42</sup>

For a comprehensive understanding, the thesis will also examine the factors affecting AWS' current legal position. For this, arms control treaties, such as the Convention on Certain Conventional

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<sup>36</sup> Henk Botha 'Human Dignity in Comparative Perspective' (2009) 20 *Stellenbosch Law Review* 171

<sup>37</sup> See Christoph Enders 'A Right to Have Rights – The German Constitutional Concept of Human Dignity' (2010) 3 *NUJS Law Review* 253

<sup>38</sup> Mirko Bagaric & James Allan 'The Vacuous Concept of Dignity' (2006) 5 *Journal of Human Rights* 257, 260

<sup>39</sup> See the Statute of the International Court of Justice Art. 38(1) stating the primary and secondary sources of international law, and International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

<sup>40</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287 and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609

<sup>41</sup> See for example ICRC commentary on the 'Guiding Principles' of the CCW GGE on 'Lethal Autonomous Weapons Systems' Geneva, July 2020 and International Review of the Red Cross (IRRC) International Committee of the Red Cross (ICRC) position on autonomous weapon systems: ICRC position and background paper (2020) *Cambridge University Press*, 102 (915), 1335–1349

<sup>42</sup> The role of the ICRC is formally recognized as follows: 'The four Geneva Conventions of 12 August 1949 for the protection of war victims, to which 166 States are party, and their two Additional Protocols of 1977 explicitly establish the role of the ICRC as a neutral and impartial humanitarian intermediary' in *Handbook of the International Red Cross and Red Crescent Movement* 14<sup>th</sup> ed, ((2008) Annex, 496

Weapons (CCW) are utilized as well as recent political developments, since CCW is currently the fora for state's trying to regulate AWS usage. It should be noted that several sources wish for the AWS discussion to take place also within a human rights discourse, adding vital elements for the discussions currently only conducted within disarmament. Therefore, documents from the treaty body Human Rights Council (HRC) and its mechanisms, such as resolutions, decisions, statements and reports from the UN Special Rapporteur on extrajudicial, summary or arbitrary executions are analysed for gaining a broader understanding of the current developments within the human rights context, and for highlighting the states' current attitudes towards the use of AWS. Further, academic articles from the fields of military science and statements from roboticist experts are used for the technical understanding of AWS and their functioning.

The legality of AWS will hence first be analysed through a doctrinal method to create an understanding of how well existing legal doctrine and fundamental principles and concepts of international law can adhere to the use of AWS. The second part of the thesis evolves around the concept of human dignity, and whether the use of AWS can respect the right to dignity. The concept of human dignity will first be examined through a legal philosophical method, analysing human dignity as a social value. The legal philosophical method is demonstrated by reflecting on the ideas and events behind the concept of human dignity, through providing historical reasons for the inclusion in law today. It is argued that the legal philosophy method holds three elements, not unique to philosophy, with a continuity between legal scholarship and legal philosophy.<sup>43</sup> What distinguishes the legal philosophy method from legal doctrinal is that the answer is not primarily to be found in legal sources.<sup>44</sup> This is not to say that this thesis would not provide a legal argumentation or analyse the issue throughout from a legal framework, but rather to stress the philosophical scope and nature of human dignity and emphasizing the necessity of an additional method for a profound analysis. This is done by examining what principles should be accepted, or how the law should adapt in order for the use of AWS not to violate the right of dignity.

The thesis will further systematically reflect on the concept of human dignity by clarifying existing concepts and principles, thus shedding light on how human dignity is understood as a social concept,

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<sup>43</sup> The three core 'elements' or methods constituting the legal philosophical method are: Argumentation Analysis and Construction, Author Analysis and Reflective Equilibrium. These can be used as separate methods for a deeper philosophical dimension, but that would exceed the objective of this thesis. For more, see Sanne Taekema and Wibren van den Burg 'Legal Philosophy as an Enrichment of Doctrinal Research Part I: Introducing Three Philosophical Methods' *Law and Method* (2020) 17

<sup>44</sup> Taekema & van den Burg (n 43) 3

as it is argued that the nature of dignity first must be examined through a metaethical framework to be able to understand its normative position.<sup>45</sup> After having scrutinised this dimension of dignity, the concept of dignity with the specific practice of law and the normative content will be examined to understand what the law of dignity is. Thus, transcending from a philosophical perspective and understanding the abstract content of human dignity, the next step is considering its normative position through the legal doctrinal method. The legal philosophy will therefore contribute as an auxiliary discipline to the doctrinal method in this part to clarify how the concept of human dignity suits in the legal order. The legal philosophy method will enable analysing the concept of human dignity, bridging to reflecting on human dignity in a human rights context. The normative analysis in this part of thesis will focus on human dignity in primary and secondary sources of international law by looking at how the concept of human dignity is included in treaty law and customary international law.

In addition, legal practice is analysed to enshrine light on the possible normative nature of the concept. Soft law norms on the right to dignity will be used for a deeper analysis on its effect, contributing to the understanding of its role in the framework and foundation of international law. Scholarly, peer-reviewed articles on the subject are also reviewed for a profound analysis. Moreover, legal commentary and documents written by academics, and legal professionals' writings about the topic will be utilized. Then, the right to dignity will be applied on the use of AWS, answering whether dignity can constitute a strong enough right to demonstrate that the use of AWS should be regulated, when considering the arguments of this specific right. Finally, the thesis will be answering the question whether the legality of AWS use could be regulated based on arguments stemming from both the social and legal value of human dignity, by applying the outcome from the analysis of the legality of AWS, based on IHL and human rights law.

#### **1.4. Definitions**

In light of the technical character of AWS as weapon systems, it is necessary to start with explaining the critical functions of such systems, as well as the definitions for the purposes of clarity. Currently, there is no united, internationally agreed definition for autonomous weapon systems.<sup>46</sup> ICRC has

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<sup>45</sup> Remy Debes 'Dignity's Gauntlet' (2009) 23 *Philosophical Perspectives, Ethics*, 50, A metaethical framework is considered a philosophical method.

<sup>46</sup> 'What are Lehtal Autonomous Weapon Systems?' available at: <https://disarmament.unoda.org/the-convention-on-certain-conventional-weapons/background-on-laws-in-the-ccw/> accessed 13.11.2023

defined AWS as “Any weapon system with autonomy in its critical functions. That is, a weapon system that can select (i.e. search for or detect, identify, track, select) and attack (i.e. use force against, neutralise, damage or destroy) targets without human intervention.”<sup>47</sup>

Moreover, ICRC sees that AWS are clearly distinguishable from other weapon systems.<sup>48</sup> The specific location, timing and target are selected by the operator when activating the weapon. The primary concern of the ICRC is the missing element of a human, or human control over the use of force, since the weapon has autonomy over the critical functions of the weapon. Therefore, there is uncertainty for the operator regarding the exact circumstances, such as timing and location. Thus, the critical functions of the weapon refer to functions that are describing the selection, targeting and decision-making to kill a human being.<sup>49</sup>

Some more specific definitions distinguish between autonomous and highly automated weapon systems, but according to some experts there is technically no clear difference. The core legal and ethical questions remain the same.<sup>50</sup> Further, the ICRC has developed its understanding to AWS being any weapons that are able to select and apply force to targets without human intervention.<sup>51</sup> A slightly wider definition would be any system that is capable of targeting and initiating the use of potentially lethal force without direct human supervision and direct human involvement in lethal decision-making.<sup>52</sup>

In this thesis, the terms ‘robotic’, ‘robotic weapons’, ‘killer robots’, ‘unmanned weapons’, ‘autonomous machines’, ‘machines’, ‘lethal autonomous robotics’ and ‘lethal autonomous weapons’ or ‘LAWS’ are encompassed in the concept of AWS. In other words, AWS stand for an unmanned weapons or weapon systems with complete autonomy and without a human in the loop effectively

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<sup>47</sup> ICRC (n 18) 29 and Heyns (n 5), Docherty, HRW and IHRC (n 8) 2, and DoD 2012 ‘autonomy in weapons systems’. Further, for States’ opinions on definitions of AWS, see CCW/GGE.1/2023/CR1 ‘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’ Agenda item 5: Non-exhaustive compilation of definitions and characterizations, available at: [https://docs-library.unoda.org/Convention\\_on\\_Certain\\_Conventional\\_Weapons\\_-\\_Group\\_of\\_Governmental\\_Experts\\_on\\_Lethal\\_Autonomous\\_Weapons\\_Systems\\_\(2023\)/CCW\\_GGE1\\_2023\\_CRP.1\\_0.pdf](https://docs-library.unoda.org/Convention_on_Certain_Conventional_Weapons_-_Group_of_Governmental_Experts_on_Lethal_Autonomous_Weapons_Systems_(2023)/CCW_GGE1_2023_CRP.1_0.pdf) accessed 13.11.2023

<sup>48</sup> ICRC (n 18) 29

<sup>49</sup> ICRC (n 18) 29

<sup>50</sup> ICRC, Autonomous Weapon Systems: Implications of Increasing Autonomy in the Critical Functions of Weapons. Expert Meeting, Versoix, Switzerland, 15–16 March 2016, 40

<sup>51</sup> Neil Davison, ICRC, ‘What you need to know about autonomous weapons’ July 26, 2022, available at <https://www.icrc.org/en/document/what-you-need-know-about-autonomous-weapons> accessed 18.8.2023

<sup>52</sup> Asaro (n 28) 690, also, the U.S Department of Defence policy directive has defined an AWS as one “that, once activated, can select and engage targets without further intervention by a human operator.”

supervising. All the above-mentioned terms refer to the same idea of the shift from a weapon being automatic to now having autonomy over itself, and thus an increase of autonomy in the use of force in whole. This detail is vital for understanding the examination of the legality properly.

Some use the term LAWS instead of AWS in their argumentations, where the L is referring to *Lethal* before ‘autonomous weapon systems’. The UN Special Rapporteur for extrajudicial, summary, or arbitrary executions has stated that distinguishing between LAWS and AWS is important for considering the human rights aspect of possible implications from AWS. He argues that within IHL, the force used is mostly lethal, and non-lethal force is the exception. In the human rights context however, using lethal force is an exception, as the common understanding is the force that is used is not generally lethal. Therefore, when discussing the use of force from a human rights perspective, as this thesis will partly aim to do, force cannot be limited to the use of lethal force but should include all forms of force. Even if the use of force in such situation would not be lethal, and thus violate the right to life, it can contribute to other violations of rights concerning for example bodily security, or the right to dignity.<sup>53</sup>

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<sup>53</sup> Heyns (n 31) 1-2



## 2. AWS in the Legal Context: Legality within IHL and Human Rights Law

### 2.1. Current State in the AWS Debate and Recent Developments

As earlier mentioned, states are developing AWS because they are faster and smarter than humans, but also for the reasons of military advantage such as force multiplication, extreme capacity for doing the dirty, simple and dangerous work, thus decreasing the risk of a state's own soldiers losing their lives. As machines are not humans, and thus do not act out of grudge, they are also seen to potentially being able to save lives of civilians.<sup>54</sup>

The rapid pace of development of military robotics has however given reason for policymakers, legal scholars, scientists, and others, to call for a ban, mainly because of the unknown effects from them on peace and international security. The development has also been said to bring a pressing threat to civilians in war.<sup>55</sup> In addition, because AWS use artificial intelligence (AI), created by humans, they are prone to the same racial and gender biases as those who created them.<sup>56</sup> Subsequently, it has been shown that data-based programs are replicating existing inequalities. This raises concerns that humanitarian violations could be amplified by machine algorithms.<sup>57</sup> For example, facial recognition systems may cause AWS to target civilian men instead of female combatants, and biased data sets are shown to misidentify women of colour. As a result, they may not be recognized as human beings when targeting a specific location, which could lead to wrongful death.<sup>58</sup> In April 2013, Human Rights Watch and other human rights NGO's initiated the 'Campaign to stop Killer robots', with the aim to establish an international ban for AWS.<sup>59</sup> Since the campaign for establishing a ban was introduced, a pledge has been signed by over 270 organisations and over five thousand individuals, suggesting to 'neither participate in nor support the development,

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<sup>54</sup> Jürgen Altmann, Peter Asaro, Noel Sharkey and Robert Sparrow, Mission Statement of the International Committee for Robot Arms Control, (2009) <https://www.icrac.net/statements/> accessed 16.8.2023

<sup>55</sup> *Ibid*

<sup>56</sup> Katherine Chandler, 'AI is Often Biased: Will UN Member States Acknowledge This in Discussions of Autonomous Weapon Systems?' *IPI Global Observatory* (Sept. 20, 2021), available at: <https://theglobalobservatory.org/2021/09/ai-is-often-biased-will-un-member-states-acknowledge-this-in-discussions-of-autonomous-weapon-systems/> accessed 10.11.2023

<sup>57</sup> *Ibid*

<sup>58</sup> *Ibid*

<sup>59</sup> Stop Killer Robots (SKR) "The story so far" 22<sup>nd</sup> April 2013, available at <https://www.stopkillerrobots.org/the-story-so-far/> accessed 12.11.2023

manufacture, trade, or use of lethal autonomous weapons'.<sup>60</sup> The call for a ban has also been supported *inter alia* by the European Parliament in a resolution,<sup>61</sup> and by the Belgian Parliament in 2018 when it adopted a resolution calling the government to prohibit the Belgian military from using lethal autonomous weapon systems and to support international measures taken to ban the use of fully autonomous weapons.<sup>62</sup> In addition, Human Rights Watch has also released a report on calling for a ban, and it has garnered a lot of attention.<sup>63</sup>

Also, the ICRC has recently recommended states to adopt new legally binding rules for autonomous weapon systems. In their recommendations, in particular unpredictable autonomous weapon systems and use of AWS to target human beings should be prohibited.<sup>64</sup> In addition, such autonomous weapons that would not be prohibited, should be strictly regulated regarding the limits on the types of target, the limits on the duration, geographical scope and scale of use and the limits on situations of use. Lastly, requirements for human-machine interaction in order to ensure effective human supervision should be regulated.<sup>65</sup> Thus, the arrival of AWS comes with ethical and legal questions remaining open for new legislation. Krishnan argues that the success of AWS is depending primarily on an efficient regulation, because he believes that machines will never exempt humans from the responsibility and need of taking ethical decisions during both war and peace.<sup>66</sup>

However, not everyone agrees that adopting a ban is the best solution. Robotist Arkin sees that AWS can perform better than humans on the battlefield and argue therefore that their use should be permitted, and the systems continue being developed, resulting in multiple benefits. This is further supported by US Navy Judge Toscano, adding that AWS will be able to comply with IHL more efficiently than humans, and will therefore reduce collateral damage and prevent unintentional harm.<sup>67</sup> It is also suggested that it is premature to call for an outright ban on AWS.<sup>68</sup> The view of an outright ban being premature is also shared by some international law scholars.<sup>69</sup> The advances in

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<sup>60</sup> Future of Life Institute 'Lethal Autonomous Weapons Pledge' 6<sup>th</sup> June 2018, available at <https://futureoflife.org/open-letter/lethal-autonomous-weapons-pledge/> accessed 14.11.2023

<sup>61</sup> European Parliament, Resolution2014/2567

<sup>62</sup> PAX 'Belgium votes to ban killer robots' 23 July 2018 <https://paxforpeace.nl/news/belgium-votes-to-ban-killer-robots/> accessed 18.8.2023

<sup>63</sup> See Docherty, HRW and IHRC (n 21)

<sup>64</sup> See for example ICRC, 'ICRC Position on Autonomous Weapon Systems', Geneva, 12.5.2021 2

<sup>65</sup> *Ibid*

<sup>66</sup> Armin Krishnan 'Killer Robots: legality and ethicality of autonomous weapons' (2009) *Routledge 2016* 4

<sup>67</sup> Christopher P. Toscano, 'Friend of Humans: An Argument for Developing Autonomous Weapons Systems' (2015) 8(1) *Journal of National Security Law and Policy*, 192, 225

<sup>68</sup> Ronald Arkin 'Lethal Autonomous Systems and the Plight of the Non-combatant', 137 (2013) *AISB Quarterly* 4

<sup>69</sup> See for example William Boothby 'New Technologies and the Law in War and Peace' *Cambridge University Press* (2018) 159

autonomy can on one hand contribute to making war less destructive and harmful with the advantages of a more automated precision in weapons,<sup>70</sup> but on the other, the force used is more disastrous and less ethically sensible.<sup>71</sup> Thus, advancing automation raises both hopes and fears, and is described as both a progress towards humanizing war as well as an unprecedented danger to humanity.<sup>72</sup>

According to Waxman and Anderson, recognizing warfare's steady development is crucial in order to address legal and ethical questions regarding AWS. The proposals from advocacy groups do not account for this development, that they view inevitable. Further, they argue that a ban would be premature because it could possibly undermine the benefits of humanitarian advantages and accuracy of autonomous systems. As a result, they rather believe that a gradual and secure development and later, also deployment, of AWS is achievable.<sup>73</sup> It is worth to note that also the US has suggested humanitarian benefits to be the reason to oppose a preemptive ban.<sup>74</sup> Waxman and Anderson's argument continues stating that AWS should only be deployed in environments that are legally viewed less problematic. For instance, missile defence, that is deployed as an AWS, is only used in machine against machine situations, eliminating the possibility that humans or civilians could be targeted. An environment in which there are either very few or no civilians present, is an additional possibility for the legal use of AWS. This could be for example during an attack against an undersea submarine.<sup>75</sup> Accordingly, Boothby notes that currently, AWS that serve as the 'last line of defence' and that are designed to successfully distinguish between legitimate targets and persons or objects entitled protection, are not prohibited under international law.<sup>76</sup>

However, in their argumentation, Waxman and Anderson don't rule out the risk that AWS will fail to identify the target and cause harm to civilians or collateral damage, recognizing the fact that a lawful, fully autonomous weapon system is the hardest to design. In this regard, they believe that considering the most difficult operational environments as a starting point when examining legal or

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<sup>70</sup> See Council of Europe, Parliamentary Assembly, 'Drones and targeted killings: the need to uphold human rights and international law' Resolution 2051 (2015), para. 4: in the context of the use of drones, it is claimed that the improved precision of drones enables for better compliance with IHL and human rights law.

<sup>71</sup> Kenneth Anderson & Matthew C. Waxman, 'Law and Ethics for Autonomous Weapon Systems: Why a Ban Won't Work and How the Laws of War Can' (2013) *Stanford University, The Hoover Institution Jean Perkins Task Force on National Security & Law Essay Series 2*

<sup>72</sup> Krishnan (n 66) 4

<sup>73</sup> Anderson & Waxman (n 71) 18-19

<sup>74</sup> See Kelley M. Saylor, Congressional Research Service 'International Discussions Concerning Lethal Autonomous Weapon Systems, doc.IF11294 'Position of the United States' (14.2.2023)

<sup>75</sup> Anderson & Waxman (n 71) 3

<sup>76</sup> Boothby (n 69) 159

ethical issues on AWS is harmful.<sup>77</sup> They believe that states and developers can create weapon systems that comply with international legal and ethical frameworks. Further, they encourage states to share their best practices for those systems so that others can review them as required by IHL.<sup>78</sup> Additionally, this could advance states' moral and strategic goals. The idea behind is that once one state has developed and uses such system and no legal framework is yet established for regulating its use, other states will slowly start copying the state with 'superiority' over the system once it has shown to be more effective than other means and methods of warfare. That is why a ban would not work, because states, as seen, already have developed, and deployed such systems on the battlefield.<sup>79</sup> This view is also shared by the US Naval War College, stating that states are more likely to comply with regulation, than with an outright prohibition.<sup>80</sup>

In addition, Waxman and Anderson see that a prohibitory treaty could face challenges within the extent and substance. For instance, establishing a prohibition too quickly runs the risk of causing instability of norms and leaving the prohibition vague lacking specification due to the rapid advancement of technology.<sup>81</sup> Instead, their argument contends that, it would be more beneficial to allow more informal processes to open the door for internationally shared norms for consensus in such a complex subject, in the search of a stable legal basis. They further claim that agreeing on what constitutes a prohibited autonomous weapon system will be unattainable.<sup>82</sup> Therefore, legal standards are necessary for regulating AWS, but rather through improving regulation than a prohibitory ban.<sup>83</sup>

What is more, Anderson and Waxman criticize the advocacy group Human Rights Watch's report, implying that the key assertions are controversial.<sup>84</sup> The report is implying that the use of AWS is not complying with IHL, this thus being the reason for establishing an outright ban.<sup>85</sup> As opponents of the ban, Anderson and Waxman criticize the group for not proposing a treaty that would outlaw

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<sup>77</sup> Anderson & Waxman (n 71) 6

<sup>78</sup> See Article 36 of Additional Protocol I of the 1949 the Geneva Conventions, requiring states to conduct legal reviews of all new weapons in order to determine their legality by international law. Additional Protocol I to the Geneva Conventions of 1949 and Relating to the Protection of Victims in International Armed Conflicts (API 1977) (adopted 8 June 1977, entered into force 7 December 1978) UNTS 1125, Article 36

<sup>79</sup> Anderson & Waxman (n 71) 9

<sup>80</sup> Amreen Gill "Ominous or Autonomous? The Case for Banning Autonomous Weapons Systems in Targeted Killings." *University of Illinois Journal of Law, Technology & Policy*, vol. 2022, no. 2, 2022, 473, referring to Michael A. Guetlein, 'Lethal Autonomous Weapons Ethical and Doctrinal Implication (2005), at 21

<sup>81</sup> Anderson & Waxman (n 71) 20

<sup>82</sup> *Ibid* 20

<sup>83</sup> *Ibid* 20-21

<sup>84</sup> *Ibid* 21

<sup>85</sup> Docherty, HRW and IHRC (n 8) 2, 5, 46-48

a particular category of weapons, instead of a ban. Moreover, the proposal suggests not only to ban fully autonomous weapon systems, but also to ban the development of any autonomous weapon system.<sup>86</sup> Consequently, the proposal for such a ban is suggested to be over-inclusive.<sup>87</sup> On the contrary, and as earlier noted, international organisations and advocacy groups advocate for a ban that would essentially mean a prohibition on the development or implementation of AWS in all of its forms and would therefore amount to a prohibitory treaty. In addition, it is worth mentioning that NGOs lobbying for a ban has been seen during several other occasions, for example in prohibiting land mines and cluster munitions in the 1990s.<sup>88</sup>

## 2.2. Current Legal Situation

In May 2014, an intergovernmental discussion was held under the framework of the Convention of Certain Conventional Weapons (hereinafter CCW) to initiate the first discussions of the mandate to address the challenges that autonomy in weapon systems poses. Since 2017, the primary international discussions have been constructed through the Group of Governmental Experts (GGE), that is, experts of emerging technologies in the area of AWS. In former cases, the GGE has acted as a preparatory forum for negotiations for establishing new international law.<sup>89</sup> However, the progress towards a regulatory treaty on AWS is said to be stalled, the reason being the nature of the forum where the negotiations are taking place. The CCW is a treaty system that operates by consensus, and so far, it has been challenging for State Parties of the CCW to reach agreement on the way forward.<sup>90</sup> In 2019, State Parties came up with the Guiding Principles on LAWS, being viewed as the main achievement of the years of negotiation.<sup>91</sup> The principles are, however, not legally binding and have gained criticism for being a weak result of negotiations meant to establish a prohibition or regulatory framework. Nevertheless, states parties view the principles as a starting point to build upon and a

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<sup>86</sup> Anderson & Waxman (n 71) 21

<sup>87</sup> Boothby (n 69) 159

<sup>88</sup> Scientific American 'Don't Let Robots Pull the Trigger' (1<sup>st</sup> March 2019)

<sup>89</sup> Michael T. Klare 'Autonomous Weapons Systems and the Laws of War' *Arms Control Association* (Mar. 2019), available at <https://www.armscontrol.org/act/2019-03/features/autonomous-weapons-systems-laws-war> accessed 10.11.2023

<sup>90</sup> Ingvild Bode, Hendrik Huelss, Anna Nadibaidze, Guangyu Qiao-Franco and Tom F.A. Watts 'Prospects for the global governance of autonomous weapons: comparing Chinese, Russian, and US practices 25 (5) *Ethics and Information Technology* (2023) 2

<sup>91</sup> Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons System Geneva, 25–29 March 2019 and 20–21 August 2019 Item 6 of the provisional agenda Adoption of the report (second session) Report of the 2019 session of the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems, CCW/GGE.1/2019/3 Annex IV: Guiding Principles

lowest common denominator.<sup>92</sup> The guiding principles state *inter alia* about continued compliance with international law and especially IHL and a need to retain human responsibility for decisions on the use of AWS.<sup>93</sup>

The complexity of going forward in the negotiations is demonstrated by the facts that there is currently neither a common definition for AWS (as some states also prefer using for example LAWS), nor a mutual understanding of the benefits and challenges in autonomy in weapons systems. A wide range of views, starting from arguments of there being undeniable proof of the risks of AWS, to claims that existing IHL provides a sufficient framework, disagreeing with AWS posing any challenges.<sup>94</sup> In March 2022, the disappointment in the lack of progress was addressed through a joint statement from several states, recognising the urgent need for new rules and limits to the development of AWS.<sup>95</sup> Later, in October, a statement was delivered at the United Nations General Assembly (UNGA) First Committee from over 70 states, which gained much attention in illustrating true potential for finding a common ground for establishing a treaty.<sup>96</sup>

Resulting from a recognition of ethical, legal and humanitarian risks that AWS contribute with, advocacy groups now hope that nine years later, a treaty to be established in near future.<sup>97</sup> For example, The Campaign to Stop Killer Robots (SKR) has in its recent policy paper on ways to negotiate a treaty on AWS encouraged treaty negotiators to be receptive for learning from previous processes of treaty negotiations in disarmament and arms control because of the complexity AWS poses. Further, SKR wishes the treaty to be ambitious in safeguarding the rights and dignities of humanity.<sup>98</sup> The advocacy group, however, holds that given the recent demonstrated actions taken by some states to refuse to negotiate and assert the principle of consensus, CCW is not the most

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<sup>92</sup> Anna Nadibaidze, Can the UN GGE Go Beyond the Eleven Guiding Principles on LAWS? The AutoNorms Blog (23.8.2021)

<sup>93</sup> Meeting of the High Contracting Parties to the 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, Final Report: Annex III, CCW/MSP/2019/9

<sup>94</sup> Nadibaidze (n 92)

<sup>95</sup> Working Paper submitted to the 2022 Chair of the Group of Governmental Experts (GGE) on emerging technologies in the area of lethal autonomous weapons systems (LAWS)

<sup>96</sup> Stop Killer Robots (SKR) 'Negotiating a Treaty on Autonomous Weapons Systems: The Way Forward' 29.6.2022, 2, stating that among the supporters are the UN Secretary-General, at least 70 states, the ICRC and experts in technology and artificial intelligence. See also Article 36, Richard Moyles 'Ground-breaking UN joint statement on autonomous weapons' <https://article36.org/updates/ground-breaking-un-joint-statement-on-autonomous-weapons/> accessed 30.10.2023. Also see the Joint Statement on Lethal Autonomous Weapons Systems: First Committee, 77th United Nations General Assembly, Thematic Debate – Conventional Weapons (21.10.2022) [https://reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com22/statements/21Oct\\_LAWS.pdf](https://reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com22/statements/21Oct_LAWS.pdf) accessed 30.10.2023

<sup>97</sup> Stop Killer Robots (n 96) 2

<sup>98</sup> Stop Killer Robots (n 96) 2

suitable forum to establish such a treaty.<sup>99</sup> Thus, agreement on a treaty through CCW will not be found if a single state party to the convention is objecting. Therefore, the advocacy group is supporting an independent mechanism to establish the treaty, such as through the UNGA.<sup>100</sup> It is up for states to decide where the procedural mechanism will take place.<sup>101</sup> During the year of 2023, the GGE on LAWS, organised within the CCW, continued as the procedural mechanism for negotiating a treaty. Despite earlier overwhelming support for a new instrument to prohibit and regulate AWS in order to protect humanity, states continued blocking the development of binding rules. For example, the US came up with a proposal for voluntary guidelines for implementation of AWS, that states that initially would oppose a ban supported, leading to confusion in clear progress. These states were seen as middle road blocking all progress.<sup>102</sup>

Further, a comprehensive approach is desired for the negotiations.<sup>103</sup> This includes more fundamental questions related to AWS, such as considering to what extent humans should have control over the systems they develop. In addition, this includes a holistic approach through identifying the importance of ethical issues as well as several legal frameworks and not only IHL but also human rights law and international criminal law.<sup>104</sup> This is namely important since it throughout the numerous meetings at CCW remains clear for some states, the only way to regulate AWS is by IHL. Establishing a legally binding framework would indeed have benefits for IHL by for example strengthening article 36 of the Additional Protocol I to the Geneva Conventions, as it establishes a requirement of a legal review of new weapons within IHL.<sup>105</sup>

However, the UN Special Rapporteur Christof Heyns for example has raised at several occasions at the Human Rights Council's sessions that AWS does relate to issues to human rights law and ethics as well, thus requiring a cross-disciplinary approach.<sup>106</sup> A special treaty on AWS is also seen to have a specifically important impact on the transformation of international norms and attitudes. This normative value of creating a treaty dealing with a specific type of weapon has been illustrated

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<sup>99</sup> Stop Killer Robots (n 96) 3-5

<sup>100</sup> Stop Killer Robots (n 96) 3

<sup>101</sup> Article 36, Moyles (n 96)

<sup>102</sup> See CCW/GGE.1/2023/WP.4/Rev.2 CCW/GGE.1/2023/WP.4/Rev.2: Draft articles on autonomous weapon systems – prohibitions and other regulatory measures on the basis of international humanitarian law (“IHL”)

<sup>103</sup> Article 36, Moyles (n 96) and Stop Killer Robots (n 96) 4

<sup>104</sup> Stop Killer Robots (n 96) 4

<sup>105</sup> *Ibid.*

<sup>106</sup> A/HRC/26/36: Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, Human Rights Council, 25th session, Agenda item 3

through *inter alia* the Mine Ban Treaty as well as the Convention on Cluster Munitions.<sup>107</sup> The Mine Ban Treaty is in addition a great example of a separate process outside the UN framework.<sup>108</sup> Established in 1997, 164 states have ratified the treaty today.<sup>109</sup> States that have been opposing establishing a treaty on regulating AWS are, among others, Russia, the United States, Israel, and India.<sup>110</sup>

A critical point that the briefing paper from SKR also makes, among others, is that the new treaty would need to include the notion of meaningful control as a basis in all situations where AWS would be used.<sup>111</sup> Meaningful human control is vital as the data processing by machines through artificial intelligence (AI) and algorithms is beyond the capacity of humans to understand, making the human element necessary to continue to be included.<sup>112</sup> The requirement of a human element existing in the law on the use of force is also a core condition for IHL.<sup>113</sup> At the CCW in March 2023, the Centre of War Studies in University of Southern Denmark noted that a certain norm of diminished human control risks spreading silently as more autonomous AI technologies integrate into weapon platforms, and these platforms proliferate globally.<sup>114</sup> At the same time, states such as Israel argued at the CCW that there is no requirement for any form of human control over weapons, and that human control is not an obligation under IHL, asserting that IHL rules do not define how states should comply with the rules.<sup>115</sup> Most recently, a further step was taken when a resolution on LAWS passed at the UNGA,<sup>116</sup> marking a crucial step in the progress towards establishing a legally binding framework. The resolution passed with a total of 164 states in favour. What is especially interesting is that it is affirming that both IHL and international human rights law applies to AWS, welcoming a cross-cutting approach.<sup>117</sup> However, the latest negotiations within the GGE on LAWS in

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<sup>107</sup> Stop Killer Robots (n 96) 4

<sup>108</sup> Kasmira Jefford, “What Next for Talks on Regulating ‘Killer Robots’?”, Geneva Solutions (21 December 2021)

<sup>109</sup> Convention On The Prohibition of The Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction: Oslo, 18 September 1997, entered into force 1 March 1999, UNTS 2056. Currently the Treaty has 133 State’s signatories and 164 States Parties.

<sup>110</sup> Jefford (n 108)

<sup>111</sup> Stop Killer Robots (n 96) 4,6 see also for example (n 95) Working Paper submitted to the 2022 Chair of the Group of Governmental Experts (GGE)

<sup>112</sup> Stop Killer Robots (n 96) 4

<sup>113</sup> ICRC (n 18) 30. What ICRC is in substance referring to is Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted June 8, 1977, 1125 UNTS 3, entered into force December 7, 1978 : Article 57 ‘Precautions in attack’ and that ‘those who plan or decide upon attack’ refers to a human

<sup>114</sup> AutoNorms at the UN GGE on LAWS in March 2023, (9.3.2023)

<sup>115</sup> Reaching Critical Will: CCW Report, Vol. 11, No. 2 (14.3.2023)

<sup>116</sup> UNGA 78<sup>th</sup> session, GA/DIS/3731 ‘First Committee Approved New Resolution on Lehtal Autonomous Weapons, as Speaker Warns ‘An Algorithm Must Not Be in Full Control of Decisions Involving Killing’

<sup>117</sup> UNGA, A/C.1/78/L.56 1<sup>st</sup> Committee, 78<sup>th</sup> session, Agenda item 99: General and complete disarmament,



November 2023 were discussed only behind closed doors.<sup>118</sup> This progress still clearly demonstrates that regulation is needed and desired.

## **2.3. AWS and IHL**

### **2.3.1. Introduction**

International humanitarian law (IHL), also known as the law of war and armed conflict, regulates the use of force and is thus important for a deeper understanding of situations where AWS could be used lawfully.<sup>119</sup> AWS are not specifically regulated by IHL treaties, although they must be used in compliance with IHL. IHL governs the use of weapons through the rules on the conduct of hostilities during armed conflicts, through the principle of distinction, proportionality, and precautions in attack and are focused on to those who are planning, determining, and carrying out an attack.<sup>120</sup>

There is a particular concern regarding whether autonomous weapon systems can conform to article 51 of the 1977 Additional Protocol to the Geneva Conventions of 1949. It requires that weapon systems must be used in a discriminate and proportionate manner. If a new weapon is inherently unable of being used in a discriminate and proportionate manner, it should be notified of, as article 36 to the Additional Protocol I so require and should therefore not be used. So, if an AWS is capable to be used in a discriminate and proportionate manner, the use could be permissible. If the requirement of discriminate and proportionate use is not fulfilled, then the use is prohibited by IHL.<sup>121</sup>

A results-based view further holds that there is a possibility for AWS to be programmed in a way that enables them to comply with IHL, by a constraint-based approach, where IHL would be translated into programming rules. These rules would in turn strictly decide the actions that are prohibited in a specific situation. By this, the AWS would with the programmed, strict rules, become an ‘ethical governor’, being able to determine what actions the AWS has to prevent because actions are prohibited under IHL. Because AWS would in that situation sacrifice themselves instead of a

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<sup>118</sup> Laura Varella and Ray Acheson ‘CCW Operates in the Dark for Lowest Common Denominator Outcomes’

<sup>119</sup> Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (opened for signature 8 June 1977, entered into force 7 December 1978) 1125 United Nations Treaty Series 3 (Protocol I) Article 35

<sup>120</sup> Peter Asaro ‘Jus nascendi, Robotic Weapons and the Martens Clause’ in Ryan Calo, Michael Fromkin and Ian Kerr (eds.) *Robot Law*, (Edward Elgar Publishing 2016) 367–386, 373

<sup>121</sup>Asaro (n 120) 379

human being, the view holds that it results in avoiding mistakes and drawbacks that humans would do, and therefore perform even better than humans in adapting to the rules of IHL when using force.

<sup>122</sup> This would thus result in less risks for civilians.<sup>123</sup>

The argument of a safer battlefield by posing less risk to civilians, and therefore less civilians being killed is one of the core arguments for supporting the use and the technological development of AWS.<sup>124</sup> According to a study by the ICRC on civilian deaths in large-scale armed conflict during the 20<sup>th</sup> century, there were on average ten civilian deaths for every combatant killed; in the First World War, on the contrary, nine combatants were killed for every civilian death.<sup>125</sup> The numbers thus tell that there are many more civilians dying in casualties today than before. This understandably gives a reason to argue that unmanned systems such as AWS could improve the situation with saving more civilian lives. In comparison, it was found that from 48 US drone strikes, only between 89 to 102 civilians or “unknowns” died.<sup>126</sup> The reduction in civilian casualties in drone attacks is a result of technological advancements and more rigid rules for when the system can release weapons.<sup>127</sup> The former president of the ICRC, Jakob Kellenberger, has expressed that deployment of AWS would reflect a paradigm shift and a qualitative change in the conduct of hostilities. In his view, a robot could indeed be programmed to act more ethically and cautiously than a human being, but it would be impossible to program it in such way that would function in accordance with IHL on the battlefield.<sup>128</sup>

The counterargument, which is more common, is that these assertions are false since they try to restrict the AWS concerns to risk minimization alone. This is however only one factor in the assessment of intent and interpretation.<sup>129</sup> Such perspective is also incapable of considering the aspect of accountability and how new technologies could lead to the norm in question to be

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<sup>122</sup> Ronald Arkin, ‘Governing Lethal Behavior in Autonomous Robots’ (2009) *CRC Press* 71-91 and Asaro (n 28) 696

<sup>123</sup> Kenneth Anderson and Matthew C. Waxman ‘Law and Ethics Robot Soldiers’ (2012) *Policy Review, Forthcoming: American University, WCL Research Paper No. 2012-32; Columbia Public Law Research Paper No. 12-313*, 15

<sup>124</sup> Arkin, (n 68) 1, 6

<sup>125</sup> Sabrina Tavernise and Andrew W. Lehren ‘A grim portrait of Civilians Deaths in Iraq’, (22.10.2010) *New York Times* On the other hand, when looking at casualties from the Iraq War, statistics vary widely, the ratio claimed to be anywhere between 10 to 1 and 2 to 1. Thus, numbers are only an indicative feature in the argumentation.

<sup>126</sup> Rosa Brooks ‘Drones and Cognitive Dissonance’ in Peter Bergen and Daniel Rothenberg (eds.) ‘Drones, Remote Targeting and the Promise of Law’ (2013) *Cambridge University Press* 4 referring to ‘The Drone War in Pakistan’, <http://natsec.newamerica.net/drones/pakistan/analysis>

<sup>127</sup> Brooks (n 126) 4, it has to be noted that drones’ capabilities are not fully equivalent to those of AWS, but as the level of technological advancement is almost the same, it is a suitable example for illustrating how the use can reduce civilian casualties.

<sup>128</sup> Jakob Kellenberger, ‘Keynote Address’, International Humanitarian Law and New Weapon Technologies, 34th Round Table on Current Issues of International Humanitarian Law, San Remo, Italy, 8–10 September 2011, 813-814

<sup>129</sup> Asaro (n 120) 381

destabilized. Hence, it is clear that views on the potential effect of AWS under IHL and whether such impact is beneficial or harmful, diverge.<sup>130</sup>

IHL also imposes specific requirements on those who takes decisions, seen as at least implicitly human. Projecting the decision-making to ‘nonhuman’ computers and programs would be uncertain, nevertheless the fact that they are developed and created by humans.<sup>131</sup> Further, the use of force assumes human decision-making through existing customs, norms and written conventions regulating decision on the use of force, such as the Hague Convention, that requires a combatant to be commanded by a person.<sup>132</sup> In addition, the Hague Convention also establishes the Martens clause, demanding that principles of humanity to be respected during conflict.<sup>133</sup> These are questioned widely when human decision-making is replaced by automated processes.<sup>134</sup> The Martens clause and its link to humanity will further be examined in a following subchapter.

The principles of distinction, proportionality and precautions in attack are addressed to those who plan, decide upon, and carry out an attack in armed conflict.<sup>135</sup> The crucial concerns whether AWS can be legally accepted under existing IHL is nevertheless determined by whether AWS are able to satisfy especially these principles. They will therefore be discussed separately in following sections. It is however important to note that these principles must be complied with as a collective,<sup>136</sup> but for establishing a comprehensive understanding, it is vital to examine each of them separately.

### **2.3.2. The Principle of Distinction**

The principle of distinction is set out in article 48 of the Additional Protocol to the Geneva Conventions of 1949. The parties shall always distinguish between the civilian population and

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<sup>130</sup> ICRC position paper on Autonomous Weapon Systems (5/2021)

<sup>131</sup> Asaro (n 120) 382

<sup>132</sup> The Hague Convention: Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, adopted 18 October 1907, entered into force 26.1.1910, Regulations: Art. 1

<sup>133</sup> Rupert Ticehurst ‘The Martens Clause and the Laws of Armed Conflict’ 30-04-1997 Article, *International Review of the Red Cross*, No. 317, available at <https://www.icrc.org/en/doc/resources/documents/article/other/57jnhy.htm> last accessed 31.10.2023

<sup>134</sup> Asaro (n 120) 382

<sup>135</sup> Neil Davison, ‘A legal perspective: autonomous weapon systems under international humanitarian law’ in ‘Perspectives on Lethal Autonomous Weapon Systems’ United Nations Office for Disarmament Affairs (UNODA) Occasional Papers 30 (2017)

<sup>136</sup> Christof Heyns ‘Autonomous weapons in armed conflict and the right to a dignified life: an African perspective’, (2017), 33 *South African Journal on Human Rights*, 46, 52

combatants in accordance with this article.<sup>137</sup> The principle seeks to minimise the direct impact on civilians and those who are not, or not anymore, participating in hostilities through a prohibition of targeting such people.<sup>138</sup> Apart from being recognised as treaty law, the rule of distinction is also considered having a nature of customary international law,<sup>139</sup> and is applicable both during international and non-international armed conflict.<sup>140</sup> The principle also prohibits all means and methods of warfare that cannot be directed at a particular military objective, and thus viewed as indiscriminate. Hence when it comes to applying the principle on AWS, in a situation where autonomous weapons cannot reliably make a distinction between combatants and civilians, or other fighters and civilians, their use is viewed as unlawful.<sup>141</sup>

Factors that are seen to hinder autonomous weapons to operate in conformity with the rule of distinction is a machine or robot's lack of ability to understand context, as in difficulties in translating IHL language, such as definitions of civilians and combatant into computer technology and programming.<sup>142</sup> Asaro notes therefore that the distinction between civilians and combatants is a complex task.<sup>143</sup> Thus, it is impossible to view the principle of distinction as a sorting rule where one can categorically place persons into either civilians or combatants. This can be illustrated through determining what a civilian participating in hostilities means.<sup>144</sup> ICRC has laid down a set of guidelines for what can contribute to an act of direct participation in hostilities.<sup>145</sup> During direct participation in hostilities, civilians are not provided the protection that IHL normally offers.<sup>146</sup> These rules set out a complex combination of requirements, demanding a sophisticated understanding of for example implications arising of potential harm or status of other civilians that might be threatened. These are set out for a sociocultural and psychological situation, that determine

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<sup>137</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Adopted June 8, 1977, entered into force December 7, 1978, article 48 and 51 (4)(b)

<sup>138</sup> Heyns (n 136) 52

<sup>139</sup> Legality of the Threat on the Use of Nuclear Weapons (Advisory opinion) (8.7.1996) ICJ Reports 1996, 226, para 79

<sup>140</sup> Rule 1 of the Rules of Customary International Humanitarian Law, available at <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule1> Accessed 17.8.2023, See also Rule 3 and 5 for specific definitions on Combatants and Civilians.

<sup>141</sup> Heyns (n 136) 52 and Heyns (n 5) 12-13, para. 66

<sup>142</sup> Asaro (n 28) 698-699 and Heyns (n 136) 52-54

<sup>143</sup> Asaro (n 28) 697-698

<sup>144</sup> Asaro (n 28) 697

<sup>145</sup> Nils Melzer, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law: VII. Temporal Scope of the Loss of Protection, ICRC, 21

<sup>146</sup> Melzer (n 145) 20 'Direct participation'

whether the individual's intentions can be viewed as military actions or not. They thus require interpretative judgement.<sup>147</sup>

Asaro further argues that the guidelines are specifically decided to not be called rules because their purpose is to guide a moral agent in navigating multiple layers of interpretation and judgement. Thus, the very nature of IHL has a presumption that combatants are human agents, and that human judgement might be needed to meet the requirement of distinction.<sup>148</sup> On the other hand, this could potentially change over time, as technology is advancing.<sup>149</sup> It is however argued that complexity and confusion in present-day conflicts pose challenges for humans to comply with the principle. In this context, Friman asks whether the very nature of humanity may be the cause for humans to fail in overcoming such challenges, and instead if AWS, because of their inherent 'humanity deficit', could perform better.<sup>150</sup> Accordingly, human judgment can potentially appear less reliable than technology during challenging conditions on the battlefield.<sup>151</sup> In addition, machines do not experience stress, anger or fear, while it in a human can trigger the probability of failing to respect the principle.<sup>152</sup>

Finally, IHL is not only protecting civilians, but also persons *hors de combat*, in other words combatants who have been injured or surrendered.<sup>153</sup> The protection is established in customary international law and applicable in both international and non-international armed conflicts.<sup>154</sup> It is highly questionable whether AWS could be able to distinguish such combatants, as this requires ability to precisely interpret gestures and facial expressions as well as emotions.<sup>155</sup> It is still crucial to note that the challenge to distinguish between civilian and combatants, persons *hors de combat* or those directly taking part in hostilities, is also frequently present for military personnel. This is

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<sup>147</sup> Asaro (n 28) 698-699

<sup>148</sup> Asaro (n 28) 698

<sup>149</sup> Heyns (n 136) 54

<sup>150</sup> Johanna Friman 'The Pandora's Box of Military Artificial Intelligence' in Tommi Koivula, Katariina Simonen (eds) 'Arms control in Europe: Regimes, Trends and Threats' (2017) *National Defence University Series 1: Research Publications* 140

<sup>151</sup> Michael Schmitt and Jeffrey Thurnher 'Out of the loop': Autonomous Weapon Systems and the Law of Armed Conflict' (2013) 4 *Harvard Security Journal*, 248

<sup>152</sup> Robin Geiss 'The International-Law Dimension of Autonomous Weapons Systems' (2015) Policy study, Friedrich Ebert Stiftung, 14

<sup>153</sup> Jean-Marie Henckaerts, Louise Doswald-Beck 'Customary International Humanitarian Law, Volume I: Rules' ICRC, Rule 47, 164 *Cambridge University Press & International Committee of the Red Cross* 2005

<sup>154</sup> *Ibid.*

<sup>155</sup> Geiss (n 152) 14

especially challenging in urban areas. Thus, distinguishing who is a legitimate target is not a unique problem for AWS.<sup>156</sup>

### 2.3.3. The Principle of Proportionality

The principle of proportionality, viewed as a subset from the principle of distinction, requires that the anticipated harm to civilians, such as loss of life or the cause of injury, has to be assessed before the attack against what the expected military advantage achieved from the operation could be.<sup>157</sup> The principle of proportionality is seen to be a norm of customary international law.<sup>158</sup> It is argued that AWS could fail in complying with the rule of proportionality.<sup>159</sup> For the principle to be complied with, it requires value judgements and subjective assessments of risks what has to be done. This in turn is an assessment that is seen as impugning whether and to what extent AWS are capable of doing it. Some argue that the principle of proportionality is even more challenging than the principle of distinction, given its higher complexity. Thus, if a system is fully autonomous, it would be incapable of programming individual scenarios.<sup>160</sup> Such scenarios that require recognising and interpreting subtle behavioural hints, relying on culture and context are already challenging for humans to assess when making a judgement on proportionality in targets.<sup>161</sup>

If AWS would show to not be able to comply with the rules of distinction and proportionality, the effects would be violating both article 51 and 57 to the Additional Protocol to the Geneva Conventions, as they address precautions to avoid losses of civilians, as well as establishes a customary rule of keeping away civilians from hostilities, as these articles are some of the major articles for addressing the principle of proportionality.<sup>162</sup> Therefore, if AWS use would lead to violating either rule, their usage would be unlawful. On the other hand, it is argued that if AWS would be able to comply with abovementioned articles, the impact and the end-result could even be better, with fewer incidental casualties and less incidental civilian damage, than what the result of

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<sup>156</sup> Philip Alston 'Lethal Robotic Technologies: The Implications for Human Rights and International Humanitarian Law' (2011-2012) 21 *Journal of Law, Information & Science* 54

<sup>157</sup> Article 51 (5) (b) of Additional Protocol I to the Geneva Conventions of 12 August 1949

<sup>158</sup> Henckaerts and Doswald-Beck (n 153) Rule 14, 47 referring to 'Sweden, *IHL Manual*'

<sup>159</sup> HRW and IHRC 'Shaking the Foundations: The Human Rights Implications of Killer Robots' (2014) 15

<sup>160</sup> Markus Wagner, 'The Dehumanization of International Humanitarian Law: Legal, Ethical, and Political Implications of Autonomous Weapon Systems, (2014) 47 *Vanderbilt Journal of Transnational Law* 1371, 1393-1399

<sup>161</sup> Marcello Guarini and Paul Bello 'Robotic Warfare: Some Challenges in Moving from Noncivilian to Civilian Theaters', 138 in Patrick Lin, Keith Abney, George A. Bekey (eds) '*Robot Ethics: The Ethical and Social Implications of Robotics*' (2012 Massachusetts Institute of Technology)

<sup>162</sup> Article 51 and 57 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts

the usage of conventional weapons would result in. Because AWS are deployed from a safe distance and carefully chosen with time, this might also result in greater precautions.<sup>163</sup> Further, according to Arkin, a robotics expert, robots are capable to calculate proportionality better than humans.<sup>164</sup>

Sharkey however makes a distinction between ‘easy’ and ‘hard’ challenges to proportionality.<sup>165</sup> In connection to Arkin’s argument, he states that the argument about robots calculating proportionality better than humans relates to an ‘easy’ proportionality problem.<sup>166</sup> This includes determining how much collateral damage different attacks are likely to cause, and then direct an attack to reduce such damage. The problem, Sharkey argues, is that it can only reduce collateral impact. For example, it is possible that robot software could decide the munitions and weapons used near a school for reducing the number of children killed. The ‘hard’ proportionality problem is on the other hand deciding whether any kind of military attack and the lethal use of force in a close range to a school would be justified given the potential military advantage. Determining what constitutes direct military advantage is therefore a qualitative and subjective human decision. Such decisions must according to Sharkey be made by responsible human commanders, who can be held accountable and are capable of considering options according to experiences and situational awareness. Further, he argues that a machine may fail in a way that no human ever would, and in that case, ‘it can go really wrong’.<sup>167</sup>

In addition, the assessment about whether the requirement of proportionality is fulfilled needs to be made based on the benefits of each attack separately, depending on specific context and the entirety of the attack, thus requiring a case-by-case analysis.<sup>168</sup> It remains clear that a human’s judgement is more valid, when comparing to considering a single algorithm making such an assessment in advance. In addition, general legal interpretations on the principle of proportionality, for example from the US Air Force School, view that it is relying on explicit ideas such as ‘reasonable military commander standard’.<sup>169</sup> The standard is assessing whether the commander’s actions were reasonable and if another commander, under the same circumstances, would have made the same

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<sup>163</sup> Kellenberger (n 128) 814

<sup>164</sup> Noel E. Sharkey ‘The inevitability of autonomous robot warfare’ (2012) 94 *International Review of the Red Cross* 787, 789 referring to Arkin (n 122) 47–48.

<sup>165</sup> *Ibid* 789-799

<sup>166</sup> *Ibid* 789

<sup>167</sup> *Ibid* 790

<sup>168</sup> Heyns (n 136) 54

<sup>169</sup> *Ibid* 54 referring to T. Hagmaier and others, ‘Air Force Operations and the Law: A Guide for Air, Space and Cyber Forces’ 21

decisions, and then determining whether the actions were complying with IHL.<sup>170</sup> Further, since the reasonable military commander standard includes the concept of reasonableness, which has a strong link to human reason, it adds weight on both moral and ethical examination, instead of only legal.<sup>171</sup> The idea of a machine, rather than a human, completing such an examination seems obscure to many, however the reasonableness being the core idea of the concept.<sup>172</sup> In addition, another argument doubting AWS' capability to comply with the principle of proportionality is the 'proportionality test'. The test is assessing whether a specific action can comply with the principle of proportionality, and is thus of subjective nature, and cannot therefore be completed by a computer or machine.<sup>173</sup>

Summarizing, the coincidental view seems to be that it is impossible to imagine a machine having the capacity of determining such decisions, for the rules to be complied with, especially when it comes to making qualitative decisions for ensuring that force used is not excessive.<sup>174</sup> It would be illegal to use crucial features in a weapon where unpredictability occurs. Autonomy in the system of AWS would pose this threat because of, as earlier stated, its unconstrained and unpredictability in time and location, and the element of a human missing. The context-specific, complex judgements including challenging rules and principles to measure, must according to this view be taken by a human, and is in the current state of AWS not feasible.<sup>175</sup>

#### **2.3.4. The Principle of Precautions in Attack**

The principle of precautions in attack requires that constant care ought to be taken for sparing the civilians, civilian population, and civilian objects.<sup>176</sup> Therefore, all measures to prevent civilian losses must be continually taken.<sup>177</sup> When launching an attack, IHL requires all parties to take all feasible precautions to avoid, and in any event minimize collateral damage.<sup>178</sup> The rule was first

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<sup>170</sup> Oliver Corten and Robert Kolb in Max Planck Encyclopedias of International Law 'Reasonableness in International Law' May 2021, *Oxford University Press* 4: Standard of Action, 9

<sup>171</sup> Corten and Kolb (n 170) 1: Overview of Doctrine, 1

<sup>172</sup> HRW and IHRC (n 159) footnote 55, discussing the reasonable military commander standard in the context of autonomous weapons and the principle of proportionality

<sup>173</sup> HRW and IHRC (n 159) 16, referring to UN Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, Lethal Autonomous Robotics, A/HRC/23/47, April 9, 2013 32-34

<sup>174</sup> Christof Heyns, 'Autonomous weapons systems: living a dignified life and dying a dignified death' 9 in Bhuta et al (n 22)

<sup>175</sup> ICRC (n 18) 30-31

<sup>176</sup> ICRC Casebook, 'Precautions in Attack' and ICRC Database, Customary IHL, 'Target Selection'

<sup>177</sup> Geiss (n 152) 15

<sup>178</sup> Additional Protocol I, article 57(2)(a)(ii)



articulated through the Hague Convention<sup>179</sup>, and later more clearly codified in the Additional Protocol I to the Geneva Conventions.<sup>180</sup> The principle is also part of established customary international law.<sup>181</sup> Although the 1977 Additional Protocol I does not define the notion ‘feasible precautions’, it is established in the 1996 Amended Protocol II to the CCW as ‘those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations’.<sup>182</sup> The principle of precautions apply to the use of AWS, and can according to Thurnher pose difficulties for states to comply with, especially when it comes to the criteria of feasible precautions.<sup>183</sup> He sees that the principle can in certain situations prohibit the use of AWS, for example if another system can feasibly complete a mission, and therefore provide better civilian protection while maintaining military advantage.<sup>184</sup> According to Schmitt, the term feasible embodies the whole principle and suggests that the crux of the legality of AWS lies in the requirement to select the means of warfare that are least likely to put civilians and civilian objects at risk, without losing military advantage. That is, the use of AWS is lawful only when its use will achieve military objectives, that other functioning systems cannot achieve, and which results in less collateral damage.<sup>185</sup>

The principle is further seen to pose challenges for AWS because it applies not only during the planning and programming phase, but also needs to remain valid and decisive throughout the mission or operation.<sup>186</sup> Also, respecting the principle of precautions can be easier carried out in static conflict environments, but in dynamic, or even chaotic conflict settings, and without human judgement, it becomes exceedingly challenging.<sup>187</sup> As unforeseen circumstances can occur during combat missions, it is argued that the principle implicitly requires the duty to keep a human soldier

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<sup>179</sup> Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, adopted 18 October 1907, entered into force 26.1.1910, the Hague Convention (IX), Article 2(3)

<sup>180</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Article 57

<sup>181</sup> Henckaerts and Doswald-Beck (n 153) 51, “Rule 15: Precautions in attack” more specific obligations are to be found in Rules 16-21.

<sup>182</sup> Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 CCW Convention as amended on 3 May 1996) Art. 3(10)

<sup>183</sup> Jeffrey Thurnher ‘Examining Autonomous Weapon Systems from a Law of Armed Conflict Perspective’ in Hitoshi Nasu & Robert McLaughlin (eds.) *New Technologies and the Law Of Armed Conflict* (2013, Springer) 222

<sup>184</sup> Thurnher (n 183) 222

<sup>185</sup> Michael N. Schmitt ‘Autonomous Weapon Systems and International Humanitarian Law: A Reply to the Critics’ (2013) *Harvard National Security Journal*, 24

<sup>186</sup> Geiss (n 152) 15

<sup>187</sup> Nathalie Weizmann and Milena Costas Trascasas, Geneva Academy of International Humanitarian Law and Human Rights, Academy Briefing No. 8 ‘Autonomous Weapon Systems under International Law’ (November 2014)

“on the loop” in order for soldiers to react spontaneously to suddenly changing circumstances.<sup>188</sup> On the other hand, it is argued that since AWS can process information faster and can therefore react faster than humans, one could question the capability of humans to intervene in a situation where a weapons system is preparing to constitute a breach of IHL.<sup>189</sup>

Conversely, it is also argued that in practice, some measures of precautions may only be feasible through the use of AWS.<sup>190</sup> In certain situations, AWS could provide greater protection to civilians than more conventional methods of warfare.<sup>191</sup> In addition, Sassóli argues that AWS can provide an advantage for precautions given its rapid learning and capability to assimilate. This also relates to the notion of feasibility, as feasibility develops through experience.<sup>192</sup> It is imperative that AWS be recalled and reprogrammed, and that humans follow the advancements in order to fully benefit from the lessons learned.<sup>193</sup> The required legal analysis for determining whether or not to use AWS would still need to be done by human decision makers, making autonomy in AWS eventually dependent on human legal judgement.<sup>194</sup> Finally, Sassóli notes however the concern about the possibility that humans will tend to trust the machine and hesitate to override it, even when uncertain of the situational legality. This is given that AWS is able to process information so quickly and based on a vast and complex store of information, that is nearly beyond human comprehension.<sup>195</sup>

### **2.3.5. Article 36 of AP I: Obligation of Legal Reviews of New Weapons**

Given the fact that AWS are highly developed, and therefore complex systems, humans might be incapable of foreseeing how they act in complex operational environments or unforeseen and uncertain circumstances or situations. This draws attention to the question whether AWS are able to meet the requirements imposed by Article 36 of Additional Protocol I. Under article 36 of Additional Protocol I to the Geneva Conventions, legal reviews of new weapons are obligatory. This is important to ensure that a State’s armed forces are capable of conducting hostilities in accordance

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<sup>188</sup> Geiss (n 152) 15-16

<sup>189</sup> Geiss (n 152) 16, refers to Alston (n 156) 54

<sup>190</sup> Kellenberger (n 128) 813, and Marco Sassóli ‘Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to be Clarified’ (2014) 90 *International Law Studies, Naval War College*, p 336

<sup>191</sup> Thurnher (n 183) 222

<sup>192</sup> Sassóli (n 190) 336

<sup>193</sup> *Ibid* 336

<sup>194</sup> Kenneth Anderson, Daniel Reisner and Andrew Waxman ‘Adapting the Law of Armed Conflict to Autonomous Weapon Systems’ (2014) 90 *International Law Studies, U.S. Naval War College* 405

<sup>195</sup> Sassóli (n 190) 337

with international obligations.<sup>196</sup> ICRC sees that questions on rules of proportionality and precautions in attack arise, and especially how they are considered when reviewing weapons. Challenges regarding reviewing the legality of autonomous weapon systems are also present, since there is no standard method or protocols for testing or evaluating the performance of such weapons.<sup>197</sup> In particular, when carrying out the review of the weapon, in this case the AWS, the article requires full understanding of its capabilities and predicting its effects, especially through verification and testing. The legal review must therefore bring an extremely high level of certainty that once activated, the AWS is predictably and reliably operating as determined.<sup>198</sup> In detail, predictability is knowledge of how AWS will function in any given situation of use, and the effects thereof, whereas reliability is knowledge of how consistently the AWS will function as aimed, for example without failing or having unanticipated implications.<sup>199</sup> Ensuring this could be challenging, taking into consideration the numerous different situations, environments, and foreseeable scenarios of use.<sup>200</sup>

The requirement is on the other hand argued to be a way for sharing best practices and norms, once a state is willing to share its internal processes and standards for these reviews to be developing, and by sharing the best practices, shared frameworks would be developed. Some see that it is vital for national-level processes such as these to engage in the international dialogue for finding common ethical and legal standards.<sup>201</sup> However, developing a common framework on AWS through the article is only possible when the requirements of a weapon system are complying with the article. M. Schmitt makes, however, an argument against the criticism of AWS not being able to comply with IHL through the review of new weapons, by noting that the reviews of a new weapon system is only examining the legality of it, not the use of the weapon in a certain situation. Accordingly, he doubts whether this article and requirement could establish a hindrance for AWS to develop as a class of weapons, as the article demonstrates an understanding in IHL that warfare constantly is developing.<sup>202</sup>

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<sup>196</sup> ICRC, 'A guide to the Legal Review of New Weapons, Means and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol 1 of 1977', Geneva, January 2006

<sup>197</sup> Convention on Certain Conventional Weapons (CCW) Meeting of Experts on Lethal Autonomous Weapons Systems (LAWS) 11-15 April 2016, Geneva: Views of the International Committee of the Red Cross (ICRC) on autonomous weapon systems, 4

<sup>198</sup> Davison (n 135) 10

<sup>199</sup> ICRC (n 50) 9-13

<sup>200</sup> Davison (n 135) 10

<sup>201</sup> Anderson & Waxman (n 71) 4

<sup>202</sup> Schmitt (n 185) 32-33

It remains clear that it seems implausible for AWS to be identical with humans when it comes to inter alia the processing of complex information. As a consequence, it seems difficult for AWS to comply with the principles of distinction and proportionality in armed conflict. It is argued that this could lead to AWS killing arbitrarily, which thus violates a set of not only IHL principles but also human rights law.<sup>203</sup> The use of AWS and compliance to human rights law will be more closely examined after the next subchapter.

### **2.3.6. The Martens Clause and Its Relevance in the AWS debate**

The Martens Clause contributes with an ethical link to IHL, making it especially relevant in the examination of the legality of AWS. It provides that civilians and combatants are protected by customary IHL, but also by the principles of humanity and the dictates of the public conscience in situations that are not covered by existing treaties.<sup>204</sup> The clause is also recognized as customary international law.<sup>205</sup> The Martens clause can further be viewed as an ‘emergency exit form voluntarist positivism’.<sup>206</sup> Thus, it gives authority to moving further from treaty law and customary law and allows for principles of humanity and the dictates of the public conscience. The principles remain constant, but their practical effect could vary so that it justifies a method of warfare and prohibits another in another period of time.<sup>207</sup> Therefore, by this, the clause is preventing the belief of anything that not explicitly is prohibited to be permitted.<sup>208</sup>

Because of its distinct nature, it has been claimed to be a possible ‘trump’ in the arguments on technological aspects in the debate on legal use of AWS. Even if technology, as above argued, could overcome all obstacles, and thus make IHL compatible with the use of AWS, the use could still violate the Martens Clause in IHL. Accordingly, the use of AWS could be seen to violate the principles of humanity and the dictates of public conscience.<sup>209</sup> On the other hand, it is argued to

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<sup>203</sup> HRW and IHRC (n 159) 16

<sup>204</sup> “The principles of humanity and the dictates of public conscience” are mentioned especially in article 1(2) of Additional Protocol I, in the preamble of Additional Protocol II to the Geneva Conventions, and referred to the ‘Martens Clause’.

<sup>205</sup> ICJ (n 139) paras 78 and 84

<sup>206</sup> Giovanni Di Stefano and Etienne Henry, ‘Final Provisions, Including the Martens Clause’ in Andrew Clapham and others (eds) *The 1949 Geneva Conventions: A Commentary* (2015 Oxford University Press) 188. Also, voluntarist positivism holds a combination of legal positivism and legal voluntarism: a focus on act on legal creation and recognition, interplaying with human will and validity of laws in a legal system, see Basak Cali ‘International Law for International Relations’ *Oxford University Press Online Resources*, (2016) Chapter 4

<sup>207</sup> Dissenting Opinion of Judge Shahabuddeen, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ 1996, 406

<sup>208</sup> Davison (n 135) 8

<sup>209</sup> Docherty, HRW and IHRC (n 21) 29

be an overarching principle that ought to be considered in every case.<sup>210</sup> The Clause thus divides views on the ability for AWS to be fully respecting IHL. The principles of the Clause are furthermore also sometimes linked with the concept of dignity, though in a deontological argument opposing autonomous killing, and the Clause is acknowledged a rather limited normative role.<sup>211</sup> Finally, it is seen as a universal and historical determinant foundation of IHL.<sup>212</sup>

#### 2.4. AWS and International Human Rights Law

The thesis will now examine how AWS deployment can comply with or violate human rights law. Traditionally, international human rights law<sup>213</sup> and IHL<sup>214</sup> were two separate bodies of law, with different subjective substances. Human rights law stems from the rationale to find a just relation between the state and its citizens, with the aim to control the power of the state contra its citizens.<sup>215</sup> In turn, humanitarian law has the roots in the reciprocal expectations of behaviour between states at war and in notions that were considered and civilized.<sup>216</sup> Today they have come closer to each other, where international human rights law can be seen to complement IHL in situations of armed conflict, the major legislative framework to govern the rules of means and methods of warfare during armed attack.<sup>217</sup> As stated, human rights are intended to apply at all times, and are therefore understood to apply also during armed conflict, interpreted with reference to the rules of IHL, having strong legal consensus.<sup>218</sup> Some argue the other way around, that IHL rather applies in addition to human rights law.<sup>219</sup> The international court of justice (ICJ), taken that both human rights and IHL are applicable, suggested in the *Nuclear Weapons Case* that in such situations IHL serves as the *lex specialis* to

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<sup>210</sup> Schmitt (n 185) 32

<sup>211</sup> Diego Mauri 'Lethal Autonomous Weapons Systems in International Humanitarian Law and Human Rights Law' (2018) *University of Palermo* 115

<sup>212</sup> Mauri (n 211) 115 referring to Benvenuti, 'La Clausola Martens e la tradizione classica del diritto naturale nella codificazione del diritto dei conflitti armati' in AA.VV., *Scritti degli allievi in memoria di Giuseppe Barile*, Padua, 1995, 173-224

<sup>213</sup> In the following, "international human rights law", "human rights law" and "human rights" will be used interchangeably.

<sup>214</sup> "IHL" and "humanitarian law" will be used interchangeably

<sup>215</sup> Louise Doswald-Beck and Sylvain Vité, "International Humanitarian Law and Human Rights Law" (1993) 293 *International Review of the Red Cross*, 102

<sup>216</sup> Doswald-Beck and Vité (n 215), 95 and Cordula Droege "Elective affinities? Human rights and humanitarian law", (2008) 90 *International Review of the Red Cross* 501, 503

<sup>217</sup> Droege (n 216) 501

<sup>218</sup> ICJ (n 139) para 25. The court sees that the Covenant (ICCPR) and the right to life does not cease to be in force during armed conflict, except by operation of Article 4 in times of national emergency.

<sup>219</sup> Titus Hattan, 'Lethal Autonomous Robots Are They Legal under International Human Rights and Humanitarian Law' (2015) 93 *Nebraska Law Review* 1044

interpret the human rights treaty ICCPR, and especially the right to life enshrined therein, during armed conflict.<sup>220</sup>

Applying the *lex specialis* element on the debate of AWS, it has been included as an argument in a study for the Directorate-General for External Policies of the Union in the European Parliament regarding the use of AWS. It was argued that the question whether the use of unmanned robots in an armed conflict is violating the human right to life is determined by the reference to the *lex specialis* of IHL.<sup>221</sup> This argument has support in the claim that both international human rights law and IHL are complementary, and not jointly exclusive, where human rights rules needs to be taken into account when interpreting IHL rules.<sup>222</sup> This complementarity element includes a provision of IHL rules being seen as more specialized, but also more permissible.<sup>223</sup>

Concerning IHL and human rights law within the use of AWS, the requirements for the use of AWS under human rights law are stricter, and thus there is less space for the use of AWS under human rights than what there is under IHL.<sup>224</sup> This is further supported by the argument that because IHL is specifically created for times of war, it provides less protection than human rights law, as it is the recognized as the framework for protecting human rights, and war is regarded as an exception.<sup>225</sup> As an example one could compare the principle of proportionality. It is argued that the principle of proportionality has a different role in human rights law than what it has within IHL, however the role not being contradictory. When the main aim for human rights law is to regulate the level of force that could be satisfactory in order to answer to a threat, IHL aims to condemn whether the military action of using force is lawful. Either of them is nevertheless striving to protect human lives.<sup>226</sup>

Accordingly, international human rights law remains more restrictive on the use of force, than compared to IHL. It has even been stated that the two bodies of law have different starting positions.

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<sup>220</sup> ICJ (n 139) para 25

<sup>221</sup> EXPO/B/DROI/2012/12 May 2013, Nils Melzer 'Human rights implications of the usage of drones and unmanned robots in warfare', Directorate-General for External Policies of the Union, European Parliament

<sup>222</sup> Heyns (n 31) 8

<sup>223</sup> Jarna Petman 'Autonomous Weapons Systems and International Humanitarian Law: 'Out of the Loop'?' (Helsinki, 2017, Finnish Ministry of Foreign Affairs) 52 See also Françoise J. Hampson, 'The relationship between international humanitarian law and human rights law from the perspective of a human rights treaty body', (2008) 90 *International Review of the Red Cross* 549–572

<sup>224</sup> Petman (n 223) 53

<sup>225</sup> Lawrence Hill-Cawthorne 'The Role of Necessity in International Humanitarian and Human Rights Law' (2014) 47 *Israel Law Review* 225 226

<sup>226</sup> HRW and IHRC (n 159) 15

For human rights it is the right to life, and for IHL it is the right to kill. This thus illustrates the importance of examining AWS from a lens of human rights.<sup>227</sup> IHL is also seen to have less stringent rules because of its nature, only being applicable in situations of armed conflict. This serves as an argument for human rights to be relevant in situations where AWS can be used: the use of AWS is argued to have a special role also in situations moving beyond the battlefield, and where international human rights law has an even greater relevance in the context of use of force.<sup>228</sup> It should be noted that the intent of this thesis is not to examine the scope of law enforcement officials in substance specifically, but it can provide with useful examples to enshrine light on the importance of human rights in the context of use of force and thus support the argumentations made.

When examining AWS use and human rights law closer, one of the greatest concerns are that the deployment violates the human rights of combatants through the right to life.<sup>229</sup> As has been stated, human rights apply during armed conflict and so the right to life also continues to apply during armed conflict. The former UN Special Rapporteur on extrajudicial, summary, or arbitrary executions has stated in his report to the Human Rights Council (HRC) in 2013, that the use of autonomous weapon systems can potentially pose new threats to the right of life.<sup>230</sup>, which the Human Rights Council has earlier described as “the supreme right”.<sup>231</sup> The use could also weaken the rule as well as the role of international law.<sup>232</sup>

When it comes to treaty law and the right to life, it is enshrined in the International Covenant on Civil and Political Rights (ICCPR), one of the foundational treaties of international human rights law,<sup>233</sup> stating that “every human being has the inherent right to life” and that “no one shall be arbitrarily deprived of his life”. Further, there is no derogation on this right under treaty law, nor under customary international law.<sup>234</sup> As earlier stated, if AWS would fail to comply with the principles of IHL it could result in killing arbitrarily, which would be violating the most important

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<sup>227</sup> Heyns (n 29) 353, referring to Sandesh Sivakumaran ‘International Humanitarian Law’ in Daniel Moeckli, Sangeeta Shah, & Sandesh Sivakumaran (eds) *International Human Rights Law* (2013) 535 Heyns is however adding this being an oversimplification because there are limits to kill during armed conflict.

<sup>228</sup> HRW and IHRC (n 159) 1

<sup>229</sup> Heyns (n 5) para. 112, 21

<sup>230</sup> Heyns (n 5) para 30 and 31.

<sup>231</sup> UN Human Rights Committee, General Comment 6, The Right to Life (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 (1994), 6, para. 1.

<sup>232</sup> Melzer (n 221)

<sup>233</sup> Philip Alston & Ryan Goodman *International Human Rights* (2013 Oxford University Press) 157-158

<sup>234</sup> International Covenant on Civil and Political Rights (Adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art. 6 (1) on the right of life and art. 4(2) on the non-derogability, and Heyns (n 5) para. 36

human right, the right to life. Thus, if failing in complying with principles of IHL, AWS use appears to violate human rights as well. Arbitrary killing is prohibited both during armed attack and peacetime.<sup>235</sup>

In addition, it is argued that even if AWS would manage to comply with human rights law, a machine should not in principle have the right to decide upon who should live and who should die.<sup>236</sup> This criticism has led to advocacy groups calling for a total ban on AWS.<sup>237</sup> Those objecting the ban, rather advocating the technological developments see that AWS contribute to military advancements, and share a view that it makes armed conflict more humane and can thus help saving lives. The argument furthermore holds that not following these technical advancements, and therefore rejecting AWS, could result in not protecting life properly, as AWS use could save lives on both sides.<sup>238</sup> Saving lives by fulfilling the duty of a state's military by protecting own forces is nevertheless not regarded as a quality unique to AWS.<sup>239</sup>

Not only the right of life is however at stake when examining the legality of AWS. There is a view that the AWS use would also pose risks for violating of other human rights<sup>240</sup>, including the right to a remedy, and therefore most likely contributing to the earlier mentioned 'accountability gap'.<sup>241</sup> The right to a remedy is enshrined under treaty law in ICCPR under article 2 (3).<sup>242</sup> If the actions of AWS would fall in an accountability gap, it would contradict the right to a remedy, because it is unclear who would be responsible for the life and death decisions on the use of force that the AWS has taken, if there is no meaningful human control.<sup>243</sup> The lack of responsibility/accountability would thus intervene with the victims using their right to a remedy. Thus, if responsibility of AWS use is impossible, its use should be regarded unlawful also against the right to a remedy.<sup>244</sup>

Finally, it can be noted that AWS poses a risk for violating several other human rights than the right of life, in addition to the principles of IHL. It was also stated that the requirements for the use of

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<sup>235</sup> Heyns (n 5) para. 36

<sup>236</sup> Heyns (n 5), para 31

<sup>237</sup> Docherty, HRW and IHRC (n 8) 2

<sup>238</sup> Heyns (n 5) para 30 and 31, and Anderson & Waxman (n 123) 12

<sup>239</sup> ICRC, Ethics and autonomous weapon systems: An ethical basis for human control? (3 April 2018, Geneva) Executive summary 1

<sup>240</sup> These rights include the right against inhuman treatment and the right to security of the person enshrined in the ICCPR. For more, see Heyns (n 31)

<sup>241</sup> Heyns (n 31) 10 "The right to a remedy"

<sup>242</sup> ICCPR Art. 3 (2)

<sup>243</sup> HRW and IHRC (n 159) 19

<sup>244</sup> Heyns (n 31) 10 "The right to a remedy"



force are under human rights law clearly stricter, which consider the use of AWS legal. The claim of a more human rights-centred approach being vital seems legitimate, and the approach seems justified in the examination of the legality.<sup>245</sup> Therefore, in addition to the view that the use of AWS is regarded to pose potential violations to, among other human rights, the right of life, it can also be seen to contradict with the right to dignity.<sup>246</sup> This perspective has been described to be a significant but under-emphasized part of the discussion about the legality of AWS.<sup>247</sup>

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<sup>245</sup> In addition to Special Rapporteur Christof Heyns having argued this, also Izumi Nakamitsu, Under-Secretary-General, High Representative for Disarmament Affairs stated in 2017 that autonomy in weapons is a cross-cutting issue, that requires a cross-disciplinary approach. See Izumi Nakamitsu, ‘Perspectives on Lethal Autonomous Weapon Systems’ United Nations Office for Disarmament Affairs (UNODA) Occasional Papers 30 (2017) ‘Foreword’

<sup>246</sup> Chengeta (n 4) 461

<sup>247</sup> Petman (n 223) 53 referring to Dieter Birnbacher, ‘Are autonomous weapons systems a threat to human dignity?’ in Bhuta et al (n 22) 105–121

### 3. The Right to Dignity

#### 3.1. Preliminary Remarks: Dignity as a Social Value

Many argue that human dignity is a vague term, lacking a consistent definition, and it is even said that any work on dignity will start with the claim on how the concept is ambiguous, with various definitions including rank, honour, inherent worth, supreme worth and a sacred place in the order of things.<sup>248</sup> The concept of human dignity is indeed often occurring in different contexts, allowing for multiple interpretations. Therefore, dignity can be described as a complex concept that is strongly related to the ideals of equality, solidarity, autonomy and human worth. It is further argued that our understanding of dignity has been influenced by the concept's complex intellectual background as well as by the history of numerous, horrifying violations of the fundamental dignity of humankind.<sup>249</sup> What is of interest here is to what extent it could also be considered an important element for the argumentation on the legality of the use of AWS.

Dignity can be viewed as a principle and morality, closely connected to law.<sup>250</sup> This is demonstrated through being part of content of legislation and as foundation of many constitutions and statutes. It can also be a part of content of legislation.<sup>251</sup> The earliest deliberations around the concept of dignity and its connection to law can be found from Aristotle.<sup>252</sup> Many definitions on dignity today are reflections of Kant's view on dignity.<sup>253</sup> He believed that an absolute inner worth, dignity, is obtained by humans, and by which they call for respect from everyone, all rational beings in the world, including themselves. Further to his view, every human is bound to respect each other.<sup>254</sup> Kant is also regarded as the father of the modern concept of dignity<sup>255</sup>, as he secularized the concept and introduced it as a normative legal ideal. On a philosophical note what Kant means with dignity,

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<sup>248</sup> Debes (n 45) 45, 45-46

<sup>249</sup> Botha (n 36) 217

<sup>250</sup> Saxon (n 34) 22 referring to J. Waldron, "Dignity, Rank and Rights: The Tanner Lectures on Human Values," delivered at University of California, Berkeley, 21–23 April 2009

<sup>251</sup> *Ibid* Saxon (n 34) 22 referring to Waldron (n 250) 210

<sup>252</sup> G. Kennedy (translator) Aristotle, book 1, chapter 13, *On Rhetoric: A Theory of Civic Discourse*, 2nd ed. (2007) *New York: Oxford University Press* 97 Aristotle believed that 'there is in nature a common principle of the just and unjust that all people in some way divine, even if they have no association or commerce with each other.'

<sup>253</sup> R. Howard and J. Donnelly, "Human Dignity, Human Rights, and Political Regimes," (1986) 80 *American Political Science Review*, 802 and Saxon (n 34) 23

<sup>254</sup> Saxon (n 34) 23, referring to Immanuel Kant, *The Groundwork of Metaphysics of Morals*, M. Gregor and J. Timmermann (eds. and trans.) (Cambridge University Press, 2011), vol. 4, 428, 429, and 434-436.

<sup>255</sup> Rex D. Glensy, *The Right to Dignity* (2011) 43 *Columbia Human Rights Law Review* 65, 76 referring to Giovanni Bognetti, 'The Concept of Human Dignity in European and US Constitutionalism' in *European and US Constitutionalism* Georg Nolte (ed.) (Cambridge University Press 2005)

is that human dignity has no equivalence and cannot be replaced, substituted, or traded.<sup>256</sup> Human dignity according to Kant is giving people an intrinsic value, making dignity a higher norm, that then gives people the right to participate in law-making, and to expect certain moral standards.<sup>257</sup> Translated into a legal application, the thought of Kant is to use the concept as a basic standard. This notion holds that individuals should be protected from any instrumentalization by the state.<sup>258</sup> Kant's beliefs are further seen to have shaped modern international law and European legal frameworks fundamentally. The influence is however seen to have had a somewhat smaller impact in the United States.<sup>259</sup> Noting this is important, because even if the Kant's moral provides a fundamental framework for conceptualizing dignity, other philosophies and views also have an influence.<sup>260</sup> Further, Del Vecchio has argued that in an efficient legal system, the fundamental principles of law constitute of directive ideas and the informative principles, and that the entire system takes precedence over the rules, where the fundamental principle is dignity.<sup>261</sup>

Treating human dignity as a social value is nevertheless not only occurring in philosophical or religious settings. Also judges in constitutional courts have stated that dignity can be referred to and understood from a theological point of view.<sup>262</sup> The theological as well as philosophical interpretation is also linked to Kant's interpretation. The core notion in the social value aspect of dignity seems to be that a person knows what is morally right and wrong<sup>263</sup> translated to the ability of humans to think and therefore to reason.<sup>264</sup> Knowing when doing wrong is therefore the acknowledgement of human dignity.<sup>265</sup> But, as dignity is something intrinsic and inherent to people, they do not lose dignity because of committing something wrong. Instead, human dignity is maintained by punishing but not mistreating the person who has done wrong. Therefore, human dignity can be understood as a status as well as a higher standard that dictates how we should treat one another.<sup>266</sup> Finally, the most influential definition of dignity is the "object formula", that rests

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<sup>256</sup> Glensy (n 255) 76

<sup>257</sup> Ozlem Ulgen 'Human Dignity in an Age of Autonomous Weapons: Are We in Danger of Losing an "Elementary Consideration of Humanity"?' (2016) 8 *ESIL Conference Paper Series* 4

<sup>258</sup> Glensy (n 255) 76

<sup>259</sup> *Ibid*

<sup>260</sup> Botha (n 36) 207

<sup>261</sup> Giorgio del Vecchio, Felix Forte (translator) 'General Principles of Law' (1956) *Boston University Press*, 24, 25, 52 & 54 and Saxon (n 34) 32

<sup>262</sup> Chengeta (n 4) 477. Chengeta is referring to the court of Israel, for more see EA 2/84 *Moshe Neiman et al v. Chairman of the Central Elections Committee for the 11<sup>th</sup> Knesset*, 8 *Israel Law Reports* 83, 148 (1985)

<sup>263</sup> *Ibid*, 477, Chengeta refers to Ian Dennis & Patrick Tapsfield 'Human abilities: their nature and measurement' (2013) in general.

<sup>264</sup> Chengeta (n 4) 477.

<sup>265</sup> Chengeta (n 4) 477 and Aharon Barak, (Daniel Kayros, transl) '*Human Dignity: The Constitutional Value and the Constitutional Right*' (2015 Cambridge University Press) 17

<sup>266</sup> Ulgen (n 257) 4-5

on Kant's categorical imperative, according to which a human being is an end in itself, and not only a means to an end.<sup>267</sup>

### 3.2. The Shaping of Human Dignity in International Law

The shaping of much of international law was formed in the shadow of the Second World War, reflecting a nature similar to what shaped modern Germany.<sup>268</sup> Especially the human rights movement was galvanized following the awful events.<sup>269</sup> Therefore, treaties and agreements were declared in the late 1940s, and the centrality of human dignity as a predominant value became shared by all societies in the world.<sup>270</sup> It is also said that the end of the horrific atrocities and totalitarianism gave a sudden push for a more robust protection of human dignity,<sup>271</sup> because the world thought to defend the very existence of human rights, truth and morality, with a new purpose for universally recognised rights, applying to and safeguarding all.<sup>272</sup> Thus, the concept of dignity started gaining value as a right and value after the world wars contributing to a 'constitutionalisation' of human dignity, meaning it started receiving more attention as a value and as a right.<sup>273</sup> Dignity then thus became reconceptualized within the language of international law.

It is also argued that the protection of human dignity at the time rose into something worth promoting because it included a common principle, adequately vague enough for every state to recognise its value that deserved worldwide attention.<sup>274</sup> Further, human dignity was a vital factor when human rights treaties were negotiated and drafted, because it served as a theoretical basis in the context of human rights, as it is said that there was a lack of any other basis for consensus.<sup>275</sup> In addition, this is argued to be the reason for the concept of human dignity appearing in for example the preamble

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<sup>267</sup> Botha (n 36) 183 referring to Dürig "Der Grundrechtssatz von der Menschenwürde" 1956 AöR 117 118-120; Dreier Grundgesetz Kommentar Bd I 207-209; Isensee 2006 AöR

<sup>268</sup> Glensy (n 255) 102 and Barak (n 265) 51

<sup>269</sup> Gideon Boas 'Public International Law: Contemporary Principles' 2<sup>nd</sup> edition, (Edward Elgar Publishing, 2023) (Massachusetts, USA) 49

<sup>270</sup> Glensy (n 255) 102 and Barak (n 265) 51

<sup>271</sup> Bagaric & Allan (n 38) 261, referring to Joern Eckert (2002) 'Legal roots of human dignity in German law' In D. Kremtzer and Eckart Klein (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002 The Hague: Kluwer), 41–52.

<sup>272</sup> Kevin J. Hasson, 'Religious Liberty and Human Dignity: A Tale of Two Declarations' (2003) 27 *Harvard Journal of Law & Public Policy* 81

<sup>273</sup> Barak (n 265) 17

<sup>274</sup> Glensy (n 255) 102 referring to Jaques Maritain, 'Man and the state' (1951) *Chicago, III*

<sup>275</sup> Christopher McCrudden 'Human Dignity and Judicial Interpretation of Human Rights' (2008) *European Journal of International Law* (forthcoming) 26 Human rights treaties that McCrudden refers to are the UN Charter and the Universal Declaration of Human Rights.

of the Charter of the United Nations (the Charter).<sup>276</sup> In the case of the Universal Declaration of Human Rights, dignity can mirror the Declaration's secular character, but it is also argued that it serves as an ecumenical compromise, carefully disregarding any mention of God.<sup>277</sup>

Further, the general principle of respect for human dignity has been declared through dignity being the *raison d'être* in both IHL and human rights law.<sup>278</sup> It is argued that dignity serves both an architectural as well as an axiological function. The former, architectural function is demonstrated in having shaped the current IHL system and is encouraging changes in the future.<sup>279</sup> The latter mentioned, axiological function, serves through being the 'common link' and the abovementioned *raison d'être*<sup>280</sup> for rules found in the international legal system, a social value that is widely recognized as requiring to be protected.<sup>281</sup> Therefore, it is suitable to state that human dignity is acknowledged as an overarching principle of the entire international legal system, serving as a thread, strengthening and linking together the foundations of both human rights and humanitarian branches within international law.<sup>282</sup>

Kant's notion of human dignity is seen to define the generic category of "wrongdoers" within IHL, helping to understand that even if someone is suspected or has done wrong, or is an enemy combatant, they remain to be entitled status and certain treatment. What Kant viewed as "disgraceful punishments" are today incorporated in IHL by prohibiting certain acts and forms of conduct.<sup>283</sup> The moral foundation of IHL derives from "principles of humanity" and "the dictates of public conscience", with the aim to eliminate any doubts or ambiguities by anchoring the law in what would be best for humanity.<sup>284</sup> This forbids the assumption of that something that the law does not forbid would be acceptable through the Martens Clause. In addition, this also applies regardless of

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<sup>276</sup> Glensy (n 255) 102 See also The Charter of United Nations, signed in San Francisco on 26<sup>th</sup> of June 1945, entered into force on 24<sup>th</sup> of October 1945, 'Preamble'

<sup>277</sup> See for example Summary Record of the ninety-eighth meeting (of the Third Committee of the General Assembly), 9 October 1948, Official Records of the General Assembly, Third Session, 1948, 110-113

<sup>278</sup> Prosecutor v. Furundžija, Case IT-95-17/1-T, 10 December 1998, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY), para 183, *raison d'être* (French) can in this context be translated as "the main purpose".

<sup>279</sup> Ginevra Le Moli 'Human Dignity in International Law' (2022) ASIL Studies in International Legal Theory, Cambridge University Press 182-183

<sup>280</sup> *Ibid* 183 referring to Alfred Verdross, 'Les principes généraux du droit applicables aux rapports internationaux' (1938) 45 *Revue Générale de Droit International Public* 52

<sup>281</sup> Le Moli (n 279) 183, referring to David Feldman, 'Human Dignity as a Legal Value: Part I' (1999) *Public Law* 682-702

<sup>282</sup> Saxon (n 34) 29 referring to David Feldman 'Human Dignity as a Legal Value: Part 2', (2000), *Public Law* 5. See also Prosecutor v. Furundžija, (n 278) para.183

<sup>283</sup> Ulgen (n 257) 9 For example through Common Article 3 to the Conventions

<sup>284</sup> Ulgen (n 257) 10

advancements in weapons technology.<sup>285</sup> It is also recognized that the Martens Clause has the normative power to provide additional protection by appropriately regulating military conduct.<sup>286</sup>

The formation of IHL has its roots in the Battle of Solferino of 1859, whereafter Henry Dunant, 4 years later, created the ICRC.<sup>287</sup> The formation of the ICRC and humanity being its *raison d'être* are intimately connected to the initial endeavours to codify IHL.<sup>288</sup> In 1983, Pictet acknowledged that IHL was connected to the formidable struggle between those who seek to preserve, unite and liberate mankind and those who seek to destroy it.<sup>289</sup> Le Moli has noted in this essence that because States demonstrated a commitment to the application of elementary considerations of humanity, the crystallization stage of human dignity within the framework of IHL was made possible.<sup>290</sup>

From a legal perspective, where international law is argued to be ever changing by nature, it is also argued that dignity should not have a concrete meaning. This is because it could advantage those who attempt to interpret it in a weaker way, degrading (the position of) human rights as circumstances change.<sup>291</sup> When it comes to judicial interpretation, McCrudden has noted that dignity can be interpreted through different understandings. Dignity can be seen as providing the basis for human rights in general, and through thinner and thicker variations to the approach. He further notes that dignity can also be seen as a conceptual principle that assists further explanation of the set of rights stemming from the principle itself. In this regard it is believed that the lens of dignity provides the most precise explanation for rights.<sup>292</sup>

### 3.3. Human Dignity in Treaty Law

The next subchapter will examine more closely to what extent the notion of human dignity occurs in treaties. It is suggested that international law treaties are described to be overflowing with

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<sup>285</sup> Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, 1987), Paras 55 and 56, at 39

<sup>286</sup> Dissenting Opinion of Judge Shahabuddeen (n 207) at 405-409

<sup>287</sup> Henry Dunant, 'A Memory of Solferino' (1986) (English version, *ICRC*) 149 'Mission'

<sup>288</sup> Le Moli (n 279) 181, The mandate to ICRC includes monitoring the application of IHL. See Statutes of the International Red Cross and Red Crescent Movement (adopted by the 25th International Conference of the Red Cross at Geneva in 1986, amended in 1995 and 2006), Art. 5.

<sup>289</sup> Jean Pictet 'Development and Principles of International Humanitarian Law' (1985) *Martinus Nijhoff Publishers, Henry Dunant Institute, Geneva*, 5

<sup>290</sup> Le Moli (n 279) 181

<sup>291</sup> Chengeta (n 4) 473 referring to Rena Uruena 'Deciding what is humane: towards a critical reading of humanity as a normative standard in international law' in Britta van Beers et. al. (ed.). *Humanity across international law and biolaw* (Cambridge University Press 2014) 189

<sup>292</sup> McCrudden (n 275) 30

references to ‘dignity’ and ‘human dignity’.<sup>293</sup> The form how human dignity is articulated in international law can be conducted to treaty obligations, customary international law, general principles of law and even authoritative norms.<sup>294</sup> In the preamble to the United Nations Charter, dignity is established through member states’ reaffirmation with ensuring faith in fundamental human rights and in the dignity and worth of the human person.<sup>295</sup> The Charter is thus a treaty and all states are parties to it, and therefore, the respect for dignity is obligatory for Member States of the United Nations.<sup>296</sup> However, dignity is only mentioned in the preambular part and it is argued that expanding the duty to more particular rules would require additional measures of a legislative character.<sup>297</sup> The International Court of Justice (ICJ) stated in 1966 that the preamble establishes “the moral and political basis” for the distinct rules that are laid out in the treaty.<sup>298</sup>

Later, judge Weeramantry stated in the *Nuclear Weapons* case, that the obligation of protecting human dignity in the Charter establishes ‘fundamental Charter law’.<sup>299</sup> It is further suggested that the protection and safeguarding of human dignity through the Charter can enable a foundation for much of international law. This includes treaties and declarations codifying human rights law and international humanitarian law, strengthening the normative position of the concept.<sup>300</sup> The narrative of human dignity in international treaties has further been described as states’ acknowledgement set out in the Charter, to bear a duty to prioritize human dignity in a societal context, in the conduct of its citizens.<sup>301</sup> According to Schachter, there seems to be no ideal that could be so clearly accepted as a social good, than human dignity.<sup>302</sup>

As earlier mentioned, the pervasive atrocities that took place during the Second World War contributed considerably to the rise in recognition of the concept of dignity. The Universal Declaration of Human Rights (the Declaration), that was drafted shortly after the war and echoing the Charter, also includes the notion of dignity the preamble.<sup>303</sup> The reference to dignity in the

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<sup>293</sup> William A. Schabas *The Customary International Law of Human Rights* (2021 Cambridge University Press) 107

<sup>294</sup> Saxon (n 34) 25

<sup>295</sup> The Charter (n 276) ‘Preamble’

<sup>296</sup> Philip Jessup, ‘A Modern Law of Nations’ (1948) New York: Macmillan, 91

<sup>297</sup> *Ibid.*

<sup>298</sup> Saxon (n 34) 30, referring to South West Africa, *Ethiopia v South Africa*, Second phase judgment, ICJ GL No 46, (1966) ICJ Rep 6, ICGJ 158 (ICJ 1966), 18th July 1966, para. 50

<sup>299</sup> Dissenting Opinion of Judge Weeramantry, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (ICJ) 507

<sup>300</sup> Saxon (n 34) 29

<sup>301</sup> Saxon (n 34) 30

<sup>302</sup> Oscar Schachter, ‘Human Dignity as a Normative Concept’ 77 (4) *American Journal of International Law* (1983) 848, 849

<sup>303</sup> Schabas (n 293) 107

Declaration is further seen to have an explanatory function. Article 1 of the Universal Declaration of Human Rights,<sup>304</sup> is intended to give a reason to *why* persons have rights in the first place.<sup>305</sup> The same is to be seen, among others, in both in the ICCPR's and ICESCR's preambles, where the notion of dignity is included through recognizing that 'human rights derive from the inherent dignity of the human person'.<sup>306</sup> Thus, this is showing that the notion of human dignity is necessarily distinct, in order to be able to protect all human rights.<sup>307</sup> In addition to the Declaration, both the ICCPR<sup>308</sup> and ICESCR<sup>309</sup> further include references to dignity in their operational provisions, also seen as giving the notion in the preamble further explanation.<sup>310</sup>

The use of human dignity is also occurring in numerous regional instruments, demonstrating its universal nature. The Charter of Fundamental Rights of the European Union refers to dignity in both the preamble and the operative part numerous times, starting from Article 1, where human dignity is recognised as inviolable.<sup>311</sup> The preamble of the African Charter on Human and Peoples' Rights refers to the duty "to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity". Further, a substantive provision acknowledges that all people ought to have the right to the respect of dignity that is inherent in all human beings.<sup>312</sup> In addition, the Arab Charter on Human Rights includes acknowledging dignity in its preamble and substantive provisions,<sup>313</sup> and the American Convention on Human Rights also includes references to dignity.<sup>314</sup>

Furthermore, although not having the function of drafting treaties, it is still interesting to see that the Universal Periodic Reviews (UPR) of the UN HRC does not refer to human dignity as a general principle but regards it rather as an overarching principle to be used in conjunction with other rights. Hence, dignity could be easier understood being rather an adjectival than a substantive concept.

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<sup>304</sup> Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) Article 1

<sup>305</sup> Saxon (n 34) 28-29, referring to Mary Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2002), 146.

<sup>306</sup> Preamble, International Covenant on Economic, Social and Cultural Rights, (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 and Preamble, International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

<sup>307</sup> Saxon (n 34) 30 refers to George Kateb *'Human Dignity'* (2011 Harvard University Press) 42

<sup>308</sup> ICCPR Article 10(1)

<sup>309</sup> ICESCR, Article 13(1)

<sup>310</sup> Glensy (n 255) 102 It is however important to note, however, that the UDHR is an adopted General Assembly Resolution in the form of a Declaration, and that the latter mentioned are recognized as treaties.

<sup>311</sup> Charter of Fundamental Rights of the European Union (2007/C 303/01), 14 December 2007, Art. 1,

<sup>312</sup> African Charter on Human and Peoples' Rights, adopted 27 June 1981, entered into force 21 October 1986, UNTS 1520A, Preamble and art. 5.

<sup>313</sup> Arab Charter on Human Rights, for example arts. 2(3), 3(3), 17 and 20(1) CHR/NONE/2004/40/Rev.1,

<sup>314</sup> American Convention on Human Rights, (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, arts. 5(2), 6(2) and 11(1)



Schabas notes that in the context of the Universal Periodic Reviews, the option has been to treat dignity as a category, rather than a distinct right.<sup>315</sup> Also a further step to the use of dignity was the Vienna World Conference on Human Rights in 1993, when the concept of dignity was adopted as the central organizing principle, although being a declaration and not a treaty.<sup>316</sup> Apart from being adopted as the cornerstone of human rights in general, the concept of dignity was also adopted in provisions connected to specific areas of human rights, such as the prohibition of torture.<sup>317</sup>

The notion to protect human dignity is also to be found in IHL. Humanitarian law conventions reflect the principles of protection that derive from the inherent dignity of persons, and here also recognized as the foundation of the Charter.<sup>318</sup> This, can again, be seen to reflect a belief that the revival of human dignity was a main obstacle in times after the Second World War.<sup>319</sup> *Inter alia*, Common Article 3 to the Geneva Conventions offers fundamental guarantees that civilians and persons *hors de combat* ought to be treated humanely in all circumstances, where more closely Article 3(1)(c) prohibits outrages against personal dignity and thus poses an obligation to respect human dignity. Common Article 3 is applicable both during non-international and international armed conflicts,<sup>320</sup> and is also customary international law.<sup>321</sup> According to Jean Pictet, humane treatment requires that the person in question is granted a minimum treatment in order to live an acceptable life with dignity.<sup>322</sup> The scope of humane treatment is broad, but the essential requirement is the preservation of human dignity.<sup>323</sup> In contrast to the Declaration, establishing dignity as the cornerstone of human rights, the Geneva Conventions demonstrate a sense of dignity that is almost equivalent to “a right to dignified treatment”.<sup>324</sup> Also the Statute of ICC prohibits committing outrages upon personal

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<sup>315</sup> Schabas (n 293) 108

<sup>316</sup> Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, 14-25 June 1993, UN Doc A/CONF 157/24 (Part 1) (1993), 20 Preamble

<sup>317</sup> Vienna Declaration (n 316) art. 55

<sup>318</sup> Separate Opinion of Judge Weeramantry Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ Reports 2007, 645

<sup>319</sup> Mona Rishmawi, ‘Protecting the right to life in protracted conflicts: The existence and dignity dimensions of General Comment 36’ 101 (912) *International Review of the Red Cross* (2019) 1163

<sup>320</sup> See Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva, 12 August 1949) Commentary of 01.01.2017; Article 3 - Conflicts not of an international character and Convention (III) relative to the Treatment of Prisoners of War (Geneva, 12 August 1949); Article 3 - Conflicts not of an international character

<sup>321</sup> See Henckaerts and Doswald-Beck (n 153) rule 90 of Customary International Law on the prohibition on outrages upon personal dignity

<sup>322</sup> Jean Pictet and ICRC ‘The Fundamental Principles of the Red Cross: Commentary’ (1.1.1979) (Principle of Humanity). See also Prosecutor v Kordić and Čerkez (Judgment, Appeals Chamber, 2004) International Criminal Tribunal for the former Yugoslavia (ICTY) 7 (17 December 2004) para 39

<sup>323</sup> Le Moli (n 279) 196

<sup>324</sup> Le Moli (n 279) 191

dignity through Article 8(2)(b) (xxi) and Article 8(2)(c) (ii).<sup>325</sup> According to the ICC Statute, an outrage upon personal dignity as a war crime is also applicable for dead persons.<sup>326</sup>

In most of human rights treaties, the mentioning of human dignity seems to appear in preambles of the treaties. Indeed, it is important to note that there are differences in whether a notion is mentioned in the preamble, or if it is a particular rule enshrined in a treaty. For example, the preamble of the Declaration is said to encapsulate the basic human rights philosophies of modern time.<sup>327</sup> The preamble of the Declaration has also been described as having extraordinary significance, establishing customary international law, as the preamble has further been interpreted by numerous instruments, and therefore constituting the nature of custom.<sup>328</sup> Nonetheless, Allott suggests that ‘a treaty is a disagreement reduced to writing’. Therefore, specific rules of a treaty should not always be interpreted as explicitly defined: rather, less precise language can often act as the common ground and denominator.<sup>329</sup> Further, those who argue for human dignity to have a normative value argue that the benefit lies in its versatility as a concept. This is demonstrated by it being adaptable, allowing for contextual evaluations as well as for flexibility, while still appealing to a specific normative value.<sup>330</sup>

### **3.4. Human Dignity in State Practice**

#### **3.4.1. Introduction**

Apart from interpreting dignity in the judicial context as the foundation for human rights in general, McCrudden notes that dignity can also be understood as a right or obligation itself, with a particular content. In some jurisdictions, human dignity is acknowledged as such a right, enforceable in the same manner as any other right.<sup>331</sup> In this essence, there are several State constitutions that include

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<sup>325</sup> See Elements of Crimes for Art. 8(2)(b) (xxi) and Art. 8(2)(c) (ii) of the Rome Statute of the International Criminal Court (ICC) (2010)

<sup>326</sup> Elements of Crimes, War Crimes, art. 8(2)(b)(xxi), War crime of outrages upon personal dignity, para 1, footnote 49 and Elements of Crimes, War Crimes, art. 8(2)(c)(ii), War crime of outrages upon personal dignity, para 1, footnote 57.

<sup>327</sup> Johannes van Aggelen, ‘The Preamble of the United Nations Declaration of Human Rights’ (2000) 28 *Denver Journal of International Law & Policy* 131

<sup>328</sup> van Aggelen (n 327) 132

<sup>329</sup> Philip Allott, ‘The Concept of International Law’ (1999) 10 *European Journal of International Law* para. 35

<sup>330</sup> Chengeta (n 4) 473 referring to Uruena (n 291) 189

<sup>331</sup> McCrudden (n 275) 30

the notion of human dignity and is also included in operative parts of constitutional articles, providing guidance of the implementation of such provisions.<sup>332</sup>

Some states, such as South Africa are further recognizing the right to dignity as a separate right in their constitution.<sup>333</sup> Other States that include dignity as a constitutional right in their constitutions are Germany<sup>334</sup>, Israel<sup>335</sup>, Switzerland<sup>336</sup>, Poland<sup>337</sup> and Namibia.<sup>338</sup> State practice can therefore demonstrate that human dignity also is recognised as more than a normative value, constituting human dignity as a normative right. This chapter seeks to understand whether the concept of dignity as a right is used in state practice.

### 3.4.2. The Constitution of South Africa

The constitution of South Africa recognizes human dignity as a separate human right and gives it further significance by viewing it as a right, that is ‘concomitant to life itself’.<sup>339</sup> The constitution additionally views dignity as a framework for constitutional interpretation.<sup>340</sup> The constitutional value of human dignity is seen as essential in the South African constitution, as the value is serving as the objective that the right to human dignity is meant to fulfil. The right itself is then interpreted in light of this objective. Thus, the constitutional value’s role is primarily interpretational.<sup>341</sup> Further, The South African constitution holds that human dignity as a legal norm is the source of all other personal rights in the Bill of Rights, giving it a superior value.<sup>342</sup> As human dignity serves as both a constitutional value and a constitutional right, Barak notes that it is important to be aware of the dual role that human dignity plays.<sup>343</sup> One of the factors why dignity is a strong right in the South African constitution, is that apartheid consisted of the systemic denial of people’s inherent worth and dignity.<sup>344</sup>

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<sup>332</sup> Doron Shultziner and Guy E. Carmi, ‘Human Dignity in National Constitutions: Functions, Promises and Dangers’ (2014) 62 *The American Journal of Comparative Law* 461, 482-483

<sup>333</sup> The Constitution of South Africa (adopted on 8 May 1996 and amended on 11 October 1996), art. 10

<sup>334</sup> Germany: Basic Law for the Federal Republic of Germany (adopted 8 May 1949, entered into force 23 May 1949) art. 1

<sup>335</sup> Israel: Basic Law of 1992, Human Dignity and Liberty, 25 March 1992, articles 2 and 4

<sup>336</sup> Constitution of Switzerland (adopted 18.4.1999, entered into force 1.1.2000) art. 7

<sup>337</sup> The Constitution of the Republic of Poland (2.4.1997) art. 30

<sup>338</sup> The Constitution of Namibia (adopted 9.2.1990 entered into force 12.3.1990) art. 8

<sup>339</sup> Judgment, South African Constitutional Court, *The State v. T. Makwanyane and M. Mchunu*, Case No. CCT/3/94, (6 June 1995) (ZACC 3) at para. 311, Justice Mokgoro concurring.

<sup>340</sup> *Botha* (n 36) 217

<sup>341</sup> *Barak* (n 265) 111

<sup>342</sup> *The State v. T. Makwanyane and M. Mchunu* (n 339) at para 172, Justice Mokgoro concurring, and ‘Conclusion’ para. 144

<sup>343</sup> *Barak* (n 265) 111

<sup>344</sup> *The State v. T. Makwanyane and M. Mchunu* (n 339) at paras 322 and 329

Further, human dignity in the South African Constitution is a relative right, meaning that it can be proportionately limited.<sup>345</sup> Barak argues that what differs the South African constitution from *inter alia* Israel's with regards to human dignity, is that even if in both systems, the normative zone ought to cover all human actions that the constitutional value of human dignity is intended to preserve, the daughter rights stemming from human dignity are regarded as freestanding rights in South Africa.<sup>346</sup> In addition, the constitutional value of human dignity also applies to many of the constitutional rights,<sup>347</sup> constituting a complementarity overlap. The overlap contributes to a reinforcement of each right.<sup>348</sup> For example, it is said that the right to dignity is closely associated and also overlapping with the right to equality.<sup>349</sup> With regards to cases where the Court has examined human dignity as a constitutional right, Botha has argued that the right to dignity can at times serve as a residual right. As such, it is applicable only in situations where no other rights are to be found.<sup>350</sup>

As earlier mentioned, dignity is not only viewed as one right, but as a supreme value and an interpretive *Leitmotiv*. Numerous factors have supported the idea, among others being dignity's significance in international law, namely the Declaration and the Charter<sup>351</sup>, the understanding of apartheid's denial of inherent dignity for the population,<sup>352</sup> and lastly the close affinity of dignity and the notion of ubuntu.<sup>353</sup> Ubuntu is a notion, also viewed as an ideology and political philosophy, that has instructed many African governments' policies particularly when it comes to human rights. It can be interpreted as the equivalent to humanity and should not only be left to the extent of having a strong notion on the whole continent of Africa but should be regarded also as a factor that has contributed to shaping many African communities.<sup>354</sup>

South African judges have furthermore invoked the notion of ubuntu in their judgements, thus treating ubuntu as a source of law. It has *inter alia* been noted that ubuntu stands for a society, where

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<sup>345</sup> Barak (n 265) 261

<sup>346</sup> Barak (n 265) 262

<sup>347</sup> The State v. T. Makwanyane and M. Mchunu (n 339) para 328

<sup>348</sup> South African Constitutional Court, National Coalition for Gay and Lesbian Equality v. Minister of Justice (1999) (ZACC 17) at para. 114

<sup>349</sup> South African Constitutional Court, President of the Republic of South Africa v. Hugo, (1997) (ZACC 4) para. 41

<sup>350</sup> Botha (n 36) 198

<sup>351</sup> Laurie Ackermann, 'Equality and the South African Constitution: The Role of Dignity' (2000) *Heidelberg Journal of International Law* 539

<sup>352</sup> The State v. T. Makwanyane and M. Mchunu (n 339) para 329 and Ackermann (n 351) 540

he State v. T. Makwanyane and M. Mchunu (n 339) paras 222-224 and 307-313

<sup>354</sup> Chengeta (n 4) 461

dignity is a right granted to everyone.<sup>355</sup> Moreover, the ubuntu notion emphasizes every human's equal value, and that every human ought to be treated not only with humanity but also dignity.<sup>356</sup> The Court has further in its judgements used the notion of ubuntu in connection to dignity.<sup>357</sup> However, the Court has been criticized for the use of ubuntu because it is seen to be romanticising traditional African values. Ubuntu is also feared to be used to restrict disagreement and difference, and to encourage to dominant mindsets because of its appeal to broad notions of interdependence and harmony in society.<sup>358</sup> It has nevertheless been argued that ubuntu is perfectly in line with a person's inherent dignity, because it allows for an understanding to what impact culture, religion and community can play in the formation of individual identity.<sup>359</sup>

Furthermore, Kant's moral thought can be seen to have had an influence on the constitution. Kant's imperative of persons always having to be treated as ends in themselves, rather than a means to an end, can be seen from the South African Court's utilization of the object formulation, as well as through the emphasis on the individual's freedom to choose her own ends.<sup>360</sup> However, Botha argues that also other philosophies and outlooks have an influence in the constitution.<sup>361</sup> Further, the Court has also on a few occasions invoked the dignity of the broader community. This conception was put forth *inter alia* in the case *S v Makwanyane*, where it was held that when deliberate killing of a human being takes place, it is not only the person in question whose dignity is violated, but also the dignity of the whole society might be violated.<sup>362</sup> Such judgments link everyone in the society's dignity to the dignity of the poor and marginalized sections of society, and have been interpreted to reflect Kant's notion of individual dignity through "realm of ends", where everyone's dignity is recognized. Finally, in addition to South Africa, also regional international human rights instruments recognize dignity. Among others,<sup>363</sup> the African Court of Human and peoples' rights has recognized

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<sup>355</sup> *Afri-Forum and Another v Malema and others*, (The Equality Court, Johannesburg 2011) para. 18, at 10

<sup>356</sup> *Chengeta* (n 4) 466

<sup>357</sup> For example *S The State v. T. Makwanyane and M. Mchunu* (n 339) paras 223-225 and *Dikoko v Mokhatla* (2006) (ZACC 10) paras 68-69 and 112-120

<sup>358</sup> *Barak* (n 265) 205 referring to R. English 'Ubuntu: The Quest for an Indigenous Jurisprudence' (1996) 12 *South African Journal on Human Rights* 641 and Van der Walt *Law and Sacrifice: Towards a Post-Apartheid Theory of Law* (2005 Birkbeck Law Press) 109-115

<sup>359</sup> *Botha* (n 36) 205

<sup>360</sup> *Botha* (n 36) 207, referring to own chapters 4 3 2 and 4 4 1 as well as Drucilla Cornell 'A call for a nuanced constitutional jurisprudence : ubuntu, dignity, and reconciliation : post-apartheid fragments : law, politics and critique' (2004) *SA Public Law* 666, 666-668

<sup>361</sup> *Botha* (n 36) 207

<sup>362</sup> *The State v. T. Makwanyane and M. Mchunu* (n 339) para. 272

<sup>363</sup> *Bagaric & Allan* (n 38) 261 stating that numerous instruments use the notion of dignity, often according it cardinal status.

the protection of dignity of the human person within the context of international law as a cardinal principle.<sup>364</sup>

### **3.4.3. A European Perspective on The Use of Dignity**

The European Convention of Human Rights does not include the mention of dignity and can be seen as an exception to the incorporation of dignity in human rights treaties adopted shortly after the Second World War.<sup>365</sup> However, Protocol 13 to the Convention, dealing with the annulment of death penalty refers to the inherent dignity of all humans in its preamble.<sup>366</sup> Furthermore, the European Court of Human Rights (ECtHR) stated the very essence of the Convention to be the respect for human dignity and human freedom.<sup>367</sup> Before this statement, Schacter criticized the court for using the concept of dignity in its decisions without trying to define the concept in general terms.<sup>368</sup> The interpretations based on the idea of human dignity have further in particular been invoked in connection to Article 3 on the prohibition to torture and inhuman and degrading treatment and punishment.<sup>369</sup>

It has further been argued that when looking at case-law, the application of human dignity has been diverse and nuanced, tailored to a specific situation, where also applying human rights as a whole, in a nuanced way has played a key role. Human dignity has therefore different meanings depending on the context in which it is used in jurisprudence. Furthermore, human dignity has been used as a tool to interpret a wider context of the purpose of the Court, or as a tool to claim lack of personal protection of dignity, or as a discourse serving rhetorical functions that are beyond the scope of the human rights norm. This shows that there is little decisive weight of dignity in the legal judgements made by ECHR, as it seldom adds any specific content to the issues. With this said, the use of Article 3 is left with some flexibility for the Court to strike a balance between treatment that is unquestionably cruel or degrading, and treatment that is permissible. Even though the prohibition of

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<sup>364</sup> Robert John Penessis v. United Republic of Tanzania, No. 013/2015, Judgment, 28 November 2019, para. 87

<sup>365</sup> McCrudden (n 275) 33

<sup>366</sup> Protocol 13 is a supplementary protocol to the Convention, see Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty in all circumstances, Vilnius 3.V.2002, 54

<sup>367</sup> *Pretty v. the United Kingdom*, (2002) (no. 2346/02, ECHR) paras 61 and 65

<sup>368</sup> Schacter (n 302) 849 referring to the decision of the European Court of Human Rights in *Lawless v. Ireland* (Merits), 1 EHRR 15, 39 (Judgment of July 1, 1961) (individual op. Maridakis, J.)

<sup>369</sup> McCrudden (n 275) 33 See also the European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, ETS 5, (amended 4 November 1950, entered into force 3.9.1953) ) Article

torture and other cruel, inhumane treatment is absolute, its limits may vary from case to case.<sup>370</sup> The Court President Costa has emphasized that the Court is not only making decisions, but also functioning as a pedagogical tool. Further, it is a signal to States on the significance of what is at stake.<sup>371</sup>

It is also of relevance to look closer at a certain constitution in Europe that includes dignity an absolute right in their constitution, namely Germany. The notion of human dignity is also present in the German Constitutional Court and has also, similarly to South Africa, articulated that human dignity is not only about the individual dignity of a person, but rather the dignity of a man as a species.<sup>372</sup> Human dignity is regarded unique to its character within the German Constitution. It is an absolute, eternal and supreme right.<sup>373</sup> The nature of it being an absolute right was expressly agreed in the *Aviation Security Case*.<sup>374</sup> In the *Aviation Security Case*, it was decided that the dignity of the hostages was limited, because in their deaths they would come to be the mere means for saving the lives of others.<sup>375</sup> Human dignity is in this case always seeing a person as an end, and not as an object or as a mere means, constituting the object formula.<sup>376</sup> Dignity is further protected by a constitutional Bill of Rights, including a catch-all right for developing one's personality. These characteristics have in turn led to a diminishing within the area of the constitutional right to human dignity within the German Constitution.<sup>377</sup> What in this regard distinguishes the German Constitution from the South African is that the normative zone is narrower, meanwhile the zone in the South African Constitution, as earlier mentioned, is covering all human activity that the constitutional value of human dignity is meant to fulfil.

### **3.5. Challenges with Dignity in Judicial Interpretation**

As mentioned above, human dignity's position in the legal frameworks is grounded in treaties and customary international law. It is viewed as a legal starting point and a guiding approach, allowing

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<sup>370</sup> Antonie Buyse 'Dignified Law: The Role of Human Dignity in European Convention Case Law' (21.10.2016) *ECHR Blog*

<sup>371</sup> *Ibid* referring to Jean-Paul Costa, 'Human Dignity in the Jurisprudence of the European Court of Human Rights', in: Christopher McCrudden (ed.), *Understanding Human Dignity - Proceedings of the British Academy*, (vol. 192, 2013) 393-402.

<sup>372</sup> *Chengeta* (n 4) 473 referring to *Uruena* (n 291) 188

<sup>373</sup> *Barak* (n 265) 261

<sup>374</sup> The German Federal Constitutional Court (Bundesverfassungsgericht), Judgment of the First Senate of 15 February 2006 (1 BvR 357/05) paras 115, 118

<sup>375</sup> *Barak* (n 265) 236

<sup>376</sup> *Ibid* 235

<sup>377</sup> *Ibid* 261

states to implement different norms and values.<sup>378</sup> However, as already earlier stated, dignity is challenging to define because of its philosophical and abstract nature. This is further the cause for concerns about the ability to guide and constrain constitutional argument, as well as about utilization of the idea in concrete legal contexts.<sup>379</sup> Criticism is also directed towards references to dignity found in regional and international instruments, by stating that the concept is referred to, each time in a different context with an unspecified meaning.<sup>380</sup> In addition, it allows for interpretation in both ways, so that whoever wants to use the right to dignity, may interpret it in a way that suits to support their way alone.<sup>381</sup> The use of dignity by judges is also criticized for lacking context and further elaboration, leaving the meaning obscure.<sup>382</sup> On the other hand, a lack in an agreed understanding of the normative concept does not have to mean that the concept wouldn't exist.<sup>383</sup> It is further argued that using dignity gives judges too much power, which then can be subject to abuse, and has for that reason been viewed as a “conversation stopper”:<sup>384</sup> However, in contrast it is also stated that constitutional lawyers have given up on the attempt to define dignity, claiming that dignity can only be defined case-by-case or negatively, based on previous examples of its violation.<sup>385</sup> Barak has nevertheless contended that the complex nature of dignity is an insufficient argument for a negative approach toward human dignity.<sup>386</sup>

In addition, Howard and Donnelly contend that human dignity is confused with human rights, arguing that human dignity should not be regarded as one,<sup>387</sup> even if, as seen above, the expression is included prominently in different international human rights documents.<sup>388</sup> Further, they argue that every form of political regime has a certain societal understanding of human dignity. In these conceptions, human dignity expresses specific perceptions of their inner moral nature and intrinsic value, as well as one's relation to the society. In contrast, they argue that human rights are inviolable, equal rights with a strong sense of entitlements that give especially powerful claims against the state, that each person just possess by virtue of being a human being.<sup>389</sup> The reason why human rights are

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<sup>378</sup> Saxon (n 34) 22

<sup>379</sup> Botha (n 36) 217

<sup>380</sup> Mauri (n 211) 160

<sup>381</sup> Yecheil Michael Barilan 'Human Dignity, Human Rights, and Responsibility: The New Language of Global Bioethics and Biolaw' (2012) 2

<sup>382</sup> Bagaric & Allan (n 38) 264

<sup>383</sup> Bagaric & Allan (n 38) 265

<sup>384</sup> Chengeta (n 4) 481-482 referring to Barilan (n 381) 2

<sup>385</sup> Botha (n 36) 182

<sup>386</sup> Barak (n 265) 10

<sup>387</sup> Howard and Donnelly (n 253) 801

<sup>388</sup> See chapter 3.3 above

<sup>389</sup> Howard and Donnelly (n 253) 801-802



distinct from human dignity is therefore that the conception of human dignity differs a lot depending on society, and the differences are incompatible with the values of equality and autonomy, that this argument views as governing elements of human rights.<sup>390</sup> However, Saxon notes that even if the definition of human dignity varies across societies, many of the definitions are, as earlier noted, seen to reflect Kant's belief.<sup>391</sup> Indeed, dignity is argued to rest in both the systems of law and morality, because the border between them is at best so vague.<sup>392</sup> Nevertheless, Saxon furthermore argues that rejecting the normative legal force to be illogical, since dignity clearly has an established legal norm and is thus enshrined in many international treaties, including operative articles, as well as in national legal systems.<sup>393</sup>

It is important to note that human dignity first was understood as only a social value due to the lack of international conventions and treaties protecting human rights. Thus, it was impossible to regard human dignity as anything else but a social value.<sup>394</sup> Therefore, a joint understanding of the concept, including both social and normative value, is argued to be the strongest form of the constitutional understanding of human dignity.<sup>395</sup>

Further, human dignity can be seen to be the ultimate canon of human rights, where the basic human rights are flowing from it, protecting fundamental human interests. The moral gravity of a violation of human dignity gives the concept a special emphasis, going further than the gravity of emphasis in other moral concepts. The extraordinary emphasis of dignity having a strong moral force is argued to easily being misused by an inflationary application, leading the concept to be stretched beyond recognition, by using it in a purely expressive manner, blurring the conception of dignity having a normative force. This inflationary effect is argued to inevitably lead to weakening the normative force of the concept to a stage where it is no longer capable of fulfilling its original function in legal or moral dissertation.<sup>396</sup>

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<sup>390</sup> *Ibid*

<sup>391</sup> *Ibid* 802 and Saxon (n 34) 23

<sup>392</sup> Susan Marks, Fiorentina Azizi, Raphaële Rivier, Jean-Paul Costa & Habib Gherari "Responsibility for Violations of Human Rights Obligations: International Mechanisms," in James Crawford et al. (eds.), *The Law of International Responsibility Oxford University Press*, (2010), 736 stating that it is hard to separate law strictly from ethics, politics and culture.

<sup>393</sup> Saxon (n 34) 30

<sup>394</sup> Barak (n 265) 4

<sup>395</sup> Chengeta (n 4) 478 and Barak (n 265) 5

<sup>396</sup> Dieter Birnbacher, 'Are Autonomous Weapon Systems a threat to human dignity?' in Bhuta et al (n 22)

However, Botha has suggested that in order to understand the primacy of dignity and its capacity to be stable enough to guide legal decision-making, one should question how the inability to come up with one single, comprehensive definition on dignity could actually promote rational and constitutional debate on disputed social issues. This approach would accordingly avoid the categorized thinking of dignity either presuming legal meaning being unconstrained or it being predetermined by legal content. By adopting an open approach for the possibility of dignity's capacity to guide and constrain constitutional interpretation, one could see that it might be a capacity of its ambiguity or its paradoxical nature. This could help in assessing more realistically both the potential and limits of a dignity-based jurisprudence.<sup>397</sup>

On the other hand, the use of dignity in constitutional courts can also be experienced as counterproductive from dignity's original function, for example in a situation where the notion is overused. An example illustrating this challenge is Canada and its constitution, where the operative criteria of dignity has been difficult, and in the end led to the Canadian Supreme Court to recognize that the notion is not necessarily suitable and cannot be used for example for purposes of enhancing equality.<sup>398</sup> In *R. v. Kapp* this was clearly demonstrated by the Court admitting that human dignity is an abstract and subjective notion that can lead to confusion and difficulties in applying.

What is interesting is that it was moreover seen to be rather an additional burden in equality claimants, instead of what the original intention of a 'philosophical enhancement' was intended to be.<sup>399</sup> This approach by the Court has led to a significant decrease in the use of the notion of human dignity in the Canadian Supreme Court.<sup>400</sup> However, the Canadian Charter of Rights and Freedoms does not specifically include the mention of dignity, but the particular rights of the charter have rather been recognized as 'inextricably tied to the concept of human dignity' by the Supreme Court.<sup>401</sup> Thus for Canada, the right of dignity is seen as an unenumerated right and can therefore affect the possibility to limit the use in such way. It is important to note that in a constitution where human dignity is not seen as a formal value or an enumerated right, the use is easier to limit.<sup>402</sup> As demonstrated above, the concept of dignity as a normative value share both advocating and opposing

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<sup>397</sup> Botha (n 36) 217

<sup>398</sup> Shultziner and Carmi (n 332) 483

<sup>399</sup> Supreme Court of Canada, *R. v. Kapp*, 2 Supreme Court Report 483, para 22 (2008). The 'philosophical enhancement' was cited to and noted by Donna Greschner at 299 in Donna Greschner, 'Does Law Advance the Cause of Equality' (2001) 27 *Queen's Law Journal* 299-318

<sup>400</sup> Shultziner and Carmi (n 332) 483

<sup>401</sup> Supreme Court of Canada, *R. v. Morgentaler*, 1 Supreme Court Report 30, at 164 (1988)

<sup>402</sup> Shultziner and Carmi (n 332) 483

views. The line between moral and law was claimed to be vague, and human dignity is an example of a concept that lies within both.<sup>403</sup>

Finally, when examining international and national constitutions and courts' judicial interpretation on dignity, it can be concluded that there is no customary rule that obligates to respect human dignity.<sup>404</sup> Although it earlier was mentioned that the preamble to the Declaration constitutes customary international law, the custom nature stems from the preamble in its entirety, since it constitutes a fundamental basis for human rights conventions, that states later have adopted in their constitutional practice. The preamble, with a principle to respect for human dignity can therefore only constitute customary international law. This is an important distinction to be made before turning over to discuss AWS in the light of dignity.

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<sup>403</sup> Saxon (n 34) 30 referring to the United Nations General Assembly, that declared that the crime of genocide is contrary to "moral law." "The Crime of Genocide," Resolution 96 (I), Fifty-Fifth Plenary Meeting, 11 December 1946, 86

<sup>404</sup> Saxon (n 34) 31

## 4. The Role of Human Dignity in the AWS Debate

### 4.1. Applying Human Dignity in the AWS Debate

The right to dignity can be viewed as the foundation of both human rights and IHL and is therefore relevant when discussing the legality of AWS.<sup>405</sup> As seen in the discussion on the role of human rights and IHL in the AWS debate, it remains clear that there is less space for the use of AWS when considering the perspective of human rights. It has been argued that saving lives of civilians by using AWS could come at the cost of the dignity of those targeted. Special Rapporteur Heyns further argued that the AWS issue from only either the humanitarian law and disarmament or human rights context would be lacking perspective of the other on a vital issue.<sup>406</sup> When regulating the use of AWS, Heyns has emphasized the need of considering not only IHL aspects, but also the human rights implications of AWS, and in particular the right to human dignity.<sup>407</sup> Heyns has further argued that the right of life must be understood in conformity with the right to dignity.<sup>408</sup> The argumentation behind is the idea of dignity as the value of life, and it is the value of life that makes it worth protecting. Therefore, the right to life should not be understood in isolation from the concept of dignity.

The legal challenges on the use of AWS have therefore also been recognised within the context of human rights. Furthermore, Heyns has argued that AWS are indeed able to possess power and kill humans but fail in respecting their dignity, as AWS are lifeless machines incapable of appreciating the worth of life, and the gravity of its loss. To permit AWS to determine when to take one's life would, according to Heyns conflict with the principle of dignity.<sup>409</sup> What is more, he has claimed that the use of AWS constitutes 'death by algorithm', suggesting that humans are not treated with inherent dignity, but rather as "pests or objects, as a nuisance that must be gotten rid of".<sup>410</sup>

In the legality of AWS- discussion and the context of dignity, Heyns and Mauri have also raised the fundamental question whether machines *should* be given the power to take lethal decisions. Here, the dignity-based argument is seen to take logical precedence over others, moving from discussing

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<sup>405</sup> Chengeta (n 4) 461

<sup>406</sup> Human Rights Council (n 106)

<sup>407</sup> Heyns (n 31) 2, 4

<sup>408</sup> Petman (n 223) 54

<sup>409</sup> Heyns (n 5) 20 and HRW and IHRC (n 15) 23

<sup>410</sup> Heyns (n 29) 370

the legality of AWS from a *can* they do it-perspective, to rather asking whether AWS should be given the decision to do it.<sup>411</sup>

The advocacy group Human Rights Watch has also raised concerns that the use of AWS could undermine the principle of dignity. In their report they highlight that all human rights stem from the inherent dignity and worth of the human person, making reference to the Vienna Declaration of the 1993 World Human Rights Conference.<sup>412</sup> Further, in another article concerning the same issue, it is argued that a machine lacks the ability to truly respect the value of human life and cannot comprehend the significance of its loss.<sup>413</sup> However, AWS constituting a violation against the right to human dignity is not mentioned, as she only puts emphasis on the principle of dignity. Nevertheless, the human right to life is still according to her possibly violated by the use of AWS. Also academic scholars, such as Asaro, has stressed that AWS should not be allowed to decide whether to take a human life, claiming that it is violating dignity, morality and law.<sup>414</sup> In the AWS debate, the references to dignity are therefore addressed either by noting that the use violates the human rights and human dignity,<sup>415</sup> where dignity is referred to as a principle, or that the violation constitutes a violation against the right to dignity on its own.<sup>416</sup>

It was previously asserted that the social value of human dignity is based on the idea of a person knowing what is right and wrong. As humans are capable to reason, they understand that doing wrong is an acknowledgement of human dignity. When it comes to AWS, and not only a specific system but machines in general, Chengeta has argued that they can never have such moral consciousness.<sup>417</sup> For the recognition of human dignity, and humanity in large, the capacity to think is thus vital. According to Chengeta it is crucial to consider whether a machine's decision to kill during warfare is in line with the right to dignity, because AWS lacks the certain human quality, namely the capacity to reason.<sup>418</sup> Further, he argues that the right of dignity demands that the decision to use force against another human must be taken by a fellow human.<sup>419</sup>

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<sup>411</sup> Heyns (n 136) 58, 65, 67 and 69

<sup>412</sup> HRW and IHRC (n 159) 28

<sup>413</sup> Bonnie Docherty, The Human Rights Implications of "Killer Robots", *JURIST-Hotline*, (June 9, 2014)

<sup>414</sup> Asaro (n 28) 709

<sup>415</sup> See HRW and IHRC (n 159)

<sup>416</sup> Heyns (n 29) 371

<sup>417</sup> Chengeta (n 4) 474

<sup>418</sup> *Ibid* 474

<sup>419</sup> Thompson Chengeta, 'Measuring Autonomous Weapon Systems Against International Humanitarian Law Rules' (2016) 5 *Journal of Law and Cyber Warfare* 66

Furthermore, he contends that because humans are capable of reasoning, they are not only able to make decisions and take things into consideration, but they are also able to live in the past, present and future. The claim, which sets the groundwork for understanding human origins, is demonstrating what makes humans fundamentally different from for example animals or AWS.<sup>420</sup> In this regard, Barak has claimed that because only humans are capable of creating a rational and ethical community, as a result, only humans are capable of preserving and respecting human dignity.<sup>421</sup> Asaro further notes that AWS are not able to understand the meaning of their actions, death in the hands of a machine, constituting an undignified and arbitrary death, thus not being in line with the right to dignity.<sup>422</sup> Finally, Axinn and Johnson argue that giving a programmed machine the power to decide to kill is to deny the concept of dignity because an autonomous machine would treat humans as mere objects, as they are not aware of making sacrifices or thinking morally based on values.<sup>423</sup>

Another factor that is interesting when examining AWS use in light of dignity is a claim that younger people are more prone to accept certain weapons, and thus their attitude against the use of AWS can be easier to accept them.<sup>424</sup> The so called ‘age factor’ has its roots in a “PlayStation” mentality, where the argument is that this mentality is far from understanding human consequences of their actions, as the younger generation is preferring immoral systems with a lower threshold, meanwhile the older generation might easier resist.<sup>425</sup> This mentality’s concern has been raised by the Special Rapporteur Alston<sup>426</sup>, in the context of drone technologies, at the Human Rights Council, seen as a threat to the mentality lacking the understanding the value of life.<sup>427</sup> The alarming difference in this essence seems though to be that, while the PlayStation mentality is raised in the context of armed drones and the younger generation, this system still has a human in the loop in some way, thus being able to affect the understanding for value of life. AWS, on the other hand, are distinguishable in their technology systems from not having a human control at any stage, meaning that there is

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<sup>420</sup> Chegeta (n 4) 477

<sup>421</sup> Barak (n 265) 17

<sup>422</sup> Asaro (n 120) 380

<sup>423</sup> Aaron M. Johnson & Sidney Axinn ‘The Morality of Autonomous Robots’ (2013) 12 *Journal of Military Ethics*, 134-135

<sup>424</sup> Peter Bergen and Daniel Rothenberg, ‘Drone Wars’ (2014 Cambridge University Press) 233

<sup>425</sup> Hina Shamsi and Philip Alston ‘A killer above the law?’ (8.2.2010) *The Guardian*

<sup>426</sup> Philip Alston served as Special Rapporteur for Extrajudicial, Summary or Arbitrary Executions between 2004 and 2010.

<sup>427</sup> A/HRC/14/24/Add.6 ‘Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston’ in general and para. 84, see also Shamsi and Alston (n 425)

ultimately no possibility for influencing a machine to understand right and wrong, and thus no possibility for valuing human dignity.

Finally, Birnbacher notes that it should not be overlooked that throughout the AWS discussion, references to dignity serve as a means of highlighting the importance of established human rights, without dignity contributing to this appeal with any distinct or new content.<sup>428</sup> A similar, but more philosophical view is shared by Pop, who in her critique traces the dignity-based arguments on AWS to the Kantian idea of never treating humans as mere objects. She argues that remarkably little thought is given to what precise definition of human dignity would be required to be able to support arguments on dignity in the AWS discussions. According to her, the idea is mostly brought up rhetorically or with the aim to function as a “conversation-stopper”. As a result, no critical evaluation can be made, and there will exist a gap of analysis, she claims. Furthermore, she denies that AWS killing would be anything different from any other type of weapon and fails thus to see the point of dignity being rendered from particularly AWS use. Hence, any type of force should in that case undermine human agency.<sup>429</sup> There is after all no requirement in international law for machines to act ethically or be humane.

The ICRC views that the use of AWS, in addition to legal concerns that they view are issues to complying with IHL, would raise ethical concerns as well, the reason being that for upholding moral responsibility and human dignity, a ‘human agency’ would be necessary in decisions to use force.<sup>430</sup> The ICRC, as the guardian of the Geneva Conventions and having the responsibility of monitoring IHL,<sup>431</sup> view that the ethical concerns of AWS use are outside the limits of existing law.<sup>432</sup> They see that the loss of human dignity and diffusion of moral responsibility are some of the most acute of anxieties that the AWS currently present. Further, they view that these ethical concerns present risks for human life.

The core ethical challenge in this instance with AWS is delegating decisions regarding life and death. The ethical concerns also focus on three interconnected rights and responsibilities that govern the decision-making of the use of force. These are human agency, moral responsibility, and human

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<sup>428</sup> Dieter Birnbacher ‘Are Autonomous Weapon Systems a threat to human dignity?’ in Bhuta et al. (n 22)

<sup>429</sup> Ariadna Pop ‘Autonomous Weapon Systems: A threat to human dignity?’ (2018) *ICRC Humanitarian Law & Policy*

<sup>430</sup> ICRC (n 18) 29

<sup>431</sup> Le Moli (n 279) 181 see also Statutes of the International Red Cross and Red Crescent Movement (n 288) Art. 5

<sup>432</sup> ICRC (n 239) 5

dignity.<sup>433</sup> Further, using AWS is also argued to undermine the dignity of combatants, because substituting AWS for combatants could undermine their professional training and military ethics of courage and respect towards human targets. In that case, armies would also appear unnecessary.<sup>434</sup> Special Rapporteur Heyns has in this regard argued that considering ethical norms should not be excluded when discussing the use of AWS. According to him, an approach that is neglecting moral principles could possibly result in an international order that is ever less anchored in the fundamental values of the people whose interests it is intended to represent. Accordingly, ethical standards must be considered alongside human rights norms, such as the right to life and dignity.<sup>435</sup>

However, references to cases where combatants have committed war crimes considered as ‘outrages upon personal dignity’ have also been used as an argument for advocating that AWS could contribute to acting more rationally and making fewer mistakes.<sup>436</sup> In this essence it is assumed that machines will act more ethically than humans, and that humans have no capacity to stop unethical behaviour.<sup>437</sup> With regard to this, Ulgen argues that human emotions are necessary for navigating complex social environments, where it is particularly important to be able to understand and interpret human behaviour. An example of this could be distinguishing a man running with a stick rather than a gun.<sup>438</sup> The human judgment and reasoning cannot be done by a machine. Ulgen further argues that the war crimes can function as barometers of public conscience on appropriate behaviour during conduct of warfare, rather than to support the replacement of human combatants with machines. War crimes therefore adhere to human dignity by acknowledging that only human action can justify lethal force and calls for human accountability.<sup>439</sup>

## **4.2. The Notion of Meaningful Human Control**

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<sup>433</sup> Stockholm International Peace Research Institute (SIPRI) and ICRC, Vincent Boulanin, Neil Davison, Netta Goussac and Moa Peldán Carlsson ‘Limits on Autonomy in Weapon Systems: Identifying Practical Elements of Human Control’ (2020) 11

<sup>434</sup> Ulgen (n 257) 7

<sup>435</sup> Heyns (n 31) 8, Heyns argues forcefully “...it presents a very bleak picture of the international order if ethical norms are explicitly excluded from consideration.”

<sup>436</sup> Ulgen (n 257) 12 referring in general to Arkin (n 68)

<sup>437</sup> Ulgen (n 257) 12 referring to Daniel Muñoz-Rojas and Jean-Jaques Frésard., ‘The Roots of Behaviour: Understanding and Preventing IHL Violations’ (Geneva: ICRC, 2004), where it was found that “Conflicts in which recourse is had to advanced technologies which permit killing at a distance or on the computer screen prevent the activation of neuro-psychological mechanisms which render the act of killing difficult”, 198-199

<sup>438</sup> Ulgen (n 257) 12, referring to Guarini and Bello (n 161)

<sup>439</sup> Ulgen (n 257) 12



Now when the thesis has discussed the conception of human dignity and the link to its normative framework, it is relevant to state that the notion of meaningful human control is vital in the context of dignity in the AWS debate. The reason for scholars to argue that meaningful human control should be retained seems to be that according to abovementioned discussion on human dignity as a social value, it is only humans that have the capacity to understand the results of actions, to understand what is right and wrong, cause and effect.

Even though no legally binding framework has thus far been established for regulating the use of AWS, there seems to be a common consensus among states that autonomy in weapon systems must be limited in a way where humans have the responsibility for the use of AWS, and thus of the use of force during armed conflict. In the CCW States Parties general agreement, this is articulated through requiring that ‘meaningful’ or ‘effective’ human control should be retained.<sup>440</sup> Human control means that there is a way of translating the user’s intention into the operation of the weapon system.<sup>441</sup> One of the most vital components of human control is predictability. It is considered an important factor for ensuring compliance with IHL, and as the complexity in AWS use is high, it makes predictability challenging. A high level of confidence is needed from the operator (human) to trust the system to operate predictably, because the greater the unpredictability and consequently the uncertainty, the higher the risk is for IHL to be violated.<sup>442</sup>

Also, the ICRC has called for human control to be maintained for meeting both ethical and legal requirements, in order to be able to ensure respect to IHL.<sup>443</sup> A certain level of human control should be maintained through the conduct of hostilities in IHL. This proposes certain limits for autonomy in weapon systems, being therefore vital for ensuring compliance with the rules of distinction, proportionality, and precautions in attack.<sup>444</sup> These are seen as inherently qualitative assessments, requiring unique human judgement and reasoning.<sup>445</sup> The use of AWS without the requirement of meaningful human control is also argued to result in a so called ‘accountability gap’, posing

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<sup>440</sup> Human Rights Watch ‘Killer Robots and the Concept of Meaningful Control’ (11.4.2016)

<sup>441</sup> On a more technical note, Neil Davison has defined the human control to happen within one or many of three stages: the development stage, the activation stage and the operation stage. The ICRC sees that the activation and operation stages are the most vital for IHL compliance, and measures at the development stage alone is insufficient for IHL compliance. For more, see Davison (n 135) 30 and ICRC (n 18) 30

<sup>442</sup> Davison (n 135) 15

<sup>443</sup> ICRC commentary (n 41)

<sup>444</sup> ICRC, Statement to the Convention on Certain Conventional Weapons (CCW) Meeting of Experts on Lethal Autonomous Weapons Systems (LAWS), (Geneva, 11 April 2017), and Views of the ICRC (n 197)

<sup>445</sup> ICRC, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, 32<sup>nd</sup> International Conference of the Red Cross and Red Crescent, October 2015, 44-46

challenges for *inter alia* state- and criminal responsibility, as a machine cannot be directly held responsible for its acts and thus not held liable for violations against international law.<sup>446</sup> This is a vital argument when looking at the entire legal debate on the legality of AWS, but most important for this thesis is still the effect the use has on human dignity, as AWS usage without meaningful human control is also viewed to run counter to the principle of human dignity.<sup>447</sup>

At the States Parties level, it has within the CCW also been stressed that ethical debate could help in deciding a minimum threshold for human involvement. The notion of meaningful human control has also been proposed on to function as the framework for such an ethical standard.<sup>448</sup> Accordingly, the ICRC holds that the fundamental ethical question is whether it could be permissible through the principles of humanity and dictates of public conscience to allow the human element in decision making on the use of force and therefore take decisions about life and death, to be replaced with processes that are characterized in AWS. Here, the ICRC has suggested that the Martens Clause could provide a possible framework for IHL to include the notion of meaningful human control.<sup>449</sup>

The importance of meaningful human control is however not only vital for IHL compliance, but also for compliance with human rights. It is argued that without meaningful human control, the use of AWS would be in conflict with the principle of human dignity, since the principle requires human operators to preserve decisions affecting human life, integrity and property. This responsibility cannot be allocated to an autonomous, artificial operator. The reasoning behind this is that the use of AWS would systematically deny appeal to shared humanity, thereby denying the inherent value of the targeted individuals.<sup>450</sup> This emphasizes the need for guidelines to distinguish functions of meaningful control, as it would create a situation where their inherent value is denied.<sup>451</sup> Meaningful human control should not be looked at only as a solution to making the use of AWS legal, but rather as an approach to the AWS discussion, contributing with means to manage with both ethical and legal implications.<sup>452</sup>

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<sup>446</sup> HRW and IHRC, *Mind the Gap: The Lack of Accountability for Killer Robots*, April 2015

<sup>447</sup> Daniele Amoroso and Guglielmo Tamburrini, 'What Makes Human Control Over Weapons 'Meaningful'?', International Committee for Robots Arms Control (ICRAC) Working Paper no. 4 (ICRAC, Aug. 2019), 2

<sup>448</sup> CCW/CONF.V/2 2016 Report and recommendations of the Informal Meeting of Experts 10, at 58

<sup>449</sup> ICRC (n 239) 1

<sup>450</sup> Asaro (n 28) 689 and Amoroso and Tamburrini (n 447) 8

<sup>451</sup> Amoroso and Tamburrini (n 447) 2

<sup>452</sup> United Nations Institute for Disarmament Research (UNIDIR) (2014), 'The Weaponization of Increasingly Autonomous Technologies: Considering how Meaningful Human Control might move the discussion forward', UNIDIR Resource No. 2, 4

Further, meaningful human control is considered a tool for protecting human dignity by limiting the power of technology and thus not letting the threat of losing human dignity be too high.<sup>453</sup> The UN Special Rapporteur has argued that such an obligation within AWS use could present a possible compromise position between the right to life and right to dignity, while still recognising the essence of each. It is predicted that technical developments will be occurring more in the future, pushing the boundaries of human control, and it is needed for protecting a value and right, that once lost, cannot be regained.<sup>454</sup> From an African perspective, Chengeta stresses that AWS use without meaningful human control is not in line with the notion of ubuntu, and therefore also not in line with the right to dignity, because he sees that the right to dignity is an integral part of humanity, and as seen earlier, the notion of ubuntu is strongly mirroring the concept of humanity.<sup>455</sup> It remains clear that the principle of human dignity is strongly demonstrated in the element of meaningful human control. It is also clear that states parties and ICRC, among others, have consensus on the notion to be required. The notion of meaningful human control is thus contributing with a strong element to the discussion on the legality of AWS.

### **4.3. Considering dignity as a normative right in the AWS debate**

Looking at dignity in a legal context in the AWS debate, the argumentation often shifts between an ethical and a legal perspective. In his argumentation on dignity being a legal right and emphasizing its significance in the AWS debate, Heyns admits that too often dignity is considered important, but only recognized as an ethical concept, thus irrelevant to law and would not as such constitute any legal constraints on the actions of states.<sup>456</sup> Within the legal argumentation on AWS violating dignity, it is further argued that the use of AWS cannot be allowed under the current human rights framework, mirroring the example of AWS to death penalty. A legitimately carried out death penalty cannot be executed in an inhumane way because it would be violating the right to dignity. In the same manner he argues that lethal force or use of force in general cannot be conducted by AWS towards humans due to the very nature of AI and AWS.<sup>457</sup> Accordingly, this perspective was put forth when suggesting that a moratorium on the use of such weapons ought to be put in place in order to protect the right of life and the right to dignity.<sup>458</sup>

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<sup>453</sup> Human Rights Watch (n 440)

<sup>454</sup> Heyns (n 31) 11-14

<sup>455</sup> Chengeta (n 4) 484

<sup>456</sup> Heyns (n 31) 7

<sup>457</sup> Themistoklis Tzimas 'Legal and Ethical Challenges of Artificial Intelligence from an International Law Perspective' (2021) 46 *Springer* 194, referring to CCW/CONF.V/2 (n 448) 4–5 and 10. See also Heyns (n 136)

<sup>458</sup> Heyns (n 5) 'Summary' and paras 35, 111, 114, 116, 118

Tzimas has asked in this essence why the AWS prohibition should be based on human rights, if AWS one day could be trained and thus be capable to act with respect to human rights and providing ‘ad hoc to human dignity its whole context – or part of it’. He contends that the general principle of human dignity is nevertheless harmed by the use of AWS, even if particular human rights would be protected more effectively. This is, according to his view, because the general principle of dignity places the human at the centre of decision-making and implementation within state authority.<sup>459</sup>

The right to dignity is further emphasized by Aharon Barak to be a ‘mother right’ and a ‘framework right’, where all other rights are seen to be ‘daughter rights’ to it, for example the right to family life and the right to equality.<sup>460</sup> Chengeta has noted that the right to due process could be considered such a daughter right. If this was the case, one could ask whether it is permitted if machines assessed the need to use force against human beings according to the appeals of due process. He further notes that the use of machines to take decisions on people being guilty or accused has been rejected for a long time.<sup>461</sup> According to this view, the use of AWS to take the decision of killing a human could as well be condemned.<sup>462</sup>

There are further arguments for the fundamental right to dignity to be objecting the idea of giving the decision to kill to AWS. One of the most describing examples in connection to objecting the use and referring to dignity, is the parallel of allowing the power to kill to AWS being like setting a mousetrap for human beings.<sup>463</sup> The UN Special Rapporteur Heyns has also referred to the overriding consideration in AWS being whether machines *should* do it, not whether they are technically able to do it. Taking the human out of the decision-making loop over the use of force would according to him be an undesirability. Because AWS lack both morality and mortality, taking the human out is risking taking the humanity out of the loop. This then leads to a vacuum of responsibility, that can be tantamount to ‘giving up on hope for a better world’.<sup>464</sup> Therefore, even if AWS could technically be able of using force on legitimate targets, it could still be a violation

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<sup>459</sup> Tzimas (n 457) 194

<sup>460</sup> Barak (n 265) 256 referring to the South African Constitution

<sup>461</sup> Thompson Chengeta ‘The Challenges of increased autonomy in weapon systems: In search of an appropriate legal solution’ (2015) *University of Pretoria* 169 referring to Judith L. Gersting & Michael Caesar Gemignani ‘The computer: history, workings, uses & limitations’ (1988 Ardsley House Publishers) 270

<sup>462</sup> Chengeta (n 461) 169

<sup>463</sup> Johnson & Axinn (n 423) 129-141, 134

<sup>464</sup> Heyns (n 5) para 97

against the right to human dignity, because only humans ought to make the decision on the use of force.<sup>465</sup>

Ensuring that the final decision of using lethal force remains with combatants is also according to Saxon the only possible way to use AWS so that it complies with the rules of IHL, containing international law's underlying precept of human dignity.<sup>466</sup> However, he argues that states should not give up on autonomous technologies that can help soldiers to enable better compliance to IHL and human dignity. Saxon argues the reason being that commanders act based on their experience and training in order to distinguish the situations where the use of AWS is legal. If AWS use would become the rule rather than the exception, these qualities that guide commanders' inherent moral agency would not apply. He sees that the continued pressure to develop more efficient weapon systems for increasing military effectiveness will diminish human dignity as a foundation for adhering to the law.<sup>467</sup> Additionally, he sees that respect for human dignity might prevail in situations when other human rights are juxtaposed against each other,<sup>468</sup> and that respect for human dignity may have more weight than the right to life, if dignity is to be regarded to have real legal significance under international law.<sup>469</sup>

Finally, Saxon argues that the use of AWS could paradoxically change the perception of humanity, resulting in less violence being used. As AWS use decreases moral agency in general, because less combatants are present, it also decreases the level of human dignity in warfare. This reduces the human element to a mere agent, without being the source of legal and moral judgment. When the meaning of human element becomes more limited, the use of AWS could then lead to less suffering, and this becomes the meaning of humanity and human dignity in context. According to this, the use of AWS would be necessary, at least at times, in order to uphold human dignity.

When it comes to the arguments of dignity being a vague, vacuous concept and a relative new concept within constitutional law<sup>470</sup>, Barak has argued that the novelty will pass, and society will be familiarized and accept the present. He further argues that with time, judges will determine a more

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<sup>465</sup> Chengeta (n 461) 174

<sup>466</sup> Saxon (n 34) 66

<sup>467</sup> Saxon (n 34) 80

<sup>468</sup> Saxon (n 34) 80, Saxon is in his argument referring to Case of Lambert and Others v. France (2015) 60 EHRR 2 para. 3, citing Case of Pretty v. the United Kingdom (n 367) para. 65

<sup>469</sup> Saxon (n 34) 80

<sup>470</sup> Neomi Rao 'Three Concepts of Dignity in Constitutional Law' (2011) 86 *Notre Dame Law Review* 190

precise meaning for dignity within the legal framework.<sup>471</sup> Barak has argued that dignity as a constitutional value has a central normative role through serving as the factor that links all the human rights together.<sup>472</sup>

The notion of ubuntu was earlier examined because of its influence within the South African constitution, and how it is connected to the right of dignity. Chengeta has argued that the notion should gain more attention in the debate of the legality of AWS, as the notion is closely linked to the conception of both humanity and human dignity. The notion is therefore a vital concept to understand and plays an important role for the right to dignity, especially when examining the use of AWS from the light of the right to dignity. Against the background of the notion of ubuntu as an important part of human dignity, Chengeta argues that the use of AWS is not in line with the notion of ubuntu, and the use violates the right to dignity. For this reason, he also wishes African states to participate stronger in the discussions for a regulation.<sup>473</sup> Mentions to dignity have also been taken up by State Parties within the CCW discussions on AWS, both by referring to the right to dignity as well as noting dignity within a broader context in undermining human rights and human dignity.<sup>474</sup>

Further, it is argued that considering the right to dignity in the AWS debate could also be done through the IHL rule of humanity. Humanity is regarded as the core and basis of IHL.<sup>475</sup> According to Chengeta, the rule of humanity exists to uphold and remind combatants that despite warfare, all people are still entitled to respect and human dignity.<sup>476</sup> Chengeta has further argued that giving AWS the right to kill is not in line with the rule of humanity, because it violates the right to dignity of those targeted.<sup>477</sup> Further, the violation of human dignity based on degrading treatment in IHL has also been argued to take place when AI force is applied on humans without human control of AWS, as this is a situation of inhumane treatment by definition.<sup>478</sup> Similarly, a link between humanity and dignity can be found in IHL, as it has been suggested that the intrinsic dignity of the human person justifies the protection of humans during armed conflict. Any behaviour that violates this during warfare is then an act against humanity. Further, it is suggested that the broader concept of ‘humanity’

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<sup>471</sup> Barak (n 265) 10-11

<sup>472</sup> *Ibid* 103

<sup>473</sup> Chengeta (n 4) 484

<sup>474</sup> Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons System, CCW/GGE.1/2020/WP.7 Ecuador referring to the right to dignity at 39, as well as CCW/CONF.V/2 (n 448) 10, at 55.

<sup>475</sup> Chengeta (n 419) 125 referring to Marielle Matthee, Birgit Toebes and Marcel Brus ‘Armed Conflict and International Law: In Search of the Human Face’ (2013 Springer)

<sup>476</sup> Chengeta (n 419) 126

<sup>477</sup> Chengeta (n 419) 137

<sup>478</sup> Heyns (n 29) at 363, footnote 58

as a normative standard is strongly relying on human dignity.<sup>479</sup> It has thus been argued that dignity enables the concept of humanity to have an impact on both the content of universal IHL instruments and the way in which warfare is conducted.<sup>480</sup>

This argument also applies to the right to a dignified death, meaning that the obligation to respect the dignity also applies to dead persons. Heyns has argued that AWS use could violate the right to dignity, because AWS use can come with the price of those who targeted.<sup>481</sup> As earlier mentioned, when examining outrages upon personal dignity as a war crime, it was noted that outrages upon personal dignity can also be committed against the dead.<sup>482</sup> In the context of AWS, Ulgen has noted that these provisions become irrelevant, as combatants and human targets are not in contact. A death resulting from a situation with human contact can therefore be more protected against outrages upon personal dignity than AWS.<sup>483</sup>

A situation where international human rights law stands solely as the applicable framework is law enforcement, even though force is used. Therefore, law enforcement situations and the use of AWS are also useful in the argumentation, as these situations can illustrate clearly how the right to dignity is necessary to be preserved during the use of AWS.<sup>484</sup> It is thus argued that AWS use in law enforcement would affect the right to dignity, because there is no element of meaningful human control included.<sup>485</sup> As has been mentioned, the discussion on acceptability of AWS touches both legal and ethical considerations, going beyond the adaptability in existing laws, moving to including fundamental questions of acceptability to values. The ethical discussions on AWS have contributed to transcending the context of legal boundaries of IHL and human rights law.<sup>486</sup> This makes arguing for dignity to be regarded as a normative right in the AWS debate harder. Human dignity is therefore argued to be a relative concept, dependent on *inter alia* social, cultural, and historical aspects.<sup>487</sup>

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<sup>479</sup> Le Moli (n 279) 182 referring to Uruena (n 291) 188

<sup>480</sup> Le Moli (n 279) 18

<sup>481</sup> Heyns 369, footnote 92

<sup>482</sup> See this thesis at 53, 3.4 Human dignity in Treaty Law

<sup>483</sup> Ulgen (n 257) 14

<sup>484</sup> Diego Mauri, 'Autonomous weapons systems under international human rights law' in *Autonomous Weapons Systems and the Protection of the Human Person: an International Law Analysis* (2022 Elgar International Law and Technology Series) 67

<sup>485</sup> Heyns (n 31) 375

<sup>486</sup> ICRC (n 239) 8

<sup>487</sup> Jackie Jones 'Common Constitutional Traditions: Can the Meaning of Dignity under German Law Guide the European Court of Justice?' (2004) *Public Law* 167

Against this, one could of course argue that the notion of dignity is vague and understood in different settings depending on culture or religion.<sup>488</sup> But, it is argued that regardless of that, the core of human dignity is similar everywhere, since the factors constituting the content of dignity are more or less experienced to be the same, as the core of human dignity is shaped by the rule of law, democracy and human rights.<sup>489</sup> When it comes to viewing dignity as a right, the argument seems to be even stronger.<sup>490</sup>

When trying to establish a normative understanding of dignity as considering it a normative right in the AWS debate, it remains clear that it is challenging because of dignity's overarching nature. Human dignity is according to some to be referred to as a right, and by some as a principle, and the same alternating is present in references to dignity in the AWS debate. The strongest focus on the normative legal character is seen through references to the notion of ubuntu, which can be mirrored to the constitution of South Africa, that has the right to dignity established in their constitution. The South African constitution has also referred to ubuntu as being interconnected with both dignity and humanity. However, even when not considered a separate right itself, but part of something bigger reflecting on the framework of international law, it is clear that human dignity would be rendered from the use of AWS.

#### **4.4. A Theoretical Framework for a Regulation on AWS through the Scope of Applicability of the Right to Dignity**

##### **4.4.1. The Importance of Meaningful Human Control**

One argument for the right to dignity and the use of AWS to be in conformity with international human rights law is namely the concept of meaningful human control. If meaningful control was to be included in the decision on the use of force, the 'accountability gap' would cease to exist.<sup>491</sup> Dignity is also regarded as one of the core arguments for those opposing completely the development of AWS.<sup>492</sup> Nevertheless, human rights can also include moral status independent of existing law, functioning as a sound provider of guidance for extending the law in order to better deal with issues raised by AWS.<sup>493</sup> The biggest requirement, when considering a potential framework of regulation

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<sup>488</sup> Barak (n 265) 5

<sup>489</sup> *Ibid* 7

<sup>490</sup> Chengeta (n 4) 479 referring to Boggetti (n 255) 85

<sup>491</sup> Heyns (n 29) 375

<sup>492</sup> Mauri (n 484) 107

<sup>493</sup> Asaro (n 28) 689



for AWS, is human involvement in the decision-making process. As was previously discussed, the prerequisite can also be understood as the idea of meaningful human control. When in turn looking at the use of AWS and the right to dignity, the outcome is that the violation is taking place as there is not a human taking the decision to kill another human being. Scholars have even suggested that allowing a machine to take the decision constitutes ‘ultimate indignity’.<sup>494</sup> It is suggested that through the notion of meaningful human control it is possible to distinguish acceptable from unacceptable, translating the core notion of dignity in knowing what is right and wrong.<sup>495</sup> Further, human judgement is needed, as it is constitutive of the system of justice, and thus must rely on human reason.<sup>496</sup> Without meaningful human control over the use of force, the use of AWS cannot be lawful under human rights law and would constitute a violation of the right to dignity.<sup>497</sup> The notion could further provide a useful starting point to the discussions, because what is at risk in this view is the right to live a dignified life and a dignified death.<sup>498</sup>

When looking at the possibility to establish a regulation through the right of dignity, there seems to be plenty of arguments supporting it. As earlier mentioned, AWS use was claimed to save lives in the long run, and especially civilians. In this essence, the right to dignity plays a vital role. Human rights are considered to overtaking a long-term effect, and therefore the claim is argued to be implausible to justify a short-term, or concrete, violation of the right to dignity.<sup>499</sup> The notion of meaningful human control certainly allows for considerations of the right to dignity. However, it seems to be a challenge for states to recognise the relevance of it, the reason being it falls in the category of human rights. Thus, that is not regarded a relevant part of assessing legality of means and methods of warfare, when negotiations are taking place and the mandate falls within the CCW. States such as the United States, the United Kingdom and Israel have strictly opposed to consider means and methods of warfare in view of substantive human rights.<sup>500</sup>

Earlier, the German constitution was examined how it has included the right to dignity in its legal framework on a national level. Not surprisingly, Germany was the first of states to explicitly refer to human dignity on the CCW framework negotiations on the use of AWS. The right to dignity was

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<sup>494</sup> Heyns (n 31) 8

<sup>495</sup> Heyns (n 31) 13

<sup>496</sup> Asaro (n 28) 701

<sup>497</sup> Heyns (n 31) 14

<sup>498</sup> Christof Heyns ‘Autonomous weapons systems: living a dignified life and dying a dignified death’, in Bhuta et al (n 22) 19

<sup>499</sup> Christof Heyns ‘Autonomous weapons systems: living a dignified life and dying a dignified death’, in Bhuta et al (n 22) 18

<sup>500</sup> Bhuta et al (n 22) 381-382, see especially footnote 111.

used in the context of a need for a ‘principle of human control’ on AWS.<sup>501</sup> Noteworthy is the fact that the notion of human dignity has been applied by states as a ‘principle’ in negotiations, thus yet without further discovery of both content nor scope of it.<sup>502</sup>

When looking at IHL, the Martens Clause is argued to be a potential solution for the notion of meaningful human control, since it provides a passage for ethical considerations. It has also been suggested by the Special Rapporteur that the complementarity of IHL and human rights means that the right to dignity has to be taken into account, also when interpreting rules of IHL. Here, again, the Martens Clause could provide a solution for such interpretation, when establishing a regulation.<sup>503</sup>

#### 4.4.2. A Cross-Cutting Framework?

In chapter 2 when examining the legality of AWS from both IHL and human rights perspectives, it was noted that human rights are applicable alongside IHL during armed conflict, through the *lex specialis* framework, that has been confirmed in a number of decisions by the ICJ.<sup>504</sup> Both frameworks could regulate the use of AWS together, with human rights law posing stricter requirements for the use of force. A few decades later another theory was gaining attention, where the two bodies of law could complete each other on specific points, while still remaining discrete and divergent in their roots and approaches.<sup>505</sup> This theory of complementarity was also confirmed by the ICJ in the *Wall* case in 2004.<sup>506</sup> This is also the case with drone strikes, within the context of the right to life. When a particular drone strike takes place during an armed conflict, both IHL and human rights law applies within the theory of complementarity.<sup>507</sup> Mirroring AWS to the legality of the use of drones can provide support for the argumentation, as drones have similarities in their

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<sup>501</sup> Weizmann and Costas Trascasas (n 187) 7, Table 1: State positions and issues raised at the CCW Experts Meeting, May 2014 (excerpts) Should be noted that the choice of source is chosen specifically because these statements are not available elsewhere anymore.

<sup>502</sup> Mauri (n 484) 108

<sup>503</sup> Heyns (n 31) 8 and Bhuta et al (n 22) 377

<sup>504</sup> ICJ (n 139) para 25

<sup>505</sup> Hans-Joachim Heintze ‘Theories on the relationship between international humanitarian law and human rights law’ in Robert Kolb & Gloria Gaggioli (eds) *Research Handbook on Human Rights and Humanitarian Law*, (2013 Edward Elgar) 57

<sup>506</sup> ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory, (Advisory Opinion), (9 July 2004), ICJ Reports 136, para. 106

<sup>507</sup> Christof Heyns, Dapo Akande, Lawrence Hill-Cawthorne and Thompson Chengeta ‘The International Law Framework Regulating the use of Armed Drones’ (2016) 65 *International and Comparative Law Quarterly* 791, 821

capacities to function.<sup>508</sup> What is interesting, however, is that it was concluded at the 28<sup>th</sup> session of the HRC that in situations of armed conflict, the right to life is interpreted in accordance with IHL, and human rights still continued to apply. This was concluded because drones could also be used in other settings than during armed conflict, and during those time the applicable framework was naturally decided to be human rights law.<sup>509</sup> In that sense the case differs from AWS, but does still provide evidence for showcasing that both IHL and human rights law can be applicable during armed conflict in a setting with advanced military technology. In addition, this example provides interesting knowledge about the question of accountability in the case of arbitrary deprivation of life. This thesis is limited to not examine the accountability gap stemming from AWS, but also in this case it is worth noting that the decisions taken on drones can provide as guiding examples.

More recently, an additional theory has gained attention, with a focus on the similarities in the frameworks, rather than specifying the relationship of them through either *lex specialis* or *lex generalis*. This ‘harmonization theory’ has an approach to eliminate differences in the two bodies, preferring a systemic integration.<sup>510</sup> . The theory is further motivated by IHL and human rights often overlapping to an extent where it is impossible to separate respective obligations, and that it therefore would be more logical to form an unicum.<sup>511</sup> Through this theory it has been possible to demonstrate that the adoption does impact the interpretation of legal obligations.<sup>512</sup> An example of this is the duty to investigate arbitrary deprivations of life in armed conflict,<sup>513</sup> that was mentioned above in the context of drones. The content of human dignity could be especially important in the discussion of the legality of AWS usage, the reason being that there is no mutual agreement on what the concept of dignity encompasses.<sup>514</sup>

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<sup>508</sup> See for example Vivek Sehrawat ‘Autonomous weapon system: Law of armed conflict (LOAC and other legal challenges’ (2017) 33*Computer Law & Security Review* 38, 47: Sehrawat compares drones with AWS when discussing complexity in weapon systems.

<sup>509</sup> A/HRC/28/38 HRC 28<sup>th</sup> Session, Summary of the Human Rights Council interactive panel discussion of experts on the use of remotely piloted aircraft or armed drones in compliance with international law: Report of the Office of the United Nations High Commissioner for Human Rights, para. 12, 51 and 52.

<sup>510</sup> Vera Gowlland-Debbas and Gloria Gaggioli ‘The relationship between international human rights and humanitarian law: an overview, in Kolb & Gaggioli (n 505) at 87, the legal basis for this theory can be traced back to the ILC Report quoted above and lies on the provision of Article 31, para 3, of the Vienna Convention on the Law of Treaties., referring to Martti Koskeniemi ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ Report of the Study Group of the International Law Commission finalized by Martti Koskeniemi, UN Doc. A/CN.4/L.682 (13 April 2006) 58-59 at 107

<sup>511</sup> Hans-Joachim Heintze ‘Theories on the relationship between international humanitarian law and human rights law’ in Kolb & Gaggioli (n 505) 61-62 (discussing the example of the 1989 Convention on the Right of the Child)

<sup>512</sup> Mauri (n 211) 174

<sup>513</sup> *Ibid*

<sup>514</sup> Jack Donnelly ‘Universal Human Rights in Theory and Practice’ (2013) *Cornell University Press*, 132

During the drafting of Geneva Conventions, there was a draft preamble adopted by the Stockholm Conference referring to dignity of all human beings being the main principle to be respected to, underlying all humanitarian conventions.<sup>515</sup> This provides proof to attraction to the idea of IHL and IHRL being interpreted together, already in the drafting stage of the Geneva Conventions. Additional Protocol II:s preamble sheds further light on this, including a ‘common origin’ shared by IHL and IHRL.<sup>516</sup> This ‘common origin’ has been enshrined also by state practice, for example in the *Corfu Channel* case.<sup>517</sup> Legal scholars such as Pictet and Meron have stressed this approach, in the context of stressing the sharing of a ‘minimum of humanity’, as well as acknowledging that IHL and IHRL share ‘the principle of humanity’, making it a common denominator.<sup>518</sup>

As seen, the concept of dignity is strongly linked to humanity. Addressing humanity plays a vital role in the governance of armed conflict, in law enforcement situations or at any time when weapons are used. Humanity is described as more than a source of international law, with thin links to natural law.<sup>519</sup> The understanding of humanity as a normative standard is closely linked to human dignity, as the right to dignity is viewed as an integral part of humanity.<sup>520</sup> Human dignity as a legal principle is also viewed to subsume humanity, because the moral understanding of dignity is that it can be applied on every single human. Le Moli holds that dignity is fundamental for humanity as a legal standard in its larger meaning.<sup>521</sup> Further, as earlier stated, the Martens Clause forbids the assumption that what law does not prohibit is accepted. This also applies regardless of advancements in weapons technology.<sup>522</sup> It is further recognized that the Martens Clause has the normative power to provide additional protection by appropriately regulating military conduct.<sup>523</sup> Finally, the Martens Clause has however also been recognized to allow specific moral requirements to enter into law.<sup>524</sup>

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<sup>515</sup> Mauri (n 211) 175 referring to Andrew Clapham ‘The Complex Relationship Between the Geneva Conventions and International Human Rights Law’, in Andrew Clapham, Paola Gaeta and Marco Sassóli (eds) *The 1949 Geneva Conventions. A Commentary* (Oxford, 2015) 701-736

<sup>516</sup> Mauri (n 211) 175- 176 referring to Additional Protocol II to the Geneva Conventions of 1949 and Relating to the Protection of Victims in International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) stating ‘the humanitarian principles enshrined in Article 3 [...] constitute the foundation of respect for the human person in cases of armed conflict not of an international character’

<sup>517</sup> ICJ, *Corfu Channel Case* (1949), ICJ Reports 4, para. 21-22

<sup>518</sup> Mauri (n 211) 176 referring to Jean Pictet, ‘Développement et principes du droit international humanitaire’ (Geneva, 1983) 73-74 and Theodor Meron ‘The Humanization of Humanitarian Law’ (2000) 94 *The American Journal of International Law* 245

<sup>519</sup> Robin Coupland ‘Humanity: what is it and how does it influence international law?’ (2001) 83 *International Review of the Red Cross* 969, 988

<sup>520</sup> Chengeta (n 4) 464

<sup>521</sup> Le Moli (n 279) 182

<sup>522</sup> Sandoz, Swinarski and Zimmermann (n 285) paras 55 and 56, at 39

<sup>523</sup> Dissenting Opinion of Judge Shahabuddeen (n 207) at 405-409

<sup>524</sup> Le Moli (n 279) 183, referring to Thomas Joseph Lawrence *The Principles of International Law* (4th ed., London: McMillan 1911), 395

The relevance of the theory of a common denominator is significant in the argumentation on dignity and AWS, where the concept of humanity, linked to IHL, and human dignity, linked to human rights law, could be interpreted together and thus provide stronger argumentation for regulation of AWS in light of dignity. To stress the argumentation, it has recently been argued that the principle of humanity must be abided in any circumstances where human beings are dispensed treatment. The principle is further argued to permeate the complete *corpus juris* of the international rights of the human person.<sup>525</sup> This could, according to for example Mauri, mean also that the notion of human dignity in human rights law and that of ‘humanity’ in IHL are sourced from the same, ‘common denominator’. This argument is further encouraged to be used in ongoing discussions on AWS.<sup>526</sup> To this support, the Under-Secretary-General, High Representative for Disarmament Affairs has recently called for a cross-disciplinary approach for regulating AWS.<sup>527</sup> In practice, several references to dignity can though be found in both human rights law and IHL instruments.<sup>528</sup>

What is interesting to see is also that dignity has been included as a dimension in the right to life. In General Comment 36, the UN Human Rights Committee includes a notion of “to enjoy a life with dignity” in the context of the right to life. The Comment has a specific focus for situations of protracted conflict. This serves as an additional element demonstrating dignity’s strong position in human rights and can also serve as an example on situations where dignity is included as a tool in a specific situation, for example a protracted conflict.<sup>529</sup> A General Comment from the Committee on the right to life and dignity in cases of AWS usage could indeed add desired emphasis on human dignity, but with maintaining the focus on the question of AWS use and the right to life.

#### **4.4.3. *Lex lata* or *lex ferenda*?**

The discussions about a potential treaty or ban on AWS have indeed sparked academia, practitioners, and states, to mention a few. Reeves and Johnson hold that collaboration between scholars and practitioners would be the most likely way to develop a pragmatic response to the questions raised

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<sup>525</sup> Antonio Augusto and Cancado Trindade ‘Some reflections in the principle of humanity in its wide dimension’ in Kolb & Gaggioli (n 505) 189

<sup>526</sup> Mauri (n 211) 175, It is worth to note that Mauri is referring to LAWS in his argumentation, not AWS.

<sup>527</sup> Nakamitsu (n 245)

<sup>528</sup> Rishmawi (n 319) 1163

<sup>529</sup> Human Rights Committee, General Comment No. 36, “Article 6 (Right to Life)”, UN Doc. CCPR/C/GC/ 36, 30 October 2018 (General Comment 36), para 3.

by AWS.<sup>530</sup> In legal terms, the collaboration, an effort to bridge the divide, would mean colluding *lex lata*, or what international law is in practical terms, with *lex ferenda*, the view on what law should become. The creation of a framework will be posed with challenges of complexities in the modern battlefield, that risk overwhelming the established understandings of international law regarding warfare. This same view holds that combining the drive for technology with the drive for humanity can only result in improving both.<sup>531</sup>

By contrast, diverging these disciplines could risk a recurrence of past tragedies.<sup>532</sup> Arguments on *lex lata* and *lex ferenda* make an extraordinary distinction on dignity, and suits in the current picture on AWS. The findings and discussions on dignity and its relevance in the AWS debate are still affecting the current understandings on the topic within academia in international law. Interpretations on dignity could through this approach in the longer run affect rights, as well as state practice. Further, it has also been stated that IHL is more soft law oriented today, and ‘informal’ IHL is emerging a lot.<sup>533</sup> Applying and interpreting a less recognized part of human rights such as human dignity in conformity with IHL should, against that argument, establish a pragmatic response.

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<sup>530</sup> Shane R. Reeves and William J. Johnson, ‘Autonomous Weapons: Are You Sure Those Are Killer Robots? Can We Talk about It?’, (2014) 2014 *Army Lawyer* 30

<sup>531</sup> *Ibid*

<sup>532</sup> *Ibid* 31

<sup>533</sup> Shereshevsky (n 1) 1245

## **5. Conclusions: a way forward**

Now, the legality of the use of AWS has been examined through the frameworks of IHL and human rights law, and further with a special focus on the right to dignity. For the sake of IHL, it goes to say that against the principle of distinction, the principle of proportionality and the principle of precautions of attack, it is highly questionable on whether an AWS ever could be able to be applicable, because of the nature of unpredictability that AWS comes with. An attack that is not proportionate is a grave violation of IHL. When it comes to the obligation of the legal review of new weapons, the opinions of legal scholars seem twofold. On one hand, this requirement is in itself already telling that it is doubtful whether AWS can comply with IHL, posing a critical view since there are no developed methods for reviewing such systems. On the other hand, the most positive view see that the article provides means for sharing best practices on weapon development between states.

When it comes to human rights, the legality of AWS seems even more unlikely, as it was noted that the use of force under this framework is stricter than under IHL. Especially vulnerable for violations are violations of life and bodily integrity. In here, again the principle of proportionality is one of the factors contributing to a questionable outcome of legality of AWS use. The legality of AWS seems therefore highly questionable against the both the framework of IHL and human rights. However, there are still some advocating that AWS systems could for example be translated into IHL language and thus comply with means and methods of warfare. The general opinion still seems to be to object AWS use, but the reasons seem to be more moral and ethical based. Also, the critique raised in academia and other material examined sends an alarming, highly concerned signal about possible risks of finding a way through the legal frameworks to make AWS use respect international law.

Further, the thesis examined the right to dignity's position in international law. What can be said is that it indeed has a normative status, but its distinct status is dependent on the social aspect behind it, bringing a fundamental importance to the discussion. However, indications to dignity's social value does not though make the legal assessment easier. The origins and reasons to why dignity became such an important right was because of historical reasons, after the Second World War. This is also to be seen in the German constitution, that has a unique character when assessing the right to dignity. Through its object formula, it seems that the right is rather concrete, than abstract. This is something that is further distinct in the way how Germany makes references to dignity in the

negotiations regarding the use of AWS at the CCW forum. The backside with the right to dignity argument in the AWS debate is thus its weak normative position, that is also seen in how other states are using it in negotiations, without further developing it as a concept, but just appealing to ‘principle of dignity’ or ‘loss of human dignity’ in a context of an ethical concern.<sup>534</sup> It can be concluded that within the CCW forum and among Member States, there is yet no consensus on what dignity means in legal terms. Without consensus on the concept in the first place, it can be challenging to start negotiating a regulation from such a perspective.

When further examining dignity, it is clear that the interest for the normative position is growing within academia. This could further work as an incentive for its position to grow also in the CCW forum, from only being mentioned as a principle, to bravely enough being raised as a right in the argumentation. Another way this is evident is that the right to life is mentioned together with dignity, and there have been speculations over dignity’s position in the right to life itself. As a strong established, enforceable right, another way to bring the notion of dignity stronger to the table could be to build a stronger link between dignity and the right to life, and thus empower the position of dignity in that way. A general comment from the Human Rights Committee on dignity’s purpose in connection with the right to life in the context of AWS would indeed be desirable. In addition, a common understanding of what meaningful human control entails has to be established, and negotiations within the CCW on the topic are to be conducted in the future, with the historical step forward with having a UNGA resolution to start with. Time will show what is to be negotiated and how the notion of meaningful human control will (or if it will) be articulated into internationally agreed text. In the mission of regulating AWS, human dignity could be regarded as a starting point and a guiding legal concept, that leaves room for more particular rules and norms, with a demonstrating example in the context of the notion of meaningful human control.

Meaningful human control thus seems to be the required element for the use of AWS to be considered justified. The notion of meaningful human control seems to be an element that the international community should accept in order for the right to dignity not to be violated from the use of AWS. A conclusion that can be drawn from the analysis above is that it is not unclear that meaningful human control is needed per se, but the connection to the concept of dignity is still not

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<sup>534</sup> Convention on Certain Conventional Weapons (CCW) Group of Governmental Experts on Lethal Autonomous Weapons Systems 9–13 April 2018, Geneva Statement of the International Committee of the Red Cross (ICRC) 2



yet fully established. In some arguments, dignity indeed seems to have a special role within the notion, but this link could be even more intensified.

What is further interesting to see is the notion, or spirit of ubuntu, that is enshrined in the right to dignity in the South African constitution as well as in the African Charter of Human and Peoples' Rights. This is a highly social value that translates into law, also bridging humanity and dignity. The reason for the African states to include dignity in their constitutions is also historical. The right to dignity thus gains a stronger normative position through these constitutions and the treaty. The stronger the loss once was, the stronger the right is seen today in their constitution. In addition, dignity reflects beliefs of equality, for example within the South African constitution.<sup>535</sup> As mentioned earlier, AWS use could result in wrong choices because of the algorithm's behaviour, for example misidentifying women of colour.<sup>536</sup> This could be seen as an issue undermining equality of gender. In this essence, invoking dignity could be a means to regulate AWS also from the perspective of equality, that dignity holds within. Indeed, the South African interpretation is additional evidence of what impact the history can have for dignity within a legal system. With the current atrocities of today happening in the Middle East, it should still be looked at as an important reminder of global order and what maintaining humanity and dignity means.

The fact that references to dignity are made in treaties, and even in international treaty bodies' case law, such as the in the ECtHR, is also a clear indicator of the fact that it has an established status within the jurisprudence. However, it is clear that it does not occur as much as when comparing the number of references to other, more concrete and established human rights, such as the right to life. As was noted, it indeed is viewed as a vacuous right, with room for interpretation so that the wished outcome would win. This indeed can raise further questions on the possibility to enforce the right in international law.

When looking at whether the use of AWS is in line with the right to dignity, it seems clear that the answer is no. The biggest reason for this was noted to be the element of a human missing, because for the use of force to be legal and for dignity to be respected, a human being has to be included in the decision to use force. Therefore, the notion of meaningful human control is a necessity for the right to dignity not to be violated. It was further suggested that the Martens Clause could pave a

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<sup>535</sup> Botha (n 36) 218

<sup>536</sup> See this thesis, at 17

possible way for ethical considerations. A constructive idea could also be to establish the link through meaningful human control through the Clause. The problem one then could think of is its enforceability, as the Clause mainly is considered to help in an ethical manner, to preserve the dictates of public conscience and humanity. A notion like this could however continue to constitute a violation of human rights, namely the right to dignity, if the framework of human rights is excluded.

Therefore, the strongest argumentation is to establish a framework with meaningful human control through both IHL and human rights, with the newest theory of a ‘common denominator’. There are several reasons for this. This theory would enable using both human rights and IHL frameworks when establishing a regulation of means and methods of warfare. With the starting point in mind that as unregulated, AWS constitute a violation against dignity, it is clear that human rights have to be included. At the same time, the traditional framework for regulating warfare must be respected, thus IHL. Against this, to preserve both humanity, that stems from IHL, as well as dignity, stemming from human rights law, this common denominator- theory would function to preserve both, using a cross-cutting approach, where further elements from both frameworks are included. Against this theory, it is also interesting to look at the notion of ubuntu. As was mentioned, the notion itself already today holds a link between humanity and dignity, that could be strongly demonstrated through the right to dignity in the context of AWS.

In addition, in one of the latest joint appeal from the UN Secretary General and the President of the ICRC, there are mentions that the foundation for the adoption of explicit prohibitions and restrictions has been laid down through discussions at the UN-level, including the HRC, under the CCW as well as the General Assembly.<sup>537</sup> This can be seen as a further verification from the international organisations that a foundation for prohibition can derive from both IHL and human rights frameworks.

Furthermore, it was said that African states are encouraged to participate more in the discussions. This encouragement is stemming from both international legal scholars as well as from the sphere of global governance.<sup>538</sup> The link could therefore in practice be made through references to their

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<sup>537</sup> Joint Call by the United Nations Secretary-General and the President of the International Committee of the Red Cross for States to establish new prohibitions and restrictions on Autonomous Weapon Systems, 5 October 2023, New York, available at <https://www.un.org/sg/en/content/sg/note-correspondents/2023-10-05/note-correspondents-joint-call-the-united-nations-secretary-general-and-the-president-of-the-international-committee-of-the-red-cross-for-states-establish-new>

<sup>538</sup> See Chengeta (n 4) 460, 464, 484 and Bode et al. (n 90) 10

already existing constitutions on the notion of ubuntu and its translation to legal systems. Further, this approach would be timely topical, as the recent calls on appeals for restriction are to be made for the sake of humanity. Allowing a part of meaningful human control, that cares for both humanity and dignity, would suit the purposes best.

In a theoretical world, this would be the best possible outcome. In practice, it is highly doubtful whether such a regulation, negotiated between states, could possibly be established. Not only considering the clashes in opinions about even establishing a regulation on AWS is concerning, but again, so is also the fact that there seems to be little consensus on what dignity means for states in legal terms. This is clearly demonstrated by the fact that states so far only have made references to the principle of dignity, as earlier already mentioned. The normative potential is therefore left aside by the negotiating states.<sup>539</sup> That being said, the right to dignity should first ‘earn’ a custom status in international law. International custom is, as seen, after all subject to change, leaving an open door for solutions in this regard. However, it is worth noting that it cannot be said for dignity to have consensus within the philosophical-ethical sphere either, making the enforcement of the concept even harder in the first place. At the same time, it goes to argue that the agreement reached on the dignity-argument for AWS within academia so far can possibly stem from its particular vagueness. It seems like there cannot be a legal requirement in international law on demanding human dignity without there being an ethical rule that only human beings can take decisions to use force on other human beings.

Finally, it has been suggested that the current state of human dignity is more of a character of *lex ferenda*, as to law that should be created, even if they are viewed as ‘principled’. So, the arguments do not constitute a statement of existing law. These are described as optative in nature, having an optative meaning, expressing a subjective desire, rather than an indicative meaning, looking at a real situation, when it comes to the context of AWS.<sup>540</sup> This again demonstrates the practical challenges of the desired regulation.

A concrete example of the abovementioned, practical challenge is the state of Israel. Israel includes the right to dignity in their constitution because of the theological aspect belonging to the right. That could possibly explain why the state never voted for a ban on or even regulating AWS in the CCW,

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<sup>539</sup> Mauri (n 484) 117

<sup>540</sup> *Ibid*

and neither wants to include a cross-cutting approach in the negotiations, where also human rights could be included as a complimentary part of the regulation. If they instead would advocate a cross-cutting approach, the question arises whether someone in the room would raise the right to dignity and give a reference to their constitution. But this issue is not unique for AWS. Also, other states such as Russia and the US have made it clear that they do not see a reason to regulate AWS. It is important to remember that this is part of a wider-ranging topic, as we know that regulating AI in general is a problem in also other parts of societies today.

Lastly, with the oppressing situation today in various armed conflicts across the globe, most recently concerning the situations in Gaza and Ukraine, the use of AWS must be regulated. The question is timelier than ever.<sup>541</sup> The biggest reason for this can still be the violations against dignity. Looking at the history and the cruel fatalities, that afterwards resulted in establishing human rights and brought up the concept of a normative value of dignity, there should be a reason enough to believe that the world does not want to face those experiences ever again. Dignity was shaped through the horrific violations against it. In the world we are living in, with as brutal atrocities taking place, dignity should in principle gain a stronger position in the international legal framework and system, to be able to be enforced and therefore regulate violations against ultimate indignity. Therefore, it is absolutely crucial to establish an internationally binding framework for the use of AWS, for purposes of preserving both humanity and dignity of all.

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<sup>541</sup> Mohar Chatterjee 'Isarel's appetite for high-tech weapons highlights a Biden policy gap' *Politico* (25.11.2023) <https://www.politico.com/news/2023/11/25/israel-hamas-war-ai-weapons-00128550>

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