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The Principle of Distinction in Modern Warfare: Challenges Posed by Autonomous Weapons Systems

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The principle of distinction is among the oldest and most fundamental tenets of International Humanitarian Law (IHL). It obliges parties to armed conflict to distinguish at all times between combatants and civilians, as well as between military objectives and civilian objects, directing attacks exclusively at the former.¹ Rooted in customary international law and codified in Additional Protocol I to the Geneva Conventions, this principle serves to maintain a basic threshold of humanity even during armed conflict.² However, the rapid development of autonomous weapons systems (AWS), often referred to as "killer robots," is placing unprecedented strain on this foundational rule.

Autonomous weapons systems are platforms capable of selecting and engaging targets without direct human intervention once activated. In contrast to remotely piloted drones, where a human operator retains control over the decision to fire, AWS rely on sensors, algorithms, and pre-programmed criteria to make targeting determinations.³ This transition from human judgment to machine calculation raises a critical question: can an algorithm meaningfully apply the principle of distinction, which has historically depended on human contextual reasoning?

The challenge arises from the qualitative nature of the principle of distinction. Determining whether an individual is a combatant, a civilian directly participating in hostilities, or a civilian

¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 48, June 8, 1977, 1125 U.N.T.S. 3.

² Jean-Marie Henckaerts & Louise Doswald-Beck, Customary International Humanitarian Law Rule 1 (Cambridge Univ. Press 2005).

³ Int'l Comm. of the Red Cross, Autonomous Weapon Systems: Technical, Military, Legal and Humanitarian Aspects 5-8 (2014).

entitled to full protection often requires assessment of intent, context, and rapidly evolving battlefield circumstances. Even advanced machine-learning systems operate on pattern recognition derived from training data, rather than genuine contextual understanding.⁴ For example, a civilian carrying a farming tool that visually resembles a weapon, or a group of combatants who have laid down their arms and become hors de combat, may not be reliably identified by an automated system trained primarily on visual or sensor-based classifiers. This risk of misclassification is not merely theoretical; battlefield conditions frequently involve poor visibility, deliberate concealment, and rapidly shifting allegiances that challenge even experienced human soldiers, let alone systems relying solely on probabilistic inference.

This concern is further amplified in urban warfare, where combatants and civilians frequently occupy the same physical space, and the distinction between a legitimate military objective and a protected civilian object can change rapidly. The proportionality assessment under IHL, which requires weighing anticipated military advantage against expected civilian harm, also presumes a level of contextual judgment that current algorithmic systems are not equipped to replicate.

Advocates of AWS contend that machines, unburdened by fear, fatigue, or emotional volatility, may reduce civilian casualties by applying the principle of distinction more consistently than human soldiers.⁵ Military organizations have also emphasized that human oversight, whether through "human-in-the-loop" or "human-on-the-loop" configurations, can be integrated into AWS to maintain meaningful human control over the use of force. However, critics, including the International Committee of the Red Cross (ICRC), warn that the increasing autonomy of modern weapons systems risks eroding meaningful human control, especially in systems designed for rapid, high-volume engagements where human operators act more as passive supervisors than active decision-makers.⁶

The accountability gap further exacerbates these concerns. The enforcement mechanisms of IHL, including individual criminal responsibility for war crimes, presuppose an identifiable human decision-maker whose intent and conduct can be scrutinized.⁷ When a targeting error arises from

⁴ Human Rights Watch, *Losing Humanity: The Case Against Killer Robots* 4-6 (2012).

⁵ Ronald C. Arkin, *Governing Lethal Behavior in Autonomous Robots* 29-31 (2009).

⁶ Int'l Comm. of the Red Cross, *ICRC Position on Autonomous Weapon Systems* 2-3 (2021).

⁷ Rebecca Crootof, *War Torts: Accountability for Autonomous Weapons*, 164 U. Pa. L. Rev. 1347, 1352-55 (2016).

an opaque algorithmic process rather than a deliberate human decision, attributing responsibility becomes significantly more complex, whether to the programmer, the commander, or the system itself. This "responsibility vacuum" has led to calls, including from United Nations bodies, for a binding international instrument to regulate or prohibit fully autonomous lethal weapons.⁸

At the international level, discussions under the UN Convention on Certain Conventional Weapons have persisted for over a decade within the Group of Governmental Experts on Lethal Autonomous Weapons Systems. States remain divided between those advocating for a pre-emptive ban and those supporting a regulatory framework that allows continued development under strict human oversight. This impasse reflects the broader tension between military innovation and humanitarian restraint that has historically shaped the evolution of weapons law, from the prohibition of expanding bullets to the regulation of chemical and biological weapons.

The principle of distinction was originally designed for battlefields where human beings made life-and-death decisions in real time, bearing both moral and legal responsibility for those choices. Autonomous weapons systems not only alter the tools of warfare but also risk transforming the decision-making processes that IHL is intended to regulate. Whether through strengthened human-control requirements, technical safeguards, or a complete prohibition on fully autonomous lethal targeting, the international community faces a diminishing opportunity to ensure that legal frameworks keep pace with technological advancements. Without decisive regulatory action, the gap between the promise of precision and the humanitarian protections that distinction was intended to guarantee is likely to widen.

⁸ Secretary-General, Rep. on Lethal Autonomous Weapons Systems, U.N. Doc. A/76/17, at 12-14 (2021).