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THE DESTABILIZATION OF IHL: AUTONOMOUS WEAPON SYSTEMS AND THE CRISIS OF NORMATIVE COHERENCE

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ABSTRACT

Autonomous Weapon Systems (AWS) fundamentally transform the conduct and regulation of armed conflict by challenging the assumption that International Humanitarian Law (IHL) is technologically resilient. While existing scholarship focuses on compliance, accountability, and state responsibility, it often overlooks a deeper normative disruption: the displacement of human judgment that underpins the principles of distinction, proportionality, necessity, and humanity. By threatening not only the application of IHL safeguards but the coherence of its normative architecture, AWS expose a structural vulnerability within the law itself. This study undertakes a critical examination of whether these foundational principles remain applicable and resilient when lethal decision-making is delegated to systems detached from human moral agency. Through a combined doctrinal and analytical approach, the research systematically evaluates legal texts, state practice, UN and ICRC reports, technical documentation, and philosophical works to assess how the humanitarian character of IHL withstands the autonomous turn. Article 36 designed for predictable, human-operated systems risks devolving into procedural formalism when applied to the opacity and unpredictability of Autonomous Weapon Systems. This study examines whether existing review processes can meaningfully assess technologies whose behaviour may be neither fully foreseeable nor explainable, and argues for a reconceptualised weapons review framework that integrates normative, ethical, and human-centred safeguards essential to preserving IHL's humanitarian purpose in the autonomous age.

Key words: *Autonomous weapons system (AWS), International humanitarian law (IHL), Article 36 of Additional Protocol 1, International Committee of the Red Cross (ICRC), Normative principles.*

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INTRODUCTION

International Humanitarian Law (IHL) is often regarded as a legal regime capable of accommodating technological change without sacrificing its humanitarian purpose. Historically, the law has absorbed new means and methods of warfare—from long-range artillery to precision-guided munitions—while retaining its core normative commitments. This presumed resilience, however, rests on an under examined assumption: that decisions to employ lethal force remain anchored in human judgment, moral deliberation, and responsibility. Autonomous Weapon Systems (AWS) place this assumption under unprecedented strain.

Contemporary debates frequently treat autonomy as a technical complication within an otherwise stable legal framework. This article advances a different claim. It asks whether IHL's foundational principles can retain their meaning and legitimacy when the cognitive and moral capacities they presuppose are no longer present at the moment of lethal decision-making³. Furthermore, it argues that AWS do not merely complicate the application of IHL rules, but destabilise the normative coherence of IHL by displacing human judgment—the moral, interpretive, and epistemic foundation upon which its core principles depend.

The principles of distinction, proportionality, military necessity, and humanity are not self-executing rules amenable to algorithmic translation. They are normative constructs rooted in just war theory, natural law traditions, and ethical reasoning about restraint, responsibility, and human dignity, each presupposing a morally reasoning human agent. When lethal decision-making is delegated to autonomous systems operating through statistical and non-anthropocentric processes, these principles may persist formally but become substantively hollow, producing a crisis of normative coherence.

This article demonstrates that such destabilisation is structural rather than incidental. Autonomy transforms distinction into algorithmic classification, proportionality into technical optimisation, necessity into technological determinism, and humanity into outcome-based harm management divorced from moral authorship. A central focus of the analysis is Article 36 of Additional Protocol I, whose weapons review framework is increasingly ill-equipped to address opaque, learning systems. As applied to AWS, Article 36 risks devolving into

³ Human Rights Watch, *Losing Humanity: The Case Against Killer Robots* (2012).

procedural formalism, prompting the need for a reconceptualization grounded in normative and ethical criteria to preserve IHL's humanitarian purpose

NORMATIVE ARCHITECTURE, TECHNOLOGICAL DISRUPTION, AND THE HIDDEN ROLE OF HUMAN JUDGMENT IN IHL

I. IHL AS A NORMATIVE SYSTEM, NOT A RULEBOOK

IHL is often presented as a collection of discrete rules governing the conduct of hostilities. Such a presentation obscures the fact that its principles form an interdependent normative system. Distinction enables proportionality by identifying who and what may lawfully be targeted; proportionality constrains military necessity by limiting permissible harm; necessity is itself bounded by humanity, which affirms that even lawful violence must respect human dignity. None of these principles operates in isolation, and none can function mechanically.

This interdependence is reflected in the structure of Additional Protocol I, which places distinction at the foundation of the conduct-of-hostilities regime and repeatedly frames obligations in terms of *decisions*, *assessments*, and *anticipation* rather than outcomes alone.⁴ The language of the Protocol presupposes agents capable of interpretation and judgment, not merely systems capable of execution.

International jurisprudence reinforces this systemic understanding. Liability for violations of IHL is consistently grounded in mental states—intent, knowledge, recklessness—rather than in mere causation.⁵

II. THE MORAL GENEALOGY OF IHL: NATURAL LAW AND JUST WAR FOUNDATIONS

A. NATURAL LAW AND THE MORAL LIMITS OF VIOLENCE

The normative architecture of IHL is deeply rooted in natural law traditions that conceive of war as a moral activity constrained by ethical limits. From Grotius onward, the regulation of warfare has been justified not merely by reciprocity or utility, but by reference to human dignity, moral responsibility, and the minimisation of unnecessary suffering.⁶ This lineage is evident in the Martens Clause, which anchors the law of armed conflict in “the principles of

⁴ Protocol Additional To The Geneva Conventions Of 12 August 1949, And Relating To The Protection Of Victims Of International Armed Conflicts Art. 48, June 8, 1977, 1125 U.N.T.S. 3.

⁵ *Prosecutor V. Galić, Case No. It-98-29-T, Judgment, 57–60 (Int'l Crim. Trib. For The Former Yugoslavia Dec. 5, 2003)*.

⁶ Hugo Grotius, *De Jure Belli Ac Pacis* (1625).

humanity and the dictates of public conscience.”⁷

B. JUST WAR THEORY AND MORAL AGENCY

Just war theory further illuminates the human-centred structure of IHL. Classical theorists conceive of *jus in bello* obligations as resting on the moral agency of combatants, who must exercise restraint, discrimination, and proportionality even under conditions of extreme pressure. These obligations are intelligible only if agents are capable of moral reflection and choice.

Contemporary just war theorists reinforce this point. Walzer’s account of combatant liability grounds the permissibility of killing in participation in collective threat, a concept that requires moral recognition rather than mere identification.⁸ McMahan’s revisionist theory goes further, grounding liability in individual moral responsibility for unjust harm, thereby intensifying the demand for fine-grained moral judgment.⁹

III. AUTONOMY AS A QUALITATIVE, NOT QUANTITATIVE, DISRUPTION

A. WHY AWS ARE NORMATIVELY DIFFERENT

Earlier technologies transformed the means by which force was applied, AWS transform the locus of decision-making itself. This constitutes a qualitative shift with significant normative consequences. Autonomous systems operate through pattern recognition, probabilistic inference, and optimisation, rather than understanding meaning, intention, or moral salience. They cannot recognise surrender, reassess intent, or exercise hesitation in conditions of uncertainty. Although such systems may simulate compliance with legal rules, they lack the capacity for moral reasoning that those rules inherently presuppose.

B. FROM MORAL JUDGMENT TO TECHNICAL PROCESS

The displacement of human judgment risks recasting International Humanitarian Law from a normative legal regime into a system of technical governance, where compliance is reduced to parameter satisfaction rather than ethical restraint. Civilian harm is treated as a variable to be minimised, not as a moral limit on action. This displacement initiates the process of normative hollowing analysed in Section VII.

⁷ Convention (I) With Respect To The Laws And Customs Of War On Land Pmbi (Martens Clause), July 29, 1899, 32 Stat. 1803

⁸ Michael Walzer, *Just And Unjust Wars* (5th Ed. 2015).

⁹ Jeff McMahan, *Killing In War* (2009).

IV. DISTINCTION AS A MORAL THRESHOLD, NOT A TECHNICAL FILTER

A. DISTINCTION AND THE ARCHITECTURE OF MORAL LIABILITY

The principle of distinction occupies a foundational position within International Humanitarian Law. It is not merely a targeting rule but the normative threshold that renders killing legally intelligible. Distinction determines who may be made the object of lethal force and, more importantly, why such force may be morally and legally justified. Without correct distinction, the application of proportionality and necessity becomes incoherent, as there is no lawful target against which harm may be weighed or necessity assessed.

This structuring role is evident in Additional Protocol I, which obliges parties to “distinguish between the civilian population and combatants” at all times.¹⁰ The obligation is framed not as a one-time classification but as a continuous evaluative duty, responsive to changes in status, behaviour, and context. Distinction is therefore not reducible to identification; it is an exercise in moral recognition.

In *Prosecutor v Galić*, the ICTY held that indiscriminate attacks against civilians constituted a violation of the laws or customs of war where the attacker acted with recklessness, defined as conscious disregard of civilian risk.¹¹ Recklessness, as a legal concept, presupposes awareness, deliberation, and moral choice. A machine may malfunction or misclassify, but it cannot be reckless.

Similarly, in *Prosecutor v Blaškić*, the Tribunal emphasised that the legality of attacks must be assessed on the basis of “information available at the time,” underscoring the epistemic and interpretive nature of the obligation.¹² These judgments reveal that distinction is inseparable from situated human judgment.

B. JUST WAR THEORY AND THE MORAL MEANING OF DISTINCTION

The jurisprudential emphasis on mental states mirrors the moral foundations of distinction in just war theory. Walzer grounds combatant liability not in uniform or formal status alone, but in participation in a collective threat.¹³ Distinction, on this account, requires attackers to recognise when individuals cease to pose such a threat—through surrender, incapacitation, or disengagement. This recognition is a moral act, not a technical process.

¹⁰ Protocol Additional To The Geneva Conventions Of 12 August 1949, And Relating To The Protection Of Victims Of International Armed Conflicts Art. 48, June 8, 1977, 1125 U.N.T.S. 3.

¹¹ *Prosecutor V. Galić, Case No. It-98-29-T, Judgment, 57–60 (Int’l Crim. Trib. For The Former Yugoslavia Dec. 5, 2003).*

¹² *Prosecutor V. Blaškić, Case No. It-95-14-T, Judgment, 180 (Int’l Crim. Trib. For The Former Yugoslavia Mar. 3, 2000).*

¹³ Michael Walzer, *Just And Unjust Wars* Ch. 9 (5th Ed. 2015).

McMahan's revisionist account intensifies this demand. For McMahan, liability to attack depends on individual moral responsibility for unjust harm, not merely on membership in an armed force.¹⁴ This conception renders distinction even more responsibility-sensitive, requiring fine-grained moral assessment of threat, culpability, and necessity.

Autonomous Weapon Systems collapse this moral architecture. They replace recognition with correlation and judgment with pattern matching. The result is not simply an increased risk of misidentification, but a normative transformation: distinction becomes a technical filter rather than a moral threshold.

C. ALGORITHMIC CLASSIFICATION AND NORMATIVE HOLLOWING

The destabilising impact of Autonomous Weapon Systems on distinction lies less in error rates than in the redefinition of compliance itself. When distinction is reduced to algorithmic classification, its justificatory logic is inverted: compliance is measured by confidence thresholds rather than moral recognition. The result is normative hollowing, whereby the language of distinction is retained while its ethical substance is eroded. Civilians are protected not as morally non-labile persons, but as statistical non-matches, rendering such protection contingent, fragile, and normatively diminished.

V. PROPORTIONALITY: ETHICAL BALANCING VERSUS ALGORITHMIC OPTIMISATION

A. PROPORTIONALITY AS A NORM OF MORAL JUSTIFICATION

The principle of proportionality prohibits attacks in which expected incidental civilian harm would be excessive in relation to the concrete and direct military advantage anticipated.¹⁵ Unlike distinction, which establishes liability, proportionality governs justification. It asks not whether harm may be inflicted, but whether it may be justified in pursuit of military ends. Crucially, proportionality is an ethical balancing exercise, not a mathematical one. They require moral evaluation of competing values: military advantage and civilian life.

In *Prosecutor v Kupreškić*, the ICTY rejected approaches that sought to quantify proportionality, emphasising instead the obligation to take into account the foreseeable effects of an attack on civilians.¹⁶ The Chamber grounded proportionality in foresight and restraint,

¹⁴ Jeff McMahan, *Killing In War* Chs. 3–4 (2009).

¹⁵ Protocol Additional To The Geneva Conventions Of 12 August 1949, And Relating To The Protection Of Victims Of International Armed Conflicts Art. 51(5)(B), June 8, 1977, 1125 U.N.T.S. 3.

¹⁶ *Prosecutor V. Kupreškić, Case No. It-95-16-T, Judgment, 524 (Int'l Crim. Trib. For The Former Yugoslavia Jan. 14, 2000).*

both of which presuppose human judgment.

The European Court of Human Rights has adopted a similar stance. In *Banković v Belgium*, the Court resisted attempts to reduce proportionality to technical precision or casualty minimisation, implicitly affirming that proportionality must be assessed within a broader humanitarian context.¹⁷

B. PHILOSOPHICAL FOUNDATIONS: WHY PROPORTIONALITY RESISTS

AUTOMATION

Walzer insists that civilian lives possess moral equality, such that harm to civilians cannot be justified solely by reference to efficiency or technological superiority. Proportionality, on this view, is about moral restraint, not optimisation.

McMahan deepens this critique by arguing that proportionality depends on the moral weight of the goods pursued, not merely their strategic value.¹⁸ An attack that advances an unjust or marginal objective cannot be rendered proportionate through precision alone. Such judgments require evaluative reasoning about ends, not merely means.

Sparrow's contribution is particularly salient in the context of AWS. He argues that proportionality judgments are inseparable from moral responsibility for outcomes.¹⁹ While machines may predict the consequences of an attack, they cannot answer the moral question that proportionality ultimately poses: *was the harm inflicted worth it?* Without an agent capable of owning that judgment, proportionality collapses into technical risk management.

C. FROM MORAL BALANCING TO DESIGN CONSTRAINT

Autonomous systems, however, operationalise proportionality through probabilistic modelling and optimisation rather than moral evaluation.

VI. URBAN WARFARE, AUTONOMY, AND COMPOUNDED NORMATIVE STRAIN

The destabilising effects of Autonomous Weapon Systems on distinction and proportionality are intensified in contemporary urban warfare, where dense civilian populations, fluid participation in hostilities, and asymmetric tactics make both principles heavily dependent on contextual judgment. In such environments, the differentiation between civilians and combatants often turns on subtle, situational cues such as surrender, incapacitation, or shifting intent that autonomous systems, reliant on historical data and sensor fusion, are unable to

¹⁷ *Banković V. Belgium, 2001-Xii Eur. Ct. H.R. 333.*

¹⁸ Jeff McMahan, *The Ethics Of Killing In War*, 114 *Ethics* 693 (2004).

interpret. The consequence is not merely heightened risk of harm, but a systematic erosion of normative safeguards: distinction becomes brittle and proportionality abstract, as the principles persist in form while losing their practical capacity to guide and restrain violence.

VII. FORMAL SURVIVAL BUT SUBSTANTIVE EROSION

Autonomous Weapon Systems do not merely risk violating distinction and proportionality, but fundamentally redefine what compliance entails. By displacing human judgment, autonomy recasts these principles from moral constraints into technical parameters, producing a condition of normative incoherence. The law continues to invoke concepts such as recognition, balancing, and foresight—each premised on human agency—while permitting their application through systems incapable of supplying it. The result is a hollow legality that preserves formal structure while eroding substantive meaning.

VIII. MILITARY NECESSITY: CONTEXTUAL JUDGMENT AND THE LOGIC OF RESTRAINT

A. NECESSITY AS A LIMITING, NOT ENABLING PRINCIPLE

Military necessity is frequently misunderstood as a doctrine that authorises violence. In fact, within International Humanitarian Law it operates as a principle of restraint, permitting only those measures that are indispensable for achieving a legitimate military objective and not otherwise prohibited by law.¹⁹ It requires continuous reassessment of whether force remains required as circumstances evolve. This temporal sensitivity is central to its normative structure. Necessity is not satisfied by the existence of a lawful objective alone; it demands judgment at the moment force is applied.

B. JURISPRUDENCE AND THE REQUIREMENT OF REASSESSMENT

International and regional jurisprudence consistently affirms the contextual and revisable nature of necessity. In *Al-Skeini v United Kingdom*, the European Court of Human Rights held that the use of lethal force must be “absolutely necessary” in light of the circumstances prevailing at the time, emphasising that necessity cannot be assessed solely on the basis of prior authorisation or planning.²⁰ The Court’s reasoning presupposes agents capable of reassessing evolving threats and suspending action when the justificatory basis for force dissipates.

Similarly, in, the Court condemned the use of heavy weapons in populated areas where less

¹⁹ Office Of Gen. Counsel, U.S. Dep’t Of Def., Law Of War Manual § 2.2 (Rev. Ed. 2016).

²⁰ *Al-Skeini V. United Kingdom*, 53 Eur. Ct. H.R. 18, 149–150 (2011).

harmful means were available, underscoring that necessity entails choice and restraint, not mere technical capability.²¹ These judgments are unintelligible without reference to human decision-makers capable of hesitation, reconsideration, and moral restraint.

C. PHILOSOPHICAL FOUNDATIONS: MORAL HESITATION AND AGENCY

Just war theory illuminates why necessity is inseparable from human judgment. Michael Walzer characterises necessity as bound up with *moral hesitation*—the capacity of combatants to recognise when force, though possible, is no longer justified. This hesitation is not weakness; it is the moral discipline that distinguishes justified violence from brutality.

Jeff McMahan reinforces this point by grounding necessity in individual moral liability. For McMahan, force is justified only insofar as it is required to avert unjust threats for which targets are morally responsible.²² This conception demands continuous evaluative judgment about threat, responsibility, and alternatives—capacities that autonomous systems do not possess.

D. AUTONOMY AND TECHNOLOGICAL DETERMINISM

Autonomous Weapon Systems negate the temporal and evaluative structure of necessity by pursuing objectives according to preset parameters, regardless of whether the justificatory conditions for force continue to exist. Changing circumstances—such as surrender, incapacitation, or the availability of alternative means—cannot interrupt execution unless anticipated in advance. This rigidity converts necessity into technological determinism, whereby the capacity to use force displaces the judgment that it should be used. Necessity thus becomes a feature of system design rather than an exercise of moral restraint, surviving in form while losing its limiting function.

IX. HUMANITY: DIGNITY, MORAL AUTHORSHIP, AND THE EXPRESSIVE FUNCTION OF IHL

A. HUMANITY AS THE MORAL CORE OF THE LAW OF ARMED CONFLICT

The principle of humanity occupies a distinctive place within IHL. Unlike distinction, proportionality, or necessity, it is not confined to specific operational rules. Rather, it animates the entire legal framework, affirming that even lawful violence must respect human dignity and avoid unnecessary suffering.

The Martens Clause encapsulates this foundational role by anchoring the law in “the principles

²¹ *Isayeva V. Russia*, 41 Eur. Ct. H.R. 38, 176–180 (2005).

²² Jeff McMahan, *Killing In War* Ch. 6 (2009).

of humanity and the dictates of public conscience.”²³ The Clause reflects a recognition that law cannot exhaustively regulate warfare and must therefore rely on moral judgment to guide conduct in unforeseen circumstances. Humanity, in this sense, is not an add-on but a normative anchor.

B. JURISPRUDENCE AND THE CENTRALITY OF HUMAN AGENCY

International criminal jurisprudence consistently links violations of humanity to deliberate human action. In *Prosecutor v Akayesu*, the ICTR emphasised that crimes against humanity derive their gravity from intentional assaults on human dignity.²⁴ The crime is constituted not merely by harm, but by the conscious decision to inflict it.

Similarly, in *Prosecutor v Kunarac*, the ICTY underscored that crimes against humanity involve the systematic dehumanisation of victims through intentional acts.²⁵ This jurisprudence presupposes perpetrators capable of moral choice, awareness, and intent. Humanity is violated when human beings decide to treat others as less than human.

C. MORAL AUTHORSHIP AND THE EXPRESSIVE FUNCTION OF LAW

Robert Sparrow argues that AWS facilitate *moral abdication* by allowing humans to distance themselves from responsibility for lethal decisions.²⁶ Violence becomes an event without an author, and legality risks becoming detached from moral accountability.

D. DEHUMANISATION THROUGH AUTOMATION

Autonomous Weapon Systems threaten the principle of humanity not only by increasing the risk of harm, but by recasting killing as a technical process. The mediation of algorithms attenuates empathy, moral hesitation, and responsibility, rendering violence efficient, distant, and abstract. This dehumanisation is subtle yet profound: civilians are spared not through recognition of dignity, but because their data profiles fail to trigger engagement. Humanity is reduced from respect for persons to instrumental outcome management

²³ Convention (ii) With Respect To The Laws And Customs Of War On Land PmbL. (Martens Clause), July 29, 1899, 32 Stat. 1803.

²⁴ *Prosecutor V. Akayesu, Case No. Ictr-96-4-T, Judgment (Sept. 2, 1998).*

²⁵ *Prosecutor V. Kunarac, Case No. It-96-23-T & It-96-23/1-T, Judgment (Int'l Crim. Trib. For The Former Yugoslavia Feb. 22, 2001).*

²⁶ Robert Sparrow, *Robots And Respect*, 33 Ethics & Info. Tech. 93 (2016).

E. NORMATIVE COLLAPSE AND THE ICJ'S HUMAN-CENTRED CONCEPTION OF INTERNATIONAL LAW

The risk of normative collapse posed by autonomous decision-making extends beyond the internal logic of International Humanitarian Law and implicates the broader value structure of international law as articulated by the International Court of Justice.²⁷ A content-based reading of the Court's jurisprudence reveals a consistent normative orientation: the legality of violence is assessed not merely by reference to capability or effectiveness, but through human judgment, moral restraint, and responsibility. This is most evident in the ICJ's *Nuclear weapons* advisory Opinion, where the Court reaffirmed that distinction and proportionality remain applicable even under extreme necessity, explicitly rejecting a purely instrumental or technologically determinist logic in favour of the principles of humanity and the dictates of public conscience. The Court's reasoning presupposes agents capable of deliberation and restraint, an assumption disrupted by autonomous systems whose decision-making is statistical rather than moral.

This human-centred conception of legality is reinforced in the *Wall* advisory Opinion, where IHL is integrated with human rights law and situated within a framework aimed at protecting dignity, social order, and peaceful coexistence,²⁸ and in *Bosnia and Herzegovina v Serbia and Montenegro*, where responsibility for genocide is grounded in human knowledge, judgment, and failure to act.²⁹ Together, these cases demonstrate that human judgment is a structural presupposition of international legality. Autonomous decision-making thus risks producing a formally articulated but normatively unmoored legal order—rules without judgment and authority without conscience—threatening not only the coherence of IHL, but the human-centred foundations of international law more broadly.

X. NORMATIVE SYNTHESIS: FROM INDIVIDUAL PRINCIPLES TO SYSTEMIC EROSION

The analysis reinforces the article's central claim: autonomy destabilises International Humanitarian Law by eroding the moral architecture that unifies its principles particularly when lethal decisions are no longer authored by moral agents. The principle of humanity survives linguistically but loses its expressive force.

²⁷ *Legality Of The Threat Or Use Of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8).

²⁸ *Legal Consequences Of The Construction Of A Wall In The Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 106, 112–13 (July 9).

²⁹ *Application Of The Convention On The Prevention And Punishment Of The Crime Of Genocide (Bosnia & Herzegovina V. Serbia & Montenegro)*, Judgment, 2007 I.C.J. 43, ¶¶ 430–38 (Feb. 26).

XI. TRANSITION: FROM DIAGNOSIS TO NORMATIVE RECONSTRUCTION

Autonomous Weapon Systems challenge not merely compliance or accountability, but the coherence of International Humanitarian Law as a normative system. The problem is structural rather than procedural: so long as human judgment remains an implicit assumption rather than an explicit legal requirement, the law cannot adequately confront autonomy. By exposing the inadequacy of Article 36 weapons reviews and advancing human judgment as a general principle of international law—capable of crystallising into customary law and tending toward *jus cogens*—this article seeks to restore the moral authorship and normative coherence on which IHL depends.

The argument advanced here has implications that extend beyond the adequacy of weapons review procedures and into the hierarchical structure of international law itself. If human judgment is not merely a procedural safeguard but a structural presupposition of lawful violence, its displacement by autonomous systems raises questions not only of regulatory sufficiency but of normative validity. The analysis that follows therefore situates human judgment not simply as a policy preference or design requirement, but as a candidate general principle of international law, capable of informing the development of customary norms and, potentially, engaging the logic of peremptory constraints.

XII. ARTICLE 36 WEAPONS REVIEWS: PURPOSE AND EPISTEMIC ASSUMPTIONS

Article 36 of Additional Protocol I obliges States Parties to determine whether the employment of a new weapon, means, or method of warfare would be prohibited under international law.³⁰ The provision is preventive in character, designed to ensure that unlawful weapons are identified before deployment rather than condemned after harm has occurred.³¹ Historically, Article 36 has been regarded as a flexible and technologically neutral mechanism capable of accommodating innovation.³²

However, the effectiveness of Article 36 rests on a set of epistemic assumptions that have

³⁰ Protocol Additional To The Geneva Conventions Of 12 August 1949, And Relating To The Protection Of Victims Of International Armed Conflicts Art. 36, June 8, 1977, 1125 U.N.T.S. 3.

³¹ Int'l Comm. Of The Red Cross, A Guide To The Legal Review Of New Weapons, Means And Methods Of Warfare (2006).

³² Int'l Comm. Of The Red Cross, Commentary On The Additional Protocols Of 8 June 1977 To The Geneva Conventions Of 12 August 1949, At 391 (Yves Sandoz Et Al. Eds., 1987).

remained largely unexamined. Weapons reviews presuppose that the behaviour of a weapon system is sufficiently predictable, explainable, and attributable to human decision-makers.³³ They assume that legality can be assessed by examining weapon characteristics, foreseeable effects, and intended modes of use. These assumptions hold true for deterministic, human-operated systems. They do not hold for Autonomous Weapon Systems.

Autonomous Weapon Systems introduce opacity, learning capacity, and emergent behaviour that render their decisions neither fully foreseeable nor explainable, even to their designers. As a result, Article 36 reviews risk devolving into procedural formalism, confirming compliance in form while failing to address the normative displacement of human judgment that autonomy entails. The resulting failure is not one of state negligence, but of conceptual mismatch.

XIII. WHY TECHNICAL COMPLIANCE IS NORMATIVELY INSUFFICIENT

A. THE LIMITS OF EFFECTS-BASED REVIEW

Traditional Article 36 reviews focus on weapon effects: blast radius, accuracy, lethality, and compliance with specific treaty prohibitions.³⁴ Such an approach is inadequate for AWS because the primary normative concern is not *what* harm the weapon causes, but *how* decisions to cause harm are made.

A weapon may be technically precise, produce fewer civilian casualties, and still undermine IHL if it displaces the moral agency upon which legality depends. Precision does not compensate for the absence of judgment; predictability does not substitute for responsibility.

B. AUTONOMY AND THE ILLUSION OF NEUTRALITY

There is a persistent tendency in weapons review practice to treat autonomy as a neutral technical feature³⁵, to be assessed alongside range or payload. This framing obscures the fact that autonomy alters the normative locus of decision-making. When machines select and engage targets, the legal subject of IHL is no longer clearly identifiable.

International jurisprudence consistently grounds legality in mental states—intent, recklessness,

³³ Int'l Comm. Of The Red Cross, *Autonomous Weapon Systems: Technical, Military, Legal And Humanitarian Aspects* 14–16 (2014).

³⁴ Int'l Comm. Of The Red Cross, *A Guide To The Legal Review Of New Weapons, Means And Methods Of Warfare* 17–20 (2006).

³⁵ *Group Of Governmental Experts On Emerging Technologies In The Area Of Lethal Autonomous Weapons Systems*, Report Of The 2019 Session, U.N. Doc. Ccw/Gge.1/2019/3 (Sept. 25, 2019).

foresight—and in moral authorship.³⁶ A review process that ignores whether such mental states can exist at the point of lethal decision-making is normatively incomplete, even if procedurally thorough.

XIV. FROM “MEANINGFUL HUMAN CONTROL” TO HUMAN JUDGMENT

International discussions on AWS frequently invoke the notion of “meaningful human control.”³⁷ While valuable, this concept remains under-theorised and insufficiently normative. Control is a technical and managerial concept; it does not capture the moral and legal functions performed by judgment.

Human judgment involves:

- contextual interpretation;
- moral evaluation of competing values;
- capacity for hesitation and restraint; and
- responsibility attribution.

A system may be under human control in a formal sense—activated, supervised, or overridden—without involving human judgment at the moment lethal force is applied. Control without judgment risks preserving the appearance of legality while hollowing out its substance.

XV. THE PRINCIPLE OF HUMAN JUDGMENT IN LETHAL DECISION-MAKING

A. ARTICULATION OF THE PRINCIPLE

The proposed principle requires that decisions to employ lethal force involve contemporaneous human judgment capable of moral evaluation, contextual interpretation, and responsibility attribution. It does not prohibit automation or mandate human control over every function, but insists that the ultimate decision to kill remain a human moral act rather than a machine output.

B. DOCTRINAL FOUNDATIONS

Human judgment is already embedded throughout IHL doctrine:

- Distinction presupposes recognition of civilian status.
- Proportionality presupposes moral balancing.
- Necessity presupposes reassessment and restraint.

³⁶ *Prosecutor V. Galić, Case No. It-98-29-T, Judgment (Int’l Crim. Trib. For The Former Yugoslavia Dec. 5, 2003); Al-Skeini V. United Kingdom, 53 Eur. Ct. H.R. 18 (2011).*

³⁷ *Group Of Governmental Experts On Emerging Technologies In The Area Of Lethal Autonomous Weapons Systems, Report Of The 2019 Session, 11(C), U.N. Doc. Ccw/Gge.1/2019/3 (Sept. 25, 2019).*

- Humanity presupposes moral authorship and dignity.³⁸

The principle proposed here does not invent a new value; it renders explicit what the law already assumes.

C. ICRC Commentaries and the Presupposition of Human Judgment in Weapons Review

The epistemic inadequacy of Article 36 weapons reviews becomes clear when viewed through the normative lens of the ICRC Commentaries.³⁹ A content-based analysis of these interpretive texts reveals that International Humanitarian Law is structured around a grammar of human deliberation, fundamentally incompatible with fully autonomous lethal decision-making. The 2016 ICRC Commentary on Additional Protocol I consistently frames obligations—particularly distinction, proportionality, and precautions—as duties of those who plan, decide, and launch attacks, requiring assessment, anticipation, and judgment rather than mere weapon performance.

This linguistic structure reflects the ICRC's understanding of IHL as a normative system regulating human conduct, not simply weapon effects. ICRC position papers on Autonomous Weapon Systems reinforce this view by emphasising the erosion of human responsibility and judgment⁴⁰ when life-and-death decisions are delegated to machines, framing the concern not merely in terms of control, but of moral authorship and dignity. From this perspective, Article 36 reviews are intended as normative evaluations,⁴¹ not purely technical screenings. When a weapon system's defining feature is the removal of human judgment at the point of lethal decision-making, the review framework becomes conceptually insufficient. The resulting inadequacy is therefore structural rather than procedural,⁴² underscoring the necessity of integrating ethical, philosophical, and AI-specific criteria to preserve the humanitarian purpose of IHL as articulated by its principal interpretive authority.

³⁸ Protocol Additional To The Geneva Conventions Of 12 August 1949, And Relating To The Protection Of Victims Of International Armed Conflicts Arts. 48, 51, 52, June 8, 1977, 1125 U.N.T.S. 3; *Prosecutor V. Kupreškić*, Case No. It-95-16-T, Judgment (Int'l Crim. Trib. For The Former Yugoslavia Jan. 14, 2000).

³⁹ Int'l Comm. Of The Red Cross, *Commentary On The Additional Protocols Of 8 June 1977 To The Geneva Conventions Of 12 August 1949*, At 983–85 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann Eds., 2016).

⁴⁰ Int'l Comm. Of The Red Cross, *Autonomous Weapon Systems: Implications Of Increasing Autonomy In The Critical Functions Of Weapons* 6–9 (2016).

⁴¹ Int'l Comm. Of The Red Cross, *A Guide To The Legal Review Of New Weapons, Means And Methods Of Warfare* 7–9 (2006).

⁴² Stuart Casey-Maslen Et Al., *Autonomous Weapons Systems And International Humanitarian Law: A Reply To The Critics*, 4 J. Int'l Humanitarian Legal Stud. 185, 200–03 (2014).

XVI. HUMAN JUDGMENT AS CUSTOMARY INTERNATIONAL LAW

The crystallisation of a customary norm requires consistent state practice and *opinio juris*. Both elements are increasingly present with respect to human involvement in lethal decision-making.

States have repeatedly affirmed, in CCW Group of Governmental Experts discussions and UN General Assembly debates, that humans must remain involved in decisions to use lethal force.⁴³ Military doctrines emphasise command responsibility and human oversight.⁴⁴ Even technologically advanced states exhibit reluctance to deploy fully autonomous systems without human judgment at critical stages.

Opinio juris is reflected in the language of legal necessity rather than policy preference. States do not merely state that human involvement is desirable; they assert that it is legally required. The persistence of this position across diverse legal systems supports the emergence of a customary norm.

XVII. THE JUS COGENS TRAJECTORY

The argument for *jus cogens* status is necessarily more ambitious. *Jus cogens* norms are characterised by their universality, non-derogability, and foundational importance. The principle of human judgment plausibly satisfies these criteria in functional terms.

First, without human judgment, the core principles of IHL lose coherence. A norm that preserves the very possibility of lawful conduct in war performs a foundational role. Second, the principle safeguards human dignity and responsibility, values already recognised as peremptory⁴⁵ in related contexts such as the prohibition of torture.

Third, derogation from human judgment would permit a form of violence unaccountable to moral or legal evaluation, undermining the international legal order itself.

While formal recognition of *jus cogens* status may be aspirational, the principle can be understood as functionally non-derogable—a necessary condition for the operation of other

⁴³ G.A. Res. 78/241, Lethal Autonomous Weapons Systems, U.N. Doc. A/Res/78/241 (Dec. 22, 2023).

⁴⁴ Office Of Gen. Counsel, U.S. Dep't Of Def., Law Of War Manual (Rev. Ed. 2016).

⁴⁵ Vienna Convention On The Law Of Treaties Art. 53, May 23, 1969, 1155 U.N.T.S. 331.

peremptory norms.

XVIII. RECONCEPTUALISING ARTICLE 36 AS A NORMATIVE FIREWALL

A. FROM TECHNICAL SCREENING TO NORMATIVE ASSESSMENT

Article 36 must be reconceptualised as a normative firewall, tasked with preserving the moral architecture of IHL. Reviews should explicitly ask:

- Does this system preserve human moral authorship over lethal decisions?
- Can human judgment intervene meaningfully at the moment force is applied?
- Is responsibility clearly attributable to a human agent?

A weapon system incapable of satisfying these criteria should be presumptively unlawful, not because autonomy is prohibited, but because law without judgment is normatively incoherent.

B. CONTINUOUS REVIEW AND POST-DEPLOYMENT OBLIGATIONS

Given the learning capacity of AWS, legality cannot be assessed once and for all. Article 36 reviews must become continuous processes, incorporating post-deployment monitoring and reassessment. Normative compliance is not static; it evolves with system behaviour.

CONCLUSION

Autonomous Weapon Systems reveal a latent vulnerability within International Humanitarian Law. For decades, IHL operated on the unchallenged premise that lethal force, however technologically mediated, remained anchored in human judgment. By relocating decision-making authority from human agents to algorithmic systems, autonomy disrupts this premise and reveals the extent to which the law's core principles depend on moral cognition, contextual interpretation, and responsibility attribution—capacities machines do not possess.

This displacement generates a crisis of normative coherence. Distinction, proportionality, military necessity, and humanity remain formally applicable, yet their justificatory foundations erode when detached from human judgment, producing a hollow legality that regulates violence in human terms while permitting its execution through non-human reasoning processes. This destabilisation is structural rather than incidental: autonomous systems may simulate compliance through optimisation and probabilistic inference, but they cannot supply the moral authorship that gives legal rules their meaning.

Existing Article 36 weapons reviews are ill-equipped to confront this transformation, as they

risk devolving into procedural formalism when applied to opaque and learning systems whose behaviour may not be fully foreseeable. Preserving IHL's humanitarian character therefore requires a normative reorientation. The recognition of human judgment in lethal decision-making as a distinct legal principle requiring contemporaneous human moral evaluation, contextual interpretation, and responsibility attribution responds directly to this deficit. Doctrinally grounded and increasingly supported by state practice and *opinio juris*, the principle is capable of crystallising as customary international law and tending toward *jus cogens* status, operating as a structural safeguard against the delegation of lethal authority to autonomous systems.

Reconceptualised Article 36 reviews offer a concrete means of operationalising this principle by shifting the focus from technical capability to the preservation of moral agency and normative coherence. Ultimately, the future of IHL in the autonomous age turns not on whether machines can be taught to follow rules, but on whether the law can continue to insist that the gravest decision in war—the decision to take human life remains a human one.

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