The Holy See's Position on Lethal Autonomous Weapons Systems: An Appraisal through the Lenses of the Martens Clause

Diego Mauri
Department of Legal Sciences, University of Florence, Italy
diego.mauri@unifi.it

The issue of lethal autonomous weapons systems (LAWS) goes to the heart of the debate on new warfare technologies: States, international organizations, non-governmental organizations and civil society at large have long been discussing the acceptability of 'autonomous killing'. The present contribution zooms in on the position held by the Holy See, exploring its content and the main arguments which support the call of a ban on such technology. Both diplomatic statements and doctrinal teachings will be tackled. Importantly, a solid argument for a prohibition of LAWS is based on the moral unacceptability of autonomous killing, which may assume also a legal standing through the so-called Martens Clause. The history and the actual content of the Clause will be analysed in order to explore whether – and to what extent – it can be interpreted so as to offer a legal ground for rejecting LAWS. It will be argued that the Holy See is in a particularly fit position to advocate for a renewed appraisal of the Martens Clause that may help the pro-ban front to structure a more principled debate.

Keywords: autonomous weapons systems – international humanitarian law – Martens Clause – legal sources – positivism and natural-law thinking – Catholic social teachings.

1 **Introduction**

Often hailed as another 'revolution in military affairs', autonomous weapons systems are machines able to perform a given number of tasks (eg flight, navigation, loitering, data collection) without human intervention.[1] They are labelled as 'lethal' – thus acquiring the acronym LAWS, currently employed within the UN debate[2] –

[1] US Department of Defense, 'Directive No. 3000.09: Autonomy in Weapon Systems' (21 November 2012, updated 8 May 2017) <www.dtic.mil/whs/directives/corres/pdf/300009p.pdf> accessed 13 March 2020; UK Ministry of Defence, 'Joint Doctrine Publication 0-30.2: Unmanned Aircraft Systems' (August 2017) <www.gov.uk/government/publications/unmanned-aircraft-systems-jdp-0-302> accessed 13 March 2020.
[2] United Nations Office at Geneva, 'Background on Lethal Autonomous Weapons Systems in the CCW'

when functions such as target selection and engagement (commonly referred to as 'critical functions') are entrusted to the machine. In short, the final decision to open fire against a target is one on which the human operator may not exercise any meaningful 'control'.

Even though key concepts – such as the notions of 'autonomy' and 'control' – have not been clarified yet,[3] there is a significant divide with respect to the acceptability of such technology. Albeit the positions that have been expressed so far are numerous and diverse, for the purposes of the present contribution it is convenient to draw an imaginary line and – at the cost of oversimplifying – split them in two groups.

On the one hand, there are those who vocally support LAWS: in their view, their deployment will eventually render warfare more humane.[4] This position has been aptly described as 'nothing-new-under-the-sun':[5] LAWS do not raise unsolvable issues from the legal standpoint. First, it is maintained that LAWS can ensure adequate levels of operational efficiency: not only can they allow for a greater distancing from physical harm, but their computing capacity and situational awareness may also outpace those of humans. Second, they can be programmed and operated in a way that ensures compliance with existing provisions of *jus in bello* or international humanitarian law (IHL) and human rights law (HRL): international law thus applies fully to LAWS, with no risk of legal vacuums. What is more, there are no risks of unexpected outcomes deriving from fielding a weapon system capable of reaching its own determinations because human presence – or at least a certain degree thereof – will always be preserved for critical functions.

Expanding on the latter point, many of these authors argue that LAWS can be accepted on condition that 'meaningful human control' (MHC) over a machine's critical functions is maintained.[6] By invoking the need to maintain such 'control' –

<www.unog.ch/80256EE600585943/(httpPages)/8FA3C2562A60FF81C1257CE600393DF6?OpenDocument> accessed 13 March 2020.

[3] See William C Marra and Sonia K McNeil, 'Understanding the Loop: Regulating the Next Generation of War Machines' (2013) 36 Harv J L & Pub Poly 1.

[4] Michael N Schmitt and Jeffrey S Thurnher, '"Out of the Loop": Autonomous Weapon Systems and the Law of Armed Conflict' (2013) 4 Harv Natl Sec J 233; Tim McFarland and Tim McCormack, 'Mind the Gap: Can Developers of Autonomous Weapons Systems be Liable for War Crimes?' (2014) 90 Intl L Stud 361; Marco Sassoli, 'Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to be Clarified' (2014) 90 Intl L Stud 308; Nathan Reitinger, 'Algorithmic Choice and Superior Responsibility: Closing the Gap Between Liability and Lethal Autonomy by Defining the Line Between Actors and Tools' (2015) 51 Gonz L Rev 79; Kenneth Anderson, Daniel Reisner and Matthew Waxman, 'Adapting the Law of Armed Conflict to Autonomous Weapon Systems' (2014) 90 Intl L Stud 387; Patrick Lin, George Bekey and Keith Abney, 'Autonomous Military Robotics: Risk, Ethics and Design' (Report for the US Department of Navy, Office of Naval Research, 20 December 2008).

[5] McFarland and McCormack (n 4).

[6] UN Institute for Disarmament Research (UNIDIR), 'The Weaponization of Increasingly Autonomous Technologies: Considering How Meaningful Human Control Might Move the Discussion Forward' (2015); Thompson Chengeta, 'Defining the Emerging Notion of "Meaningful Human Control" in Autonomous Weapon Systems (AWS)' (2017) 49 NYU J Intl L & Pol 833;

of which there still is no universally accepted definition though – the idea of full autonomy in respect of engaging (human) targets is substantially rejected. As a matter of fact, current debates on LAWS are attributing growing importance to the topic of human/machine interaction, to the point that recently some authors have called for replacing emphasis on 'autonomy' and 'control' with in-depth analysis of military-relevant 'networks'.[7] Others have already proposed a philosophical account of MHC so as to close any possible accountability gaps and maintain satisfactory levels of human involvement in critical decisions.[8] Be that as it may, provided that some form of MHC is maintained, LAWS would not be incompatible with IHL.

On the other hand, there are those adhering to a 'the-sky-is-falling' paradigm, who tend to raise a 'technological objection' to LAWS.[9] In their view, today's technology has not yet developed enough to ensure compliance with IHL and HRL: core principles regulating the use of force – both in armed conflict and in law-enforcement operations – still require evaluations that only a human decision-maker can conduct.[10] Algorithmic decision-making would not be suitable for such evaluations. On closer inspection, this position implies that while *today's* technology may not be adequate for decision-making in the field of IHL and HRL, the same cannot be said for *future* technology. In short, the 'technological objection' is inevitably temporary: as soon as future technology ensures sufficient

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Daniele Amoroso, 'Jus in bello and jus ad bellum Arguments against Autonomy in Weapons Systems: A Re-appraisal' (2017) 43 Questions Intl L 5.

[7] Hin-Yan Liu, 'From the Autonomy Framework towards Networks and Systems Approaches for 'Autonomous' Weapons Systems (2019) 10 JIHLS 89; Léonard Van Rompaey, 'Shifting from Autonomous Weapons to Military Networks' (2019) 10 JIHLS 111.

[8] Filippo Santoni de Sio and Jeroen van den Hoven, 'Meaningful Human Control over Autonomous Systems: A Philosophical Account' (2018) 5 Frontiers in Robotics & AI 1.

[9] Human Rights Watch and International Human Rights Clinic, 'Losing Humanity: The Case Against Killer Robots' (2012) <www.hrw.org/sites/default/files/reports/arms1112_ForUpload.pdf> accessed 13 March 2020, and 'Heed the Call: A Moral and Legal Imperative to Ban Killer Robots' (2018) <www.hrw.org/report/2018/08/21/heed-call/moral-and-legal-imperative-ban-killer-robots> accessed 13 March 2020. Other publications are available on the website. See also Christof Heyns, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions' (9 April 2013) UN Doc A/HRC/23/47; Christof Heyns, 'Human Rights and the Use of Autonomous Weapons Systems (AWS) during Domestic Law Enforcement' (2016) 38 Human Rights Quarterly 350; Christof Heyns, 'Autonomous Weapons Systems: Living a Dignified Life and Dying a Dignified Death' in Neil Bhuta and others (eds), *Autonomous Weapons Systems* (CUP 2016); Eliav Lieblich and Eyal Benvenisti, 'The Obligation to Exercise Discretion in Warfare: Why Autonomous Weapons Systems are Unlawful' in Neil Bhuta and others (eds), *Autonomous Weapons Systems* (CUP 2016); Kjølv Egeland, 'Lethal Autonomous Weapon Systems under International Humanitarian Law' (2016) 85 Nordic JIL 89; Mary Ellen O'Connell, 'Banning Autonomous Killing' in Matthew Evangelista and Henry Shue (eds), *The American Way of Bombing: How Legal and Ethical Norms Change* (Cornell University Press 2013); Amoroso (n 6); Andrea Spagnolo, 'Human Rights Implications of Autonomous Weapon Systems in Domestic Law Enforcement: Sci-fi Reflections on a Lo-fi Reality' (2017) 43 Questions Intl L 33.

[10] Jeroen van den Boogard, 'Proportionality and Autonomous Weapons Systems' (2015) 6 JIHLS 247; Robert Sparrow, 'Twenty Seconds to Comply: Autonomous Weapon Systems and the Recognition of Surrender' (2015) 91 Intl L Stud 699; Heyns, 'Human Rights and the Use of Autonomous Weapons Systems (AWS) during Domestic Law Enforcement' (n 9).

reliability and LAWS ensure levels of performance at least comparable to humans', the argument will lose its momentum.

Among the critical voices raised against autonomous weaponry, prominent is the one of the Holy See. Out of 30 States currently calling for a prohibition on LAWS,[11] the Holy See is one of the few claiming that in order for LAWS to be compliant with IHL and HRL it must be preliminarily ascertained whether the very act of removing human presence from decisions involving the taking of human life is legally permissible. To put it differently, while the *pathology* of LAWS raises concern (and rightfully so), their *physiology* ought to do as well: the premise is that the legality of LAWS operating without MHC *per se* logically runs ahead the inaccuracy or unreliability of that technology.

The present contribution starts from the following three assumptions.

First, the relevant notions of 'autonomy' and 'human control' are those contained in the Holy See's Working Paper of April 2016.[12] The former is understood as a tri-dimensional concept, comprising: (1) the 'degree' and 'duration' of human supervision; (2) the predictability of the machine's behaviour; (3) the characteristics of the operational environment. An 'autonomous' machine can be thus considered as under 'significant human control' or MHC if: (1) there is a degree of human supervision at least capable of calling off a particular sortie; (2) all courses of action are 'well known' to the operator; (3) the environment is 'perfectly circumscribed and known'. Thus, not only self-learning and self-programming systems (so-called 'innovative' machines) are included in the definitions above, but also 'supervised' systems in which, despite humans retaining control over programming and learning, the operational tempo would make any human reaction ineffective.[13] What matters, from the Holy See's standpoint, is whether human control is *meaningfully* present in each particular engagement.

Second, this analysis will be confined to exploring the legal implications of LAWS applying force against *human* targets (a scenario that can be described as 'autonomous killing') inasmuch as more morally sensitive. This is without prejudice to the issue of autonomous weapons targeting objects (eg incoming missiles), which nonetheless raises important legal questions – first and foremost

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[11] Algeria, Argentina, Austria, Bolivia, Brazil, Chile, China, Colombia, Costa Rica, Cuba, Djibouti, Ecuador, Egypt, El Salvador, Ghana, Guatemala, Holy See, Jordan, Iraq, Mexico, Morocco, Namibia, Nicaragua, Pakistan, Panama, Peru, State of Palestine, Uganda, Venezuela, and Zimbabwe. See Campaign to Stop Killer Robots, 'Country Views on Killer Robots' (25 October 2019) https://www.stopkillerrobots.org/wp-content/uploads/2019/10/KRC_CountryViews_25Oct2019rev.pdf accessed 6 April 2020.

[12] Holy See, 'Elements Supporting the Prohibition of Lethal Autonomous Weapons Systems' (Working Paper, 7 April 2016) <unog.ch/80256EE600585943/(httpPages)/37D51189AC4FB6E1C1257F4D004CAFB2?OpenDocument> accessed 9 March 2020.

[13] To expound on this classification, see Dominique Lambert, 'The Humanization of Robots: Lethal Autonomous Weapons Systems and Ethics' in *The Humanization of Robots and the Robotization of the Human Person: Ethical Reflections on Lethal Autonomous Weapons Systems and Augmented Soldiers* (The Caritas in Veritate Foundation Working Papers 2017).

the respect for core IHL principles such as distinction and proportionality. The Holy See's prior concern is however the 'relationship of a person to a person and the discovery of the face of the other' in the battlefield.[14]

Third, there is no doubt that the Holy See is concerned about the accountability gap resulting from the removal of human presence from particular engagements.[15] However, its argument against LAWS is admittedly broader. Even if that responsibility for any (mis-)use of LAWS can be correctly distributed among relevant actors, according to the Holy See it *does* make a difference whether the particular decision of engaging a human target is taken without any 'control' by the operator as showed above. One could thus imagine a scenario in which a permissible target under IHL – say, a combatant – is engaged by LAWS in keeping with applicable rules (eg distinction, proportionality, precautions in attack) such that, *prima facie*, no accountability issues arise. The Holy See has something to say also in this scenario – this contribution will delve into it.

With these assumptions in mind, one may argue that the Holy See's position towards LAWS is based on exquisitely moral or ethical grounds that, whether shared or not, have little to no relevance for law in general, and international law in particular. Such conclusion is belied by the existence of the so-called Martens Clause, which stipulates that, being it impossible to regulate all circumstances that could occur in time of conflict, and whenever existing laws of war were to be found incomplete, civilians and combatants 'remain under the protection and the empire of the *principles of international law*, as they result from the usages established between civilized nations, from the *laws of humanity*, and the *requirements of the public conscience*'. In the Clause's terms, legal principles – such as the principle of humanity – and moral imperatives are intertwined. If the Holy See's position were to be translated into legal terms, the Clause would thus be an appropriate starting point.

The present contribution starts from here. First it will consider the arguments put forward by the Holy See against LAWS from the standpoint of IHL (Section 2), focussing not only to specific contributions to the debate (2.1) but also at a more general level to Catholic social teachings (2.2). It will be argued that such position may benefit from a solid legal appraisal of Martens Clause (Section 3). Generally, the Martens Clause can be understood as playing a normative role in IHL, given its historical background (3.1) and its subsequent interpretations (3.2). Specifically, in the debate on LAWS, many international actors – mostly NGOs, but also States – consider the Martens Clause as a relevant provision (3.3). Therefore, the position held by the Holy See will be assessed against the proposed

[14] Holy See, 'Elements Supporting the Prohibition' (n 12) 4.

[15] For a recent and thorough overview of issues associated with accountability, see COMECE, 'Technology at the Service of Peace: How Can the EU and its Member States Address the (Mis-)Use of Force through Uncrewed Armed Systems?' (1 July 2019) <www.comece.eu/comece-reflections-on-uncrewed-armed-systems> accessed 9 March 2020.

interpretation of the Martens Clause (Section 4). This will then lead to some conclusions and to a proposal for future discussions on LAWS (Section 5).

2 **A Journey through the Holy See's Position…**

2.1 ***Interventions by the Holy See's Delegation in Geneva (2014-2019)***

The forum hosting the most prominent debate around LAWS is the Meeting of the High Contracting Parties to the Convention on Certain Weapons (CCW).[16] The 2014 Meeting of the High Contracting Parties decided to convene the first Meeting of Experts on LAWS in 2014, with the specific aim of fostering the discussion on the topic at the international level. The issue had already been addressed in the 2013 Report of the UN Special Rapporteur on Arbitrary, Summary and Extrajudicial executions, Christof Heyns, to the Human Rights Council,[17] and incidentally in a 2014 European Parliament Resolution.[18]

The Holy See's position with regard to the issue was clearly stated in the first Meeting of Experts (MoE), which took place in May 2014. According to the Statement delivered by the then Permanent Observer to the UN in Geneva, Monsignor Tomasi, the first requirement that LAWS must fulfil is respect for IHL and HRL, and more generally international law.[19] However, full compliance with normative standards does not remove a more radical and moral dilemma: is it acceptable that machines replace humans in decisions over life and death? The Holy See's answer is in the negative:

> Decisions over life and death inherently call for *human qualities*, such as compassion and insight, to be present. While imperfect human beings may not perfectly apply such qualities in the heat of war, these qualities are *neither replaceable nor programmable*.[20]

Two important considerations have to be highlighted in the Statement. First, concerns about a machine's autonomy in lethal decisions seem to disappear on condition that some form of 'meaningful human intervention' is ensured.[21] Second, the underlying concept of humanity is linked to the ability to reason morally, ie to refrain from behaviour in a particular way (to kill another human being) when compassion and insight enter the equation and prevail. As Monsignor Tomasi put

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[16] 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 (opened for signature 10 April 1981, entered into force 2 December 1983) 1342 UNTS 137 (CCW).
[17] Heyns, 'Report of the Special Rapporteur' (n 9).
[18] Parliament Resolution 2014/2567 (RSP) on the Use of Armed Drones [2014] OJ C285, para 2.
[19] Holy See, Statement at the First Meeting of Experts on LAWS (13 May 2014) <www.unog.ch/80256EDD006B8954/%28httpAssets%29/D51A968CB2A8D115C1257CD8002552F5/$file/Holy+See+MX+LAWS.pdf> accessed 13 March 2020.
[20] ibid (emphasis added).
[21] ibid.

it, 'human beings are innately adverse to taking life, and this aversion can show itself in moments of *compassion* and *humanity* amidst the horrors of war'.[22] Algorithms, even when (almost) flawless, cannot reproduce such qualities: once the conditions for engaging a target are met, to abort the operation is not possible if at least one other element (eg an environmental modification, a civilian approaching the target) does not change. *Pietas* cannot be translated into a mathematical formula. Whether such element can be ascribed to legal categories, however, is very much debatable: there is no legal requirement – for human agents too – to spare a legitimate target. In this sense, the argument based on *pietas* has at best a *moral* relevance, but not a *legal* one.

In the 2015 Second MoE, the Holy See multiplied its efforts, providing other delegates with a ten-page Working Paper dedicated to ethical questions raised by LAWS.[23] The paper expresses concern about the compatibility of LAWS with international law on three tiers (*jus ad bellum*, *jus in bello*, *jus post bellum*), concluding that legal compliance is a necessary but insufficient condition to solve the moral dilemma. Once again, the point here is that human absence in battlefield is the source of an unstoppable and tragic dehumanization of war. In the paper's words,

> [t]he presence, in the field, of human mediation can, in certain cases, open doors …. This human presence permits us to be open to concrete occasions where empathy can operate, with the capacity to be able to be *touched* by *other*'s suffering.[24]

Machines lack prudence too, a quality which constitutes the core feature of moral agents. Prudence essentially presumes 'experience', which is a collection of facts and judgements illuminated by 'evaluation and interpretation' and, thanks to such process, action can be oriented in the real world. As the paper puts it, the decision to engage a target, when taken by humans, allows compassion and insight to come to the fore, as well as the whole background soldiers possess thanks to their experience in the field: ultimately, humans are the only ones who can choose to 'transgress the letter of universal rules to safeguard its spirit'. Such quality posits that human reason, contrary to algorithmic reason, is able to detect and understand the values that support legal rules.

In the 2016 Statement delivered by the Holy See's new Representative, Monsignor Jurkovič, for the Third MoE, *jus ad bellum* becomes the object of an in-

[22] ibid.
[23] Holy See, Statement at the Second Meeting of Experts on Lethal Autonomous Weapons Systems (16 April 2015) <www.unog.ch/80256EDD006B8954/%28httpAssets%29/4D28AF2B8BBBECEDC1257E290046B73F/$file/2015_LAWS_MX_Holy+See.pdf> accessed 13 March 2020.
[24] ibid.

depth analysis.[25] However, on closer inspection a *jus ad bellum* argument does not pertain to the solution of the problem raised by autonomous killing *per se*, as it places itself on a general plane ignoring the issue of using force against a specific target.

In December 2016, with a view to enhancing the debate, the Fifth Review Conference of the High Contracting Parties to the CCW established an open-ended Group of Governmental Experts (GGE) replacing MoE, and tasked it with exploring 'possible recommendations on options related to emerging technologies in the area of LAWS'.[26] At the first GGE meeting, Monsignor Jurkovič returned to the *jus in bello* perspective, again focusing on the importance of a human presence in each and every act of applying lethal force against a particular human target. While acknowledging that unpredictability of actions is surely an issue, particularly in case of LAWS programmed with self-learning capabilities, the Holy See argued:

> The disappearance or concealment of the human agent is problematic not only from the point of view of the ethics of responsibility, but also from the point of view of the foundation of law. In this regard it would be dangerous to consider an 'electronic personality' for the robot, be it civilian or military, or to give it legal status as a human person. A machine is only a complex set of circuits and this material system cannot in any case become a truly morally responsible agent. In fact, *for a machine, a human person is only a datum, a set of numbers among others*.[27]

In 2018, the GGE met twice, namely in April and August. During the April Meeting, the Holy See insisted that there is an ontological difference between human – and machine – decision-making process, the latter being incapable of 'moral judgment'.[28] Importantly, it is argued that such difference has a significance in terms of IHL: LAWS may consider behaviours 'acceptable' that, albeit not outlawed by relevant provisions, 'are still forbidden by *dictates of morality and*

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[25] Holy See, Statement at the Third Expert Meeting on Lethal Autonomous Weapons Systems (11 April 2016) <www.unog.ch/80256EDD006B8954/%28httpAssets%29/F7020F20B0844885C1257F9200579023/$file/2016_LAWS+MX_GeneralExchange_Statements_Holy+See.pdf> accessed 13 March 2020. For an overview of *jus ad bellum* issues, see Amoroso (n 6) 28.

[26] Fifth Review Conference 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 Document of the Fifth Review Conference' (23 December 2016) UN Doc CCW/CONF.V/10.

[27] Holy See, Statement at the 2017 Group of Governmental Experts on Lethal Autonomous Weapons Systems (13 November 2017) (not available on the UNOG website) (emphasis added).

[28] Holy See, Statement at the 2018 Group of Governmental Experts on Lethal Autonomous Weapons Systems (9 April 2018) <www.unog.ch/__80256ee600585943.nsf/(httpPages)/7c335e71dfcb29d1c1258243003e8724?OpenDocument&ExpandSection=7#_Section7> accessed 13 March 2020.

public conscience'.[29] This expression implicitly refers to the Martens Clause, marking the first time that this provision surfaces in the Holy See's statements.

The Martens Clause was then expressly mentioned in the statement delivered in August 2018:

> [T]he starting point for a common understanding of LAWS should be the ethical implications upon which many legal frameworks … are based. In this regard, the Martens' Clause, which has also been included wisely in the Preamble of the CCW itself, offers *a priori* a crucial regulating compass for our work.[30]

Lastly, the intervention at the March 2019 GGE appropriately recapitulates the main passages that mark the position of the Holy See on LAWS.[31] First, there are 'tasks' for which algorithms are not suitable as they cannot grasp the values that are at stake – the use of (lethal) force against individuals being one of those tasks.[32] Second, such circumstance calls for human factor to enter the equation: human agency is fundamental as it ensures proper understanding of the situation and therefore responsibility for ensuing actions.[33] Third, in legal terms such demand is met by the Martens Clause, in that it places humans affected by the scourges of armed conflicts under the shield of 'dictates of morality and public conscience'.

2.2 ***Background: IHL from the Standpoint of the Holy See***

The position held by the Holy See with regard to LAWS may be grounded in the Catholic Church's teaching on issues related to international peace and disarmament. Whereas the Catholic social teachings show great concern about such issues, surprisingly there are fewer interventions in specific IHL fields.

It is not a case that most references to armaments and weapons are contained in statements concerning international peace and security at large (that is, from a *jus ad bellum* perspective rather than a *jus in bello* one), as in the Holy See's view

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[29] ibid (emphasis added).

[30] Holy See, Statement at the 2018 Group of Governmental Experts on Lethal Autonomous Weapons Systems (27-31 August 2018) <www.unog.ch/__80256ee600585943.nsf/(httpPages)/7c335e71dfcb29d1c1258243003e8724?OpenDocument&ExpandSection=7#_Section7> accessed 13 March 2020.

[31] Holy See, Statement at the 2019 Group of Governmental Experts on Lethal Autonomous Weapons Systems (26 March 2019), unavailable on the website.

[32] 'Consider the actions that require the agency of human reasoning … these tasks cannot be limited to a set of pre-established rules or to the elaboration of algorithms. Legal and ethical decisions often require an interpretation of the rules in order to save the spirit of the rules itself'.

[33] '[t]he bedrock principle of legal systems is the recognition of the human person as a responsible subject that could be sanctioned for his/her wrongdoings and be obliged to provide redress for the damage caused. This notion of responsibility originates from the profound reality of the human person as a free and rational being'.

one aspect is intimately correlated to the other. Numerous interventions are recorded, during both the first half of the past century and after.[34] Sophisticated and thus more powerful armaments can trigger harsher and even more frequent conflicts, fuelling what has been defined a 'culture of competition and conflict … involving not only States but also non-institutional entities, such as paramilitary groups and terrorist organizations'.[35] To prevent the escalation of such conflicts, and the inevitable killing of human beings (both combatants and civilians) and the destruction of the natural environment involved, an effective and appropriate control of armaments is considered vital by the Holy See.[36]

Having said this, the Holy See has at times specifically focused on weapons and their impact on armed conflicts. On the premise that wars are always a defeat for humanity, the Holy See has insisted that IHL is an important tool that the international community uses in order to reduce the suffering and the loss of lives. In other words, the Holy See considers IHL as a key legal tool to ensure the respect of the enemy's humanity.

The Holy See officially expressed its view on several occasions. To begin with, when ratifying the 1977 Additional Protocols, it made a Declaration in which it strongly affirmed the relevance of the principle of humanity in the body of law regulated by the two Protocols. In particular, it declared that:

> [t]he *humanization of the effects* of armed conflicts, such as that undertaken by the two Protocols, is received with favour and encouraged by the Holy See in so far as it aims to alleviate human suffering and strives, amid unbridled passions and evil forces, to safeguard the basic principles of humanity and the supreme benefits of civilization. The Holy See expresses, moreover, its

[34] Benedict XV, 'Ad Beatissimi Apostolorum' (Encyclical of Pope Benedict XV Appealing for Peace to Our Venerable Brethren the Patriarchs, Primates, Archbishops, Bishops, and Other Local Ordinaries in Peace and Communion with the Apostolic See, 1 November 1914) para 3 ('[t]he combatants [in the World War] are the greatest and wealthiest nations of the earth; what wonder, then, if, well provided with the most awful weapons modern military science has devised, they strive to destroy one another with refinements of horror?'); John Paul II, 'Message Of His Holiness Pope John Paul II for the Celebration of the XXX World Day of Peace: Offer Forgiveness and Receive Peace (1 January 1997) ('[p]recisely in a time such as ours, which is familiar with the most sophisticated technologies of destruction, it is urgently necessary to develop a consistent 'culture of peace', which will forestall and counter the seemingly inevitable outbreaks of armed violence').

[35] John Paul II, 'Message of His Holiness Pope John Paul II for the Celebration of the XXXIV World Day of Peace: Dialogue Between Cultures for a Civilization of Love and Peace' (1 January 2001).

[36] This is without prejudice to the Holy See's position on *ad bellum* issues, for instance as far as the debated concept of 'Responsibility to Protect' (R2P) is concerned. See Holy See, Statement at the Informal Interactive Dialogue on the Report of the Secretary-General on the Responsibility to Protect: The Responsibility to Protect and Accountability for Prevention (New York, 6 September 2017) <holyseemission.org/contents/statements/59b07e40cc3c3.php> accessed 9 March 2020 (stating that support for R2P has to be understood in compliance with IHL and human rights law). For more on the R2P see Ivan Santus, *Il contributo della Santa Sede al diritto internazionale. Dal diritto di ingerenza alla responsabilità di proteggere la dignità umana* (CEDAM 2012).

> firm belief that the ultimate goal, that which is worthy of the calling of man and of human civilization, is the abolition of war.[37]

While maintaining that war in itself is problematic, the Holy See acknowledged that once hostilities break out, IHL is the most efficient tool for preserving a minimum of humanity in a context of structural inhumanity. Again, in the Declaration on the Ratification of the Convention on Cluster Munitions, the Holy See recalled:

> the preeminent and inherent value of *human dignity*, the centrality of the *human person*, and the 'elementary considerations of humanity', all of which are elements that constitute the basis of international humanitarian law.[38]

The use of cluster weapons is likely to violate a principle of humanity that, albeit left undefined in IHL, is recognized by the Holy See – and, interestingly, acknowledged by it as a core principle of that body of law.

Other important Declarations can be found with respect to the CCW, namely the one on the Ratification of Protocol V to the CCW (concerning explosive remnants of war). On that occasion, the Holy See, in addition to encouraging the international community 'to continue on the path it has taken for the reduction of human suffering caused by armed conflict', affirmed that 'the CCW is confirmed as a 'forward-looking living instrument' of [IHL]'.[39]

In 2015, Pope Francis made his contribution to the issue, stating that IHL 'needs to be developed further to deal with the new reality of war, which today, unfortunately, has an "increasingly deadly arsenal of weapons available"'.[40] More importantly, he hinted at the core meaning of 'humanity' when he claimed:

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[37] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (APII), Declaration of the Holy See (21 November 1985) <ihl-databases.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=DD9BD7B841787E88C1256402003FB901> accessed 13 March 2020 (emphasis added).

[38] Convention on Cluster Munitions (adopted 3 December 2008, entered into force 1 August 2010) 2688 UNTS 39 (CCM), Declaration of the Holy See (3 December 2008) <treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-6&chapter=26&lang=en> accessed 13 March 2020 (emphasis added).

[39] Protocol on Explosive Remnants of War 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 (Protocol V) (adopted 28 November 2003) 2399 UNTS 100, Declaration of the Holy See (13 December 2005) <treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-2-d&chapter=26&lang=en> accessed 13 March 2020.

[40] Francis, 'Address of His Holiness Pope Francis in the Fourth Course for the Formation of Military Chaplains on International Humanitarian Law Promoted by the Pontifical Council for Justice and Peace' (26 October 2015) (quotations omitted).

> we must never give in to the temptation of considering the other as merely an enemy to destroy, but rather as a person endowed with intrinsic dignity, *created by God in his image*.[41]

Here is the *fil rouge* that links all the statements quoted above. 'Humanity' is what defines the creature of God, made by Him in His image (*imago Dei*): 'called to be the visible sign and the effective instrument of divine gratuitousness'.[42] Humans are endowed with reason to investigate the natural world and to decide how to act (moral reason) and, foremost for the purpose of this article, the inherent openness to other humans.[43] As recalled by Pope Francis, in the interpersonal relations such common origin must be kept in mind, in order to treat the other consistently with his own dignity as creature:

> Every human being is the object of God's infinite tenderness, and He himself is present in their lives. Jesus offered his precious blood on the cross for that person. Appearances notwithstanding, every person is *immensely holy* and deserves our love.[44]

Such way of conduct is universal (as is human fraternity), meaning that it must be observed in peacetime as well as in war: however, it is in war that this is dramatically at stake, and it is therefore the precise task of an authentic *jus in bello* to strive to protect this vulnerable truth. Pushed by instincts of predomination, fuelled by ultra-technological weapons, humans can easily forget what their nature entails. When the Holy See intervenes on IHL, it recalls that the ultimate goal of this branch of law is to ensure that belligerents, '[e]ven amid the lacerations of war',[45] treat their enemy as another self (*se*). This is without prejudice to whether the resort to force can be considered as 'just' according to *jus ad bellum*: the Holy See maintains that IHL applies to both parties to hostilities irrespective of the reasons that may justify the use of force.[46]

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[41] ibid (emphasis added).

[42] *Compendium of The Social Doctrine of the Church*, pt 1, ch 1, I, b) para 26.

[43] ibid pt 1, ch 1, III, a), para 34; John Paul II, 'Encyclical Letter Fides et Ratio of the Supreme Pontiff John Paul II to the Bishops of the Catholic Church on the Relationship between Faith and Reason' (14 September 1998) para 1.

[44] Francis, 'Apostolic Exhortation Evangelii Gaudium of the Holy Father Francis to the Bishops, Clergy, Consecrated Persons and the Lay Faithful on the Proclamation of the Gospel in Today's World' (24 November 2013) para 274.

[45] ibid.

[46] Santus (n 36) 404 quoting 'Pastoral Constitution on the Church in the Modern World *Gaudium et Spes* Promulgated by His Holiness, Pope Paul VI on December 7, 1965' para 79: 'On the subject of war, quite a large number of nations have subscribed to international agreements aimed at making military activity and its consequences less inhuman. … As long as the danger of war remains and there is no competent and sufficiently powerful authority at the international level, governments cannot be denied the right to legitimate defense once every means of peaceful settlement has been exhausted. State authorities and others who share public responsibility have the duty to conduct such

When considered in the light of this principled approach to IHL, the Holy See's position on LAWS appears coherent and supported. It has been argued that LAWS structurally separate a *particular* use of force from a *specific* human deliberation: subsequently, a radical asymmetry exists between the one that applies the force and the one who receives it. This constitutes a brand-new, unprecedented form of asymmetry, namely in humanity. The Holy See, in line with the Catholic social teachings, calls for human deliberation to be present at each and every stage of the decision of using force. On this premise, it is of no surprise that in order to demonstrate the legal soundness of its position the Holy See resorts to – and proposes a clear understanding of – the Martens Clause.

3 **… and the Martens Clause**

3.1 ***The History of the Clause***

'[H]ailed as a significant turning point in the history of [IHL]',[47] the Martens Clause, which was named after the Russian delegate to the Hague Peace Conference who proposed it,[48] was first inserted in the Preamble of the 1899 Hague Convention II.[49]

The original purpose of the Clause does not appear as noble as one may infer from its importance in IHL. The Hague Peace Conference was discussing the treatment of civilians taking up arms against an occupying force when a dispute arose between the delegates. On the one hand, some States (especially military powers) suggested they should be regarded as *franc-tireurs* and treated accordingly (namely subjecting them to capital punishment), on the other hand, smaller States, fearing that their territories could become the theatre of military occupation, believed it to be more appropriate to extend the *status* of combatants to them.[50]

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grave matters soberly and to protect the welfare of the people entrusted to their care. But it is one thing to undertake military action for the just defense of the people, and something else again to seek the subjugation of other nations. Nor, by the same token, does the mere fact that war has unhappily begun mean that all is fair between the warring parties'.

[47] Antonio Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?' (2000) 11 EJIL 187, 188.

[48] Michael Salter, 'Reinterpreting Competing Interpretations of the Scope and Potential of the Martens Clause' (2012) 17 JCSL 403; Theodore Meron, 'The Martens Clause, Principles of Humanity and Dictates of Public Conscience' (2000) 94 AJIL 78; Vladimir Pustogarov, 'F. F. Martens (1845–1909), a Humanist of Modern Times' (1996) 312 IRRC 300; Shigeki Miyazaki, 'The Martens Clause and International Humanitarian Law', in Christophe Swinarski (ed), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (Martinus Nijhoff 1984).

[49] Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 29 July 1899, entered into force 4 September 1900) 187 CTS 429 (Hague Convention II).

[50] Fritz Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War. An Introduction to International Humanitarian Law* (CUP 2011) 11–12.

The Clause – which was then proposed as a mere compromise between these positions and purposely drafted in vague terms – was intended to establish that the conduct of hostilities is governed by international law even absent specific rules.[51] It can be said to act as a permanent reminder that what proves to be inhumane and abhorrent in war could never be tolerated, even if this has not been translated into treaty or customary norms.[52] The Martens Clause is repeated almost verbatim in numerous international legal instruments, such as the Preamble of the 1907 Hague Convention IV,[53] in the 1949 Geneva Conventions,[54] the 1977 Additional Protocols,[55] and the very CCW.[56]

In spite of its origins, the Martens Clause has played a key role in the development of IHL, for instance by boosting broader and more human-oriented interpretations of existing law and thus enhancing the protection of the human person.[57] In a sense, the 'principles of humanity' and 'dictates of public conscience' are the very heart of the whole edifice of IHL. Considering its content, the Clause can be understood as essentially rejecting the so-called 'Lotus principle' – according to which 'whatever is not explicitly prohibited by international law is permitted' – in IHL: State sovereignty in choosing how to conduct in warfare is not unlimited, even absent treaty or customary law.[58] This idea of 'limitation' to sovereignty has been consistently reaffirmed by the ICJ throughout the past century when it considered that certain practices (such as the lack of notification of the existence of a minefield in territorial waters) run against 'elementary considerations

[51] Robert Kolb, *Advanced Introduction to International Humanitarian Law* (Elgar 2014) 20; Cassese (n 47) 46, 54.

[52] Cassese (n 47) 69 (concluding that in spite of its broadly diplomatic rather than strictly humanitarian rationale, the Clause has been nonetheless employed to promote a better protection of human dignity).

[53] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 277.

[54] See for instance Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, art 158: 'The denunciation … shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience'.

[55] See for instance Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (API), art 1: 'In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience'.

[56] (n 16) preamble, para 5: 'Confirming their determination that in cases not covered by this Convention and its annexed Protocols or by other international agreements, the civilian population and the combatants shall at all times remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience'.

[57] Salter (n 48) 404.

[58] For an overview of this principle, see An Hertogen, 'Letting *Lotus* Bloom' (2015) 26 EJIL 901.

of humanity',[59] considered as 'general and well-recognized principles' going beyond written law.[60]

The limits to State sovereignty are particularly visible as far as weapons, means and methods of warfare are concerned. As an historical, but equally telling, example involving the Holy See, one may think of crossbows, which were banned (temporarily) by the Second Ecumenical Lateral Council in 1139.[61] This limitation sprang from peculiar moral exigencies. The use of crossbows required little training: unlike the archer, the crossbowman did not need to be physically vigorous, and his volume of fire was not limited by fatigue. It follows that their use made it possible for simple peasants to shoot down knights, which looked intolerable to the rigid chivalric society of that epoch.

Coming to more recent examples, the 1868 Saint Petersburg Declaration represents the first formal agreement prohibiting the use of certain weapons in war, namely small explosive rifle projectiles.[62] Albeit effective against objects, when used against combatants they caused heavier injuries than other types of bullet, equally effective in disabling the enemy.[63] Two points deserve attention. First, in the text of the Declaration it is emphatically stated that 'the progress of civilization should have the effect of alleviating as much as possible the calamities of war',[64] thus equating Western progress with *humanization* of warfare (to be reached through prohibition of de-humanizing technology). Second, States acknowledged that a certain degree of openness to technological advancements had to be ensured: 'future improvements which science may effect in the armament of troops' will require new declarations, upgrades, modifications, in order to render the abovementioned process of humanization effective.[65]

The 1899/1907 Hague Conferences added numerous prohibitions on weapons, means and methods of warfare. Of paramount importance is the 1907

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[59] *Corfu Channel (UK v Albania)* (Merits) [1949] ICJ Rep 4; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ Rep 226; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 (*Nuclear Weapons*).

[60] Pierre-Marie Dupuy, 'Les "considerations élémentaires d'humanité" dans la jurisprudence de la Cour internationale de Justice' in René-Jean Dupuy (ed), *Mélanges offerts à N. Valticos. Droit et justice* (Pedone 1999); Pierre-Marie Dupuy, 'L'unité de l'ordre juridique international, Cours Général de droit international public' (2002) 297 Recueil des Cours 9, 186–7 (tracing their origin back to a sort of morality and public order). For a comparison between 'elementary considerations of humanity' and the Martens Clause, see Cassese (n 47) 67.

[61] Tanner (ed), *Decrees of Ecumenical Councils* (Georgetown University Press 1990) 203. Canon 29 reads: '[w]e [the Supreme Pontiff] prohibit under anathema that murderous art of crossbowmen and archers, which is hateful to God, to be employed against Christians and Catholics from now on'.

[62] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (signed 29 November/11 December 1868) 138 CTS 297 (St Petersburg Declaration).

[63] Kalshoven and Zegveld (n 50) 9-10.

[64] St Petersburg Declaration (n 62).

[65] ibid: 'The Contracting or Acceding Parties reserve to themselves to come hereafter to an understanding whenever a precise proposition shall be drawn up in view of future improvements which science may effect in the armament of troops, in order to maintain the principles which they have established, and to conciliate the necessities of war with the laws of humanity'.

Hague Convention IV on war on land with its annexed Regulations:[66] here, for the first time, the principle was elaborated according to which 'the right of belligerents to adopt means of injuring the enemy is not unlimited' (Article 22). This principle is restated in Article 35 of the 1977 Additional Protocol I to the Geneva Conventions.[67] According to the commentaries to Additional Protocol I, the principle requires that choice of weapons, means and methods of warfare be lawful according to other IHL rules and be 'always subject to the Martens Clause' enshrined in Article 1.[68]

3.2 ***The Understanding(s) of the Clause***

The above overview has demonstrated that the 'principles of humanity' and the 'dictates of public conscience' act as a permanent limit to States' sovereign prerogatives in the conduct of hostilities, no matter how advanced war technology gets. What remains to be discussed is the legal significance to be attributed to the Clause, an issue with respect to which scholarship is divided.

On the one hand, some argue that the Clause cannot produce legally binding effects.[69] For instance, the Martens Clause is incapable of prohibiting a specific weapon, means and method of warfare *per se*, as confirmed by the very factual circumstance that so far none of them has been considered as proscribed on the sole basis of the Martens Clause.[70] Rather, both domestic and international case-law seem to resort to the Clause: (i) to confirm a solution already reachable through the application of existing law;[71] (ii) to advance a new interpretation of the law;[72] (iii) to reject *a contrario* arguments.[73] This position finds support among a vast number of States. Written and oral submissions to the ICJ in the *Legality of the Threat or Use of Nuclear Weapons* advisory proceedings give important indications on

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[66] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 905 CTS 277.
[67] API (n 55).
[68] Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff 1987) 399.
[69] Georges Abi-Saab, 'The Specificities of Humanitarian Law' in Swinarski (ed) (n 48) 274-5.
[70] Cassese (n 47).
[71] See *Klinge* (Supreme Court of Norway) (1946) 13 Annual Digest Public Int L 263; *Krupp* (US Military Tribunal Nuremberg) (1948) 15 Annual Digest Public Int L 626; *Rauter* (Special Court of Cassation of Holland) (1949) 16 Annual Digest Public Int L 526. For international case-law, see *Prosecutor v Martić* (Judgment) ICTY-95-11-R61 (8 March 1996) 13.
[72] *K.W.* (Conseil de Guerre de Bruxelles) (1950) 17 ILR 388.
[73] See cases quoted in Cassese (n 47) 60. In this line, see also Georg Schwarzenberger, 'The Legality of Nuclear Weapons' (1958) 11 Curr Leg Prob 258 (highlighting that the Clause was adopted with a view to preventing 'an unintended and cynical argument *a contrario*').

States' practice, numerous delegation contrasting any Clause's binding effect expressly.[74]

However, one may question whether such an approach to the Clause does not end up neutralizing the scope of the provision, which would stand as a mere re-statement of existing positive norms. In fact, it is true that the Clause makes an explicit reference to 'established custom', that is customary law: if a weapon, means or method of warfare is not proscribed by treaty law, no one would doubt it may still be unlawful if it is not consistent with a customary norm. If the Clause terminated here, it would be at best redundant. Yet, the additional reference to 'principles of humanity and dictates of public conscience' implies that *other* sources of law are considered: one may therefore wonder whether another interpretation of the Clause has to be preferred.

Relying on this argument, a second group of scholars suggests that the Clause has an impact on the sources of international law.[75] To begin with, authors that are more inclined to natural law strive to defend a more incisive role for it in international law-making, and thus consider the Clause as an extra-positive source of law. While it is not feasible to provide a thorough account of natural law theories in international law, suffice it to say that in its most basic form natural law posits the existence of legal norms beyond State consent (thereby constituting a body of extra-positive law) and enshrining higher moral values.[76]

O'Connell proposes a revitalized understanding of natural law as the basis for the prohibition on the use of force; in her view, there are rules and principles in international law that emanate from extra-positive law, that is law 'beyond consent', the Martens Clause falling within this category.[77] Cançado Trindade argues that 'human conscience' is a 'source' of international law,[78] and finds that the 'public conscience' as per the Martens Clause may work as a natural-law source endowed with binding force.[79] Salter emphasises the 'natural-law dimensions' of the Clause, and argues that 'it has come to operate as a translator of moral imperatives into concrete legal outcomes', thereby supporting not only its role as judicial aide, but also as 'norm-creating principle'.[80] Moodrick-Even Khen considers IHL as a legal

[74] *Nuclear Weapons* (n 59); Cassese (n 47) and references therein.
[75] Cassese (n 47) 42-3 (comparing and contrasting scholarship on the point); Rupert Ticehurst, 'The Martens Clause and the Laws of Armed Conflict' (1997) 317 IRRC 125.
[76] For an overview of natural-law thinking in international law, see Mary Ellen O'Connell, *The Art of Law in the International Community* (CUP 2019) 19 ff.
[77] ibid 80 ff.
[78] Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (Martinus Nijhoff 2013) 139.
[79] Antônio Augusto Cançado Trindade, 'Some Reflections on the Principle of Humanity in its Wide Dimension' in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Elgar 2013) 195.
[80] Salter (n 48) 437.

system imbued with morality and thus considers the Clause as a feature particularly revealing the tight connection with extra-positive values.[81]

Some judges at the ICJ at times explicitly or implicitly referred to extra-positive law to support their position. For instance, Judge Tanaka argued that the category of general principles includes also 'natural law element' going 'beyond the limit of legal positivism'.[82] In the same line, in his dissenting opinion in *Nuclear Weapons*, Judge Koroma labelled the quest for a specific legal prohibition on weapons, means and methods of warfare (namely, nuclear weapons) as 'an extreme form of positivism'.[83]

Cassese himself – while remaining loyal to a positivist approach to the Clause – acknowledges that 'Martens deserves credit for crafting such an ingenious blend of natural law and positivism', having, probably unknowingly, approached moral principles from an 'apparently positivist' perspective.[84] Translating this into positivist terms, Cassese approaches the Martens Clause as *lex specialis* in customary law: the traditional components of customs – namely, *usus* and *opinio* – are maintained but appraised in a methodologically different fashion. He argues that the Clause 'loosens the requirements prescribed for *usus*, while at the same time elevating *opinio* (*juris* or *necessitatis*) to a rank higher than that normally admitted'.[85] Importantly, this view has been taken up also by the ICTY in the *Kupreškić* case, where it held that IHL principles 'may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent'.[86]

Judge Shahabuddeen argues that both 'principles of humanity' and 'dictates of public conscience' operate as *normative* sources of international law, albeit acknowledging that their precise content has to be 'ascertained in the light of the changing conditions'.[87] In a different fashion, Meron too seems to admit that the Martens Clause can play a normative role. After asserting that it 'does not allow one to build castles of sand', he concedes that '[e]xcept in *extreme cases*, its references to principles of humanity and dictates of public conscience cannot, alone, delegitimize weapons and methods of war, especially in contested cases'.[88] It is legitimate though to wonder on what bases a legal source can sometimes (very

[81] Hilly Moodrick-Even Khen, 'Aidos and Dike in International Humanitarian Law: Is IHL a Legal or a Moral System? (2016) 99 The Monist 26, 34.
[82] *South West Africa (Ethiopia v South Africa; Liberia v South Africa)* (Judgment) [1966] ICJ Rep 285, Dissenting Opinion of Judge Tanaka, 315.
[83] *Nuclear Weapons* (n 59), Dissenting Opinion of Judge Koroma, 575.
[84] Cassese (n 47) 40.
[85] ibid 67 (comparing the role played by the Martens Clause in IHL to that of 'elementary considerations of humanity' in general international law).
[86] *Prosecutor v Kupreškić et al* (Judgment) [2000] ICTY-95-16 (14 January 2000) 527.
[87] *Nuclear Weapons* (n 59), Dissenting Opinion of Judge Shahabuddeen, 406: 'the principles would remain constant, but their practical effect would vary from time to time: they could justify a method of warfare in one age and prohibit it in another'.
[88] Meron (n 48) 88 (emphasis added).

often) be void of binding effect, and sometimes (quite rarely) have that very effect. Either the Martens Clause is a binding source or it is not: *tertium non datur*.

An alternative way to express Meron's position may be the following. In most cases, existing IHL (thus, positive law) suffices to proscribe weapons, means and methods that are at variance with 'principles of humanity' and 'dictates of public conscience'. There are (few) cases, however, where positive law as such does not regulate a specific weapon, means and method of warfare which nonetheless appears in sharp contrast with 'principles of humanity' and 'dictates of public conscience'. In these cases, the latter come to the fore and exercise their normative power directly, without the intermediation of positive law. In Aristotelian terms, their *potential* normative force is always present and switches to *actual* normative force only when positive law is absent. This position has been captured by Paolo Benvenuti years ago: he argues that the Martens Clause, in codifying 'principles of humanity' and 'dictates of public conscience', referred to 'substantial values, inherent in individual and group relations [that] … by virtue of their foundations … impose themselves, by their own force, in the legal order'.[89] Those 'principles' and 'dictates' constitute the 'universal, and at the same time historically determined foundation' of all treaty and customary IHL.[90]

This last view on the Martens Clause seems particularly convincing, as it shows two strong points. First, it encapsulates moral imperatives and thus reflects an inherent driver of the whole body of IHL. Second, in so doing it does not endorse an arbitrary disregard of treaty and customary law, as it remains centred on objective, contextual-related exigencies. While no one doubts that the Martens Clause plays a *de jure condendo* role, the one should likewise accept the view that the Clause displays also normative effects, in that it accommodates positivist and natural-law thinking.

3.3 ***The Relevance of the Clause in the Debate on LAWS***

'Principles of humanity' and 'dictates of public conscience' are also regularly employed in the debates on LAWS, especially by those supporting the 'the-sky-is-falling' paradigm.[91] It must be ascertained to what extent the Martens Clause is believed to apply to autonomous killing; in particular, it is important to assess whether it is resorted to only when discussing moral arguments, and thus employed only as a *de jure condendo* argument, or it is believed to have legally binding effects too. Attention will be devoted to the practice of States – inasmuch as they are the

[89] Paolo Benvenuti, 'La Clausola Martens e la tradizione storica del diritto naturale nella codificazione del diritto dei conflitti armati' in *Scritti degli allievi in memoria di Giuseppe Barile* (CEDAM 1995) (all translations are mine).
[90] ibid 179.
[91] McFarland and McCormack (n 4).

most concerned actors – as well as the positions held by other international actors and finally by legal scholarship.

States referring to the Martens Clause or to the principle of humanity at large have been numerous so far:[92] to name a few, Brazil at the 2014 MoE[93] and at the 2017 and 2019 GGE;[94] Sri Lanka[95] and Ecuador[96] at the 2015 MoE; Australia[97] and Sierra Leone[98] at the 2016 MoE; Sri Lanka again at the 2017 GGE.[99] In appealing to the Martens Clause, these States tend not to distinguish between legal and moral arguments: in most cases the Martens Clause is seen only through the lens of morality. Nor do States refer to a particular meaning of the Clause: they content themselves with affirming that 'principles of humanity' and 'dictates of public

[92] ICRC, 'Ethics and Autonomous Weapon Systems: An Ethical Basis for Human Control?' (Report, 3 April 2018) para 15 (listing the States that have generally referred to the Clause or its content: Algeria, Argentina, Austria, Belarus, Brazil, Cambodia, Costa Rica, Cuba, Ecuador, Egypt, France, Germany, Ghana, Holy See, India, Kazakhstan, Mexico, Morocco, Nicaragua, Norway, Pakistan, Panama, Peru, Republic of Korea, Sierra Leone, South Africa, Sri Lanka, Sweden, Switzerland, Turkey, Venezuela, Zambia and Zimbabwe).

[93] Brazil, Statement at the First Meeting of Experts on Lethal Autonomous Weapons Systems (Geneva, 13 May 2014) <www.unog.ch/80256EDD006B8954/(httpAssets)/12688EA8507C375BC1257CD70065815B/$file/Brazil+MX+LAWS.pdf> accessed 13 March 2020.

[94] Brazil, Statement at the 2017 Group of Governmental Experts on Lethal Autonomous Weapons Systems (Geneva, April 2017) <www.unog.ch/80256EDD006B8954/(httpAssets)/A0B7B1C9846B02F9C125823B00452D57/$file/2017_GGE+LAWS_Statement_Brazil.pdf> and Brazil, Statement at the 2019 Group of Governmental Experts on Lethal Autonomous Weapons Systems (Geneva, March 2019) <www.unog.ch/__80256ee600585943.nsf/(httpPages)/5c00ff8e35b6466dc125839b003b62a1?OpenDocument&ExpandSection=7%2C1%2C6#_Section7> accessed 13 March 2020.

[95] Sri Lanka, Statement at the Second Meeting of Experts on Lethal Autonomous Weapons Systems (Geneva, April 2015) <www.unog.ch/80256EDD006B8954/(httpAssets)/30534E70A6CFAAC6C1257E26005F2B19/$file/2015_LAWS_MX_Sri+Lanka.pdf> accessed 13 March 2020.

[96] Ecuador, Statement at the Second Meeting of Experts on Lethal Autonomous Weapons Systems (Geneva, April 2015) <www.unog.ch/80256EDD006B8954/(httpAssets)/8FD4D07ECAF70100C1257E26005E147F/$file/2015_LAWS_MX_Ecuador.pdf> accessed 13 March 2020.

[97] Australia, Statement at the Third Meeting of Experts on Lethal Autonomous Weapons Systems (Geneva, April 2016) <www.unog.ch/80256EDD006B8954/(httpAssets)/008A00242684E78FC1257F920057BD3C/$file/2016_LAWS+MX_GeneralExchange_Statements_Australia.pdf> accessed 13 March 2020.

[98] Sierra Leone, Statement at the Third Meeting of Experts on Lethal Autonomous Weapons Systems (Geneva, April 2016) <www.unog.ch/80256EDD006B8954/(httpAssets)/0054AE2FAA24E566C1257F9B004A2CAB/$file/SIERRA+LEONE+GENERAL+STATEMENT+2016+MEETING+ON+LAWS.pdf> accessed 13 March 2020.

[99] Sri Lanka, Statement at the 2017 Group of Governmental Experts on Lethal Autonomous Weapons Systems (Geneva, April 2017) >www.unog.ch/80256EDD006B8954/(httpAssets)/57E7A2A6AEC534B6C125823C00601784/$file/2017_MHCP_Statement_SriLanka.pdf> (mixing legal and moral considerations: '[e]ven if any of the existing IHL principles are found to be inapplicable, the test of public conscience and laws of humanity as referred to in the Martens Clause provides compelling reasons for establishing basic guiding principles on the legality of the use of LAWS').

conscience' could run against LAWS, without specifying *why*. More importantly, it is often resorted to as a *de jure condendo* instrument.[100]

The Martens Clause is a key argument for NGOs that oppose the development of LAWS. Human Rights Watch has repeatedly referred to the Clause in its reports, enlisting it as one of the grounds against which the legality of LAWS has to be checked. It is acknowledged that 'there is no consensus' among 'experts and laypeople' on whether autonomous killing is permissible; however, 'there is certainly a large number for whom the idea is shocking and unacceptable', and 'States should take their perspective into account when determining the dictates of public conscience'.[101] The International Committee for Robot Arms Control (ICRAC), an important network of experts advocating against autonomous weaponry, stands on the same line.[102] In short, the fact that LAWS allegedly contradict the Martens Clause results in the need for a pre-emptive ban treaty. The Martens Clause is thus considered from a *de jure condendo* standpoint: whether the Martens Clause can provide a legal basis for considering LAWS as *already* prohibited is neither denied nor affirmed.

Amongst non-state actors, a prominent role in this sense is played by the ICRC. In its statements, the ICRC refers to the 'principles of humanity' and 'dictates of public conscience' as structurally linked with morality,[103] distinct from positive law,[104] but capable of acting as a 'portal' connecting morality and law.[105] When it comes to assessing the normative status of the Martens Clause, however,

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[100] See Brazil, Statement at the 2019 GGE (n 94): '[t]he Martens Clause is, therefore, of extreme relevance when we discuss the ethical and humanitarian impact of incorporating autonomy features in weapons systems, and is a most valuable guide for elaborating new law for new phenomena'.

[101] See 'Losing Humanity' (n 9) 35.

[102] International Committee for Robot Arms Control, Statement at the 2018 Group of Governmental Experts on Lethal Autonomous Weapons Systems (Geneva, 9 April 2018) <www.unog.ch/80256EDD006B8954/(httpAssets)/02958914420956E2C1258272005789BE/$file/2018_LAWS6a_ICRAC.pdf> accessed 13 March 2020 (arguing that '[d]ictates of public conscience must always take precedence over any short-term advantage that might be gained from autonomous technologies … ICRAC reiterates the spirit of the Martens Clause—that morality can provide a strong basis *for new law*', italics added)

[103] ICRC, Statement at the Second Meeting of Experts on Lethal Autonomous Weapons Systems (Geneva, 13 April 2015) <www.unog.ch/80256EDD006B8954/(httpAssets)/4CE346B40DDBF000C1257E2600616A59/$file/ICRC+general+statement+CCW+LAWS+expert+meeting+13+04+2015+FINAL.pdf> accessed 13 March 2020.

[104] ICRC, Statement at the Third Meeting of Experts on Lethal Autonomous Weapons Systems (Geneva, April 2016) <www.unog.ch/80256EDD006B8954/(httpAssets)/B3834B2C62344053C1257F9400491826/$file/2016_LAWS+MX_CountryPaper_ICRC.pdf> accessed 13 March 2020 ('[t]he fundamental question at the heart of concerns, and *irrespective of whether they can be used in compliance with IHL*, is whether the principles of humanity and the dictates of public conscience would allow machines to make life-and-death decisions in armed conflict without human involvement', emphasis added).

[105] ICRC (n 92) para 73: '[c]onsiderations of humanity and the public conscience provide ethical guidance for discussions, and there is a requirement to connect them to legal assessments via the Martens Clause'.

there is no clear indication that LAWS are proscribed *as such*. At most, as illustrated by the ICRC, they raise ethical concerns that need to be translated into legal terms; should this translation not occur, as a matter of principle, their development and deployment would be permissible under IHL.

As for scholars, many resort to the Martens Clause as a ground for outlawing LAWS. O'Connell contends that '[i]t is simply insufficient to say that a human being is somewhere in the picture when discussing legal and moral standards for killing'; this is because there are 'essential human qualities' such as 'conscience, common sense, intuition' that are definitively 'unprogrammable'.[106] To Sparrow, allowing a machine to take decisions about human life is patently contrary to any moral imperative: it would mean, for a belligerent party, to literally 'treat [its] enemies like vermin,[107] ie refusing to acknowledge a common humanity that both sides share. In the words of Heyns, LAWS would be perceived as a sort of 'mechanized pesticide' employed by an enemy that despises his opponent's dignity and consider his life undeserving a human decision to be taken.[108] As a matter of fact, '[w]hen someone comes into the sights of a computer, that person is literally reduced to numbers: the zeros and the ones of bits'.[109]

Philosophical reflections may help grasp the reason of such aversion. Human dignity demands lethal decisions to be taken by humans (ie agents that can fully understand the meaning of their actions), instead of being left to an 'algorithmic' calculation of machines (ie agents that cannot understand the meaning of their actions), otherwise they become 'meaning-less', 'arbitrary' and thus unlawful. This is the argument put forward also by Asaro.[110] From a purely Kantian perspective, Ulgen asserts that '[h]uman moral reasoning involves a combination of comprehension, judgment, experience, and emotions',[111] and that the replacement of human decision-making when targeting another human is at variance with the notion of 'objective end' (as opposed to 'relative end'). Human dignity is a 'priceless and irreplaceable objective end possessed by all rational beings'; however, employing LAWS and, by means of it, removing face-to-face killing result in diminishing a human target's dignity, which is treated as a 'relative

[106] O'Connell (n 9) 7.
[107] Robert Sparrow, 'Robotic Weapons and the Future of War' in Jessica Wolfendale and Paolo Tripodi (eds), *New Wars and New Soldiers: Military Ethics in the Contemporary World* (Ashgate 2011).
[108] Heyns, 'Report of the Special Rapporteur' (n 9) para 95.
[109] Heyns, 'Human Rights and the Use of Autonomous Weapons Systems' (n 9) 370.
[110] See Peter Asaro, '*Ius Superveniens*: Robotic Weapons and the Martens Clause' in Ryan Calo and others, *Robot Law* (Elgar 2016) 385 ('For the killing of a human to be meaningful, it must be intentional. That is, it must be done for reason and for purpose. … While autonomous systems may be programmed to act in a certain way, given a certain set of conditions, they cannot understand the significance of their acts').
[111] Ozlem Ulgen, 'Kantian Ethics in the Age of Artificial Intelligence and Robotics' (2017) 43 Questions Intl L 59, 79.

end'.[112] The paradox of 'machine will' is well illustrated by Belgian philosopher Lambert, who explains that the very attribute of 'autonomous' is an 'illusion'.[113]

Interestingly enough, an appeal to particular notions of 'human dignity' as a normative basis to proscribe autonomous killing comes from the African tradition of 'Ubuntu'. On this point, legal scholar Chengeta argues that 'Ubuntu' is the product of a long-standing tradition stemming from Zimbabwe and spreading throughout the continent; in its core content, it reveals the essence of being human, which is 'the fact that you can't exist as a human being in isolation'.[114] The openness to the 'other' is thus a key feature of the notion of 'Ubuntu'. Chengeta believes LAWS to be at variance with 'Ubuntu' as they inherently disrespect the target's dignity.[115]

Still, many criticize such resort to the Martens Clause to oppose LAWS, arguing that positive IHL already covers all the issues that this technology raises and thus that the Clause plays an extremely limited role in assessing the legality of LAWS.[116] For instance, Evans argues that appealing to 'principles of humanity' and 'dictates of public conscience' has no other purpose than of 'incentiviz[ing] the dissemination of sensationalist, fear-mongering rhetoric aimed at persuading the public, impressionable States or NGOs that the challenged weapons are abhorrent'.[117]

In conclusion, the view is spreading that autonomous killing is unacceptable as such. However, when it comes to translating such moral repulsion into a legally binding prohibition, only at times is the Martens Clause resorted to and, most frequently, it serves as a *de jure condendo*, programmatic argument for future discussions.

4 **Construing the Martens Clause as Legal Basis for Prohibiting LAWS**

From the foregoing, it seems safe to imply that both at the time of its conception and in its present-day applications the Martens Clause stands as a 'blend of natural law and positivism',[118] which results in considering the Clause as producing legally binding effects at best problematic. Here, it is submitted that a reconciliation

[112] ibid 82.
[113] Dominique Lambert, 'Une éthique ne peut être qu'humaine ! Réflexion sur les limites des moral machines' in Ronan Doeré and others, *Drones et « Killer Robots ». Faut-il les interdire?* (Presses Universitaires de Renne 2015) 234-5.
[114] Thompson Chengeta, 'Dignity, Ubuntu, Humanity and Autonomous Weapon Systems (AWS) Debate: An African Perspective' (2016) 13 Revista de Direito Internacional 461, 465.
[115] ibid 482-4.
[116] Schmitt and Thurnher (n 4) 275 (contending that rather than being 'an overarching principle', it may at most 'address lacunae in the law', which however is not the case for LAWS).
[117] Tyler D Evans, 'At War with Robots: Autonomous Weapon Systems and the Martens Clause' (2013) 41 Hofstra L Rev 697, 727.
[118] See Cassese (n 47) 40.

between the two antithetical approaches is feasible – and auspicious, to a certain extent.

To begin with, instead of a black-or-white conception of the Clause – that is, neatly divided between natural-law and positive-law viewpoints – a more nuanced understanding is possible. It may be useful, in this sense, to recall Benvenuti's take on the 'principles of humanity' and the 'dictates of the public conscience', ie as 'universal, and at the same time historically determined foundation' of IHL.[119]

As the history of IHL demonstrates, a bedrock principle is that the 'enemy' cannot be killed (or injured) at any cost: an idea of limitation is somehow inherent in IHL.[120] Back in the eighteenth century, this idea was embodied in the ideology that inspired IHL in its very blossoming, namely humanitarianism, which aimed (and still aims) at reducing human suffering.[121] Humanitarianism proceeds from a particular, 'historically determined' understanding of 'humanity' as incompatible with (a certain kind of) suffering.[122] Key IHL provisions, such as the prohibition of weapons causing unnecessary suffering and superfluous injury, or of indiscriminate weapons, as well as the provisions protecting civilians or combatants temporarily *hors de combat*, can all be explained in the light of humanitarianism. More recently, in the twentieth century, 'humanity' was then enlarged to include 'human rights' and the concept of 'human dignity'. Incidentally, the relationship between the two (apparently) segregated bodies of law has made the object of a long-standing doctrinal debate.[123] The principle of humanity as a key driver for IHL has been reaffirmed also by the ICTY in the *Tadić* case, where it is argued that the 'gradual extension to internal armed conflict of rules and principles concerning international wars' (namely the protection of civilians and civilian objects and means and methods of warfare) has to be traced back to the abovementioned principle.[124]

Coming to the case of LAWS, it is therefore possible to claim that *today's* understanding of 'humanity' requires human deliberation to be present at each and every act of using lethal force against individuals. Human control would thus appear as 'something that has historically been taken for granted – assumed but never stated'.[125] It is today, in an historical moment when this nexus risks being radically

[119] See Benvenuti (n 89).
[120] Amanda Alexander, 'A Short History of International Humanitarian Law' (2015) 26 EJIL 109, 115 (citing provisions adopted by the Hague Conferences with a view to showing that by the end of the nineteenth century 'the existence of an unlimited right to injure the enemy' had already been denied).
[121] Larissa Fast, 'Unpacking the Principle of Humanity: Tensions and Implications' (2016) 97 IRRC 111.
[122] Robin Coupland, 'Humanity: What Is It and How Does It Influence International Law?' (2001) 83 IRRC 969.
[123] Kjetil Mujezinović Larsen, 'A 'Principle of Humanity' or a 'Principle of Human-Rightism'?' in Kjetil Mujezinović Larsen and others, *Searching for a 'Principle of Humanity'* (CUP 2013).
[124] *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1 (2 October 1995).
[125] Asaro (n 110) 383.

severed, that a particular understanding of 'humanity' has begun to emerge, and make itself *discernible*.[126] This understanding of the principle of humanity seems not only particularly fitting as far as LAWS are concerned, but also, on a more general plan, consistent with the way international law-making is acknowledged to operate.[127] This approach may be seen as inclined towards natural-law thinking, but it does not result unacceptable for positivist lawyers, as for instance it reflects Cassese's conception of the Martens Clause as *lex specialis* in customary law.[128]

Concluding on such finding, it is worth mentioning at least one of its limits. One may also wonder whether the same line of reasoning applies to autonomous weapons employed against non-human targets, for instance against military objects. While specific IHL provisions exist that regulate how to target such objectives,[129] it seems that the argument based on the Martens Clause is too tight to the target's 'humanity' to be extended *telle quelle* to different ones. However, this does not imply that, subsequent to the advancement of a principled discussion on LAWS, 'principles of humanity and dictates of public conscience' may not evolve in this direction, for instance by observing that IHL already limits means and methods of warfare also with respect to object perceived as indispensable for human life (such as the environment or water supplies).[130]

This evolution would not be unwarranted, especially in the light of the inherent humanitarian spirit of IHL. Unfortunately, from the above one can imply that such 'discernment' still does not seem in sight today. The Holy See may play a unique role in contributing to such a present-day 'discernment' of the principle of humanity, at least for the following reasons.

First, in the international legal order the Holy See traditionally endorses the normative role of open-ended clauses with an inherent connection to morality. For instance, during the discussions around Article 53 of the Vienna Convention on the Law of Treaties, the Holy See's delegate, René-Jean Dupuy, welcomed the inclusion of *jus cogens* as an attempt at the 'positivization' of natural law.[131] Albeit

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[126] For further explanation on the natural-law oriented notion of 'discerning', see Mary Ellen O'Connell and Caleb May, 'Sources and the Legality and Validity of International Law: Natural Law as Source of Extra-Positive Norms' in Samantha Besson and Jean d'Aspremont, *The Oxford Handbook on the Sources of International Law* (OUP 2017) 563 (arguing that international law stemming from natural law is recognizable through a process of discernment that embraces 'the exercise of reason, observation of nature, and openness to transcendence').

[127] Benvenuti (n 89).

[128] Cassese (n 47) 67 (arguing that the Clause 'loosens the requirements prescribed for *usus*, while at the same time elevating *opinio* (*iuris* or *necessitatis*) to a rank higher than that normally admitted').

[129] API arts 51(2) and 52, acknowledged as corresponding to customary IHL.

[130] API arts 35(3) and 53.

[131] 'Official Records of the UN Conference on the Law of Treaties, First Session (Summary records of the plenary meetings and of the meetings of the Committee of the Whole)' (Vienna 26 March–24 May 1968) UN Doc A/CONF.39/C.1/SR.45 para 74: 'progressive integration of natural into positive law was highly desirable, because of the increased precision it gave to positive law'. For a commentary, see Andrea Bianchi, 'Human Rights and the Magic of Jus Cogens' (2008) 19 EJIL 491.

the two plans remain distinct,[132] the Holy See has no objection to the international community's attempts 'to subordinate power to certain fundamental principles'.[133] On closer inspection, the Holy See's approach to LAWS would perfectly fit in this position.

Second, while structurally sensitive for a natural-law oriented approach, the Holy See resorts to arguments that are fully compatible with others currently employed against LAWS. In spite of several – and to an extent even substantial – divergencies, the final outcome does not change. To begin with the divergencies, as mentioned above, the Holy See grounds its arguments in Catholic social teachings: the enemy must be treated as another *se* inasmuch as *imago Dei*. Of course, such starting point is not necessarily shared by all actors involved in the discussion around LAWS. However, one could hardly deny that, at least with respect to the proposed final outcome, this approach is fully in line with most non-Catholic positions, as it is not incompatible with the various notions – such as those of 'human dignity', 'objective ends', or 'Ubuntu' – currently employed as an argument against LAWS. Joint works of legal scholars and engineers have come to analogous conclusions.[134]

All in all, the Holy See's position has to be understood as expressing a convinced discernment on the incompatibility of LAWS with the Martens Clause. In this sense, before – and even absent – any treaty, one could argue that 'principles of humanity and dictates of public conscience' already proscribe such weaponry. It has been demonstrated that if understood not as abstract or arbitrary principles remaining ultimately ungraspable, but as 'universal, and at the same time historically determined foundations' of IHL, 'principles of humanity and dictates of public conscience' do constitute a sufficient normative basis against autonomous killing.

One final caveat applies. The circumstance that the Holy See supports a multilateral regulatory framework does not contradict the findings above.[135] As a matter of fact, one may contend that if LAWS were truly proscribed as such by 'principles of humanity and dictates of public conscience' (admitting that these stand as sources of international law) an international instrument aimed at prohibiting the development and deployment of such weaponry would be redundant.

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[132] 'Official Records' (n 131): '[J]us cogens must not be confused with natural law, since its rules were not immutable, although it contained natural law. Principles such as the prohibition of slavery and genocide had entered positive law; but those rules of natural law had been ratified and sanctioned by positive law without losing their value as fundamental dictates of the universal conscience'.

[133] ibid.

[134] Daniele Amoroso and Guglielmo Tamburrini, 'The Ethical and Legal Case Against Autonomy in Weapons Systems' (2018) 18 Global Jurist 1 (explaining that pro-ban arguments can count not only on deontological reasons – such as the inherent worth of human life as basis of the notions of human dignity and the principle of humanity in IHL – but also on sound consequentialist reasons – namely an increase in the number and scale of conflicts all over the world).

[135] See Campaign to Stop Killer Robots (n 11).

However, this argument can be easily rebutted. First, from a theoretical perspective contending that extra-positive law bans autonomous killing as such is consistent with supporting a legally binding instrument against it: the two positions are not mutually exclusive. Rather, the Holy See has constantly called for the harmonization of written and non-written law, not only as required by the Catholic social teachings and doctrine,[136] but also in the name of legal certainty.[137] Second, from a practical perspective, gathering as many States as possible around a clear, legally binding prohibition of a weapon has more chances to effectively regulate the conduct of States: strategically and diplomatically, this is a better move than relying on a non-written prohibition. By insisting that autonomous killing *per se* runs against 'principles of humanity and dictates of public conscience', and that all concerned actors are required to discern such contrariety, the Holy See's appraisal of the Martens Clause may push States to find an additional – and decisive – argument for supporting a legally binding instrument without contradicting the previous stance.

5 **Conclusion**

The Martens Clause provides States with a solid basis for advocating for a prohibition on LAWS: it is no coincidence that many NGOs have recently turned to this provision when elaborating their arguments against such weaponry. In this sense, today the Martens Clause is largely relegated to a *de jure condendo* role, while only to a limited extent it is resorted to as a legally binding provision. As far as its legal nature is concerned, it has been demonstrated that in the eternal confrontation between natural-law scholars and legal positivists, a more balanced position seems preferable according to which the 'principles of humanity and dictates of public conscience' stand as normative source of IHL. Actually, the Martens Clause refers to humanity as a 'universal, and at the same time historically determined' principle whose meaning has to be declined – 'discerned' – in present-day conditions.

Thanks to its natural-law background and by virtue of its unique role in the 'family of Nations',[138] the Holy See is perfectly situated to invite other States to a discernment of what the 'principles of humanity and dictates of public conscience' require today. To treat the enemy as another *se* insomuch as *imago Dei*: this is the gist of the argument invoked by the Holy See against autonomous killing. To deprive a particular engagement of any meaningful human presence runs against

[136] John Paul II, 'Encyclical Letter *Veritatis Splendor* of the Supreme Pontiff John Paul II to all the Bishops of the Catholic Church regarding Certain Fundamental Questions of the Church's Moral Teaching' (6 August 1993) para 44.
[137] See 'Official Records' (n 131): '[i]t could even be said that such progressive integration of natural into positive law was highly desirable, because of the increased precision it gave to positive law'.
[138] Silvano Maria Tomasi, *The Vatican in the Family of Nations: Diplomatic Actions of the Holy See at the UN and Other International Organizations in Geneva* (CUP 2017).

'humanity', that is the inherent core of IHL, irrespective of accountability issues that may arise from the (mis-)use of LAWS.

Against this line of reasoning, two objections may be legitimately raised. First, the proposed understanding of the Martens Clause is far from being endorsed universally: as has been demonstrated, most recognize only a limited *de jure condendo* role to it. Even accepting that the Clause stands as *lex specialis* in the field of IHL – one in which *opinio juris* weighs more than *usus* –, the fact remains that on this sole basis no weapon, means or method of warfare has ever been banned.[139] Second, conceiving humanity as a value that takes different shapes depending on historical contexts may seem an argument that both goes much in the direction of natural-law supporters and lends itself to arbitrariness. Arguing that LAWS are prohibited on this basis would be but a rhetorical exercise.

According to the writer, these objections can be overcome if a principled discussion on the Martens Clause and its potential as far as LAWS are concerned is engaged timely. Future works at the CCW forum, for instance, can only benefit from a sound analysis of the values at stake, within a moral *and* legal framework. As has been said, limiting the debate to the narrower '*can* LAWS kill human targets?' question (which implies an assessment of their factual compliance with IHL) and wilfully ignoring the larger '*should* LAWS kill human targets?' question is at best near-sighted.[140] It would be like observing the mote out of one's eye but ignoring the beam in the own eye – a danger that the Scriptures warn against when it comes to judging the neighbour. By the same token, focussing on mere adherence to rules on targeting while ignoring the foundational principles enshrined in the Martens Clause is the main danger against which the Holy See is warning other States.

Acknowledgments

This contribution has been made possible by the author's participation in the Holy See's Delegation to the Group of Governmental Experts (GGE) on emerging technologies in the area of lethal autonomous weapons systems. In addition to the head and other members of the delegation, the author wishes to thank – in chronological order – Vincenzo Buonomo, Dominique Lambert, Mary Ellen O'Connell and Micaela Frulli for their invaluable support throughout the drafting process, as well as to the anonymous referees for their precious commentaries. A twofold caveat applies: first, the opinions expressed in the article do not necessarily reflect the Holy See's; second, all mistakes remain exclusively mine.

[139] Cassese (n 47). For a critique on the Martens Clause's ability to provide a legal basis against LAWS coming from the front of those inclined to adverse them, see Amoroso (n 6) 26-7.
[140] Heyns, 'Autonomous Weapons Systems' (n 9).