Autonomous Weapon Systems, Human Dignity and International Law

Saxon, D.R.

Chapter Six

Autonomous Weapon Systems and International Human Rights Law

I. Introduction

In the preceding chapter, I demonstrated that during armed conflict, autonomous weapons potentially have the capacity to comply with the rules governing the conduct of hostilities. Nevertheless, humans should continue to make decisions in situations involving complex and (often) conflicting values. Anything less would result in violations of human dignity, which is the foundation and guide of all international law.

In this chapter, I explain that international human rights law is most relevant to the use of autonomous weapon systems in two sets of circumstances: 1) in law enforcement/anti-terrorist situations where state authorities use lethal force, and 2) during armed conflict, where international human rights law applies concurrently with international human rights law. Three international human rights are most germane to this discussion: 1) the right to life, 2) the right to freedom of thought and 3) the right to freedom of expression. Underlying all three rights is the value of human dignity.

As autonomous technology advances, autonomous weapons may have the capacity to fulfill the requirements of international human rights law. However, consistent with my arguments in chapter five concerning international humanitarian law, I demonstrate that the regular use of autonomous weapons in law enforcement situations requiring the assessment of, complex values violates human dignity and the rights to freedom of thought and freedom of expression.

This chapter begins with a brief review of the sources of international human rights law. It continues with a general discussion of the scope of the rights to life, freedom of

thought and freedom of expression in international human rights law. I describe the capacity of autonomous weapons to protect these human rights during law enforcement/anti-terrorist operations. Subsequently, I review the interplay between international humanitarian law and international human rights law during armed conflict and explain when the use of autonomous weapons during law enforcement/anti-terrorist operations and/or armed conflict can comport with the principle of human dignity. Finally, I conclude that a co-active design of autonomous weapon systems provides the strongest opportunity for this new technology to fulfill the objectives of international human rights law.

II. The Sources of International Human Rights Law

Unlike international humanitarian law, which strives to find a balance between the imperatives of military necessity (i.e. the use of violence) and the value of humanity, the *basic assumption* of human rights law is the universal principle of human dignity.[1] Logically, then, this ubiquitous, bedrock principle must inform all interpretations of human rights law.[2] Dignity is a source, as well as a product, of fundamental human rights because '[h]uman rights flow from, and are necessary for, the recognition of human dignity.'[3] Thus, in the context of international human rights law, violations of the value of human dignity take on a nearly primordial significance.[4]

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[1] Benvenisti, 'Human Dignity in Combat: The Duty to Spare Enemy Civilians,' nte 12. See *Husayn Abu Zubaydah v. Poland*, para. 532, citing *Pretty v. the United Kingdom*, Judgment, ECtHR, Application No. 2346/02, 29 July 2002, paras. 61 and 65.

[2] The preambles to the ICCPR and the ICESCR, for example, explain that the rights contained therein 'derive from the inherent dignity of the human person.' The American Convention on Human Rights recognizes that the essential rights of persons "are based upon attributes of the human personality' whilst the ICESCR requires that the right to education 'shall be directed to the full development of the human personality and the sense of its dignity, ….' Preamble, ACHR and Art. 13, ICESCR, 16 December 1966.

[3] B Beyer, 'Economic Rights: Past, Present, and Future,' in T Cushman, (ed.) *Handbook of Human Rights*' (New York: Routledge, 2012), p. 297. See P Carroza, 'Human Dignity,' in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (Oxford University Press, 2013), pp. 2 and 5 (observing that human dignity serves as a foundation for generic claims of human rights as well as a normative principle for the interpretation and application of specific rights).

[4] 'Man … can lose all so-called Rights of Man without losing his essential quality as man, his human dignity.' H Arendt, *The Origins of Totalitarianism* (New York: Harvest Books, 1976), p. 297.

Writing in the seventeenth century, British political philosopher John Locke observed that human beings cannot alienate their fundamental rights which, for Locke, emanated from natural law.[5] Any early (but limited) Western expression of these rights can be found in the Bill of Rights of 1689, which provided members of the English Parliament with certain rights and protections against abuses of power by their sovereign.[6] One hundred years later, the National Assembly of France attempted to codify 'in a solemn declaration the natural, unalienable, and sacred rights of man, ….'[7] Moreover, beginning in 1791 and continuing into the twentieth century, a number of these rights were adopted and/or extended in the Bill of Rights attached to the Constitution of the United States.[8]

The genesis of the 'detailed tapestry'[9] of modern international human rights law lies in the United Nations Charter of 1945 ('UN Charter').[10] In the Preamble, state parties 'reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, ….'[11] Moreover, one of the purposes of the United Nations is to promote and encourage respect for human rights and

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[5] 'Concerning the True Original Extent and End of Civil Government' in *Two Treatises of Government*, paras. 22, 87 and 135, available online at http://socserv2.socsci.mcmaster.ca/econ/ugcm/3ll3/locke/government.pdf.

[6] *An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown*, available online at http://avalon.law.yale.edu/17th_century/england.asp.

[7] *Declaration of the Rights of Man – 1789*, available online at http://avalon.law.yale.edu/18th_century/rightsof.asp. This Declaration also emphasized the importance of the rule of law. Art. 16. More than 18 hundred years previously, in his oration in defence of Titus Annius Milo (referred to in Chapter five on International Humanitarian Law and Autonomous Weapon Systems), Cicero argued in favour of the existence of law 'not written, but born with us, … imbibed from nature herself; ….' Part IV, para. 2, <http://www.uah.edu/student_life/organizations/SAL/texts/latin/classical/cicero/promilone1e.html#cfour>. I am grateful to Frenkchris Sinay for this point.

[8] <https://www.law.cornell.edu/constitution/overview>. Jean-Jacques Rousseau also advocated for the importance of 'natural rights,' at least for men. *The Social Contract (or Principles of Political Right)* (1762), Translated by G Cole, p. 22, <http://www.ucc.ie/archive/hdsp/Rousseau_contrat-social.pdf>. The concept of 'natural rights' was rejected and famously mocked by Jeremy Bentham who called the notion 'nonsense on stilts.' *Anarchical Fallacies: Being an Examination of the Declaration of Rights Issued During the French Revolution* (1843), Art. II, pp. 4 – 5, <http://english.duke.edu/uploads/media_items/bentham-anarchical-fallacies.original.pdf>. Bentham argued that all 'rights' originate from laws made by governments. *Ibid*.

[9] H Duffy, *The 'War on Terror' and the Framework of International Law*, 2nd ed. (Cambridge University Press, 2015), p. 466.

[10] C Chinkin, 'Sources,' in Daniel Moeckli, et. al. (eds.) *International Human Rights Law* (Oxford University Press, 2010), p. 105.

[11] Signed in San Francisco, 26 June 1945.

fundamental freedoms without distinction as to race, sex, language or religion.[12] Concurrently, however, Article 7 constrains international intervention to protect human rights as it reaffirms the sovereign power of states to address matters arising within their domestic jurisdiction.

Following the adoption of the UN Charter, a large and comprehensive body of international and regional human rights conventions (and corresponding monitoring and judicial mechanisms) were produced. The Universal Declaration of Human Rights (the 'Universal Declaration') was ratified on 10 December 1948. The Universal Declaration was drafted as a non-binding,[13] aspirational document and the arguable development of its provisions into customary international law will be discussed below. The United Nations General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide ('the Genocide Convention') just one day before the ratification of the Universal Declaration. The contracting parties to the Genocide Convention accepted the duty to undertake to prevent and punish the crime of Genocide.[14]

States enacted a number of international and regional human rights treaties and conventions during the last half of the twentieth century; the two most prominent are the International Covenant on Civil and Political Rights ('ICCPR')[15] and the International Covenant on Economic, Social and Cultural Rights ('ICESCR').[16] These two covenants, together with the Universal Declaration, are referred to as the 'International Bill of Rights.'[17] In addition to their substantive provisions expressing international human rights norms, the

[12] Art. 1 (3). Art. 1 (2) affirms the principle of equal rights and self-determination of peoples. Art. 13 (1) (b) charges the General Assembly with 'assisting in the realization of human rights and fundamental freedoms for all ….'
[13] M Ishay, *The History of Human Rights: From Ancient Times to the Globalisation Era* (Berkeley: University of California Press, 2004), p. 223.
[14] No. 1021, Adopted by the General Assembly of the United Nations on 9 December 1948.
[15] Adopted by the United Nations General Assembly on 16 December 1966, entered into force on 23 March 1976.
[16] Adopted by the United Nations General Assembly on 16 December 1966, entered into force on 3 January 1976.
[17] Chinkin, 'Sources,' p. 106.

ICCPR, ICESCR and other 'core' international human rights treaties[18] establish monitoring bodies (or 'treaty bodies') that review state party compliance with their obligations and provide guidance or ('General Comments') on the nature and scope of these duties.[19] These treaty bodies may also conduct inquiries into well-founded reports and complaints of serious violations of the relevant convention by a state party.[20]

Moreover, a number of human rights rules expressed in these conventions, such as the prohibitions of slavery, torture and genocide, have been described as part of *jus cogens.*[21] Indeed, Professor Bianchi observes that there 'is an almost intrinsic relationship between *jus cogens* and human rights.'[22]

Furthermore, several regional human rights conventions[23] – and the human rights judicial systems they created – have led to the development of a large body of international human rights jurisprudence.[24] Indeed, in *1994* two commentators concluded that the European Convention on Human Rights' 'achievements have been quite staggering, the case-

[18] Markus Schmidt opines that the 'core' United Nations human rights treaties are: the ICCPR and the ICESCR (as well as their Optional Protocols), and the International Conventional on the Elimination of Racial Discrimination ('ICERD'), the Convention Against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment ('UNCAT'), the Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW') (as well as its Optional Protocol), the Convention on the Rights of the Child ('CRC') (as well as its Optional Protocols), the International Convention on the Rights of Migrant Workers and Their Families ('ICRMW'), the Convention on the Rights of Persons with Disabilities ('CRPD') (as well as its Optional Protocol), and the International Convention for the Protection of All Persons from Enforced Disappearances. M Schmidt, 'United Nations,' in Moeckli, International Human Rights Law, p. 405. One might add to this list, inter alia, the 1951 Convention Relating to the Status of Refugees and the International Convention on the Suppression and Punishment of the Crime of 'Apartheid.'

[19] *Ibid*, pp. 404 - 409.

[20] *Ibid*, pp. 409 – 415.

[21] Chinkin, 'Sources,' p. 113. The International Law Commission also includes the prohibitions of aggression, racial discrimination and crime against humanity, violations of the duty to respect the right of self-determination as well as violations of basic rules of international humanitarian law as constituting peremptory norms. *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries* (2001), Commentaries to Arts. 26 and 40, <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>.

[22] A Bianchi, 'Human Rights and the Magic of Jus Cogens,' in 19 *European Journal of International Law* (2008) 3, 491, 495.

[23] See the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR)', and its fourteen additional Protocols; the American Convention on Human Rights ('ACHR'), available online at 'Pact of San Jose, Costa Rica; African Charter on Human and Peoples' Rights.

[24] Chinkin, 'Sources,' pp. 460 – 473; D Harris et. al. *Law of the European Convention on Human Rights* (Oxford University Press, 2014); H Steiner & P Alston, *International Human Rights in Context*, 2nd ed. (Oxford University Press, 2000), pp. 787 – 937.

law of the European Commission and Court of Human Rights exerting an ever deeper influence on the laws and social realities of the State parties.'[25]

Determinations of the customary status of international human rights obligations are complex given the frequent disparity between state expressions of their human rights obligations and the common occurrence of gross human rights violations around the world; in other words, the dichotomy between opinio juris and state practice.[26] Professor Chinkin notes, for example, that 'many commentators' believe that the contents of the Universal Declaration of Human Rights have become customary law.[27] Simma and Alston, however, strongly rejected this view, arguing that it is impossible to elevate the Universal Declaration and other documents to the status of customary international law 'in a world where it is still customary for a depressingly large number of states to trample upon the human rights of their nationals.'[28]

In addition, the development of international human rights law may occur over time through forms and expressions of 'soft law.'[29] Examples would include the work of the 'treaty bodies' mentioned above and other human rights mechanisms,[30] as well as the vast body of United Nations General Assembly and Security Council Resolutions that pronounce

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[25] A Drzemczewski & M Ladewig, 'Principle Characterisitics of the New ECHR Control Mechanism, as Established by Protocol No. 11,' 15 *Human Rights Law Journal* 81 (1994), 82.

[26] B Simma & P Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles,' 12 *Australia Yearbook of International Law* 82 (1988-1989), 88 – 100. The formation of customary international law will be addressed in Chapter 8, 'Autonomous Weapon Systems and the Responsibility of States and Arms Manufacturers.'

[27] Chinkin, 'Sources,' p. 120. M A Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001), p. 178.

[28] Simma & Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles,' 90. C.f. the concurring opinion of U.S. Supreme Court Justice Breyer in *Kiobel v. Royal Dutch Petroleum Co*, et. al. where Breyer argued that acts of torture (prohibited, *inter alia*, by article 5 of the Universal Declaration) and genocide violate customary international law. 569 U.S. ___ (2013), p. 5. The Kiobel decision took a restrictive view of the ability of victims of violations of customary international law occurring outside the territory of the United States to seek damages in U.S. courts. Justice Roberts, pp. 1 – 14.

[29] Chinkin, 'Sources,' pp. 119 – 122.

[30] For example, General Comment 31 of the ICCPR's Human Rights Committee addressed 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant.' U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), <https://www1.umn.edu/humanrts/gencomm/hrcom31.html>.

on human rights issues,[31] reports of United Nations Special Rapporteurs and Special Experts,[32] the Universal Periodic Review process conducted by the United Nations Human Rights Council,[33] reports by international Commissions of Inquiry[34] and more.

Finally, whilst obviously the development of this large body of international human rights law and its associated structures and enforcement mechanisms creates enormous potential for furthering the rule of law, primary responsibility for its implementation lies with national governments and courts.[35]

III. The Rights to Life, Freedom of Thought and Freedom of Expression

A. The Right to Life

According to the ICCPR, '[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'[36] The European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'), the American Convention on Human Rights ('ACHR') and the African Charter on Human and Peoples' Rights ('ACHPR') also prohibit the arbitrary deprivation of life.[37]

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[31] L Henkin, *How Nations Behave: Law and Foreign Policy* (New York, Frederick A. Praeger, 1968), p. 27. For example, in December 2015, the General Assembly passed a Resolution condemning violence against and intimidation of human rights defenders. 'General Assembly Adopts 64 Third Committee Texts Covering Issues Including Migrants, Children's Rights, Human Rights Defenders.' 17 December 2015, <http://www.un.org/press/en/2015/ga11745.doc.htm>. In October 2013, the Security Council issued its seventh resolution addressing the empowerment of women and girls, gender equality and the effects of violence against women in conflict and post-conflict situations. S/Res/2122 (2013), <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2122(2013)>.

[32] For example, on 9 April 2013, Professor Christoph Heyns, United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, issued a report entitled 'Lethal Autonomous Weapons and the Protection of Life,' <A/HRC/23/47, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/127/76/PDF/G1312776.pdf?OpenElement>.

[33] Described in detail at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx>.

[34] See for example, the comprehensive 'Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea,' A/HRC/25/CRP.1, 7 February 2014.

[35] Duffy, The 'War on Terror' and the Framework of International Law, p. 466; U.N. Security Council Resolution 2122 (2013), p. 2. For example, the *Torture Victim Protection Act of 1991* gives victims of torture or extrajudicial execution perpetrated by foreign nationals the right to sue those foreign individuals for damages in U.S. federal courts. H.R.2092, <http://thomas.loc.gov/cgi-bin/query/z?c102:H.R.2092.ENR>.

[36] Art. 6.1, ICCPR.

[37] Article 2, ECHR; Article 4 (1), American Convention on Human Rights "Pact of San Jose, Costa Rica," Article 4, African Charter on Human and Peoples' Rights.

The right to life is a condition precedent for realisation of other rights and when disrespected, 'all the other rights lack meaning.'[38] Thus, Professor Benvenisti refers to the norm that every human being has the inherent right to life as '*the premise* that permeates human rights law.'[39] States, therefore, must take 'all appropriate measures' to ensure the creation of conditions required to avoid violations of inalienable human rights.[40] In the context of the right to life, these steps include all necessary measures, not only to prevent and punish deprivation of life as a consequence of criminal acts, in general, but also to prevent arbitrary executions by its own security agents.[41] This positive, proactive obligation applies to legislators and all state institutions, in particular those who must protect security, i.e. its police and armed forces.[42]

At the same time, circumstances may compel constraints on the right to life, particularly when the cost to other rights is too high. Thus, international human rights law permits states or their agents *to take life* via the use of force which is no more than absolutely necessary:

> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection.[43]

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[38] *Case of Myrna Mack Chang v. Guatemala*, Judgment, InterAmerican Court of Human Rights ('Inter-Am. Ct. H.R.'), November 25, 2004, para. 152.

[39] E Benvenisti, 'Human Dignity in Combat: The Duty to Spare Enemy Civilians,' 39 *Israel Law Review.* 2 (2006), 83 (emphasis in original).

[40] *Velasquez Rodriguez v. Honduras*, Judgment, Inter-Am. Ct. H.R, 29 July 1998, para. 188; Myrna Mack Chang v. Guatemala, paras. 152 and 153.

[41] *Juan Humberto Sánchez v. Honduras*, Judgment, Inter-Am. Ct. H.R. (2003), para. 110.

[42] *Ibid; The Massacres of El Mozote and Nearby Places v. El Salvador*, Judgment, Inter-Am. Ct. H.R. October 25, 2012, para. 146. According to article 1 of the ECHR, '[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.' The American Convention on Human Rights and the African Charter on Human and Peoples' Rights contain similar provisions. Article 1, African Charter on Human and Peoples' Rights ('ACHPR'); Article 2, American Convention on Human Rights. The latter two instruments require state parties to undertake to adopt such 'legislative or other measures' to give effect to the rights contained therein.

[43] Art. 2, European Convention for the Protection of Human Rights and Fundamental Freedoms.

Thus, in certain circumstances, the use of lethal force by state security forces in peacetime may be justifiable.[44] However, due to the fundamental nature of the right to life, the scope of circumstances where its deprivation is justified is construed narrowly.[45] For example, when state agents use lethal force with the aim of protecting persons from unlawful violence, deadly force must be 'absolutely necessary'[46] to achieve one of the three purposes listed above. In other words, the force used must be 'strictly proportionate' to the achievement of the permitted aims.[47] In the context of human rights law (in contrast with international humanitarian law), 'necessity' means that force must only be used as a last resort and, in such circumstances, states should use a graduated approach.[48]

Consequently, during law enforcement and anti-terrorist operations, government authorities must plan and control activities so as to minimise, as much as possible, recourse to lethal force.[49] Police may not use lethal force, for example, against a fleeing burglar who poses no immediate danger, although the burglar will escape, because the preservation of property rights does not justify the intentional taking of life.[50] Force should only be used against a person if that person poses an imminent threat of violence '—normally implying a matter of seconds or even split-seconds.'[51]

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[44] *Akpinar and Altun v. Turkey*, Judgment, European Court of Human Rights ('ECtHR'), Application no. 56760/00, 27 February 2007, para. 50.

[45] *Case of Putintseva v. Russia*, Judgment, ECtHR, First Section, application no. 33498/04, 10 August 2012, para, 42.

[46] *McCann and Others v. the United Kingdom*, Judgment, ECtHR, Application No. 18984/91, 27 September 1995, para. 213. In *McCann*, U.K. soldiers shot dead three members of the Irish Republican Army on a street in Gibraltar. The soldiers feared that the IRA members carried a remote control device for the purpose of exploding a car bomb. A majority of the ECtHR held that the U.K. was in breach of Article 2 because the state could have planned and performed the operation without killing the suspects.

[47] 'A balance must be achieved between the aim pursued and the means employed to achieve it.' *Case of Isayeva v Russia*, Judgment, ECtHR, Application No. 57950/00, paras. 173 and 181, 24 February 2005.

[48] C Heyns, United Nations Special Rapporteur for Extrajudicial Executions, presentation to Annual Meeting of State Parties to Convention on Certain Conventional Weapons, 13 – 16 May 2014, p. 5, <http://www.unog.ch/80256EDD006B8954/(httpAssets)/DDB079530E4FFDDBC1257CF3003FFE4D/$file/Heyns_LAWS_otherlegal_2014.pdf>.

[49] McCann and Others v. the United Kingdom, para. 194.

[50] Heyns, presentation to Annual Meeting of State Parties to Convention on Certain Conventional Weapons, 13 – 16 May 2014, p. 6.

[51] *Ibid*, p. 6. The hostile intent of the target often plays a decisive role in the application of human rights law. The target's intention in the context of international humanitarian law, however, is irrelevant since the focus is on status or conduct. *Ibid.*

Accordingly, authorities should minimize to the greatest extent possible recourse to lethal force in circumstances of arrest and detention.[52] For example, where it is known that a person escaping from lawful detention poses no threat to life or limb and is not suspected of having committed a violent offence, recourse to deadly force does not meet the 'absolutely necessary' standard.[53]

Moreover, protection of the right to life requires states to ensure that their agents do not perform unregulated and arbitrary actions involving the use of lethal force.[54] Thus, governments must create a framework of rules and safeguards to guard against the arbitrary exercise of force.[55] This framework should include modern and effective laws regulating the use of weapons by state agents in peacetime,[56] as well as systems for planning and controlling law enforcement and anti-terrorist operations so as to minimise, as much as possible, resort to lethal force [57] In circumstances where the risk to innocents is great, the primary aim of such operations should be to protect lives from unlawful violence.[58]

Finally, the obligation to protect the right to life implicitly requires an effective form of official investigation when citizens die as a result of the use of force by state agents.[59]

[52] Putintseva v. Russia, para. 71. In *Putintseva*, the commandant of the detention facility entrusted care of the prisoner to a subordinate who, shortly before shooting the deceased, previously had a physical altercation with him. The ECtHR held that the Russian authorities failed to minimise possible recourse to lethal force and risk to the life of the deceased.
[53] *Ibid*, para. 69.

[54] *Case of Makaratzis v. Greece*, Judgment, ECHR, App. 50385/99, 20 December 2004, para. 58.

[55] In *Makaratzis*, the ECtHR concluded that Greece's laws concerning the use of firearms by police were 'obsolete and incomplete in a modern democratic society.' Thus, the 'chaotic' shooting of the deceased while the police effected his arrest constituted a violation of his right to life. *Ibid*, at paras. 58 and 70.
[56] *Ibid*, at para. 70.
[57] McCann and Others v. the United Kingdom, para. 193.
[58] Isayeva v Russia, para. 191.
[59] Juan Humberto Sánchez v. Honduras, para. 112.

B. The Rights to Freedom of Thought and Freedom of Expression

Throughout history and today, human societies often repress the freedom of thought, in particular new ideas.[60] Nevertheless, intellectuals have advocated the importance of this right for millennia. Socrates, for example, when tried for impiety and corruption of the youth of Greece, argued to the Athenians serving as his jurors that the greatest good of humankind is to discuss excellence, i.e. the improvement of the human condition.[61] In 1644, John Milton argued that a restriction on the expression of ideas 'strikes at that ethereal and fifth essence, *the breath of reason itself*; [and] slays an immortality rather than a life.'[62]

The exercise of freedom of thought 'is an axiom of human progress.'[63] This right refers to the freedom of individuals to have independent thoughts, ideas and beliefs.[64] Thus, it is 'largely exercised inside an individual's heart and mind;'[65] a 'far-reaching and profound' right that 'encompasses freedom of thought on all matters.'[66] The rights to freedom of thought and freedom to form and hold opinions are related[67] and both rights cannot be subject to derogation, even in times of emergency.[68] The imposition of an 'official ideology,' for example, cannot impair the freedom of persons who reject and/or oppose the official ideology.[69]

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[60] J Bury, *A History of Freedom of Thought* (1913) (London: Thornton Butterworth Ltd. 1932), p. 8.
[61] Plato, *Apology of Socrates* (around 399 B.C.), J Redfield, trans. p. 31, http://www.philosophy.uncc.edu/mleldrid/intro/apol.pdf.
[62] "Areopagitica: A Speech of Mr. John Milton for the Liberty of Unlicensed Printing to the Parliament of England' (Cambridge at the University Press, 1918), p. 7, http://files.libertyfund.org/files/103/1224_Bk.pdf.
[63] J Bury, A History of Freedom of Thought, p. 250.
[64] K Boyle, 'Thought, Expression, Association, and Assembly,' in Moeckli, International Human Rights Law, p. 261.
[65] Harris, Law of the European Convention on Human Rights, p. 594 (citing D Gomien, *Short Guide to the European Convention on Human Rights*, Council of Europe Press, 1991, p. 69).
[66] Human Rights Committee, General Comment 22, Article 18 (Forty-eighth session, 1993), <https://www1.umn.edu/humanrts/gencomm/hrcom22.htm>.
[67] Human Rights Committee, General Comment No. 34, *Article 19: Freedoms of Opinion and Expression*, 102nd Session, CCPR/C/GC/34, 12 September 2011, para. 5.
[68] Arts. 4 and 18, ICCPR; Art. 9, ECHR.
[69] General Comment 22, para. 10. A contemporary example of the effective use of state ideology to restrict freedom of thought is North Korea. 'The people of the DPRK are taught from young [sic] to revere the Kim family and to internalize the state ideology as their own thoughts and conscience.' … The DPRK operates an all-

The freedoms of expression and the right to thought are intrinsically linked as expression and the dissemination of ideas is crucial for the advancement of knowledge.[70] Freedom of expression subsumes the right to engage in open discussion of difficult problems in order to, inter alia, express opinions on possible solutions.[71] It also includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, in any media.[72] This last element is crucial for the existence of the right, which 'includes the right to hear other views and to exchange ideas and information with others.'[73] Thus, the right to freedom of expression is an essential foundation of a democratic society, 'one of the basic conditions for its progress and for the development of every man.'[74]

The rights to freedom of thought and freedom of expression are mutually reinforcing and enshrined in several international human rights covenants.[75] The guarantee of each right is necessary for the enjoyment of the other and indeed for the exercise of many human rights.[76] 'Thus, freedom of expression is necessary if freedom of thought is to be exercised. In turn freedom of expression has little meaning without the individual having freedom to think.'[77]

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encompassing indoctrination machine which takes root from childhood to propagate an official personality cult and to manufacture absolute obedience to the Supreme Leader (*Suryong*), effectively to the exclusion of any independent thought from the official ideology and state propaganda.' 'Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic Republic of Korea,' paras. 196 and 260.

[70] Areopagitica: A Speech of Mr. John Milton, p. 6. 'To advance knowledge and to correct errors, unrestricted freedom of discussion is required.' Bury, A History of Freedom of Thought, p. 239.

[71] *Case of Ceylan v. Turkey*, Judgment, ECtHR, no. 23556/94, 8 July 1999, para. 31.

[72] Art. 19, ICCPR.

[73] Boyle, 'Thought, Expression, Association, and Assembly,' p. 267.

[74] *Case of Handyside v. the United Kingdom*, Judgment, ECtHR, application no. 5493/72, 7 December 1976, para. 49. See *Rekvényi v. Hungary*, Judgment, ECtHR no. 25390/94, 20 May 1000, para. 42 (holding that freedom of expression is a basic condition for 'each individual's self-fulfillment').

[75] Boyle, 'Thought, Expression, Association, and Assembly,' p. 277. Also see articles 8 and 9 of the ACHPR (protecting the freedom of conscience, the right to receive information and the right to express and disseminate his opinions within the law). The ICCPR protects the right to both the freedom of thought (article 18) and freedom of expression (article 19). Articles 9 and 10 of the ECHR do the same.

[76] 'Freedom of Opinion and Expression: Mandate of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Human Rights Council, A/HRC/25/L.2/Rev.1, 24 March 2014, < http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G14/123/41/PDF/G1412341.pdf?OpenElement>.

[77] Boyle, 'Thought, Expression, Association, and Assembly,' pp. 257 – 258.

Law, like the state, cannot control the totality of human relations.[78] For example, law regulates the external conduct of persons;[79] it does not control their thought processes. Consequently, under international human rights law, states do not have the authority to restrict the right to freedom of thought under any circumstances.[80] States can constrain the right to freedom of expression, however, but only in very limited circumstances such as during periods of 'public emergency which threatens the life of the nation,'[81] or, in the interests of national security, territorial integrity or public safety, when the restrictions are prescribed by law and are necessary in a democratic society.[82] When these conditions are present, the interests of the society as a whole override the rights of the individual.[83] The interference with the right, however, must be proportionate to the legitimate aim. Thus, consistent with the concept of human dignity, only the minimum restriction of the right which secures the objective is permissible.

IV. The Use of Autonomous Weapon Systems and the Protection of the Rights to Life, Freedom of Thought and Freedom of Expression

A. Autonomous Weapon Systems and the Protection of the Right to Life

The jurisprudence of regional human rights courts requires states to plan and control law enforcement and anti-terrorist activities 'so as to minimise, to the greatest extent possible, recourse to lethal force.'[84] To achieve that objective, authorities must take all feasible precautions in the choice of means and methods of security operations.[85] '[T]he more predictable a hazard, the greater the obligation to protect against it.'[86] Thus, if the

[78] H Lauterpacht, *The Function of Law in the International Community* (Oxford: Clarendon Press, 1933), p. 390.
[79] *Ibid*.
[80] Articles 4, 5 and 18, ICCPR; Articles 9 and 15 of the ECHR.
[81] Article 4, ICCPR.
[82] Article 10, ECHR.
[83] B Rainey, et. al., *The European Convention on Human Rights* (6th ed.) (Oxford University Press, 2014), p. 309.
[84] McCann and Others v. the United Kingdom, para. 194.
[85] *Finogenov and Others v. Russia*, Judgment, ECtHR, Application No. 18299/03, 20 December 2011, paras. 208 and 209.
[86] *Ibid*, para. 243.

deployment of an autonomous weapon system – even one with lethal capabilities - feasibly can minimise the necessity of lethal force, international human rights law should require the use of the weapon.

However, as discussed above in section A, international human rights law provides that during peacetime, states may use lethal force only in three complex and value-laden situations: 1) to defend persons from unlawful violence; 2) to effect a lawful arrest or to prevent the escape of a lawfully detained person or 3) in lawful actions to quell riots or insurrections.[87] Moreover, a state's use of lethal force must be 'absolutely necessary and proportionate,'[88] which substantially reduces the incidence of lawful lethal force in law enforcement situations. The current generation of autonomous machines, however, cannot make such complex, values-based judgments.[89] Thus, the contemporary use of lethal autonomous weapons during law enforcement and/or anti-terrorist operations will violate international human rights law.

Will this situation change, however, when artificial intelligence capabilities advance? Might use of more advanced autonomous weapon systems in some situations reduce recourse to lethal force? Threats to the life and safety of law enforcement officials are a threat to the stability of society as a whole.[90] Thus, police officers and other state agents rightly can consider their own security when evaluating whether the use of lethal force is 'absolutely necessary' to save a third party, to apprehend a fleeing detainee, or to control a riot or

[87] Art. 1, European Convention for the Protection of Human Rights and Fundamental Freedoms.
[88] Putintseva v. Russia, para. 71.
[89] Professor Heyns contends that 'there is significantly less room' for the use of lethal autonomous weapons 'in law enforcement, where it will be difficult to outperform human beings.' C Heyns, Presentation to 2015 Meeting of Experts on LAWS, Convention on Certain Conventional Weapons, 16 April 2015, p. 10, <http://www.unog.ch/80256EE600585943/(httpPages)/6CE049BE22EC75A2C1257C8D00513E26?OpenDocument>.
[90] Preamble, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, Eighth United Naitons Congress on the Prevention of Crime and the Treatment of Offenders, 7 September 1990, http://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx.

insurrection.[91] Therefore, where it is known that a person facing arrest or escaping from lawful detention poses an imminent threat to the arresting officer, recourse to deadly force may meet the 'absolutely necessary' standard. But where the same suspect or detainee confronts an autonomous weapon, the presence of the autonomous weapon system should *preclude* the use of lethal force – which will not be absolutely necessary - unless the suspect poses an immediate danger to third parties in close proximity. In these circumstances, the use of autonomous weapons would result in reduced loss of life.

Legislators and other state institutions, in particular security forces, have a positive obligation to regulate 1) the deployment of autonomous weapon systems in law enforcement and anti-terrorist situations, and 2) the degrees of force that these systems may employ.[92] Accordingly, states will need new laws that regulate the use of autonomous weapon systems during law enforcement and anti-terrorist activities.[93] For example, as in the case of military operations, fast decisions and actions are important for successful police efforts to apprehend criminals, protect third parties, control riots, etc.[94] Nevertheless, the speed of decisions by autonomous weapon systems is inversely proportional to the degree of human judgment available to guide or override the machine. A balance must be struck, therefore, between faster, fully autonomous weapons systems and systems that permit the influence of human judgment over complex, value-based law enforcement decisions. Therefore, interdependent human-machine systems, a co-active design that ensures full compliance with human rights law, should be the subject of democratic debate and codified in legislation.

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[91] *Ibid*, paras. 9 and 16.
[92] The Massacres of El Mozote and Nearby Places v. El Salvador, paras. 145 - 146.
[93] Professor Heyns has suggested that it may be necessary to develop a system for autonomous weapons to be used in law enforcement that is analogous to the Article 36, API procedure. C Heyns, United Nations Special Rapporteur for Extrajudicial Executions, presentation at annual meeting of State Parties to the Convention on Certain Conventional Weapons, Geneva, 13 – 16 May 2014, p. 4, <http://www.unog.ch/80256EDD006B8954/(httpAssets)/DDB079530E4FFDDBC1257CF3003FFE4D/$file/Heyns_LAWS_otherlegal_2014.pdf>.
[94] Makaratzis v Greece, para. 70 (observing that the police officers involved in the fatal shooting under review did not have sufficient time to evaluate all the parameters of the situation and carefully organise their operation).

B. Autonomous Weapons and the Protection of the Rights to Freedom of Thought and Freedom of Expression

The design and use of autonomous weapon systems do not per se constitute affirmative restrictions or limitations on freedom of thought and expression. Government decisions and policies to design, develop and use weapons with autonomous functions are different from de jure laws, declarations or state practices *intended* to repress the rights to think, believe and express one's opinions. The latter are positive measures for the restriction of human rights. Instead, the delegation from humans to machines of responsibility for complex, value-based decisions concerning the use of force effectively transforms these rights (and human dignity) into impotent and unnecessary concepts. States and groups that field these autonomous weapons exchange – in a de facto sense - the importance of human thought and expression (personal autonomy) for the value of speed in the exercise of violence. Soldiers, police officers and their commanders can use their intellects and communication skills to influence the use of non-autonomous weapons such as rifles and tanks. The purpose of autonomous weapon systems, however, is to obviate the need for thought, reason and expression in the interests of achieving military and/or law enforcement advantage.

The right to thought must, logically, include the right and ability to determine our moral and legal responsibilities. Moral reasoning, in particular, involves drawing on an embedded series of convictions about value, each of which could, in turn, draw on other such convictions.[95] Yet, this process is never complete as humans constantly reinterpret their concepts as they use them.[96] We reinterpret our normative values to resolve our dilemmas and progress towards a more integrated understanding of our responsibilities.[97] We do this to

[95] R Dworkin, *Justice for Hedgehogs* (Cambridge, Massachusetts: Harvard University Press, 2011), pp. 118 – 119.
[96] *Ibid*, p. 119.

[97] *Ibid.*

strengthen respect for our own human rights and the rights of others, and to advance our personal autonomy.

International human rights jurisprudence (consistent with my inclusion of 'personal autonomy' as a component of human dignity), describes how 'the notion of personal autonomy is an important principle *underlying the interpretation*' of human rights guarantees.[98] As discussed above, underlying the right to freedom of thought is the ability to develop and employ one's powers of reasoning. In chapter three, I explained that the dignity of right-holders arises generally from the capacity and autonomy of persons to bear the responsibilities implicit in the right. In chapter four, however, I described how the increased use of autonomous weapon systems will limit the development of powers of human reasoning and judgment that arise from important experiences, thereby reducing the ability of individuals to bear and exercise these responsibilities. This constraint on personal autonomy, whether viewed as a violation of human dignity, as a violation of the right to freedom of thought, or both, contravenes international law.[99] Moreover, this dynamic exists regardless of whether the autonomous weapon system eventually exercises lethal force. Indeed, it is precisely those decisions *not* to use force that often require the most sophisticated and courageous forms of thinking and reasoning.[100]

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[98] *Case of Pretty v. The United Kingdom*, Judgment, ECtHR, application no. 2346/02, 29 July 2002, para. 61 (emphasis added).

[99] John Locke called the human ability to form and exercise judgments 'the end and use of our liberty.' *An Essay Concerning Human Understanding*, 1690, Chapter XXI, para. 49, <https://ebooks.adelaide.edu.au/l/locke/john/l81u/B2.21.html>.

[100] Professor Heyns argues that the deployment of lethal autonomous weapons will eviscerate human hope for expressions of compassion or last minutes changes of mind about the use of force. 'Dignity in many instances depends on hope, and high levels of lethal machine autonomy can do deep damage to our collective sense of worth.' Heyns, Autonomous Weapon Systems and Human Rights Law,' pp. 8 and 9. C Heyns, 'Autonomous Weapon Systems and Human Rights Law,' Presentation Made at Informal Expert Meeting Organized by the State Parties to the Convention on Certain Conventional Weapons, Geneva, 13 - 16 May 2014, p. 7 - 9, <http://www.unog.ch/80256EDD006B8954/(httpAssets)/DDB079530E4FFDDBC1257CF3003FFE4D/$file/Heyns_LAWS_otherlegal_2014.pdf>.

Part of personal autonomy entails making decisions about moral and legal values.[101] Our decisions may not always be – objectively – the 'right' decision. But that is not the point. The benefits (and the human dignity) are in the process and it is immoral, therefore, to restrict the ability of persons to have moral ideas.[102] That is one reason why the right to thought is so important.

In addition, as discussed in chapter four, the right to thought has a crucial relationship to the broader concepts of the function and the 'rule of law.' Through the promulgation of laws, the right to thought permits societies to express the humanity of individuals:

> 'The social nature of man; his physical and mental constitution; his sentiment of justice and moral obligation; his instinct for individual and collective self-preservation; his desire for happiness; his sense of human dignity; his consciousness of man's station and purpose in life – all these are not products of fancy but objective factors in the realm of existence. As such, they are productive of laws which may be flouted by arbitrariness, ignorance, or force, but which are in conformity *with the more enduring reality of reason and the nature of man.*'[103]

Thus, as we narrow opportunities for thought, we restrict our development as moral persons, including our ability to make and use laws.

Every right, however, must have a right holder.[104] When autonomous weapon technology demands the delegation of value-based decisions to computer software, soldiers, police officers and their commanders (as well as members of armed forces) and any other persons usually tasked with determinations about the use of force, lose an important aspect of their dignity and freedom of thought. They are denied the opportunity to assess their moral and legal responsibilities and gain the essential intellectual capacities and knowledge that

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[101] Essentially law is an extension of morality. M Minnow, 'In Memoriam: Ronald Dworkin,' 127 *Harvard Law Review* 2 (2013), 504.

[102] The price of 'intellectual pacification is the sacrifice of the entire moral courage of the human mind.' J Mill, 'On Liberty,' in D Miller (ed.), *The Basic Writings of John Stuart Mill*, D Miller (New York: The Modern Library, 2002), p. 34.

[103] H Lauterpacht, *An International Bill of the Rights of Man* (1945) (Oxford University Press, 2013), p. 35 (emphasis added).

[104] I Bantekas & L Oette, *International Human Rights Law and Practice* , 2nd ed. (Cambridge University Press, 2016), p. 72.

results from this experience.[105] They are denied, therefore, the *development* of their personal autonomy.[106]

One might argue that individuals *do not have to be* police officers or soldiers. Policemen and women, after all, can refuse to follow orders and/or use certain weapons and officers can resign their positions. Indeed, in states where 'volunteer' armies are the norm, no one need put herself in a position whereby she might have to cede her responsibilities to a machine. While this claim may be true, it misses the point. The result still will be that human beings will not develop the ability to perform the kinds of moral and legal reasoning necessary to make difficult decisions during armed conflict and law enforcement operations. This narrowing of thousands of years of human thinking is plainly inconsistent with the norm of human dignity and, therefore, human rights law. Thus, in addition to individuals, society as a whole suffers constraints on its 'rights' to freedom of thought and expression, similar to states that impose particular forms of indoctrination on its citizens.

Others might contend that the use of autonomous weapon systems simply creates new forms of thinking and new methods to address moral and legal questions. Yet this seems to be a disingenuous and illogical argument. One cannot abdicate opportunities for moral and legal reasoning, and then call it 'new forms of reasoning.' Similarly, as described in chapter five, the reasoning applied to orders to deploy autonomous weapons, or the act of programming their onboard computers, ignores many of the moral and legal balancing processes inherent to the law of targeting and the use of lethal force in war and peacetime.

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[105] It is indispensable, argued Mill, to enable human beings to attain the mental stature which they are capable of. 'On Liberty,' p. 35.

[106] As I acknowledged in Part V, Section B of chapter 4, humans already delegate important responsibilities for certain tasks to machines with autonomous functions. Commercial airplanes, for example, operate extensively on 'autopilot' where the pilot does not physically control the plane. Nevertheless, there is a major qualitative difference between autonomous technology programmed to comply with 'mechanical' rules that normally require little human thought -- such as altitude levels for airplane autopilots – and autonomous technology that is programmed to apply complex and sometimes contradictory instructions and values in fluid and confusing circumstances, resulting in the destruction of life and infrastructure.

When human beings leave these processes to software, whether as a matter of policy, for strategic or tactical reasons, or simply out of convenience, the result is a restriction of the human dignity that underlies the right to freedom of thought.

As discussed above, the right to freedom of thought is non-derogable. In certain situations, however, persons can waive their human rights if they do so on the basis of informed consent.[107] However, no such waivers of human rights are acceptable when they contradict an important public interest.[108] As explained above and in chapter four, the freedom of thought (and speech) 'is the matrix, the indispensable condition, of nearly every other form of freedom.'[109] As it is indisputable that the maintenance of the right to freedom of thought constitutes an important public interest, international human rights law disallows 'waivers' of this right produced by the employment of autonomous weapon systems.

Constraints to the right to freedom of expression, however, require a different analysis. The imperative of national security can justify restrictions to the right to freedom of expression.[110] National security concerns 'protect the safety of the State against enemies who might seek to subdue its forces in war or subvert its government by illegal means.'[111] In disputes where a state justifies a limitation of the right to freedom of expression on national security grounds, human rights courts must determine whether the restriction strikes a fair

[107] *Case of D.H. and Others v. The Czech Republic*, Judgment, ECtHR, Application No. 57325/00, 13 November 2007, para. 202.
[108] *Ibid*, para. 204. In D.H., the ECtHR held that Roma parents could not waive their right not to be discriminated against.
[109] *Palko v. Connecticut*, 302 U.S. 319 (1937), 326 – 327. The U.S. Supreme Court overruled Palko (but left this reasoning intact) in *Benton v. Maryland*, 395 U.S. 784 (1969).
[110] *Adams and Benn against the U.K.*, European Commission of Human Rights, 13 January 1997, <http://caselaw.echr.globe24h.com/0/0/united-kingdom/1997/01/13/adams-and-benn-v-the-united-kingdom-3464-28979-95.shtml>.
[111] Rainey, The European Convention on Human Rights, pp. 315 – 316, quoting P Kempees, '"Legitimate Aims" in the Case-Law of the European Court of Human Rights,' in *Protecting Human Rights: The European Perspective: Studies in Memory of Rolv Ryssdal*, Koln, Carl Heymanns, 2000, p. 662.

balance between the individual's fundamental right to freedom of expression and a democratic society's right to protect itself against internal or external threats.[112]

'Extraordinary situations may not wisely or fairly be subjected to tests or regulations that are fitting for the commonplace or normal.'[113] Thus, the European Court of Human Rights grants states a wide margin of appreciation when national security interests are implicated given that the protection of large numbers of persons is at stake and that states often base their decisions to limit the exercise of rights on very sensitive information.[114] Indeed, the Court's jurisprudence holds that dissemination of information about a new weapon outside the armed forces can cause considerable damage to national security.[115] Therefore, national security grounds can justify limitations on the right to freedom of expression that arise when states field lethal autonomous weapons.

V. The Interplay of International Human Rights Law and International Humanitarian Law

As discussed in chapter five, during armed conflict international humanitarian law protects certain categories of persons from deliberate targeting by belligerents. Conversely, under the same body of law, the intentional killing of enemy combatants and civilians directly participating in hostilities is lawful. However, international human rights law prescribes standards for the use of lethal force that are more rigorous than the laws of war. If belligerents must uphold the protection against 'arbitrary' deprivations of life in conditions of armed conflict, armed forces and organized armed groups must consider whether their use of autonomous weapon systems complies with the requirements of international human rights law. This section examines the application of international human rights law during armed

[112] *Case of Zana v. Turkey*, Turkey, ECtHR Application No. 18954/91, 25 November 1997, para. 55.
[113] *Pokora v. Wabash Railway Co*., 292 U.S. 98 (1934), pp. 105 – 106.
[114] Rainey, The European Convention on Human Rights, p. 330.
[115] *Case of Hadjianastassiou v. Greece*, Judgment, ECtHR, Application No. 12945/87, 16 December 1992, para. 45.

conflict and its relationship with international humanitarian law. It foreshadows how the development and use of autonomous weapon systems can shape this relationship.

Although international humanitarian law and international human rights law are distinct bodies of law, they protect similar principles and interests[116] and, as explained in the previous chapter, in a normative sense, modern international humanitarian law has roots in international human rights law. For example, the principle of humanity in international humanitarian law and related rules such as the duty to distinguish between combatants and civilians and the obligation to treat prisoners and wounded combatants decently are linked to fundamental human rights such as the right to life, the right to be free of torture, cruel and inhuman treatment, etc.[117] Indeed, the Geneva Conventions contain certain norms that can be regarded as *jus cogens*; those higher rights that are invoked as moral and legal barriers to derogations from violations of human rights.'[118]

Thus, '… humanitarian law also contains a prominent human rights component'[119] and human rights law continues to apply during armed conflict. According to the International Court of Justice, international humanitarian law is the *lex specialis* designed to regulate the conduct of hostilities, while international human rights law continues to function as the *lex generalis*.[120] Consequently, some circumstances in armed conflict may conform only to

[116] 'Both bodies of law take as their starting point the concern for human dignity, which forms the basis of a list of fundamental minimum standards of humanity.' *Prosecutor v. Zejnil Delalić, et. al*, Judgment, IT-96-21-A, 20 February 2001, para. 149.
[117] The preamble to APII recalls 'that international instruments relating to human rights offer a basic protection to the human person' but a need exists to ensure a better protection for the victims of armed conflicts.
[118] T Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989), p. 9. For example, Common Article 3's requirement that civilians and persons hors de combat must be treated humanely 'is an overarching concept,' given expression by the detailed rules incorporated into modern international humanitarian law. 'Commentary,' *Rule 87. Humane Treatment*, ICRC Customary International Humanitarian Law Study, <https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32_rule87>.
[119] Meron, Human Rights and Humanitarian Norms as Customary Law, p. 10.
[120] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, International Court of Justice, 8 July 1996, para. 25. The principle of lex specialis derogat lex generali stands for the idea that because general rules may be interpreted in more than one way, we should interpret them in light of specific rules rather than vice versa. W Abresch, 'A Human Rights Law of Internal Armed Conflict: the European Court of Human Rights in Chechnya,' 16 *European Journal of International Law* (2005), 741, 744. For a strong critique of lex specialis as an interpretive model for analysis of the relationship between international humanitarian law and international

matters of international humanitarian law; others may speak exclusively to international human rights law, and others may implicate both branches of international law.[121] In its Judgment in the 'Case Concerning Armed Activities on the Territory of the Congo,' for example, the Court ruled that Ugandan forces, as the occupying power of parts of the Democratic Republic of Congo, were obliged to secure respect for the applicable rules of international humanitarian law *and* international human rights law.[122]

In some situations, therefore, international human rights law can inform (if not control) the scope of law of war obligations. For example, the ability of persons interned during armed conflict to appeal the restrictions on their freedom provides the protected persons a stronger guarantee of fair treatment[123] and layers the application of international humanitarian law with responsibilities imposed by international human rights law. The human right to fair legal procedures also resonates in Article 84 of Geneva Convention (III) Relative to the Treatment of Prisoners of War, which provides: '[A] prisoner of war shall be tried only be a military court, …. In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality….' These 'essential guarantees,' and others, are enshrined, inter alia, in Article

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human rights law, see M Milanović, 'Norm Conflicts, International Humanitarian Law and Human Rights Law,' in Orna Ben-Naftali (ed.), *Human Rights and International Humanitarian Law: Collected Courses of the Academy of European Law*, Vol. XIX/1 (Oxford University Press, 2010).

[121] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, International Court of Justice, 9 July 2004, para. 106. The Court held that Israel, by constructing a wall that passed through occupied territory, breached various obligations under the applicable international humanitarian law and international human rights law. *Ibid*, para. 137. C.f. *Case of Al-Jedda v. The United Kingdom*, Judgment, ECtHR, 7 July 2011, para. 105.

[122] *Case Concerning Armed Activities on the Republic of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, paras. 179 and 216 – 220. Professor Schabas interprets the Court's language as treating international humanitarian and international human rights law 'as two complementary systems, as parts of a whole.' W Schabas, 'The Right to Life,' in A Clapham et. al. (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press, 2014), p. 5.

[123] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, para. 368 (2).

14 of the ICCPR.[124] Thus, parties holding prisoners of war should look to international human rights instruments when they initiate proceedings under Article 84.

Conversely, as mentioned above, relevant provisions of international humanitarian law instruments serve as guides for the interpretation of international human rights law.[125] For example, Article 9 (1) of the ICCPR provides that '[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.' During international armed conflicts the Fourth Geneva Convention grants Occupying Powers the authority to intern protected persons 'for imperative reasons of security.'[126] Thus, in these circumstances, allegations of violations of Article 9 (1) should be viewed through the lens of the Fourth Geneva Convention.

In important ways, 'the standards of human rights law, at least as applied by the [European Court of Human Rights], are probably more rigorous than those of international humanitarian law.'[127] For example, international humanitarian law permits combatants to kill their enemy in situations where capture might be an alternative.[128] The European Court of

[124] C.f. art. 6, ECHR; art. 8, ACHR; art. 7, ACHPR.
[125] *Case of Bámaca Velásquez v. Guatemala*, Judgment, Inter-Am. Ct. H.R, 25 November 2000, para. 209.
[126] Art. 78 of Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949. Persons interned pursuant to Art. 78 need not be guilty of any violation of the laws of the Occupying Power. Nevertheless, that Power may consider them dangerous to its security and thus entitled to restrict their liberty of movement. ICRC Commentary to Art. 78, para. 368 (1), <http://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleUNID=0DFFF94F559B0D17C12563CD0051C023>. C.f. articles 40, 41 and 42.
[127] F Hampson, Written Statement, Appendix 3 to 'Expert Meeting,' *The Use of Force in Armed Conflicts: Interplay Between the Conduct of Hostilities and Law Enforcement Paradigms*, Geneva, ICRC, 2013, p. 78.
[128] Unless a combatant is hors de combat, she can be made the object of attack by her adversary. JSP 383, *The Joint Service Manual of the Law of Armed Conflict*, U.K. Ministry of Defence, 2004, para. 5.5. See art. 23 (c), Regulations Respecting the Laws and Customs of War on Land, 1907 Hague Convention IV Respecting the Laws and Customs of War on Land (It is forbidden to 'kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion;').

Human Rights, on the other hand, requires that every use of lethal force be 'no more than absolutely necessary' to achieve the desired aim.[129] As Professor Hampson observes:

> '… the key distinction between an international humanitarian law analysis and a human rights law analysis is that the former allows targeting by reference to status. That means that a person can be targeted on account of their membership of a group, whether that is opposing armed forces or an organised armed group in which the individual exercises a continuous combat function. Generally speaking, a human rights paradigm only allows targeting based on the behaviour of the individual targeted.'[130]

The precise contours, however, of the application of international human rights law during armed conflict, and its interplay with international humanitarian law, remain a matter of debate. Preliminarily, there is no single applicable rule that controls the relationship between the two regimes.[131] Professor Jinks makes an articulate argument that international humanitarian law 'is best understood as a floor of humanitarian protection – but the application of this law does not require the level of legal protection down to this floor. … the inference that the [Geneva] Conventions displace much, if not all, of international human rights law is unwarranted.'[132]

The European Court of Human Rights takes a similar view. In Hassan v. the United Kingdom, the Court concluded, first, that international human rights law continues to apply during international armed conflict, 'albeit interpreted against the background of the provisions of international humanitarian law.'[133] In the words of the majority, relevant

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[129] Isayeva v Russia, para. 181. The Isayeva case addressed the deaths of civilians as a consequence of the Russian military's bombing of a village in Chechnya during the Chechnyan internal armed conflict in 2000. In an effort to avoid the ultra vires application of international humanitarian law, the ECtHR disingenuously described the context of the events as 'outside wartime' and implied that the Russian armed forces were a 'law enforcement body.' *Ibid*, para. 191. This jurisprudence raises the question whether the ECtHR disregards international humanitarian law, at least in internal armed conflict. Abresch, 'A Human Rights Law of Internal Armed Conflict: the European Court of Human Rights in Chechnya,' 746.

[130] Hampson, Written Statement, p. 69.

[131] *Case of Hassan v. The United Kingdom*, Judgment, ECtHR, Application No. 29750/09, 16 September 2014, para. 95 (referring to submission of third party Human Rights Centre of the University of Essex).

[132] D Jinks, 'International Human Rights Law in Time of Armed Conflict,' in Andrew Clapham et. al. (eds), The Oxford Handbook of International Law in Armed Conflict, pp. 3 and 4.

[133] Hassan v. The United Kingdom, para. 104. This language appears to be an implicit rejection of a rigid application of the 'lex specialis' terminology originally used by the International Court of Justice in the 'Nuclear Weapons' Advisory Opinion, para. 25.

provisions of international human rights covenants 'should be accommodated, as far as possible' with the relevant laws of war.[134] Thus, when circumstances arise where conflicting rules of both regimes apply, preference can be given (implicitly) to the rules of international humanitarian law. In Hassan, the applicant was an Iraqi citizen detained, 'screened' and released by British forces in April 2003. The Court observed that Hassan's capture and detention was consistent with the rules prescribed in the Third and Fourth Geneva Conventions.[135] Accordingly, the Court ruled that Hassan's detention conformed with the essential purpose of Article 5 (1) of the European Convention of Human Rights, which is to protect the individual from arbitrary detention.[136]

Perhaps no aspect of the interplay between international humanitarian law and international human rights law is more controversial today than the 'kill or capture' debate emanating from the 'Interpretive Guidance on the Notion of Direct Participation in Hostilities Under IHL'[137] ('Interpretive Guidance'), published by the International Committee of the Red Cross ('ICRC'). In part IX of the Interpretive Guidance, the ICRC opined:

> In addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must

[134] *Ibid.* C.f. Serdar Mohammed v. Ministry of Defence, Judgment, Case No. HQ12X03367, 2 May 2014, para. 288, (holding that in a situation where a more specialised body of international law also applies, provisions of the Convention should be interpreted as far as possible in a manner consistent with that *lex specialis*).

[135] Arts. 4 (A) and 21 of Geneva Convention III Relative to the Treatment of Prisoners of War of 1949 and Arts. 43 and 78 of Geneva Convention IV Relative to the Protection of Civilian Persons of 1949.

[136] Hassan v. The United Kingdom, Judgment, paras. 105 – 11. The Court specified that its broad interpretation of a state's powers of detention under Art. 5 of the ECHR – and the Court's implicit deference to the laws of war in situations of capture or internment - could only apply to an international armed conflict where the safeguards provided by international humanitarian law and international human rights law co-exist. *Ibid*, para. 104. In a strongly-worded dissent, however, five judges contended that the majority decision 'effectively disapplies or displaces' the ECHR's fundamental safeguards for permissible detention 'by judicially creating a new, unwritten ground for a deprivation of liberty and hence, incorporating norms from another and distinct regime of international law in direct conflict with the Convention provision.' Partially Dissenting Opinion of Judge Spano, Joined by Judges Nicolaou, Bianku and Kalaydjieva, para. 18. Effectively, the Court incorporated the rules concerning capture and internment (from the law of armed conflict) into Article 5 of the ECHR. C De Koker, 'A Different Perspective on Hassan v. United Kingdom: A Reply to Frederic Bernard,' *Strasbourg Observers*, 14 October 2014, <http://strasbourgobservers.com/2014/10/14/a-different-perspective-on-hassan-v-united-kingdom-a-reply-to-frederic-bernard/>.

[137] N Melzer, May 2009, <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>.

not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.[138]

Effectively, the ICRC suggests that international law prohibits (or should prohibit) soldiers from killing enemy combatants when the possibility of capture or other non-lethal means to neutralise the enemy exists.[139] This constraint is consistent with the 'absolutely necessary' standard for the use of lethal force under human rights law reflected in the jurisprudence of the European Court of Human Rights. The language of the more recent Hassan judgment, directing states to accommodate, 'as far as possible' relevant provisions of international human rights law with the rules of international humanitarian law, echoes the Interpretive Guidance.[140]

Part IX of the ICRC's Interpretive Guidance has been the subject of sustained and forceful criticism, in particular from international humanitarian law experts with military expertise,[141] who contend that the ICRC incorrectly imposes international human rights standards into the norms and obligations of the law of war. Indeed, the capture-if-possible standard proposed in the Interpretive Guidance is absent from the ICRC's extensive study and

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[138] *Ibid*, at 77.

[139] *Ibid*, 82. The Israeli Supreme Court has taken a similar position with respect to the possible arrest of suspected terrorists, in particular under conditions of belligerent occupation. Thus, in Israeli domestic law, 'among the military means, one must choose the means whose harm to the human rights of the harmed person is smallest.' *The Public Committee Against Torture in Israel v. The Government of Israel* ('Targeted Killing Case'), Judgment, HCJ 769/02, 11 December 2005, para. 40. Importantly, the Court based its decision on 'the rules of international law' as well as Israeli law. *Ibid*, para. 61.

[140] As one commentator observed, it is unsurprising that, in Hassan, the ECtHR rejected the United Kingdom's argument that the application of international humanitarian law in the circumstances excluded the authority of international human rights law. The majority decision, like the Interpretive Guidance, strengthens the jurisdiction of international human rights law during armed conflict. S Rau, *EJILTalk*, 18 September 2014, <http://www.ejiltalk.org/the-grand-chamber-judgment-in-hassan-v-uk/>. Professor Milanović refers to this jurisprudence as an example of the Court's 'interpretive self-empowerment.' M Milanovic, 'A Few Thoughts on Hassan v. United Kingdom,' *EJILTalk*, 22 October 2014, http://www.ejiltalk.org/a-few-thoughts-on-hassan-v-united-kingdom/.

[141] M N Schmitt, 'The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis' 1 *Harvard National Security Journal* (2010), 5 - 44; W H Parks, 'Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect,' 42 *International Law and Politics* (2010), 769; K Watkin, 'Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance' 42 *International Law and Politics* (2010), 641. For a more positive view, see the remarks of R Goodman in 'The Changing Character of the Participants in War: Civilianization of War-Fighting and the Concept of "Direct Participation in Hostilities"' (US Naval War College, International Law Conference 2010) <http://www.usnwc.edu/Events/International-Law-Conference-2010.aspx> accessed 27 August 2012.

formulation of rules of modern customary international humanitarian law.[142] Furthermore, the ICRC position contradicts a 2003 NATO policy that '[t]here is no legal obligation to resort to non-lethal force when lethal force is authorised and today there is no foreseeable reason why this may change in the future.'[143]

Time will tell whether states will adopt the Interpretive Guidance's more restrictive approach to the use of lethal force during armed conflict.[144] The increasing use of autonomous weapon systems, however, could facilitate the development of state practice and opinio juris in this direction. The availability of autonomous weapon systems with the capacity to make these 'capture or kill' judgments puts fewer human soldiers at risk from enemy combatants and reduces the dangers of efforts to capture the enemy (i.e. the dangers of accommodating international human rights law).[145] Thus, by fielding sophisticated autonomous weapon systems, belligerent parties reduce the number of situations where the use of lethal force is 'actually/absolutely necessary,' thereby changing the balance between military assessment and humanity. Therefore, modern armed forces that follow the ICRC's standard and field lethal autonomous weapon systems will constantly assess whether it is inappropriate (if not illegal) to use lethal force instead of capturing enemy combatants.

Artificial intelligence software has not yet advanced to a level whereby computers can make complex, value-based determinations as to the 'actual/absolute necessity' of using lethal force against enemy targets to serve 'a legitimate military purpose' in the 'prevailing circumstances.' However, should the Interpretive Guidance's standard for the use of lethal

[142] Customary International Humanitarian Law Database, <https://www.icrc.org/customary-ihl/eng/docs/home>.
[143] The RTO Studies, Analysis and Simulation Panel (SAS), 'NATO Policy on Non-Lethal Weapons' (Annex B to RTO-TR-SAS-040, Non-Lethal Weapons and Future Peace Enforcement Operations, December 2004, in (n 65) 5-2, <http://www.cso.nato.int/pubs/rdp.asp?RDP=RTO-TR-SAS-040>.
[144] Hitoshu Nasu contends that the power to kill or capture debate should be seen as a possible future legal approach to weapons law, 'heralding a new humanitarian law era in which questions concerning "humane" ways to attack lawful targets may be more fully explored, rather than an argument that reflects lex lata.' 'Nanotechnology and the Future of the Law of Weaponry,' 91 *International Law Studies* (2015), 486, 508 – 509.
[145] For a discussion of the related issue of the capacity of autonomous weapon systems to recognize the intent of combatants to surrender, see R Sparrow, 'Twenty Seconds to Comply: Autonomous Weapon Systems and the Recognition of Surrender,' 91 *International Law Studies* (2015), 699.

force one day become an obligation under customary international humanitarian law, the fielding of autonomous weapon systems lacking this capacity will violate the law's prohibition of means and methods of warfare designed to cause unnecessary suffering. Under the same standard, use of these weapons to exercise lethal force potentially would violate international human rights law's proscription of arbitrary deprivations of the right to life.

The analysis should not end, however, when artificial intelligence in autonomous weapon systems possesses the capability to make the complex assessments necessary to fulfil the Interpretive Guidance's rigorous standard for the exercise of lethal force. It must be determined whether, under international humanitarian law as well as international human rights law, the delegation of power and responsibility to make such decisions from humans to machines comports with the rights to freedom of thought and expression and, by extension, human dignity. That is the subject of the next section of this chapter.

VI. Autonomous Weapons, Human Dignity and the Interplay of International Humanitarian Law and International Human Rights Law

In chapter five, we saw how the delegation of responsibility from persons to lethal autonomous weapon systems for complex, value-based decisions during armed conflict violates human dignity. Norms with sufficient importance to apply during wartime - in particular the value of human dignity - ought to apply during peacetime as well.[146] If state authorities can protect (or take) human life in armed conflict, law enforcement, or anti-terrorist operations without recourse to autonomous weapons, they protect the human rights

[146] Schabas, 'The Right to Life,' p. 7.

and dignity of all parties: state agents compelled to use force and, in law enforcement situations, persons facing imminent threats to their lives.[147]

Nonetheless, as described above, a tension arises in human rights law between the state imperative to protect the right to life of third parties against unlawful force, the loss of human dignity arising from constraints to freedom of thought, and the use of autonomous weapon systems. The exercise of lethal force by autonomous weapon systems is not wholly inconsistent with the obligation to protect human dignity because the use of force may be necessary to secure rights against persons intending to violate them.[148] Furthermore, the use of lethal autonomous weapons might be more effective at saving innocent lives than men and women conducting security actions for the state. If that contention is correct, then autonomous machines can protect the fundamental right to life (and the value of human dignity) more successfully.

I explained previously that, when state agents use lethal force with the aim of protecting persons from unlawful violence, deadly force must be absolutely necessary. 'Necessity' requires that (proportionate) force only be used as a last resort and, in such circumstances, states should use a graduated approach. The precondition of a graduated approach in the use of force in law enforcement or anti-terrorist environments completely vitiates one of the primary reasons to field autonomous weapons: the ability to act with exceptional speed. It would be illogical, therefore, to employ such weapons and hence devalue the right to freedom of thought and the dignity of state agents, when the use of conventional weapons could achieve the same result.

[147] 'Protection of the right to life must be implemented in a way that respects the human dignity of the protected individuals *and of those called upon to protect them.*' Benvenisti, 'Human Dignity in Combat: The Duty to Spare Enemy Civilians, 109 (emphasis added).

[148] See Benvenisti, 'Human Dignity in Combat: The Duty to Spare Enemy Civilians,' 86 (noting, similarly, that the principle of human dignity is not inconsistent with armed conflict, as conflict may be necessary to protect rights).

That leaves two legal arguments in support of the premise that human rights law demands the employment of autonomous weapon systems in law enforcement and anti-terrorist operations. First, circumstances could arise both during armed conflict and peacetime where the use of autonomous weapon systems could reduce (at least in the short term) human rights violations. For example, in one scenario autonomous weapon systems might neutralize, more quickly and accurately than human soldiers or police, an armed group that is detaining and mistreating civilians. In such situations, concerns about law and human dignity arguably would demand their use. A similar situation might arise where the only available soldiers or police officers available to a commander have a history of disrespect for the rules of international humanitarian law and/or human rights law.

Second, as described above, in certain law enforcement situations, the presence of an autonomous weapon system should preclude the use of lethal force – which will not be absolutely necessary - unless an alleged criminal poses an immediate danger to third parties in close proximity. In these circumstances, the availability of autonomous weapons will curtail the use of 'absolutely necessary' lethal force and place fewer state agents in harm's way. If, as discussed above, state officials must plan and control activities during law enforcement and anti-terrorist operations so as to minimise, as much as possible, recourse to lethal force, human rights law (and the underlying value of human dignity) seems to require the use of autonomous weapons.

These arguments, however, actually support the claim that the *systematic* use of autonomous weapons vitiates the right to freedom of thought. If a military commander or a law enforcement officer has the ability to identify those situations where autonomous weapon systems lawfully can be used, she will do so based on her background, experience and

accumulated knowledge.[149] These qualities of reason and reflection – the capacity to exercise the right to thought -- will not develop (much less be used) when the employment of autonomous weapons becomes the norm rather than the exception.

Moreover, laws are means to ends. As explained in chapter four, they help individuals and communities to adjust their rights between them. The adjustment of rights is necessary, inter alia, to preserve the moral principles of every society.[150] Often, this process presupposes a complex weighing of different interests at stake[151] and states deserve a margin of appreciation as regards the means to strike a balance between the protection of different rights.[152] Indeed, where human rights are 'pitted against each other, …' '"respect for human freedom and human dignity" may prevail.'[153] As discussed in chapters four and five, if dignity is to be a meaningful concept in international law, it should receive greater weight in some cases than the right to life. Thus, for example, a number of countries qualify the right to life by permitting terminally ill persons to receive lethal drugs and/or the assistance of physicians to end their lives[154] and their 'constant and unbearable physical or mental suffering.'[155]

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[149] W Boothby, *The Law of Targeting* (Oxford University Press, 2012), p. 409.
[150] *Case of A, B and C v. Ireland*, Judgment, ECtHR, Application, No. 25579/05, 16 December 2010, paras. 222 – 228.
[151] *Case of Haas v. Switzerland*, Judgment, ECtHR, No. 31322/07, 20 January 2011. In Haas, the ECtHR weighed a person's right (of privacy) to determine when and how her life should end versus the state's interest to protect public health and avoid abuse of vulnerable persons. *Ibid*, paras. 53 – 58. While ultimately ruling in favour of Switzerland, the Court acknowledged that the applicant enjoyed a right to choose the time and manner of his death. *Ibid*, para. 60.
[152] *Case of Lambert and Others v. France*, Judgment, ECtHR, Appliction No. 46043/14, 5 June 2015, para. 148. Margins of appreciation are not unlimited and 'must always be viewed in light of the values underpinning the Convention, chief among them the right to life.' *Ibid*, Joint Partly Dissenting Opinion of Judges Hajiyev, Šikuta, Tsotsoria, De Gaetano and Gritco, para. 7.
[153] *Ibid*, para. 3, citing Case of Pretty v. the United Kingdom, *ECtHR*, No. 2346/02, 29 April 2002, para. 65.
[154] 'Netherlands Termination of Life on Request and Assisted Suicide (Review Procedures)' (2002), <https://www.government.nl/topics/euthanasia/contents/euthanasia-assisted-suicide-and-non-resuscitation-on-request>; 'The Belgian Act on Euthanasia of 28 May 2002, <http://www.ethical-perspectives.be/viewpic.php?LAN=E&TABLE=EP&ID=59>; In Colombia, the Constitutional Court authorized the practice of assisted suicide in 1997. However, no law exists that specifies the parameters for performing the procedure. P Sierra Palencia, 'Por Quinta Vez, Se Abre el Debate de la Eutanasia en el Congreso,' El Heraldo, 9 Noviembre, 2014, <http://www.elheraldo.co/nacional/por-quinta-vez-se-abre-el-debate-de-la-eutanasia-en-el-congreso-173293>; Luxembourg Law of 16 March 2009 on Euthanasia and Assisted Suicide, <http://www.luxembourg.public.lu/en/vivre/famille/fin-vie/euthanasie-soinspalliatifs/index.html>; In South

Indeed, the Canadian Supreme Court held that bans on 'physician-assisted dying' violated, inter alia, *the right to life* because 'the prohibition deprives some individuals of life, as it has the effect of forcing some individuals to take their own lives prematurely, *for fear that they would be incapable of doing so* when they reached the point where suffering was intolerable.'[156] In addition, the Court concluded that Canada's ban violated the rights to liberty and security of the person, which includes a person's dignity and autonomy.[157] Therefore, compliance with the law (in this case the right to protection of life) is self-defeating if compliance implies harmful consequences for the spirit and purpose of the law.

'If the burdens [of protecting life] surpass the benefits, then the state's obligation may, in appropriate cases, cease.'[158] A possible duty on states to use autonomous weapon systems, rather than human agents, to protect life in armed conflict and/or law enforcement situations, severely limits the rights to freedom of thought and expression. Reason and persuasion – thought and expression – rather than force, are the pillars of democracies.[159] The loss of human dignity and erosion of democratic skills and processes emanating from such a duty represents an intolerable burden to freedom and human rights.[160] These consequences will usually outweigh any potential benefits to the protection of human rights derived from the

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Africa, the Constitutional Court currently is reviewing a lower court order asserting a right to assisted suicide. 'South African Court to Hear Landmark Assisted Suicide Case,' BBCNEWS, 2 June 2015, <http://www.bbc.com/news/world-africa-32970801>; In Switzerland, providing assistance to another's suicide is legal, as long as the assistance is not provided for 'selfish motives.' Article 115, Swiss Criminal Code, <https://www.admin.ch/opc/en/classified-compilation/19370083/201501010000/311.0.pdf>. In Uruguay, judges will not punish persons who assist the suicide of another, if the assistance was motivated by compassion and repeated requests of the victim. Article 17, Codigo Penal de Uruguay, <https://en.wikipedia.org/wiki/Assisted_suicide#cite_note-McDougall_2008-20>.

[155] 'The Belgian Act on Euthanasia of 28 May 2002,' section 3, para. 1.

[156] *Carter v. Canada* (Attorney General), 2015 SCC 5, [2015] (emphasis added).

[157] *Ibid.*

[158] Case of Lambert and Others v. France, Joint Partly Dissenting Opinion of Judges Hajiyev, Šikuta, Tsotsoria, De Gaetano and Gritco, para. 7.

[159] See T Jefferson, *Letter to David Harding*, 20 April 1824, available <http://tjrs.monticello.org/letter/428> ('In a republican nation whose citizens are to be led by reason and persuasion and not by force, the art of reasoning becomes of first importance'). Thus, a 'rule-of-law state employs, to the extent possible, procedures of law and not procedures of force. Targeted Killing Case, para. 40.

[160] Human dignity 'cannot be gained or lost.' W Tadd, et. al., 'Clarifying the Concept of Human Dignity in the Care of the Elderly: A Dialogue between Empirical and Philosophical Approaches,' 17 *Ethical Perspectives* 1 (2010), 253, 255.

employment of autonomous weapon systems by state authorities during and outside of armed conflict.

VII. International Human Rights Law and the Design of Autonomous Weapon Systems

The preceding discussion demonstrates, again, the logic and advantages of a co-active design for autonomous weapons systems when employed during law enforcement and/or anti-terrorist activities, as well as during armed conflict. The 'graduated approach' for the use of force by state agents required by international human rights law usually negates the advantage of speed offered by fully autonomous weapons. A co-active design permits human-machine teamwork, which preserves the human right to freedom of thought for the complex, value-based decisions inherent to the use of lethal force by states.[161] The co-active design permits states to achieve a reasonable balance between their duty to protect human life and the rights to freedom of thought and expression, consistent with the fundamental value of human dignity.

VIII. Conclusions

Paradoxically, the deployment of autonomous weapon systems by states outside of armed conflict potentially can reduce the frequency of the exercise of deadly force by state agents. Moreover, during wartime, should state practice and opinio juris adhere to the position expressed in chapter IX of the ICRC's Interpretive Guidance, customary international human rights law and humanitarian law will require the use of autonomous weapons to increase opportunities for the capture, rather than killing, of enemy belligerents

[161] Such teamwork also protects against dynamics where human and/or computer errors are 'locked in' to weapon system, resulting in greater violations of international law. P Margulies, 'Making Autonomous Weapons Accountable: Command Responsibility for Computer-Guided Lethal Force in Armed Conflict,' in J Ohlin (ed.) *Research Handbook on Remote Warfare* (Northampton: Edward Elgar Press, forthcoming 2016).

Conversely, the widespread use of autonomous weapons carries a serious cost to human dignity, as the delegation to machines of the decision(s) to apply lethal force, as well as determinations about whether arrest or capture is more appropriate, restricts the rights to freedom of thought and expression, and thus undermines human dignity. The burden on the enjoyment of these rights produced when autonomous weapon systems regularly make these complex, value-based decisions outweighs possible benefits to the protection of the right to life. Thus, co-active, human-machine interdependence for decisions about the use of lethal force presents the best option for effectively balancing conflicting rights enshrined in international human rights law and the value of human dignity itself.