

Briefing Memo

Unmanned Weapons and International Humanitarian Law

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Preface

The day when robots take over the subject on the battlefield from human beings - such discussions are being held in the arena of the Convention on Certain Conventional Weapons (CCW). About Lethal Autonomous Weapons Systems (LAWS), weapons that can search, identify, select and attack targets without human control have so far discussed at the informal Meeting of Experts held in May 2014, the Meeting of the High Contracting Parties in November of the year, and the informal Meeting of Experts taken place from 13 to 17 April, 2015. Discussions have been held on the autonomy level of the robotic systems, military effectiveness, where the responsibility lies, ethical issues as well as the application of International Humanitarian Law (IHL). Taking these into consideration, a report of the issues over emerging technologies will be submitted to the Meeting of the High Contracting Parties to be held from 12 to 13 November, 2015. That is highly suggestive not only legal affairs but also fields of research and development, and operations. For that reason, I would like to review in this Memo from the operational viewpoint concerning unmanned weapons and IHL.

1. The goal of IHL - Prevention of Civilian Damages

In addition to CCW, a framework of IHL that control unmanned weapons is the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Additional Protocol I), establishing the protection of victims over international conflicts. Article 36 of Additional Protocol I addresses directly "New weapons". It imposes the obligation on the High Contracting Party to determine whether they are applicable to IHL in the study, development, acquisition or adoption of a new weapon, means or warfare. Conversely IHL has developed not from thoughts and contemplations inside the study rooms but from practicing and learning on the battlefields. The following are the main three principles through Additional Protocol I.

Firstly, the methods or means of warfare is not unlimited and superfluous injury or unnecessary suffering is prohibited (Article 35).

Secondly, it is the principle of distinction where the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and

accordingly shall direct their operations only against military objectives (Article 48, Article 51, Article 52, etc.)

Thirdly, it is the principle of proportionality between an attack which may be expected to cause incidental damage to civilians and the military advantage anticipated (Article 51, etc.).

I would like to take a look at the Rules of Engagement (ROE) of the British Army as an example of principles. That stipulates “are you sure that the target is a military objective? If you are in any doubt, would you or friendly forces be placed in danger if the attack were not carried out? If not, the attack is NOT to be carried out.” This is the actual and specific implementation of IHL. Combatant, in particular the commanders devote themselves to cultivating their knowledge, skills and personalities throughout their lifetime, so they can instantaneously and without hesitation carry out such strict judgment and decisions.

What is in question right now is the justifiability that robots will make the extreme austerity.

2. Needs and possibilities

The terminology of “robot” has different levels of autonomy. Nils Melzer, legal advisor of the International Committee of the Red Cross (ICRC) categorized these into three levels.

First are human-controlled (“human-in-the-loop”) systems. They can perform tasks delegated to them independently, but depend on certain real-time commands by a human operator, such as current drones.

Second are human-supervised (“human-on-the-loop”) systems. They can conduct independently, but remain under the real-time supervision of human operator who can immediately override robotic decisions.

Third are such autonomous (“human-out-of-the-loop”) systems as LAWS.

Taking the above into consideration, it is necessary to don’t confuse “is there a need” with “is it possible”. Some are of the opinion that robots can execute the principles of IHL more strictly than human beings, identifying that they are not built to possess such feelings or emotions as fear or anger, and thus are not influenced by them for judging things. On the other hand, there are strong views against entrusting the judgment of whether to kill to something other than human beings. Both sides are discussions as regards the needs and should require interdisciplinary studies, such as ergonomics and ethics as well as IHL. By contrast whether “human-out-of-the-loop” is capable of performing accurately is a discussion of not the needs but the possibility, and should be discussed primarily from technology or budget (cost effectiveness). Besides, it is also important to specify whether the causes of the anticipated issues are the weapons themselves or the humans who are the users. There seem to be confusions occurring during the current debates. For example, when to discuss collateral damages of civilians by drones, these are issues occurring on “human-in-the-loop” and thus the results of judgment, decisions and orders made by human beings. Therefore the focal point of the legal issue should be to review ROE or educational training for the combatants and to do disciplinary or penal action against violators (refer to Article 87 of Additional Protocol), rather than to control the weapons themselves.

On the other hand, the weapons themselves have been identified the problems such as malfunction, bugs and hacking. Although current smart weapons are capable of delivery with considerable accuracy, due to the enemy defense measures or the technical problems, even if the target is accurately hit, do not mean that there

will be no collateral damages. It can be perceived that there are still problems with the weapons themselves. Where the views collide is whether to take anti-development oriented: the future may be dangerous or pro-development oriented: there will be progress. There must be a problem in taking only an optimistic attitude toward technology. However it is also presumed that the rapid progress in Information and Communication Technology (ICT) and Artificial Intelligence (AI) is further enhancing the performance of weapons.

What is the way to lead the new technologies toward the goal of IHL? That would be the legal review.

3. Legal Review: the Role of the Judge Advocate General

Learning from the legality of the weapons during the Vietnam War, Sweden established an independent institution in 1974, and has been conducting the legal review of weapons. In the United States, the instruction of “Review of Legality of Weapons under International Law” was established in 1974, consequently the Army in 1979, the Air Force in 1994 and the Navy in 2004, legal reviews have been carried out accordingly. That has been also regulated in Australia, Belgium, Holland, Norway, United Kingdom, France and Germany.

Article 82 of Additional Protocol I requires each State Party that legal advisers are available, when necessary, to advise military commanders on the application of IHL and on the appropriate instruction to be given to the armed forces on this subject. Article 36 above to be the grounds for the legal review does not specify how is to be carried out. Thus, the interpretations would depend on legal advisers called the judge Advocate General.

ICRC's Guide on the legal review indicates that Article 36 is complemented by Article 82 and that both provisions establish a framework for ensuring that armed forces will be capable of conducting hostilities in strict accordance with IHL, through legal reviews of planned means and methods of warfare. In the implementation, importance is placed on scope, mechanism, process, decision-making and record-keeping.

Although “legal review” is often described in the governmental administrative agencies including the Self-Defense Forces as “examination”, the term has various meanings according to stages. In the early stage such as the study, development and acquisition, if it were legally binding, it would be virtually the decision in administrative laws and regulations called “examination”, and if it were a recommendation, it would be only “opinion”. In the operational stage, if it assisted a commander to incorporate legalities into a concept or a plan of an operation, it would be “staff estimate”, and if when after them, it would be “check”. Even though weapons exist, they are not necessarily used. Whether a tank is suitable for operations for mountainous districts or close terrain? The most suitable weapons, means or method of warfare is decided through analyzing and comparing such operational factors as terrains, enemy, relative combat powers, logistics and legalities, etc. Hence, the legal review should be emphasized not only at the early stage but also at the operational stage.

After ratifying Additional Protocol in 2004, in 2006 the Self-Defense Forces has already established legal advisors stipulated in Article 82 of Additional Protocol, namely, the Legal Affairs General in the Joint Staff Office, the Maritime Staff Office and the Air Staff Office headed by a colonel, and the Judge Advocate General in the Ground Staff Office headed by the Major General. Discussing at CCW from now on, it is anticipated to deepen and progress with “how should be the legal review”. The Judge Advocate General, legal

adviser, is expected to take effective measures for the future on the legal review.

Conclusion

Combatants are toward the victory and technical engineers are toward the highest technology, both tend to pursue weapons with the maximum expected performance. With the rapid progress of technology, the technical limits would have anticipated to be overcome. This may lead to realizing the precision munitions that can only attack the military objectives. That can be expected a paradigm shift. This is a sign that the strong desire by the military can consequently lead to promoting the development of weapons which comply with IHL, that is to say approaching to the goal of IHL. It will become increasingly important to view the relation between IHL and the military as not contradictory but complementary. Conversely the current IHL does not have treaties or customary laws regulating the weapons which make judgments and decisions in place of human beings. In Article 87 of Additional Protocol, the duty of commanders is one for “members of the armed forces under their command” or “subordinates”. According to the existing understanding, the commanders should take the responsibility for the subordinates who made the usage decision or programming, not for the weapons themselves. The responsibility on the battlefields lies with human beings. Will the technology change the current IHL that presume the subject to be human beings? Focus on the discussion at the CCW arena.

It seems that the issues over the unmanned weapons have become complicated due to the mixing of logic and emotions. IHL can be described as the result of the wisdom, courage and dedication in the devastation of battle, devoted by our predecessors. That is the history of untiring efforts by them. When faced with the complex issues, the necessary approach is, conveyed through that history, to get back to the “principles”. Everything begins from going back to the “starting point”.

(Completed on March 13, 2015)

Main reference literature:

ICRC, “A Guide to the Legal Review of New Weapons, Means and Methods of Warfare Measures to Implement Article 36 of Additional Protocol I of 1977”, January 2006,

https://www.icrc.org/eng/assets/files/other/icrc_002_0902.pdf

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