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Background Guide

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War crimes law and the increasing role of AI in conflict

Statement of the Problem

Artificial Intelligence (AI) is the use of computer systems to carry out tasks- often associated with human intelligence- that require cognition, planning, reasoning, or learning; and machine learning systems are AI systems that are ‘trained’ on and ‘learn’ from data, which ultimately define the way they function. Since these are software tools, or algorithms, that could be applied to many different tasks, the potential implications may be far-reaching and yet to be fully understood.¹

Modern armed conflicts and military strategies have undergone dramatic shifts as a result of new technologies, and the next generation of innovations will have profound consequences for how wars are fought, where they are fought, and who fights them. This, in turn, will inevitably have a pronounced influence on the development of the laws of war and the justice mechanisms mandated with enforcing those laws. Therefore, as new strategies and dynamics of war emerge related to the use of new technologies, war crimes investigators and prosecutors must adapt in order to meet the goals of establishing the truth, protecting the historical record, and holding individuals accountable for grave violations of international law.²

¹<https://international-review.icrc.org/articles/ai-and-machine-learning-in-armed-conflict-a-human-centred-approach-913>

² <https://nyujilp.org/wp-content/uploads/2019/07/NYI303.pdf>

A particular concern is the use of digital AI and machine learning tools to control physical military hardware, in particular the increasing number of unmanned robotic systems – in the air, on land and at sea – with a wide range of sizes and functions. AI and machine learning may enable increasing autonomy in these robotic platforms, whether armed or unarmed, and whether controlling the whole system or specific functions such as flight, navigation, surveillance or targeting.³

Autonomous weapon systems – weapon systems with autonomy in their ‘critical functions’ of selecting and attacking targets – are an immediate concern from a humanitarian, legal and ethical perspective, given the risk of loss of human control over weapons and the use of force. This loss of control raises risks for civilians, because of unpredictable consequences; legal questions, because combatants must make context-specific judgements in carrying out attacks under international humanitarian law; and ethical concerns, because human agency in decisions to use force is necessary to uphold moral responsibility and human dignity.⁴

AI and machine learning software – specifically of the type developed for “automatic target recognition” – could form the basis of future autonomous weapon systems, bringing a new dimension of unpredictability to these weapons, as well as concerns about lack of explainability and bias.⁵

Developments have arisen in certain technical fields resulting in new or amplified technological capabilities that might be employed in armed conflict. Those developments

³<https://international-review.icrc.org/articles/ai-and-machine-learning-in-armed-conflict-a-human-centred-approach-913>

⁴<https://international-review.icrc.org/articles/ai-and-machine-learning-in-armed-conflict-a-human-centred-approach-913>

⁵<https://international-review.icrc.org/articles/ai-and-machine-learning-in-armed-conflict-a-human-centred-approach-913>

include increases in the efficiency of algorithms, computing power, sensor capacity, and the volume and range of available data. Another set of developments relates to an increase in the potential physical distance or amount of time (or both) that constructed systems with partial or full automatic or autonomous navigation may be able to travel at sea, on land, in air, or in outer space. Furthermore, developments in the fields of miniaturisation of constructed systems and of interactive capacities between humans and machines and among machines may be relevant as well.⁶

Some armed forces are increasingly relying on combinations of algorithmic, computational, and other data-driven tools and techniques. That increased reliance turns in part on perceptions that those technological developments could facilitate military advantages, including increases in speed, accuracy, and economy of resources and decreases in the number of personnel placed at risk of physical harm.⁷

Technology develops faster than the law. This is especially true of international law. In contrast to the reciprocal relationship between war and technology, and the speed at which both develop, the laws of war progress slowly and somewhat separately. There is a collective hesitation among states regarding cyberspace regulation at the international level, and national lawmakers appear cautious to legislate on issues surrounding new technologies and technology companies.⁸

Treaties, which constitute the primary source of international laws of war, take years, if not decades to form. Even once adopted, treaty law is slow to take hold at the local level- such

⁶ <https://dash.harvard.edu/bitstream/handle/1/37366359/360-481-1-SM.pdf?sequence=1&isAllowed=y>

⁷ <https://dash.harvard.edu/bitstream/handle/1/37366359/360-481-1-SM.pdf?sequence=1&isAllowed=y>

⁸ <https://nyujilp.org/wp-content/uploads/2019/07/NYI303.pdf>

laws are often difficult to implement and nearly impossible to enforce. As a result, the laws of war have failed to adapt to, address, and keep pace with the reality on the ground.⁹

The next generation of military and civilian technologies will have profound consequences for how wars are fought, where they are fought, and who fights them. This, in turn, will inevitably influence the development of the laws of war and the justice mechanisms mandated with enforcing those laws. The diverse actors entering the physical and cyber battlefields make application of the traditional international humanitarian law's classifications increasingly difficult for lawyers. Furthermore, the speed and openness of information exchange, the vast and growing volume of data, and the ease with which digital material can be manipulated or distorted, frustrates the ability of war crimes investigators to ferret out the truth. Therefore, an updated and more flexible legal framework that takes into account how technologies are transforming armed conflicts in the 21st century is sorely needed.¹⁰

One problem concerns the potential risks of military applications of AI. There are undoubtedly risks posed by applications of AI within the military domain. It is important, however, to not be alarmist in addressing these potential challenges. Militaries are likely to use AI to assist with decision making. This may be through providing information to humans as they make decisions, or even by taking over the entire execution of decision-making processes. This may happen, for example, in communications-denied environments or in environments such as cyberspace, in which action happens at speeds beyond human cognition. While this may improve a human operator's or commander's ability to exercise direct command and control over military systems, it could also have the opposite effect. AI

⁹ <https://nyujilp.org/wp-content/uploads/2019/07/NYI303.pdf>

¹⁰ <https://nyujilp.org/wp-content/uploads/2019/07/NYI303.pdf>

affords the construction of complex systems that can be difficult to understand, creating problems of transparency and of knowing whether the system is performing as expected or intended. Where transparency is sufficiently prioritised in AI design, this concern can be reduced. Where it is not, it becomes possible that errors in AI systems will go unseen—whether such errors are accidental or caused deliberately by outside parties using techniques like hacking or data poisoning.¹¹

Another aspect to consider is the potential benefits of military applications of AI. There is a need to consider more fully the potential positive applications of AI within the military domain and to develop state-level and multilateral means of capturing these benefits safely. For national militaries, AI has broad potential beyond weapons systems. Often referred to as a tool for jobs that are ‘dull, dirty, and dangerous,’ AI applications offer a means to avoid putting human lives at risk or assigning humans to tasks that do not require the creativity of the human brain. AI systems also have the potential to reduce costs in logistics and sensing and to enhance communication and transparency in complex systems, if that is prioritised as a design value. In particular, as an information communication technology, AI might benefit the peacekeeping agenda by more effectively communicating the capacities and motivations of military actors.¹²

The particular problem here is the potential governance of military applications of AI. There are considerable challenges to international governance posed by these emergent technologies, and the primary work of stakeholders will be to devise constructs that balance the tradeoffs made between innovation, capturing the positive effects of AI, and mitigating

¹¹<https://front.un-arm.org/wp-content/uploads/2020/06/Stanley-Stimson-UNODA-2020-TheMilitaryization-ArtificialIntelligence.pdf>

¹²<https://front.un-arm.org/wp-content/uploads/2020/06/Stanley-Stimson-UNODA-2020-TheMilitaryization-ArtificialIntelligence.pdf>

or eliminating the risks of military AI. The primary challenge to multilateral governance of military AI is uncertainty—about the ways AI will be applied, about whether current international law adequately captures the problems that use of AI might generate, and about the proper venues through which to advance the development of governance approaches for military applications of AI. These characteristics of military AI are amplified by the technology’s rapid rate of change and by the absence of standard and accepted definitions. Even fundamental concepts like autonomy are open to interpretation, making legislation and communication difficult.¹³

Current Situation

International Humanitarian Law (IHL) continues to apply fully to all weapons systems, including the potential development and use of lethal autonomous weapons systems; human responsibility for decisions on the use of weapons systems must be retained since accountability for developing, deploying, and using any emerging weapons system must be ensured in accordance with applicable international law. The IHL provisions that most commonly arise in these debates concern distinction, proportionality, and precautions in attack. Focus has also been placed on reviews of weapons, means and methods of warfare.¹⁴

Disagreements have also arisen. The most prominent divergence concerns whether existing IHL is sufficient to address the range of issues that may arise in this area or whether a new norm needs to be elaborated (and, if so, what the content of that norm should be and what form(s) it should take). For example, calls have been made for the elaboration of a new legal

¹³<https://front.un-arm.org/wp-content/uploads/2020/06/Stanley-Stimson-UNODA-2020-TheMilitaryization-ArtificialIntelligence.pdf>

¹⁴ <https://dash.harvard.edu/bitstream/handle/1/37366359/360-481-1-SM.pdf?sequence=1&isAllowed=y>

norm aimed at the regulation, prohibition, or some combination thereof of lethal autonomous weapons systems or at least certain weapons involving an autonomous attribute in the ‘critical functions’ of selection of targets and engagement in attacks.¹⁵

Looking to the future: the use of AI in proving war crimes in court¹⁶

Human rights activists want to use AI to help prove war crimes in court. It would take years for humans to scour the tens of thousands of hours of footage that document violations in Yemen. With machine learning, it takes just days.

In 2015, Saudi Arabia led an air campaign against Yemen, carrying out by some estimates over 20,000 air strikes, many of which have killed Yemeni civilians and destroyed their property, allegedly in direct violation of international law. Human rights organisations have since sought to document such war crimes in an effort to stop them through legal challenges.

On-the-ground verification by journalists and activists is often too dangerous to be possible. Instead, organisations have increasingly turned to crowdsourced mobile photos and videos to understand the conflict, and have begun submitting them to court to supplement eyewitness evidence. The time it takes to analyse this digital documentation has exploded as it has proliferated. The disturbing imagery can also traumatise the investigators who must comb through and watch the footage.

¹⁵ <https://dash.harvard.edu/bitstream/handle/1/37366359/360-481-1-SM.pdf?sequence=1&isAllowed=y>

¹⁶ <https://www.technologyreview.com/2020/06/25/1004466/ai-could-help-human-rights-activists-prove-war-crimes/>

There is an initiative to trial a machine-learning alternative, it could model a way to make crowdsourced evidence more accessible and help human rights organisations tap into richer sources of information. Part of an ongoing effort to monitor the alleged war crimes happening in Yemen and create greater legal accountability around them. In 2017, the platform Yemeni Archive began compiling a database of videos and photos documenting the abuses. Content was gathered from thousands of sources- including submissions from journalists and civilians, as well as open-source videos from social-media platforms like YouTube and Facebook- and preserved on a blockchain so they couldn't be tampered with undetected.

Along with the Global Legal Action Network (GLAN) a nonprofit that legally challenges states and other powerful actors for human rights violations, the investigators then began curating evidence of specific human rights violations into a separate database and mounting legal cases in various domestic and international courts. The partners are focusing on a US-manufactured cluster munition, the BLU-63 in order to explain why instances are war crimes. The use and sale of cluster munitions, explosive weapons that spray out smaller explosives on impact, are banned by 108 countries, including the UK. If they would prove in a UK court that they had indeed been used to commit war crimes, it could be used as part of mounting evidence that the Saudi-led coalition has a track record for violating international law, and make a case for the UK to stop selling weapons to Saudi Arabia or to bring criminal charges against individuals involved in the sales.

They decided to develop a machine-learning system to detect all instances of the BLU-63 in the database. Images of the BLU-63s are rare precisely because they are illegal, which left the team with little real-world data to train their system. As a remedy, the team created a synthetic data set by reconstructing 3D models of the BLU-63 in a simulation. Once the

system is fully tested, the team plans to run it through the entire Yemeni Archive, which contains 5.9 billion video frames of footage. This would allow a system to complete it in roughly 30 days, compared to the 2750 days required by a person.

Machine-learning techniques can allow human rights organisations, for whom it is not uncommon to store massive amounts of video crowdsourced from eyewitnesses, to scour these archives and demonstrate the pattern of human rights violations at a previously infeasible scale, making it far more difficult for courts to deny the evidence. Showing, for instance, hundreds of videos of hundreds of incidents of hospitals being targeted, shows that it is really a deliberate strategy of war. When things are seen as deliberate, it becomes more possible to identify intent, and intent might be something useful for legal cases in terms of accountability for war crimes.

As the Yemen collaborators prepare to submit their case, evidence on this scale will be particularly relevant. The Saudi-led air-strike coalition has already denied culpability in previous allegations of war crimes, which the UK government recognizes as the official record. A UK court also dismissed an earlier case that a different organisation submitted to stop the government from selling weapons to Saudi Arabia, because it deemed the open-source video evidence not sufficiently convincing. Though a different court later walked back some of these criticisms upon appeal, the collaborators hope that the greater wealth of evidence will avoid any contestations this time.

The Yemen effort will be one of the first to be involved in a court case, and could set a precedent for other human rights organisations.

Relevant UN Actions

The Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (CCW):

The Convention, negotiated under United Nations auspices in 1979–1980, has its roots in key IHL principles, such as proportionality and distinction between civilians and combatants. Currently, the Convention has five Protocols—Protocol I on Non-Detectable Fragments; Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (as amended on 3 May 1996); Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons; Protocol IV on Blinding Laser Weapons; and Protocol V on Explosive Remnants of War. Thus, it has a modular design that allows new instruments to be attached to the framework treaty as humanitarian concerns around weapons systems evolve and as new systems emerge.¹⁷

While discussions at human rights forums in Geneva on remotely controlled weapons in 2012-2013 were helpful in raising awareness, CCW turned out to be the forum of choice to discuss emerging technologies in the area of lethal autonomous weapons systems (LAWS). Its flexible nature and the balance it upholds between humanitarian principles and military necessity provided the space for States with very differing views to begin engaging on a complex and rapidly evolving technology. Its standing as an instrument of IHL, alongside the 1949 Geneva Conventions and their 1977 Additional Protocols, made it attractive to all

¹⁷<https://www.un.org/en/un-chronicle/role-united-nations-addressing-emerging-technologies-area-lethal-autonomous-weapons>

those concerned with the potential undermining of IHL principles by autonomous combat systems. It is also helpful that all countries with established or emerging capabilities in AI systems—Canada, China, France, Germany, India, Israel, Japan, the Republic of Korea, the Russian Federation, the United Kingdom, and the United States—are High Contracting Parties to the Convention. This is not to say that the forum was without challenges. An important and continuing problem is financial stability. Arrears in payments by High Contracting Parties created uncertainty around some of the meetings in 2017. Another challenge was how to involve industry and technology developers in discussions on lethal autonomy, given the industry fear of being stigmatised, among other things. A significant mindset challenge was the tendency of the traditional arms control community to see weapons in discrete material terms. Hollywood depictions of Ironman and the Terminator did not help either.¹⁸

These issues of mindsets and cross-domain literacy were tackled first through a series of informal discussions at CCW in Geneva between 2014 and 2016. The Informal Meeting of Experts, led first by Ambassador Jean-Hugues Simon-Michel of France and later by Ambassador Michael Biontino of Germany, raised awareness of the complex dimensions of the issue—humanitarian, ethical, military, legal and techno-commercial. The fact that the CCW rules of procedure allow the participation of a broad range of stakeholders, including civil society, helped, as did the raised profile of the issue in forums outside of Geneva.¹⁹

CCW's Group of Governmental Experts (GGE):

¹⁸<https://www.un.org/en/un-chronicle/role-united-nations-addressing-emerging-technologies-area-lethal-autonomous-weapons>

¹⁹<https://www.un.org/en/un-chronicle/role-united-nations-addressing-emerging-technologies-area-lethal-autonomous-weapons>

These informal discussions helped build consensus on the establishment of a Group of Governmental Experts (GGE) with a formal mandate at the Fifth Review Conference of the High Contracting Parties to CCW in December 2016, chaired by Ambassador Tehmina Janjua of Pakistan.²⁰

The first formal meeting of the Group of Governmental Experts related to emerging technologies in the area of lethal autonomous weapons systems in the context of the objectives and purposes of CCW was held in Geneva from 13 to 17 November 2017. The discussion was animated by a “food-for-thought paper” from the Chair,⁴ with nine other working papers from High Contracting Parties, as well as four Panels of Experts, organized around the legal, ethical, military, technical and cross-cutting dimensions of the subject. Side events held by NGOs, research institutions and States enriched the discussion with new perspectives, including from young AI entrepreneurs. At the end of the week, the participants adopted a set of conclusions and recommendations.

One conclusion was that CCW is the appropriate framework for dealing with the issue; the other was that IHL applies fully to the potential development and use of LAWS. This was an important early assurance, although it did not settle the question of whether further legal norms were needed. The consensus conclusions also allowed the Chair to focus the agenda of the Group for 2018 on 1) characterization of the systems under consideration—the so-called definitional issue; 2) aspects of human-machine interaction, which were critical to the concern about potential violations of IHL; and 3) possible options for addressing the

²⁰<https://www.un.org/en/un-chronicle/role-united-nations-addressing-emerging-technologies-area-lethal-autonomous-weapons> / <https://dash.harvard.edu/bitstream/handle/1/37366359/360-481-1-SM.pdf?sequence=1&isAllowed=y>

humanitarian and international security consequences of the implementation of such systems.

Divergent views on definitions and risks, as well as possible benefits of LAWS, and approaches to regulation and control, including the idea of a pre-emptive ban, persisted, but the Chair's summary emerged as a practical device to capture the diversity of views without blocking progress on substance through the pithier conclusions.²¹

GGE stepped up its work in 2018 with two sessions in April and in August. At the meeting that took place from 9 to 13 April in Geneva, the Group made significant progress in reaching common understandings on the quality and depth of the human-machine interface required not only for ensuring respect with IHL but also for the eventual construction of more ambitious outcomes on human responsibility and accountability. The Group used a so-called 'sunrise slide' to examine the different phases of technology development and deployment, and acquire an appreciation for the work that would be required in those phases to ensure meaningful human oversight and control. With regard to characterization, the discussions enhanced common ground on the concepts and characteristics required for an eventual definition, and shifted minds away from the elusive silver bullet of a technical bright line between what is of emerging concern and what can be handled under legacy instruments.

The work on common understandings and principles that was started in 2017 was continued in April 2018 and culminated in a set of possible guiding principles at the end of the August session that year. These principles are supported by a set of building blocks on

²¹<https://www.un.org/en/un-chronicle/role-united-nations-addressing-emerging-technologies-area-lethal-autonomous-weapons>

characterization, on the human-machine interface and on technology review. The GGE report presents four options for policy, including a possible legally binding constraint, which can be constructed using the agreed guiding principles and the building blocks.²²

The 10 principles included applicability of IHL; non-delegation of human responsibility; accountability for use of force in accordance with international law; weapons reviews before deployment; incorporation of physical, non-proliferation and cyber security safeguards; risk assessment and mitigation during technology development; consideration of the use of emerging technologies in the area of LAWS in compliance with IHL; non-harm to civilian research and development and use; the need to adopt a non-anthropomorphic perspective on AI; and the appropriateness of CCW as a framework for dealing with the issue. The building blocks on characterization include the need to maintain a focus on the human element in the use of force. The understandings on the human-machine interface are built around political direction in the pre-development phase; research and development; testing, evaluation and certification; deployment, training, command and control; use and abort; and post-use assessment. The Group agreed that accountability threads together these various human-machine touch points in the context of CCW.

GGE also agreed on the need to move in step with technology and build in partnership with industry and other stakeholders a common scientific and policy vernacular across the globe.²³

²²<https://www.un.org/en/un-chronicle/role-united-nations-addressing-emerging-technologies-area-lethal-autonomous-weapons>

²³<https://www.un.org/en/un-chronicle/role-united-nations-addressing-emerging-technologies-area-lethal-autonomous-weapons>

The CGE mandate concerns weapons specifically and, in certain respects, the conduct of hostilities more broadly. However, the potential employment of AI techniques and methods in situations of armed conflict may impact several other areas as well, including detention, humanitarian services, uninhabited military maritime systems, and legal advice.²⁴

One part of the CGE's mandate during the 2020-2021 period concerned the exploration and agreement on possible recommendations for options related to emerging technologies in the area of lethal autonomous weapons systems, such as potential challenges to IHL. Included among the categories of possible options raised for addressing the humanitarian and international security challenges posed in this area are a legally binding instrument, a political declaration and clarity on the implementation of existing obligations under international law, in particular IHL.²⁵

Another part of the GCE's current mandate pertains to the formulation of consensus recommendations concerning the clarification, consideration, and development of aspects of the normative and operational framework on emerging technologies in the area of lethal autonomous weapons systems.²⁶

²⁴ <https://dash.harvard.edu/bitstream/handle/1/37366359/360-481-1-SM.pdf?sequence=1&isAllowed=y>

²⁵ <https://dash.harvard.edu/bitstream/handle/1/37366359/360-481-1-SM.pdf?sequence=1&isAllowed=y>

²⁶ <https://dash.harvard.edu/bitstream/handle/1/37366359/360-481-1-SM.pdf?sequence=1&isAllowed=y>

Bloc Positions

For at least some of the states, including the US, the employment of weapons with an automatic or autonomous attribute may yield purported increases in capabilities to (among other things) enhance distinction between civilians and military objectives through greater precision and accuracy. According to that position, the employment of such technologies may result in greater protection of civilians, increased compliance with IHL, and heightened realisation of some of the (other) humanitarian aims underlying IHL.²⁷

In a discussion on the Russian invasion of Ukraine in the 77th session of the UNGA DISEC, the Chinese representative supported the United Nations leading role in stronger artificial intelligence governance and advocated for the peaceful use of science and technology, with dividends shared among all.²⁸

Questions a Resolution Must Answer

Here are some discussion points you may want to consider during your research and the progression of the committee. Please note that these discussion points are only meant to serve as a starting point for your debate and should not in any way limit your debate.

Does the current international law around war crimes reflect the increasing potential for war crimes that do not arise directly from human decisions?

²⁷ <https://dash.harvard.edu/bitstream/handle/1/37366359/360-481-1-SM.pdf?sequence=1&isAllowed=y>

²⁸ <https://press.un.org/en/2022/gadis3686.doc.htm>

What kind of problems have already appeared, and how can we solve them, as well as preventing worse accountability problems in the future?

If an AI or a computer programme targets an area for a drone strike and a strike is carried out, who if anyone can be prosecuted?

How can we make sure that as military operations become more automated this does not lead to a decrease in human accountability for atrocities?

Suggestions for Further Research

Geneva Graduate Institute- International Law- Lethal Autonomous Weapons Systems and War Crimes Research Page (<https://www.graduateinstitute.ch/academic-departments/international-law/lethal-autonomous-weapons-systems-and-war-crimes>)

The LAWS & War Crimes project analyses the challenges of ascribing criminal responsibility for war crimes raised by the advent of increasingly autonomous weapon systems and human-machine shared decision-making in the targeting process (so-called mixed-initiative systems).

In particular, the project focuses on the criminal responsibility of the user of autonomous weapons and of the human-operator in mixed systems. It is in this area that the risk of a responsibility gap is greatest. It is likely that the criminal intent required for the commission of war crimes in combat operations is lacking. At the same time, it is also likely that the causal connection between the human conduct and the harmful and wrongful result is missing.

The LAWS & War Crimes project seeks to understand this gap, both at the international and domestic level, and identify ways to resolve it. The project team consists of an international team of researchers based at the Graduate Institute of International and Development Studies in Geneva and is supported by a four-year grant from the Swiss National Science Foundation.

International Committee of the Red Cross (ICRC) Position Paper: Artificial intelligence and machine learning in armed conflict: A human-centred approach

(<https://international-review.icrc.org/articles/ai-and-machine-learning-in-armed-conflict-a-human-centred-approach-913>)

UN- The Militarisation of Artificial Intelligence:

(<https://www.un.org/disarmament/the-militarization-of-artificial-intelligence/>)

In 2019, the United Nations Office for Disarmament Affairs, the Stanley Center and the Stimson Centre partnered in a workshop and series of papers to facilitate a multistakeholder discussion among experts from Member States, industry, academia, and research institutions, with the aim of building understanding about the peace and security implications of AI. This publication captures that conversation and shares assessments of the topic from US, Chinese, and Russian perspectives. It is intended to provide a starting point for more robust dialogues among diverse communities of stakeholders as they endeavour to maximise the benefits of AI while mitigating the misapplication of this important technology.



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