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INTERNATIONAL CRIMINAL LAW ISSUES OF AUTONOMOUS WEAPONS: THE KARGU-2 DRONE IN LYBIA

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Abstract

The aim of this study is to show how war crimes can occur when using AI-driven autonomous weapon systems and what legal issues arise in the prosecution of these crimes. AI-based weapon systems are capable of making autonomous decisions in combat environments without human intervention. This is particularly relevant in areas such as target identification, execution of attacks and use of lethal force. The article presents how, in these cases, if war crimes are committed, who can be held accountable.

1 Introduction

Lethal Autonomous Weapon Systems (LAWS) are a new technological category of warfare that allows weapons to select and attack targets without human intervention, using artificial intelligence-based decision-making. This technology represents a significant change from conventional weapon systems, which require constant human supervision to operate. [1] Autonomous weapon systems are based on rapid advances in robotics, data processing and artificial intelligence, and allow machines to adaptively respond to changing conditions on the battlefield. [2] While the development of LAWS could significantly increase the efficiency of the military, it raises serious ethical and legal questions. Because the decision-making is left to artificial intelligence, autonomous weapons are incapable of moral deliberation and cannot take into account rules for avoiding civilian casualties to the same extent as human soldiers. Machine learning algorithms are used to guide these types of systems and identify targets, but they are prone to error in complex environments and can lead to misidentifications. Prosecuting lethal autonomous weapon systems (LAWS) is a complex challenge, as these systems have no moral responsibility and their decisions are made by AI-based algorithms, not humans. This question highlights, in particular, who could be held responsible for the damage caused by an autonomous weapon, be it the loss of a civilian life or a disproportionately destructive attack. The current legal framework of the International Criminal Court (ICC), such as the Rome Statute, does not clearly define the liability of AI-based systems. Since criminal law is traditionally based on the accountability of individuals, an act committed by a fully autonomous system does not fit into the legal categories.

In this study, I examine whether the currently applicable international legal norms are sufficient to achieve the elimination of impunity as enshrined in the Preamble of the Rome Statute, ensuring that no perpetrator of war crimes remains unpunished.

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2 The concept of an autonomous weapons system

The development of artificial intelligence (AI) is fundamentally shaping decision-making mechanisms in both the public and private sectors. The emergence of autonomous systems, particularly in the context of armed conflicts and law enforcement applications, poses new challenges for legislators. The European Union's response to this challenge is the AI Act, which represents the first comprehensive regulatory framework for artificial intelligence. One of the key elements of this regulation is the mandatory human oversight requirement, ensuring that AI systems do not violate fundamental rights and international legal norms.

The European Union's Artificial Intelligence Regulation 2024/1689 (AI Act) establishes a comprehensive regulatory framework for the operation of AI systems, setting requirements for transparency, accountability, and human oversight. While the regulation primarily applies to civilian applications, it raises the question of whether its provisions could be extended to the regulation of autonomous weapon systems and their implications for criminal liability.

The 2024/1689 regulation explicitly states that AI systems used for military, defense, and national security purposes are outside its scope. This is consistent with Article 4(2) of the Treaty on European Union (TEU) and Title V, Chapter 2 of the TEU, which affirm that defense and security matters primarily fall under national jurisdiction.

Nevertheless, certain aspects of the regulation could still influence the governance of military AI systems. For instance, if an autonomous weapon system is deployed for non-military purposes, such as law enforcement or border security, it may fall within the scope of the AI Act. In such cases, the respective state or organization must ensure that the system complies with the safety and transparency requirements outlined in the regulation.

According to the Rome Statute, the International Criminal Court (ICC) exercises jurisdiction based on individual criminal responsibility. This poses a challenge concerning autonomous weapon systems, as they are not natural persons and therefore cannot be directly held accountable. However, the principle of command responsibility in ICC jurisprudence may be applicable, making military leaders and decision-makers accountable for the actions of autonomous systems under their command if those systems commit war crimes.

Although the EU AI Act does not extend to military applications, its principles—such as the necessity of human oversight and stringent monitoring of high-risk AI systems—could potentially contribute to the development of future international regulations governing the legal accountability of autonomous weapons.

The AI Act adopts a risk-based regulatory approach, categorizing different AI systems according to their potential dangers. High-risk systems, including autonomous weapon systems and AI-driven law enforcement tools, are subject to stricter regulatory oversight. The role of human oversight is paramount in these applications as it ensures:respect for human rights,transparency and accountability in decision-making processes, and control over predictive and operational errors of AI systems.

One of the fundamental pillars of the AI Act is that in systems with potentially severe social and legal consequences, human intervention and supervision must be continuous.

The regulation of artificial intelligence has become a global priority, with numerous countries seeking to establish legal frameworks for the responsible use of autonomous systems. The AI Act's strict requirements for human oversight align with the following international regulatory trends:

OECD Principles on AI (2019), which emphasize the importance of human supervision,

United Nations discussions on autonomous weapon systems, aiming to develop an international legal framework for maintaining human control. Under the Convention on Certain Conventional Weapons (CCW) framework, negotiations on the regulation of lethal autonomous weapon systems (LAWS) have been ongoing since 2014. According to the 2023 UNIDIR report, numerous states support the mandatory retention of human control in decision-making processes involving autonomous systems. UN expert panels argue that restricting or banning autonomous weapons is necessary to ensure compliance with international humanitarian law and the protection of human rights. These discussions have revealed multiple approaches: while some nations

advocate for a complete ban, others propose stricter transparency and human oversight requirements.

In November 2023, the UN General Assembly adopted a resolution aimed at tightening international regulations on autonomous weapon systems, including enhanced oversight of their development and deployment. However, within a few months, the resolution was rescinded after the United States, Russia, and China—citing their technological advancements and national security interests—opposed stricter regulation.

The AI Act's provisions on human oversight are legally and ethically well-founded, as they ensure that AI-based systems do not operate irresponsibly or in violation of human rights. The continued advancement of autonomous systems raises further legal and regulatory concerns, but the AI Act serves as an essential starting point for establishing a transparent and accountable AI ecosystem. Maintaining human oversight is not merely a legal requirement but also a security and ethical safeguard to prevent AI applications from undermining human dignity and international legal principles.

According to the International Red Cross, an autonomous weapon system is defined as any weapon system that has autonomy in terms of its decisive, "critical" functions. [3] These weapons have the capability to select targets and carry out an attack without human intervention. [4] In addition to the previous definitions, the definition of autonomous weapon systems was added in 2021, according to which an autonomous weapon system is also characterised by the fact that, once activated or armed, it autonomously initiates an attack in response to data collected from its environment through its sensors, i.e. the 'operator' of the weapon system cannot determine or know exactly when, where and against which targets the weapon system will launch an attack. [5]

Scharre uses the term semi-autonomous for the first category of systems - in the loop - which implies that these weapons can only act on human command. [6] on the loop, on the other hand, is a weapon that can execute its tasks completely autonomously without human intervention, but with the possibility of a human overriding the system's decision and changing its outcome. [7] Out of the loop autonomous systems are able to sense their environment, make decisions based on the data collected and execute them without the possibility of effective intervention, completely without human control and supervision.[8]

3 Historical background

In line with the aim of this study, it is worth briefly mentioning the historical background of how autonomous weapons were used in Libya.

The Libyan civil war started in 2011, when protests and riots broke out across the country against the dictatorial regime of Moammer Gaddafi during the 'Arab Spring' movements. The discontent against Gaddafi, who had been in power for decades, quickly escalated into armed conflict, followed by intervention by the UN[9] and NATO[10] in support. NATO launched air strikes in March 2011 to support some rebel groups, and eventually Gaddafi[11] fell and died in October 2011.

Following the fall of Gaddafi, the country plunged into an internal political crisis, as various militias and armed groups took control of regional areas.[12] With no central authority, the former anti-Gaddafi groups were unable to unite, and Libya was characterised by years of unity and violence.[13]

The situation worsened in 2014, when the country split into two main political and military blocs. The UN-backed Government of National Accord (GNA) was based in the capital, Tripoli, while a second 'House of Representatives' government in Tobruk was led by the Libyan National Army (LNA), led by General Khalifa Haftar. Haftar and the LNA controlled eastern Libya and gradually put pressure on Tripoli to take control of the country.[14]

During this period, several foreign countries intervened in the conflict: Turkey, Italy and Qatar supported the GNA, while Egypt, Russia and the United Arab Emirates supported Haftar. This intervention further deepened the civil war, which became particularly complex due to geopolitical power relations and energy interests.[15]

In April 2019, Haftar launched an offensive to seize Tripoli[16], seeking to seize control of the entire country. In the course of the fighting, the Libyan National Army has received a number of foreign support, including Russian mercenaries and the United Arab Emirates Turkey supported the GNA with military equipment and advisers. Turkish support was crucial, as Turkey was also beginning to provide autonomous drones to the GNA, which played an important role in the fighting.[17]

4 The Kargu-2 drone in Libya

On March 27, 2020, Prime Minister Faiez Serraj announced the launch of Operation PEACE STORM, in which the GNA went into attack mode in coastal areas. The combination of Gabya-class frigates and Korkut short-range air defence systems provided a mobile air defence "bubble" around GNA ground units, making the HAF air force militarily ineffective. The strengthened operational intelligence capability included Turkish-operated signals intelligence, as well as the reconnaissance and surveillance capabilities of the Bayraktar TB-2 and possibly TAI Anka S combat drones, allowing for an asymmetric warfare that gradually weakened the capabilities of the HAF ground units. The attack launched from Tripoli was supported by Firtina T155 155 mm self-propelled guns and T-122 Sakarya rocket launchers, which struck the HAF's medium tanks and heavy artillery with longer-range precision munitions. Logistic convoys and retreating HAF units were then targeted and destroyed remotely by drones or STM Kargu-2 lethal autonomous weapons and other homing munitions. The lethal autonomous weapons had programming that allowed them to engage targets without a data link between the operator and the munition, providing a true "shoot, forget and seek" capability.[18]

The deployment of the Kargu-2 drone in Libya has attracted considerable attention from the international community, as the drone has been able to carry out autonomous attacks without human guidance, The Turkish-made Kargu-2 drone has autonomous decision-making capabilities that allow it to operate in "fire, forget and find" mode, i.e. it can autonomously select, track and attack targets. It also features a target recognition system without human intervention, which means that it can use built-in artificial intelligence to distinguish between different objects and persons on the battlefield (by classifying targets in real time) without the need for direct data communication with the operator.

It is worth noting that, in relation to this type of weapon system, Turkey stated in April 2016 that such weapon systems do not exist, and then reiterated the need for human control and accountability of autonomous weapon systems. [19]

The Kargu-2's capabilities include machine learning-based target recognition to track and destroy identified targets. This autonomous targeting system is not without risks, however, as complex situations and distractions, such as terrain conditions or the presence of various objects, can confuse the system, leading to the destruction of erroneous targets. In addition, the Kargu-2 also has a so-called "swarming" capability, which allows several drones to drone to perform tasks in groups in cooperation, although this autonomous system can be risky in case of communication failures.[20]

In the 2020 Libya deployment, drones were used against logistics convoys and retreating military units. According to UN experts, the Kargu-2 drone's autonomous decision-making system even enabled it to carry out a personalised attack using database-based target identification. [21] This technological advance has raised concerns from many AI and military experts who believe that the reliability of autonomous target recognition based on machine learning is insufficient to distinguish military targets from civilians, potentially putting human lives at risk.

The significance of the Kargu-2 case is that it was one of the first documented times that a fully autonomous drone carried out an attack in the battlefield, raising serious ethical and legal questions about the future of autonomous weapons. Experts, such as Zachary Kallenborn, predict an increasing role for these types of weapons in future military conflicts, particularly in asymmetric warfare, but stress the need for accountability and regulation to reduce the risk of civilian casualties and potential failures of autonomous systems.[22]

5 International criminal law and liability

The International Criminal Court, established by a treaty (Rome Statute)[23] in 1998 by a community of states, can, as a general rule, only exercise its criminal jurisdiction in relation to acts committed on the territory of a state party to the treaty (currently 114).

The adoption of the Rome Statute marked a major step forward in the development of the international legal order and a breakthrough in the fight against impunity at world level. The International Criminal Court is the first permanent criminal justice institution of a universal nature, established for the purpose of prosecuting the perpetrators of the most serious crimes of concern to the international community as a whole, as set out in Article 5 of the Rome Statute. [24] ide Schabbas 21Schabas,William A. (2009). International Crimes. In D. Armstrong (Ed.), Routledge Handbook of International Law. Routledge. https://doi.org/10.4324/9780203884621

The International Criminal Court is a court of last resort, with a complementary role to national courts[25]. Investigating, prosecuting and bringing to justice the perpetrators of the most serious international crimes is primarily the responsibility of each State.[26] The fundamental principle of the ICC is complementarity, whereby, in the event of war and crimes against humanity committed by a State concerned by reason of the place of commission or the nationality of the perpetrator is able and willing to prosecute, the ICC does not act.[27]

Two factors have been identified in which the ICC may act, namely the state of collapse of the judicial system and the consequences thereof, the lack of capacity to obtain evidence and conduct proceedings. In examining all these issues, it is necessary to look at the technical means available to the State to carry out the prosecution; the working methods of the internal criminal justice system; and the procedural and evidentiary rules in force.[28]

States Parties are obliged to cooperate with the Court in accordance with the Rome Statute. However, under Article 97 of the Rome Statute[29], the obligation to cooperate may also apply to a State not party.

It is important to note here that Article 12(2)(a) of the Rome Statute, according to some, ignores the customary international law rule that the consent of a State is required for the entry into force of a binding international treaty. Article 34 of the 1969 Vienna Convention on the Law of Treaties[30] states that an international treaty does not create obligations or rights for a third State without its consent.

In relation to the foregoing paragraph, I agree with the view that Article 12(2)(a) of the Rome Statute does not impose obligations on third States without their consent, nor does it oblige them to act or to abstain from acting.[31]

In the event that the Security Council refers a situation involving the territory of a non-state party to the ICC, such a state[32]—if it is a UN member—is obliged to cooperate with the ICC, and this obligation derives from its UN membership and its acceptance of the UN Charter. If the state is not a UN member, the special powers granted to the Security Council under Chapter VII of the Charter, which acknowledges the Council's authority in cases of threats to or breaches of international peace and security, provide the legal basis for its intervention. The UN's objective legal personality in this case also aids the ICC.

Libya, along with several other states, has not ratified the Rome Statute to this day, meaning that, in principle, the Court would not have jurisdiction over events occurring there. However, under the aforementioned provisions, the Statute exceptionally allows the Security Council to refer the investigation of crimes committed on the territory of a non-state party to the Court under Article 13(b) of the Statute. [33]

The sensitivity of this situation is well illustrated by the fact that the resolution, while acknowledging that non-state parties are generally not bound by obligations under the Statute, imposes a duty of cooperation with the Court on all other states, without compelling them to surrender their own nationals. This wording seeks to ensure that states not directly involved in the conflict, but potentially affected by it, do not obstruct or limit the execution of the resolution out of fear that they might have to extradite their own citizens to a court whose jurisdiction they, like Libya, do not recognize. This provision is evidently a political compromise, considering that a significant portion of the violations in Libya were committed not by Libyans, but by mercenaries of other nationalities, who

were paid by the Gaddafi regime. This compromise likely represents the Security Council's decision to forgo prosecuting these individuals in exchange for securing support for bringing Libya's high-ranking officials before an international criminal tribunal.

6 Ethical and Legal Dilemmas: Who Is Responsible?

Before examining the legal dilemmas, it is worth briefly analyzing the ethical issues surrounding autonomous weapons.

One of the most significant ethical concerns regarding the use of autonomous weapons is the lack of human control. Under international law and the rules of armed conflict, decisions involving the taking of human life must be made by humans. However, autonomous drones like the Kargu-2 are capable of executing attacks without human intervention. This raises the question of how these systems can be ensured to comply with international legal norms, particularly the principles of distinction and proportionality, which require that attacks must not cause excessive harm to civilians.

Errors in artificial intelligence, or the processing of incorrect data, can have tragic consequences when such weapons are used. The absence of human intervention in decision-making also raises the issue of accountability: who can be held responsible if an autonomous drone commits a war crime?

When examining the legal framework governing autonomous weapon systems, it is essential to consider the Martens Clause, which ensures that future weapons—including fully autonomous out-of-the-loop systems—do not remain entirely unregulated. [34] The question is whether the Martens Clause provides sufficient legal regulation for the elimination of impunity?

The Martens Clause was codified in Additional Protocol I to the Geneva Conventions of 1949. According to Article 1(2) of the Protocol[35]: "[i]n cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."

An autonomous weapon system must meet three criteria: it must not cause unnecessary suffering or superfluous injury, it must not inherently lack the ability to distinguish between civilians and combatants or between civilian and military objects, and it must not have uncontrollable effects.

Autonomous weapon systems lack the human capability to fully comply with the requirement of distinction, such as recognizing a soldier in a combat environment who suddenly intends to surrender. Therefore, in my view, compliance with humanitarian law can only be ensured in a simplified combat environment when using autonomous weapon systems, as the principles of distinction and proportionality must be upheld both at the initiation of an attack and throughout its execution—the latter of which cannot be guaranteed in the case of these weapons.

Similar to the requirement of proportionality, the requirement of distinction necessitates that a weapon operates based on human decision-making and experience, even in complex combat scenarios, such as when civilians are used as human shields.

The European Parliament's resolution on autonomous weapon systems (2018/2752/RSP) of September 12, 2018, established that autonomous weapons are not and likely never will be capable of distinguishing targets in a human-like manner or making decisions that adhere to the principle of proportionality. This inability is further exacerbated by the risk of malfunctions or cyberattacks.

Given that these weapons lack human emotions, the principle of humanity cannot be expected to apply to them, despite the fact that the Martens Clause mandates the examination of this principle. The absence of these principles would classify the Kargu-2 drone, analyzed in this study, as an unlawful weapon under international law.

Furthermore, throughout history, human instinct has served as a barrier against cruelty. From this, it follows that since Kargu-2 weapons lack human emotions, the barrier preventing excessive cruelty is significantly weakened.

Additional Protocol I also states: "[i]ndiscriminate attacks are prohibited. Indiscriminate attacks are those that employ a method or means of combat which cannot be directed at a specific military

objective and, consequently, strike military objectives and civilians or civilian objects without distinction." [36]

To ensure compliance with these criteria, states are obligated to review the legality of autonomous weapon systems under Article 36 of Additional Protocol I. If they fail to do so, they may be held responsible for any unlawful harm caused by such weapons. [37]

The review process mentioned above serves as a crucial safeguard to ensure that only autonomous weapons compliant with international law are developed and deployed. However, several factors hinder its practical implementation. Given that weapon review procedures largely rely on state discretion, their results are not required to be made public—nor is it likely that they will be disclosed for tactical reasons. Furthermore, since the review process primarily determines the legality of autonomous weapon systems, it is, in my view, insufficient to fully guarantee their compliance with international law. [38]

A fundamental question in international law regarding autonomous weapons is determining responsibility. Organizations such as the UN and the International Criminal Court (ICC) are still seeking appropriate regulatory solutions. Under the Rome Statute, the ICC can only hold natural persons accountable for war crimes. This means that an autonomous system, such as the Kargu-2 drone, cannot be held legally responsible. However, individuals involved in its development, deployment, or authorization for use can be.

The UN report does not specify whether Kargu-2 attacks resulted in casualties, but the independent decision-making capability of autonomous systems raises serious concerns about the chain of responsibility. If an autonomous drone makes an error, who will be held accountable? Military commanders? Developers? Or the state that deploys these weapons?

Since the ICC's jurisdiction under the Rome Statute is limited to natural persons, direct accountability for AI-controlled weapons is not possible. However, under Article 25(3)(c) of the Statute, individuals who facilitate the commission of a crime can be held criminally liable. This provision allows for the prosecution of commanders, developers, and decision-makers who contribute to the deployment of autonomous weapons, even if these systems operate without human control.

The doctrine of command responsibility is particularly sensitive when it comes to autonomous weapons. International law holds commanders accountable for the actions of their forces, especially if they knew or should have known about potential crimes. However, in the case of autonomous systems, independent decision-making and rapid response capabilities may circumvent human intervention, complicating accountability determinations.

The Kargu-2 case raises the question: how can a commander be held responsible if a weapon makes decisions autonomously? In this context, the chain of responsibility may extend to commanders, operators who authorized the deployment of the weapon, and decision-makers who failed to ensure proper oversight.

Developers and manufacturers involved in the creation and deployment of autonomous weapons may also bear responsibility for crimes, particularly if the programming of the weapon is flawed or if its operation poses risks. Establishing such liability could be a crucial aspect of future international regulations. Just as a software malfunction or poor programming decision can contribute to unlawful attacks, developers and manufacturers may also face accountability before international courts.

Current international legal regulations do not provide a clear solution to the issue of state responsibility in the use of autonomous systems. However, states can be held accountable for their deployment of autonomous weapons in conflicts. The issue of state responsibility becomes particularly complex when a state employs autonomous systems that commit crimes.

7 Conclusion and Recommendations

This study has demonstrated that, at the international level, no definitive decision has been reached regarding the restriction or complete prohibition of autonomous weapons in warfare.

In the absence of a comprehensive legal framework, and if such weapon systems are fully permitted, it would be impossible to establish criminal liability for war crimes committed solely due to the actions of autonomous systems. This is because current legal frameworks are designed for natural persons. Consequently, the principle of eliminating impunity, as enshrined in the Preamble of the Rome Statute, would become unattainable.

The study focuses on the issue of accountability, encompassing both retributive justice and restorative justice, principles that international humanitarian law mandates. Based on this analysis, autonomous weapons currently fall into a legal loophole under existing regulations, particularly because they cannot fall under the jurisdiction of the International Criminal Court (ICC).

This study has also demonstrated why the Martens Clause alone is insufficient as a legal framework for regulating autonomous weapon systems, particularly when examined in light of the principle of humanity. Furthermore, to support my argument that current international legal norms are inadequate, I reference the Convention on Cluster Munitions, where the international community correctly recognized the necessity of a dedicated international treaty to prohibit such weapons. Following the same logic, I argue that a comprehensive international treaty must be established for the prohibition of autonomous weapon systems, based on the European Union's AI Act, incorporating clear legal provisions to ensure criminal liability in cases where such weapons are used despite the ban.

Another strong justification for a complete ban is that these weapons are capable of making independent decisions and can carry out attacks without human oversight, potentially targeting civilians due to their inability to distinguish between combatants and non-combatants. Additionally, if these weapons were to enter the market, they could fall into the hands of terrorist organizations, leading to catastrophic and unpredictable consequences. The issue is further exacerbated by the Kargu-2 drone, which, as demonstrated in this study, is capable of conducting swarm attacks, where the malfunction of even a single unit could lead to unforeseen disasters.

Autonomous weapon systems, in the wrong hands, could be used for targeted assassinations, oppression, and political killings, threatening international stability and democratic governance.

From an ethical perspective, I find it unacceptable to argue that no regulation is needed merely because humans also make mistakes, so machines should be allowed to as well. The concept of "collateral damage" cannot be justified by machine error alone, as it removes human agency from life-and-death decisions. In this regard, I fully align with the words of Pope Francis, who emphasized that only humans should make decisions regarding human life, as failing to uphold this principle would condemn humanity to a hopeless future.

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