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Zlata Đurđević, Marin Bonačić & Nikša Vojvoda (Eds.)

**International perspectives on AI:
challenges for judicial cooperation and
international humanitarian and criminal law**

Revue Internationale de Droit Pénal
International Review of Penal Law
Revista internacional de Derecho Penal
Международное обозрение уголовного права
刑事法律国际评论
المجلة الدولية للقانون الجنائي
Revista Internacional de Direito Penal
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International Perspectives on AI: Challenges for Judicial Cooperation and International Humanitarian and Criminal Law

(International Colloquium Section IV, Opatija, Croatia, 7th-8th December 2023)

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Edited by

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THE REGULATION OF WAR IN TIMES OF ARTIFICIAL INTELLIGENCE: LEGAL PERSPECTIVES AND PRACTICAL CHALLENGES REGARDING THE DEPLOYMENT OF AUTONOMOUS WEAPONS SYSTEMS IN BELGIUM

*Vanessa Franssen, Alyson Berrendorf and Christophe Deprez**

Abstract

This article pursues a two-fold objective: (1) it explores if and how AI-driven weapons systems are defined and regulated under Belgian law; and (2) it examines whether the current legal framework is sufficiently adjusted to deal with offences committed by or by means of such weapons systems. To this end, it first presents the Belgian political debate and legal approach to those complex issues, at both the national and international levels. Whereas Belgium has been an active party in international discussions, parliamentary initiatives at the national level have not resulted in substantial legislative amendments. Next, the article describes the general, domestic legal framework on the jus ad bellum and the jus in bello, questioning the conformity of the use of autonomous weapons systems (AWS) with the existing principles and rules. Finally, the article addresses potential jurisdictional questions and explains the legal challenges triggered by AWS in light of the general principles of criminal liability.

1 Introduction

Like almost any other sector, the field of defence and security is rapidly undergoing fundamental changes due to the integration of artificial intelligence (AI) in all kinds of weapons systems. AI-driven systems enable better and faster detection of targets; they can even select and attack targets in complex and changing environments, without systematically requiring prior human intervention.¹ They have reduced the need for ‘boots on the ground’, may be more cost-effective, and, according to some, might perhaps even make war scenes less violent and more ‘human’ in the future.²

Surely, the use of AI in military armament creates a large number of unparalleled opportunities. But AI-driven systems also come with a whole range of challenges, whether technical, ethical, political, or legal in nature. These legal challenges will be at

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¹ Alyson Berrendorf, *Vers une déshumanisation du champ de bataille: analyse des conséquences juridiques des systèmes d’armes létaux autonomes (‘LAWS’)* (PhD thesis, University of Liège 2025) 20–21.

² *ibid* 199, 251–252 and the references mentioned there.

the heart of this contribution, even if one cannot make an abstraction of the other challenges, as they are intimately intertwined and highly relevant to the legal questions.

This particularly holds true for the technical capabilities of AI-driven weapons and their level of autonomy, especially regarding the control that would be left to humans concerning targeting decisions.³ Due to the progressive integration of autonomy in weapons, the role of the human operating such a weapon seems to change from that of an ‘active controller’ to that of a ‘passive supervisor’.⁴ While it is generally agreed upon that ‘meaningful human control’ should remain at all times to ensure legal use and appropriate accountability,⁵ this notion has recently evolved into ‘context-appropriate human judgement and control’,⁶ reflecting a more nuanced understanding of human involvement in increasingly automated decision-making environments. In practice, however, such control remains less obvious and is increasingly difficult to uphold due to the speed of execution, the number of tasks to be accomplished, and the complexity of these tasks.⁷ Moreover, the unpredictability resulting from the nature and design of these autonomous systems questions the role and impact of human control. For instance, in the case of weapons with self-learning capabilities, the role of human actors is further reduced as the system learns by itself and develops new solutions to complex problems, without human intervention.⁸

This contribution aims to explore if and how AI-driven weapons systems are defined and regulated in Belgian law, and to examine whether the current legal framework is sufficiently adjusted to deal with offences committed by or by means of such weapons

³ For a more in-depth analysis of this question, see *ibid* 123.

⁴ Ingvid Bode, ‘Meaning-less Human Control: Lessons from Air Defence Systems for Lethal Autonomous Weapons’ (webinar, Drone Wars UK, 25 March 2021).

⁵ Final Report, Meeting of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects’, (Geneva, 13 December 2019) CCW/MSP/2019/9. See Annex III, Guiding Principles affirmed by the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons System: ‘(c) Human-machine interaction, which may take various forms and be implemented at various stages of the life cycle of a weapon, should ensure that the potential use of weapons systems based on emerging technologies in the area of lethal autonomous weapons systems is in compliance with applicable international law, in particular IHL. In determining the quality and extent of human-machine interaction, a range of factors should be considered including the operational context, and the characteristics and capabilities of the weapons system as a whole’. In this sense, see also the open letter published by technology experts who call for a 6-months’ moratorium on the development of AI tools. Future of Life Institute ‘Pause Giant AI Experiments: An Open Letter’ (22 March 2023) <<https://futureoflife.org/open-letter/pause-giant-ai-experiments/>> accessed 24 October 2025.

⁶ Chair’s summary – Second 2025 session of the GGE on LAWS, ‘Meeting of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects’ (Geneva, 5 September 2025) CCW/GG.1/2025/WP.9.

⁷ Bode (n 4).

⁸ Gérard De Boisboissel, ‘Les opportunités d’usage qu’offre l’autonomie en robotique militaire’, in Centre de recherche de l’Académie militaire de Saint-Cyr Coëtquidan and Croix-Rouge française, *Les enjeux de l’autonomie des systèmes d’armes létaux* (Pedone 2022) 20.

systems. To this end, it will first present the Belgian political debate and legal approach to these complex issues, at both the national and international levels (Section 2). Then, it will describe how this approach fits into the more general, domestic legal framework on the *jus ad bellum* (Section 3) and the *jus in bello* (Section 4). Lastly, it will analyse whether and how the general principles of criminal liability can be applied (Section 5).

Before delving into the main analysis, a couple of terminological points should, however, be clarified. Whereas certain authors may still prefer the term ‘automated weapon systems’, this contribution will give preference to the notion ‘*autonomous weapons systems*’ (AWS). In our view, the latter is more adequate and more commonly used when discussing the challenges created by AI in the field of international humanitarian law (IHL). Indeed, automated weapons have been used for decades, without giving rise to major debates in legal doctrine.⁹ In contrast, the new generation of autonomous weapons seems more problematic as they create greater challenges in terms of reliability and predictability. Autonomous weapons systems also present major problems with respect to attributing criminal liability.

Lethal autonomous weapon systems (LAWS), also referred to as ‘killer robots’, constitute a specific subcategory of AWS. Admittedly, at international level, the political debate has centred a lot in LAWS, but this seems primarily due to the mandate of the Group of Governmental Experts (GGE),¹⁰ established in 2016 in the context of the United Nations (UN) 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).¹¹ The GGE is open to all State Parties to the Convention, but also to representatives of various civil society organisations, industry, academic institutions, and renowned research centres.¹² Due to the influence of the GGE’s work, several political initiatives at the national level also focus primarily on LAWS.

In a position paper submitted to the GGE in May 2023, Belgium, however, explicitly departed from the term LAWS, arguing that ‘the notion of lethality is not defined in international law and not relevant to determine if a system is IHL compliant or not’, and therefore decided to give preference to the term AWS.¹³ In our view, this choice is legitimate as many AWS may generate lethal effects, but regardless of whether the effects are lethal or not, the nature of the questions regarding legal framework and liability raised by such weapons is essentially the same. The differences rather reside in the

⁹ Magdalena Pacholska, ‘Military Artificial Intelligence and the Principle of Distinction: A State Responsibility Perspective’ (2022) *Israel Law Review* 3, 8–9.

¹⁰ In full: Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems.

¹¹ United Nations, 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, 10 October 1980, *Treaties Series* vol 1342, 137.

¹² On the establishment of the GGE, see Alyson Berrendorf and Noémi Bontridder, ‘Le développement, le déploiement et l’utilisation d’un système d’armes létales autonome pour la conduite des hostilités: en quête de responsabilité’ (2022) 88 *Revue du Droit des Technologies de l’Information* 44.

¹³ Belgium, ‘Position paper’, GGE (15–19 May 2023) 1 (unpublished).

concrete answers that are given to certain questions, depending on whether an AWS does or does not produce a lethal impact. Therefore, we will prefer the term AWS in this contribution too, unless the debate or legal instrument in point would focus specifically on LAWS.

2 AWS in the Belgian Legal and Political Landscape

In order to sketch the Belgian legal and political landscape in relation to AWS, this contribution relies essentially on two sets of *sources*. On the one hand, Belgium, being a quite active member of the GGE, has publicly expressed its opinion on a number of occasions, through both official documents submitted in the framework of the GGE and declarations made to the CCW. On the other hand, at the national level, several political initiatives regarding AWS have been taken in recent years. While the Belgian (federal) government's position¹⁴ has been rather consistent at the international level, we will see that the initiatives at the national level are more diverse, as they have been put forward by individual Members of Parliament (MP) pursuing their own political agenda and thus diverging objectives.

In what follows, we will first address the question of the definition of AWS (2.1), presenting Belgium's contributions to the international discussions on this issue (2.1.1) as well as national attempts to characterise AWS (2.1.2). Next, we will turn to the legality issue and the need for further regulation of AWS (2.2). Along the way, we will also make a few more general reflections on how an adequate legal framework for AWS could or should look and the appropriate forum for negotiating such a framework.

2.1 Defining AWS

At present, there is no common definition of AWS among States, despite several years of discussions within the GGE. While multiple countries have attempted to define AWS, most national legislators have yet to adopt precise legal definitions. Instead, they resort to non-binding instruments, reports, and discussions. This is also the case in Belgium, as we will see.

At the supranational level, certain reference texts – such as the 2018 Resolution of the European Parliament – have defined 'lethal autonomous weapons systems' as 'weapon systems without meaningful human control over the critical functions of selecting and attacking individual targets'.¹⁵

At the international level, the definition of AWS remains a hotly debated linguistic and conceptual challenge. For certain national delegations to the GGE, a joint definition is a

¹⁴ Whenever using the 'Belgian government', we refer to the federal government. Belgium being a federal state, defence policy still belongs to the powers of the federal level. The same holds true for substantive criminal law and criminal procedure, even if the regions have a number of limited powers in those areas too (eg they can adopt criminal offences in the policy areas for which they are competent).

¹⁵ European Parliament Resolution of 12 September 2018 on Autonomous Weapons Systems (2018/2752(RSP)) [2018] OJ C433/201.

prerequisite for negotiating a future international framework regulating and/or prohibiting AWS. Therefore, as long as there is no agreement on the definition of AWS, it is impossible to make any progress on the legal framework.¹⁶ At the time of writing these lines, a so-called ‘rolling text’ is being developed to serve as a common linguistic and conceptual foundation for future discussions (post-2026).¹⁷ By its very nature, this document is intended to be evolutionary, providing a flexible and consensual basis for the continuation of negotiations.

2.1.1 *Belgium’s Position at the International Level*

Over the years, the Belgian delegation has actively contributed – and continues to do so – to the international discussions in search of a common understanding of AWS. This subsection will give a brief overview of the work and positions taken by the Belgian government in the framework of the GGE.

Back in 2017, Belgium filed a *first proposal* to reach a common definition.¹⁸ After recalling the scope of the GGE’s work – ‘existing weapons systems (whether automated or partially autonomous)’ are excluded from its discussions – and ‘the unanimous acknowledgement that fully autonomous lethal weapons systems do not exist yet’, the proposal insists on the distinction between LAWS and non-autonomous weapons systems, which should be considered ‘different in nature, and not in degree’.¹⁹ With automated systems, the ultimate decision to produce lethal effects remains entirely in the hands of a human being. Such systems are ‘fully programmed’ and ‘their whole functioning is predictable and intended’.²⁰ Even partially autonomous weapons systems (eg anti-missile systems) are entirely programmed, and their use depends on the intention of human beings. In contrast, in the case of LAWS, the human being would not intervene in the final decision to inflict a lethal effect, or, if he were to intervene, it would be ‘among other “artificial deliberative” authorities taking ultimately the decision whether to inflict or not the lethal effects’.²¹ Consequently, ‘(1) the human being would be sidelined in the decision-making process (he would only remain the originator of the lethal process)’; and (2) the outcome ‘would become potentially highly unpredictable for

¹⁶ For an analysis of the political obstacles to establishing a definition, see Merel A.C. Ekelhof, ‘The Distributed Conduct of War: Reframing Debates on Autonomous Weapons, Human Control and Legal Compliance in Targeting’ (PhD thesis, Vrije Universiteit Brussels 2019) 57-78 <<https://research.vu.nl/ws/portalfiles/portal/90547665/complete+dissertation.pdf>> accessed 24 October 2025.

¹⁷ With this evolving text, the GGE aims to advance ‘its work on a set of elements of an instrument’, in the hope of eventually reaching a consensus. See GGE on LAWS, ‘Revised rolling text as of 12 May 2025’ 1 <<https://meetings.unoda.org/ccw/convention-on-certain-conventional-weapons-group-of-governmental-experts-on-lethal-autonomous-weapons-systems-2025>> accessed 24 October 2025.

¹⁸ Belgium, ‘Towards a definition of lethal autonomous weapons systems’ (Geneva, 7 November 2017) CCW/GGE.1/2017/WP.3.

¹⁹ *ibid* paras 2 and 4.

²⁰ *ibid* para 6.

²¹ *ibid* para 4.

the human agent’.²² That said, the decision whether or not to deploy LAWS with the objective to kill ‘remains under human authority, be it political and/or military’.²³

Therefore, the Belgian delegation argued that the following *characteristics* should be taken into account when attempting to define LAWS:

- The total autonomy of LAWS in making lethal decisions;
- The ability to identify and select a target, with lethal intent, in total independence of human intervention;
- The ‘unclear or uncertain division of authority’ between man and machine in the intentionality, with lethal consequences;
- The impossibility to bring autonomously functioning LAWS ‘back to remotely operated mode, or to deactivate them’;
- The limited knowledge of LAWS’ potential behaviours, ie their ‘uncertain, unpredictable or unreliable character’;
- And finally, the ability of LAWS to redefine their own operating criteria.²⁴

At the same time, Belgium also called upon the international community to be vigilant about the ‘potential dual-use nature of robotic technology’, and warned that any future definition or ‘characterization of LAWS should not hinder the development and use of [such] technology for civilian purposes’.²⁵

More recently, in the context of its 2021 presidency of the GGE, Belgium proposed the following *distinctions* in a new attempt to clarify the discussions in the assembly:

- Autonomous weapons systems are weapons systems that, once activated, can select and apply force against targets without direct human supervision or control;
- Fully autonomous weapons systems are autonomous weapons systems that are designed to operate outside of any framework of human command and control;
- Partially autonomous weapons systems are autonomous weapons systems that are designed to operate within a framework of human command and control;
- In contrast, weapons systems that incorporate autonomy only into functions other than to select and apply force against targets are not autonomous weapons systems.²⁶

²² *ibid.*

²³ *ibid* para 5.

²⁴ *ibid* para 8.

²⁵ *ibid* para 7.

²⁶ See Belgian Ambassador Marc Pecsteen (Chair of the Group of Governmental Experts) oral statements made at the GGE meetings (Geneva, July 2021). See also Group of Governmental Experts, ‘Provisional Agenda for 2021 Sessions’ (Geneva, 14 July 2021) CCW/GGE.1/2021/1, item 5(b) (‘Characterization of the systems under consideration in order to promote a common understanding on concepts and characteristics relevant to the objectives and purposes of the Convention’).

Unfortunately, this proposal failed to convince the other delegations.

Considering the lack of significant progress made by the GGE since its creation, Belgium (together with other State Parties to the CCW) expressed its ‘deep disappointment’ in 2022.²⁷ It started to openly question whether the GGE is still the most adequate and only forum to negotiate an international framework for AWS. Belgium was not alone in raising this concern: the question whether the CCW is the relevant framework for initiating a diplomatic process to regulate AWS was indeed fiercely debated at the GGE meeting in July 2022.

In its May 2023 position paper, Belgium still expressed support for the work of the GGE and confirmed its willingness to ‘actively participat[e] in all initiatives aimed at improving understanding and raising awareness of AWS issues’.²⁸ Yet, at the same time, the position paper also highlights the value of organising ‘conferences and other initiatives, such as the Joint Statement delivered by Austria on behalf of 70 states during the session of the First Committee of the United Nations General Assembly in October 2022 and the conferences related to this issue such as those organised by The Netherlands, Costa Rica and Luxemburg in 2023’.²⁹ It thus appears that Belgium is no longer attached to the CCW being the one and only forum, but is willing to resort to any other forum that could lead to the ultimate objective of a legally binding international instrument to prohibit and regulate AWS. This approach has been confirmed since then: although Belgium has continued to consistently participate in the GGE meetings, its involvement appears to have been somewhat less proactive lately, with its initiatives over the past few years being mainly focused on the work of other bodies (see below, 2.2.2.2).

2.1.2 Attempts to define AWS at the national level³⁰

In addition to Belgium’s proposals to circumscribe LAWS at the international level, several attempts to define AWS have been made in recent years in the Belgian Parliament (*Chambre des représentants* or House of Representatives). Whereas none of these initiatives has yet resulted in the adoption of a formal Act as such, they provide valuable insight into how Belgian politicians and experts perceive the growing autonomy in armaments, especially with respect to the critical functions of selection and targeting, and the answers they propose to the challenges created by AWS.

²⁷ Argentina, Austria, Belgium, Chile, Costa Rica, Ecuador, Guatemala, Ireland, Kazakhstan, Liechtenstein, Luxembourg, Malta, Mexico, New Zealand, Nigeria, Panama, Peru, the Philippines, Sierra Leone, Sri Lanka, State of Palestine, Switzerland and Uruguay, ‘Working Paper’ (Geneva, 8 August 2022) CCW/GGE.1/2022/WP.4 (the so-called ‘Signpost document’) para 6.

²⁸ Belgium (n 13) 4.

²⁹ *ibid.*

³⁰ Unless stated otherwise, English translations of legal provisions and parliamentary documents in this contribution do not have an official character but were made by the authors. The same holds true for the literature in French that is cited in later parts of the contribution.

In 2016, a *first proposal for a resolution*³¹ put forward by a group of MP of the Green Party coalition wanted to prohibit the research, production, commercialisation and use of ‘totally autonomous weapons’. This proposal defined these weapons by reference to their lethal capacity: such ‘fully autonomous weapons could determine themselves whether the use of lethal force is appropriate or not’, they go ‘one step further than the current generation of semi-autonomous armed drones, since these weapons are capable of selecting and attacking targets without any significant human intervention’.³²

In 2018, *another proposal for a resolution*,³³ this time coming from three MP of the French-speaking³⁴ Liberal Party, called on the Belgian government: (1) to prohibit the financing – directly or indirectly – of the development of LAWS, and the acquisition and use of LAWS, in accordance with the principles of IHL; (2) to support the use of robotic technology for civilian purposes, by financing research and development; and (3) to consult with the competent committee for the evaluation of the legality of any new weapon³⁵ purchased by the Belgian state or produced in Belgium.

Nevertheless, neither of these proposed resolutions was adopted.

A *third* initiative was more successful. Indeed, in July 2018, the Belgian Parliament adopted a *resolution*³⁶ aiming to prohibit the use of killer robots and fully automated armed drones by the Belgian Defence and asking the government to advocate for an international treaty banning such weapons systems. Even if this (short) resolution

³¹ A *resolution* needs to be distinguished from an *Act of Parliament*. In a resolution, the aim is to guide or influence the policy agenda of the government, to which the resolution is addressed. Unlike with an *Act of Parliament*, the government is not obliged to implement a resolution: a resolution is not legally binding, neither on the Assembly that adopts it, nor on the government or on the citizens.

³² Proposition de résolution relative à l’interdiction de la recherche, la production, le commerce et l’utilisation des armes totalement autonomes, Doc parl Ch repr sess 2016–17, no 54-2219/001, 3.

³³ Proposition de résolution portant à une contribution active de la Belgique aux négociations internationales dans le cadre de la Convention de 1980 sur certaines armes classiques en ce qui concerne les systèmes d’armes létales autonomes et à interdire dans notre pays le financement de la fabrication de l’acquisition, et par conséquent la détention et l’utilisation de systèmes d’armes létales autonomes, Doc parl Ch repr sess 2017–18, no 54-3219/001.

³⁴ In Belgium, except for the extreme-left-wing party PTB (*Parti du travail de Belgique*), there are no national political parties anymore since the 1970s. Indeed, as a result of the major political tensions between the main two linguistic communities in the 1960s, all traditional political parties (socialists, socio-democrats, liberals) were split, one by one, into a French-speaking party and a Dutch-speaking party. The same holds true for the two Green Parties, even if they form a coalition and cooperate closely at federal level (as well as in Brussels-Capital Region).

³⁵ Belgium has set up a Committee for the Legal Evaluation of New Weapons, Means and Methods of Warfare at national level. See Ministère de la défense (Direction Générale Appui Juridique), Commission d’Évaluation Juridique des nouvelles armes, des nouveaux moyens et des nouvelles méthodes de guerre (procédure spécifique) (21 November 2018) DG Jur-SPS-CJBCEJ-CXX-001/LEGAD-Int (unpublished, confidential).

³⁶ Résolution visant à interdire l’utilisation par la Défense belge, de robots tueurs et de drones armés (Texte adopté en séance plénière), Doc parl Ch repr sess 2017–18, no 54-3203/005.

eventually does not propose a definition of AWS, the parliamentary discussions leading up to this resolution are worth a short analysis here.

First, it is worthwhile noting that the MP who proposed the resolution,³⁷ belonging to centrist and liberal political parties, based themselves³⁸ on the definition of AWS given by the American Department of Defense.³⁹ This is a broad definition that can be applied to both future and existing systems, in contrast to, for instance, the definition used by the army of the United Kingdom (UK), which is much more restrictive.⁴⁰ During the parliamentary discussions, reference was also made to the positions and recommendations made by various organisations active in the field of IHL, such as the UN Human Rights Council and the GGE, and to the definition of LAWS proposed by the International Committee of the Red Cross (ICRC), which is most commonly used in international debates.⁴¹ According to this definition, the term ‘autonomous weapon’ refers to any weapon that has autonomy in its most critical functions, in particular weapons that ‘select’ their targets and ‘attack’ them without human intervention.⁴² Still, to fully grasp what this means, one would have to agree clearly on what the ‘selection’ and ‘attack’ phases precisely entail.

Second, in the framework of this resolution, several experts were heard by the National Defence Committee at the House of Representatives.⁴³ According to a high-level expert of the Belgian Ministry of Defence,⁴⁴ defining AWS is a fundamental step, especially in view of establishing a future ban, but it is not easy because these technologies are in full development: while some machines do not yet exist, others may very well never exist

³⁷ Proposition de résolution visant à interdire l’utilisation par la Défense belge de robots tueurs et de drones armés, Doc parl Ch repr sess 2017–18, no 54-3203/001.

³⁸ Rapport au nom de la Commission de la Défense nationale, Doc parl Ch repr sess 2017–18, no 54-3203/003, 36 and 83.

³⁹ US Department of Defense, Directive 3000.09: Autonomy in Weapon Systems (21 November 2012).

⁴⁰ According to this definition of the UK army, an AWS is a system capable of understanding, to a high degree, the intentions of the target and thus would have a level of perception comparable to that of a human being. See UK Ministry of Defence, ‘Joint Doctrine Note 2/11: The UK Approach to Unmanned Aircraft Systems’ (Development, Concepts and Doctrine Centre, 30 March 2011) 14 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/644084/20110505-JDN_2-11_UAS_archived-U.pdf> accessed 24 October 2025. This publication was withdrawn on 12 September 2017 and superseded by *Unmanned Aircraft Systems (JDP 0-30.2)*; however, the definition of AWS remains unchanged.

⁴¹ Proposition de résolution visant à interdire l’utilisation, par la Défense belge, de robots tueurs et de drones armés (n 37) 3; Rapport au nom de la Commission de la Défense nationale (n 38).

⁴² ICRC, ‘ICRC Position on Autonomous Weapon Systems’ (12 May 2021) <<https://www.icrc.org/en/document/icrc-position-autonomous-weapon-systems>> accessed 24 October 2025; ICRC, ‘Autonomous Weapons: Decisions to Kill and Destroy Are a Human Responsibility’ (11 April 2016) <<https://www.icrc.org/en/document/statement-icrc-lethal-autonomous-weapons-systems>> accessed 24 October 2025. See also Rapport au nom de la Commission de la Défense nationale (n 38) 83.

⁴³ Rapport au nom de la Commission de la Défense nationale (n 38) 28–69.

⁴⁴ Opinion Nicolas Lange (member of the Directorate-General for Legal Support and Mediation, Belgian Ministry of Defence) *ibid* 28–33.

and remain science fiction.⁴⁵ Still, to have a good understanding of and correct information on both the functioning and limitations of such systems is indispensable, as is the ability to test those systems. In his view, the definition should not be too broad 'because it would risk including existing non-lethal technologies or technologies that are also for civilian use and whose development will be compromised'.⁴⁶ Moreover, similar to Belgium's position in the GGE (see above, 2.1.1), he stressed the importance of clearly distinguishing autonomy from automation.⁴⁷ Despite this expert opinion, the text of the adopted resolution makes an unfortunate amalgam between AWS and armed drones that are fully automated, which both should be prohibited, even though they are two fundamentally different systems.⁴⁸ It seems that the Belgian Parliament managed to maintain a more solid distinction between AWS and (automated) armed drones since then: on 13 February 2025, in particular, a *resolution* was adopted that gave a green light to arming the military drones fleet of Belgian armed forces – especially the *SkyGuardian* model that was purchased in recent years.⁴⁹ During the debate in Parliament that led to the adoption of this resolution, it was highlighted that drones may refer to very different systems 'with different applications and varying levels of autonomy',⁵⁰ and that the *SkyGuardian* currently possessed by Belgian forces 'is technically not capable of making automatic or autonomous decisions regarding the use of weapons [as] [a]ll actions remain fully under human control, which is essential to ensure compliance with ethical and legal standards'.⁵¹

During the hearings that led to the adoption of *resolution* on the prohibition of killer robots,⁵² the expert of the Belgian Ministry of Defence also echoed the six characterizing elements put forward by the Belgian government in the GGE: (1) full autonomy, from decision to use of lethal firepower; (2) the ability to identify a target completely independently and to focus on that target, without any human intervention; (3) an unclear authority relationship between man and machine regarding the intent to use lethal force; (4) the impossibility of putting these weapon systems into remote control mode or disabling them; (5) the limited knowledge of the behaviour of this type of weapon systems; and (6) the ability of the system to redefine its own mission.⁵³

⁴⁵ *ibid* 29.

⁴⁶ *ibid*.

⁴⁷ *ibid*.

⁴⁸ Résolution visant à interdire l'utilisation par la Défense belge, de robots tueurs et de drones armés (n 36) 4.

⁴⁹ Résolution visant à armer les capacités UAS de la Défense (Texte adopté en séance plénière), Doc parl Ch repr sess 2024–25, no 56-0370/007.

⁵⁰ Proposition de résolution visant à armer les capacités UAS de la Défense, Doc parl Ch repr sess 2024–25, no 56-0370/001, 6.

⁵¹ *ibid* 4.

⁵² Résolution visant à interdire l'utilisation par la Défense belge, de robots tueurs et de drones armés (n 36).

⁵³ Rapport au nom de la Commission de la Défense Nationale (n 38) 31–32.

Shortly after this resolution was adopted in July 2018, a *bill* amending the 8 June 2006 Act regulating economic and individual activities involving weapons with a view to banning killer robots was introduced in Parliament by MP of the Dutch-speaking and French-speaking socialist parties.⁵⁴ The purpose of this bill was to add ‘killer robots’ to the list of prohibited weapons under the 8 June 2006 Act. In pursuing this unique objective, the MP also put forward a definition of killer robots in the explanatory note to the bill: they are ‘autonomous weapon systems capable of selecting and attacking targets without meaningful human control. This means that these weapon systems can use lethal violence without direct instructions from a human being.’⁵⁵ Furthermore, ‘killer robots may be applied to a variety of weapon systems, such as motorised combat vehicles, combat aircraft or ships’.⁵⁶ Although this bill was not adopted and has now become obsolete, it was later reintroduced in August 2024.⁵⁷ The definition of LAWS provided in this new bill is slightly more restrictive as it is limited to weapons that are capable of selecting and attacking ‘a human target or a target in which a human is present’.⁵⁸ The new bill was ultimately rejected by Parliament in April 2025. Although the full reasons for this outcome remain unclear, some MP voiced concern that the proposition might hinder research and development at a critical time for European defence.⁵⁹

Finally, it is worth mentioning the *proposal for a resolution* on an international treaty banning LAWS,⁶⁰ submitted in June 2021 by several MP of the Green Party coalition. The explanatory note to this proposal provides us with a few additional definitional features. While the explanatory note starts by reiterating that there is at present no international consensus on the definition of AWS, it refers to the aforementioned definition of the ICRC and then emphasises the importance of distinguishing between remotely piloted weapons (such as contemporary drones), automated weapons (such as sea mines and anti-tank mines) and autonomous systems.⁶¹ The text of the proposed resolution requests the Belgian government: (1) to advocate for an international treaty that bans on the production, storage, trade and use of LAWS; (2) alternatively, if no consensus can be reached within the CCW forum, to negotiate a ban treaty, within a multilateral framework, with likeminded countries, in a process comparable to the multilateral

⁵⁴ Proposition de loi modifiant la loi du 8 juin 2006 réglant des activités économiques et individuelles avec des armes en vue d’interdire les robots tueurs, Doc parl Ch repr sess 2019, no 55-0322/001.

⁵⁵ *ibid* 3.

⁵⁶ *ibid* 3.

⁵⁷ Proposition de loi modifiant la loi du 8 juin 2006 réglant des activités économiques et individuelles avec des armes en vue d’interdire les systèmes d’armes létaux entièrement autonomes, Doc parl Ch repr sess 2024, no 56-0095/001.

⁵⁸ *ibid* 4. This more restrictive approach has been pointed out by the Council of State (*Conseil d’État*), that is tasked to advise on draft legislation in Belgium: Avis du Conseil d’État (no 77.124/4, 13 November 2024) Doc parl Ch repr sess 2024–25, no 56-0095/002.

⁵⁹ Rapport fait au nom de la commission de la Défense nationale par Mme Annick Ponthier, Doc parl Ch repr sess 2024–25, no 56-0095/004, 7.

⁶⁰ Proposition de résolution relative à un traité international interdisant les systèmes d’armes létaux autonomes, Doc parl Ch repr sess 2020–21, no 55-2087/001.

⁶¹ *ibid* 4.

processes that led to the treaties banning anti-personnel mines and cluster munitions; (3) to make sure that in the discussions on the definition of AWS, are included at least all systems capable of making autonomous decisions (ie without human supervision) with regard to the selection and attack of human targets; and (4) to develop a regulatory framework at national level prohibiting the research and development of fully autonomous weapons systems, as well as their use. This proposal, however, has likewise not succeeded in garnering the necessary support and has now become obsolete in Parliament.

2.2 Legal Framework on AWS

2.2.1 *Preliminary Observations*

In the discussions on a legal framework for AWS, two questions have been *central*: (1) is there a need for a *ban* or rather *regulation* to control these weapons systems, and (2) what form should this ban or regulation take, ie a binding or non-binding document? In addition, it is important to distinguish between a general ban on all AWS and a ban on certain applications.

More fundamentally, one may question whether the legal framework on AWS should necessarily involve a ban: should regulation not be preferred? Both options have advantages and disadvantages. On the one hand, regulation would not be sufficient to determine which weapons may be developed and used in the future and for which purpose(s). On the other hand, a ban has the advantage of clarity, but it should be well defined and not compromise the development of technologies for civilian purposes.⁶²

According to the position most widely publicised by NGOs, a preventive binding ban on these systems would be the ideal solution to counter the risks involved in these systems. However, the position of the State Parties to the CCW seems more nuanced, as we will see when presenting the Belgian position.

The choice of legal framework that will be made in the future will, of course, strongly depend on the purpose(s) pursued by the political actors. One objective put forward quite often is to ensure that technological innovations can be developed in a safe way. The question, however, remains whether it is possible to identify and control all innovations that would be developed outside this framework, in an illicit way, by countries, regimes, or individuals.⁶³

2.2.2 *Current Legal Framework*

Despite the policy documents mentioned above, there are no specific regulations concerning the production or use of AWS under Belgian law. So far, the only directly relevant legal instrument that has been adopted is the aforementioned resolution of 2018

⁶² See the opinions expressed by several academic experts and a Dutch NGO: Rapport au nom de la Commission de la Défense nationale (n 38) 65–69.

⁶³ Rapport au nom de la Commission de la Défense nationale (n 38) 65.

of the Belgian Parliament. This resolution is, however, not legally binding. It merely invites the government to negotiate a global ban on the use of killer robots and fully automated armed drones, and to make sure that such weapons are not deployed by the Belgian Army.⁶⁴

At the international level, a ban or specific regulation on AWS does not exist either. Yet, as explained above, the GGE has been trying to conceptualise LAWS ever since 2016, as a preliminary step for potential future regulation.

Moreover, at the level of the European Union (EU), the European Parliament adopted in 2018 a resolution urging the EU and its Member States to negotiate a legally binding instrument prohibiting LAWS and stressing ‘the fundamental importance of preventing the development and production of any lethal autonomous weapon systems lacking human control in critical functions such as target selection and engagement’.⁶⁵ Meanwhile, Regulation 2024/1689 (the so-called ‘AI Act’) has also been adopted with the objective of providing a global legal framework on AI systems within the EU.⁶⁶ This new addition, however, is of limited relevance in relation to AWS, as AI systems that are used exclusively for ‘military, defence or national security purposes’ are excluded from the scope of the Regulation⁶⁷ (though one cannot exclude that AI systems that are initially intended for AWS might also be used in civilian or other contexts, in which case they would then fall into the scope of the Regulation).

Notwithstanding the lack of a legal definition of AWS, both at the international level and at the national level, Belgium has taken a clear stance on the legal framework applicable to AWS and a number of other aspects that are detrimental to any future regulation.

2.2.2.1 *The Principled Applicability of Existing International Law*

First of all, according to Belgium, the starting point for regulating AWS should be existing international law. International law – in particular IHL on the conduct of hostilities or the law of conflict – ‘fully applies’ to this new type of weaponry.⁶⁸ Hence, as such, there is at present no legal vacuum. This viewpoint is shared by several other State Parties to the CCW.⁶⁹

⁶⁴ Résolution visant à interdire l’utilisation par la Défense belge, de robots tueurs et de drones armés (n 36) 4.

⁶⁵ European Parliament (n 15) paras 3–4.

⁶⁶ Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) [2024] OJ L2024/1689.

⁶⁷ *ibid* art 2 para 3.

⁶⁸ Belgium (n 13) 1.

⁶⁹ See eg Austria, Belgium, Brazil, Chile, Ireland, Germany, Luxembourg, Mexico, and New-Zealand, ‘Joint “Commentary” on Guiding Principles A, B, C and D’ (Geneva, 1 September 2020) 1 (Austria and others).

Yet, at the same time, the Belgian delegation has also underscored in the GGE discussions that the current legal framework has been developed ‘for human agents, not for autonomous non-human agents’.⁷⁰ Certain principles of the law of conflict (such as the principles of distinction, proportionality and precaution) may be more difficult to apply (see also below, 4.2).⁷¹ Therefore, they require further clarification and guidance ‘in terms of design requirements and human behaviour requirements when developing, deploying and using these systems’ (see also below 2.2.2.2).⁷²

To the extent that AWS operate fully autonomously, it may even be impossible to comply with the international law requirements.⁷³ Belgium has repeatedly stated that weapons systems that contravene international ‘legal, humanitarian and/or ethical standards’ should be prohibited.⁷⁴ Therefore, ‘additional policy options should also be considered, within the framework of the CCW’, whether taking the form of ‘a strong political declaration and/or a dedicated international legal instrument’.⁷⁵ While Belgium still called for a non-binding political declaration in 2019,⁷⁶ it explicitly favours a legally binding international instrument based on a ‘two-tier approach’ in its 2023 position paper.⁷⁷ This two-tier approach will be explained in more detail in the next subsection.

2.2.2.2 *Belgium’s Proposal for a Two-Tier Approach to a Future Legal Framework on AWS*

Based on several working papers and the discussions within the GGE,⁷⁸ Belgium has indeed developed a proposal for a ‘two-tier approach’, involving ‘a prohibition of certain types of AWS and the regulation of others’,⁷⁹ which it presented in a position paper in May 2023.

More specifically, Belgium advocates, on the one hand, a *prohibition of specific AWS*, in particularly the ones ‘that are inherently illegal under IHL because they are of a nature to cause superfluous injury or unnecessary suffering because they have indiscriminate effects, or because they are intended, or may be expected to cause widespread, long-term

⁷⁰ Belgium (n 18) para 9.

⁷¹ Austria and others (n 69) 1-2 (arguing that the application of these principles ‘require context-specific value-based judgment by a human, which, with respect to emerging technologies in the area of LAWS, must not be substituted by autonomous machines or systems’).

⁷² Belgium (n 13) 3.

⁷³ *ibid* pt A.

⁷⁴ Belgium, Ireland and Luxembourg, ‘Food for Thought Paper’ (Geneva, 28 March 2019) CCW/GGE.1/2019/WP.4 para 8. See also Belgium (n 13) 3.

⁷⁵ Belgium, Ireland and Luxembourg, ‘Food for Thought Paper’ (n 74) para 7.

⁷⁶ Also referred to in: Proposition de loi modifiant la loi du 8 juin 2006 réglant des activités économiques et individuelles avec des armes en vue d’interdire les robots tueurs (n 54) 3.

⁷⁷ Belgium (n 13) 3.

⁷⁸ In particular ‘[t]his approach has been developed during recent years through multiple working papers and documents, notably the Food for Thought Paper submitted by Belgium, Ireland, and Luxembourg in 2019, the so-called Signpost document submitted in March 2022 by 23 countries, including Belgium, and the Joint Statement delivered by Austria in the name of 70 States during the session of the First Committee of the United Nations General Assembly in October 2022.’ Belgium (n 13) 1.

⁷⁹ Belgium (n 13) 3.

and severe damage to the natural environment as well as of the AWS that are otherwise incapable of being used in accordance with IHL. The latter include those that are designed or used in a manner such that their effects cannot be sufficiently understood, predicted or explained, as well as those that lack meaningful human control over their critical functions, such as target identification, selection and engagement.’

On the other hand, Belgium argues that all AWS that are not outright prohibited should be *regulated* to ensure compliance with international law, including IHL and its fundamental principles of distinction, proportionality and precaution. Such regulation ‘involves establishing clear guidelines and standards in terms of design requirements and human behaviour requirements when developing, deploying and using these systems, with an emphasis on maintaining meaningful human control, responsibility, and accountability throughout their entire life cycle.’⁸⁰

Belgium’s understanding of the two-tier approach recognises that not all AWS are equal in terms of their implications. By distinguishing between systems that should be prohibited and those that should be regulated, the two-tier approach aims to create a more nuanced and effective legal framework for addressing the challenges posed by AWS⁸¹. The most adequate tool to realise this two-tier approach is, in Belgium’s view, a legally binding international instrument.⁸²

More recently, Belgium has re-emphasised the need for a legally binding instrument. In October 2024, the Belgian delegation stated before the First Committee of the United Nations General Assembly that ‘Science does not wait for the regulators. Scientific development is outpacing regulations in the field of autonomous weapon systems. Innovative systems and artificial intelligence are being introduced on the battlefield. Now is the time for a normative framework, if we wish to regulate the development and use of these systems before being confronted with a *fait accompli*.’⁸³ In 2023, 2024, and 2025, the First Committee of the United Nations General Assembly successively proposed three draft resolutions – all of which were co-sponsored by Belgium and subsequently adopted by the General Assembly plenary – on the importance to internationally address the ‘challenges and concerns’ raised by AWS,⁸⁴ especially by continuing ‘to work towards completing the set of elements for an instrument (...) with a view to future negotiations’.⁸⁵

⁸⁰ *ibid.*

⁸¹ *ibid.* 4.

⁸² *ibid.* 5.

⁸³ Belgium, ‘Statement for the General Debate’ (UN General Assembly First Committee New York, 14 October 2024).

⁸⁴ UN General Assembly, First Committee, Lethal autonomous weapons systems (12 October 2023) A/C.1/78/L.56, para 1; UN General Assembly, First Committee, Lethal autonomous weapons systems (14 October 2024) A/C.1/79/L.77, para 1; UN General Assembly, First Committee, Lethal autonomous weapons systems (14 October 2025) A/C.1/80/L.41, para 1.

⁸⁵ UN General Assembly, First Committee, Lethal autonomous weapons systems (14 October 2025) A/C.1/80/L.41 (n 84) para 3.

2.2.3 *The Need for Legal Review and Regular Evaluation*

Considering the applicability of international law, Belgium has insisted for years on the importance of respecting and implementing the obligation to carry out a legal review or assessment of new weapons, particularly in accordance with Article 36 of the First Additional Protocol to the 1949 Geneva Conventions (AP I),⁸⁶ in order to guarantee that any new weapons system developed complies with applicable international law. It supports the universalisation of the conduct of legal reviews of any weapon system, including AWS, as the earliest possible stage, with Article 36 of the AP I.⁸⁷ Furthermore, Belgium favours the sharing of information and good practices in the conduct of such legality assessments.⁸⁸

At the national level, experts have pointed out the value of a certification procedure under which a regulatory authority would be responsible for certifying a new weapons system or technology.⁸⁹ Meanwhile, such a certification process is also provided for in the EU AI Act, especially for high-risk systems.⁹⁰ As already mentioned, the AI Act does, however, not apply as such to military AI systems.⁹¹

What is more, considering the specificities of AWS, Belgium emphasises the need to renew this legal review ‘in case of significant modification undergone by the weapon on its core functions and/or on its effects’. This is particularly important because AWS are likely to encompass self-learning capabilities, enabling them to define their own evaluation criteria of actions and to redefine their missions and objectives without human intervention.⁹² Other countries, too, have insisted on the need for a ‘regular evaluation process (...) across the life cycle of a weapons system’.⁹³

At the national level, Belgium has set up a compliance procedure with regard to Article 36 of the AP I,⁹⁴ which imposes an obligation to assess the legality of any new weapon under international law.⁹⁵ Yet, the current procedure is not well adjusted to AWS. An update of this procedure is expected in the near future.

⁸⁶ Belgium (n 74) para 6.

⁸⁷ Belgium (n 13) 3.

⁸⁸ Oral intervention by the Belgian delegation at the Group of Governmental Experts (Geneva, 13 November 2017).

⁸⁹ Georges Heeren, representing AGORIA (ie the Belgian association of the technology industry) and BSDI (ie the Belgian Security & Defence Industry), Rapport au nom de la Commission de la Défense nationale (n 38) 34–35 and 81.

⁹⁰ Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence (n 66) Chapter III, Section 5.

⁹¹ *ibid* art 2 para 3.

⁹² Belgium (n 18) 3; Belgium (n 13) 3.

⁹³ Austria and others (n 69) 2–3.

⁹⁴ Ministère de la défense (n 35).

⁹⁵ ‘Belgium is fighting the introduction of Lethal Autonomous Weapons Systems’ (*Brussels Reporter*, 24 March 2019) <<https://brusselsreporter.com/brussels/2019/belgium-is-fighting-the-introduction-of-lethal-autonomous-weapons-systems/>> accessed 24 October 2025.

2.2.4 Vigilance with Respect to 'Dual-Use' Technologies

Lastly, at both national and international levels, Belgian policy-makers have expressed their concern about potential spill-over effects that a future ban or regulation of AWS might have on dual-use technology. In the framework of the GGE, the Belgian delegation stressed in 2017, as indicated, that a 'future characterization of LAWS should not hinder the development and use of robotic technology for civilian purposes'.⁹⁶ Around the same time, the Belgian Parliament requested the government 'to support the development and use of robotic technology for civilian purposes'.⁹⁷

3 AWS and the Use of Force

3.1 Regulation of the Use of Force in General

According to Article 167, paragraph 1 of the Constitution (as renumbered in 1994),⁹⁸ '[t]he King commands the armed forces; he states that there exists a state of war or that hostilities have ceased'.⁹⁹ This provision must be read in conjunction with the core principle that, in Belgium, all political acts of the King must be endorsed by one or more ministers¹⁰⁰ – a principle which, since August 1949, is undisputedly recognised to apply in all circumstances, including war.¹⁰¹ Therefore, in the Belgian context, all matters pertaining to the use of force lie in the hands of the Executive. Parliament, on the other hand, only has the right to be informed of the decisions taken by the government.¹⁰²

The most common avenue for the Belgian government to discharge its missions normally consists of adopting 'royal decrees' (*arrêtés royaux*).¹⁰³ Consistent practice, however, shows that, when deploying military troops, the Belgian government does not consider itself bound to formalise its decision with the adoption of such instruments – a position which has been criticised repeatedly.¹⁰⁴ On 13 May 2016, for instance, the government

⁹⁶ Belgium (n 18) para 7.

⁹⁷ Résolution visant à interdire l'utilisation par la Défense belge, de robots tueurs et de drones armés (n 36) 4.

⁹⁸ Moniteur Belge, 17 February 1994.

⁹⁹ An official English translation of the Belgian Constitution can be found at: <https://www.dekamer.be/kvvcr/pdf_sections/publications/constitution/GrondwetUK.pdf> accessed 24 October 2025.

¹⁰⁰ Under art 106 of the Constitution, '[n]o act of the King can take effect without the countersignature of a minister, who, in doing so, assumes responsibility for it'.

¹⁰¹ Until 1949, it was considered that in time of war the King could command the army in his personal capacity, without prior governmental approval (Christian Behrendt, 'Le commandement de l'armée et la notion d'état de guerre' in Cedric Jenart and others (eds), *De Grondwet en Jan Velaers. Een vriendschapsgewijze commentaar* (Die Keure 2022) 518-521.

¹⁰² Constitution, art 167 para 1.

¹⁰³ Constitution, arts 105 and 108.

¹⁰⁴ Pierre d'Argent, 'Le Roi commande les forces armées' (1994) 1 *Belgian Review of International Law* 210, 215-219; Jan Velaers, 'De Grondwet and de krijgsmacht' in Alexander De Becker and others (eds), *De grondwet en het inzetten van strijdkrachten* (Maklu 2005) 97-100. For a less critical view, see Nicolas Lagasse, 'Le commandement des forces armées: principe et mise en œuvre' in Valéry De Saedeleer, Nicolas Lagasse and Emmanuel Vandenbossche (eds), *Questions juridiques d'actualité en lien avec la défense – Actuelle juridische vraagstukken met betrekking tot defensie* (La Charte 2017) 30-36.

announced the extension of the Belgian military mandate in the fight against ISIS to the Syrian territory.¹⁰⁵ No royal decree, however, came to support this important decision.

Article 167, paragraph 1 of the Constitution not only empowers the government to deploy military troops, but also to officially recognise a state of war. This is meant to have a series of practical consequences in the domestic sphere,¹⁰⁶ including – as will be further developed below – the reactivation of military courts. In practice, however, no such official declaration has been made by the government since the end of World War II (although Belgium has, as a matter of fact, been engaged in military operations since then).¹⁰⁷

International law – whether in the form of customary norms or treaties ratified by the Executive and formally approved by Parliament¹⁰⁸ – is immediately applicable in Belgium and normally takes precedence even over the Constitution.¹⁰⁹ There is therefore no doubt that, in deploying military personnel abroad, the government is strictly bound to abide by *jus ad bellum* limits and principles,¹¹⁰ as most clearly reflected in the UN Charter.¹¹¹ As a result, military operations decided by the government should normally come within the scope of admissible self-defence, consist of peacekeeping missions or other interventions authorised by the Security Council of the UN, or be authorised by the State in whose territory the operations are taking place.¹¹² These global limits are also apparent from the normative history of the Constitution: while Article 167¹¹³ initially

¹⁰⁵ Résolution relative à l'engagement de la Défense belge contre l'État islamique (EI ou DAECH) en Irak et en Syrie, Doc parl Ch repr sess 2015-16, no 54 11883/006, 4.

¹⁰⁶ See Christian Behrendt and Martin Vrancken, *Principes de droit constitutionnel belge* (3rd edn, La Charte 2024) 447-448.

¹⁰⁷ Vincent Moyse and André Dumoulin, 'Le processus décisionnel belge en matière d'opérations civilo-militaires' (2011) 1 *Courrier hebdomadaire du CRISP* 5, 25.

¹⁰⁸ On this requirement for parliamentary assent to international treaties (*loi d'assentiment*), see Constitution, art 167 para 2.

¹⁰⁹ On the foundations of these notions as well as their reception in Belgium, see Hervé Bribosia, 'Applicabilité directe et primauté des traités internationaux et du droit communautaire. Réflexions générales sur le point de vue de l'ordre juridique belge' (1996) 1 *Belgian Review of International Law* 33.

¹¹⁰ Paul de Visscher, 'La Constitution belge et le droit international' (1986) 1 *Belgian Review of International Law* 5, 43-44.

¹¹¹ On the Charter's incorporation in the domestic legal order, see *Loi du 14 décembre 1945 approuvant la Charte des Nations unies et le Statut de la Cour internationale de Justice*, signés à San Francisco le 26 juin 1945 (*Moniteur belge*, 1 January 1946).

¹¹² For less common or more controversial grounds to use force in a Belgian perspective, see Nicolas Lange and Thierry Werts, 'Les missions de la défense à l'étranger', in Valéry De Saedeleer, Nicolas Lagasse and Emmanuel Vandebosche (eds), *Questions juridiques d'actualité en lien avec la défense – Actuele juridische vraagstukken met betrekking tot defensie* (La Charte 2017), 156-169; Hélène Paquay and Nicolas Lagasse, 'La force juste et la juste force. Réflexions sur l'usage de la contrainte par les Forces armées: état du droit et mise en perspective à la lumière de l'article 2 de la Convention européenne des droits de l'homme', in Valéry De Saedeleer and Nicolas Lagasse (eds), *Nouvelles missions de la défense: quel cadre juridique? – Nieuwe Defensiemissies: welk juridisch kader?* (Anthemis 2021) 181-183; Velaers (n 104) 101-103.

¹¹³ Constitution, art 68.

provided that it was for the King to *declare* war, the provision was amended in 1993 to only refer to his ability to acknowledge the *existence* of a war.¹¹⁴

While international law thus restricts the way in which Belgium may enter into war, in the context of NATO and the EU, the government may also be *bound* to participate in military operations, and therefore use force (to the extent *jus ad bellum* so allows). This is due to the collective defence mechanisms established under Article 5 of the North Atlantic Treaty¹¹⁵ and Article 42, paragraph 7 of the Treaty on European Union,¹¹⁶ respectively. According to the latter, for instance, '[i]f a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter'.

3.2 Specific Implications and Challenges Related to AWS

As was just seen above, AWS are not mentioned in the law of the use of force. However, from a political perspective, these systems raise important considerations.

One problem that has often been put forward – whether on the international or national scene – is that autonomous systems would facilitate the entry into war.¹¹⁷ Indeed, these systems would imply a reduction of the moral, political, and even financial cost of going to war,¹¹⁸ and in this way, they would influence the *jus ad bellum*.

This problem was revealed in particular by the Vietnam War, where the so-called body bag policy was a major obstacle to American military action.¹¹⁹ This policy demonstrated that citizens care less about military action abroad if there is less loss of life, except in terms of taxpayer expense. As Prof. Sassòli points out, '[i]t is true that the motivation for a State to comply with *ius ad bellum* could be lowered if it could expect that only combatants and civilians suffering incidental effects of the enemy will be affected'.¹²⁰

Two experts from the University of Ghent emphasize this risk: 'the inherent expendability and relatively low cost of (L)AWS compared to human combatants have the repercussion that (L)AWS could result in a "normalization" of armed conflicts to state citizens, which in turn might reduce the threshold for states to resort to lethal force on

¹¹⁴ See Rob Gerits, 'De "staat van oorlog" en de "staat van beleg": uitzonderingsregimes die aan een herziening toe zijn', in Emmanuel Vandenbossche (ed), *Uitzonderlijke omstandigheden in het grondwettelijk recht* (La Charte 2019) 67; Velaers (n 104) 89-90; d'Argent (n 104) 213.

¹¹⁵ North Atlantic Treaty (4 April 1949) 34 UNTS 243.

¹¹⁶ Consolidated Version of the Treaty on European Union [2012] OJ C326/47.

¹¹⁷ As highlighted by the Belgian independant expert in desarmement, Lode Dewaegheneire, during the online seminar 'Les armes autonomes (aka robots tueurs): vers un traité international d'interdiction et de regulation?' (webinar, Centre de Recherche et d'Information Pour le Désarmement et Sécurité (CRIDS) 21 December 2021).

¹¹⁸ Marco Sassòli, 'Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to be Clarified' (2024) 90 International Law Studies 308, 315-316.

¹¹⁹ Noël Sharkey, 'Automated Killers and the Computing Profession' (2007) 40 Computer 125.

¹²⁰ Sassòli (n 118) 315.

the global stage and might cause a reconsideration of armed conflict as being a measure of last resort.’¹²¹

In addition, unlike atomic weapons, autonomous weapons do not require any fissile or otherwise restricted materials. They could therefore become relatively inexpensive and accessible to produce, although their manufacture still depends on certain advanced electronic components.¹²²

4 AWS and the Conduct of Hostilities

4.1 Regulation of the Conduct of Hostilities in General

Since the Geneva Conventions and their Additional Protocols have been ratified and received parliamentary approval,¹²³ the key *jus in bello* principles that they contain are unquestionably part of Belgian domestic law as such. A different question is whether they have direct effect – ie whether the principles of distinction, proportionality or precaution (to mention only a few) are drafted in a sufficiently clear, precise and unconditional manner, and whether they are directly intended to confer rights upon individuals,¹²⁴ to the extent that they may be invoked before national courts on the sole basis of their international foundation.¹²⁵ Some commentators have suggested that they do.¹²⁶ And, surely, one may reasonably expect Belgian courts to decide so, as their approach towards the direct effect of other international standards meant to protect individuals has usually been rather flexible.¹²⁷ There is very little conclusive practice in Belgium, however, on this issue. The *Touax* case may nonetheless be mentioned.¹²⁸ In this

¹²¹ Sebastiaan Van Severen and Carl Vander Maelen, ‘Killer Robots: Lethal Autonomous Weapons and International Law’, in Jan De Bruyne and Cédric Vanleenhove (eds), *Artificial Intelligence and the Law* (Intersentia 2021) 161.

¹²² Proposition de résolution relative à l’interdiction de la recherche, la production, le commerce et l’utilisation des armes totalement autonomes (n 32) 17.

¹²³ *Loi* du 3 septembre 1952 portant approbation des [quatre Conventions] signées à Genève le 12 août 1949 (Moniteur belge, 26 September 1952); *Loi* du 16 avril 1986 portant approbation des [deux Protocoles additionnels aux Conventions de Genève du 12 août 1949] adoptés à Genève le 8 juin 1977 (Moniteur belge, 7 November 1986).

¹²⁴ On this twofold criteria and its reception in Belgium, see Bribosia (n 109) 48-49; Walter Jean Ganshof Van Der Meersch, ‘Le juge belge et le droit international’ (1970) 2 *Belgian Review of International Law* 409, 421-431; Michel Waelbroek, ‘Portée et critères de l’applicabilité directe des traités internationaux’ (1985) 1 *Revue critique de jurisprudence belge* 22, 27-42.

¹²⁵ For a transversal approach to this issue, see Liesbeth Zegveld, ‘Remedies for Victims of Violations of International Humanitarian Law’ (2003) 85 *International Review of the Red Cross* 497, 507-513.

¹²⁶ Eric David, *Éléments de droit pénal international et européen* (2nd edn, vol 2, Bruylant 2018) 1258-1259; Damien Vandermeersch, ‘Les violations du droit international humanitaire’, in Henri Bosly and Christian De Valkeneer (eds), *Les infractions. Volume 5: les infractions contre l’ordre public* (Larcier 2013) 122-123.

¹²⁷ Mireille Salmon, ‘Les droits fondamentaux devant le juge des référés’, in Frédéric Krenc, Frédéric Bouhon and Christophe Deprez (eds), *Contentieux des droits fondamentaux* (coll. Commission Université-Palais, vol 203, Anthemis 2021) 75-77.

¹²⁸ See Luc Walley, *Droits sans frontières* (Anthemis 2023) 108-109; Pierre d’Argent, ‘Jurisprudence belge relative au droit international public (2004-2007)’ (2007) 1 *Belgian Review of International Law* 149, 174-175.

dispute, the Brussels Court of Appeal was called upon to assess the civil liability of the Belgian State for the NATO bombing of Serbian bridges over the Danube in 1999. In a judgment of 16 May 2012, the Court held that the plaintiffs had failed to demonstrate a violation of the prohibition to attack civilian objects in IHL – but only because the Court found that the bridges in question were military objectives.¹²⁹ Therefore, it may be argued that the Court implicitly recognised the direct effect of the principle of distinction between civilian objects and military objectives under Article 52 of the AP I.

Furthermore, in the field of criminal law, those principles are certainly grounded in the implementing legislation on the grave breaches regime under the Geneva Conventions. According to Article 136*quater*, paragraph 1, 14° and 20° of the current¹³⁰ Belgian Criminal Code (Criminal Code),¹³¹ direct attacks against civilian objects and against the civilian population are prohibited, reflecting the principle of distinction of IHL.¹³² Furthermore, according to Article 136*quater*, paragraph 1, 22° of the same Code,¹³³ attacks are prohibited when they would be disproportionate, ie when the perpetrator has knowledge ‘that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects (...) which would be excessive in relation to the concrete and direct overall military advantage anticipated’. In this respect, it is of particular importance to note that Article 136*quater*, paragraph 1 of the Criminal Code¹³⁴ consists of a list of war crimes that is common to both international and non-international conflicts.¹³⁵ The traditional classification effort for the purpose of prosecuting serious breaches of IHL is therefore of limited significance in the experience of Belgium, as, by contrast with the international model,¹³⁶ most conduct that is constitutive of war crimes when committed in an international armed conflict also qualifies as such in the context of a non-international armed conflict.

The conduct of soldiers is further governed by a series of additional sets of rules that are specific to the military – some of which also echo, at least indirectly, core principles on

¹²⁹ Bruxelles (2^{ème} ch.) (Brussels Court of Appeal 2nd Section) 16 May 2013, partly reproduced in Nicolas Angelet and others (eds), *Les juges belges face aux actes adoptés par les Etats étrangers et les organisations internationales* (Bruylant 2016) 58-67.

¹³⁰ Belgium is about to undergo a significant reform of its Criminal Code pursuant to two Acts adopted on 29 February 2024, with the majority of the new provisions scheduled to enter into force on 8 April 2026 (*Loi du 29 février 2024 introduisant le livre Ier du Code pénal* (Moniteur belge, 8 April 2024); *Loi du 29 février 2024 introduisant le livre II du Code pénal* (Moniteur belge, 8 April 2024)). Unless expressly stated otherwise, references to the Criminal Code in the main text of this contribution refer to the provisions in effect at the time of writing, ie prior to the entry into force of the reform. However, for future purposes, references to the legal provisions in the new Criminal Code are consistently provided in footnotes where applicable.

¹³¹ *Code pénal* du 8 juin 1867 (Moniteur belge, 9 September 1867).

¹³² New Criminal Code, arts 87 para 1, 1°, c) and 85, 1°, e).

¹³³ New Criminal Code, art 85, 1°, g).

¹³⁴ New Criminal Code, arts 85, 1°, 86 para 1, 87, para 1, 1° and 88 para 1, 1°.

¹³⁵ See David (n 126) 1229; Vandermeersch (n 126) 122-123.

¹³⁶ See eg, the duality of war crime lists under art 8 of the Rome Statute of the International Criminal Court (ICC Statute).

the conduct of hostilities. Firstly, in addition to general criminal law, military personnel are also bound to abide by the 1870 Military Code (Military Code), which provides for specific offences such as treason, insubordination, espionage and desertion.¹³⁷ Since the definitive abolition of the death penalty in 1996,¹³⁸ the most severe sentence under the Military Code is life imprisonment. Secondly, soldiers are subjected to a series of legislative acts organising *military status and discipline*.¹³⁹ This includes Article 171 of a 2007 Act governing military status,¹⁴⁰ according to which members of the military must at all times ‘refrain from conducting any act that is contrary to international law’. Under Article 21 of the 1975 Act on military discipline,¹⁴¹ any breach of the former obligation qualifies as a disciplinary offence and may result in the imposition of a range of sanctions.¹⁴² Thirdly and finally, specific *rules of engagement* are systematically adopted to govern the extent to which troops may use force in the context of a specific mission.¹⁴³ Respect for IHL principles is an essential component of all rules of engagement,¹⁴⁴ the binding nature of which for Belgian soldiers is usually associated with the prohibition of insubordination under Article 28 of the Military Code.¹⁴⁵

4.2 Specific Implications and Challenges Related to AWS

In light of the *jus in bello* rules, it is generally argued that AWS could hardly comply with the founding principles of the law of armed conflict, such as the principle of distinction, proportionality and precaution (see above, 2.2.2.1),¹⁴⁶ especially as they would be likely to cause significant collateral damage.¹⁴⁷

In order to determine the legality of a weapons system, a two-step analysis is necessary: first, the *weapons law* ‘deals with the nature and design of weapon systems, their innate

¹³⁷ *Loi du 27 mai 1870 contenant le Code pénal militaire* (Moniteur belge, 4 June 1870) arts 15, 28, 17, and 43, respectively.

¹³⁸ *Loi du 10 juillet 1996 portant abolition de la peine de mort et modifiant les peines criminelles* (Moniteur belge, 1 August 1996).

¹³⁹ For a general overview of this complex regime, see Rob Gerits, ‘Statut des militaires’ *Répertoire pratique du droit belge* (Larcier 2019) 169-187; Christian Gossiaux and Henri Oldenhove, ‘Belgium – Belgique’, in Stanislas Horvat, Ilja Van Hespen and Veerle Van Gijsegem (eds), *Military Jurisdiction – La juridiction militaire*, Recueils of the International Society for Military Law and the Law of War (Brussels) 173-179.

¹⁴⁰ *Loi du 20 février 2007 fixant le statut des militaires et candidats militaires du cadre actif des Forces armées* (Moniteur belge, 10 April 2007).

¹⁴¹ *Loi du 10 janvier 1975 portant le règlement de discipline des Forces armées* (Moniteur belge, 1 February 1975).

¹⁴² For an introductory overview to these disciplinary sanctions, see Ministère de la défense, *Manuel de droit opérationnel* (House of Defence 2017) 592-593.

¹⁴³ Jolien F. R. Boddens Hosang, *Rules of Engagement and the International Law of Military Operations* (Oxford University Press 2020) 19.

¹⁴⁴ *ibid* 126-127. See also in the Belgian law of war manual: Ministère de la défense (n 142) 18-19.

¹⁴⁵ See Lange and Werts (n 112) 177.

¹⁴⁶ See Daniel Amoroso, *Autonomous Weapons Systems and International Law* (Edizioni Scientifiche Italiane 2020) 31-115.

¹⁴⁷ Maziar Homayounnejad, ‘Lethal Autonomous Weapon Systems Under the Law of Armed Conflict’ (PhD thesis, King’s College 2018) 282.

behaviour and how they affect people or objects against which they are directed',¹⁴⁸ and a second set of rules, the *targeting law*, 'deals with how weapon systems are used and how operators of a weapon system must behave in the course of planning and conducting an attack in order to satisfy State and individual legal obligations'¹⁴⁹. As far as AWS are concerned, the legality of these systems in their use (ie targeting law) constitutes a major issue, even if some AWS may also be illegal *per se*, ie in their design. For an AWS to be legal in light of the targeting law, it would have to comply with, among other things, the principles of distinction, proportionality and precaution.¹⁵⁰

According to the *principle of distinction* (Arts 48, 51 and 52 of the AP I), it is necessary to distinguish between combatants and non-combatants on the one hand, and between military and civilian objects on the other. In order for the use of an autonomous weapon system to be lawful, the system would have to be capable of making a reasonable distinction between combatants and civilians, taking into account the particular environment and circumstances of the battlefield at a particular time. Many experts have pointed out the apparent difficulty of developing a technology that can make such a distinction, comparable to the ability of a human being to distinguish, under the same circumstances.¹⁵¹ Other experts are more optimistic, though, in pointing out that technology will certainly be able, in the future, to distinguish between a person carrying a weapon and intending to use it, a person carrying a weapon but not intending to use it, and an unarmed person. AWS are promising because it would have an even better capacity for distinction and would be able to identify intentions even better than human beings. Moreover, when implemented, they would cause less suffering than a human actor.¹⁵² Nevertheless, such projections remain largely prospective, not to say somewhat speculative. They rest on technological assumptions that have yet to materialise and whose realisation, reliability, and ethical acceptability remain uncertain at this stage.

Yet even if AWS could be equal to or even better than humans in certain tasks, there are still significant challenges. Indeed, in order to apply the rules of targeting law correctly, the weapons system should be able to understand the context, as well as make qualitative judgments about certain situations. The principle of distinction is particularly complex and cannot be reduced to identifying a soldier as 'a man carrying a weapon'.¹⁵³ Indeed,

¹⁴⁸ See Tim McFarland, *Autonomous Weapon Systems and the Law of Armed Conflict* (Cambridge University Press 2020) 85.

¹⁴⁹ *ibid.*

¹⁵⁰ See Berrendorf and Bontridder (n 12) 57-62.

¹⁵¹ Rapport au nom de la Commission de la Défense nationale (n 38) 30.

¹⁵² *ibid.* 35.

¹⁵³ This issue was also raised in Belgian Parliament when a first resolution was proposed in 2016 (see above, 2.1.2). The MP proposing this resolution pointed out that AWS are unable to distinguish between military and civilian targets, particularly in asymmetric conflicts that no longer oppose States exclusively, but more commonly involve non-state armed groups. In such wars, combatants do not wear distinctive markings (such as uniforms or insignia) and blend in with the civilian population. See Proposition de résolution relative à l'interdiction de la recherche, la production, le commerce et l'utilisation des armes totalement autonomes (n 32) 12-13.

it sometimes happens that a civilian carries a weapon, for example, during a ceremony or to protect himself.

The second principle under the targeting law – the *principle of proportionality* – requires warfighters to consider whether the expected collateral damage from an attack would be excessive in relation to the expected military gain (Arts 51(5)(b) and 57(2)(iii) of the AP I). This principle is one of the most difficult to implement in an AI system, as it traditionally involves human judgment to make this assessment. Indeed, as highlighted by D. Jacqmin during the hearings in Belgian Parliament leading up to the aforementioned 2018 resolution,¹⁵⁴ ‘the machine is still unable to assess the proportionality of its action’, even if ‘the ability to distinguish is apparently beginning to be part of the possibilities of these systems’.¹⁵⁵ Proportionality is a real challenge for AWS because the system would have to be able to determine, firstly, the military advantage of a target in a particularly contextual and changing environment and, secondly, to compare this military advantage with the estimated collateral damage.¹⁵⁶ Despite all the progress made by technology, the interpretation of certain situations remains very delicate: guessing a person's intentions and motivations remains very difficult.¹⁵⁷ It is unlikely that an AWS will ever have the ability to understand all possible scenarios.¹⁵⁸ Nevertheless, the technology to determine the degree of collateral damage is already available. This ‘Collateral Damage Estimate Technology’ would be able to take into account ‘factors such as the accuracy of a weapon, the range of the explosion, the likelihood of civilians being present in the vicinity and the structure of the facility under attack’.¹⁵⁹

The last principle – the *principle of precaution* – requires that military operations are conducted with constant care to spare the civilian population, civilians and civilian objects (Arts 57 and 58 of the AP I). Several obligations derive from the precautionary principle; we will highlight here only the most important ones with regard to AWS. For instance, the precautionary principle imposes that the attacker must do everything ‘practically possible’ to verify that the targets to be attacked are neither civilians nor civilian objects, and to ensure that they do not benefit from special protection. This principle also requires that all practically possible precautions be taken in the choice of means and methods of attack in order to avoid, or at least minimise, loss of civilian life. How should these requirements be interpreted in relation to AWS? Depending on the

¹⁵⁴ Denis Jacqmin is an expert at the GRIP (*Groupe de recherche et d'information sur la paix et la sécurité*), which is an independent Belgian research centre.

¹⁵⁵ Rapport au nom de la Commission de la Défense nationale (n 38) 38.

¹⁵⁶ Proposition de résolution relative à l'interdiction de la recherche, la production, le commerce et l'utilisation des armes totalement autonomes (n 32) 13.

¹⁵⁷ Rapport au nom de la Commission de la Défense nationale (n 38) 39.

¹⁵⁸ Human Rights Watch, ‘Losing Humanity: The Case against Killer Robots’ (2012) 32-33.

¹⁵⁹ Proposition de résolution relative à l'interdiction de la recherche, la production, le commerce et l'utilisation des armes totalement autonomes (n 32) 13.

interpretation, the use of an AWS should be either prevented if another type of weapon would better protect civilians, or required if it offers better protection for civilians.¹⁶⁰

To conclude, these three principles confirm the importance of human judgment – whatever terminology one may use to describe it – in the decision-making process, particularly with regard to target selection and attack decisions. AWS, therefore, cannot, and should not, replace humans. Nonetheless, advances in AI offer significant potential to enhance the quality of human decision-making by providing faster, more comprehensive, and data-informed assessments. Accordingly, some scholars argue that a model of human-machine collaboration, in which technological capabilities are harnessed to support, rather than substitute, human ethical and legal reasoning in warfare.¹⁶¹

5 AWS and Criminal Liability

5.1 Jurisdiction of Criminal Courts

5.1.1 General Overview

Belgian criminal law in general has a broad *territorial* scope of application due to the application of the so-called ‘objective ubiquity theory’, developed by the Supreme Court (*Cour de cassation*).¹⁶² According to this theory, which will be codified in the new Criminal Code,¹⁶³ Belgian criminal law is applicable whenever the material element¹⁶⁴ of the offence, or part of it, has been committed in Belgian territory, regardless of the nationality of the perpetrator. In contrast, the location of the intent to commit the offence is irrelevant.

In practice, the application of this theory seems to encompass several other theories or doctrines that are often distinguished in legal literature on jurisdiction and that use as a ‘nexus’ (or ‘connecting factor’) the location of the criminal conduct (referred to as the ‘subjective territoriality principle’),¹⁶⁵ the location of the instrument (or rather where the

¹⁶⁰ Michael Press, ‘Of Robots & Rules: Autonomous Weapon Systems in the Law of Armed Conflict’ (217) 48 *Georgetown Journal of International Law* 1351.

¹⁶¹ Opinion Bram Vanderborght, Rapport au nom de la Commission de la Défense nationale (n 38) 61.

¹⁶² Cass 23 January 1979, Arresten Cassatie 1978-79, 575.

¹⁶³ New Criminal Code, art 3 para 3.

¹⁶⁴ This may also be a legally defined aggravating circumstance or a consequence of the offence. See Thierry Moreau, Damien Vandermeersch and Jean-Marc Hausman, *Éléments de droit pénal: ancien et nouveau Code pénal* (La Charte 2024) 56-57.

¹⁶⁵ Jean-Baptiste Maillart, ‘The limits of subjective territorial jurisdiction in the context of cybercrime’ (2019) 19 *ERA Forum* 377; Dan Svantesson and Anna-Maria Osula, ‘Unresolved Jurisdictional Issues in Law Enforcement Access to Data’ in Vanessa Franssen and Stanislaw Tosza (eds), *Cambridge Handbook of Digital Evidence in Criminal Matters* (Cambridge University Press 2025) 46.

instrument ‘does the job’),¹⁶⁶ the result of the offence (the ‘objective territorial principle’)¹⁶⁷ and even its more remote effects (ie the ‘effects doctrine’).¹⁶⁸

Belgian courts indeed tend to apply this theory in a very extensive manner on the basis of the ‘theory of indivisibility.’ This means that Belgian courts also have jurisdiction for the part of the criminal behaviour that is located outside the Belgian territory and in itself a punishable act, provided that this act constitutes an indivisible part of the offence committed in Belgian territory.¹⁶⁹ For instance, if a perpetrator has committed several offences with the same criminal intention (a so-called *infraction collective*),¹⁷⁰ all these offences can be prosecuted under Belgian law, even if only one of the offences has been (even partially) committed in the territory. What is more, any act of participation in an offence committed (partially) in the territory can also be tried in Belgium on the basis of this theory, regardless of where the act of participation was executed.¹⁷¹ In contrast, if an attempt is committed abroad without any act of execution in Belgian territory, it is not considered to be located in Belgium.¹⁷² Not surprisingly, Belgium’s extensive territorial jurisdiction can be a source of many positive conflicts of law.

In addition to broad *territorial* jurisdiction, Belgian courts have *extraterritorial* jurisdiction in a number of legally defined cases,¹⁷³ as set out in Articles 6 to 14/15 of the Preliminary Title of the Code of Criminal Procedure (PTCCP).¹⁷⁴ The cases are based on one of the following principles: the principle of active personality (ie the perpetrator is a Belgian national or resident),¹⁷⁵ the principle of passive personality (ie the victim is a Belgian national, resident or refugee),¹⁷⁶ the principle of universal jurisdiction¹⁷⁷ and the protective principle.¹⁷⁸

¹⁶⁶ Jan Kerkhofs and Philippe Van Linthout, *Cybercrime 3.0* (Politeia 2019) 652.

¹⁶⁷ Maillart (n 168) 377.

¹⁶⁸ Kerkhofs and Van Linthout (n 166) 652-653; Svantesson and Osula (n 165) 46.

¹⁶⁹ Kerkhofs and Van Linthout (n 166) 652.

¹⁷⁰ Criminal Code, art 65. This *infraction collective* will however disappear in the new Criminal Code.

¹⁷¹ Raf Verstraeten and Frank Verbruggen, *Inleiding tot het Belgische strafrecht en strafprocesrecht* (2nd edn, Intersentia 2024) 782, para 2154 and the references mentioned there.

¹⁷² *contra*: Cass 16 January 1996 (1996) *Pasicrisie* I 75. See also Franklin Kutu, *Principes généraux du droit pénal belge. Tome I: la loi pénale* (3rd edn, Larcier 2018) 433.

¹⁷³ Criminal Code, art 4 (new Criminal Code, art 3 para 2).

¹⁷⁴ *Loi du 17 avril 1878 contenant le titre préliminaire du Code de procédure pénale* (Moniteur belge, 25 April 1878).

¹⁷⁵ PTCCP, arts 6-11.

¹⁷⁶ PTCCP, arts 11-14/2.

¹⁷⁷ PTCCP, art 14/10.

¹⁷⁸ PTCCP, arts 14/3-14/9. For more details, see Moreau, Vandermeersch and Hausman (n 164) 59-60; Verstraeten and Verbruggen (n 171) 773-779; Vanessa Franssen, Solène Vandeweerd and Lorraine Grisard, *Principes de procédure pénale* (8th edn, Presses universitaires de Liège 2025) 15-21.

As far as international crimes are concerned – ie in the Belgian experience, genocide, crimes against humanity and war crimes¹⁷⁹ – these principles have been translated as follows:

- Article 8, 1° of the PTCCP sets that any Belgian national or person who has his/her main residence in the territory can be prosecuted in Belgium for an international crime that has been committed abroad.
- Article 13 of the PTCCP provides that an international crime committed abroad against (1) a Belgian citizen, or (2) a person who has been granted the status of authorised refugee in Belgium, or (3) any person who has been residing usually and legally, for at least three years, in Belgium, can be prosecuted in Belgium. In this specific case, the Federal Prosecutor's Office has exclusive competence to initiate the proceedings.¹⁸⁰
- In addition, Article 10 of the PTCCP contains the so-called '*loi du drapeau*'. It states that any person subject to military law (ie all military personnel as determined under Belgian law)¹⁸¹ who has committed an offence in the territory of a foreign State can be prosecuted in Belgium. The same holds true for persons who are attached, in whatever capacity or function, to a section of the army present in foreign territory or to sections that are authorised to follow a troop unit which is part of it.

In all three cases, criminal prosecution can be initiated even if the suspect cannot be located in the territory.¹⁸² A complaint of the victim is formally not required.

Furthermore, in accordance with Article 14/11 of the PTCCP, a foreign co-author or accomplice of a crime committed by a Belgian national or resident outside the territory can be prosecuted in Belgium, either together with the Belgian accused or after the latter has been convicted.

Other offences committed abroad that are based on international treaties or international customary law may also be prosecuted in Belgium if such treaties or law require Belgium to do so (ie universal jurisdiction).¹⁸³ In this case, too, only the Federal Prosecutor's Office can initiate the prosecution.¹⁸⁴

¹⁷⁹ Criminal Code, arts 136bis-136quater (new Criminal Code, arts 82-88).

¹⁸⁰ PTCCP, art 13 para 2. For more information on the Federal Prosecutor's Office's mandate, see below, 5.3.2.

¹⁸¹ *Loi* du 28 février 2007 fixant le statut des militaires du cadre actif des Forces armées (Moniteur belge, 10 April 2007), arts 19 ff.

¹⁸² *contra*: PTCCP, art 6 ff.

¹⁸³ PTCCP, art 14/10.

¹⁸⁴ PTCCP, art 14/10.

Consequently, considering that Belgian courts in many instances have extraterritorial jurisdiction over international crimes, this could result in positive conflicts of jurisdiction, if the territorial State (and potentially other States) would claim jurisdiction too. Whereas an expansive exercise of extraterritorial jurisdiction creates legitimate concerns of ‘an unjustifiable interference in the sovereignty of other states,’¹⁸⁵ in practice, such crimes more often lead to negative conflicts of jurisdiction (ie a lack of prosecution, despite the fact that several States could exercise jurisdiction).¹⁸⁶

Positive conflicts of jurisdiction may also originate between international courts and national courts.¹⁸⁷ As a general rule, the statutes of the various international courts give priority to the jurisdiction of the national courts.¹⁸⁸ For instance, the jurisdiction of the International Criminal Court is complementary to domestic courts (Art 17 of the ICC Statute). National authorities thus remain primarily responsible for investigating and prosecuting core international crimes, while the International Criminal Court may only act when the normally competent State is unwilling or unable to act.

Under Belgian law, there is no formal mechanism for resolving positive conflicts of jurisdiction in relation to international crimes. As far as we know, this does not create any difficulty in practice, thanks to the principle of discretionary prosecution that applies to the Belgian Public Prosecutor’s Office¹⁸⁹ as well as informal and common-sense arrangements with other States that have jurisdiction. Informal consultation is explicitly required by some international treaties ratified by Belgium¹⁹⁰ and, within the European Union, facilitated by Eurojust, whose mandate consists of supporting and strengthening coordination and cooperation of national prosecuting authorities with respect to serious cross-border crime,¹⁹¹ as well as Europol.¹⁹² Moreover, some provisions on extraterritorial jurisdiction expressly contain a ‘*forum conveniens*’ exception.¹⁹³ Indeed, the Federal Prosecutor’s Office may decide not to prosecute a case if it would be in the interest of the good administration of justice to refer it to an international court or to a court in the State of the perpetrator or the State where the crime was committed, provided that the court in point meets fundamental requirements of independence, impartiality and equal treatment.

¹⁸⁵ Jonathan Clough, *Principles of Cybercrime* (Cambridge University Press 2015) 483.

¹⁸⁶ Henri Bosly and Damien Vandermeersch, *Génocide, crimes contre l’humanité et crimes de guerre face à la justice* (2nd edn, Bruylant 2012) 19.

¹⁸⁷ *ibid* 20.

¹⁸⁸ *ibid*.

¹⁸⁹ Code of Criminal Procedure, art 28^{quater} para 1. See Franssen, Vandeweerd and Grisard (n 178) 35-36.

¹⁹⁰ See eg, Council of Europe, Convention on Cybercrime (23 November 2001) ETS no 185 (Cybercrime Convention), art 22, para 5.

¹⁹¹ Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust) [2018] OJ L295/138, art 2 para 1.

¹⁹² Kerkhofs and Van Linthout (n 166) 660.

¹⁹³ PTCCP, arts 13 and 14/10.

5.1.2 *Specific Implications and Possible Challenges related to AWS*

As far as we know, the above principles of territorial jurisdiction have not yet been tested on offences involving the use of AI systems, let alone on AWS. But they have been applied a couple of times to cybercrime, in particular hacking (which belongs to the category of ‘target cybercrime’), cyber forgery, illegal online sale (both constituting a form of ‘cyber-enabled crime’) and cyber harassment (ie ‘content-related cybercrime’).¹⁹⁴ Based on this case law, the following projections can be made for future jurisdictional questions regarding AI systems and AWS.

The *location of the hardware* can be used as a connecting factor, but it is, as such, not detrimental. In a case involving hacking and cyber forgery, the location where the perpetrator’s computer is located was not conclusive for the criminal court to assert jurisdiction. In the case at hand, the criminal court of the district of the *victim’s residence* established *adjudicative jurisdiction* on the basis that the (male) victim had opened his computer and logged on to his Hotmail web and email accounts at home, to find out that he could no longer access them as the hacker had changed his login credentials. Those elements were considered an indivisible part of the acts the (female) perpetrator had performed on her computer. Moreover, one could argue that the location where the victim suffers harm is relevant because causing damage is an aggravating circumstance of hacking under Belgian law¹⁹⁵ and thus part of the material element of the offence.¹⁹⁶

Furthermore, the *location of the data* processed by AI systems is likely to be irrelevant. In the aforementioned hacking case, the *location of the server* or of the *service provider* (based in the United States) was not taken into account. This can also be concluded on the basis of another case involving the illegal sale of drugs (*médicaments*) and hormonal substances, both offline (through brochures delivered by regular mail) and online (through several webshops). In this particular case, the location of the instrument and the effect of the offence were determining, in particular, the place where potential buyers had learnt about the sales offer.¹⁹⁷

Similarly, in case law regarding online hate speech and cyberharassment, where the criminal conduct typically takes place online, especially on social media platforms provided by foreign service providers, the localisation question is never considered problematic.¹⁹⁸

¹⁹⁴ Corr Dendermonde (Criminal Court of First Instance of Dendermonde) 29 September 2008 (2009) 2 Tijdschrift voor Strafrecht 111-112, note Philippe Van Linthout; Anvers (Court of Appeal of Antwerp) 5 May 2010 (2010) 6 Tijdschrift voor Strafrecht 343, note Jan Kerkhofs. Both cases are extensively discussed in: Kerkhofs and Van Linthout (n 166) 653-658.

¹⁹⁵ Criminal Code, art 550bis para 3 (new Criminal code, art 526).

¹⁹⁶ Kerkhofs and Van Linthout (n 166) 655.

¹⁹⁷ Anvers (n 194); Kerkhofs and Van Linthout (n 166) 657.

¹⁹⁸ In the framework of a recent research project funded by the Belgian Science Policy Office, a large body of (unpublished) Belgian case law on online hate speech was analysed, identifying several obstacles for

In a quite different case, a foreign company was convicted as a co-perpetrator of attempted recruitment of adults for prostitution purposes and for making publicity to this end, hiring other persons to drive around advertising trailers at a university campus. In particular, the company wanted to recruit young female students for a website that brings together sugar babes and sugar daddies. For sure, the advertising trailers could be localised in Belgian territory, but the website for which the students were recruited was hosted by that foreign company and was merely accessible in Belgium. In the case in point, the application of Belgian law was not even a matter of discussion.¹⁹⁹

Ultimately, the location where the victim is confronted with the offence will play a huge role in the exercise of territorial jurisdiction. While this approach is not self-evident in a legal system where the location of the offence's material element is the main connecting factor, it offers, according to some authors, a welcome 'modern interpretation' of the theories of objective ubiquity and indivisibility,²⁰⁰ which provides a satisfactory solution to the problem of loss (of knowledge) of localisation²⁰¹ in cyberspace.²⁰²

Moreover, the way in which Belgian authorities assert *enforcement jurisdiction* (ie the jurisdiction to enforce Belgian law)²⁰³ shows, time and again, that the location of the data is not regarded as a relevant connecting factor. Neither is the *location of the service provider* (or, in the future, the 'artificial agent operating on websites or networks (...) in foreign countries').²⁰⁴ Indeed, foreign service providers offering services in Belgium are,

prosecution. Interestingly though, the establishment of adjudicative jurisdiction did not emerge as problematic. See Michel Walrave and others, 'Cyberviolence: defining borders on permissibility and accountability - @ntidote 2.0. Final Report' (BELSPO, 2023) 44-47 <https://www.belspo.be/belspo/brain2-be/projects/FinalReports/Antidote_FinRep_en.pdf> accessed 24 October 2025. For an overview of (published) case law, see eg Mona Giacometti, 'Les discours de haine en ligne: vers un cadre légal plus moderne' in Vanessa Franssen and Adrien Masset (eds), *Le droit pénal et la procédure pénale en constante évolution* (coll. Commission Université-Palais, vol 217, Anthemis 2022) 191 ff.

¹⁹⁹ Cass 8 February 2023 no P.21.0730.F.

²⁰⁰ Kerkhofs and Van Linthout (n 166) 656.

²⁰¹ On this problem, though mainly from a procedural perspective, see Svantesson and Osula (n 165) 43 and 52-54.

²⁰² Philippe Van Linthout, 'Territoriale bevoegdheid in cyberspace' (note under Corr Dendermonde 29 September 2008) (2019) *Tijdschrift voor strafrecht* 113, 114.

²⁰³ See eg Clough (n 185) 475 and 486-488.

²⁰⁴ Milena Sterio, *Questionnaire – Section IV. International Perspectives on AI: Challenges for Judicial Cooperation and International Humanitarian/Criminal Law* (AIDP, March 2021) question 20.

following the notorious *Yahoo!* and *Skype* judgments of the Supreme Court,²⁰⁵ considered to be ‘present’ in the territory – virtual presence thus suffices.²⁰⁶

In conclusion, Belgium is likely to assert *broad territorial jurisdiction* for future offences committed by (means of) AI systems. While this approach definitely creates opportunities for prosecuting such offences, one may also criticise it as it, *de facto*, may result in a form of universal jurisdiction.²⁰⁷ And, perhaps most importantly, whenever such systems would be operationalised – directly or indirectly – by State actors, the chances of prosecution are, in reality, rather slim.²⁰⁸

5.2 Modes of Criminal Liability

5.2.1 General Overview

Under Belgian criminal law, both individuals (or ‘natural persons’)²⁰⁹ and legal entities (or ‘legal persons’) can be held criminally liable. Criminal liability requires proof of the existence of a material element (*actus reus*) and a mental element (*mens rea*). The mental element can consist of special intent (*dol spécial*), general intent (including both direct and indirect intent) (*dol général*), or negligence (*négligence*, *culpa* or *faute*), encompassing both criminal and ordinary negligence (ie, even the lightest failure to act reasonably, which also triggers civil liability²¹⁰).²¹¹

²⁰⁵ Cass 1 December 2015 no P.13.2082.N; Cass 19 February 2019 no P.17.229.N. This case law ‘echoes’ the definition of territorial jurisdiction for the production of subscriber data by art 18(b) of the Cybercrime Convention, as clarified by T-CY Committee, Guidance Note #10, 28 February 2017. Meanwhile, the Supreme Court’s case law has been codified by the so-called Internet Investigatory Powers Act of 25 December 2016. *Loi du 25 décembre 2016 des modifications diverses au Code d’instruction criminelle et au Code pénal, en vue d’améliorer les méthodes particulières de recherche et certaines mesures d’enquête concernant Internet, les communications électroniques et les télécommunications et créant une banque de données des empreintes vocales* (Moniteur belge, 17 January 2017).

²⁰⁶ For a more detailed analysis, see Vanessa Franssen, ‘The Belgian Internet Investigatory Powers Act – A Model to Pursue at European Level?’ (2017) 4 European Data Protection Law Review 534, 538-542; Vanessa Franssen and Olivier Leroux, ‘Recherche policière et judiciaire sur internet: analyse critique du nouveau cadre législatif belge’, in Vanessa Franssen and Daniel Flore (eds), *Société numérique et droit pénal. Belgique, France, Europe* (coll. Europe(s) Larcier/Bruylant 2019) 196-205; Vanessa Franssen and Marine Corhay, ‘La fin de la saga Skype: les fournisseurs de services étrangers obligés de collaborer avec la justice belge en dépit des possibilités techniques et de leurs obligations en droit étranger’ (note under Cass 19 February 2019) 8 Tijdschrift voor Belgisch Handelsrecht – Revue de droit commercial belge 1014, 1019-1021.

²⁰⁷ Kerkhofs and Van Linthout (n 166) 658.

²⁰⁸ Cyber warfare is in Belgium mostly considered a matter of national security and therefore not dealt with by police and judicial authorities, but rather by intelligence agencies or, potentially, cybersecurity experts in the army.

²⁰⁹ In European Union law, the terms ‘natural persons’ and ‘legal persons’ are used.

²¹⁰ On the unity of criminal and civil negligence in Belgian law and practice, see eg Roger Dalcq, ‘Faute civile – faute pénale’, (1983) *Annales de droit de Louvain* 73, 74-77.

²¹¹ It should, however, be noted that the new Criminal Code brings an end to the unity of criminal and civil negligence, setting a higher threshold for negligence and introducing the concept of *faute lourde* in Article 7.

As far as legal persons are concerned, they have been criminally liable since 2 July 1999.²¹² The Belgian legislator opted for a regime of autonomous or direct corporate criminal liability. This means that legal persons are considered full subjects of criminal law, which can be personally prosecuted and convicted by a criminal court for any type of criminal offence.²¹³ To establish their liability, it is necessary to prove, on the part of the legal entity, the mental element required by law for the offence at hand.²¹⁴ The required *mens rea* thus depends on the legal description of the offence and is identical for individuals and legal persons.²¹⁵ Whether or not the natural person who materially committed the act is guilty is irrelevant. On a theoretical level, this autonomous approach seems rather unique, or at least very progressive, in Europe²¹⁶ (and beyond). Furthermore, since legal persons have no body or limbs, the material act of their offences always requires the intervention of one or more individuals, irrespective of whether the offence consists of a positive action or an omission. However, because the Belgian system is based on autonomous corporate criminal liability, it is not required that the individual's behaviour constitutes an offence, ie, meets all legal requirements of the offence. It suffices that he/she commits the material element of the offence, which will then be imputed to the legal person on the basis of (at least) one of the three attribution criteria laid down in Article 5, paragraph 1 of the Criminal Code. According to this provision, a legal person is criminally liable for offences that are intrinsically linked to the realisation of its purpose (first criterion) or to the protection of its interests (second criterion), or for offences that have been committed on its account, as results from the factual elements of the case (third criterion).

Besides direct (or material) perpetrators, persons who do not commit all the elements of the offence can be held criminally liable too. This is where the rules on punishable attempt²¹⁷ and, more importantly for this analysis, participation come in.

Belgian criminal law currently draws a major distinction between two modes of participation (or accomplice liability): co-perpetration (*corréité*) under Article 66 of the Criminal Code and facilitation (*complicité*) under Article 67 of the Criminal Code. While perpetrators and co-perpetrators are treated alike, lower sentences apply to accomplices

²¹² *Loi du 4 mai 1999 instaurant la responsabilité pénale des personnes morales* (Moniteur belge, 22 June 1999).

²¹³ Criminal Code, art 5 para 1 (new Criminal Code, art 18 para 1).

²¹⁴ Cass 12 June 2007 no P.07.0246.N. For a more extensive analysis, see Vanessa Franssen and Raf Verstraeten, 'La volonté et la faute de la personne morale. Rappel des principes généraux et évaluation critique de dix années de jurisprudence' (2010) *Journal des Tribunaux* 65.

²¹⁵ Contrary to the criteria laid down in art 5, para 1 of the Criminal Code for the attribution of the material element, the law does not include any specific criteria that tell the courts how to establish a legal person's negligence or intent.

²¹⁶ It is worth mentioning that, contrary to the Belgian approach, the (minimum) rules on corporate liability imposed by the EU are strongly dependent on the individual's liability. For a more in-depth analysis, see Vanessa Franssen, 'The EU's Fight against Corporate Financial Crime: State of Affairs and Future Potential' (2018) 19 *German Law Journal* 1221.

²¹⁷ Criminal Code, arts 51-53 (new Criminal Code, art 9).

under Article 67.²¹⁸ The general criterion to distinguish between a co-perpetrator and an accomplice relates to the degree of involvement in the offence: while (co-)perpetration requires a ‘necessary contribution’ (ie one without which the offence could not have occurred), facilitation only presupposes a ‘useful contribution’ (ie one that was not indispensable as such to the commission of the offence).²¹⁹ More in particular, acts of co-perpetration can be further subdivided into three main types of conduct: direct cooperation in the commission of the offence, provision of indispensable assistance, and direct incitation.²²⁰ Facilitation entails three subcategories of actions: instructing to commit the offence, providing the material means to the offence, and providing non-indispensable assistance.²²¹

The distinction between co-perpetrators (*coauteurs*) and accomplices (*complices*) is, however, set to disappear. Pursuant to a global reform of the Criminal Code, the main provisions of which will enter into force on 8 April 2026,²²² all modes of participation will be united in a single regime enshrined in Article 19 of the new Criminal Code. Under this provision, it is no longer necessary to distinguish between ‘necessary’ and ‘useful’ contributions: accomplices (*participants*) are all those who make a ‘significant contribution’ to the offence.²²³

Be that as it may, all modes of participation, whether under the current or revised regime, require proof of three basic elements:

- (i) the commission, or possibly the attempted commission,²²⁴ of the main offence by a principal perpetrator;
- (ii) the materialisation of an act of participation as defined by the Criminal Code (*actus reus*);²²⁵ and
- (iii) the intention to contribute to the commission of the main offence (*mens rea*).

The *actus reus* should normally consist of some positive action that must occur prior to or simultaneously with the offence.²²⁶ That said, occasionally, participation by abstention has been accepted by Belgian courts, especially when such abstention is considered to act as a form of approval or encouragement.²²⁷ An example of such ‘qualified abstention’

²¹⁸ Criminal Code, art 69.

²¹⁹ Nathalie Colette-Basecqz and Noémie Blaise, *Manuel de droit pénal général* (4th edn, Anthemis 2019) 350.

²²⁰ Criminal Code, art 66.

²²¹ Criminal Code, art 67.

²²² See above, 4.1 (n 130).

²²³ See Jeroen De Herdt, Joëlle Rozie and Damien Vandermeersch, *Le livre Ier du nouveau Code pénal. Les principes généraux du droit pénal revisités* (La Charte 2024) 136.

²²⁴ Criminal Code arts 51-53 (new Criminal Code, art 9)

²²⁵ Criminal Code, arts 66-67 (new Criminal Code, art 19).

²²⁶ Moreau, Vandermeersch and Hausman (n 164) 194.

²²⁷ See Colette-Basecqz and Blaise (n 219) 360-367; Moreau, Vandermeersch and Hausman (n 164) 193-194. This practice will soon be echoed in art 19 para 1, 4° of the new Criminal Code.

is the case where the suspect has a legal duty to act or to supervise but deliberately fails to meet this duty, thereby enabling another person to commit an offence.²²⁸

As regards *mens rea*, the participant must have the intention to contribute to the main offence, ie he/she must contribute willingly and knowingly.²²⁹ Clearly, this *mens rea* requirement differs from the one required by law for the main offence, which, logically, must be an intentional offence but may require either special or general intent.²³⁰ Mere negligence is thus insufficient to qualify as a co-perpetrator or an accomplice.²³¹ Whether indirect intent (*dol indirect* or *éventuel*),²³² or some forms of recklessness,²³³ is sufficient, is debated and usually rejected.²³⁴

The above rules on attribution of criminal liability apply not only to ordinary offences defined in the Criminal Code, but also to most offences defined by special criminal laws (ie Acts other than the Criminal Code that incriminate certain behaviour), unless these laws derogate explicitly from the general rules of the Criminal Code.²³⁵ Therefore, these rules also apply to the military offences provided for in the Military Code.²³⁶ Furthermore, whereas civilians fall outside the scope *ratione personae* of the Military Code as such,²³⁷ they may still be prosecuted for acts of participation regarding military offences.²³⁸

Besides the standard principles applicable to all types of criminal offences, Articles 136*sexies* and 136*septies* of the Criminal Code establish a series of stricter grounds of liability in specific relation to *international crimes*.²³⁹ Under these provisions is liable the

²²⁸ See eg Cass 15 December 2009 no P.07.1543.N.

²²⁹ This 'will agreement' between the participant and the principal perpetrator must exist either prior to the offence or at the moment of its commission. See Philippe Traest, 'Ontwikkeling van nieuwe deelnemingsvormen' (2007) 2 *Nullum Crimen* 244.

²³⁰ For a more detailed analysis, see Franklin Kutry, *Principes généraux du droit pénal belge. Tome III: l'auteur de l'infraction pénale* (2nd edn, Larcier 2020) 311-329.

²³¹ Moreau, Vandermeersch and Hausman (n 164) 185.

²³² Under Belgian criminal law, '*dol éventuel*' means the agent did not seek to produce the harmful consequence that occurred but nevertheless accepted it in the event it came about. See eg Aurore Delannay, 'Section 1 – Le caractère volontaire des homicides et lésions corporelles – Élément moral commun à ces deux grands types d'atteintes', in Marie-Aude Beernaert and others (eds), *Les infractions. Volume 2: les infractions contre les personnes* (2nd edn, Larcier 2020) 128.

²³³ On these notions, see, in a comparative perspective, Johannes Keiler, David Roef and Jeroen Blomsma, 'Forms and Aspects of Mens Rea', in Johannes Keiler and David Roef (eds), *Comparative Concepts of Criminal Law* (4th edn, Intersentia 2025) 195 ff.

²³⁴ Adrien Masset, *Introduction au droit pénal* (course notes, Presses universitaires de Liège 2022) 164. For a critical and more mitigated analysis, see Jan Vanheule, 'Deelnemingsopzet: graden en modaliteiten' (2014) 14 *Rechtspraak Antwerpen Brussel Gent* 983.

²³⁵ Criminal Code, art 100 (new Criminal Code, art 77).

²³⁶ Military Code, art 58.

²³⁷ Military Code, arts 14-14*quater*.

²³⁸ Criminal Code, art 100*bis* (this provision will no longer be laid down in the new Criminal Code but will be enshrined as a new art 14*quinquies* in the Military Code).

²³⁹ New Criminal Code, arts 90 and 91.

person who: orders the commission of such crime;²⁴⁰ offers to commit such crime or accepts such an offer;²⁴¹ incites the commission of such crime;²⁴² participates in any other manner in the commission of such crime;²⁴³ and finally, manufactures, possessed or transports objects, or erects or transforms constructions that are meant to commit or to facilitate such crime.²⁴⁴ The key difference with the aforementioned rules on participation²⁴⁵ lies in the fact that these are inchoate offences: they are criminal whether or not the main offence is committed or even attempted.²⁴⁶ In this respect, they go beyond their functional equivalent in the Rome Statute of the International Criminal Court (ICC Statute). The latter, for instance, also criminalises the order to commit an international crime, but only insofar as ‘such a crime (...) in fact occurs or is attempted’.²⁴⁷

Finally, Belgian law adopts a somewhat different approach to command responsibility than the ICC Statute. With respect to *military discipline*, Article 11 of the 1975 Act²⁴⁸ provides that superiors are responsible for ‘any disorder caused by their subordinates, where such disorder was caused by their negligence or excessive tolerance’. In contrast, as far as *criminal liability* is concerned, the position of superiors is not specifically addressed. Nonetheless, Article 136septies, 5° of the Criminal Code²⁴⁹ provides for a more general, *sui generis* offence:²⁵⁰ it criminalises abstention to act – within the limits of their possibility of action – by any person (including but not limited to commanders) in an effective position to prevent or put an end to an international crime. The applicable *mens rea* consists of the knowledge of the existence of orders given to commit such a crime or of acts initiating the commission thereof. Thus, while no intention to approve or facilitate the commission of the crime is needed under Article 136septies, 5° of the Criminal Code, actual knowledge is required.²⁵¹ Negligence, on the other hand, falls short of this specific provision, which has rightly been described as both wider (*ratione personae*) and narrower

²⁴⁰ Criminal Code, art 136septies, 1° (new Criminal Code, art 92, 1°).

²⁴¹ Criminal Code, art 136septies, 2° (new Criminal Code, art 92, 2°).

²⁴² Criminal Code, art 136septies, 3° (new Criminal Code, art 92, 3°).

²⁴³ Criminal Code, art 136septies, 4° (new Criminal Code, art 92, 4°).

²⁴⁴ Criminal Code, art 136sexies (new Criminal Code, art 90).

²⁴⁵ Criminal Code, arts 66-67 of the Criminal Code (new Criminal Code, art 19).

²⁴⁶ Criminal Code, art 136septies (*‘même non suivie d’effets’*). See Vincent Guerra and Alyson Berrendorf, ‘Droit international humanitaire’, in *Postal Memorialis – Lexique du droit pénal et des lois pénales spéciales* (Kluwer 2020) no D 250, 657.

²⁴⁷ ICC Statute, art 25(3)(b). See also ‘Belgium – Belgique’, in *Compatibilité des systèmes juridiques nationaux avec le Statut de la Cour pénale internationale permanente* (Recueils de la société internationale de droit militaire et de droit de la guerre, vol. 1, Éditions de la Défense 2003) 156-159; Magdalena Forowicz, ‘Implementation of the Rome Statute in Belgium’ (2005) 16 *Finch Yearbook of International Law* 61, 62.

²⁴⁸ *Loi du 10 janvier 1975 portant le règlement de discipline des Forces armées*.

²⁴⁹ New Criminal Code, art 92, 5°.

²⁵⁰ See Damien Vandermeersch, ‘The ICC Statute and Belgian Law’ (2004) 2 *Journal of International Criminal Justice* 140; Pierre d’Argent, ‘La loi du 10 février 1999 relative à la répression des violations graves du droit international humanitaire’ (1999) *Journal des Tribunaux* 551.

²⁵¹ Forowicz (n 247) 61.

(as far as the mental element is concerned) than command responsibility under Article 28 of the ICC Statute.²⁵²

Article 136septies, 5° of the Criminal Code was once applied in the *Butare Four* judgment, Belgium's first ever case based on its (then still unrestricted) universal jurisdiction.²⁵³ One of the accused, known as V.N., was convicted for failing to prevent, within the limits of his capacities, a war crime consisting of the killing of an unidentified, wounded girl.²⁵⁴ Another attempt – that eventually proved unsuccessful due to the application of immunities²⁵⁵ – was made to use this provision, in the context of a civil suit brought against the Belgian State and several Belgian military officers for deciding to withdraw from a school in Kigali during the 1994 genocide, leaving several hundred victims who had sought refuge in the school to their deathly fate.²⁵⁶ In yet another case, which related to crimes against humanity committed against Belgian missionaries in Guatemala, the provision was used to convict a former head of Guatemalan military intelligence.²⁵⁷ According to the court, the conviction was justified by the fact that, 'although he unquestionably had the power to do so, he deliberately refrained from putting an end to the widespread perpetration of crimes against humanity'.²⁵⁸

5.2.2 *Specific Implications and Challenges Related to AWS*

Clearly, the Belgian rules on criminal liability are based on the idea that the perpetrator (co-perpetrator or accomplice) controls his/her acts and understands the implications of his/her behaviour. Considering AWS (will) entail a high degree of autonomy and thus a (much more) limited role for humans in the decision-making, Belgian criminal law, like most other legal systems, will inevitably face new challenges. This subsection will first analyse how AWS could be categorised from a criminal law perspective, as a (co-)perpetrator ('combatant') or as an instrument of the offence (5.2.2.1). Second, it will present what is often referred to as the 'accountability gap' for harmful use of AWS and the way in which this 'gap' is perceived by policy-makers, stakeholders and experts in

²⁵² See Vandermeersch (n 250) 141; Vandermeersch (n 126) 144-145.

²⁵³ For an early commentary, see Luc Reydam's, 'Belgium's First Judicial Application of Universal Jurisdiction: the Butare Four Case' (2003) 1 Journal of International Criminal Justice 428.

²⁵⁴ *Cour d'assises de Bruxelles-Capitale* 8 June 2011, *Butare Four* case, <<http://www.legal-tools.org/doc/a70d94/>> 24 October 2025. See also Philippe Meire and Damien Vandermeersch, *Génocide rwandais: le récit de quatre procès devant la cour d'assises de Bruxelles* (Les dossiers de la Revue de droit pénal et de criminologie, no 19, La Charte 2011) 59.

²⁵⁵ Bruxelles (18^{ème} ch.) (Court of Appeal of Brussels 18th Section) 8 June 2018, no 2011/AR/292 (unpublished).

²⁵⁶ Bruxelles (71^{ème} ch.) (Court of First Instance of Brussels 71st Section) 8 December 2010 (2011) *Revue de jurisprudence de Liège, Mons et Bruxelles* 1527.

²⁵⁷ *Cour d'assises Brabant flamand* (Court of Assizes of Vlaams-Brabant) 14 December 2023, no 9/2023 (unpublished).

²⁵⁸ See Christophe Deprez, 'Crimes internationaux: le droit et la pratique belges' *Répertoire pratique du droit belge* (Larcier 2025) 297.

Belgium (5.2.2.2). Finally, it will examine whether and how the current attribution mechanisms in Belgian law could be applied to AWS (5.2.2.3).

5.2.2.1 *Legal Categorisation of AWS*

The classification of AWS is an essential preliminary question because, depending on whether these systems belong to the combatant category (ie (co-)perpetrator or accomplice) or the weapons category (ie instrument), the applicable legal regime will differ. Whereas '[w]eapons are inherently lawful or unlawful', 'combatants may act lawfully or unlawfully. Accordingly, the law of weapons regulates their physical design and capabilities, while the law governing combatants attempts to direct or constrain their behaviour through a combination of training and accountability mechanisms.'²⁵⁹

Even if there is no international consensus on the characteristics of AWS (see above, 2.1.2), those that have been many times identified in political discussions and scholarly literature (eg autonomy in selection and attack decisions, self-learning capabilities that allow AWS to adjust to new situations in a way that is difficult to foresee for human beings and thus resulting in limited human control) trigger the question as to whether AWS 'can remain meaningfully categorized as "weapons", whether the current legal categorization is adequate to regulate their use, and how their use may challenge the existing legal regime'.²⁶⁰ This absence of consensus, however, may evolve in the coming years, as the aforementioned rolling text that is currently under negotiation at the international level (see above, 2.1.1) aims precisely to establish a common conceptual foundation that could help clarify these definitional uncertainties.

At the most advanced – and admittedly hypothetical – end of the autonomy spectrum, to the extent that an AWS is capable of making its own choices and decisions, of choosing and adapting its behaviour autonomously in a complex and dynamic environment, one could envisage the system's own liability, as a perpetrator, independent of any person or entity involved in its development or deployment, due to the lack of control on, or even knowledge of, the subsequent decisions and actions taken by the system.²⁶¹ Yet, if one were to regard AWS as autonomous agents akin to combatants, one would also have to establish the 'will' of this weapons system. Can we consider the (presumably fully) autonomous decision of an AWS as an intentional decision? Not so long ago, it was difficult to conceive a legal person as an autonomous entity with its own will, but gradually this conceptual obstacle was overcome (see above, 5.2.1). Could we expect the same for AWS in the near future?

²⁵⁹ Rebecca Crootof, 'Autonomous Weapon Systems and the Limits of Analogy' (2018) 9 *Harvard National Security Journal* 51, 55.

²⁶⁰ Hin-Yan LIU, 'Categorization and legality of autonomous and remote weapons systems' (2012) 94 *International Review of the Red Cross* 628.

²⁶¹ Berrendorf and Bontridder (n 12) 8.

As we have pointed out elsewhere,²⁶² the possibility of machines or robots having legal personality and being holders of rights and obligations was considered during the 2017 GGE discussions. At the time, this idea was already not totally new, as the European Parliament had already asked the European Commission to consider as a possible legal solution to ensure civil liability for damages caused by ‘robots’: ‘creating a specific legal status for robots in the long run, so that *at least the most sophisticated autonomous robots* could be established as having the status of *electronic persons* responsible for making good any damage they may cause, and possibly applying *electronic personality* to cases where robots make autonomous decisions or otherwise interact with third parties independently’.²⁶³ But thus far, neither the State Parties to the CCW nor the EU legislator have taken a clear stance on this matter.

5.2.2.2 Misconduct by AWS: From ‘Accountability Gap’ to Attribution of Liability

Much has been written about ‘accountability’, ‘responsibility’ and ‘liability’ for the development, deployment and use of AWS, even if the precise meaning of these terms is not always clear.²⁶⁴ Whereas, as will be explained below, some claim an untenable ‘*accountability gap*’, which would justify a preventive ban on these weapons systems, others maintain that there is absolutely no ‘accountability gap’ because there will always be a human being in the chain of command to whom the wrongful act can be attributed. Despite these opposite viewpoints, all seem to agree that AWS fall into the legal category of ‘things’ (or weapons), not ‘persons’ (or combatants). Consequently, *attributing liability* to the weapons system as such seems difficult, even if the question has been raised and discussed by legal scholars.²⁶⁵ Moreover, from a policy perspective, this may not be desirable either. At the same time, though, it is equally difficult to accept that offences committed by such systems would go unpunished. The solution to this legal and political conundrum is not (yet) within reach, it seems.

²⁶² *ibid* 10.

²⁶³ European Parliament, ‘Resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics’ (2015/2103(INL)) [2018] OJ C252/239, para 59 (f), emphasis added.

²⁶⁴ While the terms ‘accountability’, ‘responsibility’ and ‘liability’ seem to be used interchangeably in international discussions on AWS (see eg Belgium (n 13) 2), we prefer to stick to the terms ‘responsibility’ and ‘liability’ in a criminal law context. Criminal courts rule on who is ‘liable’ or ‘responsible’ for certain conduct and its legal consequences (criminal sanctions, compensation), not on who is ‘accountable’. Accountability, in our view, is a broader notion that focuses on how human beings, corporate entities or public institutions are ‘answerable’ to an external body for the consequences of their decisions. For a different interpretation, see Austria and others (n 69) 4-5 (recognizing that ‘[d]uring discussions at the GGE, the terms “responsibility” and “accountability” have, at times, been used interchangeably’ and insisting that ‘it is important to recall that they refer to related by distinct concepts’, to then define ‘human responsibility’ as ‘encompassing moral and ethical considerations as well as legal obligations and expected conduct’ and ‘accountability’ as ‘legal liability and legal consequences’, but unfortunately without clearly distinguishing between both terms in the subsequent developments).

²⁶⁵ Ronald Arkin, *Governing Lethal Behavior in Autonomous Robots* (Chapman & Hall 2009); John Sullins, ‘When is a Robot a Moral Agent?’ (2006) 6 International Journal of Information Ethics <<https://doi.org/10.29173/irjie136>> accessed 24 October 2025.

On the one hand, international NGOs active in Belgium (such as peace organization PAX and Human Rights Watch) and research centres (like the GRIP, already mentioned above) indeed believe that the use of AWS creates a major ‘accountability gap’, meaning circumstances in which no human being can be held accountable for the decisions, actions and effects of the weapons systems.²⁶⁶ According to these stakeholders, the question of who is liable for violations of international law is therefore highly problematic. Could it be the manufacturer, the programmer of the software, or the person who deployed or supervised the implementation of the system? Although several options are possible, none of them seems desirable. At the national political level, too, this liability question was discussed, for instance, in the earlier-mentioned proposed resolution of 2016.²⁶⁷

On the other hand, an expert of the Belgian Ministry of Defence argued during the parliamentary hearings leading up to the 2018 resolution that this gap was not founded because the commander always remains responsible for the target. In his view, the solution should be comparable to what happens nowadays when soldiers commit an offence in the execution of an order given by the commander: both the soldiers and the commander can be held liable.²⁶⁸

Industry seems to be of the same opinion. According to a representative of the Belgian security and defence industry, an AWS can be compared to a riot dog: the dog ‘is trained to attack people who are not wearing uniforms’, and like the autonomous weapon, ‘once the animal is released, it decides for itself whether it will attack the person or not’.²⁶⁹ He went on to say that the activation of the weapon is always based on a human decision,²⁷⁰ comparable to the decision of a military commander or police commissioner who gives a specific and well-defined mission to his military troops. This will not change in the future with AWS. Therefore, logically, the responsibility will continue to lie with the person giving the mission.²⁷¹

At the international level, the Belgian government has acknowledged that ‘increasing autonomy in weapon systems may present challenges in attribution of conduct to individuals and holding them accountable’.²⁷² Yet, as such, there is no legal gap concerning the use of these weapons, or even for their development; international and national law applies to AWS as well. According to Belgium, ‘[a] responsible human chain of command and control must always be ensured during the deployment and use stages

²⁶⁶ See eg Human Rights Watch, ‘Mind the Gap: The Lack of Accountability for Killer Robots’ (2015). Cf Ingrid Verdiesen, Filippo Santoni de Sio and Virginia Dignum, ‘Accountability and Control Over Autonomous Weapon Systems: A Framework for Comprehensive Human Oversight’ (2021) *Minds & Machines* 138.

²⁶⁷ Proposition de résolution relative à l’interdiction de la recherche, la production, le commerce et l’utilisation des armes totalement autonomes (n 32) 5.

²⁶⁸ Opinion Nicolas Lange, Rapport au nom de la Commission de la Défense nationale (n 38) 30.

²⁶⁹ Opinion Georges Heeren, Rapport au nom de la Commission de la Défense nationale (n 38) 33.

²⁷⁰ *ibid.*

²⁷¹ *ibid* 34.

²⁷² Belgium (n 13) 2.

of AWS' life cycle'.²⁷³ In addition, it has emphasised 'the importance of considering Guiding Principles (b)²⁷⁴ and (d)²⁷⁵ with respect to developers and manufacturers, as they bear responsibility in the design and programming stages of the weapon. This is particularly relevant for issues related to data bias, which can bias the analysis and affect decision-making, to malicious or careless programming and to data spoofing.'²⁷⁶

5.2.2.3 AWS and Attribution of Liability under Belgian Criminal Law

Since the Belgian government argues that the existing law applies to AWS too, it is now appropriate to examine the legal options to prosecute and punish these offences committed by (means of) AWS under Belgian criminal law. We will thus question and analyse the possibilities and obstacles to the application to AWS of the above-mentioned modes of liability (see above 5.2.1).

As mentioned, Belgium has already taken the position that AWS are machines, not persons. Therefore, the option of treating AWS as *direct perpetrators* seems, at present, excluded. But even if Belgian policy-makers were to reconsider their viewpoint, it would remain challenging to conceive, in the current state of the science, that these weapons reach such a level of autonomy that they would be comparable to human beings. What distinguishes a person from a machine – even if the latter presents certain autonomous characteristics – is that the human being possesses freedom of thought, reflection, understanding and, consequently, of action. To be criminally liable, it would also be necessary for the weapons system to have a guilty mind, meaning 'the possibility of linking material facts committed in violation of the law to the conscience and will of the perpetrator'.²⁷⁷ For an individual, this means the 'capacity to understand and to want, their aptitude to delinquency'.²⁷⁸ Today, such a conception does not seem transposable to AWS in Belgian law. But perhaps one day, in light of future technological developments, the Belgian legislator will change this, as he did for legal persons at the end of the 1990s, in order to be able to meet new societal challenges and expectations, by accepting that legal entities too can have the intention to commit an offence or cause them due to negligence.²⁷⁹

²⁷³ *ibid.*

²⁷⁴ 'Human responsibility for decisions on the use of weapons systems must be retained since *accountability* cannot be transferred to machines. This should be considered across the entire life cycle of the weapons system.' (Emphasis added.)

²⁷⁵ 'Accountability for developing, deploying and using any emerging weapons system in the framework of the Convention on Certain Conventional Weapons must be ensured in accordance with applicable international law, including through the operation of such systems within a *responsible* chain of human command and control.' (Emphasis added.)

²⁷⁶ Belgium (n 13) 2.

²⁷⁷ Masset (n 234) 137.

²⁷⁸ *ibid.* The mental element is to be distinguished from circumstances where the person does not understand and does not intend what he or she is doing, eg due to insanity, coercion, or irresistible force.

²⁷⁹ For further analysis of the mental element requirement on the part of legal persons, see Franssen and Verstraeten (n 214) 65-73.

Under the current state of law, *co-perpetration and facilitation* could perhaps be more attractive avenues to address the liability of supervisors and commanders for offences committed by AWS, insofar as, under Belgian law, the lack of liability of the principal perpetrator does not rule out the liability of the co-perpetrator or accomplice, provided that a main offence was committed. As explained above (5.2.1), three conditions are required by law for there to be punishable participation: the commission or attempted commission of a main offence, the willingness to act with a view to committing this offence (including factual knowledge of the offence committed or to be committed), and a positive act of participation provided for by Articles 66 and 67 of the Criminal Code.²⁸⁰ These conditions are likely to raise problems when applied to AWS as they would require: 1) a principal intentional offence committed by AWS, and 2) intent to participate in this offence on the part of the co-perpetrator or accomplice – whether the supervisor, the operator, or the military commander. Condition 1) indeed brings back to the problem of establishing intent on the part of the AWS (recalling, as stated earlier, that participation in an offence committed by negligence is impossible).²⁸¹ As to condition 2), it will be hard and rare in practice to prove the existence of general intent on the part of the operator, the supervisor or the commander. It is more likely that the offence committed by the AWS is an unintended consequence. To the extent that this consequence was foreseeable and accepted by the human being deciding on the deployment or use of the AWS, indirect intent or '*dol éventuel*' may be proven. However, as explained above, *dol éventuel* is, in principle, not enough to establish co-perpetration or facilitation on the part of the operator, supervisor, or military commander.²⁸²

Furthermore, as explained above, Articles 136*sexies* and 136*septies* of the Criminal Code²⁸³ establish a series of stricter grounds of liability specifically in relation to international crimes.²⁸⁴ These articles seem more promising as to the establishment of liability of the operator, supervisor, or military commander, insofar as they could be punished regardless of whether the main offence is committed or even attempted.²⁸⁵

In contrast, Articles 136*septies*, 1°, 2°, 3° and 4° of the Criminal Code²⁸⁶ seem difficult to apply to AWS, although there is currently no case law on the subject in this specific context.²⁸⁷ Nevertheless, a promising opportunity in Belgian law to ensure effective liability for AWS could be Article 136*sexies*, insofar as it sanctions any person who:

²⁸⁰ New Criminal Code, art 19. See eg Cass 23 December 1998, *Agusta-Dassault* case (1999) *Revue de droit pénal et de criminologie* 393; Cass 21 May 2003 (2003) *Journal des Tribunaux* 857; Cass 12 September 2006 no P.06.0416.N. See also Masset (n 234) 164 and the references mentioned there.

²⁸¹ Kutu (n 230) 322; Masset (n 234) s 164.

²⁸² Masset (n 234) 164.

²⁸³ New Criminal Code, arts 90-92.

²⁸⁴ Criminal Code, arts 136*bis*-136*quater* (new Criminal Code, arts 82-88).

²⁸⁵ See above, 5.2.1.

²⁸⁶ New Criminal Code, art 92, 1°-4°.

²⁸⁷ Consideration should be given to how courts and tribunals might interpret different concepts, such as 'inciting' or whether the use of LAWS could be equated with participation 'in any other manner into the commission of such crime'.

‘manufactures, possesses or transports objects, or erects or transforms constructions, that are meant to commit or to facilitate such crime’.

5.3 Special Regime for the Military

The Belgian regime for the criminal liability of soldiers and commanders has been the object of a profound reform in 2003, when military courts were abolished, with only a residual possibility to reactivate them during a state of war. Therefore, three situations must be distinguished for the purpose of this brief account: the former regime that was applicable until 2003 (5.3.1), the current regime in peacetime (5.3.2), and the residual possibility to reactivate military justice during a state of war (5.3.3).

5.3.1 *The Former Regime Until 2003*

Historically, the criminal branch of the judiciary in Belgium was twofold. Next to ordinary criminal courts, military courts were competent to prosecute all members of the military – whether in relation to ordinary offences, international crimes or specific crimes under the Military Code.²⁸⁸ Military courts were divided into two levels, with several *conseils de guerre* as first instance bodies, and a unique *Cour militaire* on appeal.²⁸⁹

Belgian military courts were occasionally called upon to try soldiers for allegations of conduct incompatible with the laws of war at that time. This was especially the case in a series of post-World War I and post-World War II judgments (130 cases and 35 cases, respectively, according to a recent research project on this judicial heritage), almost exclusively directed against soldiers of German nationality or allegiance.²⁹⁰ As war crimes had no autonomous existence under Belgian law at that time, these historical trials were primarily based on ordinary criminal law (murder, ill-treatment, etc.), principles of IHL only being used in combination with the latter.²⁹¹ After World War II, in particular, military courts could build on a 1947 Act introducing the very first reference to war crimes in Belgian legislation.²⁹² Under this historical regime, however, war crimes could only be prosecuted subject to the twofold condition that they matched some ordinary

²⁸⁸ See Loi du 15 juin 1899 comprenant les titres I et II du Code de procédure pénale militaire (Moniteur belge, 30 June 1899). By way of exception, ordinary courts remained competent for members of the military in relation to a limited series of specific offences – eg driving and tax offences. See Nicolas B. Bernard, ‘Défense nationale’ *Répertoire pratique du droit belge* (Larcier 2022) 95.

²⁸⁹ For a much more detailed overview, see Pierre d’Argent, ‘Military Law in Belgium’ in Georg Nolte (ed), *European Military Law Systems* (De Gruyter 2003) 183-231.

²⁹⁰ Pieter Lagrou (ed), *JUSINBELLGIUM: A Century of Pioneering Case-Law. A Digital Database of Belgian Precedents of International Justice, 1914-2014: Final report* (2020) 8 and 10 <https://www.belspo.be/bel-spo/brain-be/projects/FinalReports/JUSINBELLGIUM_FinRep.pdf> accessed 24 October 2025.

²⁹¹ *ibid* 30-31.

²⁹² Loi du 20 juin 1947 relative à la compétence des juridictions militaires en matière de crimes de guerre (Moniteur belge, 27 June 1947). See also David (n 126) 1258.

offence under preexisting Belgian criminal law, and that they also revealed illicit conduct under IHL.²⁹³ As such, international crimes could not yet be prosecuted autonomously.

In addition to post-World War judgments, four other cases may be identified where the criminal responsibility of Belgian soldiers was sought, under the pre-2003 regime, for 'acts of war' formally characterised as ordinary offences. In the *Sergeant W.* case decided in 1966, the Brussels *Conseil de guerre* imposed a five-year sentence on a Belgian sub-officer serving in the Congolese army (in the context of military cooperation between Belgium and Congo) for killing a civilian woman.²⁹⁴ The conviction was upheld a few months later by the *Cour militaire*, yet the sentence was reduced to three years.²⁹⁵ In the *Korad Kalid v. V.J.* case and in the *Osman Somow v. D.A.* case, the *Cour militaire* was called upon to assess the possible responsibility of two Belgian soldiers involved in the UNOSOM peacekeeping operation in Somalia in 1993. In the first case, *V.J.* was charged with the willful killing of a child who was believed to be a child soldier for a local militia.²⁹⁶ In the second case, *D.A.* was charged with unintentional killing after a warning shot accidentally hit and killed a civilian.²⁹⁷ In both cases, considering the operational context in Somalia, the rules of engagement of the Belgian contingent and the defence of superior orders under Article 70 of the Criminal Code,²⁹⁸ the *Cour militaire* acquitted the accused.²⁹⁹ Finally, in the *Marchal* case, the *Cour militaire* acquitted on 4 July 1996 the commander of the Belgian contingent of MINUAR in Rwanda, in relation to his decision to launch an operation that would eventually result in the death of ten 'blue helmets' of Belgian nationality.³⁰⁰

In 1993, war crimes were formally introduced as a full-fledged, independent offence in Belgian criminal law.³⁰¹ Nonetheless, it would still take another decade before the military courts were abolished. During that decade, only a handful of cases were processed that involved charges of war crimes against Belgian soldiers. One of them is

²⁹³ See René Grevy, 'La répression des crimes de guerre en droit belge' (1947) 9 *Revue de droit pénal et de criminologie* 808; Lange and Werts (n 112) 179-180.

²⁹⁴ Brussels Conseil de guerre (fr) *Sergeant W* 18 May 1966 <<http://www.legal-tools.org/doc/b0e236/>> accessed 24 October 2025. Though intentional killing was the formal charge, in its judgment the *Conseil de guerre* also refers to the 'laws and customs of war and the law of humanity'.

²⁹⁵ *Cour militaire* (fr) *Sergeant W* 14 July 1966 <<http://www.legal-tools.org/doc/85b199/>> accessed 24 October 2025.

²⁹⁶ See Boddens Hosang (n 143) 283-284.

²⁹⁷ *ibid* 284.

²⁹⁸ New Criminal Code, arts 11-12.

²⁹⁹ *Cour militaire* (nl) (Military court, Dutch-speaking Section) *Korad Kalid v VJ* 24 May 1995 (1996) *Revue de droit pénal et de criminologie* 45; *Cour militaire* (nl) *Osman Somow v DA* 24 May 1995 <<https://ihl-databases.icrc.org/en/national-practice/osman-somow-case-re-belgian-soldiers-somalia-military-court-24-may-1995>> accessed 24 October 2025.

³⁰⁰ *Cour militaire* (fr) (Military court, French-speaking Section) *Marchal* 4 July 1996 <<https://ihl-databases.icrc.org/en/national-practice/luc-marchal-case-unamir-commander-military-court-4-july-1996>> accessed 24 October 2025.

³⁰¹ *Loi* du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire (*Moniteur belge*, 5 August 1993).

the *C. & B.* case,³⁰² which once again relates to the participation of Belgian troops in the UN-led humanitarian operation in Somalia. Two soldiers – *C & B* – were charged for having injured and threatened the civilian population, including by throwing a child across a firepit ‘as a game’.³⁰³ Although the *Cour militaire* did consider war crimes under the new 1993 Act, it concluded that IHL was not applicable in Somalia at that time as the Somali militia lacked the minimum level of organisation to be considered a party to a non-international armed conflict.³⁰⁴ Consequently, there could be no war crimes, and the accused were acquitted.³⁰⁵

5.3.2 *The Current Regime in Peace Time*

The former, extraordinary regime for the criminal prosecution of military personnel was regularly criticised,³⁰⁶ including by the European Court of Human Rights (ECtHR).³⁰⁷ For this reason, the Belgian Constitution was amended in 2002 and now provides in Article 157 that ‘[t]here are military courts when a state of war referred to in Article 167, paragraph 1, second sub-paragraph has been stated to exist’. This constitutional reform paved the way for the abolition of military courts in time of peace, which was put into practice by two legislative acts dated 10 April 2003.³⁰⁸

Since then, ordinary courts have been competent for all criminal offences committed by the military – ie ordinary crimes, international crimes, and specific crimes under the Military Code.³⁰⁹ In light of the specific clause for extraterritorial jurisdiction already mentioned above (*loi du drapeau*),³¹⁰ this includes all offences committed abroad.³¹¹ The Federal Prosecutor’s Office – which has a unique mandate to exercise a range of specific investigative and accusatorial missions across the whole Belgian territory³¹² – is vested with the exclusive competence to deal with international crimes, whether committed by

³⁰² See Walley (n 128) 117-121 (mentioning a few other cases); Olivier Dubois, ‘Mise en œuvre du droit international humanitaire: chronique semestrielle de législation et de jurisprudence nationales – janvier-juin 1998’ (1998) 832 *International Review of the Red Cross* 790, 792-793.

³⁰³ See ICRC, ‘Ministère public et Centre pour l’égalité des chances et la lutte contre le racisme v *C & B*’ (National Implementation of IHL Database, 1997) <<https://ihl-databases.icrc.org/en/national-practice/violations-ihl-somalia-and-rwanda-case-military-court-17-december-1997>> accessed 24 October 2025.

³⁰⁴ *Cour militaire* (Military court), *C & B* 17 December 1997, (1998) *Journal des Tribunaux* 286.

³⁰⁵ *ibid.*

³⁰⁶ Henri Bosly and Thierry Moreau, ‘Les Tribunaux militaires en Belgique’ in Elisabeth Lambert-Abdelgawad (ed), *Juridictions militaires et tribunaux d’exception en mutation: perspectives comparées et internationales* (Contemporary Publishing International 2007) 36-38; Ministère de la défense (n 142) 480-481.

³⁰⁷ *Pauwels v Belgium* App no 10208/82 (ECtHR, 26 May 1988) paras 37-38.

³⁰⁸ *Loi du 10 avril 2003 réglant la suppression des juridictions militaires en temps de paix ainsi que leur maintien en temps de guerre* (Moniteur Belge, 7 May 2003); *Loi du 10 avril 2003 réglant la procédure devant les juridictions militaires et adaptant diverses dispositions légales suite à la suppression des juridictions militaires en temps de paix* (Moniteur belge, 7 May 2003).

³⁰⁹ *contra*: *Loi du 10 avril 2003 réglant la suppression des juridictions militaires en temps de paix ainsi que leur maintien en temps de guerre*, art 77. See also Bernard (n 288) 98.

³¹⁰ See above, 5.1.1.

³¹¹ PTCCP, art 10.

³¹² Code of Civil Procedure (*Code judiciaire*), art 144bis.

the military or by civilians.³¹³ Normally, the Federal Prosecutor's Office also leads investigations into ordinary crimes and military offences committed by Belgian soldiers abroad, but this competence may occasionally be delegated to local prosecutors' offices.³¹⁴

In practice, allegations of ordinary crimes and military offences by Belgian soldiers, whether committed in the context of operations abroad or on Belgian soil, result in the opening of a significant number of individual cases each year – on account of burglary, physical violence, possession of illicit drugs, desertion, insubordination, etc.³¹⁵ Given the difficulty for the ordinary justice system to process all these cases in a timely and effective manner,³¹⁶ in 2010, a mechanism was adopted (or more precisely reintroduced as it already existed before the 2003 reform) in accordance with which minor offences to the Military Code may be taken off the criminal track and referred to military discipline instead.³¹⁷

Very few proceedings, on the other hand, have been initiated against Belgian soldiers under this post-2003 regime in relation to allegations of international crimes. To this day, only some fifteen persons have been convicted of war crimes, crimes against humanity or genocide based on this normative framework, in eight separate cases finalised between 2001 and 2024.³¹⁸ Most of these convicted persons were civilians, while one was a former member of the Rwandan armed forces,³¹⁹ and two others were former commanders in the Guatemalan army.³²⁰ Furthermore, as far as we know, none of the several dozen further cases that are currently being investigated in Belgium on account of international crimes – 150 cases approximately at the time of writing³²¹ – involves Belgian or foreign military personnel.

Two former cases – that have now been closed – are, however, of interest. The first one, known as the *Left-to-Die Boat* case, involved a complaint against two officers responsible

³¹³ Code of Civil Procedure, art 144*quater*.

³¹⁴ Code of Civil Procedure, art 144*quinquies*.

³¹⁵ See the official numbers and charts published by the Federal Prosecutor's Office, most recently in 'Rapport annuel 2021', 336-344, <<https://www.om-mp.be/fr/votre-mp/parquet-federal/rapports-annuels>> accessed 24 October 2025 (no detailed data has been provided in the later annual reports). See also the analysis of Jasper Claerman and Pierre-Jean Tuts, 'De teloorgang van het militaire strafrecht: over het nut van een apart strafrechtssysteem ter handhaving van de militaire operationaliteit in de 21e eeuw' (2022) 1 Tijdschrift voor Strafrecht 3.

³¹⁶ Projet de loi modifiant diverses lois applicables au personnel militaire, Doc parl Ch repr sess 2009-10, no 52-2432/001, 4. See also Christian Gossiaux and Henri Oldenhove (n 139) 167; Ministère de la défense (n 142) 483.

³¹⁷ Loi du 10 janvier 1975 portant le règlement de discipline des Forces armées, art 44.

³¹⁸ See Deprez (n 258) 353.

³¹⁹ See Philippe Meire and Philippe Fabri, 'La complémentarité de l'action des juridictions internationales et nationales: la situation de la Belgique' (2021) Journal des Tribunaux 789-790.

³²⁰ See Deprez (n 258) 213.

³²¹ This is based on our own information. The last official number, as of 31 December 2021 (no further update has been provided since then), was 135. Federal Prosecutor's Office, 'Rapport annuel 2021' (n 315) 154.

for a Belgian ship involved in a NATO-led arms embargo in the Mediterranean Sea, close to an area where a small boat with 72 migrants was left to drift off for 14 days, resulting in the death of 62 of them.³²² At the pre-trial stage, Belgian investigative courts (ie the *chambre du conseil* at the level of first instance and the *chambre des mises en accusation* on appeal) considered that the ship was too distant from the boat to justify any reasonable charges of war crimes or illicit failure to assist a person in danger against the Belgian officers.³²³ The second one was prompted by some public allegations of collateral damage in the civilian population that would have been caused by Belgian aircrafts participating in the international coalition against Daesh.³²⁴ Although no information seems to be publicly available on this case, we do know that, after a preliminary examination of these allegations and some material shared by the military, the Federal Prosecutor's Office considered that the rules of engagement had been complied with and that no further investigation was therefore justified.

5.3.3 *The Current Regime During a State of War*

Belgian military courts may still be reactivated if a state of war is officially recognised by the government.³²⁵ Should such a situation occur, military courts would once again be competent to prosecute members of the military in relation to military offences as well as ordinary crimes.³²⁶

In practice, however, this scenario seems theoretical.³²⁷ This is because, as was already noted earlier,³²⁸ it is a consistent policy for the Belgian government to abstain from formally declaring a state of war under Article 167, paragraph 1 of the Constitution, even in circumstances where Belgian troops are, as a matter of fact, clearly and actively engaged in an armed conflict abroad.³²⁹

Furthermore, under the existing regime, an important exception exists for international crimes that are *always* meant to remain within the exclusive jurisdiction of ordinary courts – including when committed by the military at a time when military courts would

³²² See FIDH, ECCHR and REDRESS, 'Breaking Down Barriers. Access to Justice in Europe for Victims of International Crimes' (September 2020) 30 <<https://www.fidh.org/en/issues/international-justice/report-eu-must-eliminate-barriers-to-justice-for-victims-of-serious>> accessed 24 October 2025.

³²³ Corr. Bruxelles (ch. cons.) (Brussels Court of First Instance, pre-trial Section), *Left-to-Die Boat* 5 January 2016 (unpublished); Bruxelles (mis. ch.) (Brussels Court of Appeal, pre-trial Section), *Left-to-Die Boat* 24 January 2019 (unpublished).

³²⁴ See the report by Airwars Investigations, 'Europe's shame: Claims by key allies of no civilian harm in war against ISIS exposed' (15 March 2020) <<https://airwars.org/investigations/europes-shame-claims-of-no-civilian-harm-exposed/>> accessed 24 October 2025.

³²⁵ Constitution, art 157. On the difference between the wording of the Constitution ('state of war') and that of the two 10 April 2003 acts ('time of war'), and on the confusion such difference may create, see Bernard (n 288) 81-83.

³²⁶ *Loi du 10 avril 2003 réglant la suppression des juridictions militaires en temps de paix ainsi que leur maintien en temps de guerre*, art 73.

³²⁷ Lange and Werts (n 112) 169.

³²⁸ See above, 3.1.

³²⁹ See Moyse and Dumoulin (n 107) 25.

be in place due to the (hypothetical) declaration of a formal state of war.³³⁰ Therefore, as Belgian law currently stands, international crimes committed by soldiers and commanders do fall, in all circumstances, under the jurisdiction of ordinary criminal courts.

5.4 Aspects of International Judicial Cooperation

Belgium is a party to an important series of extradition treaties, whether general in scope or covering specific offences only.³³¹ The 1957 European Convention on Extradition³³² is but one example of those numerous instruments. Under Article 1 of a 1874 domestic Act governing extradition,³³³ the existence of a dedicated international convention (whether bilateral or multilateral in nature) is a strict precondition for Belgium to grant an extradition request. Belgium is also bound by a range of international agreements on judicial and police cooperation in general,³³⁴ which all must be read in conjunction with a 2004 Act on international judicial cooperation in criminal matters.³³⁵ In the specific context of the EU, Belgium is due to apply an extensive series of additional instruments and mechanisms that seek to further facilitate judicial and police cooperation in criminal matters.³³⁶

To the best of our knowledge, however, none of these international or domestic instruments on international judicial cooperation address the specific situation of offences related to the use of AWSs. While AWSs have attracted some important attention in relation to *jus ad bellum*, *jus in bello*, or criminal liability in general, it very much seems that this debate has not percolated through the domain of international cooperation just yet – or at least not in an express manner. The ‘MLA initiative’ sponsored since 2011 by Belgium and other States,³³⁷ for instance, has recently led to the adoption of a very comprehensive (revised) draft Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes

³³⁰ *Loi du 10 avril 2003 réglant la suppression des juridictions militaires en temps de paix ainsi que leur maintien en temps de guerre*, art 77.

³³¹ For an overview, see Marie-Aude Beernaert, Henri Bosly and Damien Vandermeersch, *Droit de la procédure pénale* (9th edn, La Charte 2021) 2043-2046; Paul-Emile Trousse and Jacques Vanhalewijn, *Uitlevering en internationale rechtshulp in strafzaken* (Larcier 1970) 37-39.

³³² Council of Europe, European Convention on Extradition (13 December 1957) ETS no 24.

³³³ *Loi du 15 mars 1874 sur les extraditions* (Moniteur belge, 17 March 1874).

³³⁴ See generally Frédéric Lugentz, Jacques Rayroud and Michel Turk, *L'entraide pénale internationale en Suisse, en Belgique et au Grand-Duché de Luxembourg* (Larcier 2014) 321-492.

³³⁵ *Loi du 9 décembre 2004 sur la transmission policière internationale de données à caractère personnel et d'informations à finalité judiciaire, l'entraide judiciaire internationale en matière pénale et modifiant l'article 90ter du Code d'instruction criminelle* (Moniteur belge, 24 December 2004).

³³⁶ See eg Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1, implemented in Belgium by *Loi du 19 décembre 2003 relative au mandat d'arrêt européen* (Moniteur belge, 22 December 2003).

³³⁷ See <<https://www.gov.si/en/registries/projects/mla-initiative/>> accessed 24 October 2025.

against Humanity, War Crimes, and other International Crimes.³³⁸ It is noteworthy that even this modern and specialised draft instrument on international cooperation for core international crimes, the scope and content of which are presented as particularly wide,³³⁹ does not refer to or consider AWSs or AI in general.

6 Conclusion

It has now become a truism that AI exercises significant influence on all aspects of (the legal regulation) of society. IHL and international criminal law are no exceptions. The use of AI in military armament, in particular, gives rise to unprecedented opportunities, but also to a series of legal difficulties and ethical issues. While these challenges are best evidenced by the many discussions and developments surrounding the use of AWS, the impact of AI on traditional conceptions and principles pertaining to *jus ad bellum*, *jus in bello*, and the prosecution of international crimes in general cannot be overlooked. Prominent actors in those disciplines are now well aware of the importance of these issues and of the necessity to confront them in a proactive manner. The ICRC, for instance, has long made AI and AWS an area of key concern.³⁴⁰ In a similar move, International Criminal Court Prosecutor Karim A.A. Khan recently made clear that the use of AI and other advanced technology has become a top priority in relation to his mandate to prosecute international crimes.³⁴¹

In this context, this contribution aimed to analyse how these issues have been addressed in Belgium. In short, the analysis shows that a rather clear dichotomy separates the political and legislative spheres, respectively. On the one hand, challenges and opportunities raised by the use of AWS and other forms of AI-driven technologies in times of armed conflict have been regularly addressed in political and policy discourse – whether in Belgian forums as such or in the context of Belgium’s participation in the activities of international structures such as the GGE.³⁴² On the legislative agenda, on the other hand, issues related to AWS and AI have led to very few realisations so far. The orthodox position in Belgium is that the general rules and principles of existing international and domestic (criminal) law are sufficient, as they are, to adequately

³³⁸ Version of 30 November 2022 <<https://www.gov.si/en/registries/projects/mla-initiative/#e52197>> accessed 24 October 2025.

³³⁹ Alison Bisset, ‘The Mutual Legal Assistance Treaty for Core Crimes: Filling the Gap?’ (*EJIL: Talk!*, 13 June 2022), <<https://www.ejiltalk.org/the-mutual-legal-assistance-treaty-for-core-crimes-filling-the-gap/>> accessed 24 October 2025.

³⁴⁰ ICRC, ‘ICRC Position on autonomous weapon systems’, (n 42); ICRC, ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Report’ (2019) 26-35 <<https://www.icrc.org/en/document/icrc-report-ihl-and-challenges-contemporary-armed-conflicts>> accessed 24 October 2025.

³⁴¹ See eg ICC, ‘At #UNGA78 side event, #ICC Prosecutor Karim A.A. Khan KC spoke with Microsoft Vice Chair and President Brad Smith on the importance of harnessing advanced tech & AI in the pursuit of justice’ (*LinkedIn*, 22 September 2023). See also Karim A.A. Khan KC, ‘Technology Will Not Exceed Our Humanity’ (*Foreign Policy Analytics*, 20 August 2023) <<https://digitalfrontlines.io/2023/08/20/technology-will-not-exceed-our-humanity/>> accessed 24 October 2025.

³⁴² See above, 2.

regulate these new phenomena. While this certainly holds true for most aspects of the law, others do seem to leave some gaps as far as AI-related criminality is concerned – one example being the rules on criminal liability in relation to harmful use of AWS, where limited human control is involved.³⁴³ Therefore, it is probably just a matter of time before the legal issues raised by AI regarding IHL and the prosecution of (international) crimes move from the political sphere to the Belgian legislative agenda.

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³⁴³ See above, 5.2.

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This volume brings together state-of-the-art scholarship on one of the most urgent issues of contemporary international law: the governance of artificial intelligence (AI) in military contexts. Drawing on contributions from the international scientific AIDP Section IV colloquium held in Opatija, Croatia, in December 2023, it explores how national and international legal systems confront the emergence of autonomous weapon systems (AWS) and other AI-driven military technologies.

Featuring six national reports from Belgium, Croatia, Finland, Hungary, Italy, and Poland, the publication provides a comparative perspective on the legal, ethical, and policy challenges posed by AWS. Authors examine critical issues such as the distinction between autonomous and automated weapons, meaningful human control, individual and corporate accountability, command responsibility, compliance with international humanitarian law (IHL) principles and transnational judicial cooperation, including jurisdiction, extradition, evidence gathering, and prosecution in cases involving AI-related cases.

Opening with an ethical reflection by Steven W. Becker, the volume highlights the moral, humanitarian, and legal consequences of delegating life-and-death decisions to machines lacking empathy and moral reasoning. The discussions emphasise the urgent need for international consensus, binding norms, and robust oversight to ensure that AI in warfare respects human dignity, the laws of armed conflict, and human rights.

The AIDP Section IV Resolution, included in this volume, calls for a global prohibition on AWS without meaningful human control and sets binding norms for transparency, traceability, independent reliability testing, lifecycle oversight, and extraterritorial liability. This publication is essential reading for policymakers, scholars, and practitioners navigating AI's existential challenges to IHL, criminal justice, and ethical conduct of warfare.

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