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Emerging Technologies and the Laws of War: AI Warfare under IHL and the EU Regulation Gap

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RESEARCH REPORT



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RESEARCH REPORT

As declared by the European Commission's Directorate-General for Defence Industry and Space, it is an undeniable fact that emerging technologies, including artificial intelligence (AI), are rapidly reshaping modern warfare as we know it.¹ The European Union (EU) and its Member States (MSs), in recognition of the growing importance of AI use in the security and defence sectors, have accordingly aimed to increase the Union's investments in said technologies for a more robust European security and readiness framework.² Nevertheless, while the EU vows to achieve long-awaited strategic autonomy by enhancing its technological competitiveness in the defence sector, the international community falls behind in the creation and implementation of a legally binding framework to regulate the use of AI technology in armed conflict.

Taking this into consideration, this paper aims to examine the EU's state of play in terms of AI and determine the Union's stance with regard to ethical, legal and humanitarian concerns and standards. Thus, the first section focuses on the EU's AI Act and some of the Union's defence-related initiatives that feature artificial intelligence, while the second section examines current efforts to address AI in warfare by the international community. The analysis shows that there is no binding legislation on AI use in conflict settings, either in the EU or internationally. Accordingly, recommended lines of action are provided. AI warfare must abide by the principles set out by international humanitarian law (IHL), and it is the EU's duty to effectively regulate the use of military AI in compliance with humanitarian standards and champion its regulation at the international level. Doing so would allow the EU to further its technological competitiveness and preparedness in a way that also reaffirms its commitment to an ethical, legal and humanitarian use of military AI.

1. The EU, Defence and AI: Current State of Play and the Security Exception

First and foremost, the European Union's Artificial Intelligence Act (AI Act) constitutes a landmark piece of legislation, the aim of which is the establishment of a common legal framework for AI in the Union. The rationale behind the AI Act, as explained in its first article, is to promote the development and use of artificial intelligence systems that are both trustworthy and human-centric, and which ensure the protection of the Union's and its citizens' health, fundamental rights and safety.³ Before delving into its contents, it bears mentioning that in the final negotiations for the text's approval, last-minute objections were put forward by some MSs, which ultimately led to significant changes to the text with regard to the use of AI for military or defence purposes, and thus the scope of the Act itself. The reason offered by the countries for such objections was that, were the text to be left as is, the restrictions on European companies would be such that it would hinder their competitiveness in the global market.⁴ The approved text goes on to show that such objections were given due consideration and were incorporated into the legislation.

The Act takes on a risk-based approach, meaning that specific requirements are to be respected depending on the risk level that an AI system's application poses. The legislation lays out the following classification.

¹ DG DEFIS, 'From AI to Quantum: How the European Defence Fund Shapes the Future of EU Defence Technologies - European Commission' (2025) <https://defence-industry-space.ec.europa.eu/ai-quantum-how-european-defence-fund-shapes-future-eu-defence-technologies-2025-12-15_en>.

² European Commission and EEAS, 'White Paper for European Defence – Readiness 2030' (2025) <https://commission.europa.eu/document/download/e6d5db69-e0ab-4bec-9dc0-3867b4373019_en?filename=White%20paper%20for%20European%20defence%20-%20Readiness%202030.pdf>.

³ Regulation (EU) 2024/1689 laying down harmonised rules on artificial intelligence 2024 (OJ L, 2024/1689, 12.7.2024).

⁴ Luca Bertuzzi, 'Landmark AI Deal: Will Europe Succeed as the World's Digital Regulator?' (CEPA, 12 December 2023) <<https://cepa.org/article/landmark-ai-deal-will-europe-succeed-as-the-worlds-digital-regulator/>>.

Firstly, we find unacceptable risk, which comprises a range of AI applications that are banned in the European Union (exceptions allowing when used for law enforcement), such as remote biometric identification systems or the manipulation of people. The second category corresponds to high risk, which applies to AI systems with the potential to threaten safety or the respect of fundamental rights. These are further divided into two subcategories. The first one corresponds to AI systems used in products under the scope of the EU's product safety legislation, such as aeroplanes or medical devices. The second is comprised of AI systems that must be registered in a database due to falling into potentially sensitive areas, such as border control management, health, or law enforcement. This tier requires an assessment of the systems both before and during their entry into the market, and it also allows citizens to file national complaints about them should they consider it is negatively affecting their safety and/or fundamental rights.⁵ The third tier is comprised of AI that is considered to generate limited risk, with transparency requirements and copyright law to ensure users are made aware that the content they are engaging with is both AI-generated and legally compliant. Lastly, AI systems that are deemed to generate minimal risk are not regulated at all, though the Union encourages MSs to follow a voluntary code of conduct.

However, the most notable aspect of the AI Act is arguably its 'Security Exception'. Indeed, the text asserts that any and all AI systems marketed and used for exclusively military, defence or security aims are to be excluded from the Act's scope, as specified in Article 2(3) of the Act.⁶ This exception is duly justified by invoking Article 4(2) TEU, thus citing that the Union must respect that certain competences related to essential State functions remain with the MSs, including the protection of a State's territorial integrity and the safeguarding of its national security.⁷ Chapter 2 within Title V TEU is equally invoked, citing that international public law is the more appropriate legal framework to address matters such as the regulation of AI in contexts of military and defence activities or the use of lethal force.⁸

Interestingly, dual-use AI falls within the scope of the AI Act, albeit with certain nuances. The legislation states that the temporary or permanent use of an AI system that was initially developed, in the market, or used for military, defence or national security ends in other contexts, such as, for instance, humanitarian or public security reasons, will require the compliance of such a system with the Regulation when used in these non-military contexts.⁹ Despite this attempt at regulating dual-use AI, the Act also asserts that this does not affect the exclusion of AI systems from the legislation's scope when used in military or national security contexts. Additionally, the Act also establishes that AI systems initially developed for civilian contexts but then repurposed, with or without modification, for military, defence or security situations shall also fall outside the Act's scope.¹⁰

Beyond legislation, the EU has also published a series of plans and papers that express the need for the Union and its MSs to heavily invest in new technologies for defence, resilience and preparedness, with AI being one of the key investment areas. To note, the 2022 Strategic Compass dedicates an entire section to the cyber domain, citing the need to collectively invest in capability development and use of key emerging technologies such as artificial intelligence to gain a military advantage,¹¹ which the EU plans to achieve through the

⁵ Artificial Intelligence Act art 27.

⁶ *ibid* art 2 para 3.

⁷ Consolidated version of the Treaty on European Union (OJ C 202, 7.6.2016) art 4 para 2.

⁸ Artificial Intelligence Act; Consolidated version of the Treaty on European Union tit V ch 2.

⁹ Artificial Intelligence Act.

¹⁰ *ibid*.

¹¹ EEAS, 'A Strategic Compass for Security and Defence' (2022) <https://www.eeas.europa.eu/sites/default/files/documents/strategic_compass_en3_web.pdf>.

Likewise, the European Defence Readiness 2030 Plan, published in 2025, calls for the investment of new technologies such as AI to not only guarantee peace in the continent, but also capitalise on Europe's ambition to increase competitiveness in the industrial sector.¹² By arguing that these emerging technologies are already changing warfare as we understand it, and whose presence in battlefields is likely to increase in the coming years, the Plan stresses the need for the EU to support the increase of the European defence industry's capabilities to deliver on the manufacturing of these technologies at a quicker and larger scale than current competitors and geostrategic rivals. To do so, the Plan puts forward initiatives such as the EU's Defence Innovation Scheme and its subsequent Hub to kickstart support for tech entities, or a soon-to-be-published technological roadmap on European armament with an initial phase that focuses on AI and quantum technology development.¹³ Lastly, the ReArm Europe Plan, with a budget of over 800 billion euros, has the potential to allocate funds to defence-centred innovation, with AI technology mentioned under the SAFE (security action for Europe) instrument as a joint procurement venture.¹⁴

In addition to these, the EU also contends with other platforms to encourage the investment and development of AI systems on the continent. For instance, we find the EU defence innovation scheme (EUDIS), co-funded with the European Defence Budget and MSs' contributions, as well as the Defence Equity Facility (DEF), the goal of which is to support investment for European companies to research and develop cutting-edge technology with dual-use potential.¹⁵ The development of AI systems is also being conducted through Permanent Structured Cooperation (PESCO) projects, such as 'automated modelling, identification, and damage assessment of urban terrain' (AMIDA-UT), to enhance the Union's defence capabilities with the integration of artificial intelligence in the field.¹⁶

Overall, the exclusion of military, defence and security-purposed AI systems from the AI Act's scope due to treaty restrictions entails a near-complete lack of regulation for one of the most critical and potentially harmful uses of artificial intelligence, that of AI in warfare. In other words, the EU remains unable to fully legislate on defence and security matters because these remain, at their core, a national competence. Consequently, this gives MSs complete freedom in the development, purchase and use of such systems, as exemplified by several of the aforementioned initiatives and plans. As already mentioned, the AI Act also states that, when discussing AI in military or defence contexts, international public law should be the legal framework that addresses such matters. The following section will explore how international humanitarian law (IHL) is addressing AI in warfare.

2. The Ethics of AI in Warfare and International Humanitarian Law

The growing presence of AI in warfare raises several ethical considerations. The following section aims to explore the legal and humanitarian implications of artificial intelligence systems in warfare and the current state of international legal frameworks.

¹² European Commission and EEAS (n 2).

¹³ *ibid.*

¹⁴ Sebastian Clapp, 'Defence and Artificial Intelligence' (EPRS 2025)

<[https://www.europarl.europa.eu/RegData/etudes/BRIE/2025/769580/EPRS_BRI\(2025\)769580_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2025/769580/EPRS_BRI(2025)769580_EN.pdf)>.

¹⁵ *ibid.*

¹⁶ 'Automated Modelling, Identification and Damage Assessment of Urban Terrain (AMIDA-UT)' (PESCO, 2024)

<<https://www.pesco.europa.eu/project/automated-modelling-identification-and-damage-assessment-of-urban-terrain-amida-ut/>>.

One of the main concerns regarding the use of artificial intelligence in circumstances of conflict is that of distinction/discrimination. The Principle of Distinction/Discrimination refers to the ability to differentiate civilians from combatants. AI's lack of contextual awareness can, in fact, lead to a high chance of target misidentification when external uncontrollable and unpredictable factors like, for instance, a noncombatant holding a weapon or an erratic behavioural response to the situation at hand.¹⁷ Not only does AI struggle to distinguish between civilians and combatants, but these systems may also struggle to determine when to or not to engage in conflict based on specific contexts, such as combatants surrendering.

Another issue is that of the Principles of Necessity and Proportionality. The former refers to making sure that no other course of action that generates less harm could have been taken to achieve a goal, thus using minimal force, while the latter refers to ensuring that the actions undertaken are proportionate to the threat. It is difficult to technically predict whether AI, as a self-learning adapting tool, is able to remain consistent in its interpretation of situations and thus appropriately evaluate the best course of action to avoid or limit unnecessary harm. Indeed, decision-making on the need to use force involves moral and contextual considerations that AI, as a tool programmed to make algorithmic calculations for maximum efficiency, simply cannot replicate.¹⁸ This may, in turn, create situations in which AI systems make choices that undermine humanitarian principles for the sake of successful tactical outcomes.

However, perhaps the most important issue is to attribute responsibility and accountability to the decisions taken by artificial intelligence. When a decision taken by an AI system causes harm, especially if it has violated principles of international humanitarian and human rights law, the determination of responsibility and thus accountability becomes a key matter. For instance, in the case of international humanitarian law, it is imperative to hold someone responsible when a civilian death occurs. Thus, naturally, ethical concerns emerge when decision-making that results in the loss of human life is delegated to autonomous systems because it is difficult to determine who is to be held responsible. These circumstances could potentially undermine accountability. To solve this, concepts such as meaningful human oversight and human control have been put forward as essential for a responsible use of AI in warfare, especially when human life and dignity are concerned. In other words, to avoid a lack of accountability, it is essential to make sure that people remain the ultimate decision-makers in life-or-death scenarios.¹⁹ Having discussed some of the key humanitarian and legal implications of using artificial intelligence in warfare, and seeing as the EU AI Act keeps defence and security out of its scope, interest in regulating the use of military AI at an international level has increased.²⁰

Talks have been held under the United Nations Convention on Certain Conventional Weapons on how to regulate defence-related artificial intelligence for over a decade, but no consensus has been reached due to conflicting opinions on the matter.²¹ On the one hand, several UN MSs and NGOs have advocated for the banning of certain technologies, such as Lethal Autonomous Weapons Systems (LAWS), citing ethical concerns and a lack of meaningful human oversight that therefore makes these technologies illegal under

¹⁷ ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (2024) 106 Int rev Red Cross 1357.

¹⁸ Nia Henry, 'Artificial Intelligence and Autonomous Weapons - Strategic and Ethical Considerations for European Defence' (Finabel 2025) <<https://finabel.org/wp-content/uploads/2025/04/AR-AI-and-Autonomous-Weapons-Strat-and-Ethical-considerations.pdf>>.

¹⁹ Lena Trabucco, 'AI-Enabled Autonomous Weapons and Human Control. Part II: Human Control and Military Commanders' (2025) 106 International Law Studies <<https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=3116&context=ils>>.

²⁰ Clapp (n 14).

²¹ Kelley M Saylor, 'International Discussions Concerning Lethal Autonomous Weapon Systems' (Congressional Research Service) IF11294 <<https://www.congress.gov/crs-product/IF11294>>.

IHL. On the other hand, some MSs have argued that outright banning might be too extreme a measure and favour the creation of regulations or codes of conduct for such systems. They justify this opinion by either arguing that other uses can be found for these systems with humanitarian benefits and that IHL can already sufficiently regulate AI in warfare, or conversely by asserting that the pre-emptive banning of an entire type of weaponry has no legal precedent.²² Also under the UN framework, the High-Level Advisory Body on Artificial Intelligence has published a report on the use of AI in conflict. In it, both the potential and the risks of AI are discussed, but most importantly, the report calls for the creation of a global framework on responsible AI governance that both protects human rights and fosters development.²³ Nevertheless, as of today, no further action has been taken.

A potentially interesting development is that of Resolution 79/239, adopted by the UN General Assembly (UNGA) in late 2024, titled Artificial intelligence in the military domain and its implications for international peace and security. The resolution asserts that international humanitarian and international human rights law is applicable in all stages of AI's lifecycle and calls for States to responsibly address challenges arising from AI use in the military domain.²⁴ Nonetheless, UNGA resolutions remain legally non-binding on States, and thus hold no power other than potentially shaping global trends and influencing future treaties.

Lastly, it is worth noting that, under the Biden Administration, the United States (US) issued a Political Declaration on Responsible Military Use of Artificial Intelligence and Autonomy as an attempt to regulate military AI governance on an international scale.²⁵ Endorsed by over 50 countries and emphasising compliance with IHL and human accountability, this Declaration aimed at providing a quasi-normative framework on ethical and responsible AI development, deployment and use in military contexts. Nevertheless, under the second Trump Administration, it is very likely that this policy will be abandoned in favour of boosting American dominance in the field of AI, as exemplified by the 2025 Executive Order on AI.²⁶

3. Complementary Regulations and the EU's Normative Power: Analysis of Pitfalls and Possibilities

As discussed in the previous sections, the European Union's AI Act leaves AI systems used for military, defence and security purposes out of its scope of application. Similarly, current efforts to regulate AI use in conflicts on an international scale have been unsuccessful due the lack of enforcing power over States. Thus, it could be argued that there is a governance gap in military AI in Europe and beyond, as there exists no common European or international strategy to responsibly govern AI use in defence contexts.

Under no circumstances can the EU disregard the aforementioned ethical implications of using AI systems in the fields of defence and security. Thus, it is imperative that the Union takes responsibility, which it can do in two ways. Firstly, the development of a framework that covers both exclusively military and dual-use

²² Clapp (n 14).

²³ United Nations High-Level AI Advisory Body, 'Governing AI for Humanity: Final Report' (United Nations Publications 2024) <https://www.un.org/sites/un2.un.org/files/governing_ai_for_humanity_final_report_en.pdf>

²⁴ UNGA Res 79/239 Artificial intelligence in the military domain and its implications for international peace and security 2024.

²⁵ Bureau of Arms Control and Nonproliferation, 'Political Declaration on Responsible Military Use of Artificial Intelligence and Autonomy' (United States Department of State, 2024) <<https://www.state.gov/bureau-of-arms-control-deterrence-and-stability/political-declaration-on-responsible-military-use-of-artificial-intelligence-and-autonomy/>>.

²⁶ The White House, 'President Donald J. Trump Takes Action to Enhance America's AI Leadership' (*The White House*, 23 January 2025) <<https://www.whitehouse.gov/fact-sheets/2025/01/fact-sheet-president-donald-j-trump-takes-action-to-enhance-americas-ai-leadership/>> accessed 12 December 2025.

applications of AI systems.²⁷ It would replicate the AI Act's risk categorisation, thus allowing for the potential banning of LAWS if deemed too unacceptable a risk, and ideally cover all stages of the AI system's lifecycle, from research and development to deployment and use. Admittedly, because national security and defence remain a MS competence, such a comprehensive Act would likely require a treaty change that cedes these competences, partly or fully, to the EU. Conversely, the EU has the²⁸ competence to legislate on matters of research, technological development, the internal market and trade. Therefore, it could be argued that the EU has the capacity to legislate on military and dual-use AI systems research, development, and entry into the market is concerned. Furthermore, the fact that a significant amount of research and development is backed by EU funding, such as the EDF, the Union could also include conditionality clauses that limit the development of AI systems with the potential to incur great harm. These actions would not only ensure an EU-wide responsible development and use of these systems in such critical fields, but also show that the EU is capable and willing to become a leader in responsible, values-based defence AI governance.

The latter point ties to the second action the EU can take. As a potential champion of responsible military and dual-use AI governance, the EU must strive to engage with like-minded actors to advocate for the international regulation of AI systems in conflicts and military settings. The outcome should be a legally binding agreement that enshrines human oversight and control, the determination of responsibility and accountability, and the protection of fundamental rights as the foundation for military AI governance. If the creation of a new treaty seems too far-fetched, an alternative could be the addition of a sixth protocol to the Convention on Certain Conventional Weapons that focuses on restricting AI systems from a human control-centric approach. Regardless of the form this international regulation takes, it is the EU's duty to use its normative power and ensure that the outcome is a legally binding, values-based text that complies with international humanitarian and human rights law. The establishment of the Independent International Scientific Panel on AI and the Global Dialogue on Artificial International Governance within the UN system seems like a good first step in the right direction.

Concluding Remarks and Future Lines of Action

This report has shown that the current European and international frameworks to regulate the development, deployment and use of artificial intelligence in security and defence contexts are deficient. Considering the unprecedented pace at which artificial intelligence is transforming warfare and the rise of geopolitical instability, decisive action must be taken. The existing governance gap in AI use in warfare has the potential to threaten international peace and stability, especially when human oversight, control and IHL principles are not embedded into its systems.

The EU should strive to regulate the use of military AI in compliance with humanitarian standards, both in Europe and beyond. While it might be directly unable to do so due to treaty restrictions, the Union does have the competence to legislate on research, development, trade and the single market. Thus, inspired by the AI Act, the EU should develop a complementary regulation to govern military and dual-use applications of AI

²⁷ Rosanna Fanni, 'Why the EU Must Now Tackle the Risks Posed by Military AI' (CEPS, 8 June 2023) <<https://www.ceps.eu/why-the-eu-must-now-tackle-the-risks-posed-by-military-ai/>>.

²⁸ Consolidated version of the Treaty on European Union (OJ C 202, 7.6.2016) arts 3 and 4.

²⁹ Raluca Csernaton, 'Weaponizing Innovation: Mapping Artificial Intelligence-Enabled Security and Defence in the EU' [2023] Non-Proliferation and Disarmament Papers <https://www.sipri.org/sites/default/files/2023-07/eunpdc_no_84_0.pdf>.

³⁰ United Nations, 'Independent International Scientific Panel on AI' (2025) <<https://www.un.org/independent-international-scientific-panel-ai/en>>; United Nations, 'Global Dialogue on AI Governance' (2025) <<https://www.un.org/global-dialogue-ai-governance/en>>.

systems from a research and development, and entry into market standpoint. Additionally, EU-funded projects regarding military and dual-use AI should include conditionality clauses to restrict the development and potential deployment of AI systems considered too risky for human life and dignity, such as LAWS. Doing so will allow the EU to further its technological competitiveness and its readiness in the face of conflict in a way that also reaffirms the Union's commitment to an ethical, legal and humanitarian use of artificial intelligence. Internationally, the Union must continue to advocate for a legally binding agreement on military AI use, based on human oversight and control, a clear determination of responsibility and accountability, and compliance with IHL principles.

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