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Examining the *jus ad bellum* – *jus in bello*-human rights law dichotomy from an African freedom values perspective: Towards comprehensive governance of autonomous weapon systems¹

Prof. Dr. Thompson Chengeta² and Dr. Gift Manyatera³

ABSTRACT

*Since 2013, following a presentation of the first report on lethal autonomous weapon systems (AWS) at the United Nations (UN) Human Rights Council (HRC) by the late Prof. Christof Heyns of the University of Pretoria in South Africa, states have been gathering at the UN to discuss challenges that are raised by AWS. One of the main objectives of the UN meetings on AWS is to map out how the international community can comprehensively respond to AWS. At the heart of the UN AWS debate is which legal regime or normative framework should guide the discussions or formulation of policy on AWS. The battle of which legal regime should take precedent in the AWS discussions often manifest itself in questions about which UN or international fora should states debate the challenges posed by AWS. While the discussions on AWS may have started in 2013 in the UN HRC, some states quickly argued for the discussions to be moved from the HRC – an international human rights law-focussed framework – to the UN Convention on Conventional Weapons (CCW) – a *jus in bello* or international humanitarian law-focussed framework. Many states and scholars have forcefully argued that the UN CCW is the appropriate forum within which AWS should be discussed. For the past years that the AWS discussion has been in the CCW, a number of states have repeatedly insisted on the *jus in bello* – *jus ad bellum* – international human rights law (IHRL) dichotomy, arguing that it is *jus in bello* or international humanitarian law (IHL) that should determine the acceptability or otherwise of AWS. Indeed, in the recent meeting of the UN Group of Governmental Experts (UNGGE) on AWS held from 2 to 8 December 2021, a number of states objected to the inclusion of IHRL in the report of the UNGGE on AWS, reminding other states that the UN CCW is an IHL-focussed framework whose mandate is limited to situations of armed conflict. Towards the international community's goal of a comprehensive governance framework on AWS, this paper considers, from an African freedom ethics perspective, whether, when considering the acceptability of AWS, and in the interest of diversity of values, ethics and interests, it is correct to insist on the dichotomy between *jus in bello*, *jus ad bellum* and IHRL.*

1. Introduction

The dangers posed by autonomous weapon systems (AWS) are serious and imminent. AWS are artificial intelligence (AI) powered robotic weapon systems that once activated are able to

¹This research was funded by the Human Sciences Research Council (HSRC) and Facebook in a grant project aimed at supporting interdisciplinary independent academic research across Africa in the field of AI, ethics and human rights.

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make the decision as to who to target, kill or harm without any further human intervention or control.⁴ AWS are currently being developed by the United States of America (US), China, Russia, Israel and Australia etc. AWS present far reaching legal, ethical and security concerns.⁵ In 2020, the United Nations (UN) Secretary General, Antonio Guterres, identified AWS as one of the “four horsemen” threatening world peace and security⁶ and that AWS are morally repugnant, politically unacceptable and should be banned by international law.⁷

Various legal and ethical questions that are often asked are as follows: Can AWS comply or be used in compliance with international humanitarian law (IHL) and international weapons law (IWL)? If used in contexts outside armed conflict, for example, in law enforcement situations, can they comply with international human rights law (IHRL)? If AWS commit crimes in violation of IHL and IHRL, who will be held accountable or held legally responsible? There are ethical questions that have also been asked in relation to AWS. Is it consistent with human dignity and morality to allow AWS to make the decision as to who lives or dies? Equally, there are security questions that arise: will AWS proliferate leading wars and insecurity – contrary to the international community’s efforts towards peace and security?

On the African Continent, of equal concern is the apparent link between development of AWS, machine learning, personal data and digital ethics. AWS heavily rely on facial recognition technologies and recently, Western and Chinese companies have been making investments in Africa which is reported as the “Big Brothers” seeking “African Faces” to train facial recognition technologies.⁸ Are the global frameworks on data privacy and digital ethics alive to the values and concerns of African communities in this regard?

⁴ ICRC position on autonomous weapon systems (2021) available at <https://www.icrc.org/en/document/icrc-position-autonomous-weapon-systems#:~:text=ICRC%20position%20on%20autonomous%20weapon%20systems%20Article%2012,rules.%20The%20ICRC%27s%20concerns%20about%20autonomous%20weapon%20systems> (all internet references accessed in November 2021).

⁵ See report on AWS (A/HRC/23/47) by the South African Professor, Christof Heyns, to the United Nations Human Rights Council, available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-47_en.pdf.

⁶ See UN, “UN chief outlines solutions to defeat ‘four horsemen’ threatening our global future” (2020) available at <https://news.un.org/en/story/2020/01/1055791> (accessed 28 July 2020).

⁷ See A Guterres, “Machines capable of taking human lives are unacceptable” (2019) available here <https://www.un.org/press/en/2019/sgsm19512.doc.htm> (accessed 28 July 2020).

⁸ See A Hawkins, “Beijing’s Big Brother Tech Needs African Faces” (2018) available at <https://foreignpolicy.com/2018/07/24/beijings-big-brother-tech-needs-african-faces/>

Central to these legal, ethical and security questions relating to AWS is the overall question on the acceptability of AWS. Since AWS are yet to be publicly deployed, should the international community accept their development and deployment? Those who attempt to answer this question consider relevant ethics and legal regimes. It is critical to note that the legal regimes that govern the use of force – those that are often invoked in attempt to answer the above question – were largely formulated when those from the Global South were still under the yoke of oppression – either in slavery, under colonialism or apartheid. The term “Global South” is used in this paper to denote not only low or middle- income countries but also “to address spaces and peoples negatively impacted by globalization, including subjugated peoples and poorer regions within wealthier countries.”⁹

Without participation of those from the Global South¹⁰, the legal regimes on the use of force were divided with rigid lines that dictate their scope of application – how, when and to whom they apply. Today, in the face of emerging military technologies like AWS that reek of yesternight oppression, domination and dispossession, peoples from the Global South are expected to express and debate their concerns within the rigid lines that were drawn not only in their absence but by their former oppressors. That, in essence, is the bedrock of legal-neo-coloniality and epistemic injustice. Many nations from the Global South have already called for a pre-emptive ban on AWS. For example, the African Group of States on Disarmament submitted to the UN that AWS are inconsistent with African ethos of *ubuntu* and irreconcilable with the African Union’s theme of silencing the guns.¹¹

In 2014, the UN formed a Group of Governmental experts on AWS to discuss and map a comprehensive governance framework on AWS. Although the Group adopted a multi-disciplinary approach, powerful states, notably, the US, the UK, France, Switzerland, Russia

⁹ Marlea Clarke, “Global South: What does it mean and why use the term” (2018) available at <https://onlineacademiccommunity.uvic.ca/globalsouthpolitics/2018/08/08/global-south-what-does-it-mean-and-why-use-the-term/>

¹⁰ The 1864 Geneva Convention was negotiated by 12 European Countries. The 1949 Geneva Diplomatic Conference had limited African nations participation (See Final Record of the Diplomatic Conference of Geneva of 1949).

¹¹ See African Group of States Statement (April 2018), available at https://reachingcriticalwill.org/images/documents/Disarmament-fora/ccw/2018/gge/statements/9April_African-Group.pdf; See also African Group Statement (August, 2018) available at https://reachingcriticalwill.org/images/documents/Disarmament-fora/ccw/2018/gge/statements/29August_AfricanGroup2.pdf; T Ray, “The need for African centrality in the Lethal Autonomous Weapons debate” (2018) available at <https://www.orfonline.org/expert-speak/the-need-for-african-centrality-in-the-lethal-autonomous-weapons-debate-49695/>.

etc. have emphasized that the acceptability or otherwise of AWS should be determined on the basis of *jus in bello*.¹² In other words, *jus in bello* is regarded as the stable framework against which AWS must be measured. *Jus in bello* refers to the law that governs the conduct of parties engaged in a war or armed conflict. *Jus in bello* is basically IHL and IWL that is aimed at minimising suffering in armed conflicts by protecting those who are not directly taking part in hostilities and regulate which weapons, means or methods of warfare are permissible in war.

While nations from the Global South, particularly, African States have pointed out the link between AWS and *jus ad bellum* rules, particularly, concerns regarding the potential use of AWS in aggression, such concerns are relegated to *jus ad bellum* rules which do not necessarily occasion the prohibition of a weapon. *Jus ad bellum* refers to the law that governs conditions under which one State may use force against the territory of another State. In general, Article 2 (4) of the UN Charter prohibits States from using force against other States. *Jus ad bellum* prohibits aggression and provides strict conditions under which States are permitted to use force such as the use of force in self-defence.

Likewise, a number of nations from the Global South have noted the implications of AWS to fundamental human rights such as the right to life, the right to dignity and the right to non-discrimination. IHRL is thus considered to be a critical regime in measuring the acceptability or otherwise of AWS. Yet, as indicated above, a number of powerful nations undermine the relevance of IHRL by insisting that *jus in bello* or IHL is the regime that ought to guide the UN discussions on AWS.

Towards the international community's goal of a comprehensive governance framework on AWS, this paper's main question is whether, when considering the acceptability of AWS, and in the interest of diversity of values, ethics and interests, it is correct to insist on the dichotomy between *jus in bello*, *jus ad bellum* and IHRL? There are several questions that are related to this main question: In the legal review of AWS as new weapons, can or should their acceptability be also predicated on the risks they pose to *jus ad bellum* or risks they pose to peace and security? Put differently, can or should certain AWS be considered to be illegal weapons *per se* on the basis that they make it easy for one State to violate the territorial

¹² See the statements of the mentioned states to the UN Group of Governmental Experts on Lethal Autonomous Weapon Systems.

integrity of another or make it easy for one people to dominate another? In the sense of this question, how do African freedom ethics or Global South values interact with *jus ad bellum* and the acceptability of AWS? Are AWS a mere case of neutral conventional weapons whose governance and acceptability should be located in the UN Convention on Conventional Weapons (CCW) framework as guided by *jus in bello*? To what extent, if any, does the current *jus in bello* contain African freedom ethics or values from the Global South? What role, if any, should IHRL play in the acceptability or otherwise of AWS? What is the relationship between IHRL norms that are relevant to the governance of AWS and freedom ethics or values from the Global South? What is the role of African values, ethics and traditions in determining the acceptability or otherwise of AWS? Are there (relevant) African ethics in the first place? How do such ethics or values fit or relate to the *jus in bello* and *jus ad bellum* dichotomy and why does it matter? Are existing global principles/codified values as reflected in *jus in bello* sufficiently encompassing the values and concerns of African nations and other marginalised peoples in as far as deciding the acceptability of AWS? Who determines or determined whether existing principles – *jus in bello* – are sufficient in determining the acceptability or otherwise of AWS? Most of the existing rules governing use of force have existed for a long time and are considered to be part of customary international law. Is it possible that those who decided on the sufficiency of such rules and values upon which acceptability of weapons is determined today might have been mistaken or not comprehensive? Are there participants in the current AWS debates who indicate that existing values and standards are insufficient and what weight is given to their contributions?

Finding answers to the above questions is critical for a number of reasons. It is important to investigate the salient values, ethics and traditions from the Global South that ought to be taken into consideration when determining the acceptability or otherwise of AWS. AWS are globally identified as one of the most cutting edge and contentious AI technology with a bearing on other AI technologies and as such, norms and values that are identified as relevant to AWS can also be applied *mutatis mutandis* to other AI technologies. A regulation or governance framework that is going to be produced on AWS is going to impact on several uses of AI. This is because technologies that are used for development of AWS have a dual use – both military and civilian. It is important, therefore, contributions from the Global South to be taken seriously in all proposed governance frameworks. Further, peoples from the Global South are among those who will be adversely affected in the process of development and use of AWS.

The central thesis of this paper is that AWS raise far reaching concerns that go beyond the prescripts of *jus in bello* to encompass issues of *jus ad bellum*, IHRL, and freedom ethics – standards and values of which are not sufficiently covered/captured under *jus in bello*. As such, an institution such as the UN CCW whose mandate is framed in terms of *jus in bello* and whose approach is to emphasize the *jus in bello-jus ad bellum- IHRL* dichotomy may not be best suited to deal with the challenges that are posed by AWS. The history in the creation of the *jus in bello* regime and the setting up of the UN CCW can explain why values (such as freedom ethics) of marginalized groups and peoples who have been historically oppressed are not well-represented. As such, using the *jus in bello* regime and the UN CCW institution to determine the legality/ethicality/acceptability of AWS may be flawed *ab initio*.

In examining the central thesis of this research, this paper adopts a multi-disciplinary and interdisciplinary approach that is located in critical theories. Critical theories are approaches to social philosophy that critique society with the aim of revealing and challenging power structures.¹³ Critical theories such as decolonial theory¹⁴, critical race theory¹⁵ and intersectionality¹⁶ are chosen in this research because they enable digging beneath the surface to uncover and challenge power structures that shape the development and use of AWS. Decolonial theory, critical race theory and intersectionality caution against adoption of *ahistorical* and *non-contextualised* approaches when framing both the challenges posed by AWS and proposed solutions.¹⁷

Those who emphasise the primacy of *jus in bello* in determining the legality, ethicality and acceptability of AWS often assume that AWS are a neutral technology – in the sense of the UN CCW, AWS are discussed as if they are just neutral conventional weapons. This paper seeks to go beyond the artificial or imperial *jus in bello-jus ad bellum-IHRL* dichotomy and ask the questions: are AWS a mere case of great man's imaginations in pursuit of science or are they shaped by specific social, political and ideological projects, conditions of which are anti-freedom ethics? Will AWS contribute to social structures of authority that perpetuate

¹³ See generally, Piet Strydom, *Contemporary critical theories and methodology* (Routledge, 2013).

¹⁴ See Shakir Mohamed *et al*, "Decolonial AI: Decolonial theory as sociotechnical foresight in artificial intelligence", *Philosophy and Technology*, 2020, pp. 660-684.

¹⁵ Stephen Cave & Kanta Dihl, "The Whiteness of AI", *Philosophy and Technology*, 2020, pp. 686-703.

¹⁶ See Kimberle Crenshaw, "Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics" *University of Chicago Legal Forum*: Vol. 1989: Issue 1, Article 8.

¹⁷ Yarden Katz, *Artificial whiteness: Politics and ideology in artificial intelligence* (Columbia University Press, 2020) p.2.

inequality and oppression – a form of algorithmic coloniality, algorithmic oppression, algorithmic domination and subjugation and algorithmic dispossession? If that is the case, when the international community, particularly in the UN, determine the acceptability or otherwise of AWS, it is an error to only consider *jus in bello* norms as is likely the case in the UN CCW framework.

2. Africa freedom ethics and values

During discussions on AWS in the 2020 Bruges Colloquium that was organized by the International Committee of the Red Cross (ICRC), when one of the authors of this paper pointed out that existing *jus in bello* may not necessarily contain African values that are relevant and critical to the determination of acceptability of AWS, one of the participating scholars responded by questioning which African values are not incorporated in *jus in bello*. The question was not necessarily a question about which African values are not included in the current *jus in bello*, but rather, it was an argument that *jus in bello* as it stands is not only universal but comprehensive.

The above is a common response that is given by scholars and stakeholders who do not only believe in the universality of *jus in bello* but also its comprehensiveness. Indeed, in response to claims that *jus in bello* was constructed around Western philosophies, there have been research to show that values contained in *jus in bello* can also be located in African customs.¹⁸ Substantively, there is no doubt that *jus in bello* norms can also be located in African customs and values. Yet, that is not being questioned in this paper: what is problematic is the politics deciding which regime of law applies when and how in the governance of use of force and weapons thereof. Whether intentionally or unintentionally, the unbridled belief in the universality and comprehensiveness of *jus in bello* contributes to the drive towards a strict adherence to the *jus ad bellum-jus in bello*-IHL dichotomy in the governance of use of force, an approach that favours ignoring the politics of violence. Yet, to those who are often at the receiving end of violence, the politics behind violence is critical – there is a critical intersection between freedom ethics and politics of violence. Indeed, this prompted one to ask the following

¹⁸ Sarah Jean Mabeza, “Does international humanitarian law reflect African traditions and customs? A spotlight on the ICRC’s tool on African values in war” (2021), available at <https://auihl-clinic.org/2021/09/06/does-international-humanitarian-law-reflect-african-customs-and-traditions-a-spotlight-on-the-icrcs-tool-on-african-values-in-war/>; see also ICRC, “African values in war: A tool on traditional customs and IHL” (2021), available at <https://www.icrc.org/en/document/african-customs-tool-traditional-customs-and-ihl>

questions: What is the role of African values, ethics and traditions in determining the acceptability or otherwise of AWS? Are there (relevant) African ethics in the first place? How do such ethics or values fit or relate to the *jus in bello* and *jus ad bellum* dichotomy and why does it matter?

The core of the argument and investigation of this paper is thus not necessarily about the universality of *jus in bello* but rather whether it is sufficiently comprehensive to encompass critical African values that can be located in the politics of violence – values that are relevant to the determination of acceptability of AWS. Thus, aside issues that may arise with the substantive content of legal regimes such as *jus ad bellum*, *jus in bello* and IHRL, it is the politics about when and how they apply that result in exclusion of important African values in specific circumstances. The fact that African nations and its peoples did not play any significant role in the adoption of these legal regimes and the drawing of lines that delineate their scope of application is at the core of epistemic injustice – a point that is later discussed in this paper.

Furthermore, when one refers to the relevance of African values or ethics to the AWS debate, there is of course, questions about whether, given the diversity of the African Continent and its peoples, one can talk about a common or universal African ethic or value. The diversity of the African peoples notwithstanding, there are indeed common African values and ethos that are relevant to the AWS debate. Already, scholars have discussed common African values such as *ubuntu* – human dignity – and how it relates to AWS.¹⁹

This paper focuses on the concept of freedom as a universal or common value on the African Continent. The term “African freedom ethics” is coined in this paper to refer to the moral philosophies and values relating to freedom from violence, freedom from domination and oppression of one people by another, and freedom from discrimination. Indeed, as will be shown below, freedom from the aforementioned forms of violence is foundational to African nationhood; it is the core of Africanness, and it forms the base of the African human rights system.

¹⁹ Christof Heyns, “Autonomous weapons in armed conflict and the right to a dignified life: an African perspective”, *South African Journal on Human Rights*, 2017, Volume 33:1, pp. 46-71; Thompson Chengeta, “Dignity, ubuntu, humanity and autonomous weapon systems debate: An African perspective”, *Brazilian Journal of International Law*, 2016, Volume 13(2), pp. 461-501.

Of course, the critical question for consideration in this paper is how Africa's freedom ethics or values are impacted when States in the UN CCW, bound by its institutional sclerosis, insist on a strict adherence to the *jus in bello-jus ad bellum*-IHRL dichotomy when considering the acceptability of AWS. Nevertheless, before consideration of this question, it is important to show – through the values of African peoples, mandates of African institutions etc. – how freedom ethics is a common value on the African Continent.

African freedom ethics, African humanism, conception of human dignity and respect identity can be located in Africa and its peoples' historical struggles for freedom from various forms of oppression, domination, exploitation and exclusion. In May 1996, South Africa's former president, Thabo Mbeki, delivered a popular speech titled "I am an African". The speech captures the essence of African freedom ethics – Africa and its peoples' conception of freedom from a historical, present and futuristic perspective. Historical in the sense that Africa and its peoples remembers how superiority and military might was used to subjugate African peoples. In the present, Africa and its peoples also realise they are not completely free as they continue to struggle against domination in the form of neo-colonialism. Futuristic in the sense that Africa and its peoples express aspirations of a tomorrow where everyone is truly free and equal. It is worthwhile to include some of the extracts from Thabo Mbeki's speech in this paper because as already noted, it captures some of the salient values that shapes African freedom ethics.

I am an African. I owe my being to the hills and the valleys, the mountains and the glades, the rivers, the deserts, the trees, the flowers, the seas and the ever-changing seasons that define the face of our native land. At times and in fear, *I have wondered if I should concede equal citizenship of our country to the leopard and the lion, the elephant and the springbok, the hyena, the black mamba and the pestilential mosquito. A human presence among these, a feature on the face of our native land just defined. I know that none dare challenge me when I say: I am an African.*

I owe my being to the Khoi and the San whose desolate souls haunt the great expanses of the beautiful Cape, *they who fell victim to the most merciless genocide our native land has ever seen, they who were the first to lose their lives in the struggle to defend our freedom and independence and they who, as a people, perished in the result.*

Today, as a country, we keep an audible silence about these ancestors of the generations that live, fearful to admit the horror of a former deed, seeking to obliterate from our memories a cruel occurrence which, in its remembering, should teach us not and never to be inhuman again. *I am formed of the migrants who left Europe to find a new home on our native land. Whatever their own actions, they remain still, part of me.*

In my veins courses the blood of the Malay slaves who came from the East. Their proud dignity informs my bearing, their culture is a part of my essence. *The stripes they bore on their bodies from the lash of the slave master are a reminder embossed on my consciousness of what should not be done.*

I am a grandchild of the warrior men and women that Hintsa and Sekhukhune led, the patriots that Cetshwayo and Mphephu took to battle, the soldiers Moshoeshoe and Ngungunyane taught never to dishonour the cause of freedom. My mind and my knowledge of myself are formed by the victories that are the jewels in our African crown, the victories we earned from Isandhlwana to Khartoum, as Ethiopians and the Ashanti of Ghana, as the Berbers of the desert.

I am the grandchild who lays fresh flowers on the Boer graves at St Helena and the Bahamas, who sees in the mind's eye and suffers the suffering of a simple peasant folk, death, concentration camps, destroyed homesteads, a dream in ruins. I am the child of Nongqause.

I am he who made it possible to trade in the world markets in diamonds, gold, in the same food for which my stomach yearns. *I come of those who were transported from India and China, whose being resided in the fact, solely, that they were able to provide physical labour, who taught me that we could both be at home and be foreign, that human existence itself demanded that freedom was a necessary condition for that human existence.* Being part of all these people, and in the knowledge that none dare contest that assertion, I shall claim that: I am an African.

I have seen our country torn asunder as these, all of whom are my people, engaged one another in a titanic battle; the one to redress a wrong that had been caused by one to another and the other, to defend the indefensible. *I have seen what happens when one person has superiority of force over another, when the stronger appropriate to themselves the prerogative even to annul the injunction that God created all men and women in His image. I know what it signifies when race and colour are used to determine who is human and who subhuman.*

I have seen the distraction of all sense of self-esteem; consequences of trying to be what one is not, simply to acquire some of the benefit which those who imposed themselves as masters had ensured that they enjoy. I have experience of the situation in which race and colour is used to enrich some and impoverish the rest. I have seen the corruption of the minds and souls as a result of the pursuit of an ignoble effort to perpetrate a terrible crime against humanity.

I have seen concrete expression of the denial of the dignity of a human being emanating from the conscious, systemic and systematic oppressive and repressive activities of other human beings. There the victim's parade with no mask to hide the brutish reality, the beggars, the prostitutes, the street children, those who seek solace in substance abuse, those who have to lose their sanity because to be sane is to invite pain. Perhaps the worst among these, who are my people, are those who have learnt to kill for a wage ...*Among us prowl the products of our immoral and amoral past, killers who have no sense of the worth of human life, rapists who have disdain for the women of our country, animals who would seek to*

benefit from the vulnerability of the children, the disabled and the old, the rapacious who brook no obstacle in their quest for self-enrichment. All this I know and know to be true because I am an African! Because of that, I am also able to state this fundamental truth that I am born of a people who are heroes and heroines, of a people who would not tolerate oppression.

The great masses who are our mothers and fathers *will not permit that the behaviour of a few result in the description of our country and people as barbaric...*Patience, because history is on their side. These masses do not despair because the weather is bad; nor do they turn triumphalist when tomorrow, the sun shines. *Whatever the circumstances they lived through, and because of that experience, they are determined to define for themselves who they are and who they should be. We are assembled here today to mark their history in acquiring and exercising their right to formulate their own definition of what it means to be African.*

I am of a nation that would not allow that fear of death, torture, imprisonment, exile or persecution should result in the perpetuation of injustice. The dignity of an individual is an objective that society must pursue, and it is a goal that cannot be separated from the material well-being of that individual...*All our people shall be free from fear, including fear of the oppression of one national group by another. Each one and all [should be able] to state their views, promote them, strive for their implementation in the process of governance without fear that contrary views will be met with repression.*

[Dignity] *enables resolution of conflicts by peaceful means...it rejoices in the diversity of our people; it creates a space for all of us to voluntarily define ourselves as one people. It constitutes a tribute to our loss of vanity that we could, despite the temptation to treat ourselves as an exceptional fragment of humanity, draw on the accumulated experience and wisdom of all humankind; to define for ourselves what we want to be. Together, with the best in the world, we too are prone to pettiness, to selfishness and short-sightedness...To respond to the call to create for ourselves a glorious future, [we] remind ourselves of the Latin saying: "Gloria est consequenda" – glory must be sought after.*

I am born of the peoples of the continent of Africa. The pain of the violent conflict that the peoples of Liberia and Somalia, of Sudan, of Burundi and Algeria is a pain that I also bare. The dismal shame of poverty, suffering and human degradation of my continent is a blight that we share. The blight on our happiness that derives from this and from our drift to the periphery of the ordering of human affairs leaves us in a persistent shadow of despair. This is a savage road to which no one should be condemned. Whatever the setbacks of the moment, nothing can stop us now! Whatever the difficulties, Africa shall be at peace! However improbable it may sound to the sceptics, Africa will prosper.²⁰

²⁰ From South African History online, "Extracts from one of South African President Thabo Mbeki's most stirring speeches" (2011) available at <https://www.sahistory.org.za/dated-event/extracts-one-south-african-president-thabo-mbekis-most-stirring-speeches>; See also T Mbeki, "I am an African", available at <https://www.youtube.com/watch?v=dCeLwTITRoQ>; See also Charles Ngwena, *What is Africanness? Contesting nativism in race, culture and sexualities* (Pretoria University Law Press, 2018) p.114.

These African values of freedom, as articulated by Thabo Mbeki above, are reflected in the African human rights system. As will be discussed below, while some of these freedom values may be found in *jus in bello*, they are largely reflected in *jus ad bellum* and IHRL. The African human rights system is largely based on the African Charter on Human and Peoples' Rights (African Charter). The Preamble of the African Charter contains a number of statements relating to African freedom ethics. For example, African States are called upon to take "into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights."²¹

The African Charter further calls upon all African nations and their peoples to be always "conscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence."²² In regard to freedom ethics as influenced by African history, the African Charter reminds Africa and its peoples of their solemn pledge to "eradicate all forms of colonialism from Africa"²³ and their "undertaking to eliminate colonialism, neo-colonialism [and] apartheid."²⁴ Already, while some scholars have indicated problems of data exploitation associated with development of AWS²⁵, others have pointed "how data is colonizing human life and appropriating it for capitalism."²⁶

Couldry and Mejias have noted that in the AI race among powerful nations, there is scrambling for a "Cloud Empire" where there are "blatant forms of appropriation that have a lot in common with the economic logic of historical colonialism."²⁷ They argue that data has recreated a colonising form of power where one can see that while "historical colonialism was an appropriation of land, bodies and natural resources, data colonialism ...[is] an appropriation of social resources...[in which] the colony is not the geographical location but an enhanced reality in which we conduct our social interactions under conditions of continuous data extraction."²⁸

²¹ Preamble of the African Charter on Human and Peoples' Rights Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

²² Preamble of the African Charter.

²³ *Id.*

²⁴ *Id.*

²⁵ Hanna Corsini, "AI, big data and LAWS: Challenges in a new era of warfare" (2020), available at <https://medium.com/good-data-initiative/ai-big-data-and-laws-challenges-in-a-new-era-of-warfare-4da6ada75cd4>; Campaign to Stop Killer Robots, "RightsCon: Preventing digital dehumanisation" (2021) available at <https://www.stopkillerrobots.org/news/rightscon-preventing-digital-dehumanisation-2/>; Campaign to Stop Killer Robots, "How our data is fuelling the development of autonomous weapon systems" (2020), available at <https://www.youtube.com/watch?v=Hm3T2Cuh44U>.

²⁶ See Nick Couldry and Ulises Mejias, *The costs of connection: How data is colonising human life and appropriating it for capitalism* (2019, Stanford University Press).

²⁷ Couldry and Mejias, *supra*, 38.

²⁸ Couldry and Mejias, *supra*, 85.

In this sense, data is seen as the “natural resource”, data is the “new oil” subject to appropriation.²⁹ Unfortunately, in the context of AWS, data is appropriated for purposes of using violence against the subjects from which such data is appropriated. Just like in the context of the historical colonialism where natives died so that the colonial master may enjoy the native’s resources, the digital colonial master extracts data that results in the death of the “digital native”.³⁰

More importantly, in relation to equality and freedom as a value, the African Charter categorically states that “nothing shall justify the domination of a people by another.”³¹ Towards this value, it is considered to be the duty of every African nation “to dismantle aggressive foreign military bases and all forms of discrimination.”³² In this sense, “freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples.”³³

Towards the idea of freedom ethics, particularly as it relates to freedom from violence, the African Union (AU) adopted the theme “silencing the guns” as one of its ultimate goals. The AU’s Peace and Security Council (PSC) has noted its goals on freedom from violence by noting that it is determined “to achieve the goal of a conflict-free Africa, to make peace a reality for all our people and to rid the continent of wars, civil conflicts, human rights violations, humanitarian disasters and violent conflicts, and to prevent genocide.”³⁴ The value of freedom from violence is critical on the African Continent and many researchers are currently researching in this area. For example, the late Professor Christof Heyns who, in 2013 submitted a report on AWS to the UN, founded a research group on freedom from violence in Africa which is “a collaborative research network that brings together researchers from across the African Continent focussing on evidence-based and human-rights based approaches to the problem of violence.”³⁵ The central thesis of this freedom from violence research is the idea

²⁹ Couldry and Mejias, *supra*, 89.

³⁰ Couldry and Mejias, *supra*, 108.

³¹ Article 19 of the African Charter.

³² Preamble of the African Charter.

³³ *Id.*

³⁴ See “African Union master roadmap of practical steps to silence the guns in Africa by year 2020 (Lusaka Master Roadmap 2016)” available at https://au.int/sites/default/files/documents/38304-doc-1_au_roadmap_silencing_guns_2020_pdf_en.pdf

³⁵ See Institute of International and Comparative Law in Africa, “Freedom from violence in Africa/SDG16”, available at <https://www.icla.up.ac.za/freedom-from-violence-sdg-16>

that “violence is not an immutable constant— [but rather,] that it can be affected by social, economic, legal and policy interventions.”³⁶

Along these lines, PSC has “pledge[d] not to bequeath the burden of conflicts to the next generation of Africans and [has] undertaken to end all wars.”³⁷ The idea of AWS, is not necessarily a step closer to this goal. It is also important to note that African States link the problem of violence and the value of freedom from violence to African history. For example, in coming up with the theme of freedom from violence and silencing the guns, “the PSC took into consideration the political history of the African Continent, which has been marred particularly by three major tragedies, namely, slavery, colonization and the unpaid for extraction/exploitation of natural resources, which have created a huge burden for Africa and its people.”³⁸ Thus, it is clear that in articulating the theme of “silencing the guns”, African States align their values more with the idea of *jus ad bellum* than with *jus in bello*. From analysis, while silencing the guns entails humanitarian restraint, this imperative is subordinate to the preventive logic of *jus ad bellum*, which is the normative constraint of determining the legitimacy of the war in implementing the right to war. This, in many ways, influences how African States approach global governance of weapons of war. It is to no wonder that African States have played an important role in recent armament and disarmament treaties.³⁹

The African Commission for Human and Peoples’ Rights (African Commission) recently adopted Resolution 473 within which it links African freedom ethics to emerging AI technologies such as AWS.⁴⁰ The African Commission is the regional institution mandated to protect, promote and interpret rights provided for in the African Charter.⁴¹ In the Preamble of Resolution 473, after “noting the challenges and concerns that are posed by autonomous systems that are not under meaningful human control”, the African Commission emphasizes “the need for sufficient consideration of African norms, ethics, values such as ubuntu, communitarian ethos, freedom from domination of one people by another, freedom from racial

³⁶ *Id.*

³⁷ Lusaka Master Roadmap 2016, *supra*.

³⁸ *Id.*

³⁹ Olamide Samuel, “How African leadership made the (Nuclear) Ban Treaty a reality” (2020) available at <https://www.aljazeera.com/opinions/2020/10/27/africa-nuclear-weapons-ban-treaty>

⁴⁰ African Commission Resolution 473 on the need to undertake a study on human and peoples’ rights and artificial intelligence, robotics and other emerging technologies in Africa, ACHPR/Res/473 (ECT.OS/XXXI) 2021, available at <https://www.achpr.org/sessions/resolutions?id=504>

⁴¹ See mandate of the African Commission on Human and Peoples’ Rights, available at <https://www.achpr.org/mandateofthecommission>

and other forms of discrimination in framing of global AI governance frameworks”.⁴² Further, in paragraph 2 of Resolution 473, the African Commission calls on the international community to take “serious consideration of African values and norms in formulation of AI governance frameworks to address the global epistemic injustice that currently exists.”⁴³

In fostering freedom from racial oppression, the African Commission recalled the Report by the UN Working Group of Experts on the Rights of Peoples of African Descent where it cautioned about “the ongoing influence of mindsets that channel certain narratives, including racially-biased beliefs, and remain embedded in decision-making and the importance of surfacing views to mitigate their impact, particularly in computerised algorithms that may lack reflective capacity or effective independent oversight.”⁴⁴ The African Commission also recalled the African values that were noted by the African Group of States on Disarmament when they submitted their statement on AWS to the UN CCW in 2018. It particularly noted that “notions of dignity and humanity are the parents of all human rights and should govern human conduct including human inventions” and that it is “inhumane, abhorrent, repugnant, and against public conscience for humans to give up control to machines” and “that technology should be solely dedicated for the prosperity and progress of human beings in all spheres of life.”⁴⁵ African nations’ emphasis on human dignity – particularly, when dealing with issues of use of force – stems from the historical experience of African peoples having suffered indignity and inhumane treatment in colonialism and slavery. In emphasizing the importance of IHRL which is often linked to freedom ethics, the African Commission called on States to codify the emerging notion of human control as a human rights principle.⁴⁶

In Resolution 473, the African Commission also noted that African positionality and African agency in the debate on AWS is critical.⁴⁷ In this sense, African freedom ethics includes the recognition of African peoples’ agency – as humans who can make decisions and take positions on issues that affect them. To this end, the African Commission noted “the importance of participation by African States and Africans in the development of international policies and governance frameworks on AI technologies, robotics and other new emerging technologies.”⁴⁸

⁴² African Commission Resolution 473, *supra*, Preamble.

⁴³ African Commission Resolution 473, *supra*, para 2.

⁴⁴ African Commission Resolution, *supra*, Preamble; See also A/HRC/42/59, UN Report by the UN Working Group of Experts on the Rights of Peoples of African Descent (2019).

⁴⁵ African Commission Resolution 473, *supra*, Preamble.

⁴⁶ African Commission Resolution 473, para 6.

⁴⁷ African Commission Resolution 473, *supra*, Preamble.

⁴⁸ African Commission Resolution 473, *supra*, Preamble.

The challenge, however, is that in many cases at the global level, the rules that govern the manner in which African States and peoples have to participate in the formulation of policies have already been defined and there is always resistance to change them. This is the gist of this research that the rules that created the dichotomies in legal rules governing use of force are sometimes presented by international institutions in a manner that excludes important African values such as freedom ethics.

In the AWS debate, the above-mentioned African positionality – and its recognition – in African freedom ethics is critical. It is important to understand the AWS debate or the emergence of AI military technologies not as just a constitutive force of discourse but rather to also recognize the peoples from the Global South within that discourse, how they interact with that discourse and their concerns. African positionality in this regard is the clear idea that Africans – as guided by their own values – have agency, they “are not simply automatons trapped in a position required by a discourse that summons them, requiring their compliance.”⁴⁹ The point being made here is that peoples and nations from the Global South should be free to articulate relevant values in the determination of acceptability or otherwise of AWS without being subjected to institutional sclerosis that demands of them to comply with legal regime dichotomies that relegates their concerns to the not-so-important-miscellaneous.

When one suggests, for example, that the development and use of AWS is contrary to African freedom ethics, in the mind of an international law scholar, the question that arise is where do African freedom ethics fall within the existing international law spectrum? Are African freedom ethics part of *jus in bello*? Are there part of *jus ad bellum* or IRHL? Indeed, in the recent UN GGE meeting on AWS that was held between 2 and 8 December 2021, the UK delegation, commenting on the draft report of the group noted that “discussions on ethical considerations need to show how they relate to legal considerations.”⁵⁰ Where the international lawyer locates the African freedom ethics often determines their importance or relevance in governance of AWS. For example, for those who are currently insisting that the UN CCW is the appropriate forum to discuss AWS and that *jus in bello* should guide the discussions, the fact that African freedom ethics may not necessarily fall within *jus in bello* makes such African freedom ethics not important or relevant to the discussion. The international lawyer who

⁴⁹ Charles Ngwena, *supra*, p.38.

⁵⁰ See UK intervention in the CCW UNGGE meetings on AWS (2-8 December 2021), recordings available at <https://conf.unog.ch/digitalrecordings/>

supports this line of thinking is, in many ways, convinced that they are following a legal science – a universal, neutral and customary legal science that is meant to serve all humanity. Indeed, in the UN CCW, States and stakeholders have submitted: Let us, in the context of the objectives of the UN CCW, engage in a true scientific inquiry into the issues raised by AWS without prejudging or prejudicing the policy outcomes.⁵¹ Yet, science and tools of scientific evaluations – including international legal science – is not necessarily neutral. While science is often touted as a neutral, free from ideology and dependable source of knowledge for those seeking the truth, science’s outcomes can be manipulated by the investigators.

In his observation that in many cases scientific inquiries are not necessarily neutral, Charles Ngwena noted that “from time to time, the ideologies of white supremacy have strived to manipulate science. Phrenology, craniometry and intelligence testing are among the scientific methods that race science has historically enlisted in a bid to identify intrinsic biological differences and demonstrate that racial differences are fixed and deep, further entrenching the idea that black persons are intrinsically inferior to white people.”⁵² Equally, legal science, including that which resulted in *jus ad bellum-jus in bello*-IHRL dichotomy is also not free from ideology – ideology of which may not necessarily align with African freedom ethics. As such, while there may be legitimate reasons for *jus ad bellum-jus in bello*-IHRL dichotomy, in face of the critical question on acceptability of AWS, the privileging of *jus in bello* as the go-to-regime may not be reconcilable with values that are at the core of Global South nations like Africa and its peoples.

3. Origins of *jus ad bellum* and *jus in bello*

In light of the above framing, it is important to briefly examine the origins of the *jus ad bellum-jus in bello*-IHRL dichotomy to show that it is a distinction that was decided by man and as such, its questioning in light of the challenges posed by AWS is not at all blasphemous. The terms *jus ad bellum* and *jus in bello* were coined around the time of the League of Nations and their practical use began in the late 1940s – the era of the Second World War.⁵³

⁵¹See CCW/GGE.1/2019/CRP.1/Rev.2, Report of the 2019 session of the Group of Governmental Experts on Emerging Technologies in the area of lethal autonomous weapon systems, pp.3,8, 9, 12.

⁵² Charles Ngwena, *supra*, pp.80-81; See also Paul Rich, “Race, science and the legitimization in South Africa 1902-1940”, *International Journal of African Historical Studies*, 1990, Volume 23, p.665; Kimberle Williams Crenshaw, “Race, reform and retrenchment: Transformation and legitimization in anti-discrimination law”, *Harvard Law Review*, 1988, 101, p1331, 1370-1371.

⁵³ R Kolb, “Origin of the twin terms *jus ad bellum/jus in bello*” (1997) *International Review of the Red Cross* 553.

Notwithstanding that scholars like Grotius wrote that “there is a law common to all nations governing both recourse to war and the conduct of warfare”⁵⁴, the terms *jus ad bellum* and *jus in bello* neither existed in the Romanist and scholastic traditions nor were they known to canon and civil lawyers of the Middle Ages. More importantly, in that era, there was no dichotomy between *jus ad bellum* and *jus in bello*.⁵⁵ What existed in the Western tradition was the just war doctrine – *bellum justum* – where one could only resort to war for a just cause. In terms of this formulation, those who went to war without just cause had no rights and were considered to be criminals. Since a belligerent without just cause was considered to be a criminal with no rights, there was also no expectation for them to carry obligations. In this sense, there was no room for *jus in bello* which is an independent and objective regime that provides for rights and obligations of all parties to an armed conflict regardless of whether their cause is just or not.

While the terms *jus ad bellum* and *jus in bello* may not have existed during the above-mentioned times, an analysis of the *bellum justum* tended to show that *ad bellum* considerations carried more weight than *in bello* considerations.⁵⁶ The need for justifiable reasons to go to war was a critical value. From the perspective of weaker nations or peoples who have been historically dominated by virtue of military power or might, this was and remains an important value. Yet, in the context of emerging military technologies such as AWS that makes it very easy for certain nations to use force, the question remains what that value should play in regulation of such weapons or deciding whether certain new weapons should be accepted by the international community in the first place.

During the era of *raison d'Etat* – that is, through the 17th and 18th Centuries – States started emphasising their discretionary powers to wage war which resulted in the doctrine of *bellum justum* losing ground. With the recognition of armed conflicts as *de facto* and intellectually neutral situations, powerful States started to move away from *bellum justum* and instead started emphasizing the rights and duties of belligerents at war. The idea that war should be regulated regardless of whether or not it is just laid the foundations of *jus in bello* as it is known today. Although the terms *jus ad bellum* and *jus in bello* were still not expressly used, scholars like

⁵⁴ Grotius, prolegomena, para. 28: “Ego cum ob eas, quas jam dixi, rationes, compertissimum haberem, esse aliquod inter populos ius commune, quod & ad bella & in bellis valeret...”

⁵⁵ Kolb, *supra*, 553; P Haggemacher, *Grotius et la doctrine de la guerre juste*, Paris, 1983, pp. 250ff and pp. 597ff.

⁵⁶ Kolb, *supra*, 555.

Kant started to make an express distinction in the substance of these regimes in what he called *Recht zum Krieg* and *Recht im Kriege*.⁵⁷

It cannot be lost that the shift from *bellum justum* happened during imperialist expansions and preceded the colonisation of Africa which by all accounts was unjust. It can be argued that the development of laws on the use of force and how they apply were largely guided by the political interests of those who were developing such laws. Peoples and nations from the Global South – particularly, African peoples and States – did not have a seat at the table.

After deaths of millions in the first World War – deaths of which included large numbers of peoples from the Global North – there was once again a shift in political interests and States sought to outlaw war. With the formation of the League of Nations, the theoretical distinction between *jus ad bellum* and *jus in bello* became more pronounced.⁵⁸ Yet, until in the 1930s, the terms were not used until when they were more fully used by Josef Kunz.⁵⁹ From then, a number scholars started using the terms and the distinction between the two regimes were maintained. Today's *jus ad bellum* is codified in the UN Charter while *jus in bello* is largely found in the Geneva Conventions and their Additional Protocols. Many rules of *jus ad bellum* and *jus in bello* are part of customary international law.

3.1 The *jus ad bellum-jus in bello*-human rights law dichotomy

There exists an old debate on *jus ad bellum-jus in bello*-human rights law dichotomy, particularly, on the separation between *jus ad bellum* and *jus in bello*. There are scholars who have, with reason, insisted that *jus ad bellum* and *jus in bello* are “logically independent” of each other.⁶⁰ Other scholars have proceeded to note that “even those who question the morality of this distinction understand its institutional significance.”⁶¹ Yet, that notwithstanding, there are also scholars who have already shown good reasons for questioning that dichotomy when it comes to regulation of weapons and use of force.⁶² There is a recognition that on account of

⁵⁷ *Metaphysik der Sitten, Rechtslehre*, para. 53.

⁵⁸ Kolb, *supra*, 558.

⁵⁹ J Kunz, *The changing law of nations*, Toledo, 1968, pp.9ff.

⁶⁰ M Walzer, *Just and unjust wars* (2006) 21.

⁶¹ E Benvenisti, “Rethinking the divide between *jus ad bellum* and *jus in bello* in warfare against nonstate actors” (2009) 34 *The Yale Journal of International Law* 542.

⁶² *Id.*

the nature of current conflicts and weapons used⁶³, the strict dichotomies that had historically characterized the above-mentioned legal regimes “have evolved into continua, and the sharp distinctions have softened into overlapping sets of norms.”⁶⁴ Some scholars have also observed that the development and use of certain means and methods of warfare have affected how the norms and values from the above-mentioned legal regimes are invoked, where and when they are applied – without necessarily adhering to the strict lines that divide them.⁶⁵

While noting that there are valid reasons for maintaining the dichotomy between *jus ad bellum* and *jus in bello*, Mertus acknowledges that there are critical changes in the ways force is used today that affects the relationship between *jus ad bellum* and *jus in bello*.⁶⁶ Towards showing how current changes in the use of force affects the relationship between *jus ad bellum* and *jus in bello*, Mertus poses the following questions: “who is at war? What is the war strategy? When does the war strategy meet political goals? Where does the fight occur? How are battles waged?”⁶⁷ These questions by Mertus can be adapted to the challenges that are posed by AWS and can be informing when determining the acceptability of AWS by the international community. Who is developing AWS? In what regions and in what contexts are AWS likely to be deployed? How will the battles through AWS waged and which peoples are likely to be at the receiving end of this technology? These questions influence which regime of law – *jus ad bellum*, *jus in bello* or IHRL – that one considers to be the regime that should guide the discussions on the acceptability of AWS.

Similarly, in context of governing emerging technologies, Akande *et al*, observed that while there may be different legal regimes that are invoked in different circumstances depending on the classification of a particular conflict, the objective of the aforementioned legal regimes is to protect humans from unlawful and unjustifiable violence or use of force. This observation is

⁶³ WM Reisman, “Assessing claims to revise the laws of war” (2003) 97 *American Journal of International Law* 82, 86; D Belz, “Is International humanitarian law lapsing into irrelevance in the war on international terror?” (2006) 7 *Theoretical Inquiries* 97.

⁶⁴ Benvenisti, *supra*, 541; WM Reisman, “Hollow victory: Humanitarian intervention and protection of minorities” (1997) 91 *American Society of International Law Proceedings International* 431; WM Reisman, “Legal responses to genocide and other massive violations of human rights” (1996) *Law and Contemporary Problems* 75.

⁶⁵ WM Reisman, “International legal responses to terrorism” (1999) 3 *Houston Journal of International Law* 22; WM Reisman & A Armstrong, “Past and future of the claim of pre-emptive self-defence” (2006) 100 *American Journal of International Law* 525 (2006); WM Reisman, “Self-defense in an age of terrorism” (2003) 97 *American Society of International Law Proceedings International* 142.

⁶⁶ J Mertus, “The danger of conflating *jus ad bellum* and *jus in bello*: Past, present, future” (2006) *ASIL Proceedings* 116.

⁶⁷ Mertus, *supra*, 115-116.

indeed at the core of the idea of freedom from violence. Each legal regime – whether it is *jus ad bellum*, *jus in bello* or human rights law – is grounded in values that provides a critical layer of protection against use of force. Noting the close relationship between *jus ad bellum*, *jus in bello* and human rights law in the governance of emerging military technologies, Akande *et al*, noted as follows:

The law on the inter-state use of force serves in the first place to protect state sovereignty, but in doing so it also serves to protect individuals. Indeed, one might think of the *jus ad bellum* as an outer layer of protection of the right to life. The protection of state sovereignty and of territorial integrity—which in other ways often presents a barrier to the protection of human rights—can, in this sense, constitute an important component of the protection of individuals against lethal force, especially with the advent of armed drones, by containing the spread and intensity of armed conflicts. IHL and IHRL, by contrast, speak not to the inter-state use of force, but rather the specific features of a particular drone strike, such as how it is carried out, against whom it is carried out, and the consequences that follow. *These differences notwithstanding, all three areas are closely related when discussing the use of lethal force across borders, and both international security and the protection of the right to life depend on the principle that the use of force is a matter of last resort.*⁶⁸ (My emphasis)

Clearly, Akande *et al* noted that on account of the manner by which armed drones are used, they straddle across *jus ad bellum*, *jus in bello* and IHRL – affecting and impacting the values and norms that are contained therein. It is for that reason that they argued that when seeking to regulate the use of armed drones, one has to adopt a holistic approach.

In order to examine the legality of a particular drone strike under international law, *a holistic approach is therefore needed*. For a particular drone strike to be lawful under international law, it must satisfy the legal requirements under all applicable international legal regimes. Although a particular drone strike may satisfy the requirements of the *jus ad bellum*, it may still be inconsistent with applicable rules of IHL and IHRL, and thus unlawful under international law. And the opposite may also be true: whereas a drone strike by a state may appear to comply with applicable rules of IHL and IHRL, if it does not satisfy the conditions for lawful force under the *jus ad bellum*, it will constitute an unlawful act under international law, entailing the responsibility of the state.⁶⁹ (My emphasis).

While this holistic approach was suggested in terms of governance of use of armed drones, this paper argues for the same holistic approach but not only in terms of governing use or potential use of AWS but also the determination of acceptability or otherwise of AWS. The international

⁶⁸ Dapo Akande, Christof Heyns, Lawrence Hill-Cawthorne, Thompson Chengeta, “The right to life and the international law framework regulating the use of armed drones” in D Akande, J Kuosmanen, H McDermott, D Roser, *Human rights and 21st Century challenges* (2020, Oxford University Press) 155.

⁶⁹ Akande *et al* (supra) 156.

community needs to adopt such a holistic approach in their consideration of whether or not to accept AWS, not only because AWS have implications for *jus ad bellum*, *jus in bello* and IHRL but also because the aforementioned legal regimes have certain unique values that are critical to the AWS debate.

Part of the objective of this paper is to critically consider the appropriateness of the aforementioned dichotomies when ascertaining the acceptability or otherwise of AWS. After all, one scholar has rightly observed that when there is a contentious issue for the international community, it is the responsibility of international lawyers and other practitioners to critically and carefully assess the current form of international law, its nature, its contribution in historical, present and projected contexts.⁷⁰

Already, scholars like Mégret have advised that when faced with challenges of new weapons, means and methods of warfare, the international community should resist both institutional sclerosis or humanitarian thinking that often suffers from too much sclerosis to the extent that new ideas and questions that are worth asking are often disregarded.⁷¹ As already indicated, such approaches lead to epistemic injustice. In face of contemporary challenges in the use of force, Mégret has noted that some of those who insists on the dichotomy between *jus ad bellum* and *jus in bello* perpetuate the Solferino fallacy, the idea that *jus in bello* came into being to regulate war as a thing that pre-existed and exists in nature. Rather, Mégret argues that war is, in fact, a social or legal artefact.⁷² In his view, the bottom line is that “*jus ad bellum* and *jus in bello* are converging towards making war either illegal (as in the case of

the former) or so onerous legally (as in the case of the latter) as to be ever less of a viable option.”⁷³ It is along the same lines that the freedom from violence project in Africa has noted that “violence is not an immutable constant— [but rather,] that it can be affected by social, economic, legal and policy interventions.”⁷⁴

⁷⁰ Reisman, “Assessing claims to revise the laws of war”, *supra*, 89.

⁷¹ F Mégret, “*Jus in bello* as *jus ad bellum*: “Humanitarian intervention” as a rare case where bringing *jus in bello* and *jus ad bellum* closer makes sense” (2006) 3 *American Society of International Law Proceedings*, Vol. 100, pp. 121-123, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1321351

⁷² Mégret, *supra*, 3.

⁷³ *Id.*

⁷⁴ See Institute of International and Comparative Law in Africa, “Freedom from violence in Africa/SDG16”, available at <https://www.icla.up.ac.za/freedom-from-violence-sdg-16>

4. The role of *jus ad bellum*, *jus in bello* and human rights law in acceptability of AWS

While a number of scholars have noted that AWS raise various issues to which regimes of *jus ad bellum*, *jus in bello* and IHRL are applicable⁷⁵, there is no clarity as to what role, if any, *jus ad bellum* should play in determining the acceptability or otherwise of AWS. In the legal review of new weapons, can or should the acceptability of a new weapon be predicated on the risks it poses to *jus ad bellum* rules or risks it poses to peace and security? Put differently, can or should a new weapon be considered to be an illegal weapon *per se* on the basis that it makes it easy for one State to violate the territorial integrity of another or makes it easy for one people to dominate another?

4.1 Forum choice and the *jus ad bellum-jus in bello-human rights law* dichotomy

It is critical to note that the forum in which AWS are currently being discussed also determines or influences the role that *jus ad bellum*, *jus in bello* and IHRL play in the determination of acceptability or otherwise of AWS. AWS are currently being discussed by the UN Group of Governmental Experts on Lethal Autonomous Weapon Systems (UNGGE) in the framework of the UN Convention on Conventional Weapons (CCW). Principle (k) of the eleven Guiding Principles of the UNGGE on AWS provides as follows:

The CCW (Convention on Conventional Weapons) offers an appropriate framework for dealing with the issue of emerging technologies in the area of lethal autonomous weapons systems within the context of the objectives and purposes of the Convention, which seeks to strike a balance between military necessity and humanitarian considerations.⁷⁶

In its 2021 submission to the UNGGE, Australia noted that it supports the CCW discussing AWS⁷⁷ because it “is the appropriate forum to discuss issues, regulations, frameworks and legal aspects related to lethal autonomous weapons systems.”⁷⁸ Likewise, Canada submitted that it supports the CCW process on a AWC as the appropriate forum because of “the mixture of States party to the CCW and the fact that it includes major military powers.”⁷⁹ In the same vein, in their 2021 submissions to the UNGGE, France and Germany noted that a normative

⁷⁵ Heyns *et al*, *supra*, 153.

⁷⁶ CCW/GGE.1/2019/CRP.1/Rev.2, *supra*, Annex IV, p.13.

⁷⁷ See ‘2021 Convention on Certain Conventional Weapons Group of Governmental Experts on Lethal Autonomous Weapons Systems, Submission of Australia’ p.1.

⁷⁸ *Id.*

⁷⁹ See ‘Commentary by Canada on the operationalization of the Guiding Principles affirmed by the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems’ (2021) 4.

framework on AWS “could include a reaffirmation of the role and objectives of the CCW which remains the appropriate forum, notably because of its multilateral nature.”⁸⁰ In reference to *jus in bello*, France also emphasized that a normative framework on AWS should be “in line with the objectives and purposes of the CCW”⁸¹ and that it “should primarily aim at ensuring that *International Humanitarian Law* will continue to apply fully to all weapons systems.”⁸²

In its 2021 submission to the UNGGE, Russia stated that it considers “the CCW as an optimal forum to address the issue of LAWS (Lethal Autonomous Weapon Systems)”⁸³ and emphasized the applicability of *jus in bello*.⁸⁴ Russia further stated that “discussions within the GGE on AWS should be structured fully in line with the objectives of the CCW and should not go beyond its scope”⁸⁵ and as such “the subject of the discussion within the GGE on LAWS should be limited to *fully autonomous military systems*.”⁸⁶ Similar sentiments were expressed by the United Kingdom which noted that “IHL (*jus in bello*) and the existing regulatory framework for the development, procurement and use of weapons systems are capable of sufficiently regulating new capabilities.”⁸⁷ It further noted that “the CCW remains the optimum forum to discuss and progress the issue of Lethal Autonomous Weapons Systems.”⁸⁸ This position is similar to that of the United States.⁸⁹

After noting that “existing IHL rules do not hold all the answers to the humanitarian, legal and ethical questions raised by AWS”⁹⁰ the ICRC recommended States “to establish internationally agreed limits on autonomous weapon systems to ensure civilian protection, compliance with

⁸⁰ See ‘Franco-German contribution: Outline for a normative and operational framework on emerging technologies in the area of LAWS’ (2021)1.

⁸¹ See ‘Possible consensus recommendations in relation to the clarification, consideration and development of aspects on the normative and operational framework on emerging technologies in the area of LAWS, Written contribution by France’ (2021) 2.

⁸² *Id.*

⁸³ See ‘Russia’s Considerations for the report of the Group of Governmental Experts of the High Contracting Parties to the Convention on Certain Conventional Weapons on emerging technologies in the area of Lethal Autonomous Weapons Systems on the outcomes of the work undertaken in 2017-2021’ (2021) 4.

⁸⁴ See ‘Russia’s Considerations for the report of the Group of Governmental Experts of the High Contracting Parties to the Convention on Certain Conventional Weapons on emerging technologies in the area of Lethal Autonomous Weapons Systems on the outcomes of the work undertaken in 2017-2021’ (2021) 2.

⁸⁵ *Id.*

⁸⁶ *Supra*, 3.

⁸⁷ See United Kingdom, ‘written contributions on possible consensus recommendations in relation to the clarification, consideration and development of aspects of the normative and operational framework on emerging technologies in the area of lethal autonomous weapons systems’ (2021) 1.

⁸⁸ See United Kingdom, ‘written contributions on possible consensus recommendations in relation to the clarification, consideration and development of aspects of the normative and operational framework on emerging technologies in the area of lethal autonomous weapons systems’ (2021) 1.

⁸⁹ See USA Submissions, CCW/GGE.1/2017/WP.6, 10 November 2017.

⁹⁰ ICRC position on AWS, *supra*, 11.

international humanitarian law, and ethical acceptability.”⁹¹ In relation to the forum where that new law may come from, the ICRC noted that it “supports initiatives by States aimed at establishing international limits on autonomous weapon systems...such as efforts pursued in the Convention on Certain Conventional Weapons to agree on aspects of a normative and operational framework.”⁹²

Likewise, in its recent statement to the UNGGE, the International Committee for Robot for Robot Arms Control (ICRAC) also noted that “existing international law is not sufficient”⁹³ and “considers it vital that the CCW moves to the negotiation of an international legal instrument” on AWS.⁹⁴ Similarly, other stakeholders who are advocating for new law on AWS have indicated that such new law could take form of an additional Protocol to the CCW. For example, in its 2021 submission to the UNGGE, the Republic of the Philippines noted that “a normative and operational framework [on AWS] should ultimately be institutionalized through a legally-binding Protocol of the Convention on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or To Have Indiscriminate Effects (CCW).”⁹⁵ The fundamental question is how the CCW framework interacts with the *jus in bello*, *jus ad bellum* and IHRL regimes. This interaction is clearly defined in the *purpose* of the CCW and its scope of application.

Article 1 on the Scope of Application of the CCW provides that the CCW “and its annexed Protocols *shall apply in the situations referred to in Article 2 common to the Geneva Conventions of 12 August 1949* for the Protection of War Victims, including any situation described in paragraph 4 of Article 1 of Additional Protocol I to these Conventions.”⁹⁶ The referred Article 2 Common to the Geneva Conventions of 12 August 1949 and paragraph 4 of Article 1 of Additional Protocol 1 to the Geneva Conventions refer to contexts of armed conflict. Indeed, it is indicated that the “the purpose of the Convention (CCW) is to ban or restrict the use of specific types of weapons that are considered to cause unnecessary or

⁹¹ *Id.*, p.2.

⁹² *Id.*

⁹³ See Written contribution from the International Committee for Robot Arms Control to the CCW GGE on LAW (10 June 2021) p.1.

⁹⁴ *Id.*, p.2.

⁹⁵ See ‘Commentary of the Republic of the Philippines on the Normative and Operational Framework in Emerging Technologies in the Area of Lethal Autonomous Weapon Systems’ (2021) para 2.

⁹⁶ Article 1 of the UN Convention on Conventional Weapons.

unjustifiable suffering to combatants or to affect civilians indiscriminately.”⁹⁷ As such, the CCW framework focusses on armed conflict and *jus in bello*, not *jus ad bellum*.

Indeed, all the Protocols to the CCW, namely, Protocol I on Non-Detectable Fragments, Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices, Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons, Protocol IV on Blinding Laser Weapons, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices and Protocol V on Explosive Remnants of War are all contemplated in the context of armed conflict and under the *jus in bello* framework.⁹⁸ It is to no surprise why the UNGGE, in its Guiding Principles states that *jus in bello*, not *jus ad bellum*, “should guide the continued work of the Group.”⁹⁹ Thus, in the UN CCW, when it comes to acceptability of AWS, more emphasis is placed on *jus in bello* while *jus ad bellum* is regarded as either not as important or irrelevant.

4.2 The challenge of privileging *jus in bello* to the prejudice of other values

In the face of contemporary challenges posed by emerging technologies, it is not useful to rigidly follow the dichotomy between *jus ad bellum*, *jus in bello* and IHRL. Already, there are a number of scholars who argue that the use of emerging technologies, new means and methods of ‘warfare’ in the context of counterterrorism make the current legal classification of conflicts inadequate. As already indicated above, there are three broad classifications and legal regimes applicable: *jus ad bellum* relating to the general prohibition on the inter-State use of force; situations of armed conflict to which *jus in bello* is the *lex specialis* and use of force in peace time to which IHRL is the applicable regime. Yet, in the wake of terrorism, counterterrorism and use of emerging technologies, some scholars have argued for the creation of another classification, the so-called *jus ad vim*, “the just use of force short of war.”¹⁰⁰ Of

⁹⁷ See the UN CCW and its Protocols, available at <https://www.un.org/disarmament/the-convention-on-certain-conventional-weapons/> (accessed 7 June 2021).

⁹⁸ See the UN CCW and its Protocols, available at <https://www.un.org/disarmament/the-convention-on-certain-conventional-weapons/> (accessed 7 June 2021).

⁹⁹ CCW/GGE.1/2019/CRP.1/Rev.2, *supra*, p.13.

¹⁰⁰ CN Braun, ‘*Jus ad vim* and drone warfare: A classical just war perspective’ (2021) 31 in C Enemark, *Ethics of drone strikes: Constraining remote control killing* (Edinburgh University Press); See also D Brunstetter, ‘*Jus ad vim*: A rejoinder to Helen Frowe’ (2016) 30 *Ethics and International Affairs* 131-6; H Frowe, ‘On the redundancy of *jus ad vim*: A response to Daniel Brunstetter and Megan Braun’ (2016) 30 *Ethics and International Affairs* 117-29; SB Ford, ‘*Jus ad vim* and the just use of lethal force-short-of-war’ (2013) 63-75 in F Allhoff *et al*, *Routledge Handbook of Ethics and War: Just War Theory in the 21st Century* (New York: Routledge); M Walzer, ‘On fighting terrorism justly’ (2007) 21 *International Relations* 480-4; ME Vaha, ‘The ethics of war, innocence, and

course, the idea of *jus ad vim* has been hotly debated, with those in favour arguing that it will “shift away from mechanised slaughter of modern warfare towards more calibrated applications of force”¹⁰¹ while those against it indicating that “it may encourage greater profligacy on the part of States in respect of the recourse to arms.”¹⁰² On analysis, it can be argued that the fluidity between war and peace via *jus ad vim* underlines the contingency of use of force classifications.¹⁰³ The point being made here is that in the wake of new conflicts and AI technologies, scholars are realising that certain classifications and ideas on the law relating to use of force should not be seen as cast in stone or holy precepts whose re-examination and questioning is blasphemous. It is in this sense that the acceptability or non-acceptability of AWS should be approached.

In the above sense, the declarations that are being made in the current UN discussion on AWS that existing *jus in bello* should be the yardstick upon which the acceptability or otherwise of AWS must be premised are problematic. Those declarations and assumptions neither address the question of adequacy of *jus in bello* nor its breadth in covering diverse values of different peoples across the globe – including freedom ethics. They also ignore the controversies surrounding ideas of global social justice and how, for example, superiority in use of force is the basis upon which certain marginalized groups have been historically dominated and continue to be dominated. For example, when considering African values and how they fit in the discussion on AWS, there is perhaps, no critical reflection on African freedom ethics as influenced and shaped by lived experiences such as colonialism, slavery and discrimination. It is argued in this paper that AI military technologies like AWS will have far ramifications for the continued domination and exploitation of peoples from the Global South.

While there are various efforts to have diversity in the governing frameworks of AI technologies, African freedom ethics and values from marginalized groups are presented as if they are ideas that are meant only to plug into a set of stabilized global arrangements and values that should not be disturbed. The argument in this paper is that if global arrangements such as those provided in *jus in bello*, are insufficient or enable or sustain the continued

hard cases: A call for the middle ground’ (2013)182-202 in C Navari, *Ethical reasoning in international affairs: Arguments from the middle ground* (Palgrave McMillan).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Daniel Brunstetter and Megan Braun, ‘From Jus ad Bellum to Jus ad Vim: Recalibrating Our Understanding of the Moral Use of Force’ (2013) 27 (1) *Ethics & International Affairs* 87–106.

domination of peoples from the Global South, such international arrangements should be open to alterations and additions.

The insistence on the idea that acceptability of AWS should be predicated on *jus in bello* is problematic because it is based on the assumption that the said framework is comprehensive and sufficiently diverse to cover the values, traditions and interests of different peoples across the globe – including freedom ethics discussed above. Such an assumption is problematic if one considers this: the origins of *jus in bello* can be traced to 1864 when twelve imperial powers gathered in Switzerland to negotiate the First Geneva Convention that became the basis of the 1949 Geneva Conventions. Twenty years later, in 1884, the same imperial powers met in Berlin for the Berlin Conference, a meeting on the partition of Africa and the subjugation of African people. Most of such imperial powers did not abolish slavery until as late as 1948 when the Universal Declaration of Human Rights was adopted. In 1949 when the rest of the Geneva Conventions were negotiated, all African countries were still under the yoke of colonialism. One scholar once noted that in addition to the history of *jus in bello* which is often glossed as a law that sought to humanise war¹⁰⁴, “there is another story about (*jus in bello*) which describes it not as a history of compassion and civilisation but, rather, as a history of oppression and imperialism...a history in which military or Western needs have consistently trumped humane values, exposing civilians to the violence of war and legitimizing their suffering.”¹⁰⁵

It is, therefore, a huge assumption that the values that were codified in the foundations of *jus in bello* – a set of values that are still used today to measure the acceptability of weapons or otherwise – are diverse and comprehensive enough to cover the values and concerns of those who were oppressed and not at the negotiating table. Insisting that the acceptability of AWS should be predicated only on *jus in bello* rules may have an effect of excluding serious concerns by African nations and African freedom ethics. Such an approach also results in global epistemic injustice.

¹⁰⁴ A Alexander, “A short history of international humanitarian law” (2015) 26 *European Journal of International Law* 111.

¹⁰⁵ Alexander (as above) 113; See also JG Gardam and MJ Jarvis, “Women, armed conflict and international law” (2001); JG Gardam, “Gender and non-combatant immunity” (1993) 3 *Transnational and Contemporary Problems* 348-349; Anghie, “Finding the peripheries: Sovereignty and colonialism in nineteenth-century international law” (1999) 40 *Harvard International Law Journal* 1.

The insistence on the separation between *jus in bello* and *jus ad bellum* and the interpretation thereof has happened before with disastrous consequences. For example, during negotiations of the Rome Statute on the establishment of the International Criminal Court (ICC), powerful States insisted that the crime of aggression should be excluded from crimes against humanity, much to the disappointment of many African states. Later, after asking member states not to cooperate with the ICC, the African Union adopted a regional criminal court within which the crime of aggression was recognized as a crime against humanity. In armed conflict, a crime against humanity is that which violate certain *jus in bello* rules while aggression relates to *jus ad bellum* rules. This is an example of international processes and frameworks failing to take into account or to seriously reflect on diverse approaches and values of different peoples. It may be counter-productive to refer to existing rules – rules that were made when many African nations had no say – to exclude their current contributions today. There is a lot that can be gained from critically reflecting on relevant African philosophy, ethics, traditions and values relating to the development and use of AWS and other AI technologies – including freedom ethics that have been referred to above.

In terms of the theory of situated knowledge, perhaps all forms of knowledge relating to *jus in bello* largely reflects the particular conditions in which they were produced. The existing knowledge on *jus in bello* – a field that is being used as a standard upon which the international community should decide the acceptability of AWS or not – largely reflects the social identities and social locations of those who produced the knowledge in 1864 and 1849 when the foundations of *jus in bello* were laid. Now that African states or communities from the Global South were not represented at the negotiating table at this stage, African fundamental values – particularly, those relating to freedom ethics – were not sufficiently incorporated. It therefore, becomes problematic for standards of *jus in bello* to be the beginning and the end of what the international community ought to consider when deciding the acceptability or otherwise of AWS.

Further, while international organisations make declarations about the importance of diversity in the framing of policy and governance frameworks for AI technologies such as AWS, in the current approaches to AWS, particularly, in the UN *fora*, there is no deliberate expression or discussion on the potential impact of AWS on groups that have been historically oppressed or dominated. Consideration of who is likely to be disproportionately affected by the development and use of AWS sheds light on legal regimes and values that should be equally

considered. It is, therefore, important to contextualize the identity of the likely victims of AWS. A number of UN reports have indicated that where inter-State force is used in the context of counterterrorism operations – even so, through emerging technologies such as armed drones – civilians in the Muslim communities, including women and children, are disproportionately affected.¹⁰⁶ The potential inter-State uses of force through AWS is also critical to States who are often on the receiving end when it comes to aggression or unlawful use of inter-State force. Contending with the challenges raised by AWS from the *jus ad bellum* lens is thus critical because the technology of AWS is not necessarily neutral. The *jus ad bellum* lens and context give a broader view on use of force through AWS than the *jus in bello* which does not concern itself with whether a particular war is just or not. To overly or exclusive focus on the use of AWS in the context of armed conflict and the application of *jus in bello* is to approach the technology of AWS as if it was a neutral technology.

It is important for stakeholders to interrogate the issue through the lens of critical theories such as decolonial theory and critical race theories, theories that are relevant to freedom ethics in the Global South.¹⁰⁷ These critical theories are social theories that critique society and culture in order to dig beneath the surface, uncover and challenge power structures that shape not only our society and geopolitics but our technological inventions such as AWS. Indeed, science has been instrumental in creating systems that are oppressive to certain peoples, reproducing social structures of authority, hierarchies of race and oppressive geopolitics.

Through these critical theories, one can understand that AI technologies like AWS are neither a simple matter of algorithms nor a mere case of great man's imaginations in pursuit of science but rather, such technologies are shaped by specific political and ideological projects of the powerful that permeate geopolitics.¹⁰⁸ Studies have already noted that racialised AI military technologies will lead to algorithmic coloniality, algorithmic oppression, exploitation and dispossession of those who have been historically oppressed.¹⁰⁹ It is, therefore, important to emphasise the social context of AWS and confront epistemic forgeries where AI technologies like AWS are presented as if they are neutral technologies that are free from social context.

¹⁰⁶ See for example, A/75/18, Report of the Committee on the Elimination of Racial Discrimination, Ninety-ninth session (5–29 August 2019), 100th session, (25 November–13 December 2019), para 22.

¹⁰⁷ S Mohamed *et al*, “Decolonial AI: Decolonial theory as sociotechnical foresight in artificial intelligence” (2020) *Philosophy and Technology* 659.

¹⁰⁸ Y Katz, *Artificial Whiteness: Politics and ideology in artificial intelligence* (2020) 3-13.

¹⁰⁹ See A Birhane, “Algorithmic colonisation of Africa” (2020) 17 *Scripted* 2; Mohamed *et al* (above) 659.

Some scholars have argued that, AI technologies like AWS “come from a rather specific, White, and privileged place. They are racialised, gendered, and classed models of the self.”¹¹⁰

In view of the above, focusing on the context of armed conflict and the applicable *jus in bello* alone is to equally adopt a non-contextual and ahistorical approach to a technology that is likely to be deployed more in certain contexts such as counter-terrorism operations. *Who*’s developing *what*, and *where* will it be deployed and against *who*? What has been the historical experience on use of force through emerging technologies such as armed drones? Where have they been deployed? It is critical for stakeholders to contend with these questions and with this context because excluding them may result in the adoption of a new law on AWS that ignores important values from the Global South such as freedom ethics.

5. Towards a comprehensive governance of AWS

Given the complexity and nuances of challenges that are raised by AWS, the international community needs to be comprehensive and holistic in their response to AWS. In consideration of whether certain AWS are legally and morally acceptable, it is important to consider all applicable legal regimes and values without necessarily being tied down to the legal dichotomies that have been discussed in this paper. Such legal dichotomies also persist where stakeholders insist that the appropriate forum within which to discuss AWS is the UN CCW. As already noted above, the CCW framework is primarily governed by *jus in bello* and is limited to situations of armed conflicts. As will be shown below, *jus in bello*, *jus ad bellum* and IHRL are all relevant legal regimes – with *jus ad bellum* and IHRL containing critical values from the Global South like African freedom ethics discussed above.

5.1 The role of *jus in bello* in measuring acceptability of AWS

As already indicated above, when considering the role that *jus in bello* should play in the determination of the question relating to the acceptability of AWS, a number of questions arise. Are AWS a mere case of neutral conventional weapons whose governance and acceptability should be located in the UN Convention on Conventional Weapons (CCW) framework as guided by *jus in bello*? To what extent, if any, does the current *jus in bello* contain African freedom ethics or values from the Global South? Are existing global principles/codified values as reflected in *jus in bello* sufficiently encompassing the values and concerns of African nations

¹¹⁰ Katz, *supra*.

and other marginalised peoples in as far as deciding the acceptability of AWS? Who determines or determined whether existing principles – *jus in bello* – are sufficient in determining the acceptability or otherwise of AWS? Some of these questions have already been answered or partly answered in the above discussions.

While this paper has criticised the over-emphasis on *jus in bello* – to the exclusion of other legal regimes and applicable values – in the UN debate on AWS, it does not contest the fact that *jus in bello* has a role to play in deciding the acceptability of AWS. Indeed, The 2013 Report on AWS indicates that AWS may be deployed in armed conflict,¹¹¹ AWS may be used in international armed conflict (IAC) or non-international armed conflict (NIAC) to which *jus in bello* applies.¹¹² In June 2021, a UN Report indicated that AWS were deployed in Libya in the context of armed conflict where combatants were “hunted down and remotely engaged by the unmanned combat aerial vehicles or the lethal autonomous weapons systems such as the STM Kargu-2 and other loitering munitions.”¹¹³ Further, the UN report also noted that “the lethal autonomous weapons systems were programmed to attack targets without requiring data connectivity between the operator and the munition.”¹¹⁴ Thus, to a degree, it is understandable why in the current AWS discussions in the CCW, stakeholders have generally focused on the context of armed conflict, that is, the potential use of AWS in times of war and whether AWS can be used in compliance with *jus in bello*.¹¹⁵

Whether used in the context of IAC or NIAC, AWS raise similar concerns.¹¹⁶ It is also important to note that AWS may be used by both States and non-State actors. In the context of armed conflict, because AWS lack human judgment, they raise serious questions about compliance with *jus in bello*.¹¹⁷ Recently in June 2021, in its widely publicized position on AWS, the ICRC noted that because ‘unpredictability is inherent in the effects of using all AWS

¹¹¹ A/HRC/23/47, 2013, *supra*, paras. 63-74.

¹¹² See the Geneva Conventions of 1949 and their Additional Protocols.

¹¹³ See S/2021/219, Letter dated 8 March 2021 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council, (2021) para 63, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/037/72/PDF/N2103772.pdf?OpenElement> (accessed 01 June 2021). Note, however, that the Turkish company that developed the drone, regardless of describing the system as autonomous, countered the UN report noting that “autonomous technologies are advancing so fast, but we are not there yet. At STM, we always think ethically a human should be involved in the loop”. See S Tavsan, ‘Turkish defense company says drone unable to go rogue in Libya’ (2021) available at <https://asia.nikkei.com/Business/Aerospace-Defense/Turkish-defense-company-says-drone-unable-to-go-rogue-in-Libya> (accessed 21 June 2021).

¹¹⁴ *Id.*

¹¹⁵ See CCW/GGE.1/2019/CRP.1/Rev.2, *supra*.

¹¹⁶ A/HRC/23/47, 2013, *supra*, paras. 63-74.

¹¹⁷ A/HRC/23/47, 2013, *supra*, paras. 31, 55; Thompson Chengeta, ‘Measuring Autonomous Weapon Systems against International Humanitarian Law Rules’, *Journal of Law & Cyber Warfare* 5, no. 1 (Summer 2016) p. 103.

due to the fact that the user does not choose, or know, the specific target(s), and the precise timing and/or location of the resulting application(s) of force¹¹⁸, they pose a serious challenge to compliance with IHL rules.¹¹⁹ Where there is no compliance with IHL rules such as distinction and proportionality, the lives and well-being of protected persons such as civilians – who ought to be protected at all times – are placed at risk.¹²⁰ Thus, once again, there is no doubt that *jus in bello* can and ought to play a role in the determination of whether AWS are acceptable.

Central to *jus in bello* when deciding the acceptability of AWS is the legal review of new weapons, a process whose objective is to make sure that States do not develop or transfer weapons that are prohibited by international law or whose use is inconsistent with norms of international law. Many States agree that legal reviews of new weapons “are a useful tool to assess nationally whether potential weapons systems based on emerging technologies in the area of lethal autonomous weapons systems would be prohibited by any rule of international law applicable to that State in all or some circumstances.”¹²¹ The UNGGE has since repeated the language found in Article 36 of Additional Protocol I on the review of new weapons,¹²² noting, in particular, that “in accordance with States’ obligations under international law, in the study, development, acquisition, or adoption of a new weapon, means or method of warfare, determination must be made whether its employment would, in some or all circumstances, be prohibited by international law.”¹²³

Some States have indeed noted that there are AWS that would be illegal *per se* – and hence, unacceptable¹²⁴ States have noted, in particular, that “any weapons system, including a weapon system incorporating emerging technologies in the area of lethal autonomous weapons systems, *must not be used if it is of a nature to cause superfluous injury or unnecessary suffering, or if it is indiscriminate, that is, incapable of being used in accordance with the prohibition on*

¹¹⁸ ICRC position on AWS, *supra*, 7.

¹¹⁹ ICRC position on AWS, *supra*, 7; See also V Boulanin *et al*, ‘Autonomous weapon systems and international humanitarian law: Identifying limits and the required type and degree of human-machine interaction’ (2021) SIPRI.

¹²⁰ Human Rights Watch, *Losing humanity: The case against killer robots*, p.30; Article 51 of Additional Protocol I to the Geneva Conventions of 1949.

¹²¹ CCW/GGE.1/2019/3, *supra*, para. 17 (i).

¹²² AP I, art. 36.

¹²³ CCW/GGE.1/2019/3, *supra*, para. 17(i) and Principle (e), Annex IV, p.13.

¹²⁴ Chair’s non-paper, *supra*, para. 16 (i).

*indiscriminate attacks, or is otherwise incapable of being used in accordance with the requirements and principles of IHL.”*¹²⁵

It is critical to note, nevertheless, that there are three cardinal rules of *jus in bello* that are considered in the legal review of new weapons. These are prohibitions on weapons that are indiscriminate by nature,¹²⁶ weapons that cause superfluous harm,¹²⁷ and weapons that cause serious damage to the environment.¹²⁸ These rules have attained customary international law status and are part of Article 36 of Additional Protocol I on the review of new weapons.¹²⁹ They are the basis upon which a new weapon can be deemed illegal *per se* or a lawful weapon that can be used in compliance with IHL. In other words, there are the standards which a number of States are proposing to be used as a guide to the acceptability or otherwise of AWS. Indeed, there are scholars and States that posit that once AWS are deemed compatible with the above three rules, then that must be the end of the debate. This is certainly not a true capture of all the concerns associated with AWS—in particular, ethics and value-based concerns that go beyond what is found in existing law.¹³⁰ It certainly does not capture the African freedom ethics discussed above. It should not be enough to simply argue that the current law is what it is. Something that ought to be there in the current laws relating to acceptability of new weapons is absent. With the advent of AWS, the three *jus in bello* rules that were once an ultimate yardstick on the acceptability of a new weapon have become, unfortunately, an inadequate scale. The ICRC has noted that while the current legal reviews of new weapons – as provided for in *jus in bello* – are important, “they are not a substitute for States working towards internationally agreed limits on autonomy in weapon systems.”¹³¹ It is for this reason that this paper argues for a holistic approach when deciding the acceptability of AWS. Stakeholders should not be trapped in the dichotomy or the lines that may divide *jus ad bellum*, *jus in bello* and IHRL. All of these regimes contain rules that are critical in measuring the acceptability of AWS by the international community.

¹²⁵ Chair’s non-paper, *supra*, para. 16 (i) (emphasis added).

¹²⁶ Rule 71 of ICRC Customary Study; art. 51(4) of AP I; art. 8 (2)(b) of ICC Statute; and para. 42 (b) of San Remo Manual.

¹²⁷ Rule 70 of ICRC Customary Study; art. 35(2) of AP I; art. 20 (2) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 UNTS 609; Preamble of UNCCW; art. 3(3) Protocol II to CCW; art. 8 (2) (b) of ICC Statute; art. 23 (e) of 1899 Hague Regulations.

¹²⁸ Rule 45 of ICRC Customary Study; AP I, art. 35 (3) and art. 55 (1).

¹²⁹ AP I, art. 36.

¹³⁰ ICRC, “Ethics and Autonomous Weapon Systems: An Ethical Basis for Human Control?,” Apr. 3, 2018, p.5.

¹³¹ ICRC Statement to the UN CCW Group of Governmental Experts on Lethal Autonomous Weapon Systems, Mar. 25-29, 2019.

The inadequacy of *jus in bello* being used as the only relevant regime in deciding the acceptability of AWS is made clear when one considers that AWS are not neutral conventional weapons. They raise issues that go to the core of fundamental values such as those of contained in the customary human rights norm of non-discrimination. Elaborate rules on non-discrimination on the grounds of race, gender or any other prohibited ground are not found in *jus in bello* yet AWS may discriminate on these prohibited grounds. Further, as already indicated, the current *jus in bello* does not contain African freedom ethics or values from the Global South as discussed above. Thus, values and concerns of African nations and other marginalized peoples in as far as deciding the acceptability of AWS are not reflected in *jus in bello* – a regime which some states are arguing to be the appropriate and only regime to decide acceptability of AWS.

5.2 The role of *jus ad bellum* in measuring acceptability of AWS

While there is no doubt of the exact role that the three cardinal rules of *jus in bello* discussed above play in measuring acceptability of new weapons like AWS – the case is not so clear with *jus ad bellum*. Indeed, a number of questions arise: In the legal review of AWS as new weapons, can or should their acceptability be also predicated on the risks they pose to *jus ad bellum* or risks they pose to peace and security? Put differently, can or should certain AWS be considered to be illegal weapons *per se* on the basis that they make it easy for one State to violate the territorial integrity of another or make it easy for one people to dominate another? In the sense of this question, how do African freedom ethics or Global South values interact with *jus ad bellum* and the acceptability of AWS? Like in the case of *jus in bello*, some of these questions have been partly answered in the discussion above.

As is in the case of armed drones, it is likely that AWS will be deployed in inter-State use of force, particularly, in counter-terrorism operations.¹³² While inter-State use of force is likely to be conducted by States agents, AWS may also be used by non-State actors.¹³³ The potential inter-State use of force through AWS has implications for *jus ad bellum* – the law governing

¹³² Christof Heyns *et al*, ‘The right to life and the international law framework regulating the use of armed drones’ (2020) 158 in *Human rights and 21st Century challenges: Poverty, conflict, and the environment* (Oxford University Press).

¹³³ CCW/GGE.1/2019/3, Report of the 2019 session of the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems, p.13, Guiding Principle (f).

inter-State use of force. Article 2(4) of the UN Charter prohibits the use of force by one State against the territorial integrity of another State. The prohibition of the threat or use of inter-State force is part of customary international law.¹³⁴

In the 2013 AWS Report, it is noted that AWS may aggravate the idea of expanding the battlefield beyond *jus in bello* contexts where “terrorists are targeted wherever they happen to be found in the world, including in territories where an armed conflict may not exist.”¹³⁵ Thus, AI military technologies like AWS may encourage the idea where “the world is seen as a single, large and perpetual battlefield and force is used without meeting the [armed conflict] threshold requirements.”¹³⁶ It is no wonder why in the context of inter-State use of force and concerns about situations of aggression, it has been indicated that the development and use of AWS risk lowering the threshold on the use of force.¹³⁷ AWS will make it too easy for States to resort to use of force and has a potential of increasing cases of inter-State uses of force.¹³⁸ States have thus noted the concern that the advent of AWS may jeopardise world peace and security.¹³⁹

The critical question for consideration is whether the fact that a new weapon lowers the threshold on the use of force, makes it easy to violate *jus ad bellum* rules or poses risks to peace and security is a legal ground upon which the acceptability of a weapon can or should be decided. As already been noted, there are three main cardinal rules of *jus in bello* which are used to measure whether or not, a new weapon is illegal *per se*. Currently, that a weapon poses risks to peace and security is not part of the legal grounds upon which a weapon can be ruled to be illegal *per se*. The argument in this paper, made from an African freedom ethics standpoint, is that in the context of AI-powered military technologies such as AWS, the grounds upon which the decision on whether or not a weapon is an illegal weapon *per se* should be extended to include real risks that a new weapon poses to *jus ad bellum* – that is, risks posed to freedom from violence, peace and security. As having been argued above, towards epistemic justice, it is undesirable to insist that *jus in bello* rules should be the only ones to determine the acceptability of new weapons when the values from other parts of the word – such African freedom ethics – are more fully contained in *jus ad bellum* rules.

¹³⁴ C Heyns *et al*, *supra*.

¹³⁵ A/HRC/23/47, 2013, *supra*, para. 83.

¹³⁶ *Id.*

¹³⁷ A/HRC/23/47, 2013, *supra*, para. 58.

¹³⁸ *Id.*

¹³⁹ CCW/GGE.1/2019/CRP.1/Rev.2, *supra*, para 24 (a).

Furthermore, the importance of the role that *jus ad bellum* can play in deciding the acceptability of AWS is clear if one considers the role that *jus ad bellum* already plays in the protection of fundamental human rights. Inter-State uses of force through AWS has far-reaching implications for State sovereignty and the protection of fundamental rights such as the right to life. As noted by Heyns *et al* in relation to use of armed drones, *jus ad bellum* not only protects State sovereignty but also protects the important “right and interest of the State to have the lives of its citizens and inhabitants protected from acts of aggression.”¹⁴⁰ As such, while the approach of states – particularly, in the UN CCW – has been to privilege *jus in bello* in questions relating to acceptability of AWS, *jus ad bellum* must equally play a significant role.

5.3 The role of IHRL in measuring acceptability of AWS

What role, if any, should IHRL play in the acceptability or otherwise of AWS? What is the relationship between IHRL norms that are relevant to the governance of AWS and freedom ethics or values from the Global South? From 2 to 8 December 2021, the UN CCW held the meeting of the GGE on AWS within which some states reiterated their views on role of IHRL in the AWS debate. While states like France, the UK, Switzerland, the US etc. reiterated their views that *jus in bello* is the applicable regime, some states went as far as insisting that references to IHRL in the GGE draft report should be deleted.¹⁴¹ For example, during the GGE session on 3 December 2021, the Israel delegation noted as follows: “the CCW is an IHL-focused framework, we think that other legal frameworks that are outside the CCW mandate and objectives should not be mentioned (in the CCW report on AWS). We therefore, support what several delegations have already suggested: to delete the words ‘international human rights law’ (from the report)”.¹⁴² The delegation from India also spoke strongly against the inclusion of IHRL in the report of the CCW report on AWS. It noted as follows: “For my delegation, we cannot accept the inclusion of international human rights law...in this paragraph or elsewhere in the report...We can keep discussing these issues till the cows go home but we will not be able to agree to this.”¹⁴³

¹⁴⁰ Christof Heyns *et al*, *supra*, 158.

¹⁴¹ See the CCW UNGGE meetings on AWS (2-8 December 2021), recordings available at <https://conf.unog.ch/digitalrecordings/>

¹⁴² *Id.*

¹⁴³ *Id.*

As has been partly discussed above, this approach by Israel, India and other states stems mainly from the idea of strictly adhering to the *jus ad bellum – jus in bello – IHRL* dichotomy. What underlies the idea in governance of emerging AI military technologies is what this paper has referred to as the mistaken belief that such technologies are neutral conventional weapons which squarely fall within the ambit of the CCW framework. This paper has also argued that an approach that insist on a strict adherence to the *jus ad bellum – jus in bello – IHRL* dichotomy in face of a technology that raises multifaceted problems poses three main challenges: First, such an approach results in relevant values and concerns from other regions, particularly, the Global South, either being inadequately considered or totally left out when mapping rules that ought to govern AWS. For example, freedom from discrimination is one of the critical values in African freedom ethics. This value is more fully captured in IHRL than it is in *jus in bello*. It has already been noted that AWS may contribute or exacerbate social biases such as racial and gender discrimination. Now, an approach that insists on the *jus ad bellum – jus in bello – IHRL* dichotomy – that is, undermining the relevance of IHRL – has the effect of undermining or dismissing the concerns, worries and values of peoples who are going to be affected by AWS in the manner described above.

Second, since the insistence on the *jus ad bellum – jus in bello – IHRL* dichotomy results in exclusion or undermining of certain values of certain peoples, values that are relevant to the discussion on the acceptability of AWS, it poses another prevalent and global challenge of epistemic injustice. As has been demonstrated in this paper, it is easy for delegations to simply argue that the CCW is a *jus in bello*-focused framework and values or concerns that fall outside that framework should not be considered regardless of their relevance or how far reaching they might be for other peoples. Such is a privileged, discriminatory and non-inclusive approach to international law and governance of AWS. It is an approach that holds that the global framing of international law – its dichotomies, its arrangements as to when, where and how it applies – should not be challenged, questioned or disturbed, even if it is absurd not to do so. It is also an approach that insists that values such as African freedom ethics, values of those who were not there when global arrangements on international law were forged, should fit into these existing arrangements if they are to be considered to be relevant. Indeed, the UK, in its submissions to the UN GGE on 3 December 2021 noted that “discussions on ethical considerations need to show how they relate to legal considerations.”¹⁴⁴ The argument in this paper is that values such

¹⁴⁴ *Id.*

as African freedom ethics, values of those who have been historically oppressed, do not necessarily need to fit in any existing global frameworks for them to be relevant or decisive in the discussions on acceptability of AWS. States should not seek to exclude relevant ethics or values on the basis of certain bureaucratic legalism or institutional sclerosis that pander to certain dichotomies in international law.

Third, to insist on the *jus ad bellum – jus in bello – IHRL* in the discussions on the acceptability of AWS is to ignore all the contexts within which AWS may be deployed. AWS may be used in the context of law enforcement where IHRL fully applies. Indeed, in its submissions on 3 December 2021, the delegation from Australia noted that while *jus in bello* may be the *lex specialis* of armed conflict, there are circumstances within which IHRL applies.¹⁴⁵ Regulation of use of AWS in law enforcement situations is important to people of colour who are often disproportionately affected when force is used by state agents.

In 2020, a UN report on the United States – one of the states that are currently developing AWS – noted various concerns regarding racial bias and the use of lethal force. It noted “the continuing practice of racial profiling, the use of brutality and the excessive use of force by law enforcement officials against persons belonging to racial and ethnic minorities.”¹⁴⁶ Similar concerns have been noted regarding other countries such as the United Kingdom, France and Israel. In cases where people of colour are involved, the UN Report noted the disproportionate use of lethal force regardless of whether or not the victim concerned is armed.¹⁴⁷ The Report further noted that racism associated with use of lethal force is a matter of “systemic and structural discrimination [that] permeates state institutions and disproportionately promotes racial disparities against [people of colour and ethnic minorities].”¹⁴⁸ It recommended that UN institutions should be condemn “modern day racial terror lynchings and [should call] for systematic reform and justice.”¹⁴⁹

¹⁴⁵ *Id.*

¹⁴⁶ See A/75/18, Report of the Committee on the Elimination of Racial Discrimination, Ninety-ninth session (5–29 August 2019), 100th session, (25 November–13 December 2019), para 22.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ See also General recommendations Number 31 of 2005 on the prevention of racial discrimination in the administration and functioning of the criminal justice system, No. 34 (2011) on racial discrimination against people of African descent and No. 35 (2013).

In counter-terrorism operations that often regarded as ‘war’ by countries such as the US, it is likely the AWS may be used in situations that are outside armed conflict.¹⁵⁰ As noted in the 2013 AWS Report, this type of military technology “finds its way with ease into situations outside recognized battlefields.”¹⁵¹ Thus, while contravening *jus ad bellum* rules, a state may also be violating fundamental human rights of citizens of another nation,¹⁵² fundamental rights such as the right to life¹⁵³ and the right to non-discrimination.¹⁵⁴ For example, in situations of law enforcement where inter-state force is used, a concern remains that AWS do not have situational awareness and understanding of the nuances of human behaviour in order to comply with fundamental principles on the use of force such as the “protect life principle.”¹⁵⁵ This principle demands that states agents must only use lethal force as a last resort to protect the life of another person that is in immediate danger.¹⁵⁶

From the foregoing, it clear that IHRL should equally play a role in the determination of acceptability or otherwise of AWS. This is particularly critical when consider that IHRL is more detailed than *jus in bello* and contains many values from the Global South. Much of the African freedom ethics discussed above can also be located within IHRL, for example, the value of freedom from discrimination.

6. Conclusion

In regards to the main question whether, when considering the acceptability of AWS, and in the interest of diversity of values, ethics and interests, it is correct to insist on the dichotomy between *jus in bello*, *jus ad bellum* and IHRL, the study established that strict adherence to that dichotomy is not in the interest of a comprehensive governance of AWS. The dichotomy between *jus in bello*, *jus ad bellum* and human rights law did not always exist. The distinctions between these regimes of law in governance of use of force were initially influenced by politics and political interests, particularly, imperial interests. In the face of many humanitarian catastrophes, while acknowledging the importance of the divisions between these regimes of

¹⁵⁰ A/HRC/23/47, *supra*, 82-85.

¹⁵¹ A/HRC/23/47, *supra*, 82; See also Heyns *et al*, *supra*, 181; C Enemark, ‘Armed drones and ethical policing: Risk, perception, and the tele-present officer’ (2021) *Criminal Justice Ethics*, DOI: 10.1080/0731129X.2021.1943844

¹⁵² A/HRC/23/47, *supra*, 84.

¹⁵³ *Supra*, 85.

¹⁵⁴ *Supra*, 30.

¹⁵⁵ A/HRC/23/47, 2013, 2013, *supra*, para 85.

¹⁵⁶ UN Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/26/36, 2014 para 72.

law, many scholars and stakeholders have acknowledged that these regimes ought to complement each other and the lines dividing them should not be approached with rigidity. Further, the study established that as a consequence of the aforementioned dichotomy, in the legal review of new weapons, the *jus in bello* regime is the one that is given precedent when deciding the acceptability or otherwise of a new weapon. Those who insist on giving *jus in bello* precedent over other regimes suppose that AWS are mere conventional and neutral weapons. Using decolonial and critical race theories to analyse AWS, the research found out that AWS are not neutral weapons, they are not only gendered but racialised and are reflective of the oppressive geopolitics between the Global South and the Global North. Further, if AWS raise serious concerns not only in *jus in bello* but also for *jus ad bellum* and human rights law, it makes no humanitarian sense to give *jus in bello* precedent and exclusive dominion in determining the acceptability of AWS. Now that African freedom ethics and values from the Global South are more fully reflected in *jus ad bellum* and human rights law, the privileging of *jus in bello* as the go-to-regime when determining the acceptability or otherwise of AWS has an exclusionary effect, is contrary to diversity and reeks of epistemic injustice – the idea that the antient Western legal traditions could not have been wrong in determining the rules of the road, when, where, how and to whom they apply.

Furthermore, the forum and framework within which AWS are discussed and within which a new regulation may emerge determines which regimes of law are substantively considered in the regulation of AWS. For example, *fora* such as the United Nations Convention on Conventional Weapons (UNCCW) within which AWS are currently being discussed are designed to consider *jus in bello* effects of weapons. They are deeply entrenched with the dichotomy of legal regimes on the use of force. The analysis took the position that when considering the acceptability of AWS, the dichotomy between *jus ad bellum*, *jus in bello* and IHRL should perhaps not be presented as a holy distinction whose questioning amounts to blasphemy.

A question relating to the *jus ad bellum* was also considered particularly, the question whether, in the legal review of AWS as new weapons, can or should their acceptability be also predicated on the risks they pose to *jus ad bellum* or risks they pose to peace and security? Put differently, can or should certain AWS be considered to be illegal weapons *per se* on the basis that they make it easy for one State to violate the territorial integrity of another or make it easy for one people to dominate another? Further, the research considered how African freedom ethics or

Global South values interact with *jus ad bellum* and the acceptability of AWS? The study established that as the current law stands, it is *jus in bello* rules that determine the acceptability or otherwise of a new weapon. More specifically, there are three main *jus in bello* rules that are considered when determining whether a new weapon is an illegal weapon *per se* are **i)** whether the weapon is indiscriminate by nature. **ii)** whether the weapon will cause superfluous harm and **iii)** whether the weapon will cause irreparable harm to the environment. The study noted that while there is no doubt that these are very important rules, they do not contain certain values that are enumerated in *jus ad bellum* and human rights law.

The study revealed that African freedom ethics and values from the Global South, particularly, values relating to freedom from colonialism in all its forms, freedom from domination and exploitation, freedom from slavery etc. are more reflected in *jus ad bellum* rules and human rights law than they are in *jus in bello*. Given the importance of freedom ethics and the aforementioned values to African people and those from the Global South, the research did not find any principled reason why the aforementioned three rules of *jus in bello* should be the only ones to determine whether or not a new weapon is considered to be an illegal weapon *per se*. As already highlighted, AWS are not neutral weapons, current research suggests that people of colour and those from the Global South will be disproportionately affected by their development and use. If it is to be accepted that AWS are further tools of oppression, tools of invasion to be used by those who have historically dominated and exploited African people and other peoples from the Global South – contrary to *jus ad bellum* rules, then, that ought to qualify as a ground upon which to prohibit a weapon as an illegal weapon *per se*. The research further found out that in certain circumstances such as the one relating to acceptability or otherwise of AWS, the current dichotomy between *jus in bello*, *jus ad bellum* and human rights law is reflective of imperial and colonial legal thinking that needs urgent decolonization.

A number of questions relating to *jus in bello* were considered, particularly, whether AWS are a mere case of neutral conventional weapons whose governance and acceptability should be located in the UNCCW framework as guided by *jus in bello*. It also considered to what extent, if any, does the current *jus in bello* contain African freedom ethics or values from the Global South. Regarding the first question, the research found out that UN organs such as the UNCCW and major powers such as USA, Russia, United Kingdom, Australia, France etc. are all approaching AWS as mere conventional and neutral weapons. Indeed, in one of its guiding principles, the UNCCW's Group of Governmental Experts on Lethal Autonomous Weapon

Systems states that the UNCCW is the appropriate forum to discuss AWS because the forum seeks to balance military necessity with humanitarian considerations. The aforementioned States have hailed *jus in bello* as the applicable regime to AWS and that the UN CCW should stick to its purpose, a purpose that is governed and constrained by *jus in bello* considerations. As already indicated, the research found that AWS are not a neutral technology. It was further argued that what is often referred to as “military necessity” in current geopolitics is many times euphemism for imperialism and domination of one people by another. As has already been indicated, because AWS raises challenges not only for *jus in bello* but equally for *jus ad bellum* and human rights law, the UN CCW as a forum that is governed by *jus in bello* may not necessarily be the appropriate forum to deal with the issue of acceptability or otherwise of AWS.

Regarding the second question, the study established that while *jus in bello* may contain certain African values and customs relating to use of force as found in the recent research by the ICRC in Southern Africa, *jus in bello* does not contain African values relating to freedom ethics. Yet, it is argued in the research that African freedom ethics and values from the Global South are critical when it comes to the determination of whether or not AWS are acceptable.

Regarding questions relating to human rights law, particularly, what role, if any, should human rights law play in the acceptability or otherwise of AWS and what is the relationship between human rights norms that are relevant to the governance of AWS and freedom ethics or values from the Global South, it is apparent that AWS raise serious concerns for human rights that need to be extensively and comprehensively considered in a forum whose mandate is not limited to *jus in bello* such as the UN CCW. While to some extent, *fora* such as the UN CCW may consider implications of AWS to the right to life in the context of armed conflict, they cannot comprehensively deal with implications of AWS to fundamental human rights such as the right to non-discrimination. Yet, it is clear that AWS may exacerbate situations of racial and religious discrimination. More fundamentally, because AWS may be used in the context of law enforcement to which human right law is applicable, human rights law has a role to play. Yet, as indicated under *jus in bello*, the acceptability or otherwise of new weapons is measured on three basic *jus in bello* rules: **i)** whether the weapon is indiscriminate by nature. **ii)** whether the weapon will cause superfluous harm and **iii)** whether the weapon will cause irreparable harm to the environment. Now, the fundamental and rhetorical question is why, if a weapon exacerbates racial discrimination – contrary to customary human rights law – should such a

weapon not be deemed to be an illegal weapon *per se*? The research further found out that African freedom ethics and values from the Global South are more reflected in human rights law and as such, in the interest of diversity and inclusion in the regulation of AWS, human rights law must be given due regard.

7. Recommendations

- a. When deciding the acceptability or otherwise of AWS, the UN and states should place *jus ad bellum*, *jus in bello* and human rights law on equal footing. Insisting on the dichotomy separating these regimes is counter-productive and inconsistent with the UN principles of diversity and inclusion in the regulation of artificial intelligence technologies since some of the aforementioned regimes better express African freedom ethics and Global South values than others.
- b. The UN and states should realise that in the determination of acceptability of new weapons, particularly, in the context of artificial intelligence and emerging technologies, the current rules of *jus in bello* are inadequate. It is therefore, recommended that further rules should be added to the grounds upon which a new weapon may be deemed to be an illegal weapon *per se*. – Such additional rules may come from *jus ad bellum* and human rights law, for examples, rules relating to prohibition of racial discrimination, religious discrimination, peace and security norms.
- c. The UN and states should not use fora such as the UN CCW (in their current format and framework) which prefers the *jus in bello* framework to *jus ad bellum* and human rights law. It is, therefore, recommended that a policy response to AWS should be considered and negotiated under the framework of the UN General Assembly.
- d. The UN and states should adopt a *Principle Against Discrimination and Oppression* (PADO) as part of the governance framework of AWS and artificial intelligence technologies at large. This principle applies to development, use and formulation of policy on AI technologies such as AWS. This will ensure that concepts of diversity and inclusion are present in policy formulation.
- e. The UN and states should adopt the notion of Meaningful Human Control (MHC) over AWS as a human rights principle as suggested by the African Commission on Human and

Peoples' Rights in Resolution 473 of the African Commission on Human and Peoples' Rights on AI, robotics and emerging technologies (2021).

- f. The UN and states should adopt a legally binding instrument prohibiting the use of AWS that are not under MHC.



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