

AI Enabled Weapons: Reappraising Reasonableness & Responsibility

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With increasing interest on utilizing autonomous systems and artificial intelligence (AI), militaries will face a looming challenge to traditional aspects of military command responsibility. AI enabled autonomous systems, from distributed systems to cooperative or stand-alone platforms, will challenge operators and commanders in ways that previous “smart” systems have not. We argue that the current command responsibility theory, which holds military commanders criminally liable for the foreseeable law of armed conflict (LOAC) violations their subordinates commit, even when there is no evidence the commander shared the culpable mental state with that subordinate, will need to shift. This “should have known” standard requires commanders to maintain awareness of their subordinate’s actions so that the commander may identify – and respond to – indications of pending (or actual) LOAC violations. Where a commander has fulfilled their obligations subsequent LOAC violations by subordinates would be considered objectively unforeseeable and not subject the commander to criminal liability.

However, where AI-enabled autonomous systems are engaging in various tasks within a mission space, the “should have known” standard becomes impossible for a commander to meet. Instead, we need to shift to a different liability framework, one of “reasonability.” In this regime, the requirements for militaries to support their commanders and operators to educate, train and establish to groundwork to meet a “reasonability” standard has two important implications.

First, greater emphasis must be placed on “acquisition accountability” within the development and acquisition phase of such systems. Under acquisition accountability, individuals responsible for weapons review and compliance validation would be accountable for the due diligence referenced above. If it was determined that the subsequent LOAC violations of an approved AI enabled weapon were objectively foreseeable, then acquisition officials and not the commander should be subject to criminal liability.

Second, due to the obligations of States to equip and train their service members extends further than previously envisioned. Training will need to encompass not merely how to operate a system, but under which circumstances, environments, and risk profiles those systems may be permissibly used, and that training must be widely accepted and broad enough to establish a “reasonable person” standard within the command responsibility doctrine. Without the ability for peers to assess the reasonableness of a fellow commander’s actions, the doctrine of command responsibility is insufficient to establish liability for AI-enabled systems’ actions.