

### **Autonomous Weapons Systems and the Obligation to Exercise Discretion**

- Most of the debate concerning AWS is a circular argument between result-oriented approaches and deontological, “moral” approaches. Unfortunately, many of the instrumental arguments are based on speculations about future technology. Likewise, many of the moral arguments against AWS are based on ideas of justice and due process, but they do not tell us how and why these are relevant, as such, in situations of warfare.

#### **Slide 2: Four General Claims**

- The argument presented here, however, is different, and can be summarized in four points:
  - (a) Due to its nature, modern warfare should be seen as a form of governance, in which state-executive power is exercised vis-à-vis individuals;
  - (b) This perception of war spawns obligations stemming from administrative-law – the body of law that governs the proper exercise of administrative decision-making;
  - (c) AWS, in this context, reflect the use of executive power against individuals through a computerized proxy, and thus without proper administrative discretion. This is because they operate upon programmed algorithms. As long as they are incapable of *human*-like metacognition, each of their actions is a case where executive decision is made on the basis of discretion bound in advance. Operating on the basis of bound discretion, especially where human life is concerned, is *per se* arbitrary and negates the essence of sovereignty. It runs counter to notions of human dignity, but also diminishes the long-term quality of decision making. As such, it contradicts basic notions of administrative law.
  - (d) These basic notions should inform and complement existing standards of IHL. In the context of AWS, this would mean that they would be subject to additional, residual constraints, even if such weapons could perform reasonably, in terms of immediate results, under IHL.

#### **Slide 3: What does an administrative legal perception require during hostilities?**

- Essentially, the administrative law perception allows us to understand standards of IHL (such as the duty to take “constant care”) as requiring to exercise continuous discretion during hostilities. It requires that each targeting decision be considered in light of the specific circumstances in the specific situation.
- Of course, this duty implies a prohibition on binding one’s discretion in advance, since this makes it impossible to consider each case individually and make appropriate adjustments.
- The idea of AWS seems to contravene this duty. This is because during hostilities, the commander (and her subordinates) are required to exercise discretion up to the last moment before pulling the trigger. However, in autonomous targeting, discretion in the last moment would be undertaken by the AWS, not by humans. Since AWS cannot

engage in “true” discretion, their deployment reflects the binding of executive discretion in advance – through the algorithms that govern their behavior.

- Binding discretion during hostilities runs counter to the obligation to give due respect to the individual, since we are dealing with life or death decisions in which the harmed individual is not considered at all, but is ‘factored’ into a pre-determined process. Moreover, war is an extremely complex environment, by nature requiring constant adjustments. In such situations, any operation based on rigid, pre-determined decision-making patterns is unlikely to yield good long-term results.

#### **Slide 4: Counterarguments**

- **Is the human discretion of the programmers enough?** Some supporters of AWS claim that human discretion is indeed exercised through the human discretion of the programmers. However, this is unconvincing since it precisely points out the problem: AWS do not (and cannot) exercise discretion in real-time.
- **Is the human discretion of the deploying commander enough?** Some argue that discretion is also exercised by the commander in the field when deciding whether to deploy the system. However, it is unlikely that the deploying commander would be able to predict how the AWS operates. If, however, commanders *would be* able to predict the exact manner in which the system operates, this would mean that the weapon is not sophisticated enough to satisfy the complex standards of IHL, such as proportionality, to begin with.
- **Does an AWS that “freezes” solve the problem?** A related argument is that AWS can be programmed to freeze in complex situations which require reengaged human discretion. However, ascertaining that a certain situation is complex is in itself a substantive decision that requires human discretion.
- **Does the problem of discretion arise in “traditional” battlefields?** Does this analysis hold even when AWS are deployed in “traditional” battlefield scenarios, in which it is clear that no civilians are present, or in open environments such as in deserts, the open sea or in space? Indeed, some claim that for a weapon to be banned, its deployment must be unlawful in *all* circumstances. If, therefore, combatants can always be targeted, then AWS might be lawful in environments where only combatants are present. If, however, there are some administrative-like obligations between the attacker and enemy troops, then the same problem of bound discretion applies also in such cases.
- This question depends on the moral justification to target enemy soldiers during war. The common moral justification is their presumed threat: meaning, combatants can be attacked since they are presumed to be threatening. Now, if we admit that threat plays any part in the justification of targeting this must mean that some grain of discretion must remain throughout to determine whether threat exists. For instance, the fact that combatants *hor de combat* cannot be targeted, requires exercising discretion in determining whether, in a specific case, a person is indeed *hor de combat*.
- Thus, it seems that administrative legal obligations – chiefly the duty to exercise discretion – might apply even vis-à-vis enemy troops. If this is indeed the case, the problem of bounded discretion posed by AWS applies to enemy troops also.

- In sum, much of the current debate refers to the need for “meaningful human control” or “appropriate levels of human judgment.” Such terms are not self-explaining and require significant interpretation. As I suggest, human control or judgment must be understood in the context of modern warfare, which is closer to executive-administrative action than to “classic” wars. Since AWS do not exercise substantive discretion – because they cannot engage in metacognition and are based on predetermined algorithms – their use amounts to executive action based on bound discretion. Meaningful human control or appropriate judgment must be understood to imply that human beings – as agents of true discretion – should make final targeting decisions when human lives are affected.