

# MACHINE LIABILITY & THE COMBATANT'S STANCE

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Effective international criminal regulation of Autonomous Weapons Systems (AWS) faces two conceptual obstacles. The first is deeply philosophical: when might an autonomous system be sufficiently self-aware that it could be held criminally liable as a morally responsible agent? The second issue is far more urgent: when could a military commander be held criminally responsible for violations of IHL perpetrated by an Autonomous Weapons System? I argue in this paper that the answer to the second question is logically independent from the first.

Although the literature on AWS is new, the basic framework for AWS liability was outlined, in nascent form, at Nuremberg and its aftermath. Although this sounds unlikely, a close reading of international criminal law's infancy shows that modes of liability were designed for convicting those who indirectly perpetrate war crimes through a "machine" or organized "apparatus" of power. Indeed, the whole narrative of post-Nuremberg international criminal law involves individuals who were mere "cogs in a machine." Although this language was once deployed as a metaphor to refer to human "machine-like" organizations, the technical requirements for liability under these legal doctrines map on surprisingly well to the indirect perpetration of war crimes through an AWS. In particular, international criminal law, following several domestic systems, abandoned the "innocent instrumentality rule," thus paving the way for prosecuting individuals for indirectly perpetrating an international crime even if the "instrument" of their criminality is also a morally culpable agent.

This is an important development because I also argue in this paper that combatants on the battlefield would be required by the demands of behavior interpretation to approach a sophisticated AWS with what I call the "combatant's stance"—the *ascription* of mental states required to understand the system's strategic behavior on the battlefield. However, military commanders can be held responsible for perpetrating war crimes through an AWS *regardless* of the moral status of the AWS as a culpable or non-culpable agent. In other words, a military commander can be liable for the acts of the machine (call this "machine liability") independent of what conclusions we draw from the fact that combatants—even artificial ones—must approach each other with the combatant's stance.

However, there is still one jurisprudential area where international criminal law is ill suited to prosecuting AWS cases, and that involves the mental state of recklessness. The majority of AWS cases will involve commanders who are reckless in deploying an AWS that launches attacks that violate the core prohibitions of IHL. Unfortunately, international criminal law's treatment of crimes of recklessness remains wholly inadequate, mostly because there is no international equivalent to manslaughter or a similar crime that meets any reasonable standard of fair labeling.