

ESSAY

THE SOLDIER AS AN AUTONOMOUS WEAPON

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From a legal perspective, what is the difference between human soldiers and autonomous weapon systems? Eliav Lieblich and Eyal Benvenisti answer that in combat, soldiers are under the legal duty to exercise constant administrative discretion while autonomous weapons cannot exercise such discretion. I argue that in making this argument, Lieblich and Benvenisti fail to understand the concept of an order. Following Joseph Raz's discussion of orders as exclusionary reasons, I argue that the entire point of an order is to negate the need of soldiers receiving orders to exercise administrative discretion. For this reason, a soldier who commits a crime while obeying an order may avoid criminal liability based on the criminal defense of obedience to superior orders, even if at the time the order was given, it could not withstand the scrutiny of administrative law. Soldiers need to disobey orders only in cases of manifestly unlawful orders. In order to detect manifestly unlawful orders, soldiers are not required to exercise discretion according to administrative law tests. A sound reading of the manifestly unlawful order doctrine shows that the difference between soldiers and autonomous weapons is not to be found in the realm of reason, but in the realm of emotions. The rise of military lawyers' involvement in scrutinizing orders demonstrates this point. With lawyers' scrutiny, soldiers are required to obey orders that were legally cleared in terms of administrative law. Hence, according to Lieblich and Benvenisti, in a world in which all orders are cleared by lawyers, the difference between soldiers and autonomous weapons would not exist. Yet it does exist, and it is based on rejection of orders that have been cleared in terms of administrative law yet still pierce the human eye.

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INTRODUCTION

In “The Obligation to Exercise Discretion in Warfare: Why Autonomous Weapon Systems Are Unlawful,” Eliav Lieblich and Eyal Benvenisti argue that the “administrative-legal duty to exercise constant discretion”¹ makes autonomous weapon systems (AWS) unlawful as they are unable to exercise such discretion. By using the prism of administrative law, “chiefly the obligation to exercise proper administrative discretion,”² the authors argue that they are able to break the “‘circular’ debate on AWS, caught between the instrumentalists and deontological discourses”³ and present a “third prism”⁴ that offers a sustainable objection to the use of AWS.

Unfortunately, Lieblich and Benvenisti’s entire argument rests on a misunderstanding of the concept of an “order.” The entire point of an order as a concept is to negate a soldier’s need to exercise “proper administrative discretion.”⁵ Orders—as Joseph Raz explains—are exclusionary rules.⁶ As such, they exclude not only the result of the soldier’s discretion but also his need to exercise such discretion. Hence, in terms of their administrative discretion, soldiers are different than AWS only in situations of manifestly unlawful orders, where soldiers have the right and duty to refuse to obey orders. This exception clarifies the legal situation: in regular scenarios, an order would negate administrative discretion and from this vantage point, there is no difference between AWS and human combatants.

I begin this Essay by describing Lieblich and Benvenisti’s (hereinafter: the authors) argument. Then, I explain the concept of an order and criticize the authors for misunderstanding it. In the third section, I focus on the manifestly unlawful order doctrine. I show that the authors are unable to properly account for this doctrine under their theoretical construct. Next, I explain how in a world in which

¹ E. Lieblich & E. Benvenisti, *The Obligation to Exercise Discretion in Warfare: Why Autonomous Weapon Systems are Unlawful*, in AUTONOMOUS WEAPONS SYSTEMS: LAW, ETHICS, POLICY 244, 248 (Nehal Bhuta et al. eds., 2016).

² *Id.* at 247.

³ *Id.* at 248. *See also id.* at 251–59.

⁴ *Id.* at 259.

⁵ *Id.* at 247.

⁶ J. Raz, PRACTICAL REASON AND NORMS 38 (Oxford: Oxford Univ. Press, 1999).

all orders receive legal clearance, it is hard to argue that orders are not only unlawful, but manifestly unlawful. Moreover, if we adopt Lieblich and Benvenisti's thesis, in a world in which orders receive a lawyer stamp of approval for administrative law legality, a combatant would lack the *de-facto* ability to refuse an order based on the manifestly unlawful order doctrine. In this brave new world, soldiers would become no different than AWS. In order to prevent this result, rather than emphasizing the ability to exercise administrative discretion as the difference between human soldiers and AWS, the emphasis should be put on the human emotional-visceral response to manifestly unlawful orders. This response, rather than administrative discretion, has caused soldiers on many occasions to disobey orders and has stood for many years at the core of the manifestly unlawful order doctrine.

I

LIEBLICH AND BENVENISTI'S ARGUMENT

Lieblich and Benvenisti summarize their conclusion succinctly:

In sum, the reading of relevant legal norms in the light of administrative law notions, and, specifically, the duty to take constant care and thereby exercise discretion, results in the conclusion that, technically, autonomous systems cannot be allowed to make final targeting decisions.⁷

Their first step in establishing their argument is following "a widely accepted definition" of autonomous weapons as a system that "once activated, can select and engage targets without further intervention by a human operator."⁸ Humans will program AWS's algorithms to direct these weapons, but the capability of autonomous choice makes these weapons unique. On the one hand, they are incapable of independent ("human like") discretion and on the other hand, they do hold an ability to choose their targets ("technical autonomy").⁹ According to the authors, the combination of technical autonomy and the exclusion of discretion contradicts principles of administrative law thus making AWS unlawful.

Administrative law offers a tool that is on its face neutral to the substance of the current debate.¹⁰ The "administrative-

⁷ Lieblich & Benvenisti, *supra* note 1, at 275.

⁸ *Id.* at 249.

⁹ *Id.* at 249–50.

¹⁰ *Id.* at 276.

legal duty to exercise constant discretion”¹¹ that the authors use in their analysis was not created specifically to deal with AWS. It has been an established part of administrative law long before the invention of AWS.¹² The move the authors make in applying a well-established principle from one field of law to a new controversy in a different field is a well-known technique in legal reasoning. Its logic goes as follows: we, the community of legal experts accept rule X in all issues that are under its scope. In this case: the duty of every administrative decision-maker to exercise constant discretion. A new controversy (Z) falls under the scope of this rule: an administrative organ decides to shoot on a specific target. In the authors’ view, as no one can deny that the new controversy is under the scope of rule X, the only option open beyond applying rule X is re-writing the entire legal terrain that is controlled under rule X, only so that controversy Z will be decided differently. As the duty to exercise administrative discretion is so central to administrative law, the authors figure that everyone will just “bite the bullet” and agree to apply it to AWS. The only other option, according to the authors, would be to re-write a central pillar of administrative law so that the targeting decision will somehow fall outside this rule.¹³ Such re-writing will not only require the creation of a new rule to somehow distinguish the targeting decision from other administrative decisions, but it will also have costs in terms of the consistency and coherency of administrative law in general.

The authors thus seem to present a strong case. After situating AWS’s targeting decisions within the realm of administrative law, the issue becomes clear: if AWS cannot follow the “administrative-legal duty to exercise constant discretion,” their operation is unlawful.¹⁴ As the authors explain, AWS “are only capable of exercising technical autonomy; they cannot engage in the metacognition required in order to exercise ‘true’ discretion in real time. Therefore, their use reflects a case where executive discretion is stringently bound in advance. . . .”¹⁵

Yet, there is another option: rule X does not cover controversy Z. The case of obeying orders in the military does not fall under the “administrative-legal duty to exercise

¹¹ *Id.* at 248.

¹² See *British Oxygen v. Minister of Tech.* [1971] AC 610 HL (UK).

¹³ Lieblich & Benvenisti, *supra* note 1, at 270.

¹⁴ *Id.* at 269–72.

¹⁵ *Id.* at 271.

constant discretion.”¹⁶ Therefore, AWS’s inability to exercise constant discretion does not make their operation unlawful.

II

WHAT IS AN ORDER?

In his discussion of exclusionary reasons Joseph Raz uses an example that aims to distill the essence of what an order is. Since I argue that a major flaw in Lieblich and Benvenisti’s argument stems from their misunderstanding of the concept of an order, I bring this example in a very detailed manner. Raz writes that:

While serving in the army Jeremy is ordered by his commanding officer to appropriate and use a van belonging to a certain tradesman. Therefore, he has reason to appropriate the van. His friend urges him to disobey the order pointing to weighty reasons for doing so. Jeremy does not deny that his friend may have a case. But, he claims, it does not matter whether he is right or not. Orders are orders and should be obeyed even if wrong, even if no harm will come from disobeying them. That is what it means to be a subordinate. It means that it is not for you to decide what is best. You may see that on the balance of reasons one course of action is right and yet be justified in not following it. The order is a reason for doing what you were ordered regardless of the balance of reasons. He admits that if he were ordered to commit an atrocity he should refuse. But his is an ordinary case, he thinks, and the order should prevail. It may be that Jeremy is wrong in accepting the authority of his commander in this case. But is he not right on the nature of authority?¹⁷

Raz’s answer is that Jeremy is correct. An order is not merely a reason that competes with other reasons for and against the action that soldiers are being ordered to execute. These competing lower-level reasons—which Raz titles “first order reasons”—are excluded by second-order reasons such as a military order.¹⁸ A military order is an exclusionary reason, a reason that excludes all first-order reasons. As Raz explains, “exclusionary reasons always prevail, when in conflict with first-order reasons.”¹⁹

The authors describe

[t]he obligation to exercise discretion” as imposing “upon

¹⁶ *Id.* at 248.

¹⁷ Raz, *supra* note 6, at 38.

¹⁸ *Id.* at 40.

¹⁹ *Id.*

the administrative authority the duty to consider, within the confines of its legal authority each decision to exercise power in light of the specific goals of the norm that the executive is bound to promote, including the relevant rights and interests affected in the case at hand. This obligation calls for a duty to constantly exercise discretion. Of course, this duty implies a prohibition—and, indeed, the invalidity—of fettering one’s discretion.²⁰

According to the authors, every soldier needs to constantly exercise discretion after receiving an order. They write that “those executing the attack” need to exercise administrative discretion “up to the last moment before pulling the trigger.”²¹ As Raz’s discussion demonstrates, the authors misunderstand the notion of an order.²² An order is not merely another consideration among others as part of the soldier’s discretion on the merits of the action ordered.²³ It is a reason not to exercise discretion. For this reason, a soldier who disobeyed an order can be convicted for his disobedience even if his defense lawyer proves that he applied his administrative discretion properly when the order was given and subsequently, he disobeyed.

Even if Jeremy follows the authors’ prescription and uses his “administrative discretion” after every order he receives and concludes that on the balance of reasons an order is unreasonable or that the officer failed to take into account a relevant consideration, he still has to follow it. The concept of an order means that it is the responsibility of the commander giving the order to assess the considerations for and against a particular order.²⁴ From the soldier’s vantage point, an order is a reason to act that excludes the merits for and against that act.²⁵ In another formulation: an order is both a reason for performing the act it specifies, and a reason for disregarding the reasons for and against the act.²⁶ Contrary to the authors’ view, after receiving an order, a soldier is *not* required to take constant care and thereby exercise discretion on the balance of reasons for and against the action required by the order. To do so would deny the essence of an order. An order would become a request. A soldier may use tactical discretion to

²⁰ Lieblich & Benvenisti, *supra* note 1, at 270.

²¹ *Id.* at 271.

²² Raz, *supra* note 6, at 38.

²³ See C. Gans, *Mandatory Rules and Exclusionary Reasons*, 15 PHILOSOPHIA 375 (1986).

²⁴ Raz, *supra* note 6, at 42.

²⁵ *Id.* at 41–42.

²⁶ Gans, *supra* note 23, at 378.

ensure the order is executed, but he is under no duty to constantly exercise discretion on the merits of the act he was ordered to do. After he was briefed before an operation on the targets and the orders, when he is on the battlefield and receives an order to shoot on a target, he just shoots. He may even be aware that on the balance of reasons he should act contrary to the order since, for example, the order is unreasonable or relevant considerations were not considered by the commander who gave the order. And yet he must obey (as long as the order is not manifestly unlawful).²⁷ A military order prevails over first order reasoning in virtue of being a reason of a higher level.²⁸

III

THE EXCEPTION THAT PROVES EVERYTHING²⁹

The concept of an order as an exclusionary reason that excludes first order reasoning has an exception. Raz admits that Jeremy would refuse an order to commit an atrocity.³⁰ In law this exception is captured by the manifestly unlawful order doctrine. While the authors try to use this doctrine to strengthen their position, this exception exposes the flaws of their argument.

The manifestly unlawful order doctrine is an exception to the defense of superior orders. It shows that as a rule soldiers are required to obey orders with no duty—as attributed by the authors—to exercise administrative discretion in each case an order is given. Moreover, even when the doctrine comes into play and requires that soldiers disobey orders, it does not function according to the logic of administrative law as the authors try to argue. Before discussing these points at length, I will present the manifestly unlawful order doctrine.

The superior order defense exists in many legal systems as well as in the Statute of the International Criminal Court (Article 33).³¹ According to this defense, a soldier will be relieved of criminal responsibility if the act for which he was indicted was ordered by a superior officer whose orders the

²⁷ Raz, *supra* note 6, at 41–42; Gans, *supra* note 23, at 375.

²⁸ Raz, *supra* note 6, at 46.

²⁹ Cf. CARL SCHMITT, *POLITICAL THEOLOGY* 15 (2005) (1922) (“the rule proves nothing; the exception proves everything”).

³⁰ *Id.* Raz, *supra* note 6, at 38.

³¹ See, e.g., A. Zimmermann, *Superior Orders*, in *THE ROME STATUTE OF INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 957, 964–65 (Antonio Cassese, P. Gaeta, J.R.W.D. Jones eds., 2002); M.J. Osiel, *Obeying Orders: Atrocity, Military Discipline, and the Law of War*, 86 CAL. L. REV. 939, 946–49 (1998).

soldier had a legal obligation to obey, and the soldier did not know that the order was unlawful. However, this defense has an exception that reinstates criminal liability: the manifestly unlawful order doctrine.³² This doctrine aims to invalidate the claim made by many of the Nuremberg defendants that “I was just following orders.”

Under the manifestly unlawful order doctrine, whereas the superior order defense may be a valid defense for “regular” unlawful orders, if the order is manifestly unlawful the defense fails.³³ Article 33(1)(c) of the ICC Statute is an example of this doctrinal structure that is prevalent in many domestic systems.³⁴

The manifestly unlawful order doctrine serves not only as an exception to the defense of superior order in a criminal trial after the alleged crime had happened, but also as a criterion to inform soldiers’ decision-making about whether to obey orders.³⁵ The question of course is which orders are manifestly unlawful?

The manifestly unlawful order exception proves that in “normal” situations—when the order is not manifestly unlawful—the soldier is not under a duty to exercise administrative discretion “up to the last moment before pulling the trigger.”³⁶ His duty is only to consider whether the order given to him is manifestly unlawful.

Two main tests have been developed to interpret the manifestly unlawful order doctrine.³⁷ The first is based on reason: “manifestly unlawful” means that the order is clearly outside the realm of legality.³⁸ An order by a Colonel to her soldier-driver to drive 20 km/h above the 50 km/h speed limit in order to get on time to a routine activity is clearly unlawful

³² See Y. DINSTEIN, *THE DEFENCE OF ‘OBEDIENCE TO SUPERIOR ORDERS’ IN INTERNATIONAL LAW* 8-9 (Oxford: Oxford Univ. Press, 2012) (reprinted edition).

³³ M.J. Osiel, *Obeying Orders: Atrocity, Military Discipline, and the Law of War*, 86 CAL. L. REV. 939, 946-49 (1998) (“In both international law and the military codes of most states, the nutshell answer to the problem of due obedience is that the soldier is excused from criminal liability for obedience to an illegal order, unless its unlawfulness is thoroughly obvious on its face. . . . [O]ne must conclude that international law on the matter of due obedience is not fully settled.”) (footnote omitted).

³⁴ *Supra* note 31..

³⁵ O. Bassok, *Missing in Action: the Human Eye, in CONSTITUTIONALISM ACROSS BORDERS IN THE STRUGGLE AGAINST TERRORISM* 283, 290 (F. Fabbrini and V. Jackson eds., 2016).

³⁶ Liebllich & Benvenisti, *supra* note 1, at 271.

³⁷ For an extensive review of both tests see Bassok, *supra* note 25, at 286-90.

³⁸ See, e.g., Dinstein, *supra* note 32, at 27-30.

and hence manifestly unlawful.

The second test interprets “manifestly unlawful” as morally repulsive.³⁹ This test is based on pre-reflective gut feeling. Israeli courts described it in metaphorical terms as an order that “pierces the eye.”⁴⁰ The order to drive 20 km/h beyond the speed limit does not “pierce” one’s eye. However, an order to kill innocent people who return to their village from work because they violated a curfew that had been announced without their knowledge does “pierce the eye.”⁴¹

Lieblich and Benvenisti refer in one line to the manifestly unlawful order doctrine, noting “the negation of the ‘superior orders’ defense in certain circumstances.”⁴² This line is written in response to the criticism that soldiers are required to obey orders contrary to the authors’ claim that soldiers hold “administrative-legal duty to exercise constant discretion.”⁴³ The authors have two responses to this criticism. First, they argue that “military thinkers have long been aware that, in practice, soldiers do exercise discretion, for better or for worse, even when receiving clear order.”⁴⁴ Here, as elsewhere in their chapter, the authors conflate between discretion regarding the manner in which an order is to be executed and discretion as to whether to obey an order. A soldier receiving an order to secure a beach-hill from the north-east may decide to attack it from the north-west. The “military thinkers” the authors refer to, speak of this type of discretion. That is hardly similar to a decision not to attack the beach-hill as civilians are present.

Second, the authors add that “[n]ormatively, it is clear that international law requires such discretion even from the lowest-ranked soldier, inter alia, through the negation of the ‘superior orders’ defense in certain circumstances.”⁴⁵ Whatever international law “requires” through the manifestly unlawful order doctrine that negates the superior order defense, it is clear that it does not require exercising administrative direction when an order is given. In exceptional situations, a soldier has a duty to disobey an order as it is manifestly unlawful. But as explained above, the tests for

³⁹ See, e.g., Bassok, *supra* note 35, at 286–88.

⁴⁰ CT Martial/3/57, *Military Prosecutor v. Melinki*, PM 17, 90, 212, 213–14. The translation is taken from Attorney-Gen. of the Gov’t of Isr. v. Eichmann, 36 I.L.R. 275, 277 (Supreme Ct. of Isr. 1962) (quoting Appeal/279-283/58, *Ofer v. Chief Military Prosecutor*, P.E. 44, 362).

⁴¹ *Id.*

⁴² Lieblich & Benvenisti, *supra* note 1, at 278.

⁴³ *Id.* at 248.

⁴⁴ *Id.* at 278.

⁴⁵ *Id.*

detecting such an order are not formulated in the language of administrative law. The tests for manifestly unlawful orders do not “speak” in terms of administrative law. Whether one chooses the first test or the second, both aim to identify orders according to a criterion that is much narrower than the criteria provided by administrative law.

IV

THE BRAVE NEW WORLD OF MILITARY LAWYERS

For many years, the two tests for determining whether an order is manifestly unlawful co-existed in courts’ judgments without being clearly identified as separate tests. A clear line distinguishing between the two tests was not necessary. In each case, courts chose which test to use in order to examine the manifestly unlawful character of an order in view of the factual circumstances of the case. However, the emergence of legal clearance of military operations by lawyers before orders are executed has altered the situation in two ways. First, by entrusting the determination of the legality of orders to legal advisors, orders are now evaluated according to a legal metric before they are executed. Second, the decision on an order’s legality is taken from the hands of combatants and put in the hands of lawyers. These two developments mean that the second test for determining whether an order is manifestly unlawful—the test that is based on the soldier’s emotions stopping him from executing an order—has become obsolete. Orders that in the past have been considered manifestly unlawful due to the feeling of repulsiveness created by their execution, may now be deemed lawful. The first test—of seeing if an order is clearly illegal—has also become somewhat redundant as lawyers affirm that the order is lawful and not merely clearly unlawful.⁴⁶

Military officials continue to pay lip-service in public statements to the old rule that the final decision of whether an order is manifestly unlawful is in the hands of the combatant. But by instituting a phase in the operational routine in which legal advisors “clear” orders, the combatant’s ability to break the “assembly line” mentality and argue that in his “gut-feeling” an order is manifestly unlawful in practical terms

⁴⁶ On these developments see Bassok, *supra* note 35, at 295-302; O. Bassok, *The Defense of “Obedience to Superior Orders” in the Age of Legal Clearance of Military Operations*, in *EJIL: TALK! BLOG OF THE EUROPEAN JOURNAL OF INTERNATIONAL LAW*, (Aug., 24 2017), available at <https://www.ejiltalk.org/the-defense-of-obedience-to-superior-order-in-the-age-of-legal-clearance-of-military-operations/> (last visited June 9, 2019).

disappears.⁴⁷ After all, if an order was determined to be lawful by a legal expert, how can it be not only unlawful, but also manifestly unlawful?

The manifestly unlawful order doctrine was created in an effort to prevent soldiers from becoming automatons. However, with the rise of legal clearance of orders by lawyers, the figure of the soldier as an automaton who “just” follows orders (that are now approved by military lawyers) re-emerges. To prevent this figure from re-emerging it is not enough to position military lawyers with perfect knowledge of administrative law and the ability to exercise “constant discretion” on the legality of orders. Military lawyers can scrutinize—using administrative law—orders executed either by soldiers or by AWS. What makes decision-making on the battlefield human is not constant discretion based on the principles of administrative law. What makes discretion human in the context of military orders is the possibility that an order will “pierce the eye” of a combatant beyond the screens of military and legal technology. This can only be achieved by preventing the disappearance of the second test for determining the existence of a manifestly unlawful order. It will not be achieved by adding another layer of legality in the form of administrative law. Thus, it is very plausible that militaries would be more than happy to adopt Lieblich and Benvenisti’s position and to allow military lawyers to conduct full legal scrutiny of AWS’ missions according to administrative law criteria. Even if AWS would lose some of their autonomy by administrative law scrutiny of every move they make, their humanity would not be improved by adopting Lieblich and Benvenisti’s position. They would simply become akin to human soldiers who serve as no more than “autonomous” weapons in the brave new world of military lawyers.

CONCLUSION

Lieblich and Benvenisti’s understanding of military orders contradicts the concept of an order. For them any “binding of discretion *ex ante*” is “problematic, when analysed through the lens of proper administrative action.”⁴⁸ The authors may resist the idea of an order as excluding discretion and argue that administrative discretion should always exist. But adhering to this position means that they wish to change the meaning of

⁴⁷ Cf. Herbert C. Kelman & V. Lee Hamilton, *Crimes of Obedience* 16–19 (New Haven: Yale Univ. Press, 1989).

⁴⁸ Lieblich & Benvenisti, *supra* note 1, at 274.

the concept of an order. They seek to offer a fictive world where an “order” to shoot means merely that the soldier needs to adhere to his administrative-legal duty to exercise constant discretion and only shoot if he thinks it is right to do so.

The authors argue that “exercise of proper administrative discretion is indeed a precondition for the application of human rights standards.”⁴⁹ It is not surprising that those who believe that the problems of international humanitarian law can be solved by adding more law (in the form of administrative law) fail to see the real danger of current times. Simply put, by adding more law to the battlefield, lawyers have taken discretion from combatants to refuse manifestly unlawful orders. The danger of the brave new world we are living in is not from the entrance of autonomous weapons who would act without the “administrative-legal duty to exercise constant discretion.”⁵⁰ Rather, the danger is from soldiers who with legal clearance from lawyers will act like automata. More law is not the solution. It is the problem.

⁴⁹ *Id.* at 268.

⁵⁰ *Id.* at 248.