

## TOWARDS A WORKING DEFINITION OF LAWS

- I have been asked to look at definitions in other arms treaties and how they might be relevant with regard to autonomous weapons, **so I will have to take as my point of departure: legal definitions**, or definitions that determines the object of a prohibition or regulation. (I realise that at this point, it is not entirely clear that this will be the purpose of a definition of autonomous weapons.)

I will start by looking at how the question of definitions has been approached in disarmament law more generally, and then look at some features of weapon definitions in other treaties.

First thing to note is that **not all weapons categories regulated by an international instrument are explicitly or exhaustively defined in the instrument itself**. Neither the NPT nor the CTBT, for example, define nuclear weapons. The biological weapons convention likewise does not define biological weapons. Hence, the lack of definitions does not imply that it is impossible to agree on measures to regulate the weapon in question.

Second, the treaties that **do** contain a specific definition highlight different aspects of the weapon:

- a) All of them contain a reference to the **larger category or family** of objects to which the weapon belongs. ~~A bacteriological (biological) weapon belongs to the broader category of “living organisms”, an anti-personnel mine is a type of “mine”, a cluster munition is a type of “conventional munition”, a “booby-trap” is a type of “device or material” and so on and so forth.~~
- b) However, the definitions highlight **different types of attributes** that distinguish the weapon from the broader category:
  - i) One fairly common distinguishing attribute type is a description of the intended or actual **functioning** of the weapon. The CCM definition of a cluster munition contains a description of how munitions *are delivered* for example, the MBC and Protocol II of the CCW defines Mines by describing how

**Comment [ML1]:** Foreslår å endre eksempelet her, siden du i forrige avsnitt sier at BWC ikke inneholder en definisjon.

these munitions *are detonated*. A key feature of the definition of an anti personnel mine is that it is victim activated. If the mine functions through manual detonation, that someone other than the victim sets it off, then it falls outside the definition of an AP mine. (Otherwise, the defining difference between anti-personnel mines, on the one hand, and anti-vehicle mines, on the other, is that the former is set off by a person, the latter is triggered by a vehicle.)

- ii) Other instruments highlight other types of distinguishing attributes. One example is **effects**. CCW Protocol I on blinding lasers, for example, says nothing about how the weapons function, but highlights instead the intended or actual **effect** of the weapons, which is permanent blindness. Protocol III in the CCW describe incendiary weapons as a weapon that causes burn injuries to persons. Other treaties also introduces this qualifier: An anti-personnel mine is a mine designed to “incapacitate, injure or kill”, a chemical weapon is a toxic chemical leading to “death, temporary incapacitation, or permanent harm”.
- iii) Other attribute types seen in definitions included in the treaties mentioned above is the possible **targets** or **victims** of the effects of the weapon in question. The Mine ban treaty refers to “one or more persons”, ~~the BTWC refers for example to “man, animal or plants”~~, the CWC refers to humans or animals, whereas the EMOD for example refers to the natural environment.
- iv) Another distinguishing definitional attribute that might be especially relevant in a LAWS context concerns the **intended use** of the weapon. This concerns in particular weapons where there is dual-use potential. Weapon categories with limited dual-use potential, such as a cluster munition, does not have—or, indeed, require—a reference to the intended use of the weapon. Weapon categories with more pronounced dual-use potential, such as chemical and biological agents, do contain this qualifier.

Hence, a chemical weapon is defined as a toxic chemical that may temporarily or permanently incapacitate or kill a human being - in other words, aspirin or alcohol could be covered by this very wide definition. Thus, the exceptions also have to be very extensive. In fact, chemical agents **intended** to be used for industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes; as well as protective purposes; military purposes not connected with the use of chemical weapons; **and** law

**Comment [ML2]:** Samme grunn som over.

enforcement, are all explicitly exempt from the definition, leaving the prohibition to encompass use of chemical agents as means of warfare. Biological weapons, moreover, are implicitly defined in the BWC as a living organism (which is a very wide term) but used “for hostile purposes”.

- v) Yet another feature of definitions in arms treaties is that they sometimes refer **to rules under international humanitarian law**. The most obvious case is of course this very forum: the CCW framework convention makes it clear (through its title) that the protocols are directly relevant for, and possibly aim at strengthening the implementation of two fundamental rules under IHL: the prohibition against means and methods of warfare that lead to superfluous injury or unnecessary suffering for combatants, **and** the prohibition on means or methods that are indiscriminate, thus violating the rule on distinction. In the CCW protocols, these qualifiers are not contained in the various definitions, but it is still clear that this reference to two core rules under IHL is the very basis for the protocols.

In the CCM, the definition of cluster munitions contain a direct reference to IHL. In its article 2 (c), where the exceptions to the wider category are listed, it starts with: "A munition that, in order to avoid indiscriminate area effects and the risks posed by unexploded submunitions",...(and then continues) These qualifiers pertain directly to the rule on distinction. (Other arms treaties have references to IHL and humanitarian principles in their preambles).

- vi) One key feature in arms treaties, which is not strictly a part of the definitions of the weapon, but which nevertheless is very interesting with regard to autonomous weapons, is the **scope of application, in other words: in what situations do the treaty apply?**. The CCW has a relatively limited scope compared to many other arms treaties. Originally, it applied only in international armed conflicts. Then it was amended to include also non international armed conflicts, but not all state parties to the CCW has accepted this amendment, and thus the protocols only apply in international armed conflict for those states.
- vii) Other arms treaties, on the other hand; BWC; CWC, MBC, CCM apply in all circumstances - regardless of the classification of the situation - and so they apply also in situations that do not reach the threshold of armed conflict. (The chemical weapons convention has specific exceptions regarding the use of toxic chemicals in law enforcement.) The issues regarding

whether autonomous weapons could be used outside of armed conflict, for law enforcement purposes, will be a key one. If this eventually develops into a process towards a protocol under the CCW, the issue of scope of application will have to be addressed.

One final point I would like to make, is more about the process than about the substantive elements of a definition. It concerns the **timing** of solving the definition issue in a multi-lateral process. And again, I am talking about a legal definition: - Most international legal processes to ban or regulate specific weapons have started and proceeded without a clear definition of the object(s) to be regulated or banned. Key definitions are typically among the very last issues to be settled in negotiations. This was the case, for example, in the negotiations of the Chemical Weapons Convention (adopted in 1993), the Mine Ban convention (adopted in 1997), and the Convention on Cluster Munitions (adopted in 2008). This shows that agreement on a definition of the object to be regulated is rarely a prerequisite for proceeding with negotiations.

- I will end here - and I will not attempt to suggest approaches to a definition of autonomous weapons - but only point to one factor: all weapons have to comply with IHLs rules on means and methods of warfare. It will be one of the key discussions here, to ask the question of which of these categories autonomous weapons will fall into - should they be defined as specific means (weapon system) or as methods? Or both?