

# Humanitarian security regimes

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In October 2012, on the 20th anniversary of the international campaign to ban landmines, 90 representatives from non-governmental organizations met in New York for a 'Humanitarian disarmament campaigns summit' convened by Human Rights Watch; they called for strong disarmament initiatives driven by humanitarian imperatives to strengthen international law and protect civilians. The meeting called on states to put humanitarian considerations ahead of national security, giving first priority to the security of individuals.<sup>1</sup>

This article examines the conditions that give rise to a novel type of regime not yet explored in the literature—*humanitarian security regimes*—and their impact on world politics. I define them as regimes driven by altruistic imperatives aiming to prohibit and restrict behaviour, impede lethal technology, or ban categories of weapons through disarmament treaties, and centrally embracing humanitarian perspectives that seek to prevent civilian casualties, precluding harmful behaviour, and protecting and guaranteeing the rights of victims and survivors of armed violence. Thus, the chief goals of humanitarian security regimes are to reduce human suffering, to prohibit harm and to protect victims.

Behaviour, technology and weapons that are the objects of humanitarian efforts include: blinding laser weapons, anti-personnel landmines, cluster munitions, arms transfers, nuclear weapons, depleted uranium and other toxic remnants of war, the use of explosive weapons in populated areas, incendiary weapons, and lethal autonomous robots (or autonomous weapons systems, known as 'killer robots', and referred as such here).<sup>2</sup> For two of the developing humanitarian security regimes,

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<sup>1</sup> <http://www.hrw.org/news/2012/10/24/nations-should-step-humanitarian-disarmament>, accessed 19 Nov. 2014.

<sup>2</sup> The term 'killer robots' refers to robotic weapon systems that, once activated, can select and engage targets without further intervention by a human operator. The important element is that the robot has an autonomous 'choice' regarding selection of a target and the use of lethal force. See *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, A/HRC/23/47*, 9 April 2013. Heyns called states to 'declare—unilaterally and through multilateral fora—a commitment to abide by International Humanitarian Law and International Human Rights Law in all activities surrounding robotic weapons and put in place and implement rigorous processes to ensure compliance at all stages of development' (para. 119).

namely those concerned with nuclear weapons<sup>3</sup> and killer robots, intense transnational campaigns are already under way generating strong momentum to set new rules for these weapons within a humanitarian paradigm. Therefore I examine novel regimes across a spectrum: *established*, *recent* and *developing* regimes. All are located in the same area: how states wage war. This allows analytical factors in the 'model concepts' to be held constant while at the same time displaying variation in terms of the maturity of the regimes to open up a broader range of research avenues.

The literature on regimes has evolved over three decades to occupy centre stage in the study of international relations. The present is an apposite moment to evaluate two aspects: first, how it responds to new types of regimes, different from those which existed when the concept of regimes was originally developed; and second, how it responds to the appearance of novel regimes, like the ones examined here in the security area, that operate in opposition to the aspirations of the most powerful states. Illuminating as the literature is, it lacks explanations of the impact of humanitarian regimes on the security realm. This article intends to fill that gap. The processes that led to bans on landmines in the late 1990s and cluster munitions a decade later operated outside existing multilateral frameworks and instead used unconventional negotiation channels, creating a new form of diplomacy and new international norms for state behaviour. The negotiations that produced the Arms Trade Treaty started in traditional negotiating frameworks within UN channels using the consensus rule, but ended using an unconventional route that ultimately broke free from consensus. From the outset, the first two processes generated a moral stigma. The calculation of national security that privileges the possession of certain arms or unregulated conduct was changed. The Arms Trade Treaty, adopted in April 2013, was ratified by the requisite 50 states for entry into force in September 2014, resulting in the proscription of arms transfers that breach international humanitarian law (IHL) and human rights law (HRL). The treaty entered into force at the fastest pace seen for an international arms control treaty. Thus the overarching goal of creating a framework for the reduction of human suffering was achieved.<sup>4</sup> The creation of new international norms transforms deeply held practices and changes behaviour.<sup>5</sup>

Although most humanitarian security regimes centre on disarmament and the regulation of arms, they are different from traditional arms control regimes.<sup>6</sup> The

<sup>3</sup> The International Campaign to Abolish Nuclear Weapons (ICAN) was launched in 2007, and is active in more than 60 countries with the principal goal of negotiating a global nuclear weapons abolition treaty. Its platform is strictly effects-based and focused on the humanitarian consequences of nuclear arms.

<sup>4</sup> Denise Garcia, 'Global norms on arms: the significance of the Arms Trade Treaty for global security in world politics', *Global Policy* 5: 4, 2014, pp. 425–32.

<sup>5</sup> The reference here is to transfers of conventional arms that violate IHL or HRL. In recent years, leading up to the Arms Trade Treaty, they have come to be viewed increasingly as illegitimate. On this point I thank Edward Laurance for his advice. See also Denise Garcia, *Disarmament diplomacy and human security: regimes, norms, and moral progress in international relations* (London and New York: Routledge, 2011).

<sup>6</sup> For a review of compliance and enforcement of arms control regimes, see Harald Müller, 'Compliance politics: a critical analysis of multilateral Arms Control Treaty enforcement', *The Nonproliferation Review*, Summer 2000, pp. 77–90; see also, for the literature on arms control regimes, Emanuel Adler, 'The emergence of cooperation: national epistemic communities and the international evolution of the idea of arms control', *International Organization* 46: 1, 1992, pp. 102–145; Ramesh Thakur and William Maley, 'The Ottawa Convention on landmines: a landmark humanitarian treaty in arms control', *Global Governance* 5: 3, 1999, pp. 273–95

latter typically take a purely regulatory approach and have often been guided by the rationale of military necessity and economic benefit. Humanitarian security regimes are about everyone's security, not just that of the states that possess weapons or the technology to make them, and aim for the establishment of humane frameworks that negotiators and activists can use to create new international norms prescribing but often proscribing behaviour. Within these frameworks, a change of traditional national security calculations may occur. The emphasis is on humanizing international security through the setting of principled, multilaterally agreed proscriptions. The regimes literature has advanced comprehensive explanatory variables for the environmental and political economy realms,<sup>7</sup> and, to a lesser extent, those focused on disarmament. This literature evolved in two phases: one setting out to explain the conditions under which regimes emerge and persist, and through which they enable actors; and another on implementation, in terms of complex density and effect on global governance.<sup>8</sup>

This study's aims are threefold. The first is to enquire under what conditions humanitarian security regimes arise. The second is to highlight what is distinctive about them, with particular focus on already existing cases including the Anti-Personnel Mine Ban Treaty,<sup>9</sup> the first to breathe life into the concept of humanitarian disarmament; the Convention on Cluster Munitions;<sup>10</sup> and the Arms Trade Treaty.<sup>11</sup> The third is to explore research avenues for the 'emerging humanitarian security regimes', that is, other behaviour (controlling the transfer and use of arms), technologies (present and future) and weapons (conventional,

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at p. 274. For an ideational and rationalist explanation of conventional arms control in Europe, see Andreas Hasenclever, Peter Mayer and Volker Rittberger, 'Integrating theories of international regimes', *Review of International Studies* 26: 1, 2000, pp. 3–33.

<sup>7</sup> A vast literature has emerged, including Michael J. Trebilcock and Robert Howse, *The regulation of international trade: political economy and legal order* (London: Routledge, 1995); Peter M. Haas, Robert O. Keohane and Marc A. Levy, *Institutions for the earth: sources of effective international environmental protection* (Cambridge, MA: MIT Press, 1993); Oran R. Young, *Global governance: drawing insights from the environmental experience* (Cambridge, MA: MIT Press, 1997); Kirsten Rodine-Hardy, *Global markets and government regulation in telecommunications* (New York: Cambridge University Press, 2013).

<sup>8</sup> For the literature on regime complexity, see Kal Raustiala and David G. Victor, 'The regime complex for plant genetic resources', *International Organization* 58: 2, 2004, pp. 277–309; Karen J. Alter and Sophie Meunier, 'The politics of international regime complexity', *Perspectives on Politics* 7: 1, March 2009, pp. 13–24; Christina Davis, 'Overlapping institutions in trade policy', *Perspectives on Politics* 7: 1, March 2009, pp. 25–31; Daniel W. Drezner, 'The power and peril of international regime complexity', *Perspectives on Politics* 7: 1, 2009, pp. 65–70; Emilie M. Hafner-Burton, 'The power politics of regime complexity: human rights conditionality in Europe', *Perspectives on Politics* 7: 1, March 2009, pp. 33–8; Robert O. Keohane and David G. Victor, 'The regime complex for climate change', *Perspectives on Politics* 9: 1, March 2011, pp. 7–23.

<sup>9</sup> This treaty was recognized by many as embodying a new form of diplomacy by creating international law outside the traditional channels of the United Nations and by using a diverse and unique constellation of actors.

<sup>10</sup> It is interesting to note that, in contrast to landmines, cluster munitions have a vital place in the military doctrines of NATO allies and others and constitute a major element in global artillery arsenals: for example, 80% of US artillery, for instance, consists of such munitions. Cluster munitions are much more costly to produce than landmines and the trade is substantially more profitable. Russia, China and the US are the biggest producers. What is common among the two weapons systems is that both were banned despite having recognized military utility for armies across the world.

<sup>11</sup> The Arms Trade Treaty was adopted on 2 April 2013 by majority vote in the UNGA, when 154 states, including the US, voted in favour of the first ever comprehensive, legally binding international treaty governing arms. It entered into force on 24 Dec. 2014. The arms covered by the treaty are: battle tanks; armoured combat vehicles; large-calibre artillery systems; combat aircraft; attack helicopters; warships; missiles and missile launchers; and small arms and light weapons.

blinding laser weapons, mines, cluster munitions, nuclear weapons, incendiary weapons and depleted uranium).

The research presented here is the result of analysis of public documents, observations of meetings and international negotiations, and private conversations (all under the Chatham House Rule) in New York and Geneva with United Nations personnel, NGO activists and advocacy groups, including the Nobel Peace Prize laureates of 1997 with the International Campaign to Ban Landmines, survivors of landmines, the Implementation Support Unit of the Landmines Convention,<sup>12</sup> the campaigners for the Convention on Cluster Munitions,<sup>13</sup> researchers from the United Nations Disarmament Institute (UNIDIR), the International Committee of the Red Cross (ICRC), the Geneva Forum and the Geneva Academy of Human Rights and International Humanitarian Law, and several diplomats based in Geneva, many of whom are spearheading the negotiations on issues examined here. The people I met are part of what I call the 'Geneva disarmament communities', and my conversations with them have been conducted during one month each summer over the past five years. The last year was devoted in particular to the communities of the emerging humanitarian security regimes, primarily researchers in Geneva at the UN Nuclear Weapons Open-Ended Working Group and from Chatham House and the International Atomic Energy Agency; the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions (who spoke on killer robots); representatives of the Geneva Center for Security Policy and UNIDIR; and campaigners from Reaching Critical Will, the International Committee for Robot Arms Control and the Stop Killer Robots Campaign.

The importance of the study of humanitarian security regimes rests on three factors. First, security areas that were previously considered to be the exclusive domain of states have now been the focus of change by actors beyond the state, aiming to protect the potential and actual victims and survivors and to reduce human suffering. There was some civil society engagement in the conferences at The Hague in 1899 and after that led to the Hague Conventions, but not in the same dynamic way that has occurred since the process leading to the landmines treaty of 1997. In that campaign, civil society groups became vital actors; before that, they did not wield the same power and did not participate as insiders. More recent campaigns have benefited from new technologies that help activists, in particular the internet and social media, which have exponentially increased civil society's capacity to stimulate change. The Nobel Peace Prize of 1997 was awarded to Jody Williams and the International Campaign to Ban Landmines (ICBL) in recognition of the new role played by civil society efforts in bringing the treaty to fruition.

<sup>12</sup> The 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (the Mine Ban Convention) was opened for signature on 3 Dec. 1997 and entered into force on 1 March 1999, just 15 months later: at that time, the shortest period for any international agreement in history. By 1 August 2013, 36 states were not parties.

<sup>13</sup> The Convention on Cluster Munitions was signed by 94 states when it opened for signature in Oslo on 3 Dec. 2008. On 16 Feb. 2010, just 15 months later (as with the landmines treaty), the 30th state ratified the convention, triggering its entry into force on 1 Aug. 2010. To date, 115 countries have joined the convention, 88 are states parties and 27 are signatories, using the same coalitions and non-traditional negotiation channels.

Second, states have embraced changes in domains close to their national security (such as armaments), largely in acknowledgement of humanitarian concerns. The 'Martens Clause' was first introduced into international law in 1899 as part of the first Hague Convention, and sets a longstanding and influential normative imperative whereupon states' actions should be driven by ethical and moral concerns.<sup>14</sup> Arguably the promise of that 1899 provision has never been fully reached until now, with these novel humanitarian security regimes. Third, states are compelled to re-evaluate their national interests duty-bound by a clear humanitarian impetus.

In this article, I begin by enumerating competing explanations to my definition and analysis of humanitarian security regimes, to state my theoretical claims. I then set out what will constitute my 'model concepts for research on humanitarian security regimes', namely the three conditions for their emergence and their distinguishing characteristics. I examine in detail three existing humanitarian security regimes, applying my 'model concepts' to examine existing and emerging regime processes. Finally, I present my conclusions, with the aim of examining the prospects for future humanitarian security regimes.

## Competing explanations

Sceptics may challenge the concept of humanitarian security regimes and advance different competing explanations of humanitarian security. One is that there exists plenty of 'unhumanitarian' security, and interest-driven behaviour abounds throughout the international arena. Others may suggest that discrete initiatives to disarm may defeat the overarching goals of weapons reductions in the world,<sup>15</sup> and that in the end more regimes will benefit the most powerful.<sup>16</sup> In each of these new 'humanitarian' disarmament initiatives, this argument runs, the Great Powers are either benefiting by gaining more power or are reaffirming their sovereignty by not ratifying treaties. Realists and institutionalists alike claim that states would not consider restraining their freedom over their arms because those arms represent the core of their national security. Some scholars have argued that states tend not to build regimes of zero-sum gains,<sup>17</sup> or that weapons bans simply do not work.<sup>18</sup> There may also be tension between the explicitly stated positions adopted by states to bolster their reputations, and what is actually done when material interests come to play.<sup>19</sup>

<sup>14</sup> The importance of the Martens Clause was reaffirmed in the landmark opinion: International Court of Justice, advisory opinion, 'The legality of the threat or use of nuclear weapons', 8 July 1996.

<sup>15</sup> Keith Krause, 'Leashing the dogs of war: arms control from sovereignty to governmentality', *Contemporary Security Policy* 32: 1, April 2011, pp. 20–39.

<sup>16</sup> Drezner, 'The power and peril of international regime complexity'.

<sup>17</sup> Robert Gilpin, *War and change in world politics* (Cambridge: Cambridge University Press, 1981); Stephen D. Krasner, 'Global communications and national power: life on the Pareto frontier', *World Politics* 43: 3, 1991, pp. 336–66; Joseph M. Grieco, 'Anarchy and the limits of cooperation: a realist critique of the newest liberal institutionalism', *International Organization* 42: 3, 1988, pp. 485–507.

<sup>18</sup> Matthew C. Waxman and Kenneth Anderson, 'Law and ethics for autonomous weapon systems: why a ban won't work and how the laws of war can', Council on Foreign Relations, 13 April 2013, <http://www.cfr.org/drones/law-ethics-autonomous-weapon-systems-why-ban-wont-work-laws-war-can/p30445>.

<sup>19</sup> Jennifer L. Erickson, 'Stopping the legal flow of weapons: compliance with arms embargoes, 1981–2004', *Journal of Peace Research* 50: 2, 2013, pp. 159–74.

To respond to these competing explanations, I advance three claims. First, even in areas in which conduct is controversial and perceived as contrary to humanitarian principles or based upon purely realist perspectives, there is increasing awareness of the illegality of given behaviour, of the legal vacuum and of the need for international legal accountability to reduce human suffering, and a mounting cry for the creation of humane governance to tackle areas where no governance currently prevails. The existence of humanitarian security regimes shows that even if realist perspectives triumph in some areas, calls for regimes based on humanitarian paradigms are increasingly being heard and actualized. Even when action is lacking from the Great Powers, it is increasingly apparent within local and regional arenas.

Second, to discount developments such as the landmines and cluster munitions bans and the Arms Trade Treaty as discrete initiatives with no real meaning is to overlook the actual significance of the power of new international norms in world politics, and their transformative impact on global security. New norms, weapons stigmatization processes and taboos have an effect that goes beyond the high contracting parties of a new international treaty. Even the countries who will stand outside the treaty may be compelled to abide by the normative prescriptions and proscriptions evolving from the new norms created by the treaty. For instance, although the United States is not a party to the treaty that prohibited blinding laser weapons, an example of a humanitarian security regime, it has stated that it has no intention 'to spend money developing weapons we are prohibited from using'. About the same treaty, China declared: 'This is the first time in human history that a kind of inhumane weapon is declared illegal and prohibited before it is actually used.'<sup>20</sup> Take slavery, genocide, colonization and apartheid. Many powerful resisting forces initially opposed their abolition; nowadays, the global normative power of these proscriptions is firmly established in a more civilized world. Even in the hardest case of disarmament, nuclear weapons, there is fresh impetus to shift the legal and political debate towards a humanitarian focus. A sub-regime of the nuclear area, the Comprehensive Test Ban Treaty, is noteworthy here. Even though the treaty is not in force, the only recent state to explicitly violate it, North Korea, has received widespread condemnation for doing so, including from China.

Third, recording normative changes that bring real improvement to human lives helps to advance the discipline's much-needed quest for ethical reasoning.<sup>21</sup> Constructivist scholars have taken power and material constraints seriously, and have showed that meaningful humanitarian change is possible and can be translated into practical ethics. In the words of one activist in Geneva: 'They may not join the treaty, but the treaty will join them.'<sup>22</sup>

<sup>20</sup> [http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule86#Fn\\_29\\_9](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule86#Fn_29_9), accessed 19 Nov. 2014.

<sup>21</sup> Richard Price, 'Reversing the gun sights: transnational civil society targets land mines', *International Organization* 52: 3, 1998, pp. 613–44.

<sup>22</sup> Private conversations, Geneva, 2013.

## **Model concepts: conditions and characteristics of humanitarian security regimes**

Regimes in areas such as the environment or trade are a well-established characteristic of the relations among states. They also exist in the core area of security, how states wage and prepare for war, and in arms control and disarmament, although in these areas they are less examined. The literature on regimes has spawned research programmes explaining why states cooperate and under what circumstances they create regimes. To this end, I make three theoretical claims in respect of humanitarian security regimes.

First, as noted by some, the main scholarship on regimes has taken a functional approach to analysing cooperation.<sup>23</sup> In this framework, the regime design patrons are the ones who will benefit the most from the regime's successes. Humanitarian security regimes cannot be explained by functional hypotheses because they are not about reducing uncertainty or purely facilitating cooperation under conditions of anarchy.<sup>24</sup> Rather, they arise from an aspiration to minimize human suffering, to prevent further humanitarian tragedies, and to privilege the rights of victims and survivors. Humanitarian security regimes belong in an effects-based framework that is non-existent in the regimes literature. Success should therefore be measured against the impact on people's livelihoods. Here, the regime design benefits all humanity, not just its patrons.

Second, the regimes literature lacks a humanitarian hypothesis and does not explore the emergence of new regimes in the core area of security. I argue that in the processes of humanitarian security regime-making, national interest is restructured to incorporate new normative understandings that then become part of the new national security interest. What occurs, then, is a reconsideration and redefinition of security and consequently a change in how security issues are considered. The initial motivations to build a humanitarian disarmament regime are often idealistic and humanitarian.

Third, the literature tends to overlook three crucial steps for regime formation. First is the generation of authoritative knowledge that gives credibility to the existence of the problem and is a determinant of the birth of a new regime. Second, a 'champion state' often embraces the cause, usually through persuasion by non-state actors, and starts a process of peer-to-peer pressure towards other states. This is critical for moving the non-state activism to another level. Third, a multiregional 'core group' often appears. This is composed of states that may opt to jointly draft a resolution at the UN General Assembly (UNGA), or take the process out of the usual UN channels, and will sponsor workshops and gatherings to generate momentum. The key for regime advancement at this stage is the synergy between state and non-state realms. The mechanism through which this process happens is what I call 'multilevel agency' and is described in more detail below.

<sup>23</sup> Raustiala and Victor, 'The regime complex for plant genetic resources'.

<sup>24</sup> Arthur A. Stein, 'Coordination and collaboration: regimes in an anarchic world', in Stephen D. Krasner, ed., *International regimes* (Ithaca, NY: Cornell University Press, 1983), pp. 115–40; Robert Axelrod, *The evolution of cooperation* (New York: Basic Books, 1984).

## Explaining the model

There are three conditions for the emergence of humanitarian security regimes:

1. *Marginalization and delegitimization.* This process is crucial for building regime momentum and usually precedes other steps. If particular behaviour, technologies or weapons systems are considered legitimate, it is because they were given authority under a legal or political framework that gradually organized the practice of states. They therefore came to be part of the fabric of international security and, at least in some part, deemed legitimate. Delegitimization means a progressive change in the values attached to such behaviour, technologies or weapons systems from prestige and authority to marginalization and illegality.

2. *Multilevel agency.* State and non-state actors alike initiate processes of marginalization and delegitimization. These are accompanied by the generation of credible and authoritative knowledge that shows that a problem exists or may materialize in the future and therefore requires a change in status quo. At first, one 'champion state' may adopt the idea; this is often followed by a process of multiregional 'core group' formation, bringing together other countries that espouse the same idea. They will then engage in peer-to-peer pressure towards other states to create momentum for regime emergence, supported by non-state actor advocates. The core group may jointly draft a resolution at the UNGA and will sponsor workshops and gatherings to further generate momentum at many levels. *Throughout these stages, synergies between the state and non-state realms are markedly significant.* Through 'multilevel agency', actors at various levels function to build new norms and establish the political cost associated with violating them.

3. *Reputational concerns.* States do care about their reputations, and try to maintain their image as normal, accepted members of the international community that abide by the commonly accepted framework of values agreed upon in international law. These values constitute humanitarian motivation and stem from the body of norms and ideas of two branches of international law: human rights law (HRL) and international humanitarian law (IHL). The latter has been instilled into state practice for over a century; the IHL Geneva Conventions are now universal and their rules considered customary.

Three distinguishing characteristics define humanitarian security regimes. The first is 'effects-based goals': the principle underlying all humanitarian security regimes is the reduction of human suffering. The objective is to create frameworks that protect the most vulnerable and underprivileged, the victims of armed violence, and the civilian population at large, to benefit the security of the individual. The second is a 'constituent source of agency', namely, an exceptional constellation of actors in multilevel agency, in which the ICRC, as the guardian of IHL, has an integral constituent function. The third is a 'humanitarian law



framework',<sup>25</sup> provided by the compelling force of the previously existing IHL normative framework, the aim of which is to ensure human security, in particular the rights of survivors and victims.<sup>26</sup>

### *Marginalization and delegitimization, and effects-based goals*

In the three cases examined here, the processes of marginalization started with the first efforts by activists. The Anti-Personnel Mine Ban Convention has changed many people's lives, especially through victim assistance and demining; and, if properly implemented, the Arms Trade Treaty may have a transformative impact on the lives of millions of people.<sup>27</sup> In the latter case, what was no longer considered legitimate was the lack of regulation of arms transfers that would breach IHL and HRL commitments. These three cases epitomize the reframing of the debate to prioritize the reduction of human suffering; in other words, away from the military–utility-centred discourse which overlooks the humanitarian implications of the use of certain weapons.<sup>28</sup>

*Mines.* The Mine Ban Convention has had a definitive impact on the behaviour of states that are not party to the treaty. The Israeli government, for example, was dissuaded from mining the wall separating Israel from the Palestinian territories. Specifically, the convention created five major new international norms that affect what states are doing now as opposed to what they did before: no production, no transfer, no stockpiling, a duty to demine, and a responsibility to the victims. This new framework has fundamentally altered how states relate not only to this weapon system but also to others, such as cluster munitions. The most startling example of non-use has been the United States, which has not deployed landmines since the first Gulf War and is under pressure not to use them during joint NATO operations.

The Convention has had a significant impact on worldwide anti-personnel mine use, production and trade. Among States, the use of anti-personnel mines is now rare—with only one instance reported in 2009 and 2010—and use by non-State armed groups is

<sup>25</sup> Particularly germane to my discussion is the framework developed by Teitel's seminal work on humanity's law as founded upon three branches of international law: namely, international humanitarian law, human rights law and international criminal law. This framework rethinks security in terms of preserving not the state, but peoples and individuals. See Ruti G. Teitel, *Humanity's law* (New York: Oxford University Press, 2011), pp. 3–18.

<sup>26</sup> The framework of 'victim assistance' is very well established and developed in the Mine Ban Convention, which serves as a model for other processes: 'Victim assistance is a process aiming to ensure that landmine survivors can participate fully and effectively in their societies. The injuries caused by anti-personnel mines often result in the amputation of one or more limbs and in other permanent disabilities, with serious social, psychological and economic consequences for the victims, their families and their communities': ICRC, 'The Mine Ban Convention: progress and challenges in the second decade' (International Committee of the Red Cross: Geneva, Aug. 2011), p. 20. I thank Kerry Brinkert for his advice on this point.

<sup>27</sup> ICRC, 'Arms trade treaty: a historic opportunity to reduce suffering', statement by Christine Beerli, Vice-President of the ICRC, at the opening for signature of the Arms Trade Treaty, UN Headquarters, New York, 3 June 2013.

<sup>28</sup> John Borrie, *Unacceptable harm: a history of how the treaty to ban cluster munitions was won* (New York: UN Publications, 2009), pp. 173, 233, 241, 337, and 'Humanitarian reframing of nuclear weapons and the logic of a ban', *International Affairs* 90: 3, May 2014, pp. 625–46.

declining. Production of anti-personnel mines has ceased in 39 States, five of which are not party to the Convention. The legal trade in these weapons is virtually non-existent.<sup>29</sup>

*Cluster munitions.* In the summer of 2006, in the short but devastating war between Israel and Hezbollah, the Israeli army fired about 4 million cluster bombs into Lebanese territory. The humanitarian consequences sparked the global movement, culminating in the Oslo Process, to ban cluster munitions.<sup>30</sup> It started with 46 states that made a commitment to begin negotiations in February 2007 towards creating an international instrument to ban the use of cluster munitions. Over the following year and a half, several conferences were held to continue regime-building on banning cluster munitions. Over the course of 2007, a group of like-minded core states emerged, including Australia, Canada, the Czech Republic, Denmark, Finland, France, Germany, Italy, Japan, the Netherlands, Slovakia, Spain, Sweden, Switzerland and the UK. Their main preoccupation was continuing joint military operations with the United States, especially within NATO.<sup>31</sup> After failed attempts during negotiations at the United Nations in Geneva in 2006, Norway spearheaded the Oslo Process to ban cluster munitions.<sup>32</sup>

Thus individuals, core states and NGOs (chiefly the ICRC) transformed perceptions and created a new systemic factor, constructing a new reality in which these weapons came to be viewed as increasingly inappropriate to the changed nature of war. The British Foreign Secretary David Miliband, representing the world's third largest user of the weapon in the preceding decade, said that all states should 'tell those not here in Oslo that the world has changed, that we have changed it and that a new norm has been created'.<sup>33</sup>

### *The Arms Trade Treaty*

'The text of the [Arms Trade] treaty is a historic advance and a worthy response to widespread human suffering resulting from the poorly regulated availability of weapons.' The ICRC considered the Arms Trade Treaty a 'historic step towards reducing human suffering' and stated that, once in force and effectively implemented, it will contribute to the health and well-being of millions of people. 'States have never before signed an international treaty that aimed to regulate the arms trade, with the express purpose of reducing human suffering. The widespread availability of conventional arms exacts a terrible human cost and the Arms Trade Treaty is the first concerted international response.'<sup>34</sup>

The treaty's goal is to proscribe the international transfer of arms intended to perpetrate widespread violations of IHL and HRL in situations of conflict and

<sup>29</sup> ICRC, 'The Mine Ban Convention', p. 5.

<sup>30</sup> The principal works that have detailed the history of these efforts are: Eric Prokosch, *The technology of killing: a military and political history of antipersonnel weapons* (London: Zed, 1995), and Borrie, *Unacceptable harm*.

<sup>31</sup> Borrie, *Unacceptable harm*, pp. 173, 233, 241, 337.

<sup>32</sup> Private conversations, Geneva, 2009–13.

<sup>33</sup> Speech delivered at the signing ceremony in Oslo, Dec. 2008, <http://www.stopclustermunitions.org/calendar/?id=1107>, accessed 13 Jan. 2009.

<sup>34</sup> ICRC, 'Arms trade treaty'.

armed violence in general. The treaty's intent is 'to establish the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms'. This, according to the treaty's article 1, will enable the treaty to achieve its two purposes: 'contributing to international and regional peace, security and stability and reducing human suffering'.

Leading up to the treaty, the UNGA passed three ground-breaking resolutions by overwhelming majority, signalling consensus on the need to proscribe weapons transfers that jeopardize states' commitments to IHL and HRL. In 2006, Resolution 61/89, co-authored by the initial core group of states promoting the treaty, recognized that the absence of common standards for arms transfers undermined peace and security and contributed to conflict, crime and terrorism. The resolution was supported by 153 countries; 24 abstained, and the United States was the only country to vote against it. On 30 October 2009, the General Assembly voted in favour of the draft resolution and timetable to negotiate an Arms Trade Treaty in 2012, with 153 states supporting the motion, 19 abstaining and only Zimbabwe voting against. On 2 December 2009, the UNGA adopted Resolution 64/48, aiming to elaborate a legally binding instrument on the highest possible common international standards for the transfer of conventional arms.

Two aspects of this process are particularly significant. One is the final acceptance of the United States that it should be part of the process. The first scheduled negotiations, in July 2012, broke down after a month owing to American opposition. In December 2012 the UNGA adopted Resolution 67/234, which recommended that states continue negotiating by consensus, in March 2013. On that occasion, only three countries, Iran, North Korea and Syria, voted to block consensus. A group of countries led by Mexico then proposed that the treaty be taken to the UNGA by majority rule vote. This happened through Resolution 67/234B on 2 April 2013, passed by 155 states including the United States, with 22 abstentions and three opposed (Iran, North Korea and Syria). The second noteworthy development is that since 2006 more than 80 per cent of states have declared their wish that IHL and HRL should constitute the core of the treaty. This indicates that the long-established behaviour of transferring arms with no regard to assumed obligations in international law has started to become marginalized and to be seen as no longer legitimate.

### *Effects-based goals*

Some International Relations scholars have studied the implications of weapons bans for global politics. My work augments these studies. The landmine and cluster munitions bans are the first instruments in international law not only to ban a weapon, but also to mandate the high contracting parties to assist present and future victims, while the Arms Trade Treaty is the first treaty to expressly state, as its purpose, the aim of reducing human suffering. Humanitarian security regimes create mechanisms to protect civilians after a conflict is over or prevent further unlawful use.

*Mines.* Article 6.3 of the Mine Ban Convention states that ‘each State Party in a position to do so shall provide assistance for the care and rehabilitation, and social and economic reintegration, of mine victims’. Given that, as noted above, this was the first time assistance to victims had been stipulated in international law, the politics of implementation after the convention had entered into force became extremely important. The first review conference, held in 2004, specified the term ‘victim’ to ‘include those who either individually or collectively have suffered physical or psychological injury, economic loss or substantial impairment of their fundamental rights through acts or omissions related to mine utilization’.<sup>35</sup>

The ICBL was launched in October 1992. The first time landmines were addressed as a humanitarian question rather than a security issue was in a testimony in a US Senate hearing that year involving refugees from Cambodia.<sup>36</sup> Throughout the years of the campaign, the ICBL developed its advocacy within an effects-based framework, citing the annual numbers of victims, amputees and survivors, losses of arable land and of political and economic opportunity, and the burden on public health systems.

In some of the communities worst hit by landmines, such as Afghanistan, Bosnia, Cambodia and Mozambique, the socio-economic and health effects were devastating, with grave damage done to the economy and food security: for example, much mined land was unusable, and animals killed by mines represented a loss of some \$6.5 million. Meanwhile the rehabilitation needs of survivors imposed a significant burden on public health systems.<sup>37</sup>

In the early 1990s, doctors working for the ICRC and other organizations documented the effects of landmine use on a global scale. This prompted the Medical Division of the ICRC to organize a symposium of experts on anti-personnel mines in Montreux, Switzerland, in April 1993. Compelling spokespersons were gathered here or joined the ICBL later. The Vietnam Veterans of America Foundation (VVAFA) coordinated its efforts with those of other agencies such as Human Rights Watch and Handicap International, and worked on country studies to obtain data on the social and economic impacts of mine use.<sup>38</sup> The ICRC summed up both the achievement represented by the ban and the continuing threat represented by these weapons:

The treaties prohibiting anti-personnel mines and cluster munitions provide a comprehensive response to the humanitarian consequences of these weapons and the promise of a future where affected communities can one day live without the threat of these weapons.

<sup>35</sup> Kerry Brinkert, *Understanding the Ottawa Convention's obligations to landmine victims* (Geneva: Geneva International Centre for Humanitarian Demining, 2008).

<sup>36</sup> Maxwell A. Cameron, Robert J. Lawson and Brian W. Tomlin, ‘To walk without fear’, and Jody Williams and Stephen D. Goose, ‘The international campaign to ban landmines’, both in Cameron, Lawson and Tomlin, eds, *To walk without fear: the global movement to ban landmines* (Toronto: Oxford University Press, 1998), pp. 1–19, 20–47.

<sup>37</sup> For an overview of the global situation and effects of unexploded ordnance in general, including mines, especially the public health and economic costs for societies, see ‘Hidden killers: the global landmine crisis’, Report released by the US Department of State, Bureau of Political-Military Affairs, Office of Humanitarian Demining Programs, Washington DC, Sept. 1998.

<sup>38</sup> For a full review of the medical literature, see Robin M. Coupland, FRCS, and Remi Russbach, MD, ‘Victims of anti-personnel mines: what is being done?’, *Medicine and Global Survival* 1: 1, 1994, pp. 18–22.

## *Humanitarian security regimes*

Millions of civilians in more than 70 countries live their lives in fear of weapons that keep on killing long after conflicts have ended.<sup>39</sup>

*Cluster munitions.* According to the ICRC, the Convention on Cluster Munitions contains the most far-reaching victim assistance obligations ever included in an IHL treaty. The word 'victim' is mentioned 18 times in the 18-page convention; starting in its preface, which declares the signatories to be: '*Determined* also to ensure the full realization of the rights of all cluster munitions victims and *recognizing* their inherent dignity; *Resolved* to do their utmost in providing assistance to cluster munitions victims, including medical care, rehabilitation and psychological support, as well as providing for their social and economic inclusion.' The main operative provisions are articles 5 and 6. Article 5 is a comprehensive and groundbreaking contribution to international law that places the responsibility for caring for victims on affected states, and article 6 sets out a plan for states that do not have the financial capacity to do so. States are mandated to develop national laws and policies, to allocate financial means within human rights framework mechanisms, and to establish non-discriminatory policies.

Human Rights Watch and Handicap International led the systematic documentation of the effects of cluster munitions through detailed assessment of the casualties and impact of use in Lebanon, Kosovo, Afghanistan and Iraq.<sup>40</sup> The Cluster Munitions Coalition, working with champion state Norway and its core group of supporting countries, insisted on negotiations for a ban being carried out using an effects-based humanitarian framework focusing on the harm done to victims, survivors and their countries.

These NGOs published several authoritative documents on the effects of cluster weapons. One in particular, entitled *M-85: an analysis of reliability*, exposed the fact that, despite the incorporation of high-quality self-destruction mechanisms, M-85 bomblets presented a higher-than-anticipated failure rate that did not prevent contamination. This report struck down the argument by some states that technical improvements had reduced failure rates, since the M-85 bomblets were lauded as the best models.

*Arms Trade Treaty.* The publication of three studies that were widely circulated at the UN First Committee in autumn 2007 played a key role in attracting attention to the effects of the unregulated arms trade.<sup>41</sup> One of these studies quantified, for the first time, the effect of armed violence on Africa's development. Since 1990, approximately \$300 billion has been lost to conflict in Africa, the equivalent of \$18 billion a year—a figure comparable to the amount of international aid received by African countries.

<sup>39</sup> <http://www.icrc.org/eng/resources/documents/news-release/2009-and-earlier/landmines-news-030409.htm>, accessed 19 Nov. 2014.

<sup>40</sup> Handicap International, 'Fatal footprint: the global human impact of cluster munitions', Preliminary Report, November 2006.

<sup>41</sup> These were Debbie Hillier, *Africa's missing billions: international arms flows and the cost of conflict* (London: IANSA, Oxfam and Saferworld, 2007); Amnesty International, *A global Arms Trade Treaty: what states want* (London: Amnesty International, 2007); and Sarah Parker, *Analysis of states' views on an Arms Trade Treaty* (Geneva: UNIDIR, 2007).

## *Multilevel agency and constituent source of agency*

The power of individuals is vital to the processes occurring within multilevel agency: 'There are not many visionaries so if you have a handful then a process can be galvanized. All the processes are about practical visionaries'.<sup>42</sup> Both the landmine and cluster munitions ban regimes, though not universal, have created powerful international norms that go beyond the obligations undertaken by the high contracting parties to the treaties. It is interesting to observe how even unlikely participants quickly want to embrace the new normative standard and be seen to be playing by the new global rules.<sup>43</sup>

*Mines.* In 1996, the Canadian Foreign Minister Lloyd Axworthy invited countries to create a ban. The core group of countries in this case comprised Austria, Belgium, Canada (the champion state), Ireland, Mexico, the Netherlands, Norway, the Philippines, South Africa and Switzerland. Middle-power countries shaped the agenda.<sup>44</sup> Canada's traditional friends and allies, notably Australia and the United States, accused Axworthy of 'grandstanding on an issue of national security',<sup>45</sup> but his call was greatly strengthened by support not only from the ICBL but also the ICRC, which, in a departure from its traditional neutrality, initiated a major advocacy campaign in November 1995. The focus of this campaign, which represented an unprecedented involvement on the part of the ICRC, was on stigmatizing the weapons in the public consciousness.<sup>46</sup>

*Cluster munitions.* The role of particular individuals was vital in the moral reframing of all activities associated with cluster bombs as no longer legitimate. John Borrie advances the idea of an 'informal network of individuals' or a group of 'humanitarian disarmers' who were significant to the achievement of the prohibition treaty.<sup>47</sup> Prominent in the category of influential individuals was Norwegian Ambassador Steffen Kongstad, who was also involved in the landmines process. Among the NGOs there was a genuine coalition of individuals, involving Thomas Nash, coordinator of the Cluster Munitions Coalition (CMC), Steve Goose, director of the Human Rights Watch Arms Division, and Grethe Østern of Norwegian People's Aid, who was also co-chair of the CMC. They worked to provide global assistance to the campaign, and in particular targeted David Miliband, the British Foreign Secretary at that time.<sup>48</sup>

<sup>42</sup> Private conversations, Geneva, 2013.

<sup>43</sup> In Gaddafi's last days as leader of Libya, his forces were accused of using cluster munitions; he promptly denied it. See <http://www.bbc.co.uk/news/world-africa-13104365>, accessed 19 Nov. 2014. In their brief 2008 war, both Georgia and Russia were also accused of using cluster bombs. Both swiftly tried to either cover up their actions or deny the charges.

<sup>44</sup> K. Rutherford, S. Brem and R. A. Matthew, *Reframing the agenda: the impact of NGO and middle power cooperation in international security policy* (Westport, CT: Praeger, 2003); private conversation in Geneva, 2011; Lesley Wexler, 'The international deployment of shame, second-best responses and norm entrepreneurship: the campaign to ban landmines and landmine ban treaty', *Arizona Journal of International and Comparative Law* 20, 2003, p. 561.

<sup>45</sup> Thakur and Maley, 'The Ottawa Convention on landmines'.

<sup>46</sup> Louis Maresca, Stuart Maslen and ICRC, *The banning of anti-personnel landmines: the legal contribution of the International Committee of the Red Cross, 1955-1999* (Cambridge: Cambridge University Press, 2008).

<sup>47</sup> John Borrie, 'Humanitarian reframing of nuclear weapons and the logic of a ban', *International Affairs* 90: 3, pp. 625-46.

<sup>48</sup> Private conversations, New York, 2008.

The partnership established among the ICRC, core states, the UN Development Programme (UNDP), and civil society was invaluable, and the combination of the core group of states, in coalition with actors on several levels, was essential in providing the leadership needed.<sup>49</sup>

*Arms Trade Treaty.* Multiple actor partnerships across several levels constituted a crucial factor in the extraordinary process that led to the Arms Trade Treaty.<sup>50</sup> Initially, the 1990 Nobel Peace Prize laureates' initiative, led by Oscar Arias, along with several NGOs, crafted a strategy to create a diverse and powerful coalition of governments and non-governmental actors committed to the negotiation of a new instrument. This decade of efforts led to two key NGOs, Amnesty International and Oxfam, joining forces with the International Action Network on Small Arms (IANSA), an umbrella coalition of hundreds of NGOs worldwide, to create the Control Arms Campaign.<sup>51</sup> A major breakthrough moment came in March 2004 when the then UK Foreign Secretary, Jack Straw, offered his support to the campaign and pledged to gain backing from other countries. France's support followed, then Norway and the EU as a whole.<sup>52</sup> In 2007 the UN Secretary General promoted a consultation on the 'feasibility, scope and draft parameters of an Arms Trade Treaty'; in the course of this process, 101 states submitted their views to the UN, an unprecedented level of participation. All of these activities successfully mobilized the overwhelming majority of governments to vote in favour of the historic UN resolution in 2006. The UK, as the champion state, worked intensively with the core group that drafted the resolution and subsequently led the process. The work of states in the regime-building process was just as important as that of civil society in moving the treaty process forward.

### *Constituent source of agency*

For other scholars studying these questions, the ICRC was but one member of a transnational network of activists and moral entrepreneurs;<sup>53</sup> in contrast, I consider the ICRC a vital, distinctive actor, whose authority is unrivalled,<sup>54</sup> for three reasons. One is the ability of the ICRC to generate credible, international law-based evidence through authoritative publications. The ICRC has engaged in extensive humanitarian diplomacy over the years and has been instrumental in the development of new norms on various conventional weapons. Second, the ICRC, as a respected neutral body, has privileged access to militaries all over the

<sup>49</sup> Private conversations, Geneva, 2008–10; Edward J. Laurance, 'The UNDP role in the comprehensive approach to security in fragile states: an assessment' (unpublished paper), version 5.1, 10 June 2010.

<sup>50</sup> Private conversations, Geneva, 2009–13.

<sup>51</sup> Denise Garcia, *Small arms and security: new emerging international norms* (London and New York: Routledge, 2006).

<sup>52</sup> At the Council of the European Union's 2,678th General Affairs Council Meeting, Luxembourg, 3 Oct. 2005.

<sup>53</sup> Price, 'Reversing the gun sights'; Don Hubert, *The landmine ban: a case study in humanitarian advocacy* (Providence, RI: Thomas J. Watson Jr. Institute for International Studies, 2000); Kenneth Rutherford, 'The evolving arms control agenda: implications of the role of NGOs in banning antipersonnel landmines', *World Politics* 53: 1, 2000, pp. 74–114; Wexler, 'The international deployment of shame'.

<sup>54</sup> Here my work is in line with that of Charli Carpenter, who considers the ICRC as a key network hub for mobilization of advocacy: Charli Carpenter, *'Lost' causes: agenda vetting in global issue networks and the shaping of human security* (New York: Cornell University Press, 2014).

world, and to meetings of states, to a much greater degree than other NGOs.<sup>55</sup> Third, the ICRC, as the guardian of the Geneva Conventions, has exceptional moral power through the practice and observance of IHL. The Arms Unit of the ICRC has international lawyers constantly working on weapons issues and the applicability of IHL.<sup>56</sup>

*Mines.* As early as the 1950s, the ICRC had singled out landmines as one of the conventional weapons of concern. Throughout that decade, it reissued analyses informing and reminding states of the injurious effects of the use of landmines on civilians. With the recurrent use of mines in Indochina in the 1960s, the ICRC attempted to further the understanding of IHL applicable to landmines. In 1973, it published a report entitled *Weapons that may cause unnecessary suffering or have indiscriminate effects*. Later, three publications were essential in fostering a mounting awareness: *A perverse use of technology: mines* in 1992; *Landmines, time for action: international humanitarian law* in 1994; and *Anti-personnel landmines: friend or foe? A study of the military use and effectiveness of anti-personnel mines* in 1996. These publications exercised influence in constituencies around the world and proved to be essential connectors between NGO advocacy and states parties to the Geneva Conventions. They benefited from the commanding knowledge of ICRC personnel who worked in the field, including surgeons, delegates and others who saw at first hand the humanitarian tragedies resulting from the use of certain weapons. These publications, based on large surveys over decades of conflict and backed by senior military commanders, were important in demonstrating that mines are not an indispensable weapon of high military value. They showed instead that the weapons were time-consuming to deploy and dangerous because of their limiting effect on tactical flexibility. These studies confirmed the ICRC's position that the military value of mines is 'far outweighed by the human and social costs' and reinforced both 'its call for a ban and its world-wide campaign against this weapon'.<sup>57</sup> Senior military commanders endorsed the inutility of cluster munitions at the beginning of the negotiations for a treaty banning them in Dublin in May 2008.

*Cluster munitions.* The war in Lebanon in 2006 was a turning point for the ICRC in prompting it to take a stand on cluster munitions.<sup>58</sup> The background was the mine ban process, which has fundamentally contributed to changing behaviour and how security arms issues are considered. The landmines ban has constructed a taboo that makes it almost unthinkable for states to use them. In April 2007, the ICRC convened a meeting that helped catalyse perceptions regarding the inadequacy of technical fixes and solutions, and openly called for the promotion of new norms.<sup>59</sup> The ICRC's endorsement of the Oslo Process was instrumental in rallying some states to support the ban.<sup>60</sup>

<sup>55</sup> Private conversations, Geneva, 2013.

<sup>56</sup> Private conversations, Geneva, 2010–13; Maresca et al., *The banning of anti-personnel landmines*.

<sup>57</sup> <http://www.icrc.org/eng/resources/documents/misc/57jjud.htm>, accessed 19 Nov. 2014.

<sup>58</sup> Borrie, *Unacceptable harm*, pp. 173, 233, 241, 337.

<sup>59</sup> Private conversations, Geneva, 2009.

<sup>60</sup> Private conversations, Geneva, 2010–13; Borrie, *Unacceptable harm*, pp. 173, 233, 241, 337.



*Arms Trade Treaty*. The same trend is apparent in respect of the Arms Trade Treaty process, in which the ICRC was an integral part of all negotiations, advising countries and civil society groups alike. The treaty sets out three express prohibitions that have been welcomed by the ICRC and by activists working to reduce armed violence worldwide. One, a reiteration that the transfer of arms, parts and ammunition to countries under arms embargoes is unlawful. Two, transfers are barred if they would violate relevant obligations under any international agreements. Three, transfers are prohibited if the weapons transferred would be used for genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, or other war crimes. The ICRC has been a key actor in demonstrating the necessity of taking IHL into account when transferring arms. For the ICRC, respect for IHL must be one of the fundamental criteria for arms transfers. The ICRC has been developing and consolidating information through ICRC-sponsored studies since 1999, as well as articles published in the *International Review of the Red Cross*.<sup>61</sup>

### *Reputational concerns and the humanitarian law framework*

IHL, which is principally constituted by the four 1949 Geneva Conventions and its two Additional Protocols of 1977, establishes a powerful legal framework for state behaviour. The conventions are universally ratified and comprise the most powerful multilateral regime in international law, most of its principles being also considered as customary law.<sup>62</sup> The conventions give rise to three broad principles: first, the requirement to distinguish between combatants and civilians during conflict; second, the rule of proportionality, which states that a lawful attack may not have excessive consequences for civilians in the light of the initial military objective; and third, that the weapon chosen must be that which shall have least impact on civilians.

States do not want to be seen as of poor repute or uncivilized in breaking this customary and legally binding normative framework. Reputational concerns matter in a densely globalized world where information is easily accessible. Since 1945, states have been building new understandings, norms, prohibitions, and politically and legally binding obligations to limit what can be done during war with the aim of reducing human suffering. States will tend to embrace, even if not as high contracting parties to a treaty, new obligations that will prescribe conduct aligned with the customary framework that limits harm during war or peace.<sup>63</sup>

<sup>61</sup> See e.g. ICRC (International Committee of the Red Cross), *Arms availability and the situation of civilians in armed conflict* (Geneva: ICRC, 1999); ICRC, *Arms transfer decisions: applying international humanitarian law criteria* (Geneva: ICRC, 2007); ICRC, *Increasing respect for international humanitarian law in non-international armed conflicts* (Geneva: ICRC, 2008); Robert, J. Mathews and Timothy L. H. McCormack, 'The influence of humanitarian principles in the negotiation of arms control treaties', *International Review of the Red Cross* 81: 834, 1999, pp. 331–52; Jean-Marie Henckaerts, 'Study on customary international humanitarian law: a contribution to the understanding and respect for the rule of law in armed conflict', *International Review of the Red Cross* 87: 857, March 2005, pp. 175–212; Alexandra Boivin, 'Complicity and beyond: international law and the transfer of small arms and light weapons', *International Review of the Red Cross* 87: 859, 2005, pp. 467–96.

<sup>62</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary international humanitarian law* (Cambridge: Cambridge University Press and the International Committee of the Red Cross, 2006).

<sup>63</sup> A. Gillies, 'Reputational concerns and the emergence of oil sector transparency as an international norm', *International Studies Quarterly* 54: 1, 2010, pp. 103–126; Erickson, 'Stopping the legal flow of weapons'.

*Humanitarian law framework.* The cases examined here, as well as emerging humanitarian security regimes, embody the stipulations set by agreed normative prescriptions and proscriptions, both those that are legally binding and those that are considered customary. I call this the humanitarian law framework. IHL then forms the conceptual normative tenor of the cases examined and the heart of what compels states to act legally and politically in curtailing technology, behaviour or weapons that may be excessively harmful and give rise to tragic humanitarian circumstances. The Additional Protocol to the Geneva Conventions of June 1977, which articulates the limits and prohibitions set by IHL concerning the choice of weapons in hostilities in articles 35, 36, 51 and 57, is at the core of the humanitarian law framework. The protocol's article 35 asserts the basic rules covering the methods and means of warfare, mandating that the means of waging war be bound by consideration of humanity and the environment. As a result, there is a clear prohibition on the employment of weapons and methods of warfare that 'cause superfluous injury or unnecessary suffering' (article 35.2).

Some of the negotiators who spearheaded the ban processes examined here saw them as measures to prevent future humanitarian tragedies. The same is occurring in emerging humanitarian security regimes. There are two applications of the precautionary principle in IHL.<sup>64</sup> One is article 36 of the Additional Protocol regarding the choice of weapon. It declares that when developing new weapons, parties should determine whether their use would violate IHL or international law in general. The other is article 57, entitled 'Precautions in attack', which articulates the need to distinguish civilian populations and objects from military personnel and objects. It mandates that targets should be strictly military objectives that may yield advantage in a battle. Beyond laying down the requirement of distinction, the article also reiterates the constraint and limitation on the means and methods of attack. This has to be carried out in a precautionary fashion aimed at minimizing collateral damage to civilians and their property. Article 57 institutes the idea of 'proportionality', according to which force shall not exceed the military goal. This rule also restates the notion of precaution in advising parties to provide sufficient warning prior to attacks in order to spare civilians.

The rule of distinction is further elaborated in article 51, in conjunction with further restraints on the choice of weapon, by defining 'indiscriminate attacks' as well as by prohibiting violence and tactics that terrorize the civilian population. Article 51 urges parties not to use means and methods that cannot distinguish civilians and combatant populations, mandating that the choice of weapon should discriminate between military and civilian objects.

<sup>64</sup> Precaution in international law includes three components: action to avoid harm regardless of improbability; shifting the burden of proof to supporters of a probably damaging activity through consideration of all alternatives; and transparent decision-making to include the affected. In a nutshell, the precautionary principle calls upon the advocates of actions that may lead to irrevocable damage to take preventive measures to avert harm, notwithstanding a lack of scientific certainty. Regrettably, this principle is still at a stage of what the law ought to be (*lege ferenda*) and not what the law and state practice are (*lex lata*); however, it is also in the process of becoming international customary law, despite persistent opposition, see Markus Gehring and Marie-Claire Cordonier Segger, 'Precaution in international sustainable development law', CISDL legal brief for the preparatory committee process for the world Summit on Sustainable Development (Geneva: Aug. 2001).

## **Conclusion: new future humanitarian security regimes**

The making of new humanitarian security regimes is under way in the Geneva disarmament communities and across activist and research networks around the world, with real momentum. Within the humanitarian security regimes typology I present here, there is concerted action and high momentum in respect of nuclear weapons and killer robots, with campaigns launched, UN open-ended working groups in development, and the appointment of UN special rapporteurs. Significant attention is focused on raising the bar regarding use of explosive weapons in populated areas, especially in the light of the war in Syria. There is less activity regarding incendiary weapons, and depleted uranium and other toxic remnants of war.

Applying the model concepts I present, the emerging regimes, in particular those concerned with nuclear weapons and killer robots, already fulfil most of the conditions for rise to prominence and feature the distinguishing characteristics I outline here. In the killer robots case, talks have started at the United Nations and will continue on into negotiations.<sup>65</sup> In the main humanitarian security regimes studied here, there were several examples of recent use of the weapons at issue, and therefore plenty of evidence upon which to base humanitarian claims and move the campaigns forward. For the other emerging humanitarian regimes, namely those relating to nuclear weapons, to depleted uranium and other toxic remnants of war, and to the use of explosive weapons in populated areas, incendiary weapons and killer robots, there is either no recent use or no use at all. This will make the work of activists and champion states substantially harder. However, in the case of nuclear weapons, the effects from years of testing as well as recent nuclear energy disasters vindicate the efforts of activists.

Nuclear weapons represent an anomaly in international law, as they are the only category of weapons of mass destruction that is not subjected to a strict prohibition/ban.<sup>66</sup> Activists and champion states are therefore working on the reframing of the nuclear weapons debate.<sup>67</sup> Their efforts build on an established taboo against these weapons and on rethinking the security these weapons supposedly provide.<sup>68</sup>

Humanitarian disarmament takes a facts-based approach that helps construct a new discourse about the utility of certain weapons and the validity of particular behaviours. The International Campaign to Abolish Nuclear Weapons (ICAN) is working intensively using an economic and humanitarian framework under the rubric 'One hundred billion dollars for nuclear weapons: one billion people

<sup>65</sup> Denise Garcia, 'The case against killer robots: why the United States should ban them', *Foreign Affairs*, May 2014, <http://www.foreignaffairs.com/articles/141407/denise-garcia/the-case-against-killer-robots>, accessed 19 Nov. 2014.

<sup>66</sup> See International Court of Justice, opinion on the legality of nuclear weapons, <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=e1&p3=4&case=95>, accessed 19 Nov. 2014.

<sup>67</sup> The global conference on 'The humanitarian impact of nuclear weapons' was held in Oslo on 4–5 March 2013, with a follow-up in Mexico in April 2014: see <http://www.unog.ch/oewg-ndn>, accessed 19 Nov. 2014.

<sup>68</sup> For the understanding of taboos *vis-à-vis* nuclear weapons, see Nina Tannenwald, 'The nuclear taboo: the United States and the normative basis of nuclear non-use', *International Organization* 53: 3, 1999, pp. 433–68; Nina Tannenwald, 'Stigmatizing the bomb, origins of the nuclear taboo', *International Security* 29: 4, 5–49, 2005

in extreme poverty', with the objective of building momentum for a new international treaty that will give rise to a novel humanitarian security regime and replace the nuclear non-proliferation regime of 1968. ICAN is also using an effects-based framework, acknowledging 'that any use of nuclear weapons would cause catastrophic humanitarian and environmental harm; ... [and] that there is a universal humanitarian imperative to ban nuclear weapons, even for states that do not possess them'.<sup>69</sup> Its activists have been spearheading authoritative facts-based research using many of the remaining surviving victims from Hiroshima and Nagasaki, and doctors' and medical personnel's testimonies from that time, as we approach the 70th anniversary of the nuclear bombing of those cities.<sup>70</sup>

In sum, champion states, keenly aware of reputational concerns based on international law and of the failure of the nuclear non-proliferation arms control regime, in collaboration with the transnational advocacy network, are building a new normative understanding of the 'il-legitimacy' of continuing the possession of nuclear weapons.<sup>71</sup> Intensive efforts are under way to construct frameworks for the marginalization of nuclear weapons. The UN Secretary General released a Five Point Proposal on Nuclear Disarmament in 2008,<sup>72</sup> in which he proposed a new nuclear weapons convention. Activists repeatedly emphasize that these weapons are a legacy of old, clumsy and dirty technologies, indiscriminate in their effects, and with appalling long-term consequences on the environment.<sup>73</sup> The champion states are using a cautious, fact-based approach and building momentum through peer-to-peer diplomatic pressure. In their view, the nuclear weapon states should join the mainstream of UN member states that do not rely on nuclear weapons.

As the constituent source of agency, the ICRC is pursuing its goal through a twofold effects-based approach. The first element is a health-based tactic that builds on the potential impacts of use of these weapons, including accidents and unintended uses, principally focusing on health impacts which, it believes, is the best way to galvanize wider support for new understandings.<sup>74</sup> The second element consists of publicizing its own inability to deliver large-scale assistance in the event of a nuclear explosion.<sup>75</sup>

Nuclear weapons are inherently indiscriminate. Collateral damage would be so catastrophic that distinction between civilians and combatant forces would be

<sup>69</sup> Private conversations, Geneva, 2013.

<sup>70</sup> Beatrice Fihn, ed., *Unspeakable suffering: the humanitarian impact of nuclear weapons* (Geneva: ICAN partner organization Reaching Critical Will (RCW) of Women's International League for Peace and Freedom, 2013).

<sup>71</sup> The 2012 Oslo conference on nuclear weapons was for many in the Geneva disarmament communities a real breakthrough, because it created a norm that nuclear weapons are unacceptable in a densely populated and highly integrated world. The non-state elements of the Geneva disarmament communities are moving fast and undergoing 'massive mobilization', as I know from many sources. This process entails putting pressure on the veto-wielding members of the UN Security Council and shifting on to them the burden of proof and of justifying their positions, using techniques developed in the mine ban process: 'Not all countries agree on everything at once; at the outset, however, the mobilization efforts include setting the bar high, setting the standards, creating a norm and making others change behaviour' (private conversation, Geneva, 2013).

<sup>72</sup> <http://www.un.org/disarmament/WMD/Nuclear/sg5point.shtml>, accessed 19 Nov. 2014.

<sup>73</sup> Remarks by Rebecca Johnson, co-chair of the ICAN, at public hearing in Geneva, 21 May 2013, of the UN Open-Ended Working Group on Nuclear Disarmament. I was present and talked to Johnson.

<sup>74</sup> Private conversations, Geneva, 2013.

<sup>75</sup> ICRC statement to the United Nations, general debate on all disarmament and international security agenda items, UNGA, 67th session, First Committee, New York, 16 Oct. 2012.

impossible. Tactical nuclear weapons are also very unpredictable. In the view of the ICRC, nuclear weapons raise a number of concerns regarding the compatibility of use and IHL.<sup>76</sup> It is hard to ban nuclear weapons when they are seen as an integral part of the collective imaginary of national security. If one starts with deterrence, no movement is possible. If one starts with public health and the impact on human security, however, then it is possible to create a foundation for the redefinition of interests. The ICRC adopted a resolution in 2001 stating that it would be impossible to save people in case of a nuclear detonation. Since then, it has been releasing 'information notes' setting out legal and policy analysis on the illegality of nuclear weapons.

All the actors taking part in multilevel agency on this subject are utilizing the 'humanitarian law framework'. Many of them argue that the veto-wielding members of the UN Security Council should not be equated with nuclear weapons, which came into use after the Charter was signed. The strategy of deterrence itself undermined the security that it sought to achieve. There is no evidence that nuclear weapons have preserved the peace. They are fraught with risk and do not necessarily provide security.<sup>77</sup> Further, deterrence is not a viable strategy because targeting cities is against international law. The ICRC is building its case on the 1996 opinion of the International Court of Justice entitled 'Legality of the threat or use of nuclear weapons'. This opinion contains a very clear analysis of IHL, and although it does not rule conclusively on the point of illegality, nevertheless a majority of judges stated unequivocally that it is not possible to use nuclear weapons and respect IHL.<sup>78</sup>

Thus a vigorous process of delegitimization of these weapons, and their increasing marginalization as a tool of security policy, is clearly under way. Through multilevel agency, efforts are being made by this means to pave the way to action and build future humanitarian security regimes. The international community has proved its ability, as shown in the cases examined here, to put humanitarian considerations together with national security concerns. Humanitarian security regimes nurture the continuation of this trend and are indeed gaining the momentum necessary to strengthen international law, advance humanitarian disarmament initiatives, and protect civilians in a more secure international system.<sup>79</sup>

<sup>76</sup> ICRC Council of Delegates, Resolution 1, 26 Nov. 2011, 'Working towards the elimination of nuclear weapons'.

<sup>77</sup> Observation of expert testimonies at UN Open-Ended Working Group on Nuclear Disarmament, Geneva, May 2013.

<sup>78</sup> During the meeting of the UN Open-Ended Working Group on Nuclear Disarmament, Geneva, May 2013.

<sup>79</sup> I thank Bailey Marcus for this insight.

