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Between Morality and Military Interests: Norm Setting in Humanitarian Arms Control

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Summary

The concept of humanitarian arms control emerged in the context of the new security challenges of the 21st century. The 1997 Ban on Anti-Personnel Mines, the 2001 Programme of Action on Small Arms and Light Weapons (PoA) and the 2008 Convention on Cluster Munitions all set out to introduce arms control instruments to regulate not only uncontrolled transfers of arms, but also to end or to limit the indiscriminate use of weapons, and to deal with the long-term effects following intra-state conflicts. The three institutions share similar characteristics and thus permit the conclusion that a structural change has taken place in arms control and disarmament. This change is a consequence of the changed security environment after the end of the Cold War: Fragile statehood, economic under-development, internal state conflicts, terrorism and transnational organized crime provided the international state community with new challenges calling for different and new forms of arms control.

This report identifies the indicators for this change and examines the reasons for the development of particular forms of arms control and disarmament. The three regimes banning anti-personnel mines and cluster munitions and restricting the illicit trafficking of small arms and light weapons all show similar characteristics which were decisive for their evolution and have given a new face to arms control as a whole. The key normative agents that were decisive for this structural change included transnational campaigns by non-governmental organizations as well as a number of small and medium-sized states. These alliances managed to get the arms control agreements off the ground despite opposition from the leading powers. Two factors were remarkable: On the one hand, the special negotiating formats which were set up for the Ottawa and Oslo processes and, on the other hand, “new diplomacy”, which was characterized by a mutual “give and take” between the different actors. By involving NGOs, like-minded states sought global public support and gained additional legitimacy for their ambivalent undertaking. By granting civil society stakeholders the right to participate in the negotiations, these states also enabled NGOs to gain certain influence on the norm generation processes.

The change of perspective on arms control also becomes visible in a different, individualized understanding of security. Instead of concentrating exclusively on improving state’s security, attention is now being increasingly directed towards human security. Embedded in the concept of “human security”, one finds references to larger concepts such as development aims and conflict resolution practices. Humanitarian arms control is concerned with mitigating the consequences of the use of weapons as well as their deliberate misuse during and following intra-state conflicts. This new understanding of arms control lies within the wider context of security sector reform, which seeks to make fragile states capable of guaranteeing public security again, but it also addresses individual human needs in post-conflict situations such as victim rehabilitation and reintegration.

The new arms control and disarmament agreements are an outcome of specific norm-generating processes which are to be seen in the context of “new humanitarianism”. The most visible expression and, at the same time, probably the most controversial expression

of this new humanitarianism are a number of military interventions in response to gross violations of human rights and the deliberate disregard of international humanitarian law, as for example in Ruanda or Bosnia. Questions of justice are becoming the direct legitimization for state action and have also inspired and triggered norm-generation processes in other policy fields – for example, the establishment of the International Criminal Court (ICC). Moral convictions or questions of justice also motivated norm generating actors in the field of humanitarian arms control. In all three cases under consideration, the need for a new institution was determined by the moral conviction that action must be taken against numerous incidents of severe injustice where innocent people and civilians were killed or wounded by the indiscriminate use of these weapons in cases of intra-state conflicts. This conviction is based on one of the few global concepts of justice in international relations which is also anchored in international humanitarian law, such as the principle of need and proportionality. At the same time, this moral conviction has provided the basis for norm development in the field of humanitarian arms control: The suffering of the civilian population as a result of the use of anti-personnel mines or cluster munitions prompted non-governmental organizations to demand of states to take action and seek a norm banning the use of such weapons.

Certain convictions of justice, which seem to be shared in the international system of states, were finally enshrined in the principles, norms and procedures of the three regimes. According to the principle of equality, for example, all states parties must renounce the use of anti-personnel mines or cluster munitions and compile an overview of their national stocks of small arms. A further characteristic of humanitarian arms control is the comprehensive application of the principles of proportionality, need and compensation. For example, the costs-by-cause principle applies to the clearance of cluster munitions. Those states which are particularly affected can rely on technical as well as financial support under the Ban on Anti-Personnel Mines and the Programme of Action on Small Arms and Light Weapons.

This structural change towards humanitarian arms control is significant for arms control and for disarmament as a whole. However, the moral convictions and the principles of justice demanded by the NGOs in particular touched the limits of national and national security interests. Normative conflicts occurred in the negotiating processes of all three regimes; particularly over question of the appropriate definition of weapons categories, but also with regard to the possible renunciation of sovereignty, for example banning transfers of arms to non-state actors or prohibiting the private possession of weapons. Although the principles of proportionality, necessity and compensation and the recognition of the special needs of the affected states provided an important impetus for the negotiations, the actual implementation process, particularly of the PoA, has been very slow.

Despite this ambivalence, the need for further norms and institutions in humanitarian arms control remains high. One of the core gaps is the lack of global norms limiting global arms transfer. The seizure of a ship – headed for Zimbabwe carrying weapons from China – by dock workers in South Africa once again revealed those regulatory gaps, which the Arms Trade Treaty (ATT) is now attempting to close. This initiative was also

prompted by a transnational network of non-governmental organizations and is supported by a number of states, including the Member States of the European Union, which adopted the EU Code of Conduct for Arms Exports in 2008. The ATT could become an important touchstone for humanitarian arms control as its global principles for arms transfers hit the very nerve of state security interests: State representatives must now show their colors and reveal what importance they attach to the moral convictions of global justice and legal principles of a future world society.

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1. Introduction

The decade of “human security” was fundamental for humanitarian arms control in many respects¹ (Shaw et al. 2006: 3). The concept of individualized security was introduced into the global debate in 1994 with the Human Development Report of the United Nations Development Programme (UNDP). Although state security concepts were predominant during the Cold War, there were nevertheless also ground-breaking attempts to put an end to the closely defined military security discourse and to develop concepts for a more socially just world, for example the Brandt and Brundtland Commissions at the beginning of the 1980s.² In this context, Jones also speaks of “broadening and deepening the conceptualisation of security” (Jones 1996: 6). It was also an attempt of channeling state’s attention towards global challenges and problems. By calling a security problem by its name, one signals an extraordinary emergency situation which justifies certain state’s action (Buzan et al. 1998). At the same time, the academic debate dealt critically with attempts to enlarge the security concept (Ulbert/Werthes 2008; Tadjbakhsh/Chenoy 2007). Nevertheless, the focus on “human security” succeeded in establishing a changed normative framework, introducing ethical aspects of individual human well-being as well as development policy objectives and human rights into the otherwise static security policy debate and attracting the attention of the international community.

Norm development in the field of humanitarian arms controls also benefited from this situation. The change in security perspectives encouraged the establishment of a different form of arms control and disarmament. This report sets out to examine the particularities of the norm formation processes in humanitarian arms control and to develop the thesis of a structural change. This change in form is demonstrated by various indicators such as the individualized security perspective described above as well as a strong moral rhetoric, which led to political action and concrete norm generation. It is also apparent in particular settings of negotiation processes and different constellations of stakeholders which were important for the successful outcome of the negotiations.

1 Humanitarian arms control is considered to be the development of new norms in the field of landmines, small arms and cluster munitions which were negotiated and approved outside existing conventions on international humanitarian law. Humanitarian arms control was the consequence of the misuse of weapons against the civilian population in internal state conflicts, but also of the dissatisfaction of numerous states with the norms of international humanitarian law. The aim of these regimes – and thus the central reason for their establishment– is to alleviate human suffering by a total ban on, or the improved control of, these weapons. Cf. Green (2000: 17).

2 www.brandt21forum.info/About_BrandtCommission.htm; www.un-documents.net/wced-ocf.htm (5.10.2009).

The regimes³ of humanitarian arms control and disarmament were all negotiated in the new context of a stronger multilateralism. New coalitions of stakeholders can be identified and in some cases non-state actors gained direct access to the negotiation fora. The starting point, in 1992, was the International Campaign to Ban Landmines (ICBL), which sought to achieve a global ban on these indiscriminate weapons.⁴ The process to negotiate the 1997 Ottawa Convention marked the beginning of a series of negotiating activities which were characterized by cooperation between certain states as well as non-governmental organizations. Efforts to curb the globalized and increasingly illicit trafficking of small arms and light weapons also involved a transnational coalition of NGOs as well as a group of particularly committed states that were decisive for the development of the new institution. The recently negotiated ban on cluster munitions, the so-called Oslo Convention, was also initiated by like-minded states in cooperation with non-governmental organizations.⁵

However, it is not only this new and extensive cooperation in the field of arms control between a group of states and a transnational coalition of non-governmental organizations which exemplifies the structural change in arms control. All three regimes share similar characteristics, even though they were negotiated in different forums and show divergent outcomes with regard to their universality and their legally binding character. In comparison to classical arms control, the peculiarities become more visible: They focus on preventing war between states, easing tension between states, limiting damage in the event of war, and reducing the cost of an arms race. Humanitarian arms control developed as a consequence of the misuse of weapons in internal state conflicts. Its aim is to reduce tension between conflict groups and to curb violence in the aftermath of civil wars. It aims to help states to become more capable of acting in the security sector but, at the same time, places the protection of individual security at the center of its normative principles. Because humanitarian arms control developed in close connection with the discourse on “human security”, it also attaches central importance to the protection of civilians and the rehabilitation of victims.

3 Regimes in this context are understood to be “cooperative institutions which are characterized by informal and formal, legal and non-legalized structures – principles, norms, regulations and procedures – and deal with conflicts between rival states (occasionally also by involving other stakeholders)”. Cf. Müller (1993: 26). Rittberger/Meyer add that regimes must have an effect, that is to say, must induce a change of behavior on the part of states (Rittberger/Meyer 1993: 9).

4 Article 51 defines indiscriminate attacks, as attacks which “employ a method or means of combat which cannot be directed at a specific military objective, the effects of which cannot be limited as required by this Protocol, and which consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

5 Cluster bombs or munitions are generally defined as “large weapons which are deployed from the air and from the ground and release dozens or hundreds of smaller submunitions. Submunitions released by air-dropped cluster bombs are most often called ‘bomblets’, while those delivered from the ground by artillery or rockets are usually referred to as ‘grenades’”. Cf. www.stopclustermunitions.org/the-problem (7.12.2009).

Individually negotiated solutions are typical of the structural change in humanitarian arms control – the norm generation processes in the case of the conventions banning anti-personnel mines and cluster munitions took place outside existing international organizations such as the United Nations or the Geneva Conference on Disarmament. These processes dispensed with universality, which is to say that they did not succeed to involve the entire community of states. The 2001 PoA, on the other hand, which was negotiated within the framework of the United Nations, was able to establish a regime that was universal but at the same time only politically binding. In contrast to the stigmatization and ban of anti-personnel mines and cluster munitions, norm-building activities in the field of small arms aim at arms control and disarmament, whilst acknowledging legitimate state security interests. The general structural change is also demonstrated by the offers of assistance for affected states; for example, technical support for mine clearance or the disarmament of surplus stocks of small arms and light weapons.

However, this report does not only consider the structural changes in arms control and disarmament, but also focuses on the stakeholders responsible for norm development. The new form of arms control is characterized first and foremost by the overriding moral principles which determine the coexistence of states as well as their people in the world society and are also embodied in the norms of humanitarian arms control. The agents of norm generation – primarily the non-governmental organizations – based their demands for new forms of arms control on existing principles and norms, for example codified human rights or international humanitarian law, and here in particular on “justice in war” (*jus in bello*). When calling for new regimes, they pointed out fundamental elements of injustice whereby innocent people are killed and injured through the indiscriminate use of these types of weapons, and referred to the few universal principles of justice in the field of international relations (Shklar 1997: 30). Humanitarian arms control must therefore also be seen in the context of the “new humanitarianism” which emerged after the end of the Cold War as a consequence to changing security policy needs (Finnemore 1997: 197-224). Other institutions and norms such as the International Criminal Court or the “Responsibility to Protect” emerged and referred to similar principles of universal justice.

In addition to these more general moral principles, other ideas of distributive justice can also be found in the norm-generating processes – the principles of compensation and need are particularly prominent in humanitarian arms control, where the focus lies on recognizing particular security needs (Johansen 2000: 209-230; Hurrell et al. 2003: 36ff). Principles of distributive justice can also be found in classic arms control regimes, for example in the 1968 Non-Proliferation Treaty or the 1993 Convention on Chemical Weapons, but moral principles and justifications as a whole tend to play a more prominent role in humanitarian arms control, as this report will show.

As remarkable as the structural change in humanitarian arms control may be, moral convictions and principles of justice reach their limits when it comes to state security interests. The ambivalence of norm development is the result of the ambiguity of the prevailing reference bases: According to Article 51 of the UN Charter, states have the right of self-defense, which also includes the possession of conventional arms. This leads to

conflicts over norms in the negotiating processes, which have been solved in various ways according to the different negotiating forms of the three regimes. Whereas it was not possible to achieve universal membership in the cases of anti-personnel mines and cluster munitions, the PoA was forced to abandon certain controversial norms. The report will study this ambivalence in norm development in humanitarian arms control – which staggers between universal principles of justice and particularistic/national security interests – before finally considering questions of future needs and paths for further progress in this field. A new alliance between like-minded states and a transnational coalition of non-governmental organizations is currently being established with the aim of negotiating a legally binding arms trade treaty (ATT).

Chapter 2 will look at the question of norm development and structural change in humanitarian arms control from a theoretical point of view. What role do principles of morality and justice play with regard to state cooperation in security policy and norm generation processes in the sector of arms control and disarmament? Chapter 3 focuses on the processes of regime formation and describes the problems arising from the deliberate misuse of certain conventional weapons in intra-state conflicts. Of the types of weapons under consideration, only cluster munitions have been deployed predominantly in interstate conflicts in the past; however, their impact is similar to that of anti-personnel mines. Chapter 3.1 deepens the study of regime demand by looking at norm generation processes which have taken place within the framework of international humanitarian law and seeks to identify the gaps in its provisions. In Chapter 4, the report reflects upon the stakeholders in the three norm generation processes: What were the argumentative justifications that prompted states to act? What role did moral principles and references to principles of justice play in this context? Who were the stakeholders and what are their particular characteristics? Chapter 5 is devoted to empirical case studies and specific norm development: What distinguishes humanitarian arms control? What is special about the formulation of its principles, norms and rules? Chapter 6 goes on to study the ambivalence of moral motives and national security interests and its consequences for norm development.

2. Morality and justice as impetus for negotiations in arms control and disarmament

Norm-building processes are important for the development of various institutions within a broad understanding of arms control and disarmament. Not only do they include ways to regulate arms races and deal with existing arsenals, they also cover issues of non-proliferation, disarmament, the regulation of the use of weapons, and finally the elimination of entire categories of weapons (Becker et al. 2008: 15). They can also specify the use of weapons in wars as it is the case in international humanitarian law with its principles of proportionality and discrimination. Finally, the norm-building processes within this broad understanding of arms control also include the grafting of weapons taboos, in other words, a normative understanding on their non-use which can pave the way for arms control policy agreements, as was the case with chemical and nuclear weapons, for example (Price/Tannenwald 1996: 114). This kind of taboo is based on universally recognized humanitarian principles – or moral convictions of right or wrong – which deter the majority of states from using these weapons. Such universal principles are codified *inter alia* in international humanitarian law; for example, in the form of the unconditional protection of the civilian population during armed conflicts or the renunciation of particularly cruel weapons (Yihdego: 2007: 196).

International relations theories offer different approaches on how norms can emerge. Generally speaking, norms are considered to be “collectively shared standards of appropriate behavior on the basis of the given identities of a community” (Deitelhoff 2006: 14). Cooperative institutions come about with the lasting support of powerful states, or when stakeholders have complementary interests. Such rationalist approaches cannot, however, explain the success of norm-building processes in those cases where hegemonic states are skeptical or even hostile towards the institutions concerned. These were the conditions prevailing in the three examples of humanitarian arms control (Wisotzki 2008: 177-198): It was possible to establish the institutions despite the fact that the United States, Russia and China either did not participate in the negotiating processes at all, or only very reluctantly.

To realize moral convictions or ideas of justice in security policy and arms control, or even the fact that they are considered guiding elements in the norm-building processes, would seem at first sight to be contra-intuitive. According to the theory of neo-realism, states cannot be led by principles of justice, but must rely on their own strengths and self-help strategies to ensure their survival (Thompson 1992: 2). Special principles determine the course of negotiations as far as security policy and classic arms control are concerned, because, even after a cooperative institution has been established, there is still an incentive to violate the treaty and secure unilateral benefit. Security policy institutions derive their effectiveness above all from the binding force of their norms and rules as well as from the monitoring procedures and sanctioning mechanisms in the case of eventual norm violations. But apart from this form of legality, they also need a certain degree of legitimacy which is based on “the subjective and material consensus of institutions with social ideas of justice” (Daase 2003: 9).

Michael Walzer refutes the global skepticism of neo-realism in his attempt to categorize just and unjust wars by referring to the fact that politics consists of decision-making processes into which moral considerations are permanently being introduced.⁶ Warfare – as well as its prevention through arms control – is permeated by normativity and moral considerations (Nolan 1995: 26). Such principles set standards for right and proportional behavior in conflict situations and are codified as international humanitarian law or stated in the Universal Declaration of Human Rights.⁷

If utilitarian or rationalist explanations are not able to adequately explain cooperation in these cases of arms control, one must consider other aspects. Sociological or constructivist approaches indicate that states also cooperate in the realm of security because they are incorporated in social systems which provide guidelines for appropriate behavior and encourage further norm-building processes (Katzenstein 1996). For example, the model of the Convention on Anti-Personnel Mines was helpful for the negotiations to ban cluster munitions. Stakeholders act as social beings on the basis of their experiences, habits and intuitions. Appropriateness as the basis for action indicates that stakeholders consider their role in the international community when choosing alternatives for action or solutions, and act on the basis of collective, moral convictions. In other words, they refer to existing, internationally recognized standards such as the norm of sovereignty or principles which are firmly anchored in international humanitarian law (Hashmi/Lee 2004: 12). The “claim to absoluteness of moral judgments” implies that the particular objectives and interests of social actors are subjected to a normative evaluation of their rightness and importance. This is the highest level of evaluation for individual behavior as well as for social institutions (Hasenclever 2001: 118). The normative context must therefore be taken into consideration in order to assess the reasons for the development of new norms (Finnemore/Sikkink 1998: 887-917).

I have already briefly described the basis of action for the development of norms in the field of humanitarian arms control. A certain kind of a “new humanitarianism” emerged as a consequence and reaction to the genocide in former Yugoslavia and Ruanda in the early 1990s, which recognized not only states but also individuals – particularly the unprotected civilians – as legal subjects. Basic principles of this form of humanitarianism can already be found in the origins of international humanitarian law, which were codified in the 1949 Geneva Convention for the protection of civilians in times of war. During the Cold War,

6 Walzer’s book is often interpreted as developing “just reasons” for the use of violence – in fact Walzer is primarily interested in substantiating people’s right to peace and justice (Walzer 1997). Cf. Brown (2002: 103-104).

7 Overriding standards of appropriateness are often disputed and are frequently criticized as “western values”. In fact, the theory of the “just war” developed from Christian tradition and is not reflected in this form in any other religion. The same applies to the norm of human rights after 1945, which was repeatedly criticized as being predominantly western (Brown 2002: 119).

states sometimes also justified their interventionism with humanitarian claims of justice⁸, but in general principles of non-interference and state sovereignty tended to dominate the debates.⁹ The end of the Cold War coincided with a change of perspective: The principles of non-interference and state sovereignty were diluted in favor of a new form of humanitarian interventionism.

The central aim of this “new humanitarianism” is to redress a fundamental state of injustice: namely the mass murder and injury of innocent civilians who are not part of the combat operations. A number of military interventions in crisis and conflict areas, including Somalia, Bosnia and Kosovo, were the most visible expression and, at the same time, probably the most controversial element of this humanitarianism. The discourse justifying humanitarian interventions always refers to overriding moral principles such as the duty of human solidarity in the face of massive violations of human rights (Wheeler 2000: 34). Issues of justice thus became the immediate basis for action and inspired the development of norms on a global level, for example in the field of international criminal justice or humanitarian arms control.

In international negotiation settings, questions of justice are an important topic on various levels. They can accelerate the norm-generating processes, as shown by the example of “new humanitarianism”. But they also play a role in the negotiations themselves, for example when questions of procedural or distributive justice are involved. Druckman/Albin have studied the significance of questions of justice for negotiations, in particular in peace negotiations following civil wars. Procedural justice plays a role on various levels: for example, as the condition under which negotiations take place at all (for instance: Which conflict parties may take part?), but also during the actual negotiation process and in the conclusion of the final outcome. This is where questions of distributive justice also come into play, or become the central object of negotiation (Albin/ Druckman 2008).

Questions of distributive justice can be resolved on basis of the guidelines of the following four principles:

1. Principle of equality: Identical or comparable distribution of resources, costs and rights.
2. Principle of proportionality: Differentiation of resources according to the different starting positions and living conditions of the conflict parties.

8 According to Wheeler, India justified its war against Pakistan in 1971 primarily with the right to self-defense but also cited humanitarian reasons for rescuing the Bengalis (Wheeler 2000: 55).

9 Belloni rightly points out that humanitarianism is not new but is already to be found in the great religions as a leading principle of solidarity (help for the weak). It was anchored in international humanitarian law at the instigation of Henry Dunant, the founder of the Committee of the Red Cross. Cf. Belloni (2007: 452).

3. Principle of compensation: Distribution of resources as compensation for injustice suffered or costs incurred.
4. Principle of need: Distribution of resources as support to provide basic needs.

Numerous examples during the Cold War indicate that these principles already played a role in classical arms control, although they did not always lead to conflict-free solutions. Arms control negotiations were made more difficult due to differences in notions of justice – this was demonstrated, for example, by the arms control negotiations between the United States and the Soviet Union in the 1970s, when differing ideas of justice initially made negotiations difficult (Müller 1994: 34). Nevertheless, there too, the parties succeeded in establishing a regime, and principles of justice certainly played an important role in the negotiation processes. The negotiations on SALT I and II were informed by the justice principles of equality and reciprocity, for example, when it came to negotiating the ceilings for strategic nuclear weapons (Albin 2001: 184-185). Multilateral arms control is characterized by the fact that states are granted equal rights and obligations; for example, under the 1993 Convention on Chemical Weapons, all states had to destroy their old stocks in equal measure. One exception is the 1968 Non-Proliferation Treaty which recognized the status quo of the five nuclear weapons states indefinitely, although Article VI does call upon them to pursue nuclear disarmament.¹⁰ The principles of proportionality and need are also applied in classical arms control, for instance, by granting states in need the right to both technical and financial assistance (Albin 2001: 187).

Aspects of justice in negotiation processes also play an important role in humanitarian arms control and have provided a crucial momentum for norm-building activities in this area. In particular, the principles of proportionality, compensation and need have played a certain role in the negotiation processes, as this report will demonstrate. Aspects of justice were already decisive in the run-up to the negotiating processes: Accordingly, the need for normative agreements and multilateral negotiations were justified on the basis of moral principles and reasons of justice.

¹⁰ The nuclear weapons states claimed, however, that this commitment was only to be seen in conjunction with the general and complete disarmament of all weapons systems. Cf. Wisotzki (2001: 228).

3. The starting position: Regime demand and the development of humanitarian arms control

Statistics on the incidence of global wars provide some cause for optimism: The number of large-scale wars with more than 1,000 fatalities is dwindling; the overall number of conflicts has dropped by more than 40 percent since 1992.¹¹ Since the 1950s, wars and conflicts on the whole have been less fatal – with the exception of genocides, for example in the 1990s in Rwanda or the former Yugoslavia. But even though the incidences of war and the numbers of victims are declining, it is characteristic of the conflicts of the 21st century that they are carried out on the intra-state level with fierce brutality, particularly against civilians; that there are numerous conflict parties which contribute to the complexity of these conflicts; and that violence persists on a rather low level for a long time. These forms of conflicts are often described as “new wars”. However, research has proved that the indicators for these “new wars” already existed during the Cold War in form of numerous proxy wars (Newman 2004: 173-190).

It was precisely this brutalization of conflicts and targeted violence against the civilian population which motivated the development of humanitarian arms control. Landmines – and in particular anti-personnel landmines – were being deployed in intra-state conflicts on a regular basis. These weapons were originally developed as tactical defensive weapons for conventional warfare, but were being increasingly “misappropriated” and used for offensive purposes against the opposing civilian population, thereby violating central principles of international humanitarian law. This change in the form of warfare with the use of mines became apparent in the 1990s, primarily in the conflicts in Angola and Mozambique as well as in Bosnia-Herzegovina. Humanitarian aid organizations were confronted with the effects of the indiscriminate use of mines against civilians and the consequences for post-conflict reconstruction. This was the scenario which prompted them to develop the idea of an arms control initiative beyond international humanitarian law (Wisotzki/Müller: 1997: 12).

Despite the reduction in the number of conflicts, the illicit proliferation of small arms¹² remains a global problem with numerous consequences for affected states and civil

11 www.humansecuritycentre.org (5.10.2009).

12 Small arms (and light weapons) are considered to be “any portable barreled weapon that expels, is designed to expel or may be readily converted to expel a shot, bullet or projectile by the action of an explosive”. The Firearms Protocol of 2000 also includes in its definition “parts and components” as well as “ammunition”. Cf.: Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, A/Res/55/255, Article 3. The 2001 Action Programme on Small Arms dispensed with a definition of its own because the negotiating states were unable to reach an agreement. Although it adopted the definition from the Firearms Protocol, it excluded the term “ammunition”. Whenever this report speaks of “small arms” it always means “small arms and light weapons”.

societies. The international community is faced with a tremendous task in view of an estimated 639 million small arms and light weapons in circulation throughout the world. Small arms have become the most important tool of violence in intra-state conflicts and civil wars in particular – they also can be used to target the civilian population. This practice does not only violate international humanitarian law, but also important principles of universal human rights. 500,000 people are killed every year as a result of bullet wounds, 300,000 are wounded in intra-state conflicts and a further 200,000 become victims of violent crime or commit suicide using pistols or rifles. Violations of human rights using or involving small arms are an everyday reality and an important incentive for norm-building activities.¹³

While the uncontrolled proliferation of small arms is in itself not the immediate cause of conflict, it nevertheless provides considerable potential for the escalation of violence. Weapons continuously pass borders in the crisis regions of Africa due to poorly trained police forces and the lack of transfer and border controls, and are thus trafficked from one conflict to another. Small arms and light weapons also pose a great danger in post-conflict situations. Without disarmament programs, they jeopardize individual security, increase the risk of new hostilities by up to 44 percent, and lead to high levels of violent crime and massive human rights violations (IANSA 2006). High numbers of small arms in societies also inhibit peace-building processes and thwart the objectives of development aid. A correlation between state failure and large numbers of weapons is to be observed in regions with fragile statehood (Byman/Van Evera 1998: 381-400). All in all, these factors lead to an increased regime demand. This need intensified following 9/11 and the awareness of the link between terrorism and the proliferation of light weapons. Non-state actors in Afghanistan and Iraq have repeatedly deployed man-portable air defense systems (MANPADS) against the allied forces (Wisotzki 2007).

Cluster bombs and cluster munitions have a similar indiscriminate effect as anti-personnel mines, but are usually deployed in inter-state wars. Since the end of World War II, cluster munitions have been used in approximately 25 wars; for example by the United States in Vietnam, but also in wars in the 1990s or in the 21st century: in the second Gulf War in 1991, by NATO forces in Kosovo as well as in Afghanistan. According to estimates, approximately 2 million cluster bombs were dropped during the last Iraq war alone. Cluster bombs are an important means of air-borne tactical warfare, they help to avoid casualties on ones side, and are cost efficient. These aims of conventional warfare collide with the central principles of international humanitarian law and universal human rights. The use of cluster munitions violates the norms of proportional warfare, which differentiate between the civilian population and combatants. The submunitions of cluster bombs have a relatively high failure rate of 10 to 15 percent. Long after the end of hostilities, these unexploded submunitions are even more deadly than anti-personnel

13 These figures are based on estimates; reliable numbers are not available as a result of weapons traded illegally and gaps in the statistics on violent crime in numerous countries.

mines, and kill and maim civilians, especially children. Even modern types of cluster munitions with self-destructing mechanisms can fail, as the incidents in Lebanon have shown. In the 2006 war against Hezbollah, Israel dropped an estimated 2.8 to 4 million cluster bomblets over Lebanon – Hezbollah, for its part, also resorted to these weapons in the fight against Israel. In Afghanistan, the number of unexploded ordnance in the war against the Taliban is estimated at approximately 40,000 pieces – this is tantamount to a humanitarian catastrophe in a country that is already highly contaminated with anti-personnel mines. The Oslo Process, which led to the ban on cluster munitions, was the result of the dissatisfaction of like-minded states with the existing regulations under international humanitarian law at the time. Also in the case of anti-personnel mines, like-minded states had sought to establish improved norms within the context of international humanitarian law. Ultimately, however, it was the inadequacies of international humanitarian law which led to the establishment of alternative institutions in both cases.

3.1 Norms within the framework of humanitarian international law

The precursors of the three regimes can be found in international humanitarian law which deals *inter alia* with the protection of the civilian population during war. Earlier considerations concerning limitations on the use of means of violence can be identified in all cultures dating back to the ancient world, for example in the code of honor and knightly ideals from the Middle Ages, or the idea of “just warfare” in the philosophy of Augustine and Hugo Grotius. The concept of “limited warfare” was first introduced into international humanitarian law in the 19th century. International humanitarian law is based on the principle of regulating the forms of the use of violence, that is to say, subjecting the “how” in warfare to certain restrictions and thus limiting the methods and means of combat in armed conflicts. According to the principle of military necessity, warfare should be limited to the use of those means of violence which are absolutely necessary in order to achieve certain military aims. Two general principles can be derived from this: 1. A restriction of the use of violence to military targets, sparing the civilian population. 2. A ban on the use of particularly cruel weapons which cause serious injury, such as dum-dum bullets, which were outlawed at The Hague Peace Conferences of 1899 and 1907 (Green 1993). Despite a number of conventions regulating types of weapons and their use, international humanitarian law is confronted with the problem of the continuous development of new military technologies, which, as a consequence, always imply a need for further improvement of the humanitarian norms. The greatest dilemma facing international humanitarian law, however, is the fact that it is caught between the conflicting priorities of military necessity and humanitarian concerns. Negotiated solutions which are agreed upon by all state parties on the basis of the principle of consensus often fail to meet the demands of those states which are particularly committed to arms controls. This also applies to transnational non-governmental organizations.

This ambivalence in lawmaking is also reflected in the examples of anti-personnel mines and cluster bombs. Within the framework of international humanitarian law the

international community of states could only manage to agree on certain restrictions concerning the use of these weapons. At the initiative of the French President Mitterrand, the problem of anti-personnel mines was originally to be negotiated under the 1980 Convention on Prohibitions and Restrictions on the Use of Certain Weapons (CCW), which lists particularly cruel conventional weapons, including landmines (Protocol II). Whilst this Protocol mentions the indiscriminate use of anti-personnel mines, it does not regulate the production, storage and export of this category of weapons. It bans among other things the indiscriminate planting of mines if there is no direct connection to military operations. However, in practice, this regulation provided inadequate protection for the civilian population: Overall, too many exceptions weakened the Protocol's effectiveness. Moreover, the three negotiation sessions of the CCW Review Conferences in 1995 and 1996 did not provide the much-hoped-for breakthrough. As with the original Protocol, efforts to enhance the effectiveness of international humanitarian law were thwarted by military interests. State parties tried to identify loopholes for those mines which they considered to be of military relevance for their countries. The western industrial nations called for exemptions for their "intelligent" mines because they contained a self-destruction mechanism and were therefore not considered dangerous in post-conflict settings. These states stigmatized plastic mines as the real threat, prompting vehement opposition from Russia, China, India and Pakistan as the main producers of these types of mines. These differences in positions were solely based on national interests and prevented an agreement on a comprehensive ban on all anti-personnel mines in the Revised Protocol II. Nevertheless, the parties did succeed in extending the regulations governing anti-personnel mines to include intra-state conflicts, thus expanding the scope of international humanitarian law to also cover this type of conflict. The obligation to map the location of mines is also intended as a means of providing better protection for the civilian population; the same applies to a ban on the use of plastic mines. Nevertheless, this example demonstrates the ambivalence of international humanitarian law, wanting, on the one hand, to protect civilians in situations of war and, on the other hand, being constrained by efforts to safeguard national military and security interests.

The story of the Cluster Munitions Convention is very similar. In principle, Protocol I of the 1949 Geneva Convention already implies a ban on the use of cluster munitions. In principle, the Protocol bans attacks using indiscriminate weapons, although it does not specifically mention cluster munitions.¹⁴ In November 2003, the international community of states negotiated Protocol V on the marking and clearance of explosive remnants of war within the framework of the CCW. This completely new norm of international humanitarian law entered into force in November 2006 and, in the meantime, has been ratified by 23 states (including Germany). However, Protocol V does not include any general provisions banning the use of cluster munitions (Justen 2007: 1-4; van Woudenberg 2008: 455).

14 Cf. Footnote 4.

The reasons for the demand for a regime regarding humanitarian arms control norms are thus obvious: Within the framework of international humanitarian law it has proven impossible to reconcile the conflicting interests of the various states. Although international humanitarian law is also concerned with strengthening humanitarian norms, efforts are often undermined by national security interests. Humanitarian arms control norms could be established in this particular form as a result of the inability of existing institutional forums, including international humanitarian law, to meet the demands of those states concerned with arms controls. These states initially opted for norm-building efforts within the framework of international humanitarian law. Germany, for example, originally proposed negotiating a ban on cluster munitions as a further protocol to the CCW.

International humanitarian law also serves as a reference base for the arms control efforts of non-governmental organizations in two respects: On the one hand, the NGOs refer to the importance of protecting civilians as the central principle of international humanitarian law. At the same time, they take advantage of the failures and deficits of the norms negotiated within this framework and use them as a starting point for their own efforts to introduce recommendations for alternative arms control institutions.

4. The norm-generating stakeholders of humanitarian arms control

One particular characteristic of humanitarian arms control is its norm-generating stakeholders, also called norm entrepreneurs, who are particularly active in developing new institutions. What is striking about all three regimes is the fact that small and medium-sized states committed themselves to negotiating a new arms control agreement in close cooperation with transnational networks of non-governmental organizations. Moreover, they succeeded despite the declared opposition of major powers. NGOs made the start by identifying the demand for a regime and regulatory gaps. They received support by international organizations, particularly the United Nations. Together, they managed to achieve a change in discourse, since concurring interpretations regarding the security and military relevance of these weapons existed in all three cases. The NGO campaigns initially also met with opposition from the later like-minded states which they had to convince through “better” arguments. Together with these like-minded states, they then sought to increase the group of supportive states. This form of “new diplomacy” seems to have proven of value for humanitarian arms control (Cooper 2002). States as well as non-state actors each provided resources which the other side considered useful for its own efforts of persuasion. With the support of the NGOs the states reached out to the public and managed to achieve a certain degree of legitimacy for their actions. In return, the like-minded states granted NGOs access to the negotiations and, some, albeit limited, influence of shaping the regime (Deitelhoff/Wisotzki 2004). One important

precondition for the process of persuasion was a sophisticated rhetoric which resonated with the public.

4.1 The discursive context: Argumentative starting points for norm development

For the norm entrepreneurs in humanitarian arms control the question of justice in war, and particularly the abolition of moral injustice, served as an important means of persuasion. The norm-generating actors often sought to connect with existing normative standards, as will be seen in the following (Price 1998: 630). Non-governmental organizations fueled doubts about the proportionality of anti-personnel mines or cluster munitions and their use in wars. They especially pointed to their inability to discriminate between combatants and non-combatants in order to achieve a total ban on these categories of weapons. In their discourses, they drew on the moral-philosophical debates on “just war”, which have their roots in the Christian scholastics, for example, in the writings of Augustine or of Thomas Aquinas. However, the “just war” debate is also cross-cultural: “Nothing in it need be alien or repugnant to Muslims or Jews or those of other faiths...”¹⁵. Accordingly, war is “a highly regulated cultural institution” (Finnemore 1999: 149-165) and in itself “an inherently normative phenomenon” (Bull 1977). The constantly growing body of principles, norms and regulations which have been codified in the course of the last 200 years in the form of international humanitarian law is based on this need to regulate violence in war. I have already shown in Chapter 2.1 that the dissatisfaction with the outcome of the negotiations on the CCW and its Protocols also formed an argumentative starting point for the NGO community. The demand for a complete ban on anti-personnel mines is also not without precedent. The campaigns repeatedly referred to the fact that the taboo on the use of chemical and biological weapons contributed to the treaty banning these weapons (Price 1998: 629). The NGOs argued in the case of anti-personnel mines that states should stick to moral principles of “just war” and ban such weapons as they fail to discriminate between combatants and civilian population.

The debate on an appropriate definition of security following the end of the Cold War also served the interests of the NGOs as it stood in line with their own convictions. As states in intra-state conflicts were unable or unwilling to ensure the safety of their citizens, the NGOs referred to the increased significance of the concept of individualized human security and called upon the community of states to act against indiscriminate warfare using anti-personnel mines. Since the 1994 United Nations Development Programme first used the term “human security” in the Report on Human Development to demand a

15 Guthrie/Quinlan (2007: 8). The two authors thus reject the criticism of the “Just War Debate” that it referred to purely western values.

“peace dividend” at the end of the Cold War, this term has become the key concept for mobilizing an undeniably heterogeneous coalition middle-power states, NGOs and international organizations (Ulbert/Werthes 2008: 13). The debate on an appropriate, individualized security concept helped to heighten awareness of changing security policy needs at the international level.¹⁶

4.2 The role of norm-generating stakeholders

4.2.1 *The role of non-governmental organizations*

Non-governmental organizations have secured themselves a solid position in international politics. Their well-designed campaigns and their moral rhetoric enable them to direct the attention of the world public and of their national clientele to normative regulatory gaps (Brühl 2003). As transnational campaigns, they set out to change the attitudes and views of states in order to persuade them to take action. In the past, NGOs were of limited relevance in the field of security policy and multilateral arms control and disarmament as the negotiations were dominated by states. Non-governmental organizations came together to form transnational coalitions in the case of anti-personnel mines, the campaign to ban cluster bombs and the Action Programme on Small Arms. These types of transnational coalitions between non-governmental organizations are usually distinguished by their informal and international character. They are set up on the basis of common values and objectives in order to launch a campaign, to set the agenda on specific issues or, as in the case of humanitarian arms control, to bring about a multilateral agreement.¹⁷

The International Campaign to Ban Landmines (ICBL) was founded in 1992 as a coalition of NGOs with a common goal: As humanitarian aid organizations, they were interested in curbing the effects of the unlimited and indiscriminate use of anti-personnel mines in intra-state conflicts such as in Cambodia or Angola and taking preventive action against the deliberate misuse of mines.¹⁸ In 1996 – at the height of the campaign – the ICBL had more than 600 members from 40 countries (Price 1998: 620). The International

16 In the UNDP report, human security was deliberately broadly defined as “freedom from want” and “freedom from fear” (“community, economic, environmental, food, health, personal and political securities”). Cf. <http://hdr.undp.org/en/reports/global/hdr1994/> (24.10.2009).

17 Khagram/Riker/Sikkink differentiate in this context between transnational coalitions/campaigns, networks and movements which differ according to the degree of their organization: The first group demonstrates the characteristics of a coordinated course of action and joint strategies most strongly in their campaigning. Cf. Khagram et al. (2002: 7).

18 Founding members of ICBL were Handicap International (France), Human Rights Watch (United States), Medico International (Germany), Mines Advisory Group (Great Britain), Physicians for Human Rights (United States) and Vietnam Veterans of America Foundation (United States), cf. Rutherford (2009: 133).

Action Network on Small Arms (IANSA) also began in 1999 as a group of just a few NGOs and grew rapidly over the years. The coalition for the ban on cluster munitions is the most recent transnational network. Launched in 2003 and consisting of 300 members from more than 80 states, it was set up by founding members of the ICBL: Human Rights Watch and the ICBL itself.

The three coalitions show some similarities with regard to their membership; they also pursue comparable strategies. All three campaigns put forward moral arguments in their efforts of persuasion, particularly by referring to the injustice of the use of weapons against civilians. Since the military and strategic relevance of these conventional weapons was undoubted at the beginning of the campaigns, all three networks were faced with the challenge of developing convincing arguments for restrictions of or a complete ban on these weapons. Therefore, the transnational NGO campaigns aimed at contrasting the military relevance of the weapons with the human suffering they cause in order to put their strategic relevance into perspective and successfully discredit them in public. The arguments were based on existing ethical and normative standards such as the proportionality of war within the framework of international humanitarian law and pointed to the indiscriminate effect of the weapons, the suffering of the civilian population and the socio-economic consequences of the misuse of weapons. The drastic description of these “conditions of injustice” helped to draw world public attention to this topic. This process led to the stigmatization of the weapons and was the starting point for the norm-building processes (Borrie et al. 2009: 20).

IANSA members always referred to the fact that the use of small arms in wars and post-war situations helps to violate human rights, undermines individual security and diminishes the effectiveness of development aid (IANSA 2006: 57; Wisotzki 2008: 34). They also publicly denounced the weapons-producing industries and western democracies which produce weapons and export them to the Third World. The significance of human security was emphasized by depicting the individual and personal suffering of victims of mines, cluster bombs or firearms. The aim of the NGOs was to obtain an emotional impact – even on the diplomats involved in the negotiations (Price 1998: 622).

Whereas the campaigns were always based on actions with strong public outreach effects – particularly at the national level – they also became experts in multilateral negotiations and put forward their own ideas and proposals in the course of the negotiations. It was the NGOs that focused the attention of the negotiations on questions of distributive justice, for example on the special needs of affected states and civil society. In the case of the Ottawa Convention, for example, they succeeded in convincing the state parties to commit themselves to include the funding of victim rehabilitation programs as a norm in the Convention. IANSA drafted, *inter alia*, its own version of the PoA, expressing the ideas of the transnational network. IANSA members organized regular meetings of experts with diplomatic representatives, for example, in Geneva, in order to reach an understanding about the possibilities and limits of the PoA.

Ideas of justice, or evidence of injustice, were thus important arguments for the non-governmental organizations, helping them to mobilize public opinion in their home

constituencies and reach governments via this indirect route. Even though norm-building took place at the international level, the transnational networks used their national platforms for their efforts of persuasion. Only when they had succeeded in convincing a number of small and medium-sized powers of the necessity of independent action did norm-building begin to make decisive progress, at least in the case of anti-personnel mines and cluster munitions.

4.2.2 From opponents of negotiations to norm-generating actors: Small and medium-sized powers

The small and medium-sized powers are important actors in establishing norms of humanitarian arms control. They assumed the role of the norm-generating stakeholders on the side of the states and, in the case of the conventions on anti-personnel mines and cluster bombs, ensured that both regimes were negotiated outside existing forums. Whilst Canada assumed the leading role in the Ottawa Process, Norway initiated the Oslo Process which led to the ban on cluster munitions. The two states did not shoulder these – by the standards of arms control negotiations – extraordinary processes alone, but were accompanied, or supported, by a number of like-minded states in a kind of “job-sharing” exercise.¹⁹

However, even the most committed advocates of this new kind of arms control were initially outright opponents of a ban and skeptical towards the transnational NGO networks. It was the failure, or rather the lack of results, of the protocol negotiations within the framework of the CCW that opened a “window of opportunity” for the alternative negotiating processes. The Mine Action Group had previously employed great efforts of persuasion, particularly in Canada, and had found a prominent advocate in Foreign Minister Lloyd Axworthy, for whom a ban on anti-personnel mines was a matter of personal moral conviction. Furthermore, both Canada and Norway were founders of the “Human Security Network”, whose aim was to shape a “just and peaceful world order” with the help of new (development cooperation) initiatives.²⁰ The group of like-minded states which was influential in steering the Ottawa Process consisting of Belgium, Canada, Denmark, Germany, Ireland, Mexico, the Netherlands, Norway, New Zealand, the Philippines, Peru, South Africa, Sweden and Switzerland. Whilst Canada assumed a leading role, other states, for example, Belgium and Germany, had already implemented moratoriums on the export and/or production and use of anti-personnel mines in 1995. The Oslo Process to ban cluster munitions was steered by a similar group of states:

19 Austria, for example, presented the first draft version of the subsequent anti-personnel mine convention; Belgium, Germany and Norway hosted the conferences of states parties. South Africa organized a regional conference to persuade African states. (Rutherford 2009:128ff).

20 Cf. www.humansecuritynetwork.org (15.8.2009).

Austria, Ireland, Mexico, New Zealand, Peru, the Vatican and Norway. These groups of like-minded states assumed different functions; for example, drafting the text of the conventions or organizing state conferences.

Norm-building in the realm of small arms and light weapons developed along quite different lines. There were never any doubts about the legitimacy of state security needs and thus about the legal possession of small arms. The aim was not to negotiate an actual ban, but to limit the illicit trafficking of arms – particularly involving non-state actors – and to provide help for the affected states. Even the norm-seeking stakeholders with the greatest interest in an agreement advocated negotiations within the framework of the United Nations. A number of states called for more comprehensive norms but did not succeed due to the principle of consensus on which the negotiations were based. The group of like-minded states originally consisted of Belgium, Canada, Japan, Mali, Norway, South Africa and Switzerland. They favored various elements of a control regime for quite different reasons: Mali, for example, as a state which is particularly affected by the proliferation of small arms as a consequence of violent, internal conflicts, had initiated a moratorium on imports and exports and on the production of small arms within the framework of the ECOWAS states in 1998 and was interested in an universalization of these norms (Wisotzki 2000: 232). In South Africa, the national NGO network, SACBL, had a prominent supporter in Nelson Mandela at its head and many top bureaucrats at his side. Their shared past in the anti-apartheid movement made it easier for members to gain access to decisive government agencies which, in turn, were open for “humanitarian issues” (Rutherford 2003: 30).

4.2.3 The third group involved: The role of international organizations

The United Nations and regional as well as sub-regional organizations were important stakeholders for the three norm-generation processes. On the one hand, they succeeded in highlighting problems, as was the case with the United Nations. On the other hand, the regional organizations in particular developed problem-specific solutions whose scope was usually wider than that of the global regime. This applies in particular to the problem complex of small arms. UN Secretary-General Boutros-Ghali made a start in 1995 by commissioning a group of experts to study the problems connected with the illicit trafficking and proliferation of small arms. In its report, the group recommended the normative regulation of this problem within a global framework. With UNGA Resolution 54/54V at the end of 1999, the Member States established the preconditions for the negotiations on the PoA. The previous year, the UN Office for Disarmament Affairs (UNODA) had established a mechanism to coordinate action to control small arms (CASA) in order to serve, on the one hand, as an UN-internal contact point – also for peace-keeping missions – and, on the other hand, to later assume responsibility for

implementing the PoA.²¹ The United Nations also made its field experience available within the framework of the Oslo Process. It supported the transnational NGO campaign in its efforts to outlaw these types of weapons. Compared to the Ottawa Process, giving expertise and doing lobbying work has considerably increased within the UN bodies (Borrie et al. 2009: 20).

One should not underestimate the role of regional and sub-regional organizations in substantiating the need for a regime as well as in implementing this institution. For example, the Member States of the European Union focused their attention at a very early stage on the problem of illicit trafficking of small arms and were one of the most important driving forces behind the PoA. The EU Member States had already developed the Program on Illicit Trafficking in Conventional Arms in 1997. This was intended, among other things, to strengthen national export control legislation and encourage cooperation with third party states. A year later, the EU States approved the EU Code of Conduct on Arms Exports and strongly supported the introduction of a norm to control legal arms exports during the negotiation process on the PoA. The OSCE also became a normative stakeholder by agreeing on numerous measures to fight the illicit trafficking of small arms. The OSCE Handbook of Best Practices on Small Arms and Light Weapons is of particular importance for the implementation of the PoA and contains overviews of the necessary control standards as guidelines in eight fields relevant to proliferation, for example, export controls.

The PoA was negotiated by consensus and the many regulatory gaps resulting from the opposition of individual states had to be accepted. It was for this reason that other regional and sub-regional organizations, in Africa for example, proceeded to introduce their own framework agreements on SALW controls. These included the ECOWAS Protocol on the Proliferation of Small Arms and Light Weapons, which stipulates that Member States should provide neither of these items to non-state actors. In June 2006 it became the ECOWAS Convention on SALW and thus a legally-binding document for the whole West African region. The 2004 Nairobi Protocol also includes significant efforts towards the harmonization of small arms control between states in the Great Lakes region and the Horn of Africa. It subjects the private possession of weapons to new legislative procedures – a gap which could not be closed in the global norm-building process of the global PoA.²² All in all, these examples demonstrate that international and regional organizations assumed important functions in the evolution of norms and in the further differentiation of the provisions of the PoA. In the specific case of the United Nations, the staff of UNODA contributed important expertise to the various negotiating processes and supported the norm-building efforts of the non-governmental organizations.²³

21 www.un-casa.org (24.10.2009).

22 Cf. Chapter 6.

23 See www.poa-iss.org/poa/poa.aspx.

5. Characteristics of norm-building efforts in humanitarian arms control

Humanitarian arms control is characterized by particular features which indicate a structural change in arms control and disarmament and which this Chapter will consider in more detail. In Chapter 4, I referred to the special cooperation between small and medium-sized powers and transnational networks of non-governmental organizations. After taking a look at the stakeholders, this Chapter will go on to focus on the normative settings of humanitarian arms control. The focus on human security mentioned above played a constitutive role for this new form of arms control, in which humanitarian principles were applied, for example to protect the civilian population and taking their special security needs into account. Various principles of justice also played an important role and were applied in the generation of norms. This Chapter will outline the genesis of the respective regime and will proceed to take a more detailed look at the structural change and the inherent principle of justice.

In December 1997, 122 states signed the Anti-Personnel Mine Ban Convention, the so-called Ottawa Treaty. It banned the production, export, stockpiling and use of this category of weapons.²⁴ Remaining stockpiles were to be destroyed within four years. The goal of clearing all anti-personnel mines in mined areas appears even more ambitious: The signatory states committed themselves to clearing all mines within ten years. Article 6 of the Ottawa Treaty specifies financial and technical assistance for affected states. On the other hand, the Treaty forgoes the usual elements of classical arms control, for example, a sophisticated verification system. So-called “fact-finding missions” may be authorized upon suspicion of the violation of clauses of the Treaty, but otherwise the Convention is based on “soft” forms of verification: annual reports by the signatory states on the status of implementation, supplemented by the ICBL’s annual “Landmine Monitor”.

As a result, the Convention devotes itself to the problems of mines in a very distinctive way and demonstrates the typical characteristics of humanitarian arms control. These include *inter alia* offering affected states assistance with mine clearance and focusing on victim rehabilitation: in other words, a change of perspective from state security to human security. On the whole, the Treaty attaches considerable importance to applying central principles of justice such as equality, proportionality, compensation and consideration of special needs. To start with, all states are called upon to refrain from the production, stockpiling, export and deployment of anti-personnel mines. Article 6 takes the principle of proportionality into account by including the right of those states which are particularly affected to both technical and financial assistance for mine clearance operations and measures to destroy stockpiles.

24 Cf. www.un.org/Depts/mine/UNDocs/ban_trty.htm (5.10.2009).

Such strong results could only be achieved by setting-up a special negotiation process which was designed by Canada and other like-minded states. Initially, all interested states were entitled to participate in the negotiations, but at a certain point they had to commit themselves by signing a declaration (conference in Brussels in June 1997) stating they supported the Treaty: Only these signatory states were admitted to the final round of negotiations.

Although a global ban on anti-personnel mines could not be achieved on this basis, there has nevertheless been an impressive decline in the number of landmine victims. A number of states, including major producers of anti-personnel mines such as China, Russia, the USA, India and Pakistan, did not accede to the Ottawa Convention. Nevertheless, they too are abiding by its norms and have so far not used or exported anti-personnel mines. Furthermore, the United States has provided the world's largest budget for mine clearance operations. It is too early to speak of a developing taboo because there have been violations of the Convention. Nevertheless, the Anti-Personnel Mines Convention has contributed to the stigmatization of these types of weapons.

Of the 156 signatory states, 83 have destroyed their stocks, totaling 41.8 million anti-personnel mines.²⁵ The balance with regard to mine clearance is less straightforward: A large number of states were supposed to have cleared all anti-personnel mines on their territory by March 2009. Bulgaria, El Salvador, Swaziland and Macedonia can already report success. Heavily mined states such as Bosnia-Herzegovina, Croatia or Mozambique will not be able to observe the deadline. Furthermore, a number of Western states have also been lax in enforcing the regulations, including Denmark and Great Britain, which still has to clear mines on the Falkland Islands.²⁶ Meanwhile, 24 states which are seriously affected by mines have stated that they will be unable to observe the ten-year deadline due to lack of international support. These include Afghanistan, Burundi, Eritrea and the Democratic Republic of Congo. Whilst mine clearance is making progress, there is still a shortage of funds for victim rehabilitation measures.²⁷

The international campaign against cluster bombs was founded in November 2003 with the aim of banning cluster munitions.²⁸ The transnational NGO campaign received support from the EU Parliament, which passed a resolution in October 2004 calling upon its Member States to observe moratoriums unilaterally and to work internationally in support of a ban on cluster bombs. From 2006 onwards, Belgium, Norway and Austria were the first states to speak out in favor of the ban on cluster munitions. Following the disappointing results of the Protocol V negotiations of the CCW, the Norwegian

25 Cf. www.icbl.org/news/sd_bckgr and www.apminebanconvention.org/en/background-status-of-the-convention/destroying-stockpiled-mines/ (16.5.2009).

26 Cf. www.icbl.org/news/treaty_deadlines_bckgr (16.3.2009).

27 Cf. www.apminebanconvention.org/en/background-status-of-the-convention/assisting-the-victims/ (16.3.2009).

28 In the meantime, according to its own figures, the campaign includes more than 250 non-governmental organizations from 70 countries. Cf. www.clustermunitions.org (6.10.2009).

government copied the Canadian example and launched the Oslo Process. Like the Ottawa Process, the ban on cluster munitions was initiated outside the negotiating forums of the United Nations. The like-minded states assumed different responsibilities. The process was brought to a successful end in Dublin/Republic of Ireland in May 2008 following five meetings of states parties.

Like the Ottawa Convention, the Oslo Convention took the aspect of human security into account by including an article on victim rehabilitation. Elements of procedural fairness were reflected in the institutional design of the negotiating process: The non-governmental organizations were granted participation rights, thus recognizing their key role in the talks in the run-up to the actual negotiations. The design of the Treaty took into account principles of distributive justice, proportionality, the recognition of particular needs and compensation. For example, the costs-by-cause principle applies to the clearance of cluster munitions and includes the obligation to provide comprehensive assistance to those states on whose territory these weapons were deployed. Moreover, donor countries are called upon to provide comprehensive technical and financial support and to take into account the socio-economic rehabilitation of the mined areas.

Whereas it was possible to negotiate a complete ban on anti-personnel mines and cluster bombs, this vision was never even considered as realistic in the case of SALW – due to the legitimate security interests of all states which need to keep these weapons for equipping their national police and armed forces. Nevertheless, the 2001 PoA sets out to tackle the problem of the illicit trafficking of SALW in a variety of ways.²⁹ A politically binding action program was agreed upon in New York, calling upon all states to institute preventive and reactive measures to stop the uncontrolled and unlimited proliferation of small arms. The aim of the Action Programme is to tackle the causes of demand for and supply of small arms.³⁰

The reasons for demand of SALW are to be found primarily in the relationship between weak statehood, economic deprivation, and conflicts over resources in an increasingly regional and transnational dimension. On the supply side, one has to take into account the various forms of globalized licit and illicit trade in small arms. A major part of today's stocks of weapons, especially in the conflict regions of sub-Saharan Africa, date back to the period of the Cold War when both superpowers supplied their clientele states with military aid and weapons in order to secure their own influence (Laurance 1998: 22; Wisotzki 2000: 223). After 1989, the members of the former Warsaw Pact and NATO reduced their armies and conventional weaponry. Surplus weapons reached conflict regions via direct or indirect routes (Volman 1998: 150-163). According to estimates, legal state trade accounts for 8 million small arms per year (Small Arms Survey

29 Cf. Report by the UN Panel of Governmental Experts on Small Arms, 27. August 1997, A./52/298 and Report of the Group of Governmental Experts on Small Arms, 19. August 1999, A/52/258.

30 Cf. Chapter 4 for details.

2003: 98). This leads to the constant proliferation of pistols and machine guns in crisis regions, as the delivery of Chinese weapons to Zimbabwe in April 2008 demonstrated.³¹ The lack of global and binding norms regulating the legal trade in small arms is probably the greatest weakness of the PoA in its current form. There are also problems due to manufacturing licenses which western democracies as well as the former Soviet Union have allocated to Third World countries for the production of small arms. Finally, the supply side is also controlled by non-state actors: by professional arms dealers, organized crime and illegal local manufacturers (Small Arms Survey 2003: 97-116).

The Programme of Action tries to tackle these complex relationships. In addition to improving or restoring state security through arms control measures, the PoA sets out to improve the individual security of citizens. It provides various initiatives at the global, regional and state level such as national contact points and coordination agencies in order to facilitate inter-state cooperation, particularly between donor and recipient countries. This structural change is enhanced by the provision of technical and financial aid to states which are particularly affected by the proliferation of small arms and light weapons.

A further norm calls upon states to get an overview of their stocks of SALW, being held by the police and the national army. Surplus stocks are to be destroyed instead of being sold to third parties. Illegal production as well as the illicit possession, trade and transfer of small arms should be made punishable. Cooperation at the regional level should be improved: For example, national rules and regulations governing the transfer of SALW should be coordinated and harmonized at the regional level.

Unlike classical arms control agreements,³² the Programme of Action does not have any verification mechanisms – instead it was agreed to have biennial meetings of state parties. The states met in 2003 and 2005 to present a status report on the progress made in implementing the Action Programme (UNIDIR 2003). However, the discrepancies between the extensive reports presented by the states and the norms and measures which they had actually introduced became apparent at the first Review Conference in July 2006. For example, 102 countries stated that they were attending to the security of state stockpiles and had relevant standards and procedures. Yet only 30 states have reviewed or improved these standards. In weak states, poorly paid soldiers and police forces use these stockpiles to conduct a lucrative business, and one must be cautious in dealing with at least some of the national reports. The weaknesses of the PoA also became apparent in the area of transfer controls where there is an absence of global standards which could serve as a guide for the international community of states. The number of disarmament processes also appears inadequate: only 62 states have conducted disarmament in the field of small arms, 73 have destroyed surplus weapons.³³

31 Cf. www.iansa.org/regions/safrica/ZimShipment.htm (23.5.2008).

32 The only exception here is the biological weapons regime. Cf. Becker et al. (2005).

33 Cf. www.international-alert.org/pdfs/BtB_global.pdf (19.5.2009).

The Programme of Action on Small Arms combines different forms of distributive justice. For one, the principle of equality dominates: According to this principle, all states must review their legal stocks of small arms, close legal gaps and present regular reports on the implementation of the PoA to the United Nations. Apart from the principle of equality, the Programme of Action also takes into account the principle of proportionality and the differences in the needs of the member states. Accordingly, it contains norms and rules for handling small arms in post-conflict situations: The focus here is on disarmament, demobilization and reintegration programs. Weak states which are affected by the high proliferation of small arms may receive assistance for their national programs from the donor countries. Measures to deal with the vicious cycle of violence and to remove weapons from society are to be implemented at the local level in cooperation with the civilian population.

Subsequent UN working groups succeeded in drafting two further politically binding documents on SALW control: An instrument on the marking and tracing of newly produced small arms was adopted in 2005 as well as norms to regulate brokerage by non-state actors, according to which they are subject to the national legislation of their native countries.³⁴ Two further groups of UN experts have been set up to think about solutions for important sub-issues of small arms proliferation. The UN Group of Experts which is to draft recommendations for dealing with the issue of conventional ammunition stockpiles in surplus met under German chairmanship in the first half of 2008. Incidents in Mozambique in March 2007, or in Albania a year later, demonstrated that such ammunition stockpiles represent a considerable danger to the people. A further UN Group of Experts has developed ideas on the question of a global standard for controls on transfers of conventional weapons. In this case a transnational NGO campaign also took over the agenda setting and is currently monitoring the progress towards the resumption of negotiations on an Arms Trade Treaty.³⁵

6. Handling norm conflicts

Humanitarian arms control is characterized by certain moral principles and principles of justice. This Chapter will take a look at the conflicts in norm development which determine both the processes of negotiations and the implementation of norms. It will demonstrate the ambivalence in norm-generation efforts in humanitarian arms control: the moral aspirations of the transnational campaigns of the non-governmental organizations in particular are thwarted by state's particularistic national security

34 Cf. <http://disarmament.un.org/CAB/salw-oewg.html> (22.5.2009).

35 Cf. www.controlarms.org (23.5.2009).

interests. Powerful states such as the United States, Russia and China opposed the norm-building processes on the grounds of national interests and, in some cases, blocked important norms or turned them into an object of conflict. It should be mentioned that opponents to norm-building include both democracies and non-democracies. One would expect democracies in particular to be especially committed to the development of norms in the field of humanitarian arms control because the underlying moral convictions and normative principles closely resonate with democratic values (cf. Becker et al. 2008: 810-854). Quite to the contrary, an ambivalence between norm-building efforts and national interests can be identified, such as in the case of the United States, particularly under the Bush administration. The opponents of certain norms of humanitarian arms control were able to dominate the negotiating processes – the explanatory variables in this case are the particular venue for the negotiations and the respective procedural principles: The more consensual the institutional framework, the weaker the negotiated outcomes and thus the norm-building processes.

6.1 Norm conflicts in the three negotiating processes

With the anti-personnel mines convention and the ban on cluster munitions, it was possible to negotiate two regimes banning entire categories of weapons. Decisive for the success of these regimes were the respective negotiating processes which the like-minded states established outside existing institutions such as the United Nations or the Geneva Conference on Disarmament. However, the legitimacy of these processes was not undisputed. The United States, Great Britain, Australia and France, together with a number of other states, tried to launch a negotiation initiative parallel to the Ottawa Process within the framework of the Geneva Conference on Disarmament. They aimed for a regime with a limited range which would have banned only the transfer of anti-personnel mines. This attempt failed, however, due to the general blockade on negotiations at the Geneva Conference on Disarmament (Arms Control Reporter 1997: 5).

The differences in the institutional frameworks of the negotiating processes were also noticeable with regard to questions of procedural justice. While the transnational campaigns of the non-governmental organizations in the Ottawa and Oslo processes were involved in the negotiations right from their beginning, the PoA was mainly negotiated behind closed doors by state representatives without the direct involvement of civil society stakeholders, although a number of NGOs were certainly present in New York.

Norm conflicts occurred over various aspects; first and foremost over the question of an appropriate definition of the respective category of weapon. The conflict between humanitarian views and tangible national military and security interests became particularly clear when negotiating the definition. The Ottawa Process had already experienced an intense struggle over the definition of those anti-personnel mines which were to be banned. To the immense displeasure of the ICBL, anti-tank mines with so-called anti-handling devices are exempted from the ban. The definition issue was also the

subject of controversial discussion during the negotiations on the ban on cluster munitions. Germany had already presented a three-phase plan in the run-up, according to which dangerous munitions with a high rate of failure should be banned immediately and other cluster munitions within ten years. There were to be exemptions for so-called alternative munitions which “took into account the protection of the civilian population”. Germany received support from Australia, Canada, France, the Netherlands, Sweden and Switzerland – and thus from states which also produce these alternative cluster munitions. The German Ministry of Defense justified this definition, stating that these high-accuracy munitions did not have indiscriminate area effects and were extremely reliable in distinguishing between military and civilian targets. It was necessary to maintain these munitions in order to be able to meet national NATO commitments within the framework of current operations. There was opposition to this proposed definition from African and Latin American countries, which referred to the injustice of such a definition as they were not in a position to restock their arsenals with expensive high-tech munitions (Aktionsbündnis Landminen.de 2008:3). Paragraph 2c finally specifies which types of cluster munitions are not covered by the ban: They must contain fewer than ten explosive submunitions, which weigh less than four kilograms and furthermore are equipped with an electronic self-destruction mechanism. As far as Germany was concerned, accession to the Treaty means that it has to destroy 95 percent of its cluster munitions. Article 21/3 also triggered norm conflicts: This stipulates that states parties may cooperate in military alliances with states not party to the Convention, even though these activities may violate the rules of the Oslo Convention and involve the use of cluster bombs. This norm, too, is based on considerations of alliance cohesion as well as on experience with the Anti-Personnel Mines Convention, where the lack of a corresponding norm led to legal problems during NATO missions.

The question of a definition of small arms was also a huge stumbling block in the negotiations on the PoA, which is why the parties resorted to an existing definition: The state parties adopted the definition of the 2000 UN Firearms Protocol. The greatest norm conflicts in the negotiating process on the Programme of Action were over the meaning of illicit trafficking and as to what extent it should also include legal, state-to-state transfers. Whereas the EU Member States in particular were in favor of such a wide definition, opposition came from the US, Russian and Chinese delegations. The United States also refused to accept a norm on domestic gun control and a ban on the transfer of small arms to non-state actors, which the African states in particular had advocated. Due to the consensus system of UN negotiations, these norms and provisions had to be left out of the PoA. This is generally perceived as a serious weakness of a program which is in any case only politically binding.

Military security interests had already been of key importance for the United States in the Ottawa Process and the US also tried to seek exemptions in the final negotiation round at Oslo. The United States’ position on the Anti-Personnel Mines Convention was ambivalent from the very beginning. On the one hand, former US-President Clinton shared the moral conviction and the humanitarian interests of the US-based NGOs; on the other hand, the US Department of Defense insisted on the protection of national security interests and the retention of mine capabilities. First of all, an attempt was made

to set up alternative negotiations at the Geneva Conference on Disarmament, but then Clinton yielded to pressure from the national NGO campaign to take part in the final negotiations in Oslo. The supreme commanders of the US armed forces, who had previously been consulted, instructed the negotiating delegation to insist on the following conditions: An exemption for the use of anti-personnel mines along the Korean border; an extension of the transitional deadline of nine years during which technical alternatives can be developed; an exemption for anti-personnel mines which are used in conjunction with anti-vehicle mines, and the possibility of leaving the Treaty immediately in the case of “supreme national interests” (United States 1997: 1-3; Wareham 1998: 213). The realization of these demands would have seriously damaged the effectiveness of the Treaty – some of the like-minded groups of states, including Canada and Germany, tried to persuade the United States to join in order to enhance the universality of the ban and thus strengthen the legitimacy of the Treaty. But those states affected by anti-personnel mines in particular refused to comply with these hegemonic demands and were supported by the transnational campaign of the non-governmental organizations. The US delegation finally declared its withdrawal from the negotiations and the conflict of norms was solved in favor of a ban on anti-personnel mines with no exceptions.

The specific form of the negotiations meant that it was possible to solve this normative conflict with an effective Treaty. The fact that the Ottawa Treaty was negotiated outside existing institutions meant that it was possible to circumvent the principle of consensus. This example clearly shows that more inclusive negotiation processes must not necessarily always lead to more effective institutions.

Although hegemony and the attempt to enforce national interests failed in the case of the Anti-Personal Mine Convention, they did determine the negotiations on the PoA. Norm conflicts also dominated the first Review Conference in 2006 which sought to tackle the program’s weaknesses. Here too, the United States, but also other major powers refused to agree on common standards of transfer controls, the ban on non-state actors, and the regulation of the civilian possession of weapons. The future of the Action Programme was at stake when the United States also refused to agree to further biennial meetings of states to ensure the implementation of a rather weak program. In the end, the first Review Conference closed without a final document, which initially led to the further undermining of the Action Programme (Wisotzki 2006; Taylor 2006: 46).

But it was not only the United States which provoked normative conflicts during the negotiating processes. National interests, for example, also determined China’s refusal to agree to the inclusion of a norm on the violation of human rights resulting from the misuse of weapons in the Preamble to the Programme of Action on Small Arms. The former non-aligned states, on the other hand, insisted on including the connection between small arms disarmament and nuclear disarmament in the Preamble to the Programme of Action, but were unable to assert themselves in the face of opposition from the P-5 states.

7. Conclusion and outlook: The future of humanitarian arms control

Fragile statehood, poverty and under-development, war economies, conflict over resources, terrorism, transnational organized crime and the privatization of security have all been named as core challenges of the 21st century. In this context, international attention is focusing increasingly on the problem of illicit trafficking and the indiscriminate use of certain forms of conventional weapons which inhibit the individual security of the civilian population as well as the socio-economic environment of the countries affected. The international community of states, together with the transnational campaigns of the non-governmental organizations, has begun to introduce new forms of arms control and disarmament in order to meet these challenges.

This structural change towards humanitarian arms control and disarmament can be identified on the basis of certain indicators. Transnational campaigns by non-governmental organizations and small and medium-sized countries are identified as the most important normative agents. Despite opposition from large powers such as the United States, Russia and China, these alliances succeeded in initiating negotiation processes which succeeded with a complete ban on an entire category of weapons in the case of anti-personnel mines and cluster bombs. This form of “new diplomacy” is characterized by the mutual provision of resources: Whereas states cooperated with NGOs in order to gain legitimacy, they in turn offered the civil society actors access rights to participate in the negotiating processes and thus a certain influence on the development of the new norms. International organizations such as the UN Office for Disarmament Affairs helped to define the problem and the need for the regimes. Regional organizations established more extensive norms and regulations than would have been possible on a global level, particularly in the context of the uncontrolled proliferation of small arms. On the whole, a comparison of the three regimes of humanitarian arms control also demonstrates the importance of the institutional design of the negotiating processes and its consequences for norm development. The Ottawa and Oslo processes were deliberately established outside existing institutions in order to achieve faster negotiation results and more rigid bans. The Programme of Action on Small Arms, on the other hand, was not able to implement important norms in the face of opposition from a few states which led to the weaker development and implementation of norms.

The change of perspective is also evident in the form of a different, individualized concept of security: The new arms control agreements correspond to the broader context of human security. They set out to mitigate the consequences of the misuse of weapons during and following conflicts, but also to enable states to gain control and sovereignty through security sector reforms. The new arms control regimes are to be seen in the context of a “new humanitarianism” whose central aim is to eliminate fundamental matters of injustice: the murder and wounding of innocent people and civilians who are not involved in the conflict. This humanitarianism is based on overriding moral principles such as the commitment to global solidarity in the case of massive violations of human rights. Issues of justice thus became the immediate basis for action and inspired

the development of norms at a global level; for example, in the field of international criminal jurisdiction or arms control. Questions of justice were taken into account in justifying the need for a regime when the indiscriminate use of conventional weapons was described as “injustice”. Principles of justice also played a decisive role in the processes of negotiation: Principles of just distribution had an effect on norm development itself and principles of procedural justice helped non-governmental organizations to participate in the negotiations in the context of providing assistance for the affected countries or victims.

But ultimately the ambivalence of a moralistic effort to improve world affairs and particularistic national security interests revealed itself not only in international humanitarian law but also in the processes to negotiate these new forms of arms control and disarmament. The discrepancy between humanitarian causes and national interests was most blatant in the case of the PoA, where it was not even possible to close the normative gaps at the first Review Conference. The incongruity between normative declarations and their political realization was revealed in the implementation of the treaties and action programs: Although weapons were cleared, collected and destroyed, there was a lack of funds specifically for victim rehabilitation, that is to say, for the central issue of humanitarian arms control. In other words, although the principles of justice, proportionality, compensation and recognition of the particular needs of affected countries were an important incentive for the negotiations, in retrospect it is clear that the actual implementation and funding of these norms has been very laggard.

There is still further need for state action at the level of norm-building. Probably the most serious shortcomings of the PoA are its lack of binding norms to regulate the legal transfer of small arms. The seizure of a ship with weapons from China destined for Zimbabwe by dock workers in South Africa in 2008 once again revealed the precarious status of the PoA, which does not regulate legal state transfers even when these weapons are exported to crisis and conflict regions. An Arms Trade Treaty (ATT) is now intended to close this normative gap. The initiative originated from a coalition of transnational non-governmental organizations in 2003. In October 2006, a large majority of states approved the first UN General Assembly resolution on such an arms trade treaty which is intended to develop global standards to regulate the import, export and transfer of conventional weapons. First of all, a group of experts was charged with testing the scope and limits of such an ATT. However, blatant differences between the 28 government representatives became obvious even at this stage; for example, over the question of the scope of the agreement, whether it should seek to be legally binding, or whether such an agreement, like the Action Programme on Small Arms, should not simply aim to be politically binding (da Silva 2009: 149). The group of experts was unable to answer the question of what principles and norms should regulate the global transfer of arms in the future – apparently the only point where agreement was reached was that the UN Charter with its general principles should serve as the basis for negotiations. The demands of the

coalition of non-governmental organizations go much further than this: Transfers of weapons should no longer be approved if the recipient country violates globally recognized principles (of justice), that is to say, violates universal human rights or international humanitarian law.³⁶ These demands have received the support of a large majority of the community of states, including the Member States of the European Union, which made the EU Code of Conduct legally binding in 2008. The ATT could develop to become an important touchstone for humanitarian arms control since global standards for regulating the transfer of weapons touch the very nerve of state security interests. The UN Member States must now reveal how much importance they attach to humanitarian arms control and the recognition of universal global norms – such as the Universal Declaration of Human Rights or international humanitarian law – and thus how much importance they attach to the central moral principles of a future world society.

36 Cf. www.controlarms.org (12.9.2009).

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