

# **The Administration of Arms Control - Ensuring Accountability and Legitimacy of Field Operations**

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## **1. Introduction**

Arms control depends both on top-level legal and political agreements, and on a raft of practical measures, including field operations. These are interdependent, but the practical measures, many of which have an administrative character, have received much less analysis than they warrant. This article focuses on integrating the overall normative text with specific practical dimensions of field operations for humanitarian demining, weapons collection, and other arms control purposes. After two decades of gradually declining interest, arms control and disarmament have recently crept back into the spotlight. This is primarily due to the re-emergence of concern about nuclear destruction (concerns which had faded after the end of the cold war), and to the Obama Administration's placing arms control high on its agenda.<sup>2</sup> It remains to be seen whether the newfound interest and good intentions will lead to any concrete results but some developments give rise to cautious optimism.<sup>3</sup>

That is not to say that there has been no progress in arms control in the period after the end of the cold war.<sup>4</sup> In fact, the lack of political leadership from the nuclear weapons states in disarmament

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<sup>1</sup> The views expressed in this article are personal and cannot be attributed to the Ministry. A substantial amount of information about field missions comes from confidential reports about arms control projects, which therefore could also not be quoted. Thanks are due to Mr Michael Leitgab for his meticulous compilation of these primary sources.

<sup>2</sup> See the speeches of President Obama held in Prague on 5 April 2009 and in Cairo on 4 June 2009 and the bilateral negotiations between Russia and the US on reductions of nuclear weapons in view of the expiration of START at the end of 2009; and the special meeting of the UN Security Council on nuclear disarmament and non-proliferation on 24 September 2009 (UN S/RES/1887 (2009)). Concerns about nuclear destruction have been fuelled by the debates about the Iranian and North Korean nuclear programs, the growing interest in nuclear energy and technology worldwide and the conclusion that nuclear terrorism may, in the long run, be unavoidable.

<sup>3</sup> In reaction to the US' proposals several states have presented disarmament initiatives, among them the nuclear powers Russia and the United Kingdom. At the NPT-Preparatory Committee in New York in May 2009 the positive atmosphere enabled quick agreement on an agenda for the 2010 NPT-Review Conference. Perhaps the best indicator that political will to achieve progress has returned in earnest is the agreement in the Geneva Conference on Disarmament at the end of May 2009 on a programme of work, ending 12 years of deadlock.

<sup>4</sup> Positive examples include the indefinite extension of the Nuclear Non-Proliferation Treaty (NPT) and the adoption of the Comprehensive Test Ban Treaty (CTBT). The Nuclear Non-Proliferation Treaty was adopted in 1968 and entered into force in 1970. Membership of 188 States, including the five recognized nuclear-weapon States, makes the Treaty the most universal nuclear arms control instrument. It was indefinitely extended in 1995 but has since come under pressure from many sides in particular after the nuclear tests by India and Pakistan and its member state North Korea (although North Korea claims to have withdrawn from the regime). The Review Conference 2005 was a dismal failure and the approval of the Nuclear Suppliers Group of the US-India Nuclear Deal generally raised the question about the continued relevance of the NPT. The 2010 Review Conference will demonstrate the level of commitment by the international community to maintain the NPT as one of the pillars of the international security architecture. The CTBT was negotiated at the Geneva Conference on Disarmament and opened for signature in 1996. It has not yet entered into force because this requires ratification from all states listed in its Annex 2. From this list nine states currently still need to ratify: the US, China, Indonesia, Israel, Egypt, India, Pakistan, Iran and North

and the failure of large multilateral conferences such as the NPT-Review-Conference 2005 facilitated the emergence of initiatives by other states and enabled international organisations, civil society and private companies to participate directly in arms control and disarmament, especially in the humanitarian field.<sup>5</sup> Not surprisingly, the resulting activity is fragmented and largely uncoordinated.<sup>6</sup> This is particularly evident in the efforts conducted towards containment of the harm done by smaller conventional weapons, in particular land-mines, cluster munitions and small arms and light weapons (SALW) which will be examined in this article. Here, the past years have witnessed the evolution of a complex operational activity by various entities whose work is formally conducted within the framework of political programs and instruments created by traditional international actors but who often operate with candid indifference to any general rules or procedures of the wider system. In view of the generally difficult working conditions in the field, both formal public institutions and private entities are dependent on one another and complement each other in many ways.

Unlike the formal field missions in the context of weapons of mass destruction,<sup>7</sup> controlling conventional arms in the field - such as clearing minefields and destroying small arms - are conducted by a multitude of institutions with little local regulation and oversight. Many questions about the rule of law and good governance arise in this respect, especially regarding internal administrative procedures, inter-agency cooperation, accountability and responsibility, relations to host states and donors. The manner in which these issues are dealt with can influence how the mission as whole is perceived, especially as regards legality and legitimacy, and this in turn will have a significant impact on donor support and on the overall success of the project.

For this paper, the reports on a number of arms control field projects have been examined to identify the central challenges facing field missions and the means that have been developed to address them. The techniques and procedures that evolved both within the field operation and in the relations between the field missions and outside entities, in particular established organs of states and international organizations, have a distinct administrative character.<sup>8</sup> In the first part of the paper, the current global framework of programs, instruments and institutions devoted to arms control and disarmament will be outlined. This is the platform that forms the systemic foundation for the field activity. Subsequently, field operations will be analyzed to determine what

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Korea. There is hope that the US Senate will ratify the Treaty in the near future and that this, in turn, spurs further ratifications.

<sup>5</sup> This humanitarian agenda enabled two very positive results: The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (the “Mine Ban Treaty”) was adopted in Ottawa in 1997 and entered into force in 1999. The Convention on Cluster Munitions was adopted at the Dublin Conference in May 2008 and signed in Oslo in December 2008. The core group of states that elaborated the text of the Convention and drove the process consisted of Austria, Ireland, Mexico, New Zealand, Norway, Peru and the Holy See.

<sup>6</sup> In the nuclear arena examples include the Proliferation Security Initiative (PSI), the Global Initiative to Counter Nuclear Terrorism (GICNT) or the proposal for a multilateral nuclear fuel bank proposed by the Nuclear Threat Initiative. The Hague Code of Conduct is a confidence-building regime that encourages notification of ballistic missile launches. Export control regimes for various types of weapons include the Wassenaar Arrangement, the Missile Technology Control Regime and the Australia Group.

<sup>7</sup> Field missions in the context of countering weapons of mass destruction usually adopt the form of highly regulated inspection visits, such as inspections of pre-determined technologically relevant sites by the International Atomic Energy Agency and the Organization for the Prohibition of Chemical Weapons. Bilateral disarmament treaties also foresee verification visits.

<sup>8</sup> Obviously this character is not reserved for practical arms control projects but can be found as well in other areas of international relations which rely heavily on field operations, as human rights, humanitarian assistance, etc.

challenges exist in practice and which administrative means have been developed to address them. Special attention will be devoted to the secondary norms of missions, especially those governing accountability, and to the relationship between the internal legal system of the field operation (often conceived as a largely autonomous self-contained regime) and the legal system of its higher authority and general international law. Finally, since the increasingly relevant role of NGOs in international arms control raises questions regarding the legitimacy and legality of their involvement, the participatory role of civil society in arms control and its conformity with basic principles of international administrative law will also be examined.

## 2. The global response to the harm caused by smaller conventional arms

As regards potential damage, smaller conventional weapons such as landmines, cluster munitions and SALW may appear far less devastating than a weapon of mass destruction. But due to their numbers in circulation, they inflict ravaging harm on whole societies every year. According to a UN estimate 875 Million small arms and light weapons were in circulation in 2008. More than 500.000 people are killed every year by these weapons, 90% of victims are civilians - mainly women and children.<sup>9</sup> Before the Mine Ban Treaty entered into force, the ICRC estimated that every month 2000 people were killed or maimed by landmines.<sup>10</sup> In the last 40 years thousands of civilians were killed by cluster munitions in over 30 countries and mines and cluster munitions have contaminated vast stretches of land, rendering it inaccessible and unusable for the local population recovering from conflict.<sup>11</sup>

On the whole, the impact of these weapons causes significant economic, societal, humanitarian and development costs which are a particular burden for afflicted developing states. Former UNSG Kofi Annan underlined this in the Millennium Report in respect to small arms:

The death toll from small arms dwarfs that of all other weapons systems—and in most years greatly exceeds the toll of the atomic bombs that devastated Hiroshima and Nagasaki. In terms of the carnage they cause, small arms, indeed, could well be described as “weapons of mass destruction”.<sup>12</sup>

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<sup>9</sup> Estimate of casualties given in Small Arms Survey 2002, p. 155. In 2004 the Swiss Government put the number of deaths “between 500.000 and 700.000, roughly the equivalent of one death per minute”; swissinfo.ch of 16 January 2004. Small arms and light weapons are produced by about 1000 companies in 100 countries; 80% of countries have inadequate arms control/export control regulations. For the statistics see the Small Arms Survey website ([www.smallarmssurvey.org](http://www.smallarmssurvey.org)). See also P. Herby, “Humanitarian Implications of Small Arms Proliferation and Proposed Codes of Conduct: Arms Availability – a Matter of Urgent Humanitarian Concern”, in E. Dahinden *et al* (eds.), *Small Arms And Light Weapons: Legal Aspects of National and International Regulations* (United Nations, New York, 2002), 95.

<sup>10</sup> The number was estimated for the year 1994. The International Campaign to Ban Landmines (ICBL) estimated that in 2003 the number of casualties was 15.000 – 20.000. The impact of the Ottawa Convention has been significant: Today, that number is down to 6000 – 7000 incidents a year, in 2007 there were 1700 deaths reported. In the past 10 years 42 million landmines were destroyed, over 1000km<sup>2</sup> of territory was cleared. See generally the ICBL website ([www.icbl.org](http://www.icbl.org)).

<sup>11</sup> The Cluster Munitions Coalition claims that 76 countries stockpile billions of sub-munitions, 33 states produce them and 15 have used them. Accidents continue long after conflicts ended; data collected by NGOs indicate that 30% of victims are children. See the information at the website ([www.stopclustermunitions.org](http://www.stopclustermunitions.org)).

<sup>12</sup> The Millennium Report *We the Peoples: The Role of the United Nations in the 21<sup>st</sup> Century* (United Nations, New York, 2000), 52.

## 2.1. Political and programmatic instruments

Among the global instruments adopted to respond to this problem, the most important is the UN Program of Action on SALW (2001).<sup>13</sup> It encourages states to adopt a series of measures such as criminalizing illicit gun production and possession, insisting on end-user certificates for weapon exports, marking guns for better identification and tracing, destroying stocks of surplus weapons, ensuring adequate administrative structures to implement the measures and enforce arms embargoes, etc. The UN organizes biannual meetings of states to discuss the implementation of the Program but it contains no mandatory target dates or benchmarks and no requirements for information-sharing or increasing transparency.<sup>14</sup>

Other important global instruments include the International Tracing Instrument (2005) which encourages states to mark small arms at the site of production or import and establishes a framework for inter-agency cooperation on tracing requests<sup>15</sup>, and the UN Register (1991), a transparency measure for participating states that only belatedly was made accessible for reports on small arms transfers and holdings.<sup>16</sup> Similar goals as those contained in the UN Program of Action are found in a number of regional or sub-regional political instruments, such as the African Union's Bamako Declaration,<sup>17</sup> ECOWAS' Abuja Declaration<sup>18</sup>, the EU Strategy<sup>19</sup> or the OSCE Document.<sup>20</sup>

These programmatic instruments have been derided as irrelevant populist smoke screens set up to deflect claims of political inaction, and indeed, state practice implies that many states are quick to agree to international declarations but slow to implement them nationally.<sup>21</sup> Lack of implementation and enforceability alone, however, does not make the instruments irrelevant. In practice, these instruments have helped states affected by the weapons in identifying problems,

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<sup>13</sup> The United Nations Program of Action to prevent, combat and eradicate illicit trade in small arms and light weapons in all its aspects is attached to the Report of the UN Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects (2001); A/CONF.192/15.

<sup>14</sup> While promoting the inclusion of civil society in counter-proliferation efforts, it also contains no references to human rights issues or gender problems. This has not prevented states and NGOs from taking up these issues at the biannual conferences.

<sup>15</sup> The International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons was adopted by the General Assembly in 2005 by decision 60/519. *See generally* to the issue of tracing, UNIDIR/Small Arms Survey, *The Scope and Implications of a Tracing Mechanism for Small Arms and Light Weapons* (United Nations, New York, 2003).

<sup>16</sup> The UN Register of Conventional Arms is maintained by the UN Secretariat. It was made accessible to reports on SALW and man-portable air defence systems in 2003.

<sup>17</sup> The Declaration on an African Common Position on the Illicit Proliferation, Circulation and Trafficking of Small Arms and Light Weapons was adopted in Bamako in 2000.

<sup>18</sup> The Declaration of a Moratorium on Importation, Exportation, and Manufacture of Small Arms and Light Weapons in West Africa adopted in Abuja in 1998.

<sup>19</sup> The European Union adopted the Strategy to Combat Illicit Accumulation and Trafficking of SALW and their Ammunition in 2005. Already in 1998, the EU had adopted a Code of Conduct on Arms Exports. As regards landmines, the European Commission has established a "Mine Action Strategy", more specifically a series of three year programs dedicated to assisting in mine related projects.

<sup>20</sup> The OSCE Document on Small Arms and Light Weapons was adopted in 2000; it has since been furnished with a Best Practice Guide on SALW. Other regional instruments include the Nairobi Declaration and Coordinated Plan of Action for the Prevention, Control and Reduction of SALW in the Great Lakes Region and the Horn of Africa (2000).

<sup>21</sup> For SALW see the significant differences in implementation of the UN Programme of Action by UN Member States as compiled by Small Arms Survey ([www.smallarmssurvey.org](http://www.smallarmssurvey.org)).

proposing possible solutions and creating national and international networks of expertise.<sup>22</sup> In some instances such “soft law” has proven to be as effective and successful in achieving its objectives as legally binding and enforceable “hard law”.<sup>23</sup>

## 2.2. Legally binding instruments

A central goal of arms control is the establishment of universal, legally binding regimes which ban or regulate certain weapons and monitor compliance. In the context of smaller conventional arms, the most important international legal instruments are the Convention on Certain Conventional Weapons (1981),<sup>24</sup> the Mine Ban Treaty (1997),<sup>25</sup> the Vienna Firearms Protocol (2001),<sup>26</sup> and the Convention on Cluster Munitions (2008).<sup>27</sup> Some global development agreements contain specific provisions related to arms control, emphasizing the need for a long-term, flexible policy of sustainable arms control and development that includes all relevant institutions.<sup>28</sup> Among the many regional legal instruments, some African conventions contain far-

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<sup>22</sup> In most instances, the process leading to the instrument creates national know-how and ownership. Several political instruments, such as the Abuja Declaration and the Nairobi Declaration, also paved the way for subsequent legal instruments.

<sup>23</sup> H. Neuhold, “The Inadequacy of Law-Making by International Treaties: ‘Soft Law’ as an Alternative?”, in R. Wolfrum and V. Röben (eds.), *Developments of International Law in Treaty Making* (Springer, Heidelberg, 2005), 39. For examples see A. Marschik, “Hard Law Strikes Back – How the Recent Focus on the Rule of Law Promotes Compliance with Norms in International Relations”, in I. Buffard *et al* (eds.), *International Law between Universalism and Fragmentation. Festschrift in Honour of Gerhard Hafner* (Brill, 2008), 61 at footnote 2.

<sup>24</sup> The Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects is a humanitarian framework convention that bans specific weapons in five separate protocols, among them, for example, a Protocol on Mines (Protocol II, 1996). It was adopted in 1981 and entered into force in 1983. It currently has over 100 states parties.

<sup>25</sup> The Convention on the Prohibition of the Use, Stockpiling and Transfer of Anti-Personnel Mines and Their Destruction, also known as the „Mine Ban Treaty” or the “Ottawa Convention“ prohibits use, production, stockpiling, etc. of land-mines and contains obligations to destroy stocks, clear affected areas and assist victims. It is in force since 1999 and has 156 member states. It has been exceedingly effective in stigmatizing anti-personnel mines so that the effects are truly global, even if not all mine-producers have become a party.

<sup>26</sup> The Protocol on the Illicit Manufacturing and Trafficking in Firearms, their Parts and Components and Ammunition, Supplementing the UN Convention against Transnational Organized Crime as annexed to GA-Res. A/RES/55/255 (2001) criminalizes illicit production and trafficking of small arms and requires states to adopt control measures, regulate brokerage and transfers of arms. The Protocol entered into force in 2005 and currently counts 72 parties and 52 signatories. The UN Office for Drugs and Crime in Vienna issued a legislative guide to implement the protocol in 2004. Since SALW are indispensable for security authorities and are used in sport and hunting and because they are considered necessary for personal safety in many countries and societies, efforts for containment are difficult, focusing primarily on improving international cooperation to counter illicit production, brokerage and reliance on these weapons, and to regulate trade. See the efforts for an Arms Trade Treaty (ATT) currently discussed at the United Nations. According to a UN estimate in 2000, about 40-50% of global trade in SALW is illegal. The ATT is designed to regulate trade in arms by requiring marking and tracing of weapons, defining legal brokerage and ensuring cooperation between states to ensure proper implementation.

<sup>27</sup> Modelled after the Ottawa-Convention, the Convention on Cluster Munitions (also known as the „Oslo-Convention“) was signed by 105 States in December 2008. It prohibits the use, production, etc. of cluster munitions and contains obligations to destroy stocks, clear affected areas and assist victims. It has few provisions dedicated to verification and compliance, relying instead on more participatory enforcement through reporting obligations. In some instances, such as on victim assistance, the Oslo Convention goes beyond the respective obligations of the Mine Ban Treaty. There are currently efforts to raise the Ottawa-provisions to Oslo-levels.

<sup>28</sup> A good example is the Cotonou Partnership Agreement between the European Union and the African, Caribbean and Pacific States. The Agreement, adopted in 2000 and revised in 2003, contains in paragraph 11 cooperation provisions regarding landmines and small arms. It is essentially an inter-regional agreement.

reaching obligations, such as the ECOWAS Convention (2006),<sup>29</sup> the SADC Firearms Protocol (2001)<sup>30</sup> and the Nairobi Small Arms Protocol (2004).<sup>31</sup>

Apart from primary obligations on the state parties the legal instruments foresee secondary procedures that encourage compliance and promote participation. Most conventions require annual reporting by member states on national implementation and enable discussion of these reports at annual meetings and periodic review conferences, at which not only member states participate but also international organizations, civil society and the media.<sup>32</sup> Such open scrutiny of implementation serves as a strong incentive for states to demonstrate compliance. As with other international treaties, lack of resources or political will nevertheless often results in unsatisfactory national implementation of the convention – quite often precisely by those countries most affected by the problem and who would benefit most by full compliance.<sup>33</sup> Similarly to political instruments, the legal regimes generally lack explicit independent verification and enforcement mechanisms. Should such be sought, a member state would have to rely on the rules of state responsibility of general international law to implement the obligations owed to it, a route rarely taken in practice.

### 2.3. Institutions

Even leaving aside the activities, legal and illegal, of weapons production, transfer and local distribution in order to focus exclusively on institutions devoted to arms control and disarmament, the multitude of entities involved is still impressive. On the global level, the United Nations family engages several bodies. Apart from the political or legislative functions of the General Assembly,<sup>34</sup> the Security Council adopts arms embargoes against states, entities or individuals.<sup>35</sup>

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<sup>29</sup> The ECOWAS Convention on Small Arms and Light Weapons, their Ammunition and other Related Materials (Abuja, 2006) emerged from the ECOWAS Abuja Declaration. It prohibits trade in SALW except for governmental self-defence and peace-keeping, prohibits transfer of arms to non-state actors and regulates weapons production and possession. It has enabled the establishment of the ECOWAS Small Arms Program (ECOSAP) for capacity building assistance.

<sup>30</sup> The Protocol on the Control of Firearms, Ammunition and other Related Materials in the South African Development Community (SADC) Region (Blantyre, 2001) entered into force in 2004. It is designed to eliminate illegal production of SALW and ammunition and to counter excessive weapons possession. It has enabled the establishment of an information-sharing network. See Stott, *Development and Security: Implementing the SADC Firearms Protocol* (presentation at a seminar entitled “Security and Development in Southern Africa” (8-10 June 2008), Johannesburg, South Africa (copy on file with the author).

<sup>31</sup> The Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lake Region and the Horn of Africa was adopted in 2004 in the course of 3 Ministerial Conferences after the adoption of the Nairobi Declaration and Coordinated Plan of Action for the Prevention, Control and Reduction of SALW in the Great Lakes Region and the Horn of Africa (2000). It eliminates the illegal production, trade and possession of SALW and contains both legally binding obligations and non-binding best practice guidelines and has enabled the establishment of an information-sharing network. It entered into force in 2006.

<sup>32</sup> The Mine Ban Treaty, for instance, has annual meeting of state parties and a review conference every 5 years (the next such conference will be in Cartagena, Colombia, late 2009). States parties report annually to the UN Secretary General who also has the power to organize special fact finding missions.

<sup>33</sup> The irregular compliance with a treaty usually cited as exemplary for national implementation is well documented in ICBL, *Landmine Monitor Report 2008, Towards a Mine-Free World* (2008); see also W. Boese, “Some Countries Miss Mine Treaty Deadlines”, XXXVIII/1 *Arms Control Today* (2008).

<sup>34</sup> Cf. the annual resolutions on disarmament, non-proliferation and arms control prepared in the first committee and the legislative work for an Arms Trade Treaty. The GA also serves as a general authority to recognize and approve various initiatives in the field. For instance, both the Ottawa and the Oslo Conventions were elaborated outside the

In view of the limited success of the embargoes in practice, several sanctions regimes have been equipped with special implementation monitoring mechanisms to assist the sanctions committees but these often can do little more than certify the ineffectiveness of the regime.<sup>36</sup> Practical arms control and disarmament by the UN in the field is mainly conducted by the UN's Office for Disarmament Affairs, its Office for the Coordination of Humanitarian Affairs, by the Department for Peacekeeping Operations (where arms control plays an increasing role in stabilizing conflict areas),<sup>37</sup> the UN Development Program, the UN Mine Action Service, the UN Institute for Disarmament Research and the UN Office for Drugs and Crimes. The involvement of so many UN-entities led to the establishment of a meta-forum, the Coordinating Action on Small Arms (CASA), an internal UN-mechanism to enable coordinated assistance to international small arms instruments like the UN Program of Action and the Firearms Protocol.<sup>38</sup>

Any attempt to exhaustively list regional, sub-regional and local institutions would be futile; it is presumably safe to hazard the guess that, today, organizations involved in political security would find it difficult not to address the need to control smaller conventional arms in some way or another.<sup>39</sup> Most efforts focus on improving cooperation between national authorities, harmonizing national regulations and establishing common best practices. On the national and local level, practical arms control and disarmament is mainly the prerogative of the civilian or military security forces and customs authorities, but parliaments and judicial bodies may also be involved; in the case of mine clearance, agricultural or environmental agencies may also need to be consulted. Countries most affected by harm emanating from smaller conventional weapons are those that also suffer most from the lack of resources to address the problem. Mine clearance is an expensive, technology-heavy procedure; controlling vast land or maritime borders requires extensive personnel, vehicles and technological equipment. Without resources, national and local authorities are reduced to virtual actors with no influence and little interest in the issues.

All the more important is the increasing contribution from non-governmental organizations. Some of these are global actors or initiatives with wide support either individually or in the form of coalitions such as the International Action Network on Small Arms (IANSA), the Cluster-Munitions Coalition (CMC) or the International Campaign to Ban Landmines (ICBL) which won the Nobel Peace Prize for its efforts for the Mine Ban Treaty.<sup>40</sup> The trend towards outsourcing in

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UN. In resolutions acknowledging their importance, these instruments receive a subsequent "blessing" by the international community.

<sup>35</sup> In 2008 there were 12 arms embargoes imposed by the Security Council in force; a proposal to impose an embargo on Zimbabwe was vetoed by Russia and China. The EU had 15 arms embargoes in force. See P. Holtom and N. Kelly, "Multilateral Arms Embargoes", in *SIPRI Yearbook 2009: Armaments, Disarmament and International Security* (Oxford University Press, Oxford, 2009), 482.

<sup>36</sup> There are two main reasons for the limited success of arms embargoes: lack of political will (on behalf of the international community to ensure arms are not exported to the state in question and on behalf of the Security Council to enforce the embargoes) and lack of resources (inadequate border monitoring, export controls, personnel etc.). As regards arms embargoes by the Security Council in relation to SALW see the Report of the Secretary General on Small Arms of 17 April 2008 (S/2008/258), 11.

<sup>37</sup> The Security Council's peace-keeping operations are increasingly involved in arms control work on the ground, often in the context of DDR (disarmament, demobilization and re-integration) and SSR (security sector reform).

<sup>38</sup> Other global institutions addressing questions with arms control elements include Interpol and the World Customs Organisation.

<sup>39</sup> For a compact overview of the activity of the European Union see UNIDIR, *European Action on Small Arms and Light Weapons and Explosive Remnants of War*, Final Report (United Nations, New York, 2006).

<sup>40</sup> A good example for an initiative commanding global support is the "1 million faces petition" for an Arms Trade Treaty backed by more than 1 million persons around the world and 250 NGOs. The US NGO "Roots for Peace"

the public sector has opened arms control further, enabling direct participation by humanitarian NGOs and private commercial companies. Since most field missions dealing with smaller conventional arms are joint undertakings, public-private-partnerships (PPPs) are common. For instance, the International Trust Fund for Demining and Mine Victims Assistance (ITF), a humanitarian non-profit organization established by the Government of Slovenia works with various public and private entities on projects in south-eastern Europe, especially Bosnia and Herzegovina.<sup>41</sup> Over the last 10 years it carried out more than 2.200 mine action projects, clearing almost 100 million square meters of land and contributing to the physical rehabilitation of almost 1000 persons. Today, the Fund acts as a central broker for mine action in the region.<sup>42</sup> In 2008 the ITF launched the “Demine-Design and Development Fund” - a novel type of PPP that enables private investment in an economic development venture that specifically requires landmine clearance as an integral component of the project. It brings together national and local government agencies, the private sector and institutional investors and NGOs involved in the demining process.<sup>43</sup> Over 50 mainly private organizations cooperate with public authorities in the US State Department’s Public-Private Partnership for Mine Action. Since 1998, this program has facilitated collaboration between the US government and NGOs, foundations, and other private groups to reduce the threat from explosive remnants of war and illicit conventional weapons, such as the “Adopt-A-Minefield”-campaign with field projects in more than 12 countries and mine clearance operations world-wide by the HALO-Trust and the Mines Advisory Group (MAG).<sup>44</sup>

### 3. Administering Arms Control in the Field

Even this short overview of the programs, conventions and organizations that together compose the traditional institutional framework of global arms control and disarmament makes clear why the resulting activity in practice, an uncoordinated jungle of interaction, cooperation and competition, is a fantasy playground for Global Administrative Law: Global, regional, national

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engaged school children in its “Penny Campaign” and raised 25 million USD for demining and construction of schools and playing fields in Afghanistan.

<sup>41</sup> Bosnia and Herzegovina had been a particularly difficult environment for field operations, for various reasons: Firstly, the scale of the problem is substantial (even after years of demining, 1683 square kilometres of suspected area and 200.000 estimated mines remain in 2009). Secondly, the complicated national and local administrative structures (including the security forces of both entities), fragmented responsibilities and competing public authorities, the high number of de-mining/clearance providers, duplication, inefficiencies and corruption all make field operations particularly burdensome. International pressure finally lead to a consolidation of structures (there is now only one Mine Action Centre for both entities) and better regulation of demining has improved the situation but the local supply-heavy competition (40 organizations are accredited for mine action) has resulted in price dumping, hiring of cheaper inexperienced personnel and, this in turn to sloppy work, incomplete execution of assignments and lethal accidents. The adoption of the national Mine-Strategy 2009-2019 should improve the situation but carries a high price tag (at least 40 million Euros a year).

<sup>42</sup> Established 1998, it has so far received almost 280 million USD from over 100 public and private donors. The initial purpose of ITF was to help Bosnia and Herzegovina in post-conflict rehabilitation. Today, its activities focus on demining and on assistance for landmine survivors with physical and socio-economic rehabilitation also in Croatia, Macedonia, Serbia, Montenegro and Albania.

<sup>43</sup> For more information, see the funds website <[www.deminedevelop.com](http://www.deminedevelop.com)>.

<sup>44</sup> HALO Trust received much recognition for having successfully demined the "Devil's Garden", an area around Bagram, Afghanistan, that had reputedly contained the most dangerous minefields in the world, infested with thousands of landmines, unexploded and abandoned ordnance and booby-traps. For information on the PPP and the institutions involved see <[www.state.gov/t/pm/wra/partners/c14760.htm](http://www.state.gov/t/pm/wra/partners/c14760.htm)>.

and local collaboration and confrontation; a plethora of well-meaning instruments but inadequate national resources for implementing them; clashing interests of weapons producers and national regulating authorities, of arms dealers and customs officials, of networks of organized crime and victims and affected communities - enough material for a multi-volume book. Yet, it may be not enough material to explain why all this highly disorganized activity, in general, produces remarkably successful results.

From the manner in which field missions operate in practice this chapter will try to extract common principles and standards for administering operations in the field. First, the challenges that field mission face and the techniques and procedures that have been developed to address them will be examined. Subsequently, the question will be addressed what consequences arise when these secondary norms do not remedy internal norm violations in a satisfactory manner within the field operation. In view of the increasing relevance of civil society and the private sector in arms control and disarmament, a further brief analysis will be devoted to the question of legitimate participation in legislating and implementing arms control.

### 3.1. *Challenges and means to address them*

Not surprisingly, arms control and disarmament field missions such as de-mining and weapons destruction projects face substantial dangers and need to overcome serious difficulties to even begin implementing their mandate. Most operations are based in insecure, sometimes hostile conflict or post-conflict areas and they must cope with infrastructure deficits, unreliable communication technology, poor medical equipment and sometimes challenging living conditions. Most field operations suffer from chronic systemic or self-inflicted deficiencies and there are few institutions to turn to for guidance and assistance.<sup>45</sup>

To ensure local support – quintessential for sustainable success – field operations need to interact with the local population. This requires diligent efforts to overcome initial mistrust by explaining the objectives of the operation, acting transparently and respecting local culture and traditions.<sup>46</sup> Decisions by the field mission with outside effects should take into account the national laws and regulations as well as the local level of development.<sup>47</sup> Crucial for every mission is the reliability of local information and expertise, such as regarding mine-contaminated areas or the numbers, types and location of weapons to be collected<sup>48</sup> According to the Geneva Centre for

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<sup>45</sup> Even the UN – an organization that does not lack experience in organizing field missions – has difficulties equipping its arms control projects appropriately: UN-Security Council adopts arms embargoes without effective means of monitoring and control, and - even in the case of known violations - without dire sanctions against violators. In Somalia, through 17 years of UN arms embargo there was never a shortage of small arms and there are more weapons in circulation in Somalia today than in 1990s.

<sup>46</sup> See in regard to SALW but equally applicable for other arms control operations J. Hughes-Wilson and A. Wilkinson, *Safe and Efficient Small Arms Collection and Destruction Programmes – A Proposal for Technical Measures* (UNDP, New York, 2001). Most difficult is always the identification of a suitable initial interlocutor; obviously, internationally oriented, well organized local or national NGOs are the exception.

<sup>47</sup> Field manuals for demining and weapons collecting operations stress the need to minimize risks for the local population. Collected weapons and recovered unexploded ordnances have to be stored and/or destructed safely and efficiently.

<sup>48</sup> Some missions have very fast rotation in personnel and, as a result, information painstakingly assembled and personal experience are lost, mistakes are made over and over. At the end of a mission, the personnel sometimes departs without sharing technical information (maps with suspected mines) with other missions or the local

Humanitarian Demining (GICHD), not least due to inaccurate information, on average less than 3% of cleared land actually contained land mines or other unexploded ordnances.<sup>49</sup>

Close cooperation with the local authorities, especially security forces, is essential but not always easy.<sup>50</sup> Remoteness of an operation makes mission personnel vulnerable to local authorities. Mission mandates, especially in disarmament operations, may require confronting state security forces, armed non-state groups and organized crime. Host states sometimes have difficulty ensuring the safety of the mission due to inadequate resources, conflicting interests among government agencies, or simply a lack of interest in the project by the authorities.<sup>51</sup> Just like any other humanitarian project, arms control missions also suffer from constant vigilance to conform to donors' expectations and pressure to fulfil unrealistic time schedules. Financial dependency makes it hard to plan comprehensive and long-term. The resulting small, short-term projects calculated under budget lead to understaffed, ill-equipped missions doing hasty and imprecise work, - a result that in the dangerous world of arms control can quickly lead to deadly accidents.<sup>52</sup> The difficult environment may well impede efforts to comply with the strict obligations regarding proper accounting and many programs need additional financial means to fulfil their goals before completion.

As a consequence, significant efforts go into explaining problems and deficiencies to headquarters or to donors, submitting proposals for authorization, and justifying requests for more time or more resources.<sup>53</sup> The larger the parent organization and the more organizations simultaneously involved, the more time is spent on intra- and inter-organizational communication, administrative paperwork and authority-disputes. While the significant challenges in the field more often than not induce close cooperation among the different institutions involved, especially

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population. Lots of personnel/time goes into adjusting to the difficult environment and gathering the most basic information.

<sup>49</sup> Considering it takes about 100 days for a de-miner to clear an area the size of a football field, this is a huge waste of resources. See to the importance of information sharing C. Downs, "Increasing the Impact of Mine Action Surveys", 10 *Journal of Mine Action*, Winter (2006), 61.

<sup>50</sup> In order to ensure the long-term viability of the project it is necessary to move from cooperation to local ownership: interest, participation, contribution by local population. Support by local leadership is crucial but willingness, effectiveness, reliability, integrity of the persons responsible varies enormously and personal involvement depends almost exclusively on the individual since operations offer few immediate incentives and rewards (mine clearance takes time, destroying guns in an insecure environment can create fear and hostility).

<sup>51</sup> While easier to sustain on local level, ownership decreases with distance to the affected areas. Once a project receives international assistance, there is the danger that it is identified as a "foreign" issue (and the sole remaining interest remains in generating money from the international operation). In some instances, interests of government departments may be at odds with one another or with donors and international organisations. Insufficient involvement by politicians may result from the different perspectives of political elites and the afflicted local population. In cases where complicated and expensive procedures (e.g. marking and tracing, de-mining) require state support (import of equipment, spare parts, etc.), the lack of support from the host government may have crippling effects on the field missions. See generally on the challenges of field missions A. Stemmet, "Learning from Field Experience", in E. Dahinden *et al* (eds.), *supra* note 9, 18.

<sup>52</sup> This has become a particular problem in the area of mine clearance. Outsourcing of services such as de-mining has created a supply-heavy market with too many private firms and NGOs offering "mine action" and undercutting themselves in bidding. See the example of Bosnia explained above at note 41.

<sup>53</sup> For local communities a higher sense of security is much more relevant than quantitative results such as weapons collected. Yet international organizations and donors are often primarily interested in detailed numbers of weapons destroyed, area of land cleared and number of people receiving special risk education. There is much less interest, unfortunately, and therefore also much less available information on whether these achievements have enhanced the well-being and security of the communities.

among operations on the ground, the different mandates and working procedures of international organizations can cause unproductive competition. On headquarters-level organizations sometimes work indifferent to each other, creating duplicity and waste of resources. In the worst case the lack of coordination among organizations, leads to lack of responsibility or ownership.

### 3.2. *Improving accountability of field operations*

Faced with so many challenges, there is a very strong likelihood that something – or rather many things – at the field level will go wrong. Mandates will prove insufficient, resources inadequate, equipment inappropriate, personnel unsuitable. Without appropriate structures or procedures, mismanagement, corruption and criminal conduct are difficult to address; respect for the rule of law, human rights and for aspects such as gender issues is difficult to implement, especially if local standards do not correspond to international norms.

To try to address these issues all field operations are equipped with a specific set of rules and procedures. These consist of primary norms that determine the mission and regulate the activity of personnel and, in more sophisticated projects, secondary norms that regulate the primary norms (their creation, interpretation modification and violation).<sup>54</sup> Together, primary and secondary norms compose a subsystem of the legal system on the basis of which they were established.<sup>55</sup> Central characteristic for a subsystem is that the internal rules have precedence over any external systemic rules: If a field operation has the necessary norms, it will regulate itself.<sup>56</sup> Should the norms prove inadequate to address the situation, recourse is taken to the next higher system. Depending on the organization involved this might be the parent organization, the local legal system or general international law.

In view of the difficult and often remote environment, there is an understandable interest in establishing field operations in the area of arms control as fairly independent entities with considerable autonomous powers. It is argued that increasing self-reliance maximizes success, that dependence from headquarters or donors hampers a flexible response to developments on the

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<sup>54</sup> This functional distinction between types of norms was proposed by H.L.A. Hart, *The Concept of Law* (Clarendon Press, Oxford, 1961), and adopted inter alia by the International Law Commission in its work on state responsibility.

<sup>55</sup> For general literature on subsystems in international law see the Reports of the ILC on State Responsibility, in particular Arangio-Ruiz' Fourth Report on State Responsibility, A/CN.4/444 and Add. 1 and 2, and the contributions in L.A.N.M. Barnhoorn and K.C. Wellens (ed.), *Diversity in Secondary Rules and the Unity of International Law* (Martinus Nijhoff, The Hague, 1995). See also A. Marschik, "Too Much Order? – The Impact of Special Secondary Norms on the Unity and Efficacy of the International Legal System", 9 *EJIL* (1998), 212. Subsystems were mostly examined in the context of the consequences arising from a violation of a primary norm – in other words, state responsibility; see K. Doehring, "The Unilateral Enforcement of International Law by Exercising Reprisals", in R.St. Macdonald (ed.), *Essays in Honour of Wang Tieya* (Martinus Nijhoff, Dordrecht, 1994), 240; L. Boisson de Chazournes, *Les contre-mesures dans les relations internationales économiques* (Pedone, Paris, 1992), 183; B. Simma, "Grundfragen der Staatenverantwortlichkeit in der Arbeit der Internationalen Law Commission", *Archiv des Völkerrechts*, Bd.24 (1986), S. 360-370.

<sup>56</sup> K. Zemanek, "Responsibility of States: General Principles", 10 *Encyclopedia of Public International Law* (R. Bernhardt, ed., 1987), 370. As a *raison d'être* for the precedence of the secondary norms Boisson de Chazournes points to the particular importance that the creators of the subsystem accord to the special norm implementation system; L. Boisson de Chazournes, *supra* note 55, 185.

ground.<sup>57</sup> If this is true, why not go all the way and establish field missions as completely independent and autonomous entities? All issues regarding mandate, administration, accountability and responsibility would be addressed solely within the subsystem. A violation of a primary norm would be dealt with exclusively by the subsystem's secondary norms. Interaction with other entities would occur at the pleasure of the subsystem; the market would ensure that field operations apply standards of accountability and good governance.<sup>58</sup>

This notion of a closed subsystem, a “self-contained regime” which excludes any recourse to external legal remedies, was introduced by the International Court of Justice in the Tehran Hostages Case and applied to international diplomatic law.<sup>59</sup> Legal literature, not least influenced by the work of the International Law Commission on the issue, harboured reservations as to the systemic compatibility and the practical advantages of closed subsystems.<sup>60</sup> From a theoretical point of view, legal subsystems would have to contain all relevant norms necessary to ensure that the internal system functions as a legal system. In particular, the secondary norms would have to be so sophisticated to ensure that the primary norms are applicable, implementable and enforceable.<sup>61</sup> This would require either hyper-regulation which would counter the goals of practicality and flexibility or the granting of broad undefined powers which would give rise to concerns regarding legality and the rule of law.<sup>62</sup>

From the perspective of arms control and disarmament operations in practice, there is certainly much merit in making field missions self-sufficient. Any operation that requires instructions from – possibly various – higher authorities to deal with every problem in such challenging environments would be doomed to fail. It is questionable, however, whether complete autonomy would actually constitute much of an advantage. Without higher oversight or monitoring, the local administrators have an extraordinary authority that can easily be abused.<sup>63</sup> Without recourse to the legal system of the host state or to internal disciplinary rules of a parent or sending organization the system would need such an elaborate oversight system to ensure basic principles of due process and the rule of law that all benefits of making a field operation small and flexible would be nullified.

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<sup>57</sup> Indeed, practice shows that compact NGOs or private companies that offer a very limited service in a tightly controlled local area can be very successful while larger operations with complex decision-making procedures and rigid hierarchies, such as UN peace-keeping operations, often struggle to cope with adversity.

<sup>58</sup> This argument obviously only applies to field operations that are run by private enterprises and that depend on donor financing. The market would hardly work as a corrective for public organizations, especially in monopoly situations.

<sup>59</sup> United States of America Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgement of 24.05.1980, ICJ Reports (1980). The designation as a self-contained regime resulted in substantial criticism in legal literature, see as an example C. Dominicé, “Représailles et droit diplomatique”, in K. Eichenberger (ed.), *Recht als Prozess und Gefüge* (Bern, 1981), 551; K. Zemanek, “The Unilateral Enforcement of International Obligations”, 47 *ZaöRV* (1987), 40, 47.

<sup>60</sup> B. Simma, “Self Contained Regimes”, *NYIL* 16 (1985), 118; L.-A. Sicilianos, *Les réactions décentralisées à l'illicite: des contre-mesures à la légitime défense* (LGDJ, Paris, 1990), 347. For a detailed analysis of the concept see A. Marschik, *Subsysteme im Völkerrecht – Ist die Europäische Union ein “self-contained regime”?* (Duncker & Humblot, Berlin, 1997).

<sup>61</sup> Simma, *supra* note 55, 388; Marschik, *supra* note 55, 233.

<sup>62</sup> In practice some field operations grant far-reaching ‘emergency powers’ that can be used for practically any occasion. This creates a legal setting similar to a closed system because the internal system cannot really fail. The *de facto* exclusion of over-sight and control creates significant concerns from the perspective of the rule of law.

<sup>63</sup> Depending on the internal decision-making procedures, the subordinates, acting together, might also have rights that they could maliciously exploit.

An analysis of several subsystems of international law in practice demonstrated that, irrespective of how they are conceived, subsystems function in an open manner and permit recourse to the norms of the originating system.<sup>64</sup> As open subsystems, all instances of norm creation, implementation, accountability and responsibility initially fall under the subsystems' internal rules. If these suffice to serve their purpose - create norms, implement the mandate and restore the equilibrium in the case of a violation of the subsystem's primary norms through its own secondary rules of accountability and responsibility – then the subsystem works self-sufficiently and independently from the general system. If however, the sub-system's own rules fail to achieve their purpose or if the subsystem is incapable of redressing an internal wrong, then recourse can be taken to the rules of the general system.

This would appear like a very complicated way to state the obvious: clearly, if problems arise in a field mission, the higher authority will be asked to sort them out. Practice shows, however, that this is much more difficult than it sounds.<sup>65</sup> Firstly, there are often many entities involved within a field mission, some public, some private, all with very different constituent instruments, mandates and obligations. A certain conduct may be a violation of a norm in one entity but legal in another. Secondly, even if there is agreement that a certain act is illegal, the secondary norms to investigate, decide and sanction the violation differ substantially.<sup>66</sup> As a result, in the case of several entities working together on a joint project it is likely that similar acts will trigger different consequences. Considering that some entities sub-contract with one-another and that individuals often work for more than one organization involved, this creates an almost impenetrable fog of accountability and responsibility.

In view of the trend towards self-sufficient field operations, this accountability deficit should be addressed by developing a uniform standard of accountability and responsibility for field missions, including provisions that regulate recourse to a higher authority specifically established for this purpose whenever an issue of accountability cannot be solved within a mission. Such harmonization of secondary norms regarding accountability and responsibility would not only serve the personnel of field missions by enhancing their rights but also raise the level of the rule of law in international operations in general.

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<sup>64</sup> Simma examines subsystems in the area of human rights, the European Communities and diplomatic law and concludes that they are all, in fact open; Simma, *supra* note 55, 388. This author analyzed Diplomatic Law, various international environmental regimes and the General Agreement of Tariffs and Trade (GATT) in Marschik, *supra* note 60, 117-145. See also K. Zemanek, "Responsabilité des Etats pour faits internationalement illicites, ainsi que pour faits internationalement licites", in K. Zemanek and J. Salmon, *Responsabilité Internationale* (Pedone, Paris, 1987), 64. For Boisson de Chazournes the GATT is a self-contained regime but her interpretation of such regimes enables a fallback to general norms to implement the regime's primary norms; the « closed character » is a means to protect the subsystem from violations from outside; Boisson de Chazournes, *supra* note 55, 183.

<sup>65</sup> Less successful was the Cambodian Mine Action Centre which operated as both coordination and implementation body but was too weak to effectively conduct its own affairs. Significant structural and managerial inadequacies resulted in accusations of corruption, nepotism, poor financial management and donor abandonment. In Mozambique, the National Demining Institute initially failed to maintain a sound national database and to produce a meaningful action plan to enable a well coordinated operation. Mozambique also suffered from the lack of cooperation and coordination with neighbouring countries, such as in surveying cross-border mine fields.

<sup>66</sup> Some entities, in particular private commercial companies, do not have any accountability regulations at all, as they rely on the legal system of the host state or the state of their incorporation. Some organizations have very general procedures, others profoundly complicated institutional proceedings involving third-party oversight mechanisms.

### 3.3. *Participation of civil society in arms control*

In disarmament and arms control, civil society enjoys considerable influence. Concern about the global arms race, especially the prospect of “mutually assured destruction” in an atomic war, and the need for better humanitarian assistance to victims have proven to be conducive to both analytical as well as activist contributions. Over the past years, several well organized NGOs have evolved from national pressure groups to independent international actors. Often working in coalitions of hundreds of separate organizations, civil society’s influence is present in the elaboration of treaties, the formulation of mandates and the monitoring of compliance.<sup>67</sup>

As activists and respected providers of expertise, NGOs have always had some influence in arms control legislation. In the area of humanitarian arms control, this role has evolved over the past decade from lobbyist to participant. A recent example is the contribution of the Cluster Munitions Coalition to the elaboration of the Convention on Cluster Munitions.<sup>68</sup> Compared to many states negotiating the treaty, the CMC had superior resources, media-connections, technical experts and schooled campaigners.<sup>69</sup> As a consequence, the states promoting a legal instrument banning these weapons had a substantial interest in enabling full participation by the CMC in the negotiations, thereby granting civil society considerable access to international legislation.<sup>70</sup> The resulting Convention banning cluster munitions is thus a product of in-depth cooperation by states and civil society, which is expected to continue in the implementation phase.

Apart from advocacy work, the monitoring of implementation of international commitments by states is probably the most recognized contribution of civil society. Organizations like Amnesty International and Human Rights Watch have demonstrated the effectiveness of verification regarding compliance with human rights obligations and they have also set high standards. For the Mine Ban Treaty, civil society has expanded this role to a quasi-public monitoring function: In relatively short time, the “Landmine Monitor”, an annual survey of national implementation compiled by the International Campaign to Ban Landmines, has become a generally accepted monitoring mechanism of the Mine Ban Treaty regime.<sup>71</sup> In respect to SALW, the NGO

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<sup>67</sup> The work of NGOs has a real impact and has received appropriate international recognition. Some NGOs have received the Nobel Peace Prize, for example the International Campaign to Ban Landmines for the efforts leading to the adoption of the Mine Ban Treaty 1997.

<sup>68</sup> See J. Borrie *et al*, “Learn, Adapt, Succeed: Potential Lessons from the Ottawa and Oslo Processes for other Disarmament and Arms Control Challenges”, 10 *Disarmament Forum* (1 &2) (2009), 19. A short summary of the Oslo Process is contained in the introduction of the Report entitled “Banning Cluster Munitions: Government Policy and Practice” (2009) compiled by NGOs involved.

<sup>69</sup> At the Vienna Conference on Cluster Munitions in December 2007, diplomats from 138 countries were joined by hundreds of activists. The negotiations included representatives from civil society and governments, parliamentarians and school children, survivors and their assistants, international organisations and journalists, de-miners and medical experts, academics and soldiers, social activists and diplomats.

<sup>70</sup> On the whole, the CMC acted professionally and responsibly. Its active role created unease for some delegates, more accustomed to seeing NGO-representatives outside conference halls rather than at the negotiation table. After some harsh inter-changes with delegates that wanted to limit the scope of the convention at the Wellington Cluster Munitions Conference, several delegates from Western countries (quite obviously not used to being the target of NGO-scorn in humanitarian issues) sought the exclusion of civil society from further deliberations. But the CMC was fully involved in the subsequent negotiations at the Dublin Conference, though it wisely toned down its vocal criticism and activism.

<sup>71</sup> Landmine Monitor was established in 1998. It reports, in currently over 1000 pages, on the progress of each state in implementing the Ottawa Convention.

published “Small Arms Survey” is often cited as the “official” source for information on facts and figures relating to small arms and, in particular, on national implementation of the UN Program of Action.

In the operative arms control work at field level, the role of NGOs has a different quality. They are an indispensable part of conventional arms control projects, contributing in many ways as partners in planning, implementation and evaluation. They often bear the brunt of the actual work, such as de-mining, surveying areas to be cleared, collecting weapons for destruction, offering risk education to the affected local population and providing victim assistance.<sup>72</sup> The close cooperation between civil society and subjects of public international law requires direct, unbureaucratic interaction. As a result, NGOs are respected as equals at field level and assume many formal functions on an equal basis with their public international partners. Here, more than in any other area of arms control, the distinction between governmental and non-governmental organizations in field operations is fading.<sup>73</sup>

The increasingly relevant role of organized civil society in all aspects of international arms control is a very positive trend. NGO-participation regularly leads to higher levels of transparency, accountability and responsibility from state authorities. As we have seen with the Mine Ban Treaty and the Convention on Cluster Munitions, active involvement of civil society also enabled the few recent success stories in disarmament. It remains to be seen whether this trend in humanitarian disarmament will have an effect on other areas of arms control and make the more traditionally structured *fora*, such as the Disarmament Conference in Geneva or the UN’s Disarmament Committee and Commission, more accessible and transparent. In the past years, the reluctance of these entities regarding NGO-participation has only been surpassed by their inability to achieve meaningful results. If they remain immune to change, however, they risk redundancy because arms control instruments will be negotiated elsewhere – with the full involvement of civil society.

More participation by NGOs will, however, require addressing comprehensively and unambiguously the concern, raised for many years, regarding accountability, responsibility and legitimacy of these organizations. International law regulates legitimate representation of states in international relations. These rules ensure that commitments undertaken and positions presented are attributable to existing governments and states. With the exception of the most well-known NGOs, it is not always clear which constituency is represented, who funds the organization, how positions are established, how delegates are appointed and what powers of representation they have.<sup>74</sup> At international negotiations as well as in the phase of implementation of instruments, partners must rely on each other’s capacity to fulfil obligations.<sup>75</sup> Most problematic is the

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<sup>72</sup> NGOs such as Survivor Corps and Handicap International have begun to expand their work from offering victims-related services envisaged under the Ottawa Conventions to analytical expertise and active advocacy in the review process for the convention.

<sup>73</sup> There are a few exceptions such as immunities and relations to the host country which becomes relevant as regards the dangers of persecution from the host state’s organs (eg. the measures against NGOs by the Sudanese Government in reaction to the International Criminal Court’s indictment of President Bashir). The importance of their contribution in the field should not mask the remaining vulnerability of NGOs in this regard.

<sup>74</sup> M. Fitzpatrick, “Activists and Analysts: The Role of NGOs”, *Foreign Service Journal* 44 (2007).

<sup>75</sup> With some exceptions, NGOs rarely have guaranteed funding over the period of many years and few would be able to promise fulfilment of monitoring or verification functions for the full length of an international instrument or commit to the complete implementation of a multi-year field project.

question of accountability and responsibility of representatives, especially in the implementation of arms control projects in the field. In most cases, local criminal law and judiciary are not sufficient to ensure that an NGO correctly represents the interests of its constituency and abides by the standards of rule of law and good governance in the implementation of a project.

It is therefore in the very interest of civil society to develop distinct rules regarding these issues. There are good examples in arms control that demonstrate how efficiently this can be done. In some field operations, NGOs and public entities monitor each other. The Mine Action program set up by UN-OCHA in Afghanistan is a good example which allocated distinct but complementary activities to various NGOs thereby creating an in-built control and self-monitoring system.<sup>76</sup> In de-mining and mine clearance operations, the UN endorsed a set of specific “International Mine Action Standards” (IMAS) that apply to all UN mandated mine action operations and regulate a substantial segment of field operations activity.<sup>77</sup> The standards were elaborated by a number of mine action stakeholders, many of them NGOs. A continuous transparent review process ensures that they remain practical and up to date. IMAS have had a positive effect on field missions not only because the existence of uniform standards facilitates cooperation among entities used to working within the same normative parameters but also because the consolidation and harmonization of rules facilitates adherence.<sup>78</sup> The participatory process that created IMAS could also be employed to elaborate standards regulating participation, representation, accountability and responsibility of civil society in international arms control and disarmament operations. This would strengthen the rule of law and the application of principles of good governance at field operations level and NGOs could receive for legislation and implementation of arms control what they already have today as activists and campaigners: recognized legitimacy in representing the people of the world.

#### 4. Conclusion

International arms control operations are confronted with a multitude of challenges: there are many actors, many diverse arenas of operation, little oversight or verification and only few effective sanctions beyond national criminal systems. The lack of comprehensive, long-term coordinated policies have lead to fragmentation of international efforts and to a waste of resources. Though the current international climate raises hopes for a new leadership in disarmament by the major powers, the competition of “international priorities”, the chronic budgetary constraints of governments and the short attention span of the international media make it advisable that the actors involved take matters into their own hands.

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<sup>76</sup> This resulted in a significant degree of local ownership and operational capability which allows for diversity, flexibility and cost-effectiveness. UNOCHA initially served as the central planning, regulatory, coordination and resource mobilization mechanism.

<sup>77</sup> They were endorsed by the UN Inter-Agency Coordination Group on Mine Action in 2001; *see* the website <[www.mineactionstandards.org](http://www.mineactionstandards.org)>.

<sup>78</sup> IMAS are themselves not drafted as legal norms and their violation does not generate responsibility. They also do not themselves address the consequences of norm violations. This is left to “standing operating procedures” that regulate the specific characteristics of the individual project and determine the distribution of competences, accountability and oversight requirements, monitoring and reporting obligations, emergency powers, etc and also determine the consequences of a violation.

And examples abound that arms control, at least in area of smaller conventional arms, enables its community to do just that. Based on a seemingly chaotic foundation of multifaceted programmatic and legal instruments, countless governmental and non-governmental actors, interacting in collaboration, competition and confrontation, manage to negotiate and implement arms control projects. They elaborate and make use of harmonized standards for field operations and participate in shared monitoring and oversight activities. Chaotic as it may seem, the basis of international programs and instruments, as well as their underlying principles of general international law, is a firm and reliable foundation which field operations can turn to if their internal means prove insufficient: As open, permeable subsystems they permit recourse to the systemic norms to ensure that even in the face of adversity or failure of their internal system they can operate on the basis of the rule of law and in applying the principles of good governance.

Clearly, however, the system would benefit from specially developed secondary norms that regulate the administration of field operations and thereby ensure that the requirements of accountability and responsibility, human rights, due process and the rule of law are fully met. Harmonizing secondary norms in field operations would accord better protection to the personnel on the ground and give assurances to donors and the sending organizations that the subsystem, even if it is construed as a self-contained regime, is capable of addressing subsystemic norm violations and implementing the rule of law.

The strength of humanitarian arms control efforts in the area of smaller conventional weapons has its roots in the active participation of civil society. The energy and competence of international NGOs and the interests of the affected local population are the best instruments to promote arms control projects and to enable their sustainable success on the ground. The influence of civil society in humanitarian arms control projects has sharply risen over the past years. To ensure that the contribution remains as positive in the future as it has been in the past, civil society will have to give itself normative parameters of operation. NGOs demand full transparency, legality and good governance from governments. By assuming near-governmental responsibilities in legislation, implementation and verification of compliance in arms control activities they must also abide by the rule of law. Again, a uniform standard, elaborated in a participatory manner by NGOs themselves, would best convey legitimacy.

Over the many issues examined, arms control in the area of landmines, cluster munitions and small arms has emerged as an interesting example for the complexity of administering international relations in today's global world. It will still need substantial efforts by states, international organizations and civil society to ensure that the current fragmented system evolves into a reliable global rules-based system.