

Authority in the Breach? Assessing the Influence of the Anti-Personnel Landmine Ban Over
Non-Party States

Adam Bower
Ph.D. Candidate
Department of Political Science
University of British Columbia
asbower@interchange.ubc.ca

Annual Convention of the Canadian Political Science Association
Waterloo, Ontario – May 16, 2011

DRAFT – PLEASE DO NOT CITE OR DISTRIBUTE WITHOUT PERMISSION

Word Count: 7650

How do we know when a treaty has achieved widespread influence in the international system? This question is especially challenging in the case of states that formerly oppose a legal instrument, since most accounts of international law assume that states may only accrue legal obligations through formal consent. Yet attention to behavioural indicators like treaty membership tends to marginalize more subtle constitutive effects institutions may have in socializing state actors to adopt and internalize new legal obligations. To what extent is this occurring in the case of the Ottawa Convention banning antipersonnel landmines? To explore this question, I evaluate non-party compliance with the treaty's core norm concerning the non-use of AP mines, and supplement this analysis with close attention to discursive patterns of acceptance and contestation during prominent moments in the life of the regime. The analysis reveals how legal institutions may shape the discourse and practice of states, even in instances where they officially reject the treaty's authority.

What are the prospects that a treaty may assert meaningful global influence when it is resisted by many of the most materially powerful actors in the international system? The ban on antipersonnel (AP) landmines would appear to be a hard case for international cooperation, as most prominent theories assume that matters of national security policy will be largely immune from highly restrictive international obligations.¹ In this respect, the Mine Ban Treaty (MBT) is surprising, as it sought to eliminate an entire class of weapons in frequent use, and, more fundamentally, constrain the use of violent force within and across national borders – an activity that is central to the creation, maintenance, and legitimacy of the state system. The MBT’s origins in a partnership between civil society and “middle power” states also holds important consequences for its potential universality. With some significant exceptions², efforts to achieve binding global regulations have been stewarded by the most powerful states of the period, and legal obligations have been limited to what key states would tolerate in order to ensure their inclusion.³ While the United States in particular played an active role in negotiation, it ultimately refused to join the final agreement; number of other prominent states including China, Russia, India, Pakistan, Israel and Iran have similarly declined to endorse the treaty. As such, the Ottawa Convention may be usefully thought of as a “non-hegemonic treaty,” a subject that has received only limited attention in the academic literature to this point.⁴

The strategy embodied in the so-called “new diplomacy”⁵ typified by the mine ban movement is premised on an assumption that global norms can be more effectively promoted via rigorous treaties with imperfect membership rather than by weaker agreements with wider endorsement. While the decision to pursue a full prohibition on antipersonnel landmines resulted in the non-participation of key powers, negotiators calculated that the inclusion of controversial provisions—most notably an absolute ban without geographic or temporal exceptions—could overcome the loss of important potential members and more effectively address the humanitarian impacts posed by AP mines.⁶ This strategic choice embodied in the mine ban movement and resulting Ottawa Convention is surprising from the perspective of much of mainstream international relations theory, which assumes implicitly or explicitly that materially powerful states play a disproportionate role in the provision of collective international goods. At the same time, it is typically expected that legal instruments will have little impact for those states that choose to remain outside the formal agreement, as obligations are held to be created only through the explicit consent of concerned parties. Yet this would seem to foreclose interesting and potentially productive modes of legal influence that may be generated through less formal means. Has the MBT altered the policies of states that continue to resist its formal authority?

¹ Price, Richard. (1998) “Reversing the Gun Sights: Transnational Civil Society Targets Land Mines.” *International Organization*. 52(3): 613-644, at 613.

² The Convention on the Elimination of Discrimination Against Women (CEDAW), the UN Convention on the Law of the Sea (UNCLOS), the 1977 Additional Protocols to the Geneva Conventions (API and APII), and the Kyoto Protocol to the Framework Convention on Climate Change all emerged without the endorsement of the United States. The U.S. has signed, but not ratified, each of these agreements. My thanks to Professor Michael Byers for highlighting this key point.

³ Rutherford, Ken. (1999) “The Hague and Ottawa conventions: A model for future weapon ban regimes?” *The Nonproliferation Review*. 6(3): 36-50, at 44.

⁴ *Cooperating Without America: Theories and Case Studies of Non-Hegemonic Regimes*. Edited by Stefan Brem and Kendal Stiles. New York: Routledge, 2009.

⁵ Davenport, David. (2002) “The New Diplomacy.” *Policy Review* 116: 17–30.

⁶ Cameron, Maxwell A. (1999) “Global Civil Society and the Ottawa Process: Lessons From the Movement to Ban Anti-Personnel Mines.” *Canadian Foreign Policy* 7(1): 85-102, at 89.

And if so, how, and to what extent? Assessing this latter possibility is the chief purpose of this paper.

Consent, International Legal Authority, and the Possibility of the Mine Ban Treaty

The Mine Ban Treaty's origins would seem to make it an unlikely candidate to assert influence over resistant states. Most international legal scholarship is premised on a voluntaristic account of legal authority that assumes that formal consent—typically via ratification of treaties and other instruments—is the mode through which state actors accrue legal obligations.⁷ This would suggest that international legal institutions will be largely irrelevant for actors beyond their formal ambit. This view is reinforced in much of the prevailing literature in International Relations (IR) which assumes both that materially powerful states are disproportionately consequential to the creation and maintenance of international institutions, and that as a result of their privileged position, can largely ignore or otherwise resist legal obligations which they do not endorse.⁸

A constructivist concern for the social basis of legal obligation offers a viable alternative conception of law as an independent source of international authority. Politics is here conceived as an inherently social phenomenon, where the contours of the international system—the identities of constituent actors, legitimate behaviours and institutional forms, responsibilities and rights—are defined through continually evolving processes of dialogue and interaction.⁹ International law holds a privileged position in this conception because legalization invests norms with a concrete language and binding status, and provides a forum for reinforcing and gradually modifying normative structures.¹⁰ Legal institutions are also situated within a hierarchical system of prior or superseding values, principles and norms, and a horizontal arrangement of legal regimes in other issues areas. It is this interdependence that gives

⁷ Goldsmith, Jack L. and Eric A. Posner (2005) *The Limits of International Law*. Oxford: Oxford University Press. This view is most famously reflected in the ruling of the Permanent Court of International Justice, which in the *Lotus Case* found *inter alia* that “[t]he rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these *co-existing independent communities* or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.” Permanent Court of International Justice, *The Case of the S.S. Lotus*. France v. Turkey. Judgment No. 9 (7 September 1927). Available online at http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm. My emphasis.

⁸ Krasner, Stephen D. (1976) “State Power and the Structure of International Trade.” *World Politics*. 28(3): 317-347; Jervis, Robert. (1978) “Cooperation Under the Security Dilemma.” *World Politics*. 30(2): 167-214; Grieco, Joseph. (1993) “Understanding the Problem of International Cooperation: The Limits of Neoliberal Institutionalism and the Future of Realist Theory.” In *Neorealism and Neoliberalism: The Contemporary Debate*. Edited by David A. Baldwin. New York: Columbia University Press, 301-335; Mearsheimer, John L. (1994-1995) “The False Promise of International Institutions” *International Security* 19(3): 5-49; Downs, George W., David M. Rocke, and Peter N. Barsoom. (1996) “Is the Good News About Compliance Good News About Cooperation?” *International Organization*. 50(3): 379-406.

⁹ Wendt, Alexander. (2000) *Social Theory of International Politics*. Cambridge: Cambridge University Press.

¹⁰ Risse, Thomas (2000) “‘Let’s Argue!’: Communicative Action in World Politics.” *International Organization*. 54(1): 1–39; Johnston, Alistair Iain. (2001) “Treating International Institutions as Social Environments.” *International Studies Quarterly*. 45: 487-515; and Brunnee, Jutta and Stephen J. Toope. (2010) *Legitimacy and Legality in International Law*. Cambridge: Cambridge University Press.

international treaties their persistence and legitimacy, since individual institutions are not isolated phenomena, but are rather embedded within webs of recurring practice and meaning.¹¹

Constructivists therefore suggest that the preference for international law as an organizing institution is driven not merely by narrow concerns for instrumental agency, but more fundamentally by shared notions of *appropriate* action.¹² A number of studies have convincingly argued that—as focal points for the propagation and evolution of norms—legal structures contribute to the articulation and elaboration of cultural scripts, like the content of legitimate statehood, that are central to the modern practice of international relations.¹³ In this sense, treaties and norms help to constitute the international system by contributing to the (re)definition of actor identities. Laws also serve a regulative function as they “operate as standards for the proper enactment or deployment of a defined identity.”¹⁴ It is precisely this dual role of defining actors and structuring their relationships, and adjudicating their subsequent actions that imbues legal institutions with their legitimacy and authority.

I argue that this constructivist approach both enlarges the theoretical possibilities for cooperation, and suggests alternative means of assessing treaty impact. To the extent that treaties reflect collectively-held expectations, they rely on social conceptions of appropriateness as the basis of their legitimacy, may assert influence even in the absence of material coercive capacity. In this sense, legal authority may exist independent of the enforcement capacity provided by materially powerful states. At the same time, the networked quality of treaties holds important implications for states that remain outside of a legal regime, since they typically cannot escape the broader legal milieu in which a particular treaty is located. While states like China, Russia, and the United States might reject the particular obligations of the Ottawa Convention, they also claim to support the broader norms upon which the MBT is based. This suggests that while non-parties may resist new developments in international law, they also cannot entirely ignore these processes.

Conceptualizing Treaty Effectiveness and Non-Parties

How should we assess the impact of legal institutions? In general terms, studies of institutional effectiveness are concerned with whether, and to what extent, institutions can prove

¹¹ Andreas Hasenclever, Peter Mayer and Volker Rittberger (1997) *Theories of International Regimes*. Cambridge: Cambridge University Press, 9-10; Jutta Brunnee and Stephen J. Toope (2010) *Legitimacy and Legality in International Law*. Cambridge: Cambridge University Press, 48-50; and Alexander Wendt (2001) “Driving With the Rearview Mirror: On the Rational Science of Institutional Design.” *International Organization* 55(4), 1019–49.

¹² Ruggie, John. (1993) “Territoriality and Beyond: Problematizing Modernity in International Relations.” *International Organization* 47(1): 139-174; Reus-Smit, Christian. (1997) “Constitutional Structure of International Society and the Nature of Fundamental Institutions.” *International Organization*. 51: 555-589.

¹³ Finnemore, Martha. (1993) “International Organizations as Teachers of Norms: The United Nations Educational, Scientific, and Cultural Organization and Science Policy.” *International Organization* 47(4): 565-597; Eyre, Dana P. and Mark C. Suchman. (1996) “Status, Norms, and the Proliferation of Conventional Weapons: An Institutional Theory Approach.” In *The Culture of National Security*. Edited by Peter J. Katzenstein. New York: Columbia University Press, 79-113; Scott D. Sagan, (1996-1997) “Why Do States Build Nuclear Weapons? Three Models in Search of a Bomb” *International Security*. 21(3): 54-86, especially 73-84.

¹⁴ Jepperson, Ronald L., Alexander Wendt, and Peter J. Katzenstein. (1996) “Norms, Identity and Culture in National Security.” In *The Culture of National Security*. Edited by Peter J. Katzenstein. New York: Columbia University Press, 33-78, at 54.

consequential in influencing state behaviour and impact the composition of the international system. The most developed accounts of effectiveness are arguably to be found in the fields of environmental regulation and human rights. Here the literature tends to focus on behavioural indicators of treaty impact, either in reference to changes in the outcomes of state policy, or more holistic assessments of improvements in the status of international goods.¹⁵ Recent work has frequently employed innovative large-*n* statistical approaches in this effort.¹⁶ Assessments of the Ottawa Convention have tended to share this preference for directly observable measures of progress, albeit with far less reliance on quantitative methods. Indeed, given the treaty's relative youth, a significant portion of the existing scholarship has been directed towards its projected future operation and impact or particular issues of substantive concern during the Convention's early years.¹⁷

While providing vital data in evaluating the impact of various treaties, these accounts lack an appreciation for the full range influence that legal institutions may exert in the international system. Many studies focus on measures of formal compliance—either operationalized as ratification or rule-following—and thus largely neglect other forms of partial adaptation available to non-parties. Widespread membership in an international treaty is the most obvious evidence of a strong international legal norm, but this naturally excludes non-parties, making it difficult to assess the authority of “non-hegemonic” treaties on those actors outside of its formal legal ambit. An emphasis on behavioural indicators thus obscures more subtle evidence of legal influence, particularly in the ways legal institutions may shape the context in which debates about rights and responsibilities are undertaken.¹⁸ This paper explores the

¹⁵ Hall, Charles. (1998) “Institutional Solutions for Governing the Global Commons: Design Factors and Effectiveness.” *The Journal of Environment Development* 7(2): 86-114; Sprinz, Detef F. and Carsten Helm. (1999) “The Effect of Global Environmental Regimes: A Measurement Concept.” *International Political Science Review*. 20(4): 359–369; and Young, Oran R. and Michael Zurn. (2006) “The International Regimes Database: Designing and Using a Sophisticated Tool for Institutional Analysis.” *Global Environmental Politics*. 6(3): 121-143.

¹⁶ For example: Hathaway, Oona A. (2001-2002) “Do Human Rights Treaties Make a Difference?” *Yale Law Journal* 111: 1935-2042; Neumayer, Eric (2005) “Do International Human Rights Treaties Improve Respect for Human Rights?” *Journal of Conflict Resolution*. 49(6): 925-953; Hafner-Burton, Emilie M. and Kiyoteru Tsutsui. (2007) “Justice Lost! The Failure of International Human Rights Law To Matter Where Needed Most.” *Journal of Peace Research*. 44(4): 407-425; Hafner-Burton, Emilie M. and James Ron. (2009) “Seeing Double: Human Rights Impact through Qualitative and Quantitative Eyes.” *World Politics*. 61(2): 360-401.

¹⁷ Morgan, Matthew J. (2002) “A New Kellogg-Briand Mentality? The Anti-Personnel Landmine Ban.” *Small Wars & Insurgencies*. 13(3): 97-110; Chamberlain, Paul and David Long. (2004) “Europe and the Ottawa Treaty: Compliance with Exceptions and Loopholes.” In *Landmines and Human Security: International Politics and War's Hidden Legacy*. Edited by Richard A. Matthew, Bryan McDonald, and Kenneth R. Rutherford. Albany, New York: State University of New York Press: 81-96; Fraser, Leah. (2004) “Evaluating the Impacts of the Ottawa Treaty.” In *Landmines and Human Security: International Politics and War's Hidden Legacy*. Edited by Richard A. Matthew, Bryan McDonald, and Kenneth R. Rutherford. Albany, New York: State University of New York Press: 35-47; Jacobs, Christopher W. (2004) “Taking the Next Step: An Analysis of the Effects the Ottawa Convention May Have on the Interoperability of United States Forces with the Armed Forces of Australia, Great Britain, and Canada.” *Military Law Review*. 180: 49-114; Wareham, Mary. (2006) “The Role of Landmine Monitor in Promoting and Monitoring Compliance with the 1997 Anti-Personnel Mine Ban Convention.” In *Disarmament as Humanitarian Action: From Perspective to Practice*. Edited by John Borrie and Martin Randin. Geneva: United Nations: 79-108; *Banning Landmines: Disarmament, Citizen Diplomacy, and Human Security*. Edited by Jody Williams, Stephen D. Goose, and Mary Wareham. Lanham: Rowman & Littlefield Publishers, Inc., 2008.

¹⁸ A few studies have directly addressed the normative content of treaty implementation; none, however, have offered a systematic, integrated treatment of various discursive and behavioural indicators. In particular, please see

intermediary stage between the creation of a legal agreement—wherein new norms and rules are crystallized in the treaty—and its prospective adoption as a universally accepted standard of international society. In particular, it is concerned with evaluating the degree to which state actors¹⁹ have internalized the legal norms embedded in the treaty text, and whether this may occur in the absence of formal adherence to the legal document.

Scholarship on customary international law (CIL) provides a useful analogue for the study of how treaties may bear on non-members. Scholars of international law have long recognized that legal obligations may stem from negotiated sources like treaties, as well as via longer-term processes where a “generalized consensus” develops concerning the content of the law in the absence of specific codification or consent from constituent state actors.²⁰ In that latter respect, Byers describes customary international law as “a set of shared beliefs, expectations or understandings held by the individual human beings who govern and represent states.”²¹ Research on CIL has therefore demonstrated that legal obligations may obtain even in the absence of explicit consent, this opens a potential avenue whereby the MBT may exert influence over formal non-parties. These dual sources of law also match well with the typical IR concern with regimes, which are themselves composed of rule-based structures and broader normative systems.²²

While not adopting the approach of customary international legal scholarship in its entirety, the notion of legal obligation as emanating from—and thus evidenced by—objective compliance and subjective belief in the status of law is highly valuable to an assessment of how treaty-based law may generate authority in the face of substantial opposition. Legal scholars identify two sources—state practice and *opinio juris*—as evidence of customary international law. The former concerns whether (and to what extent) state behaviour accords with or confirms the purported legal norm. The latter refers to intersubjective understandings concerning the status

Herby, Peter and Kathleen Lawand. (2008) “Unacceptable Behavior: How Norms Are Established.” In *Banning Landmines: Disarmament, Citizen Diplomacy, and Human Security*. Edited by Jody Williams, Stephen D. Goose, and Mary Wareham. Lanham: Rowman & Littlefield Publishers, Inc., 199-216; and Smith, Shannon. (2008) “Surround the City With Villages: Universalization of the Mine Ban Treaty.” In *Banning Landmines: Disarmament, Citizen Diplomacy, and Human Security*. Edited by Jody Williams, Stephen D. Goose, and Mary Wareham. Lanham: Rowman & Littlefield Publishers, Inc., 69-86. Here I leave aside the numerous impressive studies concerning the social and normative context of the emergence of the mine ban movement and negotiation of the Ottawa Convention. See, for example, Price 1998; Price, Richard. (2004) “Emerging Customary Norms and Anti-Personnel Landmines.” In *The Politics of International Law*. Edited by Christian Reus-Smit. Cambridge: Cambridge University Press, 106-130; and various contributions in *To Walk Without Fear: The Global Movement to Ban Landmines*. Edited by Maxwell A. Cameron, Robert J. Lawson, and Brian W. Tomlin. Toronto: Oxford University Press, 1998.

¹⁹ This paper restricts its analysis to states and does not systematically assess the impact on non-state armed groups, since only the former may formally join international treaties. This simplifying decision, however, should not be interpreted to suggest that non-state actors are unimportant to the progressive expansion of international humanitarian law, or to deny the valuable work by scholars and practitioners in this regard.

²⁰ Statute of the International Court of Justice, Article 38.1(a-b).

²¹ Byers, Michael. (1999) *Custom, Power, and the Power of Rules: International Relations and Customary International Law*. Cambridge: Cambridge University Press, 151.

²² Moreover, the conceptual overlap between “custom” and “norms” as advanced in the respective literatures means that insights from the study of customary international law should be broadly transferable to this assessment of specific treaties. The definition of custom advanced above shares a great deal with the classic definition of norms as “collective expectations about proper behavior for a given identity.” Jepperson, Wendt, and Katzenstein 1996, 54.

of the law: do the same state actors suggest—through their public discourse—that they regard a given practice as an obligation under international law?²³ Legal norms may thus be advanced and contested through the behaviour of the constituent actors of the international system and their rhetorical positions in explaining their positions vis-à-vis the law(s) in question.

A holistic measure of legal influence should therefore capture behavioural indicators like compliance with core treaty rules, as well as patterns of reasoning and justification whereby state representatives express an affinity with relevant legal norms. The discursive positions of state actors can provide telling evidence of normative influence above and beyond the strict reality of their behaviour. *Ceteris paribus*, more rule-following indicates healthier norms and a stronger treaty. Taken in isolation, however, state practice is an incomplete measure of norm strength since these observable metrics lack any sense of the *motivations* that inspired the behaviour. “[B]ecause norms by definition embody a quality of ‘oughtness’ and shared moral assessment, norms prompt justifications for action and leave an extensive trail of communication among actors that we can study.”²⁴ Acknowledging the tentative nature of actor change also provides a richer view of the myriad ways in which states may progress or regress in their adherence to a treaty’s rules or objectives, and the influence that legal institutions have in facilitating these processes. Indeed, a key insight from the constructivist literature is that the authority of norms may endure even in the face of some non-compliance. “Important here is the intersubjective phenomenon that the transgressor feels compelled to justify (or deny) the violation because of mutually shared expectations that such behaviour is normally unacceptable and requires defence to reconfirm the status of the violator as a legitimate member of international society.”²⁵ Integrating an analysis of state practice with attention to the ways in which actors justify their behaviours can provide the context necessary for a fuller account of treaty influence.

The focus of this assessment is the central normative injunction concerning the absolute prohibition on the use of AP landmines, and associated considerations regarding the legal legitimacy and authority of the MBT. The approach advanced here draws attention to intermediate forms of treaty influence that would be obscured if one were only interested in the formal membership status of relevant actors (ratification or not) or the completion of complex long-term goals. The final resolution of the problem may be achieved far in the future or never at all. However, short of this end point, treaties may still influence actors towards incremental adaptation – by modifying calculations of cost and benefit, generating incentives for actors to adhere to rules, and providing alternative “scripts” concerning appropriate behaviour. An emphasis on the normative dimension of legal authority is specifically attentive to the possibility that non-parties may associate themselves with treaty norms even as they continue to resist its formal obligations. While based in empirical assessment, these are explicitly *political* metrics, and ones well-suited to a constructivist methodology.

Non-Party Behaviour and the Influence of the Mine Ban Treaty

²³ Byers 1999, 19.

²⁴ Finnemore, Martha and Kathryn Sikkink. (1998) “International Norm Dynamics and Political Change” *International Organization* 52: 887-917, at 898. For the purposes of this study, I rely on the official statements of state representatives in relevant treaty fora; these are supplemented as necessary with domestic sources including policy documents and statements from relevant national ministries.

²⁵ Price 2004, 114.

For the Mine Ban Treaty to be judged to be widely effective, we seek evidence of what Price has termed “behavioural compliance pulls” – changes in state practice in conformance with the core injunctions of the treaty.²⁶ That is, want to assess whether states are adhering to the specific features of the anti-landmine norm, and whether the empirical record suggests a progressive deepening of this observance. Evidence that non-parties—and especially materially powerful states with active military operations—were largely complying with the ban on AP landline use would provide especially important evidence against the realist hypothesis that legal restraints will have little impact in matters of national security.

The absolute ban on the use of AP landmines sits at the very heart of the normative order created by the Ottawa Convention.²⁷ As Price has noted, antipersonnel landmines have been regarded for much of their history as uncontroversial weapons, to be employed—within the normal bounds of international humanitarian law—as would other “conventional” munitions like artillery shells, rockets, and personal infantry weapons.²⁸ The United States Department of State and the International Campaign to Ban Landmines have estimated that between 2.5 and four million antipersonnel landmines were emplaced annually in the 1970s, 1980s, and 1990s; as of 1998, over 70 countries were infested with a total of 60-70 million mines.²⁹ Thus for the AP landmine ban to be considered effective, it must substantially overturn the *prior* norm by which the use of antipersonnel landmines was a widespread and legitimate feature of warfare.³⁰

The continued resistance of many states to the MBT clearly presents a challenge to the consolidation of the anti-landmine norm. At present, 39³¹ states remain outside the Ottawa regime, including a number of prominent states including the United States, China, Russia, and India. Other non-parties like Egypt, Iran, Israel, Pakistan, and South Korea, are important regional actors. Moreover, many of the remaining non-members are significant past users of AP landmines, and possess the largest stockpiles of the weapons. In terms of their geopolitical influence, then, these states would seem to be highly significant to the realization of an effective international treaty, especially when that agreement directly implicates the security functions of the state. Many treaty experts believe that the pool of likely members has been nearly exhausted, and the many non-parties are simply unprepared to endorse the MBT in the foreseeable future.³² The impressive figure of 156 States Parties is thus moderated by the fact that no new members have joined the Convention since 2007.³³

²⁶ Price 2004, 122.

²⁷ Maslen, Stuart. (2005) *Commentaries on Arms Control Treaties, Volume I: The Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on Their Destruction*. Second Edition. Oxford Commentaries on International Law. Oxford: Oxford University Press, 79.

²⁸ Price 1998 and 2004.

²⁹ International Campaign to Ban Landmines. (1999) *Landmine Monitor 1999: Toward a Mine-Free World*. Washington, D.C.: Human Rights Watch, 4-5. Available online at www.icbl.org/lm1999; United States Department of State, Bureau of Political-Military Affairs, Office of Humanitarian Demining Programs. (1998) *Hidden Killers 1998: The Global Landmine Crisis*. Washington, D.C.: U.S. Department of State. Available online at http://www.state.gov/www/global/arms/rpt_9809_demine_toc.html.

³⁰ Price 2004, 110.

³¹ This includes the two states—the Marshall Islands and Poland—that have signed but not ratified the Convention.

³² Interviews with Implementation Support Unit staff and representatives of the International Campaign to Ban Landmines (ICBL). Geneva, October 2009 and November 2010.

³³ The last state to accede to the MBT was Palau, which did so on November 18, 2007.

Yet the extent of opposition from major powers may not be as uniform as their formal membership status suggests. International treaties may often stimulate behavioural and discursive changes in advance of official adherence to a legal agreement via ratification or accession. The pattern of state use of AP landmines over the past decade is strongly suggestive of a strengthening legal and moral norm associated with the treaty.³⁴ Since the advent of the Mine Ban Treaty the new deployment of landmines has declined dramatically across the international system. 17 state actors were confirmed to have used AP landmines between 1997 and 1999³⁵; this figure has fallen precipitously in the intervening years. And since 2007, only two states—Myanmar and Russia—have continued to deploy landmines as a regular feature of their military operations. The Russian Federation is not believed to have engaged in any new mine use during 2009 and 2010; this leaves Myanmar as the sole remaining state user of antipersonnel landmines.³⁶

This trend line is significant in part because it is not matched by a parallel decline in the frequency of violent conflict in the international system. While the total number of armed conflicts has ebbed globally, organized violence remains common.³⁷ Yet prominent past users of the weapons are now engaged in substantial pattern of restraint, suggesting that the taboo against mine use extends to states outside the MBT. It is particularly notable that the United States appears not to have used AP landmines in any of its interventions since the 1991 Gulf War.³⁸ This includes the military invasions of Afghanistan and Iraq – though there are some allegations that landmines may have featured in the former conflict.³⁹ If proven conclusively, this would represent a significant setback for the deepening authority of the non-use norm. Yet ambiguity may actually serve to reinforce the normative prohibition: even if ultimately confirmed, the fact that this allegation remains unverified speaks at least in part to a desire among U.S. officials to obscure their behaviour. This in turn reflects a sensitivity to the demands of an international norm, albeit one that the U.S. does not officially endorse. The apparent restraint demonstrated by American forces also has important compounding effects over time. The international

³⁴ The data in this section is primarily drawn from the annual Landmine Monitor reports between 1999 and 2009, available online at <http://www.the-monitor.org/index.php>.

³⁵ 16 of the 17 confirmed state users of antipersonnel landmines during this period were not non-parties at the time of their use. Only Senegal had ratified the Ottawa Convention prior to its use of landmines.

³⁶ International Campaign to Ban Landmines. (2010) *Landmine Monitor 2010: Toward a Mine-Free World*. Washington, D.C.: Human Rights Watch, 13. Available online at <http://www.the-monitor.org/index.php/publications/display?url=lm/2010/>. *Landmine Monitor 2009* was unable to verify Russian policy with respect to the continued use of AP landmines. However, the subsequent edition—as cited here—gives strong reason to believe that Russia did not engage in the new employment of AP landmines during 2009. International Campaign to Ban Landmines. (2009) *Landmine Monitor 2009: Toward a Mine-Free World*. Washington, D.C.: Human Rights Watch. Available online at <http://www.the-monitor.org/index.php/publications/display?url=lm/2009/>.

³⁷ For example, in 2007 the Human Security Report recorded 32 active “state-based armed conflicts” as well as 18 “non-state armed conflicts” and 24 “campaigns of one-sided violence”. This data is derived from the Human Security Report Project’s Organized Violence Statistics. Available online at www.hsrgroup.org/our-work/security-stats/Organized-Violence.aspx. Definitions of the three categories of armed violence can be found at the same site.

³⁸ For a detailed discussion, please see the United States General Accountability Office, *Military Operations: Information on U.S. Use of Land Mines in the Persian Gulf War*. GAO-02-1003. September 2002.

³⁹ See *Human Rights Watch Backgrounder: Landmine Use in Afghanistan* (October 2001), 4-5. See also Michael Byers, “The Laws of War, US-Style” *London Review of Books* 25(4) (February 20, 2003). Available online at <http://www.lrb.co.uk/v25/n04/michael-byers/the-laws-of-war-us-style>.

stigmatization of AP mines has increased the political salience of the issue such that any future decision to resume use would involve the most senior decision makers. This has had the effect of reinforcing the exceptional nature of AP mines, and thus further raising the threshold for future use.

It is also significant that a variety of states with historically aggressive neighbours—including Finland, Lebanon, and Poland—have not sought to utilize antipersonnel landmines in the defence of their borders. Taken together, this represents a hard case, since “conventional wisdom assumes that the high politics of security policy is where the state ought to be the most autonomous from society at large and able to set its sights on military imperatives relatively independent of societal pressures, whether domestic or international.”⁴⁰ By this reading, the existence of armed conflicts should, *ceteris paribus*, make states less likely to adhere to legal norms restricting their policy options in employing military force. Were it not for their effective stigmatization, we would expect to see AP mines used in a greater number of these conflicts, where the weapons previously featured extensively.

Though still early in the life of the treaty, employment of landmines has increasingly become an aberration in international practice. This conclusion is all the more striking given the fact that until the mid-1990s, the use of AP landmines was widespread and extensive. Moreover, the pattern evidenced above cannot be explained away as merely the result of a declining frequency of violent conflict. Rather, the empirical record would suggest a strengthening norm against the use of antipersonnel landmines, the effect of which has been to render the use of AP mines a highly exceptional occurrence, even among states that have resisted the legal obligations of the MBT. To the extent that violations of the non-use norm persist, they are understood in qualitatively different terms than prior to the mine ban movement’s emergence. In many cases, then, behavioural change—*de facto* compliance with the non-use norm—has preceded official endorsement of the Ottawa Convention. These patterns of practice would also seem to fall below the threshold of persistent and transparent resistance as commonly understood as necessary in order to undermine an emerging rule in international law.⁴¹ These observations leave open the possibility of a gradually expanding community of membership that may itself be subject to internal differences of formality.

Discourse and the Normative Authority of the Mine Ban Treaty

The empirical record seems to suggest that the core rule of the Ottawa Convention concerning non-use of AP landmines is receiving widespread adherence. Yet the reasons for this cannot be inferred directly from the behaviours themselves. To assign influence to the treaties as instruments of international law requires some evidence that compliance is not epiphenomenal—as sceptics would suggest—but is rather motivated by an affinity with the legal text. Put differently, for a treaty to be effective it must alter state behaviours, but these changes must be the result of its own normative authority rather than mere coincidence.

Humanitarianism and Discursive Legitimacy in the MBT Regime

⁴⁰ Price 1998, 613.

⁴¹ Guldahl, Camilla G. (2008) “The Role of Persistent Objection in International Humanitarian Law.” *Nordic Journal of International Law*. 77: 51-86, at 53.

The MBT's claim to legitimate authority is based on two distinct assertions: first, that antipersonnel landmines are a humanitarian threat that can only be addressed through their complete abolition; and second, that the Convention is the appropriate legal mechanism to achieve this end.⁴² A key question in rendering a more holistic assessment of the political implications of the mine ban thus concerns how state actors view the "central validity claims"⁴³ of the legal norm. A judgement on the standards of *opinio juris*—that the state in question had accepted these principles as legal obligations—is central to the evaluation of the normative impact of the Mine Ban Treaty.

At the broadest level, the vast majority of non-parties appear to acknowledge the Convention's importance as an instrument of international humanitarian law. Virtually every state still outside of the Mine Ban Treaty has explicitly adopted the *humanitarian* discourse promoted by ban proponents, and have identified AP landmines as a significant and enduring threat to civilian populations.⁴⁴ In one interesting example, China has pointedly associated the Ottawa Convention with a long history of international legal efforts to ameliorate the effects of war:

From the *St. Petersburg Declaration* and the *Geneva Conventions*, one can see the greatness of mankind and the progress it has made, testifying that humanitarianism, an important symbol and core element of our civilization, has become the common aspiration of all modern states. It is this common spirit of humanitarianism that we discern in the *Ottawa Convention*... signifying a new and important effort to preserve human safety. It is for this reason that we applaud the objective in the Convention.

The Chinese Government attaches great importance to humanitarian issues and supports the efforts by the international community in addressing the humanitarian problems caused by landmines.⁴⁵

Resistant states have frequently endorsed the goals of the Convention, while at the same time seeking to avoid the binding effects of its legal obligations in the near term. Indeed, in the early days of the mine ban movement, then U.S. President Clinton was the first world leader to call for the eventual elimination of AP landmines.⁴⁶ And while continuing to assert their legitimacy under some contingencies, the U.S. has emphasized that it "is committed to

⁴² Gard Jr., Robert G. (1998) "The Military Utility of Anti-Personnel Landmines." In *To Walk Without Fear: The Global Movement to Ban Landmines*. Edited by Maxwell A. Cameron, Robert J. Lawson, and Brian W. Tomlin. Toronto: Oxford University Press, 136-157, at 137.

⁴³ Beier, J. Marshall. (2002) "Siting Indiscriminacy: India and the Global Movement to Ban Landmines." *Global Governance* 8: 305-321; also Price 2004.

⁴⁴ This includes China, Cuba, the D.P.R.K., Egypt, Finland, Georgia, India, Iran, Israel, Kazakhstan, Korea, Kyrgyzstan, Lao P.D.R., Lebanon, Libya, Marshall Islands, Micronesia, Mongolia, Morocco, Nepal, Oman, Pakistan, Poland, Russia, Saudi Arabia, Singapore, Sri Lanka, Syria, Tonga, Tuvalu, United Arab Emirates, the United States, and Vietnam. Only Myanmar and Uzbekistan appear to have made no specific statements on the legitimate humanitarian objectives of the Ottawa Convention.

⁴⁵ Statement of the Chinese Observer Delegation at the Fifth Meeting of States Parties. Bangkok, September 19, 2003. Available online at <http://www.apminebanconvention.org/meetings-of-the-states-parties/5msp/daily-summaries-and-statements/update-day-5/>.

⁴⁶ Statement by President William Clinton at the United Nations General Assembly. September 1994. See also Human Rights Watch, *Back in Business? U.S. Landmine Production and Exports*. A Human Rights Watch Briefing Paper. August 2005, 3. Available online at www.hrw.org/backgrounder/arms/arms0805/.

eliminating the humanitarian risks posed by landmines.”⁴⁷ Other prominent non-parties, including China, India, Israel, the Republic of Korea, Pakistan, and Russia have accepted the principled basis of the Convention and indicated support for an eventual ban.⁴⁸ This is reflected in the fact that no states have voted against the annual United Nations General Assembly resolution supporting universalization of the Mine Ban Treaty.⁴⁹ In some cases, non-parties have explicitly recognized the legal authority of the Ottawa Convention even while they maintain policies directly at odds with the treaty. According to Nepal, which had previously employed mines domestically, “[i]t is an established fact that the use of antipersonnel mines is an act of severe criminal nature.”⁵⁰ Such statements are remarkable, as they highlight important ways in which discourse may outstrip, and even directly conflict with, official policy.

Even abstract statements of support highlight important tensions between a strengthening international standard and the purported requirements of *realpolitik*. The competing demands of maintaining an official position asserting the utility of AP mines, while at the same time acknowledging the humanitarian logic underpinning the Mine Ban Treaty, can open the door to further reconsideration of fundamental interests, as state actors face internal and external pressure to align their formal policies with declared aspirations. Stating broad support while still resisting the specific commitments of the treaty is therefore

⁴⁷ United States Department of State, *Fact Sheet: New United States Policy on Landmines: Reducing Humanitarian Risk and Saving Lives of United States Soldiers*. February 27, 2004. Available online at www.fas.org/asmp/campaigns/landmines/FactSheet_NewUSPolicy_2-27-04.htm.

⁴⁸ China has similarly stated that it supports “the ultimate goal of a complete ban on APLs in a bid to eliminate the threat to innocent civilians by APLs.” Statement by H.E. Ambassador Shao Guanfu, Head of the Chinese Observer Delegation to the First Meeting of States Parties to the Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Landmines, and Their Destruction. Maputo, Mozambique, May 4, 1999. Similarly, “Korea in principle supports the ultimate goal of eliminating APLs.” Statement of the Delegation of the Republic of Korea. Ottawa Conference. October 3-5, 1996. Pakistan has previously suggested employing the Conference on Disarmament as a potential forum for “advanc[ing] the goal of ultimate global prohibition of APL’s.” Statement by Pakistan to the First Conference of Parties to the Amended Protocol II to the Convention on Certain Conventional Weapons. Geneva, December 17 1999. The Russian Federation has also acknowledged that “a mine-free world remains our common goal. . . . [O]ur movement towards this goal has to be realistic, staged and ensuring [the] necessary level of stability.” Statement by Russia to the Fourth Annual Conference of Parties to the Amended Protocol II of the Convention on Certain Conventional Weapons. Geneva, December 2002. Notes and documents on file with the author. Finally, India has repeatedly stated that it is “fully committed to the eventual elimination of anti-personnel landmines.” Statement by Mr. Amandeep S. Gill, Counsellor, Permanent Mission of India to the Conference on Disarmament, to the 10th Meeting of States Parties. Geneva, 29 November 2010. Available online at <http://www.apminebanconvention.org/meetings-of-the-states-parties/10msp/what-is-happening/day-1-monday-29-november>

⁴⁹ Some non-parties including China, Georgia, Finland, and Sri Lanka have voted in favour of the resolution. Summaries of the annual UNGA sessions, including voting records and national statements, are available at <http://www.un.org/en/ga/sessions/>.

⁵⁰ Bhupendra Prasad Poudyal Undersecretary Ministry of Defence. *Status Paper of Nepal On The National Implementation of The Spirit of Anti-Personnel Mine Ban Convention 1997*. Submitted to the Intersessional Standing Committee Meeting, Geneva. April 23, 2007. Available online at <http://www.apminebanconvention.org/intersessional-work-programme/april-2007/gs-summary-and-statements/>. In a very similar vein, Sri Lanka, at the time a user of landmines, nonetheless asserted that it “recognizes the vital role played by the Ottawa Convention. . . . to raise global consciousness and achieve international humanitarian and disarmament cooperation on the issue of anti-personnel landmines.” Statement by Sri Lanka at the Nairobi Summit for a Mine Free World (First Review Conference). Nairobi, December 2-3 2004. Available online at <http://www.nairobisummit.org/high-level-segment/overview/>.

not necessarily mere cynical statecraft. “Rather, engaging in such legal discourse can mark a crucial step in the process of legal obligation imparting its influence on the identities and purposes of states.”⁵¹ This process may thus include formal non-parties in an expanding web of community standards and obligations that defy the traditional emphasis on state consent. While incomplete, the pattern of discourse suggests a strengthening norm associated with the MBT, since even states that refuse to abandon landmines entirely have been compelled to express support for the purposes of the ban. In this respect, the Ottawa Convention has clearly altered the legal and political reality in which international actors must operate.

“Exceptional” Politics: Denials, Justifications, and the Status of MBT Norms

The observed shift in non-party discourse has been largely reinforced in moments when the mine ban has come under specific challenge. Norms may endure and continue to assert authority in the face of some contrary acts.⁵² In rendering an assessment of the impact of violations, we are chiefly interested how the given act is situated within the scope of possible behaviours – that is, whether the act is understood as a genuine aberration from the regular pattern of state action, or a foreseeable (if regrettable) outcome that is to be expected. In instances of direct or suspected violation, the nature of subsequent discourse is therefore vital to the assessment of treaty health.

Reports of violations have often been met with vigorous denials from relevant quarters. Georgia has for example repeatedly challenged suggestions that it employed AP landmines in its domestic security operations: “In recent years the South Osetian separatists accused the Georgian side in mining the territories in conflict area, however, it must be stressed, that all allegations of that sort do not reflect the real picture – the Georgian Armed Forces and other relevant structures strictly follow the declared moratorium.”⁵³ De facto rhetorical support for a norm offers important evidence of an expanding sense of legal obligation in the international community that can be traced directly to the mine ban movement. Indeed, were it not for a strengthening norm prohibiting the use of AP landmines, such incidents would likely go unremarked-upon, and there would be little reason for states to issue denials or otherwise obscure their behaviour. The fact that actors must conceal their actions—rather than openly declaring their non-compliance—provides strong evidence that the norm has gained acceptance among a significant constituency in the international community such that public violations imply an unpalatable political cost. Behaviour that challenges the treaty is thus no longer considered appropriate, even if it continues to occur in the shadows. The customary prohibition of torture is instructive here: while abuse undoubtedly occurs with considerable frequency, no one claims that torture is an acceptable or “normal” practice. For this reason, covert non-compliance does not directly threaten the status of legal norms or their broader institutions, but rather “constitute[s] legally relevant State practice *in support* of a rule prohibiting the actions in question.”⁵⁴ It is only because antipersonnel landmines have come to be so widely condemned that states should seek to specifically distance themselves from such behaviours.

⁵¹ Price 2004, 119-20.

⁵² Price 2004, 114.

⁵³ Statement by Georgia at the Intersessional Standing Committee Meetings. Geneva, May 8, 2006. Document on file with the author.

⁵⁴ Byers 1999, 149.

Two further points are important here. First, denials have not come solely from full treaty parties, who might be motivated by a fear of punishment relating to the non-observance of contractual commitments. A number of states accused of using AP landmines were not members of the MBT at the time, and possessed no legal obligations according to a traditional consent-based reading of international law. The apparent need to refute accusations stemmed instead from a concern for international standing or reputation. Second, the allegations considered here have typically been framed not as more generic violations of the laws of war—for example, by deliberately targeting civilians or using disproportionate military force *per se*—but have instead centred on a much more particular assumption that AP landmines, as a specific class of weapons in their own right, were *particularly* illegitimate. A number of conflicts have therefore featured accusations of mine use among belligerents that had the apparent intention of discrediting the opposing side.⁵⁵ These developments only make sense in an international environment in which the specific prohibition concerning landmines has expanded beyond a merely consensual commitment among sovereign units to become a prominent independent source of international authority.

In a different vein, a number of states have acknowledged violations of the Convention, yet at the same time sought to portray these actions as fundamentally unique or aberrant situations that were not in keeping with a more general respect for the treaty. “In the context of the internal armed conflict, the Sri Lankan armed forces were compelled to use anti-personnel landmines for legitimate defensive purposes. Minefields were laid by the security forces in keeping with internationally accepted standards including proper marking and record-keeping procedures.”⁵⁶ This statement is interesting both for its claim to exceptional mitigation, and for the fact that the acknowledged violations were framed as a limited and humane transgression within the previously-existing restraints of international law. Azerbaijan and Eritrea have made similar statements in confirming past mine use.

In one respect, such claims are inherently problematic for the absolute prohibition of antipersonnel landmines, as they suggest some—even highly circumscribed—conditions under which their use might be permitted. The net effect might therefore be to erode the absoluteness of the prohibition and degrade the central premise of the legal regime. While this concern is appropriate, the implications for the broader health of the MBT may not be especially severe. In the Sri Lankan example, the particular severity of the situation was presented as a necessary exception to a more general support for the MBT, and was not held to lead to a generalized right to use the weapons. In this sense, the exceptional circumstances actually serve to reinforce the

⁵⁵ This dynamic appears to have been at work in recent inter-state conflicts, including the 1998-2000 border war between Eritrea and Ethiopia, and the 2008 Georgian-Russian war. See for example International Campaign to Ban Landmines. (2000) *Landmine Monitor 2000: Eritrea Country Report*. Available online at http://www.the-monitor.org/index.php/publications/display?act=submit&pqs_year=2000&pqs_type=lm&pqs_report=eritrea&pqs_section=. Regarding the war between Georgia and Russia, please Ministry of Foreign Affairs of Georgia, “Statement of the Ministry of Foreign Affairs of Georgia” 18 August 2008. Available online at http://www.mfa.gov.ge/index.php?lang_id=ENG&sec_id=59&info_id=7522; Georgia Statement at ISC, May 8 2006; Luke Harding, Tom Parfitt and Julian Borger, “No sign of military withdrawal as Russian armour stays put.” *Guardian* 18 August 2008. Available online at <http://www.guardian.co.uk/world/2008/aug/18/russia.georgia1>.

⁵⁶ Sri Lanka Statement at Nairobi Summit. Document on file with the author.

authority of the prohibition under “normal” conditions. Thus the threshold for violations remains exceedingly high, even if the absolute prohibition has been breached in some discrete cases.

Just as importantly, the justifications were not endorsed by other states—and especially States Parties—as qualifying as legitimate exceptions to the prohibition. Without making reference to any instance in particular, the delegates to the second Meeting of States Parties were clear in their condemnation of ongoing AP landmine use: “[w]e implore those States that have declared their commitment to the object and purpose of the Convention and that continue to use anti-personnel mines to recognize that this is a clear violation of their solemn commitment. We call upon all States concerned to respect their commitments.”⁵⁷ So while some states have justified their use of antipersonnel landmines under limited conditions, the broader international community has not recognized these cases as producing *de facto* exceptions to the universal prohibition concerning AP mine use.

Utility, Humanitarian Impact, and the Enduring Significance of AP Landmines

Much more troubling from the perspective of an enlarging normative consensus, therefore, are instances where state actors make no particular effort to address their non-compliance through specific denial or qualification. The Russian Federation, for example, has repeatedly acknowledged using antipersonnel landmines “to protect facilities of high importance” in Chechnya, Dagestan, Tajikistan, and along the border with Georgia.⁵⁸ This use has been presented as an unexceptional part of regular operational policy. The apparent restraint over the past two years has not been accompanied by a formal rejection of past practice, or any suggestion that this will continue to be observed in the future. Others including China, India, Israel, Pakistan, and the United States have similarly asserted a continued right to employ the weapons.

Indeed, many non-party states continue to envision a role for antipersonnel landmines in the protection of deployed military forces and the defence of national borders. Thus in its 2004 policy review the United States announced that it “will not join the Ottawa Convention because its terms would have required us to give up a needed military capability.”⁵⁹ A similar view is reflected in the discourse of other prominent non-parties. Indeed, embedded within the necessity discourse are frequent allusions to the utility antipersonnel landmines have in providing an inexpensive capacity for states with limited technical means. Hence the Chinese government in 1999 endorsed the view that

⁵⁷ Declaration of the Second Meeting of States Parties, pg. 11, paragraph 6. Geneva, September 15, 2000. APLC/MSP.2/2000/1. Available online at <http://www.apminebanconvention.org/meetings-of-the-states-parties/2msp/summary-of-decisions-and-actions/>.

⁵⁸ International Campaign to Ban Landmines. (2009) *Landmine Monitor 2009: Russia Country Profile*, 1071.

⁵⁹ United States Department of State, Bureau of Political-Military Affairs Fact Sheet, “New United States Policy on Landmines: Reducing Humanitarian Risk and Saving Lives of United States Soldiers.” February 27 2004. Available online at www.fas.org/asmp/campaigns/landmines/FactSheet_NewUSPolicy_2-27-04.htm. This merely restated the prior official view that antipersonnel landmines remain vital to operational plans for the defence of South Korea and in ensuring the efficacy of anti-vehicle mine systems. United States, *Anti-Personnel Landmines: Seeking Support for U.S. Positions at Oslo Conference*; and *Proposed U.S. Amendments*. Presented at the Oslo Diplomatic Conference. September 1997. Document on file with the author.

[t]o some countries, especially developing ones, [antipersonnel landmines], as a defensive weapon, [are] still an important military means for safeguarding national sovereignty and preventing foreign invasion. Under the present situation, when international conflicts [pop] up here and there, and foreign interference is on the rise, APLs are still of important practical significance for countries like China, who lack advanced defensive weapons, to defend their national sovereignty and territorial integrity.⁶⁰

This has been repeated by a variety of smaller states including Cuba, Egypt, Kazakhstan, Kyrgyzstan, Libya, Mongolia, Syria, Uzbekistan and Vietnam, among others. Within this critique can be found an assertion not only that antipersonnel landmines are acceptable weapons, but equally that the prohibitory norm enshrined in the Ottawa Convention may be fundamentally discriminatory. Indeed, some states—notably India and the Korean Republic—have gone so far as to argue that if the continued use of AP mines avoids employment of other, less discrete forms of violent force, they may result in a *more* humane outcome.⁶¹

Despite the variety of necessity-based objections, all are ultimately grounded in a commitment to the enduring utility of antipersonnel landmines in at least some circumstances. Still, no states openly argue that antipersonnel landmines should be deployed in an indiscriminate fashion, and virtually all non-parties have endorsed the humanitarian norm at the heart of the mine ban regime. For many MBT opponents, the solution to this apparent discrepancy is to reconstruct the central causal claim of the mine ban movement—that landmines by their design are inherently indiscriminate—and instead emphasize particular conditions of their use as the cause of unacceptable humanitarian impact. “Landmines, by this logic, are not illegitimate – only such practices as result in dire human consequences.”⁶² In announcing its new policy on anti-personnel mines in February 2004, the Bush administration explicitly adopted this framing, and asserted that a reliance on self-destructing “smart” mines would alleviate suffering caused by “persistent” mines at a more acceptable cost.

[T]he President's policy focuses on the kinds of landmines that have caused the humanitarian crisis, namely persistent landmines, and it extends to all persistent landmines because the roads and fields we are helping to clear, in the Balkans, Africa, Asia and elsewhere, are infested with lethal anti-vehicle landmines in addition to the live anti-personnel landmines.... The evidence is clear that self-destruct and self-deactivate landmine munitions do not contribute to the grave risks of civilian injury that we find with persistent landmines that can and do, literally, wait for decades before claiming an innocent victim.... In sum, the President's policy strikes an appropriate balance that accommodates two important national interests: It takes significant and comprehensive steps... toward surmounting the global problem caused by persistent landmines, while at the same time meeting the needs of our military for defensive capabilities that may save American and friendly forces' lives in combat.⁶³

⁶⁰ Statement by H.E. Ambassador Shao Guanfu, Head of Chinese Observer Delegation. First Meeting of States Parties. Maputo, May 4 1999. See also the Statement of the Chinese Observer Delegation to the Fifth Meeting of States Parties. Bangkok, September 15-19, 2003. Both documents on file with the author.

⁶¹ Statement by the Korean Republic at the Ottawa Conference. Regarding India, see Beier 2002.

⁶² Beier 2002, 312.

⁶³ On-the-Record Briefing by Lincoln P. Bloomfield, Jr., Assistant Secretary of State for Political-Military Affairs, February 27, 2004. Washington D.C. Available online at <http://statelists.state.gov/scripts/wa.exe?A2=ind0402d&L=dosssdo&T=0&H=1&P=1255>.

The key feature of the new U.S. approach was to identify the persistence of landmines as the source of their humanitarian impact, and thus their impermissibility under existing humanitarian norms. Yet these features could be, it was argued, eliminated via technical changes and were not inherent in the class of weapons themselves. Seen in this light, it is possible to assert the legitimacy of AP landmines as acceptable weapons subject to proper design and use.

While not necessarily endorsing the technological solution implied by the 2004 Bush policy, the majority of states currently outside of the Ottawa regime have similarly sought to justify their retention of antipersonnel landmines by contesting the indiscriminacy claim at the heart of the mine ban norm. Fundamental to this alternative view is the assertion that antipersonnel landmines can be employed in ways that respect the humanitarian content of existing international humanitarian and customary law. In the view of many non-parties, then, *restrictions* on the use of antipersonnel landmines, rather than an outright ban, are the most appropriate means of addressing the threat AP mines pose to civilians. In particular, 1996 Amended Protocol II to the Convention on Certain Conventional Weapons (APII) has been widely endorsed by prominent opponents of the Mine Ban Treaty.⁶⁴ This framing reverses the assumptions of agency and intent central to the mine ban movement to argue instead that the nature of mine use—rather than the existence of the weapons themselves—constitutes the source of adverse outcomes.⁶⁵ Yet it also implies a fundamental disagreement regarding the proper institutional means of achieving broadly similar humanitarian goals. States that support APII in lieu of the Mine Ban Treaty reject the central validity claim of the Ottawa Convention, namely that antipersonnel landmines—regardless of their design or method of employment—are inherently indiscriminate weapons that necessarily present an unacceptable threat to civilian populations that can only be addressed through their complete abolition. In making this assertion, opponents of the MBT rely on the same foundational normative frame as supporters of the mine ban norm but employ it to assert the inverse proposition, that antipersonnel landmines can be employed within the bounds of international humanitarian law. Regulation, in this view, is sufficient to meet the core ethical demands of ban proponents, while still recognizing the prerogatives of military powers.

There are, therefore, are two separate legal regimes governing antipersonnel landmines in contemporary international society. Formal legal parity aside, the enduring preference of some prominent states for the lower legal standard enshrined in Amended Protocol II holds direct implications for the prospective universalization of the mine ban norm enshrined in the Ottawa Convention. APII is best understood not as a parallel or subsidiary legal standard, but rather an alternative source of authority that undermines a prospective international consensus surrounding the full prohibition of AP landmines. Prominent treaty hold-outs thus continue to subsume their acceptance of the MBT's humanitarian logic under various claims of national interest. While their discourse suggests a partial shift in favour of the mine ban norm—particularly in allowing for a more proscribed application of the weapons—the change is incomplete. Indeed, to the

⁶⁴ For treaty text please see www.icrc.org/ihl.nsf/FULL/575?OpenDocument. According to the Chinese delegation to the CCW Review Conference, “These important measures will effectively prevent the irresponsible use of landmines which caused civilian casualties and injuries and reduce the threat of landmines to the peaceful life of civilians.” Statement of the Chinese Delegation to the Review Conference of the Convention on Certain Conventional Weapons. Geneva, May 1996. Document on file with the author.

⁶⁵ Beier 2002, 316-317.

extent that it remains a consistent feature, this position would seem to offer the most relevant manifestation of persistent objection to the Mine Ban Treaty.⁶⁶

Nevertheless, non-party discourse may also suggest important potential in the context of a gradually expanding legal community. First, such statements represent a clear departure from the prior status quo in which mines did not warrant special attention as particularly problematic tools of warfare. Non-parties now must operate in an international system that has experienced a rapid change in a heretofore stable expectation concerning the accepted use of military force. As noted above, virtually no states are now willing to assert an unlimited right to employ AP mines. This is itself a notable development and evidence of the transformative potential of legal norms. The effect of the ban is apparent in the extent to which even resistant states have qualified and narrowed their expectations concerning the legitimate scope of warfare. At the minimum, then, official discourse has the effect of reinforcing the sense of antipersonnel landmines as a “special” category of weapons. The nature of this change is also significant: the prior calculus of military utility has been replaced by a widely-accepted reference to humanitarian effect as the basis for assessing the legitimacy of antipersonnel landmines.⁶⁷ The shift represents both a broadening and deepening of legal influence attributable to the Ottawa Convention. By endorsing the framing advanced by treaty proponents—protecting civilian populations from indiscriminate military force—non-parties further entrench the underlying premises upon which the legitimacy of the Ottawa Convention is predicated. Invoking principled and legalistic language has thus left opponents of the MBT vulnerable to subsequent assessments on these grounds. Evidence that the restrictions embodied in APII have not stemmed the tide of new antipersonnel landmine victims, for example, would likely generate further social pressure to formally adopt the mine ban.

In this way, the employment of a humanitarian discourse may have the effect of drawing non-parties progressively closer to the norms of the Mine Ban Treaty. While this shift in framing has not led to a wholesale adoption of the Ottawa Convention, it is difficult for non-parties to entirely ignore alterations in their broader social environment, particularly as these relate to new understandings of their intersubjective relations and fundamental identities. This discursive shift can therefore offer initial impetus to further pressure and change. This process can be understood as a potential gateway towards the fuller recognition of legal norms, irrespective of whether the actors in question intend it as such. In this respect, the widespread acceptance among non-parties for a complete ban *at some future point* seems increasingly significant. It is in this particular conceptual space that the potential for further entrenchment of the MBT will most likely occur.

Conclusion: The Legal Authority of the Mine Ban Treaty

What can we conclude about the current status of the Ottawa Convention? The above analysis reveals widespread compliance in relation to the central non-use norm, even among states that might otherwise benefit from their employment. This pattern has strengthened over the relatively short life span of the treaty. In these ways, antipersonnel landmines have been largely

⁶⁶ Benesch, Susan, Glenn McGrory, Cristina Rodriguez, Robert Sloane (1999) “International Customary Law and Antipersonnel Landmines: Emergence of a New Customary Norm.” *Landmine Monitor 1999: Toward a Mine-Free World*, 5. Available online at http://www.the-monitor.org/index.php/publications/display?url=lm/1999/appendices/custom_law.html.

⁶⁷ Price 1998, 613-614.

marginalized as a common tool of warfare. This is all the more surprising given the prior prevalence of AP landmines in global military doctrine and tactics. As Price has noted, the impact of the MBT is most clearly apparent when “an emergent international rule induces states to engage in practices they would not otherwise perform.”⁶⁸ Stimulating a redefinition of “standard military practice” is thus a prominent way that international norms may exert influence in the international system. Many of the observed policy changes would be inconceivable absent the Ottawa Convention and the associated diplomatic and civil society campaigns. In this respect, the Mine Ban Treaty appears to have enjoyed considerable success thus far.

The various positions deployed by non-parties—whether based in narrow terms of capacity or security, or relying on broader conceptions of national interests and necessity—largely concede the humanitarian framing advanced by mine ban proponents. At the level of broad animating principles, therefore, rhetorical acceptance of the Convention is extensive irrespective of particular membership status. The same process bears on questions of membership in the MBT, as those remaining on the outside of the Convention must justify their continued resistance rather than merely regarding this as an unexceptional fact. Even among sceptics of the Mine Ban Treaty, landmines are rarely defended as merely another type of conventional munitions. The pattern of rhetorical denials, obfuscations, and qualified justifications further illustrates the discursive authority and disciplinary effect legal institutions may have in international society. Such statements are suggestive of accruing sensitivity to community obligations. Indeed, were it not for the existence of a robust international norm prohibiting antipersonnel landmines, the political costs of public non-conformance would be considerably lower. While unintended, non-party practice and discourse thus largely reflects a presumption that a ban norm is the *de facto* position which must be argued against. This would seem indicative of the significant influence the Ottawa Convention asserts even among those states formally outside its legal ambit. For example, the stated intention of many non-parties to retain the right to use antipersonnel landmines must be understood in the context of a rapidly declining rate of actual use internationally. The normative force of the Convention has therefore shifted antipersonnel landmines into realm of “exceptional” politics and away from the previous view of the weapons as uncontroversial features of conventional military arsenals.

Rather than ignoring inconvenient developments, therefore, shifting expectations have forced non-parties to engage with the mine ban as a feature of the international legal environment. An optimistic reading might therefore suggest that antipersonnel landmines have been widely stigmatized, even among prominent non-parties. However, many states do continue to view AP mines as necessary means of defence, and this fact undermines any contemporary assessment that the Convention has achieved near-universal adherence. To the extent that claims to the unproblematic nature of mines endure, they threaten to significantly impede the gradual expansion of the norm’s authority among states that resist the formal restraints of the Ottawa Convention. In particular, we risk a scenario in which the majority of states endorse a strict legal prohibition, while a sub-set of (frequently powerful) states continue to be subject to a much less stringent set of constraints. Such conditions would seem to exclude the possibility of universalizing the Convention’s scope via appeals to the customary legal status of the constituent treaty norms.

⁶⁸ Price 2004, 114.

Despite the apparent pitfalls, the Ottawa Convention has succeeded in a relatively short period of time in substantially reversing the previous status quo position of antipersonnel landmines in international society. To the extent that the new prohibitory norm has taken root, it has done so in uneven and at times contradictory ways. Yet the fundamental expectations regarding the normative and legal status of AP landmines have indeed changed rather dramatically, and this transformation extends in different ways both to members of the formal legal community and non-parties as well. Both developments, but especially the latter, are surprising for theories of international cooperation that emphasize material self-interest or coercive power as the source of legal authority. Rather, the preceding discussion has suggested that legal institutions can serve as receptacles social meaning, and in this way can assert meaningful influence in the international system in the absence of formal support from prominent states.