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Commentaries on Arms Control Treaties

VOLUME I

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*

STUART MASLEN

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Preface

Background

On 18 September 1997, 89 States gathered in Oslo at a specially convened diplomatic conference¹ adopted a new instrument of international law, the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction. The Anti-Personnel Mine Ban Convention, as it is hereinafter referred to for the sake of brevity,² is, for a number of reasons, a remarkable achievement, not only for the States that negotiated it, but also for the International Campaign to Ban Landmines, a network of more than 1,000 non-governmental organizations (NGOs) worldwide, and the International Committee of the Red Cross (ICRC), both of which campaigned effectively for a total prohibition on anti-personnel mines.³

Indeed, such was the momentum that had been achieved by the summer of 1997, that rather than weakening the draft treaty that had been submitted to it as often occurs in these situations, the Oslo Diplomatic Conference strengthened the text in a number of ways, not least by requiring comprehensive clearance of emplaced anti-personnel mines within an initial deadline of 10 years⁴ and promoting the provision of assistance to all mine victims.⁵ The level of consultation and cooperation between States, NGOs, and the ICRC in the elaboration of the Convention is probably unprecedented in international law. It may be some time before its like is seen again.

The global campaign for the adoption of the Convention was swiftly followed by a determined push for its swift entry into force. More than 120 States had signed the Convention before the end of 1997, and the necessary level of ratifications or accessions (40) was secured by September 1998, with the result that the Anti-Personnel Mine Ban Convention entered into force as

¹ The Diplomatic Conference on an International Total Ban on Anti-Personnel Land Mines, held in Oslo, Norway, on 1–18 September 1997. It is hereinafter referred to as the Oslo Diplomatic Conference.

² The abbreviated form of the title used here is currently employed by the United Nations but has no formal legal status.

³ Others, of course, played an important role in promoting the adoption of the Convention, not least the Secretary-General of the United Nations, and UN bodies such as the Office of the UN High Commissioner for Refugees (UNHCR) and the United Nations Children's Fund (UNICEF).

⁴ See below the commentary on Article 5.

⁵ See below the commentary on Article 6(3).

binding international law on 1 March 1999. By early 2005, almost three-quarters of the world's States had become parties to it.

Even many States outside the purview of the Convention—a number of major military powers have yet to accede to it—have endorsed the concept of a total prohibition of anti-personnel mines and some have destroyed part of their stockpiles of anti-personnel mines. Globally, production of anti-personnel mines appears to have slowed significantly,⁶ and licit trade 'has effectively ceased'.^{6a} A new humanitarian norm has been created that may one day become custom applicable to all.

The Aim and Layout of the Commentary

A commentary is defined as: 'An expository treatise; a series of comments or annotations on a text'.⁷ It is hoped that, given the international attention paid to landmines,⁸ and the Anti-Personnel Mine Ban Convention in particular, this 'expository treatise' will be not only well-founded in fact and law but also useful and usable. If, further, the commentary comes to be considered as authoritative, this will be thanks to the many experts who have willingly and generously contributed their time and their insights to its development. Where there are errors or omissions, however, these remain the author's sole responsibility.

⁶ The Landmine Monitor, the annual, worldwide report by the International Campaign to Ban Landmines (ICBL), states in its 2004 edition that of the more than 50 countries known to have produced anti-personnel mines only 15—China, Cuba, the Democratic People's Republic of Korea, Egypt, India, Iran, the Republic of Korea, Myanmar, Nepal, Pakistan, the Russian Federation, Singapore, the United States of America, and Viet Nam—continue to produce, or retain the right to produce, anti-personnel mines. ICBL, *Landmine Monitor Report 2004, Toward a Mine-Free World*, Human Rights Watch, Washington DC, 2004, 10–11.

^{6a} Part II, Review of the Operation and Status of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction: 1999–2004, 'The Final Report of the First Review Conference of the States Parties to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction', APLC/CONF/2004/5, 9 February 2005, 11. According to the Landmine Monitor, 'A *de facto* global ban on the transfer or export of antipersonnel mines has been in effect since 1996. The trade in antipersonnel mines has dwindled to a very low level of illicit trafficking and unacknowledged trade. A significant number of states outside the Mine Ban Treaty have enacted or extended export moratoria in the past five years including China, India, Israel, Kazakhstan, Pakistan, Poland, Russia, Singapore, South Korea, and the United States. In addition, representatives of Cuba, Egypt, and Vietnam have claimed not to export antipersonnel mines, although no formal unilateral prohibition has been put into place.' 'Major Findings', *Landmine Monitor Report 2004, op. cit.*, available at: www.icbl.org/lm.

⁷ *The Shorter Oxford English Dictionary*, 5th edn. on CD-ROM (Oxford: Oxford University Press).

⁸ The term 'landmines' encompasses all mines, including anti-tank or anti-vehicle mines, although it is sometimes used loosely to refer only to anti-personnel mines.

The introduction to the commentary discusses the development and use of anti-personnel mines and their perceived military utility, and provides a historical overview of the legal regulation of the weapons and the negotiation of the Anti-Personnel Mine Ban Convention.

The commentary on the Convention itself addresses first its title and preamble and then, separately but in chronological order, each of its articles, with the respective commentary broken down into sub-paragraphs, where relevant. All paragraphs are numbered and accordingly cross-references, as well as the index at the end of the book, refer to paragraph, rather than page, numbering. In discussing the interpretation of a provision, the commentary follows the schematic hierarchy laid down in Article 31 of the 1969 Vienna Convention on the Law of Treaties, as discussed below.

The bibliography for the commentary is followed by the appendixes. The first appendix contains key provisions of international treaty law from the 1969 Vienna Convention; subsequent appendixes include documentation relating to the Anti-Personnel Mine Ban Convention itself, including relevant United Nations General Assembly resolutions, various drafts of the Convention, the proposals tabled formally at the Oslo Diplomatic Conference, and documents adopted by the States Parties to the Convention at the First Review Conference in December 2004.

The Principles of International Treaty Interpretation

The commentary bases its interpretation of the Convention on the basic principles of treaty law,⁹ notably the 1969 Vienna Convention on the Law of Treaties.¹⁰ General principles and methods for treaty interpretation are embodied in Articles 31 and 32 of the 1969 Vienna Convention.¹¹ The International Court of Justice (ICJ) has expressly affirmed that these provisions, which set out, respectively, the general rule and supplementary means of treaty interpretation, reflect customary law. Thus, 'a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and

⁹ For a more detailed discussion of international treaty law see generally Aust, A., *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2000); de la Guardia, E., *Derecho de los tratados internacionales* (Buenos Aires: Abaco de Rodolfo Depalma, 1997); McNair, A., *Law of Treaties*, 2nd edn. (Oxford: Clarendon Press, 1961); Reuter, P., *Introduction au droit des traités*, 3rd edn. (Geneva: Publications de l'Institut Universitaire des Hautes Etudes Internationales—Genève, 1995); and Sinclair, I., *The Vienna Convention on the Law of Treaties*, 2nd edn. (Manchester: Manchester University Press, 1984).

¹⁰ Hereinafter referred to as the 1969 Vienna Convention.

¹¹ See Appendix 1 for the text of the relevant articles.

in the light of its object and purpose. Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion.¹² By virtue of Article 31(3), any subsequent agreement or practice¹³ relating to the treaty together with any relevant rules of international law must be considered together with the context.

S.M.

February 2004

¹² *Territorial Dispute (Libyan Arab Jamahariya/Chad)* case, *ICJ Reports*, 1994, pp. 21–2.

¹³ The International Law Commission has included, in a non-exhaustive list, the following acts as forms that State practice may take: 'treaties, decisions of international and national courts, national legislation, diplomatic correspondence, opinions of national legal advisers and the practice of international organisations'. Other categories could be policy statements, official manuals on legal questions, such as manuals of military law, executive decisions and practices, comments by governments on draft treaties produced by the International Law Commission, press releases, and resolutions relating to legal questions in the United Nations General Assembly. See Harris, D. J., *Cases and Materials on International Law*, 5th edn. (London: Sweet & Maxwell, 1998), 25–6, citing also Brownlie. As far as anti-personnel mines are concerned, State practice also includes instructions to armed forces and their behaviour with respect to the weapons.

Donation of Royalties to Mine Victim Assistance

All the royalties from this book are being donated to *Standing Tall Australia* on behalf of mine survivors and other persons with disabilities. *Standing Tall Australia* (also known by its acronym, STAIRRSS) is an Australian non-governmental organization that provides financial and technical support to local organizations working in mine-affected countries and regions to promote the rehabilitation and socio-economic reintegration of all persons with disabilities into their communities.

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The Development and Use of Anti-Personnel Mines

The Origin of the Anti-Personnel Mine

0.1 The exact origin of the anti-personnel mine is the subject of debate. A 1998 publication, *The History of Landmines*, argues that modern landmines ‘trace their lineage from non-explosive predecessors such as the spikes and stakes that were employed by ancient armies.’¹ Similarly, it is claimed that: ‘The concept of mine warfare has been around for a very long time. More than 2,000 years ago, the Romans used the caltrop to stop enemy cavalry. Outnumbered forces have always turned to any means, from mines to poisoned water to scorched earth, to mitigate the advantage of superior forces.’² According to another commentator:

In the Middle Ages, the so-called ‘mine’ was a common feature of medieval siege warfare . . . The besieger removed as much earth as he could carry away from beneath some exposed corner of the fortifications, and shored up the hole with beams. He then filled the space between the beams with straw and brushwood, and set fire to it. When the supports were consumed, the wall crumbled downwards into the hole, and a breach was produced . . . Over time, gunpowder and explosives took the place of fire, but the essentially medieval technique was retained, and was used as recently as the First World War.³

0.2 The first-known explosive mine can be dated back to at least the eighteenth century, when a German military historian referred to the use of a *fladdermine* (literally, a flying mine). This consisted of a ceramic container with glass and metal fragments embedded in the clay containing two pounds of gunpowder, buried at a shallow depth in the glacis of a fortress and activated by the pressure of a footstep or disturbance of a low-strung wire.⁴ Yet in April 2001, archaeologists in northern China reported the discovery of more than 20 ancient ‘landmines’ dating back more than 600 years.⁵

¹ Croll, M., *The History of Landmines* (Barnsley: Leo Cooper, 1998), p. ix; see also 1–8.

² Epstein, A., ‘Mine Warfare’, in United States Department of State, *Hidden Killers: The Global Problem with Uncleared Landmines: A Report on International Demining* (Washington: Bureau of Political-Military Affairs, Department of State Publication 10098, July 1993), 11.

³ Cornish, P., *Anti-Personnel Mines, Controlling the Plague of ‘Butterflies’* (London: Royal Institute for International Affairs, 1994), 18, citing Oman, C., *The Art of War in the Middle Ages, Volume One: 378–1278AD* (London: Greenhill, 1991), 133.

⁴ Freiherr von Flemming, *The Perfect German Soldier*, 1726, cited by Croll, *The History of Landmines*, 10; see Kreuzfeld, U., in Dupuy, T. N. (ed.), *The International Military and Defence Encyclopaedia*, iv (London: Brassey’s, 1993), 1757–8.

⁵ ‘600-Year-Old Mines Unearthed in Inner Mongolia’, *Xinhua Press Agency* (Hohhot, Mongolia, 11 Apr. 2001).

The American Civil War

0.3 It is claimed that a Russian engineer designed an anti-personnel fragmentation mine in 1855.⁶ But modern explosive landmines, or ‘torpedoes’ as they were initially termed, are more often said to be the invention of the American Civil War.⁷ In the spring of 1862, when commanding a garrison of 2,500 men at Yorktown, Virginia, Gabriel Rains, a Brigadier-General in the Confederate Army, ordered his troops to prepare artillery shells so that they could be exploded by pulling tripwires or by being stepped on. The first casualties of these early anti-personnel mines were reported on 4 May 1862; even some of the Confederate troops deemed the devices ‘barbaric’ and Rains’s commanding officer forbade their further use, declaring them neither a ‘proper nor effective method of war’.⁸ Yet, despite concerns on both sides, use of the weapons continued and in 1864 at Fort McAllister, near Savannah, mines killed 12 men and wounded 80 others during the Union assault. It was following this battle that the commander of the Union Army, General William T. Sherman uttered his now famous dictum that the use of mines ‘was not war, but murder’.⁹

The 1914–1918 and 1939–1945 Wars

0.4 Anti-personnel mines were not widely deployed on the battlefields of Europe during the 1914–18 war.¹⁰ Tripwire-activated mines were reportedly laid within wire entanglements early in the war but they were often as dangerous to the side that had laid them as they were to the enemy and this use was quickly phased out.¹¹ However, a number of anti-personnel mines and booby-traps were laid in abandoned positions in anticipation of an enemy advance. These weapons were adapted from artillery shells, with specially designed fuses screwed into the bottom of the shell.¹²

⁶ Association of Military-Political and Military-Historic Research, ‘The Position of Russia as Regards the Problem of Use of Anti-Personnel Mines Considering the Conferences in Brussels and Oslo’ (Moscow, 1997), 5. It is further asserted that ‘Russian troops used shrapnel mines . . . very similar to their modern successors’ when defending Port Arthur in 1905 (*ibid.*).

⁷ See generally Perry, M. F., *Infernal Machines: The Story of Confederate Submarine and Mine Warfare* (Baton Rouge, La.: Louisiana State University Press, 1985).

⁸ Croll, *The History of Landmines*, 16. ⁹ *ibid.* 18.

¹⁰ Although, under Article 8 of the Armistice Agreement of 11 November 1918, Germany was required to hand over plans showing where any mines had been laid.

¹¹ School of Military Engineering, *The Work of the Royal Engineers in the European War 1914–19*, (Chatham: SME, 1924), 257.

¹² Croll, *The History of Landmines*, 26; see also 27–8.

0.5 In contrast, in the 1939–1945 war anti-personnel and anti-tank mines were both used on a huge scale.¹³ According to the United States (US) Defense Intelligence Agency, more than 300 million anti-tank mines were used during the war, including 220 million by the Soviet Union.¹⁴ Landmines were a key factor during the battles at El Alamein¹⁵ and Kursk,¹⁶ among others.¹⁷ Chinese records of their Japanese occupation place great stress on the role played by ‘mines’ in their resistance against the Japanese.¹⁸ It is claimed that one German anti-personnel mine, the *Schrapnellmine 35* or S mine as it was later called, ‘was probably the most feared device encountered by Allied troops in the war’.¹⁹ Following the end of the war, demobilized soldiers introduced the term ‘minefield’ into everyday parlance, meaning a situation beset with problems.²⁰

The Post-1945 Period

0.6 Anti-personnel mines were used widely in the wars in Korea and Vietnam, with landmines accounting for slightly less than 5 per cent of US troop casualties in Korea.²¹ The Vietnam war saw the first widespread use of remotely delivered

¹³ According to Rae McGrath, the first widespread use of anti-personnel mines on their own (distinct from anti-tank mines) was probably in the war between Finland and Russia. McGrath, R., *Landmine and Unexploded Ordnance: A Resource Book* (London: Pluto Press, 2000), 4.

¹⁴ US Defense Intelligence Agency and US Army Foreign Science and Technology Center, ‘Landmine Warfare: Trends and Projections (U)’, DST-1160S-019-92 (Washington, Dec. 1992), sec. 2-1.

¹⁵ For details of the use of mines in North Africa see for instance Ceva, L., ‘The Influence of Mines and Minefields in the North African Campaign of 1940–1943’, Paper presented to the Symposium on Material Remnants of the Second World War on Libyan Soil (Geneva, 28 Apr.–1 May 1981); Vines, A., ‘The Crisis of Anti-Personnel Mines’, in Cameron, M. A., Lawson, R. J., and Tomlin, B. W. (eds.), *To Walk Without Fear: The Global Movement to Ban Landmines* (Toronto: Oxford University Press, 1998), 119.

¹⁶ See generally Healy, M., *Kursk 1943: The Tide Turns in the East* (London: Osprey Military, 1997).

¹⁷ According to Croll, by the end of the war, the Germans had manufactured 16 different types of anti-tank mine, 10 different types of anti-personnel mine, and used many different types of improvised devices and captured mines. This included the development and incorporation of anti-handling devices, and the first use of an aerially delivered scatterable anti-personnel mine. Towards the end of the war, the Germans experimented with magnetic-influence, vibration-sensitive, radio-controlled and frequency-induction fuses.

¹⁸ Although in most cases the term is incorrectly applied; the devices used by the Chinese resistance were more often booby-traps than landmines.

¹⁹ Sloan, Lieutenant-Colonel C. E. E., *Mine Warfare on Land* (London: Brassey’s, 1986), 36.

²⁰ Croll, *The History of Landmines*, 53.

²¹ *ibid.* 97. As a result of experiences during the Korean war, in particular following human-wave attacks against United Nations positions, the United States developed the M18 Claymore directional fragmentation mine. When detonated, either by tripwire or by electric command wire, hundreds of steel ball bearings are expelled in a 60-degree arc; the lethal radius is around 50 metres.

or 'scatterable' mines by US forces seeking to stop the flow of men and material from North to South Vietnam through Laos and Cambodia.²² Based on its experiences in Vietnam, the USA committed considerable resources to the development of anti-personnel mines that would self-destruct within a pre-set time (usually 4–48 hours).²³ It also developed landmines that could serve as chemical weapons, each mine containing a quantity of VX nerve gas.²⁴

0.7 Yet, while mine technology advanced rapidly, the typical use of landmines involved the manual emplacement of 'long-duration'²⁵ anti-personnel mines in internal armed conflicts by both government armed forces and armed opposition groups.²⁶ In Angola, Cambodia, Ethiopia, Mozambique, Nicaragua, Iraq, Somalia, Sudan, and many other war-torn nations, anti-personnel mines were widely used as part of military strategy or simply to terrorize civilians or control their movements. Proliferation was fuelled by low cost and ready availability, with average prices ranging from US\$3–15 per mine.²⁷ And as the Soviet Union collapsed, bitter conflicts in the Caucasus and the former Yugoslavia, which included some of the world's leading landmine producers, saw widespread and often indiscriminate use of anti-personnel mines.

²² Aerially delivered anti-personnel mines had a number of obvious advantages over their manually emplaced counterparts: they could be deployed rapidly, required little logistic support, and could be laid deep within enemy-held territory, causing disruption in troop movements and supply lines, all with minimal risk to the aircrews. But at the same time, they represented a substantial danger to advances by friendly forces unless equipped with an effective self-destructing or self-neutralizing mechanism. It is reported that between 1966 and 1968, the US Department of Defense procured more than 114 million anti-personnel mines for use in the Vietnam war. Cornish, *Anti-Personnel Mines*, 7.

²³ Following the difficulties encountered in clearing mines left over from the battles in North Africa in the 1939–45 war, a British report entitled 'Engineer Lessons from the North African Campaign' recommended the design of a new form of mine capable of 'self-destroying after a certain period to avoid the need for lifting'. Croll, *The History of Landmines*, 65.

²⁴ On 30 November 2000, the Department of Defense reported the successful destruction on Johnston Atoll in the Pacific of more than 13,000 landmines filled with VX gas. 'Chemical Weapons Destruction Complete on Johnston Atoll', Press Release No. 715-00, Office of the Assistant Secretary of Defense (Public Affairs) (Washington, 30 Nov. 2000).

²⁵ That is, mines not equipped with self-destruct or self-neutralization devices or a self-deactivation feature. Such mines are sometimes referred to as 'dumb' or 'persistent' mines. A self-destruct mechanism is, as the name suggests, an automatically functioning timing device incorporated into the mine that causes it to explode after a pre-set period of time; self-neutralization, on the other hand, uses an automatically functioning timing device to render the mine inert. Self-deactivation is not a device, but rather a process by which an essential component of the mine, usually the battery, exhausts itself in a predictable time.

²⁶ Although the increasingly widespread use of anti-personnel mines was not limited to armed forces and groups, for by the 1990s, civilians in many countries were laying mines for their own purposes.

²⁷ See e.g. UN Department for Humanitarian Affairs, 'Fact Sheet on Manufacturing and Trade' (New York, 1996). Hi-tech mines are, however, considerably more expensive.

Current and Future Landmine Technology

0.8 Landmines continue to develop in sophistication. Already in 1992, a US defense agency study had found that:

A massive infusion of technology in the 1970s and 1980s has drastically altered landmine holdings the world over. The widespread introduction of scatterable landmines allows a much more dynamic and responsive placement of minefields. Improved fuzes can employ pressure and contact, and also magnetic, infrared, seismic/acoustic, command-detonated,²⁸ anti-disturbance, and anti-mine detector²⁹ technologies. Advances have also been made in landmine warhead designs, giving landmines more than sufficient lethality in smaller packages. As awesome and effective as landmines have become, the outlook is even more overwhelming. Micro-electronics are enabling the technical capabilities of landmines to be expanded. Brilliant sensors with target discrimination, two-way communication between the minefield and the employer, and mobile landmines are futuristic, but are actually in development.³⁰

0.9 On 27 February 2004, following a two-and-a-half-year review, the USA announced a new policy on landmines, which reversed the previous administration's announced goal of joining the Anti-Personnel Mine Ban Convention by 2006. The new policy stated that 'The United States will continue to research and develop enhancements to the current technology of self-destructing/self-deactivating landmines to develop and preserve military capabilities that address our transformational goals.' It also declared that 'future tactical barriers may include a new generation of landmines or alternative systems, most likely incorporating improvements to our current SD/SDA [self-destructing/self-deactivating] technology to provide more flexibility and control of the devices once employed.'³¹

²⁸ Command detonation in fact renders a device not a mine, since one of the key characteristics of a mine under international law is its victim activation.

²⁹ This has since been prohibited by international law, under Amended Protocol II to the Convention on Certain Conventional Weapons.

³⁰ US Defense Intelligence Agency and US Army Foreign Science and Technology Center, 'Landmine Warfare—Trends and Projections (U)', A Defense S&T Intelligence Study, DST-1160S-019-92 (Washington, Dec. 1992), p. xvii.

³¹ 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, Washington DC, 27 February 2004. The ICBL claimed that the USA was pursuing the development of two new landmine systems, known as the Spider programme and the Intelligent Munitions System, but it was not known if the resultant weapons would ultimately fall within the definition of an anti-personnel mine in Article 2 of the Anti-Personnel Mine Ban Convention. 'The Spider system consists of a control unit capable of monitoring up to 84 hand-emplaced unattended munitions that deploy a web of tripwires across an area. Once a tripwire is activated, a man-in-the-loop control system allows the operator to activate either lethal or non-lethal effects. Early in its development, Spider contained

The Military Utility of Anti-Personnel Mines

Anti-Personnel Mines and Military Doctrine

Introduction

0.10 Anti-personnel mines clearly have military utility.³² Thus, a 1997 South African defence review suggested that ‘anyone doubting the effectiveness of . . . an anti-personnel minefield, should try it sometime’.³³ Similarly, an independent study of the military utility of anti-personnel mines conducted in the mid-1990s records that ‘it is extremely difficult to counter the claim that anti-tank mines and anti-personnel mines have a military utility’.³⁴ Further, it has been said that:

Landmines are subtle and much misunderstood weapons. Traditionally they are a means of transforming the terrain to the defender’s advantage, rather than providing a definitive barrier. They can inflict casualties but need to be covered by fire. They shape the attacker’s posture, but do not define the outcome of battle. They provide economies in defence while imposing attrition on the attacker. They are laid without relish and contemplated with fear. They are simple to lay but remarkably difficult to remove. They are not activated unless an attacker advances but they do not recognise ceasefires. The employment of mines is complex and synergistic.³⁵

a feature that removed the man-in-the-loop and allowed for target-activation—a so-called “battlefield override” switch. The status of this feature at this stage is unknown . . . A decision whether to produce Spider is scheduled for June 2005 and the first units are scheduled to be produced in March 2007 . . . The Intelligent Munitions System (IMS) is a new program combining the previous efforts under the Track 2 and Track 3 of the landmine alternatives programs into a research and development program titled Close Combat Capabilities . . . According to budget documentation, the IMS is “an integrated system of effects (lethal, non-lethal, anti-vehicle, anti-personnel, demolitions), software, sensors/seekers, and communications that may be emplaced by multiple means and is capable of unattended employment for the detection, classification, identification, tracking and engagement of selected targets.”’ ICBL, *Landmine Monitor Report 2004, op. cit.*, 1144–45.

³² As a Canadian defence research paper has noted: ‘The fact that millions of anti-personnel mines are in the ground today attests to the military utility of landmines’: Roy, R. L., ‘Tactical Impact of Removing Antipersonnel Landmines’, Research Note RN 0005, Department of National Defence (Kingston, Canada, Nov. 2000), p. iii.

³³ Department of Defense, Landmines in the Department of Defense, South African National Defence Forces, Logistical Division, 20 May 1997, cited in International Campaign to Ban Landmines, *Landmine Monitor Report 1999: Toward a Mine-Free World* (Washington: Human Rights Watch, Apr. 1999), 783.

³⁴ Smith, Dr C. (ed.), *The Military Utility of Landmines . . . ?*, North–South Defence and Security Programme, Centre for Defence Studies, King’s College, University of London (June 1996), 98.

³⁵ See Croll, *The History of Landmines*, p. x; see also *Anti-Personnel Landmines—Friend or Foe?* (Geneva: International Committee of the Red Cross, Mar. 1996), 37–8 and 40–1.

0.11 Indeed, mine warfare has been an element in military doctrine in many of the world's armed forces, especially at the operational³⁶ and tactical³⁷ level, for several decades.³⁸ Thus, for example, concerned by moves towards the national and international prohibition of anti-personnel mines, leading members of the US military wrote to the chairman of the Armed Services Committee in July 1997, declaring that:

Landmines are a 'combat multiplier' for US land forces, especially since the dramatic reduction of the force structure. Self-destructing landmines greatly enhance the ability to shape the battlefield, protect unit flanks, and maximize the effects of other weapons systems. Self-destructing landmines are particularly important to the protection of early entry and light forces, which must be prepared to fight outnumbered during the initial stages of a deployment.³⁹

The Operational Use of Anti-Personnel Mines

0.12 The situation most usually cited as the justification for the continued possession and use of anti-personnel mines is the case of those countries that, by reason of geography, are forced to defend long borders against potential aggressors. Thus, for example, in the 1991–2 Gulf war, the Iraqis laid several million mines to impede the coalition advance, most in well-organized fields that were often fenced. In accordance with standard military doctrine, the minefields were covered with fire and the overall defence was developed in considerable depth, although they were probably not sufficiently wide.⁴⁰ In fact, the minefields were breached by Coalition forces in only about two hours.⁴¹

³⁶ 'The level of war at which campaigns and major operations are planned, conducted, and sustained to accomplish strategic objectives within theatres or areas of operations', US Department of Defense, Joint Chiefs of Staff, *Dictionary of Military Terms* (London: Greenhill Books, 1999), 278.

³⁷ 'The level of war at which battles and engagements are planned and executed to accomplish military objectives assigned to tactical units or task forces', *ibid.* 374.

³⁸ Thus, for instance, an Australian government document from 1998 stated that: 'Anti-Personnel mines represent a significant tactical capability that has had a well-established place in . . . Australian Defence Force plans for the conduct of military operations. Finding alternatives will involve a costly research and development effort. As alternative technology does not exist and is some years away, the ADF for this period could face an increased risk of casualties, especially if deployed overseas, and a potentially reduced capacity for coalition operations in certain circumstances.' Department of Foreign Affairs and Trade, Conventional and Nuclear Disarmament Section, International Security Division, 'National Interest Analysis: Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction', tabled on 26 May 1998, available at: www.austlii.edu.au/au/other/dfat/nia/1998/1998019n.html.

³⁹ Letter from the US Joint Chiefs of Staff to the Chairman of the Senate Armed Services Committee, 10 July 1997.

⁴⁰ Croll, *The History of Landmines*, 118.

⁴¹ US Army, Office of the Chief of Staff, *Certain Victory: United States Army in the Gulf War*, Desert Storm Study Project (US Army, 1993), 232, cited in *Anti-Personnel Landmines—Friend or Foe?*, 41. Croll alleges that barrier minefields still have a role to play in defence, arguing that 'mines, even in

0.13 Other experiences cast doubt on the effectiveness of barrier minefields. In 1988, South Africa scrapped plans to build a 30 km-long minefield along Namibia's northern border, in part because it determined that such a barrier would only delay any potential invasion by around half an hour.⁴² Further, a study of the use of anti-personnel mines in conflicts in southern Africa found 'few, if any, examples where anti-personnel mines have provided significant or lasting military advantages. In Mozambique, during the 1977–92 war Renamo quickly breached government minefields. In Angola, government mine belts around the main towns did not stop UNITA from capturing several of them. In the 1960s and 1970s, saboteurs simply shovelled their way across the minefield protecting the Kariba power station in Rhodesia, did their damage and left.'⁴³ According to a Royal Engineer who served during the Falklands conflict: 'minefields should not be too big a hindrance to the advance. Mines are terrifying things but their aim is to demoralise rather than hinder . . . You need thousands of them to stop an advance.'⁴⁴ Thus, the long-term effectiveness of a large permanent barrier minefield is dubious against a competent adversary.

The Tactical Use of Anti-Personnel Mines

0.14 When used as a temporary barrier or fixing device, landmines have a unique psychological impact. When crossing a field made hazardous by conventional means such as artillery or automatic-weapons fire, soldiers feel pressured to advance as rapidly as possible, in order to minimize their exposure time. But when crossing a minefield, exposure time is of little relevance. The hazard lies in taking the next step, regardless of whether that step is slow or fast. Thus, mines create a unique psychological pressure on the advancing troops to not take another step—that is, to freeze in place. According to a South African landmine expert, tactical uses of anti-personnel mines include: surveillance/early warning; delaying/canalizing enemy forces on foot; delaying/canalizing mobile/mechanized enemy forces (protection of anti-tank mines/minefields); protection of bases and installations; and demoralizing the enemy and overloading his

Kuwait, added to the strain of war—additional fear was created, movement was inhibited, and extra matériel, training and coordination were required. Although ultimately peripheral to the Gulf war, barrier minefields were the only means of enhancing defence available to the Iraqis' (Croll, *The History of Landmines*, 121). It has been remarked that the mining of beaches by the Iraqi forces did prevent an amphibious assault by US Marines. Gard, R., 'The Military Utility of Anti-Personnel Mines', in Cameron *et al.*, *To Walk without Fear*, 142.

⁴² *Still Killing: Landmines in Southern Africa*, Human Rights Watch (USA, 1997), 110. Vines, A., 'The Crisis of Anti-Personnel Mines', in Cameron *et al.*, *To Walk without Fear*, 127.

⁴³ *Anti-Personnel Landmines—Friend or Foe?*, 30.

⁴⁴ Cited in McManners, Captain H., *Falklands Commando* (London: William Kimber, 1984), 220.

support systems.⁴⁵ Similarly, in 1998, the Director of Military Engineering of the Canadian armed forces set out seven principal functions for anti-personnel mines: to provide early warning; to protect anti-tank mines; to delay or canalize enemy forces; to provide economy of force in close terrain; to inflict casualties on enemy personnel; to deny use of terrain; and to provide close protection of defenders.⁴⁶

Assessments of the Effectiveness of Anti-Personnel Mines

0.15 A number of studies, especially in the 1990s, have reviewed the specific effectiveness of anti-personnel mines (as opposed to other landmines or landmines in general). In 1994, the Office of the US Secretary of Defense commissioned an independent research organization, the Institute for Defense Analyses (IDA), to conduct a study of the military utility of anti-personnel mines in high-intensity mechanized warfare. Robert Gard, a retired US army general supporting a comprehensive prohibition of anti-personnel mines, concedes that ‘one can support different positions by citing various sections of the IDA study’, but affirms that the study’s principal conclusion is that anti-personnel mines have only a ‘quite modest’ utility.⁴⁷ ‘While anti-personnel mines are judged to be useful in static defensive situations, the study concludes that they are of marginal utility in a defence that also employs tactical offensive operations . . . The study determined that the use of anti-personnel mines by both sides during US offensive operations would probably yield a “*negative net military utility*” for US forces.’⁴⁸

0.16 A subsequent study was requested by the Chairman of the US Joint Chiefs of Staff, General Shalikashvili, and conducted in April 1996 by an independent non-profit organization, the Dupuy Institute.⁴⁹ Following additional analysis, the President of the Institute, a recently retired US Major General, wrote a memorandum to General Shalikashvili on 2 January 1997 in which he

⁴⁵ Rossouw, Colonel A. J., ‘Rethinking Military Doctrine: Making War without Anti-Personnel Landmines’, unpublished paper, undated, 4.

⁴⁶ Colonel (now Brigadier-General) E. Fitch, Presentation to the ICRC Seminar on the Humanitarian Impact and Military Utility of Anti-Personnel Mines (Budapest, 26–8 March 1998). See also Hewish, M., and Pengelley, R., ‘In Search of a Successor to the Anti-Personnel Landmine, Non-lethal Weapons, Precision Weapons and Close Surveillance’, *Jane’s International Defense Review* (Mar. 1998), 30; Faulkner, F., ‘Anti-Personnel Landmines: A Necessary Evil?’ *International Relations*, 13/4 (Apr. 1997), 42–5.

⁴⁷ Gard, ‘The Military Utility of Anti-Personnel Mines’, 140.

⁴⁸ *ibid.* 140–1 (emphasis in original), citing Institute for Defense Analyses, ‘The Military Utility of Landmines: Implications for Arms Control’, Doc. D–1559 (Washington, June 1994), p. iv.

⁴⁹ Dupuy Institute, ‘Military Consequences of Landmine Restrictions’ (Washington, Apr. 1996). See Gard, ‘The Military Utility of Anti-Personnel Mines’, 141.

concluded that ‘our historical research, when coupled with probable future engagements, indicates that a total ban on this [anti-personnel] type of mine, if eventually adhered to by most nations, will only benefit U.S. ground forces in the long run’. On the basis of the study, it was recommended ‘that the United States support a total ban on anti-personnel mines’.⁵⁰

0.17 Humanitarian organizations have also commissioned research into the military utility of anti-personnel mines. In March 1996, the International Committee of the Red Cross (ICRC) published a study of the military use and effectiveness of anti-personnel mines entitled *Anti-Personnel Landmines—Friend or Foe?*⁵¹ The study looked at the use of anti-personnel mines in 26 conflicts since 1940 and found that few instances could be cited where use had been consistent with international law and that, even when used on a massive scale, anti-personnel mines had at best a marginal tactical value under certain specific but demanding conditions. The study conclusions, which were drafted by ten military experts from eight countries, declare *inter alia*, that ‘the limited military utility of anti-personnel mines is far outweighed by the appalling humanitarian consequences of their use in actual conflicts. On this basis, their prohibition and elimination should be pursued as a matter of utmost urgency by governments and the entire international community.’⁵²

0.18 Anti-personnel mines have been widely used in internal armed conflicts, typically in violation of international law and legal norms. Thus, ‘if anti-personnel mines have a debatable utility when used in tandem with anti-tank mines, they really come into their own when used in low intensity conflicts. In Afghanistan, Viet Nam, Sri Lanka, El Salvador and throughout Africa the anti-personnel mine had a devastating impact upon both soldiers and civilians mixed up in low intensity conflicts. Anti-personnel mines laid by irregular forces can be very valuable as a way of affecting morale and terrorising civilians in the battle for hearts and minds.’⁵³ The use of landmines by the African National Congress (ANC) during its struggle against the apartheid regime in South Africa was specifically criticized by the Truth and Reconciliation Commission for being indiscriminate in its effects.⁵⁴

⁵⁰ Krawciv, N., ‘Banning of Antipersonnel Mines’, Memorandum (2 Jan. 1997), cited in Gard, ‘The Military Utility of Anti-Personnel Mines’, 141.

⁵¹ *Anti-Personnel Landmines—Friend or Foe?*

⁵² See Maresca, L., and Maslen, S. (eds.), *The Banning of Anti-Personnel Landmines: The Work of the International Committee of the Red Cross 1955–1999* (Cambridge: Cambridge University Press, 2000), 415ff.

⁵³ Smith, *The Military Utility of Landmines* . . . , 101.

⁵⁴ See e.g. ‘Apartheid Indictment finds Fault on all Sides’, CNN (Pretoria, 29 Oct. 1998), available at: www.cnn.com/WORLD/africa/9810/29/truth.commission.03/. The ANC responded with a claim that ‘It was out of this consideration to minimise the loss of civilian lives that the ANC discontinued the use of land mines, after it made an assessment that this form of warfare was, according to its own

0.19 It has been remarked that although anti-personnel mines are low cost their effectiveness is also low while their humanitarian cost is high.⁵⁵ This applies particularly to long-duration mines. None the less, debate as to the present and future utility of anti-personnel mines will probably persist as a number of States outside the Convention remain convinced by their military utility.⁵⁶ The North Atlantic Treaty Organization (NATO), for instance, is said to continue actively to study the utility of anti-personnel mines.⁵⁷ On 30 September 2002, the US General Accounting Office (GAO), the investigative arm of Congress, published a study entitled 'Military Operations: Information on US Use of Land Mines in the Persian Gulf War'. The study found that concerns about landmines, including fear of fratricide and loss of battlefield mobility, led to the reluctance of some US commanders to use mines in areas that US and allied forces might have to traverse. Six per cent of total US casualties (killed and injured) in the Gulf war were the result of mines.⁵⁸

0.20 In tandem with ongoing study of the utility of landmines is the search for more humane alternatives to anti-personnel mines. In 1994, the United Nations (UN) General Assembly adopted resolution 49/75D, which encouraged 'further international efforts to seek solutions to the problems caused by

principled humanitarian norms, leading to an unacceptable loss of civilian lives'. Submission of the African National Congress to the Truth and Reconciliation Commission in Reply to the Section 30 (2) of Act 34 of 1996 on the TRC 'Findings on the African National Congress' (Oct. 1998).

⁵⁵ Fitch, Presentation to the ICRC Seminar. Colonel (now Brigadier-General) Fitch noted, however, that anti-tank mines have the reverse relationship to anti-personnel mines: high military utility and low humanitarian effect.

⁵⁶ The 1992 US defense agency study referred to above found that: 'New technologies boost the effectiveness of landmines, simplify laying minefields, and lower logistical burdens . . . Even with relatively costly new technologies, landmines are an affordable weapon for the entire range of military organisations, from terrorist groups to large, well-equipped armies. Landmines reduce the number of military personnel needed to defend a given area. They are ideal autonomous harassment devices. Landmine warfare will continue to be a significant element in armed conflicts at all levels of intensity well into the foreseeable future. Landmines remain a problem beyond the end of an armed conflict.' US Defense Intelligence Agency and US Army Foreign Science and Technology Center, *Landmine Warfare—Trends and Projections (U)*, sec. 5-1. Similarly, Mike Croll suggests that: 'Technological, economic and social factors combine to ensure that not only will mines be used in the future, but that they will be used in increasing numbers . . . The ability of mines rapidly to deny land and destroy the enemy with limited manpower in a cost-effective manner will be critical to defensive success.' Croll, *The History of Landmines*, 143.

⁵⁷ Thus, in 2001, the US Commission on Engineering and Technical Systems (CETS) reported that 'several countries are participating in a North Atlantic Treaty Organization (NATO) study on the consequences of the [anti-personnel mine] ban and possible technological alternatives that do not have the negative effects of [anti-personnel mines]'. CETS (Commission on Engineering and Technical Systems), *Alternative Technologies to Replace Antipersonnel Landmines* (Washington: National Academies Press, 2001), 115 (Appendix F).

⁵⁸ General Accounting Office, 'Military Operations: Information on U.S. Use of Land Mines in the Persian Gulf War', Report No. GAO-02-1003 (Washington, 30 Sept. 2002), available at: www.access.gpo.gov/su_docs/aces/aces160.shtml.

anti-personnel land-mines, with a view to their eventual elimination'.⁵⁹ The sixth preambular paragraph to the resolution recognized 'that States can move most effectively towards the goal of the eventual elimination of anti-personnel land-mines as viable and humane alternatives are developed'.

0.21 There are a number of doctrinal and weapons alternatives to using anti-personnel mines in combat,⁶⁰ although it is widely agreed by military experts that no other single weapon or tactic can fulfil as successfully the military tasks performed by anti-personnel mines.⁶¹ Thus, for example, the United Kingdom (UK) Ministry of Defence believes that in renouncing anti-personnel mines it has lost an operational capability, but it has accepted to do so because of the humanitarian imperative.⁶² According to a Canadian military research adviser: 'Specific attempts to completely replace the anti-personnel mine have proven extremely difficult and costly to implement'.⁶³

0.22 The use of 'Claymore-type' directional fragmentation devices, lawful under the Anti-Personnel Mine Ban Convention when command detonated, 'may provide a cost-effective and legitimate solution to the replacement of anti-personnel mines'.⁶⁴ Indeed, a number of States Parties to the Convention have already selected these devices as alternatives.⁶⁵ Other weapons and tactics include the better use of early warning and surveillance techniques and equipment, such as the 'anti-personnel obstacles system' under development by the Japan Defense Agency.⁶⁶ However, the effectiveness of these concepts is, so far, unproven.

⁵⁹ Operative paragraph 6, UN General Assembly resolution 49/75D, adopted by consensus on 15 Dec. 1994.

⁶⁰ For a review of some of the alternatives available or being developed see generally Roussouw, 'Rethinking Military Doctrine'; Roy, 'Tactical Impact of Removing Antipersonnel Landmines'; Gard Jr., R. G., 'Alternatives to Anti-Personnel Mines', Vietnam Veterans Monograph Series, 1/1 (Washington, spring 1999), and esp. 22–3.

⁶¹ According to Brigadier-General Ed Fitch, the utility of the anti-personnel mine can be reduced to two fundamental military tasks: area defence (through surveillance and early warning) and the infliction of casualties (and therefore the protection of anti-tank mines). No other single weapon can achieve these two activities, although there are a plethora of surveillance devices that will alert defenders to the presence of the enemy without their knowledge. Interview with the author in Ottawa, 19 Aug. 2002. See also Sage, Lieutenant-Colonel J., 'Anti-Personnel Mines, their Military Utility and Humanitarian Considerations', *Journal of the Royal Military College of Science* (UK, July 1995).

⁶² Information provided by Peter Balmer, UK Ministry of Defence (London, 3 June 2002).

⁶³ Roy, 'Tactical Impact of Removing Antipersonnel Landmines', p. iii. ⁶⁴ *ibid.*

⁶⁵ Both Austria and Norway, for instance, opted to rely on these weapons, with the Dutch military deciding to use them to protect observation posts and installations and to deploy anti-tank mines, including scatterable mines, to provide obstacles. Smith, *The Military Utility of Landmines . . . ?*, 99. Using JANUS war game scenarios, Canada found that a field of remotely detonated Claymores up to 500 m ahead of the defended position and/or using 40 mm Automatic Grenade Launchers, along with wire obstacles, provide a capability that compensates for the loss of anti-personnel mines against a mass assault. Roy, 'Tactical Impact of Removing Antipersonnel Landmines', p. iii. Australia was said to be developing a similar system to the command-detonated Claymore. CETS, *Alternative Technologies to Replace Antipersonnel Landmines*, 115 (appendix F). ⁶⁶ *ibid.*

0.23 At the First Review Conference of the Convention in Nairobi, a group of ten senior serving and retired officers met to review the 1996 ICRC Study *Anti-personnel Landmines—Friend or Foe?* on the basis of experiences over the eight years since that study was completed. The group reaffirmed the ICRC study as valid, concluding that ‘there is no military advantage or situation offered by these indiscriminate weapons that can possibly, in any measure, warrant their human cost. They, like the sword, the pike and the horse, are obsolete weapons on the modern battlefield.’⁶⁷ The group pointed to the fact that ‘of the current 144 States Parties to the Convention, none is known to have assigned a high priority to the issue of the development of alternatives, material or non-material. This confirms the fact that such alternatives are no longer considered necessary.’^{67a}

0.24 In sum, a Canadian research adviser concluded that:

There are several existing and many potential systems that can perform most of the functions of anti-personnel mines. Continuous unattended electronic or electro-optical sensors can improve the detection from hidden approaches and data links can trigger immediate response by long-range direct and indirect fire weapons, achieving both greater effectiveness and far fewer indiscriminate casualties than anti-personnel mines. Improved barbed-wire entanglements covered by coordinated use of Automated Grenade Launchers, Claymores, machine guns and aimed fires can provide close protection, exert an equivalent deterrence effect on enemy troops and help delay hand-breaching by dismounted troops. However, there is the possibility of greater ammunition consumption levels, increased unit footprint, and greater manpower and logistics requirements that result from these anti-personnel mine alternatives.⁶⁸

There is also the possibility of greater friendly force losses, and greater post-combat risk to civilians due to the large amounts of unexploded ordnance that would result from using much larger numbers of less efficient instant-acting munitions to replace anti-personnel mines.

A Historical Overview of the Legal Regulation of Anti-Personnel Mines

Historical Background

0.25 Despite widespread use of anti-personnel mines in the 1939–45 war, the 1949 Geneva Conventions addressed only issues of mine clearance, prohibiting expressly the forcible use of prisoners of war for such

⁶⁷ ‘Report on observations and conclusions from a review of the ICRC study “Anti-personnel Landmines, Friend or Foe?”’, Meeting of military experts during the First Review Conference of the Anti-Personnel Mine Ban Convention.

^{67a} *ibid.*

⁶⁸ Roy, ‘Tactical Impact of Removing Antipersonnel Landmines’, p. iv.

purposes.⁶⁹ In 1955, the ICRC published a set of *Draft Rules for the Protection of the Civilian Population from the Dangers of Indiscriminate Warfare*.⁷⁰ The rules provided *inter alia* that:

The use of so-called delay-action projectiles is only authorized when their effects are limited to the objective itself.

Weapons capable of causing serious damage shall, so far as possible, be equipped with a safety device which renders them harmless when they can no longer be directed with precision against a military objective.⁷¹

0.26 But States were reluctant to transform the draft rules into binding international law and the issue dropped down the international agenda until the 1968 International Conference for Human Rights, which adopted a resolution calling for a study of ‘the need for additional humanitarian international conventions or for possible revision of existing Conventions to ensure the better protection of civilians, prisoners and combatants in all armed conflicts and the prohibition and limitation of the use of certain methods and means of warfare’.⁷² Most of the attention, however, focused on napalm, which was being extensively deployed by the USA in Vietnam.⁷³

0.27 In the mid-1970s, a series of three meetings convened by the ICRC to discuss a variety of conventional weapons⁷⁴ identified landmines (in general) as a means of warfare deserving particular legal regulation. At the last of these meetings, held in Lugano, Switzerland, in 1976, France, the Netherlands, and the UK introduced a written proposal for the regulation of landmines and booby-traps. The proposal contained draft provisions requiring that records of minefields containing more than 20 mines be made public upon the cessation of hostilities; that either remotely delivered mines should be equipped with a

⁶⁹ Thus, Article 52 of the Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III) provides in part that: ‘Unless he be a volunteer, no prisoner of war may be employed on labour which is of an unhealthy or dangerous nature . . . The removal of mines or similar devices shall be considered as dangerous labour.’ It is otherwise asserted, however, that the use of prisoners of war for such activities was already implicitly prohibited under the 1929 Geneva Convention. See Pictet, J. S. (ed.), *Commentary, III Geneva Convention Relative to the Treatment of Prisoners of War* (Geneva: International Committee of the Red Cross, 1960), 277–8.

⁷⁰ *Draft Rules for the Protection of the Civilian Population from the Dangers of Indiscriminate Warfare* (Geneva: ICRC, June 1955), 86–7.

⁷¹ Articles 10(4) and 11, respectively.

⁷² Operative Paragraph 1, Resolution XXIII, ‘Human rights in armed conflicts’ of 12 May 1968 of the International Conference on Human Rights, Tehran, 22 Apr. to 13 May 1968, UN Doc. A/CONE.32/41.

⁷³ See Shaw, M., ‘The United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, 1981’, *Review of International Studies*, 9/2 (1983), 110.

⁷⁴ Participants considered the possible legal regulation of a number of categories of weapons, including incendiary weapons, small calibre projectiles, blast and fragmentation weapons, and delayed action and treacherous weapons.

neutralizing mechanism or the area in which they were delivered should be marked; and that the civilian population be ensured of a minimum level of protection against the impact of mines.⁷⁵

The Negotiation of the 1980 Convention on Certain Conventional Weapons and Protocol II

0.28 It had been hoped that the use of certain conventional weapons would be specifically restricted by the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)⁷⁶ and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).⁷⁷ But final agreement on the regulation of three categories of conventional weapons—fragments not detectable by X-ray; landmines and booby-traps; and incendiary weapons—remained elusive, and on 9 June 1977 the Diplomatic Conference that adopted the two protocols⁷⁸ decided to recommend to the UN General Assembly that a separate conference be convened under UN auspices to negotiate a distinct legal instrument.⁷⁹

0.29 Subsequently, and in accordance with successive General Assembly resolutions,⁸⁰ preparatory conferences involving some 85 States were held in August–September 1978 and March–April 1979. The United Nations Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have

⁷⁵ Working Paper submitted by the Experts of France, the Netherlands and the UK, 'Land Mines and Booby-Traps and Proposals for the Regulation of Their Use', Annex A2 (COLU/203) in ICRC, *Report on the Conference of Government Experts on the Use of Certain Conventional Weapons, Second Session (Lugano, 28 January–26 February 1976)* (Geneva: ICRC, 1976), 167–71. See Rogers, Lieutenant-Colonel A. P. V., 'A Commentary on the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices', *Military Law and Law of War Review*, 26 (1987), 187.

⁷⁶ Hereinafter, 1977 Additional Protocol I.

⁷⁷ Hereinafter, 1977 Additional Protocol II.

⁷⁸ The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts was convened by the Swiss government between 1974 and 1977. See e.g. Roberts, A. and Guelff, R., *Documents on the Laws of War*, 3rd edn. (Oxford: Clarendon Press, 2001), 419.

⁷⁹ A number of delegations had pushed hard for the establishment of a permanent international weaponry review committee under 1977 Additional Protocol I, but this proposal too was voted down, albeit only by a narrow margin. Fenrick, W. J., 'The Conventional Weapons Convention: A Modest but Useful Treaty', *International Review of the Red Cross*, no. 279 (Nov.–Dec. 1990), 501.

⁸⁰ UN General Assembly Resolutions 32/152 of 19 Dec. 1977 and 33/70 of 14 Dec. 1978. Resolution 32/152, which was adopted by 115 votes to 0, with 21 abstentions, including, once again, France, the UK, the USA and the USSR, called for a UN Conference to be convened in 1979 with a preparatory conference to precede it 'with a view to reaching agreements on prohibitions or restrictions on the use of specific conventional weapons'.

Indiscriminate Effects met for two sessions in Geneva: from 10 to 28 September 1979,⁸¹ and from 15 September to 10 October 1980.⁸² Although controls on the use of landmines, especially remotely delivered mines, were discussed at length, the most controversial issue continued to be the regulation of incendiary weapons, particularly napalm. A last-minute compromise enabled the adoption of the Convention on Certain Conventional Weapons (CCW),⁸³ and three annexed Protocols: Protocol on Non-Detectable Fragments (Protocol I); Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II); and Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III).

0.30 The structure of the Convention was an unusual one, comprising a *chapeau* Convention of ten Articles, to which were annexed the three Protocols. The idea, intended to allow flexibility in the future regulation of weapons, came from Mexico. At the end of the second preparatory conference, it had put forward an 'Outline of a General Treaty' whereby a series of optional protocol agreements would be annexed to an 'umbrella' agreement.⁸⁴ Following negotiations with a number of Western States, at the first session of the Conference proper, the Dutch and UK delegations jointly tabled a draft treaty reflecting this approach.⁸⁵

0.31 In adhering to the Convention, States were obliged to accept at least two of the three annexed Protocols.⁸⁶ There had been concern that because of the relative redundancy of CCW Protocol I, which banned the use of a weapon no one believed in existence or even under development,⁸⁷ governments would be tempted to ratify just this Protocol so as to become party to the Convention.⁸⁸

⁸¹ For a brief report on the first session of the conference see Szasz, P., 'The Conference on Excessively Injurious or Indiscriminate Weapons', *American Journal of International Law*, 74 (Jan. 1980), 212–15.

⁸² See UN, 'Summary of Negotiations Leading to the Conclusion of 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 and of Subsequent Developments related to the Convention', UN Doc. CCW/CONF.I/GE/5 (6 May 1994), 5–18.

⁸³ 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 entered into force on 2 December 1983 in accordance with its Article 5.

⁸⁴ See e.g. Roach, 'Certain Conventional Weapons Convention', 13. ⁸⁵ *ibid.*

⁸⁶ Article 4(3), CCW. According to Levie, the USA had even proposed that adherence to *all* annexed Protocols should be mandatory. See Levie, H. S., 'Prohibitions and Restrictions on the Use of Conventional Weapons', *St John's Law Review*, 68 (summer 1994), 651–2.

⁸⁷ 'Any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays.' Many weapons, of course, have such secondary effects.

⁸⁸ See e.g. Fenrick, W. J., 'The Law of Armed Conflict: The CUSHIE Weapons Treaty', *Canadian Defence Quarterly*, 11 (1981), 27; Fenrick, 'The Conventional Weapons Convention', 501.

The Negotiation of Amended Protocol II to the CCW

0.32 International reaction to the new instruments was subdued and few States chose to adhere to them. Most of the attention concentrated on the continuing, if restricted, legality of the use of incendiary weapons, or the need to address the use of fuel-air explosives.⁸⁹ As the decade drew towards a close, however, there were signs that the indiscriminate use of landmines was increasing, despite the adoption of Protocol II. Anti-personnel mines had become a significant, particular threat to life and limb in war-torn States, such as Afghanistan, Angola, and Cambodia. War surgeons working for the ICRC, for instance, found themselves confronted with large numbers of traumatic amputations resulting from individuals stepping on blast anti-personnel mines.⁹⁰ This presented a specific challenge in how to close the stumps without provoking an infection; medical literature gave little guidance⁹¹ and Western doctors were not skilled in mine injuries.

0.33 In September 1991, Asia Watch, a division of Human Rights Watch, and Physicians for Human Rights jointly published *The Coward's War: Landmines in Cambodia*, a seminal work in the burgeoning non-governmental response to the mine threat.⁹² At the same time, the two organizations called for a total ban on landmines.⁹³ Two months later, the Vietnam Veterans of America Foundation, based in Washington DC, and Medico International, based in Frankfurt, discussed a joint advocacy campaign to bring together non-governmental organizations (NGOs) in a coordinated effort to ban landmines.⁹⁴ In October 1992, the six NGOs that would form the steering committee of the future International Campaign to Ban Landmines—Handicap International, Human Rights Watch, Medico International, Mines Advisory Group, Physicians

⁸⁹ See e.g. Wulff, T., *Barriers Against Weapons: Development of Weapons and Restrictions on their Use* (Stockholm: Swedish Red Cross, 1984), 51.

⁹⁰ Coupland, R. M., 'Technical Aspects of War Wound Excision', *British Journal of Surgery*, 76 (July 1989), 663–7. Dr Robin Coupland was seconded by the British Red Cross Society to the International Committee of the Red Cross. In 1989, as a result of his experiences with Afghan and Cambodian war victims, he wrote a paper for the *British Journal of Surgery*, which discussed the appropriate treatment of mine injuries, notably through complete excision of foreign material and delayed primary closure of the wounds.

⁹¹ Thus, in December 1991, in an edition of the *British Medical Journal*, Dr Coupland and Dr Adriaan Korver described the results of a study of 757 patients with anti-personnel mine injuries, noting that 'surprisingly little attention' had been paid to the subject in the medical literature. Coupland, R. M., and Korver, A., 'Injuries from Antipersonnel Mines: The Experience of the International Committee of the Red Cross', *British Medical Journal*, 303 (14 Dec. 1991), 1509–12.

⁹² The Americas Watch division of Human Rights Watch had already in 1986 published a report on landmines in El Salvador and Nicaragua. It did not, however, call for a ban on the weapons at that time.

⁹³ See 'ICBL ban chronology', available at: www.icbl.org. Although not specified, it appears that this applied to all landmines, not merely anti-personnel mines.

⁹⁴ *ibid.*

for Human Rights, and the Vietnam Veterans of America Foundation—sat down together in New York to plan a coordinated NGO campaign.

0.34 On 9 February 1993, having previously expressed its desire, upon signature of the CCW, to seek to strengthen the provisions in the Convention relating to verification of compliance, France formally submitted a request to the Secretary-General of the UN to convene a Review Conference of the Convention, in accordance with its Article 8.⁹⁵ On 16 December 1993, the UN General Assembly formally welcomed the request, encouraged the establishment of a group of governmental experts to prepare the review conference, and called upon ‘the maximum number of States’ to attend.⁹⁶ Six days later, States Parties requested the Secretary-General to set up a group of governmental experts to consider among other things ‘as a matter of priority’ concrete proposals for amendments to Protocol II, and especially:

- strengthening restrictions on the use of anti-personnel mines and, in particular, those without neutralizing and self-destruction mechanisms;
- considering the establishment of a verification system for provisions of this Protocol;
- studying opportunities for broadening the scope of this Protocol to cover armed conflicts that are not of an international character.⁹⁷

0.35 The ICRC began to become more actively involved in the mines issue at the legal and political level, largely as a result of prompting from its recently created Medical Division. In April 1993, the organization convened the so-called Montreux Symposium, bringing together lawyers, mine clearance experts, surgeons, and campaigners to discuss the many facets of the landmine problem. NGOs had already issued a call for an outright ban on anti-personnel mines.⁹⁸ At the Symposium, however, the ICRC’s policy was to call only for the incorporation of self-destruct mechanisms in anti-personnel mines⁹⁹ as a way to tackle what it would come to term the ‘epidemic of mine injuries’.¹⁰⁰ The Symposium spurred a number of initiatives, notably the study of the socio-economic impact

⁹⁵ In February 1993, Handicap International passed on to the French Ministry of Foreign Affairs a letter from US Senator Patrick Leahy to the organization in which he encouraged it to persuade the French government to call for a review conference of the CCW. See Chabasse, P., ‘The French Campaign’, in Cameron *et al.*, *To Walk without Fear*, 61–2.

⁹⁶ UN General Assembly Resolution 48/79, operative paras. 5–7.

⁹⁷ See UN Doc. CCW/CONF/GE/4, 2–3.

⁹⁸ The NGO ‘joint call to ban antipersonnel landmines’, issued by the six NGOs making up the steering committee of the ICBL in October 1992, sought ‘an international ban on the use, production, stockpiling and sale, transfer or export of antipersonnel mines’.

⁹⁹ Although ICRC President Sommaruga was believed to already personally favour a ban.

¹⁰⁰ See e.g. *The Worldwide Epidemic of Landmine Injuries: The ICRC’s Health Oriented Approach* (Geneva: ICRC, 1995).

of landmines, conducted by the Vietnam Veterans of America Foundation,¹⁰¹ and research by Human Rights Watch into global production and trade in the weapons.¹⁰²

0.36 At the beginning of 1994, the ICRC convened a meeting of military experts to discuss the military utility of anti-personnel mines. Although opinions were divided, it was acknowledged that anti-personnel mines could be harmful to one's own soldiers, but there was a general belief in their military utility and a marked reluctance to renounce their use before an alternative was available.

0.37 In accordance with General Assembly Resolution 48/79, the ICRC had been invited to participate as an observer in the Group of Governmental Experts convened to prepare the first Review Conference of the CCW. Just prior to the Group's first meeting, the ICRC called a press conference in Geneva to enable its President to set out the organization's position on the issues to be covered. Following considerable internal debate within the institution, on 24 February 1994, ICRC President Cornelio Sommaruga declared that 'from a humanitarian point of view', a 'worldwide ban on anti-personnel mines' was 'the only truly effective solution'.¹⁰³

0.38 Subsequently, certain UN bodies began to support the campaign against landmines, sometimes to the obvious irritation of certain States. The Office of the United Nations High Commissioner for Refugees (UNHCR), the United Nations Children's Fund, and the Secretary-General himself, all called for a total ban on anti-personnel mines. On 10 July 1994, the Chairman's Statement of the Group of Seven meeting in Naples included a paragraph which, *inter alia*, stated that the G7 assigned 'priority to the problems of anti-personnel landmines, including efforts to curb their indiscriminate use, halt their export, assist in their clearance worldwide'.¹⁰⁴ In September 1994, at the UN General Assembly, the US President, William Jefferson Clinton, called for the 'eventual elimination' of anti-personnel mines.¹⁰⁵ This call was endorsed in Resolution 49/75D, adopted without a vote on 15 December 1994.

¹⁰¹ Roberts, S. and Williams, J., *After the Guns Fall Silent: The Enduring Legacy of Landmines* (Washington: Vietnam Veterans of America Foundation, 1995).

¹⁰² See e.g. Human Rights Watch and Physicians for Human Rights, *Landmines: A Deadly Legacy* (New York: Human Rights Watch, Oct. 1993).

¹⁰³ See e.g. Maresca and Maslen, *The Banning of Anti-Personnel Landmines*, 264–5.

¹⁰⁴ Para. 7, Chairman's Statement, Naples G7 Summit (10 July 1994).

¹⁰⁵ The Assembly had already adopted a resolution the previous year by consensus, calling for a moratorium on the export of anti-personnel mines. This followed domestic legislation enacted by the United States in 1993, the Landmine Moratorium Act, which imposed a one-year ban on the sale, export, and transfer abroad of landmines. National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, sect. 1365.

0.39 Yet, despite this bold call, progress in the review process of the Convention was slow and difficult,¹⁰⁶ largely because of the practice of taking all decisions by consensus.¹⁰⁷ In total, four meetings of the group of governmental experts were necessary to prepare the Review Conference, which proved unable to report before the end of 1994 as had been hoped because of the problems in reaching agreement.¹⁰⁸ The first session of the Review Conference—originally intended to be its only session—was held in Vienna on 25 September to 13 October 1995.¹⁰⁹ As agreement on amendments to Protocol II proved impossible to achieve,¹¹⁰ the Conference decided to continue its work at resumed sessions in Geneva on 15–19 January 1996 and on 22 April to 3 May 1996.¹¹¹ Finally, on 3 May 1996, after last-minute negotiations with Pakistan,¹¹² States Parties to the Convention adopted by consensus Amended Protocol II.¹¹³ In accordance with

¹⁰⁶ Major issues were whether non-detectable mines should be banned, whether both self-destruction and self-deactivation should be required, and what the duration and reliability requirements for self-destruction and self-deactivation should be. China initially insisted that it could accept a required limit on duration or a required minimum reliability, but not both—a position which would have rendered the restrictions meaningless. The final issue to be resolved was the length of the transition period to be permitted; the Western group favoured the shortest possible period, while China in particular held out for the longest possible period.

¹⁰⁷ In fact, the Preparatory Conference to the 1979–80 UN Weapons Conference had itself failed to reach agreement on the rules for decision-making. According to one expert: 'Decisions were reached on the basis of an unofficial, and undefined, consensus', although he notes that a number of delegations repeatedly asserted that voting would be possible. See Fenrick, W. J., 'The Conventional Weapons Convention: A Modest but Useful Treaty', *International Review of the Red Cross*, no. 279 (Nov.–Dec. 1990), 501; Fenrick, W. J., 'New Developments in the Law concerning the Use of Conventional Weapons in Armed Conflict', *Canadian Yearbook of International Law*, 19, 19 (1981), 238 n. 36. It is otherwise asserted that the US delegation believed that the relevant language in Article 8 of the CCW ('shall be adopted . . . in the same manner as this Convention and the annexed Protocols') meant by consensus 'and only by consensus'. Roach, 'Certain Conventional Weapons Convention', 43.

¹⁰⁸ The group met from 28 Feb.–4 Mar. 1994, from 16–27 May 1994, from 8–19 Aug. 1994, and from 9–20 Jan. 1995. Altogether, 33 States Parties and 33 States non-parties to the Convention participated in the work of the Group. In addition to the ICRC, the UN was subsequently invited to attend the group of governmental experts as an observer. NGOs, however, were excluded, with China effectively imposing a veto on their participation.

¹⁰⁹ Altogether representatives of 44 States Parties and 40 States non-parties to the Convention participated in the first session of the Review Conference.

¹¹⁰ Although the Review Conference successfully agreed to adopt Protocol IV banning the use of blinding laser weapons.

¹¹¹ UN General Assembly Resolution 50/74, adopted on 12 Dec. 1995, called upon States Parties to 'intensify their efforts in order to conclude negotiations on a strengthened Protocol II'.

¹¹² Pakistan opposed the extension of the scope of the protocol to cover internal armed conflicts on the basis that it encroached on its national sovereignty.

¹¹³ Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended on 3 May 1996 (Protocol II as amended on 3 May 1996), hereinafter, Amended Protocol II. The two versions of the Protocol continue to co-exist even though Protocol II as amended has formally entered into force and it remains open to States to ratify the 1980 Protocol, or the Amended Protocol II, or even both. See further Roberts, A. and Guelff, R., *Documents on the Laws of War*, 3rd edn. (Oxford: Clarendon Press, 2001), 518.

its *chapeau* Article 2,¹¹⁴ the Protocol entered into force on 3 December 1998, after 20 States had notified the depositary of their consent to be bound by it.

The Negotiation of the Anti-Personnel Mine Ban Convention

Background

0.40 Reaction by many States to the adoption of Amended Protocol II was quite negative,¹¹⁵ as its provisions were widely considered to be overly complex and insufficiently stringent to deal with the extent of the humanitarian crisis. The Protocol banned the use (and transfer) of ‘undetectable’ anti-personnel mines,¹¹⁶ and remotely delivered anti-personnel mines that did not self-destruct and self-deactivate to a stated standard,¹¹⁷ but allowed States to opt for a nine-year period of deferral from its entry into force to fully comply with each of the two prohibitions on use.¹¹⁸ It further required that anti-personnel mines not equipped with self-destruction and self-deactivation features be laid in marked and protected areas,¹¹⁹ but included an exception to that requirement (not to the requirement applied to remotely delivered anti-personnel mines) for certain situations, including where direct enemy military action made it impossible to comply,¹²⁰ and again allowed for a nine-year period of deferral as

¹¹⁴ See UN Doc. CCW/CONF.I/16 (Part I), 32.

¹¹⁵ Although China, the Russian Federation, and the USA have made positive statements about the Protocol on a number of occasions. In addition, the Swedish Ministry of Foreign Affairs declared the agreement a significant diplomatic success for Sweden. (The Review Conference had been presided over by the Swedish Ambassador, Johan Molander.) ‘La Suède se félicite sur l’accord sur les mines antipersonnel’, *Agence France Presse* (Stockholm, 3 May 1996).

¹¹⁶ According to Article 4 of Amended Protocol II and Article 2(a) of the Technical Annex, all anti-personnel mines produced after 1 January 1997 should ‘incorporate in their construction a material or device that enables the mine to be detected by commonly-available technical mine detection equipment and provides a response signal equivalent to a signal from 8 grams or more of iron in a single coherent mass’. According to Article 2(b) of the Technical Annex, a similar requirement was made with respect to mines produced before 1 January 1997, with the exception that as an alternative to incorporation, such a material or device could be attached prior to emplacement ‘in a manner not easily removable’.

¹¹⁷ At least 90 per cent of all ‘activated’ remotely delivered anti-personnel mines must automatically detonate within 30 days of emplacement and after 120 days the back-up self-deactivating mechanism must have ensured that no more than 1 in 1,000 of the mines originally laid is capable of functioning as a mine. Article 5 of Amended Protocol II and Article 3(a) of the Technical Annex.

¹¹⁸ Article 2(c) of the Technical Annex.

¹¹⁹ Under Article 5 of Amended Protocol II, all anti-personnel mines that are not equipped with both self-destructing and self-deactivating mechanisms to the same effectiveness as for remotely delivered anti-personnel mines, must be ‘placed within a perimeter-marked area which is monitored by military personnel and protected by fencing or other means, to ensure the effective exclusion of civilians from the area. The marking must be of a distinct and durable character and must at least be visible to a person who is about to enter the perimeter-marked area.’

¹²⁰ Under Article 5(3) of Amended Protocol II, a party to a conflict is ‘relieved from further compliance’ with the obligation to mark, fence, and monitor ‘only if such compliance is not feasible due to

long as the use of non-compliant mines was 'to the extent feasible' minimized and such mines at least self-deactivated within 120 days.¹²¹

0.41 The ICRC called the restrictions on the use of anti-personnel mines 'woefully inadequate' and indicated that the Protocol alone was 'unlikely to significantly reduce the level of civilian landmine casualties'.¹²² The then Secretary-General of the United Nations, Boutros Boutros-Ghali, said he was 'deeply disappointed' by the failure to agree a ban.¹²³ Jody Williams, the Coordinator of the International Campaign to Ban Landmines (ICBL), declared that the agreement was a 'humanitarian failure'.¹²⁴ Even Ambassador Johan Molander, the President of the Review Conference, would later remark that,

the cumbersome diplomatic process, based on universality and consensus, set in motion a chain reaction that was difficult to foresee. It created the focal point for the international efforts to ban landmines. The haggling over seemingly unimportant details and procedure in comfortable Geneva, on [the] one hand, and the nameless suffering of children, women and men torn to pieces by the hidden killers in the rice paddies of Cambodia, the valleys of Afghanistan or the fields of Angola, on the other—this contrast was too stark, too brutal not to bring home the message to millions around the globe that anti-personnel mines represent an evil that must be stopped.¹²⁵

0.42 Indeed, it had been clear even from the early discussions in the Group of Governmental Experts that amendments to the Protocol were unlikely to be far-reaching and to include an outright ban on anti-personnel mines. These difficulties led to greater unilateral activities towards a prohibition on anti-personnel mines. The ICBL, which had been sceptical from the outset at the likelihood of achieving a prohibition under UN auspices with decision-making by consensus, had been growing in size and influence with national campaigns in dozens of countries, and conferences and meetings on the issue that were bringing together several hundred participants, not only from NGOs but also representatives of States and international organizations.¹²⁶

forcible loss of control of the area as a result of enemy military action, including situations where direct enemy military action makes it impossible to comply'.

¹²¹ Article 3(b) and (c) of the Technical Annex.

¹²² Statement of Eric Roethlisberger, Vice-President of the ICRC, to the closing session of the First Review Conference of the 1980 Convention on Certain Conventional Weapons (3 May 1996). See Maresca and Maslen, *The Banning of Anti-Personnel Landmines*, 445–6.

¹²³ See Williams, F., 'UN Fails to Agree Outright Ban on Landmines', *Financial Times* (4 May 1996).

¹²⁴ See Agence France Presse wire release, *AFP-DL82* (3 May 1996).

¹²⁵ Molander, J., 'Foreword' to Maresca and Maslen, *The Banning of Anti-Personnel Landmines*, p. xxiii.

¹²⁶ In June 1995, the Cambodian Campaign to Ban Landmines and the NGO Forum on Cambodia hosted a three-day international conference on landmines attended by more than 400 people from 42 countries, representing NGOs, governments, the UN, demining organizations and landmine victims. See www.icbl.org.

0.43 In March 1995, Belgium became the first country in the world to adopt national legislation outlawing anti-personnel mines, including components, parts and technology. Other governments, in Europe and beyond, were being pushed and cajoled one by one into supporting, at least publicly, an international ban on production, stockpiling, transfer, and use of anti-personnel mines. States could not persuasively argue that they were pursuing a realistic solution to the problem as it was widely believed that the Protocol would be complex, difficult to implement, and largely ineffective. Thus, by May 1996, more than 40 States, many of which were party to the CCW, had publicly expressed their support for a total international prohibition on anti-personnel mines, 25 States had renounced the use of anti-personnel mines by their own forces and 11 were destroying their stockpiles of the weapon.¹²⁷ In addition, Werner Ehrlich of the Austrian Ministry of Foreign Affairs had taken the initiative, informally, to draft the text of a treaty banning anti-personnel mines.¹²⁸

0.44 In Canada, diplomats—and the military¹²⁹—engaged in the review process had identified landmines as an issue that was deserving of further work. In the spring of 1996, after having consulted with the ICRC and the ICBL and subsequently with sympathetic governments,¹³⁰ Jill Sinclair, the Director of the Non-Proliferation, Arms Control, and Disarmament Division (IDA) at the Department of Foreign Affairs and International Trade (DFAIT), sought and obtained approval to propose a ‘think-in’ of States which had endorsed the

¹²⁷ See for instance Maresca and Maslen, *The Banning of Anti-Personnel Landmines*, pp. 460–1. The level of support for a total ban that had been achieved by the time of the 1996 Ottawa Conference was largely responsible for convincing the then Canadian Foreign Minister, Lloyd Axworthy, and his staff that the necessary ‘critical mass’ could result in the successful fast-track negotiation of a treaty prohibiting anti-personnel mines. See below the section dealing with the 1996 Ottawa Conference.

¹²⁸ The ‘first draft’ of the Convention on the Prohibition of Anti-Personnel Mines, dated April 1996. Ehrlich reportedly drafted the text in his hotel room in Geneva during frustration at the review process.

¹²⁹ Ed Fitch became Director of Military Engineering in the Canadian army in December 1995, reporting to the Deputy Military Chief of Staff. Within two months of his appointment it became clear that landmines were going to be an issue that could not be avoided. Previously, the Canadian armed forces had taken the view that they were ‘not part of the problem’ but in the experiences at UNPROFOR in Bosnia and Herzegovina and then SFOR they saw at first hand what mines could do. Discussion with Brigadier-General E. S. Fitch, Assistant Chief of the Land Staff, Canadian National Defence Headquarters (Ottawa, 15 Aug. 2001).

¹³⁰ An initial lunch meeting with ICBL and eight supportive governments had been convened by Pax Christi Netherlands in January 1996. The meeting, which identified the need to coalesce pro-ban States, led to a memorandum being sent by the Canadian delegation to their Minister for Foreign Affairs regarding a possible Canadian initiative. The idea for a conference was subsequently discussed during a dinner meeting of 14 States at the offices of the Quaker United Nations Office in Geneva on 22 April 1996. States present were: Afghanistan, Australia, Austria, Belgium, Canada, Denmark, Germany, the Holy See, Ireland, the Netherlands, New Zealand, Norway, Peru, and Sweden. The reaction to the idea from all parties was positive. Then at the beginning of May 1996, Canada convened a second informal meeting with ‘pro-ban’ States and NGOs at the Palais des Nations in Geneva.

objective of an international ban on the use, production, transfer, and stockpiling of anti-personnel mines. Initially, a small, informal meeting was foreseen with a view to discussing strategy on how to push the issue forward.¹³¹ On 3 May 1996, at the closing session of the Review Conference, Canadian Ambassador Mark Moher announced that Canada would host a meeting of pro-ban States in the summer. The announcement was followed by a press conference.¹³²

0.45 Yet, as the months went by and the scope of the meeting and its intended participation grew apace, there was a fear that a number of States would attend with a view to blocking progress towards the objective of a total prohibition of anti-personnel mines. For this reason, DFAIT decided to set criteria whereby each State wishing to come would have to decide whether it came as a full participant or merely an observer, depending on whether it specifically endorsed the objective of a total ban. A proposed conference declaration was circulated in advance of the meeting not for comment but to help States make up their mind.¹³³

0.46 Internal discussions were also engaged in the host country, Canada, with DFAIT using the conference as an opportunity to improve Canada's own position towards anti-personnel mines.¹³⁴ After intensive internal discussions between ministries, the Department of National Defense agreed that it would eliminate its stockpile of anti-personnel mines in the context of a global agreement to prohibit the weapons and, for the purposes of the Conference, they undertook to destroy half of Canada's anti-personnel mine stockpiles.¹³⁵ The announcement was made on 2 October 1996.

0.47 In Geneva, meanwhile, discussions on the text of a possible anti-personnel mine ban treaty were already being held between interested governments, NGOs, and the ICRC. David Atwood, Associate Representative at the Quaker UN Office in Geneva, convened regular strategy meetings. On 7 July 1996, he circulated a note to selected NGOs, UNICEF, the UN Institute for Disarmament Research (UNIDIR), and representatives of Austria, Canada, and Switzerland, reporting on a small meeting held at his offices on 26 June. Attached to this note was the draft treaty text prepared by Werner

¹³¹ Discussion with Ralph Lysyshyn, 14 Aug. 2001.

¹³² Other countries, even those supporting an international prohibition, were unclear about Canada's agenda, discussing privately whether it was merely an attempt to appease public opinion or a serious initiative, and if the latter, what its underlying strategy was.

¹³³ On the other hand, concerns were also expressed by certain States about non-governmental participation, especially of a number of vociferous individuals and NGOs from the ICBL.

¹³⁴ Discussion with Ralph Lysyshyn, former Director-General, International Security Division, DFAIT, 14 Aug. 2001.

¹³⁵ Discussions with Mark Gwozdecky and Jill Sinclair, DFAIT, Ottawa, 14 Aug. 2001.

Ehrlich.¹³⁶ The draft,¹³⁷ which comprises 11 articles, provided for a complete prohibition of the employment, production, transfer, and stockpiling of anti-personnel mines, required destruction of stockpiles within one year of entry into force, and clearance of laid anti-personnel mines within five years. It represents the essence of what would subsequently be elaborated into the first Austrian draft text of the Anti-Personnel Mine Ban Convention.

The ‘Ottawa Process’

The 1996 Ottawa Conference

0.48 The International Strategy Conference: Towards a Global Ban on Anti-Personnel Mines (the 1996 Ottawa Conference) was held in the Canadian capital on 3–5 October 1996. During the Conference, the Chair, Ralph Lysyshyn, the then Director-General of DFAIT’s International Security Division, sensed that there was sufficient momentum to initiate fast-track negotiations for an international agreement prohibiting anti-personnel mines. Aware that such a process would be costly, on the morning of 4 October, he telephoned the Assistant Deputy Minister for Foreign Affairs to propose that Canada launch negotiations and asked for two million Canadian dollars to support the initiative. The same afternoon, he received confirmation that the money would be available. A meeting was then held with the Minister of Foreign Affairs, Lloyd Axworthy, to discuss the idea of a total ban treaty. Warning was given of the consequences of unilaterally calling for the negotiation of a ban: there was a significant risk of failure,¹³⁸ and friendly countries and other allies were likely to be antagonized.

0.49 Despite the concerns, Lloyd Axworthy decided to call for the negotiation and signature of a treaty by the end of 1997 in his closing address to the Ottawa Conference. The Secretary-General of the UN was informed in advance and sent a message of support. Jody Williams, the ICBL Coordinator, and Cornelio Sommaruga, the President of the ICRC, were both primed and on hand to give verbal expressions of support before the conference was abruptly closed. To other States, the announcement came as not only a surprise,¹³⁹ but also a shock. The head of the US delegation had enquired of Ralph Lysyshyn on the morning of 5 October whether there was any reason for him to postpone his flight home before the end of the Conference and was told that there was none.

¹³⁶ Jozef Goldblat, a leading academic authority on disarmament, had also offered to draft a treaty banning anti-personnel mines.

¹³⁷ See Appendix 4 for the draft treaty texts.

¹³⁸ In the memorandum to the Minister, 100 signatory States were felt to be the threshold for credibility. Discussion with Robert Lawson, DFAIT, Ottawa, 15 Aug. 2001.

¹³⁹ Diplomats closely involved in the process believe that surprise was critical to prevent certain States blocking the initiative before it had got off the ground.

Australia and France were particularly angered by Canada's unilateralism; even close allies had not been told in advance. Other countries believed that 'something could be done', but they were not clear how fast. A number, at least, understood that, if well managed, the process could become a bandwagon with many governments feeling unable or unwilling to stay outside.

0.50 Thus, the Anti-Personnel Mine Ban Convention was negotiated outside the UN,¹⁴⁰ an implicit recognition of the international community's failure to act as one in response to a humanitarian emergency. The Conference had successfully set the stage for coordinated action on landmines with a strong declaration and detailed Chairman's Agenda for Action on Anti-Personnel Mines.¹⁴¹ The Ottawa Process mirrored the more traditional mechanism for negotiating an international humanitarian law agreement—typically a single State would offer to convene a Diplomatic Conference—but was an anathema to many of the diplomats engaged in consensus-based disarmament negotiations.¹⁴² This fast-track negotiation of the Anti-Personnel Mine Ban Convention became known as the Ottawa Process.

0.51 A 'core group' of friendly States was quickly assembled, bringing together, initially, Austria, Belgium, Canada, Ireland, Mexico, Netherlands, Norway, the Philippines, South Africa, and Switzerland.¹⁴³ There was an

¹⁴⁰ Other multilateral treaties have also been negotiated outside the UN, such as the Organization for Security and Cooperation in Europe, the Conventional Forces in Europe (CFE) agreement, the Seabed Treaty and the Antarctica Treaty, though many were Cold War constructs. International trade law agreements, such as the General Agreement on Tariffs and Trade, and the agreement to establish the World Trade Organization, were also negotiated outside UN auspices.

¹⁴¹ The Conference declaration, for instance, included a call for 'a commitment to work together to ensure: the earliest possible conclusion of a legally-binding international agreement to ban anti-personnel mines; progressive reductions in new deployments of anti-personnel mines with the urgent objective of halting all new deployments of anti-personnel mines; support for an UNGA 51 resolution calling upon member states, inter alia, to implement national moratoria, bans or other restrictions, particularly on the operational use and transfer of anti-personnel mines at the earliest possible date; regional and sub-regional activities in support of a global ban on anti-personnel mines; and, a follow-on conference hosted by Belgium in June 1997 to review the progress of the international community in achieving a global ban on anti-personnel mines.'

The Chairman's Agenda listed actions to be taken, broken down into global action, regional action, and land mine clearance, mine awareness, and victim assistance. See Appendix 3 for a copy of the Conference Declaration and Chairman's Agenda.

¹⁴² According to two international lawyers, disarmament 'is the traditional term for the elimination, as well as the limitation or reduction (through negotiation of an international agreement) of the means by which nations wage war'. It is increasingly regarded as a subset of 'arms control'. Matthews, R. J. and McCormack, T. L. H., 'The Influence of Humanitarian Principles in the Negotiation of Arms Control Treaties', *International Review of the Red Cross*, 81, 834 (1999), 333–4.

¹⁴³ The precise membership of the core group is the subject of some debate. This list is the one claimed by the Canadians most closely involved in the Ottawa process. See Lawson, R. J. *et al.*, 'The Ottawa Process and the International Movement to ban Anti-Personnel Mines'; Cameron *et al.*, *To Walk without Fear*, 167.

obvious need for dedicated countries¹⁴⁴ and some semblance of geographical distribution, although the weight was heavily European.¹⁴⁵ In February 1997, after the Expert Meeting on the Text of a Convention to Ban Anti-Personnel Mines (the Vienna Conference), Germany would join the group, thereby accentuating this bias.¹⁴⁶

The First Draft of the Convention

0.52 The Austrian delegation to the Ottawa Strategy Conference already had a first draft of an anti-personnel mine ban convention with them, but although they referred to it in their remarks, they did not circulate it formally.¹⁴⁷ The initial draft prepared by Ehrlich was revised following input from his colleagues and a second draft dated 30 September 1996 had been elaborated.¹⁴⁸ The draft was significantly more detailed than his initial draft, with a small number of annotations to the text. Article 3 on prohibitions already reflected the approach taken in the 1993 Chemical Weapons Convention and Article 7 on verification provided for challenge inspections ‘in the case of serious doubts about compliance’. Forty ratifications were set as the threshold for entry into force, with a view to rebutting ‘the argument of lack of universality’. No reservations were allowed. The draft, with only minor alterations but now entitled the Austrian draft text, was sent out worldwide in November 1996.¹⁴⁹

0.53 At the end of 1996, Werner Ehrlich left his post in the Disarmament Department of the Ministry of Foreign Affairs to become Austrian Ambassador to Iran. He was replaced as ‘drafter’ by his former superior, Thomas Hajnoczi, who had headed the Disarmament Division at the Austrian Ministry of Foreign Affairs since January 1996. He was assisted throughout the process by an international lawyer ‘seconded’ from the Ministry of Defence, Thomas Desch, Head of the International Legal Division, and Hans Hamberger, also

¹⁴⁴ There appeared to be intense loyalty to the Core Group among its original members—a loyalty that would be severely tested towards the end of the Oslo Diplomatic Conference. See below paragraph 0.89.

¹⁴⁵ Within the European Union (EU), Canada was fortunate that a very sympathetic ally, Ireland, held the EU presidency. This prevented a common position in favour of putting negotiations into the Conference on Disarmament. Subsequently, changes in governments in France and the UK were, in the words of one diplomat, ‘tremendously significant’, as they led to both States joining the Ottawa Process.

¹⁴⁶ The Netherlands claims credit for serving as the intermediary between the Core Group and Germany.

¹⁴⁷ Discussions with Mark Gwozdecky and Jill Sinclair, DFAIT, Ottawa, 14 Aug. 2001.

¹⁴⁸ The provisions were largely adapted from those contained in the 1993 Chemical Weapons Convention and Amended Protocol II to the CCW. See Appendix 4 for a copy of the draft text by Dr Ehrlich.

¹⁴⁹ The Chairman’s Agenda of the 1996 Ottawa Conference formally asked Austria to circulate a first draft of a treaty prohibiting anti-personnel mines to a follow-up meeting to be held in Brussels. See Appendix 3 for a copy of the Chairman’s Agenda.

from the Ministry of Defence.¹⁵⁰ Dr Desch had a good grounding in international humanitarian law, which balanced the more disarmament-oriented bent of Ambassador Hajnoczi.

0.54 Disquieted by rumours of a watered-down approach to a treaty to attract wider support, especially from the USA, Thomas Hajnoczi contacted Jill Sinclair at the beginning of 1997 to suggest that they ‘stick as long as possible to the concept of a comprehensive total ban. As a first line in the search of compromise transitional periods could be prolonged.’¹⁵¹ Indeed, Canada did make a number of attempts during the autumn of 1996 to bring the USA on board (as well as to reconcile relations with allies such as Australia, France, and Japan). For instance, it was suggested that a *chapeau* Convention could be adopted with four annexed Protocols, each dealing with a distinct prohibition (production, stockpiling, transfer, and use). This would respect the principle of a total prohibition, while allowing States to choose how far they would go in meeting that objective.¹⁵² The USA rebuffed the idea, however,¹⁵³ believing that they could steer the issue and any negotiations into the Conference on Disarmament (CD), where it would be subject to the consensus rule—a ‘slow-track’ approach to a total prohibition, as it was characterized by the ICBL.¹⁵⁴

0.55 Belgium also prepared a draft treaty text in both English and French. Although it appears to have had little direct influence on the Austrian drafts, Austria was keen to include Belgium as much as possible in the process because of the role it could play within the EU. The ICBL draft treaty text,¹⁵⁵ which

¹⁵⁰ The Ministry of Defence was solidly behind a ban treaty as it had already renounced anti-personnel mines so was keen to bring other States—and their militaries—on board.

¹⁵¹ Fax from Thomas Hajnoczi to Jill Sinclair, 7 Jan. 1997. There was concern even among potential signatories about the feasibility of a total prohibition. Germany, for instance, saw three options: a draft with the possibility of exceptions, a *chapeau* Convention with annexed Protocols, or a phased approach starting with transfers.

¹⁵² Other members of the Core Group were concerned about the four protocol approach, which remained an option until the success of the 1997 Vienna Conference. Pressure was brought to bear on Canada by a number of core group members that their support could be withdrawn if they were not satisfied with the process and the likely outcome. Eric Newsom, the head of the US delegation at the Oslo Diplomatic Conference, raised the idea during the Conference to allow the USA to adhere to the treaty but by then it was too late.

¹⁵³ It is claimed by one source that the USA did not genuinely engage with Canada on the issue until June 1997 when a delegation came to Ottawa for a briefing.

¹⁵⁴ Indeed, right to the end of the process, Canadian diplomats were concerned that the CD would be given the negotiating role, which would effectively have ended serious prospects for an early agreement. In particular, DFAIT was concerned to contest any language suggesting equivalence as they fought to establish the legitimacy of the Ottawa Process.

¹⁵⁵ Convention on the Prohibition of the Development, Production, Stockpiling, Transfer and Use of Anti-Personnel Mines and on their Destruction, Proposal by the International Campaign to Ban Landmines, ICBL, 20 Dec. 1996.

was promoted actively with governments in New York towards the end of 1996, had a much greater impact on subsequent draft treaty texts. The ICBL draft contained 19 draft articles and a proposed fact-finding annex, and much of its desired language would subsequently be reflected in the text of the Convention as adopted.

The UN General Assembly

0.56 By 1996, the UN General Assembly had already adopted a number of resolutions relating to anti-personnel mines. A call for a moratorium on the export of anti-personnel mines was contained in the first operative paragraph of Resolution 48/75K, adopted without a vote on 16 December 1993.¹⁵⁶ On 12 December 1995, the Assembly adopted, also without a vote, Resolution 50/70O, which included a call for 'further immediate international efforts to seek solutions to the problems caused by anti-personnel landmines, with a view to the eventual elimination of anti-personnel landmines'.¹⁵⁷ The resolution had been proposed by the USA and was co-sponsored by 110 States.¹⁵⁸

0.57 At the Assembly in 1996, the USA initially touted a resolution referring to a total ban on anti-personnel mines, but Canada felt that the initial draft was not sufficiently strong and began to circulate its own prospective text. On the basis that the USA would not refer to the CD in the resolution,¹⁵⁹ agreement was reached to merge the two texts into a single draft that would be introduced by the USA.¹⁶⁰ Resolution 51/45S, which attracted 115 co-sponsors, was adopted on 10 December 1996 by 155 votes to nil with 10 abstentions.¹⁶¹ Its first operative paragraph urged States 'to pursue vigorously an effective, legally binding international agreement to ban the use, stockpiling, production and

¹⁵⁶ See also para. 0.20. See Appendix 2 for copies of relevant UN General Assembly resolutions.

¹⁵⁷ Operative para. 6.

¹⁵⁸ In 1994, the General Assembly had already established as a goal of the international community the eventual elimination of anti-personnel mines. UN General Assembly Resolution 49/75D, adopted on 15 Dec. 1994.

¹⁵⁹ On 6 February 1997, Canada made the following declaration before the CD: 'In our view, USE is the problem and it is the USE of anti-personnel mines which must be urgently addressed . . . In conclusion, Mr President, let us make two points: if it is the will of this body to pursue the issue of anti-personnel mines, we will not oppose it; but we will strongly oppose any initiative which does not reinforce or complement the ongoing work of the Ottawa Process or which delays unduly the establishment of the urgently needed norm against anti-personnel mines.'

¹⁶⁰ Tomlin, B. W., 'On a Fast Track to a Ban: The Canadian Policy Process', in Cameron *et al.*, *To Walk without Fear*, 197. This was despite strong pressure from France and the United Kingdom (UK).

¹⁶¹ Those abstaining were: Belarus, China, Cuba, the Democratic People's Republic of Korea, Israel, Pakistan, the Republic of Korea, the Russian Federation, Syria, and Turkey. A Canadian academic, David Lenarcic, refers to an unsourced remark by China that the vote on the resolution was a 'beauty and popularity contest'. Lenarcic, D. A., *Knight-Errant? Canada and the Crusade to Ban Anti-Personnel Land Mines*, Contemporary Affairs No. 2 (Toronto, Canada: Irwin Publishing, 1998), 28.

transfer of anti-personnel landmines with a view to completing the negotiation as soon as possible'.¹⁶²

The 1997 Vienna Conference

0.58 A whirlwind series of conferences followed in the first half of 1997. The first, in Vienna on 12–14 February 1997,¹⁶³ was a formal follow-up to Lloyd Axworthy's call for the fast-track negotiation of a total ban treaty.¹⁶⁴ The Expert Meeting on the Text of a Convention to Ban Anti-Personnel Mines (the 1997 Vienna Conference) provided States with an initial opportunity to comment directly on Austria's first draft of the Convention, which had been circulated the previous November.¹⁶⁵ Austria had expected representatives of around 90 governments to attend—in fact 111 turned up.¹⁶⁶ In addition, the room chosen to host the meeting was long and narrow—and full—creating a strong impression on the participants that the process was serious, and with momentum behind it.¹⁶⁷

0.59 The Conference was chaired by Ambassador Thomas Hajnoczi, now the person primarily responsible for the draft treaty text. He had already received written comments on the draft Austrian text from more than a dozen governments in advance of the meeting, but it was felt that bilateral comments made in a multilateral forum would give legitimacy to the draft¹⁶⁸ as well as

¹⁶² See also paras. 0.101 and 0.119 below.

¹⁶³ Originally, it had been planned to hold two meetings in Vienna, with the second envisaged for May 1997 intended to address specific concerns, such as how verification measures would be included in the treaty. This second meeting was not deemed necessary, as it was agreed in Vienna that Germany could host a meeting on verification in April of the same year.

¹⁶⁴ The Conference had to compete with a proposed French project for an EU seminar on anti-personnel mines, planned, coincidentally, to be held in Paris on 10–11 Feb. 1997.

¹⁶⁵ See paras. 0.52 to 0.54 above.

¹⁶⁶ The attention of the international media had focused strongly on anti-personnel mines in January 1997 when Diana, Princess of Wales, on a visit to Angola as a guest of the British Red Cross, had called publicly for an international ban on anti-personnel mines in defiance of instructions from the British Foreign and Commonwealth Office. A junior minister would famously describe her as a 'loose cannon', thereby drawing further public attention to the issue. It is not known, however, if this had any bearing on the level of participation.

¹⁶⁷ According to one commentator, based on the results of the Vienna Conference, Canada thought that 50–60 signatories were likely, Belgium was more conservative, predicting around 40–50. Short, N., 'International Efforts to Ban Landmines: The Vienna Conference', Briefing Notes, Centre for European Security and Disarmament (Brussels, 4 Mar. 1997). Austria, at least, saw the success of the meeting as the effective end of the CD as a credible threat to the Ottawa Process. Information provided by Thomas Hajnoczi, Austrian Ambassador to Norway, Oslo, 24 Oct. 2001.

¹⁶⁸ Thus, Japan, one of a number of States that were at best lukewarm *vis-à-vis* the Ottawa Process, had more than 20 questions on the text. This represented a welcome engagement in the process, notwithstanding any of its oral or written caveats. There were unconfirmed reports of parallel meetings with key States opposed to the Ottawa Process convened to discuss how to kill it. One of the

helping Austria to decide how to revise the text.¹⁶⁹ NGOs, which were working on an almost daily basis with the members of the Core Group, were allowed to attend the plenary sessions, and the UN and the ICRC were invited to participate in the closed meetings.¹⁷⁰

The Mobilization of Southern Africa

0.60 On 25–8 February 1997, following the 1997 Vienna Conference, the ICBL convened its Fourth International Non-governmental Organization Conference on Landmines, ‘Toward a Mine-Free Southern Africa’, in Maputo, Mozambique. The conference, which brought together more than 450 participants from 60 countries, stressed the need for regional organizations, such as the Organization of African Unity (OAU) and the Southern Africa Development Community (SADC), to follow the lead of South Africa and Mozambique, which announced a unilateral ban on landmines the week before and during the conference. The conference’s final declaration also called upon the international community to increase resources for mine clearance and assistance to survivors, especially in those countries and regions that had banned landmines.¹⁷¹

0.61 Within the context of the Conference, the ICRC brought together twelve National Societies from southern Africa ‘to discuss their role in moving the region forward towards a total ban on anti-personnel mines’.¹⁷² The National Societies issued a strong declaration calling upon their governments to support the Ottawa Process, to prohibit anti-personnel mines at national level, and to work together to establish an anti-personnel mine-free zone in the region.¹⁷³ Indeed, as a result of the work of South Africa, the OAU, the ICBL, and the ICRC, at the Oslo Diplomatic Conference, southern African States would prove to be key to the achievement of a total ban without exceptions.

alleged members, Germany, decided to ‘change sides’ and as a ‘reward’ Germany was brought into the Core Group, a fact not to every other member’s liking. Their participation was important to Austria because of the strength of the Franco-German alliance within the EU. As a further quid pro quo, Germany was also invited to organize a meeting as part of the Ottawa Process. Germany believed, as did France and the UK, that verification was essential to the credibility of a total ban treaty.

¹⁶⁹ The ICBL circulated an annotated review of the Austrian draft treaty text.

¹⁷⁰ Core Group members were instructed to intervene as much as possible in the debates and to be supportive. South Africa spoke first and Belgium, in particular, was very talkative. Very few governments spoke out against a ban, demonstrating that international opinion was turning away from the legitimacy of anti-personnel mines as a means of warfare.

¹⁷¹ Indeed, support for mine clearance and victim assistance was seen by a number of countries as a quid pro quo for bringing southern nations on board.

¹⁷² Maresca and Maslen, *The Banning of Anti-Personnel Landmines*, 509.

¹⁷³ *ibid.* 509–11.

The Second Draft of the Convention

0.62 Based on comments received at the 1997 Vienna Conference, Austria prepared a second 'tentative' draft of its treaty text on 7 March 1997 and circulated it to the Core Group. The draft was reviewed by the Core Group on 12 and 13 February 1997 and the Second Austrian Draft was completed on 14 March 1997.¹⁷⁴ This text differed quite significantly from the first draft, with the removal of the article on the scope of application, a major change to the definition of an anti-personnel mine and the consequent inclusion of a definition of an anti-handling device, as well as the addition of definitions of 'transfer' and 'minefield'. The key prohibitions were recast as 'general obligations' in the style of the 1993 Chemical Weapons Convention and moved up to the beginning of the treaty;¹⁷⁵ and an undertaking to destroy anti-personnel mines was added to the provision.

0.63 The deadline for the destruction of stockpiled anti-personnel mines was extended from one to three years, and an obligation to destroy emplaced anti-personnel mines, now limited to those laid within minefields, extended to ten years. Other emplaced mines were to be destroyed but no time limit was prescribed. The draft provision on grave breaches, included in the previous draft, was removed. New articles were added on the settlement of disputes, review conferences, and meetings of the States Parties. A footnote was added to the effect that the draft provisions on verification, which were unchanged from those in the first Austrian draft, would be reviewed following a conference dedicated to the issue, to be held in Bonn in April 1997.

The 1997 Bonn Conference

0.64 Thus, the International Expert Meeting on Possible Verification Measures to Ban Anti-Personnel Landmines, the second formal follow-up gathering to the 1996 Ottawa Conference, was held in Bonn on 24–5 April 1997. In advance of the meeting, Germany circulated an 'Options Paper for a possible verification scheme for a convention to ban anti-personnel landmines', which implied a desire to see significant and intrusive verification measures common in disarmament treaties.¹⁷⁶ Within the Core Group, Canada presented proposals for more cooperative compliance. Although there was little initial enthusiasm from Core Group members, the spirit of the concept can be seen reflected in the text, especially in the first paragraph of Article 8 of the Anti-Personnel Mine Ban Convention.

¹⁷⁴ See Appendix 4.

¹⁷⁵ See below the commentary on Article 1.

¹⁷⁶ Yet, even Germany understood that there were limits to the extent of verification that would be acceptable and achievable, especially given the tight deadlines of the process.

0.65 A total of 121 States were represented at the meeting, and views were divided, as they had been at the 1997 Vienna Conference, between States who believed that detailed verification was essential to ensure that any agreement was effective, and others that argued, as did the ICRC, that the proposed agreement was essentially humanitarian in character and stressing the overriding importance of a clear norm prohibiting anti-personnel mines.¹⁷⁷ Diplomats intimately involved in the negotiation of the Convention noted afterwards that:

While some progress was achieved, no convergence of minds was in sight. Having dodged this controversial issue in the second version, the final Austrian draft had to find a viable middle ground. After numerous consultations, Austria presented a compromise solution that did not satisfy any side fully, but was conceptually acceptable for everyone.¹⁷⁸

0.66 As noted above, the Second Draft of the Convention did not include a provision on grave breaches, a potentially significant tool for the implementation of international humanitarian law. At the Bonn Conference, the ICRC had circulated an informal draft article on national implementation measures. Central to this draft was a proposal for a provision laying down modified compulsory jurisdiction for all nationals of a State Party to the Convention 'alleged to have used, or to have ordered the use of, anti-personnel mines' in violation of the Convention.¹⁷⁹

Opinions on the success of the Bonn Conference are extremely mixed. Certainly, disagreements were brought into sharper focus, with Mexico at one end of the spectrum refusing all manner of verification, and Germany at the other demanding sophisticated disarmament verification measures, with the rest of the Core Group supporting shades in between.¹⁸⁰

The Third Draft of the Convention

0.67 Austria circulated its Third Austrian Draft on 28 April 1997 to the Core Group and then, after revision, especially concerning compliance issues,

¹⁷⁷ The ICBL had changed the position it had held during the negotiation of Amended Protocol II. It now maintained that extensive verification was not crucial to the treaty and should not be used as a pretext to weaken the scope of a total ban.

¹⁷⁸ Hajnoczi, T., Desch, T., and Chatsis, D., 'The Ban Treaty', in Cameron *et al.*, *To Walk without Fear*, 301. Ambassador Molander of Sweden, on the other hand, complained subsequently that the Anti-Personnel Mine Ban Convention 'contains provisions on verification which make an unusual combination of total intrusiveness in principle and considerable weakness in practice'. Molander, J., 'Foreword' to Maresca and Maslen, *The Banning of Anti-Personnel Landmines*, p. xxv.

¹⁷⁹ See further below paras. 8.8 and 9.9 of the Commentary.

¹⁸⁰ Norway, for instance, had already expressed its view at the 1997 Vienna Conference that it did not see that a legally binding ban on anti-personnel mines needed any traditional verification instruments

issued the text on 14 May 1997. In other respects, most of the changes from the Second Austrian Draft were small; the most significant was the inclusion of a provision in the article dealing with duration and withdrawal prohibiting an effective withdrawal where the State in question was involved in an armed conflict at the conclusion of the notice period. This provision would be keenly contested during the Oslo Diplomatic Conference.

0.68 The period that followed the publication of the third draft text saw two members of the UN Security Council join the Ottawa Process, in both instances shortly after a change of national government. By the end of April 1997, France, which had previously been an ardent supporter of the role of the CD in tackling the mines issue,¹⁸¹ knew the Ottawa Process was irreversible and was planning how to join without losing face diplomatically.¹⁸² In 'exchange' for its participation, the French Ministry of Foreign Affairs sought a reference to the role of the CD in the preamble stressing the complementarity of the two fora, and the deletion of the draft article prohibiting reservations.

0.69 In the UK, on 21 May 1997, the newly installed Labour government announced that it was joining the process, imposing an operational moratorium on the use of anti-personnel mines and that it would ensure the destruction of UK stockpiles by 2005. The Ministry of Defence announced that to make up for the operational shortfall it would improve battlefield surveillance, and use air-blast mortar systems, which would be operational by 2005.¹⁸³

0.70 A few days later, the Organization of African Unity (OAU) organized a major conference in Kempton Park, near Johannesburg, in cooperation with the government of South Africa. The First Continental Conference of African Experts on Landmines, Landmine Free Africa: The OAU and the Legacy of Anti-Personnel Mines, took place on 19–21 May 1997. The conference

and agreed with the 'widespread view' that complete verifiability was 'neither feasible, nor necessary, nor desirable'.

¹⁸¹ See for instance the letter on behalf of the French President, signed by Françoise Delattre, of 31 December 1996 in response to a letter from ICBL Coordinator, Jody Williams: 'Afin de mobiliser la communauté internationale dans son ensemble, la France a proposé que soit négocié dans le cadre de la Conférence du Désarmement, un accord international juridiquement contraignant et vérifiable sur l'interdiction totale et générale des mines anti-personnel'. The communication noted, however, the important contribution that the Ottawa Process could make and promised that France would continue to participate in the most positive manner. In January 1997, French Ambassador Joëlle Bourgeois declared that: 'France preferred an efficient treaty, even if the result took time, to a hastily concluded but useless agreement'. See 'Disarmament Conference hears Further Calls for Bans on Landmines and Fissile Materials, Establishment of Negotiating Committee on Nuclear Disarmament', UN Press release DCF/283 (Geneva, 23 Jan. 1997).

¹⁸² For one view of the evolution of French policy on landmines, see Chabasse, P., 'The French Campaign', in Cameron *et al.*, *To Walk without Fear*, 60–7.

¹⁸³ 'Forces will have to Destroy all Landmines', *The Times* (22 May 1997).

attracted significant participation from African nations and proved to be a further catalyst for the significant role that Africa played in the adoption of the Convention.

0.71 On 23–5 May 1997, in Stockholm, three Swedish NGOs¹⁸⁴ organized a Seminar on Anti-Personnel Mines and Strategy Workshop for countries of the Baltic and Eastern Europe Region. Many of these States were reluctant to embrace the Ottawa Process and stressed their support for a primary role for the CD in any negotiations.

0.72 There was also a conference on anti-personnel mines for Central Asian States held in Ashgabat, the capital of Turkmenistan. In a letter to his Canadian counterpart, Lloyd Axworthy, proposing the conference, the Turkmen Foreign Minister, Boris Shikmuradov, announced his country's support for a ban on anti-personnel mines and the Ottawa Process. The conference itself, A Global Ban on Anti-Personnel Mines: Central Asia Regional Conference, which took place on 10–12 June 1997, demonstrated the difficulties of attracting adherence to a future ban treaty in the region. Pakistan proved particularly reluctant to endorse a total ban on anti-personnel mines and demanded a redraft of the conference declaration to reflect its position.

The 1997 Brussels Conference

0.73 One of the factors in the Canadian decision in October 1996 to seek unilaterally a treaty prohibiting anti-personnel mines was the knowledge that Belgium had already offered to host a follow-up conference¹⁸⁵ and there was concern that it might itself launch such an initiative.¹⁸⁶ The International Conference for a Global Ban on Anti-Personnel Mines, held in Brussels in June 1997, proved essential to the Ottawa Process as it provided a clear selection process for the forthcoming diplomatic conference, and formally identified the Third Austrian Draft as the basis for its negotiations.¹⁸⁷ Austria did not want too much discussion of its draft text prior to the Diplomatic Conference, but saw input from the conference as valuable as it helped to confirm where the main sticking points would be.

¹⁸⁴ Swedish United Nations Association, Christian Council of Sweden and Rädde Barnen (Swedish Save the Children).

¹⁸⁵ Belgium formally announced its intention to host such a meeting on 3 October 1996 at the 1996 Ottawa Conference. It hoped subsequently that the conference would be the negotiating forum for the treaty but Canada and others felt that it would be too soon.

¹⁸⁶ Tomlin, B. W., 'On a Fast Track to a Ban: The Canadian Policy Process', in Cameron *et al.*, *To Walk without Fear*, 203. Indeed, the Belgians were said to be furious at the initiative by Lloyd Axworthy.

¹⁸⁷ The 1997 Brussels Conference was also notable for the call by the ICBL for a ban treaty with 'no exceptions, no reservations, and no loopholes'. This became a mantra repeated until the adoption of the Convention in Oslo.

0.74 The conference itself suffered from a number of organizational hiccups, although none was of sufficient gravity to seriously undermine the process. Ambassador André Mernier was called in at a late stage to oversee its organization and most of the sessions were chaired by the Belgian Foreign Minister, Eric Derycke. A number of States joined the Ottawa Process during the conference: Angola, Bosnia and Herzegovina, Brazil, the Czech Republic, Hungary, and Slovakia. Argentina would join shortly afterwards.

0.75 The USA attended the conference in some force and summoned delegations to its hotel for bilateral discussions, ostensibly for a briefing on why the USA could not support the process, but was believed also to sound out possible support for its position were it to join.¹⁸⁸ The USA would forcefully reject allegations of attempted sabotage made by NGOs.¹⁸⁹ The US case, however, was not well formulated. It primarily consisted of a comparison of the defence of South Korea including both anti-personnel and anti-tank mines, as against defence with no mines at all. Since the Convention being prepared did not propose to ban anti-tank mines, the US presentation seemed unpersuasive and irrelevant. During the Brussels Conference, the CD appointed a Special Coordinator on Landmines tasked with exploring the possibility of future negotiations in the Conference on landmines.¹⁹⁰

0.76 The primary document emanating from the conference was the Brussels Declaration. Ninety-seven of the 156 States attending the Brussels Conference signed the 'Brussels Declaration', which affirmed that the essential elements of a treaty to ban anti-personnel mines were: a comprehensive ban on the use, stockpiling, production, and transfer of anti-personnel mines; the

¹⁸⁸ According to a May 1997 policy paper the USA was 'committed to ending the carnage and devastation caused by APL. The comprehensive USA APL policy directs the United States to seek an international agreement to ban the use, stockpiling, production and transfer of APL, with a view to completing the negotiations as soon as possible . . . In calling for an international agreement, the policy acknowledges current U.S. reliance on APL to deter aggression against, or if necessary, successfully defend U.S. interests on the Korean peninsula. In light of the current reliance, the USA policy states that any international agreement will need to protect and preserve the right of the United States to use APL on the Korean peninsula until APL alternatives become available or the risk of aggression has been removed. Moreover, the policy states that until such time as an international agreement takes effect, the United States will reserve the right to use self-destructing/self-deactivating APL in military hostilities in Korea—and elsewhere if necessary—to safeguard American lives and hasten an end to fighting.' Report to the Secretary of Defense on the Status of DOD's Implementation of the US Policy on Anti-Personnel Landmines, Office of the Under Secretary of Defense for Policy (May 1997), 2, 3.

¹⁸⁹ Pinon, B., 'Les Etats Unis accusés de vouloir "saboter" la Conférence de Bruxelles', *Agence France Presse* (Brussels, 26 June 1997).

¹⁹⁰ 'Un "coordonnateur" pour les négociations sur les mines anti-personnel', *Agence France Presse* (Geneva, 26 June 1997). By this point, however, the CD was only a minor distraction and no longer posed a realistic threat to the Ottawa Process.

destruction of all stockpiled and cleared anti-personnel mines; and international cooperation and assistance in the area of mine clearance in affected countries. The Brussels Declaration also referred to the convening of the diplomatic conference to adopt the treaty and confirmed that the third Austrian draft would be the basis of negotiations at the conference.

0.77 In addition to forwarding the Austrian draft text to the Oslo Diplomatic Conference, States supporting the Brussels Declaration also reaffirmed the goal set by the Canadian Foreign Minister of signing the treaty in Ottawa before the end of 1997. At the close of the conference, Canada announced that the treaty signing conference would be held in Ottawa on 2–4 December 1997:

Last October I invited the international community to return to Ottawa before the end of 1997 with the goal of signing a treaty banning anti-personnel mines. It is now clear that we will reach this goal. In Ottawa, from December 2 to 4, we will be able to establish a new global norm against these terrible weapons.¹⁹¹

0.78 Surprisingly, the Brussels Declaration did not include a reference to the importance of international support for assistance to mine victims.¹⁹² Despite extensive discussions between South African and Belgian diplomats, the Belgian Foreign Minister refused to add any new language to address this. This upset African governments in general, and South Africa in particular, which refused to sign the Declaration as a result, deciding merely to associate itself with it.¹⁹³ Also notable by its absence was an absolute duty to clear emplaced mines, the requirement seemingly being only to destroy ‘cleared’ anti-personnel mines.

0.79 Of obvious importance to the outcome of the negotiations would be the rules of procedure to be followed at the Oslo Diplomatic Conference. A first draft of the rules was prepared by Gro Nystuen, a legal adviser at the Norwegian Ministry of Foreign Affairs; the draft drew on an extensive range of sources.¹⁹⁴

¹⁹¹ ‘Axworthy Announces Dates for Landmine Treaty Conference’, News Release, Canadian Embassy (Brussels, 27 June 1997).

¹⁹² A joint statement by 12 landmine survivors present in Brussels called on governments to: ‘re-read the current draft of the treaty and consider how it appears to us landmine survivors. There is virtually nothing in it to urge governments to take responsibility for the victims. Yet people are bleeding and dying even as we speak. To this day, the real needs of mine-affected communities are not being addressed. Survivors remain an afterthought. Their numbers grow each day, but without your help they have little hope of ever receiving proper medical attention or rehabilitation.’ White, J. and Rutherford, K., ‘The Role of the Landmine Survivors Network’, in Cameron, *et al.*, *To Walk without Fear*, 111.

¹⁹³ This was particularly embarrassing for the process as Ambassador Jacob Selebi of South Africa was due to chair the Oslo Diplomatic Conference.

¹⁹⁴ The United Nations Standard Rules of Procedure (the most recent version of which was from 1994), the rules of procedure used for the adoption of the Convention on the Law of the Sea, the 1977

The Norwegians first consulted on its draft with South Africa, particularly Jacob Selebi, who had already been approached to preside over the Diplomatic Conference, then Canada¹⁹⁵ and finally Austria. The revised draft was formally presented to States at the closing session of the Brussels Conference.

0.80 There were two key issues to be resolved within the Rules of Procedure: the method of adoption of the treaty, and participation in the Diplomatic Conference. With respect to the latter, voting rights were accorded only to States that had adhered to the Brussels Declaration, either by signing or associating themselves with it. The ICBL was allowed to participate as a full observer, despite concerns from a number of States.

0.81 The method of adoption of the treaty was of critical importance. According to Article 9(2) of the 1969 Vienna Convention on the Law of Treaties: 'The adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule'. The CD takes all decisions by consensus; by tradition, the CCW has done the same.¹⁹⁶ On the other hand, the UN General Assembly requires a two-thirds majority for substantive issues, whereas ECOSOC Functional Committees require only a simple majority.

0.82 The draft rules put forward for the Oslo Diplomatic Conference provided for a two-thirds majority for any substantive decisions—thus any changes to the Third Austrian Draft required the support of two-thirds of the States participating in the Diplomatic Conference, a significant threshold. Indeed, the barrier would prove critical to the failure of the USA to secure the text of a treaty to which it felt it could adhere.

Between Brussels and Oslo

0.83 In the interval between the Brussels Conference and the Oslo Diplomatic Conference, there were two events of significance. The first was a regional seminar of military experts, 'Anti-Personnel Mines: What Future for Asia?', organized by the ICRC and hosted by the Philippines in Manila. It was 'generally agreed that a total ban on anti-personnel mines was a necessary objective', although three participants were unwilling to sign the Manila Declaration.¹⁹⁷

Additional Protocols to the 1949 Geneva Conventions, the Functional Committees of the United Nations Economic and Social Council (ECOSOC), the Convention against Torture, the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, and the rules of procedure used in the United Nations General Assembly and during the International Conference on the Protection of War Victims.

¹⁹⁵ Particular assistance was provided by Philippe Kirsch and Deborah Chatsis from DFAIT's Legal Division.

¹⁹⁶ See para. 0.39 above.

¹⁹⁷ Maresca and Maslen, *The Banning of Anti-Personnel Landmines*, 562.

0.84 The second event of note was the decision by the USA to join the Ottawa Process,¹⁹⁸ two weeks before the opening of the Diplomatic Conference.¹⁹⁹ Shortly afterwards, the US Secretary of State, Madeleine Albright, sent a letter to key foreign ministers in which she laid down five conditions for the USA's eventual signature of the treaty:²⁰⁰

- a geographical exception for the use of mines in South Korea;
- a change in the definition of anti-personnel mines to allow the USA to continue to use its mixed anti-tank and anti-personnel 'munitions' systems;²⁰¹
- a transition period, either through entry into force requiring 60 countries, including all five permanent members of the Security Council and at least 75 per cent of historic producers and users of anti-personnel mines, or an optional nine-year deferral period for compliance with certain provisions;
- a strengthening of the verification regime; and

¹⁹⁸ The question of whether to attend the coming Oslo Conference was a subject of intense and protracted debate within the US government. On the one hand, the Department of Defense insisted that it needed continued access to the benefits of persistent anti-personnel mines in Korea, and of self-destructing self-deactivating anti-personnel mines anywhere its forces were sent. On the other hand, the State Department and the National Security Council staff were unwilling to accept the political consequences of refusal to join in the anti-personnel mines ban, and believed the Ottawa Core Group would go to extreme lengths to bring the USA into the treaty. Additionally, the close relationship between President Clinton and Senator Patrick Leahy on a variety of issues made the Administration still more reluctant to break with the Ottawa Process. Finally, the National Security Council staff, in coordination with General Joseph Ralston, the Deputy Chairman of the Joint Chiefs of Staff, devised what they hoped would be a successful compromise: all US self-destructing anti-personnel mines would be repackaged together with anti-tank mines into 'mixed munitions', as was already the case with other existing systems, such as Gator, Volcano, and the MOPMS. The USA would then propose changing the definitions of anti-personnel mines under the Convention so that the anti-personnel mines in mixed munitions would be considered to be anti-handling devices rather than mines. The Arms Control and Disarmament Agency (ACDA) pointed out that this contradicted the CCW Amended Mines Protocol under which the anti-personnel mines in mixed munitions were clearly defined to be anti-personnel mines. Further, ACDA saw an irreconcilable conflict between the US military's requirement to use anti-personnel mines and the Ottawa Group's determination to ban them, and predicted that other key States in the process would not accept continued use of anti-personnel mines simply because they were renamed. ACDA therefore recommended that the USA make clear from the outset that it could not join the new Convention, and attend the Oslo Conference as a friendly observer, offering its services to help with drafting, verification, and so on, while not attempting to alter the terms of the treaty. But the final decision was made by NSC staff.

¹⁹⁹ The White House announced on 18 August 1997 that the USA would be a full participant in the negotiations at the Oslo Diplomatic Conference. See for instance 'United States to Join Ottawa Process', Statement by the Press Secretary (Martha's Vineyard, Mass., 18 Sept. 1997).

²⁰⁰ The decision by the USA immediately stimulated concerns about the ability of Canada to withstand pressure from its southern neighbour. In the words of one Core Group member: 'When an elephant sneezes, the surrounding land feels an earthquake'.

²⁰¹ According to an unnamed delegate at the Oslo Diplomatic Conference, the idea of redefining anti-personnel mines as something else 'was nutty as the proverbial fruitcake. It would be like painting the label "DOG" on the side of a cow and expecting it to therefore bark.'

- a clause permitting a party to withdraw when its supreme national interests were threatened.

The 1997 Oslo Diplomatic Conference

0.85 Norway had gone to the 1996 Ottawa Conference with the offer to host a short follow-up meeting. In early March 1997, Jill Sinclair, from DFAIT's Disarmament Division, asked her Norwegian counterpart, Steffen Kongstad, if Norway would be willing to host the formal negotiating forum for the Convention. This posed a number of problems, not least the cost, organization (given the short time), and logistics (finding an appropriate venue). There was also an impending general election that would occur during the diplomatic conference itself.

0.86 The Norwegian Ministry of Foreign Affairs initially intimated a willingness to offer a two-week session and not more. On 27 March 1997, Lloyd Axworthy sent a formal request to Bjørn Tore Godal, the Norwegian Foreign Minister, asking Norway to host two rounds of negotiations: one session during the first two weeks of September and a second session during the last week of September and the first week of October 1997. It was ultimately agreed that the Conference would be held in one three-week session.²⁰²

0.87 The Diplomatic Conference on an International Total Ban on Anti-Personnel Land Mines (the Oslo Diplomatic Conference), convened by Norway, opened on 1 September 1997, and was chaired by Jacob Selebi, South African Ambassador to the CD in Geneva.²⁰³ At the opening of the Oslo Diplomatic Conference, delegates observed a minute's silence in memory of the Princess of Wales, who had died in a car crash in Paris the weekend before.²⁰⁴ Once Selebi

²⁰² Although only conjecture, it is probable that if two sessions of the diplomatic conference had been held, some of the provisions in the Convention would have been significantly weakened.

²⁰³ On 4 April 1997, Canadian and Norwegian Permanent Representatives to the UN in Geneva met with Ambassador Selebi and asked him to chair the conference. He had previously served as chair of the Preparatory Commission for the Comprehensive Test Ban Treaty Organization and had been instrumental in promoting expansion in the Conference in Disarmament in 1996.

²⁰⁴ The issue of whether the Princess's death altered the negotiations in any way remains disputed. An unnamed member of the US delegation was reported as having stated that he did not know a single country that had changed its position because of Diana. Bonner, R., 'How a Group of Outsiders Moved Nations to Ban Landmines', *New York Times* (20 Sept. 1997). Steve Goose, the head of the ICBL delegation to the Oslo Diplomatic Conference, remarked that the tragedy did not shift the negotiating process or positions of governments in Oslo, though he suggested that the increased media attention might have made it 'that much more difficult for governments to seriously consider any changes that would affect the integrity of the mine ban treaty'. Goose, S. D., 'The Ottawa Process and the 1997 Mine Ban Treaty', *Yearbook of International Humanitarian Law*, i (The Hague: Asser Press, 1998), 278. There is, however, a strong suspicion that it prevented the UK from offering stronger support to the USA during the negotiations.

had been formally elected President of the Conference, he outlined his plans for the negotiations—a series of working groups coordinated by ‘Friends of the Chair’,²⁰⁵ in parallel where necessary, no square brackets around text under discussion, and all negotiations to be concluded by 17 September allowing time for the text to be checked in all languages. He then proposed the draft rules of procedure for adoption by the conference. The most significant provision was Rule 35, which stated that: ‘Decisions of the Conference on all matters of substance shall be taken by a two-thirds majority of the representatives present and voting’.²⁰⁶ Only France intervened, stressing the importance of making every effort to achieve consensus. The rules of procedure were then duly adopted by consensus, in accordance with tradition at international conferences.²⁰⁷

0.88 For a variety of reasons, including the subsequent death of the person responsible, Norway proved unable to produce a diplomatic record of the Diplomatic Conference. Tape recordings of the final session exist and it is likely that somewhere in the Ministry of Foreign Affairs’ archives lie tapes of the plenary meetings²⁰⁸ and meetings of the ‘Committee of the Whole’,²⁰⁹ but Norway has been unable to locate them. This represents an obstacle to the interpretation of certain articles, and one which has been exploited by opponents of the Ottawa Process as evidence of its lack of seriousness.

0.89 Even if located, however, the tapes would not be able to shed light on the negotiations in the meetings of the Friends of the Chair or any of the informal discussions that characterize any multilateral negotiation. These discussions multiplied as the USA became increasingly frustrated at its inability to make headway on its five demands. By the end of the second week, most of the other outstanding issues in the Convention had been resolved amicably. In Washington DC at least, US officials still believed that it would be able to

²⁰⁵ There were five Friends of the Chair: for definitions, Austria; for mine clearance, Ireland; for international cooperation, Brazil; for compliance, Canada; and for the preamble, Mexico. All except Brazil had been Core Group members from the outset of the Ottawa Process. No African or Asian delegation had been chosen.

²⁰⁶ Draft Rules of Procedure, Diplomatic Conference on a Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, APL/CRP.2 (Oslo, 1 Sept. 1997).

²⁰⁷ See e.g. Aust, *Modern Treaty Law and Practice*, 67.

²⁰⁸ A total of six plenary meetings were held during the Diplomatic Conference. See APL/CRP.5 of 18 Sept. 1997.

²⁰⁹ The Committee of the Whole was a meeting of all the participants held to discuss general or particular issues of concern. Most of the detailed negotiations were undertaken in meetings of the Friends of the Chair.

secure sufficient support for amendments that would allow it to accept the Convention.²¹⁰ It therefore sought a suspension of a day to continue discussions with other delegations, as well as to consult further with Washington.²¹¹ As President Selebi required a new proposal to justify an extension, the USA asked Canada to introduce one. Under instructions from the Canadian Prime Minister and Foreign Minister, both of whom were keen to have US support for the Convention, the Canadian delegation drafted an amendment and handed it in to the Secretariat in order to give the USA more time to consider its position. This gesture, and the lobbying that accompanied it, both in Oslo and in capitals, earned the Canadian delegation considerable opprobrium from the NGOs and from many other delegations. It is clear, however, that Canada was not the only State participating in the Diplomatic Conference willing to make significant compromises to secure US support for the treaty.

0.90 The USA requested and obtained from the plenary a 24-hour suspension of the negotiations. With the Core Group having been battered by US pressure,²¹² it looked to some as if the USA might obtain at least some of the demands it had been pushing for. But on 18 September 1997, the US delegation announced to the plenary that it was withdrawing its proposals as it had been unable to garner the necessary support for them.²¹³ After confirmation that Japan would not pursue one of its own proposed amendments, the

²¹⁰ According to the head of the Canadian delegation, the USA entered the Diplomatic Conference in Oslo believing that they could steer the negotiations towards an outcome that they could live with. But their interagency bargaining had already been carried to a conclusion in Washington, and so their final negotiating position scarcely varied in substance from their initial one. In its final proposal, the United States sought a nine-year deferral period for compliance for ending the use of anti-personnel mines globally, an exemption for its mixed munition systems, and the possibility of withdrawal during an armed conflict. Discussion with Ralph Lysyshyn, 14 Aug. 2001. Canadian diplomats have implied, probably correctly, that had the US negotiators been able to isolate the period of deferral from the definition of anti-personnel mines, their chances of success would have improved significantly. Lawson, R. *et al.*, 'The Ottawa Process and the International Movement to Ban Anti-Personnel Mines', in Cameron *et al.*, *To Walk without Fear*, 178.

²¹¹ See for instance 'US Wins more Time for Landmines Pact', *Financial Times* (17 Sept. 1997); Bonner, R., 'New US Terms on Mine Ban are Called Unacceptable', *New York Times* (16 Sept. 1997).

²¹² Views differ as to which countries remained determined not to accept the US proposals. Belgium, Ireland, and Norway are often cited as those that held firm with South Africa. What is certain is that the South African delegation felt isolated in the final few days of the conference, although President Nelson Mandela gave unequivocal support to them when under pressure from the US President and they were confident that they could count on the support of other African delegations to block undesirable amendments if the issue were to come to a vote.

²¹³ In justifying the US rejection of the treaty, President Clinton declared that 'there is a line I simply cannot cross and that line is the safety and security of our men and women in uniform'. See e.g. Gertz, B., 'Clinton Resisted Pressure to Join Ban on Landmines', *Washington Times* (20 Sept. 1997).

Convention was formally adopted to a round of enthusiastic applause from States and NGOs alike.²¹⁴

The 1997 Ottawa Conference

0.91 In accordance with its Article 15, the Convention was opened for signature in Ottawa on 3–4 December 1997 at a formal treaty signing conference.²¹⁵ A total of 121 States signed the Convention at the Conference,²¹⁶ an achievement described by Canadian Prime Minister Jean Chrétien, as ‘without precedent or parallel in either international disarmament or international humanitarian law’.²¹⁷

0.92 Many States praised Canada’s role in launching the Ottawa Process and at the end of the 1997 Ottawa Conference a 67-page report, Agenda for Mine Action, detailed pledges of more than US\$500 million to the mine effort over a five-year period. The same month, by Resolution 52/38A, the UN General Assembly welcomed the conclusion of the Convention at Oslo and requested the Secretary-General to render the necessary assistance and provide such services as might be necessary to fulfil the tasks entrusted to him.²¹⁸

The Role of the Conference on Disarmament

0.93 The principal threat to the success of the Ottawa Process came from the international body for disarmament negotiations, the Conference on Disarmament (CD).²¹⁹ Predictably, a number of States had turned to the CD on

²¹⁴ The initiative had ultimately succeeded for a number of reasons: initially, the lack of support from the five permanent members of the UN Security Council had actually increased its credibility among a number of States from the South, although subsequently French and UK support was to prove significant.

²¹⁵ In accordance with Article 15, signature of the Convention was possible until its entry into force, which took place on 1 March 1999.

²¹⁶ Kenya signed the Convention on 5 December 1997. In total, 150 governments attended the 1997 Ottawa Conference. See e.g. Canadian Department of Foreign Affairs and International Trade, ‘A Global Ban on Landmines’, Fact Sheet, undated but 1997.

²¹⁷ See Lawson *et al.*, ‘The Ottawa Process and the International Movement to Ban Anti-Personnel Mines’, 181.

²¹⁸ Resolution 52/38A of 9 December 1997 was adopted by 142 votes to nil with 18 abstentions. The abstentions were: Azerbaijan, China, Cuba, Egypt, India, Iran, Israel, Kazakhstan, Mongolia, Morocco, Myanmar, Pakistan, the Republic of Korea, the Russian Federation, Syria, Tajikistan, Turkey, and the USA. Of these, only Tajikistan and Turkey were States Parties to the Convention as of 1 March 2004.

²¹⁹ See e.g. Tomlin, ‘On a Fast Track to a Ban: The Canadian Policy Process’, 202. See also Goose, S., ‘Anti-Personnel Mines and the Conference on Disarmament’, ICBL (Washington, Feb. 1999). It should, however, be noted that when the Belgian Foreign Minister first raised the possibility of an anti-personnel mine ban treaty in July 1995 he suggested entrusting the Conference on Disarmament ‘with the preliminary studies of such a Convention’. Speech of Belgian Foreign Minister Eric Derycke, Chairman of the International Meeting on Demining (Geneva, 6 July 1995).

the basis of its success in negotiating the text of the 1993 Chemical Weapons Convention.²²⁰ On 17 January 1997, the White House declared that,

when the Conference on Disarmament opens its 1997 session on Monday, the United States will seek to initiate negotiations on a worldwide treaty banning the use, production, stockpiling and transfer of anti-personnel landmines. After extensive consultations with many countries, the President believes that the Conference on Disarmament offers the most practical and effective forum for achieving our aim of a ban that is global. Both the Comprehensive Test Ban Treaty and the Chemical Weapons Convention were successfully negotiated in the Conference on Disarmament . . . At the same time, the United States welcomes efforts outside that forum, including the free-standing process initiated by Canada, that can help provide momentum to our common goal.²²¹

This was a big disappointment to a number of States and particularly the ICBL, which had lobbied hard for the USA to support actively the Ottawa Process.

0.94 On 30 January 1997, the UK introduced a proposed mandate for an ad hoc committee on a ban on anti-personnel landmines within the CD,²²² but this was not accepted.²²³ Then in March 1997, the Netherlands, prompted by other EU countries,²²⁴ suggested a draft mandate on anti-personnel mines

²²⁰ Though the difference in context was startling. The use, or at least the first use, of chemical weapons in warfare had been prohibited for decades by the time the CD was entrusted with the task of negotiating their total prohibition. In stark contrast, only the use of certain, limited types of anti-personnel mines had been prohibited by international agreement (Amended Protocol II), and even these were subject to an optional nine-year deferral period for compliance.

²²¹ 'United States Announces Next Step on Anti-Personnel Landmines', Statement by the Press Secretary, Office of the Press Secretary, The White House (Washington, 17 Jan. 1997).

²²² Doc. CD/1443 of 30 January 1997, available at: www.unog.ch/disarm/curdoc/1443.pdf.

²²³ On 6 March 1997, Mexico stated before the CD that: 'To sum up, as we stated in the First Committee of the General Assembly of the United Nations, we are not convinced that this is an appropriate forum in which to complete as soon as possible negotiations on an agreement to ban the use, stockpiling, production and transfer of anti-personnel landmines. The Conference on Disarmament must give the highest priority to negotiations on nuclear disarmament and should not embark on exercises which duplicate efforts that are being successfully pursued in other forums and which would divert us from the responsibilities which the international community has entrusted to us.' See CD/PV.758 of 6 Mar. 1997. On 15 May 1997, Hungary and Japan made another, similarly unsuccessful attempt to create an ad hoc committee on anti-personnel mines. Doc. CD/1455 of 15 May 1997, available at: www.unog.ch/disarm/curdoc/1455.htm.

²²⁴ Until the late spring of 1997, France and the UK had been ardent supporters of a common EU position in favour of negotiating a ban on anti-personnel mines in the Conference on Disarmament and abandoning the Ottawa Process. This was blocked by other EU States, notably Ireland. Finland, which did not support the principle of an immediate ban, sought unsuccessfully to make an alliance with France on the issue. See for instance Mannion, J., 'US Wants Talks on Landmine Ban held in Geneva', *Agence France Presse* (Washington, 17 Jan. 1997); UN Information Service, 'Disarmament Conference Hears Further Calls for Bans on Landmines and Fissile Materials, Establishment of Negotiating Committee on Nuclear Disarmament', Press release DCF/283 (Geneva, 23 Jan. 1997); 'Britain Calls for Ban on Landmine Exports', *Financial Times* (31 Jan. 1997).

for the Conference.²²⁵ Meanwhile, within the CD itself, aside from those proposing that the Conference be seized of the issue, opinions among other members were split between those who did not want a ban to be discussed at any cost and those, for instance Mexico, who wanted the CD to concentrate on other issues, particularly nuclear disarmament.²²⁶ As a result, the proposal for an ad hoc committee was not accepted.

0.95 On 26 June 1997, agreement was reached to appoint a Special Coordinator for Anti-Personnel Landmines,²²⁷ Australian Ambassador John Campbell, although this was only made possible by the discreet departure of the Syrian Representative from the room while the decision was taken.²²⁸ The task of the Special Coordinator was to try to find an agreed mandate that could form the basis for discussions. On 14 August 1997, the Special Coordinator declared that there was little point in the CD taking any decisions on a possible mandate until the outcome of the Ottawa Process was known in December 1997.²²⁹ None the less, at the UN General Assembly, a resolution entitled 'Contributions towards banning anti-personnel mines' invited the CD 'to intensify its efforts on the issue of anti-personnel landmines'.²³⁰

0.96 In 1998, the USA again sought to initiate negotiations in the CD, this time opting to call for an agreement to ban transfers of anti-personnel mines as opposed to a comprehensive ban of the weapons. As in 1997, however, the only progress made was in the appointment of a Special Coordinator (once more, Australian Ambassador John Campbell) to examine the possibility of further

²²⁵ The Dutch proposed the following language: 'The Conference on Disarmament decides to establish an ad hoc committee under item (x) of its agenda to negotiate, for conclusion at the earliest possible date, an effective legally binding international agreement to ban worldwide the use, stockpiling, production and transfer of anti-personnel landmines . . . In order to carry forward this negotiating mandate effectively, the Conference directs the ad hoc committee to make provisions for speedy and continuous negotiations, and to establish the necessary working groups. These working groups could cover the separate components of a total ban on anti-personnel landmines, while the ad hoc committee should, at the same time, preserve the comprehensive nature of the total ban.' 'Draft Elements for a mandate for an ad hoc committee in the Conference on Disarmament on a total ban on Anti-Personnel Landmines.'

²²⁶ Mexico saw the attempt by the USA to address landmines in the CD as a pretext to avoid discussion of comprehensive nuclear disarmament.

²²⁷ A formal proposal to appoint a Special Coordinator was jointly tabled on 27 March 1997 by Chile, Finland, and Poland. CD/1452 of 27 Mar. 1997, available at: www.unog.ch/disarm/curdoc/1452.pdf.

²²⁸ All decisions in the Conference on Disarmament are taken by consensus.

²²⁹ 'Disarmament Conference Hears Statements on Anti-Personnel Landmines Nuclear Disarmament and Fissile Material Cut-off', UN Press release DCF/311 (Geneva, 15 Aug. 1997).

²³⁰ UN General Assembly resolution 52/38H of 9 December 1997, adopted by 147 votes to nil with 15 abstentions (Benin, Botswana, Cuba, Eritrea, Indonesia, Kenya, Malawi, Mexico, Mozambique, Namibia, the Philippines, South Africa, Togo, Zambia, and Zimbabwe). In the First Committee Eritrea and South Africa had initially opposed the adoption of the resolution, which was passed with 121 votes in favour and 19 abstentions.

action. Attempts to secure agreement on the creation of an ad hoc committee to negotiate on mines were again unsuccessful. With the success of the Anti-Personnel Mine Ban Convention²³¹ (and current deadlock in the CD), proposals to initiate negotiations in the CD on landmines appear infeasible for the foreseeable future. Indeed, the USA has pursued greater restrictions on anti-vehicle mines within the context of the CCW rather than the CD; a mandate was agreed by States Parties to the CCW for negotiations which led, in November 2003, to the adoption of a Protocol V on explosive remnants of war.²³²

Key Developments since the Adoption of the Convention

0.97 While the CD has remained static, the Anti-Personnel Mine Ban Convention has proved dynamic.²³³ Since its entry into force on 1 March 1999, it has attracted widespread support, with 144 States having ratified or acceded to it²³⁴ and a further 8 signatories²³⁵ who had yet to ratify as of 1 February 2005. Following a decision at the First Meeting of States Parties in 1999,²³⁶ intersessional Standing Committees meetings have been organized regularly to support universality and implementation of the Convention as

²³¹ See the following section, 'Key Developments since the Adoption of the Convention'.

²³² See UN Doc. CCW/NSP/2002/CRP.1 of 12 Dec. 2002.

²³³ See e.g. *A Guide to Mine Action* (Geneva: GICHD, July 2003).

²³⁴ Afghanistan, Albania, Algeria, Andorra, Angola, Antigua and Barbuda, Argentina, Australia, Austria, Bahamas, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, Colombia, the Comoros, the Republic of the Congo, Costa Rica, Côte d'Ivoire, Croatia, Cyprus, the Czech Republic, the Democratic Republic of the Congo, Denmark, Djibouti, Dominica, the Dominican Republic, Ecuador, El Salvador, Equatorial Guinea, Eritrea, Estonia, Ethiopia, Fiji, the Former Yugoslav Republic of Macedonia, France, Gabon, The Gambia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Holy See, Honduras, Hungary, Iceland, Ireland, Italy, Jamaica, Japan, Jordan, Kenya, Kiribati, Lesotho, Liberia, Liechtenstein, Lithuania, Luxembourg, Madagascar, the Maldives, Malaysia, Malawi, Mali, Malta, Mauritania, Mauritius, Mexico, the Republic of Moldova, Monaco, Mozambique, Nauru, Namibia, the Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Niue, Norway, Panama, Papua New Guinea, Paraguay, Peru, the Philippines, Portugal, Qatar, Romania, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, San Marino, São Tomé e Príncipe, Senegal, Serbia and Montenegro, the Seychelles, Sierra Leone, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Sudan, Surinam, Swaziland, Sweden, Switzerland, Tajikistan, Tanzania, Thailand, Timor Leste, Togo, Trinidad and Tobago, Tunisia, Turkmenistan, Uganda, the UK, Uruguay, Venezuela, Yemen, Zambia, and Zimbabwe. A State becomes party to the Convention on the first day of the sixth month after it deposits its instrument of ratification or accession. See further the commentary on Article 17.

²³⁵ Brunei Darussalam, the Cook Islands, Haiti, Indonesia, Marshall Islands, Poland, Ukraine, and Vanuatu.

²³⁶ See the Final Report of the First Meeting of States Parties, UN Doc. APLC/MSP.1/1999/1 of 20 May 1999.

well as broader mine action activities.²³⁷ Standing Committees address the general status and operation of the Convention, as well as efforts to carry out programmes of mine awareness, mine clearance, stockpile destruction, and victim assistance. At the Third Meeting of States Parties in 2001,²³⁸ States Parties agreed to establish an Implementation Support Unit; this is hosted by the Geneva International Centre for Humanitarian Demining (GICHD).²³⁹

0.98 At the First Review Conference, States Parties noted that the Convention ‘came into being as a result of unprecedented partnership and determination . . . Since it was adopted in Oslo on 18 September 1997, the Convention’s unique spirit of cooperation has been sustained,²⁴⁰ ensuring the Convention’s rapid entry into force and over five successful years of implementation.’^{240a} At

²³⁷ It is said that a number of key governments were aware from the outset that a strong follow-up mechanism would be needed to ensure the effective implementation of the Convention. See for instance Lawson *et al.*, ‘The Ottawa Process’.

²³⁸ See Paragraph 31 of the Final Report of the Third Meeting of States Parties, UN Doc. APLC/MSP.3/2001/1 of 10 Jan. 2002, p. 7.

²³⁹ According to the Director of the GICHD: ‘The ISU has operated through a number of different avenues. First, by working directly with the co-chairs and co-rapporteurs of the Intersessional Standing Committees as well as the Coordinating Committee as a whole, the ISU has facilitated detailed preparation for the Meetings of the States Parties and other fora for dialogue and discussion. Second, the ISU has responded to states parties with suggestions on ways to make best use of the machinery—formal and informal—set up under the auspices of the Convention to promote its implementation. In particular, the ISU has given advice on the so-called “4P” approach to implementation. In this, affected states parties are called on to expound the *problems* they are facing, their *plans* for addressing them, the *progress* they have made, and the *priorities* they have identified for [external assistance] . . . This enables states parties in a position to do so, to allocate resources and assistance more effectively, on the basis of need. Third, and of no less importance, the ISU has helped to raise the voices of affected states parties in exchanging views on the implementation of the Convention.’ Nellen, S., ‘Lessons from the implementation of the Anti-personnel Mine Ban Convention’, Disarmament Forum, No. 1 2005, Science, technology and the CBW regimes, UNIDIR, Geneva, 2005, p. 67.

²⁴⁰ In a 2003 publication, *A Guide to Mine Action*, the GICHD notes that: ‘The cooperative approach of the States Parties has gone beyond their formal agreements to establish various implementation mechanisms as a third category of mechanisms has emerged to assist in implementing the Convention. These are mechanisms that have emerged on an informal basis. For example, to promote widespread international participation in the work of the Convention, a group of States Parties has established a delegate Sponsorship Programme. On the basis of voluntary contributions from a group of donors, this programme has ensured that more than 200 delegates each year are provided with financial support thereby ensuring that all States Parties—even those with limited means—can have their voices heard in discussions concerning the fulfilment of their responsibilities to implement the Convention . . . Other informal mechanisms that have emerged include Contact Groups—voluntary associations of States Parties and non-State partners which meet regularly to discuss matters of common interest. For example, since 2000 contact groups have been established to consider cooperative means to promote the universal acceptance of the Convention, the exchange of information in accordance with the Convention’s reporting requirements and the mobilization of resources.’ See *A Guide to Mine Action*, ch. 4.

^{240a} Part I, Organization and Work of the First Review Conference, ‘Final Report of the First Review Conference of the States Parties to the Convention on the Prohibition of the Use, Stockpiling,

the Conference, States Parties took a number of decisions concerning the future implementation of the Convention. First, it was decided that a Meeting of the States Parties would continue to be held annually, until the Second Review Conference and that such meetings 'will regularly take place in the second half of the year, in Geneva or, when possible or appropriate, in a mine-affected country.'^{240b} Second, it was decided to continue to convene annually in Geneva, until 2009, 'informal'^{240c} intersessional meetings of the Standing Committees, but that the number of weeks of such meetings each year would be reduced from two to one. The meetings would take place in the first half of the year, lasting up to five days.^{240d} Third, it was decided that the Second Review Conference of the Convention will take place in the second half of 2009. Fourth, it was noted that 'In keeping with the States Parties' practice of being flexible and pragmatic in addressing changing circumstances, the States Parties may review decisions regarding their 2005–2009 programme of meetings at each Meeting of the States Parties prior to the Second Review Conference.'^{240e}

Production and Transfer of Anti-Personnel Mines and on Their Destruction', APLC/CONF/2004/5, 9 February 2005, 10.

^{240b} *ibid.*, 8.

^{240c} It is not entirely clear why it is specified that the intersessional Standing Committee meetings are declared to be 'informal'. An informal meeting is generally one that is 'not done or made according to a recognized form; irregular, unofficial, unconventional.' Although the intersessional meetings are not empowered to reach decisions, they are nonetheless done according to a recognized form; regular, official, and conventional.

^{240d} It was further specified that: 'As a general rule, however not excluding exceptions for specific reasons, intersessional meetings of the Standing Committees would take place in February/March and the annual Meetings of the States Parties in September.' *ibid.* ^{240e} *ibid.*