

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti- Personnel Mines and on their Destruction (Ottawa Convention)

by

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Origin of the Convention

The modern anti-personnel land mine was invented by the Confederate Torpedo Bureau during the American Civil War by burying percussion-fused artillery shells adapted to explode when stepped on. First used in combat in 1862, Federal generals protested against the use of these allegedly inhumane “land torpedoes.” After the Civil War, however, no proposal surfaced to ban or regulate land mines in any of the numerous efforts to codify and update the laws of war between 1865 and 1907.

Land mines were massively used by both sides in World War I. That conflict also saw the introduction of many controversial weapons, including submarines, flame-throwers, chemical weapons and incendiary machine-gun bullets. Unlike these weapons, the widespread use of land mines gave rise to no diplomatic or legal controversy. Land mines were thereafter used in all theaters of World War II, in the Korean War and in the Middle East wars of the 1950s and 1960’s, again without controversy.

There were several reasons for the generally benign view of anti-personnel mines before 1980. To begin with, mines were considered inherently defensive weapons, used mainly in support of prepared, semi-permanent fortifications. The need to prevent harm to friendly forces led most armies to accurately record the location of minefields and

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clearly mark and fence their perimeters. These practices, common to all reasonably well-disciplined armies, had the desirable side effect of lessening risk to civilians.

It should also be noted that the military utility of mines does not necessarily require killing or injuring large numbers of enemy combatants. The primary purpose of land mines has historically been to delay or deflect enemy forces, and secondarily to warn friendly forces of an enemy movement. When an advancing enemy force is required to stop at the edge of a minefield and bring up its combat engineers to clear a path through the mines, the minefield has served its function even though no enemy soldiers may have been killed or wounded by mines.

In 1979 and 1980, a United Nations conference in Geneva negotiated the Convention on Certain Conventional Weapons, Protocol II of which introduced the first legal rules specifically addressed to the use of land mines and booby-traps. These rules were largely anodyne applications of the customary laws of war, e.g., land mines should not be directed against civilians or the civilian population; medical supplies should not be booby-trapped; the location of preplanned minefields should be accurately recorded.

However the 1980s also saw the widespread, but unexpected, use of land mines to deliberately terrorize civilians in several Third World internal conflicts. Mines were deliberately emplaced on trails leading from villages and other locations with no direct military significance. The large number of maimed civilians produced by irresponsible use of land mines produced what the United States, along with many nongovernmental organizations (NGOs) and governments, referred to as a “humanitarian crisis.” The U.S. Department of Defense regarded misuse of mines, contrary to existing rules of international law, as the primary cause of the humanitarian crisis.

By the early 1990s, several responses to the crisis were underway. From the viewpoint of potential victims, the most significant was the activation, with strong United States support, of United Nations and other humanitarian de-mining programs. Initiatives were also undertaken to prevent, or at least impede, repetition of the crisis. Parties to the 1980 Protocol on land mines and booby traps, again led by the United States, sought amendments to that treaty to close some of the loopholes (e.g., making it applicable to internal conflicts, and improving enforcement). There was also an effort to negotiate new limits on the transfer of land mines through the Conference on Disarmament. Both diplomatic efforts were backed by the United States.

For several nongovernmental human rights organizations, these diplomatic initiatives were both too slow and insufficiently comprehensive. Under an umbrella organization called the International Campaign to Ban Landmines, the NGOs began a public relations campaign seeking a total ban on possession or use of anti-personnel mines. Drawing support from the late Diana, Princess of Wales, and other celebrities, the campaign sought to de-legitimize any use of antipersonnel mines, labeling them a type of weapon of mass destruction. It denigrated as inadequate any proposal short of a total ban.

The Campaign prevailed upon several Western governments, notably Canada, Norway and Switzerland, to initiate a new diplomatic process, outside the Conference on Disarmament, the United Nations or any existing forum, to negotiate a total ban. The new process convened diplomatic conferences at Oslo and Ottawa. There the participants drafted the “Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction” (the Ottawa Convention),

which was opened for signature at Ottawa on December 3, 1997. The United States participated in both conferences, but was only partially successful in convincing the majority of participants to change the terms of the Ottawa Convention. The Convention entered into force on March 1, 1999, after the deposit of the 40th ratification.

Terms of the Convention

The Ottawa Convention defines a “mine” as “a munition designed to be placed under, on or near the ground or other surface area and to be exploded by the presence, proximity or contact of a person or a vehicle.” An “anti-personnel land mine” is defined as “a mine designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons” (Article 2, paragraph 1). The general obligations of parties are defined in Article 1 as follows:

1. Each State Party undertakes never under any circumstances:
 - a) To use anti-personnel mines;
 - b) To develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, anti-personnel mines;
 - c) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.
2. Each State Party undertakes to destroy or ensure the destruction of all anti-personnel mines in accordance with the provisions of this Convention.

The obligation not to transfer anti-personnel mines is broadly defined to include, “in addition to the physical movement of anti-personnel mines into or from national

territory, the transfer of title to and control over the mines, but does not involve the transfer of territory containing emplaced anti-personnel mines” (Article 2, paragraph 4). Transfer is specifically permitted for “the development of and training in mine detection, mine clearance, or mine destruction techniques” and “for the purpose of destruction” (Article 3).

The Convention as an Effective Disarmament Measure

The Convention has been hailed by its supporters as a “true” disarmament treaty because paragraph 2 of Article 1 requires parties to entirely eliminate their anti-personnel mines. In implementing this obligation, the drafters of the Ottawa Convention have drawn heavily on arms control techniques developed in the negotiation of the Chemical Weapons Convention and the SALT II, START and INF treaties. Each party is, for example, required to:

- Declare, and annually update, its stockpiles of anti-personnel mines, owned or possessed by it, or under its jurisdiction or control, to include a breakdown of the type, quantity and, if possible, lot numbers of each type, mined areas under its jurisdiction and control, and the status of its programs for destroying such mines and decommissioning mine production facilities (Article 7, paragraph 1).
- Destroy or ensure the destruction of all stockpiled anti-personnel mines it owns or possesses, or that are under its jurisdiction or control, as soon as possible but not later than four years after the entry into force of the Convention for that State Party (Article 4).

- Destroy or ensure the destruction of all anti-personnel mines in mined areas under its jurisdiction or control, as soon as possible but not later than ten years after the entry into force of the Convention for that State Party (Article 5, paragraph 1).

These requirements are based on arms control assumptions that do not apply well to the drafters' goal of eliminating anti-personnel land mines. Chemical and nuclear weapons and their delivery systems are expensive artifacts that require special skills, resources, equipment and facilities to produce, transport and store. Even wealthy nations produce these weapons in limited quantities. The accurate-declaration and transparent destruction of such weapons provides some assurance that significant disarmament is taking place.

Anti-personnel land mines, in contrast, can be small, simple, and cheap. Handling and storage requirements for anti-personnel mines are much the same as for artillery shells, bombs, anti-vehicle mines and other explosive munitions. They can be produced in any military munitions plant, calling into question the very concept of "anti-personnel mine production facilities" (Article 7, paragraph 1e). Soldiers in the field can improvise devices prohibited by the Convention by using grenades, demolition charges and other available munitions. Given the nature of anti-personnel mines, thousands can be declared and publicly destroyed without any assurance that significant inroads have been made on a state's stockpiles of such mines.

Organization, Verification and Compliance

The Convention does not establish a new international organization. It does, however, provide for Meetings of the State Parties (Article 11), to be held annually for the first five years after entry into force, and “regularly” thereafter. Review Conferences are to take place every five years (Article 12). The functional distinction between the Meetings and Review Conference is not entirely clear. The participants in both types of meetings are the same, and both are tasked to “review the operation and status of this Convention.” (Compare Article 11, paragraph 1a; and Article 12, paragraph 2a.) Apparently, the Meeting is intended to deal with compliance issues and the day-to-day operation of the Convention, while the Review Conference will focus on higher-level, future-oriented issues.

Several Articles address the problems of verification and compliance. The data-reporting provisions of Article 7 are intended to either build confidence among parties, or form a basis for requests for clarification under Article 8. Requests for clarification of compliance may be submitted by one or more parties to another through the UN Secretary General. Within 28 days, the party receiving the request is to provide “all information which would assist in clarifying this matter” (Article 8, paragraph 2).

If the requesting parties are not satisfied, they may submit the matter to a regular Meeting of the States Parties, or call for the convening of a Special Meeting of State Parties. The Meeting (or Special Meeting) may send a fact-finding mission of up to 9 members (drawn from a list maintained by the UN Secretary General) to the party in question for an on-site inspection. Article 8 addresses the usual details for such inspections, such as the notice to be provided to the inspected state (72 hours) and the equipment the mission may import and use.

Given the nature of these weapons, it is highly questionable whether on-site inspections for land mines can be effectively carried out. As noted above, mines are small, highly portable, and stored in facilities indistinguishable from those used for other conventional munitions. Land mines do not leave behind evidence in areas where they have been stored that would distinguish them from other munitions. A state party might appear to fully cooperate with a fact finding mission, and the mission report no evidence of anti-personnel land mine possession, and other parties would still have no reasonable assurance that the state was not in possession prohibited mines. A fact finding mission might be more useful in fixing responsibility for use of antipersonnel land mines, however.

The fact finding mission reports to the Meeting (or Special Meeting) of States Parties and to the UN Secretary-General. One would expect that the Meeting/Special Meeting would have power, on the basis of the mission report and other evidence, to impose sanctions on a party found to be in violation of the Convention. At a minimum, one would expect the Meeting/Special Meeting to have the explicit power to declare a party in violation and refer the matter to the UN Security Council.

The drafters of the Convention, however, have shied away from recognizing even the possibility that a dispute over compliance could be anything other than an unfortunate misunderstanding. Under paragraph 18 of Article 8, after receiving the report of the fact finding mission, a Meeting/Special Meeting “may request the requested State Party to take measures to address the compliance issue within a specified period of time. The requested State Party shall report on all measures taken in response to this request.” In place of sanctions, or referral to the Security Council, paragraph 19 of the same Article

provides that the Meeting/Special Meeting “may suggest to the States Parties concerned ways and means to further clarify or resolve the matter under consideration, including the initiation of appropriate procedures in conformity with international law.” The final phrase obviously includes reference to the Security Council. Note, however, that referral would not be carried out by the Meeting/Special Meeting acting as an organization reporting noncompliance by one of its members, but rather by one of the parties to the dispute acting at the suggestion of the Meeting/Special Meeting.

The parties’ action (or lack of it) at the first Meeting of State Parties in May, 1999, also suggests that the compliance mechanisms of the Convention are essentially toothless. At this Meeting it was widely known that the governments of two parties were actively using anti-personnel mines in on-going internal armed conflicts. Several participants referred to these accusations in the Meeting. One of the states denied the accusations against it, while the other declared that it would continue to use these mines as long as it was involved in a civil war. The Meeting did not appoint a fact finding mission or take any other action in the face of this alleged and admitted noncompliance.

Role of Nongovernmental Organizations: The Claim of Unique Authority

The activities of NGO International Campaign to Ban Landmines were crucial to persuading Canada and several Western European governments to initiate the negotiations that produced the Ottawa Convention, outside the Conference on Disarmament and the amendment procedures of the 1980 Protocol, and despite the fact that land mine regulation was already being considered in these fora. (Had the United

States government attempted a similar effort, it would undoubtedly have been accused of “unilateralism” and displaying lack of respect for existing international institutions.)

The active role of NGOs continued in the diplomatic conferences. Historically, multilateral arms control and law of war negotiations have relied on the technical expertise of advisers attached to national delegations. At Oslo and Ottawa, in contrast, NGOs were widely regarded as the true experts on land mines, and in consequence they had unprecedented access to, and influence with, the negotiating delegations.

Nongovernmental organizations claim to possess unique authority to determine the legitimacy of weapons. The claim is based on the “Martins clause,” included in many law of war and arms control treaties from 1899 to the present. The 1899 Hague Peace Conference undertook the revision and codification of the laws of war on land. In the course negotiations, a major division developed between the larger and smaller European powers. The small states, regarding themselves as likely targets of invasion in a future war, wanted to accord prisoner of war status to guerillas resisting an occupying army. The large states regarded such guerillas as illegitimate combatants, and refused to concede such protection to them.

A Russian diplomat named de Martins came up with a successful compromise. Under the Second Hague Convention of 1899, reaffirmed in the Fourth Hague Convention of 1907, guerillas resisting occupation were not expressly given prisoner of war status. However, the introductory provisions of both Conventions included the following language intended, *inter alia*, to apply to treatment of guerillas:

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the

Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

A few academics have asserted that this language established the dictates of “the public conscience” as a new source of international law, in addition to treaties and custom. In recent decades, NGOs have claimed that they, as representatives of civil society, are the true repositories of the “public conscience.” They also therefore claim a special competence to decide on the legitimacy of weapons and methods of warfare. Because, in this view, the dictates of the public conscience are legally binding on states regardless of their consent, some NGOs assert that use of antipersonnel mines is illegal for the United States and other non-parties to the Ottawa Convention.

The Preamble to the Ottawa Convention unfortunately lends support to the more extreme claims of the NGOs by including the following statement:

[The State Parties,] Stressing the role of public conscience in furthering the principles of humanity as evidenced by the call for a total ban of anti-personnel mines and recognizing the efforts to that end undertaken by the International Red Cross and Red Crescent Movement, the International Campaign to Ban Landmines and numerous other non-governmental organizations around the world, ... [Have agreed as follows, etc.]

Impact on the United States

The United States has not signed the Ottawa Convention. President Clinton announced this decision in the fall of 1997 in accordance with the military advice of the Joint Chiefs of Staff, who found that there was currently no adequate substitute for the unique military role of anti-personnel land mines in protecting U.S. forces. President Clinton also promised, however, that the Department of Defense would pursue research on alternatives to anti-personnel land mines, and that the United States would consider becoming a party to the Convention as soon as an alternative to these mines was developed. These promises have never been publicly repudiated.

The Ottawa Convention could still create problems for the United States because many of our allies are parties. Under Article 1, paragraph 1 of the Convention, parties undertake “never under any circumstances,” to “assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.” It could be argued that supporting a military operation in which the United States plans to use anti-personnel mines “encourages” that use. This might give other countries an excuse to refuse support to future U.S. military operations, particularly if NGOs were pressing their governments to take that position, and the operation was unpopular in that country.

The Convention’s prohibition on “transfer” of anti-personnel mines could also create difficulties for the U.S. military. The United States has pre-positioned munitions and other war readiness material in other countries, including many parties to the Ottawa Convention. The Convention defines transfer as either “the transfer of title to and control over ... mines” or “the physical movement of anti-personnel mines into or from national territory” (Article 2, paragraph 4). The latter phrase is broad enough to require an Ottawa

Convention party to prohibit the export of U.S.-owned antipersonnel mines (except export for destruction, as permitted by Article 3, paragraph 2). Ottawa Convention parties who are members of NATO have agreed that the non-transfer obligation does not apply to U.S. war readiness material on their territory. Again, however, this could change if these governments are under intense domestic pressure to resist a particular U.S. operation, probably supplemented by NGO claims that U.S. mines are inhumane and their use contrary to the “dictates of the public conscience.”

Finally, the weapons and combat methods of United States military will continue to be criticized by well-meaning but often misguided NGOs. To the extent that the Ottawa Convention, and the process leading to its adoption, have strengthened the power and pretensions of these groups, it has also weakened the military capabilities of the United States.



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The Courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequences would be the substitution of their pleasure for that of the legislative body."

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