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Christian M. Capece

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# NOTES

## THE OTTAWA TREATY AND ITS IMPACT ON U.S. MILITARY POLICY AND PLANNING

### ABSTRACT

Although the United States refrained from signing the Ottawa Treaty banning landmines in order to preserve the use of landmines on the Korean Peninsula and America's arsenal of anti-tank landmines, the Ottawa Treaty, even without America's participation, creates a series of problems for the U.S. military in terms of policy and planning. This Note examines the repercussions of the Ottawa Treaty on U.S. defense strategy.

### INTRODUCTION

President Clinton made a bold decision when he refused to sign the Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and On Their Destruction.<sup>1</sup> The international community embraced this convention—more commonly referred to as the Ottawa Treaty—as a ground breaking humanitarian initiative.<sup>2</sup> However, during the Oslo meeting last September where the final draft of the Treaty was completed, President Clinton announced from the White House on September 15, 1997 that he

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1. See Philip Shenon, *Clinton Still Firmly Against Land-Mine Treaty*, N.Y. TIMES, Oct. 11, 1997, at A6.

2. See Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sept. 18, 1997, 36 I.L.M. 1507 (entered into force Mar. 1, 1999) [hereinafter *Ottawa Treaty*]; R.J. Araujo, *Anti-Personnel Mines and Peremptory Norms of International Law: Argument and Catalyst*, 30 VAND. J. TRANSNAT'L L. 1, 1 (1997).

could not in good conscience sign an agreement that would in effect put American servicemen's lives in danger.<sup>3</sup> The President stated that there were two military considerations that prompted him to not sign the Ottawa Treaty.<sup>4</sup> First, President Clinton specifically mentioned that signing the Ottawa Treaty would mean that the United States would have to remove its anti-personnel landmines from the Demilitarized Zone along the North and South Korean border, thus eliminating a key part of America's defense in that region. This move would severely undermine U.S. and South Korean forces' ability to deter the numerically superior North Korean army from launching a pre-emptive attack.<sup>5</sup> Second, President Clinton refused to sign the Treaty because the wording of the Treaty would have banned U.S. anti-tank mines in addition to all U.S. anti-personnel mines. Currently, the U.S. military expects that any conflict it may face in the near future will likely entail an enemy armored assault.<sup>6</sup>

Although the U.S. negotiation team urged the parties at the convention in Oslo to exempt U.S. landmines in Korea and to re-word the Treaty to exempt U.S. anti-tank mines as well, their efforts failed and the final draft remained objectionable to President Clinton.<sup>7</sup> The United States hoped to preserve its

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3. See President William J. Clinton, Remarks by the President on Landmines, 33 WEEKLY COMP. PRES. DOC. 1356-59 (Sept. 22, 1997).

4. See *Id.*

5. See *Id.*; The Center for Security Policy, *Nobel Committee Notwithstanding, An Effective, Global Ban On Anti-Personnel Landmines Remains An Infeasible Unreality*, No. 97-P 151 (visited Oct. 10, 1997) <<http://www.security-policy.org/papers/97-p136.html>>; Jacob Heilbrunn, *Minefield of Dreams: Landmines are Bad. So is Banning Them.*, NEW REPUBLIC, Oct. 13, 1997, at 4. The current Chairman of the Joint Chiefs of Staff, Gen. Henry H. Shelton, U.S. Army, during his confirmation hearings before the Senate Armed Services Committee's Readiness Subcommittee, commented on the importance of an exception for Korea:

Anti-personnel landmines are integral to the defense of the Republic of Korea, and as long as there is risk of aggression in Korea and we do not have suitable alternatives fielded, we must ensure the best protection of our forces and those of our allies . . . [B]ecause of the unique situation on the Korean Peninsula, non-self-destructing (NSD) or "dumb" mines are essential to our commanders in the Republic of Korea as long as there is a risk of aggression and we have no fielded suitable alternatives to the NSD mines used in Korea.

The Center for Security Policy, *New Chairman of the Joint Chiefs of Staff Draws Line in the Sand: No Exception, No Military 'Chop' on Landmine Ban*, No. 97-D 136 (visited Sept. 16, 1997) <<http://www.security-policy.org/papers/97-p136.html>>.

6. See Clinton, *supra* note 3.

7. See White House Press Briefing by Robert Bell, Senior Director for De-

right to keep its landmines—both anti-personnel and anti-tank versions—not only on the Korean Peninsula but also at U.S. military installations around the globe by refusing to sign the Treaty. This hope, however, may not be realized. Currently, at least one U.S. ally is interpreting the Ottawa Treaty to mean that U.S. landmines presently stored in their territory must be removed in accordance with the Treaty provisions.<sup>8</sup> Moreover, another potential conflict exists as some U.S. allies may interpret the Ottawa Treaty to make it illegal for their militaries from participating alongside the United States in multi-lateral operations.

This Note examines the various ramifications the Ottawa Treaty has on U.S. defense strategy and its relations with her allies. Part I looks at the history of the landmine, its current use as a military weapon, and the effect landmines have had on civilian populations. Part II reviews the history of the international movement to ban landmines. Part III will examine the Ottawa Treaty and its effect on the U.S. pre-positioned stockpiles stored in allied territories. Part IV focuses on the issue of U.S. anti-tank mines and why they too are illegal under the Ottawa Treaty. Part V examines the reason why the United States has placed such heavy emphasis on the need to protect its landmine inventory and why the landmine is, for now, an essential part of America's overall military strategy. Finally, Part VI shows how the Ottawa Treaty will affect how the United States and her allies operate together during multi-lateral operations should U.S. allies who are party to the Ottawa Treaty favor a narrow interpretation of the Treaty text. In addition, Part VI looks at how the Ottawa Treaty will influence the decision of the United States to support the International Criminal Court.

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fense Policy and Arms Control, National Security Council, Sept. 19, 1997, *available in* 1997 WL 14463239.

8. See Nils-Inge Kruhaug, *U.S. has pre-positioned mines in Norway*, DAGBLADET, Sept. 12, 1997, at 19. I note that DAGBLADET references used herein are derived from U.S. State Department translations and/or summaries on file with the Weapons Technology Control Division, J-5, Joint Chiefs of Staff (unpublished translations on file with the author).

## PART I. WHAT IS A LANDMINE AND HOW IS IT USED?

The Ottawa Treaty defines a landmine 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 vehicle."<sup>9</sup> These devices were first introduced during World War I though it was not until the Second World War that the United States recognized the value of landmine use when operating in a situation where U.S. forces are out-gunned by enemy forces.<sup>10</sup>

For the Allies, North Africa was the crucible in which the principles and techniques of large-scale mine warfare in mobile, mechanized operations were tested and refined.<sup>11</sup> Both Allied and Axis forces utilized mines in great numbers as a countermeasure against superior forces.<sup>12</sup> As a result of U.S. and allied experience, the landmine was viewed as an efficient weapon against an armored attack.<sup>13</sup>

Since World War II landmine technology and use has advanced, although the United States has consistently followed the basic role of the landmine as a defensive military tool. U.S. Army Field Manual 20-32, Mine/Countermine Operations, lists the uses of mines as to: first, "produce a specific effect on enemy maneuver, thereby creating a vulnerability that can be exploited by friendly forces;" second, to "cause the enemy to piecemeal his forces;" third, "interfere with enemy command and control;" fourth, "inflict damage to enemy personnel and equipment;" and finally to "protect friendly forces from enemy maneuver."<sup>14</sup>

These roles as outlined in the Army Field Manual were enhanced by new technologies such as the development of the "family of scatterable mines (FASCAM)," landmines that can be delivered by air or artillery.<sup>15</sup> FASCAM technology has given U.S. military commanders the ability to order mines deployed during the course of a battle to satisfy any of the uses

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9. Ottawa Treaty, *supra* note 2, at art. 2(2).

10. Thomas Hawkins, Congressional Research Service, Report 96-362F, *Landmines: Basic Facts and Congressional Concerns* (1996).

11. See MIKE CROLL, *THE HISTORY OF LANDMINES* 56 (1998).

12. *Id.* at 57.

13. See Hawkins, *supra* note 10, at 4.

14. *Id.* (quoting Headquarters, U.S. Dep't Army, MINE/COUNTERMINE OPERATIONS, FM20-32 84-85 (1966)).

15. Hawkins, *supra* note 10, at 6.

listed in the Army Field Manual.<sup>16</sup>

In addition to the purely defensive role as envisioned by the United States, a second role for landmines has emerged since World War II. That is, the use of landmines against non-combatants in which case landmines are used to intimidate the local population by denying to them the use of commerce.<sup>17</sup> For example, landmines might be placed around a village's water supply or on roads leading to markets.<sup>18</sup> During the Vietnam War, the Viet Cong and North Vietnamese were able to pursue a dual objective of intimidating the local populations and killing U.S. military personnel.<sup>19</sup>

Use of landmines in this manner has resulted in the indiscriminate killing and maiming of millions of civilians since a landmine cannot tell the difference between a combatant and a non-combatant.<sup>20</sup> The International Campaign to Ban Landmines estimates that approximately 26,000 people are killed or maimed each year by anti-personnel landmines.<sup>21</sup> Furthermore, the killing does not stop when an armed conflict ends. The use of landmines by irregular forces like the Viet Cong means the landmines are usually left behind in unmarked minefields with no authority existing that takes the responsibility of picking the landmines up.<sup>22</sup> As a result it is estimated that there are 110 million landmines buried in sixty-four countries.<sup>23</sup>

There currently exist two approaches to solving the problems resulting from this second role of landmines. The first, favored by the United States, seeks to use technology to eliminate the potential of landmines to continue to kill or maim long after the fighting is over. The second approach, as envisaged in the Ottawa Treaty, seeks a total ban on all landmines.<sup>24</sup>

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16. *See id.*

17. *Id.* *See also* CROLL, *supra* note 11, at 107-08.

18. *See* Hawkins, *supra* note 10, at 9-10; THE ARMS PROJECT, HUMAN RIGHTS WATCH, A DEADLY LEGACY 23 (1993).

19. *See* CROLL, *supra* note 11, at 9; HUMAN RIGHTS WATCH, *supra* note 18.

20. *See* Araujo, *supra* note 2, at 2.

21. *See* International Campaign to Ban Landmines, *Facts about Landmines* (visited Oct. 27, 1997) <<http://www.vvaf.org/library/index.html>>.

22. *See* Araujo, *supra* note 2, at 2.

23. *See* Sen. Patrick Leahy, *The Scourge of Landmines* (visited Oct. 27, 1997) <<http://www.senate.gov/member/vt/leahy/general/landmine.htm>>.

24. *See* Hawkins, *supra* note 10, at 16.

## PART II. TWO APPROACHES TO SOLVING THE INTERNATIONAL LANDMINE PROBLEM

Both approaches to solving the landmine problem are embodied in two separate treaties. The first approach is represented by 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 (CCW).<sup>25</sup> Specifically, Protocol II of the CCW addresses the problem of landmines.<sup>26</sup> Following close to U.S. military doctrine, the Protocol does not require the complete ban of landmines but rather places a number of restrictions on the use of landmines in order to limit the danger landmines present to non-combatants. As a result, the CCW reasons that landmines can be used responsibly while still serving a limited, tactical role on the battlefield.<sup>27</sup> For example, the Protocol requires all mines delivered by air or artillery to be equipped with self-destruct devices, the establishment of an effective compliance mechanism, and the prohibition of employing mines attached to food, water, toys, and casualties.<sup>28</sup>

Protocol II has been criticized by organizations, such as the International Committee for the Red Cross and the Human Rights Watch, because it places greater emphasis on military considerations rather than humanitarian concerns.<sup>29</sup> The Red Cross represents the view that the only way to solve the landmine problem is to ban all landmines.<sup>30</sup> The International Committee to Ban Land Mines has championed this move-

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25. See 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, Oct. 10, 1980, 1342 U.N.T.S. 137, 19 I.L.M. 1523 (1980) (entered into force Dec. 2, 1983) [hereinafter CCW]. The CCW was signed by the United States on April 8, 1982, submitted to the Senate on May 12, 1994, given advice and consent by the Senate and ratified by the United States on March 24, 1995, and entered into force for the U.S. on September 24, 1995.

26. See Mines Protocol to the CCW, as amended, May 3, 1996, Final Document of the Review Conference of the States Parties to the Convention, Conf. Doc. CCW/CONF.I/16, 35 I.L.M. 1206 (1996).

27. See Hawkins, *supra* note 10, at 14-15.

28. *Id.* For a more comprehensive discussion of the history of Protocol II and an analysis of its recent changes, see Michael J. Mathesona, *The Revision of the Mines Protocol*, 91 AM. J. INT'L L. 158 (1997).

29. See Paul J. Lightfoot, Note, *The Landmine Review Conference: Will the Revised Landmine Protocol Protect Civilians?*, 18 FORDHAM INT'L L.J. 1526, 1558 (1995).

30. See Hawkins, *supra* note 10, at 16.

ment. Formed six years ago in Washington, D.C., this group is largely responsible for starting the Ottawa process moving last January. Then, only 40 states met in Oslo.<sup>31</sup> Throughout 1997, the movement gained momentum thanks largely to the work of Princess Diana and Canadian Prime Minister Lloyd Axworthy.<sup>32</sup> The movement culminated with the final drafting of the Ottawa Treaty in September 1997. Over 100 states, including the United States, attended that meeting.<sup>33</sup>

Despite the large turnout at the Oslo meeting, the Ottawa Treaty lacks the support of key states, namely the United States, China, Russia, India, Pakistan, North Korea, Iraq, and Iran.<sup>34</sup> With the exception of the United States, these states rely heavily on landmines mostly to defend their borders. Together these states represent over half the world's mine producers.<sup>35</sup> As a result, the Ottawa Treaty, while expansive in breadth, will not achieve its intended goal. The United States has no desire to sign the Treaty in its current form while states like China, Iran, and Iraq refuse to give up their landmines. Nevertheless, despite President Clinton's decision to not sign the Ottawa Treaty, U.S. landmines pre-positioned in allied territory abroad may still be in jeopardy of removal from exactly where they are needed the most.

### PART III. CAN THE UNITED STATES CONTINUE TO STORE ANTI-PERSONNEL LANDMINES ON THE TERRITORY OF ALLIES WHO ARE PARTIES TO THE OTTAWA TREATY?

The decision of the United States to refrain from signing the Ottawa Treaty creates many real and potential conflicts with her allies. One such conflict concerns the storage of U.S. landmines positioned in allied territories abroad.

The concept of pre-positioning stockpiles of weapons and equipment is a cornerstone of current U.S. defense strategy.<sup>36</sup>

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31. See Heilbrunn, *supra* note 5.

32. See Bell, *supra* note 7.

33. *Id.*

34. *Id.*

35. *Id.*

36. See Lt. Col. Mike W. Thumm, USMC, *Information on U.S. Anti-Personnel Landmine (APL) Storage in Europe*, Jan. 7, 1998 (on file with the author) (providing information for the Assistant Secretary of Defense for International Security



Since the early 1980's, the United States has placed a number of pre-positioned equipment and weapon stockpiles in various locations throughout the world. Some of these stockpiles are contained on ships while others are located in storage facilities located in territories of U.S. allies.<sup>37</sup> By pre-positioning equipment closer to potential hotspots around the globe, the United States need only be concerned with getting individual soldiers and Marines to the battlefield—a far less arduous task than moving personnel as well as equipment. Thus, the pre-positioning concept allows for rapid deployment of U.S. forces which in turn acts as a deterrent for would be aggressors who know that the United States has the capability to place a sizable force in an area of hostilities in a relatively short period of time. A mixed inventory of landmines is kept at each location to match the different scenarios U.S. forces might encounter.<sup>38</sup>

For example, Norway, a signatory to the Ottawa Treaty, is home to a U.S. pre-positioned stockpile of weapons, munitions, and other supplies for the Army and Marine Corps.<sup>39</sup> The landmines stored in Norway consist primarily of ADAM (Area Denial Artillery Munition) artillery rounds.<sup>40</sup> The ADAM is a cargo-like projectile fired from the M198 howitzer.<sup>41</sup> The ADAM rounds as well as the other pre-positioned equipment are designated for the use of the Norway air-landed Marine Expe-

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Affairs to use in preparation for bilateral consultations with NATO countries that provide storage for U.S. landmines).

37. *Id.*; Memorandum from the J-5 Staff of the Weapons Technology Control Division, Office of the Joint Chiefs of Staff (Nov. 6, 1997) (unpublished memorandum on file with the author). As part of the Maritime Pre-positioning Program, the U.S. Army, Navy and Marine Corps store both anti-personnel and anti-tank mines aboard PREPO (pre-positioned) ships that remain either afloat in the waters surrounding the Persian Gulf or are docked at their homeport, Diego Garcia, a British Island in the Indian Ocean.

38. See Hawkins, *supra* note 10, at 6-7. As a result of deliberate contingency planning, specific landmine types are stockpiled in various locations abroad. U.S. military planners anticipate the requirements of various units for these munitions based on possible scenarios. Some landmines are to be used in close proximity of enemy forces (GEMESS, MOPMS, Volcano), while others are delivered by fixed- and rotor-winged aircraft (Gator and Volcano) at further distances to influence deep into the battle space. The ADAM munition is delivered by artillery and is used at medium ranges.

39. See Memorandum of Understanding Governing Pre-stockage and Reinforcement of Norway, Jan. 16, 1981, U.S.-Nor., 32 U.S.T. 4539, 4539-40.

40. See *infra* note 53.

41. See Hawkins, *supra* note 10, at 7.

ditionary Brigade.<sup>42</sup> Along with the Norwegian armed forces, this Marine Corps Brigade is tasked with defending Norway and NATO's northern flank.<sup>43</sup>

The question as to whether these landmines are to be removed under the provisions of the Ottawa Treaty is yet to be determined. Specifically, the United States has four concerns: 1) whether there is a destruction requirement for anti-personnel landmines owned by the United States but stored on the territory of a State Party,<sup>44</sup> 2) whether allowing a foreign-owned stockpile to exist on a State Party's territory would fall under the provision in paragraph 1(c) of the Treaty which prohibits parties from giving assistance, encouragement or inducement to countries using landmines;<sup>45</sup> 3) whether transfer requirements would preclude logistical cooperation regarding movement of munitions involving anti-personnel landmines to either areas of combat or other operations such as the ongoing United Nations (UN) and North Atlantic Treaty Organization (NATO) peacekeeping operations in Bosnia;<sup>46</sup> 4) regarding the storage of pre-positioned landmines aboard ships, may these ships transit the territory, including the ports, of State Party's without violating the Treaty?<sup>47</sup> The answers to these questions depend on the interpretation of the language of paragraph 1(c) as well as the interpretation of the words "jurisdiction" or "control" as written in Articles 4 and 5 of the Treaty.<sup>48</sup>

Norway's stated interpretation of the Treaty does not bode well for U.S. security interests. The Norwegian government publicly debated this issue during the Oslo negotiations last September.<sup>49</sup> Norwegian State Secretary, and Norway's chief

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42. *Id.*

43. See JOHN KEEGAN & ANDREW WHEATCROFT, *ZONES OF CONFLICT: AN ATLAS OF FUTURE WARS* 10-11 (1986).

44. See Ottawa Treaty *supra* note 2, art. 1(2).

45. *Id.* arts. 1(c), 4.

46. *Id.* For example, will the Treaty prevent the United States from shipping mines through Turkey, Hungary, and/or Austria to Bosnia?

47. *Id.*

48. See Delegation of the United States, *Maintaining Mutual Security Commitments Under A Non-Universal APL Ban Treaty* (Sept. 10, 1997) (working paper for U.S. delegation to the Oslo Convention on file with the Office of the Joint Chiefs of Staff, Weapons and Technology Control Division).

49. See Kruhaug, *supra* note 8; Nils-Inge Kruhaug, *Here are the U.S. mines*, DAGBLADET, Sept. 13, 1997, at 22-23.

negotiator at the Oslo convention, Jan Egeland, revealed on September 12, 1997, that he had only recently become aware that U.S. landmines were still being stored in Norwegian territory.<sup>50</sup> This was an unexpected statement since the Norwegian government unilaterally banned the stockpiling of landmines in November 1995. Nevertheless, the issue of U.S. pre-positioned stockpiles containing landmines was apparently never settled by the Norwegian Defense Ministry and the U.S. Department of State. Norwegian working groups that were putting together Norway's position on the international problem of landmines sent a letter to the U.S. embassy in January 1996 asking for information on whether the United States stored landmines in the pre-positioned stockpiles. They never received a response.<sup>51</sup> Norway's Defense Minister, Jorgen Kosmo, had said that "[t]he Norwegian ban on pre-positioning of personnel mines applies first and foremost to the Norwegian armed forces, not to the armed forces of other countries."<sup>52</sup> Regardless, on September 12, 1997 Egeland announced Norway's official position on the storage of U.S. landmines on Norwegian territory, stating, "[t]he American mines that are pre-positioned in Norway must be taken back to the United States. We have destroyed our own mines, but naturally we can't do the same with the American ones. We must therefore negotiate about when and how the American mines be sent back."<sup>53</sup> Presently, no decision has yet been reached between the two governments as to the status of U.S. landmines in Norway, although there is no indication that Norway has backed down on its desire to rid their country of U.S. landmines.

This interpretation of the Ottawa Treaty by the Norwegian government sets a dangerous precedent which may affect U.S. stockpiles in other allied territories, namely, Japan, Germany, Italy, Spain, and the United Kingdom, all of whom are signatories to the Ottawa Treaty.<sup>54</sup> Presently, the United States is

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50. See Kruhaug, *supra* note 8.

51. See *Never Got A Response*, DAGBLADET, Sept. 13, 1997.

52. Kruhaug, *supra* note 8.

53. Arne Foss, *All mines will be removed*, DAGBLADET, Sept. 12, 1997, at 12.

54. See Unclassified Memorandum from Cpt. Maria Gervais, U.S. Army, J-5, Strategic Plans and Policy, Weapons Technology Control Branch (Technology Transfer Branch) to author (Nov. 19, 1997) (unpublished memorandum on file with author)[hereinafter Gervais Memo]. The following provides a summary of landmine

negotiating with her allies who are State Parties to the Ottawa Treaty and who are contemplating removal of U.S. landmines under Article 1(c) of the Treaty, though the results of these discussions are classified.<sup>55</sup>

The total effect of the removal of U.S. mines from pre-positioned stockpiles is a serious limitation of the ability of the United States to respond rapidly and effectively to military conflicts abroad. The United States is concerned that until it can develop an alternative system to replace anti-personnel and anti-tank landmines, the ability to slow down an enemy advance in an armor-intensive conflict is severely hindered. President Clinton expressed this concern on September 17, 1997 when he announced to the world that the United States could not support the Ottawa Treaty as it was written at the conclusion of the Oslo meeting:

First, we needed an adequate transition period to phase out the anti-personnel mines we now use to protect our troops, giving us time to devise alternative technologies. Second, we needed to preserve the anti-tank mines we rely upon to slow down an enemy's . . . armored assault against our troops, the kind of attack our adversaries would be most likely to launch.<sup>56</sup>

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stockpiles and their locations in those countries that have signed the Ottawa Treaty as of Oct. 14, 1997:

<i>Type of Landmine</i>	<i>Location</i>
M68 Practice, M74 GEMSS (Ground-Emplaced Mine-Scattering System), ADAM, M131 MOPMS, Volcano	Germany
ADAM, Volcano, M-16, Gator	Japan
M74 GEMSS, ADAM, M131 MOPMS, Gator	Italy
M692E1, ADAM	Norway
M16, ADAM, Gator	Spain
ADAM, MOPMS, GEMSS, Volcano, Gator	United Kingdom (Diego Garcia)

55. Telephone Interview with Cpt. Maria Gervais, U.S. Army, J-5, Strategic Plans and Policy, Weapons Technology Control Branch (Technology Transfer Branch) (Jan. 14, 1998).

56. Clinton, *supra* note 3.

Of course, neither concern was satisfied by the final draft of the Ottawa Treaty and so the United States refrained from signing the Treaty in December 1997.

#### PART IV. U.S. ANTI-TANK LANDMINES WOULD ALSO BE BANNED UNDER THE OTTAWA TREATY

In addition to addressing the issue of finding an alternative to the landmine, the President's remarks highlighted another interpretation problem the United States has with the Ottawa Treaty. The way in which the Treaty is worded not only bans State Parties from producing, acquiring, stockpiling, retaining or transferring to anyone anti-personnel landmines, it also bans, indirectly, U.S. anti-tank mines, while protecting those anti-tank landmines manufactured and used by European countries.<sup>57</sup>

The purpose of an anti-tank mine is to destroy or slow down an enemy tank or armored personnel carrier.<sup>58</sup> Almost all anti-tank mines contain an anti-handling device that is intended to prevent enemy personnel from approaching the anti-tank mine in order to disarm the mine.<sup>59</sup> An enemy soldier cannot explode the anti-tank mine alone, since anti-tank mines can only explode when thousands of pounds of pressure are exerted on it or when it detects "a large magnetic force."<sup>60</sup>

The difference between U.S. anti-tank mines and those used by America's European allies, is that U.S. anti-tank mines use anti-handling devices which are located next to the anti-tank mine and are detonated when enemy soldiers activate the device touching a series of tripwires which surround the anti-tank mine.<sup>61</sup> European anti-handling devices, on the other hand, are located on top, beneath, or are attached directly to the anti-tank mine. Combat engineers can disarm these anti-handling devices, except that the U.S. anti-handling devices take approximately 20 minutes to disarm while other anti-

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57. See Bell, *supra* note 7; "I . . . believe that an accurate definition of anti-personnel (AP) landmines is essential to prevent the banning of mixed munitions under the treaty." The Center for Security Policy, *supra* note 5 (comments of Gen. Henry H. Shelton, U.S. CJCS).

58. See CROLL, *supra* note 11, at 29.

59. See MODERN U.S. ARMY 151 (Richard O'Neil ed., 1986).

60. *Id.* at 151.

61. See Bell, *supra* note 7.

handling devices take only 2 to 3 minutes to disarm.<sup>62</sup>

The anti-tank landmine is a vital part of the U.S. arsenal.<sup>63</sup> The mine is used to protect U.S. forces in both a defensive and offensive posture. It gives military commanders precious time to carry out their mission by slowing down enemy forces while at the same time it limits exposure of U.S. military personnel to enemy fire since anti-tank mines like the ADAM can be delivered by air or artillery:

Imagine the Gulf War. Imagine General McCaffrey's 24th Mechanized Division with a left hook. He's out there with no protection on his flanks, maneuvering. And you see an enemy force coming in on his flank. You pick up the phone, call in an air strike. The aircraft comes over and drops this canister in front of the Republican Guard unit that's threatening his flank and puts down this field of anti-tank mines with their protective munitions as part of it. That's the concept of employment here.<sup>64</sup>

The precious minutes that a military commander can rely on by using anti-tank mines clearly make the anti-tank mine a tremendously valuable weapon.

The Ottawa Treaty, however, exempts only those anti-tank mines with anti-handling devices that are a part of, linked to, attached to or placed under the mine, thereby exempting European anti-tank mines from the ban but not U.S. anti-tank mines.<sup>65</sup> Robert Bell, Special Assistant to the President and Senior Director for Defense Policy and Arms Control with the National Security Council, described the conflict the United States had with the definition of anti-handling device used by the drafters of the Ottawa Treaty:

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62. *Id.*

63. See Center for Security Policy, *supra* note 5. Gen. Henry H. Shelton states:

I firmly believe that our anti-tank and anti-vehicle munitions—which are mixed systems composed entirely of smart anti-tank and anti-personnel mines that self-destruct or deactivate in a relatively short period of time—are vital to the protection of our men and women in the field . . . . The military utility of these systems is, in my mind, unquestionable.

*Id.*

64. Bell, *supra* note 7.

65. See Ottawa Treaty, *supra* note 2, art. 2(3).

Now, the Treaty exemption that we found on the table when we got to Oslo did not extend quite that far to capture the engineering design of our systems. And we proposed two words, two simple words added to that exemption.<sup>66</sup>

The words were "or near," so that a device placed near the anti-tank mine to protect it was exempted in the same way that the devices for our allies are exempted, would fix that problem. And, unfortunately, as the President said, the conference wouldn't agree. And he could not, as he emphasized, allow our principal antitank munitions to be stripped from our inventory.<sup>67</sup>

Although the United States could switch to using the type of mine covered in the Treaty, such a move would be time-consuming and costly.<sup>68</sup> Consequently, if the United States signs the Ottawa Treaty its inventory of anti-tank mines would effectively be banned according to the wording of the Treaty while all other anti-tank mines devices would be exempted.

#### PART V. THE EFFECT OF THE OTTAWA TREATY ON U.S. DEFENSE STRATEGY

If U.S. allies require that U.S. pre-positioned stockpiles of both anti-personnel and anti-tank mines are to be removed from their territories, the decision of the United States to not sign the Ottawa Treaty will be worthless. The ability of the United States to utilize such systems will be severely curtailed until an alternative system is developed. Of course the United States will retain its inventory of anti-personnel and anti-tank mines. However, they will not be where U.S. forces need them the most—stored close to the battlefield.

In September 1996, President Clinton ordered the U.S. Defense Department to develop an alternative to the landmine within nine years of the time the Oslo Convention was concluded.<sup>69</sup> In October 1997, however, the Clinton administra-

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66. See Ottawa Treaty, *supra* note 2. Article 2(3) states that: "Anti-handling device' means a device intended to protect a mine and which is part of, linked to, attached to, or placed under a mine and which activates when an attempt is made to tamper with or otherwise intentionally disturb the mine." *Id.*

67. Bell, *supra* note 7.

68. See *id.*

69. OFFICE OF THE UNDER SEC'Y OF DEFENSE, REPORT TO THE U.S. SEC'Y OF

tion dropped its plans to eliminate all anti-personnel landmines by 2006. Administration officials said the reason was that no alternative weapon system existed at present that could feasibly be developed, tested, and deployed by the President's original deadline.<sup>70</sup> The President shifted this policy in May of 1998 by pledging to sign the Ottawa Treaty by the year 2006—but only if the Pentagon can come up with an alternative.<sup>71</sup> As a result, this announcement is more symbolic than a true commitment to sign the present Treaty.<sup>72</sup>

Before an alternative to the landmine can be adopted the U.S. military may be vulnerable if its pre-positioned stockpiles of landmines are removed. Current U.S. military strategy is shaped primarily by the Clinton Administration's requirement that the United States have the capability to fight and win two Major Regional Conflicts such as a second Korean or Persian Gulf War.<sup>73</sup> As a result of recent and ongoing defense-budget cuts, achieving the President's stated goal means the United States must rely on new strategies as a consequence of a shrinkage in force size and slower development and procurement of new weapon systems.<sup>74</sup> Projecting effective U.S. power abroad given today's limited resources means the United States must have a rapid deployment capability and increased lethality of its weaponry.<sup>75</sup>

The combination of the pre-positioning stockpile concept with anti-personnel and anti-tank mines is intended to achieve the requirement for a rapid deployment capability as well as

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DEFENSE ON THE STATUS OF THE U.S. DEP'T OF DEFENSE IMPLEMENTATION OF THE U.S. POLICY ON ANTI-PERSONNEL LANDMINES 4 (1997).

70. See Dana Priest, *Administration Drops Plans to Find Substitutes for Anti-personnel Mine; Advocates of International Ban Say Clinton Abandoning Pledge*, WASH. POST, Oct. 31, 1997, at A28. One example of an idea that had been considered was the use of unmanned aerial vehicles. The High Altitude Endurance (HAE) platform would have carried a 2,000-pound sensors package to 65,000 feet and loiter for more than 24 hours. The HAE system would have surveyed a designated area to detect moving vehicles and personnel. Another unmanned vehicle, operating at 25,000 feet with an endurance of 24 hours, would be used as the weapons platform, raining precision-guided, gravity-driven bombs onto the target. See OFFICE OF THE UNDER SEC'Y OF DEFENSE, *supra*, note 69, at 16.

71. See Steven Lee Myers, *Clinton Agrees to Land Mine Ban, But Not Yet*, N.Y. TIMES, May 22, 1998, at A3.

72. *Id.*

73. See Hawkins, *supra* note 10, at 6.

74. *Id.*

75. *Id.* at 7.



increased lethality. The value of this component of the U.S. military strategy was tested during the Persian Gulf War, during the early days of Operation Desert Shield immediately following the Iraqi invasion of Kuwait and, later, during Allied offensive which was part of Operation Desert Storm.

As soon as Iraqi forces threatened the integrity of the Saudi oil fields U.S. forces were rapidly deployed to the Middle East to marry up to their equipment pre-positioned on ships located in the Indian Ocean.<sup>76</sup> Although the United States was able to build a sizable force within only a few weeks of Iraq's invasion of Kuwait, the early days following the invasion were a time of concern for the United States and its allies. Iraq's presence in Kuwait threatened the Saudi oil fields.<sup>77</sup> To help deter such a move by Iraqi forces, the United States had sent the 82nd Airborne Division and the Marine 7th Expeditionary Brigade to Saudi Arabia only two days after the invasion. Although these forces are both highly capable and lethal fighting units, even they could not stop an Iraqi armored assault since the United States does not at present have a weapon that can be carried by light infantry to stop an armored advance.<sup>78</sup> That left the 82nd Airborne and Marines with only one option: the use of anti-tank landmines to slow the attack until heavier U.S. and allied forces could arrive with heavy tanks and attack helicopters and fighter-bombers.

Moreover, denying the use of landmines to U.S. forces prevents military commanders from being able to shape the battlefield, force the enemy to maneuver to an unsatisfactory position, and mass power for decisive engagement.<sup>79</sup> The combination of anti-tank and anti-personnel mines serve to give U.S. forces the necessary combination of landmines to delay, turn, fix, or block enemy forces as necessary. The enemy thus can be forced into an area where U.S. forces can engage them with more efficient and accurate weapon systems.<sup>80</sup> In addi-

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76. See ROBERT MOSKIN, *THE U.S. MARINES STORY* 771-72 (1992).

77. See *id.*

78. *Id.* at 6. The 82nd Airborne Division's only effective anti-tank weapon during their initial deployment in the Gulf was the aging Sheridan tank. Since then the 82nd was supposed to receive the Armored Gun System. This system program was cancelled in 1996. Other alternative anti-tank weapons are still being developed.

79. See Gervais Memo, *supra* note 54.

80. See Hawkins, *supra* note 10, at 4.

tion to the actual use of these weapons, their removal will deny military commanders the ability to train with essential weapon systems during combined and multilateral military exercises.<sup>81</sup> Being denied this ability is all the more crucial since America's likely adversaries—Russia, China, Iraq, Iran, North Korea, India—have not signed the Ottawa Treaty and therefore their military commanders will continue to utilize the landmine in their war planning.

Thus, the United States is vigorously negotiating with its allies to keep our landmines in the pre-positioned stockpiles. Until new technologies emerge which can replace the landmine as a frontline weapon to be used against a likely armored assault, the U.S. military must rely on the landmine as the best tool to accomplish its mission.

#### PART VI. WHETHER THE OTTAWA TREATY WILL DENY THE USE OF LANDMINES DURING COALITION OPERATIONS

A third issue that concerns U.S. military officials is whether the Ottawa Treaty will prevent America's allies who are parties to the Ottawa Treaty from participating with the United States in multilateral operations. In the 1990s, the United States has participated in a number of multi-national operations. The United States operated in a coalition environment during the Persian Gulf War, Somalia, and currently in the Balkans. More missions like these are likely to be encountered by the United States and her allies in the near future.<sup>82</sup> During the Oslo negotiations the question arose as to whether the Ottawa Treaty will affect the ability of signatory States and non-signatory States from training or operating together during coalition operations. In addition, there is debate within the U.S. military as to whether the issue of Command and Control of coalition forces is impacted by the absence of the United States as a signatory to the Treaty.<sup>83</sup>

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81. See Gervais Memo, *supra* note 54.

82. See Gen. Anthony C. Zinni, *The SJA in Future Operations*, MARINE CORPS GAZETTE, Feb. 15, 1996, at 16. General Zinni is currently the Commanding Officer of the U.S. Central Command, which exercises military jurisdiction over operations in the Persian Gulf and Southwest Asia.

83. See Unclassified Memorandum from Maj. William K. Lietzau, USMC, Office of the Legal Counsel, Chairman of the Joint Chiefs of Staff to the Head of

For example, during coalition military operations, coalition officers—that is non-U.S. commanders—may be in the position to command U.S. troops. As a result, these commanders will be in a position to authorize the use of U.S. anti-tank mines, the kind of landmine banned under the Ottawa Treaty. The question then is if the coalition commander orders U.S. forces to use these landmines, might such action violate article 1(c) of the Ottawa Treaty that prohibits the assisting, encouraging or inducement of anyone to use anti-personnel landmines? Once again the Ottawa Treaty leaves room for an interpretation that may have a negative impact on multinational operations.<sup>84</sup>

Article 1, paragraph a, of the Ottawa Treaty specifically bans the “use” of anti-personnel landmines.<sup>85</sup> The United States had defined the word “use” as meaning emplacement, that is the physical placement of an anti-personnel landmine on the ground. Other countries that have signed the Ottawa Treaty differ in their interpretation of the word “use.” Specifically, comments made by Canada during the Treaty negotiations in Oslo, suggested that if a signatory receives a tactical benefit from a landmine then that would violate Article 1 regardless of who placed the mines.<sup>86</sup> Under this view, U.S. coalition partners who are Parties to the Ottawa Treaty would have to clear any U.S. mines that may exist on ground that they control. Obviously, this interpretation raises vital questions as to whether U.S. forces could effectively—and legally—fight alongside Canadian forces since U.S. tactics would be illegal under the Ottawa Treaty and thus Canada could not support such activities.

Fortunately, this potential conflict with Canada was resolved before the final draft was open for signatures in December 1997. The Canadian government added a note of understanding to the Treaty.<sup>87</sup> The note explained that, in essence, Canada would not interpret the Ottawa Treaty so that the mere participation of Canadian forces in operations with the U.S. military would not be construed as “assistance, encourage-

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the U.S. Delegation to the Sept. 1997 meeting in Oslo, Norway, discussing interoperability concerns regarding U.S. military doctrine and the Ottawa Treaty (Sept. 12, 1997) (unpublished memorandum on file with the author).

84. *Id.*

85. *See* Ottawa Treaty, *supra* note 2, art. 1(1)(a).

86. *Id.*

87. *Id.*

ment, or inducement," as stated in article 1, paragraph 1(c).<sup>88</sup> No other State Party has announced an interpretation of the Treaty similar to Canada's original position.<sup>89</sup> Nevertheless the potential exists for such an interpretation should a State Party so desire. If so, the current rules governing coalition forces will have to be re-evaluated.

Using landmines during coalition operations may make U.S. military commanders and their forces liable for using landmines in countries where the Ottawa Treaty prohibits such use. Article 9 requires State Parties to create national implementation measures to sanction the use of landmines.<sup>90</sup> Italy and Spain are currently considering such legislation, a development the United States is carefully observing.<sup>91</sup> Of course this issue is tied up with the question of whether to remove U.S. landmines from stockpiles. If the United States can keep its mines in the stockpiles the host countries will have to carve out an exception for the U.S. mines.<sup>92</sup>

On the other hand, there have been discussions in the context of the proposed International Criminal Court (ICC) in which several countries have suggested that landmine use is a crime of universal jurisdiction and should be prosecutable by an international court.<sup>93</sup> The ICC is to be established by an international treaty to be used as a mechanism to prosecute war criminals, that is, individuals accused of committing crimes against humanity such as genocide.<sup>94</sup> While recognizing the noble motives driving the ICC movement, U.S. officials are wary that the ICC may be used as a weapon by less powerful nations to hinder legitimate U.S. military operations.<sup>95</sup> David Scheffer, President Clinton's adviser on war crimes,

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88. *Id.*

89. *Id.*

90. See Letter from Maj. William K. Lietzau, USMC, Legal Counsel to Chairman of the Joint Chiefs of Staff, to Cpt. Maria Gervais, U.S. Army, J-5 Weapons Technology Control Division (Jan. 15, 1997) (unpublished letter on file with author).

91. *Id.*

92. *Id.*

93. *Id.*

94. See Barbara Crossette, *World Criminal Court Having a Painful Birth*, N.Y. TIMES, Aug. 13, 1997, at A10.

95. See Human Rights Watch, *Human Rights Watch Condemns Pentagon Lobbying on the International Criminal Court* (visited Apr. 18, 1998) <<http://www.hrw.org/hrw/press98/april/pntg-1.htm>>.

explained the U.S position:

Our military forces are often called upon to engage overseas in conflict situations, for purposes of humanitarian intervention, to rescue hostages, to bring out American citizens from threatening environments, to deal with terrorists. We have to be extremely careful that this proposal does not limit the capacity of our armed forces to legitimately operate internationally. We have to be careful that it does not open up opportunities for endless frivolous complaints to be lodged against the United States as a global military power.<sup>96</sup>

The Pentagon has appealed to non-U.S. military officials to help ensure that the ICC jurisdiction does not interfere with a state's ability to wage war. In March 1998, the Department of Defense sent a letter to military attaches based at embassies in Washington and Brussels urging them to monitor discussions on the proposed court.<sup>97</sup>

Specifically the United States is concerned that the definitions of crimes and the elements of proof for those crimes that may be prosecuted at the ICC are too vague.<sup>98</sup> At present the current draft statute would allow ICC judges to decide on many of these details.<sup>99</sup> In addition, the rules of procedure and evidence to be used by the ICC are to be authored by the court itself.<sup>100</sup> The United States is seeking to annex the statute and to provide a provision that outlines specific rules of procedure and evidence.<sup>101</sup>

The source of U.S. concern is that an ICC prosecutor may be politically motivated to affect U.S. military operations by holding U.S. service members liable for violations of various treaties, namely the Ottawa Treaty.<sup>102</sup> Since the United States is not a party to the Ottawa Treaty individual service members will not be held liable for violating the Treaty.<sup>103</sup> They may, however, be liable for violating the law of a State

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96. See Crossette, *supra* note 94 (quoting statement of David Scheffer).

97. See Human Rights Watch, *supra* note 95.

98. *Id.*

99. See *Staff Judge Advocate, May 1998 Newsletter*, ICC UPDATE, (visited May 27, 1998) <<http://www.hqi.usmc.mil/jaweb/hqmcja.nsf>>.

100. *Id.*

101. *Id.*

102. See Human Rights Watch, *supra* note 95.

103. See Lietzau Memo, *supra* note 83.

Party who has incorporated the Ottawa Treaty into their domestic law that punishes activities that are made illegal by the convention.<sup>104</sup> At the very least, the United States wants to provide absolute protection for its service members and keep the issue at the governmental level.<sup>105</sup>

#### CONCLUSION

The conflict regarding the viability of coalition operation seems to have been averted by Canada's recent decision. Nevertheless the issue of whether pre-positioned landmines can stay put is still not settled. Although Norway's position on the issue is not encouraging to U.S. military planners in Northern Europe, U.S. landmines stored in the other territories should be secured even though negotiations have not yet yielded an answer. The U.S. military is the pre-eminent military force in the world, a fact that U.S. allies rely heavily upon. Eliminating landmines from the pre-positioned stockpiles denies the U.S. military an essential military tool that it needs given current limitations on technology and the shrinking of the U.S. military in general.

Understandably the threat of a Russian attack through NATO's Northern Flank is greatly diminished. Perhaps the necessity of landmines in that region has seen its day, although no one is completely certain that the former-Soviet Union will not revert back to its old ways in the near future. Yet U.S. pre-positioned stockpiles in Germany, Japan, Italy, Spain and Diego Garcia are located close to areas where a future conflict may occur. The conflict in Bosnia, while quieted given NATO's presence there since 1994, may yet ignite and expand into a regional war that would likely include the participation of the United States. Japan's location is crucial should a second war occur on the Korean Peninsula or if China decides to exert its growing power over its neighbors. The need for landmines to be close to the Middle East region is rather obvious given the various tensions existing in the region. Just recently Iraqi President Saddam Hussein denied access to United Nations weapons inspectors searching for chemical and biological weapons resulting in a sustained bombardment by

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104. *Id.*

105. *See Staff Judge Advocate, supra* note 99.

U.S. and British forces. Removal of U.S. landmines from these regions will only serve to weaken America's ability to defend its interests abroad, interests that are often inextricably linked to the interests of America's allies. Given the fact that U.S. landmines self-destruct and/or deactivate, it makes no sense for America's allies to think that eliminating the U.S. pre-positioned landmines from their territories will in any way alleviate the world of the landmine problem. America's allies will only be weakening their own defense against an enemy that for now may be unknown, but is still a distinct possibility.

Instead of lambasting the United States for not signing the Ottawa Treaty, proponents of a total ban of landmines should support the U.S. efforts to conclude the Protocol II with Russia, China, Iran, and Iraq, among others. By concluding Protocol II, at the least the manufacture of mines that do not self-destruct or deactivate can be eliminated by those countries most responsible for their production.

*Christian M. Capece*