

INTERNATIONAL LAW AND ANTIPERSONNEL LAND MINES

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I. INTRODUCTION

Antipersonnel (A/P) land mines are devastating weapons not only during, but also after, warfare or armed conflicts. There still exist an estimated 85 million mines, or one for every 50 people on earth, scattered in 62 countries that kill and maim some 26,000 innocent civilians each year. In Cambodia and Angola, for example, there are more than 30,000 and 20,000 amputees, respectively, who are victims of mine incidents. These mines have impeded the return of refugees and internally displaced persons to their homes, thus rendering vast areas of land unproductive despite severe food shortages. The following statistics are sombering: Mines cost as little as \$3 each to produce, up to \$1,000 each to remove, and \$5,000 for the treatment and rehabilitation of each survivor. But these grim statistics do not tell the whole story. According to the United Nations, although 100,000 mines are removed each year, between 2 and 5 million new mines are laid. Thus, the problem worsens with time.

II. COMPATIBILITY OF A/P LAND MINES WITH INTERNATIONAL LAW

A. Common Features of A/P Land mines

1. Once planted, A/P land mines are not selective in their targets; they cannot distinguish civilians from soldiers.

2. Most of the civilians killed or injured are women and children: vulnerable groups requiring special protection under international law. They suffer immense bodily pain and psychological and emotional trauma. Their loss of limbs can never be recovered. Children are often lured by toy-like contraptions that explode on impact.

3. Mines are long-lasting unless fitted with deactivation or self-destruct mechanisms. They continue to hurt innocent civilians long after the ending of war or armed conflict.

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4. While originally detectable because of their metallic content, mines can now be practically undetectable.

5. Mines are used primarily in internal armed conflicts in developing countries, rather than in international armed conflicts.

B. The Law

The legal status of A/P land mines may be approached from customary international law and treaties. Customary international law forbids the use of weapons which cause unnecessary suffering and are indiscriminate as between military and civilian objects or personnel. Also forming part of customary international law is the principle of proportionality, under which the use of weapons whose damaging effects are disproportionate to their military purposes is prohibited. These rules are legally binding on all States, whether or not they are parties to any treaties regulating the use of such weapons.

There are many treaties renouncing or regulating the use of specific weapons. The most recent of these is the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, signed in Paris on January 13, 1993. Belonging to this category of treaties is the 1980 Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects ("Convention on Conventional Weapons"), with its Protocol II: Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices. On March 24, 1995, the United States ratified the Convention, whose contents are summarized below:

- Mines may be directed only at military objectives. Indiscriminate use is prohibited and all feasible precautions must be taken to protect civilians.

- Remotely-delivered mines may not be used unless their location is accurately recorded or they are fitted with an effective neutralizing mechanism.

- Records must be kept of the location of pre-planned minefields, and the parties to a conflict are also to keep records on other minefields laid during hostilities.

- At the end of hostilities, the parties are to try to agree either among themselves or with other States or organizations to take the necessary measures to clear minefields.

C. Applying the Law to A/P Land mines

As measured against the rules of customary and conventional international law, A/P land mines cannot pass the test of legitimacy. Indeed, in his address to the United Nations on September 26, 1994, President Clinton called on all nations to join the United States for the "eventual elimination" of A/P land mines. As a first step, he proposed the conclusion of a multilateral "agreement to reduce the number and availability of those mines."

The United States had in fact worked toward that goal. Thus, in late 1992, the United States adopted a unilateral, one-year moratorium on the transfer of A/P land mines to other countries. The moratorium was extended for three more years in 1993. In December 1993, the General Assembly adopted unanimously a United States sponsored resolution calling on all countries to adopt a moratorium on the export of A/P land mines that pose a grave risk to civilians.

III. STRENGTHENING THE 1980 CONVENTION

Notwithstanding many positive elements in the 1980 Convention and its Protocol II, their potential for reducing the casualties and damages to the civilian population remains unfulfilled. In fact, none of the armed conflicts since 1980 in which there has been serious misuse of land mines has been governed by the Convention. Ways must be found both to strengthen the contents of the Convention and to make it more widely applicable.

Because of space constraints, emphasis will be placed on a few major gaps or shortcomings, followed by the author's proposals for improvement.

A. Internal Armed Conflicts

The 1980 Convention at present applies only formally to international armed conflicts, although most of the armed conflicts today are of internal nature. Hence, the Convention should be amended to broaden its scope of application to include internal armed conflicts. The amendment should draw for its support the Convention's preamble (paragraph 5), Article 3 common to the four Geneva Conventions of 1949, the Fourth Geneva Convention, and the 1977 Additional Protocol II of the Geneva Conventions. Most important, the proposed amendment should be based on human rights. As defined by the late Sir Humphrey Waldock, former President of the International Court of Justice, human rights are "rights which attach to all human beings equally, whatever their nationality," hence wherever they are. To the extent that their basic

human rights have been violated, they are entitled to protection and assistance, whether in international or internal armed conflicts.

It should be stressed that equal rights for all individuals, be they nationals or aliens, refugees or internally displaced persons, men, women or children, is implied in all universal and regional human rights instruments through the use of such expressions as "all human beings," "everyone," "no one," or "all." Hence, not a single "right" in the Universal Declaration of Human Rights or the two 1966 Covenants is specified or implied as belonging only to those during international armed conflicts, but not during internal armed conflicts.

B. Implementation/Enforcement Mechanism

The lack of implementation or enforcement mechanism in the 1980 Convention and Protocol II may be remedied, at least in part, by an explicit requirement of payment of compensation to victims of A/P land mines by those who laid the mines in violation of international law. Such a requirement serves two useful purposes: to render justice and relief to victims of mines, and to prevent or deter future violations through the disincentive of compensation. Since there is no statute of limitation on the applicability of the compensation principle, it behooves all potential violators of international humanitarian law to observe such law. Violation of such law, in other words, does not pay.

As a practical matter, however, the compensation remedy may not be particularly effective if aimed at insurgent groups in developing countries like Angola and Cambodia, unless the groups have succeeded in overthrowing and replacing the former governments.

It should be noted that the compensation principle is an integral part of customary international law. As early as the mid-17th century, Grotius formulated the rule that every "fault creates the obligation to make good the loss." The most common remedy for the breach of an international obligation is adequate compensation. Along with the requirements to discontinue a wrongful conduct, to provide restitution and to guarantee non-repetition, compensation for injuries inflicted upon any victim in violation of international law constitutes a basic concept of State responsibility. Article 91 of Additional Protocol I of 1977 to the 1949 Geneva Conventions reflects this rule of customary international law by providing: "A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."

Similar provisions are found in Article 3 of the Hague Convention IV of 1907 concerning the Laws and Customs of War on Land, 36 Statute 2277, to which the United States is a party. Both the International Court of Justice,¹ and the Security Council² reaffirm the compensation principle.

C. *Obligation to Record and Report the Location of Mines*

Article 7(1)(a) of Protocol II of the 1980 Convention imposes an obligation on the parties to an international armed conflict to record the location of all "pre-planned minefields" laid by them. However, there is no definition of what is meant by "pre-planned." Article 7(2) merely requires the parties to "endeavor to ensure the recording of other minefields, mines and booby-traps which they laid or placed in position." The word "endeavor" is too weak or imprecise for enforcement purposes.

It should be noted that the obligation to record and report the location of sea mines by the parties that laid them exists under customary international law. Thus, in the *Corfu Channel Case*,³ the International Court of Justice placed Albania's liability to Great Britain for failing to notify British ships about mines in the Albanian waters of the Corfu Channel, which exploded and damaged the ships, on "certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States." In view of the analogy between land and sea mines in their destructive impact on personnel and material, legal principles applicable to one type of mines should, in general, be applicable to the other.

While the United States did not participate in or accept the conclusion of the International Court of Justice in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*,⁴ the decision of the Court remains relevant. In that case, Nicaragua alleged that a total of twelve vessels or fishing boats were destroyed or damaged by mines in Nicaraguan internal waters or territorial sea, and that fourteen people were wounded and two killed. These were reportedly small mines laid on the sea-bed and triggered either by contact, acoustically, magnetically or by water pressure. They caused noisy explosions, but were unlikely to sink a ship. The Court decided, by a vote of fourteen

1. See, I.C.J. Reports 1986, p. 149.

2. Resolution 687 of April 3, 1991.

3. I.C.J. Reports 1949, pp. 4, 22.

4. *Nicaragua v. United States of America*, Merits, Judgment, I.C.J. Reports 1986, p. 14.

(including that of Judge Schwebel) to one, "that the United States of America, by failing to make known the existence and location of the mines laid by it. . . has acted in breach of its obligation under customary international law in this respect."⁵

In reaching this decision, the Court cited, *inter alia*, the Convention relative to the laying of automatic submarine contact mines of 1907,⁶ which provides that, even in time of war, "every possible precaution must be taken for the security of peaceful shipping," and belligerents are bound to notify the danger zones as soon as military exigencies permit, by a notice addressed to ship owners, which must also be communicated to the Governments through the diplomatic channel.⁷

In response to a request from Libya that Germany assist it in removing mines laid by General Rommel's Army during World War II, Germany sent Libya a huge stack of maps detailing the locations of such mines. In addition, Germany sent several de-mining teams to Libya to help locate and remove the mines, with all expenses paid by Germany on an *ex gratia* basis. The then German Charge d'Affaires to Libya, Dr. G. Muller-Chorus, termed the obligation to render such assistance as required under *Volkerrecht im Entstehen*.⁸

D. Obligation to Remove Mines

Article 9 of Protocol II of the 1980 Convention concerns international cooperation in the removal of minefields, mines and booby-traps. Again, the imprecise word, "endeavor," is used with regard to the reaching of agreement on such cooperation. No clear legal responsibility is assigned to anyone for mine clearance.

It is submitted that the primary responsibility for mine removal rests with the parties that laid the mines. This not only conforms with the concept of State responsibility, but also is practical since the parties which laid the mines are in the best position to know their location and the armed units directly involved. Imposing a clear responsibility on these parties to remove mines would also have a deterrent effect. Such responsibility is implied in Article 7 obligating the parties immediately after the cessation of active hostilities to use the mine-location records "to protect civilians from the effects of minefields, mines and booby-traps." Such protection surely includes, at the minimum, mine removal.

5. pp. 147-48.

6. Hague Convention No. VIII.

7. Art. 3 p. 12.

8. Personal interview with Dr. Muller-Chorus in Washington, D.C., June 16 1995.

IV. CONCLUSIONS

As noted earlier, President Clinton has called for the eventual elimination of antipersonnel land mines by all nations. Characterizing these mines as “an enduring threat to post-war reconstruction around the world,” Secretary of State Warren Christopher has urged “a multi-faceted approach to addressing the problems caused by this most deadly debris of war.” Not only the use, but also the production, stockpiling and transfer of these mines should be prohibited.

The review conferences of the 1980 Convention on Conventional Weapons scheduled for January and April 1996 should be occasions for intense preparation for the eventual elimination of A/P land mines. Pending their elimination, the Convention should be strengthened along the lines suggested in this paper, and its widest possible adherence by States be promoted.