

An international ban on anti-personnel mines

History and negotiation of the “Ottawa treaty”

by Stuart Maslen and Peter Herby

The background to the Ottawa process

As the First Review Conference of the 1980 Convention on Conventional Weapons¹ (CCW) closed in Geneva on 3 May 1996, there was widespread dismay at the failure of the States Parties to reach consensus on effective ways to combat the global scourge of landmines. The CCW Protocol II as amended on 3 May 1996² (Protocol II as amended) introduced a number of changes that were widely welcomed, but it fell far short of totally prohibiting these weapons, a move already supported by more than 40 States. Keen to sustain the international momentum that might otherwise have slackened, the Canadian delegation announced that Canada would host a meeting of pro-ban States later in the year to develop a strategy to move the international community towards a global ban on anti-personnel mines.

That meeting, the “International strategy conference: Towards a global ban on anti-personnel mines” (usually referred to as “the 1996 *or* the first

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¹ United Nations 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, of 10 October 1980.

² 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), annexed to the CCW, *supra* note 1.

Ottawa Conference”), was held in the Canadian capital from 3 to 5 October 1996; it set the scene for what would become known as the “Ottawa process” — a fast-track negotiation of a convention banning anti-personnel mines. At the closing session of the Conference the host country’s Foreign Minister, Lloyd Axworthy, ended his address with an appeal to all governments to return to Ottawa before the end of 1997 to sign such a treaty. This bold initiative was immediately supported by ICRC President Cornelio Sommaruga, who was attending the Conference, by the UN Secretary-General and by the International Campaign to Ban Landmines (ICBL), but it came as a surprise to the governments taking part, and it was by no means certain that it would be successful. Indeed, at that stage only about 50 governments had publicly declared their support for a comprehensive, worldwide ban on anti-personnel mines,³ and Protocol II as amended was widely considered to be the most stringent international agreement possible in the prevailing climate.

Yet only 14 months later, at the Treaty Signing Forum held in Ottawa in December 1997, representatives of 121 governments queued up to sign the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*,⁴ and three of them — Canada, Ireland and Mauritius — also deposited their instruments of ratification. As at the end of April 1998, there were a total of 124 signatories and 11 States had already ratified the Convention, which will enter into force six months after 40 States have formally adhered to it. The present article aims to discuss this remarkable achievement in the context of the negotiation of the treaty and its various provisions. It also considers some of the implications of the process and its successful outcome for the future development of international humanitarian law. It

³ Fifty States were full participants at the first Ottawa Conference: Angola, Australia, Austria, Belgium, Bolivia, Bosnia and Herzegovina, Burkina Faso, Cambodia, Cameroon, Canada, Colombia, Croatia, Denmark, Ethiopia, Finland, France, Gabon, Germany, Greece, Guatemala, Guinea, Honduras, Hungary, Iceland, Iran, Ireland, Italy, Japan, Luxembourg, Mexico, Mozambique, the Netherlands, New Zealand, Nicaragua, Norway, Peru, the Philippines, Poland, Portugal, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Trinidad and Tobago, the United Kingdom, the United States, Uruguay, and Zimbabwe. A further 24 countries — Albania, Argentina, Armenia, the Bahamas, Benin, Bulgaria, Brazil, Brunei Darussalam, Chile, Cuba, the Czech Republic, Egypt, the Federal Republic of Yugoslavia, the Holy See, India, Israel, Malaysia, Morocco, Pakistan, the Republic of Korea, Romania, the Russian Federation, Rwanda, and Ukraine — attended as official observers.

⁴ *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*, of 18 September 1997, reprinted in *IRRC*, No. 320, September-October 1997, pp. 563-578.

does not, however, purport to serve as a commentary of the treaty *per se*, a task which is best left to a later date.

The negotiation of the treaty

Only a few weeks after the challenge issued by Canada's Foreign Minister, the Austrian government circulated a first draft of a treaty banning anti-personnel mines. The text was clearly inspired by the negotiations in the First Review Conference of the CCW and by disarmament law, especially the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, adopted by the UN General Assembly on 30 November 1992. It contained clear prohibitions of the development, production, stockpiling, transfer and use of anti-personnel mines — though it maintained the ambiguous definition of anti-personnel mines contained in Protocol II as amended⁵ — and required destruction of stockpiles within one year and clearance of emplaced anti-personnel mines within five years. In December 1996, the UN General Assembly adopted its landmark resolution 51/45S (157 votes in favour, 10 abstentions and none against) in which States were urged to “pursue vigorously an effective, legally binding international agreement to ban the use, stockpiling, production and transfer of anti-personnel landmines with a view to completing the negotiation as soon as possible.”

Thus began the process of negotiating a treaty providing for a comprehensive ban on anti-personnel mines, the target date for its adoption and signature being the end of 1997. A core group of committed governments from different geographical regions began meeting informally to discuss how to push the Ottawa process forward. The Austrian government, which had prepared a draft text in late 1996, hosted a meeting in Vienna from 12 to 14 February 1997 to enable States to exchange views on the content of such a treaty. The Expert Meeting on the Text of a Convention to Ban Anti-personnel Mines (the Vienna Expert Meeting), which was attended by representatives of 111 governments, heard the ICRC outline what it considered to be the key issues at stake. First, the ICRC emphasized the crucial importance of having an unambiguous

⁵ Article 2, para. 3, of Protocol II as amended defines an anti-personnel mine as one “primarily designed to be exploded by the presence, proximity or contact of a person”. The use of the phrase “primarily designed” was strongly opposed by the ICRC which feared its abuse in cases where a munition which was clearly an anti-personnel mine could be claimed to have another “primary” purpose.

definition of anti-personnel mines. Second, if a prohibition was to be effective, the new treaty should comprehensively ban the production, stockpiling, transfer and use of anti-personnel mines and require their destruction. A phased approach should begin with an immediate prohibition on new deployments, production and transfers; a second phase, which should be as short as practical constraints allow, could provide for the destruction of existing stockpiles and the clearance and destruction of mines already deployed.

Third, the ICRC noted that compliance monitoring would be an important element of a regime put in place to end the use of anti-personnel mines, and suggested that the best method would be for an independent mechanism to investigate credible reports of their use following the entry into force of the new treaty. But while advocating the maximum possible degree of verification, the ICRC specifically encouraged States not to allow this question to stand in the way of the basic norm prohibiting anti-personnel mines. It reminded States that earlier norms of humanitarian law prohibiting the use of specific weapons had been enacted without provisions on verification, but this did not prevent them from being very largely respected.

Fourth, the ICRC addressed the issue of universality. Universal application of legal norms is an important objective and the ICRC, in keeping with its mandate under the Geneva Conventions, has devoted a great deal of time and effort to the promotion of existing agreements. It is a fact, however, that no major instrument of humanitarian law has attracted universal adherence from the outset. Indeed, a number of States took decades to ratify the 1925 Geneva Gas Protocol,⁶ and in 1899 two of the major powers of the day voted against a prohibition of dum-dum bullets. And yet the vast majority of States have observed the norms laid down by these agreements.

Following the Vienna Expert Meeting, and taking into account the comments made by participating governments, the Austrian government revised its original text and on 14 March 1997 issued its second draft of the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*. The title, and much of the text, would remain the same in the treaty ultimately adopted.

⁶ Geneva Protocol of 17 June 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases and of Bacteriological Methods of Warfare.

The discussions at the Vienna Expert Meeting had made it clear that the question of verification would give rise to considerable debate, for some governments favoured a humanitarian law approach (i.e., one entailing a minimum of verification) while others sought a complex verification regime similar to those enshrined in negotiated disarmament agreements. Given its interest in the issue of verification, the German government offered to host a meeting devoted exclusively to this question.

The International Expert Meeting on possible Verification Measures to ban Anti-Personnel Landmines (the Bonn Expert Meeting) was held on 24 and 25 April 1997. To stimulate debate on the topic, Germany had drafted an "Option Paper for a possible Verification Scheme for a Convention to Ban Anti-Personnel Landmines". A total of 121 countries were represented at the meeting, and views were again divided between States which felt that detailed verification was essential to ensure that any agreement was effective and those which followed an approach similar to that of the ICRC, arguing that the proposed agreement was essentially humanitarian in character and stressing the overriding importance of a clear norm prohibiting anti-personnel mines.

From 24 to 27 June 1997, the Belgian government hosted the International Conference for a Global Ban on Anti-Personnel Mines (the Brussels Conference), the official follow-up to the 1996 Ottawa Conference. Its primary task was to adopt a declaration forwarding the latest (third) Austrian draft text for negotiation and adoption to the Diplomatic Conference being convened in Oslo, Norway, in September 1997. Out of the 156 States attending the Brussels Conference, a total of 97 signed the "Brussels Declaration", as it came to be known, 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 destruction of all stockpiled and cleared anti-personnel mines;
- international cooperation and assistance in the area of mine clearance in affected countries.

Notable by their absence from the declaration were references to the importance of international support for assistance to mine victims and to an absolute duty to clear emplaced mines (the duty being only to destroy "cleared" anti-personnel mines).

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. The outcome of the meeting was hailed by the ICRC as a major step forward. In the words of its President, "[t]he Brussels Conference has demonstrated that the momentum towards a ban on this pernicious weapon is now irreversible."

The Diplomatic Conference on an International Total Ban on Anti-Personnel Land Mines (the Oslo Diplomatic Conference), convened by Norway, opened in Oslo on 1 September 1997. It was scheduled to last a maximum of three weeks. The host country had already announced the draft Rules of Procedure at the end of the Brussels Conference. Modelled on those used in the negotiation of the 1977 Protocols additional to the Geneva Conventions of 12 August 1949, they provided for resolution of issues by a two-thirds majority vote in cases where consensus proved impossible. Only those States which had formally supported the Brussels Declaration were officially recognized as participants in the Oslo Diplomatic Conference and therefore entitled to vote. All other States present were officially classed as observers, together with the United Nations, the ICRC, the International Federation of Red Cross and Red Crescent Societies, and the ICBL.

The success of the Oslo Diplomatic Conference can be attributed to many factors: the creation and sustenance of the necessary political will, and extensive media attention following the tragic death of Diana, Princess of Wales, are of obvious significance. But the crucial role played by the Chairman of the Conference, Ambassador Jakob Selebi of South Africa, should not be forgotten. With skill and determination he drove the process forward to a successful conclusion without the need for the full three-week negotiation period. His contribution to the favourable outcome of the Ottawa process should be duly recognized.

Key issues in the Ottawa negotiations

The scope of the treaty

The first Austrian draft text contained an article on the proposed scope of the treaty to the effect that the Convention would apply "in all circumstances, including armed conflict and times of peace." The issue of whether such a provision was needed in a treaty entirely prohibiting a weapon was debated at the Vienna Expert Meeting. As a result of those discussions the scope article was dropped from the second Austrian draft, for it was deemed superfluous in an agreement in which States Parties

undertook “never under any circumstances” to develop, produce, stockpile, transfer or use anti-personnel mines.

The lack of such a provision, however, entailed the absence of a specific reference to the application of the treaty to all parties to a conflict. This dashed the hopes of a number of countries, particularly Colombia,⁷ and the ICBL that the treaty would expressly regulate the behaviour of all protagonists in a conflict, and not only that of States. However, on signing the Ottawa treaty Colombia stated its understanding that while it had no effect on the legal status of the various parties involved, the Convention applied to all warring parties which are subjects of international humanitarian law (i.e., under Article 3 common to the 1949 Geneva Conventions and their Additional Protocol II of 1977). This understanding was not contested.

In its Article 9 the Ottawa treaty sets out the duty of each State Party to take all appropriate legal, administrative and other measures at the national level to prevent and suppress violations of the Convention. This means that the production, stockpiling, transfer or use of anti-personnel mines by individuals under the jurisdiction *or* control of States Parties, including members of insurgent forces, are covered, at least in theory. Moreover, one of the preambular paragraphs states that the agreement by the States Parties is based on “the principle of international humanitarian law that the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited, on the principle that prohibits the employment in armed conflicts of weapons, projectiles and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering and on the principle that a distinction must be made between civilians and combatants.”⁸ These principles are elements of customary international law which apply to all parties to any conflict.

Definitions

(a) Mine

Although it had been suggested that “improvised explosive devices” were regulated as mines under Protocol II as amended, a number of States were keen to ensure that they were encompassed by the Ottawa treaty. The definition of a mine given in Protocol II as amended was therefore

⁷ See APL/CW.46 of 3 September 1997.

⁸ 11th preambular paragraph.

supplemented by the expression “designed to be” inserted immediately after the word “munition”, so that the new definition read: “a munition designed to be placed under, on or near the ground or other surface area and exploded by the presence, proximity or contact of a person or vehicle.”⁹ As a result of an Australian initiative, in the course of the Oslo negotiations on definitions it was accepted that the Convention also prohibited explosive devices improvised or adapted to serve as anti-personnel mines (i.e., if a device functions as an anti-personnel mine, it is to be considered as such).

(b) Anti-personnel mine

The definition of anti-personnel mines was inevitably one of the most highly charged issues. The definition given in Protocol II as amended was unnecessarily ambiguous, a fact recognized even by some of those States which were in favour of keeping it in the new treaty. At the Vienna Expert Meeting opinions appeared fairly evenly divided as to whether the wording contained in the first Austrian draft should be maintained or amended. The ICRC and the ICBL, for their part, made a strong call for the word “primarily” to be removed from the definition.

In the months following the Vienna Expert Meeting, however, more and more States — particularly those most active in the Ottawa process — espoused the view that the definition of anti-personnel mines had to be clarified. Accordingly, in its second draft text the Austrian government removed the term “primarily” from the definition and included an exemption for anti-vehicle mines equipped with anti-handling devices.¹⁰ The phrase on anti-handling devices mirrored the text of an interpretative statement made by Germany and more than 20 other delegations at the adoption of Protocol II as amended concerning the meaning of the word “primarily”.

At the Brussels Conference a number of States, such as Ethiopia, commented favourably on the removal of the word “primarily” from the text. Others, such as Sweden and the United Kingdom, concerned by an apparent discrepancy with the definition contained in Protocol II as amended, indicated that they might wish to discuss the definition further.

⁹ Article 2, para. 2.

¹⁰ “Mines designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person, that are equipped with anti-handling devices, are not considered anti-personnel mines as a result of being so equipped.”

Indeed, at the Oslo Diplomatic Conference there was considerable debate on the issue. The United States, for instance, sought to include an exception for anti-personnel mines contained within mixed weapons systems,¹¹ but this was not acceptable to other delegations. Likewise, a proposal by Australia to exempt mines whose effects could be limited exclusively to combatants¹² was not approved, in part at least because no such mines were believed to exist or to be under development. Finally, Norway's proposal to clarify the exemption for anti-vehicle mines, "including those equipped with anti-personnel mines",¹³ was not retained. The definition of anti-personnel mines in the Ottawa treaty thus covers all anti-personnel mines, including tripwire-activated directional fragmentation devices, but excludes anti-vehicle mines equipped with anti-handling devices. The ICRC will continue to monitor the development of anti-vehicle mines to ensure that they are not capable of detonation under the weight of a person.

(c) Anti-handling device

The second Austrian draft included a definition identical to that contained in Protocol II as amended.¹⁴ At the Oslo Diplomatic Conference, following a proposal by the United Kingdom,¹⁵ language was added to the effect that in addition to activation upon tampering with the mine, a device that detonated the mine when an attempt was made to "otherwise intentionally disturb [it]" would also be considered as an anti-handling device. A number of States invoked the so-called "doctrine of the innocent act", which holds that a mechanism so sensitive that merely touching it would cause the mine to detonate should not be considered an anti-handling device. Such a mine would therefore fall within the definition of an anti-personnel mine. If it did not, innocent passers-by would be exposed to excessive risk of injury; this would betray the very aim of the treaty, namely preventing the indiscriminate effects of anti-personnel mines. The ICRC intends to monitor developments in this field closely to ensure that both the spirit and the letter of this provision are fully observed.

¹¹ See APL/CW.9 of 1 September 1997.

¹² See APL/CW.2 of 1 September 1997.

¹³ See APL/CW.4 of 1 September 1997.

¹⁴ "Anti-handling device means a device intended to protect a mine and which is part of, linked to, attached to or placed under the mine and which activates when an attempt is made to tamper with the mine." See Protocol II as amended, Art. 2, para. 14.

¹⁵ See APL/CW.32 of 2 September 1997.

(d) Transfer

The definition of transfer given in the Ottawa treaty is an exact replica of that contained in Protocol II as amended. This in turn was based on the definition of "transfer" used since 1993 for the UN Register of Conventional Arms. It was introduced into the second Austrian draft and adopted in Oslo without major changes (the word "anti-personnel" was added to the Protocol II definition). Thus, under Article 2, para. 4, of the Ottawa treaty "[t]ransfer' involves, 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." There is, however, some disagreement as to whether the first two possibilities are cumulative or alternative. This issue has some relevance to the discussions within NATO as to the possibility of transit of United States anti-personnel mines through NATO countries.

Core prohibitions

(a) The prohibition on the use of anti-personnel mines

The prohibition on the use of anti-personnel mines was central to the success of the treaty and represented its primary object and purpose. Without an absolute prohibition on use, the other prohibitions could not be absolute, either. The first Austrian draft had stated that "it is prohibited to use anti-personnel mines as they are deemed to be excessively injurious and to have indiscriminate effects." After some negative comments regarding the implication that States had in fact been violating international law by using anti-personnel mines, in the second draft the prohibition became simply an undertaking "never under any circumstances to use anti-personnel mines". This remained the text of the provision as it was finally adopted despite the wish of a number of countries to include exceptions or transition periods. At the Brussels Conference, for example, one State called for an exception to the prohibition on use "in exceptional circumstances". In Oslo, the same State proposed a "temporary arrangement", whereby a State "under exceptional circumstances for its national security, may resort to the use of anti-personnel mines in accordance with the international laws of armed conflict." This proposal was roundly rejected by the other participating States which felt that any such exception would undermine the entire treaty.

(b) The prohibition on the development of anti-personnel mines

The prohibition on the development of anti-personnel mines¹⁶ represents the first time that such a provision has been included in a humanitarian law treaty. States will have to take great care in their military research and development programmes to ensure that the rule is fully respected. Special attention will have to be paid to dual-use technologies and anti-handling devices which could cause an anti-tank mine to function as an anti-personnel mine.

(c) The prohibition on “inciting” a violation

It is also prohibited to “assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.”¹⁷ This provision covers, for example, the granting of licences to manufacture anti-personnel mines. It is also relevant to the situation of some NATO countries. On ratifying the treaty, Canada entered an understanding that mere participation by Canadian soldiers in a United Nations operation involving a State not party to the Convention and the use of mines by such a State would not constitute assistance within the meaning of the treaty. This would also apply to the transit of anti-personnel mines owned by a State not party to the Convention across the territory of a State Party.

(d) Proposed exceptions to the general obligations

At the Oslo Diplomatic Conference, with the situation in Korea uppermost in its mind, the United States proposed that an exception be made to the general treaty obligations with respect to “activities in support of a United Nations command or its successor, by a State Party participating in that command, where a military armistice agreement had been concluded by a United Nations command.”¹⁸ This issue was discussed at great length, both inside and outside the conference hall, but ultimately it was decided that such an exception was not acceptable. The possibility of a general transition period under which any State could defer implementation of the Convention for a set period was also considered. However, the United States did not feel that the provision as it stood was sufficient to ensure its early adherence to the treaty, and the issue was dropped.

¹⁶ See Art. 1, para. 1(b).

¹⁷ Art. 1, para. 1(c).

¹⁸ See APL/CW.8 of 1 September 1997.

The destruction of stockpiled anti-personnel mines

The original Austrian draft text had called for stockpiled anti-personnel mines to be destroyed within one year, though it offered the possibility of an additional one-year deferral period.¹⁹ Following remarks by a number of States that the allotted time was unrealistically short, the second draft raised the limit to three years, but removed the possibility of deferral. At the Oslo Diplomatic Conference the limit was again raised, this time to four years, at which point final agreement was secured. The United States had suggested that an exception be made for mines not owned or possessed by a State Party though present on its territory,²⁰ but this proposal was rejected. Finally, Article 6, para. 5 of the Ottawa treaty specifically requires States Parties in a position to do so to provide assistance in the destruction of stockpiled anti-personnel mines. A good many States had emphasized the importance of international cooperation and assistance in fulfilling the obligation within what is, undoubtedly, a fairly short time period.

Exception for training in demining: the first Austrian draft contained a proposed exception to the prohibition on acquiring or retaining anti-personnel mines "if they are exclusively used for the development and teaching of mine detection, mine clearance, or mine destruction techniques and if the responsible institutions, the amount and the types are registered with the Depositary." A suggestion by Spain at the Brussels Conference that an exception be made to the prohibition on production in order that stocks of mines for training be replenished was not retained. At the Brussels Conference, Italy had called for a more specific limit on the number of mines needed for training in detection and clearance. This proved impossible to achieve during the negotiations in Oslo, so that the provision finally read: "[t]he amount of such mines shall not exceed the minimum number absolutely necessary" for such purposes.²¹ At the adoption of the treaty a number of States declared that they considered one to two thousand anti-personnel mines to be sufficient for training purposes.²² This was not contested. Under Article 7 ("Transparency measures"), the types, quantities and, if possible, lot numbers of all anti-

¹⁹ Art. 5, first Austrian draft treaty text.

²⁰ See APL/CW.10 of 1 September 1997.

²¹ Art. 3, para. 1, Ottawa treaty.

²² Canada stated it would retain around 1,500, the Netherlands 2,000, and Germany "thousands, not tens of thousands". Belgium supported this interpretation.

personnel mines retained for training purposes must be reported annually to the UN Secretary-General.

Clearance and destruction of emplaced anti-personnel mines

The original Austrian draft required that emplaced anti-personnel mines be destroyed within five years, with the possibility of an additional two-year period for States requesting an extension. At the subsequent Vienna Expert Meeting it was rightly pointed out that the ability of a State to remove and destroy anti-personnel mines depended on its technical capacity and resources, and that in the case of States with massive problems this process could take decades. It was clear that the treaty needed to allow such States to adhere without fear that they might find themselves in breach of its provisions because of the continued presence of uncleared mines. It was even suggested that emplaced mines should be fenced and marked but that their removal and destruction should not be subject to a strict timetable.

Taking account of those concerns, the second Austrian draft differentiated between the destruction of anti-personnel mines laid within minefields (deemed to be a “defined area in which mines have been emplaced”) and those laid in areas outside minefields. The former were to be marked in accordance with international standards and then destroyed within 10 years of the treaty’s entry into force, whereas in the case of the latter the obligation was simply to destroy the mines, without a fixed deadline, and to give an immediate and effective warning to the population of the danger posed by their presence.

A number of States pointed out that a 10-year fixed period for the clearance of minefields was unrealistic. In addition, at the Brussels Conference the United Kingdom, referring to the problems of clearing “undetectable” plastic mines in the Falkland Islands, proposed that an exception be made in the case of land of marginal economic value where the risk to the civilian population was minimal. The ICRC, however, asked States not to extend the time period and reminded them that the recently adopted obligation in Protocol II as amended to clear mines at the end of hostilities should not be weakened. The ICRC insisted, as did a number of others, that an open-ended commitment to clear all anti-personnel mines “as soon as possible” was inadequate, as it risked detracting from some of the undoubted urgency that would be contained in a specified time-period. The shortest possible time frame was desirable from a humanitarian point of view; on the other hand, a number of countries were so severely contaminated by mines that too short a period would be unrealistic and might deter their adherence to the treaty.

For this reason, the ICRC proposed that the obligation to clear anti-personnel mines laid in minefields within 10 years should be maintained, but that States Parties needing more time could apply for an extension period.²³ In this way progress in mine clearance and the need for greater international assistance and support could be objectively assessed. Given the difficulty of distinguishing "minefields" from "mined areas", at the Oslo Diplomatic Conference the obligation to demine within 10 years of the treaty's entry into force for each State was expanded to include all emplaced anti-personnel mines, though with the possibility for severely mine-affected States to be granted extension periods of up to 10 years at a time. As a result of this agreement the definition of a minefield was removed and only that of a mined area remained; this was deemed to be "an area which is dangerous due to the presence or suspected presence of mines."²⁴

The final issue of importance to note is that the obligation to demine covers all territory under the jurisdiction *or* control of a State Party.²⁵ This means that the obligation extends to a situation where an insurgent or separatist armed force controls a certain portion of territory within the boundaries of a State. Of course, when deciding whether to grant an extension period, States Parties can be expected to sympathize with a fellow State unable to clear emplaced mines because it does not have physical control of all of its territory.

International cooperation and assistance

It was evident that where both the clearance of emplaced anti-personnel mines and the destruction of stockpiled mines were concerned, international cooperation and assistance would play an essential role in ensuring early adherence to the treaty and its successful implementation on the ground.²⁶ At the Vienna Expert Meeting, the ICRC pointed out that the treaty's technical demands would be entirely different from those set out in Protocol II as amended, which envisages the use of new types of

²³ *Comments of the International Committee of the Red Cross on the Third Austrian Draft (13/5/97) of the Convention on the Prohibition of Anti-personnel Mines*, Informal Working Paper for the Oslo Negotiations, September 1997. A similar extension period is contained in section C (paras. 24-28) of the Verification Annex of the 1992 Chemical Weapons Convention.

²⁴ Art. 2, para. 5.

²⁵ Art. 5, para. 1.

²⁶ Art. 6.

mines. Therefore, the text relating to technical assistance could not be identical to that painstakingly put together in the CCW negotiations.

Assistance to mine victims

Similarly, international support would be a crucial element with regard to the need to provide long-term care and assistance for mine victims. In its formal comments on the third Austrian draft,²⁷ the ICRC called for the inclusion of a provision requiring each State Party in a position to do so to provide assistance for the care and rehabilitation of landmine victims and for mine-awareness programmes. A further proposal that States Parties accept a duty under Article 1 to assist mine victims was, however, not retained. The relevant provision incorporated in the final text of the treaty expressly mentioned the possibility of channelling assistance to mine victims through relevant non-governmental organizations (NGOs), the United Nations and components of the International Red Cross and Red Crescent Movement.²⁸ Following a proposal by the ICBL, the provision also set out an obligation to provide international assistance for the social and economic reintegration of survivors of mine explosions.²⁹ As ICBL representatives rightly noted during the negotiations in Oslo, comprehensive assistance to mine victims demands more than surgical care and physical rehabilitation.

Promoting compliance and implementation

As already mentioned, the issue of verification of compliance with the treaty was the subject of very detailed debate. At the Vienna Expert Meeting, differences arose between States which thought that little or no verification was necessary to oversee what was essentially a humanitarian treaty, and those which felt very strongly about the security implications of a ban and therefore pushed for comprehensive verification procedures similar to those provided for in earlier disarmament agreements. One country, Saint Lucia, speaking on behalf of the Organization of American States, pointed out that countries in Central America were eager to comply with the treaty and to cooperate fully where transparency and exchange of information were concerned in order to obtain outside assistance in eliminating their anti-personnel mines. This positive approach, it

²⁷ *Supra*, note 23.

²⁸ Article 6, para. 3.

²⁹ *Idem*.

suggested, was preferable to attempts to “catch” treaty violators through traditional verification mechanisms.

In the same spirit, at the subsequent Bonn Expert Meeting one government proposed the creation of an implementation or fact-finding commission which would work on a cooperative basis. While no consensus on any approach emerged from the discussions, the Chairman’s summary mentioned the need to ensure that any mechanism was cost-effective and practical, stressed the value of information exchange and raised the possibility of providing for fact-finding missions. The Chairman declared that a possible adoption of the approach used in arms control agreements would require further discussion and emphasized the reference to an “effective” ban in UN General Assembly resolution 51/45S.

Discussions continued in June 1997 at the Brussels Conference, during which a number of countries, including Norway, Sweden and Switzerland, asserted that since this was primarily a humanitarian law treaty, detailed verification was not essential, and might even dissuade adherence. Ecuador claimed that the prohibitions on production and export were needed to ensure that the treaty would be respected. Others, notably Australia, called for a disarmament treaty that would attract universal adherence, suggesting that the Ottawa treaty might be a “permanent partial solution”. Uruguay called for a “balanced formula” including effective verification provisions so that the treaty did not become merely an expression of good intentions.

Several “transparency measures” had already been included in the first Austrian draft. By the time the definitive text was drawn up, the list of items to be reported had grown considerably. Under Article 7 of the Ottawa treaty, each State Party must provide the Depositary with a detailed report on many compliance-related matters within 180 days of the treaty’s entry into force. Provision is also made for fact-finding missions to clarify any doubts as to the compliance with the treaty by a State Party.³⁰ For obvious reasons, this was a difficult provision to negotiate and it is easily the longest article in the treaty. Less controversially, it was agreed that States Parties would meet annually following the treaty’s entry into force up until the date of the first review conference, scheduled to take place five years after the treaty comes into force. Amendments may, however, be proposed at any time after the treaty has become legally binding. The relatively simple procedures regarding the facilitation and clarification of

³⁰ Sec Art. 8.

compliance are likely to be complemented by a “citizen-based monitoring mechanism”, the details of which are to be elaborated during the course of 1998.

National implementation

Taking up a proposal made by the United States during the negotiations leading to the adoption of Protocol II as amended, the first Austrian draft text had incorporated a provision for compulsory universal jurisdiction for wilful acts committed during armed conflict and causing death or serious injury. In the second draft, however, the proposed provision had been considerably watered down to a duty only to take “all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any activity prohibited to a State Party (...) undertaken by persons or on territory under its jurisdiction or control.”³¹ Accordingly, at the Bonn Expert Meeting the ICRC circulated an informal proposal on detailed national implementation measures. At the Oslo Diplomatic Conference, Switzerland introduced a proposal for compulsory jurisdiction over any national of a State Party who has used anti-personnel mines or ordered them to be used. Unfortunately, and perhaps as a consequence of the largely disarmament background of many of the negotiators, this proposal was not retained. The provision finally adopted is largely that contained in the second Austrian draft, and therefore normally — though not always — requires the adoption of national legislation.

Reservations

An article prohibiting reservations to the provisions of the treaty, similar to the one found in the 1992 Chemical Weapons Convention, was already included in the first Austrian draft. It remained unchanged throughout the period of negotiations, although at the Oslo Diplomatic Conference several States tried to weaken it by inserting an exception for periods of armed conflict or to have it deleted altogether.³²

Entry into force

The first Austrian draft had proposed that the treaty should enter into force six months after the deposit of the fortieth instrument of ratification.

³¹ See Art. 10, Second Austrian Draft.

³² Art. 19.

Some States felt that the number was too high; the ICRC, for its part, reminded the participants at the Oslo Diplomatic Conference that the 1949 Geneva Conventions and their 1977 Additional Protocols had entered into force after the deposit of just two ratifications. Indeed, from a humanitarian viewpoint the application of the new treaty even by a limited number of States would provide significant benefits and encourage others to follow. However, some other States felt that the security implications of forgoing anti-personnel mines were significant and that even more than 40 ratifications should be required.

Ultimately, a compromise agreement was reached, stipulating that 40 ratifications would be needed for the treaty to come into force.³³ As at the time of writing, 11 States — Belize, Canada, the Holy See, Hungary, Ireland, Mauritius, Niue, San Marino, Switzerland, Trinidad and Tobago, and Turkmenistan — had deposited their instruments of ratification with the Depositary, the UN Secretary-General. It is hoped that the number of 40 ratifications may be reached well before the end of 1998, so that the treaty could come into force in early 1999.

Following a suggestion by Belgium, an opportunity was given to the first 40 States to declare, at the time of ratification, that they would provisionally apply the treaty's core provisions, set out in Article I, para. 1 (i.e., the prohibitions on use, development, production and transfer) until the entry into force of the treaty as a whole.³⁴ As at the time of writing, two States — Mauritius and Switzerland — had taken advantage of this possibility.

Withdrawal

The first Austrian draft text had provided for withdrawal from the treaty on 90 days' notice if a State decided that "extraordinary events [had] (...) jeopardized [its] supreme interests." At the Vienna Expert Meeting a number of different approaches to this question were already emerging. Some States were of the opinion that no right of withdrawal should be permitted in view of the danger that it might be used when a country was engaged in an armed conflict, which was precisely when compliance with the treaty's provisions was most important. Mexico made a proposal along the lines of the withdrawal clause contained in 1977 Additional Protocol I whereby withdrawal was possible but would not be effective during an

³³ Art. 17.

³⁴ Art. 18.

ongoing armed conflict.³⁵ Other States proposed a straightforward withdrawal clause similar to that contained in the Austrian draft text. At the Oslo Diplomatic Conference there was extensive negotiation on this issue. Finally, agreement was reached on a provision that allows effective withdrawal six months after receipt of the relevant instrument by the Depositary. If, however, at the end of that six-month period the withdrawing State Party is engaged in an armed conflict, the withdrawal will not take effect before the end of the armed conflict.³⁶

The implications of the Ottawa process for international humanitarian law

The success of the Ottawa process marks a welcome return to the traditional approach to the development of international humanitarian law whereby treaties are adopted without a consensus rule. Indeed, recent negotiations in the domain of international humanitarian law, such as those on the 1980 CCW, were governed by the practice of consensus. The formal CCW review process demonstrated the limitations of this method where landmines were concerned. With this in mind, it may well be necessary to review the practice of adopting agreements by consensus for future CCW negotiations (a Second Review Conference is scheduled for 2001).

In addition, the continuing importance of the CCW should be stressed. It is the only framework, based on international humanitarian law, for the specific regulation of existing conventional weapons and for responding to the emergence of new weapons. The regulation of the employment of anti-personnel mines by Protocol II as amended should be seen as the absolute minimum norm for States which continue to use them. Protocol II as amended also remains the only international instrument specifically governing the use and transfer of anti-vehicle mines and establishes the rule that those who use mines of whatever type are responsible for their removal at the end of hostilities. This could prove to be an important protection, even for Parties to the Ottawa treaty, in situations of conflict with a State not party to it.

For the ICRC, and indeed for the International Red Cross and Red Crescent Movement as a whole, the mines campaign has provided an

³⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), Article 99.

³⁶ Art. 20.

example of how successful advocacy in the interests of war victims can be carried out in the post-Cold War environment. Dozens of National Red Cross and Red Crescent Societies, including many new to campaigning, have felt empowered to advocate on behalf of mine casualties present and future. The campaign has been conducted without compromising the fundamental principle of neutrality, which prohibits components of the Movement from taking sides in a conflict or favouring particular political parties or groups. This principle is intended to ensure that all victims of war receive protection and assistance — it is therefore a means to an end, not an end in itself.

The Ottawa process has also shown that civil society has a crucial role to play in strengthening international law. The complementary role played by key governments, the ICBL and the ICRC augurs well for the future development of international humanitarian law. In contrast to the ICRC, the ICBL has been able to criticize the positions of specific governments directly and publicly. On the other hand, the ICRC's special status as an international organization and its network of professional military officers working with armed forces on humanitarian law issues give it access to governmental and military circles, which NGOs often do not have.

The global mobilization that has been necessary to achieve an international legal norm prohibiting anti-personnel mines has also clearly shown that the international community must seek a more preventive approach to the control or prohibition of weapons which go against international humanitarian law, and a more dynamic method of developing that law. The Ottawa process has raised awareness among the general public of the limits that must be placed on the conduct of warfare. As a result, higher expectations will be placed on the behaviour of States. At present the ICRC is examining, together with medical experts, possible objective medical criteria to determine whether the effects on health of a given weapon are of a nature to cause superfluous injury or unnecessary suffering.³⁷

Despite its success, the Ottawa process has most clearly demonstrated the need for a more preventive approach to arms issues under international humanitarian law. One must ask whether appalling levels of civilian death and injury have to be reached before the use of each new weapon which

³⁷ See Coupland, R. M. (ed.), *The SIrUS Project, Towards a determination of which weapons cause "superfluous injury or unnecessary suffering"*, ICRC, Geneva, 1997.

may violate international humanitarian law is either regulated or prohibited, as the case may be. Far more systematic analysis and informed debate is needed before any new weapon is deployed. The recent agreement to prohibit, in advance, the use and transfer of blinding laser weapons is a basis for hope.³⁸ Given the rapid development of new technologies, the protection provided by humanitarian law will be of crucial importance in making sure that humankind is the beneficiary, and not the victim, of technical advances which have profound implications on the waging of war.

³⁸ Louise Doswald-Beck, "New Protocol on Blinding Laser Weapons", *IRRC*, No. 312, May-June 1996, pp. 272-299.