

**TAKING THE NEXT STEP: AN ANALYSIS OF THE EFFECTS THE OTTAWA CONVENTION MAY HAVE ON THE INTEROPERABILITY OF UNITED STATES FORCES WITH THE ARMED FORCES OF AUSTRALIA, GREAT BRITAIN, AND CANADA**

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*The International Campaign to Ban Landmines (ICBL) continues to believe the legality of State Party participation in joint operations with an armed force that uses antipersonnel mines is an open question, and that participation in such operations is contrary to the spirit of the treaty. The ICBL has called on States Parties to insist that non-signatories not use antipersonnel mines in joint operations, and to refuse to take part in joint operations involving use of antipersonnel mines.*<sup>2</sup>

I. Introduction

The Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on Their Destruction [hereinafter Ottawa Convention]<sup>3</sup> opened for signature on 3 December 1997, and entered into force on 1 March 1999.<sup>4</sup> As of 1 February 2004, one month shy of the Ottawa Convention's five-year anniversary, 141

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2. International Campaign to Ban Landmines, *Landmine Monitor Report 2001: Toward a Mine-Free World* (Aug. 2001), available at <http://www.icbl.org/lm/2001/> [hereinafter *ICL Landmine Report 2001*].

states are parties and an additional nine have signed but have yet to ratify the convention.<sup>5</sup>

Each State Party to the Ottawa Convention “undertakes never under any circumstances: to use anti-personnel mines; to develop, produce, or otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, anti-personnel mines; to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.”<sup>6</sup> Furthermore, “each State Party undertakes to destroy or ensure the destruction of all anti-personnel mines in accordance with the provisions of th[e] Convention.”<sup>7</sup> In short, the Ottawa Convention bans States Parties<sup>8</sup> from using anti-personnel landmines (APL).

Major powers, including the United States, Russia and China, have not signed the Ottawa Convention. A few countries, however, in regions of tension—the Middle East and South Asia—opted to participate.<sup>9</sup> In explaining why the United States was unable to ratify the Ottawa Convention, President Clinton declared, “As Commander-in-Chief, I will not send our soldiers to defend the freedom of our people and the freedom of others without doing everything we can to make them as secure as possible.”<sup>10</sup> In negotiations preceding the signing of the Ottawa Convention, the United States sought inclusion of two specific measures for the benefit of U.S. forces: an adequate transition period for U.S. forces to phase out the use of APL in favor of to-be-devised alternative technologies and a modification of the definition of “anti-handling device” to encompass the U.S. arsenal of anti-tank (AT) mines.<sup>11</sup> The United States refused to sign the Ottawa

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3. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211 [hereinafter Ottawa Convention].

4. Arms Control Association, *The Ottawa Convention at a Glance* (April 2004) at <http://www.armscontrol.org/factsheets/ottawa.asp>.

5. *Id.*

6. Ottawa Convention, *supra* note 3, art. 1.

7. *Id.*

8. The Ottawa Convention refers to the parties as “States Parties” or “State Party.” *See generally id.*

9. Arms Control Association, <http://www.armscontrol.org/factsheets/ottawa.asp>, *supra* note 4.

10. *See* Press Conference, The White House Office of the Press Secretary, Remarks by the President on Landmines (Sept. 17, 1997), available at <http://www.fas.org/asmp/resources/govern/withdrawal91797.html> [hereinafter Press Conference].

11. *Id.*

Convention when neither of these measures was included in the final draft.<sup>12</sup>

Despite the U.S.'s decision, many of its allies either ratified or acceded to the Ottawa Convention. For example, within the only security alliance that links the United States and Canada with their European Allies—the North Atlantic Treaty Organisation<sup>13</sup>—the United States is the only member not to ratify or accede to the Ottawa Convention.<sup>14</sup> This article outlines procedures for analyzing issues that may arise during joint operations with armed forces of nations that have signed, ratified, or acceded to the Ottawa Convention. In addition, this article offers three case studies as examples. The three countries studied are Australia, the United Kingdom, and Canada.<sup>15</sup> While these nations all ratified the Ottawa Convention, they do not implement it in the same manner, deepening interoperability issues. Utilizing the procedures detailed in this article,

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12. *Id.*

Now, we were not able to gain sufficient support for these two requests. The final treaty failed to include a transition period during which we could safely phase out our antipersonnel land mines including in Korea. And the treaty would have banned the antitank mines our troops rely on from the outskirts of Seoul to the desert border of Iraq and Kuwait—and this, in spite of the fact that other nations' antitank systems are explicitly permitted under the treaty.

*Id.*

13. See North Atlantic Treaty Organisation, *Welcome to NATO*, at <http://www.nato.int/> (providing background information on NATO). Various NATO members focus on the effect the Ottawa Convention will have on their ability to participate in NATO operations, rather than focusing on the ability to operate with U.S. forces. This article is not limited to joint operations in a NATO context, however, the Ottawa Convention may also affect reciprocal security commitments established between the United States and its NATO allies.

14. On 25 September 2003, Turkey acceded to the Ottawa Convention, becoming the last member of the North Atlantic Treaty Alliance (NATO), aside from the United States, to submit to the landmine ban. See Lieutenant Colonel Barfield, *Antipersonnel Land Mines Law and Policy*, ARMY LAW., Dec. 1998, at 25 n.133; see also Vahit Bora, *Turkey and Greece Ban Landmines*, SOUTHEAST EUROPEAN TIMES, Oct. 23, 2003, available at <http://www.balkantimes.com/html2/english/031023-VAHIT-001.htm>.

15. Canada ratified the Ottawa Convention on 3 December 1997, the same day the convention opened for signature. The United Kingdom ratified the convention on 31 July 1998. Australia ratified the convention on 14 January 1999. ICBL, *Ratification Updates*, at <http://www.icbl.org/ratification> (last visited Mar. 15, 2004) (listing countries that have signed, ratified or acceded to the Ottawa Convention).

military personnel can better analyze and plan for interoperability effects resulting from differing interpretations of the Ottawa Convention.

## II. Background

### A. Current U.S. Anti-Personnel Landmine Policy

Landmines have had a devastating effect on individuals and communities around the world.<sup>16</sup> As a result, the international community has taken steps to reduce the damage caused by landmines. In 1999, Captain (CPT) Andrew C.S. Efaw, Judge Advocate, U.S. Army, authored an article entitled *The United States Refusal to Ban Landmines: The Intersection Between Tactics, Strategy, Policy, and International Law*.<sup>17</sup> In that article, CPT Efaw provides an excellent overview of the lingering problems created by APL use,<sup>18</sup> the tactical and strategic need for APL by the U.S. military,<sup>19</sup> and efforts by the international community to restrict landmine use through international legislation.<sup>20</sup>

Captain Efaw discusses “three attempts . . . to control the landmine crisis through international agreement.”<sup>21</sup> The three attempts are: the

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16. See generally United Nations Mine Action, Advocacy and Conventions, *Statement of United Nations Secretary General Kofi Annan*, (Apr. 1999), at [http://www.mineaction.org/misc/dynamic\\_overview.cfm?did=317](http://www.mineaction.org/misc/dynamic_overview.cfm?did=317).

From my experience in peacekeeping, I have seen first-hand the literally crippling effects of landmines and unexploded ordnance on people and communities alike. Not only do these abominable weapons lie buried in silence and in their millions, waiting to kill or maim innocent women and children; but the presence – or even the fear of the presence – of a single landmine can prevent the cultivation of an entire field, rob a whole village of its livelihood, place yet another obstacle on a country’s road to reconstruction and development.

*Id.*

17. Captain Andrew C.S. Efaw, *The United States Refusal to Ban Landmines: The Intersection Between Tactics, Strategy, Policy, and International Law*, 159 MIL. L. REV. 87 (1999).

18. “[T]he problem of landmines claiming unintended victims remains serious and tragic, ‘a pandemic of global proportions.’” *Id.* at 94 (citing Office of Humanitarian Demining Programs, Bureau of Political-Military Affairs, U.S. Dep’t of State, *Hidden Killers: The Global Landmine Crisis* ch.1 (1998)).

19. *Id.*

20. *Id.* at 106.

Landmines Protocol (or Protocol II)<sup>22</sup> of the 1980 United Nations Convention on the Prohibitions and Restrictions on the Use of Certain Conventional Weapons (UNCCW);<sup>23</sup> Amended Protocol II;<sup>24</sup> and the Ottawa Convention.<sup>25</sup>

Captain Efaw concludes that “Amended Protocol II provides the most practical solution to the landmines crisis . . . [because it] strikes a balance between meeting military needs and protecting civilians, recognizing that correct employment of anti-personnel landmines, rather than a wholesale ban, strikes that balance.”<sup>26</sup> The U.S. position recognizes the military necessity of APL. As a result, the U.S. strategy for reducing the harmful effects of landmines focuses on the responsible use of APL.<sup>27</sup> The Ottawa Convention, on the other hand, is representative of a larger movement to declare the use of APL unlawful *per se*. While this is a lofty ideal, dispute remains as to whether this is the best method to remedy the APL problem, especially with nations (both States Parties and non-States Parties) that have little regard for the problems caused by the indiscriminate use of APL. Rather than disputing CPT Efaw’s conclusions, this article focuses on the real world fallout caused by the divergence in international opinion

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21. *Id.* at 107; *see also* Barfield, *supra* note 14.

22. Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, 10 Oct. 1980, 19 I.L.M. 1529 [hereinafter Protocol II].

23. 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, U.S. TREATY DOC. NO. 103-25, 1324 U.N.T.S. 137, 19 I.L.M. 1523 [hereinafter UNCCW].

24. Protocol on the Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, *amended* May 3, 1996, art.2, U.S. TREATY DOC. NO. 105-1, 35 I.L.M. 1206 [hereinafter Amended Protocol II].

25. Ottawa Convention, *supra* note 3.

26. Efaw, *supra* note 17, at 147.

27. COMM. ON ALTERNATIVE TECH. TO REPLACE ANTIPERSONNEL LANDMINES ET AL., ALTERNATIVE TECHNOLOGIES TO REPLACE ANTIPERSONNEL LANDMINES 15 (Nat’l Academy Press 2001) [hereinafter ALTERNATIVE TECHNOLOGIES].

Although the use of landmines by U.S. forces did not create the current humanitarian crisis, the U.S. government has taken strong actions toward mitigating the effects of indiscriminate use of APL around the world. These actions include a ban on exports, assistance with clearance of mines (also called demining), assistance to victims, and a search for alternatives to APL.

*Id.*

on the effect the Ottawa Convention will have on the ability of States Parties to engage in joint military operations with U.S. forces.

While the United States has not signed or acceded to the Ottawa Convention, the United States is a party to other international treaties that regulate the use of landmines. The United States ratified Protocol II of the UNCCW on 24 March 1995<sup>28</sup> and Amended Protocol II of the UNCCW on 20 May 1999.<sup>29</sup> In addition to the obligations created by ratification of these treaties, U.S. forces are also constrained in their use of APL by national legislation, diplomatic statements, and Presidential Decision Directives (PDD).<sup>30</sup> President Bush announced a new U.S. policy on landmines on 27 February 2004.<sup>31</sup> Pursuant to this new policy:

The United States has committed to eliminate persistent landmines of all types from its arsenal.

The United States will continue to develop non-persistent anti-personnel and anti-tank landmines. As with the current United States inventory of non-persistent landmines, these mines will continue to meet or exceed international standards for self-destruction and self-deactivation. This ensures that, after they are no longer needed for the battlefield, these landmines will detonate or turn themselves off, eliminating the threat to civilians.

The United States will continue to research and develop enhancements to the current technology of self-destructing/self-deactivating landmines to develop and preserve military capabilities that address our transformational goals.

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28. U.S. Dep't of State, *A List of Treaties and Other International Agreements of the United States in Force as of January 1, 2003*, at <http://www.state.gov/s/1/24224.htm> (last visited Sept. 14, 2004).

29. *Id.*

30. See U.S. ARMY EUROPE (USAREUR), REG. 525-50, ARMS CONTROL COMPLIANCE para. 18.b (11 Mar. 2003) [hereinafter AE REG. 525-50].

31. See Bradley Graham, *Bush Plans to Ban Only Some Land Mines*, WASH. POST, Feb. 27, 2004, at A1; see also U.S. Dep't of State Office of Political-Military Affairs, *New United States Policy on Landmines: Reducing Humanitarian Risk and Saving Lives of United States Soldiers*, (27 Feb. 2004), at <http://www.state.gov/t/pm/rls/fs/30044.htm> [hereinafter New United States Policy on Landmines].

The United States will seek a worldwide ban on the sale or export of all persistent landmines to prevent the spread of technology that kills and maims civilians.

Within one year, the United States will no longer have any non-detectable mine of any type in its arsenal.

Today, persistent anti-personnel landmines are *only* stockpiled for use by the United States in fulfillment of our treaty obligations to the Republic of Korea. Between now and the end of 2010, persistent anti-vehicle mines can only be employed outside the Republic of Korea when authorized by the President. After 2010, the United States will not employ either of these types of landmines.

Within two years, the United States will begin the destruction of those persistent landmines that are not needed for the protection of Korea.

Funding for the State Department's portion of the U.S. Humanitarian Mine Action Program will be increased by an additional 50 percent over FY03 baseline levels to \$70 million a year, significantly more than any other single country.<sup>32</sup>

The new policy reverses the previous policy of President Clinton that the United States might sign the Ottawa Convention by 2006 "[i]f viable alternatives to APLs and mixed antitank mine systems are developed and fielded."<sup>33</sup> Several remnants from the previous policy, however, remain, including the following:

While the United States values and pursues humanitarian goals, it will take the necessary precautions to ensure U.S. military personnel and the civilians whom they are defending are adequately protected. [And,] U.S. policy does not prohibit . . . the training and use of the M18 Claymore mine in the command detonated mode.<sup>34</sup>

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32. New United States Policy on Landmines, *supra* note 31.

33. *See* AE REG. 525-50, *supra* note 30, para. 18.b.

34. *Id.*

The current U.S. policy on landmines does not comply with the Ottawa Convention. First, in contravention of the Ottawa Convention's ban on the use of APL, U.S. forces currently use APL in the demilitarized zone in Korea, and may continue to do so indefinitely.<sup>35</sup> Second, U.S. forces may use self-destructing APL and self-destructing AT mines, individually (pure) or in mixed systems, in current and future military operations around the world. Third, the only landmines in the current U.S. arsenal that are not prohibited by the Ottawa Convention are both the Claymore mines when used in the command-detonated mode and also any of the AT mines when used without anti-handling devices.<sup>36</sup> Lastly, in contravention of the Ottawa Convention's prohibition on the stockpiling of APL, "[t]he Pentagon maintains a stockpile of about 18 million land mines . . . The U.S. arsenal of 10.4 million antipersonnel mines is third in size, after those held by China and Russia."<sup>37</sup> In at least one notable respect, however, the current U.S. policy exceeds the provisions of the Ottawa Convention in that it prohibits U.S. forces from using non-persistent anti-vehicle mines as well as non-persistent anti-personnel mines.<sup>38</sup>

## B Joint Operations

United States forces' authorization to employ APL under certain conditions raises questions about whether U.S. forces can engage in multinational operations with its allies that are States Parties to the Ottawa Convention, and how such operations will be structured. In the context of this article, joint operations refers to combined or multinational operations involving the United States and another nation. Because nations interpret international law through their own national perspective, coalition partners may have different positions with respect to many operational legal issues.<sup>39</sup> The Ottawa Convention is no exception—each State Party has its own interpretation of its obligations under the treaty.

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35. Presidential Policy Directive No. 64, *Humanitarian Demining* (May 1998).

36. ALTERNATIVE TECHNOLOGIES, *supra* note 27, at 5.

37. Graham, *supra* note 31.

38. "President Bush has charted a new course by addressing the entire threat to innocent civilians from the lingering nature of persistent landmines--both anti-personnel and anti-vehicle." New United States Policy on Landmines, *supra* note 31.

39. Brigadier General Jerry S.T. Pitzul, Judge Advocate General, Canadian Defense Force, *Operational Law and the Legal Professional: A Canadian Perspective*, 51 A.F. L. REV. 311, 317 (2001).

The issue of joint operations involving States Parties and non-States Parties has not escaped the attention, and the ire, of non-governmental organizations (NGOs).<sup>40</sup> Several NGOs united in 1992 to form the International Campaign to Ban Landmines (ICBL).<sup>41</sup> Each year the ICBL issues the Landmine Monitor Report on the status of the Ottawa Convention and matters related to its implementation by States Parties. In the report, the ICBL tracks the compliance of States Parties with the ICBL's interpretation of the "spirit" of the Ottawa Convention.<sup>42</sup> Based on the

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40. Major General Jarvis D. Lynch, Jr., *Landmines, Lies, and Other Phenomena*, PROCEEDINGS, May 1998.

Non-governmental organizations (NGOs) are legion in terms of both numbers and purposes. Many perform services ranking on par with Doctors Without Borders, an organization recognized with admiration by General Schroeder for its work in Rwanda and elsewhere. But all is not perfect. Some of these organizations...have an anti-U.S. bias; some have people who are anti-American activists; and some have agendas inimical to U.S. interests.

Nobel Peace Prize winner Jody Williams [co-founder of the International Campaign to Ban Landmines] had ties to El Salvador's communist guerillas and has made no secret of her part in an anti-U.S., pro-communist agitation operation. During a Cable News Network "Crossfire" program of 10 October 1997, when asked about American forces risking their lives, Williams responded that, "A soldier is only one part of larger society." The inference is that the American fighting man may be less important than others.

*Id.*

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The ICBL, formally launched in 1992 by a handful of nongovernmental organizations (NGOs), is presently made up of over 1,400 organizations in 90 countries worldwide. With its launch, the ICBL called for a ban on the use, production, trade and stockpiling of antipersonnel mines (APMs), and for increased resources for mine clearance and for victim assistance. An unprecedented coalition, the Campaign has brought together human rights, humanitarian mine action, children's, peace, disability, veterans, medical, development, arms control, religious, environmental and women's groups who work locally, nationally, regionally and internationally to achieve its goals.

ICBL, *Landmine Monitor Report 1999: Toward a Mine-Free World* (May 1999), available at <http://www.icbl.org/lm/1999/icbl>.

42. In June 1998, the International Campaign to Ban Landmines established "Landmine Monitor," a unique and unprecedented societal based reporting network to systematically monitor and document nations' compliance with the 1997 Mine Ban Treaty and the humanitarian response to the global landmine crisis. Landmine Monitor complements the existing state-based reporting and compliance mechanisms established by the Mine Ban Treaty. See ICBL, *Landmine Monitor*, at <http://www.icbl.org/lm/> (last visited Mar. 16, 2004).

divergence of interpretations of various provisions of the Ottawa Convention, there does not appear to be any common understanding among the States Parties. Arguments that invoke the “spirit” of the Ottawa Convention merely serve to highlight differing interpretations.

In light of these differing interpretations, this article outlines a procedure for analyzing the effect the Ottawa Convention will have on States Parties’ ability to engage in joint operations with U.S. forces. The procedure divides the concept of “joint operations” into eleven factors. These factors are: Authority to Engage in Joint Operations; Command and Control; Rules of Engagement (ROE); Operational Plans; Operations on Previously Mined Terrain; Obligation to Clear Minefields; Training; Transit; Stockpiling; Employment and Use of Anti-vehicle Mines with Anti-handling Devices; and Employment and Use of Claymore Mines.<sup>43</sup>

*1. Authorization to Engage in Joint Operations with a Non-State Party*

The threshold issue is whether military forces of the respective States Parties can engage in joint operations with U.S. forces (a non-State Party). While each of the eleven factors concerns “joint operations,” this first factor is used to analyze national legislation and interpretation of the Ottawa Convention so as to either permit or prohibit States Parties from engaging in joint operations with non-States Parties. The expression of permission or prohibition is evident in specific national declarations or, in their absence, in the manner in which States Parties interpret the Ottawa Convention’s definition of “assist.”

According to the plain language of Article 1, “Each State Party undertakes never under any circumstances to use anti-personnel mines...[or] to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.” Unfortunately, the term “assist” is not defined within the treaty itself.<sup>44</sup> Faced with conflicting interpretations, the ICBL advised States Parties to reach a common under-

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43. This analysis is modeled after the structure of the Canadian Army Training and Doctrine Bulletin on APL, with three additional sub-factors. Canadian Directorate of Army Training, *The Banning of the Anti-Personnel Mine*, ARMY DOCTRINE & TRAINING BULL., Feb. 1999, at 8 [hereinafter ADTB].

44. Article 2 of the Ottawa Convention contains the definitions section. Only five terms were explicitly defined in the Ottawa Convention: anti-personnel mine, mine, anti-handling device, transfer, and mined area. Ottawa Convention, *supra* note 3, art. 2.

standing. The ICBL noted the following in the Landmine Monitor Report 1999:

A number of countries, including Australia, Canada, New Zealand, and the United Kingdom, have adopted legislative provisions or made formal statements with regard to possible participation of their armed forces in joint military operations with a treaty non-signatory that may use antipersonnel mines. As has been noted by Australia and the UK, the likely non-signatory is the United States. The ICBL is concerned that these provisions and statements, while understandably intended to provide legal protection for soldiers who have not directly violated the treaty, are contrary to the spirit of a treaty aimed at no possession of antipersonnel mines, in that they contemplate a situation in which treaty States Parties fight alongside an ally that continues to use antipersonnel mines...

In each of these cases, government officials have stated that the intent is to provide legal protections to their military personnel who participate in joint operations with a non-signatory who may utilize APMs [anti-personnel mines]. The ICBL does not cast doubt on the stated motivations of these nations; it does not believe that these provisions and statements are intended to undermine the core obligations of the treaty.

However, there is serious concern about the consistency of these provisions and statements with the treaty's Article 1 obligation[s]...The ICBL is concerned that these provisions and statements go against the spirit of a treaty aimed at an end to all possession and use of antipersonnel mines. Adoption of this type of language could be interpreted to imply acceptance of, rather than a challenge to, the continued use of APMs by the United States or other non-signatories. The ICBL calls on treaty signatories to insist that any non-signatories do not use antipersonnel mines in joint operations.<sup>45</sup>

Over time, the ICBL has hardened its position on the ability of States Parties to engage in joint operations. The Landmine Monitor Report 2000 added that States Parties should "refuse to take part in joint operations that

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45. *Landmine Monitor Report 1999: Toward a Mine-Free World*, *supra* note 41, at Introduction.

involve the use of antipersonnel mines.”<sup>46</sup> In the Landmine Monitor Report 2001, the ICBL stated that “As parties to the treaty, they [States Parties] should state categorically that they will not participate in joint operations with any force that uses antipersonnel mines.”<sup>47</sup> In the face of increasing joint operations involving the United States and States Parties, however, the ICBL muted its tone somewhat in the Landmine Monitor Report 2002.<sup>48</sup>

Absent an unambiguous declaration by a State Party that it may engage in joint operations with non-States Parties, the analysis focuses on the State Party’s interpretation of “assist” in Article 1 of the Ottawa Convention. States Parties that narrowly interpret this term have better standing to engage in joint operations with U.S. forces. For example, a State Party that narrowly interprets “assist” to only encompass active or direct assistance in the laying of mines has more leeway to engage in joint military operations with a non-State Party than a State Party that interprets “assist” to also include indirect assistance.<sup>49</sup>

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46. ICBL, *Landmine Monitor Report 2000: Toward a Mine-Free World* (Aug. 2000), available at <http://www.icbl.org/lm/2000/>.

47. *Landmine Monitor Report 2001: Toward a Mine-Free World*, *supra* note 2, at Introduction: Banning Antipersonnel Mines.

48. ICBL, *Landmine Monitor Report 2002: Toward a Mine-Free World* (Aug. 2002), available at <http://www.icbl.org/lm/2002/>.

The ICBL continues to believe that the legality of State Party participation in joint operations with an armed force that uses antipersonnel mines is an open question, and that participation in such operations is contrary to the spirit of the treaty. The ICBL calls on States Parties to insist that any non-signatories do not use antipersonnel mines in joint operations, and to refuse to take part in joint operations that involve use of antipersonnel mines. All States Parties should make clear the nature of their support for other armed forces that may be using antipersonnel mines, and make clear their views with regard to the legality under the Mine Ban Treaty of their military operations with these armed forces.

*Id.* at Introduction: Banning Antipersonnel Mines.

## 2. *Command and Control*

The second factor is the effect the Ottawa Convention may have on command and control during joint operations. The issues are manifold: Can U.S. commanders assume command of armed forces of States Parties? Can U.S. commanders authorize armed forces of States Parties to use munitions prohibited by the Ottawa Convention? Can non-U.S. commanders authorize U.S. forces under their command to use munitions prohibited by the Ottawa Convention? As with the first analytical sub-factor, these issues arise from varying interpretations of Article 1. The more narrowly a State Party interprets the prohibitions of Article 1, the less likely the State Party will have problems with command and control by or of U.S. forces. For example, if an officer of a State Party serves in a coalition chain of command involving U.S. forces, that he or she may not be able to authorize U.S. forces to employ APL if doing so constitutes “assistance” as interpreted by that officer’s nation.

## 3. *Rules of Engagement*

Closely related to the issue of command and control is the third analytical factor, the effect the Ottawa Convention may have on the ROE during joint operations. Because each State Party undertakes never to use APL and never to assist anyone to engage in prohibited activity, States Parties may find that they cannot operate under coalition ROE that specifically authorize the use of APL. This may be true even though the ROE do not mandate the use of any particular weapons system, but merely grant such authority to subordinate commanders.

In preparing for military operations, military planners must be careful to incorporate the differing legal constraints placed upon coalition part-

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49. *Landmine Monitor Report 2001: Toward a Mine-Free World*, *supra* note 2, at Introduction: Banning Antipersonnel Mines.

[T]he question has been raised as to what “assist” means in the treaty’s Article 1. A number of governments have interpreted this to mean “active” or “direct” assistance in actual laying of mines, and not to other types of assistance in joint operations, such as provision of fuel or security. This narrow interpretation of assistance is of concern to the ICBL; in keeping with the spirit of a treaty aimed at total eradication of the weapon, interpretation of assistance should be as broad as possible.

ners. For example, the ROE Annex to the initial Task Force Falcon operation order in Kosovo stated:

Participation in multinational operations may be complicated by the respective treaty obligations of its participants, i.e., other members in a coalition may be bound by treaties not binding the U.S., and vice versa. U.S. forces will operate in conformity with the treaties binding upon them, and will not be bound by treaties which the U.S. is not a party to.<sup>50</sup>

The operation order of the U.S.-led European Command (EUCOM), clarified this point one level higher than the Commander of the Kosovo Force (KFOR) (COMKFOR) :

The conduct of military operations is controlled by the provisions of international and national law. Within this framework, the North Atlantic Treaty Organization (NATO) sets out the parameters within which the Kosovo Force (KFOR) can operate. ROE are the means by which NATO provides direction to commanders at all levels governing the use of force. Nothing in these ROE requires any persons to perform actions against national laws to which they are subject. National forces may issue amplifying instructions, or translations of the Aide-Memoire or Soldiers Cards to ensure compliance with their national law. Any such amplifying instructions must be developed in consultation with the Joint Force Commander (JFC) or Commander KFOR (COMKFOR) and not be more permissive than the authorized KFOR ROE.<sup>51</sup>

By declaring that “nothing in [the] ROE requires any persons to perform actions against national laws to which they are subject,”<sup>52</sup> the ROE remained flexible enough for coalition partners to engage in joint operations with the United States. This holds true even when the commander of the joint force is not from the United States.<sup>53</sup> Thus, the use of ROE that

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50. OPERATION JOINT GUARDIAN, TASK FORCE FALCON OPORD 99-01, ANNEX E, RULES OF ENGAGEMENT para. 5a(2) (1999).

51. UNITED STATES COMMANDER IN CHIEF, EUROPE, OPLAN 4250-99 Annex C, Appendix 6 para. 3a(1) [hereinafter USCINCEUR OPLAN 4250-99] (1999).

52. *Id.*

53. At the time USCINCEUR OPLAN 4250-99 went into effect, the Commander of KFOR was LTG Sir Michael Jackson, British Armed Forces.

neither authorize nor prohibit the use of APL may enable States Parties to engage in joint operations with U.S. forces under a common set of ROE.

#### 4. Operational Plans

The fourth factor is the effect the Ottawa Convention may have on a State Party's ability to participate in the planning of joint operations involving U.S. forces. United States forces are authorized to use APL in certain limited circumstances.<sup>54</sup> States Parties that assist in preparing operational plans that account for U.S. forces' ability to use APL could be viewed as violating Article 1's prohibition on "assisting" another party in activity that violates the Ottawa Convention. As with several of the other factors, this factor is less problematic in joint operations with U.S. forces if States Parties narrowly interpret Article 1 to only prohibit "assistance" in relation to the actual emplacement of APL.

#### 5. Operations on Previously Mined Terrain

The fifth factor is the effect the Ottawa Convention may have on a State Party's ability to operate on previously mined terrain. In other words, what use, if any, may States Parties make of existing minefields? Article 1 clearly prohibits the use of APL.<sup>55</sup> As previously discussed, however, States Parties have the latitude to interpret the terms "use" and "assist" very narrowly and solely in relation to the emplacement of mines.<sup>56</sup> Arguably, under a narrow interpretation, after the mines have been emplaced, the Ottawa Convention does not prohibit a States Party from using the minefield (offensively or defensively) as it would use any natural terrain obsta-

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54. See U.S. Dep't of State, *Bloomfield Details Landmine Policy Changes*, Feb. 27, 2004, at <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2004&m=February&x=20040227183138adynned0.9025537&t=livefeeds/wf-latest.html> (providing outline the Administration's new U.S. policy on landmines). As one of the policies stated goals, ensuring that the military has the defensive capabilities it needs to protect U.S. and friendly forces on the battlefield, the President pledges that after 2010 the U.S. will use neither long-lasting or "persistent" anti-personnel nor persistent anti-vehicle landmines and that any use of persistent anti-vehicle landmines outside Korea between now and the end of 2010 will require Presidential authorization. *Id.*

55. Ottawa Convention, *supra* note 3, art. 1.

56. See *supra* notes 44 and 51; see discussion *infra* pp. 58-61.

cle. Under a broad interpretation of the term “use,” however, the opposite result would occur.

Article 1, paragraph a, of the Ottawa Treaty specifically bans the “use” of anti-personnel landmines. 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 the signatory receives a tactical benefit from a landmine then that would violate Article 1 regardless of who placed the mines. 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.<sup>57</sup>

#### 6. *Obligation to Clear Minefields*

The sixth factor is whether or not States Parties have an obligation to clear minefields that they encounter within their Area of Responsibility (AOR). This factor is closely related to the previous factor because instead of taking offensive or defensive advantage of an existing minefield, the Ottawa Convention arguably creates an obligation upon the State Party to clear the minefield. Article 5 states that “[e]ach State Party undertakes to destroy or ensure the destruction of all anti-personnel mines in mined areas under its jurisdiction or control, as soon as possible but not later than ten years after the entry into force of this Convention for that State Party.”<sup>58</sup> As with other key provisions, the phrase “under its jurisdiction or control” is open to interpretation. The nature of the military operation, however, may render such an obligation impossible to perform during the military conflict. During the recent Operation Iraqi Freedom, for example, the movement by coalition forces northward towards Baghdad was undertaken so quickly that coalition forces likely did not have time to stop and clear existing minefields not impeding the forces’ movements.

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57. Christian M. Capece, *The Ottawa Treaty and Its Implication on U.S. Military Policy and Planning*, 25 BROOKLYN J. INT’L L. 183, 200 (1999).

58. Ottawa Convention, *supra* note 3, art. 5.

### 7. Training

The seventh factor is the effect the Ottawa Convention may have on States Parties' ability to engage in training with U.S. forces involving the use of APL. This factor can be further subdivided into two areas. The first area is States Parties' ability to engage in training with U.S. forces on how to react when encountering a minefield presumably laid by the opposing forces. According to Article 3, "Notwithstanding the general obligations under Article 1, the retention or transfer of a number of APL for the development of and training in mine detection, mine clearance or mine destruction techniques is permitted."<sup>59</sup> Necessarily encompassed in this provision is the ability to conduct training, including training with a non-State Party, for the purpose of mine detection and clearance.<sup>60</sup>

The second area is States Parties' ability to engage in training with U.S. forces on the manner in which U.S. forces (or any non-State Party coalition partner) may employ APL during joint operations.<sup>61</sup> The ability to engage in such training is subject to differing views. This type of training could be viewed as "assisting" a non-State Party in the use of a prohibited item contrary to Article 1. It could also be viewed as necessary training, although not directly specified in Article 3, so that non-States Parties can engage in joint operations without running afoul of their treaty obligations.<sup>62</sup> For example, such training could be used by States Parties to determine the exact nature of support they can and cannot provide outside the stress of actual combat. Military planners need to account for issues raised in such training before the start of real world operations.

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59. *Id.* art. 3.

60. *Id.*

61. Capece, *supra* note 57, at 198-99.

In addition to the actual use of these weapons [landmines], their removal will deny military commanders the ability to train with essential weapons systems during combined and multilateral military exercises. 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 [sic] their military commanders will continue to utilize the landmine in their war planning.

*Id.*

62. *See* Ottawa Convention, *supra* note 3, art. 3.

### 8. *Transit*

The eighth factor is the effect the Ottawa Convention may have on States Parties' ability to permit non-States Parties to transit APL across their territory. According to Article 1b, "Each State Party undertakes never under any circumstances to develop, produce, otherwise acquire, stock-pile, retain or transfer to anyone, directly or indirectly, anti-personnel mines."<sup>63</sup> The term "transfer" is one of only five terms Article 2 defines.<sup>64</sup> According to Article 2, "'Transfer' 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."<sup>65</sup>

According to the Landmine Monitor Report 2001:

The United States has also discussed with a number of treaty States Parties the permissibility of the US transiting mines through their territory. A debate has emerged over whether the treaty's prohibition on "transfer" of antipersonnel mines also applies to "transit," with some States Parties maintaining that it does not. This would mean that US (or other nations) aircraft, ships, or vehicles carrying antipersonnel mines could pass through (and presumably depart from, refuel in, restock in) a State Party on their way to a conflict in which those mines would be used. The ICBL believes that if a State Party willfully permits transit of antipersonnel mines which are destined for use in combat, that government is certainly violating the spirit of the Mine Ban Treaty, is likely violating the Article 1 ban on assistance to an act prohibited by the treaty, and possibly violating the Article 1 prohibition on transfer.<sup>66</sup>

As an example of the divergence of opinion between States Parties, "France, Denmark, Slovakia, South Africa, and Spain have indicated tran-

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63. *Id.* art 1.

64. *Id.* art. 2.

65. *Id.*

66. *Landmine Monitor Report 2001: Toward a Mine-Free World*, *supra* note 2, at Introduction: Banning Antipersonnel Mines.

sit is prohibited . . . [whereas] Canada, Norway, Germany, and Japan indicate that this is permitted.”<sup>67</sup>

### 9. Stockpiling

Closely related to the issue of transit is the issue of stockpiling of APL. In conjunction with the prohibition on stockpiling of APL in Article 1b is the requirement to destroy stockpiled APL—Article 4.<sup>68</sup> According to Article 4, “Except as provided in Article 3,<sup>69</sup> each State Party undertakes to destroy or ensure the destruction of all stockpiled anti-personnel mines it owns or possesses, or that are under its jurisdiction or control.”<sup>70</sup> What is not clear from the text of the Ottawa Convention, however, is whether a State Party is prohibited from permitting a non-State Party to stockpile its APL within the territory of the State Party. Unfortunately, the Ottawa Convention does not define “jurisdiction and control.”

According to the Landmine Monitor Report 2001: “The ICBL believes that it would violate the spirit of the treaty for States Parties to permit any government or entity to stockpile antipersonnel mines on their territory, and would violate the letter of the treaty if those stocks are under the jurisdiction or control of the State Party.”<sup>71</sup> The underlying issue that remains open to interpretation is whether the stockpiled APL is under the jurisdiction and control of the State Party. As with other provisions of the Ottawa Convention, there is a split of opinion among States Parties.

The United States has antipersonnel landmines stored in at least five nations that are States Parties to the Mine Ban Treaty [Ottawa Convention]: Germany, Japan, Norway, Qatar, and United Kingdom at Diego Garcia . . . Germany, Japan, and the United Kingdom do not consider the US mine stockpiles to be under their jurisdiction or control, and thus not subject to the provisions of the Mine Ban Treaty or their national implementation measures. Norway, through a bilateral agreement with the US,

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67. *Id.*

68. Ottawa Convention, *supra* note 3, art. 4.

69. Article 3 permits States Parties to retain and transfer “the minimum number [of anti-personnel landmines] absolutely necessary . . . for the development of and training in mine detection, mine clearance, or mine destruction techniques.” *Id.* art. 3.

70. *Id.* art. 4.

71. *Landmine Monitor Report 2001: Toward a Mine-Free World*, *supra* note 2, at Introduction: Banning Antipersonnel Mines.

has stipulated the mines must be removed by 1 March 2003, which is the deadline for Norway to comply with its Mine Ban Treaty Article 4 obligation for destruction of antipersonnel mines under its jurisdiction and control.<sup>72</sup>

By claiming that it does not maintain jurisdiction or control over a given area, a State Party may permit U.S. forces to stockpile APL within the State Party's borders.<sup>73</sup> For example:

Regarding stockpiling or transit of AP mines by a State not Party on its territory, Germany said there are specific prohibitions against this. It stated further that the Convention is not applicable to foreign military forces in Germany due to the fact that, under a 1954 agreement, US forces based in Germany are not under German jurisdiction or control.<sup>74</sup>

#### *10. Anti-Vehicle Mines with Anti-Handling Devices*

The tenth factor is the effect the Ottawa Convention's definition of anti-vehicle mines (AVM) with anti-handling devices (AHD) has on the ability of U.S. forces to use its current inventory of AVM in joint operations involving State Parties. According to Article 2:

"Anti-personnel mine" means a mine designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons. 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.<sup>75</sup>

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72. *Id.*

73. The ICBL noted with disapproval that "Germany, Japan, and the United Kingdom did not even mention the existence of US antipersonnel mine stocks in their Article 7 reports." *Id.*

74. Geneva Int'l Centre for Humanitarian Demining, *Intersessional Work Programme 2001-2002: Standing Comm. on the General Status and Operation of the [Ottawa] Convention Meeting Report*, at [http://www.gichd.ch/pdf/mbc/SC\\_may02/SCGS\\_Meeting\\_Report\\_27\\_31\\_May\\_02a.pdf](http://www.gichd.ch/pdf/mbc/SC_may02/SCGS_Meeting_Report_27_31_May_02a.pdf) (last visited Mar. 18, 2004) [hereinafter GICHD].

75. Ottawa Convention, *supra* note 3, art. 2.

The Ottawa Convention defines “anti-handling device” as “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 or otherwise intentionally disturb the mine.”<sup>76</sup>

According to the U.S. Army doctrinal manual on landmines, Field Manual 20-32, *Mine/Countermine Operations*:

Antihandling devices perform the function of a mine fuse if someone attempts to tamper with the mine. They are intended to prevent someone from moving or removing the individual mine, not to prevent reduction of the minefield by enemy dismounts. An antihandling device usually consists of an explosive charge that is connected to, placed next to, or manufactured in the mine. The device can be attached to the mine body and activated by a wire that is attached to a firing mechanism. U.S. forces can use antihandling devices only on conventional AT [anti-tank] mines.<sup>77</sup>

During the drafting of the Ottawa Convention, the ICBL raised concerns that AVM with AHD pose the same threat to civilians as APL.<sup>78</sup> The draft definition was eventually changed.

To address this concern, which was shared by many government delegations, negotiators changed the draft definition of AHD (which had been identical to the one in CCW Protocol II) by adding the words “or other wise intentionally disturb” . . . It was emphasized by Norway, which proposed the language, and others, that the word “intentionally” was needed to establish that if

76. *Id.*

77. U.S. DEP’T OF ARMY, FIELD MANUAL 20-32, MINE/COUNTERMINE OPERATIONS ch. 1 (29 May 1998).

78. *Landmine Monitor Report 2001: Toward a Mine-Free World*, *supra* note 2, at Introduction: Banning Antipersonnel Mines.

During the Oslo treaty negotiations in 1997, the ICBL identified as “the major weakness in the treaty” the sentence in the Article 2 Paragraph 1 definition of antipersonnel mine that exempts antivehicle mines (AVMs) equipped with antihandling devices (AHDs)...The ICBL expressed its belief that many [AVMs] with [AHDs] could function as [APLs] and pose similar dangers to civilians.

*Id.*

an AVM with an AHD explodes from an unintentional act of a person, it is to be considered an antipersonnel mine, and banned under the treaty. This language was eventually accepted by all delegations without dissent.<sup>79</sup>

Despite the ICBL's assertion that the language was accepted without dissent, varied interpretations remain as to what it actually means. There are two issues involving the differing interpretations of AVM with AHD. The first is whether the definition of AVM within the Ottawa Convention is controlling or whether AVM should be regulated by Amended Protocol II. The second stems from the following language: "[m]ines designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person."<sup>80</sup> Some States Parties interpret the definition of AVM to focus on the "intent" of the mine.<sup>81</sup> Other States Parties focus on the "effect" or "function"<sup>82</sup> of the mine.<sup>83</sup> The International Campaign to Ban Landmines recognizes that there are differing interpretations of AVM.

The ICBL has expressed concern that there has not been adequate recognition by States Parties that AVMs with AHDs that function like antipersonnel mines are in fact prohibited by the Mine Ban Treaty, nor discussion of the practical implications of this. The ICBL has repeatedly called on States Parties to be more explicit about what types of AVMs and AHDs, and what deployment methods, are permissible and prohibited. The ICRC, Human Rights Watch, Landmine Action (UK), and the German

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79. *Id.*

80. Ottawa Convention, *supra* note 3, art. 2.

81. *See generally Landmine Monitor Report 2001: Toward a Mine-Free World*, *supra* note 2, at Introduction: Banning Antipersonnel Mines.

82. The terms "effect" and "function" focus on the fact that the mine could be triggered by the unintentional act of an unsuspecting civilian. *Id.*

83. GICHD, *supra* note 74.

Austria pointed out that there are two different approaches with regard to interpreting Article 2. The approach that focuses on the purpose for which a mine was designed excludes AV mines with sensitive fuses or sensitive AHDs from the scope of the Convention, while the approach that focuses on how the mine functions would include such mines. In Austria's view, both approaches are compatible with a good faith interpretation of Article 2.

*Id.*

Initiative to Ban Landmines have all produced lists and publications regarding AVMs of concern.<sup>84</sup>

“All three existing AT [anti-tank] mines [in the U.S. arsenal] are usable under the Ottawa Convention, but APL munitions could not be used to protect them.”<sup>85</sup> The lingering issue is whether States Parties will interpret the Ottawa Convention’s definition of anti-personnel mine to permit or prohibit the current arsenal of U.S. AT mines with AHD.

### II. Claymore Mines<sup>86</sup>

The eleventh, and final, factor is the effect of the Ottawa Convention on the use of Claymore mines in joint operations.

A “Claymore mine” is a generic term for a round or rectangular directional fragmentation munition that can function either in a command-detonated or victim-activated mode. They are mostly mounted above ground level and are designed to have antipersonnel effects. However, some of the larger variants of this type can be used to damage light vehicles. When operated in the command-detonated mode, they do not meet the definition of an anti-personnel mine in the Mine Ban Treaty. However, use of Claymore-type mines with a tripwire as an initiating device is prohibited. States Parties have not adopted a common practice regarding reporting of stockpiles of Claymore-Type mines and what measures they have taken to ensure that the mines are not configured to function in a victim-activated mode.<sup>87</sup>

United States forces have Claymore mines at their disposal. The 1980 United Nations Convention on Prohibitions and Restrictions on the Use of Certain Conventional Weapons (UNCCW) limits the use of certain weapons that may cause unnecessary suffering or have indiscriminate effects.<sup>88</sup>

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84. *Landmine Monitor Report 2000: Toward a Mine-Free World*, *supra* note 46. The ICBL is concerned about the lack of reporting of prohibited AVMs with AHDs within the jurisdiction of States Parties. “Since some AVMs with AHDs are prohibited because they function like AP mines, there should be Article 7 reporting on any stockpiling or destruction of such mines.” *Id.* at Introduction: Banning Antipersonnel Mines.

85. ALTERNATIVE TECHNOLOGIES, *supra* note 27.

86. Commonly referred to as “Claymores.”

87. *Landmine Monitor Report 2001: Toward a Mine-Free World*, *supra* note 2, at Introduction: Banning Antipersonnel Mines.

Protocol II<sup>89</sup> of the convention covers land mines (including APL) and amended Protocol II regulates the use of these mines by U.S. forces.<sup>90</sup> Under Amended Protocol II,

[A]ll non-remotely delivered APL [must] be self-destructing or self-neutralizing unless they are employed within controlled, marked, and monitored minefields that are protected by fencing or other means to keep out civilians. These areas must also be cleared before they are abandoned. These restrictions, however, do not apply to claymore weapons if they are: (1) employed in a non-command detonated (tripwire) mode for a maximum period of seventy-two hours, (2) located in the immediate proximity of the military unit that emplaced them, and (3) the area is monitored by military personnel to ensure civilians stay out of the area. If a claymore weapon is employed in a tripwire mode that does not comply with these restrictions, it will be regarded as an APL and must meet the restrictions for an APL.<sup>91</sup>

Only the Claymore APL, which is activated by a man-in-the-loop, can be used under the terms of the Ottawa Convention.<sup>92</sup> United States forces' use of non-command detonated Claymores in accordance with Amended

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88. 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, U.S. TREATY DOC. NO., 103-25, at 6, 1342 U.N.T.S. 137, 19 I.L.M. 1523

89. Protocol On Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, 10 Oct. 1980, 19 I.L.M. 1529.

90. The United States is a party to the UNCCW and ratified amended Protocol II to the convention.

91. Protocol on the Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, *amended* May 3, 1996, art. 2, U.S. TREATY DOC. NO., 105-1, at 37, 35 I.L.M. 1206; *see also* Barfield, *supra* note 14, at 24.

92. ALTERNATIVE TECHNOLOGIES, *supra* note 27. The ICBL is concerned about the lack of reporting of Claymores.

Claymore mines are legal under the Mine Ban Treaty as long as they are command detonated, and not victim-actuated (used with a tripwire). States Parties that retain Claymores must use them in command-detonated mode only. . . . States Parties should take the technical steps and modifications necessary to ensure command detonation only, and should report on those measures.

*Landmine Monitor Report 2001: Toward a Mine-Free World*, *supra* note 2, at Introduction: Banning Antipersonnel Mines.

Protocol II during joint operations, however, may conflict with the obligations of a coalition partner that is a State Party to the Ottawa Convention.

### C. Attempts to Gain Consensus

In addition to its annual exhortations in the Landmine Monitor Reports, members of the ICBL took an additional step to gain consensus of States Parties at the fourth meeting of the Intersessional Standing Committee on the General Status and Operation of the Mine Ban Treaty. At this meeting, Human Rights Watch,<sup>93</sup> seeking a better understanding of what is and is not prohibited by the Ottawa Convention, developed a detailed series of questions concerning joint operations involving States Parties and non-States Parties.<sup>94</sup>

The efforts of the ICBL, however, to establish such a consensus (and to reinforce the ICBL's interpretation of what is prohibited by the Ottawa Convention) have not succeeded. The ICBL's call for "treaty signatories to insist that any non-signatories do not use antipersonnel mines in joint operations"<sup>95</sup> has gone unheeded. After four years of imploring States Parties to "sort out the different understandings about what acts are permitted and which are prohibited,"<sup>96</sup> the ICBL made the following observations:

Events since entry into force concretely demonstrated the necessity of reaching a common understanding. Since 1 March 1999,<sup>97</sup> States Parties have participated in joint combat operations with the forces of non-States Parties or armed non-state actors wherein antipersonnel mines were reportedly used by the non-State Party or non-State actor; States Parties have placed

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93. *Landmine Monitor Report 1999: Toward a Mine-Free World*, *supra* note 41 (noting that Human Rights Watch was one of the founders of the ICBL).

94. See GICHD, *Joint Operations and the Mine Ban Treaty - Memorandum for Delegates to the Fourth Meeting of the Intersessional Standing Committee on the General Status and Operation of the Mine Ban Treaty*, app. A (May 11, 2001), at [http://www.gichd.ch/pdf/mbc/SC\\_may01/speeches\\_gs/08\\_Art1\\_Joint%20Operations%20Memo%20to%20Delegates%20May%202001.pdf](http://www.gichd.ch/pdf/mbc/SC_may01/speeches_gs/08_Art1_Joint%20Operations%20Memo%20to%20Delegates%20May%202001.pdf).

95. *Landmine Monitor Report 1999*, *supra* note 41.

96. *Landmine Monitor Report 2001: Toward a Mine-Free World*, *supra* note 2, at Introduction: Banning Antipersonnel Mines.

97. March 1, 1999, was the "first day of the sixth month after the month in which the 40th instrument of ratification, acceptance, approval or accession [was] deposited." Accordingly, it is the day the Ottawa Convention entered into force. Ottawa Convention, *supra* note 3, art. 17.

their forces under the operational command of a non-State Party; States Parties have participated in joint training and peacekeeping operations with non-State Parties; and, non-States Parties have transferred antipersonnel mines stockpiled in a State Party and transited them across the territory of other States Parties for possible use in combat.<sup>98</sup>

Since the Ottawa Convention entered into force, Australia, Great Britain, and Canada have engaged in multinational military operations with U.S. forces. These operations include the Kosovo Force (KFOR); Operation Enduring Freedom (OEF) in Afghanistan, and Operation Iraqi Freedom (OIF). This article will now use the eleven factors previously discussed to analyze the effect of the Ottawa Convention on the relationship between U.S. forces and the forces of Australia, Great Britain, and Canada during joint operations. The analysis will begin with an examination of each nation's respective declarations<sup>99</sup> to the Ottawa Convention, national implementing legislation,<sup>100</sup> diplomatic policy pronouncements, and implementing guidance.

### III. Australia

#### A. National Ottawa Convention Implementing Guidance

The Australian Foreign Minister, Honorable Alexander Downer, signed the Ottawa Convention on 3 December 1997.<sup>101</sup> Pursuant to its obligation under Article 9 of the Ottawa Convention,<sup>102</sup> the Australian Parliament passed national implementation legislation on 10 December 1998. This legislation is known as the Anti-Personnel Mines Convention Act

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98. *Landmine Monitor Report 2003: Toward a Mine-Free World* (Aug. 2003), available at <http://www.icbl.org/lm/2003/>.

99. Article 19 of the Ottawa Convention states that “[t]he Articles of this convention shall not be subject to reservations.” Ottawa Convention, *supra* note 3, art. 19. Each signatory, however, was able to issue a Declaration upon ratification of the Ottawa Convention to explain that signatory's understanding of certain provisions of the treaty. Instead of issuing a Declaration upon ratification, Canada issued an Understanding.

100. Pursuant to Article 9 of the Ottawa Convention, “Each State Party shall 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 under this Convention undertaken by persons or on territory under its jurisdiction or control.” Ottawa Convention, *supra* note 3, art. 9.

101. See *Landmine Monitor Report 1999: Toward a Mine-Free World*, *supra* note 41, at *Australia—Mine Ban Policy*.

1998 (APMCA).<sup>103</sup> The APMCA was signed into law on 21 December 1998, with a commencement date of 1 July 1999.<sup>104</sup>

According to a National Interest Analysis<sup>105</sup> (NIA) prepared after signature but prior to Australia's ratification of the Ottawa Convention,

The decision to sign the Convention last December held some difficulties for the Government. Anti-personnel mines represent a significant tactical capability that has had a well-established place in ADF plans for the conduct of military operations. Finding alternatives will involve a costly research and development effort. As alternative technology does not yet exist and is some years away, the ADF for this period could face an increased risk of casualties, especially if deployed overseas, and a potentially reduced capacity for coalition operations in certain circumstances.<sup>106</sup>

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102. "Each state party shall take appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any activity prohibited to a State Party under this Convention undertaken by persons or on territory under its jurisdiction or control." Ottawa Convention, *supra* note 3, art. 9.

103. Anti-Personnel Mines Convention Act, Act No. 126, 1998 (Austl.), available at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/amca1998346/](http://www.austlii.edu.au/au/legis/cth/consol_act/amca1998346/) [hereinafter APMCA].

104. See Australasian Legal Information Institute—Commonwealth Consolidated Acts, *Anti-Personnel Mines Convention Act 1998—Notes* (July 29, 2002), available at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/amca1998346/notes.html](http://www.austlii.edu.au/au/legis/cth/consol_act/amca1998346/notes.html).

105. All treaty actions proposed by the Government are tabled in Parliament for a period of at least 15 sitting days before action is taken that will bind Australia at international law to the terms of the treaty. When tabled in Parliament, the text of proposed treaty actions are accompanied by a National Interest Analysis (NIA), which explains why the Government considers it appropriate to enter into the treaty. Australasian Legal Information Institute, *Australia and International Treaty Making Kit*, at <http://www.austlii.edu.au/au/other/dfat/infokit.html#Heading638> (last visited Mar. 19, 2004).

106. Parliament of Australia—Parliamentary Library, *Bills Digest No. 61 1998-99 Anti-Personnel Mines Convention Bill 1998*, available at <http://www.aph.gov.au/library/pubs/bd/1998-99/99bd061>. (containing the text of the NIA for the APMCA) [hereinafter APMCA NIA].

Upon its ratification of the Ottawa Convention on 14 January 1999,<sup>107</sup> Australia issued the following Declaration to the Ottawa Convention:

It is the understanding of Australia that, in the context of operations, exercises or other military activity authorized by the United Nations or otherwise conducted in accordance with international law, the participation by the ADF, or individual Australian citizens or residents, in such operations, exercises or other military activity conducted in combination with the armed forces of States not party to the Convention which engage in activity prohibited under the Convention would not, by itself, be considered to be in violation of the Convention.<sup>108</sup>

Australia further declared:

It is the understanding of Australia that, in relation to Article 1(a), the term ‘use’ means the actual physical emplacement of anti-personnel mines laid by another State or person. In Article 1(c) Australia will interpret the word ‘assist’ to mean the actual and direct physical participation in any activity prohibited by the Convention but does not include permissible indirect support such as the provision of security for the personnel of a State not party to the Convention engaging in such activities, ‘encourage’ to mean the actual request for the commission of any activity prohibited by the Convention, and ‘induce’ to mean the active engagement in the offering of threats or incentives to obtain the commission of any activity prohibited by the Convention.

It is the understanding of Australia that in relation to Article 1(1), the definition of “anti-personnel mines” does not include command detonated munitions. In relation to articles 4, 5(1), and (2), and 7(1)(b) and (c), it is the understanding of Australia that the phrase “jurisdiction or control” is intended to mean within the sovereign territory of a State Party or over which it exercises legal responsibility by virtue of a United Nations mandate or arrangement with another State and the ownership or physical possession of antipersonnel mines, but does not include the tem-

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107. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1999 Austl. T.S. No. 3, *available at* <http://www.austlii.edu.au/au/other/dfat/treaties/1999/3.html> [hereinafter Ottawa Convention (Austl.)].

108. *Id.*

porary occupation of, or presence on, foreign territory where anti-personnel mines have been laid by other States or persons.<sup>109</sup>

Australia's ability to engage in joint operations with non-signatories was the subject of much discussion during debate of the proposed legislation in the House of Representatives of the Australian Parliament. The main point of contention centered on Section 7(3) of the APMCA. Section 7(1) prohibits placing, possessing, developing, producing, acquiring, stockpiling, moving, or transferring ownership or control of APL.<sup>110</sup> As an enumerated exception to Section 7(1), Section 7(3) states:

Subsection (1) does not apply to anything done by way of the mere participation in operations, exercises or other military activities conducted in combination with an armed force that: (a) is an armed force of a country that is not a party to the Convention; and (b) engages in an activity prohibited under the Convention.<sup>111</sup>

This exception also applies "to operations, exercises or other military activities, whether or not conducted under the auspices of the United Nations."<sup>112</sup>

During debate in the Australian House of Representatives, Mr. Laurie Ferguson argued that,

[Section]

7(3) . . . is a bit of an out for Australia in regard to its involvement with allies who utilise landmines...In other words, if we are involved with an ally who still has refused to ratify, to sign, et cetera, Australia is then essentially allowed to be an onlooker, a passive participant, et cetera. That indicates moral problems for Australia--these countries failing to basically come on board.<sup>113</sup>

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109. *Id.*

110. APMCA, *supra* note 103, sec. 7(1).

111. *Id.* sec. 7(3). "However, [a] defendant bears an evidential burden in relation to the matter in subsection (3) (see subsection 13.3(3) of the Criminal Code.)" *Id.*

112. *Id.* sec. 7(4).

113. Laurie Ferguson, Address at the 39th Parliament, First Session, Commonwealth of Australia Parliamentary Debates (Nov. 26, 1998), *available at* <http://www.aph.gov.au/hansard/reps/dailys/dr261198.pdf>.

The Australian Minister of Foreign Affairs, The Honorable Alexander Downer, responded as follows:

The next issue, which a number of members raised, is a very important issue. This is the question of clause 7(3). I want to make a statement about that which should provide guidance in the future for how this clause and subclause should be interpreted. So I should like to clarify for the benefit of the House the intent and purpose of clause 7(3) of the bill in regard to joint military operations and the relevant section of the explanatory memorandum.

Clause 7(3) is not intended to be construed as a blanket decriminalisation of the activities listed in clause 7(1). There may be circumstances in which there are military operations carried out jointly with armed forces of a country which is not a party to the convention. In the course of those operations, the armed forces of that country might engage in an activity which would be prohibited under the convention. Clause 7(3) provides that a person to whom the act applies will not be guilty of an offence merely by reason of participation in such combined exercises. However, that subclause does not provide a defence in circumstances where such a person actually carries out one of the prohibited acts in the course of those combined operations . . .

I would like to add for the information of the House that the Australian Defence Force doctrinal and operation manuals will be amended to comply with the prohibitions contained in the bill, including the interpretation of clause 7(1) and (3), which I have just laid before the House. The mandatory instruction contained in these publications will have the force of law under the Defence Force Discipline Act 1982 as general orders...So it is perfectly obvious that the reason this subclause (3) is inserted is of the need for Australia to have the capacity to operate with a country that might not be a signatory to the convention. Obviously, the best example imaginable is the United States, but that does not mean the Australian Defence Force personnel, in participating with the United States forces, can contravene subclause (1).<sup>114</sup>

In keeping with Mr. Downer's directive for the Australian Defence Forces (ADF) to update doctrine and operational manuals, Australia's

Article 7 Report<sup>115</sup> for the reporting period 1 January 2002 to 31 December 2002, indicated that in addition to the APMCA, Australia promulgated Training Information Bulletin (TIB) Number 86 entitled *Conventions on the Use of Landmines: A Commanders Guide*.<sup>116</sup> This bulletin “provides commanders and staff with an interpretation of revised policy on landmines, booby traps and improvised explosive devices and their application to military operations.”<sup>117</sup> Because this bulletin carries an Australian classification of restricted, it was not used in the preparation of this article.<sup>118</sup> According to the Article 7 Report, the Australian Department of Defense also promulgated Defgram, Number 196/99 entitled *Ottawa Landmines Convention – Defence Implications and Obligations*. Defgram Number 196/99 is an information document, conveying to the defense organization its obligations under the Ottawa Convention.<sup>119</sup>

## B. Analysis of Joint Operations Involving U.S. and Australian Defense Forces

### 1. Authority to Engage in Joint Operations

As indicated in Australia’s Declaration to the Ottawa Convention and in section 7(3) of their implementing legislation, the ADF are clearly authorized to engage in joint operations with U.S. forces.<sup>120</sup> What is not

114. The Honorable Alexander Downer, Minister of Foreign Affairs, Address at the 39th Parliament, First Session, Commonwealth of Australia Parliamentary Debates (Nov. 26, 1998), available at <http://www.aph.gov.au/hansard/reps/dailys/dr261198.pdf>. [hereinafter Downer Speech].

115. Article 7 Reports originate from Article 7 of the Ottawa Convention which states that States Parties “shall report to the Secretary-General of the United Nations as soon as practicable, and in any event not later than 180 days after the entry into force of this Convention for that State Party on [among other things] the national implementation measures referred to in Article 9.” Ottawa Convention, *supra* note 3, art. 7.

116. AUSTRALIAN DEFENCE FORCE, TRAINING INFO. BULL. NO. 86, CONVENTIONS ON THE USE OF LANDMINES: A COMMANDERS GUIDE (Oct. 1999).

117. *Landmine Monitor Report 2000: Toward a Mine-Free World*, *supra* note 46, at *Australia—Mine Ban Policy*.

118. For military personnel dealing with interoperability issues between the United States and Australian forces, *TIB 86* is on file with the Center for Law and Military Operations, United States Army Judge Advocate General’s Legal Center and School, Charlottesville, VA.

119. United Nations Institute for Disarmament: Anti-Personnel Landmines, *Article 7 Reports—Australia* (reporting for time period Jan. 1, 2002 to Dec. 31, 2002), available at <http://disarmament2.un.org/MineBan.nsf/>.

120. See APMCA, *supra* note 103, sec. 7(3).

clear, however, are the details of such a cooperative arrangement. In their Declaration to the Ottawa Convention, Australia interpreted the Article 1 terms “use,” “assist,” “encourage,” and “induce” very narrowly.<sup>121</sup> This narrow interpretation focused on “actual and direct physical participation,” “actual request,” and “active engagement” in defining those actions prohibited by the convention.<sup>122</sup> According to the Declaration, “permissible indirect support such as the provision of security for the personnel of a State not party to the Convention engaging in such activities” is not prohibited.<sup>123</sup>

## 2. *Command and Control*

Due to the narrow interpretation of Article 1, the ADF should be able to assume command and control of U.S. forces. Under Australia’s Declaration to the Ottawa Convention and sections 7(1) and (3) of the APMCA, the ADF commander, however, could not order, request, or suggest that subordinate U.S. forces employ landmines—to do so would violate Australia’s obligations under Article 1 of the Ottawa Convention and could serve as the basis for criminal liability under the Commonwealth Criminal Code.<sup>124</sup>

Similarly, Australia’s narrow interpretation of Article 1 should also permit Australian forces to serve under the command and control of a U.S. commander. The U.S. commander could use Australian forces to provide security for U.S. forces in the act of emplacing APL.<sup>125</sup> The Australian forces themselves, however, could not be directly involved in placing the mines.<sup>126</sup>

The most likely command and control relationship between U.S. and Australian forces, however, is one marked by cooperation rather than subservience. The following policy statement from the Australian Embassy

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121. *See* Ottawa Convention (Austl.), *supra* note 107.

122. *Id.*

123. *Id.*

124. *See generally* APMCA, *supra* note 103, sec. 7, 32; Ottawa Convention (Austl.), *supra* note 107.

125. “In Article 1(c) Australia will interpret the word ‘assist’ to mean the actual and direct physical participation in any activity prohibited by the Convention but does not include permissible indirect support such as the provision of security for the personnel of a State not party to the Convention.” Ottawa Convention (Austl.), *supra* note 107.

126. *Id.*

in Washington D.C. concerns the cooperative effort between U.S. and Australian forces in Iraq:

The Chief of the Defence Force has full command of the ADF at all times, including all Australian Forces deployed to the Middle East Area of Operations. The commander of the Australian Middle East Area of Operations (Brig. Maurie McNairn) exercises national command over ADF forces deployed as part of Operation Falconer in the Middle East. At the unit level, ADF forces remain at all times under the command of their Australian commanding officers...Those members serving with United States forces have received a brief on their obligations under the Ottawa Convention and the Anti-personnel Mines Convention Act."<sup>127</sup>

When asked to explain how Australian troops would remain under Australian command during OIF when "the whole general command is going to be American,"<sup>128</sup> the Australian Minister of Defence, Senator Robert Hill, explained:

Well the same way really as to how it's worked in the war against terror say in Afghanistan. In this instance the coalition will be lead [sic] by the United States, but our forces are commandeered by Australians right from the Ground through to Canberra. So the United States as leader of the coalition may task the Australian force but the task would have to be accepted by the Australian commander. And if it's outside of our rules of engagement or our targeting directive, then the commander would say no.<sup>129</sup>

### 3. Rules of Engagement

The ROE in place during a joint operation or a coalition operation involving U.S. and Australian forces must not violate Australian law. During OEF and OIF, this issue was avoided altogether as coalition-wide ROE did not exist. Each coalition partner operated under its own national

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127. *Landmine Monitor Report 2003: Toward a Mine-Free World*, *supra* note 98, at *Australia—Mine Ban Policy* (citing Land Mine Use by Non-States Parties in Joint Operations, an undated policy statement).

128. *Interview with Senator the Honorable Robert Hill, Australian Minister for Defence* (ABC Radio's AM Program broadcast, Feb. 23, 2004).

129. *Id.*

ROE.<sup>130</sup> This is likely to be the model for future coalition operations involving the United States and Australia. In the unlikely event, however, that the United States and Australia operate under a common set of ROE, the best option may be to leave landmines out of the ROE altogether. This would enable the United States to deal with the use of APL as a matter of national self-defense.<sup>131</sup>

An Associated Press report issued shortly before OIF indicated that “[w]hen Australia’s Cabinet agreed at an emergency meeting . . . to commit 2,000 military personnel deployed in the Middle East to the U.S.-led war against Iraq, it also signed off on rules governing how Australian forces would wage war.”<sup>132</sup> The article went on to state the following:

Earlier this week, Defense Minister Robert Hill told Parliament Australia’s rules of engagement were more “restricted” than America’s, meaning that Australian forces had to be “more restrained in our targeting than the United States.” Alfred Boll, a specialist in military law at the Australian National University, said differing rules of engagement could make cooperation in the field more difficult, but it was unlikely to be a major impediment. “It’s less a legal issue than a practical issue, it involves greater coordination and planning than anything else,” he said.<sup>133</sup>

The Australian Defence Forces will probably operate under their own national ROE when engaging in future operations with U.S. forces, however, this is unlikely to have much of an impact on the overall operation. There may be certain tasks, however, that the ADF cannot undertake

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130. E-mail from Paul Cronan, Group Captain (Austl.), Headquarters, Australian Theatre J06, to Catherine Wallis, Squadron Leader (Austl.), Center for Law and Military Operations, The Judge Advocate General’s Legal Center and School, U.S. Army (on file at CLAMO) [hereinafter Cronan Email]. Having attended the U.S. Army, Central Command (CENTCOM) ROE Conferences, Australia drafted its ROE to be as consistent as possible with U.S. ROE as to permit the maxim level of interoperability without running afoul of Australian law. *Id.*

131. Coalition partners in joint operations are not limited by the coalition ROE in their ability to resort to national notions of the inherent right of self-defense. Resort to this authority, however, only applies to the ability of non-States Parties’ ability to use APL. The members of the ADF would still be constrained by their national legislation.

132. Peter O’Connor, *Australian Soldiers Under Stricter Rules of War than U.S. Forces*, A.P., Mar. 20, 2003, available at [http://www.banminesusa.org/news/983\\_afghan/964\\_afghan.html](http://www.banminesusa.org/news/983_afghan/964_afghan.html).

133. *Id.*

because of their obligations under the Ottawa Convention. These issues are likely to be resolved or greatly minimized during the planning and staff coordination phase of the operation.

#### 4. Operational Plans

Australia's interpretation of the Ottawa Convention does not prohibit ADF personnel from participating on a planning staff with U.S. forces. While members of the ADF can participate on a joint staff, they are prohibited from drafting operations orders directing any person to commit an act that violates section 7(1) of the APMCA.<sup>134</sup> During OIF, Australia reiterated its position by stating that members of the ADF "will not participate in planning or implementation of activities related to anti-personnel mine use in joint operations."<sup>135</sup> The participation of members of the ADF in operational planning involving the use of APL must be distinguished from participation in ROE conferences, as evidenced by Australia's participation in CENTCOM ROE conferences in preparation for OIF.<sup>136</sup>

#### 5. Operations on Previously Mined Terrain

Australian Defence Force personnel can engage in joint operations on previously mined terrain provided ADF are not directly involved in the placement of APL and the joint operation does not occur on Australian soil. Australia's Declaration addressed this issue stating that "operation or control" "does not include the temporary occupation of, or presence on, foreign territory where anti-personnel mines have been laid by other States or persons."<sup>137</sup>

#### 6. Obligation to Clear Minefields

Based on two provisions within the APMCA, it is unlikely the ADF would feel obligated by the Ottawa Convention to clear minefields from its AOR. The first provision, APMCA's definition of transfer of ownership or control, states that, "in relation to an anti-personnel mine, [it] does not

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134. See generally APMCA, *supra* note 103.

135. *Landmine Monitor Report 2003: Toward a Mine-Free World*, *supra* note 98, at *Australia—Joint Operations*.

136. Cronan E-mail, *supra* note 130.

137. Ottawa Convention (Austl.), *supra* note 107.

include the transfer of the ownership or control of land containing emplaced anti-personnel mines.”<sup>138</sup> This is consistent with Australia’s Declaration to the Ottawa Convention that the phrase “jurisdiction or control...does not include the temporary occupation of, or presence on, foreign territory where anti-personnel mines have been laid by other States or persons.”<sup>139</sup> Therefore, it is not a violation under section 7 for the ADF to “transfer ownership or control of an anti-personnel mine, whether directly or indirectly, to another person”<sup>140</sup> by relinquishing responsibility for an area contaminated with APL to U.S. forces.<sup>141</sup>

The second provision is the exception enumerated in the APMCA for failing to deliver up APL. A person is guilty of an offense under section 9(1) of the APMCA if, “the person is knowingly in the possession of an [APL] and the person does not deliver the mine, without delay, to a member of the ADF...for destruction or permanent deactivation.”<sup>142</sup> The exception, however, states that subsection 1 is not applicable if the person is possessing the APL in circumstances that are not prohibited by section 7.<sup>143</sup> As previously discussed, section 7(3) contains an exception from criminal liability for anything done by way of mere participation in joint operations with a non-State Party.<sup>144</sup> Thus, because it is not an offense for the ADF to relinquish responsibility for land contaminated by APL and it is not an offense for members of the ADF to fail to deliver APL in their possession for immediate destruction, the ADF are unlikely to feel compelled to clear all minefields within its AOR.

### 7. Training

Australian Defence Forces can engage in training with U.S. forces. The exception in section 7(3), which clears the way for the ADF to engage in joint operations with non-States Parties, uses the following language: “participation in operations, exercises or other military activities.”<sup>145</sup> Because “training” falls under the rubric of “other military activities”<sup>146</sup> it

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138. APMCA, *supra* note 103, sec. 4.

139. Ottawa Convention (Austl.), *supra* note 107.

140. APMCA, *supra* note 103, sec. 7(1).

141. *See generally id.*; Ottawa Convention (Austl.), *supra* note 107.

142. APMCA, *supra* note 103, sec. 9(1).

143. *Id.* sec. 9(2).

144. *Id.* sec. 7(3).

145. APMCA, *supra* note 103, sec. 7(3).

146. *Id.*

is, therefore, authorized. The Minister of Foreign Affairs, however, offered the following interpretation: “[subsection 7(3)] does not provide a defence in circumstances where such a person actually carries out one of the prohibited acts in the course of those combined operations.”<sup>147</sup> Hence, members of the ADF are permitted to train with U.S. forces, but cannot engage in activities that under the guise of training they otherwise would not be permitted to do in an operational setting.

#### 8. *Transit and Stockpiling*

Australia is not listed as one of the nations in which the United States maintains stockpiles of APL. Therefore, the issue of stockpiling is moot. Because the United States has stockpiles of APL in Korea, Japan, and Diego Garcia,<sup>148</sup> it is unlikely that the United States will need to stockpile APL on Australian territory or transit APL through Australian territory.

If, however, U.S. forces need to transit APL through Australian territory, the answer depends on whether the “territory” in question lies inside or outside of the borders of Australia. According to Australia’s Declaration to the Ottawa Convention,

[t]he phrase ‘jurisdiction or control’ is intended to mean within the sovereign territory of a State Party or over which it exercises legal responsibility by virtue of a United Nations mandate or arrangement with another State and the ownership or physical possession of anti-personnel mines, but does not include the temporary occupation of, or presence on, foreign territory where anti-personnel mines have been laid by other States or persons.<sup>149</sup>

The declaration is careful to distinguish between “sovereign territory,” wherein there is no question of Australia’s jurisdiction and control, and “foreign” territory, whereupon the ADF may only have temporary occupation.<sup>150</sup> In light of this distinction, Australia is not likely to permit U.S.

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147. Downer Speech, *supra* note 114.

148. *Landmine Monitor Report 2003: Toward a Mine-Free World*, *supra* note 98, at *United States of America - Stockpiling*.

149. Ottawa Convention (Austl.), *supra* note 107.

150. *Id.*

forces to transit APL over its sovereign territory, but may permit U.S. forces to transit APL through an Australian AOR in a foreign nation.

#### 9. *Anti-Vehicle Mine with Anti-Handling Device*

The APMCA qualifies the definition of APL:

[A] mine that is designed, intended or altered so as to be detonated by the presence, proximity or contact of a vehicle as opposed to a person, and that is equipped with an anti-handling device, is taken not to be an ‘anti-personnel mine’ as a result of being so equipped.”<sup>151</sup>

This definition focuses on the intent of the mine and not the effect of the mine. Because the current U.S. arsenal of AT mines with AHD in a pure munition<sup>152</sup> are designed to destroy vehicles, the ADF is less likely to take issue with them. Australian Defence Forces will focus on the intent of the U.S. AT mine, not on the possible effects of the employment of the U.S. mine.

Australia, would, however, take issue with mixed U.S. landmine munitions.<sup>153</sup> In mixed munitions, the APL does not qualify as an AHD unless it is “part of, linked to, attached to or placed under the mine.”<sup>154</sup> This is not the case in mixed U.S. landmine munitions, therefore the ADF would not be able to use or plan for the use of such munitions.

#### 10. *Claymore Mines*

The Australian Declaration to the Ottawa Convention’s definition of APL does not include command detonated munitions.<sup>155</sup> Accordingly, “[t]he Australian Army continues to use and train with command-deto-

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151. APMCA, *supra* note 103, sec. 4.

152. See ALTERNATIVE TECHNOLOGIES, *supra* note 27, at 1. As opposed to a mixed munition, which combine both AT mines and APL in the same munition and are typically used against an enemy force that is mostly mounted, but is accompanied by significant numbers of dismounted soldiers. *Id.*

153. Such munitions include the Ground Emplaced Mine Scattering System (GEMSS), the Modular-Pack Mine System (MOPMS), the Gator, and the Volcano. *Id.* at 3.

154. Ottawa Convention, *supra* note 3, art. 2.

155. Ottawa Convention (Austl.), *supra* note 107.

nated Claymore mines, and, according to the Department of Defence, has restrictions in place on their use in other than command-detonated mode.”<sup>156</sup> As previously stated, U.S. forces, in limited circumstances, are authorized to use Claymore mines in the trip-wire mode. For the ADF, however, the Ottawa Convention prohibits such use.

Australia halted operational use of AP mines on 15 April 1996, though it retains for operational use a stockpile of command-detonated Claymore mines. Use of command-detonated Claymore mines is allowed under the treaty, but not use of Claymores with tripwires. In September 1999, the Australian Defence Force confirmed that it had brought command-detonated Claymore mines to East Timor as part of its peacekeeping mission.<sup>157</sup>

Therefore, members of the ADF cannot be directly involved in emplacing Claymores in trip-wire mode. As with other forms of APL, though, the ADF could provide indirect support such as security for U.S. forces that emplace Claymores in the trip-wire mode.

#### IV. The United Kingdom

##### A. National Ottawa Convention Implementing Guidance

The United Kingdom (UK) signed the Ottawa Convention on 3 December 1997, and deposited its instruments of ratification with the Secretary-General of the United Nations on 31 July 1998,<sup>158</sup> with the following Declaration:

It is the understanding of the Government of the United Kingdom that the mere participation in the planning or execution of operations, exercises or other military activity by the United Kingdom’s Armed Forces, or individual United Kingdom nationals, conducted in combination with armed forces of States

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156. *Landmine Monitor Report 2003: Toward a Mine-Free World*, supra note 98, at Australia—Mine Ban Policy.

157. *Landmine Monitor Report 2000: Toward a Mine-Free World*, supra note 46, at Australia—Use.

158. United Nations Institute for Disarmament, *Status of Multilateral Arms Regulations and Disarmament Agreements—Mine-Ban Convention—United Kingdom of Great Britain and Northern Ireland*, at <http://157.150.197.56/TreatyStatus.nsf> (last visited Mar. 20, 2004) [hereinafter Status of Mine-Ban Convention—Great Britain].

not party to the [said Convention], which engage in activity prohibited under that Convention, is not, by itself, assistance, encouragement or inducement for the purposes of Article 1, paragraph (c) of the Convention.<sup>159</sup>

Pursuant to its obligation under Article 9 of the Ottawa Convention, the UK enacted the Landmines Act 1998 on 28 July 1998,<sup>160</sup> to become effective on the date the Ottawa Convention went into full force and effect.<sup>161</sup> In 2001, the UK enacted secondary legislation under the Landmines Act extending its provisions to British Overseas Territories.<sup>162</sup> Among the most controversial provisions of the British Landmines Act is Section 5, which provides the following:

A person is not guilty of a [violation of this Act] in respect of any conduct of his which (a) takes place in the course of, or for the purposes of, a military operation . . . or the planning of such an operation; and (b) is not, and does not relate to, the laying of anti-personnel mines in contravention of the Ottawa Convention.

In proceedings for [an offense under the Act] in respect of any conduct it is a defence for the accused to prove that: the conduct was in the course of, or for the purposes of, a military operation or the planning of a military operation; the conduct was not the laying of an anti-personnel mine; at the time of the conduct he believed, on reasonable grounds, that the operation was or would be an operation to which this section applies; and he did not suspect, and had no grounds for suspecting, that the conduct related to the laying of anti-personnel mines in contravention of the Ottawa Convention.

This [defense] applies to a military operation if: it takes place wholly or mainly outside the United Kingdom; it involves the participation both of members of Her Majesty's armed forces

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159. Declaration of the United Kingdom of Great Britain and Northern Ireland 391(1998) [hereinafter Declaration of the United Kingdom of Great Britain and Northern Ireland].

160. Landmines Act, 1998 (Eng), available at [http://www.bailii.org/uk/legis/num\\_act/la1998103.txt](http://www.bailii.org/uk/legis/num_act/la1998103.txt) [hereinafter the British Landmines Act].

161. The Ottawa Convention went into full force and effect on 1 March 1999.

162. *Landmine Monitor Report 2002: Toward a Mine-Free World*, supra note 48, at United Kingdom—Stockpiling and Destruction.

and of members of the armed forces of a State other than the United Kingdom; and the operation is one in the course of which there is or may be some deployment of anti-personnel mines by members of the armed forces of one or more States that are not parties to the Ottawa Convention, but in the course of which such mines are not to be laid in contravention of that Convention. . . .

For the purposes of this section the laying of anti-personnel mines is to be taken to be in contravention of the Ottawa Convention in any circumstances other than those where the mines are laid by members of the armed forces of a State that is not a party to that Convention.<sup>163</sup>

In July 1998, the House of Commons library drafted a research paper on the proposed Landmines Bill.<sup>164</sup> This research paper offered the following interpretation of Section 5:<sup>165</sup>

Clause 5 allows exemptions from prosecution under Clause 2 for British troops involved in joint operations with non-States Parties. The operation must take place “wholly or mainly outside the United Kingdom” and must be one in which APMs [anti-personnel mines] have been or may be deployed by non-States Parties, but in which APMs are not to be laid in contravention of the Convention (ie by a State Party).

British personnel would not in these circumstances be allowed to lay APMs, under Clause 5 (2)(b) and 5 (5). However, other conduct which would otherwise be an offence is allowed if it “takes place in the course of, or for the purposes of, [such] a military operation...or the planning of such an operation.”

The Clause is designed to remove any potential legal difficulty arising from the cooperation of British forces with those of other countries, which are not parties to the Convention and still include APMs in their arsenals. Within NATO, this includes Turkey and the USA. British forces might, for example, escort

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163. British Landmines Act, *supra* note 160, sec. 5.

164. PAUL BOWERS ET AL., HOUSE OF COMMONS LIBRARY RESEARCH PAPER 98/74, THE LANDMINES BILL (1998). “Library Research Papers are compiled for the benefit of Members of Parliament and their personal staff.” *Id.* at i.

165. The term “section” is also referred to as “clause” in the research paper.

US military convoys containing APMs or build bridges over which such convoys are driven.<sup>166</sup>

Since the passage of the British Landmines Act, further interpretation of the act and the Ottawa Convention by British ministry officials has expanded the UK's initial narrow interpretation of the Ottawa Convention. For example, at the Ottawa Convention Standing Committee on the General Status and Operation of the Convention, the British representative issued the following statement:

The United Kingdom has a broad interpretation of assistance under the terms of Article 1 of the Convention. Unacceptable activities include: planning with others for the use of anti-personnel mines (APM); training others for the use APM [sic]; agreeing [sic] Rules of Engagement permitting the use of APM; agreeing [sic] operational plans permitting the use of APM in combined operations; requests to non-States Parties to use APM; and providing security or transport for APM. Furthermore, it is not acceptable for UK forces to accept orders that amount to assistance in the use of APM.

UK forces should not seek to derive direct military benefits from the deployment of APM in combined operations. It is not, however, always possible to say in advance that military benefit will not arise where this results from an act that is not deliberate or pre-planned.<sup>167</sup>

The Landmine Monitor Report 2003 was cautiously optimistic about the apparent shift in the UK's position, stating that,

The Ministry of Defence also reported to Parliament on 24 February 2003 that, "United Kingdom Forces will not provide any assistance for the use of antipersonnel landmines." However, it earlier stated that "the mere participation in the planning or execution of operations, exercises or other military activity by the UK's Armed Forces, or individual UK nationals, conducted in combination with armed forces of States not party to the Ottawa

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166. *Id.* at 30.

167. GICHD, *Ottawa Convention Standing Comm. on the General Status and Operation of the Convention - United Kingdom Intervention on Art. 1* (May 16, 2003), at [http://www.gichd.ch/pdf/mbc/SC\\_may03/speeches\\_gs/UK%20Art%201.pdf](http://www.gichd.ch/pdf/mbc/SC_may03/speeches_gs/UK%20Art%201.pdf) [hereinafter *General Status and Operation of the Convention—United Kingdom*].

Convention, which engage in activity prohibited by that Convention, is not, by itself, assistance, encouragement or inducement.” Landmine Action and other campaigning organizations continue to argue against this definition of assistance, and believe that Section 5 of the Landmines Act 1998 could serve as a loophole in the prohibition against use.<sup>168</sup>

It is not clear whether the apparent shift in the UK’s position is an actual policy change or a diplomatic maneuver. The research paper commissioned by Parliament prior to the passage of the British Landmines Act, provides:

Critics have argued that Clause 5 “amounts to an exemption or reservation from the Ottawa Convention which allows no reservations (Article 19).” It is open to question whether other States Parties would view the matter in these terms, and whether Clause 5 would be seen as either inconsistent with the UK’s obligations under the Convention or, more generally, inconsistent with the spirit of the Convention.

If it is intended merely to facilitate co-operation by allowing British personnel to “turn a blind eye” to American policy on APMs, then this might not be seen as contradicting the obligation on the British Government to discourage the use of APMs and to promote accession to the Convention. This might be the case in particular if, at the diplomatic level, the UK actively supported the Convention and urged the USA to become party to it. If it led to greater involvement, then problems might arise. Other States Parties might take up the procedures for verification of compliance and settlement of disputes as set out in Articles 8, 10 and 11 of the Convention. A definitive opinion might then be sought from the International Court of Justice. If this were to go against the UK, then the Government would have the choice of amending domestic legislation or withdrawing from or seeking to amend the Convention.<sup>169</sup>

While the actual position of the British Government may shift with the political climate, the British Landmines Act clearly takes a very narrow

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168. *Landmine Monitor Report 2003: Toward a Mine-Free World*, *supra* note 98, at *United Kingdom - Mine Ban Policy*

169. BOWERS ET AL., *supra* note 164, at 31 (citations omitted).

interpretation of the key language within the Ottawa Convention. This bodes well for the prospect of joint operations involving British and U.S. forces.

## B. Analysis of Joint Operations Involving U.S. and British Forces

### 1. Authority to Engage in Joint Operations

As evidenced by the close cooperation between U.S. and British forces in Kosovo, Afghanistan, and Iraq, British forces are clearly authorized to engage in joint operations with U.S. forces. The United Kingdom left no doubt of its intention to engage in joint operations with the United States in its declaration to the Ottawa Convention and its subsequent implementing legislation.<sup>170</sup> One major difference between the British interpretation and the Australian interpretation, however, is that the British consider providing security for APL to be a violation of the Ottawa Convention.<sup>171</sup> It is not clear, however, if this only applies to security for the APL or if it also applies to providing security for U.S. forces emplacing APL.

### 2. Command and Control

The Ottawa Convention does not prohibit U.S. forces from falling under the command of British forces or *vice versa*, as evidenced by Operation Joint Guardian.

The nineteen member nations of NATO, along with twenty other troop contributing nations (TCNs), combined to conduct Operation Joint Guardian, the NATO peacekeeping mission in Kosovo. . . . The NATO-led Operation Joint Guardian fell under the political direction and control of the North Atlantic Council (NAC). Military control of KFOR [Kosovo Forces] included a command structure that began with NATO's Supreme Allied Commander, Europe (SACEUR), General Wesley Clark, who was dual-hatted as U.S. Commander-in-Chief, European Command (CINCEU-

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170. See generally British Landmines Act, *supra* note 160; Declaration of the United Kingdom of Great Britain and Northern Ireland, *supra* note 159.

171. *Landmine Monitor Report 2003: Toward a Mine-Free World*, *supra* note 98, at *United Kingdom—Mine Ban Policy* (explaining that providing security or transport for APM is an unacceptable activity).

COM). SACEUR designated NATO's Allied Rapid Reaction Corps (ARRC) Commander, Lieutenant General Sir Michael Jackson, from the United Kingdom, as the first Commander, Kosovo Forces (COMKFOR). KFOR consisted of five Multi-National Brigades with troops from all nineteen NATO member nations as well as twenty other troop contributing nations...[to include] the U.S.-led "Task Force Falcon."<sup>172</sup>

Thus, a U.S. four-star general commanded a British three-star general who commanded a U.S. one-star general.

This does not mean, however, that such command relationships are without reservation. British forces, for example, are prohibited by the Ottawa Convention from requesting non-States Parties to use APM and from accepting orders that amount to assistance in the use of APM.<sup>173</sup> In the above example, the British three-star general would not be able to approve a request from the U.S. one-star general to employ APL. Such a request would have to be forwarded up the chain-of-command to the U.S. four-star general for decision. Alternatively, the U.S. one-star commander could unilaterally make such a decision relying upon the inherent right of self-defense under U.S. law.

### 3. Rules of Engagement

The Operation Joint Guardian example emphasizes the need to develop ROE that take into consideration the different legal constraints placed upon TCNs. According to a British representative's statement at the Ottawa Convention Standing Committee on the General Status and Operation of the Convention, the United Kingdom cannot agree to ROE that permit the use of APL.<sup>174</sup> Coalition ROE can be developed using language similar to that used in the Kosovo ROE. For example, "Nothing in these ROE requires any persons to perform actions against national laws to which they are subject. National forces may issue amplifying instructions, or translations of the Aide-Memoire or Soldiers Cards to ensure

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172. CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, LESSONS LEARNED FOR JUDGE ADVOCATES—LAW AND MILITARY OPERATIONS IN KOSOVO, 1999-2001, 84-7 (11 Dec. 2001).

173. See British Landmines Act, *supra* note 160, sec. 2.

174. *General Status and Operation of the Convention—United Kingdom*, *supra* note 167.

compliance with their national law.”<sup>175</sup> The best option may be to leave landmines out of the ROE altogether.

#### 4. *Operational Plans*

According to a statement rendered by the British representative at the Ottawa Convention Standing Committee on the General Status and Operation of the Convention, the UK cannot agree to operational plans that permit APL use in combined operations.<sup>176</sup> As pointed out by the ICBL, this must be viewed in conjunction with the UK’s Declaration to the Ottawa Convention that, “the mere planning or execution of operations, exercises or other military activity by the UK’s Armed Forces...conducted in combination with armed forces of States not Party to the Ottawa Convention, which engage in activity prohibited by that Convention, is not, by itself, assistance, encouragement or inducement.”<sup>177</sup>

This language gives the UK latitude to engage in planning joint operations, provided those plans do not direct British forces to commit an act prohibited by the Ottawa Convention.

#### 5. *Operations on Previously Mined Terrain*

According to a statement rendered by the British representative at the Ottawa Convention Standing Committee on the General Status and Operation of the Convention, “UK forces should not seek to derive direct military benefits from the deployment of APM in combined operations. It is not, however, always possible to say in advance that military benefit will not arise where this results from an act that is not deliberate or pre-planned.”<sup>178</sup> When read in light of British forces’ ability to engage in planning for joint operations, the statement indicates that British forces may be

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175. USCINCEUR OPLAN 4250-99, *supra* note 51.

176. General Status and Operation of the Convention—United Kingdom, *supra* note 167.

177. Status of Mine-Ban Convention—Great Britain, *supra* note 158; see *Landmine Monitor Report 2003: Toward a Mine-Free World*, *supra* note 98, at *United Kingdom—Mine Ban Policy*.

178. General Status and Operation of the Convention—United Kingdom, *supra* note 167.

able to take advantage of existing minefields if British forces were not involved in planning for or emplacing the minefield at issue.

#### 6. *Obligation to Clear Minefields*

In light of the narrow interpretation given certain provisions of the Ottawa Convention by the British Landmines Act,<sup>179</sup> it is unlikely that the UK would feel obligated to clear a minefield created by U.S. forces before relinquishing control of the minefield.

#### 7. *Training*

Britain's Declaration to the Ottawa Convention clearly states that, "the mere planning or execution of operations, exercises or other military activity by the UK's Armed Forces...conducted in combination with armed forces of States not Party to the Ottawa Convention, which engage in activity prohibited by that Convention, is not, by itself, assistance, encouragement or inducement."<sup>180</sup> This implies that mere participation in training exercises is not prohibited. British forces, however, cannot train others for the use of APL.<sup>181</sup>

#### 8. *Transit and Stockpiling*

In a letter dated 19 November 2003,<sup>182</sup> the Chair, Bar Human Rights Committee, Peter Carter, referenced a previous letter which stated,

[I]t is clear that the stockpiling of US antipersonnel mines on UK territory, including Diego Garcia, or the transit of antipersonnel mines across UK territory would constitute a breach of our obli-

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179. See British Landmines Act, *supra* note 160.

180. Status of Mine-Ban Convention—Great Britain, *supra* note 158.

181. *General Status and Operation of the Convention—United Kingdom*, *supra* note 167.

182. Letter from Peter Carter, Chair, Bar Human Rights Committee, to Honorable Jack Straw, Secretary of State for Foreign and Commonwealth Affairs (Nov. 19, 2003) available at <http://www.barhumanrights.org.uk/pdfs/Jack%20Straw%20DG.pdf> (quoting Letter from Honorable Adam Ingram, Minister of State for the Armed Forces, to Diana Princess of Wales Memorial Fund and the ICBL (Feb. 25, 2003)) [hereinafter Letter to Secretary of State for Foreign and Commonwealth Affairs].

gations under the Ottawa Convention. . . . The United States...has assured us that it will respect our international treaty obligations. Any landmines that may be on US naval ships or military aircraft are not under the jurisdiction or control of the UK. However, if antipersonnel mines were off-loaded on to land, e.g. to be transferred from ship to aircraft, this would not be consistent with our Ottawa Convention obligations.<sup>183</sup>

The letter earlier insinuated that the British government did not consider the U.S. ships at Diego Garcia to be under the “jurisdiction or control” of the British government because the ships were moored just beyond the three mile territorial limit.<sup>184</sup> At the Ottawa Convention Standing Committee on the General Status and Operation of the Convention, the British representative stated,

In the view of the UK, permitting transit across UK territory would amount to assistance under the terms of Article 1. Certain assessments of the UK’s position on this matter have, however, been inaccurate. If APM are on foreign naval ships in the territorial waters of a UK Dependent Territory, these naval ships remain the sovereign territory of the state in question. In the UK’s legal interpretation such APM are not on UK territory provided they remain on the ships.<sup>185</sup>

Thus, even though the U.S. ship may be located in the territorial waters of the UK, the ship and its contents will not be considered to be under the UK’s jurisdiction and control. Therefore, the UK would not violate its obligations under the Ottawa Convention in permitting the U.S. to transmit APL through the UK’s territorial waters. As evidenced by the letter from Peter Carter to the British Secretary of State for Foreign and Commonwealth Affairs,<sup>186</sup> members of the British legal community have closely monitored this issue.

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183. *Id.*

184. *Id.*

185. General Status and Operation of the Convention—United Kingdom, *supra* note 167.

186. *See* Letter to Secretary of State for Foreign and Commonwealth Affairs, *supra* note 182.

9. *Anti-Vehicle Mines with Anti-Handling Devices*

According to a research paper commissioned by British Parliament prior to passage of the British Landmines Act,

Clause 1 includes a list of definitions used in the Bill, reproducing the definitions contained in Article 2 of the Ottawa Convention. Article 2 and Clause 1 makes an important distinction between landmines “designed to be detonated by the presence, proximity or contact of an individual,” ie APMs (which are prohibited by Article 1 of the Convention), and landmines “designed to be detonated by the presence, proximity of [sic] contact of a vehicle” ie Anti-Tank Mines (which are not). ATMs are also not prohibited if they are fitted with anti-handling devices which are intended to prevent them from being intentionally neutralized or tampered with.<sup>187</sup>

At the Ottawa Convention Standing Committee on the General Status and Operation of the Convention, the British representative further stated,

On the definition of anti-personnel mines in the Convention, the UK does not accept that certain so-called sensitive fuses for anti-vehicle or anti-tank mines are banned by the Convention. We have indicated that we are prepared to address any humanitarian issues that might arise from such fuses in the CCW or other appropriate fora. To take forward such discussions in a positive way the requirement is for evidence on the nature of humanitarian concerns, which has generally not been forthcoming.

To return to so-called legal arguments on the definition of anti-personnel mines is a retrograde step (sic). Differences on detailed interpretation of treaties is a normal situation. We have worked closely on our legal interpretation of the definition, as we did at the Oslo conference, and are confident in our interpretation. If we are to move forward on fuses, we need to look at the substantive humanitarian issues and not get bogged down in a fruitless search for an elusive consensus.<sup>188</sup>

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187. BOWERS ET AL., *supra* note 164, at 29.

188. *General Status and Operation of the Convention—United Kingdom*, *supra* note 167.

The UK has taken a strong position that the Ottawa Convention does not apply to AT mines with AHD, even though such mines may be fitted with fuses that can be triggered by the unintentional acts of people, thereby rendering the AT mine equivalent to an APL.<sup>189</sup> This represents a narrow interpretation of the restrictions applicable to AT mines. This interpretation also focuses on the “intent” of the mine and not the “effect” of the mine. Accordingly, the UK is not likely to have a problem engaging in joint operations with U.S. forces wherein the U.S. forces employ the U.S. arsenal of pure AT mines. As is the case with Australia, however, the UK’s Ottawa Convention obligations will prevent it from using or planning for the use of mixed AT munitions.

#### 10. Claymore Mines

A directional weapon, including the Claymore mine, is not prohibited under the British Landmines Act if it is detonated by deliberate human command.<sup>190</sup> Thus, British forces can engage in joint operations with U.S. forces and command-detonated Claymores may be employed by either force. British forces, however, cannot take part in the limited use by U.S. forces of Claymores triggered by trip-wires because the mine is not detonated by deliberate human command.<sup>191</sup>

Overall, the UK’s implementing legislation represents the narrowest interpretation of the prohibitions of the Ottawa Convention. In light of the conflicting guidance put forth by the British Government, however, the UK’s position on landmines appears highly susceptible to political influences. Thus, what may appear to be a permissive policy with regard to joint operations between UK and U.S. forces is, in fact, subject to political uncertainty.

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189. See *Landmine Monitor Report 2003: Toward a Mine-Free World*, *supra* note 98, at *United Kingdom - Mine Ban Policy*.

190. BOWERS ET AL., *supra* note 164, at 29.

191. *Id.* See generally *Landmine Monitor Report 2001: Toward a Mine-Free World*, *supra* note 2, at *United Kingdom—Mine-Ban Policy*.

## V. Canada

## A. National Ottawa Convention Implementing Guidance

Canada became the first state to ratify the Ottawa convention by signing and depositing its ratification documents with the United Nations on 3 December 1997.<sup>192</sup> The decision to sign and ratify the Ottawa Convention faced considerable opposition from the leadership within the Canadian military.

Canadian military leaders tried in vain to battle then-foreign affairs minister Lloyd Axworthy's initiative to have Canada destroy all its stocks of antipersonnel landmines. . . . At the time the military warned a ban on such weapons would put Canadian soldiers' lives at risk and result in heavy casualties.<sup>193</sup>

After ratifying the Ottawa Convention, the Canadian Military sought to determine whether any operational effectiveness was lost and if so, to explore alternative means in compliance with the Ottawa Convention.<sup>194</sup>

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192. United Nations Institute for Disarmament, *Status of Multilateral Arms Regulations and Disarmament Agreements—Mine-Ban Convention—Canada*, at <http://157.150.197.56/TreatyStatus.nsf> (last visited Mar. 20, 2004) [hereinafter *Status of Mine-Ban Convention—Canada*].

193. David Pugliese, *Troops Could Be Charged for Landmines Violations*, OTTAWA CITIZEN, Jan. 30, 2002, at 1.

Canadian generals such as Jean Boyle and Maurice Baril fought against the destruction of the devices, arguing they have a role to play in protecting Canadian troops. Defence leaders noted in the past, Canada has always used anti-personnel landmines properly and only against military targets. The cost of eliminating the landmines, warned one Canadian Forces report, "will be high in terms of casualties to Canadian soldiers. . . . [I]n September 1996, Gen. Baril, then head of the army, warned the army would not be able to carry out its assignments if anti-personnel landmine stocks were destroyed. Gen. Baril recommended that Canada's relatively small stockpile of 90,000 such landmines be decreased only by one-third by 2000. But a year later, Mr. Axworthy has succeeded in persuading the government to announce the destruction of all Canadian anti-personnel landmines, and Gen Baril--just promoted to Chief of the Defence Staff--had a significant change of mind. He called anti-personnel mines the "weapon of a coward," sparking an uproar among Canadian Second World War veterans, who counted on the devices as part of the arsenal used to defeat the Nazi regime.

*Id.*

A study conducted by students at the Royal Military College of Canada concluded that significant combat capability was lost as a result of the removal of APL from the Canadian arsenal.<sup>195</sup>

In a Statement of Understanding upon the signing and ratification of the Ottawa Convention, the Canadian government provided the following statement:

It is the understanding of the Government of Canada that, in the context of operations, exercises or other military activity sanctioned by the United Nations or otherwise conducted in accordance with international law, the mere participation by the Canadian Forces, or individual Canadians, in operations, exercises or other military activity conducted in combination with the armed forces of States not party to the Convention which engage in activity prohibited under the Convention would not, by itself, be considered to be assistance, encouragement or inducement in accordance with the meaning of those terms in article 1, paragraph 1(c).<sup>196</sup>

The UK's Declaration is virtually identical to Canada's Statement of Understanding.<sup>197</sup> The conciliatory nature of the Statement of Understanding reflects the Canadian military's opposition to ratification of the Ottawa Convention.

Pursuant to its obligation under Article 9 of the Ottawa Convention,<sup>198</sup> Canada enacted the Anti-Personnel Mines Convention Implemen-

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194. Royal Military College of Canada, *Anti-personnel Landmines—Has an Operational Capability Been Lost?* (May 7, 2003), at [http://www.rmc.ca/academic/gradrech/military5\\_e.html](http://www.rmc.ca/academic/gradrech/military5_e.html) [hereinafter RMC]. “This report is an unofficial document. The views expressed in the report are those of the authors and do not necessarily reflect the opinion or policy of the Royal Military College, the Canadian Forces, the Department of National Defence or the Government of Canada.” *Id.*

195. *Id.*

196. *Understanding of Canada*, in UNITED NATIONS, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS OF 31 DECEMBER 2003 391, ST/LEG/SER.E/22 (2004) [hereinafter Ottawa Convention (Can.)].

197. *Compare id.*, with Declaration of the United Kingdom of Great Britain and Northern Ireland, *supra* note 159.

198. “Each State Party shall 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 under this Convention undertaken by persons or on territory under its jurisdiction or control.” Ottawa Convention, *supra* note 3, art. 9.

tation Act (Canadian Landmines Act).<sup>199</sup> According to the Canadian Landmines Act, a party is not prohibited from the following: “participation in operations, exercises or other military activities with the armed forces of a state that is not a party to the Convention that engaged in an activity prohibited under [this act], if that participation does not amount to active assistance in that prohibited activity.”<sup>200</sup>

The legal implications of the Canadian Landmines Act on joint operations were detailed in a Canadian Army Doctrine and Training Bulletin (ADTB).<sup>201</sup> The conclusions set out in the ADTB indicate that Canada, despite being a core group member and a driving force behind the Ottawa Convention, has interpreted the effects of the Ottawa Convention on joint operations very narrowly. The ADTB can be summed up as follows:

The effect of The Ottawa Treaty on Canadian soldiers serving on operations is far reaching. Now, and in the future, troops will not use, request, even indirectly, or encourage the use of APL. In combined operations, Canada will not agree to Rules of Engagement, or operational plans, which authorise use of APL. Canadian staff may not participate in planning the use of APL and Canadians who are in positions of command will not authorise non-Canadian subordinates’ to use APL. This in no way precludes non-signatories from using APL in defending their contingents.<sup>202</sup>

#### B. Analysis of Joint Operations Involving U.S. and Canadian Forces

The Judge Advocate General of the Canadian Defense Forces addressed the issue of interoperability when participating in an alliance. Brigadier General Pitzul<sup>203</sup> explained that,

Nations are bound by customary international law but they are not bound by treaty law unless they have signed and ratified a particular treaty.<sup>204</sup> Even in a coalition of the closest allies, there

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199. Anti-Personnel Mines Convention Implementation Act, 1997, C.S. ch. 33 (Can.) [hereinafter Canadian Landmines Act].

200. *Id.* at 6(d).

201. ADTB, *supra* note 43.

202. *Id.*

203. Since delivering the speech, General Pitzul was promoted to the rank of major general.

will inevitably be international legal treaties that have a direct impact on the planning of, training for, and conduct of an operation that some coalition partners will be bound by and others will not . . . The same interoperability concerns apply equally to the [Ottawa Convention] . . . The interoperability issues are obvious although participation in a coalition operation with non-APM signatories is not prohibited. It is Canada's clearly stated national view that in the context of operations, exercises or other military activity sanctioned by the UN or otherwise conducted in accordance with international law that mere participation with nations who engage in the use of APMs would not in itself be considered to be assistance, encouragement or inducement and therefore not a breach of the APM Convention. As a result, it is a challenge that must be managed.<sup>205</sup>

Canada's interpretation of its obligations under the Ottawa Convention has not been without detractors. In December 1998, the human rights organization, Mines Action Canada (MAC),<sup>206</sup> analyzed Canada's compliance with the Ottawa Convention during the convention's first year. In its first report on compliance, MAC stated, "Among signatories, it is unfortunate that some NATO allies, including Canada, are yielding to American pressure and interpreting the treaty's prohibition on transfer not to include

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204. The ICBL, however, has taken a much broader view of the application of the provisions of the Ottawa Convention to non-States Parties,

While non-state actors are not bound directly by the Mine Ban Treaty, non-state combatants involved in armed conflict are bound by customary international humanitarian law as well as Protocol II Additional to the Geneva Conventions of 1949. The ICBL has, since its inception, held the view that APMs were already banned under customary law and Protocol II, thus non-state actors would also be legally bound to give up this illegal weapon.

*Landmine Monitor Report 1999: Toward a Mine-Free World*, *supra* note 41.

205. Pitzul, *supra* note 39, at 316-17.

206. Mines Action Canada is a key member organization of the ICBL. Mines Action Canada, *The Landmines Ban Treaty: Year Zero* (Dec. 10, 1998), available at <http://www.minesactioncanada.com/documents/088.html>.

'transit' of American mines through a country."<sup>207</sup> Mines Action Canada also noted the following:

Canada . . . pledged \$100 million over five years last December [1997] for treaty implementation, including assistance for demining and mine victims...Lack of transparency on the part of governments makes it difficult to know where the money is going and to assess how usefully it is being spent. It is thought that a high ratio around the world (17% in Canada) is being channeled into research and development of new "mine action" technologies...However, some of the research that is being funded under the flag of "mine action" may have more relevance to military operations than humanitarian demining . . . In Canada, there are indications that some of the money allocated for treaty implementation is being considered for the promotion and development of military replacements for anti-personnel mines. MAC strongly opposes such a use of the Canadian Landmines Fund.<sup>208</sup>

The press also monitors the Canadian Forces use of landmines. According to the Inter Press Service, "[a]fter leading the world to adopt an anti-landmine treaty, Canada quietly broke the spirit of the agreement when its military officials allowed United States troops to lay mines around Canada's camp in Afghanistan."<sup>209</sup> Michael Byers, a professor of international law at Duke University, concluded:

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207. *Id.* para. 3.1.

208. *Id.* para. 3.4.

209. Mark Bourrie, *Afghanistan: Canada "Betrayed Spirit of Landmine Treaty,"* INTER PRESS SERVICE, Apr. 11, 2003, available at LEXIS, News Library.

Michael Byers, a professor of international law at Duke University . . . reports in the current issue of the 'London Review of Books' that the U.S. military "ordered" the Canadians to put landmines around their camp during the U.S.-led "war" against al-Qaeda terrorists in 2001-02. When the Canadians refused, citing the international landmine treaty, the U.S. troops offered to lay the mines. The Canadians agreed . . . A senior Canadian military officer who served in Afghanistan confirmed Byers' claim. The officer, who served at the Canadian base in Kandahar and asked to be unnamed, said the mines were "an integral part of the defence perimeter of the Canadian base."

*Id.*

[I]n terms of this particular incident (in Afghanistan), I would not say at the moment that Canada violated its obligations. It is just that from a policy perspective it is inconsistent to be a strong supporter of the ban on landmines and to be putting your soldiers into positions where landmines are used to protect them.”<sup>210</sup>

Clearly Canada recognized that ratification of the Ottawa Convention would affect its ability to engage in joint operations with the United States. In order to maintain its position as the driving force behind the Ottawa Convention and simultaneously attempting to allay some of the concerns of its military, Canada issued a Statement of Understanding that permitted engaging in joint operations with non-States Parties.<sup>211</sup> Canada’s narrow interpretation of some of the provisions of the Ottawa Convention, as evidenced in the ADTB on APL, further increased the scope of Canada’s ability to engage in joint operations. This narrow interpretation, however, is counterbalanced by the media’s close scrutiny of Canadian forces activities with non-States Parties during joint operations.

### *1. Authority to Engage in Joint Operations*

“Canada may participate in combined operations with a state that is not party to the Convention, however, Canadian troops will not use, request, even indirectly, or encourage the use of anti-personnel mines by others.”<sup>212</sup> While this policy authorizes participation in joint operations, it recognizes that such participation is necessarily circumscribed by the Ottawa Convention. When read in conjunction with the remaining policy pronouncements in the ADTB, Canada’s position appears to enable Canadian forces to operate with non-States Parties, even when the parties actively utilize APL during the joint operation.<sup>213</sup> The distinction drawn by Canada is that Canadian forces cannot, themselves, be actively involved in the decision by the non-States Party to use APL.<sup>214</sup>

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210. *Id.*

211. *See generally* Ottawa Convention (Can.), *supra* note 196.

212. ADTB, *supra* note 43.

213. *See Landmine Monitor Report 1999: Toward a Mine-Free World*, *supra* note 41, at *Canada—Mine Ban Policy*.

214. *Id.*

## 2. *Command and Control*

“The use of anti-personnel mines will not be authorized in cases where Canada is in command of a combined force. Likewise, if Canadian Forces Personnel are being commanded by other nationalities, they are prohibited from participating in the use of, or planning for the use of anti-personnel mines.”<sup>215</sup> Canadian forces personnel can assume command over the forces of non-States Parties and serve under the command of such forces. The Canadian force commander, however, cannot direct the forces of the non-State Party to use munitions prohibited by the Ottawa Convention. For this reason, Canada’s interpretation of the scope of the prohibitions define the scope of their ability to exert command and control. When serving under the command of a non-State Party, Canadian forces cannot undertake any taskings or missions that would cause them to violate the Canadian Landmines Act. Therefore, pre-operational planning, to include the drafting of common or parallel ROE, will be crucial to the success of the operation.

## 3. *Rules of Engagement*

Canada’s position on combined ROE is fairly permissive, possibly the most permissive of the nations studied in this article. According to the ADTB,

When participating in combined operations, Canada will not agree to the Combined Rules of Engagement section that would authorize the use by the combined force of anti-personnel mines. This would not, however, prevent states that are not signatories to the Anti-Personnel Mine Convention from using anti-personnel mines for the defence of their contingents . . . The right of states which are not signatories or party to the Anti-Personnel Mine Convention to use anti-personnel mines is not prevented by the convention.<sup>216</sup>

The plain language of this policy indicates that Canadian forces can agree to common ROE with U.S. forces. The only limitation, however, is that Canadian forces cannot agree to that portion of the ROE that permits U.S. forces to employ APL. As suggested by Canada’s reference to the

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215. ADTB, *supra* note 43.

216. *Id.*

right of a nation to take certain actions (such as the use of APL) in self-defense, the issue of APL is best left unsaid in the ROE. Canada explicitly recognizes the right of non-States Parties to use APL, especially with regard to self-defense.<sup>217</sup>

#### 4. *Operational Plans*

The development of combined ROE is closely linked to the ability to engage in joint operational planning. The Canadian Army Doctrine and Training Bulletin expressly permits members of the Canadian forces to serve on multinational planning staffs.<sup>218</sup> The main caveat, however, is that personnel “may not participate in planning for the use of anti-personnel mines.”<sup>219</sup> The Canadian Army Doctrine and Training Bulletin also clarified Canada’s position on participating on a joint planning staff that is planning for the use of APL wherein it stated, “This would not prevent a state that is not a signatory or party to the Anti-Personnel Mine Convention from participating in a multi-national force or planning the use of anti-personnel mines by its own forces for strictly national purposes. Canadian Forces personnel will not be involved in such planning.”<sup>220</sup> Thus, Canadian forces can participate on a planning staff with U.S. forces, but cannot participate in the specific portion of the planning process in which the use of APL is considered. Such involvement enables Canadian forces to be fully informed of the actions of its coalition partners, while still adhering to the Ottawa Convention.

#### 5. *Operations on Previously Mined Terrain*

The provisions of the ADTB with regard to operations on previously mined terrain are fairly explicit.

Canadian troops may take over operational responsibility for an area in which anti-personnel mines have previously been laid. If self-neutralizing or self-destructing anti-personnel mines have been used, Canada will not seek their replacement once they expire. If the anti-personnel mines are not self-neutralizing or

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217. *See generally id.*

218. “Canadians may participate in operational planning as members of a multinational staff.” ADTB, *supra* note 43.

219. *Id.*

220. *Id.*

self-destructing, Canada will only monitor the minefield and maintain the marking, but will not conduct the maintenance thereof. Under no circumstances shall a Canadian request or encourage the use of anti-personnel mines in an area planned for occupation by Canadian troops.<sup>221</sup>

In light of President Bush's new policy that U.S. forces will only use self-destructing APL and AT mines (outside of Korea),<sup>222</sup> Canada's position is straightforward—Canada can assume responsibility for an area that had been previously mined by U.S. forces. Once the U.S. landmines self-destruct, however, Canada will not replace them. The next logical question is: does Canada bear an affirmative obligation to clear the minefield rather than simply to monitor the minefield until the mines self-destruct?

#### 6. *Obligation to Clear Minefields*

As with many legal issues, the answer to the question posed in the previous paragraph is, "it depends." According to the ADTB,

Responsibility for clearing minefields will depend upon the circumstances. There is no legal obligation to clear mines simply because Canada is conducting operations in an area of responsibility during peace support or other operations. An obligation may arise at the cessation of hostilities depending upon circumstances such as the degree of control exercised over the territory, the terms of any peace accord or other bilateral or multilateral agreement.<sup>223</sup>

In contrast to Australia's focus on the "jurisdiction or control" language of the Ottawa Convention to avoid any affirmative obligation to clear landmines from territory over which it only maintains temporary control,<sup>224</sup> the Canadian position infers that such an obligation may exist.<sup>225</sup> Given

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221. *Id.*

222. New United States Policy on Landmines, *supra* note 31.

223. ADTB, *supra* note 43.

224. *See* Ottawa Convention (Austl.), *supra* note 107.

225. *See generally* Canadian Landmines Act, *supra* note 199.

the temporary nature of self-destructing landmines,<sup>226</sup> however, this is likely to be a moot point with regard to U.S. landmines.

### 7. Training

Canada's position with regard to training is clear: "Countermine training is permitted. The Anti-Personnel Mine Convention specifically permits signatories to retain a small number of antipersonnel mines for research and development and training in mine detection, mine clearance and mine destruction techniques."<sup>227</sup> The Canadian policy does not permit Canadian forces to engage in training exercises in a manner that would violate other provisions of the Ottawa Convention or the Canadian Landmines Act.<sup>228</sup> For example, Canadian forces would not be able to serve on a planning staff for a training exercise that planned for the employment of APL.

### 8. Transit

Canada does not interpret the Ottawa Convention to prohibit U.S. forces from moving their arsenal of APL or AT mines across Canadian territory or through Canadian waters. Canada distinguishes between the transfer and the transit of APL.<sup>229</sup> Specifically, the ADTB defines the transit of APL to be, "the movement of anti-personnel mines within a state, or

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226. New United States Policy on Landmines, *supra* note 31, at 3.

Self-destructing/self-deactivating landmines have been rigorously tested and have never failed to destroy themselves or become inert within a set time. Furthermore, all are battery operated. In the event that a self-destructing/self-deactivating mine malfunctions, the battery will die at a set period of time (90 days for example) and render the mine inert.

*Id.*

227. ADTB, *supra* note 43.

228. One of the enumerated exceptions to the prohibitions listed in the Canadian Landmines Act is that, "participation in operations, exercises or other military activities with the armed forces of a state that is not a party to the Convention that engage in an activity prohibited under subsection (1) or (2) [is not prohibited] if that participation does not amount to active assistance in that prohibited activity." Canadian Landmines Act, *supra* note 199, sec. 6.

229. See *Landmine Monitor Report 2000: Toward a Mine-Free World*, *supra* note 44, at *Canada—Mine Ban Policy*.

from a state, to its forces abroad.”<sup>230</sup> Canada, however, discourages this practice.<sup>231</sup>

The Canadian Army Doctrine and Training Bulletin is consistent with the Canadian Landmines Act, which states, “No person shall . . . transfer to anyone, directly or indirectly, an anti-personnel mine.”<sup>232</sup> The term “transfer” with regard to APL includes, “in addition to the physical movement of anti-personnel mines, the transfer of title to and control over anti-personnel mines, but does not include the transfer of territory containing emplaced anti-personnel mines.”<sup>233</sup> The Canadian Landmines Act’s definition of transfer implies physical movement by someone to whom the Canadian Landmines Act applies. Therefore, a fair interpretation of the Canadian Landmines Act is that it does not prohibit the government of Canada from passively permitting U.S. forces to move landmines across Canadian territory.

#### 9. Stockpiling

According to the Canadian Landmines Act, “No person shall . . . stockpile anti-personnel mines.”<sup>234</sup> Unfortunately, the Act does not define the term “stockpile” or the term “person.”<sup>235</sup> Thus, it is not clear whether the Canadian Landmine Act’s prohibition on stockpiling applies to a stockpile belonging to another nation that is located in Canadian territory. Because the United States does not have APL stockpiled on Canadian territory,<sup>236</sup> however, this issue is moot.

#### 10. Anti-Vehicle Mines with Anti-Handling Devices

Canada has interpreted the types of AT mines with AHD that are prohibited by the Ottawa Convention very broadly. An anti-personnel mine is defined as a mine designed to be exploded by

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230. ADTB, *supra* note 43.

231. “Canada . . . discourages the use of Canadian territory, airspace or territorial waters for the purpose of transit of anti-personnel mines.” *Id.*

232. Canadian Landmines Act, *supra* note 199, sec. 6.

233. *Id.* sec. 2.

234. *Id.* sec. 6.

235. *See id.* sec. 2.

236. *Landmine Monitor Report 2001: Toward a Mine-Free World*, *supra* note 2, at Introduction: Banning Antipersonnel Mines.

the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons. The Canadian interpretation of this definition cues on the concept of “an innocent act,” meaning that any explosive device set off by an innocent act, such as walking through an area, is considered to be an anti-personnel mine. Anti-tank mines (a mine designed to be exploded by the presence, proximity or contact of a vehicle and that will damage or destroy the vehicle) are not included in the Ottawa Convention.

The impact of the Anti-Personnel Mine Convention is that no mine or device that can be exploded by an innocent act can be employed by the Canadian army. Therefore, all anti-personnel mines and tilt rod fuzes in our inventory were destroyed, and the employment of explosive booby traps as a substitute for anti-personnel mines is prohibited. However, anti-handling devices that are part of, linked to, attached to, or placed under an anti-tank mine that detonates the mine when it is tampered with or intentionally disturbed are permitted. An example of an anti-handling device is a switch connected to explosives such that when the anti-tank mine is disturbed, the explosives detonate.<sup>237</sup>

Because Canada’s interpretation of prohibited AT mines is so broad, it is unlikely that Canadian forces could use or plan for the use of the current arsenal of U.S. AT mines equipped with AHD. The AHDs on U.S. AT mines are not “part of, linked to, attached to, or placed under” the AT mines.<sup>238</sup> Accordingly, U.S. AT mines are capable of being set off by an innocent act.

### *11. Claymore Mines*

“Command detonated mines or explosive devices, such as the Claymore, are not banned.”<sup>239</sup> Therefore, Canadian forces can engage in joint operations with U.S. forces wherein either force uses command-detonated Claymores. The use of Claymores, however, in a trip-wire mode by U.S. forces would be regarded by Canada as a violation of the Ottawa Conven-

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237. ADTB, *supra* note 43.

238. *Id.*

239. *Id.*

tion's prohibitions.<sup>240</sup> Accordingly, Canadian forces could take no part in the use of Claymores in the trip-wire mode.

## VI. The Road Ahead

It is all too easy to view the Ottawa Convention as an anomaly in the area of international law. "The movement to ban landmines captured the imagination of NGOs and governments around the world and challenged and changed decades-old assumptions about the conduct and consequences of armed conflict."<sup>241</sup> As such, it can be seen as a unique event brought about by a confluence of events; not least of which was the untimely death of Britain's Princess Diana. Princess Diana supported the ban on landmines.<sup>242</sup> Her death brought increased awareness to the cause she championed—the devastation caused by the indiscriminate use of landmines.<sup>243</sup>

This view, however, may be too simplistic. The Ottawa Convention may also be viewed as the first manifestation of a larger divergence in the way the United States and its allies view international law.

In more recent years. . . fissures have opened between America and Europe over what the laws of war require with respect to when it is permissible to launch an armed attack, how warfare must be waged, and how the relevant legal norms should be enforced. Today, these disagreements are so fundamental that America and its partners in Europe can be said to operate under different legal codes. The core of this divergence can be traced to efforts . . . both to leash the dogs of war and make the laws of combat more humane by mimicking the rules governing domestic police activities, in which deadly force is always the last resort and must not be applied in an "excessive" manner. In the

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240. See *Landmine Monitor Report 2000: Toward a Mine-Free World*, *supra* note 44, at *Canada—Use*.

241. Shawn Roberts, *No Exceptions, No Reservations, No Loopholes: The Campaign for the 1997 Convention on the Production of the Development, Production, Stockpiling, Transfer, and Use of Anti-Personnel Mines and on Their Destruction*, 9 *COLO. J. INT'L L. & POL'Y* 371, 377 (1998).

242. See Jenny Lange, *Celebrities and Landmines*, 6.1 *J. OF MINE ACTION* (Apr. 2002), at <http://www.hdic.jmu.edu/journal/6.1/index.htm>.

243. Lynch, *supra* note 40.

process, “humanitarian” concerns were to be elevated above considerations of military necessity and national interest.<sup>244</sup>

The United States has remained true to the traditional concepts of *jus ad bellum* and *jus in bello*.<sup>245</sup> The decision of the United States to adhere to more traditional notions “can be traced to recognition by the United States that the world remains a dangerous place, and that adoption of a ‘policing’ model for warfare would hamper, if not cripple, America’s ability to defend itself-and its allies.”<sup>246</sup>

Ultimately, with regard to the issue of joint operations,

The United States and its allies can simply acknowledge that, because of the policy choices they have made in accordance with differing principles, they are now subject to different international law norms. While Americans cannot expect Europeans to ignore the commitments they have made, Europeans cannot expect the United States to comply with rules it has not accepted. This does not mean that joint action and operations are impossible, but it does mean that the range of areas in which U.S. and allied forces can act together has narrowed.<sup>247</sup>

This dichotomy can also be applied to the debate over the Ottawa Convention. The United States refused to sign and ratify the Ottawa Convention because it understood that doing so would place certain humanitarian principles above traditional notions of military necessity.<sup>248</sup> Unfortunately, landmines give military forces certain advantages and capabilities that cannot, at present, be obtained by other means. When used in a discriminate and responsible fashion, APL do not cause the type of devastation which served as the impetus behind the Ottawa process.<sup>249</sup>

In recent years, joint operations involving U.S. forces and the forces of States Parties have continued, despite the prohibitions of the Ottawa Convention. As the preceding analysis of Australia, Great Britain, and Canada has shown, the Ottawa Convention has certainly caused the United

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244. David B. Rivkin, Jr. & Lee A. Casey, *Leashing the Dogs of War*, NATIONAL INTEREST (2003) (noting the existence of a substantial body of law governing both the right to initiate combat (*jus ad bellum*) and how armed force is applied (*jus in bello*)).

245. *Id.* at 2.

246. *Id.*

247. *Id.* at 19.

248. *See* Press Conference, *supra* note 10.

States and its allies to modify their approach to joint operations. Ultimately, however, joint operations continued.

One possible reason for the failure of the Ottawa Convention to prevent the use of APL in joint operations involving States Parties is because the Ottawa Convention was drafted in an atmosphere in which exceptions, regardless of how practical, were not accepted. “[T]he greater priority was a total ban on landmine use with no exceptions, no loopholes, and no reservations.”<sup>250</sup> As a result, the practice of “no exceptions, no loopholes, no reservations” became a double-edged sword that forced States Parties to narrowly interpret certain provisions of the Ottawa Convention in keeping with their national interests.

In order to continue to engage in joint operations with U.S. forces, Australia, Great Britain, and Canada narrowly interpreted various provisions of the Ottawa Convention so as not to prohibit certain conduct. As detailed in this article, this practice has not escaped the attention of determined NGOs. Non-governmental organizations, such as the ICBL profess to know the true “spirit” of the Ottawa Convention, and make every effort to convince States Parties of the “intended” meaning of the Ottawa Convention’s provisions. These NGOs have played an unprecedented role in the formation of the Ottawa Convention, and will have even more of an opportunity to shape the future of the Ottawa Convention. Article 12 of the Ottawa Convention provides:

A Review Conference shall be convened by the Secretary-General of the United Nations five years after the entry into force of this Convention . . . All States Parties to this Convention shall be invited to each Review Conference. The purpose of the Review Conference shall be . . . [among other things] to review the operation and status of th[e] Convention.<sup>251</sup>

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249. ALTERNATIVE TECHNOLOGIES, *supra* note 27, at 15.

Although the use of landmines by U.S. forces did not create the current humanitarian crisis, the U.S. government has taken strong actions toward mitigating the effects of indiscriminate use of APL around the world. These actions include a ban on exports, assistance with clearance of mines (also called demining), assistance to victims, and a search for alternatives to APL.

*Id.*

250. Roberts, *supra* note 242, at 389.

251. *Id.*

The first Review Conference is scheduled to occur in November 2004. The future of joint operations may be severely affected if this conference results in the tightening of the imprecise language within the Ottawa Convention that nations have utilized to continue to engage in joint operations with the United States.

## VII. Conclusion

The Ottawa Convention represents an attempt by the international community to eliminate the catastrophic consequences caused by the indiscriminate use of APL through an outright ban on APL. While supporting the humanitarian ideals behind the Ottawa Convention, the United States was unable to sign or accede to the convention because the convention failed to account for two issues indispensable to the United States' ability to satisfy its security obligations. Most allies of the United States, to include every member of NATO, have ratified or acceded to the convention.

In spite of the prohibitions of the Ottawa Convention, the United States has continued to engage in joint operations with its allies. This article focused on three such nations: Australia, Great Britain and Canada. By dividing the concept of "joint operations" into eleven factors, this article analyzed the operational effects of the Ottawa Convention on joint operations involving U.S. forces and forces of the three named countries.

The operational effects were slightly different for each studied nation. The differences were due to the manner in which each country interpreted key provisions of the Ottawa Convention, as described in national implementing legislation and policy pronouncements. While varying in minor respects, the cumulative effect appears to be *de minimus*—each country has developed methods to enable it to continue to engage in joint operations with U.S. forces. These methods take the form of narrow interpretations of key provisions within the Ottawa Convention. The provisions are, for the most part, interpreted in such a manner that the prohibited conduct is either rendered permissible, or is acknowledged without assent. Joint operations have been affected due to the additional constraints placed on allied forces for the use of landmines. Through detailed planning, however, taking into consideration the national differences identified in this article, the United States will be able to continue to operate successfully with its Allies in joint operations.