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Yes We Should: Why the U.S. Should Change Its Policy Toward the 1997 Mine Ban Treaty

Rachel Good*

I. INTRODUCTION

¶1 Nineteen years ago, in October 1992, a group of six non-governmental organizations¹ gathered in New York City's Empire State Building to develop a strategy for achieving a worldwide ban on landmines.² That meeting resulted in the launch of the International Campaign to Ban Landmines (ICBL), a coalition of NGOs dedicated to ending the humanitarian crisis caused by landmines.³ Four years later, the ICBL, along with a group of states,⁴ responded to a challenge from the Canadian Foreign Minister, Lord Axworthy, to begin negotiations on a treaty banning landmines.⁵ After only fourteen months of negotiations, the 1997 Mine Ban Treaty (MBT),⁶ which banned the use, production, trade, and stockpile of anti-personnel landmines, was opened for signatures.⁷ On March 1, 1999, the Mine Ban Treaty, also known as the Ottawa Convention, entered into force. As of February 21, 2011, there were 156 States Parties to the Mine Ban Treaty.⁸ The United States, however, remains outside of the Treaty despite initial support of its goal and continual humanitarian support for landmine survivors and landmine-affected countries. The Obama administration should correct one of the lasting failures of the Clinton administration by joining the MBT.

¶2 In the years since the Treaty entered into force, and as a direct result of the Treaty, the global landmines situation has changed dramatically. In the mid-1990s, before the

* J.D., Northwestern University School of Law, 2011; B.A., International Studies, American University, 2005. The author wishes to thank all those who have shown her that individuals, armed with passion and a plan, can change the world for the better.

¹ The organizations were Handicap International, Human Rights Watch, Medico International, Mines Advisory Group, Physicians for Human Rights, and the Vietnam Veterans of America Foundation.

² Jody Williams & Stephen Goose, *The International Campaign to Ban Landmines*, in *TO WALK WITHOUT FEAR: THE GLOBAL MOVEMENT TO BAN LANDMINES* 22 (Maxwell A. Cameron et al. eds., 1998).

³ STUART MASLEN, *ANTI-PERSONNEL MINES UNDER HUMANITARIAN LAW: A VIEW FROM THE VANISHING POINT* 16, 16-17 (2001).

⁴ The so-called "core group" included Canada, Norway, Austria, and South Africa. Stephen D. Goose et al., *Banning Landmines and Beyond*, in *BANNING LANDMINES: DISARMAMENT, CITIZEN DIPLOMACY, AND HUMAN SECURITY* 3 (Jody Williams et al. eds., 2008).

⁵ *Id.* at 1.

⁶ Convention on the Prohibition of the Use, Stockpiling and Transfer of Anti-Personnel Mines and on Their Destruction, Dec. 3, 1997, 36 I.L.M. 1507 [hereinafter *Mine Ban Treaty*].

⁷ The complete history of the development of the Mine Ban Treaty along with the unique role of civil society, notably the ICBL, in its formation is well documented and outside the scope of this comment. See generally *BANNING LANDMINES*, *supra* note 4; *LANDMINES AND HUMAN SECURITY: INTERNATIONAL POLITICS AND WAR'S HIDDEN LEGACY* (Richard A. Matthew et al. eds., 2004); Williams & Goose, *supra* note 2.

⁸ INTERNATIONAL CAMPAIGN TO BAN LANDMINES, <http://www.icbl.org> (last visited Feb. 21, 2011).

MBT, over 130 states stockpiled landmines⁹ and landmines killed or injured an estimated 20,000 to 30,000 people every year.¹⁰ Only forty countries currently stockpile landmines,¹¹ and there were an estimated 3,956 casualties in 2009.¹² Although fifteen states used landmines in 1999, only Myanmar was believed to have used landmines in 2010.¹³ With more than three-quarters of the world's countries as States Parties to the MBT, landmines have become so stigmatized that even states not party to the Treaty behave consistently with its goal and provisions. For example, the United States, which has refused to sign the Treaty, has adopted policies in-line with the spirit and goal of the MBT.¹⁴ The last time U.S. military forces used landmines was in the 1991 Gulf War,¹⁵ and the U.S. enacted an export moratorium on landmines in 1992.¹⁶ Since 1993, the U.S. has provided more than \$1.5 billion in humanitarian mine action, more than any other country, which includes funds used for demining resources and survivor services.¹⁷

Although the Clinton administration adopted policies consistent with the spirit of the Treaty, the Bush administration announced a new landmine policy hostile to the Treaty in 2004.¹⁸ Under the Bush policy, the U.S. stopped using persistent landmines, but continues to use mines with self-destruct or deactivate mechanisms. In explaining the new policy, the Bush administration stated, “[T]he U.S. did not and will not become a party to [the] Ottawa [Convention].”¹⁹ On November 24, 2009, the Obama administration announced that it would maintain the Bush administration's landmine policy.²⁰ The following day, the administration quickly backtracked stating that it was still conducting a review of the policy and had not decided whether to back the MBT.²¹ There is no deadline for the completion of the Obama administration's policy review.

⁹ LANDMINE MONITOR REPORT 2008, 8 (Mines Action Canada et al. eds., 2008).

¹⁰ Alexander Kmentt, *A Beacon of Light: The Mine Ban Treaty Since 1997*, in BANNING LANDMINES, *supra* note 4, at 22; *See also* MASLEN, *supra* note 3, at 22-23.

¹¹ This figure includes States Parties to the Treaty whose stockpiles are marked for destruction: Belarus, Greece, Iraq, Turkey, and Ukraine. LANDMINE MONITOR REPORT 2010, 4, 15 (Mines Action Canada et al. eds., 2010).

¹² *Id.* at 1.

¹³ There were serious allegations that the armed forces of Turkey, a state party, used anti-personnel mines in 2009. The allegations are under investigation. *Id.* at 3-4, 13.

¹⁴ *See* Lesley Wexler, *The International Deployment of Shame, Second-Best Responses, and Norm Entrepreneurship: The Campaign to Ban Landmines and the Landmine Ban Treaty*, 20 ARIZ. J. INT'L & COMP. L. 561, 604 (2003) (explaining that after the U.S. refused to sign the Mine Ban Treaty, it still looked to the Treaty while developing alternatives).

¹⁵ LANDMINE MONITOR REPORT 2008, *supra* note 9, at 1042.

¹⁶ Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 656 (1998).

¹⁷ Press Release, U.S. Dep't of State, The United States is a World Leader in Humanitarian Mine Action (Nov. 3, 2009), *available at* <http://www.state.gov/r/pa/prs/ps/2009/nov/132591.htm>.

¹⁸ Fact Sheet, U.S. Dep't of State, Bureau of Political-Military Affairs, Landmine Policy White Paper (Feb. 27, 2004), *available at* <http://2001-2009.state.gov/t/pm/rls/fs/30047.htm>.

¹⁹ Fact Sheet, U.S. Dep't of State, Bureau of Political-Military Affairs, Frequently Asked Questions on the New United States Landmine Policy (Feb. 27, 2004), *available at* <http://2001-2009.state.gov/t/pm/rls/fs/30050.htm>.

²⁰ Press Release, Handicap International, Handicap International Denounces the Obama Administration's Decision (Nov. 26, 2009), *available at* [http://www.handicap-international.us/our-fight-against-landmines-and-cluster-bombs/in-brief/?dechi_actus\[id\]=78&cHash=52704e79be](http://www.handicap-international.us/our-fight-against-landmines-and-cluster-bombs/in-brief/?dechi_actus[id]=78&cHash=52704e79be).

²¹ Desmond Butler, *U.S. Corrects Statement on Land Mine Policy*, ASSOCIATED PRESS, Nov. 25, 2009, *available at* http://www.usatoday.com/news/washington/2009-11-24-landmine-ban_N.htm.

¶4 Since the Treaty was signed, many states, including the U.S., have undergone a wide-scale shift in their policies and practices with regard to landmines. While the MBT has yet to reach the level of customary international law²² there is significant indication “that an obligation to eliminate anti-personnel landmines is emerging.”²³ Considering these developments in state behavior, the question becomes whether the U.S. should now join the MBT. When the U.S. decided not to sign the Treaty in 1997, it cited the military utility of the weapon as the primary reason.²⁴ This comment argues that the military utility argument was flawed in 1997 and has become even more so over the past 19 years due to the changing nature of warfare. Also, since 1997, the U.S. has engaged in behavior, including launching two wars, which has isolated it from the larger international community and tarnished its reputation as a humanitarian nation. Joining the MBT would provide the U.S. an ideal opportunity to re-engage with the international community and demonstrate its commitment to humanitarian action.

¶5 Part II of this comment begins with a brief exploration of the history of landmine use. Part III looks at the development of the Mine Ban Treaty, with a focus on U.S. policy and practice during the Treaty’s negotiation. Part IV provides an overview of the Treaty’s provisions and of states’ compliance with and attitudes toward the Treaty. Part V evaluates U.S. landmine policy since the development of the Treaty and proposes that the U.S.’s reasons for refusing to sign the Treaty are based on blind deference to the Pentagon rather than any legitimate military necessity. The comment concludes with the recommendation that the Obama administration correct one of the lasting mistakes of the Clinton administration by ratifying the Mine Ban Treaty. Joining the Treaty would also help engender international goodwill toward the U.S. after nearly a decade of strained relations.

II. THE HISTORY OF LANDMINE USE AND THE ASSOCIATED HUMANITARIAN PROBLEMS

¶6 Anti-personnel landmines, or more simply landmines, are mines that are designed to explode and incapacitate, injure, or kill people when they make contact with it or come within its proximity.²⁵ German forces in World War I developed the forerunner to the modern landmine when they blocked advancing French and British tank movement with buried artillery shells that had exposed fuses.²⁶ The first modern landmines were actually anti-tank mines,²⁷ or mines designed to detonate by the presence or contact of a vehicle as opposed to a person.²⁸ Anti-tank mines were used by both the Allied and Axis powers

²² “[I]t cannot be said at this stage that the used of anti-personnel landmines is prohibited under customary international law.” JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: VOLUME 1, RULES 282 (2005).

²³ *Id.* at 283.

²⁴ See Jodi Preusser Mustoe, *The 1997 Treaty to Ban the Use of Landmines: Was President Clinton’s Refusal to Become a Signatory Warranted?*, 27 GA. J. INT’L & COMP. L. 541, 555-56 (1999) (discussing the reasons behind the U.S. refusal to join the Mine Ban Treaty).

²⁵ Mine Ban Treaty, *supra* note 6, Art. 2.

²⁶ Alex Vines, *The Crisis of Anti-Personnel Mines*, in TO WALK WITHOUT FEAR, *supra* note 2, at 118; The Arms Project of Human Rights Watch & Physicians for Human Rights, LANDMINES: A DEADLY LEGACY, 16 (1993).

²⁷ 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, 89 (1999).

²⁸ Mine Ban Treaty, *supra* note 6, art. 2.

during World War II.²⁹ However, anti-tank mines were easily removed and both sides developed smaller, anti-personnel mines to protect anti-tank minefields.³⁰ Soon, anti-personnel mines were used as stand alone weapons.³¹ For example, in Northern Africa, anti-personnel mines used by Italian and German forces stopped several Allied advances.³² After World War II, technological advances led to the development of new, modern landmines.³³

¶7 The U.S. engaged in the first truly modern use of landmines in Vietnam during the 1960s.³⁴ The U.S. used landmines throughout Vietnam, Laos, and Cambodia.³⁵ In addition to the mines that the U.S. ground forces laid, the U.S. Air Force dropped mines from planes so often that pilots referred to them as “garbage.”³⁶ The technological innovation of remote delivery increased the production and use of mines throughout the world.³⁷ In Africa, 18 countries are mine-affected,³⁸ and Angola, Somalia, Mozambique, Ethiopia, and Eritrea have the most serious mine contamination.³⁹ In the Middle East, Kuwait, Iraq, and Iran have the most serious mine problems, although mines have also been used in Syria, Israel, and Lebanon.⁴⁰ Mines have been used throughout Afghanistan and along the borders it shares with Pakistan, India, and China. Bosnia, Colombia, Croatia, El Salvador, Georgia, Nicaragua, Serbia, Tajikistan, and the former Yugoslavia have also been subject to large-scale landmine use.⁴¹ This is not an exclusive list of countries where landmines have been used, but it illustrates the extent to which mines were utilized throughout the twentieth century.

¶8 The military utility of landmines was debated during negotiations of the 1997 Mine Ban Treaty. While most of the world’s states concluded that the humanitarian problems associated with landmines outweighed their limited military utility, the U.S. continues to justify its refusal to sign the MBT based on the military utility argument.⁴² Proponents of landmines posit two main arguments for the weapon’s utility. First, landmines are used to delay or deter an advancing enemy.⁴³ Delaying an enemy force gives armies additional time for troop protection or movement to another location.⁴⁴ Landmines can also be used

²⁹ The Arms Project of Human Rights Watch & Physicians for Human Rights, *supra* note 26, at 16.

³⁰ *Id.* at 17.

³¹ *Id.*

³² Efav, *supra* note 27, at 90; Vines, *The Crisis of Anti-Personnel Mines*, in *TO WALK WITHOUT FEAR*, *supra* note 26, at 119.

³³ Mustoe, *supra* note 24, at 542.

³⁴ The Arms Project of Human Rights Watch & Physicians for Human Rights, *supra* note 26, at 17.

³⁵ *Id.*

³⁶ *Id.*

³⁷ Don Hubert, *THE LANDMINE BAN: A CASE STUDY IN HUMANITARIAN ADVOCACY 4* (Watson Institute for International Studies 2000), <http://www.geneva-forum.org/Reports/20010202.pdf> (last visited April 19, 2011).

³⁸ A mine-affected country is simply a country with mine contamination, that is, either marked or unmarked mined portions of land.

³⁹ See The Arms Project of Human Rights Watch & Physicians for Human Rights, *supra* note 26, at 143.

⁴⁰ *Id.* at 143-44.

⁴¹ *Id.* at 144.

⁴² Fact Sheet, U.S. Dep’t of State, *supra* note 18.

⁴³ See The Arms Project of Human Rights Watch & Physicians for Human Rights, *supra* note 26, at 21.; Robert G. Gard, Jr., *The Military Utility of Anti-Personnel Mines*, in *TO WALK WITHOUT FEAR*, *supra* note 2, at 144.

⁴⁴ Gard, *supra* note 43, at 144.

along borders to deter and protect against enemy invasions.⁴⁵ Second, armies use landmines to shape the battlefield by forcing enemy troops into vulnerable positions.⁴⁶ Once enemy forces are channeled into vulnerable areas, they are more susceptible to attacks by other weapons systems such as artillery or rockets.⁴⁷ In practice, however, the military utility of landmines is limited.

¶9 A study issued by the International Committee on the Red Cross (ICRC) and conducted by a group of active and retired military leaders from nineteen countries found that landmines have “little to no effect on the outcome of hostilities” and only “marginal tactical advantage” in certain specific circumstances.⁴⁸ The group of military experts gathered by the ICRC asked the simple question of whether there was empirical data to demonstrate the high military utility of landmines.⁴⁹ Of twenty-six major conflicts the experts studied, they failed to find a single case “in which the use of anti-personnel mines played a major role in determining the outcome of a conflict.”⁵⁰ Although landmines do have utility in some circumstances,⁵¹ they are never outcome-determinative.

¶10 In the 1991 Gulf War, Iraqi forces laid 9 million mines to delay coalition forces. Using large-scale mine plows, coalition forces cleared the minefield in only two hours.⁵² The increased use of armored tanks, coupled with specialized plows and rollers to clear minefields has decreased the effectiveness of landmines as a delay tactic.⁵³ Also, minefields constructed to delay or deter enemies pose a risk to friendly forces. Between 1961 and 1990, twenty-three people, including seventeen U.S. service personnel, were killed in minefields laid by U.S. forces around Guantanamo Bay.⁵⁴ After evaluating the delay capacity of landmines, ICRC’s military experts determined that landmines do slow battles, but battles are won or lost based on leadership and other materials.⁵⁵ As for their deterrent capacity, the experts concluded that landmines “have never yet stopped a determined advancing enemy.”⁵⁶

¶11 The same critique about the effectiveness of landmines as a delay tactic applies to their effectiveness as a channeling tool. In both cases plows and rollers, as well as better automatic weapons and protected vehicles, render landmines “redundant.”⁵⁷ Also, the arguments in support of landmine use assume that enemy forces are unwilling to accept high numbers of casualties.⁵⁸ Gen. Alfred Gray, a retired commander of the U.S. Marine Corps argued against the utility of landmines when he said, “I know of no situation... where our use of mine warfare truly channelized the enemy and brought him into a

⁴⁵ *Id.*

⁴⁶ The Arms Project of Human Rights Watch & Physicians for Human Rights, *supra* note 26, at 21; Gard, *supra* note 43, at 141.

⁴⁷ Int’l Committee on the Red Cross (ICRC), *Anti-Personnel Landmines-Friend or Foe?* 14-15 (1997) [hereinafter *ICRC*].

⁴⁸ *Id.* at 8, 80.

⁴⁹ *Id.* at 5.

⁵⁰ *Id.* at 7.

⁵¹ Gard, *supra* note 43, at 137.

⁵² ICRC, *supra* note 47, at 40.

⁵³ *Id.* at 42; Gard, *supra* note 43, at 141.

⁵⁴ LANDMINE MONITOR REPORT 1999, 318 (Human Rights Watch et al. eds., 1999).

⁵⁵ ICRC, *supra* note 47, at 40.

⁵⁶ *Id.* at 15.

⁵⁷ ICRC, *Report on observations and conclusions from a review of the ICRC study “Anti-personnel landmines, Friend or Foe?”* 2 (2004).

⁵⁸ ICRC, *supra* note 47, at 43.

destructive power. I'm not aware of any operational advantage from broad deployment of mines.”⁵⁹

¶12 A majority of states have determined that the limited military utility of landmines cannot justify their use when weighed against humanitarian costs. Long after their military use is finished in a given region, landmines remain in the ground to kill and injure civilians. Unlike a bullet, which cannot injure except at the time it is fired, a landmine remains lethal until it is safely removed from the ground. Not only do landmines that remain in the ground have a costly physical impact, they also have a psychological and economic impact on affected individuals and communities.⁶⁰ It is estimated that there are over 300,000 landmine survivors throughout the world.⁶¹ Many of these survivors live in countries that struggle to meet the basic needs of their population, making it especially difficult to provide extra services for mine survivors such as medical care or job training.⁶²

¶13 In communities where people struggle to sustain themselves, landmine survivors are often seen as a drain on resources because they are limited in their ability to work and provide for themselves.⁶³ Because landmine survivors are predominately located in poor areas, they are often stigmatized in their communities for their disabilities.⁶⁴ This stigmatization, and the resulting sense of helplessness, leads many landmine survivors to feel depressed and angry.⁶⁵ At the community level, landmines can also have a devastating economic impact by making swaths of land unusable for transportation and trade, farming, herding, or animal grazing. The civilian impact of landmines goes beyond the immediate physical injury to the individual.

¶14 Humanitarian problems such as those described above result from every instance of landmine use, because by their nature landmines are weapons of indiscriminate effect.⁶⁶ Once a landmine is placed in the ground, there is no way to prevent a civilian from triggering its detonation. Furthermore, landmines are inexpensive weapons to use but costly to remove. As a result, countless landmines remain in communities after the cessation of hostilities. This makes them appealing weapons for guerrilla forces because they are easy to acquire and can be used to depopulate or terrorize poor communities even after the fighting is stopped.⁶⁷ Because landmines are inherently indiscriminate, there is no ‘technological fix’ to the humanitarian problems they cause. This determination, coupled with the weapon’s limited military utility, led 156 states to develop the Mine Ban Treaty banning the use, transfer, and stockpiling of landmines. In an attempt to comprehensively deal with the humanitarian crisis caused by landmines, the Treaty also created an obligation for parties to clear mined land and provide assistance to survivors of landmines.

⁵⁹ *Id.* at 44-45; Gard, *supra* note 43, at 141.

⁶⁰ See generally LANDMINES AND HUMAN SECURITY: INTERNATIONAL POLITICS AND WAR’S HIDDEN LEGACY (Richard A. Matthew et al. eds., 2004).

⁶¹ Raquel Willerman, *Victim Assistance: Landmine Survivors’ Perspectives*, in LANDMINES AND HUMAN SECURITY, *supra* note 60, at 103.

⁶² Sheree Bailey & Tun Channareth, *Beyond the Rhetoric: The Mine Ban Treaty and Victim Assistance*, in BANNING LANDMINES, *supra* note 4, at 145.

⁶³ *Id.* at 145-46.

⁶⁴ *Id.* at 145.

⁶⁵ Willerman, *Victim Assistance*, in LANDMINES AND HUMAN SECURITY, *supra* note 61, at 109.

⁶⁶ ICRC, *supra* note 47, at 9.

⁶⁷ *Id.* at 21.

III. DEVELOPMENT OF THE MINE BAN TREATY AND THE U.S. ROLE

¶15 In many ways, the Mine Ban Treaty was the result of U.S. efforts to call attention to and address the global landmine crisis. However, the scope of the eventual agreement was unimaginable to the U.S. or any other country in 1992. That year, the process was ignited by two key events. First, the International Campaign to Ban Landmines (ICBL) was formally established and launched a call for a global ban on landmines.⁶⁸ Second, U.S. President Bill Clinton issued a one-year moratorium on the export of landmines.⁶⁹ The U.S. decision to halt the export of landmines, a revolutionary act at the time, gave the movement to ban landmines much needed political capital.⁷⁰

¶16 After the initial call for an export moratorium, President Clinton continued to lead the international community on the need for action on the landmine crisis. In an address before the UN General Assembly on September 26, 1994, President Clinton called upon other states to join the U.S. in “ridding the world of those often hidden weapons.”⁷¹ In an accompanying policy sheet, the U.S. proposed “the negotiation of a multinational landmine control regime” with the ultimate objective of the complete elimination of anti-personnel landmines.⁷² President Clinton’s statement before the UN General Assembly, along with the policy announcement, was seen as a signal of U.S. support for a global ban on landmines. As the world took up the call and began to work toward such a ban, it quickly became evident that the U.S. was unwilling to turn rhetoric into action.

¶17 The U.S. call for more action on the problem of landmines prompted states to discuss a solution within the UN framework.⁷³ States first sought to amend the UN Convention on Conventional Weapons (CCW), which is a leading treaty banning or restricting specific types of weapons that cause unnecessary or unjustified suffering, such as incendiary weapons or blinding laser weapons.⁷⁴ The original CCW contained a protocol pertaining in part to landmines,⁷⁵ but by the mid-1990s it was deemed inadequate to deal with the landmine problem.⁷⁶ In 1996, States Parties to the CCW⁷⁷ passed Amended Protocol II (APII), also referred to as the Landmine Protocol.⁷⁸ APII was an attempt by major powers like the U.S. to address the humanitarian problems associated with landmines. However, it only advocated for the end of “indiscriminate

⁶⁸ Williams & Goose, *supra* note 2, at 20.

⁶⁹ Efaw, *supra* note 27, at 99.

⁷⁰ *Id.*

⁷¹ UN GAOR, 49th Sess., 4th plen. mtg, at 8, U.N. Doc. A/49/PV.4 (Sept. 26, 1994).

⁷² Fact Sheet, Office of the Press Secretary, The White House, U.S. Policy on a Landmine Control Regime (Sept. 26, 1994).

⁷³ Mary Wareham, *Rhetoric and Policy Realities in the US, in TO WALK WITHOUT FEAR, supra* note 2, at 226-28 (tracking the U.S.’s “two-track” approach to the landmine problem).

⁷⁴ Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137, 199 I.L.M. 1524 [hereinafter *CCW*].

⁷⁵ CCW Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), Oct. 10, 1980, 1342 U.N.T.S. 168, 19 I.L.M. 1529 [hereinafter *CCW Protocol II*].

⁷⁶ Bryan McDonald, *The Global Landmine Crisis in the 1990s, in LANDMINES AND HUMAN SECURITY, supra* note 60, at 24.

⁷⁷ At that time there were only forty-one States Parties to the CCW. Wexler, *supra* note 14, at 582.

⁷⁸ CCW Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996), 1125 U.N.T.S. 609, 19 I.L.M. 1206 [hereinafter *CCW Amended Protocol II*].

use” of landmines and not an end to all landmine use.⁷⁹ APII urged states to take precautions in using landmines, but it lacked any enforcement mechanism and did not call for an all-out prohibition on use.⁸⁰ While it was a good first step, APII fell far short of the total ban on landmines hoped for by anti-mine advocates.⁸¹ At the same time states worked to pass APII, the ICBL worked to garner support from states for a separate, more comprehensive ban in the spirit of the U.S. call to action at the September 1994 UN General Assembly meeting.⁸² Since the ICBL advocated an immediate and total ban on landmines, the ban community regarded APII as irrelevant when it was passed.⁸³

¶18 In October 1996, months after APII was negotiated, Canada hosted a conference in Ottawa to discuss alternative forums outside of the UN for developing a more progressive solution to the landmine crisis.⁸⁴ Participant states were required to pledge support for a total ban on landmines, but states not ready to make this pledge were invited to attend as observers.⁸⁵ The U.S. attended as a full participant, having signed the pledge.⁸⁶ At the end of the conference, Canadian Foreign Minister Lord Axworthy challenged states to negotiate a treaty banning landmines by December 1997 and invited states to return to Ottawa at that time to sign the treaty.⁸⁷ Civil society groups embraced Axworthy’s challenge, but some states were skeptical of the announcement.⁸⁸ After the conference, U.S. officials privately rebuked the Canadian government for Lord Axworthy’s statement.⁸⁹ However, a core group of states decided to work with the ICBL to meet Axworthy’s challenge, launching the “Ottawa Process” that resulted in the 1997 Mine Ban Treaty.

¶19 Working outside of the normal diplomatic channels of the UN, states met in cities around the world for preparatory conferences in advance of a formal treaty negotiation session.⁹⁰ The goal of those meetings was to reach consensus on the aim and scope of the Treaty.⁹¹ The U.S. declined to formally participate in any of the preparatory conferences.⁹² Instead, the U.S. opted to work on the issue within the Conference on Disarmament,⁹³ a permanent UN-based forum for disarmament negotiations. However, by this time most states had determined that the Ottawa Process was the only route to a global ban⁹⁴ since the Conference on Disarmament is a consensus-based forum, meaning

⁷⁹ Wexler, *supra* note 14, at 582.

⁸⁰ *Id.* at 583.

⁸¹ Williams & Goose, *supra* note 2, at 26. See also Wexler, *supra* note 14, at 582; Christian M. Capece, *The Ottawa Treaty and Its Impact on U.S. Military Policy and Planning*, 25 BROOK. J. INT’L L. 183, 188 (1999); McDonald, *supra* note 76, at 29.

⁸² Williams & Goose, *supra* note 2, at 26; McDonald, *supra* note 76, at 29.

⁸³ Koh, *supra* note 16, at 659; Wexler, *supra* note 14, at 583.

⁸⁴ Koh, *supra* note 16, at 659-60; Williams & Goose, *supra* note 2, at 34.

⁸⁵ Koh, *supra* note 16, at 659; Williams & Goose, *supra* note 2, at 34.

⁸⁶ Wareham, *supra* note 73, at 226-27.

⁸⁷ *Id.* at 227.

⁸⁸ Robert J. Lawson et al., *supra* note 88, at 162.

⁸⁹ *Id.*

⁹⁰ Veronica Kitchen, *From Rhetoric to Reality: Canada, the United States, and the Ottawa Process to Ban Landmines*, INT’L J., Winter 2001-02, at 37, 45.

⁹¹ For a more in-depth look at the Ottawa Process meetings, see Lawson et al., *supra* note 88, at 160-184.

⁹² Wareham, *supra* note 73, at 227.

⁹³ *Id.*; Kitchen, *supra* note 90, at 40, 43.

⁹⁴ Lawson et al., *supra* note 88, at 174.

that all states must agree on all aspects of a proposed treaty.⁹⁵ As a result, states can drag-out issues for years or force other states to settle for the weakest possible agreement.⁹⁶ Given that, states serious about a ban moved forward with the Ottawa Process and the 1997 Oslo Conference, where ninety-seven states met for formal negotiations to create what was to become the Mine Ban Treaty.

¶20 The singular goal of the Oslo Conference was to negotiate a “comprehensive ban on the use, production, stockpiling, trade and transfer of anti-personnel mines.”⁹⁷ Realizing that the Oslo Conference was likely to lead to a treaty banning landmines,⁹⁸ the U.S. attended in an attempt to shape the outcome and participate in the development of the new norm. Canadian officials believed that if the U.S. did not participate in the Conference it would likely never sign the Treaty.⁹⁹ However, other participants, especially civil society groups such as the ICBL, did not welcome the U.S. delegation because they knew the U.S. was entering the process late and with concrete demands that would weaken the Treaty.¹⁰⁰

¶21 The U.S. came to Oslo with confidence that other states would want it as a signatory so much that they would agree to its non-negotiable demands.¹⁰¹ The U.S. sought an explicit exception in the Treaty that would allow for the continual emplacement of mines along the Demilitarized Zone (DMZ) between North and South Korea.¹⁰² The U.S. wanted a definition of “anti-personnel landmines¹⁰³” that would allow it to use anti-personnel mines in conjunction with anti-tank mines.¹⁰⁴ Finally, the U.S. wanted a delayed entry-into-force so that it could continue to deploy mines until alternative technology was developed and a “supreme national interest” provision allowing withdrawal from the Treaty when it was in a nation’s national interest to do so.¹⁰⁵ Civil society participants reacted negatively and vocally to U.S. demands by arguing that the U.S. was trying to create exceptions so that the Treaty would not apply to its use and stockpiles of mines.¹⁰⁶ A rallying call of “no exceptions, no delays, no loopholes” was taken up by civil society groups.¹⁰⁷ Other states agreed with the civil society groups and believed that the U.S. demands would unacceptably weaken the Treaty. As a result, they refused to accept or allow any of the reservations the U.S. demanded.¹⁰⁸

¶22 On September 17, 1997, after being granted a twenty-four hour delay in the negotiations, the U.S. returned to the conference and withdrew its demands and support for the Treaty negotiations.¹⁰⁹ The negotiations moved forward without the U.S., and on

⁹⁵ Kitchen, *supra* note 90, at 40.

⁹⁶ *Id.*

⁹⁷ Lawson et al., *supra* note 88, at 176.

⁹⁸ Kitchen, *supra* note 90, at 45.

⁹⁹ Lawson et al., *supra* note 88, at 175.

¹⁰⁰ Williams & Goose, *supra* note 2, at 43.

¹⁰¹ *Id.* at 44.

¹⁰² Wexler, *supra* note 14, at 588.

¹⁰³ Lawson et al., *supra* note 88, at 177.

¹⁰⁴ Williams & Goose, *supra* note 2, at 44; Koh, *supra* note 16, at 660.

¹⁰⁵ Wexler, *supra* note 14, at 588; Lawson et al., *supra* note 88, at 177.

¹⁰⁶ Williams & Goose, *supra* note 2, at 44.

¹⁰⁷ *Id.* at 43.

¹⁰⁸ Koh, *supra* note 16, at 660. Article 19 of the Treaty prohibits reservations.

¹⁰⁹ *Id.*; Wareham, *supra* note 73, at 232-233.

September 18, 1997, and the participants of the Oslo Conference adopted the text of the Treaty.¹¹⁰ In October 1997, the Nobel Committee announced that the ICBL and its coordinator Jody Williams were the winners of the 1997 Nobel Prize for Peace for their work in developing the Treaty.¹¹¹ Spurred by the momentum from the Peace Prize, the Treaty received 122 signatures the day it opened for signature and entered into force more rapidly than any other treaty of its kind.¹¹²

IV. THE MINE BAN TREATY PROVISIONS AND COMPLIANCE

¶23 The MBT provides a complete prohibition on the use, stockpiling, trade, and production of anti-personnel landmines. A landmine as defined by the Treaty is any mine that is designed to explode “by the presence, proximity or contact of a person and that will incapacitate, injury, or kill one or more persons.”¹¹³ Under this definition, munitions that are altered to function like landmines are prohibited, as are booby-traps.¹¹⁴ Excluded from the definition, however, are mines that can function through both command detonation, which is remote detonation through electric means, and victim-activation, which means detonation by the presence, proximity, or contact of a person.¹¹⁵ The ICBL and numerous States Parties urge states to disable the victim-activated component of those mines that can function through command detonation or victim-activation.¹¹⁶ States Parties to the Treaty disagree as to whether anti-vehicle mines are prohibited by the Treaty.¹¹⁷ An explicit ban on anti-vehicle mines was removed from the text during negotiations,¹¹⁸ however, twenty-four of the twenty-eight states that have commented on the issue interpret the Treaty to ban anti-vehicle mines, since a person can unintentionally cause detonation.¹¹⁹ Even though these two interpretation issues exist, the MBT is a comprehensive ban on all mines that indiscriminately kill and injure people by design.

¶24 Article 1 outlines the Treaty’s general obligations for States Parties not to use, develop, produce, or stockpile anti-personnel mines.¹²⁰ States cannot “assist, encourage, or induce” other states, including states not party to the Treaty, in activities prohibited under the Treaty.¹²¹ Finally, States Parties must destroy all stockpiles of anti-personnel mines.¹²²

¶25 Article 1 raises two important unresolved issues. The first issue is that it is unclear what acts of assistance fall within the Treaty’s prohibition.¹²³ This question pertains to

¹¹⁰ Lawson et al., *supra* note 88, at 180.

¹¹¹ Koh, *supra* note 16, at 661-62.

¹¹² Goose et al., *supra* note 4, at 3-4.

¹¹³ Mine Ban Treaty, *supra* note 6, art. 2(1).

¹¹⁴ Thomas Hajnoczi et al., *The Ban Treaty*, in *TO WALK WITHOUT FEAR*, *supra* note 2, at 298.

¹¹⁵ Fact Sheet, Landmine Monitor, *Claymore-Type and OZM-72 Command-Detonated Mines* (May 2006), available at <http://www.lm.icbl.org/index.php/content/view/full/19772>.

¹¹⁶ *Id.*

¹¹⁷ Fact Sheet, Landmine Monitor, *Mines with Sensitive Fuzes and Sensitive Antihandling Devices* (Article 2) (May 2006), available at <http://www.lm.icbl.org/index.php/content/view/full/19770>.

¹¹⁸ Hajnoczi et al., *supra* note 114, at 297.

¹¹⁹ Fact Sheet, Landmine Monitor, *supra* note 117.

¹²⁰ Mine Ban Treaty, *supra* note 6, art. 1(1).

¹²¹ *Id.* art. 1(1)(c).

¹²² *Id.* art. 1(2).

¹²³ LANDMINE MONITOR REPORT 2010, *supra* note 11, at 10.

joint military operations between States Parties and non-parties and whether and to what degree States Parties can engage in combat activities with states that use mines. The second issue concerns the foreign stockpiling and transit of mines on and through the territory of States Parties.¹²⁴ The key issues are whether states that are not party must remove stockpiled mines from States Parties' territory and whether they may transport mines through States Parties' territory. These are on-going issues of interpretation that States Parties discuss at annual meetings in an attempt to reach a consensus.

¶26 States Parties are required under Article 4 to destroy their stockpile of anti-personnel mines within four years of joining the Treaty.¹²⁵ However, Article 3 provides an exception, allowing a limited number of mines to be retained for training and development purposes.¹²⁶ The exact number of mines allowed for retention is a contested issue. Most States Parties propose that the number should be in the hundreds, and that retained mines should be actively used and destroyed through training programs.¹²⁷ This is another on-going issue of contention for States Parties to the Treaty.

¶27 Article 5 requires States Parties to destroy all anti-personnel mines in affected areas within ten years of joining the Treaty.¹²⁸ Included in this article is the requirement that States Parties identify mined areas in their jurisdiction, mark them, and protect civilians from entering through fences and other security measures.¹²⁹ Given the large number of mined areas in some States Parties' territories and the time it may take some States Parties to generate resources, Article 5 allows States Parties to apply for an extension to their demining deadlines.¹³⁰ In 2010, Colombia, Guinea-Bissau, and Mauritania applied for extensions for the first time, and Chad, Denmark, and Zimbabwe applied for extensions for the second time.¹³¹ During the 2009 Second Review Conference of States Parties to the Mine Ban Treaty, four states—Argentina, Cambodia, Tajikistan, and Uganda—requested and were granted extensions for clearing mined areas.¹³² At the 2009 Meeting of States Parties to the Mine Ban Treaty, fifteen states requested extensions.¹³³ However, as more states approach their clearance deadlines, more requests for extensions are expected.

¶28 The Mine Ban Treaty articles on use, production, demining, transfer, and stockpile destruction are considered general core obligations that States Parties must comply with to avoid violating the Treaty.¹³⁴ Article 1 mandates that States Parties may not use, develop or produce, or stockpile anti-personnel mines “under any circumstances.”

¹²⁴ *Id.*

¹²⁵ Mine Ban Treaty, *supra* note 6, art. 4.

¹²⁶ *Id.* art. 3.

¹²⁷ LANDMINE MONITOR REPORT 2007, 17-18 (Mines Action Canada et al. eds., 2007).

¹²⁸ Mine Ban Treaty, *supra* note 6, art. 5.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ LANDMINE MONITOR 2010, *supra* note 11, at 20-21.

¹³² Second Review Conference of the States Parties to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personal Mines and on Their Destruction, Cartagena, Colom., Nov. 29-Dec. 4, 2009, *Final Report*, ¶ 24, unofficial version (Dec. 4, 2009), available at <http://www.cartagenasummit.org/fileadmin/pdf/review-conference-2nd/2RC-Report-Unofficial-7Dec2009.pdf> [hereinafter *Second Review Conference*].

¹³³ Ninth Meeting of the States Parties to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personal Mines and on Their Destruction, Geneva, Switz., Nov. 24-28, 2008, *Final Report*, ¶ 26, U.N. Doc. APLC/MSP.9/2008/4 (May 15, 2009).

¹³⁴ Hajnoczi et al., *supra* note 114, at 298.

Likewise, Articles 4 and 5 require states to comply with their specific provisions. On the other hand, the Treaty's international cooperation and victim assistance provisions are soft requirements for which it would be difficult to hold any state party in violation. For example, Article 6 on international cooperation and assistance is a soft obligation that encourages states to support other parties in complying with their general obligations to the Treaty.¹³⁵ Under Article 6 States Parties "in a position to do so" should provide assistance and care for mine victims and mine awareness, or education programs.¹³⁶ Those States Parties "in a position to do so" should also provide assistance for mine clearance.¹³⁷ The goal of these provisions is not only for States Parties to provide these services domestically, but also for wealthier States Parties to assist those with fewer resources in providing services to their populations. The soft provisions of the Treaty, however, are nevertheless a focus for States Parties and are routinely advanced through the Treaty standing committee on victim assistance.¹³⁸

¶29 State compliance with the MBT is tracked in three ways. First, States Parties must submit annual transparency reports under Article 7 of the Treaty. Second, States Parties must hold annual meetings. Finally, the ICBL produces an annual Landmine Monitor Report. The UN Office for Disarmament Affairs also hosts an Implementation and Support Unit for the Mine Ban Treaty, which advises states on the implementation of the Treaty's provisions. Among these tracking instruments, the Landmine Monitor Report is widely regarded at the authoritative source for information on state compliance with the Treaty.¹³⁹

¶30 An evaluation of state compliance with the MBT illustrates how the Treaty has contributed to the significant decrease in the use of landmines and their destructive impact. Only two states—Russia and Myanmar—have used landmines since 2007, which is a decrease from the nineteen states reported to have used landmines in 1999.¹⁴⁰ Also, there has been no confirmed use of landmines by States Parties.¹⁴¹ In addition to the widespread adoption of the MBT by states, fifty-nine non-state armed groups have pledged to stop using landmines.¹⁴² Since 1999, eighty-six States Parties have destroyed their stockpiles of landmines and 45 million stockpiled mines have been destroyed.¹⁴³ Of the fifty-one states known to have produced landmines, thirty-nine have stopped production, including five states that are not party to the Treaty.¹⁴⁴ Twelve states not party reserve the right to produce landmines, but only three are believed to actually

¹³⁵ *Id.*

¹³⁶ Mine Ban Treaty, *supra* note 6, art. 6.

¹³⁷ *Id.*

¹³⁸ See Bailey & Channareth, *Beyond the Rhetoric: The Mine Ban Treaty and Victim Assistance*, in BANNING LANDMINES, *supra* note 62, at 143-58.

¹³⁹ See Mary Wareham, *The Role of the Landmine Monitor in Promoting and Monitoring Compliance with the 1997 Anti-Personnel Mine Ban Convention*, in DISARMAMENT AS HUMANITARIAN ACTION 79-109 (John Borrie & Vanessa Martin Randin eds., 2006); Kjell Erling Kjellman, *Norms, Persuasion, and Practice: Landmine Monitor and Civil Society*, 24 *Third World Q.*, 955, 956 (2003).

¹⁴⁰ LANDMINE MONITOR REPORT 2009, at 4. (Mines Action Canada et al. eds., 2009).

¹⁴¹ There was, however, unconfirmed use by two States Parties in 1999 and 2000. *Id.* There was also unconfirmed use by two States Parties in 2009. LANDMINE MONITOR REPORT 2010, *supra* note 11, at 3-4.

¹⁴² LANDMINE MONITOR REPORT 2009, *supra* note 140, at 4.

¹⁴³ LANDMINE MONITOR REPORT 2010, *supra* note 11, at 4.

¹⁴⁴ *Id.* at 14.

produce mines.¹⁴⁵ China, India, Israel, Kazakhstan, Pakistan, Poland, Russia, Singapore, South Korea, and the U.S. have enacted formal moratoria on the export of landmines.¹⁴⁶ More than 2.2 million landmines have been demined since 1999 and over 3,200 square kilometers of land has been cleared.¹⁴⁷ This simple numerical overview demonstrates the overwhelming compliance by both States Parties and states not party to the Treaty.

¶31 In addition to acting in accordance with the MBT, states not party have made explicit statements in support of the Treaty. Every year the UN General Assembly sponsors a resolution calling for the universalization of the MBT, and nineteen states not party to the Treaty voted in favor of the 2010 resolution.¹⁴⁸ In explaining its 2009 vote in favor of the of the First Committee version of the annual General Assembly Resolution, Singapore, a non-party, explained that it “supports and will continue to support all initiatives” and that since 1998 it has had an export moratorium in place for all anti-personnel landmines.¹⁴⁹ States have declared their support and interest in the MBT outside of the UN. For example, the Foreign Minister of Bahrain stated, “Bahrain endorses the treaty’s aims and principles and continues to study closely the possibility of accession.”¹⁵⁰ Even China has expressed an “ultimate goal of a total ban” on landmines.¹⁵¹ It has also submitted yearly MBT transparency reports, which track state compliance with the Treaty’s provisions.¹⁵² States not party have also shown support for the MBT by attending meetings of States Parties to the Treaty as observers. Nineteen states not party, including China, Egypt, India, Russia, and Saudi Arabia, attended the 2009 Second Review Conference to the Mine Ban Treaty.¹⁵³ Since the MBT entered into forces, states not party have not only expressed support for the Treaty, they have acted in conformity with a number of its provisions, demonstrating near universal regard for the Treaty.

V. EVALUATING U.S. LANDMINE POLICY SINCE 1997

¶32 As discussed in Part III, the U.S. landmine policy under President Clinton was one of the most progressive in the world until the development of the MBT. Over the course of his administration, Clinton toed the line between calling for international action against landmines and supporting policies protecting the United State’s right to use what it deemed “safe” landmines. The outcome of this approach was a policy that was extremely deferential to the military and focused on humanitarian programs and funding. While the U.S. did not sign the MBT under Clinton, it committed to join in the near future.¹⁵⁴ However, under President George W. Bush, the U.S. foreswore the Treaty as a

¹⁴⁵ *Id.* at 14-15.

¹⁴⁶ *Id.* at 15.

¹⁴⁷ LANDMINE MONITOR REPORT 2009, *supra* note 140, at 1.

¹⁴⁸ G.A. Res. 65/48, U.N. Doc. A/RES/65/48 (Dec. 8, 2010); General Assembly Recorded Vote on G.A. Res. 65/48 available at <http://www.reachingcriticalwill.org/political/1com/1com10/ga/48.pdf>.

¹⁴⁹ Singapore’s Explanation of Vote, Reaching Critical Will, Oct. 29, 2009, <http://www.reachingcriticalwill.org/political/1com/1com07/EOV/L39singapore.pdf> (last visited April 19, 2011).

¹⁵⁰ LANDMINE MONITOR REPORT 2009, *supra* note 140, at 894.

¹⁵¹ *Id.* at 895.

¹⁵² *Id.* at 23.

¹⁵³ Second Review Conference, *supra* note 132, at ¶ 16.

¹⁵⁴ LANDMINE MONITOR REPORT 1999, *supra* note 54, at 319.

solution to the landmine problem and chose to focus on humanitarian programs.¹⁵⁵ An evaluation of U.S. landmine policy since the mid-1990s illustrates a lack of political leadership and extreme deference to the military. Despite the humanitarian costs associated with landmines and their limited military utility, neither Presidents Clinton nor Bush chose or desired to break from military leaders on this issue. There is no clear indication of the direction President Obama will take on the MBT, meaning that now is the time to reevaluate U.S. arguments against signing.

¶33 When President Clinton took office, Congress had already flagged landmines as an important issue for the U.S. to address. In October 1992, President George H. W. Bush signed the Leahy-Evans landmine export moratorium.¹⁵⁶ Legislation extending the moratorium for another three years passed the following year under Clinton.¹⁵⁷ Building off of Congress's efforts, Clinton led the call for an international agreement regulating landmines. However, the U.S.'s reluctance to work outside of the UN meant that it joined the Ottawa Process negotiations too late to influence the content of the MBT.¹⁵⁸

¶34 The day the U.S. withdrew from the Treaty negotiations, Clinton held a press conference to detail a new landmine policy and discuss why the U.S. would not join the Treaty. During the press conference, Clinton gave two main reasons why he would not support the Treaty. First, it would in effect ban U.S. anti-tank mines.¹⁵⁹ Anti-personnel mines are placed near U.S. anti-tank mines to protect the anti-tank mine from being lifted or removed by enemy forces.¹⁶⁰ The U.S. defines the mines laid near the anti-tank mines as anti-handling devices, not mines, and defines the entire system as a "mixed munition."¹⁶¹ The MBT defines anti-handling devices as devices "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."¹⁶² Since the mines associated with U.S. anti-tank mines are not "part of, linked to, attached to, or placed under" the anti-tank mine, they qualify as banned anti-personnel mines under the MBT. As such, the U.S. determined it would not sign the Treaty since it did not obtain an exemption for its anti-tank mine system.

¶35 Clinton's second reason for not signing the Treaty was the lack of a timetable to phase out mines.¹⁶³ Until the U.S. developed alternative technologies, landmines were considered an essential part of the U.S. arsenal. To highlight this point, Clinton stated that landmines are necessary along the DMZ. He further explained that "[i]n the event of an attack...[o]ur antipersonnel mines are a key part of our defense line in Korea."¹⁶⁴

¹⁵⁵ On-the-Record Briefing, Lincoln P. Bloomfield, Jr., U.S. Dep't of State, New Developments in the U.S. Approach to Landmines (Feb. 27, 2004) available at <http://2002-2009-fpc.state.gov/29979.htm>; Fact Sheet, U.S. Dep't of State, *supra* note 19.

¹⁵⁶ *Evolution of US Policy on Antipersonnel Landmines*, Friends Committee on National Legislation, July 25, 2006 (on file with the author).

¹⁵⁷ *Id.*

¹⁵⁸ Wareham, *supra* note 73, at 235.

¹⁵⁹ Remarks by the President on Land Mines, Office of the Press Secretary, The White House (Sept. 17, 1997) available at <http://www.fas.org/asmp/resources/govern/withdrawal91797.html>; Press Briefing, Robert Bell, Office of the Press Secretary, The White House (Sept. 17, 1997), available at <http://www.fas.org/asmp/resources/govern/NSC91797.html>.

¹⁶⁰ Efaw, *supra* note 27, at 149-50.

¹⁶¹ LANDMINE MONITOR REPORT 1999, *supra* note 54, at 318, n. 1.

¹⁶² Mine Ban Treaty, *supra* note 6, art. 2.

¹⁶³ Remarks by the President on Land Mines, *supra* note 159.

¹⁶⁴ *Id.*

Clinton also sought to justify his decision as essential to protecting “the safety and security of our men and women in uniform.”¹⁶⁵ Although these were Clinton’s publicly stated reasons for not signing the Treaty, behind the scenes politics also played a key role in Clinton’s decision.

¶36 Unlike other countries where the landmine ban was dealt with primarily as a humanitarian issue, in the United States it remained squarely a military issue.¹⁶⁶ The U.S. Joint Chiefs of Staff was resistant to removing landmines from its arsenal.¹⁶⁷ The Pentagon actively lobbied Clinton not to sign the Treaty, even though military officials did not necessarily have plans to use landmines.¹⁶⁸ In their view, landmines might save soldiers’ lives in some circumstances, and the U.S. should not ban the weapons without replacement technologies.¹⁶⁹ On the other hand, Secretary of State Madeline Albright supported U.S. participation in the Treaty.¹⁷⁰ The State Department, however, failed to launch a campaign in support of the Treaty to adequately rival that of the Pentagon, because it was uncertain of Clinton’s political commitment to the issue.¹⁷¹

¶37 Clinton’s deference to the Joint Chiefs may have had to do with his fear of straining his relationship with the military. Not having served in Vietnam, the military treated Clinton as an outsider.¹⁷² Clinton acknowledged that the landmine issue in particular strained his relationship with the Joint Chiefs to the point where he concluded that could not “risk a breach” with them over the issue.¹⁷³ When Clinton publicly denounced the MBT he did so in the language of the Pentagon, labeling landmines as a military necessity essential to protecting soldiers.¹⁷⁴ This language, far different than that he used at the U.N. a few years earlier when he called for a global ban on landmines, was an indication that Clinton bowed to the pressure of the Joint Chiefs and adopted their position on the MBT.¹⁷⁵

¶38 Clinton’s priorities in Congress were another factor in the U.S.’s failure to sign the MBT. At the time, Jesse Helms, a pro-military senator who was hostile toward treaties in general, headed the Senate Foreign Relations Committee.¹⁷⁶ Clinton’s top priority was obtaining Senate approval for the expansion of NATO and he did not want to risk spending political capital by pushing the MBT.¹⁷⁷ Clinton expected to face criticism for his decision both domestically and internationally, so to mitigate the outcry, he launched a series of policies limiting the use of certain landmines and committed the U.S. to sign the MBT in the future.

¶39 Both before and after the MBT negotiations Clinton implemented many policies regarding landmines. In 1996, Clinton simultaneously called for a global ban on landmines, banned the use of all non-self-destructing landmines, and ordered the

¹⁶⁵ *Id.*

¹⁶⁶ Kitchen, *supra* note 90, at 37, 50.

¹⁶⁷ Gard, *supra* note 43, 138.

¹⁶⁸ Kitchen, *supra* note 90, at 50.

¹⁶⁹ Gard, *supra* note 43, 138.

¹⁷⁰ Kitchen, *supra* note 90, at 47.

¹⁷¹ *Id.*

¹⁷² *Id.* at 48.

¹⁷³ Gard, *supra* note 43, 140.

¹⁷⁴ Kitchen, *supra* note 90, at 50.

¹⁷⁵ *Id.*; Gard, *supra* note 43, at 140.

¹⁷⁶ Kitchen, *supra* note 90, at 47.

¹⁷⁷ Mustoe, *supra* note 24, at 542.

demilitarization of all such weapons by the end of 1999.¹⁷⁸ In this same announcement, however, Clinton put the international community on notice that the U.S. would not sign an international ban that does not “protect our right to use APL [in Korea] until alternatives become available or the risk of aggression has been removed.”¹⁷⁹ The following year, prior to joining the Ottawa Process, the U.S. announced “a permanent ban on the export and transfer of anti-personnel landmines” and a cap on the current landmine stockpile.¹⁸⁰

¶40 In 1998, after choosing not to join the Treaty, President Clinton signed Presidential Decision Directive 64. Under this directive, the Department of Defense was to stop using anti-personnel landmines, save for mixed munitions,¹⁸¹ outside of Korea by 2003.¹⁸² The Directive also ordered the Department of Defense to find alternatives to all anti-personnel landmines by 2006 so that the U.S. could stop using mines worldwide and join the Treaty.¹⁸³ Additionally, Clinton launched “Demining 2010,” a presidential initiative dedicated to accelerating international demining efforts.¹⁸⁴ Through the initiative, the U.S. committed to doubling the annual budget for the Department of State’s Humanitarian Demining Program from \$40 million to \$80 million.¹⁸⁵ Taken together, these policies were stepping-stones toward the U.S. joining the Mine Ban Treaty. In light of Clinton’s refusal to sign the Treaty in 1997, these were the only real options the U.S. had to maintain its image as a country serious about landmines.

¶41 Three years into the Bush administration, the U.S. turned its back on ever joining the MBT. In 2004, after conducting a landmine policy review, the Bush administration announced that the U.S. would no longer seek to join the MBT.¹⁸⁶ Under the new policy, the U.S. would cease using all landmines, except those with self-destructing or deactivating capabilities.¹⁸⁷ The U.S. would continue to reserve the right to use landmines without self-destructing or deactivating devices in Korea through the end of 2010.¹⁸⁸ However, the U.S. transferred the landmines along the DMZ to South Korea and they are no longer classified as U.S. mines.¹⁸⁹ Finally, under the new landmine policy, Bush sought \$70 million in humanitarian mine action funding—a fifty percent increase from 2003 funding level.¹⁹⁰ While this policy looks progressive, the MBT prohibits self-destructing or deactivating landmines. As long as the Bush administration policy is in effect, the U.S. cannot join the Treaty.

¹⁷⁸ Fact Sheet, Office of the Press Secretary, The White House, U.S. Announces Anti-Personnel Landmine Policy (May 16, 1996).

¹⁷⁹ *Id.*

¹⁸⁰ Fact Sheet, Office of the Press Secretary, The White House, United States Announces Next Steps on Anti-Personnel Landmines (Jan. 17, 1997).

¹⁸¹ Mixed Munitions contain both anti-personnel and antitank mines and are not permitted under the Treaty. LANDMINE MONITOR REPORT 1999, *supra* note 54, at 318, n. 1.

¹⁸² *Id.*; J. Antonio Ohe, *Are Landmines Still Needed to Defend South Korea?: A Mine Use Case Study*, in LANDMINES AND HUMAN SECURITY, *supra* note 60, at 225.

¹⁸³ LANDMINE MONITOR REPORT 1999, *supra* note 54, at 319.

¹⁸⁴ Press Briefing on Land Mine Policy, Secretary of State Madeleine K. Albright and Secretary of Defense William Cohen, U.S. Dep’t of State (Oct. 31, 1997).

¹⁸⁵ *Id.*

¹⁸⁶ On-the-Record Briefing, Lincoln Bloomfield, *supra* note 155.

¹⁸⁷ Fact Sheet, U.S. Dep’t of State, *supra* note 18.

¹⁸⁸ On-the-Record Briefing, Lincoln Bloomfield, *supra* note 155.

¹⁸⁹ *Id.*; Fact Sheet, U.S. Dep’t of State, *supra* note 19; Ohe, *supra* note 182, at 231.

¹⁹⁰ On-the-Record Briefing, Lincoln Bloomfield, *supra* note 155.

¶42 Bush officials outlined two goals for the new policy. First, it would ensure that the U.S. “military [had] the defensive capabilities it needs to protect [its] own and friendly forces.”¹⁹¹ Second, it would seek “to end the humanitarian risks posed by landmines.”¹⁹² As for the military capabilities, the administration stated that landmines “have a valid and essential role” because they can aid in shaping the battlefield, delay the enemy, increase the effectiveness of other weapons, and save troops’ lives.¹⁹³ The fact that the policy allowed for extended use of persistent mines in Korea, illustrates that the U.S. viewed landmines as necessary to the Korean defensive strategy. The administration believed increased humanitarian funding was “in the best interest of the United States” because it “enhances [the United States’] reputation.”¹⁹⁴ Despite the increased humanitarian aid, the Bush policy is extremely pro-military in its defense of the military utility of landmines.

¶43 Unlike the Clinton administration, which did not explicitly defer to the military, the Bush administration stated that its policy was based on the military’s judgment. At a February 2004 press conference on the new policy, Dr. Joseph Collins, a deputy assistant secretary to defense, stated, “It is the considered judgment of our senior military commanders that they need the defensive capabilities that landmines can provide.”¹⁹⁵ Like Clinton, Bush was a civilian president who military leaders saw as having avoided service in Vietnam, and this might have led Bush to be more deferential to the military.¹⁹⁶ Bush was also overseeing two wars as Commander-in-Chief. Even if Bush personally supported the MBT, pushing the military on the issue could have seriously affected the war effort and his relationship with the military.

¶44 President Barack Obama entered office with the goal of quickly overturning many Bush administration policies.¹⁹⁷ It does not appear, however, that the Bush landmine policy was one that the Obama administration seriously evaluated. In November 2009, the Obama administration announced that it would send an observer delegation of State Department and Department of Defense officials to the Second Review Conference of the Mine Ban Treaty.¹⁹⁸ At the same time, it was revealed that the administration had already undertaken and finished a review of U.S. landmine policy.¹⁹⁹ The conclusion of the review was that the Obama administration would not join the MBT because the U.S. “would not be able to meet [its] national defense needs, nor [its] national ... security commitment to [its] friends and allies” if it joined.²⁰⁰ This statement was largely a reiteration of the Bush administration’s reasons for refusing to join the Treaty.

¶45 The Obama administration was immediately criticized for adopting the Bush administration’s policy and began to backtrack. Senator Patrick Leahy, the leading Congressional advocate of the MBT, labeled the administration’s review and policy

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Fact Sheet, U.S. Dep’t of State, *supra* note 19.

¹⁹⁴ Stacy Bernard Davis & Donald F. Patierno, *Tackling the Global Landmines Problem: The United States Perspective*, in *TO WALK WITHOUT FEAR*, *supra* note 2, at 126-27.

¹⁹⁵ On-the-Record Briefing, Lincoln Bloomfield, *supra* note 155.

¹⁹⁶ William Nash et al., *Reinventing War*, FOREIGN POL’Y, Nov.-Dec. 2001, at 39.

¹⁹⁷ John F. Burns, *Obama Promises the World a Renewed America*, N.Y. TIMES, Jan. 21, 2009, at P24.

¹⁹⁸ Second Review Conference of the Ottawa Convention Banning Anti-Personnel Landmines, U.S. Dep’t of State (Nov. 24, 2009), *available at* <http://www.state.gov/r/pa/prs/ps/2009/nov/132353.htm>; Daily Press Briefing, Ian Kelly, *supra* note 20.

¹⁹⁹ Daily Press Briefing, Ian Kelly, *supra* note 20.

²⁰⁰ *Id.*

“cursory and half-hearted”²⁰¹ and “deeply disappointing to those...who expected a serious, thorough reexamination of this issue.”²⁰² Human Rights Watch criticized the decision as “a reprehensible rejection of the most successful disarmament and humanitarian treaty of the past decade” saying that it “lacks vision, compassion, and basic common sense.”²⁰³ In light of the strong negative reaction, the Obama administration reversed course one day after reaffirming the Bush policy, claiming that it had only conducted a “partial review” and that the policy was still under consideration.²⁰⁴

¶46 Obama’s decision to send representatives to a meeting of the Mine Ban Treaty for the first time was welcomed by Human Rights Watch and the ICBL.²⁰⁵ At the same time, the U.S. statement at the Second Review Conference of the Mine Ban Treaty showed continued deference to the military by pointing out that U.S. landmine policy must take into consideration national defense, security commitments to allies, and the protection of U.S. troops.²⁰⁶ The statement seemed to reference a need to reserve the right to use landmines in Afghanistan and Iraq.²⁰⁷ Instead of simply deferring to the military, the Obama administration should take into account the many counter-perspectives when evaluating the weapon’s military utility and their role in Korea, Iraq, and Afghanistan.

¶47 The military utility of landmines as a justification for their continued use was discussed in Part II of this comment. The conclusion of that discussion, that landmines have a limited military utility that does not outweigh their humanitarian harm, applies to the U.S. contention that landmines are a necessary part of the U.S. arsenal. While the U.S. military has sustained a prolonged campaign against the MBT, there is no consensus within the military on the utility of the weapon. In a New York Times advertisement placed during the Clinton administration, a group of sixteen four-star generals denied the military utility of the weapon and called on the president to sign the MBT.²⁰⁸ Even before then, the Department of Defense contracted with the Institute for Defense Analysis (IDA) to review the military utility of landmines.²⁰⁹ The IDA determined that landmines have a “quite modest” utility and a decision not to join ban negotiations based on the weapon’s utility would require “an especially demanding set of assumptions about the nature of future warfare” that may not be valid.²¹⁰ A second study issued by the Joint Chiefs of Staff and conducted by the Dupuy Institute looked at the consequences to the military if there was a total ban on landmines.²¹¹ The Dupuy Institute concluded that “a

²⁰¹ Press Release, Office of Senator Leahy, Leahy Hits U.S. Refusal to Join the Landmine Treaty (Nov. 25, 2009), *available at* http://leahy.senate.gov/press/press_releases/release/print.cfm?id=eadd48c-1a6a-4976-bc1a-6b0b6b3e556d.

²⁰² Statement of Senator Patrick Leahy on the Cartagena Landmine Ban Treaty Review Conference, Office of Senator Leahy (Dec. 1, 2009), *available at* http://leahy.senate.gov/press/press_releases/release/?id=f8a408ba-67df-449d-8aa5-17bb9509b967.

²⁰³ Press Release, Human Rights Watch, US: Obama Should Join the Mine Ban Treaty (Nov. 25, 2009), *available at* <http://www.hrw.org/en/news/2009/11/25/us-obama-rejection-mine-ban-treaty-reprehensible>.

²⁰⁴ Bulter, *supra* note 21.

²⁰⁵ Press Release, Human Rights Watch, US: Landmine Review Should Lead to Ban (Dec. 4, 2009), *available at* <http://www.hrw.org/en/news/2009/12/04/us-landmine-review-should-lead-ban>.

²⁰⁶ U.S. Statement at the Cartagena Summit on a Mine-Free World, Bureau of Public Affairs, U.S. Dep’t of State, Dec. 1, 2009, *available at* <http://www.state.gov/r/pa/prs/ps/2009/dec/132891.htm>.

²⁰⁷ Statement of Senator Patrick Leahy, *supra* note 202.

²⁰⁸ Wexler, *supra* note 14, at 577-78.

²⁰⁹ Gard, *supra* note 43, at 140.

²¹⁰ ICRC, *supra* note 47, at 45.

²¹¹ Gard, *supra* note 43, at 141.

total ban...if eventually adhered to by most nations, will only benefit US ground forces in the long run” and resulted in a recommendation “that the United States support a total ban on anti-personnel mines.”²¹² However, the U.S. continued to refuse to join the MBT pointing to the need to protect anti-tank mines and honor U.S. military commitments abroad.

¶48 U.S. anti-tank mines are banned under the MBT because they are surrounded by anti-personnel mines; the U.S. classifies these anti-tank mines as anti-handling devices. The U.S. system is not the only possible anti-tank mine system. Other systems, like those employed by many European powers, are allowed under the MBT. Instead of utilizing landmines as anti-handling devices, European anti-tank mines include anti-handling devices that are attached on top or below the anti-tank mines,²¹³ the use of which is permissible under the MBT. This alternative system, which has been used by other countries for years, negates the need for landmines as a component of the U.S. anti-tank system.²¹⁴ In a 2001 interview with *Foreign Policy*, Maj. Gen. William Nash, former commanding general of the Army’s 1st Armored Division and regional administrator for the United Nations in northern Kosovo, stated that “there are technologies that can make up for the land mine” as an individual weapon and as it is used in conjunction with anti-tank mines.²¹⁵ The use of landmines alongside anti-tank mines is not necessary for the overall effectiveness of U.S. anti-tank mines.

¶49 The U.S. has not used landmines in almost twenty years, yet the U.S. reserves the right to use landmines in defensive operations in countries like Korea, Iraq, and Afghanistan. First, Iraq and Afghanistan are States Parties to the MBT, and under Article 1, they may not “assist, encourage, or induce” any other states in using landmines on their territory or any other states territory. As such, the U.S. cannot use landmines in either country without those countries violating the Treaty.²¹⁶ Second, the mines placed along the DMZ are South Korean, not American, mines and do not affect the ability of the U.S. to join the Treaty.²¹⁷ Therefore, the U.S. argument in support of retaining landmines rests on the possibility of the U.S. using mines in Korea as a defensive measure against an invasion by North Korea is invalid.

¶50 Landmines are not an effective measure against a possible invasion of South Korea. The former commander of U.S. forces in Korea, Lt. Gen. James Hollingsworth rated the utility of landmines in Korea as “minimal.”²¹⁸ Hollingsworth never relied on landmines to “make much of a difference” because “[t]o be blunt, if we are relying on these weapons to defend the Korean peninsula, we are in big trouble.”²¹⁹ The purported purpose of landmines in Korea is to stall a North Korean invasion and provide time for South Korean and U.S. forces to mobilize.²²⁰ However, there are numerous other tactics

²¹² *Id.*

²¹³ Capece, *supra* note 81, at 194-95.

²¹⁴ ICRC, *supra* note 47, at 2.

²¹⁵ Nash et al., *supra* note 196, at 44.

²¹⁶ Press Release, Human Rights Watch, *supra* note 205.

²¹⁷ Jody Williams, Op-ed, *United States’ Shameful Land Mine Policy*, L.A. TIMES (Dec. 1, 2009), available at <http://articles.latimes.com/2009/dec/01/opinion/la-oe-williams1-2009dec01>.

²¹⁸ Gard, *supra* note 43, at 144; Ohe, *supra* note 182, at 230; Mustoe, *supra* note 24, at 561.

²¹⁹ Ohe, *supra* note 182, at 230.

²²⁰ *Id.* at 232.

including tank traps, trenches, and barricades that can delay a North Korean invasion.²²¹ Also, it is not likely that U.S. and South Korean forces will be caught off-guard by a North Korean ground invasion. U.S. satellite and spy technologies monitor North Korean military activity and would provide advance warning of any mobilization for a ground invasion, so U.S. forces would have ample opportunity to prepare.²²² Further, U.S. military strategy is to first employ precision air and missile attacks, which could halt a Korean attack.²²³ As Lieutenant General Hollingsworth said, the U.S. should not and does not have to rely on landmines to protect the Korean Peninsula.

¶51 There is some indication that the Obama administration may not defer to the military's desire in developing a landmine policy. During 2010 the U.S. Department of State hosted a number of interagency meetings that included representatives from U.S. and international NGOs, the ICRC, the UN, and members of the Clinton and Bush administration landmine policy teams.²²⁴ Additionally, the U.S. has sought input from political and military allies on whether the U.S. should join the Treaty.²²⁵ This outreach to groups other than the U.S. military is possibly a signal that the Obama administration is not willing to simply defer to the judgment and will of the military in developing a policy on the Mine Ban Treaty.

VI. CONCLUSION: OBAMA SHOULD JOIN THE MINE BAN TREATY

¶52 After leaving office, President Clinton admitted that one of his biggest regrets in office was his administration's failure to sign the MBT.²²⁶ Why? Seemingly, Clinton realized that landmines' limited military utility does not outweigh their humanitarian effect. This understanding reflects U.S. policy before and since the formulation of the MBT. The U.S. does not use, produce, or trade landmines. It reserves the right to, but does not use landmines with self-destruct or deactivation mechanisms. Landmines are not necessary for the protection of South Korea, nor can they be used in Iraq or Afghanistan without those countries violating the MBT. Finally, the U.S. has provided more humanitarian funding for mine action programs than any other nation. President Obama also has enough political support to join the Treaty. In May 2010, sixty-eight U.S. Senators sent President Obama a letter in support of the U.S. joining the MBT.²²⁷ The U.S. refusal to join the Treaty rests solely on the U.S. military's desire to keep its stockpile of landmines, which it does not even use. The Obama administration should back the Mine Ban Treaty because it is in the best interest of the United States.

¶53 The United State's failure to join the Mine Ban Treaty illustrates American exceptionalism at its worst. Whereas the majority of states understood that the humanitarian situation caused by landmines warranted the strongest possible treaty, the United States refused to join unless other states accommodated its continued use and

²²¹ Gard, *supra* note 43, at 150.

²²² Ohe, *supra* note 182, at 232.

²²³ *Id.* at 232-33.

²²⁴ LANDMINE MONITOR REPORT 2010, *supra* note 11, [US Ban Policy Section].

²²⁵ *Id.*

²²⁶ Rachel Stohl, *Signing the Ottawa Treaty*, Center for Defense Information (Dec. 7, 2000), available at http://www.cdi.org/program/document.cfm?DocumentID=511&StartRow=11&ListRows=10&appendURL=&Orderby=D.DateLastUpdated&ProgramID=89&from_page=index.cfm.

²²⁷ LANDMINE MONITOR REPORT 2010, *supra* note 11, [US Ban Policy Section].

stockpile of landmines. When its demands were rejected, chose to United States bow of the process rather than concede to middle-power states.²²⁸ Since then, the U.S. has consistently developed policies in an attempt stay in line with the international norm developed by the MBT.²²⁹ As long as the U.S. stays outside of the MBT, its landmine policies will be regarded as inadequate.

¶54 In the years since the U.S. refusal to join the Treaty, it has acted in an increasingly unilateral manner. The Bush administration's withdrawal from the Anti-Ballistic Missile Treaty and its rejection of the Kyoto Protocol, the International Criminal Court, and the Mine Ban Treaty were regarded by the international community as acts of an isolationist nation.²³⁰ Along with the U.S.'s actions in Iraq and Afghanistan, the U.S. established a clear doctrine of global domination and exceptionalism.²³¹ President Obama has articulated a plan of global reintegration and has worked to restore the U.S.'s reputation as a cooperationist nation.²³² Joining the MBT would signal to the world that the Obama administration is serious about working with the international community. Since the U.S. has long opposed the MBT, the international community may regard U.S. ratification of the Treaty as an apology for its recent exceptionalist policies. Finally, the U.S. landmine policy is so close to the requirements of the MBT that joining the Treaty would not require a drastic shift in practice. The Obama administration should correct a lasting mistake of the Clinton administration by joining the MBT, and in doing so, indicate to the world community its desire to reengage and repair relationships.

²²⁸ Kitchen, *supra* note 90, at 52.

²²⁹ Wexler, *supra* note 14, at 598-99.

²³⁰ James Chace, *Present at the Destruction: The Death of American Internationalism*, WORLD POL'Y J., Spring 2003 1.

²³¹ *Id.* at 2.

²³² Burns, *supra* note 197, at P24.