

THE OTTAWA TREATY AND NON-STATE ACTORS

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The Ottawa Treaty,¹ also referred to as the Mine Ban Treaty, is the centrepiece of the landmines ban. In the framework of the non-governmental International Campaign to Ban Landmines (ICBL), however, the landmines ban is or should be more than (or go beyond) the Ottawa Treaty. First of all, the legal ban or norm need not be limited to the Ottawa Treaty. There are and may be other international and national terms of reference. Secondly, the campaign to ban landmines is also a campaign for mine awareness, victim assistance, mine clearance, legal responsibility, and other mine action.

Prohibition/Ban, Not Criminalisation

The Ottawa Treaty in its official title uses the word ‘prohibition’ and its Preamble uses the term ‘total ban’ but hardly in its operative text. The key Article 1 on General Obligations instead uses the phraseology ‘Each State Party undertakes...’ The negative undertakings are on the use, development, production, acquisition, stockpiling, transfer of anti-personnel mines (APMs), as well as on assistance, encouragement or inducement of ‘anyone to engage in any activity prohibited to a State Party under this Convention.’ The positive undertaking is on the destruction of all APMs. Taken together, these undertakings are understood to be the prohibition or total ban. This intention is clear from the Preamble, even as the operational provisions are not as strong in language. The use, stockpiling, production and transfer of APMs are not categorically stated to be prohibited or banned, much less illegalised or criminalised. The presumably prohibited activities are not defined and penalised as crimes or more precisely

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¹ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, opened for signature in Ottawa on 3 December 1997 (*‘Ottawa Treaty’*). It had 121

international crimes. Penal sanctions are left for national implementation measures under Article 9. The prohibited activities are international wrongs but not (yet) international crimes.

The undertakings are more in the nature of obligations than in the nature of crimes. And strictly speaking, they are obligations of 'Each State Party.' There is clear state responsibility but not individual, much less group or corporate, responsibility. Each State Party undertakes never to 'assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party' but this 'anyone' is not itself prohibited from engaging in such activity. Be that as it may, the Ottawa Treaty is a major achievement both in substance and process, a definite step forward in the global movement to ban landmines.²

The Ottawa Treaty's apparently weak penal force at the international level could have been compensated for had APMs been criminalised in the later Rome Statute of the International Criminal Court³ (ICC) but it was not to be.⁴ Neither APMs nor the usual weapons of mass destruction (eg, nuclear, chemical, and biological) made it to the shortest list of criminalised weapons under the Statute's Article 8(2)(b), which in any case is limited to international armed conflict. Paragraph (xx) thereof provides as a war crime the use of weapons 'which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate' provided they are the 'subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment.' APMs fit this bill except for the last item on an annex which will have to wait at least seven years.

The non-inclusion of APMs as a criminalised weapon in the Rome Statute, like other proposals and provisions, can be attributed to what may have been necessary compromises in the give-and-take of diplomatic negotiations in view of the positions of the major military powers (especially the US) at the Rome Conference. What is surprising is that Canada, the

initial signatory States, up to 135 with 84 ratifications as of 31 August 1999. It entered into force on 1 March 1999.

²See, especially, Maxwell A Cameron, Robert J Lawson, and Brian W Tomlin (eds), *To Walk Without Fear: The Global Movement to Ban Landmines* (1998). Thanks to Mary Foster of Mines Action Canada (MAC) for the book.

³Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998 ('*Rome Statute*'). Its Final Act had 127 initial signatory States.

vanguard of the Ottawa Treaty which was then already nearing its requisite 40 ratifications for entry into force, made an early deliberate decision to abandon efforts to have APMs specifically criminalised so as not to undermine its overall efforts. The ICBL, then already with the prestige of the latest Nobel Peace Prize, was not present in its usual high-level NGO lobby to push the landmines issue, partly because it was more occupied with a project to monitor implementation of the Ottawa Treaty.⁵

The ICHRDD argues that, notwithstanding the non-criminalisation of APMs and weapons of mass destruction in the Rome Statute, their use (as distinguished from the weapons per se) 'could still be brought within the jurisdiction of the Court' under some other provision depending on the circumstances of their use.⁶ This will depend on ICC jurisprudence. In time, there may develop other venues for the international criminalisation of APMs. There is still, of course, the mechanism of an Amendment Conference under Article 13 of the Ottawa Treaty. This non-UN venue still has better prospects than such UN venues as the Conference on Disarmament (CD) and the review conferences of the 1980 Convention on Certain Conventional Weapons⁷ (CCW).

One possibility to look into is the current International Committee of the Red Cross (ICRC) study on customary IHL⁸ and see how APMs may be internationally criminalised under this. To be sure, the ICBL has already taken the position that APMs are 'already illegal under existing customary international humanitarian law, because they are inherently indiscriminate and they fail the proportionality test... The Mine Ban Treaty codifies the illegal status of anti-personnel mines and is establishing the new international norm.'⁹

⁴Helen Durham, Discussion on the International Criminal Court at the International Criminal Law postgraduate class, Faculty of Law, University of Melbourne, 10 November 1998.

⁵The information in this paragraph is based on personal sharings with Durham, above n 4, who also belongs to the Victoria (Australia) Network of ICBL as well as on email sharings with other colleagues in the campaign.

⁶International Centre for Human Rights and Democratic Development (ICHRDD), 'The Rome Statute for an International Criminal Court: The Beginning of the End of Impunity – A Summary of the Main Provisions.'

⁷Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 10 October 1980 ('CCW').

⁸Avril McDonald, 'The Year in Review' (1998) *Yearbook of International Humanitarian Law* 113, 120.

⁹Stephen D Goose, 'The Ottawa Process and the 1997 Mine Ban Treaty' (1998) 1 *Yearbook of International Humanitarian Law* 269, 291.

On the other side, the devil's advocate could make a number of counter-arguments. Aside from the 'weak' wording of the Ottawa Treaty itself and the 'negative inference' from its non-criminalisation in the Rome Statute, there is the still existing CCW Amended Protocol II,¹⁰ which merely restricts the use of landmines (both anti-personnel and anti-tank), in effect, legalises them. Incidentally, one of the major amendments in that Protocol was its extension from international to internal armed conflict.

State Parties and Non-State Actors

The Ottawa Treaty, as already pointed out, basically provides for State Party undertakings or obligations. Sub-national entities become obligated only through national implementation measures to be taken by each State Party. The ICBL has cited as one of the main areas of concern in the Treaty its 'failure to include specific language regarding application to non-state actors.'¹¹ The Austrian delegation, which provided the first draft of the Treaty, says 'The question of application to non-state entities remains an important one in view of the number of internal armed conflicts and guerrilla movements. The clarification mechanism takes into account the fact that the state party may not have control over areas or installations, which would be considered in addressing the issue of compliance.'¹²

The closest language regarding application to rebel groups is the Preamble's generic restatement of the 'principle of international humanitarian law that the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited...' This is preambular or prefatory, not operative or binding, text. Anyway, the Austrian delegation says 'the Preamble was formulated to reiterate the basic principles that all parties to the conflict are bound by the principles of IHL underlying the ban.'¹³

¹⁰Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Amended Protocol II), Geneva, 3 May 1996, Annexed to the CCW.

¹¹Goose, above n 9, 289.

¹²Thomas Hajnoczi, Thomas Desch, and Deborah Chatsis, 'The Ban Treaty' in Cameron, et al, above n 2, 292, 306.

¹³Ibid.

Although the Preamble mentions only IHL, the Austrian delegation says ‘The Convention is firmly rooted in international humanitarian law (IHL), and at the same time also contains important elements of disarmament law... The Convention totally bans a specific type of weapon and provides for a compliance mechanism, in keeping with the disarmament tradition.’¹⁴ One is tempted to look for an angle of peaceful settlement of disputes to complete the three themes of the 1899 Hague Peace Conference.¹⁵ And there is indeed Article 10 on Settlement of Disputes. A major omission though is any reference to HR. This would have been particularly relevant to national implementation measures as well as widening and strengthening the legal basis for a landmines ban.

According to the Austrian delegation, Article 9 on National Implementation Measures, was an area that combined IHL and disarmament law. The first draft had a ‘grave breaches’ provision a la Geneva Conventions for violations of the Treaty during armed conflict. This obviously did not survive. The final text was patterned after the equivalent article in Amended Protocol II (the landmines protocol) and similar articles in the 1993 Chemical Weapons Convention¹⁶ and the 1996 Comprehensive Nuclear Test-Ban Treaty,¹⁷ without the latter’s explicit extraterritorial jurisdiction.¹⁸ And so, the final Article 9:

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*. (underscoring mine)

What the State Parties would not (yet) illegalise or criminalise at the international level, they would prevent and suppress at the national level by all appropriate measures, including penal sanctions, and presumably police and military measures. That may be well and good for a landmines ban but a suppressive approach must be complemented by other approaches.

¹⁴Ibid 296.

¹⁵Commemoration of the Centenary of the 1899 Hague Peace Conference, Asia-Pacific Regional Conference, Faculty of Law, The University of Melbourne, Australia, 18-20 February 1999.

¹⁶Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 13 January 1993 (‘Chemical Weapons Convention’).

¹⁷Comprehensive Nuclear Test-Ban Treaty, 24 September 1996.

¹⁸Thomas Hajnoczi, et al, above n 75, 306.

A strong case could be made for a landmines ban not only as an IHL and disarmament measure but also as an HR measure. The greatest Filipino HR lawyer Jose W Diokno once summed up all the ‘rights of man’ into three basic rights: to life, to human dignity, and to develop.¹⁹ On all three counts, APMs as a weapon are guilty of serious, if not systematic and mass, violations of HR. The United Nations Children’s Fund (UNICEF), for one, has anchored its support for the ban on the basis of the 1989 Convention on the Rights of the Child²⁰ (CRC), particularly the rights to life, to health care and to protection.²¹

With a view to holding producers accountable, a linkage between landmines and human rights has been made,²² anchored on the International Covenant on Civil and Political Rights,²³ particularly the rights to life, to liberty of movement and to choose one’s residence.

Another interesting example is a provision against the use of landmines in the 1998 agreement on HR and IHL between the Philippine government and the rebel NDF.²⁴ Under its Part III on Respect for HR, Article 2(15) includes ‘the right not to be subjected to... the use of landmines.’ The main significant thing here is the HR context. The other significant thing is that, strictly speaking, the landmines ban here covers not only anti-personnel but also anti-tank mines. In these two senses, this government-rebel agreement goes beyond the Ottawa Treaty. It is to approaches such as this that we now turn our attention.

This rest of this paper deals with a developing complementary process (as in complementary to the Ottawa Process) to engage non-state actors (rebel groups) in the effort towards a truly universal ban on APMs. This part addresses the legal aspects of the unfolding NSA initiative within the ICBL and complements the practical work (research, monitoring, and

¹⁹Jose W Diokno, ‘Human Rights Make Man Human’ in *Justice Under Siege: Five Talks* (1981) 20, 22-6.

²⁰Convention on the Rights of the Child, New York, 20 November 1989 (‘CRC’).

²¹Office of Emergency Programmes, UNICEF, *A Child Rights Guide to the 1996 Mines Protocol* (1997) 3-5.

²²Brian Owsley, ‘Landmines and Human Rights: Holding Producers Accountable’ (1995) 21 *Syracuse Journal of International Law and Commerce* 203, 209.

²³International Covenant on Civil and Political Rights, 16 December 1966 (‘ICCPR’).

²⁴Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law between the Government of the Republic of the Philippines and the National Democratic Front of the Philippines, The Hague, 16 March 1998.

engagement) of colleagues in the Working Group on Non-State Actors²⁵ (WG-NSA). Much more so than the Ottawa and Rome Processes, the NSA initiative is perforce a purely NGO initiative.

Non-State Actors: What, Who, Where

Non-state actors (NSAs) and rebel groups are terms used interchangeably in this paper. They are, for now, the most convenient terms to have emerged, after some grappling with various possible terms. ICBL has been using the term NSA. For most of those outside ICBL, however, NSA could mean any number of things. For example, the equivalent term 'non-state entities' was used by McCormack to also refer to "Multinational corporations, international organizations, non-governmental organizations, and some national cultural groups and entities - all are acting as other-than-sovereign independent nation states".²⁶

Still, the use of the term NSA to mean the other party (or parties) in internal armed conflict has gained currency, even with some state actors. Canada, for one, has used the term in a 'proposed global convention prohibiting the international transfer of military small arms and light weapons to non-state actors'.²⁷ The classification scheme in the Documentation section of the newly launched *Yearbook of International Humanitarian Law* uses the category 'Conflicts, Armed Forces and Non-State Actors'.²⁸ Still, the term would be vague to most people, including the NSAs themselves. Also, 'actors' are not necessarily organisational but groups are.

Thus, the other term 'rebel groups', particularly based on Professor Peter Rowe's generic formulation: 'any group carrying out acts of violence for political purposes in opposition

²⁵ In the ICBL WG-NSA, the author has been privileged to work closely and benefit from interaction with Eduardo Marino of Colombia, Noel Stott of South Africa, Miriam Coronel-Ferrer of the Philippines, Mary Foster of Canada, and Elisabeth Reusse-Decrey of Switzerland.

²⁶ Timothy McCormack, 'From Solferino to Sarajevo: A Continuing Role for International Humanitarian Law?' (1997) 21(2) *Melbourne University Law Review* 621, 640. This was his Inaugural Professional Public Lecture as Foundation Red Cross Professor of International Humanitarian Law, Law School, The University of Melbourne, on 28 April 1997.

²⁷ Canada, 'Discussion Paper: A Proposed Global Convention Prohibiting the International Transfer of Military Small Arms and Light Weapons to Non-State Actors,' 7 October 1998.

to the *de jure* government.²⁹ At least, the term is not misunderstood to mean MNCs or NGOs. The context of anti-government irregular armed forces in internal armed conflict is clear. The term ‘rebels’ is also used by Professors Alfred P Rubin and Antonio Cassese in their respective articles on the status of rebels under the 1949 Geneva Conventions and 1977 Additional Protocol II.³⁰

But the term is not also without its problems, including to some rebel groups themselves. We refer to the ‘highly theoretical’ but largely impractical distinction among ‘three categories of civil conflict with different legal consequences flowing from each: rebellion, insurgency, and belligerency.’³¹ We will not get bogged down in these categories. We have learned a negative lesson about belligerency as the biggest single stumbling block in the off-and-on peace negotiations between the Philippine government and the NDF which believes it has progressed beyond the first two categories.³² In this connection, Olivier Durr as an ICRC Head of Delegation in the Philippines once wrote to the author (providing materials):

You will see that the recognition of belligerency is an obsolete legal institution which was not even a generalised and accepted practice, but rather an instrument of the policy of the USA in the Southern American affairs at the turn of the century I have always been amazed at the importance given to this subject by both parties in the Philippines. Sad enough, the application and respect of IHL, even in its fundamental principles, have been made more difficult because of this unnecessary political prerequisite.³³

Terms other than ‘rebel groups’ have been used in this discourse. The WG-NSA

²⁸McDonald, above n 8, 113.

²⁹Peter Rowe, ‘Liability for “War Crimes” During a Non-International Armed Conflict’ (1995) XXXIV (1-4) *Revue De Droit Militaire et de Droit de la Guerre* 149, 152.

³⁰Alfred P Rubin, ‘The Status of Rebels Under the Geneva Conventions of 1949’ (1972) 21(3) *International and Comparative Law Quarterly* 472; and Antonio Cassese, ‘The Status of Rebels Under the 1977 Geneva Protocol on Non-International Armed Conflict’ (1981) 30 *International and Comparative Law Quarterly* 416, 424.

³¹Heather A Wilson, *International Law and the Use of Force by National Liberation Movements* (1988), 23-9.

³²Luis Jalandoni, ‘NDFP Asserts its Status of Belligerency and Announces its Declaration of Undertaking to Apply the Geneva Conventions and Protocol I,’ 5 August 1996, from the National Democratic Front of the Philippines website (www.geocities.com/~cpp-ndf).

³³Olivier Durr, Letter to Soliman M Santos, Jr, Manila, 7 January 1991, quoted in Soliman M Santos, Jr, ‘Peace Talks and Belligerency Status’ (1992) 2(1) *Peace by Piece* 1, 5-6.

initially used ‘guerrilla groups.’³⁴ But technically, guerrilla forces and warfare obtain in both internal and international armed conflicts.³⁵ World War II had its resistance movements of mainly guerrilla forces. Some internal armed conflicts have been characterised by mainly conventional or positional warfare like the American Civil War.

There are some terms used in, derived from or associated with the Geneva Conventions and its Additional Protocols. ‘National liberation movements’ (alternatively, ‘liberation forces’) pertains to wars of national liberation which have international status under Protocol I, Article 1(4). ‘Dissident armed forces’ is a term used in Protocol II, Article 1(1) on internal armed conflicts albeit of a certain threshold or level, and therefore of specific, not generic, meaning. Liberation (forces) also has a connotation of liberation from foreign occupation. Similarly, resistance (movements) has the connotation of resistance to foreign occupation.³⁶

Canadian human rights lawyer David Matas uses the term ‘armed opposition groups’ because it is ‘ordinary everyday English’ and used by the UN Commission on Human Rights.³⁷ This is similar to some terms like ‘extra-parliamentary opposition’ and ‘anti-government forces’ which the WG-NSA brainstormed during the early conceptualisation of the NSA initiative.³⁸ Care was taken to avoid ‘value-laden’ or judgmental terms like ‘terrorist,’ ‘bandit’ or ‘criminal’. The last two remove the political essence of the rebel. As for the terrorist, he or she is often political but, as has been often said, one person’s terrorist is another person’s freedom fighter. The topic of terrorism is so full of ‘landmines,’ we will avoid it in this paper.

³⁴Eduardo Marino, ‘Proposed Parallel Consultations of Guerrilla Groups and War Veterans,’ Bogota, March 1997.

³⁵Keith Suter, *An International Law of Guerrilla Warfare: The Global Politics of Law-Making* (1984) 10-17. This book provides a critical look into ‘what went wrong’ in the making of Protocol II. For more on the legal aspects of guerrillas, see George H Aldrich, ‘Guerrilla Combatants and Prisoner of War Status’ (1982) 31 *American University Law Review* 871; Frits Kalshoven, ‘Guerrilla and Terrorism in Internal Armed Conflict’ (1983) 33(1) *American University Law Review* 67; and Lester Nurick and Roger W Barrett, ‘Legality of Guerrilla Forces Under the Laws of War’ (1946) 40(3) *American Journal of International Law* 563.

³⁶For more on the legal aspects of national liberation movements, see Wilson, above n 31; Dietrich Schindler, ‘Wars of National Liberation’ in *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols* (1979) 133; and Raul C Pangalangan and Elizabeth H Aguilin, ‘The Privileged Status of National Liberation Movements under International Law’ (1983) 58 *Philippine Law Journal* 44. And of resistance movements, see W J Ford, *Resistance Movements and International Law* (1968).

³⁷David Matas, ‘Armed Opposition Groups’ (1997) 24(3) *Manitoba Law Journal* 621, and email communication with author.

³⁸Noel Stott, ‘Proposal for a Complementary Process Aimed at Non-State Parties,’ Johannesburg, October 1997.

In the WG-NSA's 1998 database, we have a rough list of about 165 NSAs spread in Africa (about 50 groups in 13 countries, including 20 in Somalia), the Americas (about 12 groups in 5 countries), Asia (more than 50 groups in 14 countries, including 20 in Burma), Europe (about 30 groups in 9 countries), and the Middle East (about 25 groups in 7 countries). To name just three from each geographical area, so we know what groups or actors we are talking about: UNITA (Angola), POLISARIO (Morocco/Western Sahara), al-Gama'at al-Islamiyya (Egypt), FARC (Columbia), Zapatistas (Mexico), Tupac Amaru (Peru), Khmer Rouge (Cambodia), Tamil Tigers (Sri Lanka), FRETELIN (Indonesia/East Timor), KLA (Yugoslavia/Kosovo), IRA (UK/Northern Ireland), ETA (Spain), Hizbollah (Lebanon), HAMAS and Islamic Jihad (Israel/Palestine).³⁹ Mind you, just 15 of about 165.

The NSA Initiative: Why

The NSA initiative to engage rebel groups in the effort towards a global ban on APMs has a rationale which may be presented, as follows:

1) Most of the landmines being planted and used are a result of war between governments and rebel groups. In fact, most wars in the past several decades have been internal armed conflicts. According to the latest peace research data, 'The Stockholm International Peace Research Institute (SIPRI) reported in its 1998 *Yearbook* that 25 major armed conflicts were waged in 1997, compared with 27 in 1996; all but one – that between India and Kashmir – were internal. However, many were internationalised in some way.'⁴⁰

2) The Ottawa Treaty is one exclusively involving governments, particularly the undertakings and obligations therein. Rebel groups are bound not to feel bound, not having participated in its making. Additionally, there is 'no mechanism' for them 'to sign up to the treaty.'⁴¹

³⁹NSAs Group of ICBL, 'Initial Region & Country Survey for Purposes of Information & Action,' London, December 1998.

⁴⁰McDonald, above n 8, 121.

⁴¹John Ryle, 'Enforcement of Ottawa,' *Guardian*, 21 September 1998. Thanks to Heather Elliott, Coordinator of the Victoria (Australia) Network of ICBL, for this and other email sharings.

3) Engaging rebel groups becomes necessary so that the landmines ban (which need not be limited to the Ottawa Treaty) becomes truly universal. Such engagement is complementary to the mainstream Ottawa Process with governments. This way both sides of most conflicts are purposively addressed, each in their own way.

4) Rebel adherence to a landmines ban will also push more governments to reciprocate and accede to the Ottawa Treaty, and vice-versa. One prominent example of the problem is the Sri Lanka government's not signing the treaty because the Tamil Tigers (LTTE) use landmines. If the latter would adhere to a ban, the former would have no excuse not to accede.

5) Some rebel groups eventually become governments. As of October 1997, the WG-NSA listed the following governments with some ex-rebel (and also war veteran) components: South Africa, Namibia, Mozambique, Zimbabwe, Ethiopia, Eritrea, Guinea-Bissau, Angola, Algeria, Nicaragua, El Salvador, Guatemala, Cuba, Surinam, Vietnam, Cambodia, Yemen, and Palestine.⁴² This is why the initial proposal for a parallel consultation involved not only guerrilla groups but also war veterans.⁴³

6) Engaging rebel groups is necessary in order to fully solve the problem on the ground, some of which they control. This is especially feasible in the post-conflict context and for other aspects of the ban like mine clearance of rebel minefields.

7) Finally, the rebel dimension cuts across many landmines aspects and issues. Aside from demining, there is, for example, the matter of production and the very definition of APMs. The Ottawa Treaty's Article 2(1) definition of APM does not mention 'improvised' and 'command-detonated' qualifications which happen to be concerns of some rebel groups. According to the ICRC, based on the 'understanding of the negotiators,' improvised APMs are banned while command-detonated munitions are not.⁴⁴

In the Philippine internal armed conflicts, most rebel landmines (especially anti-tank) are improvised and command-detonated. The latter accounts for their relatively discriminate and selective use. In general, landmines use by both sides or all sides has not been widespread

⁴²Stott, above n 38.

⁴³Marino, above n 34.

⁴⁴ICRC, '1997 Convention on the Prohibition on Anti-Personnel Mines and on Their Destruction,' in *Ratification Packet*, Geneva, November 1997.

because of concern that civilian casualties would result in loss of popular support. The Philippine experience shows that relative 'non-use' of APMs in internal armed conflict can be done.⁴⁵

Government and Rebel Concerns

Government and rebel concerns about the NSA initiative are easy enough to anticipate and understand. For the government side, the complementary process might give legitimacy, recognition and status of belligerency to rebel groups. The process might also be used as a forum for rebel propaganda. For the rebel side, the main concern is that the landmines ban is part of a counter-insurgency or low-intensity conflict scheme to disarm them. Another concern is security in that the complementary process might make them vulnerable to intelligence-gathering and surveillance.

These are valid concerns but are not counter-arguments against the reasons for the NSA initiative. They only further underscore the sensitive nature of the initiative which must therefore be handled with care, competence, impartiality and commitment. One might say, like ICRC. But it cannot also be exactly like ICRC. In the first place, it arises from within ICBL which is an NGO coalition and campaign. At the same time, it cannot also take on the mode of the Ottawa Process, particularly the partnership with some governments, if it is to remain above suspicion by rebel groups it hopes to win over to the landmines ban.

At this juncture, we shall just briefly address the two main government and rebel concerns of belligerency and counter-insurgency, respectively. On the matter of giving legitimacy and recognition to rebel groups, it is clear both from IHL instruments and authoritative commentators that humanitarian measures shall not affect status. The standard for this is the last sentence of common Article 3 of the Geneva Conventions, considered part of

⁴⁵Capt Rene N Jarque , 'Landmines in the Philippines' (Prepared for the ICRC Meeting of Experts on the Military Utility of Anti-Personnel Mines, 12-13 February 1996, Geneva), Quezon City, 7 February 1996; and Gen Arnulfo G Acedera, Jr, 'Non-Use of Anti-Personnel Mines in Internal Armed Conflict,' Paper read at the ICRC Regional Seminar for Asian Military and Strategic Studies Experts, Manila, 23 July 1997.

customary IHL: 'The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.'

On the matter of counter-insurgency, it is not that but humanitarianism, or more precisely the victims, that was the motivation behind the launching of the ICBL in 1992. So with the ICRC's unprecedented decision in 1994 to campaign for the ban. That these two main non-governmental campaigns culminated in the Ottawa Treaty is attributable as much to them as it is to the initial core group of governments which included Canada, Norway, Austria, South Africa, Belgium, Mexico, the Philippines, Switzerland and Germany.⁴⁶ The treaty of governments means that it is they who have obligated themselves to disarm themselves of APMs.

The ICBL treats the treaty as a humanitarian rather than disarmament treaty. The element of disarmament is for a humanitarian purpose, unlike the usual disarmament treaties with mainly military balance considerations. The Ottawa Treaty deals with a particularly inhumane weapon that is indiscriminate and causes superfluous injury and unnecessary suffering. It is of a different level from the Canadian proposal for a global ban on the international transfer of military small arms and light weapons to NSAs.⁴⁷

Whatever element of disarmament is limited to APMs and does not cover anti-tank mines which rebel groups (and government forces) can still use against tanks, armored personnel carriers and other military vehicles. The point, to quote the Ottawa Treaty Preamble, is the 'principle of international humanitarian law that the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited.' In other words, revolutionary ends do not justify inhumane means.

Why Rebels Should Adhere to a Ban

In addition to the relevant points in the foregoing discussion, the purposive effort to engage NSA's for the landmines ban requires an extra effort to do so in terms accepted by

⁴⁶Goose, above n 9, 272-7. See the whole book of Cameron, et al, above n 2.

⁴⁷Canada, above n 27.

them. These may be reference to some revolutionary or Islamic standards, as the case may be. These may also be simple *realpolitik* of some benefits that accrue to them and their constituency. I present here a number of ‘selling points’ that may appeal to Maoist guerrillas like those in the Philippines:

1) Adherence to a landmines ban would be a measure of willingness of a rebel group to observe the rules and customs of war, especially now that the Ottawa Treaty is part of IHL. Mind you, this is not for belligerency status. But this will show that the group is a responsible one, especially if it aspires to take over government or is in fact already a *de facto* government in portions of the national territory under its control. More important than territorial ground (to be defended by landmines) is the matter of high moral ground and winning the hearts and minds of the people.

On the disincentive side, non-adherence could lead to stigmatization as a rogue (as in Khmer Rouge, misspelling intended) rebel group, also in the same club as the ‘enemy’ recalcitrant major military powers, for clinging on to a heinous weapon that deserves the dustbin of history.

2) While APMs or landmines in general have described as a ‘poor man’s weapon’ of choice, they are also anti-poor in the sense that most of their victims are poor people, especially peasants, women and children. And while it may be true that rich countries would be in a better position to develop and profit from ‘high tech’ alternatives to APMs, it is also the rich APM-producer/exporter countries and MNCs which would be hardest hit in the pocket by a total ban on APMs.

3) Improvised landmines have too often exploded – literally and figuratively – in the faces of rebels, resulting in what Mao called ‘unnecessary sacrifices.’⁴⁸ Improvised landmines are more dangerous than industrially manufactured ones for the following reasons: (a) they have no tabulated or established standards which make it very unpredictable and unsafe even to the handler; (b) they contain shrapnel like rusted nails or dirty metals which increase the risk of

⁴⁸Mao Zedong, *Quotations from Chairman Mao Zedong* (2nd ed, 1976) 174, citing ‘Serve the People’ (8 September 1944), *Selected Works*, Vol III, p 228.

infection and death; and (c) they are difficult to detect and identify because they look like ordinary sardine cans, jewelry boxes, paint cans or biscuit containers.⁴⁹

4) The ICRC has done several recent studies and seminars with the participation of military experts and the basic conclusion is that ‘The limited military utility of APMs is far outweighed by the appalling humanitarian consequences of their use in actual conflicts’. They also concluded that ‘some barrier systems and other tactical methods offer alternatives to APMs.’⁵⁰ In fact, there are news and other reports of NPA units using barricades instead of landmines against Philippine Army reinforcement teams.⁵¹

5) In addition to the humanitarian consequences are the socio-economic and environmental impact of APMs on poor countries like Cambodia, Afghanistan, Mozambique, Angola and Bosnia. Even where rebel groups take power or where there is a peace settlement, the urgent task of reconstruction is made so much more difficult by APMs on the ground even long after the conflict. Visionary revolutionaries should have this in their longer visions.

Are Rebels Bound by a Ban?

This question is not a problem if rebel groups are convinced about a land mines ban. If they are not convinced and refuse to adhere, are they still bound to refrain from the use (and for that matter, stockpiling, production and transfer) of APMs as a matter of international law? The question is not simple. Neither is the answer. And this will change in time. For now, they are not bound by the Ottawa Treaty per se – a treaty of States Parties obligating themselves. The treaty at most prohibits or bans the use of APMs but does not criminalise it. Neither did the Rome statute do so in the latest ICL definition of war crimes. The CCW’s Amended Protocol II may be said to have even legitimised it by merely regulating its use. In fine, conventional international law has not yet criminalised APMs and their use nor obligated NSAs to refrain from using them.

⁴⁹Jarque, above n 45, 3-4.

⁵⁰ICRC, *Anti-personnel Landmines: Friend or Foe?* (1996); and ‘Final Declaration of Participants,’ ICRC Regional Seminar for Asian Military and Strategic Studies Experts, Manila, 23 July 1997.

⁵¹Rene Alviar, ‘NPAs raid Army camp, Kill 2,’ *Philippine Daily Inquirer*, 13 April 1997, p 15.

So with common Article 3 of the Geneva Conventions and Additional Protocol II – the core of IHL on non-international armed conflict. Use of APMs is not a violation as such but a possible violation of certain rules therein. For example, common Article 3(1)(a) on violence to life and person against persons taking no active part in the hostilities. Or under Protocol II, it could be Article 4(2)(d) on acts of terrorism; Article 13(2) on attacks on the civilian population with the primary purpose is to spread terror; or Article 17 on forced movement of civilians, in cases where APMs were used.

Unlike the Ottawa Treaty or even the Rome Statute, there are provisions in common Article 3 and Protocol II which make them binding on and grant rights to rebel groups (not just individuals). Common Article 3 says ‘each Party to the conflict shall be bound to apply...’ While Protocol II, per Article 1(1), ‘develops and supplements’ common Article 3. The Protocol’s Article 6(5) speaks of ‘At the end of hostilities, the authorities in power...’ which refers to either the government or the rebel group. Cassese is credited with pointing out these and related legal aspects.⁵²

Common Article 3 is generally accepted not just as customary IHL but as customary international law. But not yet for Protocol II or even Protocol I as a whole.⁵³ The difference, of course, is that conventional international law binds only the parties to the treaty while customary international law also binds non-parties.

From the perspective of customary international law, there is a very strong case for the illegality of APMs per se, especially if we use both IHL and HR norms. On the basis of the two basic IHL principles alone – discrimination and proportionality – the inherently indiscriminate and disproportionate APM is already illegal. More so with a deeper understanding of the proportionality dimensions of a) superfluous injury or unnecessary suffering,⁵⁴ and b) humanitarian, socio-economic and environmental damage versus limited military utility.⁵⁵ Still a

⁵² Cassese, above n 30, 424-8.

⁵³ Theodor Meron, ‘War Crimes in Yugoslavia and the Development of International Law’ (1994) 88 *American Journal of International Law* 78, 79-80.

⁵⁴ ICRC, *The SirUS Project: Towards a Determination of which Weapons Cause “Superfluous Injury or Unnecessary Suffering”* (1997); and Robin M Coupland, ‘The Effect of Weapons: Defining Superfluous Injury and Unnecessary Suffering’ (1996) *Medicine and Global Survival* 3.

⁵⁵ ICRC, above n 50.

third key rule is the De Martens clause, some kind of catch-all for principles resulting from ‘usages established among civilised people, from the laws of humanity and the dictates of the public conscience.’⁵⁶ The international community of public opinion has already characterised the APM as illegal, if not criminal, and demanded its ban.⁵⁷ Now, if one adds to these key IHL rules of customary IHL⁵⁸ the full weight of fundamental HR, then we are as good as it gets to ‘a peremptory norm of general international law, or *jus cogens*,’ which ‘voids a conflicting treaty.’⁵⁹ Professor Frits Kalshoven, commenting on the Colombia Constitutional Court’s 1995 judgment on the constitutionality of Protocol II, said:

International humanitarian law belongs to the universally accepted customary law of civilised peoples. This, together with the self-evident humanitarian character of *jus cogens*, and its rules are *eo ipso* binding on all belligerent parties. For the Court, this determines why no irregular armed group can consider itself relieved of the obligation to respect the minimum standards of humanity on the mere ground that it is not party to the treaties of humanitarian law.⁶⁰

It is only a matter of time.

How May Rebels Be Bound?

How can IHL and HR obligate a rebel group? We draw much, to start with, from the answers given by Matas in his article on armed opposition groups.⁶¹ At one level, he approaches it from state succession, obligations and responsibility. Rebel groups must

⁵⁶ As quoted in Beverly Tollefson Delong, ‘Enforcement of Landmines Legislation by Global Citizens,’ 1 December 1997, p 5. She has also written ‘A Challenge to the ICBL: Responding to the Ottawa Treaty’ and ‘The Ottawa Process and Nuclear Weapons’ (December 1997).

⁵⁷ Peter Herby of the ICRC Legal Division presented Gallup poll surveys of international public opinion demanding the ban, as well as the three key rules framework, at the ICRC Regional Seminar for Asian Military and Strategic Studies Experts, Manila, 21 July 1997.

⁵⁸ The ICBL’s legal analysis of the illegality of APMs under customary IHL can be found in Human Rights Watch and Physicians for Human Rights, *Landmines: A Deadly Legacy* (1993) 261-318; and in Shawn Roberts and Jody Williams, *After the Guns Fall Silent: The Enduring Legacy of Landmines* (1996) 489-95.

⁵⁹ Wilson, above n 31, 9, citing the 1969 Vienna Convention on the Law of Treaties and commentators Brownlie and Schwarzenberger, including the latter’s ‘International Jus Cogens?’ (1965) 43 *Texas Law Review* 476.

⁶⁰ Frits Kalshoven, ‘A Colombian View on Protocol II’ (1998) 1 *Yearbook of International Humanitarian Law* 262, 264.

⁶¹ Matas, above n 37.

understand that their wish to form a new government means ‘becoming responsible internationally in the future for what they are doing now.’ He also cites the legal doctrine that treaties bind the State as a whole, not just the government, but also its citizens and even the rebel community. At another level, of course, is ICL. ‘There is both a universal jurisdiction and a universal duty to prosecute such international crimes.’ And this was precisely the subject matter in Part II of this paper. Matas puts it very down to earth about what one can say to a rebel group in the proper instance:

(Y)ou have violated standards which apply to you because of an obligation your state has undertaken on your behalf. Or, you have violated standards which apply to you and to which you have held your governmental opponents accountable. Or, you have committed an international crime. Or, you have committed an act for which you will be held accountable at international law if you should form a government, which you purport to want to do. Or, you have violated the humanitarian law of armed conflict, which applies to you...⁶²

In the case of a landmines ban, there are the proverbial two ways towards obligating rebel groups to adhere to it: the ‘hard’ and ‘soft’ approaches. The ‘hard’ approach is basically international and national criminal prosecution for war crimes, other international crimes, and violations of national legislation with penal sanctions such as may be enacted pursuant to the Ottawa Treaty’s Article 9.

Such prosecution may be conducted at the ICC, other possible international tribunals of an ad hoc nature as may be created (for Pinochet? for the Khmer Rouge?), and national criminal jurisdictions. This is a matter of lawsuits, with not only criminal but also civil aspects, against individuals and governments (and corporations?).⁶³

But, as Plattner has pointed out, ‘The ultimate purpose of repression [ie, penal repression of IHL violations] must be borne in mind. Its main interest as regards respect for IHL lies in its dissuasive and hence preventive capacity.’⁶⁴ The same ultimate purpose can be achieved through a more persuasive, less coercive approach. After all, ‘consent also applies to

⁶² Ibid 633-4.

⁶³ DeLong, above n 56.

non-state parties in internal armed conflicts.⁶⁵ It is to this 'soft' approach that the NSA initiative is devoted.

IHL lawyering or the practice of IHL, like law practice in general, is after all not only litigation (both prosecution and defense) but also counseling, drafting and negotiation. Developmental legal aid has also developed 'full use of its educative function.'⁶⁶ These other aspects of lawyering also have a role to play in the NSA initiative.

*What Is To Be Done?*⁶⁷

The WG-NSA in various discussions of the ICBL has brainstormed a number of soft approaches to engage NSAs for the global movement against landmines. These and other approaches are indicative and still unfolding.

1 *Dialogue for understanding*

This is simple good old-fashioned dialogue and exchange of views with NSAs to just understand, not necessarily yet convince, each other. Why are landmines the 'poor man's weapon' of choice for rebels? An unofficial but reliable source on the NPA in the Philippines had once put in writing their perspective on landmines upon request of the author.⁶⁸

2 *Education on the Landmines Issue*

This is much like the IHL educational work of the ICRC, albeit focused on the Ottawa Treaty, other relevant legal instruments, and the landmines issue in general. There would be a

⁶⁴ Denise Plattner, 'The Penal Repression of Violations of International Humanitarian Law Applicable in Non-International Armed Conflicts' (1990) No 278 September-October 1990 *International Review of the Red Cross* 409, 419.

⁶⁵ Gerry J Simpson, Lecture on Problems with War Crime Trials, at the International Criminal Law postgraduate class, Faculty of Law, University of Melbourne, 4 November 1998. See also Gerry J Simpson, 'War Crimes: A Critical Introduction' in Timothy LH McCormack and Gerry J Simpson (eds) *The Law of War Crimes: National and International Approaches* (1997) 1.

⁶⁶ Jose W Diokno, 'Legal Aid and Development' in *Justice Under Siege: Five Talks*, above n 82, 38, 41.

⁶⁷ V I Lenin, *What Is To Be Done?* (1902).

⁶⁸ Undated three-page paper simply titled 'Land Mines' on file with author and PCBL.

need here for educational modules and materials which cannot, of course, be of the kind for a law postgraduate class. Then, there might also be some legal counseling here, still within the bounds of impartiality, neutrality and confidentiality.

3 Unilateral Declarations

These declarations have a precedent in the unilateral declarations by national liberation movements allowed under Protocol I, Article 96(3) with the Swiss Federal Council as depositary. The Ottawa Treaty has no similar mechanism for NSAs. The WG-NSA is developing what it calls the 'Geneva Call' whereby NSAs are called upon to undertake a 'Deed of Renunciation of APMs' which would be kept by the 'Geneva authorities' to whom the NSAs may send a delegation empowered to sign it in order to sanction their commitment.⁶⁹

Other than this, NSAs may issue their own unilateral declarations as has already happened so far with several NSAs in various capacities and for various aspects: the Guatemalan National Revolutionary Unit (URNG), the Taliban (de facto government) in Afghanistan, and the Casamance Movement of Democratic Forces (MFDC) in Senegal, among others.⁷⁰ For the WG-NSA, the first formal letter of land mine renunciation from an NSA was received from the Somali Patriotic Movement (SPM).⁷¹

⁶⁹ Proposed Geneva Call papers on file with author and the WG-NSA, particularly Eduardo Marino based at International Alert, London, and Elizabeth Reusse-Decrey at the proposed Geneva Call office in where else but Geneva.

⁷⁰ Based on helpful information and materials from Catherine Mikton of the ICRC Mines-Arms Unit.

⁷¹ Eduardo Mariño, 'NSA Group & Program Update,' London, 23 November 1998.

4 *Bilateral Agreements*

This refers to government-rebel agreements on a landmines ban, ideally as part of broader comprehensive peace negotiations. Such bilateral arrangements have the advantage of being more mutual and reciprocal compared to unilateral declarations, as well as being conflict-specific or country-specific compared to a global ban. The precedent for this are the special agreements between parties to the conflict under common Article 3. 'By providing a basis for the conclusion of ad hoc agreements among the parties for the observation of humanitarian principles, the Protocol may contribute to achieving a negotiated solution of the armed conflict.'⁷²

The WG-NSA has with it so far at least three peace and/or cease fire agreements with specific landmines provisions: the Sudan Peace Agreement,⁷³ ceasefire guidelines between the Philippine government and the Moro Islamic Liberation Front (MILF),⁷⁴ and the HR-IHL agreement between the Philippine government and the NDF.⁷⁵

5 *Multilateral Undertakings*

This refers to undertakings among NSAs and may take a number of forms. The initial idea of the NSA initiative was a parallel (to the Ottawa Conference) consultation of guerrilla groups and war veterans.⁷⁶ Other 'crazy ideas' are of a Rebel Code of Conduct and, 'the craziest of them all', a Rebel Protocol or Treaty. There are precedents for a Rebel Code of Conduct like Mao's 'Three Main Rules of Discipline and Eight Points of Attention.'⁷⁷ More

⁷² Kalshoven, n 60, 263.

⁷³ The Sudan Peace Agreement, Khartoum, 21 April 1997.

⁷⁴ Implementing Operational Guidelines of the GRP-MILF Agreement on the General Cessation of Hostilities, Marawi City, 14 November 1997.

⁷⁵ See above n 24.

⁷⁶ Mariño, above n 34.

⁷⁷ Mao Zedong, 'On the Reissue of the Three Main Rules of Discipline and the Eight Points for Attention—Instruction of the General Headquarters of the Chinese People's Liberation Army' (10 October 1947) in *Selected Military Writings of Mao Zedong* (1968) 343-4.

modern and applicable to both sides is the proposed Code of Combat Conduct, also called the ‘Manila Declaration.’⁷⁸

There is no precedent for a rebel Protocol or Treaty. The closest to that was the participation of national liberation movements in the diplomatic conference which drafted Protocol II. A similar mechanism for future diplomatic conferences can be explored although the prospects are not encouraging based on the experience at the 1974-77 Geneva Diplomatic Conference.⁷⁹ Thus, our ‘crazy idea.’

6 *Peace Zones and Mine-Free Zones*

These zones may range from local to regional although it may be more feasible and practical to do it at the local community level. While these may be affected by bilateral agreements, the ideal scenario is a trilateral dynamic where the third party is the local community who demand or even declare such zones. This has been the peace zone experience in the Philippines.⁸⁰ In ICBL, a concept of a mine-free zone was first presented by the South African Campaign (SACBL) at the 1997 Oslo NGO Forum on Landmines.⁸¹ The precedents for these are the safety zones, neutralised zones, non-defended localities, and demilitarised zones under the Geneva Convention IV, Articles 14 and 15, and Protocol I, Articles 59 and 60, respectively.

7 *Long-Term Peace-Building and Conflict-Resolution*

In the final analysis, it is not enough to ban landmines while ‘the cruel war is raging’, which gives occasion for their use. To end war is to end the reason for using landmines. But to

⁷⁸ Eduardo Mariño, ‘Towards a Code of Combat Conduct: Minimum Combatant Duties – Minimum People’s Rights,’ International Conference on Conflict Resolution in the Philippines, Manila, 16 December 1988 (‘Manila Declaration’).

⁷⁹ See, especially Suter, above n 35, and Laura Lopez, ‘Uncivil Wars: The Challenge of Applying International Humanitarian Law to Internal Armed Conflicts’ (1994) 69 (4-5) *New York University Law Review* 916.

⁸⁰ See, eg, Gaston Z Ortigas Peace Institute, *Peace Zones Primer* (nd), to start with, among many other materials.

⁸¹ Richard Sherman, ‘Concept of a Mine Free Zone – A Brief Summary of the Session on Mine Free Zones’, NGO Forum on Landmines, Oslo, September 1997.

end the war, we must also resolve the conflict, especially its causes or root causes. This is where the deeper meaning of peace and peace-building comes in.⁸² Says Kalshoven, referring to the Colombian Constitutional Court, ‘What humanising the war really refers to, the Court argues, is the special link of humanitarian law with the search for peace.’⁸³

The ‘philosophical’ question of peace versus justice (as in ‘No Peace Without Justice’) is sometimes posed, in the context of some problems with war crimes trials vis-à-vis the peace process. A former judge of the International Criminal Tribunal for the former Yugoslavia, Sir Ninian Stephen, says the idea in the proceedings was one of ‘combining both’. ‘But if I have to choose (between the two), it would be peace, having seen the suffering (in war).’⁸⁴ That may not sound ‘politically correct’ but neither does much wise counsel.

The nature of conflict is changing, as McCormack notes, not for better but for worse. One aspect of this is the ‘significant increase in the incidence of internal armed conflict.’ In responding to the challenges of IHL, he says it is time ‘to become more inclusive of other international actors in the making of international law, in order to impose binding obligations upon those other actors and so increase the effective implementation of legal principles.’⁸⁵ The landmines ban is an ideal ‘test case’ to problematise and strategise a complementary and alternative track that addresses non-state actors because of the role of landmines on both sides of internal armed conflicts.

⁸² Soliman M Santos, Jr ‘Mine Action, Peace-Building and Conflict Resolution,’ Quezon City, 17 February 1998.

⁸³ Kalshoven, above n 60, 264-5.

⁸⁴ Sir Ninian Stephen, Open Forum after a lecture on the *Tadic* and *Blaskic* cases at the ICTY, at the International Criminal Law postgraduate class, Faculty of Law, University of Melbourne, 6 November 1998. Sir Ninian was former Governor-General of Australia and Justice of the High Court of Australia. He had just taken on a new assignment with the UN Commission to Cambodia to study the feasibility of a tribunal for the prosecution of Khmer Rouge crimes.

⁸⁵ McCormack, above n 26, 648.