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Hayashi, Mika

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Ottawa Convention on Landmines in Two Perspectives: International Humanitarian Law and Disarmament

Mika Hayashi *

Introduction

International humanitarian law is a set of rules applicable in armed conflicts,[1] and with respect to weapons, it regulates their use, without necessarily regulating their possession, development, production or transfer. Regulating the latter activities belongs to law of disarmament and arms control,[2] which does not necessarily involve the prohibition of their use. Concerning the international regulations of landmines, by early 1990's, it was becoming more and more evident that the instruments of international humanitarian law were not reducing or even containing the number of victims, who were mostly civilians. In order to reduce the damages caused to the civilian population by landmines, it appeared necessary to make them totally unavailable in the battlefields.[3] It also appeared necessary to start serious demining activities in order to reduce the damage that continues to occur after the termination of armed conflicts. In short, regulations that were needed were, besides a clear rule of international humanitarian law prohibiting the use of landmines, those of disarmament and arms control. Against this background, extensive rules of disarmament and arms control were incorporated in a treaty that set out the humanitarian rule of not to use the landmine: the Ottawa Convention on Landmines, that was adopted in 1997 and came into force in1999, is thus a hybrid treaty of international humanitarian law and disarmament.[4] In the context of international humanitarian law, the Ottawa Convention is often presented simply as one of the treaties regulating the use of specific weapons,[5] but that is only one aspect of this treaty. It establishes a distinct, second range of regulations, namely, disarmament and arms control regulations concerning the landmines, and therefore is a hybrid treaty.

Nominally speaking, the Ottawa Convention is not the first hybrid treaty containing both types of regulations: the Chemical Weapons Convention that was adopted in 1993 and came into force in 1997 also contains both types of rules concerning chemical weapons. The factual background of the Chemical Weapons Convention was, however, very different from the one of the Ottawa Convention. The largest concern with regard to the chemical weapons in early 1990's was certainly not their wide-spread use. Though they were used at various times since the First World War,[6] the frequency of their use is nothing like that of landmines. The dominant concern of the Chemical Weapons Convention was disarmament and arms control, and accordingly, it was negotiated by the Conference on Disarmament. During the long negotiations, the center of discussion had been the verification system whose primary purpose was to check out the illegal productions and possessions of chemical weapons. The Chemical Weapons Convention on the whole was primarily designed as a disarmament treaty rather than an instrument of international humanitarian law.[7] The Ottawa Convention, in contrast, was conceived and designed because of the wide-spread, on-going use of landmines, both by regular and irregular forces engaged in many contemporary armed conflicts. The Convention was designed primarily to tackle with this problem of the on-going use of the weapons. The International Committee of the Red Cross was heavily involved in its preparation.[8] The rules pertaining to disarmament and arms control were incorporated because they were needed for the effectiveness of international humanitarian law concerning landmines. Thus, the background of the Ottawa Convention differs from the Chemical Weapons Convention, and it makes the Ottawa Convention the first hybrid treaty in practice that needs to be assessed from both angles, if not strictly in theory.

The purpose of this chapter is to examine the ways in which the characteristics of two different branches of law are retained or modified in this hybrid treaty. There are provisions commonly found in many disarmament treaties that can be called typical provisions of these treaties. Typical provisions of disarmament treaties include a withdrawal clause, a series of provisions establishing a verification mechanism, and an obligation not to help other actors carry out activities prohibited by the treaties. Typical as they are, these provisions are not the absolute requirements of disarmament treaties, and not all disarmament treaties share all these characteristics. Nonetheless, the provisions commonly found in disarmament treaties are tailored to meet concerns and challenges that these treaties face in general. Similarly, there are provisions that are typically found in treaties of international humanitarian law, such

as the explicit limitation imposed upon the effective date of withdrawal. Typically, they are also marked with the absence of detailed and compulsory verification mechanism. It is natural that disarmament treaties and treaties of international humanitarian law have developed different sets of characteristic provisions, for their purposes differ. This, in the context of a hybrid treaty such as the Ottawa Convention, develops unique challenges: any provisions tailored to meet challenges of disarmament treaties may be inappropriate, or the ones tailored to meet concerns of international humanitarian law may be inappropriate for the operation of a hybrid treaty. Solutions in the Ottawa Convention to a variety of problems have to be either a choice between the two typical provisions of the two branches of law or a new formula of its own. Therefore, the examination of the ways in which the characteristics of each branch of law are retained, modified or rejected offers an insight into the Ottawa Convention.

In order to make this examination, the chapter first outlines the two branches of law represented in the Ottawa Convention: obligations of international humanitarian law and obligations of disarmament. In order to highlight how unprecedented the Ottawa Convention is in each aspect, the brief history of landmine regulation in each field is also presented. Then the ways in which the characteristics of each branch of law have been retained or modified in the Convention are examined. The first examination on the reduced freedom of disengagement shows the eminence of international humanitarian law in the Convention. The second examination is on the balancing of the two branches of law concerning verification mechanism, and its difficulties. The third examination on the obligation not to assist anyone to engage in the prohibited activity is an example of grafting a substantive provision of typical disarmament treaties to a hybrid treaty.

Two Branches of Law in the Ottawa Convention on Landmines

The Ottawa Convention currently enjoys the membership of 145 states.[9] Its quick formation in a matter of months instead of years, a swift acceptance by a large number of states and the role of the NGOs in the formation of this regime attracted a wide attention of political scientists.[10] As to its contents, it is a hybrid treaty of international humanitarian law and disarmament. The Canadian Foreign Minister is justified in commending that "it is a major step forward by the international community towards ending a severe, on-going humanitarian crisis"[11] since the Ottawa Convention is a first total ban of the anti-personnel landmines that fall under its definition. The idea expressed by the term "total" ban is that the Convention contains the complete prohibition of landmines in the two branches of law simultaneously. The use of anti-personnel mine is banned (international humanitarian law). Their production, stockpiling and transfer are banned, and the States Parties are also under the obligation to destroy the stock that they currently possess, as well as the mines in the mined area (disarmament and arms control obligations).

Aspect of International Humanitarian Law

International Humanitarian Law regarding Regulations of Specific Weapons In order to appreciate how unprecedented the humanitarian aspect of the Ottawa Convention is, a brief review of the history of international regulations of the use of landmine is useful.[12] The history of international humanitarian law shows the relative scarcity of regulations of specific weapons. Given the cruelty that the mankind witnessed in all the conflicts to which international humanitarian law was applicable, and the wide variety of the weapons that inflicted the cruel results on both combatants and civilians alike, one would have expected a greater number of regulations of specific weapons. Prohibitions of specific weapons *per se*, however, have been relatively few in the history of international humanitarian law. The only examples one can point to prior to the First World War are regulations of certain projectiles,[13] regulations of poison,[14] and regulations of the so-called "dum-dum" bullets.[15] The sole example of a treaty in the period between the two World Wars regulating the use of specific weapon was the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. The efforts to regulate the use of specific weapons by treaties since the Second World War have also been unsuccessful for a long time. The 1949 Four Geneva Conventions have no provision restricting or prohibiting the use of specific weapons. Though the matter was discussed for several years, 1977 Additional Protocols to the Geneva Conventions did not include any provision on the use of specific weapons, either.[16] Concerning the landmines in particular,

until the Convention on Certain Conventional Weapons was adopted in 1980,[17] there was no specific agreement regulating their use.

Concerning the rules of customary international law, as opposed to treaty rules, there is arguably a customary rule today to the effect that "when landmines are used, particular care must be taken to minimize their indiscriminate effects."[18] Such a rule, however, would be different from a total ban of the use of the weapon. The current majority of academic opinions are also skeptical about the existence of a customary rule specifically prohibiting the use of the landmine.[19] Consequently, the vacuum left is filled by more abstract principles of customary international humanitarian law: the principle of civilian protection and the prohibition of unnecessary suffering. The first principle has a direct and obvious bearing on the problem of the anti-personnel landmine. It is a prohibition of targeting the civilian population, as well as an indiscriminate attack. The second principle requires the states to consider "whether these weapons [anti-personnel mines] inflicted superfluous injury or unnecessary suffering to combatants out of proportion to their military effectiveness."[20] Because of these customary principles, any weapon that automatically infringes one of them must be considered illegal, even though such weapon *per se* is not prohibited specifically by a treaty or a specific rule of customary law. The assessment, however, of the legality of a specific weapon in the light of these abstract customary principles is not always easy. It involves the determination of the effect of the weapon in question. Is it by nature non-discriminatory and should be considered as violating the principle of civilian protection, or can it be employed in a discriminatory manner? Does it always cause unnecessary suffering prohibited by international humanitarian law, or does it depend on the situations and ways in which it is employed? Answering each of these questions involves the determination of various criteria in turn and applying them to a specific weapon. Concerning the landmines, opinions are divided.[21] In addition, whatever the status of the landmines in the light of these humanitarian principles may be, the history of armed conflicts shows that these abstract principles never seriously deterred the states and other actors from employing the landmines.[22]

The Convention on Certain Conventional Weapons of 1980 can be seen as an attempt to apply these two customary principles to specific weapons.[23] As the full title of this Convention suggests, it is a regulation of weapons that "may be deemed to be excessively injurious or to have indiscriminate effects." It is an umbrella treaty originally with three protocols, one of which was the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (hereinafter referred to as Landmine Protocol). With regard to the landmines, the main concern was the damage to the civilians, and therefore, the principle of protection of civilians.[24] Therefore, the Landmine Protocol prohibited to direct the weapons in question in any fashion against the civilian population as such, or against individual civilians.[25] Indiscriminate use of such weapons was also forbidden.[26] States that negotiated the Landmine Protocol, however, were unwilling to discontinue the use of the landmines totally. On the contrary, many states were convinced of the military utility of the landmines. For example, the mines could make the clearance by the enemy of anti-tank minefields more difficult, deny airfields and other areas to enemy infantry and help protect one's positions from surprise attack.[27] Therefore, the Landmine Protocol restricted the use of such weapons to strictly military targets,[28] but did not ban the use completely.[29] This Landmine Protocol was amended in 1996. Though showing many improvements in terms of reducing risks for the civilians, the Amended Protocol that entered into force in 1998 avoided the total ban of the landmines *per se* again. For those who wished to have a more effective protection for the civilians, the improvements were not sufficient.[30] For example, the long-lived anti-personnel mines are to be used as before, under constant marking, fencing and monitoring as protections according to the provisions of the Amended Protocol. These protections are, however, frequently not realistic.[31] Likewise, the short-lived anti-personnel mines, the so-called "smart" mines, are to be used as before, provided that they will self-destruct or self-deactivate, and are detectable. The Technical Annex, however, provided a grace period of nine years for older mines with little detectability and no self-deactivating device. The risk to which the civilians were exposed would, therefore, continue to exist during this period. Meanwhile, the Contracting Parties are only asked to, "to the extent feasible, minimize the use of anti-personnel mines that do not so comply."[32]

These states that adhered to the Convention on Certain Conventional Weapons and these Protocols but not to the Ottawa Convention can claim, and do claim, that a limited use of limited type of landmines is lawful under international law. Not surprisingly, the Second Review Conference of the Convention on Certain Conventional Weapons in 2001 did not produce a fundamental change to the legitimacy of landmines, either.

Ottawa Convention's Achievements Given this history of international humanitarian law and the difficulties it witnessed in regulating the use of landmines, what the Ottawa Convention as an instrument of international humanitarian law achieved is outstanding. Article 1(1)(a) of the Ottawa Convention categorically stipulates that "[E]ach State Party undertakes never under any circumstances to use anti-personnel mines." The attempts during the negotiations to introduce exceptions to this prohibition had been rejected. For example, against the idea of the total ban, the United States sought to introduce exceptions, such as the use of these weapons in the Korean Peninsula.[33] There was, however, a conviction "that any exception to a treaty seeking to ban a certain weapon was a contradiction in terms,"[34] and that one geographic exception might lead to another, undermining the strength of this prohibition. As a result, the only exceptions provided in the Ottawa Convention are the exceptions to the disarmament obligations.[35] The rule of international humanitarian law prohibiting the use of anti-personnel landmines is absolute. Thus, the legal status of the landmines in the Ottawa Convention is fundamentally different from the one in the Protocols of the Convention on Certain Conventional Weapons.[36] In the latter regime, as explained above, the use of landmines is lawful and legitimate, provided that it complies with the requirements laid down in the Protocols. In the Ottawa Convention, there is no such room for legitimacy: the anti-personnel landmines are illegitimate, and its use is always illegal.

In the past, some legal techniques and ideas prevented the binding rules of international humanitarian law from being effective in practice: reservations and interpretative declarations of the treaty provisions; belligerent reprisals when the opponent in the armed conflict breaches the rules; treatment of internal armed conflict as a strictly separate paradigm from the international armed conflict. These techniques that practically allow the use of prohibited weapons under certain circumstances found no place in the Ottawa Convention. Reservations to the Ottawa Convention are not allowed.[37] The use of the weapon as a belligerent reprisal is also prohibited by the very term "never under any circumstances." Moreover, the Convention makes no distinction between the internal armed conflicts and international armed conflicts. States Parties also confirm that the obligation not to use the anti-personnel landmines in the Ottawa Convention covers the internal armed conflict.[38] Since the most serious damage of landmines is currently happening in, and as a result of, internal armed conflicts, this is in fact indispensable to realize the goal of the Convention.

The obligation in question in the Ottawa Convention is imposed upon states that become party to the Convention. While no direct obligation is imposed upon non-state actors such as individuals and groups that may be engaged in the use of landmines, the States Parties have an obligation to "take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress"[39] any prohibited activity under this Convention. By this provision, the Ottawa Convention makes certain that non-state actors' acts are brought into conformity with its rules, too.

This complete and unconditional prohibition of the use of anti-personnel landmines by the Ottawa Convention is by far the most ambitious regulation of these weapons in international humanitarian law.

Aspect of Disarmament and Arms Control Obligations

International legal regulation of landmine production, development, possession and transfer was even more acutely absent prior to the Ottawa Convention. On one hand, there was absolutely no customary rule prohibiting states to possess and stockpile them. Indeed, as it is pointed out by the International Court of Justice, "in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited."[40] In addition to the absence of customary international law, prior to the Ottawa Convention, there were no treaties or agreements aimed at regulating the production, development, transfer or possession of landmines, either. A significant number of treaties of disarmament and arms control were concluded both during and after the Cold War, but mainly in the field of weapons of mass destruction.[41] These treaties were, save for the bilateral and regional agreements, usually negotiated in the Conference on Disarmament. As to the regulations of conventional weapons, there were only the afore-mentioned instruments of international humanitarian law. The Landmine Protocol of the Convention on Certain Conventional Weapons prior to its revision was solely about the use of the landmine, and not about disarmament and arms control measures. The 1996 Amended Protocol had only a limited reference to the limitation on the transfer[42] and obligations of removal,[43] and was still considered to be a "fragmented, incomplete and partial regime *limited to the use*" without meaningful disarmament or arms control measures.[44] In this regard, instead of functioning as

arms control instrument, the Amended Protocol is even suspected of indirectly promoting the development of certain types of landmines:[45] the so-called "smart" mines that can be employed in a discriminatory manner are legitimate mines under the Amended Protocol.

On the whole, therefore, in the context of disarmament and arms control, the statement that "[n]o voluntary regime, international treaty, or any other type of mechanism regulated the production, possession, or transfer of land mines internationally"[46] was entirely valid prior to the conclusion of the Ottawa Convention. In contrast, the Ottawa Convention coupled the obligation not to use anti-personnel mines with comprehensive disarmament and arms control obligations. Principal obligations are in fact included in the title of this convention: "Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction." Under the Ottawa Convention, States Parties undertake never under any circumstances "[T]o develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, anti-personnel mines,"[47] and "to destroy or ensure the destruction of all anti-personnel mines in accordance with the provisions of this Convention."[48] The latter obligation of destruction is extensive, and it includes the destruction of mines in the mined area.[49] The only exceptions explicitly permitted by the Convention are the possession or transfer of the mines for activities related to mine detection, mine clearance, or mine destruction.[50] The obligations of destruction are not just programmatic obligations that encourage the states to make efforts. They require the concrete result by specific deadlines: a state that adheres to the Ottawa Convention must, at the latest, destroy the landmine in its possession by the end of the fourth year;[51] it must, by the end of the tenth year, eliminate the mines in the mined areas as well.[52] If a State Party finds difficulties in complying with these deadlines, it may seek a rescheduling of the deadline.[53]

Coupling a humanitarian rule of not to use a specific weapon such as landmines with the obligations of disarmament and arms control makes sense.[54] Activities such as the production, sales, transfer, testing and development should be regulated in order to make the ban of the use of specific weapons effective. The disarmament measures are, however, not possible if the possession of such a weapon is believed to function as deterrence. Such a belief may allow the states to agree to a prohibition of the first-use of the weapon, but not to a prohibition of the use in reprisal or the possession, without which no deterrence is possible. Concerning the conventional weapons in particular, the difficulty of monitoring the transactions and manufacturing process by private corporations and individuals may also have curved the enthusiasm of the states to commit themselves.

Whatever the reason may be, the wisdom of coupling the humanitarian rule with obligations of disarmament and arms control was never resorted to in the regulation of conventional weapons. In this light, the extensive obligations of disarmament and arms control stipulated in the Ottawa Convention are unprecedented. Their particular value is in the way they are expected to contribute to the implementation of international humanitarian law.

Unprecedented Achievements in Both Branches of Law and their Consequences

These unprecedented achievements in the two branches of law also created challenges for the Ottawa Convention. One of the major consequences of these achievements was the absence of states such as the Russian Federation, China,[55] Pakistan, India and the United States.[56] It is unlikely that these states would join the Ottawa Convention in the near future. Nevertheless, the absence of these states in this regime was a result of a conscious choice made by those who created it. A rigorous pursuit of a wide participation would have led the negotiations to compromises by accommodating the views of states wishing to retain the anti-personnel landmines. That was unacceptable to the negotiators of the Ottawa Convention. Unlike the Convention on Certain Conventional Weapons, the goal of the negotiations for the Ottawa Convention was a comprehensive ban of the anti-personnel landmines. Therefore, the absence of a number of influential states in the regulations of landmines was a regrettable but a necessary trade-off with the absolute ban.

The unprecedented achievements of the Convention in both international humanitarian law aspect and disarmament aspect in letter also meant that the practical realization of these legal achievements needed support. In other words, the States Parties had to find a way to ensure that the obligations of the Conventions are effective and complied with. In order to monitor the operation of the Convention, and ensure the compliance of the States Parties with the obligations of the Convention, the Convention itself provides that regular Meetings of the States Parties discuss any matter related to the application and implementation of the Convention.[57] Evidently, the matters examined by the Meeting of the States Parties include

both issues of international humanitarian law and issues of disarmament and arms control. The Meeting of the States Parties was held five times between 1999 and 2003, and the First Review Conference was held in 2004. These meetings are not conducted under a secretive management in closed sessions. The International Committee of the Red Cross as well as other "relevant non-governmental organizations"[58] have been present and active in all annual Meetings of the States Parties, and in the First Review Conference.

Moreover, the States Parties of the Ottawa Convention felt that annual Meeting of the States Parties and even less frequent Review Conferences[59] were not enough to ensure the practical effectiveness of the Convention. Thus, at the First Meeting of the States Parties in May 1999, five Standing Committees were established, which would meet twice between the annual Meeting of the States Parties.[60] At the Second Meeting of the States Parties in September 2000, five Standing Committees were reorganized into the following four Standing Committees: Standing Committee on the General Status and Operation of the Convention; Standing Committee on Mine Clearance, Mine Risk Education and Mine Action Technologies; Standing Committee on Victim Assistance and Socio-Economic Reintegration; Standing Committee on Stockpile Destruction.[61] The Second Meeting of the States Parties also recognized that the work of these Standing Committees would need coordination. As a consequence, the Co-ordinating Committee was established, that would meet on an *ad hoc* basis under the chairmanship of the current President of the Meeting of the States Parties. In September 2001, the States Parties also decided to establish the Implementation Support Unit.[62]

The mechanism thus created to ensure the effectiveness of the Convention has proved to be an important forum where challenges and concerns encountered can be discussed and new solutions can be formulated. Some of the challenges studied below have been subjects of intense discussions in these formal and informal meetings. Even if the concrete solutions have not been found for all the challenges, the open debate has greatly contributed to the transparency and the confidence that the Ottawa Convention should inspire.

Challenges for the Ottawa Convention as a Hybrid Treaty

In general, disarmament treaties and treaties of international humanitarian law show different characteristics for certain procedural rules. The rules for the withdrawal from the treaty and the verification mechanism are examples of such procedures. Therefore, in a hybrid treaty of both branches of law such as the Ottawa Convention, adopting a typical procedure from one of these branches of law may be inappropriate for a part of its operation. One has to weigh what is more at stake in a hybrid treaty and decide which typical procedure is more appropriate for the purpose of the treaty, or find a new formula that responds to the unique challenges of the hybrid treaty.

The issue is not confined to the procedural aspect. Substantive rules without specific reference to either disarmament obligations or international humanitarian law apply to both types of activities, too. One example is the obligation not to assist other entities to engage in illegal acts under the treaty, a common provision found in many disarmament treaties which was incorporated into the Ottawa Convention. How such a substantive rule might operate in the context of international humanitarian law also casts a complex shadow on the operation of the Ottawa Convention.

Consequently, examples of unique challenges of a hybrid treaty are examined below, in order to learn how and why the present forms of regulations were chosen, and what the remaining issues are. The first examination concerning the reduced freedom of disengagement indicates that despite its hybrid structure, considerations of international humanitarian law are stronger than those of disarmament in certain aspects. The second examination shows the correct balancing between the two branches of law can be a challenge in a hybrid treaty. The third examination shows the issues as a result of grafting a typical provision of disarmament to a hybrid treaty.

Reduced Freedom of Disengagement

Withdrawal Clause

Though it is seldom resorted to, one of the important procedural rules in multilateral treaties is the provision related to a withdrawal. In a treaty, these provisions that stipulate the procedure to follow when a State Party wishes to leave a treaty are often called withdrawal clause or denunciation clause.[63] Disarmament treaties and treaties of international humanitarian law show a striking difference in their typical withdrawal clauses. The typical

withdrawal clause of the former strongly emphasizes the unlimited right to withdraw at any time. In contrast, the analogous typical clause of the latter is accompanied by an express limitation on this right. Therefore, in a hybrid treaty such as the Ottawa Convention, an appropriate formula for the withdrawal clause had to be found.

In disarmament treaties and treaties of arms control, states tend to stress the freedom to withdraw from these treaties, since disarmament obligations are closely linked to the issues of national security. As a result, virtually all disarmament and arms control treaties are equipped with an explicit recognition of the right of withdrawal with little substantial limitations, in more or less identical terms: "Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country."[64] These supreme national interests are defined in none of the disarmament treaties, and they are likely to be defined subjectively by withdrawing states.[65] In this respect, the Ottawa Convention is also equipped with a withdrawal clause that explicitly recognizes the right of withdrawal in a language that closely follows the language of disarmament treaties. According to this clause, "[E]ach State Party shall, in exercising its national sovereignty, have the right to withdraw from this Convention. It shall give notice of such withdrawal to all other States Parties, to the Depositary and to the United Nations Security Council."[66] The notice of withdrawal must include a full explanation of the reasons motivating the withdrawal, and the withdrawal takes effect six months after the Depositary receives this notice.

This withdrawal clause, however, has a qualification in the Ottawa Convention: "If, however, on the expiry of that six-month period, the withdrawing State Party is engaged in an armed conflict, the withdrawal shall not take effect before the end of the armed conflict."[67] On one hand, such qualification is unheard of in the disarmament treaties. Even the Chemical Weapons Convention, another hybrid treaty that, nominally at least, couples disarmament obligations with a humanitarian obligation of not to use the weapons, does not have such a proviso. On the other hand, withdrawal clauses containing a qualification similar to that of the Ottawa Convention are common in treaties in the field of international humanitarian law. The First Geneva Convention for the protection of the wounded and sick, for instance, does provide that the states are "at liberty to denounce the Present Convention," but also provides that "a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded, and until after operations connected with release and repatriation of the persons protected by the present Convention have been terminated."[68] Similar qualification to the denunciation clause is also found in other Geneva Conventions as well as Additional Protocols.[69] The Convention on Certain Conventional Weapons also has a similar clause that prevents the withdrawal from taking effect during the armed conflict.[70] Treaties being the outcome of consent freely given by states, the states cannot be forced to remain in these treaties. Nevertheless, in a treaty of international humanitarian law, letting the states denounce the treaty as soon as an armed conflict breaks out is to defeat the very purpose of the treaty. It is precisely needed when the armed conflict breaks out.

In the negotiation of the text of the Ottawa Convention, the first Austrian draft that was circulated at the Vienna Expert Meeting in February 1997 contained an explicit recognition of the right of withdrawal, without any qualification: if a state decided that "extraordinary events" jeopardized its "supreme interests," it may make the notice of withdrawal. As these terms suggested, the model of the proposed formula was obviously the corresponding clause in disarmament treaties. A number of states, on the contrary, believed that there should be no right of withdrawal at all in the hybrid treaty they were negotiating. As a result, a later draft of Austria during the same Meeting included the qualification concerning withdrawal during armed conflicts. Though there were also states that sought to eliminate this qualification in the Oslo Diplomatic Conference in September 1997, the provision was maintained and incorporated in the final text of the Ottawa Convention.[71] Because of this provision, like other treaties of international humanitarian law, the Ottawa Convention remains binding on both the withdrawing state and other belligerents in an armed conflict, in spite of the explicit intent of the former not to abide by the Convention any longer.[72]

As this withdrawal clause is applicable to both rules of international humanitarian law and disarmament obligations of the Convention, in the sense that a state withdraws from the Convention as a whole and not just from one branch of law represented in the Convention, the provision constitutes a new type of restriction on disarmament obligations. But this was a crucial provision in the context of international humanitarian law. The participants that negotiated the treaty text were aware of the hybrid structure of the Ottawa Convention, but also never lost sight of the prime objective and the very purpose of this treaty: international humanitarian law. Therefore, the typical limitation found in the withdrawal clause in

instruments of international humanitarian law was accepted in this Convention in spite of its hybrid structure. Since the conclusion of the Convention, this withdrawal clause with the qualification has not been contested or questioned by States Parties, and has not been resorted to, either.

Suspension of Treaties as a Result of Violations

Similar ideas also divide disarmament treaties and treaties of international humanitarian law in the theoretical discussions concerning suspension of treaties as a result of a breach. On one hand, the right to suspend the treaties of international humanitarian law during an armed conflict as a result of their breach is rigorously denied, even though these treaties are silent about such a possibility.[73] The rationale for this is the same as that of the restriction on the effective date of withdrawal: treaties of international humanitarian law are concluded so that it functions in armed conflict, in spite of the obvious difficulties that arise in such circumstances. On the other hand, in discussions of disarmament treaties, the right to suspend the treaty as a result of a breach is arduously defended, even though these treaties are silent about such a possibility.[74] The rationale is that a state cannot be expected to comply with a disarmament obligation when another state party builds up massive armaments. In other words, compliance by all other parties is a *sine qua non* condition for any state to comply with a disarmament treaty.

These diametrically opposed views are both correct in their own context, and both of them are affirmed by the Vienna Convention on the Law of Treaties (referred to hereinafter as VCLT), too. The VCLT provides as a default rule that a material breach of a multilateral treaty by one of the parties entitles the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it.[75] It provides, however, special rules of suspension. One of them is that for a certain type of multilateral treaties, any state may invoke the breach as a ground for suspension of the treaty, without waiting for or seeking unanimous agreement.[76] This option is limited to cases where "the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty."[77] Disarmament treaties are considered to be such treaties.[78] At the same time, the VCLT also acknowledges the reduced freedom of disengagement regarding treaties of international humanitarian law: according to the same article, neither the special rules of suspension nor the default rule of termination and suspension applies to "provisions relating to the protection of the human person contained in treaties of a humanitarian character."[79] In other words, these treaties cannot be suspended as a result of violations according to the VCLT.

Like most of the disarmament treaties and treaties of international humanitarian law, the Ottawa Convention is also silent about the right of suspension in case of violations. Nevertheless, such a right cannot be sustained in the Ottawa Convention for the following reasons. First, though it is a hybrid treaty, the disarmament dimension of the Convention does not override or eliminate the humanitarian character of the Convention. On the contrary, the careful choice of wording in the withdrawal clause suggests that it is, first and foremost, a treaty of international humanitarian law. The Ottawa Convention falls under the provision of the VCLT related to "treaties of a humanitarian character." Second, the rules of suspension for typical disarmament treaties seem inappropriate even with respect to the disarmament dimension of the Ottawa Convention. Compared to the typical disarmament treaties such as the Non-Proliferation Treaty, the Ottawa Convention is clearly not a treaty where a violation by one party topples the fundamental balance of power or national security. Even if a party decides to equip its armed forces with the forbidden landmines, would that radically change the position of other parties concerning their own obligations in the Ottawa Convention? It is hard to see why it should. Besides, it is equally hard to imagine any gain for the suspending party in practical terms.

In conclusion, at least concerning the freedom of disengagement, the Ottawa Convention is intended to operate as a treaty of international humanitarian law in spite of its hybrid structure.

Verification Mechanism

Contrasting Features in Treaties of International Humanitarian Law and Disarmament Treaties

Another set of procedural rules that shows contrasting characteristics between treaties of international humanitarian law and disarmament treaties is a verification mechanism. A verification mechanism in a treaty consists of measures to verify whether the states party to that treaty are complying with their obligations under the treaty, in order to ensure the

effectiveness of the treaty. Concretely, it is a process in which "data are collected, collated and analysed in order to make an informed judgement as to whether a Party is complying with its obligations."[80] In treaties of international humanitarian law, it has always been difficult to find the verification mechanism palatable to the states concerned.[81] For obvious reasons, states engaged in armed conflicts do not like physical interventions, even for the purpose of verification. In this regard, the Geneva Conventions codified the system of Protecting Powers, but as the system was dependent on a voluntary acceptance of parties to the conflict, it did not function as it was expected to: the nomination of Protecting Powers has frequently been denied by one or the other party to the conflict. Additional Protocol I to the Geneva Conventions tried to strengthen the system but the performance of the system has not dramatically improved since 1977, either.[82] A new mechanism of verification was equally envisaged by Additional Protocol I, namely, the International Fact-Finding Commission.[83] The Commission itself was set up and became operative in 1991, but it has not received a single submission so far.[84] Additional Protocol II that deals with the non-international armed conflicts does not have an explicit provision concerning the verification of compliance with its own rules. Concerning the humanitarian regulations of landmines specifically, apart from the submission of reports by the Contracting Parties, neither the Landmine Protocol[85] nor the Amended Protocol[86] of the Convention on Certain Conventional Weapons is equipped with any procedure that resembles a verification. The issue of verification mechanism was discussed when they were negotiated, but its inclusion was resisted each time and did not materialize.[87]

In the field of disarmament and arms control, on the contrary, the verification mechanism that includes on-site inspections and investigations of alleged violations has been incorporated in many treaties.[88] These treaties often specify the institution that plays a central role in their verification mechanism: the Chemical Weapons Convention is backed up by the Organization for the Prohibition of Chemical Weapons, the Non-Proliferation Treaty is backed up by the International Atomic Energy Agency, and the Comprehensive Nuclear Test-Ban Treaty will be, when the time comes, backed up by the Comprehensive Nuclear Test-Ban Treaty Organization.[89] Verification mechanisms usually include the reporting of States Parties about their own compliance, but that alone does not deserve the appellation "verification." It is the measures to verify contents of these reports that constitute the core of the verification mechanism in disarmament treaties. Regular and routine on-site inspections are such measures. On-site inspections can also be the so-called challenge inspections, carried out upon a sudden request based upon a certain doubt or suspicion about the compliance of a specific State Party. Challenge inspections are the most intrusive means among a variety of measures of verification, seldom adopted in fields other than arms control and disarmament.[90]

Verification Mechanism in the Ottawa Convention

During the negotiation of the treaty text, those who saw the Ottawa Convention from the perspective of international humanitarian law only asked for a modest system of reporting of States Parties as a measure to ensure compliance. At the same time, however, there were also some states and NGOs that advocated more intrusive measures of verification, closer to typical verification mechanisms in disarmament treaties.[91] For example, the draft proposed at the beginning of the negotiation in 1996 by the International Campaign to Ban Landmines contained an annex according to which the verification was to be carried out.[92] On-site inspections initiated by a request of any State Party was also found in a proposal by Germany.[93] Nonetheless, since the negotiators did not wish to prolong the negotiation by debating this issue,[94] eventually a middle ground was agreed upon.

At a first glance, though the Ottawa Convention does not employ the term "challenge inspections," it does provide for a procedure of verification which is comparable to the challenge inspections in the verification procedure of disarmament treaties. In particular, it resembles that of the Chemical Weapons Convention which was adopted several years earlier.[95] In the procedure provided in the Ottawa Convention, the process of verification may be initiated by any State Party. In the first place, a State Party makes a request for information regarding allegations of non-compliance.[96] This phase is called the clarification. In the second place, in the event of the failure by the requested State Party to respond within 28 days, or if the response given is unsatisfactory, the requesting State Party may refer the matter to the next Meeting of the States Parties.[97] A Special Meeting of the States Parties can also be convened if one-third of the States Parties agree to do so.[98] The (Special) Meeting in which the matter is thus discussed decides to establish a fact-finding mission if a further clarification is deemed necessary.[99] The third phase of this procedure involves the fact-finding mission that consists of up to nine experts. The requested State Party is consulted in the process of their nomination.[100] When the fact-finding mission renders a report after its

mission investigating the alleged situation of non-compliance, the report is reviewed by the (Special) Meeting of the States Parties.[101] This (Special) Meeting may "suggest to the States Parties concerned ways and means to further clarify or resolve the matter under consideration, including the initiation of appropriate procedures in conformity with international law."[102] Important decisions such as the authorization of fact-finding mission in this procedure can be made by a majority, if the efforts to reach a consensus fail.

A careful examination, however, of the design of the verification mechanism that the Ottawa Convention adopted also reveals certain weaknesses. One obvious weakness in this verification procedure is the treatment of the report of the mission if it indicates non-compliance. The relevant provision of the Ottawa Convention does not explicitly oblige the (Special) Meeting of the States Parties to deal with the non-compliance in any particular way. Moreover, even if the State Party in breach of the Convention receives suggestions from the (Special) Meeting, in case of a repeated non-compliance with these suggestions, nothing further is provided in the Convention. While disarmament treaties such as the Chemical Weapons Convention provide that in similar cases, problems are to be reported to the General Assembly and the Security Council of the United Nations,[103] the Ottawa Convention does not mention this possibility, either. Another weakness in the verification mechanism of the Ottawa Convention is the question of time needed to put the fact-finding mission into motion. The timeline set in the procedure is such that any state intending to conceal the production site or stocks of landmines can probably do so successfully.[104] Without a request for clarification, Meeting of the States Parties does not have the right to authorize the fact-finding mission. It does so only "[I]f further clarification is required" according to Article 8(8).[105] Moreover, the requested State Party, if it chooses not to respond to the clarification request, will have 28 days before the next step is taken according to Article 8(2).[106] Even if a State Party requests the convening of the Special Meeting of the States Parties, according to Article 8(5),[107] the requested State Party may have as long as another 28 days, in which it may take actions. If the requesting State Party decides to wait for the regular session of the Meeting of the States Parties which is held once a year, it is likely to give the requested State Party even longer period of reflection and reaction. Furthermore, nothing guarantees that the (Special) Meeting makes any swift decisions, since no time-frame is imposed on the decision-making itself. In contrast, within the framework of the Chemical Weapons Convention, a State Party is not required to go through the clarification efforts prior to making a request for a challenge inspection.[108] The existence of a standing secretariat in the Chemical Weapons Convention should also facilitate a speedy realization of a challenge inspection, whereas such a technical advantage is absent in the Ottawa Convention.

Because of these weaknesses, especially when it is compared to the verification mechanisms of disarmament treaties, the verification mechanism of the Ottawa Convention is considered to "sit indeterminably between the two traditions – more robust than some humanitarian law but weaker than the best arms control models."[109] In this regard, the lack of demanding verification measures in the Ottawa Convention is defended by some authors. In their view, the excessive reliance on the investigative on-site inspections for ensuring compliance is a misconception of the Convention, which is primarily an instrument of international humanitarian law.[110] Instead of a strengthened verification which is a means of arms control according to this view, the solution proposed is "a continued stigmatization" whose "effectiveness will depend on the strengthening of the NGO capacity to be the compliance watchdogs for the treaty."[111] The same authors also feel that "the most potent mechanism of enforcement underpinning international humanitarian law is fear of disapprobation."[112]

While the normative strength of stigmatization and disapprobation is not denied, the present author does not agree with the view that international humanitarian instruments should be kept away from the discussions of verification. Surely, the stigmatization as an abstract tool and the verification as a concrete tool can complement each other in strengthening the power of the norm to induce compliance. Moreover, classifying the Ottawa Convention as a pure instrument of international humanitarian law does not correspond to the simple fact that this Convention is hybrid and therefore needs new solutions. The input and insight from the experience of disarmament and arms control should be carefully looked into in search of these new solutions, instead of being dismissed as a matter of nominal taxonomy.

In fact, the States Parties and NGOs have not been indifferent to this new challenge in the hybrid treaty since its entry into force. Even the International Committee of the Red Cross, which had stressed the humanitarian dimension of the Convention during the negotiations, is not unmindful of the importance of verification mechanism.[113] Through formal and informal discussions, they have sought to make the verification mechanism operational. Nevertheless, current discussions still indicate a continuing divergence of views between those states and

NGOs that are willing to render the procedure more operational for a rather regular employment, and others who are inclined to keep it as such, or as a procedure of exceptional cases.[114] In that sense, this new challenge generated by the hybrid structure of the Ottawa Convention has not found a satisfactory solution yet.

"Obligation Not to Assist, Encourage or Induce"

The States Parties of the Ottawa Convention undertake never in any circumstances "[T]o assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention" under Article 1(1)(c). Since there is nothing that restricts the scope of the term "anyone," the obligation can be far-reaching. It is not only an obligation not to assist other States Parties, but also an obligation not to assist any non-state actors such as a private manufacturer. Beyond that, it is also an obligation not to assist states that are not party to the Ottawa Convention.

Similar provisions concerning obligations not to assist or encourage other entities to engage in illegal activities are typically found in the disarmament treaties. For example, the Chemical Weapons Convention has an identical provision to that of the Ottawa Convention: "Each State Party to this Convention undertakes never under any circumstances to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention."[115] The Biological Weapons Convention stipulates that "[E]ach State Party to this Convention undertakes … not in anyway to assist, encourage, or induce any State, group of States or international organizations to manufacture or otherwise acquire any of the agents, toxins, weapons, equipment or means of delivery specified in article 1 of the Convention."[116] The Comprehensive Nuclear Test-Ban Treaty provides that "[E]ach State Party undertakes, furthermore, to refrain from causing, encouraging, or in any way participating in the carrying out of any nuclear weapon test explosion or any other nuclear explosion."[117] The Non-Proliferation Treaty also imposes a similar obligation to the nuclear-weapon states: "Each nuclear-weapon State Party to the Treaty undertakes … not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices."[118]

The obligation not to assist other entities to engage in illegal activities, including states that do not adhere to the regime of regulations, usually do not entail complications in these disarmament treaties.[119] In particular, when one of the aims of the disarmament treaty is non-proliferation, it is essential that the object of prohibited assistance, encouragement and inducement include the states not party to the treaty. Indeed, the policy of non-proliferation would make no sense if the states in the treaty were allowed to help the states remaining outside the treaty regime procure or produce the weapon while they were under the obligation not to pass the weapon to one another.

In the Ottawa Convention, a combination of several factors casts a complex shadow on the prohibition of assistance, encouragement and inducement. First, the Convention is hybrid: the provision is not only applicable to the disarmament obligations of the Convention, but also to the rules of international humanitarian law in it. Thus, the States Parties must not help anyone use the prohibited landmines in armed conflicts. Second, in theory, since the rules set out in the Ottawa Convention are only treaty rules, those states who remain outside the Convention can legitimately use the landmine prohibited by the Convention. Third, also in reality, the regular armed forces of some states that remain outside the Ottawa Convention are likely to continue using landmines in their operations. For example, the United States has made it clear that it would.[120] The United States is of course free to make such a choice, but it can create a problematic situation for those who joined the Ottawa Convention, with regard to their own obligation. There is no physical insulation between the States Parties and the non-States Parties such as the United States, retaining, and, in certain cases, willing to employ, the anti-personnel landmines that are prohibited by this Convention. There can be joint military operations and exercises, in which the latter uses the prohibited landmines. The issue was no longer hypothetical in a series of recent armed conflict. It is reported that the Canadian soldiers operating in Afghanistan in 2001 were asked by their U.S. commander to lay the mines, a request they declined.[121] During the operations with the coalition forces in Iraq in 2003, the United States again indicated a possibility to use anti-personnel landmines.[122] In these instances, are the States Parties of the Ottawa Convention under any specific obligation of action or omission? Do they simply have to stay away altogether from multinational military actions involving a state such as the United States? Against this background, the provision prohibiting the assistance, encouragement and inducement in the Ottawa

Convention created a problem that did not arise under disarmament treaties with identical or similar provisions.

Prior to the adoption of the Ottawa Convention, the possibility of joint military operations with non-States Parties and the problematic situations that could arise for the States Parties were not much discussed.[123] Nonetheless, four states were at least aware of this possible implication under Article 1(1)(c). Accordingly, Australia, Canada, the United Kingdom and the Czech Republic formulated their understandings concerning this provision at the time of their ratification or accession to the Ottawa Convention. Their understandings all express the concern that the joint military operations with a state not party to the Ottawa Convention should not be construed as an illegal assistance, encouragement or inducement under this provision.[124] There is no record of objection to these understandings. The absence of objection, however, cannot be taken as a sign of consent by other States Parties. An understanding, as opposed to a reservation, is a form of interpretative declaration and does not modify the legal effect of the provision in question.[125] The absence or the presence of objection should not generate any legal consequence, either, and hence, in practice, "the vast majority of interpretative declarations do not produce any response."[126] The silence does not compromise the capacity of a state to raise the issue later.

In fact, it gradually became clear in the discussions in the Standing Committee on the General Status and Operation of the Convention that there were two opposing positions regarding joint military operations with a state not party to the Convention who may use the prohibited landmines in these operations.[127] On one hand, Brazil, Mexico and Switzerland expressed the view that Article 1(1)(c) of the Convention bans joint military operations of this kind.[128] On the other hand, there were States Parties that favored a different view: the joint military operations themselves are not necessarily illegal under the same article.[129] States such as Italy,[130] Canada,[131] Australia,[132] France[133] and the United Kingdom[134] took the latter position, and made it clear in their national legislations or measures. The First Review Conference recognized the continuing existence of these conflicting views concerning the obligation not to assist, but reached no solution.[135]

The challenge is apparently a unique one in the Ottawa Convention because of its hybrid structure and the factual background. Nevertheless, the good sign in the Ottawa Convention is that States Parties are willing to continue their discussions concerning the issue instead of letting the sleeping dogs lie. Dialogues in Standing Committees, Meetings of the States Parties and other fora since the entry into force of the Ottawa Convention have helped clarify the gap between the two positions. It became abundantly clear that those who defend the right under the Ottawa Convention to participate in joint operations with states not party to the Convention are not trying to justify the entirety of their activities carried out in these joint operations. They promote the position that further differentiates two types of possible actions in the joint operations of this kind: some actions and omissions in joint operations constitute the illegal assistance in the Ottawa Convention, and other actions and omissions do not. Through the dialogues, the minimum common denominator of what constitutes an illegal assistance under the Ottawa Convention seems to be gradually emerging. The States Parties have not agreed on a unified position, but they must be credited for fully acknowledging this new challenge of the hybrid treaty, and having been tackling with it.

Conclusion

The Ottawa Convention on Landmines is a hybrid treaty of international humanitarian law and disarmament obligations: it prohibits the use of the anti-personnel landmine, and this rule of international humanitarian law is coupled with disarmament obligations such as the prohibition of production, stockpiling and transfer. As a result, procedural rules as well as substantive rules not explicitly linked to one of these aspects are applicable to both types of obligations in the Convention. This hybrid structure, together with the factual background of this particular weapon, engenders unique challenges for the Ottawa Convention. Concretely, typical provisions of international humanitarian law may not be appropriate in the operation of a hybrid treaty, but simply grafting typical provisions of disarmament treaties does not answer the needs of a hybrid treaty, either. In the Ottawa Convention, the answers given to the balancing between these two branches of law varied. The examination of the withdrawal clause showed the adoption of a typical provision of international humanitarian law. This eminence of international humanitarian law concerning the reduced freedom of disengagement is not contested by States Parties. At the same time, other parts of the Convention indicate the influence of disarmament treaties and the grafting of their typical provisions. Two examples, the verification mechanism and the obligation not to assist other

entities to engage in prohibited activities, were studied in this chapter. These provisions continue to generate controversies among the States Parties.

The first apparent conclusion is that not all efforts to deal with challenges resulting from the hybrid structure of the treaty have been successful in the Ottawa Convention. That apparent conclusion, however, has to be complemented by the second conclusion, that there is a very encouraging trend in the ways in which these challenges are dealt with. These unique challenges of a hybrid treaty have been fully acknowledged and dealt with both before and after the entry into force of this Convention. Whenever the States Parties perceived a challenge, the difficulties were discussed and solutions were sought in Standing Committees, Meetings of the States Parties and other fora of the Convention. There is a remarkable dynamism in the Ottawa Convention when it is compared to the inertia of the Convention on Certain Conventional Weapons, which waited for more than a decade before it held its First Review Conference in 1996.

The virtue of these frequent and open consultations, which constitute the source of this dynamism in the Ottawa Convention, is two-fold. First, the fact that these consultations are frequent if not continuous ensures that this Convention regime can cope with changing circumstances and new challenges as they arise. The weight of challenges, on one hand, arising in the field of international humanitarian law, and on the other hand, in the field of disarmament, will inevitably evolve over time. Even in a very simplified schema, one can envision more than one scenario of evolution. In the first scenario, if the Ottawa Convention is very successful and all the disarmament obligations are complied with strictly, at the end of the tenth year after joining the Convention, the States Parties will have no landmines and no mined areas under their control. The lack of universality of the Ottawa Convention would then be felt more acutely than ever, as a problem obstructing the realization of the mine-free world. In the second scenario, it is also possible that many States Parties encounter physical and technical difficulties in complying with this deadline. In that case, the challenge is in the disarmament dimension. Accordingly, the focus of the Convention would also shift to the assistance to the demining efforts. In the third scenario, the Ottawa Convention unfortunately proves to be unsuccessful in even implementing its most fundamental norm of international humanitarian law that prohibits the use of the landmines. Then the greatest challenge for the Ottawa Convention would be in the field of international humanitarian law, namely, how to induce a compliance of the variety of actors engaged in armed conflicts. Whatever the weight between challenges in international humanitarian law and challenges in disarmament in the future scenario may be, it is important that the Convention as a whole is prepared to tackle with challenges as they unfold themselves. In this regard, the culture of frequent consultations to tackle with the challenges, supported by the willingness of the States Parties of the Ottawa Convention, is a very promising sign.

Second, the consultations that take place in the framework of the Ottawa Convention are also marked by openness and transparency. In these consultations, the NGOs such as the International Committee of the Red Cross and the International Campaign to Ban Landmines are given important roles to play, and they have taken the full advantage. In a hybrid treaty such as the Ottawa Convention facing new challenges that neither disarmament treaties nor treaties of international humanitarian law faced before, innovative solutions are sometimes needed. Against this background, the acceptance by the Ottawa Convention of the input from actors other than states may prove to be essential.

Notes

* Associate Professor, Graduate School of International Cooperation Studies, Kobe University, and Visiting Fellow of the Lauterpacht Research Centre for International Law. The present author expresses her gratitude to Prof. O. Yoshida. The study was partly funded by the grant of Suntory Foundation in 2003-2004.

[1] Greenwood, 1999, p. 9.

[2] In the present chapter, any effort to control the production, development, possession and transfer of a specific category of armament is called either “disarmament” or “arms control.” The two terms are either employed interchangeably, or one of them is employed to designate the same object, by many contemporary authors. Strictly speaking, one may distinguish the two: the term “disarmament” implies the elimination or at least a reduction in the quantity of the armament in question, whereas the term “arms control” designates agreements in this field that do not result in quantitative reduction. Henkin, 1964, pp. 1-42.

[3] UN Secretary-General, Report on Assistance in Mine Clearance, UN. Doc. A/49/357 (Sept. 6, 1994); UN Secretary-General, Report on Assistance in Mine Clearance, UN. Doc. A/50/408 (Sept. 6, 1995); Boutros-Ghali, 1994, p. 13.

[4] Greenwood, 1998, p. 210; Roberts and Guelff, 2000, p. 646.

[5] For example, Detter, 2000, pp. 227-229; David, 2002, pp. 368-369.

[6] A well-known case is the use in the Iran-Iraq War. Kalshoven, 1992, p. 97. For other cases, Mauroni, 2003, pp. 145-163.
[7] Mathews and McCormack, 1999, pp. 80-81.
[8] Maresca and Maslen, 2000.
[9] There are 145 states that ratified or acceded to the Ottawa Convention as of 11 July, 2005. The number of signatories is 153. For a compact but comprehensive explanation of the provisions of the Convention, Bettati, 1997.
[10] Price, 1998; Goose, 1998; Rutherford, 2000; Anderson, 2000. Concerning the role of the International Committee of the Red Cross in particular, Maslen, 1998, pp. 80-98.
[11] Axworthy and Taylor, 1998, p. 189.
[12] Texts of international humanitarian law instruments cited in this chapter can be found in Roberts and Guelff, 2000.
[13] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (Saint Petersburg, 1868); Declaration (IV, 1) to Prohibit for the Term of Five Years, the Launching of Projectiles and Explosives from Balloons, and Other Methods of Similar Nature (The Hague, 1899); Hague Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons (The Hague, 1907).
[14] Declaration (IV, 2) concerning Asphyxiating Gases (The Hague, 1899); Article 23, Regulations concerning the Laws and Customs of War on Land, annexed to the Convention (II) with Respect to the Laws and Customs of War on Land (The Hague, 1899); Article 23, Regulations annexed to the Convention (IV) respecting the Laws and Customs of War on Land (The Hague, 1907).
[15] Hague Declaration (IV, 3) concerning Expanding Bullets (1899).
[16] Sandoz, 1981, p. 7; Bretton, 1977, pp. 216-220.
[17] For the drafting history, Sandoz, 1981, pp. 3-18.
[18] Henckaerts and Doswald-Beck, 2005, pp. 280-282.
[19] Dinstein, 2004, p. 69; Price, 2004, pp. 106-130; Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (The Hague, June 14, 2000), para. 27.
[20] Gardam, 2004, p. 64.
[21] For a position arguing the illegality of landmines under the traditional principles of humanitarian law, Doswald-Beck and Herby, 1995, pp. 5-7; The Arms Project of Human Rights Watch and Physicians for Human Rights, 1993, p. 275. A position that explicitly argues the illegality of landmines in internal conflicts under customary international law can be found in Parlow, 1994, p. 736. For a position arguing that the traditional principle of discrimination does not prohibit the mines, Maslen, 2001, pp. 193-194.
[22] Falk, 1995, p. 77. Concerning the issue of compliance and utility of the principle of civilian protection, see also Hayashi, 2005.
[23] Shaw, 1983, pp. 116-117; Roberts and Guelff, 2000, pp. 515-516.
[24] The prohibition of unnecessary suffering with regard to the regulations of landmines was incorporated later in Article 3(3) in the Amended Protocol.
[25] Article 3(2) (Article 3(7) of the Amended Protocol). “It is prohibited in all circumstances to direct weapons to which this Article applies, either in offence, defence or by way of reprisals, against the civilian population as such or against individual civilians.”
[26] Article 3(3) (Article 3(8) of the Amended Protocol). “The indiscriminate use of weapons to which this Article applies is prohibited. Indiscriminate use is any placement of such weapons:
(*a*) which is not on, or directed at, a military objective; or
(*b*) which employs a method or means of delivery which cannot be directed at a specific military objective; or
(*c*) which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”
[27] U.K. Ministry of Defence, 2004, p. 112, footnote 47.
[28] Lord, 1995, pp. 337-338.
[29] Majority of the authors criticized the limited and ineffective ways it tried to regulate the landmines. Bring, 1990, pp. 165-166; Austin, 1994, p. 19; Goose, 1996, p. 601.
[30] For criticisms of the Amended Protocol, Ferrer, 1996, pp. 145-156; Petrarca, 1996, p. 229; Roberts and Guelff, 2000, p. 518.
[31] Maresca and Maslen, 2000, pp. 450-454.
[32] Articles 2 and 3, Technical Annex.
[33] Wurst, 1997.
[34] Malanczuk, 2000, p. 85.
[35] Article 3
“(1) Notwithstanding the general obligations under Article 1, the retention or transfer of a number of anti-personnel mines for the development of and training in mine detection, mine clearance, or mine destruction techniques is permitted. The amount of such mines shall not exceed the minimum number absolutely necessary for the above-mentioned purposes.
(2) The transfer of anti-personnel mines for the purpose of destruction is permitted.”
[36] The types of landmines regulated are also slightly different. Landmines regulated by the Protocols of the Convention on Certain Conventional Weapons are not restricted to “anti-personnel” landmines.
[37] Article 19 “The Articles of this Convention shall not be subject to reservations.”
Several states submitted interpretative declarations and understandings, but they do not call into question the absolute nature of the prohibition of the use of landmines. These declarations and understandings are reprinted in Maslen, 2004.
[38] See for example, U.K. Ministry of Defence, 2004, p. 395.
[39] Article 9.
[40] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. U.S.A.), Merits, I.C.J. Reports (1986), 14.

See also den Dekker, 2004, pp. 318-319.
[41] Texts of disarmament and arms control treaties cited in this chapter can be found in Graham and LaVera, 2003; Roberts and Guelff, 2000.
[42] Article 8(1) "In order to promote the purposes of this Protocol, each High Contracting Party:
(a) undertakes not to transfer any mine the use of which is prohibited by this Protocol;
(b) undertakes not to transfer any mine to any recipient other than a State or a State agency authorized to receive such transfers;
(c) undertakes to exercise restraint in the transfer of any mine the use of which is restricted by this Protocol. In particular, each High Contracting Party undertakes not to transfer any anti-personnel mines to States which are not bound by this Protocol, unless the recipient State agrees to apply this Protocol; and
(d) undertakes to ensure that any transfer in accordance with this Article takes place in full compliance, by both the transferring and the recipient State, with the relevant provisions of this Protocol and the applicable norms of international humanitarian law."
[43] Article 10(1) "Without delay after the cessation of active hostilities, all minefields, mined areas, mines, booby-traps and other devices shall be cleared, removed, destroyed or maintained in accordance with Article 3 and paragraph 2 of Article 5 of this Protocol."
[44] Bettati, 1996, p. 201 [emphasis in the original]. See also Combacau and Sur, 2004, p. 686.
[45] Maresca and Maslen, 2000, p. 454.
[46] Nolan, 1995, p. 87.
[47] Article 1(1)(b).
[48] Article 1(2).
[49] Article 5(1) "Each State Party undertakes to destroy or ensure the destruction of all anti-personnel mines in mined areas under its jurisdiction or control, as soon as possible but not later than ten years after the entry into force of this Convention for that State Party."
[50] Article 3, *supra* note 35.
[51] Article 4 "Except as provided for in Article 3, each State Party undertakes to destroy or ensure the destruction of all stockpiled anti-personnel mines it owns or possesses, or that are under its jurisdiction or control, as soon as possible but not later than four years after the entry into force of this Convention for that State Party."
[52] Article 5(1), *supra* note 49.
[53] Article 5(3) "If a State Party believes that it will be unable to destroy or ensure the destruction of all antipersonnel mines referred to in paragraph 1 within that time period, it may submit a request to a Meeting of the States Parties or a Review Conference for an extension of the deadline for completing the destruction of such anti-personnel mines, for a period of up to ten years."
[54] Bring, 1987; Frei, 1988; Almond, 1997.
[55] For the views of China and the Russian Federation, Kaye and Solomon, 2002, pp. 932-933.
[56] For the position of the United States, Roberts, 1998, pp. 385-386; Efaw, 1999, pp. 87-129. In February 2004, the U.S. administration announced that it would not sign the Convention, and retain the right to use "smart" mines indefinitely. Boese, 2004.
[57] Article 11(1) "The States Parties shall meet regularly in order to consider any matter with regard to the application or implementation of this Convention, including:
(a) The operation and status of this Convention;
(b) Matters arising from the reports submitted under the provisions of this Convention;
(c) International cooperation and assistance in accordance with Article 6;
(d) The development of technologies to clear anti-personnel mines;
(e) Submissions of States Parties under Article 8; and
(f) Decisions relating to submissions of States Parties as provided for in Article 5."
[58] Article 11(4) "States not parties to this Convention, as well as the United Nations, other relevant international organizations or institutions, regional organizations, the International Committee of the Red Cross and relevant non-governmental organizations may be invited to attend these meetings as observers in accordance with the agreed Rules of Procedure."
[59] Article 12(1) "A Review Conference shall be convened by the Secretary-General of the United Nations five years after the entry into force of this Convention. Further Review Conferences shall be convened by the Secretary-General of the United Nations if so requested by one or more States Parties, provided that the interval between Review Conferences shall in no case be less than five years. All States Parties to this Convention shall be invited to each Review Conference."
[60] APLC/MSP.1/1999/1, para. 16-17 (May 20, 1999).
[61] APLC/MSP.2/2000/1, para. 28 (Sept. 19, 2000).
[62] APLC/MSP.3/2001/1, para. 33 (Sept. 18-21, 2001).
[63] Some treaties employ the term "denunciation" instead of "withdrawal," but there is no substantive difference. The latter seems to be a preferred term for multilateral treaties according to Aust, 2000, p. 224.
[64] The example is from Article 10(1) of the Non-Proliferation Treaty.
[65] This aspect of disarmament treaties highlighted by their withdrawal clause is called "the primacy of the security dimension" by Falk, 2002, p. 46. The significance of withdrawal clauses in the disarmament treaties has also been studied elsewhere by the present author. Nishimura, 2004, p. 59.
[66] Article 20(2).
[67] Article 20(3).
[68] Article 63 of the First Geneva Convention.

[69] Article 62 of the Second Geneva Convention; Article 142 of the Third Geneva Convention; Article 158 of the Fourth Geneva Convention; Article 99(1) of Additional Protocol I; Article 25(1) of Additional Protocol II.
[70] Article 9(2) of the Convention on Certain Convetional Weapons.
[71] Maslen and Herby, 1998.
[72] See Provost, 2002, p. 177.
[73] Provost, 2002, p. 175.
[74] den Dekker, 2001, pp. 356-360.
[75] Article 60(2)(a) of the VCLT.
[76] Article 60(2)(c) of the VCLT.
[77] Article 60(2)(c) of the VCLT.
[78] Aust, 2000; Simma, 1970, pp. 75-77; Reuter, 1995, pp. 37-38.
[79] Article 60(5) of the VCLT.
[80] den Dekker, 2001, p. 104. See also, Sur, 1998, pp. 37-41; den Dekker, 2004, p. 320.
[81] In the context of international humanitarian law, other terms such as fact-finding is more commonly used. See Vité, 1999.
[82] The system has been "virtually unused" according to Greenwood, 2003, p. 820, and "only used five times" according to Deyra, 2002, p. 310.
[83] Article 90(2)(c) of Additional Protocol I: "The Commission shall be competent to:
(i) Enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol:
(ii) Facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol."
For details of negotiations of the provision, Furet et al., 1979, pp. 239-256; Vité 1999, pp. 43-46.
[84] Aldrich, 2003, pp. 6-9.
[85] For a criticism of the lack of verification mechanism, Bretton, 1981, pp. 127-145.
[86] For the negotiation concerning the verification mechanism, Caflisch and Godt, 1998, pp. 18-19.
[87] Mathews, 2001, p. 412.
[88] The overviews of verification mechanisms in major disarmament treaties are found in Sur, 1991; Sur, 1994; Sur, 1998.
[89] For details of the verification mechanisms of these treaties, Asada, 1998a, pp. 230-237; den Dekker, 2001, pp. 219-331. The Comprehensive Nuclear Test-Ban Treaty has not come into force.
[90] Oeter, 1997, p. 107.
[91] The opposition of the two views is described as "[T]he 'ideology' of the Convention", by Findlay, 1999, p. 48.
[92] The draft is reproduced in Maslen, 2004, pp. 398-404.
[93] Schmalenbach, 2003, p. 243.
[94] Rutherford, 1999, p. 41.
[95] Asada, 1998b, pp. 58-60.
[96] Article 8(2) "If one or more States Parties wish to clarify and seek to resolve questions relating to compliance with the provisions of this Convention by another State Party, it may submit, through the Secretary-General of the United Nations, a Request for Clarification of that matter to that State Party. Such a request shall be accompanied by all appropriate information. Each State Party shall refrain from unfounded Requests for Clarification, care being taken to avoid abuse. A State Party that receives a Request for Clarification shall provide, through the Secretary-General of the United Nations, within 28 days to the requesting State Party all information which would assist in clarifying this matter."
[97] Article 8(3) "If the requesting State Party does not receive a response through the Secretary-General of the United Nations within that time period, or deems the response to the Request for Clarification to be unsatisfactory, it may submit the matter through the Secretary-General of the United Nations to the next Meeting of the States Parties. The Secretary-General of the United Nations shall transmit the submission, accompanied by all appropriate information pertaining to the Request for Clarification, to all States Parties. All such information shall be presented to the requested State Party which shall have the right to respond."
[98] Article 8(5) "The requesting State Party may propose through the Secretary-General of the United Nations the convening of a Special Meeting of the States Parties to consider the matter. The Secretary-General of the United Nations shall thereupon communicate this proposal and all information submitted by the States Parties concerned, to all States Parties with a request that they indicate whether they favour a Special Meeting of the States Parties, for the purpose of considering the matter. In the event that within 14 days from the date of such communication, at least one-third of the States Parties favours such a Special Meeting, the Secretary-General of the United Nations shall convene this Special Meeting of the States Parties within a further 14 days. A quorum for this Meeting shall consist of a majority of States Parties."
[99] Article 8(8) "If further clarification is required, the Meeting of the States Parties or the Special Meeting of the States Parties shall authorize a fact-finding mission and decide on its mandate by a majority of States Parties present and voting. At any time the requested State Party may invite a fact-finding mission to its territory. Such a mission shall take place without a decision by a Meeting of the States Parties or a Special Meeting of the States Parties to authorize such a mission. The mission, consisting of up to 9 experts, designated and approved in accordance with paragraphs 9 and 10, may collect additional information on the spot or in other places directly related to the alleged compliance issue under the jurisdiction or control of the requested State Party."
[100] Article 8(10) "Upon receiving a request from the Meeting of the States Parties or a Special Meeting of the States Parties, the Secretary-General of the United Nations shall, after consultations with the requested State Party, appoint the members of the mission, including its leader. Nationals of States Parties requesting the fact-finding mission or directly affected by it shall not be appointed to the mission. …"
[101] Article 8(17) "The fact-finding mission shall report, through the Secretary-General of the United Nations, to the Meeting of the States Parties or the Special Meeting of the States Parties the results of its findings."

[102] Article 8(19).
[103] Article 12(4) of the Chemical Weapons Convention: "The Conference shall, in cases of particular gravity, bring the issue, including relevant information and conclusions, to the attention of the United Nations General Assembly and the United Nations Security Council."
[104] Asada, 1998b, pp. 59-60; Findlay, 1999, p. 47.
[105] Article 8(8), *supra* note 99.
[106] Article 8(2), *supra* note 96.
[107] Article 8(5), *supra* note 98.
[108] Article 9(2) of the Chemical Weapons Convention: "Without prejudice to the right of any State Party to request a challenge inspection, States Parties should, whenever possible, first make every effort to clarify and resolve, through exchange of information and consultations among themselves, any matter which may cause doubt about compliance with this Convention, or which gives rise to concerns about a related matter which may be considered ambiguous. …" See also Nishimura, 2004, p. 63.
[109] Findlay, 1999, p. 46.
[110] Thakur and Maley, 1999, pp. 290-293.
[111] Thakur and Maley, 1999, p. 293. Similar expectations vis-à-vis NGOs are also expressed in Stern, 2003, pp. 114-118; Rutherford, 1999, pp. 41-42.
[112] Thakur and Maley, 1999, p. 294.
[113] Maslen and Herby, 1998, pp. 698-713.
[114] Maslen, 2004, pp. 224-227.
[115] Article 1(1)(d) of the Chemical Weapons Convention.
[116] Article 3 of the Biological Weapons Convention.
[117] Article 1(2) of the Comprehensive Nuclear Test-Ban Treaty.
[118] Article 1 of the Non-Proliferation Treaty.
[119] Krutzsch and Trapp, 1994, pp. 15-16; Rubenstein, 1993, p. 333.
[120] Sharnetzka, 1998, p. 661.
[121] Byers, 2005, p. 124.
[122] Boese, 2003a. According to later information, the landmines were not employed. Boese, 2003b. For other examples of joint operations involving the landmine use by non-States Parties, see Chamberlain and Long, 2004, p. 93.
[123] Maslen, 2001, p. 115. For the drafting history, see Maslen and Herby, 1998.
[124] These declarations are available at http://disarmament2.un.org/TreatyStatus.nsf (last visited on 13 July, 2005).
[125] Reuter, 1995, p. 78.
[126] Aust, 2000, p. 103.
[127] *Review of the General Status and Operation of the Convention*, Report of the Standing Committee on the General Status and Operation of the Convention to the Third Meeting of the States Parties, APLC/MSP.3/2001/SC4/1, para.16 (Aug. 23, 2001); Final Report of the Standing Committee on the General Status and Operation of the Convention to the Fourth Meeting of the States Parties, APLC/MSP.4/2002/1, 45 (Sept. 27, 2002).
[128] Standing Committee on the General Status and Operation of the Convention, Meeting Report 4 (Feb. 1, 2002), Intersessional Work Programme 2001-2002; Standing Committee on the General Status and Operation of the Convention, Meeting Report 5 (Feb. 3 & 7, 2003), Intersessional Work Programme 2002-2003. For the clear statement by Mexico, see the declaration of the Mexican delegation concerning Article 1 in the Fifth Meeting of the States Parties (Sept. 17, 2003). In support of this interpretation, see Wexler, 2003, pp. 594-596.
[129] Standing Committee on the General Status and Operation of the Convention, Meeting Report 9 (May 27 & 31, 2002), Intersessional Work Programme 2001-2002.
[130] Articolo 5(1), Legge 26 marzo 1999, n. 106, Ratifica ed esecuzione della Convenzione sul divieto d'impiego, di stoccaggio, di produzione e di trasferimento delle mine antipersona e sulla loro distruzione, firmata ad Ottawa il 3 dicembre 1997. Modifiche alla legge 29 ottobre 1997, n. 374, riguardante la disciplina della messa al bando delle mine antipersona [Article 5(1), Law No. 106 of March 26, 1999, Ratification and Implementation of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, signed in Ottawa on 3 December 1997. Amendments to Law No. 374 of October 29, 1997, concerning the Prohibition of Anti-Personnel Mines], Gazz. Uff. n. 94 (Apr. 23, 1999), Ordinary Supplement no. 80. For its content, see Gargiulo, 1998, pp. 323-332.
[131] Act to Implement the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction of Dec. 23, 1997, c. 33, 1997 S.C. (Can.).
[132] Act to Implement the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti Personnel Mines and on their Destruction, and for Related Purposes, 1998, No. 126 (Austl.).
[133] Article V(1), Directive du chef d'Etat-major des Armées relative aux mines anti-personnel du 12 novembre 1998, *reprinted in* Commission nationale pour l'élimination des mines antipersonnel, Rapport 2000, 51 (2001).
[134] Landmines Act, 1998, ch. 33.
[135] APLC/CONF/2004/5, para. 115 (Dec. 8, 2004).

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