

## The Australian case of measures taken to ensure compliance with the Convention

Ada Cheung, Arms Control Branch, Department of Foreign Affairs and Trade,  
Australia

3 May 2007

I've been asked to provide an administrative case-study of Australia's implementation of the Mine-Ban Convention. I'll begin by commenting on two elements of our enabling legislation which have a direct impact on the way the Australian Defence Force operates, and then move onto the more bureaucratic aspects.

Article 9 of the Convention requires States Parties to enact, with criminal penalties as appropriate, legal and administrative measures to implement the prohibitions in the Convention. In accordance with Article 17(2) of the Convention, this obligation would come into force for a State Party 6 months after it deposits its instrument of ratification or accession.

Key elements of the Australian Anti-Personnel Mines Convention Act are:

Section 7(3). Although the Act applies with extraterritorial effect to all Australians and all members of the Australian Defence Force, this section notes that the prohibitions do not apply to mere participation in military operations or exercises with the armed forces of non-State Parties, even if their personnel were to engage in prohibited activities. This exception, which follows the declaration Australia made when ratifying the Convention, has allowed the Australian Defence Force to continue to operate with key non-States Parties, primarily the US, but also Singapore. All Australian Defence Force personnel operate under Australian Rules of Engagement, which reflect our international and domestic legal obligations. Also, the provisions in the Criminal Code for aiding and abetting would apply if Australian personnel actively assisted in prohibited activity such as laying anti-personnel mines.<sup>1</sup>

---

### <sup>1</sup> 11.2 Complicity and common purpose

- (1) A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.
- (2) For the person to be guilty:
  - (a) the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and
  - (b) the offence must have been committed by the other person.
- (3) For the person to be guilty, the person must have intended that:
  - (a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or
  - (b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.
- (3A) Subsection (3) has effect subject to subsection (6).
- (4) A person cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed, the person:
  - (a) terminated his or her involvement; and
  - (b) took all reasonable steps to prevent the commission of the offence.
- (5) A person may be found guilty of aiding, abetting, counselling or procuring the commission of an offence even if the principal offender has not been prosecuted or has not been found guilty.
- (6) Any special liability provisions that apply to an offence apply also to the offence of aiding, abetting, counselling or procuring the commission of that offence.
- (7) If the trier of fact is satisfied beyond reasonable doubt that a person either:
  - (a) is guilty of a particular offence otherwise than because of the operation of subsection (1); or
  - (b) is guilty of that offence because of the operation of subsection (1);but is not able to determine which, the trier of fact may nonetheless find the person guilty of that offence.

### 11.3 Innocent agency

A person who:

It's also worth noting that the UN Secretary-General's IHL Bulletin of 1993 directs that landmines are not to be used by UN peace-keeping forces. This cannot be enforced against personnel provided by non-States Parties, but is certainly indicative of the UN's views.

Section 8 allows the Minister for Defence authorise the acquisition, transfer and retention of mines for research and training in mine detection, clearance and destruction. This is consistent with Article 3 of the Convention, which permits States Parties to retain mines for these purposes. This section would not apply in practice to private individuals or non-government organisations who are interested in mine detection or clearance. But the definitions in s 4 contains a specific note that permanently deactivated mines do not fall within this legislation, which means that use of empty mine casings – which do not contain explosives – for training and research is not restricted.

Once the legislation has been drafted and enacted by parliament, what next? In Australia's case, the Department of Defence issued a Defgram, which is a formal internal memo, alerting the entire organisation to the Convention and the Act, and briefly outlining the key obligations and prohibitions. There would also have been a formal order for the destruction of Australia's stockpiled anti-personnel mines, which was done in two batches, in 1999 and 2000. The reason for the second destruction was the discovery by the ADF of an additional 6,500 mines which were previously unreported. The operational ramifications of the Convention are detailed in a Training Information Bulletin which is given to all ADF commanders, and the prohibitions form part of compulsory IHL training for all personnel.

So much, then for our military colleagues. The Convention also includes obligations which have a direct impact on us foreign affairs types: Article 7 requires States Parties to produce annual transparency reports. Because Australia has chosen to retain mines for training purposes, one of the two people listed as contacts is in Army Headquarters. The other contact is my boss – we're the ones who coordinate the annual update.

As our colleagues from Vanuatu have most recently experienced, the first Article 7 Report is the most onerous; after that, it's a case of updating the information as necessary. The main annual changes to Australia's Article 7 return are the gradual depletion of the training mines, and updating Australia's mine action assistance information, which is provided by AusAID. There is no expectation that any State's legislative and administrative implementation forms will change after the first report. Therefore, for States which are not mine-affected, have not retained stocks of training mines, and are not a mine action donor, it's entirely legitimate to submit the same report largely unchanged each year.

This report is complementary to the similar report which the States Parties to Amended Protocol II of the CCW also prepare annually, although this report contains more detail on mine-clearance research for inclusion into the UN database for mine clearance. States Parties to the new Protocol V of the CCW, which is concerned with explosive remnants of war, are currently discussing similar national reporting, including information on the extent of ERW-affected territory – which is particularly useful for donor countries.

- 
- (a) has, in relation to each physical element of an offence, a fault element applicable to that physical element; and
  - (b) procures conduct of another person that (whether or not together with conduct of the procurer) would have constituted an offence on the part of the procurer if the procurer had engaged in it; is taken to have committed that offence and is punishable accordingly.