Final Detonation: How Customary International Law Can Trigger the End of Landmines

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“Landmines are among the most barbaric weapons of war, because they continue to kill and maim innocent people long after the war itself has ended.”

Landmines have been the source of suffering for not only tens of thousands of soldiers, but also thousands of civilians worldwide. They continue to lie dormant in many countries, some hidden in nearby dirt or foliage, until triggered by an unsuspecting victim. In the past twenty years, Amended Protocol II to the Convention on Conventional Weapons and, even more so, the Ottawa Convention—also known as the Mine Ban Treaty—have led to a decrease in the number of mines lingering in nations’ soil and those used in recent conflicts.

Although a handful of holdouts to the Ottawa Convention remain, those countries’ refusal to accede to the treaty does not necessarily prevent them from being bound by a number of legal principles it set out to establish. This Note will argue that, due to states’ conduct over the last fifteen to twenty years and their views toward the Ottawa Convention, customary international law has led to the emergence of five new rules severely constraining landmine transfer, development, and use.

Part I will explore the recent legal history of landmines, which consists of Amended Protocol II to the Convention on Certain Conventional Weapons and the Ottawa Convention. Part II will discuss customary law, a principal source of international law, and theories regarding its development and applicability. Finally, Part III will dive into the intersection of customary international law, landmines, and how countries’ public statements, actions, and expressed opinions have led to the advancement of new customary laws. This Note concludes that the new laws—binding on all or nearly all nations—include a total ban on landmine transfer, a good faith obligation to work toward Ottawa Convention
accession, a ban on the development and use of smart mines, and a prohibition or at least a stringent restriction on the use of persistent mines.

I. LANDMINES

The first self-contained, explosive landmines were utilized by China in the thirteenth century to repel an attempted invasion by Mongol leader Kublai Khan. In the sixteenth century, Europe followed suit by developing the first target-activated landmine for use in the West. Hundreds of years later, a self-contained mine that proved much more durable and long lasting than its predecessors appeared and was emplaced by the thousands during the American Civil War. That number climbed to the hundreds of millions during World War II, and mines continued to be deployed in massive numbers for the next fifty years.

The asserted military value of landmines today arises from the alleged tactical advantage they provide to troops on the ground. Outnumbered soldiers being pursued by a larger aggressor can place landmines to slow the enemy’s movement. Their placement on the battlefield forces opponents to redirect their movement or halt their advancement until the landmines can be neutralized even if it does not necessarily result in enemy-combatant causalities. Effectively, the tactical placement of minefields allows fewer soldiers to achieve a particular objective because landmines do the work that another battalion would perform, like protecting the platoon’s flank or forcing the enemy to move elsewhere. In light of the costs of landmines, their perceived benefits and whether they are truly necessary weapons of war have continually been called into question since the 1990s.

Throughout this Note, unless otherwise indicated, the terms “use,” “utilize,” “emplace,” “employ,” “deploy,” “plant,” and “lay” with respect to landmines refer to the actual emplacement of mines rather than the act of maintaining currently operative minefields.

3. Id.
4. Id.
5. Id.
8. See id.
9. See id.
Landmines continue to injure and kill many people years after a conflict has ended, and because of their inherently indiscriminate nature, mines often inflict their wrath on innocent civilians instead of military targets. In 2013, about two to three people per day were injured or killed by antipersonnel mines. Approximately fifty-nine countries are still plagued by millions of mines. In Bosnia, there were estimated to be an average of an astounding 152 landmines emplaced per square mile about fifteen years ago. In January 2014 alone, ten Bosnian civilians were injured by landmine blasts, including a young boy who did not survive his injuries. The international community has spent over $2.3 billion on demining efforts and victim assistance since 2008. Even after states and nonstate armed groups cease employing them as a means of warfare, the “scourge of landmines” will likely continue to devastate afflicted populations for years.
A. ANTIPERSONNEL LANDMINES

There are two distinct categories of land-based mines: antipersonnel landmines (APLs) and antivehicle landmines (AVLs).

APLs, as the name suggests, are designed to disrupt the movement of enemies on foot.19 There are numerous subtypes of APLs with varying characteristics, such as how they are deployed (for example, by hand, by cargo-carrying artillery shells, or by aircraft), whether they explode upon impact or are first shot into the air and then explode (referred to as “bounding mines”), and the amount of explosives contained within.20 APLs are made out of metal, plastic, or other material and some contain shrapnel in addition to explosives.21 Generally, APLs activate when an unsuspecting individual—combatant or civilian—triggers its firing mechanism typically either via a tripwire or by direct pressure to the mine.22 In this sense, APLs are indiscriminate in who they target; they are “victim-activated weapons.”23 Once the mechanism is triggered, a detonator ignites a small amount of high-quality explosive.24 That detonation then activates the mine’s main charge, and the following explosion deals the intended destruction.25

APL variants fall into two categories: “dumb” mines and “smart” mines. Once activated, dumb mines—technically referred to as persistent mines—remain in place until they detonate, decompose, or are physically removed and deactivated.26 Dumb mines are “persistent” in that they have the potential to lie still for many years and be forgotten until one maims an unwary farmer or child long after it has been planted.27 Smart mines, on the other hand, are purposefully designed to minimize the ongoing threat posed to civilian populations.28

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19. Rob Nixon, a professor at the University of Wisconsin-Madison, has criticized the name “anti-personnel,” which he alleges wrongly suggests that these types of mines are intended to target individuals who are part of particular organizations where, in reality, “four-fifths of landmine casualties are civilians.” ROB NIXON, SLOW VIOLENCE AND THE ENVIRONMENTALISM OF THE POOR 222–23 (2011).
22. See Strada, supra note 14, at 41.
25. Id.
27. See Strada, supra note 14, at 41.
28. U.S. Dep’t of State, Frequently Asked Questions on the New United States Landmine Policy, FED’N AM. SCIENTISTS ARMS SALES MONITORING PROJECT (Feb. 27, 2004), http://www.fas.org/asmp/campaigns/landmines/FactSheet_FAQ_NewUSLandminePolicy_2-27-04.htm (“Self-destructing mines do not leave a long-term, harmful legacy and as a result offer little risk to civilians. The core of the humanitarian problem caused by mines is not whether the mine is anti-personnel or anti-tank, but whether the mine constitutes a continued and persistent threat.”).
They are programmed to either self-destruct, self-neutralize, self-deactivate, or some combination thereof in order to ensure their nullification.29 Self-destructing mines are designed to explode after a set amount of time, ranging anywhere from several hours to several weeks.30 Self-neutralization happens when a mechanism within the mine renders it inoperable after some set period of time—like a timer that turns the mine off.31 Self-deactivation is a backup, fail-safe mechanism within the mine consisting of a clock or a battery that renders the mine inert after about ninety days, when the clock finishes ticking or the battery is drained.32

Arguably, the root cause of APL-induced suffering stems from the landmine’s success in severely maiming, rather than killing, its targets.33 If a combatant triggers a landmine explosion that knocks off an arm, a leg, an eye, or produces multiple injuries, not only will the wounded soldier be taken out of combat, but he will burden his comrades until they can get him medical care, likely tying up more resources and time than if the landmine distributed lethal force. Disturbingly, because mines cannot distinguish between combatants and noncombatants, they have also crippled and killed thousands of men, women, and children who had no participatory role whatsoever in the conflict being fought.

B. ANTIVEHICLE LANDMINES

AVLs are designed to incapacitate tanks and other combat vehicles.34 They typically contain a larger quantity of explosives and require more pressure to be exerted upon the mines in order to trigger the firing mechanism.35 Although more difficult to set off, AVLs can still harm civilians if, for example, someone inadvertently drives over one with a car heavy enough to trigger the explosion. Because AVLs are distinct from APLs, are less of a global pandemic (relative to

29. Efaw, supra note 26, at 92.
30. See U.S. Dep’t of State, supra note 28.
33. See Richard R. Murray & Kellye L. Fabian, Compensating the World’s Landmine Victims: Legal Liability and Anti-Personnel Landmine Producers, 33 SETON HALL L. REV. 303, 315–17 (2003) (“[Landmine producers knew] what the buyers wanted their product to accomplish. Producers designed their products to kill or, more effectively, severely maim people who then required others to care for them.”); see also U.S. DEP’T OF THE ARMY, FIELD MANUAL 20-32: MINE/COUNTERMINE OPERATIONS 1-8 (1992) (“[APLs] can either kill or incapacitate their victims. Other soldiers must tend to the victim, which temporarily takes them out of the fight.”).
34. The Issues: Landmines, supra note 21.
35. Id.
APLs), and are not banned under the Ottawa Convention, this Note will not discuss them further.

C. THE GRADUAL TREND TOWARD AN APL BAN

In the 1980s and 1990s, nations began to recognize the unintended destructiveness of landmines and the mass collateral damage they caused long after conflicts were finished. Since that time, a series of treaties have slowly begun to illegalize and stigmatize landmine production, transfer, and use. The following sections discuss two of the most prominent multilateral conventions contributing to the movement toward a worldwide APL ban: Amended Protocol II to the Convention on Conventional Weapons and the Ottawa Convention.

1. Amended Protocol II to the Convention on Conventional Weapons

In 1980, the international community forged the Convention on Certain Conventional Weapons (CCW), a treaty designed to restrict the use of particular weapons that cause unnecessary or unjustifiable suffering to combatants or that indiscriminately harm civilians. The CCW itself is fairly broad and carries with it no significant international obligations; instead, the real bite comes from protocols added to the CCW. Each protocol contains provisions that deal with specific issues. Protocol II to the CCW went into force on December 2, 1983, and governs the use of APLs. Despite attaining a total of ninety-four states party to the treaty, it has been considered a practical failure due to a number of perceived weaknesses and was, therefore, later amended. Subsequently, Amended Protocol II went into effect on December 3, 1998, and currently has 102 states party.

36. In 2013, 27% of all casualties (812 out of 3034) for which the specific type of victim-activated explosive device was known were caused by APLs, versus 7% (212 out of 3034) for AVLS. LANDMINE MONITOR 2014, supra note 12, at 35. In 2012, the numbers were 24% (937 out of 3822) for APLs and 8% (320 out of 3822) for AVLS. Id.; see also The Legacy of Land-Mines, UNICEF, http://www.unicef.org/sowc96/9ldmines.htm (last visited Jan. 12, 2015) (“The most dangerous [types of mines] to children are the [APLs] that explode even under the gentle pressure of a child’s hand or foot.”).

37. See infra note 61.

38. See Rizer, supra note 7, at 43.


41. See Efaw, supra note 26, at 113. Among the list of the original Protocol II’s purported flaws are its inapplicability to civil wars, no clear indication of which states are responsible for mine clearance under what circumstances, and a failure to regulate the production, sale, export, and stockpiling of landmines. See id. at 113–14.

42. See Amended Protocol II, supra note 31; Status of the Protocol, UNITED NATIONS OFF. FOR DISARMAMENT AFF., http://disarmament.un.org/treaties/ccwc_p2a (last visited Jan. 12, 2015). States not party to the Ottawa Convention (whose relevance to customary international law is discussed infra section III.A) are each differently situated with respect to Amended Protocol II. Ottawa Convention nonparties that are parties to Amended Protocol II include China, Georgia, India, Israel, Morocco,
Article 1 of Amended Protocol II states that the Protocol “relates to the use
on land” of “mines, booby-traps[,] and other devices,”43 which means that it
does not cover sea mines and mines that theoretically could hover in midair.

Article 3 implements a series of bans. It prohibits mines with the particularly
sinister feature of exploding when in the presence of a mine detector and
targeting civilian populations with APLs. It also forbids indiscriminate use of
APLs, which includes not directing APLs toward a military objective, employ-
ing a “method or means of delivery which cannot be directed at a specific
military objective,” or using mines in a fashion which may be expected to cause an
“[excessive] incidental loss of civilian life” in relation to the military
objective at hand.44 Additionally, Article 3 requires parties to take “[a]ll feasible
precautions” to protect civilians from APLs, which requires countries to take
into account long-term effects of APLs upon nearby civilian populations,
“possible measures to protect civilians,” use of alternatives to APLs, and the
“short- and long-term military requirements” for laying APLs.45

Article 5 restricts the use of hand-emplaced mines, permitting states to
employ them only if the minefield is clearly fenced off and continuously
monitored by military personnel as long as the state that laid the minefield
controls the area.46 If the state willingly abandons the field, it must first clear
out the mines; a state is relieved of its obligation to manage the minefield only if
it is forced out of the surrounding area and fails to regain control.47

Article 6 contains restrictions on “remotely-delivered mines”—those placed
using an artillery gun or dropped from an aircraft.48 Dumb mines cannot be
remotely delivered.49 States must record the number and location of remotely
delivered smart mines along with the date and time they were laid and the
 corresponding self-destruct periods.50 Moreover, Article 6 mandates that re-
motely delivered smart mines meet certain functionality standards: no greater
than 10% may fail to self-destruct within thirty days after emplacement and
each mine must have a “back-up self-deactivation feature” where no less than
99.9% may fail to function as a mine within 120 days.51

Article 8 prohibits transfer of any landmine that does not comply with the
Protocol.52 It also does not allow transfer of mines to states that are not parties

Russia, Sri Lanka, and the United States. Status of the Protocol, supra. The rest of the Ottawa
Convention nonparties are not party to Amended Protocol II. Id.
133 (emphasis added).
44. Id. art. 3(8)(b)–(c), S. Treaty Doc. No. 105-1, at 41–42, 2048 U.N.T.S. at 136.
45. Id. art. 3(10), S. Treaty Doc. No. 105-1, at 42, 2048 U.N.T.S. at 136.
47. Id.
48. Id. art. 6(1), S. Treaty Doc. No. 105-1, at 43, 2048 U.N.T.S. at 137.
49. Id. art. 6(2).
50. Id. S. Treaty Doc. No. 105-1, at 43, 52, 2048 U.N.T.S. at 137, 144.
52. Id. art. 8(1)(a), S. Treaty Doc. No. 105-1, at 45, 2048 U.N.T.S. at 138.
to the Protocol unless those states agree to abide by its provisions.53

2. The Ottawa Convention

Amended Protocol II to the CCW was a step forward in curbing the misuse of landmines and reducing their impact on civilian populations. However, the International Campaign to Ban Landmines (ICBL)—a coalition of six nongovernmental organizations (NGOs) formed in 199254—was unsatisfied because it believed the Protocol “fell far short” of where it needed to be55 and urged nations to adopt a total ban on landmines. Thus, in October 1996, fifty governments and twenty-four observers met in Canada to kick-start what became known as the “Ottawa Process,” an international movement to draft a multilateral convention prohibiting all further use of landmines.56 In September 1997, the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction—also known as the Ottawa Convention or the Mine Ban Treaty—was adopted in Oslo, Norway, and subsequently signed by 122 nations in Ottawa, Canada, that December.57 The treaty, built on the principle that “civilians should not be killed or maimed by weapons that strike blindly and senselessly,”58 entered into force in March 1999.59 Each new nation that accedes to the Ottawa Convention, “whether it is affected by landmines or not, helps reinforce the international rejection of the weapon.”60

Article 1 of the Mine Ban Treaty completely prohibits the use, transfer, and acquisition of APLs, which are defined as “mine[s] designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons.”61

53. Id. art. 8(1)(c).
56. See About Us: Campaign Chronology, supra note 54. See generally THE BANNING OF ANTI-PERSONNEL LANDMINES, supra note 55, at 606–23 (describing the background to the Ottawa Process, the key role the International Committee of the Red Cross played in treaty negotiations, and the positive impact the Ottawa process had on international humanitarian law).
57. About Us: Campaign Chronology, supra note 54.
61. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction arts. 1, 2(1), Sept. 18, 1997, 2056 U.N.T.S. 211, 242 [hereinafter Ottawa Convention]. The prohibition exempts the use of AVLs. Id. art. 2(1). In addition, an
Pursuant to Article 4, each party to the Convention is required to destroy all stockpiled APLs within four years of the treaty’s entering into force for that state party. Article 5 mandates that each state party “undertake[] to destroy or ensure the destruction of all [APLs] . . . under its jurisdiction or control,” in both known and suspected mined areas, within ten years. Under certain circumstances, states may request an additional ten-year extension to destroy the aforementioned APLs.

Parties are called to help one another by providing assistance for mine victims, mine clearance, mine destruction, and mine-awareness programs without imposing “undue restrictions” on the provision of equipment and information.

Every year parties must submit to the United Nations Secretary-General a comprehensive report detailing the amount and type of mines stockpiled, the locations of mined areas under their respective jurisdictions, and the status of both mine-destruction programs and the decommissioning of mine-production facilities.

II. CUSTOMARY INTERNATIONAL LAW

This Part will examine the basic tenets of customary international law. The Statute of the International Court of Justice defines customary international law as “general practice accepted as law.” As one of the “two principal ways” international law is formed, customary law is law that is molded over time as a result of “constant and uniform practice of States and other subjects of international law in or impinging upon their international legal relations[] in circumstances which give rise to a legitimate expectation of similar conduct in

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62. Id. art. 4, at 243.
63. Id. art. 5(1).
64. Id. art. 5(3)–(4), at 243–44. Extensions appear to be granted with frequency, see Clear Mines: Extension Requests, INT’L CAMPAIGN TO BAN LANDMINES, http://www.icbl.org/en-gb/finish-the-job/clear-mines/extension-requests.aspx (last visited Jan. 12, 2015), although the full ten years are not always given. For example, Peru requested a ten-year extension to its initial March 1, 2009 deadline, but its mine-clearance plan was deemed inadequate, and so a subsequent request for an eight-year extension was granted instead. Lauren Nicole Hill & Cory Kuklick, Peru, J. ERW & MINE ACTION, Summer 2009, available at http://www.jmu.edu/cisr/journal/13.1/profiles/peru/peru.shtml.
65. Ottawa Convention, supra note 61, art. 6, 2056 U.N.T.S. at 244.
66. Id. art. 7, at 245–46. In the years following the Convention’s entry into force, a number of countries have voluntarily submitted Article 7 reports to the U.N. Secretary-General, showing support for the anti-APL norm. See, e.g., infra note 145 (citing a voluntary Article 7 report submitted by Azerbaijan in 2008).
68. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt.1, ch. 1, intro. note (1987). The other main vehicle is treaty law. Id.
the future." Although jurists can assist in the identification and clarification of an emerging or established customary law, customary international law is not judge-made like traditional common law. On the other hand, similar to common law, what begins as nonlegally binding behavior can transform into binding law over time, a process often referred to as "crystallization." Treaties may also play a role in either the development of new customary law or the codification of an already recognized customary rule. There are still a number of "rules about status, property, and international delicts" that countries adhere to out of a customary legal obligation, including many of the principles emanating from the Vienna Convention on the Law of Treaties, a cornerstone of contemporary international law rulemaking.

A. THE COMPONENTS OF CUSTOMARY INTERNATIONAL LAW: STATE PRACTICE AND OPINIO JURIS

A general customary international law forms "[i]f a sufficiently extensive and representative number of States participate in such a practice in a consistent manner" and is binding on all states. Customary international law consists of two elements: the objective element (state practice) and the subjective element ("opinio juris," which means a sense of legal obligation to conform to the particular state practice). The concept of two distinct elements can be deceiv-


70. However, unlike the actual chemical process of crystallization, where the precise moments in which crystals form can be identified, the moment of crystallization of customary laws is typically more difficult—or impossible—to determine, though this is considered unnecessary to the analysis of the law’s legitimacy. See id. at 49 n.128.

71. See infra section II.B for a more in-depth discussion of this topic.


73. ILA REPORT, supra note 69, at 8 (emphasis omitted). It may be possible for “persistent objectors” to exempt themselves from such laws. See infra notes 91–94 and accompanying text for more on persistent objectors.

Customary law can be general or regional. Regional customary laws are like general customary laws on a smaller scale: they can form in particular geographic locations and bind nations located within a specific area. See, e.g., Fisheries (U.K. v. Nor.), 1951 I.C.J. 116, 131 (Dec. 18); Asylum (Colom./Peru), 1950 I.C.J. 266, 277 (Nov. 20). However, because this Note analyzes only general customary international law, regional custom will not be discussed further.

74. See ILA REPORT, supra note 69, at 5–6 (“The Court, whose function is to decide according to international law such disputes as are submitted to it, shall apply . . . international custom, as evidence of a general practice accepted as law.” (emphasis added) (quoting ICJ Statute, supra note 67, art. 38(1), 59 Stat. at 1060)); see also North Sea Continental Shelf (Ger./Den.; Ger./Neth.), 1969 I.C.J. 3, ¶ 77 (Feb. 20) ("[T]he acts concerned [must] amount to a settled practice, [and] they must also . . . be carried out in such a way[] as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.” (emphasis added)). ICJ opinions are considered persuasive evidence of customary law, but they are not binding precedent. ICJ Statute, supra note 67, art. 59, 59 Stat. at 1062.
ing. The International Law Association (ILA) takes the position that it is not always necessary to prove *opinio juris* to establish the formation of a new rule, and moreover, the International Court of Justice (ICJ) has stated that it is not impossible for one course of conduct to represent both state practice and *opinio juris*. Thus, identifying what exactly is a customary law, its scope, and which states are bound by it can be a cumbersome, opaque process that does not always produce unequivocal answers.

1. The Objective Element: State Practice

State practice is generally considered to be more important than *opinio juris*. Countries’ physical acts (as well as omissions to act, in certain circumstances) and verbal acts (public proclamations or communications to at least one other state) comprise state practice. Physical acts are usually given greater weight. Conduct by intergovernmental organizations such as the United Nations General Assembly (UNGA)—like the adopting of UNGA resolutions—can count toward the formation of customary law, although those actors’ conduct might instead more accurately be viewed as a series of verbal acts by the participating states. Furthermore, the ICRC takes the position that “[i]nternational organisations have international legal personality and can participate in international relations in their own capacity” and, thus, contribute to the formation of customary law.

("The decision of the Court has no binding force except between the parties and in respect of that particular case.").

75. ILA REPORT, supra note 69, at 7.
76. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 103 cmt. a (1987) (“[F]or customary law[,] the ‘best evidence’ is proof of state practice, ordinarily by reference to official documents and other indications of governmental action.”); ILA REPORT, supra note 69, at 13 (“[M]ost members of the Committee [on the Formation of Customary Law] consider[ state practice] to be the most important[] component of customary international law . . . .”). *But see* Filartiga v. Peña-Irala, 630 F.2d 876, 884 (2d Cir. 1980) (holding that “official torture is now prohibited by the law of nations” because although the right to be free from torture is “often violated[ in practice,] . . . virtually all governments acknowledge [its] validity”).

77. Examples cited by the International Committee of the Red Cross (ICRC) include battlefield behavior and the use of certain weapons. *Introduction, Int’l Committee Red Cross*, https://www.icrc.org/customary-ihl/eng/docs/v1_rul_in_asofcuin (last visited Jan. 12, 2015).
78. ICRC examples include national legislation, opinions of official legal advisers, comments by governments on draft treaties, statements in international organizations and at international conferences, government positions taken with respect to UNGA resolutions, military manuals, instructions to armed and security forces, military communique’s during war, diplomatic protests, executive decisions and regulations, and the practice of legislative, judicial, and executive organs of a state. *Id.*

79. *See supra* note 76. The ILA notes that some accord more weight to physical acts because of the view that “talk is cheap.” ILA REPORT, supra note 69, at 13. However, “talk is not always cheap,” and “physical acts are not always formal and deliberate.” *Id.* at 13–14.

80. *See ILA REPORT,* supra note 69, at 19. For a more in-depth discussion on how UNGA resolutions can contribute to the formation of customary law, see *infra* section II.C.

81. *Introduction,* supra note 77. However, the practice of armed opposition groups is not state practice and should not be considered when evaluating the formation of customary law. *Id.*; ILA REPORT, supra note 69, at 16 (declaring that “[a]cts of individuals, corporations etc. do not count as State practice, unless carried out on behalf of the State or adopted (‘ratified’) by it” (emphasis
Conduct that forms general customary international law, which has the potential to bind all states, must be uniform, extensive, and representative. To be uniform, states “whose behavior is being considered should have acted in the same way on virtually all of the occasions on which it engaged in the practice in question.” Minor departures from uniform practice or a “few uncertainties or contradictions” will not necessarily be fatal to the formation of a new customary rule. Instead, uniformity dictates that different states not engage in “substantially different conduct.”

For practice to be extensive, it does not have to be universal; it is not even required that a majority of countries engage in particular conduct as long as there is no “significant dissent.” There is no precise number or percentage of countries that must conform to a particular practice for that conduct to give rise to a customary law. How extensive state practice must be depends on the facts and circumstances of the particular custom and the degree of representativeness of the participating nations.

Whether state practice is sufficiently representative is a qualitative, not quantitative question, meaning the main concern is which states are engaging in the specific conduct, not necessarily how many. Those that matter the most are the ones “whose interests are specially affected.” If these key states do not accept the practice at issue, it most likely will not be able to crystallize into a rule of general customary international law.

Even if conduct amounts to customary international law, it may be possible for states to exempt themselves from being bound by a rule of general custom-
ary international law by being “persistent objector[s].” To be a persistent objector, a state must oppose the rule while it is still emerging and the objection must be open, “expressed . . . and . . . repeated as often as circumstances require.” Verbal protests are adequate to maintain a dissenting position. However, the ICRC claims that a number of authorities doubt the validity of the persistent-objector rule. This Note will assume arguendo that there is a possibility that nations may become persistent objectors but recognizes that the rule’s existence is disputed.

Finally, there is no precise amount of time that must pass before an emerging customary rule crystallizes into binding law. A customary law need not be in the process of development for hundreds of years; one can form in a short period of time if state conduct is “both extensive and virtually uniform in the sense of the provision invoked.” Some customary laws, such as sovereignty over air space and rules regarding the continental shelf, “sprung up quite quickly . . . because a substantial and representative quantity of State practice grew up rather rapidly in response to a new situation.” Moreover, the advancement of telecommunications and the speed with which countries can acquire information about others and their practices supports the notion that customary rules today may potentially be formed faster than ever before. Hence, there is no precise timing requirement for a rule to crystallize, and the period could be short if the practice is uniform and sufficiently representative.

2. The Subjective Element: Opinio Juris

The second, and more controversial, component of customary international law is opinio juris. Different authorities take different positions on this subject. The ILA’s position is that if states believe that a pattern of uniform, extensive, and representative conduct is required by law, then that is sufficient, but not necessary, for that conduct to form new law—in other words, customary international law may crystallize without proving the existence of a belief that particular conduct is legally required or permitted, but, if the belief exists, that

91. ILA REPORT, supra note 69, at 27.
92. Id. at 28.
93. Id.
94. See Introduction, supra note 77.
95. This would be both a difficult and unnecessary task because all that matters is that the rule exists by the time the state actor takes action. See ILA REPORT, supra note 69, at 20 n.47.
96. North Sea Continental Shelf (Ger./Den.; Ger./Neth.), 1969 I.C.J. 3, ¶ 74 (Feb. 20) (“[T]he passage of only a short period of time is not . . . a bar to the formation of a new rule . . . [if] within the period in question, short though it may be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform . . . .”).
97. ILA REPORT, supra note 69, at 20.
98. See id. at 3 (“Until the latter part of the 19th century, . . . communications were slow. . . . [C]ommunication has speeded up to the point where it is technically possible for it to be instantaneous. . . . [T]he fact that the adoption of a position by a State can be communicated instantaneously around the world [has contributed to the process of customary law formation].”).
will establish the existence of a new customary law. On the other hand, even if there appears to be uniform, extensive, and representative state practice, it may be disqualified from counting toward a new customary rule because those states concerned assume or argue that the conduct does not count and has no precedential value, a sentiment referred to as “opinio non juris.” Furthermore, overly ambiguous conduct may not provide any indications of opinio juris or opinio non juris and thus should not be considered evidence of either.  

Finally, in weighing the value of opinio juris, the ILA determined that a substantial amount of state conduct may compensate for a relative lack of consent or belief that a customary rule exists. Relying on a number of ICJ opinions, the ILA asserted that constant and uniform state practice despite a lack of opinio juris is a stronger claim for the emergence of a rule of customary international law than the inverse proposition.

The ILA contends that its assertion that proof of opinio juris is unnecessary for the formation of a new customary law only appears to be contrary to numerous ICJ opinions. It claims that the court specifically looked for evidence of opinio juris in those cases where there was a reason to believe that otherwise qualifying conduct should not lead to a new custom. Essentially, the ILA believes that the ICJ only found opinio juris evidence relevant in specific, rare situations where it prevented the practice at issue from counting toward the formation of a customary rule.

A closer look at some ICJ opinions reveals that the court had good reason to look to evidence of opinio juris because under the particular circumstances it was not appropriate for certain state conduct to be viewed as conforming to some legal obligation (as opposed to a political or policy decision) without additional proof. For example, sometimes a strong presence of opinio non juris can prevent the formation of a new customary law. In its advisory opinion
on the legality of the threat or use of nuclear weapons, the ICJ held that although there had been consistent state practice for more than fifty years of refraining from the use of nuclear weapons, no customary law forbidding nations from such use had formed due to countries’ “profoundly divided [views] on the matter of whether non-recourse to nuclear weapons” did or did not constitute an expression of *opinio juris*.107 Here, a sufficient but unnoted number of states expressly rejected the proposition that they refrained from nuclear-weapon use because it would violate customary international law, thus crippling such a law’s formation.

Other times, conduct may be too ambiguous to be considered driven by some legal obligation. For example, in the *S.S. “Lotus”* case, a French vessel collided with a Turkish vessel on the high seas.108 Turkey prosecuted the French officer responsible after he sailed to Turkey with the survivors from the crash. France argued that because states had rarely exercised jurisdiction over collisions on the high seas, this was evidence of a customary law against such prosecutions.109 The Permanent International Court of Justice (the predecessor to the ICJ) disagreed, finding that there were many other reasons why nations would not initiate such proceedings—for example, inconvenience or a lack of interest. Thus, it could not be inferred that those states’ failure to exercise jurisdiction counted toward the formation of a rule prohibiting such conduct.110 Likewise, in the *Asylum* case, the ICJ did not count instances of countries’ recognition of political asylum as counting toward a rule requiring states to do so because “considerations of convenience or simple political expediency seemed to have led the territorial State to recognize asylum” and not a sense of legal obligation.111

The Restatement (Third) of the Foreign Relations Law of the United States takes the position that proof of *opinio juris* is always necessary for the formation of a new customary rule.112 However, the Restatement view and the ILA’s position on the essentiality of *opinio juris* are not in total conflict and likely can be reconciled in many cases. Consider the following example: Although some common practices, like sending condolences following the death of a head of state, are quite common, no nation believes, and no one would argue with a straight face, that states are bound by customary law to send such condolences. It is simply understood that such conduct is not legally required.113 The Restatement view would indicate that there is no customary rule regarding sending condolences because of a lack of *opinio juris*, and the ILA would

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109. *Id.* at 10–11, 28.
110. *Id.* at 28–30.
111. See *Asylum* (Colom./Peru), 1950 I.C.J. 266, 286 (Nov. 20).
112. Restatement (Third) of the Foreign Relations Law of the United States § 102 cmt. c (1987) (“For a practice of states to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation . . . .”).
contend that there is no customary rule due to a sufficient showing of *opinio non juris*, or a belief that no such customary rule exists. Thus, the divergence between the views of the Restatement and the ILA on *opinio juris* is not as pronounced as it appears at first glance.

In conclusion, proof of the subjective element of customary law formation may not be considered critical in some cases, at least where the practice is pervasive enough and the conduct not so vague that it could just as easily be motivated by a political or policy decision instead of an international legal obligation. On the other hand, if state practice is highly ambiguous and can potentially be explained by a multitude of reasons, or if the actions taken are obviously not driven by law, then looking for evidence of *opinio juris* may be much more useful in analyzing the formation of a customary rule. The ensuing arguments for new customary laws regarding landmines will attempt to satisfy both the ILA and Restatement criteria by alleging uniform, extensive, and representative state practice motivated by a sense of legal obligation to engage in such conduct.

B. TREATIES AND CUSTOMARY INTERNATIONAL LAW

Treaties may provide evidence of an established customary rule, help with the crystallization of an emerging norm, or set the foundation for an entirely new customary law even though they often address matters beyond customary law.\textsuperscript{114} There is no general presumption that a treaty codifies an existing customary rule.\textsuperscript{115} Although multilateral conventions can provide a basis for or give credence to a new norm, it is important to note that conduct “wholly referable to [a] treaty itself” does not count as practice for purposes of counting toward the formation of a new customary law.\textsuperscript{116} The ILA notes that “in some cases[,] it may be that frequent repetition in widely accepted treaties evinces a recognition by the international community as a whole that a rule is one of general, and not just particular, law.”\textsuperscript{117} The degree of ratification of a particular treaty may also be relevant in determining whether some of its provisions have crystallized into customary law.\textsuperscript{118}

\textsuperscript{114} See id. at 46 (“Multilateral treaties can provide the impulse or model for the formation of new customary rules through State practice. In other words, they can be the historic (‘material’) source of a customary rule.” (emphasis omitted)).

\textsuperscript{115} Id.

\textsuperscript{116} See id. at 46–47 (emphasis omitted); see also infra section III.A (arguing that the conduct of Ottawa Convention nonparties is much more useful for analyzing new customary laws because their conduct is not referable to the Convention’s explicit legal provisions but rather to norms flowing from the treaty).

\textsuperscript{117} ILA REPORT, supra note 69, at 48; see also Legality of Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 258 (July 8) (observing that, in 1945, humanitarian rules annexed to the Hague Convention IV of 1907 “were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war”).

\textsuperscript{118} See North Sea Continental Shelf (Ger./Den.; Ger./Neth.), 1969 I.C.J. 3, ¶ 73 (Feb. 20). In the North Sea cases, the ICJ considered relevant the degree of ratification of the Geneva Convention in
However, the assessment of state practice is ultimately an inquiry driven by “specially affected” nations, if there are any. Therefore, although a group of countries could potentially lay the foundation for a new customary rule by drafting a treaty around a set of principles—without necessarily the intention of forming a new custom—that treaty does not ipso facto create the new customary rule, nor does their adherence to the treaty terms count toward a new rule’s formation if only nonparties are considered specially affected.\textsuperscript{119} Contrarily, if the treaty is widely accepted and if there is a strong showing of nonparty practice conforming to the treaty terms motivated by a sense of legal obligation, the principles within the treaty may become general customary law binding on all nonpersistent objectors.\textsuperscript{120} For instance, the abolition of privateering in the Paris Declaration Respecting Maritime Law, the restrictions on the use of force in Articles 2(4) and 51 of the United Nations Charter, and many provisions of the Vienna Convention on the Law of Treaties are all examples of treaty provisions that have crystallized into customary law because of widespread conforming state practice.\textsuperscript{121} With the ever-increasing international influence of the Ottawa Convention, there is hope that “because of the treaty[,] new international norms have formed that discourage any country, signatory or not, from using mines.”\textsuperscript{122}

C. UNGA RESOLUTIONS AND CUSTOMARY INTERNATIONAL LAW

UNGA resolutions often urge nations to adopt certain behavior instead of making statements about international law.\textsuperscript{123} However, when they do make such statements, they can contribute to the formation of customary international law much in the same way as treaties.\textsuperscript{124}

Within the text of a resolution discussing international law, it is important to distinguish between what the participating states desire the law to be (\textit{lex determining whether some of its provisions had crystallized into customary international law, finding thirty-nine ratifications and accessions to be “hardly sufficient.” \textit{Id.}

\textsuperscript{119} For example, although non-nuclear weapon states vastly outnumber those that possess nuclear weapons, it is implausible that they could get together, and via a treaty, succeed in declaring the ownership or use of nuclear weapons violative of international law.

\textsuperscript{120} Consistent practice of states not party has been considered important positive evidence of customary-law development, and contrary practice of states not party has been considered important negative evidence. \textit{See Introduction, supra note 77.}

\textsuperscript{121} \textit{See ILA REPORT, supra note 69, at 46; supra note 72.}

\textsuperscript{122} \textit{See Kimball, supra note 13 (emphasis added).}

\textsuperscript{123} \textit{ILA REPORT, supra note 69, at 55.}

\textsuperscript{124} Legality of Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 70 (July 8) (“General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an \textit{opinio juris.}”); \textit{see also ILA REPORT, supra note 69, at 55 (“[R]esolutions of the [UNGA] may in some instances constitute evidence of the existence of customary international law; help to crystallize emerging customary law; or contribute to the formation of new customary law[, but generally] . . . do not ipso facto create new rules of customary law.” (emphasis omitted)).}
ferenda) and what they assert that the law actually is (lex lata).\textsuperscript{125} For example, the use of the word “shall” (a lex lata indication) instead of “should” (lex ferenda) usually means that the stated rule is more than merely recommendatory.\textsuperscript{126} However, “if circumstances prove propitious,” even lex ferenda statements can contribute to the formation of a new customary law.\textsuperscript{127} For example, such resolutions played a role in the ICJ’s analysis of a dispute between the United States and Nicaragua in Military and Paramilitary Activities in and Against Nicaragua.\textsuperscript{128} In determining whether the United States had violated customary law by supporting a Nicaraguan rebel group, the ICJ held that the text of Resolution 2625 (Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations) and other similar resolutions, which made declarations of law with respect to state sovereignty and use of force, were not merely a rehashing of the commitments put forth by the U.N. Charter and thus could be understood as “an acceptance of the validity of the rule or set of rules declared by the resolution by themselves.”\textsuperscript{129}

Unlike treaties, resolutions are generally nonbinding on the participating states and, therefore, adopting a resolution does not typically create legal obligations.\textsuperscript{130} Because of this, conduct in accordance with and referable to the resolution may be viewed as evidence of opinio juris to a new or emerging customary law.\textsuperscript{131} Generally, the greater the support for a particular resolution, the more importance it is given.\textsuperscript{132} How much weight is attributed to a UNGA resolution depends on a number of factors, including the resolution’s provisions, the process of its adoption, and any other conduct that may be consistent with or contrary to the resolution.\textsuperscript{133}

### III. CUSTOMARY INTERNATIONAL LAW AND ANTIPERSONNEL LANDMINES

This Part examines APLs through the lens of customary international law almost twenty years after the genesis of the Ottawa Convention. Since the

\textsuperscript{125} See ILA REPORT, supra note 69, at 56; see also G.A. Res. 69/34, at 1–2, U.N. Doc. A/RES/69/34 (Dec. 2, 2014) (employing words and phrases such as “[b]elieving it necessary,” “[w]ishing,” and “[r]enew[ing] [the] call upon” states to work together, which by their nature do not impose any immediate affirmative duties on consenting states).

\textsuperscript{126} ILA REPORT, supra note 69, at 58.

\textsuperscript{127} Id. at 56–57, 59 (“Resolutions of the General Assembly can . . . constitute an historic (‘material’) source of . . . [or] part of the process of formation of new rules of customary international law.” (emphasis omitted)).

\textsuperscript{128} (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

\textsuperscript{129} See id. ¶ 188.

\textsuperscript{130} See U.N. Charter arts. 10, 14 (describing the functions and powers of the General Assembly as making “recommendations”).

\textsuperscript{131} See Military and Paramilitary Activities in and Against Nicaragua, 1986 I.C.J. ¶ 188.

\textsuperscript{132} Introduction, supra note 77.

\textsuperscript{133} ILA REPORT, supra note 69, at 60.
movement to ban landmines began in the 1990s, the number of countries who remain opposed to an across-the-board prohibition has slowly dwindled. The increasing stigmatization of APLs, the NGO-driven crusade to eliminate their existence, the growing political disadvantages of their utilization, and the bear market for the weapon have resulted in a dramatic decrease in landmine production, transfer, and use in conflicts. The following sections will examine probable newly formed customary laws related to APLs.

A. STATE PRACTICE AND OPINIO JURIS: LOOKING TO THE OTTAWA CONVENTION NONPARTIES

First, when observing state conduct in relation to the formation of customary international law, the question of who is acting or not acting is initially a qualitative inquiry. It is thus most valuable to focus attention on those countries that are in some way specially affected by the pertinent law being formed. For example, in the case of a ban on use, it makes most sense to analyze the conduct and statements of states that are past or current users, or those that reserve a right to APLs for national security needs. After the qualitative aspects of the customary-law inquiry have been settled, the following question may be more quantitative in nature: how many of those states whose conduct counts toward the formation of a new customary rule support or cut against its formation?

Second, not all state conduct may be particularly useful in tracking the formation of a customary international law because some may be acting without regard to customary law. It is most effective to focus on those nations whose reasons for behaving in various ways can be traced—if not with certainty, then at least with confidence—to specific legal obligations. States who are already party to the Ottawa Convention by and large refrain from using landmines in

134. Landmine Monitor reported in 1999 that an estimated 65 million mines were emplaced during the period 1978–1993, which amounts to an average of over 4 million mines per year. See Banning Antipersonnel Mines, LANDMINE & CLUSTER MunITION Monitor, http://www.the-monitor.org/index.php/publications/display?url=lm/1999/english/exec/Execweb1-02.htm (last visited Jan. 13, 2015). That number dropped to about 2.5 million per year in the mid-1990s. See id. After the signing of the Ottawa Convention, global use of APLs plummeted—they have since been laid sporadically and only by a few governments per year, usually by the thousands or hundreds. For example, see LANDMINE Monitor 2014, supra note 12, at 7–9, and LANDMINE Monitor 2013, supra note 16, at 13–15, which have recorded use by only four alleged—two unconfirmed—nonparties in the past three years. See also Banning Antipersonnel Mines, supra ("[N]owhere in the world in 1998 and early 1999 were mines being laid on a very large scale and sustained basis.").

Some fifty-four countries produced about eight million APLs per year from 1968–1987; the average number of APLs produced decreased at about five million per year from 1988–1993. Banning Antipersonnel Mines, supra. Today, exact production levels are unknown, but expected to be extremely low given the reduction in landmine transfer and use. See LANDMINE Monitor 2014, supra note 12, at 2 (finding that "[a]ctive production may be ongoing in as few as four countries" (emphasis added)).

In 1999, Landmine Monitor concluded that thirty-four nations had exported mines in the past. Banning Antipersonnel Mines, supra. Today, the export market for landmines is practically nonexistent. See infra section III.B.1.

135. See supra notes 89–90 and accompanying text.
any context besides training. However, why those countries choose not to use APLs is not necessarily clear. Is it because they feel obligated not to violate the international convention to which they are a party? (Probably.) Or is it because of a custom against using inhumane, indiscriminate weapons, and they believe that landmines fit into that category? Maybe the conduct does not flow from a legal obligation at all; perhaps some nations are only morally opposed to landmines, or maybe their costs (including collateral damage) vastly outweigh their benefits. The point is, even with countries party to the Ottawa Convention, it is difficult to match specific conduct with specific legal obligations and figure out whether such obligations are driving the conduct in the first place.

Contrarily, states that are not party to the Ottawa Convention have one less and very important reason to refrain from certain landmine use: official treaty obligations. These states’ conduct is more easily traceable to emerging international customs. If there is insufficient evidence that countries are behaving in such a way due to potential policy-related or economic reasons, the possibility that they have taken particular action because of a customary-law obligation becomes much more convincing. Hence, the conduct of the thirty-five nonparties to the Ottawa Convention is likely most enlightening in tracking the emergence and crystallization of new customary rules.

B. NEW CUSTOMARY LAWS APPLICABLE TO APLS

Landmines may once have been accepted as just another means of warfare. Today, that is no longer the case. State conduct and views toward APLs—specifically, the conduct and views of those not party to the Ottawa Convention—have shifted dramatically over the last fifteen to twenty years. Many nonparties publicly express support for and realization of the principles of the Ottawa Convention. Countries that once utilized mines now champion a total ban. A number of nations that previously opposed the UNGA resolution calling for universalization of the Ottawa Convention “and [its] norms” now vote in favor each year so that the number of the resolution’s supporters has continually increased over time. The number of mines used in conflicts,

136. The thirty-five states not party to the Mine Ban Treaty are Armenia, Azerbaijan, Bahrain, China, Cuba, Egypt, Georgia, India, Iran, Israel, Kazakhstan, North Korea, South Korea, Kyrgyzstan, Laos, Lebanon, Libya, the Marshall Islands, Micronesia, Mongolia, Morocco, Myanmar, Nepal, Pakistan, Palestine, Russia, Saudi Arabia, Singapore, Sri Lanka, Syria, Tonga, the United Arab Emirates, the United States, Uzbekistan, and Vietnam. See Treaty Status, supra note 60.

137. G.A. Res. 69/34, at 2, U.N. Doc. A/RES/69/34 (Dec. 2, 2014); cf. BANNING LANDMINES 18–19 (Jody Williams, Stephen D. Goose & Mary Wareham eds., 2008) (“One can argue that a new standard of behavior—a new norm—against antipersonnel mines is now widely observed. Clearly, state behavior has changed significantly.”); LEON V. SIGAL, NEGOTIATING MINEFIELDS 3 (2006) (“The stigma attached to antipersonnel mines has constrained even nonsignatories, a sign that a new international norm is in the making.”).

138. In 1999, Resolution 54/54 B calling for the implementation of the Ottawa Convention, the first resolution of its kind since the treaty went into force, received 139 votes in favor. U.N. GAOR, 54th Sess., 69th plen. mtg. at 9–10, U.N. Doc. A/54/PV.69 (Dec. 1, 1999). In December 2014, Resolution 69/34 received 164 votes in favor. Item 96 (o): Recorded Vote in the General Assembly, DISARMAMENT
produced, and transferred has plummeted.\textsuperscript{139} The choice to employ landmines is now met with international stigmatization and potential backlash, consequences that have led several countries to deny or attempt to conceal that they produced, sold, or laid APLs during the last ten to fifteen years.\textsuperscript{140} Overall, nonparty practice coupled with \textit{opinio juris} indicates the emergence of at least five new legal rules from the principles embedded in the Ottawa Convention: 1) a ban on the export of APLs, 2) a good faith obligation on all nonparties to work toward accession to the Convention, 3) a ban on the development of smart mines, 4) a ban on the use of smart mines, and 5) a complete ban on dumb mines or, at a minimum, a restriction on their use to a single circumstance: defense of national borders.

1. Export Ban

There exists uniform, extensive, and representative state practice conforming to a customary international law prohibiting APL exportation. Since the mid-1990s, there has been a de facto global ban on the transfer of landmines in effect.\textsuperscript{141} At least nine nonparty states have enacted formal moratoria on the export of APLs, including military superpowers the United States, China (both formerly major producers),\textsuperscript{142} and Russia.\textsuperscript{143} More than half of all nonparties either have stated that they never exported landmines or have never been


\textsuperscript{139} See supra note 134 for numerical figures.

\textsuperscript{140} For example, a communiqé posted on Azerbaijan’s Ministry of Defense website said that production of APLs had begun at a newly opened weapons production facility, but the reference to APLs was removed a short time later and characterized by the Minister of Foreign Affairs as an “accidental technical error.” \textit{Country Profiles: Azerbaijan, LANDMINE & CLUSTER MUNITION MONITOR, http://www.the-monitor.org/custom/index.php/region_profiles/print_profile/629} (last updated Dec. 17, 2012) (citing Letter from Garay Muradov, Head of Sec. Affairs Dep’t, Ministry of Foreign Affairs, to Int’l Campaign to Ban Landmines (July 21, 2010)); see also infra note 148 and accompanying text (describing Cuba’s secret exporting); infra note 238 (discussing Israel’s denial of laying APLs in 2001 and 2006); cf. Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980). In Filártiga, a landmark decision for international human rights, a Paraguayan official was sued in the United States under the Alien Tort Statute for allegedly torturing to death the plaintiff’s seventeen-year-old brother. Filártiga, 630 F.2d at 878–79. In ruling that commission of torture violated customary international law, the court stated that “[w]here reports of torture elicit some credence, a state usually responds by denial or, less frequently, by asserting that the conduct was unauthorized or constituted rough treatment short of torture.” \textit{Id.} at 884 (emphasis added) (citing Memorandum for the United States as Amicus Curiae). The court added: “States often violate international law, just as individuals often violate municipal law; but no more than individuals do States defend their violations by claiming that they are above the law.” \textit{Id.} at 884 n.15 (citing J. BRIEFLY, THE OUTLOOK FOR INTERNATIONAL LAW 4–5 (1944)).

\textsuperscript{141} \textit{LANDMINE MONITOR} 2014, supra note 12, at 11 (“\textit{A de facto} global ban on the transfer of [APLs] has been in effect since the mid-1990s.”); see also ALAN BRYDEN, INTERNATIONAL LAW, POLITICS AND INHUMANE WEAPONS: THE EFFECTIVENESS OF GLOBAL LANDMINE REGIMES 129 (2013) (“There is a de facto international ban on licit trade in AP[L]s . . . .”); Herby & La Haye, supra note 58 (“In effect, a de facto global ban on the export of [APLs] is in force.”).

\textsuperscript{142} See Banning Antipersonnel Mines, supra note 134.

\textsuperscript{143} \textit{LANDMINE MONITOR} 2014, supra note 12, at 11. Others include India (once a major producer), Israel, Kazakhstan, Pakistan (once a major producer), Singapore, and South Korea. \textit{Id.}
confronted with evidence to the contrary.\textsuperscript{144} About fifteen may have once exported and have since stopped.\textsuperscript{145} Therefore, the near-universal suspension on landmine exportation strongly weighs in favor of a customary rule against such acts.

Despite this widespread practice, Iran and Cuba may have exported mines in the last fifteen years. Iran instituted an export moratorium in 1997, but stated in February 2006 that it had been several years since the nation voluntarily halted the export of APLs.\textsuperscript{146} Subsequently, Iranian mines were discovered in Somalia in 2006, in Tajikistan in 2007, and in Afghanistan in 2008.\textsuperscript{147} Iran may still be continuing to discreetly export mines, but this seems unlikely, at least on a major scale, given the narrow market for APLs. Cuba has denied exporting mines since 1996, but Cuban mines (apparently dated after 1996) were discov-


\textsuperscript{146.} \textit{See Country Profiles: Iran, Landmine & Cluster Munition Monitor, http://www.the-monitor.org/custom/index.php/region_profiles/print_profile/701 (last updated Oct. 21, 2011) (stating that “[i]t has been several years since Iran voluntarily halted export of [APLs]”) (quoting Letter from Iran Ministry of Foreign Affairs to Landmine & Cluster Munition Monitor (Feb. 1, 2006)).}

ered in Angola and Nicaragua some years later.148

These isolated incidents of contrary practice should neither halt the formation of a customary export ban nor elevate Iran and Cuba to the status of persistent objectors. As previously described, objections to customary rules must be open, expressed while the rule is still emerging, and repeated as often as circumstances require.149 Cuba’s covert exports combined with its denials of such activity hardly qualify as open dissent. Iran’s statement that it no longer “voluntarily halt[s] the export of [APLs]”150 should not be considered an assertion of a legal right to export mines because it is weak, it was made over eight years ago, and Iran is effectively alone in its practice. Furthermore, it is probable that the customary ban on exports formed shortly after the institution of the last export moratoria in the late 1990s given that advances in communication technology allow customary international law to crystallize faster than ever before.151 The likelihood of rapid crystallization makes Iran’s 2006 attempt to reverse course a few years too late to constitute legitimate dissent. Therefore, the substantial number and duration of many nations’ moratoria, despite a few “minor departures,”152 supports the crystallization of a customary law against the transfer of APLs.

Statements accompanying APL moratoria can help clarify whether a legal obligation compels these nations to impose bans. The 1992 U.S. law prohibiting transfers of APLs included a congressional finding that “the President should actively seek to negotiate . . . an international agreement, or a modification of the [CCW], to prohibit the sale, transfer, or export of [APLs].”153 It also announced that the United States “shall . . . seek verifiable international agreements prohibiting the sale, transfer, or export, and further limiting the use, production, possession, and deployment of [APLs].”154 Pakistan stated in an annual Amended Protocol II report that “Pakistan has declared a complete ban on export of landmines, even to States Parties.”155 An Indian ambassador announced at the eighth Amended Protocol II conference of states parties that

149. See supra notes 91–94 and accompanying text.
150. See Country Profiles: Iran, supra note 146.
151. See supra note 98 and accompanying text.
152. See supra notes 84–85 and accompanying text (discussing how a few minor departures, uncertainties, or contradictions will not stop the formation of a customary law).
154. Id. § 1365(b)(1). It might be argued that these statements by the United States—that there is a need for an international agreement to prohibit APL transfers—indicate that no customary law prohibiting their exportation exists. However, these statements were made over twenty years ago, six or seven years before the entire world ceased exporting landmines, and five years before the signing of the Ottawa Convention which officially prohibited landmine transfers.
India instituted an export ban in 1996 and supports a global prohibition on APL transfer. The declarations of these formerly major exporters do not necessarily constitute *opinio juris* that landmine transfers were viewed as violative of international law when the statements were made. However, they are evidence of a nascent international sentiment that APL transfer is illicit, and over time, this understanding has grown and developed to a point where APL exportation has effectively ceased indefinitely.

In contrast to the views of the United States, Pakistan, and India, a Vietnam representative said in 2008, “[W]e strictly observe our policy not to export” APLs. Similarly, Israel attributed the imposition of its 1994 moratorium to a need “for self imposed state restraint.” Statements like these imply that a country may believe it still has a legal right to sell landmines to others. However, in determining whether a customary law has formed, the *opinio non juris* in this context should be discounted. Statements of former major sellers should carry greater weight than those of Vietnam—a country that has *never* exported—and of Israel. Other big exporters, like Russia, China, and Italy, either do not appear to have indicated their motivations for continued adherence to an APL-export moratorium or have acceded to the Ottawa Convention. Regardless, the pervasive state conduct in this area is truly staggering: thirty-four nations used to export millions of APLs, whereas today, the market for landmines has been driven close to extinction. Therefore, due to the overwhelming uniform state practice, evidence of an ever-increasing international sentiment opposed to landmine transfer, and almost no evidence of any meaningful *opinio non juris*, it is likely that the trade of landmines today is a violation of universally binding general customary international law.

156. See *Landmine Monitor* 2009, supra note 145, at 932.
159. See Country Profiles: Vietnam, supra note 144 (quoting the Vietnam Minister of Foreign Affairs as saying that “Vietnam has never exported and will never export mines” (emphasis added)).
160. See *Banning Antipersonnel Mines*, supra note 134.
161. See, e.g., Chinese Observer Delegation, Statement at the Thirteenth Meeting of the States Parties to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Dec. 2, 2013) (on file with author) (“China has . . . faithfully fulfilled its obligations under this protocol . . . . and will continue to observe[] its commitment on not exporting [APLs].”).
163. See supra note 134.
2. Good Faith Obligation to Work Toward a Complete APL Ban

After extensive research on a variety of state conduct with respect to landmines, the ICRC concluded nearly a decade ago that there was an “indication that an obligation to eliminate anti-personnel landmines is emerging.”164 Today, the evidence supporting the formation of a customary rule imposing a good faith obligation on each nation who has not yet acceded to the Ottawa Convention to do so appears even more robust. Since the mine-ban movement began in the early 1990s, countries—whether party to the Ottawa Convention at the time or not—have increasingly shown support for the campaign to ban APLs. Many nations have lauded the Convention’s humanitarian goals, even if they still consider landmines to possess some military utility.165

However, many nations have done more than just praise the humanitarian aspirations of a landmine ban—they have also expressed a more serious desire to eventually accede to the Ottawa Convention. In the last four years, nearly three-quarters of the Ottawa Convention nonparties have 1) explicitly supported an eventual ban;166 2) mentioned the possibility of accession to the

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164. See Rule 81. Restrictions on the Use of Landmines, INT’L COMMITTEE RED CROSS, http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule81 (last visited Jan. 14, 2015). The ICRC study on customary international humanitarian law was published in 2005. Introduction, supra note 77. Other scholars have also suggested that a norm of working toward Ottawa Convention accession has been gradually emerging. See Susan Benesch et al., International Customary Law and Antipersonnel Landmines: Emergence of a New Customary Norm, in LANDMINE MONITOR REPORT 1999, at 1020, 1021 (1999) ("[T]here is rapid momentum toward a customary norm against the use of [APLs]. . . . [W]e think most legal scholars and practitioners would agree that a customary prohibition against landmines will crystallize in the near future."); Jean-Marie Henckaerts, Study on Customary International Humanitarian Law, 99 AM. SOC’y INT’L L. PROC. 423, 428 (2005) ([A]lmost all states, including those that are not party to the Ottawa Convention[,] . . . have recognized the need to work toward the eventual elimination of [APLs].").

165. See, e.g., Jagath Jayasuriya, Lieutenant Gen., Sri Lanka Army, Keynote Address at the Seminar on International Law and Landmine and Explosive Remnants of War (Oct. 28, 2009), http://www.archives.dailynews.lk/2009/10/28/fea01.asp (stating that Sri Lanka “fully subscribes to the humanitarian objectives of the Treaty” and that mines are limited to “defensive purposes only,” but, with respect to the Ottawa Convention, “it is timely that [Sri Lanka] focus[es its] attention on the international legal instruments that limit or ban certain weapons based on humanitarian grounds”); Permanent Mission of the Republic of Sing., Singapore’s Explanation of Vote on Resolution A/C.1/68/L.3, Address at the First Committee, 68th United Nations General Assembly (Oct. 28, 2013), http://www.mfa.gov.sg/content/mfa/overseasmission/newyork/nyemb_statements/first_committee/2013/201311/press_201311.html (proclaiming that Singapore “supports international efforts to resolve the humanitarian concerns over [APLs]” and will continue to work “towards finding a durable and truly global solution,” but that “the legitimate security concerns and the right to self-defence” justify Singapore’s abstention from the resolution at this time).

166. These nations include Azerbaijan, Georgia, India, Kyrgyzstan, Laos, Libya, the Marshall Islands, Morocco, Pakistan, Russia, and the United States. See, e.g., Delegation of India, Explanation of Vote on A/C.1/68/L.3 (Oct. 2013) (on file with author) (stating in the first sentence of its explanation that “India supports the vision of a world free of [APLs] and is committed to their eventual elimination”); Delegation of Pak., Explanation of Vote on A/C.1/68/L.3 (Nov. 1, 2013) (on file with author) (“Pakistan remains committed to pursue the objectives of a universal and non-discriminatory ban on [APLs] . . . . [b]ut it is not possible for Pakistan to agree to the demands for the complete prohibition of [APLs] till such time that viable alternatives are available.” (emphasis added)).
Convention;\textsuperscript{167} 3) consistently voted in favor of the UNGA resolution calling for the worldwide implementation of the Ottawa Convention;\textsuperscript{168} or performed a combination thereof.

The next section describes state conduct that has contributed to the formation of a customary rule to take steps toward Ottawa Convention accession. Section III.B.2.b analyzes the reasons why nonparties have agreed to eventually join the treaty and concludes that they have done so primarily out of a sense of legal obligation. Finally, section III.B.2.c evaluates the conduct of some outlier countries and whether their behavior has any effect on the new customary rule, eventually reaching the conclusion that the customary rule stands in spite of that state conduct.

\textit{a. Conduct Contributing to the Customary Law’s Formation.}

\textit{i. Support of a Ban.} Almost a third of the Ottawa Convention nonparties, including past APL users, have made a public statement or a statement to Landmine Monitor that they support an eventual ban on APLs.\textsuperscript{169} For example, Azerbaijan supports the humanitarian goals of the treaty and a comprehensive ban, but it is reluctant to join because of neighboring hostilities.\textsuperscript{170} In 2011, the
National Transitional Council in Libya announced that “[a]ny future Libya[an] government should relinquish landmines and join the 1997 Mine Ban Treaty.”

Even the United States, which had previously resisted global pressure to accede, seems to be reverting back to its 1994 pro-Ottawa spirit when it was the first country to call for the eventual elimination of APLs and championed the Ottawa Process. In 2009, the United States conducted a review of its use of landmines and announced in 2014 its intention to finally “pursu[e] . . . solutions . . . that would ultimately allow [the United States] to accede to” the Mine Ban Treaty. Furthermore, each of these countries has made statements or enacted policies to show conformance with Ottawa Convention provisions despite having no treaty obligation to restrict their landmine use beyond the requirements of Amended Protocol II. Azerbaijan announced that it is “de facto . . . fulfilling all the obligations prescribed by the Ottawa Convention, . . .


perhaps even better than many states parties.” Libya pledged that “no forces under the command and control of the National Transitional Council will use APLs.” The United States, pursuant to President Bush’s policy initiated in 2004, put into action a self-imposed ban on dumb-mine use anywhere in the world starting in 2010. The Obama Administration ramped up that policy in the second half of 2014, committing the United States to “not use APL outside the Korean Peninsula, not assist, encourage, or induce anyone outside the Korean Peninsula to engage in activity prohibited by the Ottawa Convention,” and vowed to “not produce or otherwise acquire any anti-personnel munitions that are not compliant with the Ottawa Convention in the future, including to replace such munitions as they expire in the coming years.” These are major signs of dedication to a global mine ban despite no treaty obligations whatsoever. Additionally, other nations have committed to an eventual ban, exhibiting conduct supporting the formation of a customary obligation to work toward Ottawa Convention accession.

ii. Desire to Accede. Some countries have shown their support for a ban on landmines through pronouncements conveying a desire to eventually accede to the Ottawa Convention. At least sixteen (nearly half) of the nonparty states have expressly mentioned the possibility of accession to the Convention. In 2014, the United States vowed to no longer “produce or . . . acquire” APLs and to work toward acceding to the treaty. Some nations, like Sri Lanka, have not only considered accession, but have expressed a readiness to join as soon as possible. This conduct appears to have been gaining momentum over the past

177. Press Release, supra note 171. In the same statement, the National Transitional Council announced that “any future Libyan[n] government should relinquish landmines and join the 1997 Mine Ban Treaty.” Id. (internal quotation marks omitted).
178. New United States Policy on Landmines: Reducing Humanitarian Risk and Saving Lives of United States Soldiers, U.S. DEP’T ST. ARCHIVE (Feb. 27, 2004), http://2001-2009.state.gov/t/pm/rls/fs/3004.htm. Armed forces are permitted to utilize smart mines. Id. It should be noted that the United States’ ban includes persistent AVLs—which are beyond the scope of the Ottawa Convention—and the Demilitarized Zone, where the United States is arguably most concerned with landmine emplacement. Id.
180. Griffiths, supra note 175.
181. See, e.g., supra note 166.
182. See supra note 167.
184. Sri Lanka had made previous statements that its accession depended on peace progress with a nonstate armed group, the Liberation Tigers of Tamil. Country Profiles: Sri Lanka, LANDMINE &
seven to ten years, further supporting the emergence of a new customary law of working toward accession.

iii. UNGA Mine-Ban Resolution Support. Since the mine-ban movement began snowballing in the early 1990s, the United Nations has attempted to inspire countries to action through annual resolutions calling for implementation of the Ottawa Convention. The resolution is essentially the same each year. For example, Resolution 69/34, adopted on December 2, 2014, begins by recalling the “suffering” landmines have inflicted upon “thousands of people—women, girls, boys, and men—every year.” It states that resolution supporters “[b]elieve it necessary . . . [t]o remove APLs placed throughout the world and to assure their destruction” and “[n]ote with satisfaction the work undertaken to

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185. The most recent accessions or ratifications to the Convention were Oman, which acceded to the treaty on August 20, 2014, and Poland, which ratified the Convention on December 27, 2012, after signing it more than fifteen years earlier. See Status: Ottawa Convention, United Nations Treaty Collection (Jan. 14, 2015, 5:02 AM), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-5&chapter=26&lang=en.


implement" the Ottawa Convention. The resolution, although not immediately speaking of APLs in *lex lata* terms, employs language that stigmatizes their use and is designed to dissuade and redirect focus toward a ban. It calls on adherence by “all States to the Convention,” shows a determination to “work strenuously towards” endorsing its “universalization and norms,” bids all nonparties to “accede . . . without delay,” and “[s]tresses the importance of the full and effective implementation of and compliance with the Convention.” Shortly after the Ottawa Convention went into force in 1999, Resolution 54/54 B (a predecessor to 69/34) had 139 states vote in favor of its adoption. In 2013, the number of supporters had climbed to 165—the highest yet. Ten nonparties who consistently abstained or who were absent from previous votes now vote in favor, including China. Thirteen states have been in favor since at least 2005, including three more since 2010. All of the above evidence, taken together, amounts to nearly three-quarters of nonparties to the Convention conveying vigorous support for and a desire to eventually achieve a global landmine ban.

Moreover, the language of recent resolutions indicates not merely a *lex ferenda* “desire,” but rather a *lex lata* expression of new international norms flowing from the Ottawa Convention. Beginning with Resolution 53/77 B, the first resolution passed after the Mine Ban Treaty went into effect, each resolution up until 2010 contained the following clause: “Emphasizing the desirability of attracting the adherence of all States to the Convention, and determined to work strenuously towards the promotion of its universalization.” Notably, beginning in December 2010 with Resolution 65/48, the words “and norms” were tacked onto the end of the clause, so that countries were called to “work strenuously towards the promotion of [the Convention’s] universalization and
This language should carry considerable legal significance. The Mine Ban Treaty itself does not mention any “norms,” “customs,” common practices, or conduct which its provisions codified. The distinctive term was not included in any resolution until 2010, when nearly half of the Ottawa Convention nonparties—excluding those who acceded in the meantime—voted and continue to vote in favor of the mine-ban resolution. The difference between the new resolution text and the Mine Ban Treaty text as well as the universal awareness that UNGA resolutions “can, in certain circumstances, provide evidence important for establishing the existence of a [binding customary] rule” leads to the conclusion that the addition of the words “and norms” should not “be understood as merely that of a ‘reiteration or elucidation’” of the Ottawa Convention commitments. Instead, it should be perceived as states’ acknowledgement of the Convention as an instrument capable of creating new customary law.

b. Reasons for Agreeing to Eventually Join the Ottawa Convention. The actions and statements previously discussed have created “an understanding by all states that [APLs] are destined to be totally eliminated” and have “give[n] rise to an expectation that they will eventually, at some undetermined point in the future, fully adhere to the [APL] ban norm.” In the S.S. “Lotus” case, the court that preceded the ICJ was not convinced that a customary rule had been established by the historical practice of countries with respect to prosecutions for legal violations on the high seas. Specifically, the court was not persuaded that states refrained from particular prosecutions pursuant to some legal obligation. Likewise, nonparties to the Mine Ban Treaty may have agreed to take steps towards accession for reasons other than a legal obligation. The following sections analyze other possibilities for committing to eventually join the Ottawa Convention in order to home in on exactly why some states have shown favor for the treaty. By process of elimination, this Note ultimately concludes that the most likely reason states have agreed to move toward an APL prohibition is due to a political and international legal obligation to do so.

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196. Legality of Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 70 (July 8).

197. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 188 (June 27); see also supra notes 128–29 and accompanying text.

198. See BANNING LANDMINES, supra note 137, at 207–08.

199. See supra notes 108–10 and accompanying text.
i. Military Reasons Have Not Compelled States to Agree to Eventually Accede. Joining the Ottawa Convention would not provide military benefits and thus cannot be a factor in states’ decisions to eventually accede. To uphold their Ottawa Convention legal obligations, states would be forbidden from employing landmines even in a conflict in which an opponent chooses to use them.200 Even if one nation thought it more beneficial to violate the treaty during a conflict and deploy APLs, it could only do so if it had any mines left after abiding by the treaty’s stockpile-destruction mandate.201 Some nations still believe landmines possess military value,202 and it seems intuitive from a military standpoint that possessing a weapon an enemy does not gives the holder a significant advantage. If APLs provide some nonzero military benefit in any given conflict, then each country’s optimal military strategy in the face of a global trend toward accession would be to resist joining the Ottawa Convention and continue using landmines—the more countries that adhere to the treaty, the greater the benefits for the holdouts. Hence, military considerations are not driving countries to agree to eventually join the Mine Ban Treaty.

ii. Economic Reasons Have Not Compelled States to Agree to Eventually Accede. Acceding to the Ottawa Convention places an economic burden on states parties. The most obvious disadvantage is the permanent and explicit commitment to no longer sell APLs.203 By joining the treaty—notwithstanding a custom prohibiting APL exports—states expressly forego a potential stream of revenue through APL sales.204 However, a much greater burden is the stockpile destruction requirement. Destroying stored landmines can take many years205 and consume a substantial amount of financial resources.206 The final and likely most considerable economic challenge is complying with the convention’s demining requirements. A single landmine may only cost a few dollars or less to produce, but the cost of removal can be as high as $1000 per mine.207 Therefore, the financial obligation imposed on the state party will depend on the extent to which it is mine-ridden. Acceding to the Mine Ban Treaty would be

200. See Ottawa Convention, supra note 61, art. 1(1)(a), 2056 U.N.T.S. at 242 (“Each State Party undertakes never under any circumstances . . . [t]o use [APLs],” (emphasis added)).
201. See Ottawa Convention, supra note 61, art. 4, 2056 U.N.T.S. at 243.
204. From 1983 to 1992, the United States approved ten licenses for the commercial export of mines worth $980,000. Efaw, supra note 26, at 98 n.84.
205. Cf. Ottawa Convention, supra note 61, art. 4, 2056 U.N.T.S. at 243 (giving countries up to four years to destroy their APL stockpiles).
206. Cf. Delegate from Mong., Mongolia’s Statement at the Meetings of the Standing Committees Established by the States Parties to the Anti-Personnel Mine Ban Convention (June 20, 2011) (on file with author) (announcing that Mongolia “continues to pursue a step-by-step . . . policy towards accession to the Convention due to a range of security and economic concerns”).
207. Efaw, supra note 26, at 105 n.118.
especially economically onerous for a highly contaminated country like Egypt that allegedly had over 21.5 million mines remaining in various territories in 2010.\footnote{Country Profiles: Egypt, American University, Institute for Landmine and Cluster Munition Research, \url{http://americanuniversity.edu/ilmrm/country-profiles/print_profile/672} (last updated Nov. 28, 2013) (citing Fathy El Shazly, Dir., Exec. Secretariat, Egypt Mine Action Project Presentation (Aug. 2010)).} Although international cooperation for mine action exists, a state must still “undertake[] to destroy or ensure the destruction of all [APLs] in mined areas under its jurisdiction or control” within ten years or at most twenty years if it requests an extension.\footnote{See Ottawa Convention, supra note 61, art. 5(1), 2005 U.N.T.S. at 243.} Even if a state party does not have a substantial contamination problem itself, it must still commit to help other nations with victim assistance, mine awareness, and mine clearance.\footnote{See id. art. 6(4), at 244.} Hence, economic considerations do not motivate states to agree to eventually join the Ottawa Convention.

iii. Moral Reasons Have Not Compelled States to Agree to Eventually Accede.

Morality seems to be one of the most justifiable reasons for joining the Ottawa Convention, especially given the harm that so many innocent individuals have suffered due to APLs. However, it is difficult to imagine that so many different nations have reached agreement on the morality of the landmine issue.\footnote{Cf. Banning Landmines, supra note 137, at 20 (“[M]oral authority . . . does not seem to have the desired effect in some countries.”).} Some states continue to assert a need to employ APLs under certain circumstances—for example, to protect their long borders.\footnote{See, e.g., Kazakhstan Hosts a Workshop to Promote Mine Action as a Confidence Building Measure in Central Asia, Relief Web (Apr. 11, 2007), \url{http://www.reliefweb.int/report/afghanistan-kazakhstan-hosts-workshop-promote-mine-action-confidence-building} (hereinafter Kazakhstan Hosts a Workshop) (quoting the Deputy Minister of Defense of Kazakhstan as saying that reasons for not yet signing the Ottawa Convention include Kazakhstan’s “long border which should be covered and protected including [through] the use of [APLs] in certain circumstances”); see also infra section III.B.5 (arguing that states, by their conduct and statements, have created a custom that at the least restricts the use of dumb mines to border protection).} For these countries, acceding to the Mine Ban Treaty would make their borders more vulnerable or put their soldiers at greater risk. Either one of those prospects would understandably make “military professionals . . . reluctant to forfeit any weapon that might have even marginal utility.”\footnote{See Robert G. Gard, Jr., The Military Utility of Anti-Personnel Mines, in To Walk Without Fear: The Global Movement to Ban Landmines, supra note 162, at 136, 138.}

Policymakers may be more in tune with the widespread humanitarian effects of landmines because “military professionals . . . are not expected to determine the point at which military needs should yield to humanitarian considerations.”\footnote{Id. at 139.} However, although government officials may disagree with the military’s use of APLs, they may view second-guessing “on-the-ground commander[s]” as beyond their province, at least absent a reason more compelling
than “landmines are bad.” Military leaders are sensitive to sacrificing landmines and, “in opposing a ban on [APLs], . . . [they] invoke the primacy of protecting” their soldiers. Expectedly, these sentiments produce resistance to the APL-ban movement which is then exacerbated by the deference government officials give to military professionals when making decisions about whether to use APLs. Moreover, some officials who believe their landmines are being deployed responsibly—that is, in compliance with Amended Protocol II and the law of armed conflict—may even completely agree with military decision makers that protecting their territorial integrity and armed forces is taking the moral high ground. Hence, morals are unlikely to be the driving force behind agreeing to eventually accede to the Mine Ban Treaty.

iv. States Have Most Likely Agreed to Accede Due to Both a Legal Obligation and Political Considerations. In conclusion, it is most likely a mix of an international humanitarian legal obligation and political considerations that compels states to eventually join the Ottawa Convention. The legal obligation comes from the enlightened recognition that landmines inflict serious damage on civilian populations in an indiscriminate and arguably disproportionate manner, violating the law of armed conflict. When state officials show support for the Ottawa Convention, they almost invariably mention the “humani-

215. Cf. Rizer, supra note 7, at 64–65 (“[T]here was some support for the Ottawa Treaty [in the Pentagon] when the landmine debate started[,] . . . [but when] the U.S. commander in Korea declared ‘I need them,’ . . . the White House and the Pentagon backed off because the administration did not want to look like it was overruling an on-the-ground commander.” (internal quotation marks omitted)).

216. Gard, supra note 213, at 139.

217. See id. (“Regardless of their personal views, it would be extremely difficult for responsible active-duty military professionals, especially the US Joint Chiefs of Staff, to advocate the prohibition of any weapon that might under some circumstances save the lives of their nation’s soldiers.”); Landmine Treaty Signed, but Not by Big Players, BBC NEWS (Dec. 3, 1997), http://news.bbc.co.uk/2/hi/special_report/1997/landmines/36031.stm (quoting President Bill Clinton, in explaining why the United States did not sign the Ottawa Convention as saying that “[t]here is a line that I simply cannot cross—that line is the safety and security of our men and women in uniform”).

There are three principles that govern the law of armed conflict, a subset of customary international humanitarian law: discrimination, which mandates that a military strike target only combatants, not civilians or other noncombatants (though not all collateral damage is prohibited); proportionality, which disallows excessive loss of innocent life and property compared to the value gained from a military operation; and necessity, which requires that combat forces engage in only those acts necessary to achieve the desired military objective. See David A. Koplow, ASAT-Isofaction: Customary International Law and the Regulation of Anti-Satellite Weapons, 30 Mich. J. Int’l L. 1187, 1242–49 (2009). See generally Jean-Marie Henckaerts, Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict, 87 Int’l Rev. Red Cross 175 (2005) (discussing the principles of the law of armed conflict).

218. Arguments for the Ban, Int’l Campaign to Ban Landmines, http://www.icbl.org/en-gb/problem/arguments-for-the-ban.aspx (last visited Feb. 6, 2015) (“The law of war imposes certain restrictions on how combatants operate. It says that they have to distinguish between civilian and military targets and that the injuries inflicted should be proportionate with military objectives. [APLs] fail both the discrimination and the proportionality tests.”); see also Koplow, supra note 217, at 1242–49 (describing the three precepts of the law of armed conflict: discrimination, proportionality, and necessity).
tarian objectives” or “humanitarian concerns” of the treaty,219 indicating a learned awareness of the harm APLs pose to civilians. Furthermore, whether landmines are truly a “military necessity” (also required by the law of armed conflict) has been challenged numerous times since the commencement of the Ottawa Process. The ICRC determined in 1996 that APLs “are not indispensable weapons . . . and don’t necessarily offer any military advantage.”220 A former member of the U.S. armed services recently concluded that landmines “are really only effective at preventing very small elements . . . from being overrun.”221 Thus, although landmines have been employed by militaries around the world for many years, it does not appear that nations have truly become aware of landmines’ disastrous long-term consequences until recently. The awareness that landmines do have lasting, devastating effects or that they will eventually cease to be a legally permissible weapon of war, coupled with the political pressure imposed by NGOs and human rights organizations, is therefore the most likely source of motivation for countries’ commitment to take steps toward Ottawa Convention accession.

c. Nonconforming Countries. Of the thirty-five nonparties, only nine do not neatly fit into one of the three categories described in section III.B.2.a: Cuba, Egypt, Iran, Israel, North Korea, South Korea, Saudi Arabia, Syria, and Uzbekistan. For numerous reasons, however, some should not be considered “specially affected” for purposes of the good faith obligation rule, and any opinio non juris emanating from their statements and conduct should be discounted. For example, Saudi Arabia has claimed that it never used mines in any capacity.222 At least two other states have not employed mines for almost a decade.223 Cuba has been unclear about its mine use in recent years, but there does not appear to be any unambiguous evidence that they have been laid.224 Thus, the aforemen-

219. See, e.g., supra note 165 (citing statements made by Sri Lankan and Singaporean officials).
220. Arguments for the Ban, supra note 218 (emphasis omitted); see also Int’l Comm. of the Red Cross, supra note 10, at 71 (“The material which is available on the use of AP landmines does not substantiate claims that AP mines are indispensable weapons of high military value.”); id. at 7 (“In the 26 conflicts considered, few instances can be cited where anti-personnel mine use has been consistent with international law or, where it exists, military doctrine. . . . [Moreover, n]o case was found in which the use of anti-personnel mines played a major role in determining the outcome of a conflict.”).
221. Rizer, supra note 7, at 64.
223. Countries that have not used mines in many years include Iran (stated in 2005 that it does not use mines), South Korea (stated that it has not used mines in “many years”), and Uzbekistan (last known use in 2000). Country Profiles: Iran, supra note 146; Country Profiles: Korea, South, Landmine & Cluster Munition Monitor, http://www.the-monitor.org/custom/index.php/region_profiles/print_profile/713_f8
224. Cuba says it carries out a strict “policy” with its landmines, which includes only using them defensively and in compliance with Amended Protocol II. Rebeca Hernández Toledano, First Sec’y,
tioned states should not be considered specially affected by landmine use.

On the other hand, Egypt has a serious landmine-contamination problem and could reasonably be considered specially affected with respect to the issue of demining. If it were to accede to the Ottawa Convention, the financial burden imposed upon it from the demining requirements of Article 7 would be substantial. Egypt has often expressed this concern to the international community as one of its primary reasons for not acceding to the Mine Ban Treaty. Given its unique circumstances, Egypt likely cannot halt the formation of the good faith custom to accede. But, assuming the legitimacy of the persistent-objector rule, it would not be unreasonable to characterize Egypt as a persistent objector to the good-faith-obligation custom, at least until its demining concerns are addressed.

North and South Korea also present a special situation because of the circumstances surrounding the Demilitarized Zone (DMZ). The DMZ emerged out of the armistice that ended the Korean War in 1953 and separates the two neighbors. It is the most heavily militarized border in the world, guarded by North and South Korean armed forces as well as U.S. military personnel since the ceasefire. Although it has been “many years” since South Korea laid any new landmines, and over a decade for North Korea, both countries continue to substantially rely on the extensive number of mines located in or near the DMZ. Their dependence on emplaced mines may explain why they have refrained from laying any new ones. Thus, North and South Korea are probably specially affected by APLs.


225. See supra note 208 and accompanying text. Regarding APL use by Egyptian forces, a retired Egyptian military engineer said forces laid a minefield in 2011 on the country’s border with Libya, but this claim was unable to be verified. Country Profiles: Egypt, supra note 208 (citing Ashraf Abouelhoul, Continue to Look After Smuggled Weapons from Libya, AL AHRAM, July 19, 2012).

226. See Delegation of Egypt, Explanation of Vote on Resolution A/C.1/65/L.8 (Oct. 27, 2010) (on file with author) (“Most importantly, the [C]onvention fails to acknowledge the legal responsibility of States for demining APL[s] they themselves have laid, in particular in territories of other States, making it almost impossible for affected States to meet alone the Convention’s demining requirements.”); Country Profiles: Egypt, supra note 208.


229. South Korea stated that it has not used mines in “many years.” Country Profiles: Korea, South, supra note 223.

However, the Koreans’ failure to back the Ottawa Convention does not defeat the formation of the customary obligation to accede to the treaty because the DMZ is an anomalous case. This is not a situation where soldiers are laying mines amongst numerous vulnerable civilian populations—only a single inhabited village with a population slightly over 200 exists within.\(^{231}\) APLs in the DMZ are emplaced only in a heavily protected area with few access points for nonmilitary personnel.\(^{232}\) There are so few civilians who could actually be harmed by emplaced landmines that humanitarian concerns are minimal, at least while the two nations continue to guard the area. Moreover, no new mines have been laid for many years. Therefore, North and South Korea’s lack of commitment to the Ottawa Convention and their concerns about one specific geographic region should not be viewed as halting the rest of the world’s obligation to eventually accede to the treaty. It is probably most appropriate to view the two nations as persistent objectors instead, neither of which is currently obligated to take steps toward Ottawa Convention accession because of their DMZ defense responsibilities.\(^{233}\)

Only two states that do not fit into the categories described in section III.B.2.a have laid mines in recent years and shown a relative lack of support for the mine-ban movement: Israel and Syria. Both countries have abstained from the UNGA mine-ban resolution since 1997.\(^{234}\) Neither nation has expressly backed an eventual landmine ban nor explicitly mentioned the possibility of accession to the Ottawa Convention.\(^{235}\) Both nations have laid mines in the last four years,\(^{236}\) and both seem to have resisted joining because of “security needs” due to “regional” circumstances.\(^{237}\)

Taken together, nothing about the two states empowers them with the ability to halt the formation of a general customary law of working toward a global mine ban, especially when former major producers and users—the United

\(^{231}\) Flack, \textit{supra} note 227.


\(^{233}\) This remains true until an exception in the treaty is made for the DMZ (extremely unlikely), tensions ease between the two countries, or they show a change of heart in regard to APLs.

\(^{234}\) See, e.g., \textit{2014 Resolution Voting Record, supra} note 138.

\(^{235}\) See, e.g., Eran Yuvan, Member, Delegation of Isr., Statement to the First Committee of the 66th Session of the United Nations General Assembly, U.N. GAOR, 66 Sess., 16th mtg. at 29, U.N. Doc. A/C.1/66/PV.16 (Oct. 19, 2011) (“As long as the regional security situation continues to impose a threat to Israel’s safety and sovereignty, the need to protect the Israeli border, including through the use of [APLs], cannot [be] diminish[ed].”).


\(^{237}\) See Yuvan, \textit{supra} note 235. Syria has made statements similar in nature. See \textit{Assad Troops Plant Land Mines on Syria-Lebanon Border, HAARETZ} (Nov. 1, 2011, 9:24 PM), http://www.haaretz.com/news/middle-east/assad-troops-plant-land-mines-on-syria-lebanon-border-1.393200 (“Syria has undertaken many measures to control the borders, including planting mines.” (internal quotation marks omitted)).
States, Russia, and China—are considering or moving toward accession. The claim that Israel and Syria could be considered persistent objectors also seems problematic because their statements and recent use simply do not amount to a sufficient objection to the customary rule’s formation. For example, every country has had the opportunity to vote against the annual UNGA mine-ban resolutions, but none have done so. A vote against the resolution would clearly convey the state’s opposition to future accession, whereas abstaining or voting in favor (as Israel and Syria have) either obscures that opposition or communicates endorsement. Furthermore, Israel seems to only have conclusively emplaced mines twice in the last fourteen years—once in 2011 and before that in 2000.\textsuperscript{238} Syria appears to have broken a nearly thirty-year streak of landmine abstinence when it laid APLs in 2011.\textsuperscript{239} Although Syria has in the past expressed a right to use landmines because they are “necessary weapons for national defense,”\textsuperscript{240} it is difficult to understand how APLs are “necessary . . . for national defense” if they have not been laid for over a quarter of a century.\textsuperscript{241} These national defense claims contrast with Egypt’s legitimate claim about the Convention’s demining requirements.\textsuperscript{242} Therefore, assuming both that states may be persistent objectors and that Israel and Syria’s conduct is persistent and sufficiently contradictory to the emerging rule, the two nations may be viewed as objectors to a customary good faith obligation to work toward accession to the Ottawa Convention. The more likely result, however, is that the rule has formed and binds Israel and Syria despite their attempts to deviate from the norm because they have not sufficiently dissented from the emerging custom.

3. Smart-Mine Development Ban

Accepting the premise that a customary law compelling states to make a good faith effort to accede to the Ottawa Convention “without delay”\textsuperscript{243} exists, an interesting corollary follows: because the Convention bans use of all mines, then a fortiori the development of new APLs like smart mines prior to acces-
sion—and probably the laying of smart mines as well—should also be prohib-

ited. Unlike Amended Protocol II, the Ottawa Convention does not distinguish
between APLs, but prohibits all APLs in every situation, and Article 1 of
the Convention explicitly prohibits APL development. Although the Protocol
views certain types of mines as more acceptable than others, the Convention has
a black-and-white perspective. Essentially, the legality of smart-mine develop-
ment in the context of a customary obligation to work toward a global ban boils
down to whether developing and emplacing smart mines violates that good faith
obligation.

It should be considered illegal to develop smart mines if there is an obligation
to work toward an APL ban. Conceiving ways to manufacture new types of
APLs is the antithesis to an APL prohibition. A state obligated to accede to the
Mine Ban Treaty at some point in the future should not pursue activities that
increase the cost of accession. Additional costs will drive the state away from
accession, not toward it. Developing smart mines does just that. For example, if
a state required to eventually join the Ottawa Convention chooses to develop
smart mines, it will be bringing upon itself the additional burden of having to
later destroy those mines. Moreover, if it emplaces the mines within its
jurisdiction, it will have to demine those areas, thereby further increasing the
cost to join the Mine Ban Treaty. Even if the state lays smart mines in foreign
territory, the state “shall provide assistance for mine clearance” under Article 6
as long as it is “in a position to do so.” No matter when a country intends to
accede, developing or utilizing smart mines will always make accession more
costly; therefore, that conduct violates its obligation to join the treaty in the
future.

Acceding to the Ottawa Convention requires solidarity with the international
community on the issue of APLs, and the decision to develop smart mines
ruptures that harmony. It is one matter for a state to develop weapons serving as
alternatives to APLs; on the other hand, investing time and resources into
weapons explicitly prohibited under the first Article of the Ottawa Convention
renders implementation of its ultimate goal impossible, which is to erase from
the earth “weapons that strike blindly and senselessly.” In a showing of what
may be an acknowledgement of this reality, Russia has invested a substantial

244. This rule includes developing smart APLs solely for training purposes because the Convention
only allows mines to be retained for training in mine detection, clearance, and destruction, not to be
created for those reasons. See Ottawa Convention, supra note 61, art. 3(1), 2056 U.N.T.S. at 243.
245. Id. art. 1(1)(b), at 242.
246. See id. art. 4, at 243. States party are required to destroy “all stockpiled [APLs they] own[] or
possess[]” (save a small number for training purposes) within four years of the treaty’s entry into force,
so smart-mine development truly serves no productive purpose for a country planning to accede to the
Convention. Id. (emphasis added).
247. See id. art. 5(1).
248. See id. art. 6(4), at 244.
249. Herby & La Haye, supra note 58 (stating that the Ottawa Convention was built on the aforesaid
principle). Smart mines are just as indiscriminate as dumb mines, if only for a shorter time period.
amount of money into researching weapons that can replace APLs altogether, and the United States and numerous other countries have long expressed a desire for an alternative to, not a variation of, landmines. Hence, the development of smart mines contradicts the very nature of an obligation to work toward a ban, and thus by logical deduction the practice should be prohibited under customary international law.

4. Smart-Mine Use Ban

If the customary obligation to work toward Mine Ban Treaty accession did not form until after several countries—such as China, South Korea, Pakistan, Russia, and the United States—developed or manufactured smart mines, then the following question arises: can those countries still employ smart mines without violating international law, or must their mines sit idle in perpetuity? It may be the case that these development activities had taken place before the crystallization of the customary good faith obligation and therefore the smart-mine development ban. Regardless, because any smart mines laid will require costly demining after accession, the answer should be a resounding “no” to emplacement. Hence, although these nations possibly developed smart mines before the ban came into existence, they are legally prohibited from using them because doing so would significantly frustrate their obligation to work toward Ottawa Convention accession.

Although these five countries may have developed smart mines, such development probably did not convey an objection to Ottawa Convention accession. China, Pakistan, Russia, and the United States have shown support for the Convention’s principles and an eventual ban. South Korea has not demonstrated the same level of support, but it nevertheless has not laid any APLs for many years. Any production—or speculation about production—of smart mines would be prohibited.

250. Russia stated that it has spent or had planned to spend $115.62 million on research, development, and production of new engineer munitions, including alternatives to APLs. Country Profiles: Russia, supra note 202 (citing Sergei Ivanov, Minister of Def., Statement at Parliamentary Hearings on Ratification of Amended Protocol II (Nov. 23, 2004)).

For more information on countries’ desire for alternatives, see, for example, Permanent Mission of India to the United Nations Office at Geneva, Statement at the Twelfth Meeting of States Parties to the Anti-Personnel Landmine Convention (Dec. 3, 2012) (on file with author) (proclaiming that India supports a global APL ban and that the “availability of militarily effective alternative technologies that can perform cost-effective defensively the defensive functions of [APLs] will facilitate the early achievement of” the goal of a total landmine prohibition); U.S. Delegation, Statement at the Ottawa Convention Second Review Conference Regarding U.S. Landmine Policy (Dec. 1, 2009) (on file with author) (announcing that the review of its landmine policy would take “some time to complete, given that [the United States] must ensure that all factors are considered, including possible alternatives to ensure protection of U.S. troops and the civilians they protect around the world”); Country Profiles: Kyrgyzstan, supra note 144 (citing Letter 011-14/809 from Kyrg. Ministry of Foreign Affairs to Landmine & Cluster Munition Monitor (Apr. 30, 2010) (on file with author)) (stating that Kyrgyzstan supports the idea of a full ban on APLs but “cannot yet join because it does not have necessary alternatives for border defense”); supra note 166 (citing a similar statement made by Pakistan).

251. See supra notes 166–67, 192 and accompanying text.

252. See supra note 229.
mines by these nations is better viewed as a “minor departure” from the nearly uniform practice of supporting the Convention’s principles. A “few . . . contradictions” will not necessarily disrupt the formation of a new customary rule.\footnote{253} especially since none of these countries has ever used smart mines in a conflict. Therefore, this practice does not prevent the formation of the accession obligation. However, given the potential persistent-objector status of Israel, Syria, Egypt, North Korea, and South Korea regarding the good faith obligation, they might also be viewed as exempted from both the smart-mine development and use prohibitions. Regardless, a rule proscribing smart-mine use and development flowing from the customary obligation to eventually accede to the Ottawa Convention has likely emerged and is binding on every other state.

5. Dumb-Mine Use Ban or Restriction

Dumb-mine use should be considered illegal because their emplacement adds to the cost of joining the Ottawa Convention, thereby violating the good faith obligation to eventually accede. If anything, their use is more costly than smart-mine use because demining carries with it a higher risk of detonation.\footnote{254} Therefore, under the theory that a good faith obligation to accede to the Mine Ban Treaty prohibits conduct increasing the cost of accession, the employment of dumb mines should be viewed as violative of international law.

In rare cases, however, emplacing dumb mines actually might not increase the costs of accession if the mines help contribute to regional stability—which is arguably necessary in order to be able to accede\footnote{255}—for less than what it would cost soldiers to perform the same function. As described in Part I, landmines may assist a nation in a conflict by redirecting enemy forces or slowing their movement. Assuming that acceding to the Mine Ban Treaty can only be done if regional hostilities cease, and if the user state cannot afford more effective, safer weapons to achieve its objective, APLs may help the state achieve stability for a lower cost than using soldiers or other means, even after accounting for the costs of future demining and destruction of those APLs. Hence, at least for some nations, dumb-mine use in the present time may not actually push them further away from the Ottawa Convention.

Even if emplacing dumb mines would not violate a state’s good faith obligation to eventually accede to the Mine Ban Treaty, a substantial amount of state conduct places a severe restriction on APL use by permitting their deployment only in border-defense situations. When nonparties decide to abstain from the

\footnote{254. See \textit{supra} notes 26–32 and accompanying text for a discussion about the differences between dumb mines and smart mines.}  
\footnote{255. For example, Sri Lanka has stated that its accession depended on peace progress with a nonstate armed group, the Liberation Tigers of Tamil, and Libya could not agree to join the Convention until an internal conflict had been resolved. \textit{See Country Profiles: Sri Lanka, supra note 184; infra note 258 and accompanying text (discussing Libya’s need to resolve an internal conflict and establish a new government before the Ottawa Convention could be signed).}
UNGA mine-ban resolution, or when they attend Meetings of States Parties to the Mine Ban Treaty in a show of support to the global anti-APL norm, they sometimes publicly communicate the reasons for their apprehension of accession. From these statements, countries generally fall into one of two groups: those that want to reserve the right to employ landmines in the future for national security or defense and those that cannot accede at the moment due to reasons unrelated to APL warfare. Almost two-thirds of nonparties cite national security or defense as a main reason why they are unable to fully commit themselves to the mine-ban movement, and nearly all of those states qualify their use of APLs for national security as necessary for “border defense.”

Other countries do not necessarily express serious qualms with banning APL use, but rather feel financially or technologically unable to comply with the Ottawa Convention’s mine clearance and destruction requirements. Some states have other reasons. For example, Libya’s government recently underwent a period of transition; it expressed support for joining the Convention in 2011 but stated that the country must first establish a new government. In July 2013, Libya signed the Arms Trade Treaty, indicating that the country can now join international agreements and that its accession to the Ottawa Convention may just be a matter of time. Hence, more than three-quarters of nonparties either only demonstrate a desire to utilize landmines primarily to

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256. These nations include Armenia, Azerbaijan, Bahrain, China, Cuba, Egypt, India, Iran, Israel, Kazakhstan, North Korea, South Korea, Kyrgyzstan, Lebanon, Myanmar, Pakistan, Singapore, Sri Lanka, Syria, the United States (for protecting the DMZ), Uzbekistan, and Vietnam. See, e.g., Delegation of the Islamic Republic of Iran, Explanation of the Vote on the Draft Resolution L.6 (Oct. 2008) (on file with author) (“[L]andmines continue to be the effective means . . . to ensure the minimum security requirement of [some countries’] borders.”); Yuvan, supra note 235 (“[A]s long as the regional security situation continues to impose a threat to Israel’s safety and sovereignty, the need to protect the Israeli borders, including through the use of [APLs], cannot [be] diminish[ed].”); Country Profiles: Uzbekistan, supra note 223 (explaining that Uzbekistan believes “mines are necessary for national security to prevent the flow of narcotics, arms, and insurgent groups across its borders”); Kazakhstan Hosts a Workshop, supra note 212.

257. These include Georgia, Kyrgyzstan (citing both financial and technological difficulties and border defense concerns), Laos, Mongolia, and Morocco. See, e.g., Permanent Mission of Georgia, supra note 10 (stating that Georgia’s inability to fulfill the treaty’s obligation in disputed territories not controlled by the government—Abkhazia and South Ossetia—prevents it from acceding).

Similarly, the Marshall Islands and Micronesia have not yet acceded primarily due to their relationship with the United States and concerns that accession will adversely affect the United States’ ability to defend their territories. See Rina Tareo, Deputy Permanent Representative of the Republic of the Marsh. Is. Mission to the United Nations, Statement at the Ninth Meeting of States Parties of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Nov. 2008) (on file with author); Concerns on Marshall Islands Ratification of the Ottawa Convention, WIKILEAKS (Sept. 1, 2011, 11:24 PM), http://www.cablegatesearch.net/cable.php?id=09STATE91952 (regarding a meeting between the United States, the Marshall Islands, and Micronesia officials, “U.S. representatives noted that the U.S. would not adhere to the Ottawa Convention and that adherence by the other three states could conflict with defense provisions of the respective bilateral Compacts of Free Association”).

258. See Country Profiles: Libya, supra note 11.
259. See id.
260. See id.
defend their borders or have reasons for not joining that are completely divorced from APL military utility, such as financial difficulties with implementing the Convention’s Article 5 requirements or having to first establish a stable government.

Only two countries’ positions on landmines stand out from the rest: Saudi Arabia and Russia. Although Saudi Arabia supports the humanitarian objectives of the Ottawa Convention, it may be holding out so that it can reserve its right to use APLs however it wishes in the future. Even so, Saudi Arabia has admittedly not produced or exported any type of mine in recent years, possesses an “old [stockpile of APLs] . . . [that] have never been used,” and has only chosen to abstain from the UNGA mine-ban resolution since 2011. Russia acknowledges the “military utility of [APLs]” but also notes the “financial difficulties in destroying its large stockpile.” Russia employed mines during the early 2000s “to stop flows of weapons, drugs, and terrorists” and is (or at least once was) one of the world’s foremost landmine producers. Kiev accused Russia of laying landmines in Crimea in March 2014, but the allegations have not been confirmed.

Russia may be able to argue persistent-objector status, but Saudi Arabia’s claim is questionable. If Russia laid mines in 2014, it will have been the first confirmed use since 2006. It may have employed APLs against Georgia in 2008, but Russia denied those allegations. In 2004, however, Russia announced that it had spent or planned to spend over $100 million on researching and developing “new engineer munitions, including alternatives to [APLs],” which might indicate that Russia’s grasp on its right to use mines however it wishes may be slipping away over time.

261. See Al Arifi, supra note 222.
263. See, e.g., 2014 Resolution Voting Record, supra note 138.
264. Country Profiles: Russia, supra note 202 (citing Interview with Georgy Todua, Minister Counsellor of the Russian Embassy, in Cartagena, Colom. (Dec. 4, 2009)).
265. Id. (citing Anatoly I. Antonov, Ambassador, Delegation of Russ., Statement at the Sixth Session of the CCW Group of Governmental Experts (Nov. 18, 2003)).
266. Russia is still listed as a producer by Landmine Monitor. LANDMINE MONITOR 2014, supra note 12, at 11; Country Profiles: Russia, supra note 202 (citing Anatoly I. Antonov, Ambassador, Delegation of Russ., Statement at the Sixth Session of the CCW Group of Governmental Experts (Nov. 18, 2003)).
269. See LANDMINE MONITOR 2009, supra note 145, at 917.
With respect to Saudi Arabia, the only real substance behind its right to use mines other than for border defense is its bare statement that it reserves that right. However, the law of armed conflict prescribes that countries may only employ “[military] operations that . . . are indispensable in securing the prompt submission of the enemy[,]” not those that are “merely nice [to possess].”271 Having never used landmines and only holding onto an “old” stockpile in the fear that it might one day be forced to emplace them, Saudi Arabia does not appear to consider APLs a matter of military necessity. Moreover, a persistent objector must be persistent. Saudi Arabia has not continuously dissented to the use of APLs. With respect to the mine-ban resolutions, Saudi Arabia has only abstained since 2011.272 At the Ottawa Convention’s First Review Summit in 2004, Brigadier General Ibrahim Bin Mohammed Al Arifi stated that the “peace loving country” of Saudi Arabia “has always supported the [APL] prohibition convention” and brought to the attendees’ attention that Saudi Arabia “has never used [APLs], nor has [it] produced them.”273 Saudi Arabia voted in favor of an APL prohibition in 1996, participated in many meetings of States Parties to the Ottawa Convention, and voted in favor of adopting the 2010 mine-ban resolution.274 Hence, although Russia might be considered a persistent objector to a border-defense-only rule because of its potential recent APL use and continuous acknowledgement of landmines’ military utility—assuming dumb-mine use is not prohibited altogether for the reasons stated at the beginning of this section—Saudi Arabia’s weak and inconsistent attachment to the weapon probably does not merit persistent-objector status.

Additionally, due to the frequency with which it has been involved in military conflicts and its history as a key APL producer and user,275 the United States’ position on dumb mines may be especially revealing of international norms. The United States has gone back and forth on the landmine issue, from spearheading the Ottawa Process, to backing away from the Mine Ban Treaty but vowing to join by 2006, to swearing off the Convention altogether but still choosing to phase out the use of dumb mines, and finally to reconsidering—and

271. Koplow, supra note 217, at 1247–48 (internal quotation marks omitted); see also Rizer, supra note 7, at 64 (“APLs . . . are really only effective at preventing very small elements, a platoon for example, from being overrun. . . . [T]his is a tactical decision; landmines do not serve the larger need and are thus not effective at serving the strategic [and therefore necessary] need.” (internal quotation marks omitted)); supra note 217 (discussing the law of armed conflict). But see Steven Groves & Ted R. Bromund, The Ottawa Mine Ban Convention: Unacceptable on Substance and Process, BACKGROUNDER (Heritage Found., Washington, D.C.), Dec. 13, 2010, at 7, available at http://www.heritage.org/research/reports/2010/12/the-ottawa-mine-ban-convention-unacceptable-on-substance-and-process (citing two studies conducted over a decade ago to support the claim that “APLs . . . provide crucial tactical advantages on the battlefield” (emphasis added)).

272. See, e.g., 2014 Resolution Voting Record, supra note 138.

273. See Al Arifi, supra note 222.


275. See, e.g., LANDMINE MONITOR 2013, supra note 16, at 18.
now pursuing accession and banning all APLs starting in 2009.\textsuperscript{276} U.S. policy now forbids APL use anywhere in the world outside the Korean Peninsula.\textsuperscript{277} The United States has not used APLs in any capacity since the First Gulf War in 1991 nor has it produced any since 1997.\textsuperscript{278} Notably, U.S. landmine policy only permits smart mines, not dumb mines, to be emplaced in the DMZ,\textsuperscript{279} which is the main reason why the United States has thus far refrained from acceding to the Ottawa Convention.\textsuperscript{280} Hence, the United States’ verbal and physical practice favors a complete dumb-mine prohibition or at least a restriction on use.

Recent statements by the United States suggest that its position on the legality of dumb mines has transformed considerably. As previously mentioned, the United States outlaws the use of dumb mines by its own forces anywhere in the world. More than two-thirds of the United States Senate—including Senator Patrick Leahy, a longtime advocate against the use of any type of APL—have shown their opposition to landmines by supporting the reconsideration of acceding to the Ottawa Convention.\textsuperscript{281} Moreover, the Department of State referred to Syria’s use of landmines on its border in 2012 as “horrific.”\textsuperscript{282} “[H]orrific,” a term State Department representatives appear to use sparingly, has been used to describe the following other recent incidents: human trafficking in Thailand over the past year;\textsuperscript{283} the shelling of Mariupol by Russian-backed separatists which resulted in the deaths of thirty innocent civilians;\textsuperscript{284}

\textsuperscript{278} US: Follow up Rebuke to Syria on Landmines, supra note 276.
\textsuperscript{280} See supra note 215 (citing that, during a discussion amongst government officials as to whether to join the Ottawa Convention, the U.S. Commander in Korea declared “I need them” in regards to landmines); Trevor Holbrook, U.S. Policy Recommendation: Ottawa Convention on Anti-Personnel Landmines, 17 HUM. RTS. BRIEF, no. 1, 2009, at 24, 26 (“According to the United States, the unique situation in the [DMZ] of the Korean peninsula requires the use of [APLs] in order to deter North Korean forces from entering South Korea.”); see also supra note 277.
\textsuperscript{281} Statement of Sen. Leahy, supra note 10; Letter from Patrick Leahy, U.S. Senator, to President Barack Obama (May 18, 2010) (on file with author).
\textsuperscript{282} US: Follow up Rebuke to Syria on Landmines, supra note 276 (“US Ambassador Susan Rice and the State Department both described reports of Syria’s use of [APLs] on its borders with Lebanon and Turkey as ‘horrific.”’).
\textsuperscript{283} Interview with Nattha Komolvadhin of Program: “Tob Jote,” U.S. DEP’T ST., http://www.state.gov/p/eap/rls/rm/2015/01/236314.htm (last visited Feb. 11, 2015) (quoting Assistant Secretary of State Daniel Russel as stating that “the horrific trafficking of women for sexual purposes . . . is a terrible human rights violation and also undermines the empowerment and development of women within [Thailand]”).
\textsuperscript{284} Kerry on Attacks in Ukraine by Russia-Backed Separatists, US POLICY (Jan. 24, 2015, 8:16 PM), http://www.uspolicy.be/headline/kerry-attacks-ukraine-russia-backed-separatists (quoting Secre-
the slaying of 145 people, including 132 children, by the Taliban in a school located in Peshawar, Pakistan; and the terrorist attack on the headquarters of Charlie Hebdo in Paris. Hence, given its recent change in attitude, its policy prohibiting the use of dumb mines, and its position on Syria’s recent use of APLs, the United States’ views on the use of persistent mines has shifted significantly since it first opposed the Mine Ban Treaty fifteen years ago.

Some other countries reserve the right to employ persistent APLs but generally do so only or primarily for border defense. But, do they qualify that right pursuant to a legal obligation? As discussed in section III.B.2.b, given APLs’ questionable status under the law of armed conflict as an indiscriminate, militarily unnecessary, disproportionate killer, states defend their use of landmines by confining them to what is arguably the most justifiable circumstance: preserving territorial integrity. Countries that maintain this need for APLs probably do so out of a hybrid political–legal obligation: political in the sense that landmines have been stigmatized over the years and their employment may lead to international disdain, and legal in the sense that landmines have continually evolved from what was once a legitimate weapon to one potentially violative of customary international humanitarian law. Hence, given the widespread state conduct of asserting a right to only use landmines to protect borders, the probable political–legal motivations for doing so, and the United States’ influential views and practice regarding dumb mines, if persistent APLs are not already prohibited under the customary good faith obligation to accede to the Ottawa Convention, then their use is probably restricted to border defense only via customary law.

**CONCLUSION**

Landmines have invaded the earth’s soil for hundreds of years, but their status as a legal and ethical means of combat is quickly coming to an end. The
momentum of the mine-ban movement plus the increasing global recognition of
the devastating effects of landmines on civilian populations has generated state
contact that has not only dramatically decreased the production, transfer, and
use of landmines, but has also developed norms that classify certain behavior as
violative of customary law. Coupled with this state practice is an ever-growing
*opinio juris* pushing states toward a landmine-free future. Since the Ottawa
Convention went into force, five new laws appear to have emerged: 1) a custom
prohibiting the export of APLs, 2) a customary good faith obligation requiring
nonparties to work toward Ottawa Convention accession, 3) a ban on the
development and 4) use of smart mines flowing from the obligation-to-accede
custom, and 5) a complete ban on dumb APLs or a restriction on their utilization
to border defense. Only a handful of persistent objectors may exist, but each
country’s status as a persistent objector is debatable: Israel, Syria, Egypt, and
North and South Korea might be considered objectors to both the obligation-to-
accede and smart-mine rules, and Russia and Saudi Arabia could possibly be
considered objectors to the APL-use restriction rule. If the trend of state practice
continues toward a complete prohibition on all APLs, even without full acces-
sion to the Mine Ban Treaty, customary international law can and will trigger
the end of landmines, and the result will be an age in which all people can
finally walk the earth in safety.