

The UK Government and the Falkland Islands under Article 5 to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (anti-personnel Mine Ban Convention)

Richard Moyes, Policy & Research Manager Landmine Action

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On 10 May 2006, Landmine Action made the following statement to The Landmine Monitor:

The Mine Ban Convention is very clear that the Falkland Island minefields are the responsibility of the UK but the UK Government has still not taken any substantial action to address the issue. Landmine Action's assessment is that there is no way that the UK will now be able to meet its obligation to destroy all of the landmines in these identified areas. Given the long history of inaction on this it is very hard to see that the UK has worked in good faith towards this legal obligation. This disregard of legal requirements does nothing to promote adherence by other States Parties. Whilst NGOs are working to encourage severely mine affected countries to meet their Article 5 deadlines so as to protect vulnerable populations, the UK is effectively saying these obligations do not need to be taken seriously. Unless it takes radical action to resolve this problem, the UK should not be granted an extension to its Article 5 deadline and should be held to be in breach of the Convention when the current deadline is reached.

In a letter of 26 July 2006 to The Landmine Monitor, John Duncan, the UK's Ambassador for Multilateral Arms Control and Disarmament, responded with respect to Landmine Action's statement that:

These comments are misguided and do not reflect the intensive efforts made by the UK in its negotiations with Argentina and are not borne out by the facts ...

This paper presents the evidence and analysis that support Landmine Action's statement.

The current situation

In November or December 2006 it is expected that a feasibility study will be started as a "first step" towards clearing the minefields in the Falkland Islands. Such an assessment is likely to get underway almost exactly 9 years after the UK signed the anti-personnel Mine Ban Convention. By the time the assessment mission reports back (it is estimated that the whole study will take six months, though only 18 to 21 days will actually be required on the Islands¹) the UK Government will probably have less than two years in which to plan and complete clearance before the Article 5 deadline of 1 March 2009.

¹ Email to Landmine Monitor from Guy Pollard, Second Secretary, UK Permanent Mission to the

UK Government attitudes towards Article 5

Before signing the Convention on 3 December 1997, the UK Government was able to clearly identify in the Convention text the various commitments to which it would be held after the more binding processes of domestic ratification and international ‘entry into force’. In particular, the UK Government was well aware of the requirements of Article 5 (1), which states:

“Each State Party undertakes to destroy or ensure the destruction of all anti-personnel mines in mined areas under its jurisdiction or control, as soon as possible but not later than ten years after the entry into force of this Convention for that State Party.”

Indeed, in the negotiation of the treaty, the UK had been actively involved in the discussion that shaped Article 5. In a commentary on the Convention published by Oxford University Press (Maslen 2005) it is recorded that:

“At the [June] 1997 Brussels Conference ... [t]he UK, concerned by the human and financial implications of residual mine contamination in the Falkland Islands, announced that it would be seeking an exception to the requirement to clear anti-personnel mines in situations where there was little or no risk to civilians and the costs and risk involved in clearance were disproportionate to the benefits.”

“... While there was some sympathy among Core Group members for the position of the UK, there was also concern that such an exception would lead to a loophole in the Convention that could be exploited by other States Parties.”

Three months later:

“The UK ostensibly failed in its attempt at the Oslo Diplomatic Conference [September 1997] to secure an explicit exception to the requirement to clear emplaced antipersonnel mines where: ‘(a) the anti-personnel mines were not laid by the State Party; (b) the minefield is outside inhabited areas; (c) the risk of death or injury in leaving the minefield undisturbed is outweighed by the risks of clearing it; and (d) the costs of destroying the mines would be wholly disproportionate to the benefit’.”

From an examination of the UK Government’s active participation in the negotiations of Article 5 to the Convention, two things are clear:

1. That the UK Government was well aware of the contents and requirements of this Article to the Convention.
2. That the UK had – unsuccessfully – attempted to secure a broad exception within Article 5 that would have enabled it to avoid an obligation to clear the Falkland Islands.

Thus, at the point of signature, the UK Government was very aware that it was to become obligated to ensure the destruction of all anti-personnel mines in the Falkland Islands “as soon as possible”. With the ratification of the Convention by Burkina Faso in September 1998, the date for the Convention’s entry into force became known and the UK knew that the destruction of these mines had to be completed not later than 1st March 2009.

A feasibility study into clearing the minefields: the “first step”

“During President Menem's visit to the UK in October 1998, we agreed as a first step to work together with Argentina to evaluate the feasibility and cost of clearing the land mines still present in the Falkland Islands.”

Mr. John Battle, Minister of State, Foreign & Commonwealth Office, 19 October 1999

According to the above statement, the first step towards clearing the Falkland minefields would be to evaluate the feasibility and cost of the process. Nine years after the UK signed the Mine Ban Convention, and nearly eight years after this “first step” was agreed, no such assessment of the feasibility and cost of clearance has been made.

After taking nine years to organise the necessary evaluation of the task in hand, the UK will have left itself just two years in which to organise and implement the clearance of some 20km² of minefields in challenging technical conditions.

Failure to take this first step raises the following question under Article 5 to the Convention:

Is the long delay to this process consistent with the Article 5 requirement to complete clearance “as soon as possible”?

We consider this question in the sections that follow.

Blaming the bi-lateral agreement

In a letter of 26 July 2006 to The Landmine Monitor, John Duncan, the UK’s Ambassador for Multilateral Arms Control and Disarmament, asserts:

“You state that because there is no actual demining taking place and no formal plan established we are somehow at odds with Article 5. Let us be clear on this: the UK takes its treaty responsibilities very seriously. The requirement for states [sic. the UK] is to complete de-mining by 2009 [sic. as soon as possible, but not later than 1st March 2009]. As we have reiterated during the Ottawa process meetings, in Parliament and informally, as well as our Ottawa obligations under Article 5, we are also committed to conduct a feasibility study jointly with Argentina under the terms of a 1999 bilateral agreement. As you know, this commitment has slowed the process down.”

With explicit reference to accusations by Landmine Action of “inaction” towards meeting the Article 5 obligations he further asserted that:

“These comments are misguided and do not reflect the intensive efforts made by the UK in its negotiations with Argentina ...”

The core of this argument is an effort to present a bilateral agreement that the UK entered into with Argentina in 1999 as a set of additional commitments that should be held to modify or mitigate the UK Government’s obligations to the anti-personnel Mine Ban Convention. By stating that the UK has explained this commitment “during the Ottawa process meetings, in Parliament and informally” there is an attempt to suggest that there has been some form of acceptance of this implicit argument. This is not the case. The UK has repeatedly stated that it was “fully committed” to the Mine Ban Convention and Ambassador Duncan’s letter states that

“the UK’s aim throughout has been to do all it can to ensure it is in a position to fulfil its Article 5 requirements.” In parliamentary statements, whilst the agreement to undertake a joint feasibility study is mentioned there have been no suggestions from the Government that this was in any way an impediment to meeting Article 5 requirements. Thus the UK has not established any understanding that its legal obligations under the Mine Ban Convention are substantially modified by the bilateral agreement with Argentina.

According to the argument now put forward by Ambassador Duncan, the complexity of working under the additional bilateral commitment should legitimate the nine year delay between signing the Convention and starting the feasibility study as the “first step” towards clearing the minefields. The particular reference to the UK’s “intensive efforts in negotiations with Argentina” seems to suggest that the requirement to negotiate with Argentina has been an impediment to progress towards Article 5 compliance – or at least that such negotiations have been a significant portion of the work so far done to that end.

As examined below, this line of argument is very weak; it lacks legal credibility and has diplomatic implications that may not have been well thought through.

The bilateral agreement is a voluntary arrangement, entered into by choice, only after the UK had ratified the Mine Ban Convention

Subsequent to the antipersonnel Mine Ban Convention’s entry into force, in a Joint Statement of 14 July 1999 the UK and Argentina agreed the following amongst a set of other points relating to “access and air services”, “fishing” and “confidence building”:

Confidence Building:

iii) As the Prime Minister of the United Kingdom and the President of the Argentine Republic agreed in October 1998, the two Governments will continue to work together to evaluate the feasibility and cost of clearing the land mines still present in the Falkland Islands.

Regarding the procedures by which the Joint Statement commitments would be carried forward it was noted that:

“this joint statement, as well as the arrangements deriving from it, will be kept under review by the two Governments.”

The bilateral agreement entered into in 1999 came after the UK had already accepted the binding legal obligation of Article 5 to the anti-personnel Mine Ban Convention and after that Convention had entered into force. Even the previous agreement of October 1998 between the UK Prime Minister and the Argentinean President occurred after the ratification of the UK and of Burkina Faso and thus at a point when the Convention’s entry into force was ensured and the deadlines for landmine clearance established.

The decision to address landmine contamination in the Falklands through the 1999 bilateral agreement was voluntary – this was a choice made by the UK Government regarding how it would undertake this work. Under the terms of the bilateral agreement, the progress of this approach “will be kept under review.” Thus for example, if the approach appears to be compromising the capacity of parties to meet binding commitments under international treaties the arrangements could be reconsidered.

The bilateral agreement of 1999 is not therefore an externally imposed obligation that presents the UK with a competing set of requirements to the anti-personnel Mine Ban Convention. Rather,

the bilateral agreement is the UK's *chosen mechanism* for addressing the need for landmine clearance in Falkland Islands in accordance with its already established legal obligations. Furthermore, it is a mechanism that can be reviewed as required.

The fact that this approach was the choice of the UK Government is further evidenced by the response of Ministry of Defence to the Select Committee on Defence in 1999:

Question 10: Are [Her Majesty's Government's] potential responsibilities under the Bill for mine clearance in the Falkland Islands in respect of mines laid by UK forces, Argentine forces or both? If the responsibilities extend to devices not laid by UK forces, are there any provisions for recovery of the cost of clearance from other governments?

Answer 10: [...] The Argentine Government offered in 1993 to assist with demining the Falkland Islands and to meet the cost. My Right Hon. Friend the Foreign and Commonwealth Secretary has asked them if, as a first step, they would be willing to help fund a British led study to assess the feasibility and cost of demining the Falklands.²

Thus although the Argentine Government had some years previously offered financial support to this work, it was the UK Government that requested their financial assistance specifically to support the feasibility study as a first step towards the UK's compliance with Article 5.

Where it is now argued by UK officials that "this [bilateral] commitment has slowed the process down" it must be recognised that this is simply an acknowledgment that the UK's chosen approach to meeting its Article 5 obligations has been slower than it could have been otherwise. So slow that it will have completed no substantive assessment of how the obligations could or should be met even nine years after signing the Convention.

This situation is then compounded by the fact that the UK Government does not appear to have reviewed its commitments to Argentina (as provided for in the terms of the bilateral agreement), at points when economic crisis in Argentina might have provided reasonable grounds for concern or when the UK became reasonably aware that clearance of the minefields before the 1 March 2009 deadline was not likely to be possible.

Remarkably, in external communications the UK continues to maintain that its Article 5 obligations might yet be fully met. In the 26 July 2006 letter to The Landmine Monitor, Ambassador Duncan stated that:

"I am glad to say that the latest meeting of the [Joint Working Party] on 20/21 July was a success and we are now very close to an agreement on all aspects of the feasibility study, which we expect to take place during the next austral summer. Against this background it is clearly premature to assess that the UK has breached its obligations: as the Convention states clearance should be completed 'as soon as possible, but no later than 1 March 2009.'"

In response to a request by Landmine Action under the UK Freedom of Information Act for "any reports written by or received by MoD staff, subsequent to the UK's signature of the anti-personnel Mine Ban Convention, regarding the feasibility or advisability of clearing minefields remaining in the Falkland Islands," the UK Ministry of Defence replied that:

² Select Committee on Defence, First Special Report (24 February 1999); Memorandum from the Ministry of Defence responding to the Committee's questions on the Landmines Bill (8 July 1998)

“The MoD has not received or produced any reports regarding the feasibility or advisability of clearing minefields remaining in the Falkland Islands subsequent to the UK’s signature of the anti-personnel Mine Ban Convention in 1997.”³

However, Landmine Action had already been given a copy of an internal report from the first half of 2005, in which UK Ministry of Defence officials noted that:

“It is unlikely that the Falkland Islands could be cleared of mines by the deadline under the Ottawa Convention even if a policy decision were taken to do so in the near future.”

The same report clearly identified the risk of the UK breaching the Convention:

“If the minefields are not cleared and there is no agreement on an extension, it is possible that the UK will be the first States Party to be in breach of the Treaty.”

Faced with this risk the report goes on to recommend that:

“As time is short, it would make sense to start making the case for an extension to the UK’s clearance deadline. We also need to influence the debate in the Ottawa Convention on the implementation of Article 5, prompted by growing acceptance that the original aim of the Convention - a world cleared of anti-personnel mines by ten years after entry into force - will not be achieved.”

It is very noticeable that rather than recommending a review of the commitment to undertake the feasibility study jointly with Argentina (which Ambassador Duncan identifies as slowing the process down), this internal report suggests instead that efforts be made to influence how Article 5 extension requests are assessed under the Convention in an attempt to secure a favourable process for the UK. Perceiving an erosion of confidence in “the original aim of the Convention - a world cleared of anti-personnel mines by ten years after entry into force” – a strategy is proposed to exploit this situation rather than to seek to rectify it.

Clearly this was an internal report and does not reflect the official position of the UK Government. However, the comments in this report provide grounds for serious concern.

If the UK wanted to clear the minefields in the Falkland Islands as soon as possible it could have:

1. Not chosen to ask for financial assistance from Argentina towards the cost of a feasibility study but undertaken such a study immediately after ratification of the Convention.
2. Revised the agreement with Argentina in good time given the very slow progress evident and clear external and internal assessments that the March 2009 deadline was going to be missed.

It does not seem that either legally or practically the bilateral agreement with Argentina stands up as a valid justification for the UK taking nine years to implement a relatively straightforward feasibility study.

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³ Email from Lt. Col. Robin Swanson to Richard Moyes, Landmine Action, 21 August 2006.

The following table provides a compilation of the UK's practical action towards completing the destruction of all anti-personnel mines in mined areas in the Falkland Islands as officially reported:

Reporting Period	Mine Ban Convention, Article 7 Report, Form F/2 UK submissions:
1 March 1999 - 1 August 1999	UK and Argentina are working together to assess the cost and feasibility of mine clearance options in the Falkland Islands.
1 August 1999 - 1 April 2000	No mine clearance activity has been conducted in this period. UK and Argentina continue to work towards the signature of an MOU to enable a study into the feasibility of mine clearance options in the Falkland Islands.
1 April 2000 – 31 December 2000	No mine clearance activity has been conducted in this period. UK and Argentina continue to work towards the signature of an MOU to enable a study into the feasibility of mine clearance options in the Falkland Islands.
1 January 2001 – 1 December 2001	Although there is no formal programme for the destruction of mines in the Falklands, 89 were destroyed locally in the last year as they were exposed to the surface. UK and Argentina continue to work towards commissioning a UK-led study, to be funded by the Argentine Government, into the feasibility of mine clearance options in the Falklands. A formal exchange of Notes took place in October 2001, which established a Joint Working Party. The UK is currently discussing with the Argentine Government details of the nature, scope and timing of the preliminary phase of the study.
1 January 2002 – 31 December 2002	We continue working towards a UK-led study, to be funded by the Argentine Government, into the feasibility of mine clearance options in the Falklands. 89 APMs were destroyed locally in the last year as they were exposed to the surface.
1 January 2003 – 31 December 2003	We continue working towards a UK-led study, to be funded by the Argentine Government, into the feasibility of mine clearance options in the Falklands. 50 APMs were destroyed locally in the last year as they were exposed to the surface.
1 January 2004 – 31 December 2004	We continue working towards a UK-led study, to be funded by the Argentine Government, into the feasibility of mine clearance options in the Falklands. 50 APMs were destroyed locally in the last year as they were exposed to the surface.
1 January 2005 – 31 December 2005	One APM was destroyed locally in the last year as it was exposed to the surface. In 2004, we declared 50 APMs destroyed as they were exposed to the surface. On re-checking the records, we have now established this should have read 16 (not 50) AP mines.

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Undermining the drive for compliance by others

Landmine Action's statement to the Landmine Monitor noted that:

This disregard of legal requirements does nothing to promote adherence by other States Parties. Whilst NGOs are working to encourage severely mine affected countries to meet their Article 5 deadlines so as to protect vulnerable populations, the UK is effectively saying these obligations do not need to be taken seriously.

As we have already highlighted, a similar point of concern was raised during the Convention negotiations and provided the basis for the rejection of the amendments proposed by the UK at that time. The Oxford University Press commentary on the Convention notes with respect to the rejection of the UK's proposed exception that:

“... there was ... concern that such an exception would lead to a loophole in the Convention that could be exploited by other States Parties.”

States Parties to the Convention, through the Nairobi Action Plan produced by the 1st Review Conference to the Convention in 2004, have clearly identified the challenge of Article 5 compliance:

2004 is the midpoint between the Convention's entry into force and the first mine-clearance deadlines. Successfully meeting these deadlines will be the most significant challenge to be addressed in the coming five years and will require intensive efforts by mine-affected States Parties and those in a position to assist them.

The speed and manner with which it is pursued will have crucial implications for human security - the safety and well-being of affected individuals and communities.

In response to this identified challenge, States Parties, including the UK, agreed amongst other things to "do their utmost to:"

Action #19: Urgently develop and implement national plans [...]

Action #22: Make their problems, plans, progress and priorities for assistance known to other States Parties, the United Nations, regional organizations, the ICRC and specialized non-governmental organisations [...]

Action #27: Strive to ensure that few, if any, States Parties will feel compelled to request an extension in accordance with the procedure set out in Article 5, paragraphs 3-6 of the Convention.

Against this backdrop, in a letter of 8th December 2005 to Jack Straw (then Secretary of State for Foreign and Commonwealth Affairs), Sir Menzies Campbell now leader of the Liberal Democrat Party stated with respect to the UK that:

Failure to meet the Article 5 obligations would weaken the overall authority of the Ottawa Treaty and it would weaken the perceived authority of other humanitarian legal instruments. Such a weakening would increase the vulnerability of communities threatened by landmines internationally by legitimating failure by their governments to meet this same commitment."

Nearly one year later, the President Designate of the Seventh Meeting of States Parties highlighted continuing problems in promoting compliance in this area:

Despite clarifications made at the 6MSP, continuing ambiguity on mine clearance was evident in 2006 [...]. Of the 45 States Parties that have indicated they must fulfil obligations under Article 5 of the Convention,

- Nine have provided details on national demining plans / programmes which are consistent with Article 5 obligations and the ten-year deadline set by the Convention.
- Five have provided details on national demining plans / programmes which are not consistent with Article 5 obligations and / or the ten-year deadline set by the Convention.
- Twelve States Parties have provided details on national demining plans / programmes which are unclear regarding consistency with Article 5 obligations and / or the ten-year deadline set by the Convention.
- Eight States Parties have indicated that efforts are underway to establish a national demining plan / programme or to acquire the necessary information to do so.
- Eleven States Parties have not provided details on a national demining plan / programme. Immediate action must be taken by several States

Parties to develop and implement national demining programmes with a view to meeting their deadlines.

Thus the UK was one of a significant number of States Parties that had not provided a clear or adequate plan of action towards meeting the Article 5 obligation.

That the UK's position in this regard could serve to legitimate non-compliance by other States had already been acknowledged by UK officials in an internal report more than a year earlier:

[...] if the UK were to make no attempt to clear the Falklands minefields, this may provide an alibi for the unwilling and unscrupulous and reduce our ability to influence other States Parties to meet their obligations.

Later this same report tries to resolve the UK's failure to effectively address its own obligation with the risk of other states "ducking their responsibilities:"

We also need to influence the debate in the Ottawa Convention on the implementation of Article 5, prompted by growing acceptance that the original aim of the Convention - a world cleared of anti-personnel mines by ten years after entry into force - will not be achieved. It might be possible to use our experience in the Falklands to reintroduce the concept of prioritisation in the way that the States Parties treat requests for extensions under Article 5, possibly by developing standard criteria. This would need to take into account the views of NGOs and must be done in a way that does not allow states to duck their responsibilities, especially where there are genuine humanitarian issues.

No reasonable basis is presented however as to why the UK should not be considered amongst those seeking to duck their responsibilities. "Prioritisation" and later in the text "lack of impact" and "general lack of enthusiasm for clearance amongst the inhabitants" are put forward as the key points to be emphasised. It is hard to see how other states supposedly more guilty of "ducking responsibilities" would put forward a weaker case than the UK by any "standard criteria" that may be developed. Any such states would no doubt also be able to point to some minefields that were not considered a high priority or were considered not to be of high "impact." It should be remembered again that during the negotiation of the Convention exceptions to the Article 5 obligation put forward by the UK on similar grounds were explicitly rejected.

As we have seen, concern was raised during the Convention negotiations and has been raised since by senior UK politicians and internally by UK officials that failure by the UK effectively to address the minefields in the Falklands undermines efforts to promote Article 5 compliance internationally. This detrimental impact is not experienced only at the very end (at some point where the UK definitively has or has not cleared these minefields) but is experienced on an ongoing basis as the UK fails to act in accordance with its obligations. Through the Nairobi Action Plan, Article 5 compliance is considered by States Parties to the Convention to be "the most significant challenge to be addressed" – one that has "crucial implications for human security."

Post-feasibility study: blame the technical challenges

When the feasibility study is finally undertaken the UK is likely to look to its results for an excuse for its lack of compliance with Article 5. Such an approach will try to suggest that the nine year gap between signing the Convention and undertaking the study should be ignored – that the reasons why the UK cannot comply can all be found in the technical findings of the study.

Even as long ago as 19 October 1999 the UK Government has been considering the sort of “good reasons” that might justify an extension:

Mrs. Curtis-Thomas: To ask the Secretary of State for Foreign and Commonwealth Affairs when his Department expects to clear the anti-personnel mines that remain in the Falkland Islands.

Mr. John Battle (Minister of State, Foreign & Commonwealth Office): We are fully committed to the Ottawa Convention, which entered into force in the UK on 1 March 1999. It requires us to clear all anti-personnel mines from the Falkland Islands within 10 years of entry, unless we can show good reasons why an extension should be granted. Such reasons may include humanitarian, environmental and technical considerations. Mine clearance in the Falkland Islands is both difficult and dangerous and we should be keeping these points in mind.

The “good reasons” suggested here as providing the possible basis for an extension would all need to be determined by a substantive feasibility study. But with such a feasibility study being undertaken so late as to leave only two years for the planning and implementation of the actual work then any “humanitarian, environmental and technical considerations” uncovered are likely to be secondary factors in creating the need for an extension.

If difficult environmental and technical conditions had delayed the clearance of the minefields throughout the process then these would surely be good reasons for an extension. However, nine years after signing the Convention these factors have had absolutely no practical impact – indeed the environmental and technical considerations have not even been assessed.

Conclusions

Landmine Action stands by its comments of 10 May 2006 to the Landmine Monitor. The facts and analysis presented here broadly support the summary that we presented at that time. As we noted in that summary the opportunity still exists for the UK to take radical action to address this matter. However, that window of opportunity is rapidly closing. The completion of the feasibility study will surely be a critical point for the UK in determining how to address this legal obligation. It is to be hoped that having undertaken some serious discussion on the issues now, the UK approach will clearly work to strengthen rather than weaken the fundamental vision of the Convention. Whether the approach proposed is sufficient will be for States Parties to decide.