Interpretation of "mined area" in Article 5 of the 1997 Mine Ban Treaty

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Article 5 of the 1997 Mine Ban Treaty requires States Parties to ensure the destruction of all anti-personnel mines from mined areas. This paper argues that interpretation of the Article's obligations can only be done in relation to the methodologies by which all reasonable effort would be made to achieve this outcome. Within the treaty text the following paragraphs are of central importance:

Definitions

> "Mined area" means an area which is dangerous due to the presence or suspected presence of mines.

Article 5

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

2. Each State Party shall make every effort to identify all areas under its jurisdiction or control in which anti-personnel mines are known or suspected to be emplaced[1] …

The critical issue within these paragraphs is the concept of a "mined area" as an identifiable "area".

The term "area" itself is not defined within the treaty and the argument of this paper is that this can only reasonably be understood, for purposes of treaty interpretation, in relation to the methodologies of mine action.

It is helpful to begin by considering the extremes of possible interpretation, both of which can be recognised as unreasonable:

1. A mined area is considered as the whole territory of a State Party with suspected contamination. In this case the mined area would be huge and would encompass areas where people live and work without any concern regarding the risk of mines; or
2. A mined area is considered only as the area of ground immediately surrounding each individual anti-personnel mine. In this case mined areas would be very small and in many cases numerous mined areas would be found together in a wider location that people would not ordinarily enter due to the risk involved.

These extremes provide an indication that the concept of an area has to be defined somewhere between these two poles. This can be done in relation to the clearance methodologies of mine

[1] There is a slight contradiction between paragraphs one and two of Article 5 in that the later only refers to identification of areas where mines are "known or suspected to be emplaced". It is arguable that this does not therefore include areas to which mines have moved having been emplaced elsewhere. However, given that paragraph one of Article 5, in conjunction with the definition of mined area, requires destruction of mines from areas where their "presence" is suspected, the narrower reading of paragraph two should probably be considered unreasonable.

action. At the most basic level, these methodologies split between two broad operational concepts:

1. One operational concept applies structured methodologies to an area of land in order to clear all[2] mines within that defined area. Such a deployment will be based on information suggesting contamination with multiple items (information that may be based on minefield maps or gathered through non-technical or technical survey). Teams remain operational on the site for some time.
2. The second operational concept responds to individual incidents and items found. The response is primarily to remove any items that have been found and to check for evidence of further items in the immediate vicinity. Unless this process provides new information of wider contamination (which may suggest a "mined area"), the teams are operational in the location only for a short period of time.

Whilst loosely defined, the first of these operational concepts is generally applied to areas and the second is generally responsive to individual items. It is the argument of this paper that a "mined area", in terms of Article 5 of the Mine Ban Treaty, is an area on which the first of these operational concepts would reasonably be applied.

The choice of appropriate operational concept is generally dictated by the information available on the threat, the anticipated impact of the work on local populations (both in terms of residual risk to that population and the cost of denying them access to land that they would otherwise put to use), and the resources that can reasonably be applied.

The balance of these factors is the only way of determining which operational concept is appropriate. Returning to our extreme interpretations of an area, the following suggest the problems of applying these approaches in an effort to meet the treaty's obligations:

1. It would clearly be inappropriate to apply an area clearance concept to a whole country (adopting a blanket 'presumption' of contamination) – the information available would allow many areas to be exempt from clearance because they have been repeatedly used without incident, and there would be many other areas where there is no positive indication of contamination; treating the country as a minefield would stop the population from working whilst the task was undertaken, much of the clearance would do nothing to increase safety and it would be resource inefficient and time consuming to operate on this basis.
2. On the other hand it *might* be inappropriate to treat all of the contamination only through responsive teams (adopting a 'presumption' of safety in all areas) – information might suggest that some locations are contaminated by multiple items; in this case the local population would be at risk and would have land denied from productive use by such contamination; it would be resource inefficient and time consuming to tackle that contamination through this approach.

Whilst at the extremes this is fairly straightforward, in practice the appropriate choice of operational concepts can require a balancing of the relevant factors. Thus what is considered a "mined area" as opposed to anti-personnel mine contamination outside of a "mined area" will depend on how these factors are weighed by mine action authorities and operators.

In addition, the humanitarian imperative of the treaty requires a normative interpretation of this balance. A State Party entirely lacking in resources for clearance cannot claim that it has cleared all mined areas simply because this constraint prevents them from applying an area

[2] It should be noted here that all methodologies contain some risk of missing mines, for the purposes of this paper it is the intention of the methodology to clear all mines, whilst recognising this qualification that is important.

clearance methodology. Similarly, the assertion that a known minefield is not having a negative impact on the local population now cannot be used to avoid its definition as a mined area.

Thus, the interpretation of "mined area" should be based on an "area" that *would* be cleared of all mines using an area clearance methodology by a mine action capacity *able* to make all reasonable efforts.

In line with IMAS 08.20 (Section 3), the criteria for "all reasonable effort" should in the first instance be defined nationally by a National Mine Action Authority.[3] However, this definition should also be subject to scrutiny by other States Parties to the Mine Ban Treaty as part of the collective effort to ensure common standards in the implementation of the treaty.

A country may thus be considered to have met the obligations of the treaty when:

1. All mined areas have been cleared of mines using an area clearance methodology; and
2. It is considered that additional assessment and survey work would not reveal further such mined areas.

Such a circumstance does not mean that all mines have necessarily been found and cleared in the country, but that the strong expectation is that any further mines found would be addressed by a responsive capacity without an additional "mined area" being identified.

[3] See also: *IMAS 08.20, First Edition, 10 June 2010, Section 8.2 - All reasonable effort*: 'The term "all reasonable effort" is widely used in many industries and legal systems. It refers to the level of effort that required to be expended to achieve a desired level of confidence in the output of a system.'