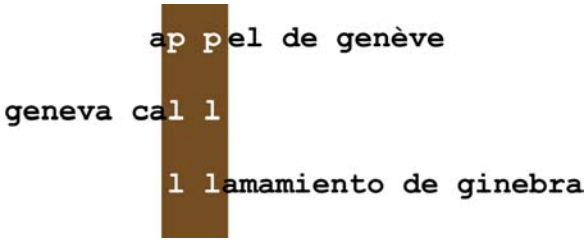

Engaging Non-State Actors Toward Compliance With Humanitarian Norms

(with focus on landmines, child soldiers and torture)

A workshop to share the lessons learned by NGO coalitions active in this process and to discuss prospects for cooperation

15th July 2001

Geneva

SUMMARY REPORT

INTRODUCTION

The workshop, organised by Geneva Call with the support of the Swiss Federal Department of Foreign Affairs, took place on 15 July 2001 at the International Conference Centre of Geneva. It brought together representatives of the Non-State Actors Working Group of the International Campaign to Ban Landmines (ICBL), the Coalition to Stop the Use of Child Soldiers, the World Organisation against Torture (OMCT), Geneva Call and a small selection of individual experts and representatives from other organisations.

The objectives of the workshop were the following:

- to share knowledge and experiences on engagements with non-State actors (NSAs);
- to draw general lessons from these diverse experiences; and
- to discuss prospects of cooperation among attending NGO coalitions, thereby contributing to the development of best practice to enhance NSA receptivity and compliance with humanitarian norms.

The following report summarises the presentations, highlights and conclusions of the discussions.

HIGHLIGHTS OF DISCUSSIONS

1. Non-State actors and landmines, child soldiers and torture

1.1 ICBL Non-State Actors Working Group

Nature of the problem

The Working Group representatives briefly outlined the origins of their work in engaging NSAs in the mine ban process.

A call for action in respect to NSAs came in 1997 from several country campaigns within the ICBL, among others from Colombia, Philippines and South Africa, countries with a long history of internal armed conflict. Whereas the campaign directed at governments was already well advanced, these campaigns raised the issue of NSAs involvement in the landmine problem:

- mines, anti-personnel mines (AP mines) in particular, are being used and often also produced not only by States, but also by NSAs as well in many armed conflicts around the world.

- NSAs are active or exercise *de facto* control over mined land, such as in southern Sudan or northern Iraq. The people living in these affected areas thus face a serious landmine problem and are often themselves victimised by this weapon.

- The NSA reality has also an adverse impact on the States mine ban policy. In some countries, governments have linked their reluctance to ban AP mines on the grounds that the NSAs they are fighting continue to use them. Other governments justify their abstention on the grounds that the existence of territories under NSA control make

difficult, if not impossible, for them to fulfil their obligations under the Ottawa Treaty.

The NSA involvement in the landmine problem made it evident for these country campaigns that the efforts focused on States needed to be complemented by campaigning work directed at NSAs. As a result, in 1997, a NSA project was initiated by a group of national campaigns and other members of the ICBL. The issue was discussed for the first time during a conference held in Maputo in February 1997. Campaigners in other countries echoed the proposal and began joining in. In May 1999, this *ad hoc* working group on NSAs was formally established at the general assembly of the ICBL.

Legal framework

Existing landmine treaties fail to incorporate a ban on the use of landmines by NSAs. The 1997 Ottawa Treaty or Mine Ban Treaty provides only for State Party undertakings or obligations. It contains no specific application to NSAs or internal armed conflict. Sub-national entities become obligated only through national implementation measures to be undertaken by each State Party as required by Article 9. The landmine Protocol II of the Convention on Conventional Weapons also leaves criminalisation to the national level. However, while not bound by conventional international law, NSAs are bound by customary humanitarian law. Customary humanitarian law applies normative rules to all parties to a conflict, including NSAs. Three general principles are relevant to AP mines. They prohibit

- inherently indiscriminate weapons;
- weapons whose harm is disproportionate to their military objectives; and
- weapons whose use violates the "public conscience".

The Working Group believes that these principles require NSAs to adopt a complete ban on the use, production, stockpiling and transfer of AP mines. In the end however, international humanitarian principles are only practically relevant if NSAs comply with them. The process of engaging NSAs and their constituencies in the landmine ban is then primary.

Tools for engagement

The Working Group representatives briefly outlined a number of tools or instruments the Working Group has devised to engage NSAs in a landmine ban. They distinguished "soft approaches" from "hard" criminal prosecution and military repression. Soft approaches rely on a persuasive and inclusive process of dialogue and education, and may utilise formal agreements. There are various models of agreement or commitment NSAs can take: unilateral declarations, bilateral agreements between governments and NSAs (usually in the context of a broader peace or ceasefire process), Memoranda of Understanding (MoU) involving international organisations or NGOs for humanitarian purposes, multilateral undertakings among NSAs such as mine-free zones or codes of conduct, and the Geneva Call mechanism. The NSA WG representatives particularly detailed this latter mechanism.

Geneva Call was launched in 2000 by members of the Working Group to provide a mechanism for NSAs to commit themselves to a total ban on AP mines. Its creation arose from the need to fill a gap in the international regime whereby NSAs cannot enter into or adhere to inter-State treaties such as the Ottawa Treaty. It was inspired by the "precedent" or "model" of the 1949 Geneva Conventions and 1977 Additional Protocol I, which, under Article 96 (3), allows for national liberation movements to deposit their declarations of adherence at the Swiss Federal Council. The Geneva Call mechanism is for NSAs to sign a standard "Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and

for Cooperation in Mine Action" (here after the "Deed of Commitment"), or to deposit their own mine ban declarations. The custodian for these deeds is the Government of the Republic and Canton of Geneva.

Under the "Deed of Commitment", signatory groups commit themselves to:

- prohibit under any circumstances the use, production, stockpiling and transfer of AP mines. It is worth noting that AP mines are defined under the "Deed of Commitment" as all devices which can be activated by victims, not just those designed to do so. Such a definition is actually an improvement of the definition provided in the Ottawa Treaty.

- issue the necessary orders and directives to its commanders and fighters for the implementation and enforcement of its commitment to a total ban on AP mines, including measures of information dissemination and training, as well as disciplinary sanctions.

- cooperate and undertake, in areas under their control, stockpile destruction, mine clearance, victim assistance, mine awareness and any other forms of mine action.

- treat this commitment as part of a broader commitment toward humanitarian norms, thus rejecting the use of inhumane means of warfare.

Furthermore, the accountability provision in the "Deed of Commitment" binds signatory groups to allow and cooperate in the monitoring and verification by Geneva Call of their commitment to a total ban on AP mines. This carries with it the obligation to provide information and compliance reports in the same way that States Parties have to submit under article 7 of the Ottawa Treaty an annual report detailing the measures they have put in place. This is also includes field visits and inspections in those cases where allegations are made of violations of their commitments. Such an accountability mechanism is currently being tested with the Moro Islamic Liberation Front (MILF), a signatory group of the "Deed of Commitment", for apparent mine use reported in the latter part of 2000 and 2001, when conflict between the MILF and the government forces intensified. Pursuant to the mechanism envisioned in the "Deed of Commitment", Geneva Call is undertaking plans to send a mission of experts to Mindanao to verify these allegations and secure the MILF commitment in practise.

The Geneva Call mechanism is in its early stages of development, said the Working Group representatives. It was draft based on the experience of members of the Working Group engaged in campaigning NSAs. It is still an evolving mechanism, and is subject to improvement and further development.

Engagement experience

The Working Group has been active in a number of fronts since its creation in 1997:

- it conducted research and disseminated information related to NSAs and landmines, in partnership with the NSA data and documentation base independently hosted by International Alert, a conflict resolution organisation based in London.

- it developed a framework of approach and guidelines through a conference "Engaging Non-State Actors in a Landmine Ban" held in Geneva in March 2000. This landmark conference brought together over one hundred representatives of NGOs, international organisations, governments and NSAs to explore ways of engaging armed groups in the mine ban process. It consolidated opinion that the NSA aspect of the landmine problem needed to be addressed in a concerted fashion.

- it initiated and supported the field work of campaigners in the effort to engage NSAs. Since 1997, members of the Working Group have been directly or by proxy approaching NSAs in South and Southeast Asia, Latin America, North and East Africa, and South Europe to promote their awareness of the landmine problem and seek their commitment to a ban. So far, three NSAs, the Sudan People Liberation Movement/Army (SPLM/A), the Revolutionary Proletarian Army-Alex Boncayao Brigade and the MILF of the Philippines, deposited their unilateral declarations before the Geneva authorities. The latter two signed the standard "Deed of Commitment" under Geneva Call. Other groups have stopped using AP mines and indicated their willingness to consider renouncing this weapon as well as supporting mine action in areas under their control.

1.2 The Coalition to Stop the Use of Child Soldiers

Nature of the problem

The Coalition representative briefly highlighted the extent of NSA involvement in the use of child soldiers:

- though it is difficult to estimate the scale of the problem given limited accessibility to relevant information, research conducted by the Coalition suggests that children have been recruited by NSAs in at least 41 countries around the world[1];
- though in numerical terms most children are recruited by governments, children are more likely to be used in actual fighting as combatants by NSAs; and
- in terms of age distribution, NSAs tend to recruit younger children.

Due to the internal and protracted nature of today's armed conflicts, NSA involvement is likely to remain a very significant part of the child soldiers problem in the years to come.

Legal framework

International humanitarian law (1977 Additional Protocols to the Geneva Conventions), international human rights law (UN Convention on the Rights of the Child) and international criminal law set 15 as the minimum age for military recruitment and participation in armed conflict. But, as the Coalition representative emphasised, the past few years have seen some major breakthroughs at the international level towards a global ban on the use of child soldiers. In May 2000, after many years of negotiations, the UN General Assembly adopted the Optional Protocol to the Convention on the Rights of the Child. The Optional Protocol raised the standard from 15 to 18 years for direct participation in hostilities and for compulsory recruitment. This represents important progress. Moreover, the Optional Protocol

[1] For a comprehensive overview countries by countries, refer to the Coalition's 2001 global report, available at http://www.child-soldiers.org.

is the first international human rights standard to directly address the responsibility of NSAs. However, the Protocol unfortunately introduces a double standard about voluntary recruitment. In effect, whereas it prohibits armed groups from *any* recruitment, the Optional Protocol only *calls* on States to raise the minimum age and implement strict safeguards for voluntary recruitment under 18. This gap is very problematic for the Coalition's work in engaging NSAs.

While it falls short of the "straight-18" position, the Optional Protocol represents nevertheless a significant step forward. It also builds upon a number of other important developments in international law:

- International Labour Organisation Convention 182 has defined child soldiering as one of the worst forms of child labour. This is the very first time that a direct link has been made between child labour and use of children as soldiers. This legal development is particularly useful for the Coalition's advocacy because many left-wing opposition groups are sensitive to this argument;

- the new International Criminal Court will treat the use of child soldiers under 15 (not 18 unfortunately) as a war crime;

- the UN Security Council, the UN General Assembly, the Organisation for African Unity, the Organisation of American States, the European Parliament and the Organisation of the Islamic Conference have all condemned in resolutions the use of children as soldiers;

- the Convention for indigenous people prohibits military recruitment.

The Optional Protocol, together with these other developments, offers a good but complex legal framework. Practical application is difficult, said the Coalition representative, because organisations working to engage NSAs do not use the same standard.

Engagement experience

The Coalition has less field experience in engaging NSAs than the ICBL Non-State Actors Working Group. So far, it has not initiated direct contact with NSAs but it has done important preliminary groundwork:

- it produced research reports on more than 180 countries, detailing military recruitment laws, practice and (where appropriate) the use of child soldiers in conflict by both governments and NSAs;

- it developed a framework of approach and a methodology through a series of regional conferences. These conferences brought together governments, international agencies and NGOs but never included official NSA representatives, even though there have been a number of non written commitments made at the back of these conferences (ex. Taliban in 1999 or the Communist Party of Nepal);

- it mobilised public pressure and political will to end the use of child soldiers and establish 18 as the minimum age for all forms of military recruitment and participation in armed conflict, both on the part of governments and NSAs;

- it lobbied successfully for intergovernmental and regional bodies to take up this issue.[2]

Recognising the need to move forward, the Coalition has decided to establish a thematic working group on NSAs and is considering direct field engagement as the next step. The Coalition will engage NSAs through a combined process of dialogue and education and, if necessary, pressure, appealing to appropriate legal and normative reference points and to political self-interest (i.e. the long-term adverse impact of using child soldiers, especially for NSAs who are *de facto* governing authorities, the limited military effectiveness of children as soldiers, etc).

The Coalition representative concluded the presentation by pointing out important challenges the Coalition will face in its fieldwork. As mentioned above, one of the main challenges is the use of different standards by organisations engaging NSAs. The Coalition is campaigning for a global ban on the use of child soldiers under 18, but other organisations or campaigners, such as UNICEF, ICRC or the Special Representative of the UN Secretary General on Children in Armed Conflict, Mr. Olara Otunnu, who has extracted commitments for the protection of children from NSAs[3], work with below a straight-18 standard. Another related problem is monitoring. The Coalition representative particularly regretted the weakness of commitments made so far under the Special Representative since no effective capacity for sustained follow-up was provided to ensure that they are respected in practice.

1.3 World Organisation against Torture (OMCT)

Nature of the problem

The OMCT representative outlined the set of norms and mechanisms against torture which exist within the current international system. The main substantive legal instruments consist of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the rights of the Child. A multitude of mechanisms for enforcing the prohibition of torture has also been established, in particular within the framework of the UN Commission on Human Rights: thematic working groups, the Special Rapporteur on Torture, and various country mechanisms. However, despite this comprehensive framework, problems arise in applying it to NSAs. Whereas an increasing number of cases of torture committed by NSAs are reported, existing instruments fail to incorporate a ban on torture by non-State agents. In the current framework, torture only refers to situations perpetrated by State agents or with acquaintance of the State.
This problem has led to much debate about the scope of the legal instruments - especially in

[2] The UN Security Council has now adopted three thematic resolutions on children and armed conflict (1261, 1314 and 1379). Few months after the workshop, during debate on Resolution 1379, the Coalition succeeded in getting language in the resolution requesting the Secretary General to present the Security Council with a list of governments and armed groups using child soldiers in breach of their international obligations in countries that are (or might be) on agenda of Security Council. This is a major opportunity to name and shame some of the worst offenders and move the Security Council towards specific actions and sanctions against them.

[3] For example, during a visit in Sri Lanka in 1998, Mr. Olara Otunnu obtained the undertaking of the LTTE not to use children below 18 years of age in combat and not to recruit children less than 17 years old. One year later, following meetings with Otunnu, the FARC agreed to stop recruiting children below the age of 15 but failed to honour their promise.

situations of internal violence - and the extent to which NSAs can be held accountable under international law for acts of torture. As reminded the OMCT representative, human rights law was developed for the most part to regulate the conduct of States towards their own citizens. It is *de jure* applicable only to State entities. On the other hand, international humanitarian law does apply to all parties to an armed conflict, including NSAs. But its rules, at least for Additional Protocol II, are applicable only in situations of conflicts that reach a certain threshold of intensity.[4] As a result, the laws of war apply in very few cases, the conditions for their application either not being met in low-intensity conflicts that are below the threshold or being denied by governments who fear that admitting the applicability of Protocol II will confer international recognition on their opponent NSAs. These are the main limitations or gaps in the current international system. Since there is no mechanism at the international level to legally establish the nature of the conflict and deal with NSAs abuses, it leaves out many situations where international law should apply and NSAs be held accountable. In this sense, one can legitimately question the practical relevance of the current international regime where States, such as Colombia, do not control the whole territory or, such as Somalia, have collapsed, and are therefore not able to enforce their obligations. Some changes slowly are taking place but so far this is the basic situation.

In recognition of these problems, the OMCT welcomes the significant progress made recently in the framework of the International Criminal Tribunal for the former Yugoslavia and Rwanda as well as the Rome Statute of the International Criminal Court to the development and clarification of the rules and principles of international law relevant to the acts of NSAs.[5] The OMCT has also been following with great interest the initiative taken in recent years to introduce Fundamental Standards for Humanity. These standards, reflecting the most basic principles of human rights and humanitarian law, should apply to all actors. According to the OMCT, it would be appropriate to ensure that these standards are not used to justify a lowering of obligations to which States have already subscribed. The current trend in international law is to extend protection to any act committed, not only by agents of the State, but also by non-State agents. This development should not lead, under the pretext of a false balance, to a calling into question by certain States of their obligations both under *jus cogens* and their commitments within the framework of international instruments. On the other hand, armed groups are not the only NSAs responsible for human rights abuses. Documents prepared hitherto in the context of the creation of Fundamental Standards of Humanity do not appear to have paid sufficient attention to other NSAs, in particular to transnational companies.

Engagement experience

The OMCT does not have extensive experience in field engagement with NSAs. Its experience is restricted to cases of dialogue on matters such as the release of hostages or prisoners, particularly in Colombia, and, through its network of NGOs, reporting of abuses committed by NSAs.

[4] Protocol II applies to situations of conflicts taking place between governmental armed forces and armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations. It excludes situations of internal disturbances and tensions such as riots, isolated and sporadic acts of violence and other acts of a similar nature.

[5] For example, under the Rome Statute, torture cases can be attributed to non-State agents.

However, the OMCT expressed its active support of the Geneva Call initiative. According to the OMCT representative, Geneva Call is a timely response to the problems mentioned above because it provides not only a tool for educating NSAs on human rights and international humanitarian law but also a mechanism allowing NSAs, which can not enter into treaties, legislation and other exclusively state-based mechanisms, to make commitments and to be held accountable for them. For these reasons, although the issue of monitoring needs still to be threshed out, the OMCT is interested in expanding the Geneva Call mechanism to include commitments made against the use of torture.

2. General discussion and lessons learned

In the general discussion, several participants raised the issue of written commitments made by NSAs. The case of the MILF commitment was discussed in particular. In March 2000, this rebel group was among the first to sign the "Deed of Commitment". In the summer of 2000 and in 2001, accusations were made by the Government of the Philippines that the MILF had emplaced landmines as part of the defensive measures of its biggest camps against attack by the army. Subsequent follow-up in the field revealed that there were some misconceptions regarding the correct concepts of total ban on the use of AP mines and the types of mines covered by the ban. The MILF did not seem to see the inconsistency between the "Deed of Commitment", understood to be a prohibition of all victim-activated mines, and their implementation of the earlier MILF policy of only "strictly defensive and discriminate" use of AP mines. Pursuant to the accountability mechanism envisioned in the "Deed of Commitment", Geneva Call began preparations for holding a fact-finding mission to Mindanao.[6] This experience revealed an important lesson. It demonstrates the necessity, before entering into any written agreement, to ensure that the signatory parties are clear on the interpretation of key concepts. The same problem may happen in other contexts. A participant raised for example the question of the definition of a child soldier since the 18 years standard conflicts with cultural realities. Another option to avoid misinterpretation would be to encourage NSAs to write their own statements subject to certain criteria (such as a total ban on AP mines). Furthermore, as another participant pointed it out, the agreement needs also to clarify the status of the custodian and include follow-up mechanisms.

In this regard, several participants highlighted the importance of providing support for NSAs to implement their commitment. For example on the landmine issue, there is much more to a mine ban than gathering signed agreements. Ultimate progress is measured not in terms of commitments made by NSAs, important as these can be as reference points, but in terms of their implementation of an effective ban. It is for that reason that written commitments should go beyond banning the use, production and transfer of AP mines measures but also contain clauses on co-operating in mine action (i.e. stockpile destruction, mine clearance, victim assistance and mine awareness). In some cases, failure to comply is less a matter of will than lack of capacity or resources. Providing support for NSAs to enforce a ban is therefore a crucial part of the process. This includes for example capacity-building for demining in NSA-controlled areas. It may also include the enhancement of local capacity to ensure safe demobilisation and sustainable reintegration of former child soldiers.

There was also some discussion among the participants about the definition of NSAs. By

[6] Delayed several times due to political instability and security concerns, the mission finally took place in April 2002. The mission was successful in securing a reaffirmation of MILF's commitment to an unconditional ban on AP mines and in threshing out some landmine incidents, especially the correct concept of "command detonation". Command-detonated munitions as well as anti-tank mines are not covered by the ban.

NSAs, we usually mean armed groups which use force to achieve political objectives. However, there are other NSAs who do not have the same kind of political focus, such as criminal entities, mercenaries or private companies. These may also deserve engagement, not least because they are responsible for human rights abuses. Another problem is the classification of militia or paramilitary forces that operate in apparent support of an existing government. Of course, where governments acknowledge their control over such groups, it should be the government that must be held accountable for their behaviour. But, in many situations, governments deny they exert control over them, and it is difficult to distinguish a State-controlled paramilitary force from an autonomous pro-government force. Such different types of NSAs should require different strategies of approach. In the end however, selecting groups on a case-by-case basis might prove the most fruitful way to follow.

Another point made during the general discussion is the link between humanitarian work and the peace process. As the preparations of the Geneva Call mission to the MILF showed, a humanitarian mission requires a minimum condition of ground safety, which in this case had to rely on the ongoing peace process. Both parties agreed on the visit could not take place until after the peace talks were resumed (they were suspended for one year) and effective cease-fire mechanism in place. At the same time, humanitarian work may itself reinforce the peace process as a confidence-building measure. That link reflects another lesson: organisations active in engaging NSAs on particular issues such as the ban on landmines or child soldiers should not work in isolation with other humanitarian and peace initiatives.

PROSPECTS FOR COOPERATION

The meeting concluded on the need to intensify exchange of information and cooperation among coalitions.

Following action points were agreed by the participants:

1. to compare coalitions respective NSA typology and information-base on NSA involvement;

2. to selectively conduct joint action on NSAs of common interest as a way to test out field cooperation;

3. to articulate common framework of approach and arguments/languages, thus contributing to better advocacy in engaging NSAs;

4. to identify common resource persons and experts;

5. to collectively lobby governments and other bodies on the importance of engaging NSAs toward compliance with humanitarian and human rights norms;

6. to explore the possibilities of expanding the Geneva Call mechanism to include commitments made by NSAs against the use of torture and the use of child soldiers;

7. to support the role played by Geneva Call in facilitating communications with and among coalitions on matters related to NSAs; and,

8. to further develop exchange of experiences and possibilities of cooperation initiated during this meeting through subsequent workshops, integrating the experience of other organisations and networks working with NSAs.

Another significant outcome of the meeting was the announcement made that the SPLM/A was going to sign the Geneva Call "Deed of Commitment". The actual signing took place few months after the workshop, in October 2001 in Geneva.