

**GROUP OF GOVERNMENTAL EXPERTS OF
THE STATES PARTIES TO THE CONVENTION
ON PROHIBITIONS OR RESTRICTIONS ON
THE USE OF CERTAIN CONVENTIONAL
WEAPONS WHICH MAY BE DEEMED TO BE
EXCESSIVELY INJURIOUS OR TO
HAVE INDISCRIMINATE EFFECTS**

CCW/GGE/VI/WG.2/WP.2
13 November 2003

Original: ENGLISH

Sixth Session

Geneva, 17-24 November 2003

Item 9 of the agenda

Working Group on Mines Other Than Anti-Personnel Mines

**Non-State Actors and the humanitarian dangers of Mines Other Than Anti-Personnel
Mines**

Prepared at the request of the Coordinator by Mine Action Canada

Introduction

1. The irresponsible use of Mines Other Than Anti-Personnel Mines (MOTAPM) threatens the lives, limbs and socio-economic development of civilian populations. MOTAPM can also pose a mortal danger for humanitarian aid workers, peacekeepers and military forces, as recent tragic events have demonstrated. The risks associated with MOTAPM have now been widely acknowledged by States Parties to the CCW.
2. The majority of armed conflicts around the world today involve Non-State Actors (NSAs). Of the 19 major armed conflicts recorded in 2002, 18 involved one or more NSAs.¹ Thus, in order to minimise the civilian consequences of modern warfare, International Humanitarian Law (IHL) and, in particular, restrictions on the use of weapons with indiscriminate effects must apply to all parties to a conflict, not just to States. It is generally recognised that NSAs are bound by customary rules of IHL² and that international legal regimes are evolving to deal with the nature of contemporary conflict. The ICRC recently stated that: “It must be recognised that IHL is not a fixed body. It evolves.”³
3. The challenge of ensuring that NSAs adhere to a new Protocol on MOTAPM is by no means insurmountable and it should not be a barrier to proceeding with work on a new CCW Protocol addressing the humanitarian impact of MOTAPM. The CCW mandate on the subject of MOTAPM requires that the Group of Governmental Experts take into account questions involving the use of MOTAPM by NSAs in developing its response to the MOTAPM issue.⁴ This paper is intended to advance the current proceedings taking place in the CCW on this urgent humanitarian issue.

1 SIPRI Yearbook 2003, Oxford University Press, Table 2A.3, pp 115-121.

2 Gasser, Hans-Peter, (1993) *International Humanitarian Law: An Introduction*, Berne, Peter Haupt (Separate print from Hans Haug, *Humanity for All, The International Red Cross and Red Crescent Movement*), p 69.

3 Ryniker, Anne, *Implementing International Humanitarian Law*, Collegium No. 25, Summer 2002, pp. 71-82 -

<http://www.coleurop.be/collegium/Collegium25.pdf>

4 UN document CCW/MSP/2002/2, paragraph 22.

Measures and restrictions that apply to NSAs

4. Although all groups and individuals within a State Party are bound by the Geneva Conventions, some groups may not recognise the authority of a particular State. While it is true that the entire body of IHL applies in a different manner to NSAs than it does to States, IHL that is considered customary law applies universally to all parties to a conflict, irrespective of whether they recognise a sovereign authority.⁵

5. Customary IHL includes the four Geneva Conventions and the Hague Conventions that set out the fundamental principles of the law of armed conflict.⁶ Common article 3 of the four Geneva Conventions applies specifically to cases of non-international armed conflict. Common article 3 is considered customary IHL and it applies to all parties to a conflict including NSAs, which, by definition, cannot be signatories to the Geneva Conventions.⁷ Common article 3 contains provisions relating to the protection of the civilian population and these rules specifically prohibit “violence to life and person, in particular murder of all kinds, mutilation...”⁸ Since MOTAPM do not discriminate between civilians and military personnel, the irresponsible use of such mines can therefore be considered a violation of the fundamental rules of common article 3 of the Geneva Conventions.

6. Additional Protocol II of the Geneva Conventions contains stricter provisions relating to the use of weapons, but it is still considered Treaty IHL and so it is only applicable to States Parties. However, as legal practice continues to crystallize in this area, Additional Protocol II will eventually become customary IHL and will apply universally to all parties to a conflict.

7. Special agreements between States and NSAs can also bind NSAs to abide by rules prohibiting or restricting the use of weapons. These agreements are provided for under common article 3 of the Geneva Conventions and are referred to below in the section dealing with engaging NSAs on the issue of MOTAPM.

8. Certain prohibitions and restrictions contained in the CCW itself also apply to NSAs. It will be recalled that the 2001 amendment to article 1 of the CCW extends its scope to non-international armed conflicts. In addition, key provisions in Amended Protocol II of the CCW refer to “parties to a conflict” rather than simply to “High Contracting Parties” and these provisions clearly set out restrictions on the use of all mines, including MOTAPM.⁹

9. Human rights law and international criminal law also present options for holding NSAs accountable for breaches of IHL or human rights law. Such crimes have become increasingly prevalent in armed conflicts around the world¹⁰ and in response to these crimes, the international community has broadened the definition of human rights violations to cover

5 See the forthcoming ICRC Study on Customary Rules of IHL, to be published by Cambridge University Press in 2003.

6 For full texts of IHL instruments see the ICRC Treaty Database at – <http://www.icrc.org/ihl>

7 Santos, Soliman M. Jr., *Legal and Ethical Reasons for Non-State Armed Groups to Adhere to a Landmines Ban*, “Looking Back, Looking Forward” Workshop on Engaging NSAs in a Landmine Ban, 13 September 2003, Bangkok.

8 ICRC, Extract from “Basic rules of the Geneva Conventions and their Additional Protocols”, Chapter V: Protection of victims of non-international armed conflicts - <http://www.icrc.org/web/eng/siteeng0.nsf/iwpList104/6D73335C674B821DC1256B66005951D1>

9 Articles 1, 3, 5, 9, 10, 12 of Amended Protocol II to the CCW specifically refer to “parties to a conflict” in addition to “High Contracting Parties” - <http://www.icrc.org/ihl.nsf/0/05e54e8fb1a42782c125641f002d5ee5?OpenDocument>

10 United Nations, *Report on the Protection of Civilians in Armed Conflicts*, UN document S/1999/957, 8 September 1999, p. 2.

States and NSAs engaged in conflict.¹¹ The irresponsible use of MOTAPM potentially violates core human rights to life, to the dignity of the person, and to development.¹²

Engaging NSAs on the use of MOTAPM

10. The most effective way to ensure that NSAs adhere to the rules of IHL concerning the irresponsible use of weapons is to educate them about the principles of IHL and about the mutually beneficial nature of its provisions. NSAs clearly have responsibilities under IHL, but they also have responsibilities to the people they represent, or claim to represent. In this way some NSAs have a direct interest in reducing the humanitarian impact of MOTAPM. Many international humanitarian organisations have long recognised the benefits of engaging NSAs in a dialogue on the principles of IHL.¹³ In addition, it has been suggested that if NSAs are given a voice and are involved in dialogue, they are considered less likely to resort to conflict.¹⁴

11. Precedents in the Ottawa Mine Ban Treaty have shown that efforts to engage NSAs in restrictions on the use of certain weapons can be successful in increasing adherence to IHL. NSAs have signed declarations and Special Agreements as provided for under the Geneva Conventions in the Philippines, Somalia, and Sudan for instance.¹⁵ The various tools for engaging NSAs in this way include unilateral declarations; bilateral agreements; Memoranda of Understanding; Deeds of Commitment¹⁶ and multilateral undertakings.¹⁷ According to Geneva Call, a leading NGO working on this subject, several governments have expressed interest in and provided support for work of this kind, including the European Commission and at least six States Parties to the CCW.¹⁸ The work that has been done to engage NSAs in the Ottawa Mine Ban Treaty could form the basis for future engagement with NSAs on restricting the use of MOTAPM.

12. Engaging NSAs on the issue of mines can also help to involve NSAs in mine clearance and the peacebuilding process in general. For example NSAs have participated in demining efforts in post-conflict situations in Central America and in Africa.¹⁹

13. It is important to note that NSAs are subject to IHL without having a legal personality under other rules of international law. Adherence to IHL does not change the legal status of a NSA or provide it with any new legitimacy.²⁰

11 Policzer, Pablo, (2002) *Human Rights and Armed Groups: Towards a new Policy Architecture*, Armed Groups Project - http://www.armedgroups.org/_media/0207policzer_humanrights.pdf.

12 United Nations Department of Public Information, Universal Declaration of Human Rights - <http://www.unhcr.ch/udhr/lang/eng.htm>

13 Bruderlein, Claude, (2000) *The role of non-state actors in building human security: The case of armed groups in intra-state wars*, Centre for Humanitarian Dialogue, Geneva.

14 Busé, M., (2001) *NSAs: Their Significance in the Global Picture*, Journal of Mine Action, 5.3, Fall 2001 - http://maic.jmu.edu/journal/5.3/features/maggie_buse_nsa/maggie_buse.htm

15 Santos, M. Soliman, (2003) *Tools or instruments for non-state armed groups to adhere to a landmines ban*, "Looking Back, Looking Forward" Workshop on Engaging NSAs in a Landmine Ban, 13 September 2003, Bangkok.

16 See Geneva Call website: <http://www.genevacall.org/resource/references/deeds.htm>

17 Santos, M. Soliman, (2003) *Tools or instruments for non-state armed groups to adhere to a landmines ban*, "Looking Back, Looking Forward" Workshop on Engaging NSAs in a Landmine Ban, 13 September 2003, Bangkok.

18 Geneva Call Statement, Fifth Meeting of States Parties to the Mine Ban Treaty, 17 September 2003, Bangkok. Geneva Call website: www.genevacall.org

19 Busé, M., (2003), op cit.

20 Sassoli, Marco and Antoine Bouvier, (1999), *How does Law Protect in War: Cases, Documents, and Teaching Materials on Contemporary Practice in International Humanitarian Law*, Geneva, ICRC, p. 214.

Existing and future rules on MOTAPM

14. It is essential that all States Parties fully implement all the provisions of Amended Protocol II, including the provisions prohibiting transfers of MOTAPM to recipients other than States or State Agencies.

15. However, the provisions in Amended Protocol II do not adequately address all the elements of the humanitarian danger posed by MOTAPM. There has been significant interest in and considerable progress towards developing a new Protocol on MOTAPM in the CCW. In order to respond comprehensively to the MOTAPM problem, any new Protocol must address the following points: detectability; limits on the life of AVM; fuse standards; marking, fencing and monitoring; and, transfers.

16. In the same way as the proposed Protocol on explosive remnants of war, it is essential that any new Protocol on MOTAPM apply to all parties to a conflict. For this reason the language used in the Protocol should clearly reflect the amendment of the scope of the CCW to cover non-international armed conflicts and the key provisions should refer to “High Contracting Parties and parties to a conflict” in the same way as Amended Protocol II of the CCW.

Summary

17. Even if they do not recognise any sovereign authority, NSAs are bound by international humanitarian law and can be held accountable under various legal regimes including customary IHL, human rights law and international criminal law.

18. Where possible, it is important to try and engage NSAs in legal agreements relating to armed conflict and international humanitarian law. Such agreements are provided for under the Geneva Conventions and many precedents exist for this practice.

19. There is an urgent need to implement comprehensive regulations on the use of all MOTAPM, whether used by States or by NSAs. A hand-emplaced anti-vehicle mine laid outside a marked area presents the same mortal danger to civilians and humanitarian relief workers whether the mine was laid by a State or by a NSA.
