

Introduction

In November 2003, the States Parties to the Convention on Certain Conventional Weapons (CCW) met in Geneva and agreed to the creation of a fifth protocol on explosive remnants of war (ERW).¹ This new international humanitarian law is designed to minimise the risks and effects of ERW in the post-conflict period.

While the Ottawa Convention has focused attention on the issue of AP landmines, the mine action community has long known that in the post-conflict environment, there are many different explosive hazards that can be found. In 2000, it was the high number of injuries caused by cluster bomblets in Kosovo that led the International Committee of the Red Cross (ICRC) to call for new international law to address ERW.² Three years later, the new “Protocol on Explosive Remnants of War” was concluded.

Implications for Mine Action

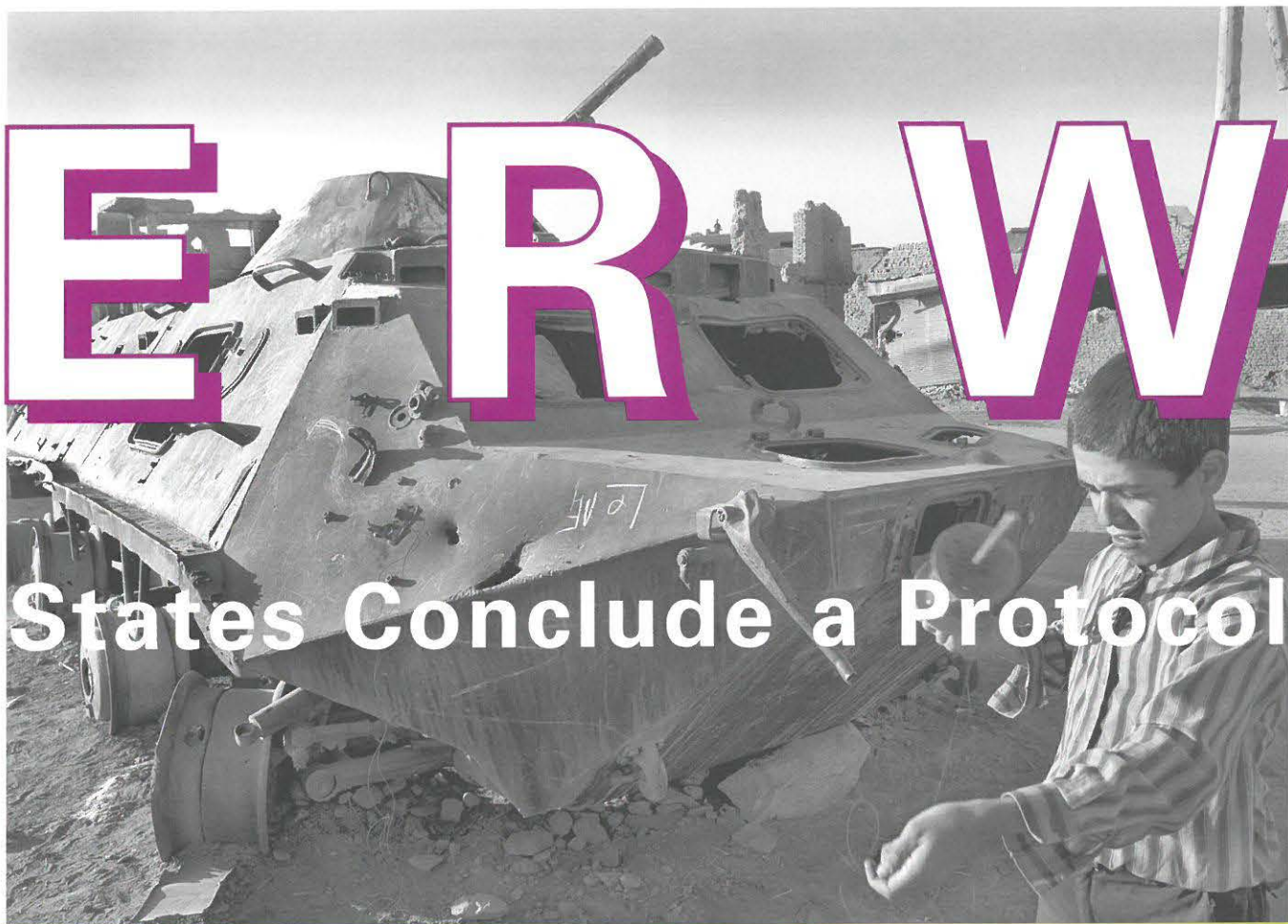
The new protocol is a recognition by the states of the serious post-conflict humanitarian problems caused by ERW. The protocol contains 11 articles and a separate (non-binding) technical annex. These articles specify post-conflict remedial measures of a generic nature to minimise the humanitarian risks and effects of ERW. The main articles in this protocol are Article Two, which provides definitions of explosive ordnance (EO), UXO, abandoned EO and ERW, thereby becoming a legal term in international law;³ Article Three, which covers clearance, removal or destruction of ERW; and Article Four, on the recording, retaining and transmission of information.

The future successful impact of the protocol will depend on how the states implement its contents. There is scope for different interpretations of what is required from signatories. However, if we take a positive view and

assume the states enact all measures of the protocol and the technical annex, the main difference for the members of mine action community will be to make their job easier and more efficient in the post-conflict period.

First, the disciplines of mine clearance and mine risk education (MRE) should benefit.⁴ The protocol makes States Parties responsible, to varying degrees, for the provision of resources (technical, financial, material and personnel) to undertake work in these areas. What is not clear, however, is how many and through which channels resources will be allocated. The protocol allows for the states to undertake work in such areas as clearance, survey and MRE, either directly or via a third party (which could be the United Nations or other supra-national body) or other parties involved in post-conflict clearance, such as non-governmental organisations (NGOs).⁵

There may be a concern that military forces, with little understanding of the process of humanitarian mine action, could



List of the Articles in the Protocol on Explosive Remnants of War¹¹

Preamble

Article 1: General provision and scope of application

Article 2: Definitions

Article 3: Clearance, removal or destruction of ERW

Article 4: Recording, retaining and transmission of information

Article 5: Other precautions for the protection of the civilian population, individual civilians and civilian objects from the risks and effects of ERW

Article 6: Provisions for the protection of humanitarian missions and organisations from the effects of ERW

Article 7: Assistance with respect to existing ERW

Article 8: Cooperation and assistance

Article 9: Generic preventive measures

Article 10: Consultations of high contracting parties

Article 11: Compliance

Technical Annex: Contains the suggested best practice for achieving the objectives contained in Articles 4, 5 and 9 of this protocol. High contracting parties will implement this technical annex on a voluntary basis.

* Part I: Recording, storage and release of information for UXO and abandoned EO

* Part II: Warnings, MRE, marking, fencing and monitoring

* Part III: Generic preventive measures

take a more active role. Recent studies suggest that military units are not ideally suited to all aspects of mine action, though they do have some relevant capabilities.⁶ Under the protocol, it could be argued that we will see the military playing an increased role. However, it is unlikely that we will see the military entering mine action in larger numbers than in previous times. The world's militaries, with limited resources and a large number of competing tasks, will probably continue to welcome the assistance of mine action organisations. Indeed, the protocol repeatedly states that states can use a third party to deal with ERW.

The second positive impact will

come from the release of information. The protocol asks the states and parties to an armed conflict to provide information, as far as practicable, to assist mine action. The specific list of information is provided in the technical annex and includes: the targets for EO, approximate amounts used, the type and nature of EO, and general locations of known and probable UXO. Further, provision is specifically made to provide information on abandoned munitions, including the location, approximate numbers and types of munitions abandoned. Of particular relevance to clearance and MRE is the recommendation that information on UXO should include methods of identification and methods for the "safe disposal" of EO.⁷ Again, while the path by which information is passed is not precise, the text of the protocol is clear that NGOs are included as possible recipients of information.⁸

The key to the military-mine action community relationship will be the implementation of the Protocol V articles. In many countries, contingency planning for post-conflict work is already done jointly by aid organisations and governments. This work now needs to be expanded to ensure that military forces also take into account the requirements of the protocol on ERW. These issues are not something that can be field-tested, but by engaging with the political and military actors now, NGOs can at least provide evidence of their experience in these matters, which states will hopefully recognise as useful for implementing the protocol on ERW.

Nothing is Perfect

The Fifth Protocol is not perfect. Many believe that the language is too conditional, and these caveats allow states to do little and yet still legally fulfil their obligations. Many would have liked the technical annex to be legally binding. Many of the criticisms are right; from a humanitarian point of view the protocol could have been stronger. However, diplomacy such as these negotiations over the last three years is the art of the possible. The coordinator of the discussions on ERW, Ambassador Chris Sanders of the Netherlands, stated in the final session of debate that in his view, the text was the best that could be achieved at the time.⁹ Ambassador Sanders is the only person who is fully aware of the haggling and compromises required to get to the final text; his judgement that the protocol was the best the process could produce is probably accurate.

For proponents of a stronger protocol there was some risk to continuing the discussions. The alternative to not agreeing in November 2003 would have been to prolong the discussions for at least another year, if not more. There were many States and NGOs who were concerned that further negotiations would result in a further weakening of the text. The issues had, after all, been exhaustively debated and few could see what new grounds for discussion existed. Significantly, many of the states who agreed to the protocol are not part of the Ottawa Convention, including India, Pakistan, Russia, China and the United States. Overall, the protocol has the agreement of 92 nations, although the states still have to individually sign the protocol.¹⁰

If the Fifth Protocol contributes anything, it is a requirement that the states now consider the humanitarian impact of ERW and they have some guidance on the measures that can be used to reduce the effects in the post-conflict environment. Much will depend on how the states will implement the protocol. Some of the states have already started to consider the implications of the protocol—the United Kingdom used the 2002 Gulf Conflict to test some of its ideas for dealing with ERW, such as information provision to clearance organisations.

The challenge ahead is to ensure that the protocol is implemented in the strongest possible manner. While the text of

the protocol carries many caveats, such as "where feasible" and "where possible," it is for states to decide how to incorporate the terms of the protocol into their military doctrine. The importance of how the protocol is implemented is perhaps most clearly shown with regard to the technical annex. The annex sets out clear requirements on the provision of information for ordnance used, the obligations concerning abandoned munitions and to whom information is to be given; however, it is all voluntary. The provisions of the technical annex are not onerous, and it might become a measure of a state's commitment to dealing with ERW as to whether or not they adopt the technical annex along with the formal protocol.

The mine action community could—and should—provide a pivotal role by engaging with policy makers wherever possible to ensure that states introduce the terms of the protocol and the technical annex into their military doctrine. For example, the mine action community can provide field experience to illustrate the importance of information provision in reducing the humanitarian impact of ERW. For organisations involved in mine action, now is the opportunity to try to influence how the protocol is implemented. Where countries require national legislation to enact the protocol, political pressure can be used to ensure that a state introduces all measures of the protocol and perhaps goes even further, for example, by making the provisions of the technical annex legally binding. Once procedures and laws are written, it will be much more difficult to persuade governments to rewrite them. How states implement the treaty is where the future success of the protocol will be decided.

Endnotes

1. The full title of the convention is "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." The framework convention has five protocols, which ban or restrict the use of various types of weapons that are deemed to cause unnecessary suffering or affect either soldiers or civilians indiscriminately. The weapons covered include: weapons that leave undetectable fragments in the body (Protocol I); mines, booby-traps and other devices (Protocol II, amended in 1996); incendiary weapons (Protocol III); blinding laser weapons (Protocol IV); and ERW (Protocol V). As of March 2004, there were 92 states that were party to the convention.

2. For a history of how the ERW process began and was developed, see: "Explosive Remnants of War: The Impact of Current Negotiations," Paul Ellis, *Journal of*

Mine Action, Issue 7.1, April 2003; and "Explosive Remnants of War: The Negotiations Continue," Paul Ellis, *Journal of Mine Action*, Issue 7.2, August 2003.

3. The definition of EO excludes mines, booby traps and other devices as defined in Protocol II of the CCW. While there is rarely a clear distinction between the location of mines and UXO, booby traps and related devices could not be included in this protocol on ERW for legal reasons, as they already had their own Protocol (II, amended 1996).

4. Victim assistance does not have the same prominence in Protocol V as in the Ottawa Convention. The issue of how much prominence to give to victim assistance was strongly debated. A number of countries, particularly South Africa, argued for much stronger provision for this area. In the end it was not possible to do more than include it as a paragraph in Article 8 on Cooperation and Assistance.

5. Article 3 of the protocol on "Clearance, Removal or Destruction of ERW," paragraph 5, states: "High Contracting Parties shall cooperate, where appropriate, both among themselves and with other states, relevant regional and international organisations and non-governmental organisations on the provision of inter alia technical, financial, material and human resources assistance including, in appropriate circumstances, the undertaking of joint operations necessary to fulfil the provisions of this Article."

6. See *The Role of the Military in Mine Action*, GICHD, 2003.

7. The technical annex has adopted many of the information requirements that the mine action community asked for, see the report *Explosive Remnants of War—Information Requirements*, GICHD, 2003.

8. In Technical Annex I.c.ii, it is stated that: "Recipient: The information should be released to the party or parties in control of the affected territory and to those persons or institutions that the releasing State is satisfied are, or will be, involved in UXO or AXO [abandoned explosive ordnance] clearance in the affected area, in the education of the civilian population on the risks of UXO and AXO."

9. Paul Ellis' personal notes from the Meeting of the Group of Government Experts to the CCW, Geneva, 24 November 2003.

10. The protocol will come into force six months after the 20th ratification by a state.

11. The full text of the convention in the six languages of the United Nations can be found on the GICHD website at: <http://www.gichd.ch/CCW/index.htm> or the UN Department of Disarmament Affairs website: <http://disarmament2.un.org/ccw/index.html>, accessed 29 March 2004.

* Photo: ICRC.

Contact Information:

Paul Ellis
Technology and Standards Expert, GICHD
7bis Avenue de la Paix
PO Box 1300
CH-1211 Geneva 1
Switzerland
Tel: +41-22-906-1696
Fax: +41-22-906-1690
E-mail: p.ellis@gichd.ch