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A new protocol on explosive remnants of war: The history and negotiation of Protocol V to the 1980 Convention on Certain Conventional Weapons

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On 28 November 2003, the States Parties to the Convention on Certain Conventional Weapons (CCW)¹ adopted a new protocol on explosive remnants of war.² This new instrument of international humanitarian law, the fifth protocol to the CCW, is an important addition to the efforts to reduce the death, injury and suffering caused by the explosive munitions that remain after the end of an armed conflict. Protocol V establishes new rules that require the parties to a conflict to clear explosive remnants of war, to take measures to protect civilians from the effects of these weapons and to assist the efforts of international and non-governmental organizations working in these areas. If widely adhered to and fully implemented, it has the potential to significantly reduce the civilian casualties that regularly occur after the end of hostilities and to minimize the long-term socio-economic consequences that explosive remnants of war inflict on war-affected countries.³ It complements the work of the international community to reduce the suffering caused by anti-personnel landmines.

This article will trace the development of the Protocol and examine the key issues that arose during its negotiation. It will also offer comments on its implications for international humanitarian law, its potential impact in war-affected areas and some of the issues that will be a challenge to its implementation.

Background: the problem of explosive remnants of war

Nearly every conflict in modern times has left behind large amounts of explosive remnants of war. These are the explosive munitions that have been

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fired, dropped or otherwise delivered during the fighting but have failed to explode as intended or have been abandoned by the warring parties on the battlefield. Explosive remnants of war often found in war-affected areas include artillery shells, hand grenades, mortar shells, cluster-bomb submunitions, air-dropped bombs, missiles and other similar weapons. They are a persistent problem and a deadly threat that kill and injure large numbers of men, women and children who subsequently disturb or tamper with them. As these weapons often take years and even decades to clear, their presence can hinder reconstruction, the delivery of humanitarian aid, farming and the return of people displaced by the fighting.

It is estimated that at least 82 countries and 10 territories are affected by explosive remnants of war.⁴ Iraq is one recent example. Although the security situation has made it difficult to obtain a comprehensive view of the scale of the problem, one non-governmental organization reported that it had cleared over one million pieces of explosive remnants of war from the recent fighting.⁵ A Human Rights Watch study found that tens of thousands of submunitions used by Coalition forces failed to explode as intended and will need to be cleared.⁶ Large amounts of explosive weapons were also abandoned by Iraqi forces and were later found or disturbed by civilians, causing many casualties.⁷ Past conflicts in other parts of the world have also produced enormous quantities of explosive debris. Some, such as Laos and Angola, have been struggling to deal with the problem for decades.⁸

There have been significant developments in recent years to reduce the death, injury and suffering caused by anti-personnel landmines. The

1 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May be Deemed to Cause Unnecessary Suffering or to Have Indiscriminate Effects (CCW), 10 October 1980.

2 Protocol on Explosive Remnants of War annexed to the CCW, 28 November 2003.

3 The Protocol on Explosive Remnants of War will enter into force once 20 States have notified the depositary, the Secretary-General of the United Nations, of their consent to be bound by it. At 1 November 2004, 3 States had done so (Sweden, Lithuania, Sierra Leone).

4 *Explosive Remnants of War: A Global Survey*, Landmine Action, London, 2003.

5 Iraq: MAG clears more than one million mines and bombs since the war. <http://www.mag.org.uk/magtest/n_iraq/marcho4.htm>.

6 *Off Target: The Conduct of the War and Civilian Casualties in Iraq*, Human Rights Watch, New York, 2003, p. 104.

7 *Ibid.*, p. 7.

8 For an overview of the impact problem in these and other contexts, see Arthur Westing (ed.), *Explosive Remnants of War: Mitigating the Environmental Effects*, Taylor and Francis, London, 1985; *Explosive Remnants of War: Cluster Bombs and Landmines in Kosovo*, ICRC, Geneva, 2000; *Explosive Remnants of War; Unexploded Ordnance and Post-conflict Communities*, Landmine Action, London, 2002.; Landmine Action, *op. cit.* (note 4).

long-term and indiscriminate effects of these weapons led to the adoption in 1997 of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction.⁹ Anti-personnel mines, however, are only one part of the problem. Equal or even greater numbers of other munitions that remain after the end of an armed conflict also claim thousands of civilian victims. With the growing capacity to deliver large amounts of explosive ordnance in battle, the serious humanitarian costs of explosive remnants of war were likely to continue to increase unless concerted international action was taken.

Towards a new protocol on explosive remnants of war

An early call to address the problem of explosive remnants of war came from the United Nations Environment Programme, which published a report in 1983 drawing attention to the impact of these weapons and proposing a series of recommendations.¹⁰ Although the report was the basis for several subsequent resolutions adopted by the United Nations General Assembly, it did not result in the development of new international rules to mitigate the effects of explosive remnants of war.

A more recent initiative came from the International Committee of the Red Cross (ICRC) and Landmine Action, a UK-based non-governmental organization that works on landmines and related issues.¹¹ During an informal meeting in early 2000 to discuss the adverse humanitarian impact of cluster-bomb submunitions, these organizations examined the need for a broader approach to deal with forms of unexploded and abandoned ordnance other than anti-personnel mines. Both felt that a comprehensive approach could be developed and that the Second Review Conference of the CCW, scheduled for December 2001, was the appropriate forum to consider the issue.

The two organizations prepared studies to raise awareness of the problem and facilitate the start of discussions with governments. An ICRC study highlighted the effects of explosive remnants of war in Kosovo following the end of the conflict in 2000. It showed that Kosovo was affected by a wide

⁹ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction, 18 September 1997.

¹⁰ "Explosive remnants of conventional war": UN Doc. A/38/383 (19 October 1983).

¹¹ In 2000, Landmine Action was known as the UK Working Group on Landmines. It changed its name to Landmine Action later that year.

range of unexploded ordnance and that more than two-thirds of the resulting civilian casualties were killed or injured by munitions other than anti-personnel landmines.¹² Cluster-bomb submunitions were found to be a particular problem. A second study focused on the use and design of submunitions and the characteristics that made them a humanitarian concern.¹³ These studies led the ICRC to call for a moratorium on the use of submunitions, and for the development of new international rules on the clearance of explosive remnants of war and other measures to protect civilians from those weapons. A publication by Landmine Action also looked at the problems caused by submunitions and made similar recommendations.¹⁴

In September 2000, the ICRC convened a meeting of governmental and other experts to examine the problem of explosive remnants of war and to consider proposing that it be placed on the agenda of the Second CCW Review Conference. For the most part, initial reactions were favourable. Many experts believed that a comprehensive approach to the problem was necessary and a logical complement to the work done on anti-personnel mines.¹⁵ Several experts, however, believed that discussions on explosive remnants of war would be long and complex and felt that the issue should be dealt with at a later review conference.¹⁶

On the basis of these reactions, the ICRC submitted a report and proposals to the First Meeting of the Preparatory Committee for the Review Conference.¹⁷ In this document the ICRC called for the negotiation of a new protocol to the CCW to reduce the humanitarian problems caused by explosive remnants of war; it proposed that this protocol should cover all types of explosive ordnance, except anti-personnel mines.¹⁸ It also proposed that the main elements of a new protocol should include:

¹² ICRC, *op. cit.* (note 8).

¹³ *Explosive Remnants of War: A Study on Submunitions and Other Unexploded Ordnance*, ICRC, Geneva, 2000.

¹⁴ Rae McGrath, *Cluster Bombs: The Military Effectiveness and Impact on Civilians*, UK Working Group on Landmines, London, 2000.

¹⁵ *Expert Meeting on Explosive Remnants of War*, ICRC, Geneva, 2000, pp. 14-15.

¹⁶ *Ibid.*

¹⁷ "Report of the International Committee of the Red Cross to the First Preparatory Committee for the 2001 Review Conference of the United Nations Convention on Certain Conventional Weapons", UN Doc. CCW/CONF.II/PC.1/WP.1 (2000).

¹⁸ The ICRC believed that landmines were comprehensively dealt with by the Convention on the Prohibition of Anti-personnel Mines and therefore did not need to be included in a new instrument.

- the central principle that those who use munitions which remain after the end of active hostilities are responsible for clearing such weapons or providing the technical and material assistance needed to ensure their clearance;
- the principle that technical information to facilitate clearance should be provided to mine-clearance organizations immediately after the end of active hostilities in an affected area;
- the principle that those who use munitions likely to have long-term effects should provide warnings to civilian populations on the dangers of such weapons;
- for cluster-bomb and other submunitions only (whether delivered by air or ground-based systems), a prohibition of their use against military objects located in concentrations of civilians.¹⁹

The ICRC noted that obligations with regard to clearance, the provision of information and warnings to civilians were already laid down for mines, booby traps and other devices in Amended Protocol II of the CCW and thus were already established in international humanitarian law. It also explained that an additional restriction on the use of cluster-bomb and other submunitions in civilian areas was necessary, in view of the particular characteristics of these weapons. Studies have shown that submunitions have created a large proportion of the explosive remnants of war problem in conflicts where they have been used. The fact that these weapons are delivered over a wide area, are free falling and are difficult to direct towards their intended target also warrants a specific restriction on their use.²⁰

Several States also submitted proposals on specific weapons that often became explosive remnants of war. Switzerland called for new rules that would require all new submunitions to have self-destruct and self-deactivation features to neutralize the weapons if the primary fuse failed to detonate as intended.²¹ The United States proposed new regulations to deal with the problems caused by anti-vehicle mines.²² This proposal would require all

¹⁹ ICRC Report, *op. cit.* (note 17), pp. 11-12.

²⁰ See Rae McGrath, *op. cit.* (note 14); *Cluster Munition Systems*, Handicap International, Lyon, 2003; *Fatally Flawed: Cluster Bombs and Their Use by the United States in Afghanistan*, Human Rights Watch, New York, 2002; Steve Goose, "Cluster munitions: Towards a global solution", *Human Rights Watch World Report 2004*, Human Rights Watch, New York, 2004, pp. 244-276.

²¹ UN Doc. CCW/CONF.II/PC.1/WP.4, 14 December 2000.

²² UN Doc. CCW/CONF.II/PC.1/WP.7, 14 December 2000. In the CCW context, anti-vehicle mines are formally referred to as "Mines Other than Anti-personnel Mines" (MOTAPM). This proposal later became a joint submission by the United States and Denmark for a new protocol to the CCW.

such mines to be detectable and remotely-delivered anti-vehicle mines to possess self-destruct and self-deactivation features in order to prevent the weapon from becoming a threat to civilians, peacekeepers and humanitarian organizations.

There was broad support for work on explosive remnants of war at the first meeting of the Preparatory Committee. The Netherlands took a lead role on the issue and submitted a working paper, co-sponsored by 26 States, to structure discussions in the next sessions of the Committee.²³ Discussions at its second and third meetings (April and September 2001) were also substantive. Governments, international and non-governmental organizations and independent experts presented a range of papers on the nature of the explosive remnants of war problem, its impact on war-affected countries and strategies for addressing the issue in the CCW context. As the Review Conference approached, there was a growing consensus that explosive remnants of war was an issue which needed to be addressed by the international community, that the CCW was the right framework to do so, and that work on the issue should continue in 2002.²⁴

The momentum of the work started on explosive remnants of war continued at the Review Conference, held from 11 to 21 December 2001. The Conference decided to establish a Group of Governmental Experts to examine further the legal, technical, operational and humanitarian aspects of the various proposals, and appointed two coordinators to guide the Group's work in 2002 on explosive remnants of war and anti-vehicle mines.²⁵ It also decided that anti-vehicle mines would be dealt with separately from other

²³ UN Doc. CCW/CONF.II/PC.1/WP.6, 14 December 2000. The co-sponsors were Argentina, Austria, Belgium, Bulgaria, Canada, Cambodia, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Israel, Italy, Luxembourg, New Zealand, Norway, Portugal, Slovakia, Spain, Sweden, Switzerland, United Kingdom, United States.

²⁴ In addition to those on explosive remnants of war, proposals were also submitted on extending the scope of application of the Convention and its protocols to non-international armed conflicts (United States and the ICRC); wound ballistic regulations for small calibre weapons and ammunition (Switzerland), and a compliance mechanism for the Convention (United States, South Africa and the European Union). For a summary of the results of the Review Conference, see Louis Maresca, "Second Review Conference of the Convention on Certain Conventional Weapons", *International Review of the Red Cross*, Vol. 84, March 2002, pp. 255-261.

²⁵ The Group of Governmental Experts is made up of government delegations and representatives of international and non-governmental organizations. It has been used to examine proposals for new CCW protocols and to develop recommendations for States Parties to consider. Ambassador Chris Sanders of the Netherlands was selected as the coordinator on explosive remnants of war. Mr Peter Kolarov of Bulgaria was selected as the coordinator on anti-vehicle mines.

explosive remnants of war,²⁶ primarily because many States believed that anti-vehicle mines were different from the other weapons that often remained after a conflict. In their view, anti-vehicle mines were designed to be left unexploded and lie in wait for their intended victim; the adverse humanitarian consequences resulted from the weapon's improper use. Other forms of explosive remnants of war, however, were viewed as a problem not because they were used improperly, but rather because they did not function as intended when fired or delivered.

The Group of Governmental Experts met for a total of five weeks in 2002. As its work progressed, growing support emerged for the development of new rules on the clearance of explosive remnants of war, the sharing of information to facilitate clearance and risk education, and the provision of warnings to civilian populations. Such obligations would not be specific to any particular type of weapon but requirements of a general nature which would apply to all explosive munitions that remained after a conflict. There was also support from many European countries, China, Japan, the ICRC and international and non-governmental organizations to consider preventive measures to stop explosive ordnance from becoming explosive remnants of war in the first place. These included developing generic standards and procedures for the production, transport and storage of munitions.

There was less agreement on specific restrictions on the design and use of weapons, in particular submunitions. Proposals tabled included that of Switzerland for self-destruct and self-deactivation features to be required on submunitions, and the ICRC's proposal for a prohibition on the use of submunitions against military objectives in or near a concentration of civilians. While both proposals garnered some support in the Group, a number of delegations, including China, Russia and Pakistan, voiced reservations about the costs of self-destruct and deactivation features and of destroying or altering weapons already in stock. Many governments, including Russia and the USA, also believed that the existing international humanitarian law on the targeting of weapons was adequate to deal with the ICRC's concerns about submunitions. In their view, better implementation of the existing rules, rather than new rules, was needed.

In its report to CCW States Parties, the Group recommended that it continue its work in 2003 and announced that it was ready to begin negotiations on "a new instrument on the post-conflict remedial measures of a

²⁶ For the full mandates, see UN Doc. CCW/CONF.II/2, (2001), pp. 12-13.

generic nature which would reduce the risks of ERW”²⁷ It also proposed to explore whether the negotiations could include generic preventive measures for improving the reliability of munitions in areas such as the manufacturing, handling and storage of munitions. Separate from the negotiations, the Group would continue its discussions on preventive measures aimed at improving the design of munitions, including submunitions, and the implementation of the existing principles of international humanitarian law.²⁸ At a meeting of States Parties held in December 2002, the continuation of the Group and its recommendations were approved.

The negotiations on explosive remnants of war were held in March, June and November 2003. They were chaired by Ambassador Chris Sanders of The Netherlands, who prepared several papers that were instrumental in synthesizing the variety of proposals submitted, and took place in three stages: the March session focused on the possible elements of a new protocol; the June meeting centred on reactions to the coordinator’s draft text; and final negotiations on the articles and other issues were conducted in November. In addition to the papers and proposals prepared by government experts, important submissions also came from international and non-governmental organizations and the ICRC. Work progressed smoothly on most of the protocol’s provisions. It was nonetheless unclear until the final session whether the Group would be able to finalize several important articles and arrive at the consensus needed to adopt the instrument.

Key issues in the negotiations

The legal nature of the instrument

Like the other CCW protocols, the Protocol on Explosive Remnants of War is a legally binding instrument and a State must express its consent to the depositary in order to be bound by the Protocol’s rules. But it was uncertain until the final negotiating session whether the text would be adopted as a legally binding protocol or as a less legally binding text (e.g. a political declaration or a statement of best practices).

²⁷ “Procedural Report of the 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”, UN. Doc CCW/GGE/III/1, 11 December 2002.

²⁸ Besides explosive remnants of war (ERW), the Group also continued to explore the most appropriate way to deal with the problems caused by anti-vehicle mines. As mentioned above, this issue was being discussed separately. The Group continued its work on anti-vehicle mines in 2003 and 2004 but not did agree to begin negotiations on a new protocol. Work on this issue will continue in 2005.

Throughout the negotiations, the United States expressed reservations about the adoption of a new protocol. It believed that negotiations on legally binding rules would be complex and consume much of the Group's time, and therefore favoured the development of an instrument of a political character that could be concluded more quickly. However, nearly all other States Parties expressed a desire for legally binding rules in the form of a CCW protocol. At the final negotiating session and after a number of amendments to the text of key provisions, the United States agreed to support the adoption of a legally binding protocol. Subsequent statements by US officials welcomed the conclusion of the protocol and announced that the United States would give careful consideration to becoming a State Party.

The preamble

The Protocol on Explosive Remnants of War (Protocol V) is the only CCW protocol to have a preamble. It underscores the motivations underlying the instrument's adoption and links the Protocol to the two principal elements of the Group's negotiating mandate: (1) to negotiate a new instrument on post-conflict remedial measures of a generic nature, and (2) to determine whether the negotiations could address generic preventive measures to improve the reliability of munitions. The Group was able to respond affirmatively to the second point. The negotiations did deal successfully with preventive measures on munition reliability, but these measures are voluntary best practices, as made clear in Article 9 and the Protocol's Technical Annex.

The preamble played a central role in allaying the misgivings of at least one delegation about mixing legal obligations and voluntary best practices in the Protocol. France argued that legally binding remedial measures and preventive best practices should be dealt with in separate instruments. It held that Article 9 should not be part of the Protocol because it did not encompass a legal obligation. Use of the preamble to make clear that States intended to include a mix of legally binding provisions and non-legally binding elements, and the placing of emphasis on the voluntary nature of the Protocol's generic preventive measures, helped to address the French concerns on this point.

Scope of application

Importantly, States Parties agreed that the Protocol would apply in both international and non-international armed conflicts. Its application to non-international armed conflicts did not give rise to controversy during the negotiations and no State spoke against it applying in such circumstances.

Like anti-personnel landmines, explosive remnants of war have been a serious humanitarian problem in internal wars, killing and injuring scores of civilians. Article 1(3) states that the Protocol will apply to the situations arising from the conflicts referred to in paragraphs 1 to 6 of Article 1 of the CCW as amended on 21 December 2001. This is a reference to the amendment adopted by the Second CCW Review Conference that extends the scope of application of CCW Protocols I-IV to non-international armed conflict. The amendment stipulated that the scope of application for other CCW protocols would be determined on a case-by-case basis.

As a result of its application to non-international armed conflicts, the Protocol refers to “High Contracting Parties” and “parties to an armed conflict”. The former is the equivalent of “States Parties”, i.e. States that have formally ratified or acceded to the Convention and the Protocol. The phrase “parties to an armed conflict” is a reference to non-State actors (i.e. organized armed groups) and is the formula used in Amended Protocol II to the CCW, which also applies to non-international armed conflicts. As used in Protocol V, “parties to an armed conflict” does not encompass States involved in a conflict that have not ratified or otherwise expressed their consent to be bound by the Protocol. Such States are not bound by it.

A related issue is the application of the Protocol’s rules to explosive remnants of war from previous conflicts, i.e. conflicts that took place before its entry into force for the relevant High Contracting Party. Although the Protocol would clearly apply to future conflicts, several delegations, including Austria, Brazil, China and Pakistan, believed that it also had to address explosive remnants of war already on the ground. A number of delegations, notably Italy, France and Japan, opposed extending its rules to past conflicts. In the end, Article 1(4) clarified that the Protocol’s main operative provisions apply to explosive remnants of war produced after the Protocol’s entry into force for the relevant State and a separate provision on assistance in dealing with existing explosive remnants of war was also included (Article 7).²⁹

Definitions

Definitions were an important issue for most delegations and there was rapid agreement on their general parameters. All agreed that the Protocol should deal only with the explosive remnants of war from conventional weapons and not address the post-conflict problems arising from the use of biological, chemi-

²⁹ See below, “Assistance and cooperation”, p 16.

cal or nuclear weapons. This is in line with the purpose of the CCW, which, when negotiated, was not meant to deal with “weapons of mass destruction”.

Most delegations supported a general definition of explosive remnants of war which would cover all forms of explosive ordnance that might become a threat after the end of an armed conflict. Although the idea was briefly considered, there was little support for the Group to develop lists or define specific categories of munitions that were most likely to become explosive remnants of war. It was also agreed that weapons covered by other international treaties, such as anti-personnel mines, anti-vehicle mines, booby traps and other similar devices, should be excluded from Protocol V so as to avoid an overlap with existing instruments, in particular the CCW’s Amended Protocol II. This earlier treaty already contained specific post-conflict obligations to reduce the impact of such weapons.

Importantly, clearance organizations had stressed that post-conflict clearance involved not only the removal of explosives that had been used and failed to explode as intended but also considerable stocks of ordnance that had been abandoned. For this reason, “explosive remnants of war” is stated to mean (1) unexploded ordnance, and (2) abandoned explosive ordnance.³⁰ Each is defined in Article 2 of the Protocol.³¹ These two categories cover the principal situations in which explosive weapons become a threat to civilian populations in a post-conflict setting. Article 2 furthermore contains definitions of “explosive ordnance” and “existing explosive remnants of war”.

The negotiations benefited from earlier definitions developed by mine action experts for the International Mine Action Standards (IMAS).³² The IMAS definitions for explosive ordnance and unexploded ordnance were a starting point and were altered to correspond with the parameters of the Group’s work as mentioned above. The Protocol’s definition of abandoned explosive ordnance, however, is new, as is the term itself. It was developed by the Group in response to concerns that the IMAS definitions did not seem to cover explosive ordnance that had not been used or prepared for use but rather had been stockpiled on or near the battlefield.

The clearance of explosive remnants of war

One of the main issues was responsibility for the clearance of explosive remnants of war. There are few treaty or customary legal rules that address

³⁰ Protocol on Explosive Remnants of War, *op. cit.* (note 2) Art. 2 (4).

³¹ *Ibid.*, Art. 2 (2) and 2 (3), respectively.

³² International Mine Action Standards (04.10) 3.217 (UXO) and 3.67.

this issue and those that do exist are generally limited to the removal of landmines.³³ Historically, each party has been responsible only for the removal of unexploded and abandoned ordnance on its territory. However, such clearance is often difficult or impossible if the affected country does not have the means to accomplish it. In some instances, the affected country is not a party to the conflict. In the opinion of a number of delegations and organizations, to improve the law in this area was a primary goal of a new protocol; strong obligations on the clearance of explosive remnants of war and requirements to assist in the removal of weapons wherever they are found would have the potential to significantly reduce the problem.

Article 3 establishes new and important rules on clearance. First and foremost, for the first time in a treaty of international humanitarian law there is a clear rule that explosive munitions, other than landmines, must be cleared once the fighting has ended.³⁴ Each High Contracting Party and party to a conflict is responsible for the clearance of these weapons in the affected territory under its control.³⁵ The Protocol adds that the parties must take measures to reduce the risks posed by explosive remnants of war until clearance takes place. Such measures include a threat survey and assessment, needs assessment, the marking of dangerous areas, and resource mobilization to carry out these activities,³⁶ which must occur “after the cessation of active hostilities and as soon as feasible”.³⁷ It is important to note that after the end of active hostilities does not mean after the conclusion of a formal peace agreement. Clearance is to begin as soon as feasible in affected areas and must not wait for a formal declaration of peace between the parties.

Perhaps even more importantly, the Protocol identifies an explicit responsibility, outlined in Article 3(1), for the users of explosive ordnance to provide assistance, where feasible, to facilitate the marking and clearance of the explosive remnants of war in territory outside their control that have

33 See Protocol on Prohibitions or Restriction on the Use of Mines, Booby-Traps and Other Devices (Protocol II), 10 October 1980, and Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Amended Protocol II) of 3 May 1996. It is also arguable that general rules of international humanitarian law that establish a general protection for civilians against the effects of military operations, prohibit indiscriminate attacks and require parties to take feasible precautions to minimize civilian casualties also entail responsibilities for the clearance of explosive remnants of war.

34 Protocol on Explosive Remnants of War, *op. cit.* (note 2), Art 3 (2).

35 *Ibid.*

36 *Ibid.*, Art. 3 (3).

37 For comments on the qualifying phrases used in the Protocol, see “Implications and challenges” below, p. 19.

been produced by the conduct of their military operations. Such assistance may be technical, material, financial or in the form of personnel. It may be provided directly to the party in control of the territory where the explosives are found, or through a third party such as the United Nations, international agencies or non-governmental organizations. This requirement is parallel to obligations that already exist for the clearance of mines, booby traps and other devices found in Amended Protocol II to the CCW.³⁸

The final wording of Article 3(1) was a major improvement on the initial text. Previous drafts contained an obligation for the parties to clear explosive remnants of war in territory under their own control, but merely “to cooperate” with the other side in the clearance of those weapons in other areas. Many delegations considered the second part of this formulation to be weak, ambiguous and not a substantial advancement of the law. The ICRC pointed out that an obligation to cooperate would be significantly less than what was already required for landmines under Amended Protocol II and argued that the hostilities themselves and claims of non-cooperation between the parties would probably result in no action being taken. Others believed that the primary responsibility for the clearance of explosive remnants of war had to remain with the affected State and that it was unrealistic to expect the parties to do anything more than cooperate in clearing them. The final wording of Article 3(1) was based on a proposal which was put forward by the United States in the latter stage of negotiations and helped to reconcile the various views.

Recording and sharing of information

The lack of information on the explosive ordnance used or abandoned in an armed conflict and the areas where explosive remnants of war may be found is often one of the difficulties facing clearance organizations and organizations conducting mine risk education. The rapid transmission of such information to them by High Contracting Parties and parties to a conflict can significantly improve an organization’s ability to respond swiftly to explosive remnants of war. Even where the parties are willing to provide such information, it can be a frustratingly slow process, as most of them do not have the mechanisms to gather, approve and transmit such information to the relevant organizations. In most cases the dangerous areas are identified through accidents involving civilians and reports by local communities.

³⁸ Amended Protocol II, *op. cit.* (note 33), specifically, Arts. 3(2) and 10.

Requirements for the recording and sharing of information on the explosive ordnance used or abandoned in armed conflict were widely supported in the negotiations, and there were few issues dividing delegations in these areas. Such obligations were viewed as practical measures that would facilitate the response to explosive remnants of war. While the original and amended versions of Protocol II to the CCW and the military doctrine of many States already required that information on the location of laid landmines be recorded, similar rules had not previously been developed for other forms of explosive ordnance.³⁹

Article 4 of the Protocol stipulates that High Contracting Parties and parties to an armed conflict must record and retain information on the use or abandonment of explosive ordnance “to the maximum extent possible and as far as practicable”. Parties are subsequently required to share this information without delay after the cessation of active hostilities and as far as practicable with other parties, the UN or organizations involved in risk education or the marking and clearance of contaminated areas.

The kinds of information that the High Contracting Parties and parties to a conflict are expected to record are listed in the Protocol’s Technical Annex. These include the types and amounts (number) of explosive ordnance used; the areas targeted with these weapons; the types, amount and location of abandoned explosive ordnance; and the general location where unexploded ordnance is known to exist or is likely to be found. The Annex also details the information that should be transmitted to the other parties and relevant organizations. As indicated in its heading, the Technical Annex sets out voluntary best practices and its contents are not legally binding. However, as High Contracting Parties and parties to the conflict are bound by Article 4 to record, retain and transmit information to facilitate the rapid removal of explosive remnants of war as well as risk education, the article’s effective implementation will require that the information recorded matches the specifications in the Technical Annex.

The United Nations Mine Action Service and other organizations have cited the Protocol’s information requirements as one of the most important developments in assisting rapid mine action. Such requirements not only assist the activities of organizations. They are also essential steps that allow the High Contracting Parties and parties to the conflict to implement the Protocol’s requirements on clearance (Art. 3), precautions for the pro-

39 Protocol II, *op. cit.* (note 33), Art. 7; Amended Protocol II, *op. cit.* (note 33), Art. 9.

tection of the civilian population (Art. 5) and protection for humanitarian organizations (Art. 6).

Precautions to protect civilians and humanitarian organizations

In addition to its clearance and information requirements, the Protocol also stipulates that High Contracting Parties and parties to an armed conflict must take additional measures to protect civilians. Under Article 5, the parties must take all feasible precautions in territory under their control to protect civilians and civilian objects from the effects of explosive remnants of war. Specific mention is made of precautions such as warnings, risk education to civilians and the marking, fencing and monitoring of contaminated territory under the parties' control. Feasible precautions are those precautions that are practicable or practicably possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations. A number of standards considered to be best practices in some of these areas are listed in Part 2 of the Technical Annex. States are encouraged to have regard to these standards in implementing Article 5.

This article was widely supported during the Protocol's development and negotiation. It encompasses measures to minimize the threat of explosive remnants of war until such weapons can be cleared. The definition of what is meant by "feasible precautions" closely follows the wording of that in Amended Protocol II, under which High Contracting Parties and parties to a conflict are obliged to take all feasible precautions to minimize the effects on civilians of mines, booby traps and other devices.⁴⁰

Article 6 is meant to minimize the effects of explosive remnants of war on the operations of humanitarian organizations. It states that the High Contracting Parties and parties to a conflict must protect, as far as feasible, such organizations from the effects of explosive remnants of war. That protection could, for instance, include providing safe passage through dangerous areas, clearing roads where access is required and giving information on safe routes through dangerous areas. Although these specific activities are not stipulated in Article 6, they are the kind of measures identified in Amended Protocol II to protect humanitarian and peace-keeping missions from mines, booby traps and other devices.⁴¹ Such measures would be equally relevant for

⁴⁰ Amended Protocol II, *op. cit.* (note 33), Art. 3 (10).

⁴¹ *Ibid.*, Art. 12.

explosive remnants of war. Article 6 also states that each party must, upon request, provide humanitarian organizations with information on the location of all explosive remnants of war that it is aware of in territory where those organizations are operating or will operate. This article, too, had wide support during the negotiations and was based on an Australian proposal that the kinds of protection found in Amended Protocol II be included in the new protocol, but in a much simpler format.

Assistance and cooperation

The Protocol contains two articles on assistance and cooperation. The first (Article 7) covers assistance to High Contracting Parties in dealing with problems posed by explosive remnants of war that already exist at the time they become party to the Protocol. The second (Article 8) is concerned more broadly with assistance in implementing the Protocol and in dealing with an explosive remnants of war problem that arises after its entry into force for a particular State.

How to deal with existing remnants of war was a major issue during the negotiations and one of the last to be resolved.⁴² As mentioned above, a number of countries wanted the Protocol's obligations with regard to clearance, the recording and transmission of information and the taking of precautions to apply to all explosive remnants of war, including those already present from earlier conflicts. Such an approach was opposed by other States, which had concerns about the retroactive application of the Protocol and sought to have it apply only to future conflicts involving one or more High Contracting Parties.

A compromise was reached through Article 7. Under this provision, each High Contracting Party facing problems posed by existing remnants of war has the right to seek and receive assistance, where appropriate, from other States and relevant organizations in dealing with them. In parallel, each High Contracting Party in a position to do so is required to provide assistance, where necessary and feasible, to help others deal with the problems posed by these weapons. The qualifications in this article (i.e. "where appropriate", "as necessary and feasible") show that it was intended to be a flexible provision and was not meant to be absolutely binding for the parties

⁴² "Existing remnants of war" is defined in Art. 2 of Protocol V as "unexploded ordnance and abandoned explosive ordnance that existed prior to the entry into force of this Protocol for the High Contracting Party on whose territory it exists".

to earlier conflicts. Nevertheless, when coupled with the consultations of High Contracting Parties laid down in Article 10, it provides an important mechanism through which affected States and the users of explosive ordnance in past wars can work to address an existing problem. As explained below, this provision may be one of the important areas of work for High Contracting Parties in the early meetings on the Protocol's implementation. It is also an incentive for States already affected by explosive remnants of war to become party to the instrument and to the CCW as a whole if they have not already done so.

Article 8 is concerned more generally with assistance and cooperation in implementing the Protocol. It contains a range of requirements designed to involve all High Contracting Parties in efforts to address the problem of explosive remnants of war, and is based on similar provisions found in Amended Protocol II to the CCW and in the Convention on the Prohibition of Anti-personnel Mines.⁴³ Each High Contracting Party in a position to do so must provide assistance for the marking and clearance of explosive remnants of war and for risk education to civilian populations, and must contribute to UN and other trust funds and databases to facilitate the provision of assistance.

Importantly, as a result of efforts led by South Africa and supported by the ICRC and several non-governmental organizations, Article 8 also contains obligations on assistance to the victims of explosive remnants of war. High Contracting Parties in a position to do so are required to provide assistance for the care, rehabilitation and socio-economic reintegration of persons injured by explosive remnants of war. Such a provision was deemed an essential part of a comprehensive response to the problem of explosive remnants of war. Article 8(2) parallels the provision on assistance to mine victims found in the Convention on the Prohibition of Anti-personnel Mines.⁴⁴

Generic preventive measures

Measures to prevent explosive ordnance from becoming explosive remnants of war were a crucial issue during the negotiations. Many States and organizations, including the ICRC, felt that such measures had an important role to play in reducing the large numbers of explosive remnants of war that

⁴³ Amended Protocol II, *op. cit.* (note 33), Art. 11; Convention on the Prohibition of Anti-personnel Mines, *op. cit.* (note 9), Art. 6.

⁴⁴ *Ibid.*, Art. 6 (3).

result from armed conflict. Several States, though, led by France, were opposed to including such provisions. France's objections were not concerned with the substance of the article but rather with the mixing of legally binding and non-legally binding provisions in the Protocol. As mentioned above, a compromise was found by including a reference to this approach in the Protocol's preamble.

Article 9 encourages High Contracting Parties to implement generic preventive measures aimed at minimizing the occurrence of explosive remnants of war. They encompass a range of activities taken before the use of explosive ordnance, so as to help ensure that weapons will explode as intended. A number of general best practices are listed in Part 3 of the Protocol's Technical Annex. They include standards for munitions manufacturing, storage, transport and handling, as well as for the training of personnel.

Promoting implementation and compliance

The Protocol's final provisions deal with mechanisms to review its implementation and ensure compliance with its provisions. Article 10 establishes that High Contracting Parties will consult and cooperate with each other on all issues related to the Protocol's operation. In this regard, a Conference of High Contracting Parties may be convened to review the status and operation of the Protocol, consider matters of national implementation and prepare for future CCW review conferences. Unlike the meetings of High Contracting Parties to Amended Protocol II, which are mandated to occur on an annual basis, the decision to convene a Conference on Protocol V must be agreed by a majority, but by no less than 18 High Contracting Parties. This flexible approach was adopted in light of concerns raised by a number of governments about the number of CCW meetings and other arms control meetings already held annually. It is likely that a first meeting will be held soon after the entry into force of the Protocol, and thereafter as needed.

Article 11 promotes ways to ensure compliance with the Protocol. It stipulates that each High Contracting Party must issue appropriate instructions and procedures and make sure that its personnel receive training consistent with the Protocol's provisions. It also requires High Contracting Parties to work bilaterally, through the UN or through other international procedures, to resolve any problems that may arise in the Protocol's interpretation or application. It should be noted that when these requirements were adopted, the Group of Governmental Experts was also considering proposals to establish a broader mechanism to monitor compliance with the CCW and

its protocols. The CCW itself does not contain any provisions on compliance, although Amended Protocol II and now the Protocol on Explosive Remnants of War have some limited requirements in this area. The Group of Governmental Experts will continue to work on this issue in 2005.

Implications and challenges

The Protocol on Explosive Remnants of War is a major development of international humanitarian law. It strengthens the law in areas where no specific rules have previously existed, providing an important legal regime to address one of the principal dangers faced by civilian populations in the aftermath of an armed conflict. Along with Amended Protocol II to the CCW and the Convention on the Prohibition of Anti-personnel Mines, international humanitarian law now has a series of complementary treaties laying down a comprehensive set of rules to reduce the problems caused by the explosive remnants of war.

These three instruments also reflect an extension of international humanitarian law into the post-conflict setting. While some rules, such as the transfer of human remains and the search for missing persons, apply beyond the actual conduct of hostilities, the recent developments on landmines and explosive remnants of war have established post-conflict responsibilities for the parties to an armed conflict to reduce to a minimum the harmful effects of weapons they have used during the fighting. Some obligations, such as clearing explosive remnants of war after the cessation of active hostilities, may take years to fulfil if the problem is severe. As pointedly observed by a representative of the United Nations Mine Action Service, "It will no longer be permissible for the parties to a conflict to fire and forget."⁴⁵

The Protocol also has the capacity to strengthen the international response to problems posed by explosive remnants of war. It will, if fully implemented, make it easier for organizations working to reduce the effects of these weapons to accomplish their goals. Organizations could expect greater cooperation and assistance from the warring sides and would be able to plan more effectively and allocate resources more efficiently in order to tackle explosive remnants of war once a conflict was over. In short, the Protocol's requirements have the potential to speed up clearance, decrease casualties and reduce costs. In addition, the meetings of High Contracting

⁴⁵ Statement of Martin Barber, Director of the United Nations Mine Action Service, at the Informational Meeting on Explosive Remnants of War, New York, 19 October 2004.

Parties provided for in Article 10 could serve as an important forum for affected States and relevant organizations to report on the progress, or lack of it, in particular countries, as well as to garner assistance from High Contracting Parties to support ongoing work. Such meetings would also be a major opportunity to deal with existing explosive remnants of war. As the Protocol's main provisions will apply to future conflicts, States affected by explosive remnants from earlier wars could use these meetings to call attention to their existing problem and ways to address it. Although generic preventive measures are voluntary and technical improvements in the design of munitions are still under discussion, the new obligations to clear and assist clearance once the fighting has ended should provide an incentive to take such preventive action at the national level. In the long run it would seem cheaper and more effective to prevent the occurrence of explosive remnants of war rather than absorb the costs of removing these weapons later.

The adoption of the Protocol has had implications for the CCW process. Unlike the negotiations on Amended Protocol II in 1995 and 1996, the 2002-2003 meetings of the Group of Governmental Experts were open to non-governmental organizations. Non-governmental representatives participated in the negotiating sessions and in meetings of military experts, bringing their expertise and field-based experience to bear on the discussions. This helped to ensure that the humanitarian aspects of the explosive remnants of war problem and the needs of organizations working in affected countries were not overlooked. Their presence highlighted the important role that non-governmental organizations can play in the CCW process.

One potential concern with regard to the Protocol's implementation is the impact of the qualifying phrases found in many of its key provisions. These include phrases such as "where feasible" and "as soon as feasible". Such clauses were intended to provide a degree of flexibility to deal with the practical difficulties and complexities that governments and armed forces often face in post-conflict situations. Many experts recognized that it would be difficult to implement the Protocol's operational provisions in an environment that was not secure or in situations where there was not sufficient good will between the parties to conflict. These phrases were not meant to be loopholes for inaction but, if abused, such qualifications could undermine the effectiveness of the Protocol.

It is expected, however, that most governments and armed forces will act in good faith and improve their response to explosive remnants of war. The Protocol's rules were adopted by consensus and supported by the five permanent members of the United Nations Security Council and other mil-

itary powers. Its provisions outline the relevant expectations of the international community. As a result, it is no longer permissible to do nothing to address explosive remnants of war after the cessation of hostilities. In most situations, measures to reduce the dangers of these weapons will be rendered feasible either by the actions of parties themselves or through support for the programmes of international or non-governmental organizations.

Another source of possible concern is the extent to which the Protocol can be implemented by non-State actors involved in the hostilities. Like other areas of international humanitarian law, securing implementation and compliance among organized armed groups will be a major challenge. Concerted efforts have, however, been made to obtain commitments from such groups that they will end the use and address the effects of anti-personnel mines. Similar initiatives with regard to Protocol V are needed to raise awareness of the new rules on explosive remnants of war and encourage compliance by non-State actors involved in the fighting.

It is also hoped that the adoption of the Protocol on Explosive Remnants of War will help to extend adherence to the Convention on Certain Conventional Weapons. At 1 November 2004, 97 States were party to the Convention. However, the number of ratifications in several important regions, namely Africa, Asia and the Middle East, is still rather low, despite the fact that many countries in those very regions are affected by explosive remnants of war and have firsthand experience in dealing with their consequences. Encouragingly, many non-party States joined in the work of the Group of Governmental Experts and contributed to the development of the Protocol. Its mechanisms for dealing with existing and future explosive remnants of war might therefore prove to motivate countries that have not already done so to consider becoming party to the Convention and all its protocols.