

# **Explosive Remnants of War ERW CCW Group of Governmental Expert meetings in June and November 2003.**

**Report from the process with recommendations for further actions**

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<b>The project.....</b>	<b>2</b>
<b>New Protocol on ERW .....</b>	<b>2</b>
<b>The protocol.....</b>	<b>2</b>
<b>Norway .....</b>	<b>4</b>
<b>Civil society.....</b>	<b>4</b>
<b>Recommendations .....</b>	<b>5</b>
<b>List of activities .....</b>	<b>6</b>

## **The project**

Fafo AIS received support from MFA in June 2003 to follow the final stages of the process leading up to new Protocol V to the Convention on Conventional Weapons – on Explosive Remnants of War.

The aim of the project was to be able to provide relevant, updated and strategic analysis of the process, with a particular emphasis on International Humanitarian Law and on the role and function of both Norwegian and international Civil Society involved. Further to establish a point of reference on the ERW-issue and the process in Norway, for the general public, civil society, researchers and media.

## **New Protocol on ERW**

The 2003 Meeting of States Parties to the CCW agreed on the November 28, 2003, to a proposed new Protocol V on Explosive Remnants of War. The new protocol came as a result of a three-year consultation process. A group of governmental experts were given two mandates by the CCW States Parties, one on Explosive remnants of War and one on Mines other than Anti-Personnel Mines (MOTAPM). This project focussed on the ERW part of the negotiations.

The ERW Mandate given at the Meeting of States Parties in December 2002, contained the following elements:

- i) to negotiate an instrument on post-conflict remedial measures to reduce the risks from ERW,
- ii) explore possibilities of developing generic preventive measures, such as improvement in design, handling and use of existing munitions, and other best practices.
- iii) To consider implementation of existing International Humanitarian Law, and possible preventive measures aimed at improving the design of certain types of munitions, including sub-munitions, to minimize the risk of these becoming ERW.

The final proposal that was accepted by the CCW States Parties addresses partially the two first issues, and not the last. The main focus is on post conflict remedial measures, and almost none on preventive measures.

The Meeting of States Parties further agreed to a new mandate to continue discussions on IHL and preventive measures to reduce ERW, under the Group of Governmental Experts umbrella.

## **The protocol**

The ERW process is a by-product of the work that led to the 1997 Anti-Personnel Mine Convention. The ICRC asked CCW States Parties in 2000 to "...draw up new rules in the area of other [than APMs] explosive remnants of war". NGOs involved in the effort to ban APMs supported the idea that there was a need for a broader, not weapon specific, framework agreement addressing the severe humanitarian problems that ERW create.

The dynamics of the ERW negotiations were quite different from the APM-Convention process. The negotiations have taken place in the context of the CCW, with the group of Governmental Experts meeting at the Palaise de Nations in Geneva. There has been little, if any, public interest in the negotiations, contrary to the documented interest there is in the issue of cluster munitions and the humanitarian problem of ERW. Norwegian Parliamentarians, with a few notable exceptions, with security and/or foreign policy portfolios has expressed little if any particular interest. Representatives from the civil society have been allowed to take part in the negotiations as observers, but have maintained a very low profile, limited to brief comments in plenary sessions and occasional presentations on certain topical issues. All this in stark contrast to the high-profile, State/Civil society partnership features of the APM-Convention.

These differences are clear also in the final product. The APM-convention goes to the root of the problem; the production, stockpiling and use of APMs. The new protocol V is mainly concerned with post conflict remedial issues. In other words, it is a protocol that regulates what parties to a conflict are obliged to do *after* an armed conflict; to clear battle areas for ERW, and to protect civilians from ERW.

As such it is an important new component of IHL. It codifies what up to now have been voluntary practices, often based on *ad hoc* arrangements related to for example information sharing and granting of access. The protocol will make it easier for humanitarian actors involved in battle area clearance to get data on targeting and types munitions used. This has been a problem many areas.

When it enters into force the new protocol will be a legally binding instrument. This was not a given outcome of the process, several States Parties, and the USA in particular, expressed clear resistance to this up to the very last moment. While it must be taken as a small victory that the CCW States Parties were able to agree on this, it is crucial to examine to what the protocol actually commits the States Parties.

The language of the protocol is weak with a number of qualifiers in almost every article. Qualifying terms such as “as soon as feasible” or just “feasible” (in article 3 paras 1, 2, 3; article 5, para 1; article 6, para 1a; Art 7, para 2,) “as far as practicable” (Article 4, paras 1 and 2), ensure that States Parties have ample opportunity to interpret their obligations in a very broad manner.

Article 9 on preventive measures – i.e. how to avoid that munitions become ERW in the first place, is voluntary in nature, and States Parties are not obliged to undertake anything, but are “encouraged to take generic preventive measures aimed at minimising the occurrence of ERW” (para 1).

Given the post-conflict focus of the protocol and the fact that it is not retroactive, its will take some time before its impact could be felt in ERW affected areas. For agencies involved in activities aimed at reducing the humanitarian impact from ERW, the protocol provides an institutional home in IHL. The most important feature is probably the recognition of the responsibility of conflict parties to remove ERW and protect civilians from the threat of ERW (Article 3).

Although the protocol is weak on defining strict obligations, Article 3 represents an extremely important principle that may be compared to the “polluter pay-principle” in environmental issues. Whether this principle will have the same impact on war-affected communities as it has had in the environmental sector is of course dependent on States Parties willingness and ability to implement the intentions behind the article in a strict and coherent manner. Given how previous Meetings of States Parties have reacted to compliance and implementation issues, it is doubtful that the CCW arena in itself will be sufficient to ensure this. The main responsibility for ensuring a rigorous and robust interpretation of this article will remain with each State Party.

For all these reasons, it is likely that the protocol itself will lead to marginally changes, if any, in the use of munitions that are likely to become ERW, in particular sub-munitions (cluster munitions). The issue of whether existing IHL provide adequate responses to the challenges presented by ERW are not addressed by the protocol.

These issues were discussed in the margins of the negotiations, and a new mandate was given by the CCW Meeting of States Parties 2003 to continue discussions of these issues in 2004. For States Parties and NGOs the new mandate is an opportunity to move the cluster-issue forward in 2004.

## **Norway**

Norway has played an active, if low profile role in the ERW process. Key positions have been to argue for a legally binding instrument, to maintain the focus on the relevance of existing IHL and to argue for further generic preventive measures. The Norwegian delegation presented two papers on IHL, including a presentation on how existing IHL is interpreted in relation to cluster munitions and implications for practices.

There is a firm political backing for Norway taking an active position on the issue of cluster munitions. A Parliamentary decision on June 14, 2001, instructed the Government to actively work, and support the ongoing efforts for an international ban on use of Cluster bombs. The Parliamentary defence committee reaffirmed this, following a public hearing on January 29, 2003, and introduced additional unilateral restrictions on use of cluster munitions.

The new Protocol V does not address the use of cluster munitions, and thus is no answer to the obligation of the Norwegian Government to work for a ban on cluster munitions. To fulfil this obligation, Norway must take an active position in the upcoming round of negotiations under the new mandate, with a stated aim to work for a ban on use of cluster munitions.

## **Civil society**

The NGOs involved in the ERW-process fought an uphill battle for a strong legally binding protocol with clear obligations for the States Parties. In addition to the ICRC and the ICBL, other NGOs involved included; Landmine Action UK, Human Rights Watch and Mines Action Canada. Common for all the NGOs involved were a stated willingness to participate actively and constructively in the negotiations, within the parameters of the CCW. None of the NGOs involved expected that the new protocol would address the use of submunitions in any substantive way. Hence the reaction to the final protocol from the NGOs to the protocol were muted. They welcomed the new protocol as an important tool for focussing post-conflict

issues, but criticized it for being weak and ambiguous, and expressed strong disappointment with the fact that States Parties failed to address the problem created by use of cluster munitions.<sup>1</sup>

## Recommendations

If Norway is going to fulfil the Parliamentary decision to work for an international ban on the use of cluster munitions, then a clear strategy towards this aim must be devised. It is quite obvious that the CCW, given the present consensus, will not be able to agree on anything that resembles a ban on cluster munitions. At the same time the renewed negotiating mandate, and the 2004 meetings of Governmental Experts is an opportunity to

- Map the limits of what the CCW can agree to;
- Identify other States Parties interested to go beyond the CCW consensus on cluster munitions:
- Clarify IHL-issues relevant to a ban on cluster munitions;
- Clarify technical issues, such as definitions and designs

In effect this is a two-track strategy, one that is embedded in the CCW, and supporting the Group of Governmental Experts, but with an eye to the fact that it may be necessary to go outside the CCW-context at some point, to reach the target of for example a ban on cluster munitions. If CCW fails to deliver expected results, then Norway and other actors will have a solid platform to continue the work.

Norway should ensure it continues to draw on the expertise of the Norwegian Military, as well as of NGOs such as Norwegian Red Cross, with their section on IHL, and Norwegian People's Aid, with their technical clearing experience and profound comprehension of the humanitarian aspects of ERW and cluster munitions. Non-Norwegian NGOs like Human Rights Watch and Landmine Action UK have unique hands-on experience of the cluster issues, both from effects in the field and from the international processes, like the CCW. Together with the legal section from the Arms and Miners unit of ICRC they represent valuable and relevant expertise that could provide useful also in the future.

Further it may be valuable to initiate research on the issue. A research agenda may include the following topics:

- Legal issues – in particular on how existing interpretation of IHL might provide adequate response to the humanitarian impacts of ERW
- Policy issues – on how the ERW and related work interacts with other security and humanitarian areas; and what Norway can achieve in these areas.

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<sup>1</sup> Statement from Cluster Munitions Coalition. The ICRC is not part of this NGO coalition, and expressed their view in a separate statement; welcoming the new protocol but also urging the States Parties to continue to work on cluster munitions.

- Field studies – generating more knowledge about impact on the ground from ERW and cluster munitions, in support of support policy formulation.
- Military tactics and weapons studies; on alternatives to cluster munitions with less humanitarian consequences, and on middle and long term prospects for the use of cluster munitions

### **List of activities**

- Participated at the fifth and sixth sessions of the Group of Governmental experts in June and November 2003
- Contact meetings with Norwegian People's Aid Mine Action Unit and Norwegian Red Cross' section for International Humanitarian Law and Save the Children Norway on the ERW process and the Protocol V
- Published op-ed in Dagsavisen on December 21, commenting the new Protocol V