

**PROTOCOL V ON EXPLOSIVE REMNANTS OF WAR,
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
(GENEVA, 28 NOVEMBER 2003)**

[2006] ATNIF 20

Documents tabled on 5 September 2006:

**National Interest Analysis [2006] ATNIA 35
with attachment on consultation**

Text of the proposed treaty action

Background information:

Current status list of Parties

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY SUMMARY PAGE

Protocol V on Explosive Remnants of War, 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 (Geneva, 28 November 2003) [2006] ATNIF 20

Nature and timing of proposed treaty action

1. It is proposed that Australia notify the Secretary General of the United Nations of its consent to be bound by Protocol V on Explosive Remnants of War ('Protocol V'), 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* ('the Convention') [1984] ATS 6, in accordance with Article 4(4) and 8(2)(b) of the Convention. Article 8(2) of the convention contemplates the adoption of additional protocols. Pursuant to Article 4(5), once adopted and in force, a protocol forms part of the Convention for those parties that are bound by it.
2. The Protocol will enter into force on 12 November 2006, having recently received the required twenty notifications to the Secretary General of consent to be bound in accordance with Article 5(3) and 8(2)(b) of the Convention. The Protocol will enter into force for Australia six months after notification of its consent to be bound, in accordance with Article 5(4) and 8(2)(b) of the Convention. It is proposed that Australia notify the Secretary General of its consent to be bound as soon as all relevant domestic treaty processes have been completed.
3. Protocol V was adopted by the High Contracting Parties to the Convention in November 2003. Its adoption does not alter the Convention or its existing four Protocols.

Overview and national interest summary

4. The objective of this Protocol is to minimise the risks and effects of explosive remnants of war. The Protocol seeks to achieve this objective by requiring the High Contracting Parties to mark and clear, remove or destroy explosive remnants of war. The measures specified by the Protocol offer protection to civilian populations and humanitarian missions within territory under the control of Parties that have consented to be bound by the Protocol. Support for this Protocol is consistent with Australia's long-standing commitment to reducing the humanitarian impact of armed conflict, particularly on civilian populations.

Reasons for Australia to take the proposed treaty action

5. The Convention is an important instrument of international humanitarian law. The Convention and its four annexed Protocols place prohibitions and/or restrictions on the use of specific categories of conventional weapons, considered to be indiscriminate and to inflict superfluous injury or unnecessary suffering on both combatants and civilians. The Convention has 100 Parties. This Protocol builds on the Convention by extending its scope to include measures to minimise the risks and effects of explosive remnants of war.

6. Australia's delegation to the Group of Government Experts responsible for drafting the Protocol, included officials from DFAT and Defence. The delegation played an active role in the negotiation of Protocol V. Australia advocated the need to strike a balance between addressing the humanitarian impact of explosive remnants of war and legitimate military needs, as well as supporting a pragmatic approach to clearance responsibilities in territories outside a State's control. Protocol V is consistent with Australia's commitment to limiting the impact of armed conflict on civilian populations.

7. The short negotiation period of 12 months demonstrates the widespread support for Protocol V, which mirrors the current practice of many States. The Protocol was adopted by consensus at the 2003 Meeting of State Parties to the Convention. New Zealand and the UK have publicly announced their intention to notify their consent to be bound, and Sweden was the first State to deposit its notification of consent to be bound, on 2 June 2004. The Protocol will enter into force on 12 November 2006, having recently received the required 20 notifications.

Obligations

8. High Contracting Parties to Protocol V are obliged to mark and clear, remove or destroy explosive remnants of war present in its territory; record, retain and transmit information regarding use of explosive ordinances; take precautions for the protection of civilians; provide certain protection to humanitarian missions operating in relevant areas; cooperate with and provide assistance to other States and international organisations with respect to explosive remnants of war; and to undertake generic preventative measures.

9. Explosive remnants of war are defined under this Protocol to include unexploded ordnance and abandoned explosive ordnance. Most obligations in the Protocol fall primarily on the Party that controls the territory where the explosive remnants of war occur, except that the party that used the explosive remnants of war is responsible for recording, retaining and transmitting information on their use and location and has a tempered obligation to assist with their marking, clearing, removal or destruction.

10. Protocol V largely operates prospectively, with most obligations not applying to explosive remnants of war that existed prior to its entry into force (Article 1(4) and 2(5)). Obligations regarding the protection of humanitarian missions (Article 6) and the provision of assistance (Article 7) do apply to existing explosive remnants of war.

Marking and clearance, removal or destruction (Article 3)

11. Parties are obliged, as soon as feasible after the cessation of active hostilities, to assess, mark and clear, remove or destroy explosive remnants of war from territory under its control. Parties are also obliged to cooperate, where appropriate, with other States, regional and international organisations to fulfil this obligation.

Recording, retaining and transmission of information (Article 4)

12. Parties are obliged, to the maximum extent possible and as far as practicable, to record and retain information on the use or abandonment of explosive ordnance in order to facilitate its post-conflict clearance. On the cessation of active hostilities, States Parties are obliged to provide this information to parties in control of the affected area or to other organisations relevant to clearance operations. This obligation is subject to Parties legitimate security interests.

13. If a Party does not control the territory in which it was the user of munitions which have become explosive remnants of war, it is obliged to provide information to Parties in control of the area.

Precautions for the protection of the civilian population (Article 5)

14. Parties are obliged to take all practicable precautions to protect the civilian population in territory in its jurisdiction or control from explosive remnants of war. These precautions may include warnings, risk education, and the marking, fencing and monitoring of affected territory. This obligation is consistent with Article 3 of Amended Protocol II to the Convention, which Australia entered into force for Australia on 3 December 1998.

Protection of humanitarian missions (Article 6)

15. Parties have an obligation to protect, as far as feasible, humanitarian organisations working in an area under the control of the Party. Parties also have an obligation to provide such organisations with information, as far as feasible, on the location of explosive remnants of war in the area in which the organisation is operating.

Assistance (Articles 7 and 8)

16. Each Party has a right to seek and receive assistance in dealing with problems posed by existing explosive remnants of war. Each Party in a position to do so shall provide such assistance. Forms of assistance will include victim care, contribution to trust funds and information, technology and equipment exchange.

Generic preventative measures - munitions reliability (Article 9)

17. States Parties are to employ generic preventative measures to minimise the occurrence of explosive remnants of war. Suggested best-practice measures are contained within Section 3 of the Technical Annex and relate to production, testing, management and training in order to reduce the failure rates of explosive ordnance. These constitute voluntary measures States Parties may wish to take in addressing explosive remnants of war.

Implementation

18. Ratification of the Protocol will not require additional implementation measures in Australian law. Some amendments to Australian Defence Force (ADF) doctrine, orders, relevant publications and standard operating procedures are required.

19. However, an audit of ADF practices has confirmed that the ADF is already substantially compliant with the provisions of Protocol V, and steps are being taken to ensure timely full compliance.

Costs

20. Ratification of Protocol V will not involve any immediate additional financial cost for Australia. This Protocol will not require the ADF to acquire new weapons or replace any existing weapons. The resources required to amend ADF doctrine, orders, relevant publications and standard operating procedures will be met from within existing Defence funds.

21. The clearance requirements may pose additional future operational costs for Defence, in the event that Australia is in control of, territory containing explosive remnants of war. Australia may also incur costs if assistance is requested of it under this protocol.

Regulation Impact Statement

22. The Office of Regulation Review (Productivity Commission) has been consulted and confirms that a Regulation Impact Statement is not required.

Future treaty action

23. The Convention allows for a conference of the Parties to adopt further protocols to deal with categories of weapons not already covered (Article 8(2)). Amendments to either the Convention or its Protocols may also be adopted by a conference of the Parties (Article 8(1)(b)). Parties must give their consent to be bound by any amendments to the Convention or its annexed Protocols, or to any new protocols, before these enter into force for the Party concerned.

24. At the 2003 Meeting of Parties it was agreed to extend the mandate of the Group of Government Experts examining the issue of anti-tank mines (also known as Mines Other than Anti-Personnel Mines), which may potentially result in further protocols to the Convention.

25. Any further future treaty action pursuant to the Convention or annexed Protocols would be subject to Australia's domestic treaty process, including consideration by JSCOT.

Withdrawal or denunciation

26. Article 9 of the Convention provides that a High Contracting Party can denounce the Convention or any of the annexed Protocols to which it is bound by so notifying the Depository (the Secretary-General of the United Nations). Denunciation shall occur one year after receipt of the notification of denunciation.

27. If on the expiry of the one-year notification period the denouncing High Contracting Party is engaged in situations referred to in Article 1 of the Convention (ie international and non-international armed conflicts, all cases of occupation of territory and situations where people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination), then the Party shall continue to be bound by the Convention and relevant Protocols until the end of the armed conflict or occupation (Article 9 of the Convention).

Contact details

Counter-Proliferation Section, Arms Control Branch
International Security Division
Department of Foreign Affairs and Trade.

**Protocol V on Explosive Remnants of War, 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 (Geneva, 28 November 2003)**
[2006] ATNIF 20

CONSULTATION

Department of Defence

1. Given the nature of the Protocol and its impact on the doctrine, orders, relevant publications and standard operating procedures of the ADF, the Department of Defence was closely involved in the development of Australia's position in the Group of Government Experts. Defence legal and operational experts formed part of the Australian delegation at each of the meetings of the Group of Government Experts, and also advised the delegation at the annual Meeting of States Parties. Consultation with Defence included:

- Strategic Policy Division; Defence Legal; Army, Navy and Airforce Headquarters; the ADF Warfare Centre; Strategic Operations Command; Capability Development Group; and the Defence Materiel Organisation.
- Strategic Policy Division, Land Command Engineers and Defence Legal have been actively involved since the formation of the Group of Government Experts (in which the Australian delegation actively participated) in 2003.
- The negotiation of Protocol V was approached on a whole-of-Government basis. Defence experts (officers from Army and Defence Legal) consistently formed part of the Australian delegation.
- In order to ensure implementation of the Protocol within Defence, the Secretary of Defence and the Chief of Defence Force issued a Joint Directive directing the Defence Organisation to ensure full compliance with the Protocol within 180 days of Australia depositing its instrument of consent to be bound with the United Nations.

Others

2. The proposed treaty action was notified to the States and Territories through the treaties schedule of the Commonwealth-States-Territories Standing Committee on Treaties (SCOT).

3. To ensure that the views of those in the non-government sector were taken into account, Protocol V has been an agenda item at the annual National Consultative Committee on Peace and Disarmament meetings in both 2002 and 2003. Members of this Committee include representatives from the Australian Red Cross, and the Australian Network of the International Campaign to Ban Landmines. International non-government organisations which also took part in the work of the Group of Government Experts included the International Committee of the Red Cross, the Geneva International Centre for Humanitarian Demining, Human Rights Watch, and the International Campaign to Ban Landmines.

**Protocol V on Explosive Remnants of War, 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 (Geneva, 28 November 2003)**
[2006] ATNIF 20

1. As of August 2006, 23 States have notified their consent to be bound by Protocol V. The notification dates are set out below

Albania	12.05.2006
Bulgaria	8.12.2005
Croatia	07.02.2005
Czech Republic	06.06.2006
Denmark	28.06.2005
El Salvador	23.03.2006
Finland	23.03.2005
Germany	03.03.2005
Holy See	13.12.2005
India	18.05.2005
Liberia	16.09.2005
Liechtenstein	12.05.2006
Lithuania	29.09.2004
Luxembourg	13.06.2005
Netherlands	18.07.2005
Nicaragua	15.09.2005
Norway	08.12.2005
Sierra Leone	30.09.2004
Slovakia	23.03.2006
Sweden	02.06.2004
Switzerland	12.05.2006
Tajikistan	18.05.2006
Ukraine	17.05.2005

