



International treaty examination of the Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, done at Dublin 19–30 May 2008

Report of the Foreign Affairs, Defence
and Trade Committee

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International treaty examination of the Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, done at Dublin 19–30 May 2008

Recommendation

The Foreign Affairs, Defence and Trade Committee has conducted an international treaty examination of the Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, done at Dublin 19–30 May 2008, and recommends that the House take note of its report.

Finding

The Foreign Affairs, Defence and Trade Committee has conducted an international treaty examination of the Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, done at Dublin 19–30 May 2008, and has no matters to bring to the attention of the House.

We would support the Minister for Disarmament's progressing the bill giving effect to the treaty expeditiously through the House.

The National Interest Analysis is appended to our report.

Appendix A

Committee procedure

The Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, done at Dublin 19–30 May 2008 was referred to the committee on 22 April 2009. We met on 7 and 14 May 2009 to consider the treaty and heard evidence from the Ministry of Foreign Affairs and Trade.

Committee members

**John Hayes (Chairperson)
Hon Chris Carter
Jacqui Dean
Hon Pete Hodgson
Dr Paul Hutchison
Keith Locke
Todd McClay
Hon Maryan Street**

Appendix B

National Interest Analysis: Convention on Cluster Munitions

Executive summary

1 The Convention on Cluster Munitions (the Convention), which bans the use of cluster munitions by States Parties, is a significant development in international disarmament and humanitarian measures. The Convention was concluded in Dublin on 30 May 2008, and opened for signature at a ceremony held in Oslo on 3 December 2008. New Zealand was one of 94 states to sign the Convention in Oslo.

2 The new Convention's central purpose is to prohibit the use of all cluster munitions, which are canister-like munitions that encase a large number of smaller explosive devices ("bomblets"). Usually delivered from aircraft, missiles or artillery, they are designed to open above ground and release their bomblets over an area which, in some cases, can be quite large. Many of the bomblets do not explode on impact and remain on the land, potentially killing or maiming civilians for years following their use.

3 The Convention also prohibits the development, production, acquisition, stockpiling, retention and transfer (which includes importation/exportation) of cluster munitions; requires stockpiles of cluster munitions to be destroyed within eight years (with limited provision for time extensions, and retention for training purposes); requires contaminated areas to be cleared within ten years, and risk reduction education to be provided in affected areas; sets out the rights of cluster munitions victims, and the obligations of States Parties for assistance to those victims; and requires States Parties in a position to do so to provide international co-operation and assistance to States Parties affected by cluster munitions.

4 In addition, the Convention includes a provision on interoperability (issues surrounding combined military exercises, operations and relations with States not Party) which ensures that coalition military operations between States Parties and States not Party to the Convention are not prohibited. This provision does not, however, permit States Parties themselves to engage in banned activities during such operations.

5 There are strong reasons for New Zealand to proceed to ratify the Convention. Most important among these is that a well supported Convention will have the greatest potential to help prevent the unacceptable humanitarian harm caused by the use of cluster munitions. This National Interest Analysis concludes that the benefits to New Zealand from ratifying the Convention outweigh any associated costs. There are no significant risks or disadvantages identified that would argue against New Zealand becoming party to the Convention.

Nature and timing of proposed binding treaty action

6 The Convention on Cluster Munitions was signed by 94 states, including New Zealand, at a ceremony in Oslo on 3 December 2008. As at 18 March 2009 there were 96 signatories. Under its terms, the Convention will enter into force six months after the

thirtieth instrument of ratification, acceptance, approval or accession has been deposited. As at 18 March 2009 five states had ratified the Convention - Ireland, Sierra Leone, Norway, Laos and the Holy See.

7 Under Article 16, the Convention is open for ratification by signatories. It is proposed that New Zealand deposit its instrument of ratification with the Secretary-General of the United Nations, as depository, as soon as practicable after the completion of the necessary domestic processes including the passage of implementing legislation. However, whether the Convention will have received thirty instruments of ratification by that time is not yet clear. If it has, the Convention would enter into force for New Zealand six months after the deposit of its instrument. If it has not, the Convention would enter into force for New Zealand on the day on which the Convention itself enters into force.

Reasons for New Zealand becoming party to the treaty

8 There are several significant reasons as to why New Zealand should become Party to the Convention.

9 First, New Zealand played a major role in the development of the Convention, in keeping with its concerns on the humanitarian harm caused by cluster munitions and as a strong proponent of international disarmament and arms control efforts more broadly. Prior to the development of the Convention, New Zealand, along with a number of other states, had pushed for the development of a legally-binding international instrument prohibiting the use of cluster munitions. Initially it was hoped that this would occur under the framework of the United Nations (UN) Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects (CCW). However, because of a lack of progress towards such an instrument over a number of years under the CCW track, New Zealand became a member of the Core Group of states that initiated and steered the “Oslo Process” on cluster munitions outside the United Nations framework, which resulted in the adoption of the Convention.

10 The Oslo Process was launched in 2007 and involved an intensive series of international meetings, including a conference hosted by New Zealand in Wellington in February 2008. The Wellington conference was the penultimate meeting before the Convention’s adoption, in Dublin, in May 2008.

11 Second, the Convention, as adopted, is a high quality treaty which adheres strictly to the humanitarian goals pursued through its negotiation.

Specifically, the Convention:

- bans the use of all cluster munitions (which are canister-like munitions that encase a large number of smaller explosive devices (“bomblets”). Usually delivered from aircraft, missiles or artillery, they are designed to open above ground and release their bomblets over an area, which in some cases can be quite large. Many of the bomblets do not explode on impact and remain on the land, potentially killing or maiming civilians for years following their use.)

- prohibits other associated activity including the development, production, acquisition, stockpiling, retention and transfer (which includes importation/exportation) of cluster munitions
- requires stockpiles of cluster munitions to be destroyed as soon as possible but not later than eight years after the entry into force of the Convention (with provision for a four year extension under certain circumstances; and with provision for a limited supply to be retained for training and research purposes)
- requires contaminated areas to be cleared as soon as possible but not later than ten years after the entry into force of the Convention (with provision for a five year extension in certain circumstances), and risk reduction education to be provided in those affected areas
- sets out clearly the rights of cluster munitions victims, and the obligations of States for assistance to these victims
- requires States Parties in a position to do so to provide international cooperation and assistance to affected States Parties.

12 Third, the Convention complements and supports New Zealand's existing treaty commitments and work in this area. New Zealand is already a party to the Convention On The Prohibition Of The Use, Stockpiling, Production And Transfer Of Anti-Personnel Mines And On Their Destruction (the Ottawa Convention), and the Protocol on Explosive Remnants of War to the 1980 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 (Protocol V of the CCW). The Convention on Cluster Munitions adds another important element to efforts aimed at reducing the harm to civilians caused by conventional weapons during armed conflicts.

13 New Zealand also continues to take a range of other actions to help deal with the issue of cluster munitions, including the deployment of New Zealand Defence Force (NZDF) personnel to southern Lebanon to assist in the United Nations-led post-conflict clean-up operation of the estimated one million unexploded bomblets from cluster munitions that affected the area after the 2006 conflict.

14 Fourth, the Convention is strongly supported by the international community. The Convention's successful adoption in Dublin was the result of a determined push by the more than 100 states present and New Zealand was one of 94 states to sign at the ceremony in December 2008 in Oslo. As at 18 March 2009 the Convention had 96 signatories. The other Core Group members of the Oslo Process (Austria, Holy See, Ireland, Mexico, Norway and Peru) and key security partners, including Australia, Canada and the United Kingdom have all signed the Convention. A wide spread of North Atlantic Treaty Organisation (NATO) states, including France, Germany, Italy, the Netherlands, Spain, Belgium, Portugal and Denmark have also signed.

15 Finally, and perhaps most importantly, New Zealand's support to the Convention will help to ensure that the Convention has the maximum possible impact. A well supported Convention will have the greatest potential to help to prevent unacceptable civilian harm caused by cluster munitions. Unfortunately, the use of such munitions has

continued to be prevalent, even in recent years as witnessed during the conflict in Lebanon (2006).

16 Several significant states did stand aside from the Oslo Process, including the United States, Russia, China, India, Pakistan and Israel, all of which have used and/or have stocks of cluster munitions. Those states are unlikely to become party to the Convention in the foreseeable future, the effect of which is to leave a large percentage of the world's stocks of cluster munitions outside the framework of the Convention. But even for those states which did not participate in the negotiations and are unlikely to ratify the Convention, a widely-supported Convention will make any future use of cluster munitions the subject of increased international attention and criticism.

Advantages and disadvantages to New Zealand of the treaty entering into force

Advantages to New Zealand of the treaty entering into force

17 There are a number of advantages to becoming a party to the Convention:

- The Convention is consistent with New Zealand's approach to international disarmament and arms control matters, and New Zealand's support for a rules-based international system that promotes its security and prosperity goals.
- New Zealand would be continuing to endorse and contribute to widely-supported multilateral efforts aimed at protecting civilians from the harmful effects of weapons, and demonstrating its continuing commitment to promote and find international solutions to pressing humanitarian problems.
- The Convention reinforces other work New Zealand is already undertaking specifically with regard to helping clear cluster munition contaminated areas. This has included the deployment of New Zealand Defence Force unexploded ordnance experts to assist with cluster munition clearance in southern Lebanon, New Zealand's un-tagged funding to the United Nations Mine Action Service which undertakes a variety of work to do with unexploded ordnance, and New Zealand's untagged funding to the International Committee of the Red Cross which supports physical rehabilitation as well as preventative programmes that focus on risk reduction, education and advocacy work.

Disadvantages to New Zealand of the treaty entering into force

18 While several articles in the Convention place obligations on States Parties, most of those obligations would be able to be implemented at no cost or disadvantage to New Zealand. For example, New Zealand does not currently use or maintain stocks of cluster munitions and does not have any plans to acquire them. Therefore New Zealand would have no destruction obligations domestically. There are no areas of New Zealand's territory contaminated by unexploded ordnance. Therefore New Zealand would have no clearance obligations domestically. In addition, the New Zealand Defence Force does not train with live cluster munitions and does not at present see any need for New Zealand to acquire stocks for this purpose, or to develop countermeasures. However, should that assessment of New Zealand's training needs change in the future, New Zealand would not be disadvantaged as the Convention permits a limited number of cluster munitions to be imported for training purposes.

19 Some Convention obligations, however, potentially have costs and/or disadvantages associated with their implementation.

20 Becoming Party to the Convention could have bilateral implications for New Zealand's relations with States that are unlikely to ratify the Convention in the near future and retain stocks of and/or use cluster munitions, including the United States. New Zealand would be obliged to promote the Convention to States not Party, and to make best efforts to discourage the use of cluster munitions by States not Party.

21 New Zealand would also be under an obligation in combined military operations not to undertake any of the banned activities identified in Article 21(3). Given that New Zealand does not use or hold stockpiles of cluster munitions and therefore would not in any event engage in the full range of banned activities, the key obligation under this provision would be that New Zealand could not “expressly request the use of cluster munitions in cases where the choice of munitions is within its exclusive control”. There may be some risk associated with how this obligation and its operational impact would be perceived by New Zealand’s military partners which are not Party to the Convention, although given the large swell of international support for the Convention, many other states, including most of the militarily significant states of NATO, would be in a similar position to New Zealand should they ratify the Convention.

22 There could also be potential risks to New Zealand Defence Force personnel and costs to New Zealand in the unlikely situation where New Zealand would be obliged to clear cluster munitions. That obligation would arise in the situation where cluster munitions were found in an area determined to be under the “jurisdiction or control” of New Zealand forces abroad. But such a situation would be very unlikely, given the normal roles and tasks of New Zealand forces deployed overseas.

Overall assessment of the advantages and disadvantages to New Zealand

23 On balance, it is considered that the advantages of becoming Party to the Convention would outweigh the potential disadvantages listed above.

Obligations which would be imposed on New Zealand by the treaty

24 As a State Party to the Convention on Cluster Munitions, New Zealand would be agreeing to the following obligations:

- never to use, develop, produce, acquire, stockpile, retain or transfer cluster munitions as defined by the treaty¹ (Article 1)
- to destroy stockpiles of cluster munitions within eight years (Article 3)

¹ For the purposes of the Convention a “cluster munition” is defined as “a conventional munition that is designed to disperse or release explosive submunitions each weighing less than 20 kilograms and includes those explosive submunitions”. There are three categories of munitions exempt from the Convention. In addition to exclusions for pyrotechnics and munitions causing electrical and electronic effects, the definition of banned cluster munitions also provides a limited exclusion for certain types of weapons, notably those that contain sub-munitions that satisfy the cumulative criteria of: quality (fewer than ten sub-munitions); weight (each sub-munition heavier than four kilograms); designed for precision guidance and targeting; and equipped with electron self-destruction and self-deactivation features.

- to clear cluster munition contaminated areas under New Zealand jurisdiction or control, within ten years, and conduct risk reduction education among civilians in affected areas (Article 4)
- to provide adequate age and gender sensitive assistance, including medical care, rehabilitation and psychological support to cluster munition victims in areas under New Zealand jurisdiction or control (Article 5)
- to provide “if in a position to do so” (Article 6):
 - assistance to other States Parties for: destruction, clearance and assistance to victims
 - urgent assistance to a State Party in which cluster munitions are used after the entry into force of the Convention
 - contributions to the economic and social recovery needed as a result of the use of cluster munitions in affected States Parties
 - contributions to relevant trust funds in order to facilitate the provision of assistance
- to facilitate and have the right to participate in the fullest possible exchange of equipment and scientific and technological information concerning the implementation of the Convention (Article 6)
- to provide an initial, then annual, report on compliance with the Convention (Article 7)
- to consult and cooperate with other States Parties, through the United Nations, regarding implementation of the Convention (Article 8)
- to take all appropriate legal, administrative and other measures to implement the Convention (Article 9)
- to attend regular meetings of States Parties and Review Conferences (Articles 11 and 12)
- to encourage States not Party to ratify, accept, approve or accede to the Convention (Article 21).

25 Under Article 19, the Convention is not subject to reservations.

26 Under Article 10, disputes between States Parties to the Convention should be resolved in the first instance by consultation between the parties, or if required through recourse to the Meeting of States Parties and referral to the International Court of Justice in conformity with the Statute of the Court.

Implementation

27 Article 9 of the Convention requires States Parties to take all appropriate legal, administrative and other measures to implement the Convention.

28 In this case it is clear that the implementation of the obligations under the Convention in New Zealand law would require the passage of implementing legislation. It

is proposed that the obligations requiring legislation be implemented through a Cluster Munitions (Prohibition) Bill, which is likely to be broadly similar to the Anti-Personnel Mines (Prohibition) Act 1998 that implemented the Ottawa Convention. There is no satisfactory non-legislative implementation approach that has been identified.

29 The primary purpose of new legislation would be to give effect to the core obligation of the Convention: the prohibition on the use, development, production, acquisition, stockpiling, retention and transfer (including import/export) of cluster munitions. It would be necessary to create offences to criminalise those actions and provide for penalties at an appropriate level.

30 The proposed Bill would also:

- establish a system to deal with the presence and/or use of cluster munitions in New Zealand - for example cluster munitions imported without detection. The system would define who could deal with such munitions; ensure that authorised persons dealing with those munitions were exempted from the offences above; and provide for the seizure, forfeiture and destruction of those cluster munitions
- allow for the potential importation of cluster munitions by the New Zealand Defence Force for training in cluster munition clearance techniques, if deemed necessary in the future and authorised by the Minister
- provide for the supply of information to the New Zealand government by persons dealing with cluster munitions so that New Zealand can meet its reporting obligations under the Convention (with an offence for the failure to provide information and a penalty at an appropriate level also attached)
- establish the Convention's relationship to Tokelau.

31 In addition, the proposed Bill would also make several consequential amendments to the Arms Act 1983 provisions on restricted weapons. Those amendments would ensure that provisions in the Arms Act which allow for some limited uses of restricted weapons would not apply to cluster munitions.

32 Aside from the legislative requirements detailed above, other aspects of the Convention, including its administrative requirements (i.e. the submission of national reports to the Secretary-General of the United Nations), would be implemented through changes to the policy and practice of relevant agencies, including the Ministry of Foreign Affairs and Trade and the New Zealand Defence Force.

Economic, social, cultural and environmental effects of the treaty entering into force for New Zealand

33 The entry into force of the Convention on Cluster Munitions would not be expected to have any economic, social, cultural or environmental effects in New Zealand as New Zealand holds no stockpiles of cluster munitions and has no plans to acquire them. The measures contained in the Convention are aimed at preventing the unacceptable civilian harm caused by cluster munitions.

Costs to New Zealand of compliance with the treaty

34 Under the Convention there would be minor fixed financial costs. There would also be some potential financial and resource costs associated with a few of the obligations, although overall those are of a minimal nature.

(a) Fixed costs

35 Following entry into force of the Convention and New Zealand's ratification, New Zealand would be obliged to meet the costs associated with the administration of the Convention. However, these would be minor, apportioned with regard to the United Nations scale of assessments, and met from Vote Foreign Affairs and Trade baseline funding. The precise administrative cost is not known as the Convention is not yet operational but the cost to New Zealand for the administration of the Ottawa Convention, a similar treaty, is approximately \$2000 USD/annum.

(b) Potential costs

36 Potential costs could arise from the obligations New Zealand would have under Articles 5 (assistance to victims) and 6 (assistance to other States Parties) of the Convention.

(i) Assistance to victims (Article 5)

37 Article 5 requires States Parties to provide adequate age and gender-sensitive assistance, including medical care, rehabilitation and psychological support, to cluster munition victims in areas under their jurisdiction or control. The definition of a victim also extends to their affected families or communities. In addition, each State Party is required to make every effort to collect reliable data with respect to cluster munitions victims.

38 At present New Zealand's existing standard of care to such victims is considered to meet the adequacy standard in the Convention and, in addition, the number of people in New Zealand who would require publicly funded health care due to injury from cluster munitions is expected to be very low. Given the extremely low likelihood of the use of cluster munitions in New Zealand, the most likely scenario for costs to flow from the obligation in the Convention would be through an increase in entry of cluster munitions victims into New Zealand. The Convention, however, would not require any changes to immigration policy and a decision whether or not to permit cluster munitions victims to migrate to New Zealand would remain within the control of the New Zealand government. Accordingly, ratifying the Convention would be unlikely to have financial implications in terms of assistance to victims.

(ii) Assistance to other States Parties (Article 6)

39 Article 6 requires States Parties "in a position to do so" to provide technical, material and financial assistance to States Parties affected by cluster munitions.

40 New Zealand has already provided assistance to states affected by cluster munitions, for example, through the recent deployment of New Zealand Defence Force clearance experts to southern Lebanon to clear unexploded cluster munitions. New Zealand also provides un-tagged funding to the United Nations Mine Action Service,

which leads the United Nations' activities in clearance of cluster munitions in affected territories, as well as to the International Committee of the Red Cross, which runs physical rehabilitation and preventative mine action programmes.

41 It is considered that Article 6 would not directly impose any assessed or compulsory financial obligations on New Zealand over and above current contributions. It would be open to New Zealand to increase contributions if it decided that an increase was appropriate, and heightened expectations and requests for assistance from cluster munition-affected states may arise following the ratification of the Convention, but the decision as to whether New Zealand is "in a position to do so" would remain one for the New Zealand government.

Future protocols and amendments

42 Under Article 13 any State Party may propose amendments to the Convention. Any proposal for an amendment will need to be communicated to the Depositary (the Secretary-General of United Nations), who will consult with other States Parties on whether a conference should be convened to consider the proposal. If a majority of States Parties support further consideration, an Amendment Conference must be convened. Such a conference may adopt the amendment by a majority of two-thirds of the States Parties present. An amendment will enter into force for States Parties that accepted the amendment on the date of deposit of acceptances by a majority of States Parties. It will enter into force for any remaining State Party on the date of deposit of its instrument of acceptance.

Consultation

43 As New Zealand does not hold any stocks of cluster munitions there were no specific interests identified which would have warranted consultation on the proposal to implement this treaty.

Withdrawal or denunciation

44 Under Article 20 of the Convention, any State Party may withdraw from the Convention by notifying all other States Parties, the Depositary, and the United Nations Security Council. Withdrawal will take effect six months after the receipt of the instrument by the Depositary unless, at the end of that six-month period, the withdrawing State Party is engaged in armed conflict, in which case the withdrawal will not take effect before the end of the armed conflict.

Adequacy statement

45 As there would be no significant impact on New Zealand's economic growth forecast as a result of the implementation of the Convention but legislative change is required, the determination of this National Interest Analysis's adequacy has been made by the Ministry of Foreign Affairs and Trade.

46 This National Interest Analysis follows strictly the guidelines under Standing Order 389, thoroughly establishing the rationale for New Zealand's implementation of the Convention. The view of the Ministry of Foreign Affairs and Trade is that the paper clearly demonstrates that the benefits of implementation outweigh the identified costs and risks.

Tokelau

47 Tokelau has been consulted on New Zealand's proposed treaty action and has decided to raise the issue at the meeting of Tokelau's Council scheduled for mid-late May 2009. A decision will be taken at that meeting on whether the treaty action will extend to Tokelau.

**Ministry of Foreign Affairs and Trade
March 2009**