

19 April 2009

The Secretary
Joint Standing Committee on Treaties
Parliament House
Canberra, ACT, 2600

**Australian Red Cross submission to the Joint Standing Committee on Treaties inquiry relating to:
Convention on Cluster Munitions adopted at Dublin on 30 May 2008**

1. Introduction

Australian Red Cross would like to thank the Joint Standing Committee on Treaties for the opportunity to make a written submission on Australia's proposed ratification of the Convention on Cluster Munitions. The issue of cluster munitions is of particular importance to Australian Red Cross given the role of the International Red Cross Red and Crescent Movement in promoting new norms in international humanitarian law (IHL) and providing humanitarian assistance in times of armed conflict. Unexploded ordinance, in particular cluster sub-munitions, have a significant adverse impact on the civilian population and depletes the capacity of humanitarian workers the Red Cross and Red Crescent Movement on our ability to provide essential services and aid pursuant to our legal mandate under IHL.

2. Convention on Cluster Munitions

The Convention on Cluster Munitions came about as a response to human suffering caused by cluster munitions, which have killed and injured high numbers of civilians in countries where they have been used. As a result of the so-called "Oslo Process" of negotiations, 107 States concluded an international treaty prohibiting these weapons in May 2008. The Convention was opened for signature on 3 December 2008, at which time Australia signed, along with 93 other countries. As at April 2009 there have been 6 ratifications of the Convention, which requires 30 ratifications before it will enter into force.

Australian Red Cross strongly supports the treaty and has consistently maintained that any treaty concluded should ban inaccurate and unreliable cluster munitions and afford civilians the strongest possible protection. This treaty goes a long way to meeting that objective.

The Convention text was agreed by more than 111 States on 30 May at a diplomatic conference in Dublin, Ireland. Australian Red Cross participated as a member of civil society on the Australian Government Delegation to the Dublin Diplomatic Conference and appreciated the opportunity to work closely and constructively with government on the issue.

The Convention prohibits the use, production, stockpiling and transfer of cluster munitions and requires State Parties to destroy existing stocks within eight years. It commits States to the clearance of areas contaminated with unexploded cluster munitions and to the provision of assistance for victims and their communities.

Under the terms of the Convention, weapons with fewer than 10 explosive sub-munitions are not covered by the definition of cluster munitions as long as each of those less than 10 sub-munition weighs more than four kilograms, can detect and engage a specific target object and is equipped with electronic self-destruct and self deactivating features. Australian Red Cross regards this as a strong definition which will effectively eliminate those cluster munitions that have caused civilians decades of suffering but will allow certain precision-guided sub-munitions which have a legitimate military utility and which will not adversely impact upon the civilian population.

The Convention does not prohibit "military cooperation and operations" with States not party to the Convention that might use cluster munitions during combined operations. States Parties may continue to be involved in planning, training, logistics, and combat operations with non-party States using these weapons. Such activities do not necessarily violate the Convention as long as the State Party does not itself use cluster munitions or directly participate in some other prohibited activity such as stockpiling, transferring or producing cluster munitions. In any case, States Parties are required to discourage the use of cluster munitions by non-party States.

This issue was a challenging one in the negotiations. The text does not prohibit "military cooperation and operations" with States not party to the Convention and which may use cluster munitions in a joint operation. The provision limits the scope of the prohibition of assistance in the use of cluster munitions contained in the Convention. However, the potential impact of this provision is limited to some degree by the requirement on States Parties to discourage use of cluster munitions in joint operations.

Importantly, the Convention contains robust provisions on assistance for victims. Each State Party with respect to cluster munition victims in its territory or under its control must provide for their medical care and physical rehabilitation, psychological support and social and economic inclusion. In addition, the State must assess domestic needs in these areas and develop plans and mobilize resources to meet them. It is worth noting that it is not only those who are killed or injured by cluster munitions who are defined as "cluster munition victims"; the term also covers families and communities that have suffered socio-economic and other consequences.

This is the most detailed provision on assistance for victims to be included in an IHL treaty. The Convention potentially establishes a new norm of international humanitarian law that cluster munitions are prohibited weapons. Such a norm is likely to have an effect on the practice of all States, even those which are not yet ready to adhere to it formally.

3. Humanitarian Consequences of Cluster Munitions

Cluster munitions have been of humanitarian concern for decades. These weapons have taken a heavy toll on civilians during armed conflict and have continued to do so even after the end of fighting.

There are significant problems with the design, reliability, targeting and deployment of cluster munitions. These include the following:

- the lack of targeting capability (i.e., they are essentially unguided);
- their use in areas where military and civilian sites are co-located;
- the high failure rate of sub-munitions (estimated at between 7 - 30 %¹, and on occasions as high as 40%²); and
- lack of self destruct/deactivation mechanisms and/or reliability of such mechanisms in more recent Cluster Munitions;
- difficulties in effectively mapping, marking and subsequently deactivating/removing unexploded submunitions.

Each of these problems raises concerns regarding the direct and indirect effect of Cluster Munitions on the civilian population, both during and after conflict.

Cluster Munitions have an immediate destructive impact on deployment, and use of such weapons in civilian areas, or in areas where military and civilian sites are co-located, invariably leads to significant civilian deaths and casualties.

However, it is not only the high civilian death and casualty toll that is of concern. Due to their relatively high failure rate and difficulties associated with de-mining, the presence of unexploded sub-munitions also creates long term social and economic impacts for the country attempting to rebuild and create a lasting peace. In Vietnam, Laos, Cambodia, Sudan, Ethiopia, Iraq, Kuwait, Russia/Chechnya, and Yugoslavia/Kosovo, many fields, villages and cities are no longer accessible because of the existence of unexploded sub-munitions and landmines. In Vietnam, the annual death toll is estimated at 300 p.a., while in Kosovo, more civilians die from unexploded sub-munitions than from landmines.

¹ International Review of the Red Cross No. 841, p. 195-205 by *Peter Herby and Anna R.Nuiten*
Explosive remnants of war : Protecting civilians through an additional protocol to the 1980 Convention on Certain Conventional Weapons. 31-03-2001.

³ UN Mine Action Centre commentary. Red Cross Red Crescent Meeting to discuss global humanitarian concerns related to the use of cluster munitions. February 2007.

Afghanistan is one of those countries that are most severely affected by landmines and unexploded ordnance (UXO). Prior to October 7, 2001, the known contaminated area was estimated at 724 million square meters, including 344 million square meters classified as high priority land for clearance³.

Cluster bombs continue to be widely used in recent armed conflicts. An estimated thirty million were expended during the first Gulf War⁴. More recently, during the conflict between Lebanon and Israel (2006), an estimated 4 million cluster sub-munitions were delivered⁵. Unexploded ordnance has caused more than 200 deaths and injuries since the cessation of armed hostilities in August 2006 and it is estimated that "more than 1 million bomblets litter the fields and orchards of southern Lebanon"⁶.

A 2007 study published by Handicap International found 13,306 deaths and injuries have occurred due to cluster munitions⁷. Men were found to be the most frequent victims, followed by children, who are often attracted by the shape, size and colour of cluster munitions. Boys are particularly at risk due to the activities they are often assigned in rural communities (such as farming and herding). Survivors of cluster munition incidents will often have serious blast or fragment injuries. They will frequently need long term treatment and rehabilitation, which will include medical care, physical rehabilitation, psycho-social support and socio-economic reintegration⁸.

4. International Humanitarian Law (IHL)

IHL is a set of rules which seek to limit the effects of armed conflict on people and objects. Also known as the law of war or law of armed conflict, IHL protects certain categories of people and restricts the methods and means of warfare.

The fundamental elements of IHL are primarily found in:

- the Geneva Conventions of 1949;
- the Protocols Additional to the Geneva Conventions of 1977 and 2005, and
- various weapons conventions,

Until now, no IHL treaty has specific rules for cluster munitions. Like other weapons used in armed conflict, however, their use is regulated by the general rules of IHL that govern the conduct of hostilities. These rules restrict how weapons may be used and outline measures which need to be taken so as to limit their impact on civilians and civilian objects.

³ Human Rights Watch – backgrounder. October 2001, *Cluster Bombs in Afghanistan*, <http://www.hrw.org/backgrounder/arms/cluster-bck1031.htm>

⁴ Smith, N, 'A Plea for the Total Ban of Land Mines by International Treaty' (1995) 17 *Loyola of Los Angeles International & Comparative Law Journal* 507, 512

⁵ Handicap International, *Fatal Footprint: The Global Human Impact of Cluster Munitions, Preliminary Report*, Brussels, November 2006.

⁶ <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/stories-lebanon-310107?opendocument>

⁷ Handicap International, *Circle of Impact: The Fatal Footprint of Cluster Munitions on People and Communities*, May 2007 quoted at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/cluster-munitions-factsheet-010208/\\$File/Cluster-munition-victims-factsheet.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/cluster-munitions-factsheet-010208/$File/Cluster-munition-victims-factsheet.pdf)

⁸ [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/cluster-munitions-factsheet-010208/\\$File/Cluster-munition-victims-factsheet.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/cluster-munitions-factsheet-010208/$File/Cluster-munition-victims-factsheet.pdf)

The most relevant rules include:

- (a) The rule of distinction,
- (b) The rule prohibiting indiscriminate attacks,
- (c) The rule of proportionality, and
- (d) The rule on feasible precautions.
- (e) The rule on environmental protection

4.1 The rule of distinction⁹

This rule requires attacks to be directed against military objectives. The parties to a conflict must distinguish between civilians and combatants and between civilian objects and military objectives.

Design characteristics and means of deployment are clearly relevant to a consideration of how and when cluster munitions can be deployed in accordance with this rule. Often, a cluster munition is dropped at high altitude and is not guided. It subsequently releases sub-munitions in a manner designed to disperse them over a large area. The ability to 'hit' the target area is thus dependent on a range of variables including height and speed on release, wind and weather conditions, and sub-munition design. Given the characteristics described above, compliance with the rule of distinction would require that such weapons not be used in situations where the military objective is co-located with, or in close proximity to civilians or civilian sites.

4.2 The rule against indiscriminate attacks¹⁰

This rule prohibits indiscriminate attacks. An Indiscriminate attack is defined to include those which employ a method or means of combat that cannot be directed at a specific military objective. An indiscriminate attack would also include any bombardment which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians.

By design, the wide area effects of Cluster Munitions, together with the means of delivery mentioned above, make it difficult, if not impossible to direct such weapons at a military objective were it is located in or near a populated target area.

4.3 The rule of proportionality¹¹

This rule prohibits the initiation of an attack which may be expected to cause incidental loss of civilian life, injury to civilians, and/or damage to civilian objects, which would be excessive in relation to the concrete and direct military advantage anticipated.

⁹ Art 48 Additional Protocol 1 1977. Note: this is also considered a rule of customary law. Ref rules 1 and 7, Customary International Humanitarian Law, International Committee of the Red Cross, Cambridge University Press Rules, 2005.

¹⁰ Art 51 (4) and (5a) Additional Protocol 1 1977. Note: this is also considered a rule of customary law. Ref rules 11-13, Customary International Humanitarian Law, International Committee of the Red Cross, Cambridge University Press Rules, 2005.

¹¹ Art 51 (5)(b), Additional Protocol 1 1977. Note: this is also considered a rule of customary law. Ref rule 14, Customary International Humanitarian Law, International Committee of the Red Cross, Cambridge University Press Rules, 2005.

The rule recognizes that civilian casualties and damage to civilian objects may occur during an attack against a military objective but requires that the military advantage anticipated outweigh the incidental impact on civilians. An attack that can be expected to cause excessive civilian casualties or damage in relation to the concrete and direct military advantage anticipated would be disproportionate and prohibited.

It is therefore necessary, during the planning and execution of an attack using Cluster Munitions, to evaluate the foreseeable incidental consequences for civilians both during and after attack. The limitations on precise targeting, high failure rate of sub-munitions, lack of self destruct/deactivation mechanisms and difficulties in effectively mapping, marking and subsequently deactivating/removing unexploded sub-munitions, and the now well documented long term problems associated with unexploded sub-munitions, mean that such weapons should not be used in or near civilian populations or sites.

4.4 The rule on feasible precautions¹²

This rule requires that in the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to avoid, and in any event to minimise incidental loss of civilian life, injury to civilians and damage to civilian objects.

The limitations on precise targeting, high failure rate of sub-munitions, lack of self destruct/deactivation mechanisms and difficulties in effectively mapping, marking and subsequently deactivating/removing unexploded sub-munitions would suggest that in taking all feasible precautions, Cluster Munitions should not be used in or near civilian populations or sites and alternative weapons should be considered.

4.5 The rule on environmental protection¹³

This rule prohibits the use of methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment.

As has been outlined in section 3 above, the indiscriminate use of Cluster Munitions in recent conflicts has not only led to the death and injury of large numbers of civilians, but has also rendered large tracts of arable land inaccessible. In so doing, it imposes an ongoing burden on the civilian population who are unable to sustain themselves, and thus re-establish civil society and create a lasting peace

¹² Art 57, Additional Protocol 1 1977. Note: this is also considered a rule of customary law. Ref rule 45, Customary International Humanitarian Law, International Committee of the Red Cross, Cambridge University Press Rules, 2005

¹³ Art 35, Additional Protocol 1 1977. Note: this is also considered a rule of customary law. Ref rule 45, Customary International Humanitarian Law, International Committee of the Red Cross, Cambridge University Press Rules, 2005.

While these general IHL rules provide a framework for limiting the potential indiscriminate effects of all weapons, IHL also accommodates the development of specific treaties for weapons which may cause unacceptable human suffering. The specific characteristics of cluster munitions and their history of causing severe humanitarian problems mean that the development of new and more specific regulation is critical.

The CCW Protocols, the Ottawa Convention, the Chemical Weapons Convention, and the Biological Weapons Convention provide examples of weapons covered by the general IHL rules for which specific treaty rules were adopted. The specific rules developed by the international community have helped strengthened the law and reduce the risk of unnecessary death, injury and suffering to civilians and combatants. It is appropriate that Cluster Munitions be regulated in the same manner.

5. Importance of ratification by Australia

The treaty provides enhanced protection for civilians and (if it is widely adhered to and fully implemented, the Convention – do we want the benefit for Australian ratification to be subject to these conditions? Too easy to say then we wont ratify until everyone else does) will directly benefit affected communities by increasing efforts to clear areas contaminated by cluster munitions. This will save lives and reclaim land for agriculture and other productive activities as well as allow safe passage for vital humanitarian assistance. The Convention will also benefit victims of cluster munitions by increasing commitment to various types of support, including medical care and rehabilitation activities. Most importantly, the Convention will prevent the significant toll of human suffering by ensuring that hundreds of millions of cluster sub-munitions are destroyed around the world.

The Asia Pacific Region is badly affected by the scourge of cluster munitions. Ratification by Australia would also serve to reinforce the importance of and Australian commitment to the protection of civilians in times of armed conflict, thus encouraging ratification in the region by states who are not yet party to the Convention.

The ratification of the convention is consistent with previous commitments made by the Australian Government. For example, at the 30th International Conference of the Red Cross and Red Crescent held in Geneva in November 2007, the Australian Government and Australian Red Cross jointly pledged, amongst other things, to:

*“continue to work together to address the humanitarian impacts of weapons on civilians both during and after armed conflict, including by working together to support international action to prohibit cluster munitions which cause unacceptable harm to civilians”*¹⁴

¹⁴ Pledge Number 232 of the International Conference of Red Cross and Red Crescent, pledged by the Australian Government and Australian Red Cross which can be found at <http://www.icrc.org/applic/p130e.nsf/pbk/PCOE-79EQPL?openDocument§ion=PBP>

In addition the Conference Resolution on “Reaffirmation and Implementation of International Humanitarian Law: Preserving Human Life and Dignity in Armed Conflict” stated:

“... calls on all States to increase their efforts to strengthen the protection of civilians against the indiscriminate use and effects of weapons and munitions and recognizes, in this regard, the need to urgently address the humanitarian impact of explosive remnants of war and cluster munitions, including through rigorous application of existing rules of international humanitarian law and additional national and international actions that will minimize the harmful effects of these munitions on civilians and on assistance to victims...”¹⁵

6. Implementation

Ratification of the Convention will require additional implementation measures in Australian law. In particular Australia will need to enact criminal offences consistent with the Convention. Department of Defence standard operating procedures will also be required.

7. Conclusion

Australian Red Cross strongly supports ratification of the Cluster Munitions Convention by Australia and incorporating its provisions into domestic legislation which provides Australia with the opportunity to augment measures for the protection of civilians in times of armed conflict.

Australian Red Cross, as part of an international movement mandated to disseminate IHL and domestically assisting States to ensure IHL is respected, is also willing and able to provide the Australian Government with any assistance or support required in the process of the ratification of this important treaty. Australian Red Cross also warmly congratulates the Government on the commitment already demonstrated in the early signature of the Cluster Munitions Convention and will continue to encourage all parliamentarians to support these crucial developments.

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¹⁵30th International Conference of Red Cross and Red Crescent, Geneva, 2007, Resolution III