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Committee Secretary
Joint Standing Committee on Treaties
Department of House of Representatives
PO Box 6021
Parliament House
Canberra ACT 2600.

By email: jsct@aph.gov.au

16 April 2009

Dear Committee Secretary

**Submission regarding treaties tabled on 12 March 2009
Convention on Cluster Munitions**

Please find attached a submission by Australian Lawyers for Human Rights to the Joint Standing Committee on Treaties on the matter of consideration of the ratification of the Convention on Cluster Munitions.

Kind regards

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Submission regarding treaties tabled on 12 March 2009 Convention on Cluster Munitions

The conclusion of this Convention indicates a significant and fundamental change in the position of many governments that until recently regarded cluster munitions as essential to their security policies and military doctrines. The importance of this shift cannot be overemphasized.¹

Over the years 2007 and 2008 nations came together in the Oslo Process to build on the commitments made in the Ottawa Convention and work towards not only a prohibition on the use of cluster munitions, but on establishing a global commitment to eliminating stockpiles, clearing contaminated land and supporting victims. On 3 December 2008 this culminated in 90 nations, Australia among them, signing on to the Convention on Cluster Munitions ("the Convention"). For Australia this treaty represents a necessary and significant contribution to the extensive international commitments Australia has made in the areas of humanitarian law, non-proliferation, victims of war and weapons.

Australian Lawyers for Human Rights commends the Australian Government for engaging with the international community on this issue but calls on the Government to take their commitment a step further and recognise that cluster munitions, in whatever form, are insidious weapons the devastating effects of which continue to be felt by nations in our region and should be eradicated and prohibited.

Who We Are

Australian Lawyers for Human Rights Inc (ALHR) was established in 1993, and incorporated as an association in NSW in 1998 (ABN 76 329 114 323).

¹ Secretary-General Ban Ki-moon on the opening of the Signing Conference, 3 December 2008.

ALHR is a network of Australian lawyers active in practising and promoting awareness of international human rights standards in Australia. ALHR has a national membership of over 1,300 people, with active National, State and Territory committees.

Through training, information, submissions and networking, ALHR promotes the practice of human rights law in Australia. ALHR has extensive experience and expertise in the principles and practice of international law and human rights law in Australia.

ALHR is a member of the Australian Forum of Human Rights Organisations. It is a member of the Commonwealth Attorney General's NGO Forum on Human Rights and the Department for Foreign Affairs Human Rights NGO Consultations.

Issues addressed by ALHR include anti-terrorism laws, refugee and migration issues, proposed reforms of the Human Rights and Equal Opportunity Commission, amendments to anti-discrimination laws, and Australia's National Human Rights Action Plan.

To help lawyers use human rights remedies in their daily legal work, ALHR runs seminars on the use of international human rights standards in daily legal practice, in areas such as family law, tenancy, anti-discrimination, crime, corporations, land and environment, and employment. We have recently commissioned a training package on human rights law that we hope to roll out to articled clerks and Australian Public Service graduate intakes.

Our Interest

In the past humanitarian law has been considered *lex specialis* to human rights law: that is that in circumstances of conflict basic human rights protections and obligations are displaced by international humanitarian law. However it is clear from recent commentary by the Human Rights Committee² and the International Court of Justice³ on the applicability of human rights law to the conflict situations that there is an increasing trend towards the supporting the compatibility of humanitarian and human rights law.

Australian Lawyers for Human Rights welcome this move towards harmonising the two sets of rules. The case of cluster munitions provides a good illustration of the benefit of such a dual approach to conflict situations for the damage caused by remnants of cluster munitions to individuals and communities can be felt decades after peace is restored and the application of humanitarian law is spent. The immediate effects and issues of proportionality and distinction may be best considered with reference to principles of humanitarian law. The after effects cluster munitions can have in restricting access to natural resources, inhibiting communities ability to recover and develop as well as to the continued threat to human life is perhaps best addressed by principles of human rights law. Using both these legal frameworks provides the greatest level of protections for civilians and non-combatants.

² "The Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive."

UN Human Rights Committee, *General Comment No. 31*, CCPR/C/21/Rev.1/Add.13 (26 May 2004), at 11

³ *Legal consequences of the construction of a wall in the Occupied Palestinian Territory, Advisory Opinion*, 9 July 2004, paras. 102-106.

The Current Position

The states most contaminated by cluster munitions are Afghanistan, Cambodia, Iraq, Laos, Kosovo and Vietnam.

At least 14 countries have used cluster munitions: Eritrea, Ethiopia, France, Israel, Morocco, the Netherlands, Nigeria, Russia (USSR), Saudi Arabia, Sudan, Tajikistan, UK, US, and FR Yugoslavia.

At least 24 countries have been affected by the use of cluster munitions including Afghanistan, Albania, Angola, Bosnia and Herzegovina, Cambodia, Chad, Croatia, DR Congo, Eritrea, Ethiopia, Iraq, Israel, Kuwait, Laos, Lebanon, Montenegro, Saudi Arabia, Serbia, Sierra Leone, Sudan, Syria, Tajikistan, Uganda, and Vietnam.

Billions of sub-munitions are stockpiled by some 75 countries. A total 34 states are known to have produced over 210 different types of cluster munitions.⁴

Despite the efforts of the international community, the proliferation and deployment of cluster munitions continues. In the Gulf War an estimated thirty million cluster munitions were deployed, while in the 2006 conflict between Lebanon and Israel it was estimated that 4 million of the sub-munitions from clusters were delivered.⁵ In most recent times Human Rights Watch found evidence that Russian forces used clusters in the conflict on Georgian territory, with unexploded remnants left scattered around villages close to the conflict zone.⁶

The United States of America, Israel and Russia are not signatories to the Convention. However the recent change in the American administration and the shift it has created in the international political arena should be viewed as an opportunity for Australia, and like minded countries, to reinvigorate the cluster munitions issue with a view to attracting American support for the Convention.

Cluster munitions have had a devastating impact on some of Australia's neighbours in the Asia-Pacific region. Australia should exercise its influential role as a regional leader and take advantage of the current political climate to ensure that Dublin does not represent the end of the fight against cluster munitions; this is particularly the case if Australia succeeds in obtaining a membership of the Security Council.

In 2007 the Australian Government's Senate Standing Committee on Foreign Affairs, Defence and Trade conducted an inquiry into a private member's Bill, Cluster Munitions (Prohibition) Bill 2006, put forward by Senator Lyn Allison.

One of the submissions received by that Committee was from the Australian Department of Defence ("the Department"). This submission highlighted that the Australian Defence Force (ADF) was "in the process of acquiring an advanced submunition capability for use against mobile armoured vehicles".⁷

The Department argued that the new acquisitions, M85 cluster devices, were distinguishable from conventional 'cluster bombs', which are unreliable in their use of unguided "dumb"

⁴ Amnesty International. *Cluster Munitions – Fact Sheet*. April 2008. Accessed at <http://www.amnesty.org.nz/files/Cluster%20Munitions%20Factsheet.pdf>

⁵ Australian Red Cross. *Submission on the Cluster Munitions (Prohibition) Bill 2006*. 22 February 2007.

⁶ Human Rights Watch. *Russia/Georgia: Cluster Bombs' Harm Shows Need to Join Ban*. April 14, 2009.

⁷ Australian Government's Department of Defence. *Submission on the Cluster Munitions (Prohibition) Bill 2006*. 27 February 2007.

submunitions. The ADF described the M85 as "more discriminating", as it contained fewer submunitions in each casing, each of which was equipped with precision and self-destruct capabilities. According to the ADF's submission these characteristics minimised the risk to civilians. These assertions were supported by a submission made by Israel Military Industries Ltd, the manufacturer of the M85.

The outcome of the inquiry saw the Committee recommend the Bill not be passed. At around the same time the Australian position in the Oslo Process negotiations strongly supported a narrow definition of a cluster munition in the Convention which would exclude munitions with self-destruct capabilities.

In response to questions from *The Sunday Age* on this issue the Parliamentary Secretary for Foreign Affairs, Greg Hunt, said the Government's "first goal is a dramatic reduction in the use and stockpiles of cluster munitions and the eradication of all unreliable and inaccurate weapons".⁸

As a result Australia promoted and supported the narrow definition of a cluster munition that today appears in the Convention – a definition which excludes munitions with fewer than 10 submunitions, precision targeted munitions and munitions with the capability to self-destruct: that is a definition that permits Australia's continued procurement and use of the M85.

The Way Forward

Use of Cluster Munitions

Australian Lawyers for Human Rights urges the Government to take their commitment to the eradication of cluster munitions to the next level and look to a second goal of eradicating not simply highly unreliable and grossly inaccurate weapons, but all unreliable and inaccurate weapons.

Australian Lawyers for Human Rights urges the Government to recognise all weapons containing clusters of any multiple of submunitions in one casing as cluster munitions, regardless of any accompanying supporting technology such as precision targeting and self-destruct mechanisms.

Coalition Forces

Australian Lawyers for Human Rights acknowledges the vital role coalition forces can play in international security and the importance of Australia's relationship with coalition members. However we also note that a key member of the current Coalition of the Willing, the United States of America, has not signed the Convention.

Australian Lawyers for Human Rights notes that under Article 21(3) of the Convention such military coalitions with non-member States are permitted, but active engagement in the use of cluster munitions in the course of operations by member states remains prohibited. The National Interest Analysis for the Convention indicates that "Australia will continue to work with allies and partners on a common understanding of how Article 21 will operate in practice and in compliance with the Convention".

Australian Lawyers for Human Rights urges the Government to negotiate all coalition arrangements with a view to ensuring that cluster munitions are neither contemplated nor deployed as a means of warfare in coalition operations Australia is a party to.

⁸ Hyland, Tom. *Defence Wants Limit on Banned Bombs* as published in [The Sunday Age](#). May 27, 2007

Recommendations

- The Australian Government ratify the Convention on Cluster Munitions as soon as possible and encourage other signatories to do the same, noting that the Convention will only come into force once 30 countries have ratified it with only 6 of the 96 signatory States having done so to date.
- The Australian Government continue to engage with non-member States on the topic of cluster munitions and encourage them to accede to the Convention.
- The Australian Government shall, in all matters of defence related policy, apply the broadest interpretation of the definition of cluster munitions detailed in Article 2(c) of the Convention so as to include any munitions which contain 2 or more submunitions.
- The Australian Government commit to ensuring that any engagement of the Australian Defence Forces in military coalitions be pre-empted by assurances from all other coalition members that cluster munitions, defined in accordance with Australia's international obligations as well as domestic policy, will not be used.