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The Secretary
Senate Standing Committee on Foreign Affairs, Defence and Trade
Parliament House
Canberra ACT 2600
By email: fadt.sen@aph.gov.au

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Dear Secretary

Please accept this submission to the Standing Committee's **Inquiry into the Cluster Munitions (Prohibition) Bill 2006**. At Sydney Law School I research and teach international humanitarian law, and I am a member of the International Law Association's International Committee on the Compensation of Victim's of Armed Conflict. I make these submissions:

1. Some armed forces perceive considerable military advantage in using cluster munitions against enemy combatants, vehicles and other military targets, since their wide area of dispersal increases the chances of damaging or destroying military objects,¹ while reducing the resources required to individually target and attack each military object.
2. The military advantage gained by deploying cluster bombs must be evaluated in light of their relative imprecision in targeting, and the considerable costs involved in identifying and rendering harmless those many sub-munitions which fail to explode upon impact,² including the inconvenience or restricted mobility caused to advancing military forces which deployed them prior to occupying territory.
3. Humanitarian law does not expressly prohibit cluster munitions, which are subject to the ordinary rules on the means and methods of warfare. In some cases, the use of cluster munitions will comply with the principles of distinction, discrimination, proportionality and necessity; for example, where they are used against massed enemy formations in areas which are clearly distinguished from civilian populations and civilian objects.
4. It is unlikely that cluster bombs are prohibited as weapons which are inherently 'calculated to cause unnecessary suffering' (1907 Hague Regulations, reg. 23(e)) or 'superfluous injury' (1977 Additional Protocol I, art 35(2)), although the analysis depends on the specific type of cluster munition, its mode of delivery, and against whom it is directed; some munitions, for instance, have especially high rates of amputation or disfigurement.³

5. The core concern about the use of cluster bombs is their adverse impact on non-combatants, both during and after the munitions are deployed, and particularly when used (as is common) against military objectives in civilian population centres. While they are not inherently indiscriminate, cluster munitions may be *unlawfully indiscriminate* if they are used in contexts where they ‘cannot be directed at a specific military objective’ or where their ‘effects’ cannot be limited to military objectives as required (1977 Additional Protocol I, art 51(4)(b) and (c)).⁴
6. In addition, their use may be *unlawfully disproportionate* where injury to civilians ‘would be excessive in relation to the concrete and direct military advantage anticipated’ (Protocol I, art 51(5)(b)). This will depend on the importance of the destroying a particular military objective to the overall military campaign.
7. Internationally, serious concerns have been raised about the effects of cluster munitions on civilians in conflicts in Laos, Cambodia, Vietnam, Afghanistan, Iraq, Kuwait, Chechnya, the former Yugoslavia and Kosovo, and southern Lebanon. The general rules of humanitarian law do not appear to have been successful in constraining serious harm to civilians by cluster munitions, not least because of the dispersal of large numbers of sub-munitions, over large areas, for prolonged periods. Unexploded cluster munitions not only threaten physical injury, but also severely disrupt development and livelihoods, by rendering agricultural land unsafe.

Recommendations

8. In my view, the inability of existing humanitarian law to limit civilian casualties from cluster munitions justifies further regulation. There is growing international support for special rules on cluster munitions, including from the International Committee of the Red Cross, the European Parliament, the United Nations, the Cluster Mmunition Coalition and more than 30 governments at the CCW conference in late 2006.⁵ Belgium banned cluster munitions in early 2006; Norway imposed a moratorium in mid-2006; and New Zealand is helping to lead international efforts to regulate them. The Oslo Conference on Cluster Munitions, on 22-23 February 2007, attended by 40 governments, aims to stimulate further international regulation of cluster munitions, in response to the failure of the 2006 CCW conference to agree on regulating cluster munitions.
9. It is possible that measures to regulate the use of cluster munitions, without banning them absolutely, may appreciably reduce future civilian casualties. Some producer countries have taken steps to improve the technical reliability of cluster munitions, such as by: (a) reducing failure rates; (b) including self-destruction or neutralization mechanisms; and (c) increasing accuracy via targeting technology for sub-munitions.⁶
10. The 2003 Protocol V on Explosive Remnants of War (under the 1980 Convention on Conventional Weapons) encourages (but does not require) countries to ‘examine ways and means of improving the reliability of explosive ordnance that it intends to produce or procure, with a view to achieving the highest possible reliability’ (article 9 and annex). Neither the Protocol nor the Convention bans cluster munitions in war. Technology is not, however, necessarily available to less advanced/resourced militaries, and, by itself, is insufficient.

11. In my view, Australia should support international initiatives to regulate cluster munitions. In particular, Australia should legislate domestically to:

- (i) prohibit the use of cluster munitions in or near civilian population areas (as recommended by the International Committee of the Red Cross);
- (ii) prohibit cluster munitions which have indiscriminate effects due their mode of delivery or pattern of dispersal;
- (iii) prohibit cluster munitions which have high failure rates (more than 1%, whether in relation to exploding, self-destructing or self-neutralizing);
- (iv) prohibit the development, production and transfer (by any means and to any actor) of such cluster munitions;
- (v) destroy stockpiles of such cluster munitions;
- (vi) record the location of areas in which cluster munitions are used, and disseminate such data to assist in clearance of unexploded munitions and in community education about the dangers of unexploded munitions;
- (vii) provide for the compensation of non-combatants injured by cluster bombs used by Australian armed forces, whether upon impact or by subsequent detonation of unexploded munitions.

Most of these recommendations roughly correlate with those made by the Norwegian government as part of its sponsorship of the inter-governmental Oslo Conference on Cluster Munitions in 2007. I do not support an absolute prohibition on the use of cluster munitions.

Please contact me if you require any further submissions or clarifications.

Yours sincerely



Notes

¹ See, eg, V Wiebe, 'Footprints of Death: Cluster Bombs as Indiscriminate Weapons under International Humanitarian Law' (2001) 22 *Michigan Journal of International Law* 85 at 90-91.

² Some cluster munitions have high failure ('dud') rates: Human Rights Watch, *Cluster Munitions a Foreseeable Hazard in Iraq*, Briefing Paper, March 2003.

³ See, eg, T McDonnell, 'Cluster Bombs over Kosovo: A Violation of International Law?' (2002) 44 *Arizona Law Review* 31 at 66-74.

⁴ See generally Human Rights Watch, 'Cluster Munitions and International Humanitarian Law: The Need for Better Compliance and Stronger Rules', Memorandum to Delegates at the Convention on Conventional Weapons (CCW) Group of Governmental Experts on Explosive Remnants of War, 5-16 July 2004.

⁵ Argentina, Austria, Belgium, Bosnia and Herzegovina, Chile, Costa Rica, Croatia, Czech Republic, Denmark, Germany, Guatemala, Holy See, Hungary, Ireland, Italy, Liechtenstein, Lithuania, Luxembourg, Malta, Mexico, New Zealand, Norway, Peru, Portugal, Serbia, Slovakia, Slovenia, Spain, Sweden, and Switzerland.

⁶ S Goose, 'Cluster Munitions: Toward a Global Solution', in Human Rights Watch, *Human Rights and Armed Conflict*, World Report 2004.