



Union Aid Abroad

APHEDA

The Secretary
Senate Foreign Affairs, Defence and Trade Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
20 January 2011

Dear Committee Secretary,

Please find attached a submission by Union Aid Abroad-APHEDA in regards to the **Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010**. The aim of this submission is to outline Union Aid Abroad-APHEDA's overall support for the amendment but to present areas of the Bill we feel the absolute necessity to strengthen, along with supporting reasons and recommendations.

Union Aid Abroad-APHEDA, the overseas humanitarian aid agency of the ACTU, appreciates the opportunity to provide input on the Bill. For more than 25 years we have been working to strengthen workers rights and human rights. As we work in countries such as Laos, Cambodia, Vietnam and Lebanon, which have all seen the catastrophic humanitarian impact that cluster munitions have on individuals, families and communities, the opportunity to participate in this submission process is very important to us.

In the following submission we wish to emphasise the crucial opportunity and responsibility we have as Australians. We feel it is vital to ensure that this Bill reflects cognizance of the suffering that comes with the use of cluster munitions, along with willingness and determination to bear the challenges that might arise from making a strong stand.

We also wish to urge the Australian Government to quickly ratify the **Convention on Cluster Munitions** upon revision and enactment of the Bill so as to be able to participate as a state party in the Convention's Second Meeting of States Parties in Lebanon this September.

Sincerely,

Executive Officer
Peter Jennings
Union Aid Abroad-APHEDA



Union Aid Abroad-APHEDA's Submission to the Senate Foreign Affairs, Defence and Trade Committee on the Inquiry into the Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010

'In a world in which so much seems to be beyond our control we have demonstrated that humanity, collectively, can summon the capacity, the will and the wisdom to eliminate a weapon which should not exist', (Peter Herby, head of the International Committee of the Red Cross, 30 May 2008)

To date the Convention on Cluster Munitions (CCM) comprises 50 ratifications and 108 signatories.¹ Australia's signature and intended future ratification of the treaty is a demonstration of its commitment to advancing humanitarian law.

While valuing and applauding Australia's progress thus far, to completely fulfill the convention's intention it is incumbent on the Australian government to produce strong legislation.

Notwithstanding the hurdles inherent in finding commonality, the international community strives to use the foundational Universal Declaration of Human Rights and subsequent international instruments, such as the Convention on Cluster Munitions to overcome some of the obstacles to unity. The influence of these instruments has been far-reaching and has brought relief to many in the world who enjoy better living conditions and a forum in which to fight for their rights when abuses occur. Any State Party that accepts that every individual is entitled to an equal level of human dignity, enshrined in instruments such as the CCM, should be ready to pass legislation that reflects an unambiguous interpretation of the convention, strongly and permanently denouncing the use of cluster munitions.

Who we are

Australian People for Health, Education and Development Abroad (APHEDA) was started in 1984 as the overseas aid agency of the Australian Council of Trade Unions. With a commitment to justice and human rights as the cornerstone of our approach, we aim to contribute directly to regions of the world where men and women workers are disadvantaged through poverty, a lack of workplace rights, human rights and civil conflict.

The consequences that result from the use of cluster munitions run contrary to the principle of protecting noncombatant civilians and their property from the ravages of war.² The indiscriminate nature of cluster munitions represents a huge hazard for innocent victims living in the arena of war, the devastating consequences often lasting long after the war has ended.

According to the Landmine and Cluster Munition Monitor, in 2009 at least 859 new casualties were identified due to mines, explosive remnants of war (ERW), and victim-activated improvised explosive devices (IEDs) in Afghanistan. Children (269) accounted for 55% of recorded civilian casualties. Some 743 casualties of cluster munition remnants were recorded between 1980 and the end of 2009.

In Lao PDR, there are enduring effects of unexploded munitions, with the National Regulatory Authority (NRA) reporting 134 explosive remnants of war (ERW) (including cluster munition remnants) casualties in 82 incidents for 2009, and around 310 casualties from 210 incidents in 2008.³ While statistics provide figures, they do not reflect the real life suffering to victims and their families, or the continued costs that exacted from communities and nations where cluster munitions have been deployed.

To avoid contributing to future suffering that will result in the use of cluster munitions, and to assist Australia to take the lead in their eradication, we strongly urge the Australian government to strengthen the Bill in the following areas.

¹ See <http://www.stopclustermunitions.org/treatystatus/>

² Steiner & Alston, *International Human Rights In Contexts*, 2000, Oxford Press

³ Data from <http://www.the-monitor.org/index.php>

AREAS OF CONCERN AND RECOMMENDATIONS

1. Investment

Problem with the current Bill: The Bill does not explicitly prohibit investment in the production of cluster munitions.

Issue: As investment assists with production, direct or indirect financial support to manufacturers of cluster munitions must be curtailed. The legislation should clearly prohibit direct and indirect investment of public and private funds in the production of cluster munitions and their components. Such a ban would add clarity to the meaning of the term 'assist' when it comes to financing – a term noted by the Joint Standing Committee on Treaties (Monday 22nd June 2009 report) as needing clarification.

Parallels in Australian Criminal Law: There are existing Australian laws that demonstrate the implementation of such a ban would be consistent and warranted.

For instance,

- seeing that the manufacture or use of cluster munitions is accepted as a crime:
In section 400.3 (Proceeds of Crime Act 2002), Dealing in proceeds of crime (1) A person is guilty of an offence if: (a) *the person deals with money or other property*; and (b) either:
(i) *the money or property is, and the person believes it to be, proceeds of crime*; or (ii) *the person intends that the money or property will become an instrument of crime*; or (2) A person is guilty of an offence if: (ii) *there is a risk that the money or property will become an instrument of crime*; and (c) *the person is reckless as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime*
- the Criminal Code already expressly prohibits financing of certain illegal activities that if permitted could result in wide scale destruction or violence. For example Criminal Code Section 3, 103.1 Financing terrorism (1) A person commits an offence if: (a) *the person provides or collects funds*; and (b) *the person is reckless as to whether the funds will be used to facilitate/engage in a terrorist act*.

Recommended action: Include a provision specifically preventing investment.

Several states have banned investment in their implementing legislation including Belgium, Ireland, Luxembourg and New Zealand. In addition, France has declared that its national implementation law's prohibition on assistance bans both direct and indirect financing of cluster munition production, while the United Kingdom's legislation has been understood to ban direct financing.

As an example, under Belgian law the financing of a company within its borders or in any other sovereign territory 'which is involved in the manufacture, use, repair, marketing, sale, distribution, import, export, stockpiling or transportation of anti-personnel mines and or sub-munitions within the sense of this act, and with a view to distribution thereof' is prohibited. This includes: offering credit to producers of cluster munitions; purchase of share and bonds issued by these companies; the drafting of a list of cluster munitions producers affected by the law. Further, Belgian legislation includes retroactive action on contracts already established, and provides a clear definition of the term 'financing' by identifying the companies on a list and nominating all forms of financial support, that is to say 'credits, bank guarantees and the acquisition of financial instruments issued by that company'.⁴

2. Positive obligations

Problem with the current Bill: The Bill does not include positive obligations.

Issue: In the Preamble of the Universal Declaration of Human Rights, all signatories undertake the responsibility of promoting and diffusing the principles of that declaration by each nation committing to 'strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction'.⁵ The ratification of the Convention on Cluster Munitions deserves the same intention and commitment, as it is an extension of the principles therein.

⁴ Belgian Act on Disinvestment, 2007

⁵ Universal Declaration of Human Rights Preamble, 1948

Article 9 of the CCM mandates states parties implement *all* obligations of the convention, including the positive ones. Article 9 does not require legislation for those positive obligations, but it does not rule it out. Implementing the convention's positive elements through legislation is the best way to set clear binding rules and ensure that Australia is fulfilling all of its treaty obligations. Australia could supplement such legislative measures with administrative or other ones that provide more details. The positive obligation laid out in Article 21(1) and (2) are particularly relevant for Australia.

Recommended action: Include provision requiring that the Australian government encourage non-states parties to join the convention and promote the convention's norms to all states.

The Bill can address this by including a provision on international cooperation and assistance that establishes a framework for Australia to assist other states parties in achieving the total elimination cluster munitions.

3. Interoperability and the Prohibition on Assistance, Jurisdiction

Problem with the current Bill: Section 72.41 may be interpreted to allow Australians to assist with prohibited activities in the context of joint military operations. Section 72.42 exempts the military personnel of non-states parties from the convention's prohibitions while they are on Australian territory.

Issue: This section is very worrying, as it will excuse Australian military personnel of responsibility for their indirect actions, and exempts troops and other military personnel belonging to states not party to the CCM from prosecution for certain acts done on Australian territory that are prohibited by the convention, in particular, stockpiling, retention, and transfer. This exemption violates Article 9 of the convention, which specifies that national implementation measures shall include penal sanctions for violations of the convention 'by persons or on territory under its jurisdiction or control.' The purpose of sanctions is both to punish people who commit prohibited acts and to deter others from violating the prohibitions. By affording immunity to foreign military personnel, Section 72.42 undermines the aims of the convention and runs counter to a state party's obligation under Article 21(1) and (2) to encourage states not party to adopt the convention's norms. It also does not provide protection to Australian troops.

Further, by allowing this loophole the Bill will contravene one of the most basic rules of international humanitarian law as found in the Additional Protocol of the Geneva Conventions, i.e. that all parties in an armed conflict undertake to abide by the rule of feasible precautions. This rule stipulates 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 minimize incidental loss of civilian life, injury to civilians and damage to civilian objects'.⁶ It is a feasible precaution for any Australian military personnel to disengage from any joint operation that may contravene this basic rule of war. Article 9 of the Convention specifically mandates the inclusion of penal sanctions for violations of the Convention by *anyone* under the jurisdiction or control of the State Party. If military personnel, either Australian or of non-states parties of the convention, participate in the use of cluster munitions it is a clear contravention of the Geneva conventions. Australian legislation should do all in its power to avoid any Australian military personnel becoming complicit in these kinds of war crimes, either directly or by association.

Recommended action: The following adjustments should be made to the amendment:

72.41 should be clarified in order to establish that all of the convention's prohibitions apply during joint military operations.

72.41(b) should be clarified in order to establish that this should not to be understood as an exhaustive list of activities prohibited during joint military operations.

72.41(c) should prohibit Australian military personnel from requesting cluster munitions strikes.

72.42 – These exemptions should be deleted as they violate Article 9 of the convention, which specifies that implementation legislation shall include penal sanctions for violating the convention that cover *anyone* under Australia's jurisdiction or control.

4. Transit/Foreign Stockpiling

Problem with the current Bill: Section 72.42(1) of the Bill explicitly allows for the transit of cluster munitions by permitting transit by ship or plane through Australian territory by non-states parties in military cooperation with the ADF. Section 72.42(1) allows non-states parties in military cooperation with the ADF to stockpile cluster munitions on bases, aircraft, and ships in Australia

⁶ [Art. 57, 1977 Additional Protocol 1; Rule 15, ICRC Customary Law Study]

Issue: The explicit permission of transit of cluster munitions through Australian territory and foreign stockpiling of CM on Australian territory facilitates the proliferation of cluster munitions. Allowing these activities violates the prohibition on assistance and runs counter to the object and purpose of the convention. It also violates Article 9 as articulated above.

No other country's implementation legislation explicitly allows for transit and foreign stockpiling. In fact, two states—Austria and Germany—have explicitly banned transit. Furthermore, Bulgaria, Burkina Faso, Colombia, Ecuador, Ghana, Lebanon, FYR Macedonia, Malawi, Malta, Mexico, Slovenia, and Zambia have all stated that they interpret the convention to proscribe transit, and at least Colombia, Guatemala, and Slovenia have taken a stand against foreign stockpiling.

Recommended action: Removal of: 72.42(1) – the provision allowing for transit and add specific language prohibiting transit and/or the hosting of foreign stockpiles.

5. Retention of cluster munitions

Problem with the current Bill: Section 72.39 permits ADF or police to acquire or retain cluster munitions for purposes of destruction, counter-measure development, or development of detection, clearance or destruction techniques with the authorization of the Defence Minister.

Issue: No training techniques undertaken by the Australian army or any UN-accredited clearing organisation is performed with live cluster munitions - the use of cluster munitions for counter-measure development, development of detection, clearance or destruction techniques extends only to disarmed or inert cluster munitions – never on live ones. This renders the necessity for live cluster munitions as unwarranted and could communicate disingenuous intentions on the part of the Australian government. While retention of stockpiles is allowed under the CCM, our position is that retention should be prohibited because it is unnecessary. Retention also goes against the object and purpose of the convention—to eliminate all cluster munitions and the harm they cause. The majority of stockpiling nations that have so far joined the convention and expressed a view on this issue have chosen not to retain cluster munitions. These states include Afghanistan, Angola, Austria, Colombia, Honduras, Moldova, Montenegro, Norway, Portugal, and Slovenia.

Recommended action: Delete addition 72.39, which allows retention of cluster munitions.

If Australia is unwilling to give up the option of permitting retention of cluster munitions and submunitions in its legislation, we believe that the legislation should at least establish certain safeguards.

As an absolute minimum the Bill should demand:

A) *Minimal amounts:* the legislation should clearly specify the number of cluster munitions, as per the convention's requirements that states parties retain only 'the minimum number absolutely necessary.'

B) *Annual Reporting:* The Bill should also require detailed annual reports as mandated by Article 3(8) of the convention. The Bill should stipulate annual reporting on: Government plans and actual use of cluster munitions; the type and quantity retained; and recipient state parties if the state transfers cluster munitions. The reporting requirement allows for monitoring and will help ensure that Australia appropriately uses the weapons it claims it needs to retain.

SUMMARY OF RECOMMENDATIONS

- Include a provision specifically prohibiting investment
- Include provision requiring that the Australian government encourage non-states parties to join the convention and promote the convention's norms to all states
- 72.41 should be clarified in order to establish that all of the convention's prohibitions apply during joint military operations.
- 72.41(b) should be clarified in order to establish that this ought not to be understood as an exhaustive list of activities prohibited during joint military operations but an illustrative list.
- 72.41(c) should prohibit Australian military personnel from requesting cluster munitions strikes.
- 72.42 – These exemptions should be deleted as they violate Article 9 of the convention, which specifies that implementation legislation shall include penal sanctions for violating the convention that cover *anyone* under Australia's jurisdiction or control
- Removal of: 72.42(1) – the provision allowing for transit and add specific language prohibiting transit and/or the hosting of foreign stockpiles
- Delete addition 72.39, which allows retention of cluster munitions