

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

### **Submission on the Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010**

Dear Committee members,

In November of 2010, I attended the First Meeting of States Parties to the Convention on Cluster Munitions, in Vientiane, Lao PDR. There were a lot of positive outcomes of this meeting, but the most influential for me was exposure to a few of the early campaigners against cluster munitions, returned to Laos after many years. People like aid workers Titus and Linda Peachey, and Fred Branfman. Their experiences are profoundly moving to me, and I believe they are pertinent to you in your work on the CCM ratification legislation. My submission includes a copy of a book by Fred Branfman, "Voices from the Plain of Jars", to give you an idea of the depth of Fred's experience. I hope that the Committee members agree that the book is relevant background for the task of drafting a suitable bill to ratify the CCM.

I am pleased that Australia has signed the CCM, and relieved that the Senate has referred our ratifying legislation, the Criminal Code Amendments (Cluster munition Prohibitions) Bill 2010, back to Committee to reconsider. I certainly agree with the Selection of Bills Committee statement of 28 October, that "... the Bill is inconsistent with recommendations made by JSCOT when it reviewed the Convention in 42nd Parliament." because the current Bill fails utterly to enable the positive obligations and power of the CCM

Australia has many foreign policy achievements to its credit, most notably in context, the Anti Personnel Mines Convention Act 1998, and actions that are a direct consequence of our commitment to the spirit of the MBT Treaty. Over the past dozen-plus years, Australia has implemented many of the measures sought by civil society advocates, in recognition of our global responsibilities regarding land mines. As a nation, we thus have shown that we are able to lead the world in humanitarian response to the dismal aftermaths of war. Achievements such as our national response to the problem of land mines make me proud to be a naturalised Australian.

I would like to have seen legislation toward a "Convention on Cluster Munitions Act of 2010", rather than the bill under its current title. Still, we have made progress compared to some of our allies and regional neighbours: nations that have yet to sign the CCM. Some still advocate the use of cluster munitions and possess vast stocks of these pernicious weapons, and continue to manufacture and deploy them.

As a further contextual consideration, we are currently engaged in armed combat against a poorly defined enemy, as an ally of the USA: one of the non-signatory nations. It is arguable that the current ratification bill offers very little beyond accommodation to this very significant and influential ally. The bill as it stands is very limited. As enabling legislation, offering scope to fulfil the more progressive mandates of the CCM, it is sadly irrelevant. The spirit of the Convention on Cluster Munitions has been ignored. My view is underscored by its drafting as an accretion to the Criminal Code Act, rather than as an Act of Parliament in its own right.

Comparing the CCM to the Mine Ban Treaty, the former is plainly more than just a parallel to the MBT. The CCM offers more than a simple, direct ban on cluster munitions, and a mandate for associated criminal sanctions. The CCM does more than oblige states parties to destroy stockpiles, clear contaminated areas of ERW and report regularly on progress toward these goals, as does the MBT. The CCM also obliges survivor assistance and social inclusion, and it robustly supports the legislation of controls and sanctions on direct and indirect investment in the manufacture of cluster munitions.

The Australian Treaty National Intelligence Analysis tabled in Parliament on 11 March 2009 lists our obligations under the CCM, and I note in particular points 7, 11 and 14 of that assessment, on three articles of the treaty:

#### **Obligations**

**7. Article 1** obliges States Parties to never under any circumstances use cluster munitions as defined by the Convention, or develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, cluster munitions as defined by the Convention, or assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention.

*11. Article 5 obliges States Parties to provide assistance, including medical care, rehabilitation and psychological support, as well as provide for their social and economic inclusion, to cluster munitions victims in areas under their jurisdiction or control on a non-discriminatory basis. States Parties are required to develop plans and budgets for such assistance, designate a national focal point for government coordination, and take steps to mobilise national and international resources.*

*14. Article 21 obliges States Parties to encourage States not party to the Convention to ratify, accept, approve or accede to the Convention, with the goal of attracting universal adherence. States Parties shall also notify the governments of States not party to the Convention of their obligations under the Convention and, inter alia, make their best efforts to discourage States not party to the Convention from using cluster munitions as defined by the Convention.*

#### **National Interest Analysis [2009] ATNIA 5**

<http://www.austlii.edu.au/au/other/dfat/nia/2009/5.html>

I believe Australia's CCM ratification law can and should be something of significantly greater scope and vision than just a set of domestic sanctions for wilful violations, implicitly addressing collateral civilian casualties, but mainly concerned with providing a framework for continuing in armed combat on the side of a nation not signatory to the CCM. As the bill currently reads, it offers only a token gesture toward the prevention of civilian death, maiming and destruction, on and off the battlefield, at the time of conflict and for generations afterward.

How effective we may be, in stopping the scourge of cluster munitions and, eventually, other indiscriminate weapons, depends in part on the courage and vision of the committee members and the parliament as a whole. The current bill still offers the opportunity to limit, drastically, the investment of Australian public and private funds in offshore corporations involved in the manufacture of cluster munitions. It is my sincere hope that the Committee will act to strengthen the preventative power of our CCM ratification legislation in this regard.

*“Article 1 obliges States Parties to never under any circumstances ... [to] ...assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention*

It is plain to me that Article 1 of the treaty extends to investment in offshore companies engaged in activities that would be prosecutable in Australia. The CCM provides a clear, robust mandate to stop Australian money flowing into cluster munitions development, manufacture and sale in non-signatory nations. A concrete, demonstrated Australian commitment to disinvestment will assist us in advocating, among our allies and regional neighbours, the measures of Article 21 of the treaty. Laws that punish Australian investment in offshore manufacturers of cluster munitions will also decrease, in the long run, the amount of foreign aid we so generously expend on removing explosive remnants of war, and on aiding survivors and their communities in affected areas.

#### **We have the opportunity to apply an effective preventive measure.**

Is there any one of you on the Committee who does not believe that an ounce of prevention is worth a pound of cure? This idea is at the core of modern medicine. It has motivated epidemiologists and doctors worldwide since the 19th century. Dr John Snow demonstrated, before the acceptance of the germ theory of infection, that cholera outbreaks could be prevented. He did so by successfully persuading the local parish council to remove the pump handle from a parish pump, owned by a commercial supplier of water, piped from a sewage-polluted stretch of the Thames.

Dr Snow's results were published in 1854, and may be found at <http://www.ph.ucla.edu/epi/snow/choleragoldensquare.html>

I include them because they are a concrete example of the power of a preventative approach to community health, including the scourge of cluster munitions: a power that is within your brief and capability to use against the evil of these indiscriminate weapons. If you do not use this power, then we must resign ourselves to merely cleaning up combat zones and ministering to surviving individuals and communities indefinitely into the future.

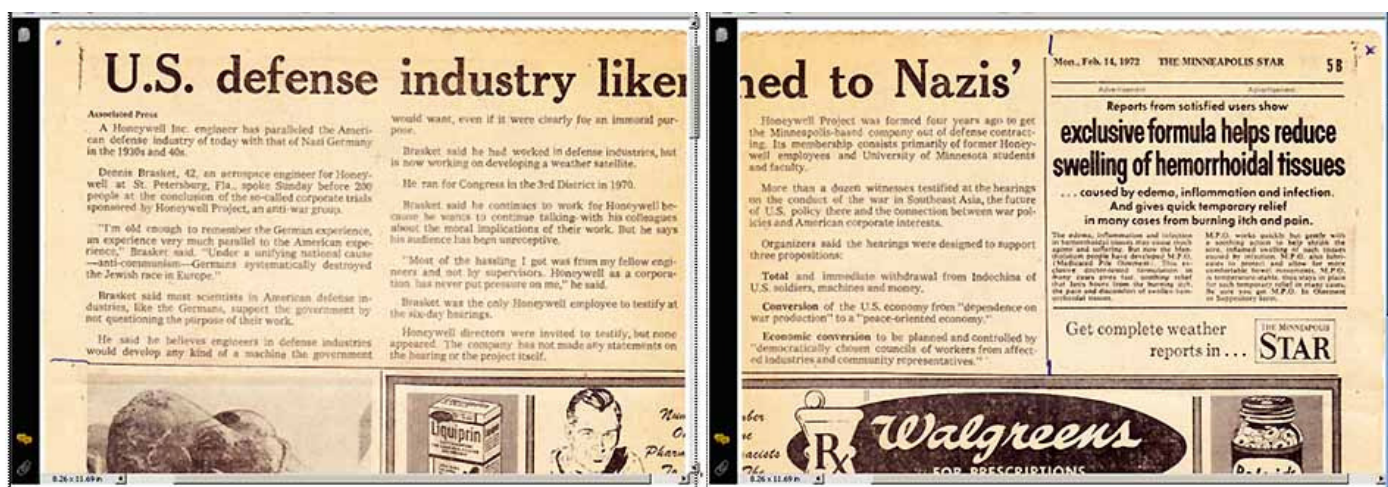
Pertinent to my argument is the view of New York Times columnist Nicholas Kristof, who wrote on Boxing Day, in an op-ed piece titled The Big (Military) Taboo:

“Let me be clear: I’m a believer in a robust military, which is essential for backing up diplomacy. But the implication is that we need a balanced tool chest of diplomatic and military tools alike. Instead, we have a billionaire military and a pauper diplomacy. The U.S. military now has more people in its marching bands than the State Department has in its foreign service — and that’s preposterous.”

<http://www.nytimes.com/2010/12/26/opinion/26kristof.html?partner=rssnyt&emc=rss>

I do not know the proportion of military band members to diplomats in China, India or the Russian Federation, to name three other CCM non-signatories and producers of cluster munitions. In the case of the USA, I believe this statistic is influenced by relentless pressure from American arms manufacturers, who lobby government agencies and legislators intensively for contracts.

When, confronted with the indiscriminate death and suffering caused by their commercial goods, these corporations have been shown to shed their responsibility by arguing that they only develop, manufacture and sell their products in response to needs dictated by government policy, and therefore it is government and government policy that should be protested. This is the argument heard by Marvin Davidov, who has campaigned for forty-two years against the manufacture of cluster munitions by Alliant Techsystems, (and before that, Honeywell, who created Alliant Techsystems in 1990), in Minnesota. Marv's autobiography, "You Can't Do That!" published last year, provides interesting detail on the extensive influence of military goods manufacturers over a range of local and national governmental processes in the USA. Marv chronicled a range of measures taken by taken by Honeywell, Alliant and US Government agencies over the years, against the Honeywell Campaign in Minneapolis, ranging from local philanthropy through to planting informants and deploying provocateurs. (see "You Can't Do That!" by Carol Masters and Marv Davidov, Nodin Press, Minneapolis MN, USA 2009) The impact of the campaign on Honeywell may be guessed from the press clipping below, but it did not stop production. And I am sure that each of you realises that the Honeywell-manufactured cluster bomb duds from that era are still killing men, women and children in SE Asia.



**I earnestly ask that you extend the reach of Australian law to effectively outlaw investment in offshore cluster munitions manufacturers and their parent companies and significant shareholders.**

My request is not unreasonable. I am asking to you to recognise, in our CCM ratification bill, our social responsibility toward civilians caught up in armed conflicts that arise through failed diplomacy or other causes. I am asking you to further the aims of the Geneva Conventions by doing what is clearly in our power to do, toward preventing the use of indiscriminate weapons in such conflicts, by recommending and advocating robust legislation that genuinely and fully supports that humane goal. I am asking you to deal with an acknowledged cause of civilian casualties by forcing disinvestment in offshore companies involved in this shameful business.

An email I received From Senator Eric Abetz, last July states that “

*“Investment decisions made by many financial institutions are usually based on a return for stockholders. Stockholders and customers of such institutions can influence these decisions as evidenced by the ANZ campaign that you reported on in ANBL Memorandum No. 90. Whether government intervenes to force disinvestment as you suggest, is an aspect that I’m sure will be debated once the legislation is introduced.”*

(Personal correspondence Wednesday, 25 August 2010 3:47 PM)

I thank Senator Abetz for his frank and specific reply. It was really the best response I received from any politician I contacted, relevant to my concerns that my superannuation money, my mortgage payments and other loans, my savings and my tax contributions may be invested in companies producing cluster munitions and other indiscriminate weapons.

Yet, on inquiry, I know of no policy by any of the parties represented in our Parliament that would prevent them from supporting legislation that prohibits investment in offshore manufacturers of cluster munitions.

Other national parliaments have risen to this occasion, in varying measures. I expect that the Committee will examine the legislation of the UK, the Republic of Ireland, NZ, Switzerland, France and Belgium, for example. I believe that debate in the UK

House of Lords resolved to let industry regulate itself, regarding the manufacture of cluster bombs. See page 8 of the UK House of Commons Research Paper 10/11 11 February 2010 <http://www.parliament.uk/briefingpapers/commons/lib/research/rp2010/RP10-011.pdf>

That British gesture toward saving civilians, saving ordinary men, women and children from death, maiming and catastrophic loss, is at least a recognition of the problem that compels me to write to you, although I am unconvinced of its efficacy. I hope that our Parliament will take stronger measures on disinvestment. I know that ordinary people are often very dismayed to find out that their money is being invested for them, invested in cluster munitions. Perhaps the person who makes these investment decisions on our behalves sleeps like a baby no matter what. It does not logically follow that others of us are not dismayed or disgusted to learn about such heinous presumption.

Certainly the Australian government could act preventatively through its funds in trust, by following the example set by Norway, with its Sovereign Wealth Fund. See <http://www.swfinstitute.org/fund/norway.php>.

There, it states that

*"Investments have to be in line with the ethical guidelines based on sector and company behaviour. The companies that the Fund invests in are closely monitored by a Council of Ethics. If companies are operating in conflict with the guidelines the Fund will consider withdrawal. Several companies have been excluded: [29 companies are listed]"*

These guidelines and the resulting "list of shame" offer a far better remedy than the woefully insipid United Nations Principles of Responsible Investment (UNPRI) <http://www.unpri.org/>: a weak framework for self-regulation used by some Australian companies.

For an English translation of the Norwegian Sovereign Wealth Fund ethical guidelines, see [http://www.regjeringen.no/en/sub/Styrer-rad-utvalg/ethics\\_council/Ethical-Guidelines.html?id=425277](http://www.regjeringen.no/en/sub/Styrer-rad-utvalg/ethics_council/Ethical-Guidelines.html?id=425277)

I think of Fred Branfman's book, of the inept pictures and unpolished texts created by refugees from Central Laos in the late 1960's, stories told by villagers whose land had been mercilessly bombed and strafed in attacks that matched the monstrosity of Guernica, again and again. I can relate to their experience, however distantly, by remembering waking from my own nightmares, as a child, nightmares of nuclear annihilation that ended with a single gleaming speck in the sky, at the end of an advancing contrail: a common sight over the skies of Idaho, in the late 1950's.

Fred, in the introduction to his book states that

*"... these voices provide the clearest possible warning about the new challenges posed by a new age of 'nonhumanity'. It was possible to mobilize against such 'inhuman' leaders of the past as the clearly mad and violent Hitler. It is far more difficult, however, to organize against personally relatively decent and sane leaders who today commit mass murder through automated war of which the outside world is largely unaware."*

Voices from the Plain of Jars page 25

Some of the text from Fred's book is sourced from his material online at <http://fredbranfman.wordpress.com/laos-automated-war-archive/>

As you committee members would each know, far more civilians than soldiers are casualties of war these days, and the proportion shows every risk of increasing. We here in Australia are fortunate to be at arm's length, currently, from these horrors. We are also in the fortunate position of being able to do what we can to reverse this trend. I pray that you in your current duties will not turn a blind eye to the financial market mechanisms that undeniably contribute to unjust and deadly strife, in our present world.

Thank you for your consideration.

Robert Rands