

Prime Minister Stephen Harper
Government of Canada

It's time for Canada to accede to the Convention on Cluster Munitions – and to do it 'right'.

Dear Prime Minister,

From 2005 to March 2011 I was the *Senior Coordinator for Mine Action* with the Department of Foreign Affairs and International Trade. Among other things, I had lead responsibility for Canada's engagement in the *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (CCW)* and the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction* (the Ottawa Convention).

I also had the honour of leading the Canadian delegation throughout the negotiation of the *Convention on Cluster Munitions* in 2007/08, a remarkable treaty that, like the Ottawa Convention on anti-personnel landmines established a decade earlier, has resulted in the total ban of an inhumane and indiscriminate weapon that has killed and maimed many thousands of innocent civilians throughout the world.

Article 1 of the Convention sets out the primary responsibilities of States Parties:

1 Each State Party undertakes never under any circumstances to:

- (a) Use cluster munitions;*
- (b) Develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, cluster munitions;*
- (c) Assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention.*

Among other things, States Parties must also:

- destroy their cluster munitions stockpiles within 8 years;
- clear all contaminated areas within 10 years;
- assist the victims; and
- if in a position to do so, to assist States Parties in need (primarily affected developing countries) to meet their obligations under the Convention.

I am writing to you concerning Canada's imminent accession to the *Convention on Cluster Munitions*, which is long overdue. I do so in an open letter in order to further engage Canadians and other interested parties on this important matter.

Background

Although Canada was not among the six countries that initiated what became known as the 'Oslo Process on Cluster Munitions' that produced this Convention, you will recall that we participated actively from the first formal meeting in February 2007 and were

among the first countries to sign the *Convention on Cluster Munitions* when it opened for signature in Oslo on December 3, 2008.

Throughout the negotiations, our delegation worked very closely with the U.K., France Germany, Australia and other like-minded countries to achieve the highest possible humanitarian standard in the Convention, while ensuring that States Parties can continue to engage effectively in combined military operations with allies, such as the United States for example, which have chosen not to become party to this Convention.

Despite strong initial opposition from the majority of participating States, we succeeded in negotiating into the final text of the Convention an article - *Article 21* - that explicitly allows for continued military ‘interoperability’ with non-party States.

Article 21 is based largely upon text that I personally drafted and delivered on behalf of Canada’s delegation in the early stages of negotiations in Dublin in 2008. As one of its authors, and one of a few who fought hardest to have this Article included in the Convention, I believe I have as good an understanding of its provisions and restrictions as anyone in the international community. I also have a duty to ensure that it is not misinterpreted in any way that would diminish or circumvent the high humanitarian standards that were achieved during negotiations.

Article 21 concerning Relations with States not party to the Convention states:

“1. Each State party shall encourage States not party to this Convention to ratify, accept, approve or accede to this Convention, with the goal of attracting the adherence of all States to this Convention.

2. Each State Party shall notify the governments of all States not party to this Convention, referred to in paragraph 3 of this Article, of its obligations under this Convention, shall promote the norms it establishes and shall make its best efforts to discourage States not party to this Convention from using cluster munitions.

3. Notwithstanding the provisions of Article 1 of this Convention and in accordance with international laws, States Parties, their military personnel or nationals, may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party.

4. Nothing in paragraph 3 of this Article shall authorize a State Party:

- a) To develop, produce or otherwise acquire cluster munitions;*
- b) To itself stockpile or transfer cluster munitions;*
- c) To itself use cluster munitions;*
- d) To expressly request the use of cluster munitions in cases where the choice of munitions used is within its exclusive control.”*

As is apparent, the ‘interoperability’ provision contained in paragraph 3 of this Article is significantly restricted by the categorical prohibitions contained in paragraph 4 not to

develop, produce, otherwise acquire, stockpile, transfer or use cluster munitions, or to expressly request their use, etc.

Paragraph 3 is further restricted by the positive obligations on States Parties contained in paragraphs 1 and 2 of the Article, including: to notify non-party States of obligations under the Convention, to encourage non-party States to become party to the Convention, to promote the norms it establishes, and to make best efforts to discourage States not party to the Convention from using cluster munitions.

This Article clearly does not allow activities conducted during combined military operations with non-party States that would obviate or compromise the fundamental object and purpose of the Convention. Quite the opposite, it reinforces them, while ensuring that the armed forces of States Parties are not held legally liable for activities contrary to the Convention which may be carried out by the forces of States not party, despite the best efforts of States Parties to discourage them.

I and the heads of delegations of like-minded countries made this point repeatedly during negotiations and it was with our solemn assurances and this clear understanding that other participating States who feared that it might be used as a ‘loophole’ agreed, with great reluctance, to include *Article 21* in the final text of the Convention.

Negotiations concluded in Dublin on May 30, 2008 and the Convention opened for signature in Oslo on 3 December 2008. To date, there are 111 signatories, 68 of which have ratified or acceded to the Convention and are thus full State Parties.

Where is Canada?

More than three years after signing the *Convention on Cluster Munitions*, Canada has yet to pass national legislation that will allow our country to become a State Party. Throughout 2009 and 2010, officials at the Department of Foreign Affairs (myself included) were embroiled in an intense debate with the Department of National Defence concerning recommendations to be made to Cabinet with respect to the specific military and related activities which would be prohibited, upon Canada’s accession to the Convention.

On December 14, 2010, senior officials at DND and DFAIT came to agreement on the specific recommendations that would be put forward to Cabinet. In my view, several were inconsistent in the extreme with the object and purpose of the Convention as a whole and even with the provisions and restrictions contained in *Article 21* itself.

In some instances, Canadian Forces personnel would be permitted to significantly and directly aid and abet the use of cluster munitions by non-party state forces and in one case Canada would be the primary author, though not the instrument of their use.

In my view, the legal and policy analysis of DND, which has largely prevailed in the interdepartmental debate, has been unduly influenced by DND’s desire not to do anything they believe will negatively influence the close relationship that the Canadian Forces

enjoy with the US military – notwithstanding the outcome of negotiations in Dublin and the fact that countries that have already ratified the Convention including the UK, France, Germany, Ireland, Norway and New Zealand have taken significantly more restrictive interpretations of what is deemed legal under the Convention. Indeed, many activities that DND insists are legal could result in 10 or more years in prison in the countries of some of our closest allies.

Should Canadian Forces undertake the activities in question, they could be vulnerable to prosecution in other jurisdictions. Most disturbing, Canada could be complicit, if not directly responsible, for more civilian deaths and suffering from the use of this indiscriminate and inhumane weapon.

That afternoon, I submitted a conscientious objection to senior management, copied to relevant colleagues in DND and the Department of Justice and asked that my name be removed as the primary departmental contact on the Memorandum to Cabinet. On February 9, 2011, after 29 years of public service, I resigned in order to be free to advocate publicly for legislation that truly reflects the standards contained in the *Convention on Cluster Munitions*.

Choices for Canada

Assuming that it is still the intention of your government to accede to the *Convention on Cluster Munitions*, Cabinet has some important choices to make – choices that are literally matters of life and death.

Recalling that the Convention imposes a total ban on cluster munitions and legally binds States Parties to advance the norms of the Convention and to make best efforts to discourage their use by non-party States:

1. Will you allow investment in any commercial or non-commercial enterprise that contributes to the development, production, transfer or use of cluster munitions?
2. Will you allow the transport of cluster munitions on Canadian carriers to assist non-party State forces?
3. Will you allow Canadian pilots or artillery personnel on exchange with non-Party State units to use cluster munitions?
4. Will you allow a Canadian commander of a combined multinational force – such as Lt. General Bouchard who commanded NATO forces in the recent operation in Libya, for example – to be able to order the use of cluster munitions by non-party State forces?
5. Will you allow Canadian Forces to do anything that will actively facilitate the development, production, transport and/or continued use of this inhumane weapon?

In my view, none of these scenarios is consistent with the letter or the spirit of the *Convention on Cluster Munitions*. **If Canada truly aspires to the agreed standards, then all of the foregoing must be prohibited in Canadian law and “penal sanctions to prevent and suppress any activity prohibited to a State Party under this Convention undertaken by persons or on territory under its jurisdiction or control” must be established, as required by Article 9 of the Convention.**

Conclusion

Canada has done a very good thing by participating in the negotiation and signing of the *Convention on Cluster Munitions*. It is now for you and your Parliamentary colleagues to follow through with legislation that will have the desired effect --- to protect the lives and limbs of innocent civilians in war-ravaged countries throughout the world from the horrific effects of this weapon.

May your deliberations confirm the position and resolve that Canada displayed throughout the Oslo process – as reflected in my closing remarks in plenary at the conclusion of negotiations in Dublin in 2008, summarized below:

“Mr. President, Ladies and Gentlemen,

It has been a great privilege and a pleasure for Canada to participate in this negotiating Conference.

... We should all be proud of what has been accomplished since February 2007 when this process began in Oslo.

Negotiations have not been easy. We all care deeply about this issue and various – some might say ‘competing’ – considerations were at play.

Canada believes that the right balance has been struck.

Nonetheless, it is inevitable in such circumstances that there is some disappointment. We heard this in many of the remarks at the end of the day on Wednesday, particularly with reference to Article 21 on relations with States not party.

The Cluster Munitions Coalition referred to it as “a stain on the fabric of the Convention” ...a powerful and, to us, a very disturbing image.

Others have referred to Article 21 as a ‘loophole’;

We have referred to it as an essential element of legal protection, to accommodate situations in combined operations which may be beyond our control.

If these circumstances ever obtain, we believe they will be rare.

Why?

Because we are in the midst of a major paradigm shift in how the world regards cluster munitions;

Because this Convention, when it enters into force, will render all cluster munitions illegal for States Parties...and we speculate that close to two thirds of the worlds nations will likely assume these legal obligations from the beginning of the formal process of signature and ratification. – And more will join over time as we work to universalize the Convention;

Because some very large producers of this weapon have already ceased production, ended export and are phasing it out of their own arsenals;

Because we know, and will ensure, that our allies take our legal obligations seriously and will try not to put us in situations where they might be abrogated;

--- Countries like ours that have fought hard for Article 21 want exactly the same thing as those on the other side of this debate.

We want to get rid of this weapon;

We want it never to be used again and to see it relegated to the dustbin of history;

We want to universalize this Convention and to advance its norms at every opportunity;

We want and will actively and forcefully discourage the development, production, stockpiling, transfer and use of cluster munitions throughout the world;

We want to get on with the business of implementing all the provisions of this Convention: from destroying stockpiles, to clearing land, providing risk education and assisting victims, their families and communities;

We want to join forces with affected States and to help to generate the resources to get the job done.

Ultimately, of course, it is not only this legal document that will determine how we behave day to day. It is also our intentions that shape our actions. And I assure you, our intentions are honourable.

...Mr. President, I would like to end by reading the following message received from my capital just a few hours ago:

“Canada joins others in welcoming the text of this important instrument that addresses the tragic humanitarian and development impact caused by cluster munitions. The provisions of the instrument that enable cooperation between

States Party to the instrument and non-party States demonstrate that the Oslo process recognizes both humanitarian and security requirements.

The outcome is a significant achievement and the text is one that we are proud to take back to our capital for consideration by the Government and Parliament, in accordance with our domestic legal process.

Thank you Mr. President”

And thank you, Mr. Prime Minister.

Sincerely,

*Earl Turcotte
Ottawa, Ontario
February 10, 2012*

*Contact Info:
Earl.turcotte@gmail.com
613-839-2777*