

Cluster Munitions

Statement by Earl Turcotte – Former Senior Coordinator for Mine Action at the Canadian Department of Foreign Affairs and International Trade

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My name is Earl Turcotte. For the past six years and until very recently, 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* (Convention on Certain Conventional Weapons or CCW), the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction* (the Ottawa Convention) and the *Convention on Cluster Munitions* (CCM).

I wish to preface my remarks today by saying that I have the greatest respect and admiration for the men and women of the Canadian Forces. My comments and my actions with respect to cluster munitions are absolutely without prejudice to them or the critically important job they do.

Background

When the international community was unable to secure a mandate to negotiate a legally binding instrument on cluster munitions in the traditional UN forum for conventional arms discussions, the *Convention on Certain Conventional Weapons*, Norway, with strong support from Austria, Ireland, New Zealand, Mexico and the Holy See led a process outside the CCW beginning in early 2007, that resulted in the negotiation of the *Convention on Cluster Munitions*. This process very much mirrored the model Canada had established a decade earlier with respect to anti-personnel mines. In both instances, the weapon in question has been banned and states parties have assumed obligations to destroy stockpiles and clear contaminated areas within a specific period of time, and to rehabilitate victims. Moreover, all obligations obtain immediately upon the entry into force of the Convention for a state party, i.e. there is no transition period.

Though Canada was not among the six states that led what became known as the Oslo Process on Cluster Munitions, we participated actively from the first formal meeting in Oslo in February 2007 and were among the first states to sign the *Convention on Cluster Munitions* when it opened for signature on December 3, 2008.

As Head of the Canadian Delegation throughout the negotiations of the *Convention on Cluster Munitions*, I worked very closely with like minded states to ensure that we achieved the highest possible humanitarian standard in the Convention while, at the same time, ensuring that Canada and participating allies could continue to engage effectively in combined military operations with allies who have chosen, at least for the time being, not to become party to the Convention. With

significant effort, we succeeded in negotiating into the text of the Convention an article - *Article 21* - which makes explicit provision for continued military interoperability with non-party states.

Article 21 is based largely upon text that I personally drafted and delivered in the early stages of negotiations in Dublin in May 2008. As one of its principal authors and one of the people who fought hardest to have it included in the final text, I feel I have as good an understanding of, and appreciation for, its provisions as anyone in the international community. I also feel a special burden of responsibility to ensure that it is interpreted correctly.

I believed during negotiations and I continue to believe that *Article 21* is an essential element of the Convention. It preserves critically important military alliances between State Parties and non-party States that are vital to Canada's national interest and to global peace and security. Without this Article, NATO and similar military alliances would have been at risk and it simply would not have been possible for many states to ban cluster munitions and to assume the many other legally binding obligations contained in the Convention.

When interpreting the provisions of Article 21, however, it is important to consider it in its entirety and within the context of the broader Convention.

Article 21 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."*

It is critically important to note that the interoperability provision contained in paragraph 3 is heavily 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 the use of cluster munitions. Paragraph 3 is further restricted by the positive obligations on States Parties contained in paragraphs 1 and 2 of the Article, including: to notify States not party of obligations under the Convention, to encourage States not party to become party to the Convention, to promote the norms it establishes and to make best efforts to discourage States not party to this Convention from using cluster munitions.

Article 21 clearly does not allow activities during combined military operations with States not Party that would obviate or qualify 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.

I and the heads of delegation 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 that were in a clear majority very reluctantly agreed to include this Article in the final text.

We and like minded delegations did not envision that this Article might be interpreted, rather misinterpreted, such that States Parties could deliberately and significantly aid and abet the use of these indiscriminate weapons.

The treaty negotiations concluded in May 2008. To date there are 108 signatories and 57 countries have ratified the Convention.

Current Status of the Convention in Canada

Canada, as mentioned, has signed the Convention, but has not yet ratified. I do believe there is political will to do so, as the Government has stated its intention to ratify on several occasions. The process has been delayed because, until very recently, officials of the Department of Foreign Affairs and International Trade and the Department of National Defence have been engaged in an intense and at times very difficult debate with respect to the provisions of Article 21 – specifically, whether or not certain military activities which could occur during combined military operations with non-party states would be legal and, if so, whether or not they should, nonetheless, be prohibited on policy grounds.

As the Departmental lead on the Cluster Munitions File for DFAIT, I was an active participant in this debate.

On December 14, 2010, DFAIT and DND, at the level of senior officials, came to agreement on the specific recommendations that would be put forward to Ministers for consideration. I was not personally in agreement with several of these recommendations and raised a conscientious objection concerning one in particular that I consider to be the most egregious. I also requested that my name be removed as the primary departmental contact on the Memorandum to Cabinet. On February 9th, I resigned from the department in order to be free to advocate for stronger legislation than will be recommended to Ministers.

I cannot disclose the specific recommendations that have been agreed between the two departments, as this information is classified.

I will say, however, that, in my considered judgment, some of the activities which would be permitted during combined operations with non party states, if the legislation as recommended is adopted, are inconsistent in the extreme with the object and purpose of the Convention as a whole and with several of the provisions in Article 21 itself. In some instances, Canada would be deliberately and significantly aiding and abetting the use of cluster munitions and in one Canada would be the primary author, though not the instrument of their use.

It is my impression that the legal and policy analysis of DND, which has largely prevailed in the inter-departmental debate, has been unduly influenced by their desire not to do anything that they believe will negatively influence the close relationship that the Canadian Forces enjoy with the US military. And this, notwithstanding the fact that countries that have already ratified the Convention or are in the process of doing so, including the UK, France, Germany, Australia, Norway, Ireland, Mexico and New Zealand, have taken significantly more restrictive interpretations of what is deemed legal under the Convention. Indeed, many activities that DND will insist are legal could result 10 or more years in prison in the countries of some of our closest allies.

If these recommendations are eventually passed into Canadian law, I believe that Canada will be isolated among the 108 signatories for its unacceptably broad interpretation of what is permitted under the Convention. Should Canadian Forces personnel undertake the activities in question, they would be vulnerable to prosecution in other jurisdictions and by the International Criminal Court and, most disturbing, Canada could be complicit if not responsible, at least in part, for more civilian deaths from the use of this indiscriminate and inhumane weapon.

I negotiated this treaty in good faith and simply cannot reconcile such actions with the obligations contained in the treaty and Canada's stated intentions throughout the negotiations.

In closing, without necessarily making reference to recommendations which have or may be advanced by Canada or other states' officials, I wish to take this opportunity to express my views on selected military scenarios which could occur during combined operations.

In addition to the prohibitions of a state party never to develop, produce, otherwise acquire, stockpile, transfer, use or expressly request the use of cluster munitions, in my view, to properly implement the provisions of the *Convention on Cluster Munitions*, states parties must never, under any circumstances, including during combined military operations with non-party states, allow any of the following:

1. cluster munitions to be stockpiled by non-party states on their territory;
2. direct or indirect investment in any commercial or non-commercial enterprise that contributes to the development, production, transfer or use of cluster munitions;
3. the personnel of a state party to provide direction and support to non-party state forces to use cluster munitions (e.g. Airborne Warning and Control (AWACs) controller);
4. state party forces to call in close air support which expressly involves the use of cluster munitions;
5. state party forces to transport non-party state cluster munitions;
6. state party pilots or artillery personnel on exchange with non-party state forces to use cluster munitions;
7. state party commander(s) of a combined force to authorize or order, directly or indirectly, the use of cluster munitions by non-party state forces.

Each of the foregoing should be deemed to be illegal and significant penalties should be imposed for their commission. In so doing, the integrity of the *Convention on Cluster Munitions* will be maintained and the international community will take another major step forward in protecting innocent civilians from the horrors of war.

Thank you.