Convention on Cluster Munitions
Comments on Proposed Canadian Legislation – Earl Turcotte

From 2005 to early 2011, I had lead responsibility in the Department of Foreign Affairs and International Trade for the *Convention on Certain Conventional Weapons*, for the *Ottawa Convention* that banned Anti-personnel landmines. I also had the honour of leading the Canadian delegation throughout the negotiation of the C*onvention on Cluster Munitions*.

The Weapon

Cluster munitions are designed to disperse large numbers of explosive submunitions over a wide area.

A cluster bomb typically contains dozens to hundreds of such submunitions which can cover up to a square kilometer.

They can also be launched from the ground and with Multiple Launch Rocket Systems, they can saturate vast areas in a short period of time.

There are currently more than 200 different types of cluster munitions in existence, and more are in development.

They were initially designed for use during the cold war in the event of attack by masses of enemy combatants.

If it ever was, it is virtually impossible to use them responsibly in the modern day given:

- **i) the asymmetrical nature of most conflicts with combatants often indistinguishable from civilians or embedded in civilian populated areas;**
- **ii) and the fact that cluster munitions are notoriously inaccurate and have high dud rates - anywhere between 10 and 40% depending on type and battlefield conditions.**

Cluster Munitions have been used in 37 countries and territories to date, including in Afghanistan, Vietnam, Cambodia, Laos, the former Yugoslavia, and more recently in Lebanon and in Libya by the Gadhafi regime.

98% of all recorded casualties from cluster munitions have been civilians, many of these are children who are often attracted to unexploded submunitions.

The Oslo Process

The extensive use of cluster munitions during the last 72 hours of the conflict between Israel and Hezbollah in southern Lebanon in the summer of 2006 provided new impetus among states to tackle the cluster munitions issue and many around the world were ecstatic when Norway - with strong support from a core group of countries including Austria, Ireland, New Zealand, Mexico and the Holy See initiated what became known as the 'Oslo Process' outside the traditional UN architecture for such discussions, in early 2007 – just as Canada had done so successfully with anti-personnel landmines a decade earlier.

Preparatory conferences were held in Oslo, Lima, Vienna and Wellington and the formal negotiations took place in Dublin over a 2 week period in May 2008.

Fifteen months from beginning to end and the results were remarkable! Like the Ottawa Convention, the *Convention on Cluster Munitions* has set a gold-standard in international humanitarian law.

The Convention

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

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 stockpiles within 8 years**
- **clear contaminated areas within 10 years;**
- **assist the victims.**

Moreover, all obligations obtain immediately upon the entry into force of the Convention for a state party, i.e. there is no transition or deferral period.

The impact of the ban promises to be quite profound – both as a preventive as well as a remedial measure and this weapon is clearly on its way to the dustbin of history.

Canadian Participation and Military Interoperability with Non-Party States

Though Canada was not among the lead states in the Oslo Process, we participated actively from the first formal meeting in Oslo in February 2007 and Canada was

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

Throughout the negotiations, our delegation worked very closely with the UK, France, Germany, Australia and other like-minded countries to ensure that we achieved the highest possible humanitarian standard in the Convention.

At the same time, it was necessary to ensure that we could continue to engage effectively in combined military operations with allies such as the US who have chosen, at least for the time being, <u>not</u> 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 cooperation with non-party states.

Article 21 **happens to be based largely upon text that I personally drafted and delivered in the early stages of negotiations in Dublin. As one of its authors and one of those who fought hardest for its inclusion in the final text, I think I understand its provisions and restrictions as well as anyone in the international community.**

I believed then and continue to believe that this provision for continued interoperability is an essential element of the Convention.

It preserves 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 may have been at some risk and it would have been very difficult for countries such as ours to ban cluster munitions and to assume the many other legally binding obligations contained in the Convention.

Provisions and Prohibitions in Article 21

However, <u>*Article 21* must be considered it in its entirety and within the context of the broader Convention.</u>

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."

Concerns about military' interoperability' with Non-Party States

During negotiations, there was grave concern among a significant majority of participating countries as well as international organizations such as the *International Committee of the Red Cross* and NGOs that comprise the *Cluster Munitions Coalition*, that the phrase at the beginning of paragraph 3, "notwithstanding the provisions of Article 1…" would nullify the categorical prohibitions contained in Article 1 against the development, production, stockpiling, use, assisting or in any way encouraging or inducing anyone to engage in any activity prohibited to a State Party in the Convention.

This is not the case. Among other things, Article 31 of the *Vienna Convention on the Law of Treaties* states that "*a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.*" -- Therefore, <u>nothing</u> in Article 21 of the Convention on Cluster Munitions could weaken the categorical prohibitions contained in Article 1, including the prohibition on assistance.

Moreover, paragraphs 1, 2 and 4 in *Article 21* itself impose categorical prohibitions on the activities of States Parties during joint operations as well as <u>positive obligations</u> on States Parties to "*promote the norms of the Convention and make best efforts to discourage States not party to this Convention from using cluster munitions*".

***<u>Article 21</u>* <u>clearly does not allow activities during combined military operations with States not Party that would in any way diminish the object and purpose of the Convention</u>. Quite the opposite, it reinforces them, while at the same time 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 our best efforts 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 shared understanding that other participating States who feared that it might be used as a 'loophole' agreed, with great reluctance, to include this Article in the final text.

Where is Canada?

There are now 111 signatories to the Convention, of which 71 have ratified or acceded to the Convention, including most of Canada's allies.

Throughout 2009 and 2010, officials in DFAIT, myself included, were embroiled in an intense debate with the department of National Defence regarding which specific military activities should be prohibited or permitted during joint operations with non-party States.

Just over a year ago, senior officials in the two Departments came to agreement. I believed at that time that some of the scenarios which would be permitted are illegal under the Convention and are completely inconsistent with our publicly stated desire and legal requirement under the Convention to protect civilians from this weapon.

I issued a conscientious objection and asked that my name be removed as the lead departmental contact on the proposed legislation as I could not, in good conscience, defend it in its existing form. I strongly and repeatedly urged colleagues in DFAIT and DND to reconsider the matter and, a few months later, resigned in protest in order to be able to advocate publicly for stronger legislation than was envisioned at that time.

Proposed Canadian Legislation

The Government of Canada has finally tabled the long-awaited legislation in Parliament. Though I strongly support Canadian accession to this Convention, I regret that the proposed legislation remains tragically and deeply flawed.

Recalling that:

(i) the object and purpose of the Convention is to ban, for all time, an indiscriminate and inhumane weapon that has a history of killing large numbers of civilians;

(ii) the first article of the Convention also imposes a total ban on any form of assistance, encouragement or inducement of anyone to engage in any activity prohibited to a State Party under this Convention…

(iii) Article 21 further requires States Parties to promote the norms of the Convention and make best efforts to discourage their use by non-party States", and

(iv) And keeping in mind that Article 19 of the Convention dictates that "the Articles of this Convention shall not be subject to reservations"…

Incredibly, the draft legislation tabled by the Harper Government seeks "exceptions" during combined military operations with non-party states that, among other things, would legally permit the following:

(i) A Canadian commander of a multinational force to authorize or direct non party state armed forces to use, acquire, posses, import or export cluster munitions;
(ii) Canadian pilots or artillery personnel themselves to use, acquire, possess, or move cluster munitions while on attachment or secondment with non-party state units;
(iii) Canadian Forces personnel to transport on Canadian carriers, cluster munitions that belong to non-party state forces;

Section 11.3 goes further and proposes blanket 'exceptions' that permit Canadian Forces personnel:

(i) To aid, abet or counsel non-party state forces to commit acts prohibited to a State Parties;
(ii) To conspire with non-party states forces to commit acts prohibited to States Parties;
(iii) To receive, comfort or assist non-party state forces to escape, knowing that that other person has committed, aided or abetted in the commission of acts prohibited to States Parties.

In what world could a reasonable person claim that any of the foregoing are consistent with a total and unequivocal ban on cluster munitions and States Parties' legally binding obligation to promote the norms of the Convention and to make best efforts to discourage non-party States from using cluster munitions?

What contortions of law, logic or morality would be required to come to such an outrageous conclusion!

From my perspective – having led the Canadian delegation that negotiated this Convention and observed how other countries, including some of our closest NATO allies, are interpreting their legal obligations under the Convention, Canada's proposed legislation is without doubt the worst tabled to date by any of the 111 countries that have signed the Convention.

In my view, it falls below even the minimum threshold of legality in international humanitarian law. It is a betrayal of the trust of colleagues in other countries who negotiated the Convention in good faith and, most tragically, it could render Canada complicit in a significant way in the ongoing use of this horrible weapon.

Canada is not in "good company"…

The Government may claim that "Canada is in good company", that many other countries, including many of our NATO allies are interpreting the provisions of Article 21 the same way.

This is simply not true. Of the 108 countries that participated in the negotiations in Dublin, only Canada, Australia, France, Germany, Japan, the Netherlands, Spain, Switzerland, the UK and a few others actively sought provision on interoperability. Virtually all of the other countries at the Conference adamantly opposed any such provision, for fear it would be used as a legal loophole for the continued use of cluster munitions during joint operations with non-party states.

The Canadian Government is now proving that concerned states had good reason to be wary.

Even among the very small group that, like Canada, sought provision for military interoperability with non-party States, no other country will allow some of the things that this Government insists are legal.

I challenge the government to identify any other State Party or signatory that will allow one of their commanders of a multinational force to authorize or order the use of cluster munitions by non-party State forces;

that will allow its forces to transport cluster munitions on its own carriers in order to assist non-party states;

that will allow their pilots or artillery personnel on exchange with non party states to use cluster munitions.

And, I challenge the Government to identify any other State Party or signatory that is giving its forces *carte blanche* to – in its own words – "aid, abet, conspire and assist" non-party forces with the commission of acts prohibited to States Parties.

NATO allies Germany and the Netherlands won't even allow a non-party State to transit their territory with cluster munitions aboard, let alone any of the scenarios Canada deems legal, and several of the proposed actions will earn one up to 14 years in prison in the United Kingdom and serious jail time in many other countries.

Canadian security will not be compromised…

I would also challenge any claim by the government that such interpretations are required to maintain effective interoperability with non-party states, in effect suggesting that Canadian security could be compromised if we were not prepared to assist in the use of cluster munitions by non-party State forces.

In all the years Canada has possessed cluster munitions (purchased from the United States), we have never used them, not even once. Even as we had brave soldiers dying in Afghanistan, this weapon was never deemed to be appropriate for use by Canadian forces.

NATO has acknowledged that a major factor in determining success of any military operation is the protection of civilians.

There are many alternative weapons systems that inflict far less collateral damage. Lt. General Bouchard, who commanded NATO forces in the recent operation in Libya, has noted that modern asymmetrical warfare requires more accurate bombs even than the unitary bombs currently used, let alone cluster munitions which are the absolute opposite of a precision weapon.

Conclusion

Canada is poised to set a dangerous international precedent in what appears to be an attempt to get through the back door via disingenuous legislation what we could not get, did not get, and did not pursue in negotiations with the international community.

As we have in the past, I believe that Canada must strive to set the highest – not the lowest - standards in international humanitarian law.

When the Prime Minister tucks his kids safely into their beds at night, he should be mindful of the fact that some other children and adults in war ravaged parts of the world will not be going to bed tonight because they have been blown to bits by a weapon that he seems prepared to help others to continue to use.

I urge the Prime Minister and his parliamentary colleagues to strengthen this legislation dramatically by prohibiting any measure that would aid and abet the use

of cluster munitions and to take seriously the legally binding obligation to discourage their use. -- Not to do so would be to fail innocent civilians at risk, to fail sister states that negotiated in good faith, to fail to meet what is legally required of all States Parties to this Convention and to fail Canadians who expect far better from our nation.

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