

Open Letter

17 October 2012

ATT: The Honourable John Baird, P.C., M.P.
Minister of Foreign Affairs, Canada

COPIES: - Prime Minister Harper,
- Defence Minister MacKay,
- Justice Minister Toews
- Leaders and Foreign Affairs critics of the Opposition Parties
- Members of the Senate Committee on Foreign Affairs and International Trade
- Members of the House of Commons Committee on Foreign Affairs and International Development

Re: Bill S-10 – The proposed Canadian Legislation to Implement the Convention on Cluster Munitions

Dear Minister Baird,

We are writing today as Canadian academic and professional lawyers and legal experts to express our concern that Section 11 of Bill S-10, now before the Senate, will ultimately put Canada in breach of its international obligations under the Convention on Cluster Munitions (the “Convention”). When Canada ratified the Convention, it undertook to itself ‘never under any circumstances’ use, develop, stockpile, transfer cluster munitions, nor to assist or encourage anyone else to use them (Art. 1). While Bill S-10 purports to give domestic effect to the Convention in Canadian law, we feel that section 11 of the bill manifestly contravenes both Articles 1 and 21 of the Convention.¹ In order to comply in good faith with Canada’s international obligations, it is necessary to remove or radically revise section 11.

The Convention on Cluster Munitions

The Convention, which entered into force on August 1, 2010, contains an absolute prohibition on the use and transfer of cluster munitions, as well as on assisting or inducing another to perform any of these activities (Art. 1). Under Art. 21, a state party may engage in joint military operations with states that are not party to the Convention, even if those states continue to use cluster munitions. This is known as the “interoperability” provision. The rationale behind it is the perceived need to preserve the capacity for joint military operations between state parties (e.g. Canada) and non-party states (e.g. the United States) in order that pre-existing alliances, such as NATO, can continue to function without impediment.

It is clear that Art. 21(3) allows a state to engage in military operations with non-state parties who use cluster munitions:

3. Notwithstanding the provisions of Article 1 of this Convention and in accordance with international law, 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.

¹ All the provisions mentioned here are set out in an Annex appearing at the end of this letter.

² Stuart Maslen, *Commentaries on Arms Control Treaties* (Oxford: Oxford University Press, 2005) p.97. See

A fundamental issue for all states parties to the Convention is whether Art. 21 is to be read as completely disapplying Art. 1 from joint military operations with non-parties to the Convention. From the outset, it should be noted that “engaging” in joint operations – even those involving cluster munitions – is not the same as providing “assistance,” which is the act banned by Art. 1 of the Convention. A leading scholarly commentary on previous arms control treaties has confirmed that *participation in joint operations* does not amount to *assistance* in the established law and practice in arms control treaty interpretation: ‘[A] State Party could provide logistical support to a non-party State that, in general, uses anti-personnel mines as long as it did not furnish such support for any specific operation involving antipersonnel mines.’²

There are, however, two interpretations of Art. 21(3) that have been advanced by states parties and commentators on the Convention. The first, which can be called the “clarification approach”, is that Art. 21 merely clarifies that joint military operations with other non-states parties who are using cluster munitions are permitted. That clarification does not alter the prohibition on assisting them with specific deployment of cluster munitions. The second interpretation, which can be called “the exception approach,” is that the word ‘notwithstanding’ means that Art. 21(3) is an exception to Art. 1, and that it overrides any rule found in Art. 1 in the context of joint operations with non-states-parties.

We feel the clarification approach is the correct interpretation of the Convention, a view also supported by the leading scholarly commentary on the Convention.³ The exception approach would read ambiguous words in a way that constitutes a major departure from the overall purpose not only of the Convention, but even of Art. 21(1) and (2) as well (which require states-parties to use ‘best efforts’ to discourage others from using cluster munitions). If the intention were that Art. 1 should not apply *at all* to joint military operations with a non-state party, that very language could have been chosen.

It is true that the exception approach derives some support from two arguments founded on a literal or textualist interpretation of the words in Art. 21. One is that the term ‘notwithstanding’ connotes an exception to, rather than clarification of the rule in Art. 1. The other is based on Art. 21(4)(d), which reads as follows:

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

(d) To expressly request the use of cluster munitions in cases where the choice of munitions used is within its exclusive control.

The textualist interpretation of this provision is that since it forbids using cluster munitions in cases where the choice is within the state party’s exclusive control, it implicitly confirms that it is allowed where the choice of munitions is not within the state-party’s exclusive control. And since allowing a state to ‘expressly request’ the use of cluster munitions is contrary to Art. 1(1)(c)’s prohibition on ‘inducing’ a state to use cluster munitions, the view must be that Art. 21(3) is an exception to Art. 1, itself limited by the finite conditions stipulated in Art. 21(4).

² Stuart Maslen, *Commentaries on Arms Control Treaties* (Oxford: Oxford University Press, 2005) p.97. See generally pp.93-106.

³ Gro Nystuen & Stuart Casey-Maslen, ed., *The Convention on Cluster Munitions: A Commentary* (New York, Oxford University Press, 2010), para 21.54: ‘[I]t may be concluded that paragraph 3 establishes a special rule that clarifies the general obligations laid down in Article 1.’

In our view, while this is not an absurd reading, it is a strained construction that emphasizes the aforementioned textualist features while ignoring the also text-based general prescription to ‘never in any circumstances’ provide assistance. It is also the reading of Art.21(4)(d) that is deliberately rejected in the leading scholarly commentary on the Convention.⁴ The clarification approach is the one that makes Art. 1 ‘effective’ rather than easily evaded.⁵

We firmly believe that the principles of international law suggest that the clarification approach should be preferred, for three reasons:

- (1) ‘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 the light of its object and purpose.’⁶ Here, the ordinary meaning of the words in Art. 21 is compatible with the continued effectiveness of Art. 1. By contrast, the ordinary meaning of the words ‘never in any circumstances’ in Art. 1 is incompatible with the exception approach, and the prohibition in Art. 1 is the *central object and purpose of the Convention* ; and
- (2) the clarification approach is the interpretation that is preferred by a growing and large number of states that have ratified the Convention,⁷ which constitutes ‘subsequent practice’ regarding interpretation;⁸ and
- (3) there is to our knowledge very little or no support for the exception approach in the *travaux préparatoires* (preparatory work) of the Convention, whereas there are several statements expressing concern that Art. 21 not be regarded as a way of evading the general prohibition on giving assistance found in Art. 1 of the Convention’s regime of protection.⁹

⁴ See Nystuen & Casey-Maslen (2010) para. 21.90: ‘Based on the obligation to perform treaty obligations in good faith and interpreting the wording of sub-paragraph (d) in the light of the context and the object and purpose of the Convention, the reference to ‘exclusive control’ over the ‘choice of munitions used’ should not be understood *a contrario* to mean that a State Party may be authorised to expressly request the use of cluster munitions in any other interoperability situation.’

⁵ On the principle of ‘effectiveness’ as a guide to interpretation, see *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (Advisory Opinion)*, [1980] ICJ Reports 73, 96.

⁶ The Vienna Convention on the Law of Treaties, Art. 31(1).

⁷ At present, *The Cluster Munitions Monitor* (Sept 2012) (available at http://www.the-monitor.org/cmm/2012/pdf/Cluster_Munition_Monitor_2012.pdf) reports that as of the date of writing, 35 states-parties of the Convention have confirmed that article 21 ‘should not be read as allowing states to avoid their specific obligation under Article 1 to prohibit assistance with prohibited acts.’ The Monitor reports contrary views from Japan, the Netherlands, and the United Kingdom. It is also reasonable to assume that the Governments of Australia and Canada now also adopt the contrary view. We cannot confirm the accuracy of this report, however it is consistent with the tone of the debates surrounding the Convention reported in the Summary Records below and there is no good reason to doubt it.

⁸ The Vienna Convention on the Law of Treaties, Art.31(3)(b) establishes the interpretive relevance of ‘any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.’ While it is true that the subsequent practice has not yet produced general consensus/agreement on interpretation, it remains relevant that the predominant opinion supports the clarification approach and is opposed to the exception approach.

⁹ The Summary Records of the debates at the Dublin Conference on the adoption of the Convention are available here: <http://www.clustermunitionsdublin.ie/summary-records.asp>. The most detailed reported discussion of the interoperability provision was heard in the morning of 26 May 2008: http://www.clustermunitionsdublin.ie/pdf/CoW10May26am_002.pdf Other comments may be found by Austria (at http://www.clustermunitionsdublin.ie/pdf/CoW16May28pm_rev15July2009.pdf) and by Norway

The best interpretation of Art. 21 and Art. 1, having regard to the objects and purpose of the Cluster Munitions Convention, is that states parties may engage in joint operations with the armed forces of non-states parties, who are also using cluster munitions, but in a manner that falls short of direct involvement or assistance in the deployment of cluster munitions. And for the sake of clarity, none of the activities listed in Art. 21(4) are permitted at any time. They are an indicative and non-exhaustive list of exceptions of forbidden activities.¹⁰

The Compatibility of Bill S-10 with the Cluster Munitions Convention

The point of section 11 is to confer immunity from any criminal or other responsibility on members of the Canadian armed forces for acts that provide assistance or inducement to a non-state-party that uses cluster munitions in joint operations with Canadian forces. A number of provisions in section 11 of the current Bill are incompatible with the Convention, on either of the interpretations detailed above.

Provisions of section 11 that are incompatible with Art. 21(4) of the Convention

The following provisions are incompatible:

Bill S-10	Convention Provision with which it is Incompatible	Reason for Incompatibility
Section 11(1)(a)	Art. 21(4)(c)	This section authorises a member of the armed forces to ‘direct’ an activity that may involve the use of cluster munitions. This is tantamount to using cluster munitions ‘itself’ under the accepted principles of attribution in international law, ¹¹ and is thus contra Art. 21(4)(c).
Section 11 (1)(c)	Art. 21(4)(c)	This section authorises the ‘use’ of cluster munitions while on ‘attachment, exchange or secondment.’ However, such status does not cause personnel to cease being members of the Canadian armed forces. ¹²
Section 11(2)	Art. 21(4)(b)	This section authorises the ‘transfer’ of munitions by

http://www.clustermunitionsdublin.ie/pdf/Plenary4May30am_006.pdf See also Nystuen & Casey-Maslen (2010) para. 21.23:

‘The balancing act of formulating the text of the interoperability provisions should therefore, in the view of the delegations involved [in the negotiations of Article 21], preserve sufficiently accurate terms the right of a State Party to engage in military cooperation and operations with States not party, while at the same time not undermining the humanitarian aims of the Convention by exempting States Parties from their general obligations in situations of interoperability.’

¹⁰ See, e.g., Nystuen & Casey-Maslen (2010), para. 21.77: ‘There are some indications from the negotiating history that delegations saw paragraph 4 as indicative, and that Article 21 should not permit any deviation from the general obligations in Article 21.’

¹¹ See the UN Draft Articles on State Responsibility, Art.8 ‘Conduct Directed or Controlled by a State’: ‘The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.’

¹² Draft Articles on State Responsibility, Art. 4. Nothing in Art.8 diminishes the responsibility of the sending state.

Bill S-10	Convention Provision with which it is Incompatible	Reason for Incompatibility
		Canadian armed forces, expressly contrary to Art. 21(4)(b).

Provisions of section 11 that are incompatible with the ‘clarification approach’ to Articles 1 and 21 of the Convention

Recall that on the clarification interpretation, the prohibition of assistance and inducement ‘under any circumstances’ in Art. 1 remains applicable and joint operations are permitted under Art. 21 insofar as they fall short of providing assistance for the use of cluster munitions.

Bill S-10	Convention Provision with which it is Incompatible	Reason for incompatibility
Section 11(3)	Art.1; arguably Art. 21(4)(c).	This section authorises not only assistance, but aiding, abetting (s.11(3)(a)), conspiracy (s.11(3)(b)), and even ‘assisting’ (s.11(3)(c)) other persons to carry out acts that are otherwise prohibited by the Convention.

In our view, section 11(3) is the most odious provision of the Bill, though claims regarding its illegality do depend on the acceptance of the ‘clarification approach’ set out above.

Conclusion

Canada’s proposed position on interoperability runs counter to the stance taken by, inter alia, Iceland, Norway, Ecuador and Ireland, which have all interpreted the Convention to the effect that Art. 21 is not an exception to the prohibition on assistance. It is perfectly possible for states-parties to conduct joint operations with non-party states without violating the ban on assistance. Many parties to the Anti-Personnel Mines Convention, which has a similar prohibition on assistance, have participated in military operations with the United States, which has not joined the treaty. There is no reason why the Convention on Cluster Munitions cannot safeguard military alliances and, at the same time, hold firm to its overarching aim to eradicate cluster munitions. We therefore strongly urge you to remove or replace section 11 of Bill S-10 should you wish for Canada to avoid being in breach of its international obligations.

Yours respectfully,

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Annex 1:

The Convention on Cluster Munitions and Bill S-1

Convention on Cluster Munitions

Article 1

General obligations and scope of application

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.
2. Paragraph 1 of this Article applies, *mutatis mutandis*, to explosive bomblets that are specifically designed to be dispersed or released from dispensers affixed to aircraft.
3. This Convention does not apply to mines.

Article 21

Relations with States not party to this Convention

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 law, 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 authorise 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; or
 - (d) To expressly request the use of cluster munitions in cases where the choice of munitions used is within its exclusive control.

Bill S-10

Section 11 (Exceptions)

11. (1) Section 6 does not prohibit a person who is subject to the Code of Service Discipline under any of paragraphs 60(1)(a) to (g) and (j) of the National Defence Act or who is an employee as defined in subsection 2(1) of the Public Service Employment Act, in the course of military cooperation or combined military operations involving Canada and a state that is not a party to the Convention, from

(a) directing or authorizing an activity that may involve the use, acquisition, possession, import or export of a cluster munition, explosive submunition or explosive bomblet by the armed forces of that state or that may involve moving that munition by those armed forces from a foreign state or territory to another foreign state or territory with the intent to transfer ownership of and control over it;

(b) expressly requesting the use of a cluster munition, explosive submunition or explosive bomblet by the armed forces of that state if the choice of munitions used is not within the exclusive control of the Canadian Forces; or

(c) using, acquiring or possessing a cluster munition, explosive submunition or explosive bomblet, or moving that munition from a foreign state or territory to another foreign state or territory with the intent to transfer ownership of and control over it, while on attachment, exchange or secondment, or serving under similar arrangement, with the armed forces of that state.

(2) Section 6 does not prohibit a person, in the course of military cooperation or combined military operations involving Canada and a state that is not a party to the Convention, from transporting or engaging in an activity related to the transport of a cluster munition, explosive submunition or explosive bomblet that is owned by, in the possession of or under the control of that state.

(3) Section 6 does not prohibit a person, in the course of military cooperation or combined military operations involving Canada and a state that is not a party to the Convention, from

(a) aiding, abetting or counselling another person to commit any act referred to in paragraphs 6(a) to (d), if it would not be an offence for that other person to commit that act;

(b) conspiring with another person to commit any act referred to in paragraphs 6(a) to (d), if it would not be an offence for that other person to commit that act; or

(c) receiving, comforting or assisting another person, knowing that that other person has committed, or has aided or abetted in the commission of, any act referred to in paragraphs 6(a) to (d), for the purpose of enabling that other person to escape, if it was not an offence for that other person to commit that act.