

## **Canada and Cluster Munitions**

**By Earl Turcotte**

What is arguably worse than not joining an important disarmament treaty? Joining with no intention of complying with its core provisions.

In 2015, Canada passed into law the Act on the Prohibition of Cluster Munitions, legislation that fails to meet the standards of the historic *Convention on Cluster Munitions (CCM)* that it is supposed to uphold.

Cluster munitions are designed to target wide areas, killing and maiming indiscriminately. Typically, more than a third fail to detonate upon impact, posing a lethal threat to man and beast for decades. Approximately 98% of all known cluster munitions victims have been civilian. Most of them, small farmers in developing nations forced by poverty to cultivate contaminated land, and children, often drawn to the bright colour and shape of the sub-munitions.

Deemed unacceptable on humanitarian grounds, in 2007 – 2008, 108 nations, including Canada, negotiated a total ban on cluster munitions. The process and the substance of the Convention were modeled upon the Ottawa Convention that banned anti-personnel landmines in the late 1990s – a stellar diplomatic achievement led by Canada.

The thorniest issue concerned ‘interoperability’ with non-party states. Canada, the UK, France, other NATO states needed to remain free to engage in combined military operations with countries such as the United States, that refused to ban cluster munitions. Canada played a leading role in drafting Article 21 that established clear limitations with respect to interoperability.

Article 21 requires States Party to the Convention to encourage all States not party to join. Second, to make best efforts to discourage the use of cluster munitions by non-party States. Third, States Party can (nonetheless) engage in military cooperation with non-party states that may themselves engage in actions prohibited to a State Party. And fourth, nothing in the foregoing section allows a State Party itself to develop, produce, stockpile, acquire, transfer or use cluster munitions; nor to request the use of cluster munitions.

A subsequent article in the Convention states that there can be no reservations with respect to the legal obligations contained within the Convention. They must be accepted in their entirety and without exception.

The text of the Convention was endorsed almost unanimously and Canada was proud to be among the first nations to sign in Oslo in late 2008.

Before ratifying, we had to develop domestic law that codifies and reflects Canada's legal obligations under the Convention. And this is where things went badly off the rails.

The following three years saw a pitched inter-departmental battle, largely between the then Department of Foreign Affairs and International Trade (DFAIT) and the Department of National Defence (DND) concerning the specific actions that would be permissible during combined military operations with non-Party States.

In 2011, a decision was made at the political level that supported DND's interpretation – or gross misinterpretation - of the obligations contained in the Convention.

Although the Convention itself imposes categorical prohibitions on cluster munitions and abides no reservations, the Harper government passed legislation that *inter alia* permits all of the following:

- A Canadian commander of a combined military force to direct or authorize the armed forces of a State not party to the Treaty to use, acquire, possess, import, export or transfer cluster munitions;
- Canadian forces to expressly request the use of cluster munitions by the armed forces of a state not party to the Treaty in certain circumstances;
- Canadian forces that are on exchange to a non-Party States forces, to acquire, possess or transfer cluster munitions;
- Canadian forces aiding, abetting, counselling or conspiring with another person to commit any act referred to above, if it would not be an offence for that person to commit that act;
- Canadian forces receiving, comforting or assisting another person, knowing that that other person has committed, or has aided or abetted in the commission of an act, for the purpose of enabling that other persona to escape, if it was not an offence to commit that act.

While the legislation was being debated in Committee, the Liberals, NDP and Greens pressed hard to have the offending clauses significantly amended or removed. Among the most forceful opposition spokespersons were the late Paul Dewar, Marc Garneau, Bob Rae and Elizabeth May. I and a host of other ‘expert’ witnesses, appeared before Committee and wrote many letters of protest to the Government of the day. All, to no avail. The legislation was pushed through and stands to this day.

Many expected that the Liberals would amend this flawed legislation when they regained power in 2015. This did not happen, despite repeated entreaties by the NDP, Greens and civil society.

One might be tempted to conclude that military interoperability with the United States and other non-party state allies required Canada to include this long list of exceptions in its legislation. If so, why join a Treaty that prohibits such actions in the first place? And why have the UK, France, Belgium and other NATO and non-NATO States Party that value inter-operability States just as much included none of the ‘exceptions’ that Canada insists upon, in their respective laws?

Flouting diplomatic tradition, the International Committee of the Red Cross publicly denounced Canada’s legislation on cluster munitions. The International Committee to Ban Landmines and Cluster Munitions call it the worst legislation of any State Party to the Convention. I, whose honour it was to lead the Canadian delegation throughout negotiation of the Convention on Cluster Munitions, call it a travesty that must be remedied.

Perhaps our current Foreign Minister, a man of integrity who championed amending the legislation while in opposition, will finally make this right.

Earl Turcotte

*(Earl Turcotte was Senior Coordinator and Director of the Mine Action Team at the Department of Foreign Affairs from 2005 to 2011. In 2011, he issued a conscientious objection and resigned from the public service in protest of Canada’s domestic legislation on cluster munitions. He subsequently served two terms as United Nations Chief Advisor to the Government of Laos on its ongoing Unexploded Ordnance Clearance Program.)*

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