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Bill S-10: An Act to Implement the Convention on Cluster Munitions

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Legislative Summary of Bill S-10

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Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

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LEGISLATIVE SUMMARY OF BILL S-10: AN ACT TO IMPLEMENT THE CONVENTION ON CLUSTER MUNITIONS*

1 BACKGROUND

Bill S-10, An Act to implement the Convention on Cluster Munitions (short title: Prohibiting Cluster Munitions Act), was introduced by the Honourable Marjory LeBreton, Leader of the Government in the Senate, on 25 April 2012 during the 1st Session of the 41st Parliament.

1.1 PURPOSE OF THE BILL

The purpose of the bill is to implement Canada's international obligations under the *Convention on Cluster Munitions* (CCM) in order that Canada may ratify the treaty.¹ Under Canada's constitutional system, obligations contained in international treaties must be implemented in legislation passed by Parliament in order to have direct effect under domestic law.

Although Canada has not yet ratified the convention, Canada participated in its negotiation and signed it in December of 2008.² Canada was also the first state to submit voluntary reports to the United Nations (UN) under the convention.³

Cluster munitions are weapons designed to disperse explosive submunitions (or explosive bomblets) that cause casualties and damage through blast, incendiary effects and fragmentation. Air-delivered or surface-launched, the number of submunitions released can range from the dozens to thousands, and are usually spread over a large area for use against armour and other materiel as well as personnel.⁴ Cluster munitions rely on simple mechanical fuses that arm the submunition based on its rate of spin; submunitions explode on impact or after a time of delay.⁵

In its 2012 voluntary report, Canada stated that it possesses a stockpile of approximately 12,600 cluster munitions, but that these were withdrawn from active service in 2007. A process to destroy remaining stockpiles reportedly is underway and is expected to be complete by sometime in 2014. Once this process is complete, Canada will not retain any cluster munitions.⁶ Through the Canadian International Development Agency, Canada has funded, and continues to fund, various initiatives to assist other countries in clearing explosive remnants of war such as cluster munitions from their territory. Funds also assist victims and cluster munition ban advocacy efforts.⁷

This legislative summary discusses the humanitarian concerns raised by the use of cluster munitions during armed conflicts and set out the relationship between the Convention and certain related treaties dealing with prohibited weapons. The provisions of the bill are then summarized, followed by a review of comment on the bill.

Internationally, there is considerable debate about the meaning and implementation of the CCM. One point in particular that is being contested is the nature and scope of the ban on cluster munitions in respect of activities by the military forces of states that have ratified the CCM (“states parties”) when they operate jointly with states that have not ratified the CCM. This is known as the interoperability exception.

1.2 INTERNATIONAL LAW, ARMED CONFLICT AND DISARMAMENT

International law is formed by the agreement of sovereign states. International humanitarian law is the specialized branch of international law that governs armed conflict.⁸ Although war is not prohibited under international law, the means and methods of warfare that may be chosen by the parties to the armed conflict are not unlimited. Legal limits apply regardless of the “justness” of the cause of either side in the conflict.

Of particular relevance in the context of the CCM is the international humanitarian law rule that parties to a conflict are forbidden from inflicting superfluous injury or unnecessary suffering, relative to the direct and concrete military advantage obtained by the attack. Parties are also required to distinguish between military targets and civilian objects. Military attacks must be planned in a way that takes care to spare civilian populations and objects as much as possible. The intentional targeting of civilians and civilian objects is forbidden. Finally, an overarching principle of international humanitarian law is that even when actions are not expressly forbidden, they are not necessarily permitted.⁹ These international legal rules apply to Canadian military operations.¹⁰

Weapons that do not distinguish between civilian and military targets are said to be “indiscriminate” in the terminology of international humanitarian law. Weapons that cause superfluous injury or unnecessary suffering, relative to the direct and concrete military advantage they achieve, are labelled “disproportionate.” The use of indiscriminate and/or disproportionate weapons is a violation of international law.¹¹

1.3 HUMANITARIAN CONCERNS RAISED BY CLUSTER MUNITIONS

Cluster munitions have significant adverse effects on civilian populations both during armed conflict and after hostilities have ceased. Cluster munitions typically discharge large numbers of submunitions over large areas, creating a substantial risk of unintended harm to civilians during and immediately after a military attack, particularly where civilian and military targets are in close proximity. Furthermore, the International Committee of the Red Cross (ICRC) has noted that “[s]ince these submunitions are generally free-falling, incorrect use, wind, and other factors cause them to strike well outside the intended target area.”¹²

The ICRC emphasizes that cluster munitions are particularly problematic as weapons because “large numbers of submunitions often fail to detonate as intended, contaminating large areas with deadly explosive ordnance.”¹³

States that continue to use cluster munitions argue that they are legitimate weapons with a clear military utility. Newer cluster munitions can achieve a failure rate of less

than 1% and may be employed in a manner that causes less unintended civilian damage than would a single larger munition in the same situation.¹⁴ Opponents of cluster munitions respond that although some newer cluster munitions technology offers lower failure rates and improved accuracy, “by their very design, cluster munitions have an indiscriminate wide-area effect that can make them difficult to target accurately.”¹⁵ Since thousands and even millions of submunitions can be dispersed in battle, even devices with low failure rates leave large numbers of unexploded munitions scattered over a wide area.

As a result of their unique characteristics, cluster munitions have continued to kill and maim civilians by the thousands for years after the end of active hostilities.¹⁶

The United Nations Institute for Disarmament Research has found that the high failure rate of cluster munitions can “prevent or hinder the safe return of refugees and internally displaced persons (IDPs), and hamper humanitarian, peace-building and development efforts.”¹⁷ Unexploded cluster munitions likewise pose a risk to mine clearance personnel and aid agencies, and are expensive to remove safely. The killing or maiming of civilians has been shown to lead to long-lasting socio-economic and psychological implications for individuals, families and communities.¹⁸

Although only a few countries actually use cluster munitions,¹⁹ many nations keep stockpiles. Some countries may have stockpiles of weapons they acquired in the past, before a consensus developed in the international community that the weapons are disproportionate and indiscriminate. Other countries take the position that cluster munitions are not disproportionate or indiscriminate weapons and consider that they are entitled to use the weapons should they decide to do so. The ICRC has stressed that “[i]f even a fraction of the cluster munitions in current stocks are used or transferred to other countries or non-State armed groups, the consequences could far exceed those of anti-personnel mines.”²⁰

1.4 THE CONVENTION ON CLUSTER MUNITIONS

The CCM was adopted at a diplomatic conference held in Dublin, Ireland in 2008, following two years of international negotiations. The convention entered into force on 1 August 2010. There are 75 states parties to the CCM.²¹ An additional 33 states, including Canada, have signed the convention but have not yet formally consented to be bound by it. These states do not have a legal obligation to act in accordance with the treaty, although they may not act in a manner that undermines its object and purpose.²²

Russia, China and the United States, among other nations, are not party to the CCM. The United States has determined that its “national security interests cannot be fully ensured consistent with the terms of the CCM.”²³ Therefore, the United States supports a less restrictive framework for the regulation of cluster munitions under 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*, as amended on 21 December 2001, also known as the *Convention on Certain Conventional Weapons* (more details on this treaty can be found in section 1.5.1).²⁴ The United States has reportedly expressed fears that certain

prohibitions in the CCM could negatively impact on joint military operations with its allies.²⁵

The preamble to the CCM sets out the concerns that led to the treaty's negotiation and conclusion, including the unacceptable harm caused to civilians by cluster munitions, the dangers presented by national stockpiles of these weapons and the obligation to provide assistance to victims. The preamble also recognizes the general need to enhance the protection of civilians in armed conflict and to facilitate post-conflict reconstruction. As well, it stresses the treaty's basis in existing international humanitarian law and the applicability of these basic rules to all parties to armed conflicts, including non-state actors such as armed rebel groups, corporations, and individuals. Although the preamble does not have operative effect, it is an integral part of the treaty and may be used to interpret the meaning of its terms.²⁶

“(N)ever, under any circumstances” can states parties directly or indirectly use, develop, produce, acquire, stockpile, retain or transfer cluster munitions to anyone.²⁷ The prohibition on both direct and indirect actions reflects an intention to extend the prohibitions in the convention to cover a broad range of activity, and an attempt to prevent states from interpreting the treaty in a manner that allows them to avoid their obligations.²⁸ Moreover, states parties must not encourage, induce or assist others to engage in such activities.²⁹ In their relations with other states, states parties must encourage non-ratifying states to accept the convention, notify non-state parties of their obligations, promote the norms in the convention and make best efforts to discourage other states from using cluster munitions.³⁰

Article 21(3) of the CCM contains an exception to the prohibitions use and certain other activities involving cluster munitions, called the interoperability exception. The specific exceptions under this clause were designed to permit military cooperation between states parties and non-states parties that might involve prohibited activities, subject to certain other positive obligations.³¹ The interoperability exception does not authorize states parties to develop, produce or otherwise acquire cluster munitions, to stockpile or transfer cluster munitions themselves, to themselves use cluster munitions, or to expressly request the use of cluster munitions in cases where the choice of munitions used is within their exclusive control.

The CCM requires states that possess cluster munitions to separate these weapons from those destined for operational use and to destroy their stocks within eight years.³² States with unexploded cluster munition remnants on territory under their jurisdiction or control must mark and clear these areas and destroy any cluster munition remnants within 10 years of the convention coming into force for that state, or, if cluster munition contamination occurs after the convention's entry into force for a state, within 10 years of the end of hostilities in which the weapons were used.³³ Detailed provisions in the treaty require states to deliver adequate age- and gender-sensitive assistance to victims of cluster munitions, including medical care, rehabilitation and psychological support in accordance with applicable international human rights and humanitarian law.³⁴ States in a position to do so must provide assistance to help other countries to fulfill their obligations.³⁵

Transparency measures are also included in the convention, requiring states to report on the steps they have taken toward national implementation of their obligations under the treaty, as well as the types and number of cluster munitions in their possession and progress towards destruction of stocks.³⁶ Reservations to the convention are not permitted. (A reservation to a treaty is a unilateral statement made by a state when signing or ratifying a treaty through which the state purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that state.)³⁷

1.5 RELATIONSHIP WITH OTHER INTERNATIONAL HUMANITARIAN LAW DISARMAMENT TREATIES

1.5.1 CONVENTION ON CERTAIN CONVENTIONAL WEAPONS

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 as Amended on 21 December 2001* (Convention on Certain Conventional Weapons) was negotiated in 1980 with the aim of protecting military troops and non-combatants from inhumane injuries. Protocols to the Convention on Certain Conventional Weapons restrict the use of non-detectable fragments, landmines, booby traps and incendiary weapons. Since the negotiation of the treaty and its first three protocols in 1980, additional provisions banning blinding laser weapons and explosive remnants of war have been finalized. The creation of protocol to the treaty requires agreement by all states parties.³⁸ There are currently 114 states parties to the Convention on Certain Conventional Weapons, including Canada, the United States, China and Russia.³⁹

At the Third Review Conference of the High Contracting Parties to the Convention held in 2006 to review the status and operation of the treaty and its protocols,⁴⁰ UN Secretary-General Kofi Annan called for the destruction of “inaccurate and unreliable” cluster munitions and a “freeze” on their use in populated areas.⁴¹ However, states parties have been unable to reach consensus in negotiations pertaining to the regulation of cluster munitions under a new protocol to the Convention on Certain Conventional Weapons.⁴²

1.5.2 MINE BAN TREATY

Under the Convention on Certain Conventional Weapons, the amended *Protocol on Landmines, Booby-Traps and Other Devices* (Protocol II) regulates the types, detection and delivery of anti-personnel landmines, but does not ban their use. Concerned with the excessive civilian harm caused by anti-personnel landmines and failure of the Convention on Certain Conventional Weapons to produce a total ban, Canada announced a moratorium on the use, production, trade or export of anti-personnel mines in January 1996.⁴³ In October 1996, following a meeting of like-minded states and civil society groups, Canada challenged states to conclude an international treaty banning anti-personnel landmines within a year.⁴⁴ Dubbed the Ottawa Process, negotiations led to the adoption of the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction* (Mine Ban Treaty) in Oslo in September 1997. Signed by 122 states

in Ottawa on 3 December 1997, the treaty is also known as the Ottawa Convention or Ottawa Treaty. Under the treaty, the 159 states parties commit to never use, develop, produce, acquire, stockpile, retain or transfer anti-personnel landmines; to destroy stockpiles; to clear mined areas in their territory within 10 years; to provide victim assistance; and to adopt national implementation measures.⁴⁵ As with the CCM, China, Russia and the United States are not parties to the Mine Ban Treaty.

1.5.3 ARMS TRADE TREATY NEGOTIATIONS

International negotiations are currently underway regarding the conclusion of a treaty restricting the international trade in conventional weapons. This treaty could potentially cover a wide range of products, including artillery, small arms and light weapons, as well as tanks, armoured vehicles, artillery, combat aircraft, warships and missile systems. The specific types of weapons to which a treaty would apply and the exact scope of the prohibitions has not yet been finalized.⁴⁶

2 DESCRIPTION AND ANALYSIS

2.1 PURPOSE (CLAUSE 4)

Bill S-10 specifies that its purpose is to implement Canada's commitments under the 2008 CCM. The convention is contained in an annex to the bill.

Article 9 of the CCM requires ratifying states to take appropriate legal and administrative measures to implement the convention, including criminalizing "any activity" prohibited under the CCM that is "undertaken by persons or on territory under its jurisdiction or control," including, for example, any activities of non-state armed groups. Administrative measures may consist of changes to regulations, policies or procedures and would include, for example, changes to military doctrine manuals.⁴⁷ Article 9 also requires states to take appropriate legal, administrative or other measures to implement the convention's positive obligations "such as those respecting storage and stockpiling, and international cooperation and assistance."⁴⁸

The requirement in article 9 that states parties take legal or administrative measures to implement the positive obligations as well as the prohibitions is somewhat unusual in treaties dealing with weapons. A similar provision in the Mine Ban Treaty, for example, only requires states to impose penalties to prevent and suppress acts that violate the treaty.⁴⁹

2.2 DEFINITIONS (CLAUSE 2)

Clause 2 defines a number of terms used in the bill. In particular, it imports the definition of a "cluster munition" in the treaty into Canadian law. A cluster munition is defined as a conventional munition designed to release explosive submunitions. "Explosive submunitions" are defined as conventional munitions that weigh less than 20 kilograms, and are dispersed from another conventional munition.⁵⁰ The bill also contains a definition of an "explosive bomblet," which is a conventional munition that itself weighs less than 20 kilograms, is not self-propelled and is released from a container fixed to an aircraft.⁵¹ Explosive submunitions and explosive bomblets must be designed to detonate before, on or after impact.

Each of these definitions carves out exceptions for certain types of devices. The exceptions to the definitions of cluster munition, explosive bomblet or explosive submunition under the bill are the same. First, directly fired munitions are not covered. Second, the upper weight limit for individual submunitions or explosive bomblets ensures that multiple bombs delivered from a single bomb rack on an aircraft are not subject to the bill.⁵² Third, the definitions exclude biological, radiological, toxin, chemical or nuclear weapons. These types of weapons are restricted or banned under separate international treaty regimes.⁵³ Fourth, anti-personnel landmines banned under the Mine Ban Treaty are also excluded. Fifth, for the purposes of the bill, certain munitions are not considered to be cluster munitions, explosive submunitions or explosive bomblets, including munitions designed to disperse flares, smoke, pyrotechnics or chaff; munitions designed only for air defence; or submunitions without an explosive capability.⁵⁴ These types of devices are not designed to cause injury or property destruction; hence, they do not raise the same humanitarian concerns that led to the ban on cluster munitions.⁵⁵

Finally, because the ban on cluster munitions, explosive submunitions and explosive bomblets is based on the unnecessary suffering, superfluous injury and indiscriminate harm inflicted by these devices, the definition of a cluster munition in the bill excludes devices that are designed to release submunitions from a container in a manner that sufficiently minimizes the harm caused to civilians or civilian objects.⁵⁶ Thus, the definition does not apply to munitions that disperse fewer than 10 explosive submunitions, in which each submunition weighs less than four kilograms, is designed to detect and engage a single object, and is equipped with both an electronic self-destruct mechanism and an electronic self-deactivating feature. Similarly, submunitions and bomblets having these specifications will not meet the definition of an explosive submunition or an explosive bomblet under the bill.

The limit on the number of submunitions dispersed is intended to restrict the area over which submunitions fall (the saturation area). The requirement that the submunitions be guided makes it more likely that they will strike the intended (and presumably military) target, rather than damaging a non-military target by mistake. The deactivation and self-destruct features make it less likely that submunitions that fail to explode as designed will remain on the ground, where they pose a threat to the civilian population.

The provisions of the CCM and the bill apply equally to cluster munitions, explosive submunitions and explosive bomblets (hereinafter referred to as “cluster munitions”).

The ICRC indicates that these definitions, which reflect the definition of cluster munitions in the CCM, “effectively (ban) all cluster munitions that have been used in conflicts over the last 6 decades” and that cause a degree of human suffering that clearly outweighs the military value of the weapons.⁵⁷ The international human rights advocacy organization Human Rights Watch states that, as of November 2010, only three weapons carrying explosive submunitions have ever been produced that would be permitted under the CCM.⁵⁸

The definition of “person” in clause 2 ensures that the restrictions and penalties in the bill apply to individuals, corporations and other forms of business organizations, public bodies, municipalities, trade unions and any other any organized association of

individuals created for a common purpose that holds itself out to the public as an association.⁵⁹

The term “use” is defined in the bill, although it is not defined in the CCM itself. For the purposes of the bill, “use” means “firing, dropping, launching, projecting, dispersing, releasing or otherwise delivering” a cluster munition “for the purpose of detonation” (clause 2). This definition draws from terms used to describe the operation of cluster munitions in article 2 of the convention.

2.3 PROHIBITIONS (CLAUSE 6)

Clause 6 prohibits the use, development, manufacture, acquisition, possession, movement, import or export of cluster munitions. Reflecting Canada’s obligations under the CCM, the prohibitions apply in all circumstances and are not limited to situations of armed conflict.⁶⁰

The terms “develop,” “manufacture,” “acquire” and “possess” found in clause 6(b) of Bill S-10 are not defined. To interpret the meaning of these terms, a court would likely consider the purpose of the bill, which is to implement Canada’s commitments under the CCM (clause 4), as well as the meaning of such terms in other statutes. This section explores the meaning of these terms in other Canadian legislation, where applicable, as well as expert interpretations of the prohibitions in the convention, in order to provide some guidance regarding the manner in which the prohibitions may be interpreted in Canadian law.

2.3.1 PROHIBITIONS ON DEVELOPING, MAKING, ACQUIRING OR POSSESSING CLUSTER MUNITIONS

Clause 6(b) of the bill prohibits developing, making, acquiring and possessing cluster munitions.

The prohibition on making or developing cluster munitions would likely prevent the production of cluster munition components in Canada. Commentators have also stated that the licensing of foreign companies to develop or manufacture cluster munitions for sale to a national military appears to be prohibited under the CCM.⁶¹ Similarly, it has been argued that states parties may not develop or produce multi-use component parts (i.e., parts that could be used in either cluster munitions or in other weapons) with the intention that these components be used to make cluster munitions. Where multi-use components are not intended for use in the manufacture of cluster munitions, however, their development and production would not be prohibited by the convention. Some commentators have suggested that the imposition of export controls could provide an effective way for states to meet their obligations with respect to multi-use components produced in their territory.⁶²

The CCM’s ban on acquiring cluster munitions is, in the view of some commentators, intended to encompass “all forms” of acquisition, including borrowing, purchasing, stealing, etc.⁶³ A Canadian court interpreting the term “acquire” would likely consider the language of the section itself, including the words used to define the other

prohibited acts, and may also consider the term's common meaning, as well as the intended meaning of the term under international law.⁶⁴

Clause 6(b) of the bill prohibits “possession” of cluster munitions, while article 1(b) of the CCM prohibits both direct and indirect “stockpiling” and “retention” of cluster munitions.⁶⁵ In Canadian criminal law, offences of “possession” usually require elements of both knowledge and control. Thus, to be in possession of a prohibited object, a person must be aware of the nature of the object in question and have some measure of control over it. Possession generally includes both actual, personal possession of an object as well as knowingly having an object in the possession of another person while retaining some element of control over the item.⁶⁶

2.3.2 PROHIBITION ON MOVING A CLUSTER MUNITION

Clause 6(c) makes it an offence to move a cluster munition from a foreign state or territory to another foreign state or territory with the intent to transfer ownership of, and control over, the device. The physical act that constitutes the offence is moving the cluster munition from one foreign territory to another. In addition, the accused must have the intention of transferring ownership or control over the device. Therefore, the prohibition on moving cluster munitions does not include their physical movement within Canada or within a foreign state, nor does it include a transfer of ownership or control within Canada or within a foreign state.

The prohibition in the bill on moving cluster munitions from a foreign state or territory to another foreign state or territory with the intent to transfer ownership and control differs from the prohibition on direct or indirect transfer contained in the CCM.⁶⁷ The definition of transfer under the convention provides that “transfer involves, in addition to the physical movement of cluster munitions into or from national territory, the transfer of title to and control over cluster munitions, but does not involve the transfer of territory containing cluster munition remnants.”⁶⁸

Commentators have noted that the phrasing of the definition of “transfer” under the CCM is not entirely clear.⁶⁹ The prohibition can be read in two ways. According to one interpretation, the CCM prohibits either: (1) movement of cluster munitions across borders; or (2) the transfer of title and control over cluster munitions. This interpretation would prohibit, for example, the delivery cluster munitions to a military base on a state party's territory, as well as the transit cluster munitions through its territory, territorial sea or airspace (arguably, subject to the interoperability exception in article 21(3)). Under the alternative interpretation, the definition of “transfer” could be read to require physical movement across a border *in conjunction with* a handover of title and control. This more restrictive interpretation would mean that the prohibition on transfer in the Convention applies primarily to arms sales and foreign aid.⁷⁰

Bill S-10's prohibition on the movement of cluster munitions adopts the latter, more restrictive interpretation of the prohibition on transfer under the CCM and applies it only to the movement of cluster munitions between foreign territories (import and export to and from Canada are prohibited in a separate subsection of clause 6). The offence of movement in clause 6(c) of the bill does not criminalize the transit of

cluster munitions through or across Canadian territory. Such transit is explicitly permitted in the course of military cooperation or combined military operations under clause 11(2).⁷¹

The preparatory materials for the CCM indicate that its definition of transfer was intended to mirror the definition found in the Mine Ban Treaty and the amended Protocol II to the Convention on Certain Conventional Weapons.⁷² Bill S-10 transforms this prohibition into Canadian law using a different approach from the one taken in *Canada's Anti-Personnel Mines Convention Implementation Act*. The latter Act prohibits the direct or indirect transfer to anyone of anti-personnel mines, reproducing in its entirety the definition of transfer found in the Mine Ban Treaty.⁷³ Bill S-10's prohibition on movement of cluster munitions also differs from the definition of the term "transfer" in the *Criminal Code* where, in the context of prohibitions on the transfer of prohibited or restricted weapons, transfer means "sell, provide, barter, give, lend, rent, send, transport, ship, distribute or deliver."⁷⁴

2.3.3 PROHIBITION ON IMPORTING OR EXPORTING CLUSTER MUNITIONS

The bill does not define the terms "import" and "export," which are prohibited under clause 6(d) in respect of cluster munitions. In interpreting these terms, it is likely that a court would consider their common meaning, as well as case law and other statutes. For example, the *Customs Act* defines import and export as being import to and export from Canada.⁷⁵ In the context of import and export limitations on restricted and prohibited weapons, the *Criminal Code* adds that "for greater certainty," export "includes the exportation of goods from Canada that are imported into Canada and shipped in transit through Canada."⁷⁶ Similarly, import under the *Criminal Code* includes "the importation of goods into Canada that are shipped in transit through Canada and exported from Canada."⁷⁷

The prohibitions in clause 6 do not apply to cluster munitions that have been deactivated as required by the bill (clause 10).

2.4 MODES OF COMMISSION OF OFFENCES (CLAUSES 6(E) TO (G) AND 17(3))

Rather than relying on the different ways that a criminal offence may be committed as set out in the *Criminal Code*, Bill S-10 explicitly prohibits attempting, aiding, abetting, counselling or conspiring to commit any of the offences under the bill (clauses 6(e) through (g) and clause 17(3)).

These concepts are distinct in Canadian criminal law.

- Aiding means helping or assisting another person with the intention of assisting that person to commit an offence. Abetting, on the other hand, includes instigating, promoting or encouraging the commission of a crime. An individual may aid or abet a crime either by doing something or by failing to do something (i.e., by omission). Moreover, where a person is under a legal duty to act in a certain way, a failure to act as required can amount to aiding or abetting if it encourages, facilitates or promotes the commission of an offence.⁷⁸

- Counselling includes, for example, procuring, soliciting or inciting the commission of a criminal offence.⁷⁹
- A conspiracy requires an agreement by two or more persons to commit an offence or to achieve a lawful goal through the commission of an offence. Those involved must agree to a “common design” and must intend that their plan be put into effect. However, no additional overt action to further the plan is required in order to complete the criminal offence.⁸⁰

It is also an offence under the bill to receive, comfort or assist a person who has committed an act prohibited under clause 6, for the purposes of assisting that person to escape (clauses 6(h) and 17(3)). This language mirrors the definition of an accessory after the fact in the *Criminal Code*.⁸¹

Canadian law normally punishes aiding, abetting, conspiracy and attempts to commit offences outside Canada only if the principal action is also a criminal offence under the law of the foreign country where it takes place. Incorporating these modes of commission into the bill aims to ensure that attempting, aiding, abetting and so forth, when done in Canada, constitute completed criminal offences even if the principal action is taken in a country where it is not a criminal offence under that country’s law.⁸²

Since aiding, abetting and counselling the development or making of cluster munitions is prohibited, the Department of Foreign Affairs and International Trade (DFAIT) has indicated that direct investment in the manufacture of cluster munitions would be a criminal offence under the bill. However, in DFAIT’s view, investment in corporations that produce cluster munitions amongst a variety of other products (indirect investment) would not be prohibited.⁸³

2.5 JURISDICTION

Offences committed anywhere in the world by members of the Canadian Forces and other individuals subject to the *Code of Service Discipline* in the *National Defence Act* are punishable under the bill.⁸⁴ However, the bill does not provide for extraterritorial jurisdiction over acts committed by other Canadian nationals or permanent residents abroad.⁸⁵ However, Canada could still take jurisdiction and prosecute an offence under the bill if, in the words of the Supreme Court of Canada, a “real and substantial link between the offence and this country” exists.⁸⁶

2.6 EXEMPTIONS AND EXCEPTIONS (CLAUSES 7 TO 11)

The offences under clause 6 of the bill are subject to a series of exceptions set out in clauses 7 to 11.

2.6.1 EXEMPTIONS FOR TRAINING AND DESTRUCTION (CLAUSES 7 TO 9 AND 12)

The bill provides exemptions from the offences set out in clause 6 for the development of countermeasures and techniques to detect, clear and destroy cluster

munitions and for training in these techniques (clause 7).⁸⁷ These exemptions may be granted by a federal minister designated by an order in council (clause 5).

For the purpose of destroying a cluster munition, the bill allows the minister of National Defence or the minister of Foreign Affairs to issue an exemption allowing the acquisition, possession, import, export or movement from one foreign state to another foreign state with the intent to transfer ownership or control (clause 8). These exemptions may be issued to individuals, corporations or other organizations. In all cases, the relevant minister may place conditions on the exemption, and may revoke the exemption, provided the persons affected are given reasonable notice (clauses 7, 8 and 9).

The bill creates an exception allowing persons acting in the course of their duties or employment to move a cluster munition from one foreign state to another with the intention to transfer ownership or control over it, in order to destroy or deactivate it. The exception also applies to most members of the Canadian Forces, peace officers, provincial or federal government employees and individuals acting on behalf of a foreign state with the permission of the Canadian government involved in investigations or proceedings under any Act of Parliament (clause 12).

These exemptions and exceptions reflect the exception contained in article 3(6) of the CCM, which permits the retention and acquisition of a limited number of cluster munitions for the purposes of training, destruction and development of countermeasures.

2.6.2 EXCEPTIONS RELATED TO INTERNATIONAL MILITARY COOPERATION (CLAUSE 11)

Clause 11 of the bill provides for exceptions to the offences set out in clause 6 that apply only during the course of military cooperation or combined military operations involving Canada and a non-state party to the CCM, such as the United States (interoperability).

Military cooperation under clause 11 could be formal or informal and although it would normally involve members of the Canadian Forces, it could also involve civilians. By way of example, cooperation could include visits by foreign military vessels or aircraft.⁸⁸

Clause 11 of the bill has its basis in articles 21(3) and (4) of the Convention, which permit exceptions for military cooperation and operations with non-state parties that might engage in prohibited activities.

Clause 11(1) provides exceptions to the prohibitions in clause 6. These exceptions apply only to specified individuals, including:

- active service members of the Canadian Forces;
- individuals seconded to the Canadian Forces from other states;
- individuals serving as part of international forces maintained outside Canada that are commanded by a Canadian Forces officer;

- individuals who accompany the Canadian Forces on service or active service;⁸⁹ and
- certain other individuals subject to the *Code of Service Discipline* under the *National Defence Act*, but not enemy spies or individuals in military detention.⁹⁰

The exceptions also apply to the majority of federal civil servants, including most civilian employees of the Department of National Defence and civilian staff of the Royal Canadian Mounted Police, as well as most employees of the Department of Public Safety Canada, DFAIT, the Canada Border Services Agency and the Canadian International Development Agency.⁹¹

In the context of combined operations or military cooperation, the interoperability exception in clause 11(1) permits these individuals to:

- direct or authorize an activity by the armed forces of a non-state party that may involve the use of a cluster munition or other prohibited activity involving a cluster munition;
- expressly request the use of a cluster munition if the Canadian Forces does not exercise exclusive control over the choice of the munition; or
- use a cluster munition or undertake another prohibited activity while on secondment, attachment or exchange with the armed forces of a non-state party.

For example, this clause would protect from criminal liability a Canadian in a command position in a multinational force or the armed forces of another state who authorizes a military attack by a non-state party's armed forces that may use cluster munitions. The clause would also allow members of the Canadian Forces to request assistance from the armed forces of another state during a military operation if the Canadians are aware that the other state might or would use cluster munitions to provide that assistance.⁹² As well, the clause would permit members of the Canadian Forces to explicitly order or request the use of cluster munitions under the control of a non-state party. The CCM does not clearly prohibit such requests, but whether they are compatible with the object and purpose of the convention and with the obligation to discourage the use of cluster munitions in joint operations has been questioned by some commentators.⁹³

Clauses 11(2) and 11(3) of the bill create a series of exceptions to the prohibitions in clause 6, and these exceptions apply to any individual or organization.⁹⁴ Therefore, these clauses extend interoperability exceptions to the civilian and military officials of foreign states, including non-state parties to the convention, as well as to private individuals.⁹⁵

Clause 11(2) provides a specific exception allowing any individual or organization, during military cooperation or combined military operations, to transport or undertake any activities related to the transport of a cluster munition that is owned or under the control of a non-state party.⁹⁶

DFAIT has indicated that, in the context of joint operations or military cooperation, this exception would permit the transit of cluster munitions by non-state parties through Canadian territory. It would also permit foreign aircraft carrying cluster

munitions to fly over and land in Canada, and would allow vessels carrying cluster munitions to traverse Canadian waters and dock in Canadian ports. Since Canada controls activities by foreign states into and on its territory, such transit could only be undertaken lawfully with Canadian consent. In addition, the clause would, for example, permit Canadian Forces vehicles, aircraft and vessels to transport cluster munitions owned, controlled or possessed by a non-state party, subject to any internal policy restrictions.⁹⁷

Transport in privately owned Canadian vehicles, aircraft or vessels in the context of military cooperation or combined operations would also be permitted under the clause.

Again in the context of interoperability, clause 11(3) creates an exception for any individual or organization that permits aiding, abetting, counselling, conspiring or being an accessory after the fact to the use, development, manufacture, acquisition, possession, movement, import or export of a cluster munition from one foreign state to another with the intent to transfer ownership or control. DFAIT has provided examples of activities that could be permitted under this clause, including the provision of information about military targets, logistical support (for example, refuelling services) as well as joint-mission planning and training activities with non-state parties that use or move cluster munitions.⁹⁸

The clause would also permit private individuals, as opposed to the agents or employees of foreign states, to participate in such activities.

The exceptions under clause 11 apply only to the offences created in clause 6 of the bill. Other offences under the *Criminal Code*,⁹⁹ including terrorist offences, international crimes under the *Crimes Against Humanity and War Crimes Act*, offences under the *National Defence Act* and offences that amount to grave breaches of the Geneva Conventions of 1949 punishable under the *Geneva Conventions Act*,¹⁰⁰ continue to apply.

2.6.3 EXCEPTIONS FOR PEACE OFFICERS (CLAUSE 12)

The bill contains an exception that allows military and civilian police officers, forensic specialists and certain other government employees to deal with cluster munitions in the context of investigations or legal proceedings, or in order to destroy or deactivate the devices.

2.7 ENFORCEMENT (CLAUSES 17 TO 22)

2.7.1 PENALTIES AND LIMITATION PERIOD (CLAUSES 17 AND 19)

Violations of the prohibitions under clause 6 of the bill are hybrid offences. This means that they may be tried by way of indictment or upon summary conviction. The maximum penalty for a conviction on indictment is five years' imprisonment and a fine of up to \$500,000. On summary conviction, an offender is liable to a maximum sentence of 18 months' imprisonment and a fine of up to \$5,000 (clause 17(1)).¹⁰¹ The bill

extends the usual six-month limitation period for summary conviction offences to two years (clause 19).¹⁰²

The bill also permits the Governor in Council to create regulations, including regulatory offences punishable by summary conviction (clauses 17(2) and 23).

The bill does not contain a continuing offence provision that would allow an individual convicted of an offence under the bill to be liable for a separate offence on each day that the offence is committed or continued.¹⁰³

2.7.2 ATTORNEY GENERAL'S CONSENT (CLAUSE 18)

The personal written consent of the attorney general of Canada is necessary to commence a prosecution under the bill in Canada's civilian courts.¹⁰⁴ The attorney general's consent is not required for military prosecutions under the *Code of Service Discipline* in the *National Defence Act*.

2.7.3 FORFEITURE (CLAUSES 20 TO 22)

The bill allows military and civilian judges to order the forfeiture of cluster munitions (clause 20). If an accused is found guilty of a summary conviction or indictable offence under the bill, or an offence under a regulation made under the bill, a military or civilian judge may also order the forfeiture of any movable property by means or in respect of which the offence was committed (clause 21).¹⁰⁵

2.8 OTHER PROVISIONS

Members of the Canadian Forces and peace officers (e.g., police officers) who come into possession of cluster munitions must keep these munitions in a safe place (clause 13). Other provisions in the bill permit the delegation of ministerial authorities (clause 15) and require that any amendments to the CCM be incorporated into the bill (clause 16). The bill does not contain coordinating or consequential amendments.

The provisions of the bill come into force on a day or days to be fixed by the Governor in Council (clause 24).

3 COMMENTARY

To date, national and international commentary on Bill S-10 has come largely from non-governmental advocacy organizations and certain concerned individuals. Critiques of the bill have focussed primarily on the broad scope of the interoperability exceptions in clause 11.¹⁰⁶ Mr. Earl Turcotte, formerly Canada's lead negotiator on the CCM, has argued that while the ability for the Canadian Forces to cooperate in international operations is "absolutely essential," the "blanket" exceptions contained in clause 11 of the bill are far too broad.¹⁰⁷ Other commentators have suggested that the bill ought to explicitly prohibit foreign countries from transporting cluster munitions across or stockpiling cluster munitions on Canadian territory, and place explicit restrictions on investment in the production of these weapons. Commentators have also said that the bill ought to contain provisions requiring Canada to promote the

CCM in international relations and to inform military allies of Canada's obligations under the treaty in joint operations, and that it ought to include clear provisions requiring Canada to destroy all stockpiles of cluster munitions.¹⁰⁸

In response to these criticisms, the Government of Canada has reiterated its position that:

[t]he proposed legislation fully meets our humanitarian obligations under the treaty while ensuring the Canadian Forces aren't compromised in any way from working with our Allies and doing what we ask of them.¹⁰⁹

Speaking in the Senate when the bill was introduced, the Honourable Senator Suzanne Fortin-Duplessis emphasized that article 21 of the CCM allowed Canada:

to continue to engage in combined security operations with allies that have not signed – operations considered to be essential to international security.¹¹⁰

She stated that the bill allows Canada:

to solidify our objective to rid the world of cluster munitions while ensuring that the Canadian Forces can continue to participate in multinational operations with allies that are important to Canada but have not signed the convention, such as the United States.¹¹¹

In her speech, the senator stressed that Canada was committed to promoting universal ratification of the convention and noted that Canada is the "fifth-largest international donor" in funding efforts to eliminate explosive remnants of war.

NOTES

- * This Legislative Summary summarizes certain basic principles of applicable international law to facilitate a reader's understanding of Bill S-10 in its international context. The paper is not intended to represent Canada's position on any international legal issues, nor does it represent an authoritative statement of Canada's interpretation of international law.
1. [Convention on Cluster Munitions](#) [CCM], Dublin, 30 May 2008 (in force as of 1 August 2010, not yet ratified by Canada).
 2. Department of Foreign Affairs and International Trade [DFAIT], "[Canada Signs Convention on Cluster Munitions](#)," News release no. 234 and Background, 3 December 2008.
 3. Landmine and Cluster Munition Monitor, [Canada: Cluster Munition Ban Policy](#), 19 August 2011.
 4. United Nations Institute for Disarmament Research [UNIDIR], [The Humanitarian Impact of Cluster Munitions](#), Geneva, 2008, p. 1.
 5. Andrew Feickert and Paul K. Kerr, [Cluster Munitions: Background and Issues for Congress](#), Congressional Research Service, 27 June 2012.

6. Canada, [Voluntary Report of Canada under Article 7 of the CCM](#), 30 April 2012; [“Statement by Canada on Stockpile Destruction,”](#) Convention on Cluster Munitions Intersessional Meeting, Geneva, 16–19 April 2012. See also Senate, *Debates*, 1st Session, 41st Parliament, 1 May 2012, [1500](#) (Honourable Suzanne Fortin-Duplessis).
7. For example, see DFAIT, [Canada-Laos Relations](#), Factsheet, July 2012, as well as these projects sponsored by the Canadian International Development Agency [CIDA]: [Project profile for Landmine Clearing for Results](#) (Cambodia); [Mines Action Canada – International Internships 2011-2014](#) (multiple countries); [Project profile for Mine Action and Development](#) (South Sudan); [Project profile for Support to Mine Action Program for Afghanistan \(2008-2012\)](#) (Afghanistan); and [Project profile for Mine Action Enabling IDP Returns in Northern Sri Lanka – MAG 2010](#) (Sri Lanka). For more information, see Landmine & Cluster Munition Monitor, [Canada: Support for Mine Action](#).
8. International human rights law also applies to armed conflict (International Court of Justice, [“Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,”](#) Advisory Opinion, *I.C.J. Reports 2004*, 9 July 2004, para. 106, p. 136, and [Declaration of Judge Buergenthal](#), p. 240, para. 2). The precise relationship between these two branches of international law remains a matter of some controversy. For example, see William Schabas, [“Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus Ad Bellum,”](#) *Israel Law Review*, Vol. 40, No. 2, 2007, pp. 592–613 and Naz K. Modirzadeh, [“The Dark Sides of Convergence: A Pro-Civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict,”](#) *U.S. Naval War College International Law Studies (Blue Book) Series*, Vol. 86, 2010, pp. 349–410.
9. These different principles have their basis in the four Geneva Conventions of 12 August 1949, Additional Protocols I and II to those conventions, customary international humanitarian law and the Martins Clause. The Martins Clause was first included in the preamble to the 1899 Hague (II) [Convention Respecting the Laws and Customs of War on Land](#) and has been reproduced in virtually every subsequent treaty governing the law of war, reminding belligerents that what is not expressly forbidden by the laws of war is not necessarily permitted. These principles are included in the preamble to the CCM. Customary international humanitarian law is the body of legal rules that comes into being because states consider that they are obliged to act in a certain manner and consistently do behave in such a manner.
10. [Law of Armed Conflict at the Operational and Tactical Levels](#) [LOAC Manual], Joint Doctrine Manual, Publication no. B-GJ-005-104/FP-021, Department of National Defence, Ottawa, 2003, ss. 103, 106, 202–204.
11. For example, see [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, Geneva, 10 October 1980, as amended on 21 December 2001](#) [Convention on Certain Conventional Weapons, or CCW] and its five protocols relating, respectively, to non-detectable fragments (CCW [Protocol I](#), ratified by Canada on 24 June 1994), mines, booby traps and other devices (amended CCW [Protocol II](#), ratified by Canada on 5 January 1998), incendiary weapons (CCW [Protocol III](#), ratified by Canada on 24 June 1994), blinding laser weapons (CCW [Protocol IV](#), accepted by Canada on 5 January 1998) and explosive remnants of war (CCW [Protocol V](#), accepted by Canada on 19 May 2009). As well, see the [Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction](#) [Mine Ban Treaty] (in force as of 1 March 1999, ratified by Canada on 3 December 1997).
12. International Committee of the Red Cross [ICRC], [Cluster munitions: Overview](#), 29 October 2010.
13. *Ibid.* See also Cluster Munition Coalition, [The Problem](#).

14. United States Secretary of Defense, "[DoD Policy on Cluster Munitions and Unintended Harm to Civilians](#)," Memorandum, 19 June 2008; Russian Federation, "[Position Paper on Cluster Munitions](#)," submitted to the 2007 Session of the Group of Governmental Experts of the States Parties to 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, 19 June 2007, UN Doc. CCW/GGE/2007/WP.6. Russia has since dropped its in-principle objection to a binding instrument restricting the use of cluster munitions. However, it reiterated similar concerns in November 2011 at the Fourth Review Conference of the CCW (Russia, "[Statement by Vladimir Yermakov](#)," Fourth Review Conference to the Convention on Certain Conventional Weapons, Geneva, 14 November 2011).
15. John Borrie and Rosy Cave, "[The Humanitarian Effects of Cluster Munitions: Why should we worry?](#)," *Disarmament Forum* (a UNIDIR publication), No. 4, 2006, p. 7; see also Human Rights Watch, "[Meeting the Challenge: Protecting Civilians through the Convention on Cluster Munitions](#)," New York, 2010.
16. UNIDIR, *Humanitarian Impact* (2008). See also ICRC, *Cluster munitions: Overview* (2010).
17. UNIDIR, *Humanitarian Impact* (2008), p. 1.
18. Ibid.
19. Borrie and Cave (2006), pp. 5–6.
20. ICRC, "[Cluster munitions: what are they and what is the problem?](#)," 1 August 2010.
21. [Vienna Convention on the Law of Treaties](#) [VCLT] (in force as of 27 January 1980, accession by Canada on 14 October 1970), arts. 11, 26. An up-to-date list of states parties to the CCM can be found on the [Convention on Cluster Munitions](#), Section 6 in Chapter XXVI, "Disarmament," *United Nations Treaty Collection*.
22. Ibid., art. 18.
23. Melanie Khanna, "[U.S. Statement at First Round of Negotiations for a Protocol on Cluster Munitions in the CCW](#)," 21 February 2011.
24. Harold Hongju Koh, Legal Advisor, United States Department of State, "[U.S. Reaffirms its Deep and Abiding Commitment to International Humanitarian Law at ICRC Conference](#)," Statement to the 31st International conference of the Red Cross and Red Crescent, 28 November 2011; Mission of the United States – Geneva, Switzerland, "[U.S. Deeply Disappointed by CCW's Failure to Conclude Protocol on Cluster Munitions](#)," Statement of the United States of America on the Outcome of the Fourth Review Conference of the CCW, November 2011. The American position on cluster munitions is set out in the 2008 memorandum from the Secretary of Defense cited in note 14. See Captain Matthew E. Dunham, "The Fate of Cluster Munitions," *The Reporter*, Vol. 37, No. 1, 2010, p. 26.
25. Feickert and Kerr (2012), p. 4; Philip Dorling, "Canberra lobbied secretly to dilute cluster bomb ban," *Sydney Morning Herald*, 2 May 2011.
26. VCLT, art. 31(2).
27. CCM, art. 1. The words "directly or indirectly" apply equally to each of the prohibitions on development, production, acquisition, stockpiling, retention and transfer (Gro Nystuen and Stuart Casey-Maslen, eds., *The Convention on Cluster Munitions: A Commentary*, Oxford University Press, New York, 2010, paras. 1.33–1.34). The prohibitions that apply to cluster munitions under the CCM also apply to explosive bomblets (CCM, art. 1(2)). An explosive bomblet is defined as a conventional munition weighing less than 20 kilograms that is dispersed or released from a dispenser, and is not self-propelled. Explosive bomblets must be designed to detonate before, on or after impact (CCM, art. 2(13)).

28. Nystuen and Casey-Maslen (2010), para. 1.35.
29. CCM, art. 1.
30. CCM, arts. 21(1)–(2). These obligations are not explicitly included in Canada's implementing legislation, but would become binding on Canada under international law following ratification. For Canada's interpretation of the nature of these obligations, see [Other Implementation Issues: Statement of Canada](#), CCM Intersessional Meeting, 30 June 2011.
31. CCM, arts. 21(3)–(4). The difference between positive and negative obligations is explained in note 48, below.
32. CCM, art. 3.
33. CCM, art. 4. Cluster munition remnants included failed or abandoned cluster munitions as well as unexploded submunitions or bomblets (CCM, art. 2(7)).
34. CCM, art 5.
35. CCM, art. 6.
36. CCM, art. 7.
37. CCM, art. 19; VCLT, art. 2(d).
38. Arms Control Association, [Convention on Certain Conventional Weapons \(CCW\) at a Glance](#), Factsheet.
39. The United Nations Office at Geneva, [Disarmament: States parties and signatories](#) (Convention on Certain Conventional Weapons).
40. States parties to the CCW hold review conferences every five years, usually in Geneva. More information on meetings of states parties to the CCW is available on the website of the United Nations Office at Geneva, "[Disarmament: Meetings of the States parties](#)," *The United Nations in the Heart of Europe* (Convention on Certain Conventional Weapons).
41. Kofi Annan, [Secretary-General's Message to the Third Review Conference of the Convention on Certain Conventional Weapons](#) [delivered by Sergei Ordzhonikidze, Director-General, UN Office at Geneva], Geneva, 7 November 2006.
42. Farrah Zughni, "[Cluster Munitions Protocol Fails](#)," *Arms Control Today*, Vol. 41, December 2011. The positions of a number of states parties to the CCW in relation to concluding a new protocol regulating the use of cluster munitions can be found in their [statements](#) to the Plenary Session of the Fourth Review Conference to the CCW, held in November 2011 in Geneva.
43. The CCW restricts, but does not ban, the use of landmines.
44. DFAIT, [Canada's Response: The Ottawa Process](#).
45. International Campaign to Ban Landmines, "[What is the Mine Ban Treaty?](#)," *Treaty Basics*.
46. Arms Control Association, [The Arms Trade Treaty at a Glance](#), Factsheet.
47. Leonard Blazeby, "The Convention on Cluster Munitions and its Domestic Implementation," *Commonwealth Law Bulletin*, Vol. 35, No. 4, 2009, p. 726. The Canadian Forces publishes military doctrine manuals, including [Canadian Military Doctrine](#), CFJP 01, Publication no. B-GJ-005-000/FP-001, September 2011; [Operations](#), CFJP 3.0, Publication no. B-GJ-005-300/FP-001, September 2011; and, Canada's LOAC Manual.

48. CCM, arts. 3 to 6, respectively. Positive obligations are those obligations that require a state to do certain things - for example, establishing a victim assistance program or destroying stockpiles of cluster munitions. The CCM also contains negative obligations, which are obligations that require states to refrain from doing certain things - for example, the obligation under article 1 of the Convention not to use, develop, acquire or transfer cluster munitions.
49. Mine Ban Treaty, art. 9; Blazeby (2009), pp. 723–724.
50. The term “explosive submunition” is also defined in clause 2 of the bill. The definition includes only submunitions weighing less than 20 kilograms that are dispersed or released from another conventional munition and are designed to explode on, before or after impact. The definition contains the same exclusions contained in the definition of “cluster munition.”
51. Like an explosive submunition, an explosive bomblet must also be designed to detonate before, on or after impact.
52. Human Rights Watch, *Meeting the Challenge* (2010).
53. The term “conventional munition” is defined in clause 2 as excluding these types of weapons. Chemical and biological weapons are prohibited under the following instruments:
- [Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare](#), 17 June 1925 (in force as of 8 February 1928, ratified by Canada on 6 May 1930);
 - [Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological \(Biological\) and Toxin Weapons and on their Destruction](#), 10 April 1972 (in force as of 26 March 1975, ratified by Canada on 18 September 1972); and
 - [Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction](#), 3 September 1992 (in force as of 29 April 1997, ratified by Canada on 26 September 1995).
- The proliferation, placement and testing of nuclear weapons is restricted principally under the following instruments:
- [Treaty on the Non-proliferation of Nuclear Weapons](#), 1 July 1968 (in force as of 5 March 1970, ratified by Canada on 8 January 1969);
 - [Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water](#), 5 August 1963 (in force as of 10 October 1963, ratified by Canada on 28 January 1964);
 - [Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof](#), 11 February 1971 (in force as of 18 May 1972, ratified by Canada on 17 May 1972);
 - [Comprehensive Nuclear-Test-Ban Treaty](#), 10 September 1996 (not yet in force but ratified by Canada on 18 December 1998); and
 - [Convention on the physical protection of nuclear material](#), 26 October 1979 (in force as of 8 February 1987, ratified by Canada on 21 March 1986).
- Canada has signed, but has not yet ratified, the [International Convention for the Suppression of Acts of Nuclear Terrorism](#), 13 April 2005 (in force as of 7 July 2007). Implementing legislation that would allow Canada to ratify this treaty was introduced in the Senate on 27 March 2012 ([Bill S-9: An Act to amend the Criminal Code](#), 1st Session, 41st Parliament, 2012).
54. Military aircraft, for example, commonly use munitions containing flares and pyrotechnics to avoid attack or detection by an enemy’s air defence systems. Such munitions are employed as decoys to lure missiles away from an aircraft (GlobalSecurity.org, [Flares – Infrared Countermeasures](#)).

55. Human Rights Watch, *Meeting the Challenge* (2010), p. 141.
56. CCM, Preamble and art. 2(2)(c).
57. ICRC, [The Convention on Cluster Munitions – frequently asked questions](#), 31 January 2009.
58. Human Rights Watch, *Meeting the Challenge* (2010), p. 141.
59. [Criminal Code](#), R.S.C. 1985, c. C-46, s. 2.
60. Nystuen and Casey-Maslen (2010), paras. 1.24–1.25.
61. *Ibid.*, paras. 1.36–1.47.
62. *Ibid.*
63. *Ibid.*, paras. 1.48–1.49.
64. In *R. v. Lyons*, (1982) 69 C.C.C. (2d) 318 (B.C.C.A.), para. 121, the British Columbia Court of Appeal interpreted the word “acquire” according to its common meaning, “to gain, or get as one’s own, by one’s own exertions.”
65. Nystuen and Casey-Maslen (2010), paras. 1.50–1.55. The meaning of the two terms under the CCM is discussed here.
66. *Criminal Code*, s. 4(3); *R. v. Hess (No. 1)*, [1949] 8 C.R. 42 (B.C.C.A.), p. 44; *R. v. Beaver*, [1957] S.C.R. 531; *R. v. Morelli*, [2010] 1 S.C.R. 253; *R. v. Terrence*, [1983] 1 S.C.R. 357. In a case where contraband was found in an individual’s room, that individual was found to be in control of the contraband because she had the right to allow or refuse to allow it to be stored in her room. See *R. v. Chambers*, (1985) 20 C.C.C. (3d) 440 (Ont. C.A.).
67. CCM, art. 1(b).
68. *Ibid.*, art. 2(8). The equally authentic French text of the CCM (art. 23) provides that “le ‘transfert’ implique, outre le retrait matériel d’armes à sous-munitions du territoire d’un État ou leur introduction matérielle dans celui d’un autre État, le transfert du droit de propriété et du contrôle sur ces armes à sous-munitions, mais pas le transfert d’un territoire contenant des restes d’armes à sous-munitions.” In international law, the meaning of a treaty clause should be determined by reference to all official language versions of the treaty, which in this case include English, French, Spanish, Russian, Chinese and Arabic (VCLT, art. 33).
69. Nystuen and Casey-Maslen (2010), paras 2.197–2.198 and 2.201–2.202. State practice is also relevant to the interpretation of ambiguous treaty terms: VCLT, art. 31(3)(b). Therefore, other countries implementing legislation may shed light on the meaning of the prohibition on transfer under the CCM. See, for example, United Kingdom, [Cluster Munitions \(Prohibitions\) Act 2010](#), ss. 2(1)(f), 3(3), 4(1) subject to exceptions in the Act; Australia, Attorney-General, [Criminal Code Amendment \(Cluster Munitions Prohibition\) Bill 2010: Explanatory Memorandum](#), 2010, p. 18, re: s. 72.45 of the [Criminal Code Amendment \(Cluster Munitions Prohibition\) Bill 2010](#) (first reading version); New Zealand, [Cluster Munitions Prohibition Act 2009](#), ss. 5(1), 10(1)(d) and exceptions in the bill; Ireland, [Cluster Munitions and Anti-Personnel Mines Act 2008](#), ss. 2(1) and 6(1), subject to exceptions set out in the Act; New Zealand, Ministry of Foreign Affairs and Trade, [Cluster Munitions \(Prohibition\) Bill: Departmental Report on Submissions for the Foreign Affairs Defence and Trade Committee](#), 12 October 2009, pp. 6–9. See also the model law prepared by New Zealand to assist small states to implement the CCM in domestic law: [Model legislation: Cluster Munitions Act 2011](#)], 7 September 2011, submitted by New Zealand to the Second Meeting of States Parties, Beirut, 12–16 September 2011, UN Doc. CCM/MSP/2011/WP.6, clause 4.
70. Nystuen and Casey-Maslen (2010), paras 2.197–2.198 and 2.201–2.202.

71. *Ibid.*, paras. 1.61, 2.198; Landmine and Cluster Munition Monitor, [Interpretive Issues and the 2008 Convention on Cluster Munitions](#), Factsheet.
72. [Summary Record of the Ninth Session of the Committee of the Whole](#), Dublin, 23 May 2008, afternoon session, Doc. CCM/CW/SR/9, p. 3. Art. 32, of the VCLT provides that the preparatory work of the treaty may be used as a supplementary means of interpreting its terms. Art. 2(15) of the amended [Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996](#) (CCW Protocol II) states this: ‘Transfer’ involves, in addition to the physical movement of mines into or from national territory, the transfer of title to and control over the mines, but does not involve the transfer of territory containing emplaced mines.
73. [Anti-Personnel Mines Convention Implementation Act](#), S.C. 1997, c. 33, ss. 2 and 6(1)(b), subject to exceptions set out in ss. 6(3) and 7.
74. *Criminal Code*, s. 84(1).
75. [Customs Act](#), R.S.C. 1985, c. 1 (2nd Supp.), s. 2.
76. *Criminal Code*, s. 84(1).
77. *Ibid.*
78. *Criminal Code*, s. 21(1). For example, a police officer who stood by while his colleague assaulted a suspect during an interrogation was found guilty of aiding and abetting. See *R. v. Dooley*, (2009) 249 C.C.C. (3d) 449 (Ont. C.A.). The concept of aiding and abetting under Canadian criminal law is not necessarily the same as a state’s responsibility for “assistance” to activities prohibited by the CCM under international law. International law requires a state knowingly and intentionally to have contributed “significantly” to the actual commission of an internationally wrongful act by another state. See International Law Commission, [Draft articles on state responsibility with Commentary](#), art. 16 and commentary paras. 1–5.
79. *Criminal Code*, s. 22(3). This definition is not exhaustive.
80. *Ibid.*, s. 465; *R. v. O’Brien*, [1954] S.C.R. 666.
81. *Criminal Code*, s. 23(1).
82. DFAIT, *Legislative Briefing Binder – Prohibiting Cluster Munitions Act*, May 2012, clause 6. Attempting to conspire is not an offence under Canadian law. See *R. v. Déry*, [2006] 2 S.C.R. 669.
83. DFAIT, “Questions and Answers,” *Legislative Briefing Binder* (2012). For more information on investment in cluster munitions, see IKV Pax Christi, [Worldwide investments in Cluster Munitions: a shared responsibility](#), Brussels, June 2012.
84. Speaking generally, the *Code of Service Discipline* governs the conduct of members of the Canadian Forces and certain other individuals. Breaches of the *Code of Service Discipline* may lead to criminal liability. The prohibitions in the bill automatically become offences under the *Code of Service Discipline* in the *National Defence Act*, which provides for extraterritorial jurisdiction over persons subject to it ([National Defence Act](#), R.S.C. 1985, c. N-5, ss. 60, 61, 130(b)).

85. Canadian criminal law does not permit the punishment of offences committed outside Canada unless explicit provision is made to do so in a statute (*Criminal Code*, s. 6(2)). No provision for extraterritorial jurisdiction over Canadian nationals or permanent residents is included in the *Anti-Personnel Mines Convention Implementation Act*. Section 7 of the *Criminal Code* lists a number of offences over which Canada takes extraterritorial jurisdiction. Extraterritorial jurisdiction is also provided for in certain specific statutes, such as the [Crimes Against Humanity and War Crimes Act](#), S.C. 2000, c. 24, s. 8. Depending on the offence in question, Canada may take extraterritorial jurisdiction in relation to offences committed by citizens and permanent residents or, in some cases, if the victim of the offence is a Canadian citizen (e.g., terrorism offences, hostage-taking). In a relatively small number of situations, Canada may prosecute an offence if the accused is present in Canada after its commission (e.g., genocide, crimes against humanity, war crimes, and the commission of certain acts of terrorism prohibited under international treaties).
86. [Libman v. The Queen](#), [1985] 2 S.C.R. 178, para. 74. Under the test set out by the Supreme Court of Canada in *Libman*, such a link could exist if a significant portion of the activities constituting that offence took place in Canada.
87. CCM, arts. 3(6)–3(7), provide exceptions to the prohibitions on retention, acquisition or transfer of cluster munitions for these purposes. The bill does not include a provision requiring that the report required under art. 3(8) of the CCM, on transfers for the purposes of training in cluster munition detection, clearance and destruction, or the development of counter-measures, be submitted to the UN Secretary General.
88. DFAIT, *Legislative Briefing Binder* (2012), clause 11.
89. Members of the Canadian Forces may be placed “on active service” in or beyond Canada by order of the Governor in Council in case of emergency for the defence of Canada, or in case of actions taken by Canada under the [Charter of the United Nations](#), the [North Atlantic Treaty](#) or similar instruments ratified by Canada. At all times, regular force members of the Canadian Forces are “on service” and are liable to perform any lawful duty. Members of the reserve force are on service when they are ordered or called to train as prescribed by the Governor in Council in regulations or otherwise. While on service or active service, regular and reserve force members of the Canadian Forces are subject to the *Code of Service Discipline* (see *National Defence Act*, ss. 31–33, 60).
90. *National Defence Act*, ss. 60(1)(a) to (g) and (j).
91. [Public Service Employment Act](#), S.C. 2003, c. 22, s. 2(1); Public Service Commission, “[Reference List: Organizations’ Statutory Links with the Public Service Commission and the Public Service Employment Act - Explanatory Notes](#),” *Financial Administration Act*, R.S.C., 1985, c. F-11, Schedule I and Schedule IV. Specifically, persons who are employed in a part of the public service to which the Public Service Commission has exclusive authority to make appointments qualify for these exceptions.
92. DFAIT, *Legislative Briefing Binder* (2012), “Questions and Answers,” and clause 11.
93. Nystuen and Casey-Maslen (2010), paras. 21.86–21.91. The obligation to discourage the use of cluster munitions in the context of international military operations or cooperation is found in art. 21(2) of the CCM.
94. As defined in the *Criminal Code*, s. 2:
- “organization” means
- (a) a public body, body corporate, society, company, firm, partnership, trade union or municipality, or
 - (b) an association of persons that
 - (i) is created for a common purpose,
 - (ii) has an operational structure, and
 - (iii) holds itself out to the public as an association of persons.

95. The propriety of extending the interoperability exceptions in the CCM to private persons has been queried by some commentators. See Nystuen and Casey-Maslen (2010), para. 21.57.
96. These exceptions contrast with the exceptions in the *Anti-Personnel Mines Convention Implementation Act*, s. 6(3)(d), which permits military cooperation or joint operations with the armed forces of states not party to the Mine Ban Treaty that engage in activities prohibited under the Act, only as long as participation “does not amount to active assistance in that prohibited activity.” Notably, however, the Mine Ban Treaty does not contain an explicit interoperability clause such as that found in art. 21 of the CCM.
97. DFAIT, *Legislative Briefing Binder* (2012), clause 11.
98. *Ibid.*
99. *Criminal Code*.
100. [Geneva Conventions Act](#), R.S.C. 1985, c. G-3.
101. The penalties under the *Anti-Personnel Mines Convention Implementation Act* are similar (s. 21). Where an individual subject to the *Code of Service Discipline* under the *National Defence Act* is charged with an offence, the individual may be tried by court martial or by summary trial. The maximum penalty of imprisonment that may be imposed on conviction by a summary trial is 30 days. Summary trials offer accused persons significantly fewer procedural protections than do courts martial and may only be used when the commanding officer in question considers that he or she has adequate powers of punishment, taking into account the gravity of the offence. An offence may only be tried by summary trial within one year of the date of commission of the offence (*National Defence Act*, ss. 163(1)(b), 163(1.1), 163(3)(a), 164(1)(b) and 164(1.1)).
102. A similar provision is included in the *Anti-Personnel Mines Convention Implementation Act*, s. 23. S. 786(2) of the *Criminal Code* provides that a six-month limitation period exists for summary conviction offences, unless a different period is specified.
103. By way of comparison, a continuing offence provision is found in s. 24 of the *Anti-Personnel Mines Convention Implementation Act*.
104. No such requirement exists under the *Anti-Personnel Mines Convention Implementation Act*, but a similar requirement is found in the *Geneva Conventions Act*, s. 3(4) in relation to charges of grave breaches of the Geneva Conventions of 1949.
105. Property by means or in respect of which an offence is committed is one type of property under the definition of “offence-related property” in s. 2 of the *Criminal Code*. “Offence-related property” under the *Criminal Code* also includes property used in connection with the commission of an offence or property that is intended to be used for committing an offence. However, the definition of “offence-related property” only includes property related to indictable offences contained in the *Criminal Code* or in the [Corruption of Foreign Public Officials Act](#), S.C. 1998, c. 34. The forfeiture provisions in the bill, on the other hand, apply to property related to both indictable and summary conviction offences.
106. For example, see Chris Cobb, “Canada’s cluster bomb legislation weak and worst of ratifying countries, experts say,” *Ottawa Citizen*, 29 April 2012; Mines Action Canada, [“Petition launched to fix flawed cluster bomb bill,”](#) *Canada Newswire*, News release, 9 May 2012 ; Chris Cobb, [“Ex-Australian PM slams Canada for cluster treaty,”](#) *Ottawa Citizen*, 4 June 2012; [“Convention on Cluster Munitions: Handicap International is concerned about Canada’s position,”](#) *Canada Newswire*, 5 April 2011; Murray Brewster, [“Canada, U.S. in lockstep on defence issues,”](#) *iPolitics*, 3 January 2012; Cluster Munitions Coalition, [CMC Urges Canada not to Buckle to US Pressure and to Re-draft Dangerous Cluster Bomb Law,](#) News release, 10 May 2012.

107. Earl Turcotte, “Canada’s severely flawed cluster bomb bill,” *Embassy*, 2 May 2012; CBC Radio, “Cluster Bomb Legislation,” [As It Happens](#), 30 April 2012. For more information, see Lee Berthiaume, “Through a Mine Field: The Story of Earl Turcotte,” *Embassy*, 31 August 2011 and Lee Berthiaume, “Through a Minefield: How a Bureaucratic Battle led Canada’s Lead Cluster Munitions Negotiator to Resign,” *Embassy*, 7 September 2011.
108. For example, see Mines Action Canada, News release, 9 May 2012; Cluster Munitions Coalition, News release, 10 May 2012.
109. Chris Cobb, “Armed Forces criticized for its cluster munitions,” *Canada.com*, 4 June 2012.
110. Senate (1 May 2012) (Fortin-Duplessis).
111. *Ibid.*