



ICRC

Submission to the Senate Foreign Affairs, Defence and Trade Committee regarding the Provisions of the Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010

The International Committee of the Red Cross (ICRC) welcomes Australia's efforts to become a party to the 2008 Convention on Cluster Munitions. Australia participated actively in the negotiation of the Convention and was instrumental in agreeing on some of its key concepts. Australia signed the instrument when it was opened for signature on 3 December 2008. As a signatory State, Australia played a lead role in the preparations for the First Meeting of States Parties to the Convention, which was held in Vientiane, Laos in November 2010. The ICRC also commends Australia's aid programme which provides support to clearance, risk education, victim assistance and advocacy activities relating to mines and other war remnants. Such actions are clear evidence of Australia's support and commitment to ending the use of cluster munitions and addressing the impact these weapons have had on the civilian population of affected countries. In preparation for its ratification of the Convention, Australia has prepared the *Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010*, which aims to incorporate important aspects of the Convention on Cluster Munitions into Australian law. This is intended to be undertaken by amendment to the Australian Criminal Code.

There is a special relationship between the ICRC and international humanitarian law (IHL), which expressly recognises the mission of the ICRC and provides a legal basis for the mandate conferred on it by the international community. The ICRC has been at the origin of or involved in the codification of most of IHL as it stands today. In this regard the ICRC also works with all States to ensure the best possible national implementation of international IHL related Conventions. This is often undertaken through direct dialogue with Governments during the drafting process of the domestic law. ICRC is making this submission as it was not able to make comments at an earlier stage.

The proposed Bill creates offences for acts prohibited under the Convention, allowing exemptions for the acquisition, retention and transfer of cluster munitions for the purposes of destruction, the development of counter-measures and training in detection, clearance or destruction techniques.

The Bill goes on, however, to create defences for actions linked to military cooperation and operations with States not party to the Convention. The ICRC is concerned that the scope of these defences would have the unfortunate consequences of effectively permitting activities that could undermine the objectives of the Convention and contribute to the continued use of

cluster munitions rather than further their elimination. The ICRC's main concerns relate to sections 72.41 and 72.42 of the Bill.

Section 72.41: Defence for acts by Australians in military cooperation with countries not party to Convention on Cluster Munitions.

This section creates a defence to the offences referred to in section 72.38. Under this, an Australian citizen, a member of the Australian Defence Force or someone performing services under a Commonwealth contract does not commit an offence in circumstances whereby the act is done in the course of military cooperation or operations with a foreign country that is not a party to the Convention on Cluster Munitions. In addition, the act for which the defence is invoked must not entail Australia itself using, developing, producing or otherwise acquiring, stockpiling, retaining or transferring a cluster munition, and cannot consist of an express request to use a cluster munition in a case where the choice of munitions used is within Australia's exclusive control.

As indicated in the explanatory memorandum accompanying the bill, this defence is based on paragraphs 3 and 4 of Article 21 of the Convention. These paragraphs allow States Parties, their military personnel or nationals, to engage in military cooperation and operations with States not party to the Convention that might engage in activities prohibited to a State Party.¹

The current draft Section 72.41 would have clear implications. In the absence of more precise language it could allow, for example, a member of the ADF, engaged in military operations with a State not party to the Convention, to be closely involved in planning cluster munition strikes and being part of a decision to use the weapons as long as the actual use is undertaken by a State not party. Ultimately, it may also permit the use of cluster munitions by ADF forces operating on exchange within the forces of a State that has not adhered to the Convention.

The ICRC believes that the defence provided by section 72.41 of the Australian Bill raises substantial concerns. It believes that such a defence could lead to permitting the forces of a State Party to be directly and actively involved in activities such as training for and planning the use of cluster munitions, which would contravene the Convention and undermines its goals and that such acts would perpetuate rather than eliminate the future use of these weapons.

While Article 21 permits military cooperation and operations between States Parties and States not party, it is equally important to note that the article also seeks to further the goals of the Convention. Paragraphs 1 and 2 of Article 21 require each State Party to promote the norms of the Convention, encourage States not party to adhere to the instrument and to use its best efforts to discourage such States from using cluster munitions.

In the view of the ICRC these two aspects of Article 21 (furthering the goals of the treaty and permitting continued military cooperation and operations with States not party) must be read together and taken into account when developing national implementing legislation. Excessively broad exceptions or defences created under paragraphs 3 and 4 of Article 21

¹ In addition to permitting certain kinds of military cooperation with States not party to the Convention, these provisions also limit the range of activities that may be undertaken. Paragraph 4 of Article 21 explicitly stipulates that States Parties are not authorised to develop, produce or otherwise acquire, stockpile, retain, transfer or themselves use a cluster munition or to expressly request the use of cluster munitions where the choice of munitions is within its exclusive control.

would conflict with and undermine the purpose of paragraphs 1 and 2. The ICRC believes that any exceptions or defences to the Convention's prohibitions based on paragraphs 3 and 4 of Article 21, must be construed narrowly so as not to contravene the Convention or undermine the objective of Article 21 and the objectives of the Convention itself.

One example of a narrow approach to implement Article 21 is the legislation adopted by New Zealand. Its legislation incorporates all the prohibitions of the Convention yet stipulates that a member of the Armed Forces does not commit an offence **merely by engaging** (emphasis added), in operations, exercises, or other military activities with the armed forces of a State that is not a party to the Convention.²

Likewise, the national legislation of Ireland makes the prohibitions of the Convention offences under its national law.³ It also explicitly excludes as offences acts or omissions done in the planning or conduct of operations with UN forces or with States not party to the Convention. In subsequent statements on the exclusions, Ireland clarified that "The purpose of section 7(4) of the Act is not to enable assistance with prohibited acts in the context of military co-operation and operations with states not party to the Convention. Rather, this provision is intended to ensure that no person may be prosecuted for an act or omission that might otherwise constitute assistance but is **unintended or inadvertent, or has only a remote or indirect relationship** (emphasis added) to the commission of a prohibited act by a state not party to the Convention and that does not in any event engage the responsibility of Ireland under international law."⁴

Section 72.42: Defence for acts by military personnel of countries not party to the Convention on Cluster Munitions.

This section provides that certain acts committed by military personnel of countries not party to the Convention are not offences against section 72.38. More specifically, it would allow the stockpiling, retention or transfer of a cluster munition by a member of the armed forces of a State not party or a person who is connected with such forces as described in subsection (2) who is neither an Australian citizen nor a resident of Australia. The acts must be committed in connection with the use by those forces of a base, an aircraft or a ship in Australia in the course of military cooperation or operations with the Australian Defence Force.

Section 72.42 in its current form would have clear consequences. It would, for example exempt the military personnel of States not party from the offences created by the Bill for acts committed in or on Australian territory. It would also permit the transit of cluster munitions through Australian waters and airspace and allow States not party to stockpile or retain cluster munitions on ADF and other bases within Australia.

The ICRC is concerned about the scope of these exceptions and their implications. In our view, allowing the foreign stockpiling of cluster munitions on Australian soil, the transit of such weapons through Australian airspace and water and other acts generally deemed contrary to the Convention would undermine the objectives of the Convention on Cluster Munitions and contribute to the continued use of these weapons. It would also undermine the desire of States Parties, as expressed in the Vientiane Action Plan adopted at the First Meeting of States

² Cluster Munitions Prohibition Act 2009, Section 11 (6).

³ Cluster Munitions and Anti-personnel Mines Act 2008, Sections 6 and 7.

⁴ Note on measures taken by Ireland to implement Article 21 of the Convention on Cluster Munitions.

Parties, which Australia attended as a signatory State and observer, to end the harm caused by cluster munitions.

As indicated in the legal commentary on the Convention on Cluster Munitions published in 2010, the underlying concerns behind Article 21 relate to limiting the potential for criminal liability of a State's Party's nationals and the potential for international responsibility of a State Party itself for assisting activities performed by a State not party.⁵ In the view of the ICRC, the article was not meant to ensure that military cooperation and operations were unaffected by the Convention and that acts prohibited by the treaty would occur in territory under the jurisdiction and control of a State Party. The ICRC calls upon Australia to find other ways to address the liability concerns that underlie Article 21, rather than permitting the activities specified by Section 72.42 in Australian territory.

The ICRC also believes that it would be difficult to reconcile the broad exceptions established under this section with the obligations established under paragraphs 1 and 2 of Article 21, which require each State Party to promote the norms of the Convention and use its best efforts to discourage States not party to the Convention from using these weapons. As was indicated above, the ICRC is of the view that any exceptions or defences based on Article 21 must be tailored as narrowly as possible so as to be consistent with purpose of the article as a whole and the objectives of the Convention itself.

It is worth noting that the Bill goes further in this area than the legislation adopted by other common law States Parties. The implementing legislation of New Zealand and Ireland do not contain provisions excluding the application of their laws to foreign forces or vehicles on their territory. While the Cluster Munitions Prohibitions Act of the United Kingdom does create defences for visiting forces not a party to the Convention for actions relating to the possession and transfer of a cluster munition as well as assisting, encouraging or inducing any other person to engage in any act that is prohibited,⁶ the UK has also indicated that it has requested the removal of foreign stockpiles of cluster munitions from UK territories within the 8 year period allowed for stockpile destruction in the Convention. Although the UK did not see this as a legal requirement under the treaty, it nevertheless reflects the gravity of such activities for the goals of the Convention.

Recommendations

The ICRC would propose the following options to address the concerns raised above:

Section 72.41

- delete this section, or
- construe this section more narrowly, for example by having it apply only to "mere participation" and acts that are unintended or inadvertent or that only have a remote or indirect relationship with the prohibited conduct.
- (If section 72.41 is to remain), consider clarifying the application of Article 21 paragraphs 1 and 2 to the Bill and suggest the inclusion of a requirement that the

⁵ The Convention on Cluster Munitions, A Commentary, G Nystuen and S. Maslen eds., Oxford Univ. Press 2010, p. 543.

⁶ Cluster Munitions (Prohibitions) Act, 2010, Section 8.

defendant demonstrate that best efforts had been made to discourage the State not party from using cluster munitions in accordance with paragraphs 1 and 2 of Article 21. As indicated in section 72.41, a defendant bears the evidential burden when invoking a defence under this section.

Section 72.42

- delete this section, and
- expressly prohibit the transit of cluster munitions in section 72.38, and
- consider alternative approaches, outside of the Criminal Code, to address the liability concerns that underlie Article 21 and to ensure these acts do not take place.

Conclusion

The promulgation of national legislation is an essential component of a State's efforts to implement the Convention on Cluster Munitions. In establishing the Convention's prohibitions as offences under national law and creating penal sanctions for violations, such laws will go far in preventing and suppressing acts that would be contrary to and undermine the treaty. Many sections of the Cluster Munitions Prohibition Bill are consistent with and further the goals of the Convention. However, the defences permitted under sections 72.41 and 72.42 raise concerns due to the types of actions they would allow, particularly within Australian territory. Such acts are far more than indirect or inadvertent assistance in the use, production, stockpiling and transfer of cluster munitions and do more than merely limit the potential liability of the State Party and its nationals.

If adopted as currently drafted, the Australian legislation would set an important precedent in how Article 21 is implemented in Australia and in other States. The ICRC fears that the defences cited above have serious implications for the implementation and success of the Convention both in the short term and over time. Considering the potential humanitarian consequences and costs of such a situation, the ICRC calls upon the Parliament of Australia to consider the recommendations presented above and to re-draft the bill in light of the overall goals and objectives of the Convention on Cluster Munitions.

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