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Chair

Mr. Dean Allison

Standing Committee on Foreign Affairs and International Development

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● (1600)

[*English*]

The Chair (Mr. Dean Allison): Pursuant to the order of reference of Friday, October 25, 2013, discussion of Bill C-6, An Act to implement the Convention on Cluster Munitions will start today.

I want to thank our guests for taking the time to be here and, as usual, for being here on such short notice as well.

We have Hugh Adsett, who is the deputy legal adviser and director general for the legal affairs bureau with DFATD. Welcome, sir.

We have Sabine Nolke, who is the director general of the non-proliferation and security threat reduction bureau, also from DFATD. Thank you, and welcome to you.

We have Brigadier-General Charles Lamarre, director general of operations in the strategic joint staff of the Department of National Defence. Thank you, and welcome to committee.

Joining him is Lieutenant-Colonel Chris Penny, who is from the directorate of international and operational law, in the office of the judge advocate general. Welcome, sir, to you as well.

Rounding it out at the end of the table, from the Department of Justice, we have Christopher Ram, legal counsel from the criminal law policy section. Welcome.

We're getting started a little bit early today. It is Thursday, so depending upon how many questions MPs want to ask, we'll go right to 5:30 or we may go sooner. Because it's Thursday afternoon, who knows? Maybe we'll finish a little bit early, as long as all the questions have been answered, and we'll certainly give all our colleagues here a chance to do that.

I'm going to start with Madam Nolke and her presentation.

You each have up to 10 minutes. I'm not sure—I thought it was maybe 10 minutes, 5 minutes, and 5 minutes. I'm not sure what you have with regard to that, but we'll start and work our way across the table. Then we will turn it over to the members of Parliament to follow up with some questions.

Madam Nolke, we'll turn the floor over to you. Thank you for being here.

Ms. Sabine Nolke (Director General, Non-Proliferation and Security Threat Reduction Bureau, Department of Foreign Affairs, Trade and Development): Thank you very much.

I am pleased to be here today to speak to you about Bill C-6, the prohibiting cluster munitions act, which is an important and necessary step toward Canada's ratification of the Convention on Cluster Munitions.

Cluster munitions are a very serious humanitarian concern. Deployed from the air or ground, some types of cluster munitions can release dozens or even hundreds of smaller submunitions, which can rapidly cover a large area. These can pose serious threats to civilians, not only during attacks but especially afterwards if they fail to detonate as intended. Unexploded bomblets can kill and maim civilians long after conflicts have ended. Sadly, many of these victims are children, who pick them up mistaking them for toys.

Even when they do not kill, cluster munitions cause horrific injuries that seriously jeopardize the future of those affected and their families. Furthermore, access to land and essential infrastructure contaminated by unexploded bomblets is blocked. This stalls the development potential of whole communities trying to rebuild their lives after conflict and undermines efforts at long-term stabilization.

[*Translation*]

Canada has long been committed to protecting civilians against the indiscriminate effects of explosive remnants of war. Canada has never produced cluster munitions, nor used them in Canadian Armed Forces-led operations. However, this weapon has been used by other states in more than 35 conflicts around the world since the end of the Second World War. Over 25 countries and other territories are thought to be contaminated by these munitions. Laos, Vietnam and Cambodia, for example, remain some of the most heavily contaminated countries in the world decades after the conflicts there have ended.

The Convention on Cluster Munitions entered into force in August 2010. To date, the convention has 83 state parties. This number will grow to 84 on March 1, 2014, when the convention enters into force for Saint Kitts and Nevis. An additional 29 states have signed the convention but have not yet ratified it. Most of our NATO allies have signed or ratified it, although some, including the United States, Turkey and Poland, have not.

[*English*]

The convention bans the use, development, production, acquisition, stockpiling, retention, and transfer of cluster munitions. It prohibits countries that agree to be bound by it from taking part in these activities and from assisting or encouraging anyone else to do so. It obliges them to criminalize these activities in domestic law.

Furthermore, it seeks to address past use by requiring clearance of contaminated areas, rehabilitation for victims of these munitions, and where possible, assisting affected countries in need.

The convention also permits military cooperation and operations between states that are party to the treaty and those that are not. This is the so-called interoperability clause. From the beginning of the negotiations, Canada strongly supported the need to ensure that state parties could continue to collaborate militarily with non-state parties. The interoperability clause was an essential compromise that allowed many countries, including Canada, to sign the convention. It ensures that Canada will be able to continue participating in multinational military operations with its key allies that are not party to the convention, particularly the United States, with which we enjoy a robust and vibrant military cooperation.

Drawing the line between prohibiting use by countries that are party to the convention while allowing legitimate and responsible cooperation with countries that are not was the most difficult issue in the negotiations, given the complex situations and scenarios in which military cooperation takes place.

Bill C-6 implements those parts of the convention that require legislation in Canada. Other provisions are carried out by other means and not necessarily through legislative mechanisms. The obligation to advocate in favour of the convention's norms, for example, will be implemented through diplomatic channels, while programming is in place to provide assistance to states affected by cluster munitions.

I'm turning now to those provisions that require legislative implementation and that are included in Bill C-6, which is before you today.

The convention requires a state party to give effect to the prohibitions it imposes on states by imposing certain criminal prohibitions on persons within its jurisdiction. Accordingly, the proposed act sets out a series of offences and the technical definitions needed to support their investigation and prosecution.

More specifically, the bill prohibits the use, development, manufacture, acquisition, possession, import, export, and cross-border movement of cluster munitions. It also prohibits aiding, abetting, counselling, and attempting or conspiring to commit such offences or such activity.

The proposed act also sets out some exceptions to these general prohibitions. Since the convention calls for the use of criminal law it is necessary to create these exceptions to ensure that members of the Canadian Forces and associated civilians who are engaged in the military activities that are specifically permitted by the convention, in particular those relating to the interoperability clause of the convention, will not be held criminally responsible for doing their jobs.

It is important to recall, as I mentioned earlier, that such exceptions are permitted by the convention itself. They do not authorize any specific activity at any particular time. They simply exclude Canadian Forces members and associated civilians who are engaged in military activities from the new criminal offences that Bill C-6 would create under specific circumstances. They have been strictly Iimited so that only persons who are acting on behalf of Canada are excluded, only when the activity in question is part of a permitted form of military cooperation, and only when the other country involved is not a state party to the convention. This is very important because it means that as other countries join the convention and renounce these munitions the legal exclusions become progressively narrower in effect.

I should also point out that these exceptions do not detract in any way from any other applicable legal obligations, including those established by the law of armed conflict. Under international law the indiscriminate or disproportionate use of any weapon is a war crime, whether or not the weapon is a cluster munition, and could be subject to prosecution in Canada under the Crimes against Humanity and War Crimes Act. Nothing in Bill C-6 changes this.

Canadian armed forces members would remain prohibited from using cluster munitions in Canadian operations and from expressly requesting their use when the choice of munitions to be used is under their exclusive control. DND will impose additional prohibitions for its forces. My colleague from DND will speak to those in more detail.

● (1605)

[*Translation*]

Canada has already taken concrete measures to implement aspects of the convention. For example, the Canadian Armed Forces have initiated the process of destroying all of their cluster munitions. Their last remaining inventory has been removed from operational stocks and marked for destruction.

Canada is also assisting countries that are affected by cluster munitions. Since 2006, Canada has contributed more than $200 million to mine action projects, which address the impact of explosive remnants of war, including cluster munitions. Most recently, Canada has provided $1 million in funding to Laos for cluster munitions clearance activities.

[*English*]

Canada is firmly committed to the goals of the Convention on Cluster Munitions. This bill, if enacted, will solidify that commitment by enabling Canada to ratify the convention and become part of the growing number of nations intent on eliminating the use of these weapons.

Thank you. Merci.

The Chair: Thank you, Ms. Nolke.

We'll now turn it over to Brigadier-General Lamarre.

BGen Charles Lamarre (Director General of Operations, Strategic Joint Staff, Department of National Defence): Thank you very much, sir.

Members of Parliament, I am pleased to be here today with Lieutenant-Colonel Chris Penny from the office of the judge advocate general. Lieutenant-Colonel Penny was a member of the Canadian delegation that negotiated this convention, and he has since assisted with its domestic implementation.

We are here to discuss the role of the Department of National Defence and of the Canadian armed forces in supporting Canada's efforts to ratify the Convention on Cluster Munitions.

[*Translation*]

Mr. Chair, the Department of National Defence and the Canadian Armed Forces are committed to the objective and purpose of the convention and to implementing all of its provisions. In this context, it is important to note that we have never used cluster munitions in any of our Canadian Armed Forces-led operations, and we are in the process of destroying our remaining stockpiles.

Bill C-6 was crafted carefully to reflect this commitment and to give effect to those obligations required by the convention within the domestic Canadian legislation. In short, it allows us to implement the convention, to meet our broader defence needs, to remain a strong and reliable ally, and to continue to contribute meaningfully on the international stage.

● (1610)

[*English*]

The Convention on Cluster Munitions itself strikes a necessary balance between humanitarian considerations and national security imperatives, and Bill C-6 reflects this balance. Bill C-6 was written in a clear and unambiguous way, which ensures that members of the Canadian armed forces understand the convention's obligations and its permitted exceptions.

In particular, direct use of cluster munitions during Canadian armed forces operations will be banned without exception. At the same time, as permitted by the convention itself, Bill C-6 protects and preserves the ability of Canada and the Canadian armed forces to continue to work with key allies that have not yet joined the convention. This continued cooperation with non-party states, also known as interoperability, helps enhance our national security by providing a wide range of collaborative opportunities such as exchange positions, intelligence-sharing, joint exercises, combined operations, and just as important, the placing of Canadians in command in key positions. This is particularly important in light of our valuable and unique relationship with the United States, our most important ally and defence partner.

In this context, it is vital that our men and women in uniform and the civilians working with them are not unjustly accused of criminal conduct when doing what we ask of them in the interests of our national security and defence. Bill C-6 thus affords them the legal protection they need to do their job, as permitted by the convention.

For example, under the convention and Bill C-6, these men and women can continue to ask for potentially life-saving military assistance from our allies, be they signatories to the convention or not, without fear of being disciplined or put on trial for the policy decisions of these other states. In situations where the Canadian armed forces have the exclusive choice of munitions to be used by the forces of a non-party state, we will prohibit our members from expressly requesting the use of cluster munitions. It is also worth underlining that nothing in the interoperability provisions of the convention, or within Bill C-6, detracts in any way from Canada's existing obligations under international humanitarian law.

The Canadian armed forces and its personnel will at all times during all operations remain bound by obligations prohibiting the authorization of, assistance with, or participation in an indiscriminate attack, including one using cluster munitions, whether they are acting on their own or in concert with foreign partners.

In 2008, as evidence of Canada's commitment to the Convention on Cluster Munitions and upon our signature of it, the chief of the defence staff issued an interim directive prohibiting the use of these weapons in any Canadian armed forces operations. As we move forward, the chief of the defence staff will issue another directive, which will reflect all the requirements of Bill C-6, as ultimately adopted by Parliament. In addition, this new directive will also prohibit Canadian armed forces members on exchange with allied armed forces from directly using cluster munitions and from giving or receiving training in their use.

It will also prohibit the transportation of cluster munitions in Canadian armed forces vehicles or vessels. This goes above and beyond the convention's requirements and it will take the form of military orders that carry the force of law within the Canadian armed forces. All these restrictions will be incorporated into the Canadian armed forces rules of engagement, and will typically be communicated to allies when Canada enters into military cooperation activities with them, as one method of informing our allies of our obligations under the convention. They will be implemented when the bill receives royal assent and will be legally binding for Canadian armed forces members under the military justice system.

That concludes my statement.

The Chair: Thank you, Brigadier-General.

We're now going to move over to the Department of Justice and Mr. Ram. Sir, the floor is yours.

Mr. Christopher Ram (Legal Counsel, Criminal Law Policy Section, Department of Justice): Thank you, Mr. Chairman.

I'll try to focus on the actual construction of the bill, my colleagues having examined the underlying policy.

The Oslo Convention on Cluster Munitions will impose a range of obligations on Canada as a state party, but only one of the obligations in the convention actually requires legislation.

Article 9 of the convention requires us to use the criminal law or the penal law to prevent and suppress the same activities that the treaty itself will prohibit Canada from engaging in. That means that the same activities that Canada is agreeing not to engage in under international law, under the treaty, will also become criminal offences applicable to persons or organizations, which includes companies and other legal entities within the jurisdiction of Canada. We're essentially translating the international law obligations of the convention itself down into domestic law obligations that apply to people within Canada.

The role of the justice department in the bill has actually been to make sure the obligation is translated in a manner that is consistent with and can be enforced within our criminal justice system. In some cases that has meant translating the language of the treaty into Canadian criminal law terms. Words such as “stockpiling” and “transfer”, for example, have different interpretations in treaty law and in an international body between states than those interpretations they would be given by a Canadian criminal court. The object of the drafting is not to copy the language of the convention itself verbatim but to ensure that the offences can be prosecuted effectively here in Canada, that they meet charter requirements, and that they're consistent with Canadian criminal law so they won't cause interpretive problems with other provisions and so on, and that they wouldn't be interpreted by a Canadian court in any way that would later put us out of conformity with our international law obligations under the treaty. So the formulation of the bill doesn't necessarily track the language of the convention, which is annexed as a schedule.

The offences themselves track the prohibitions of the convention, and they also track the permitted exclusions—to which my colleagues have referred—dealing with military cooperation and a number of other scenarios that are permitted by the convention for things like defensive research and training. Training peacekeepers in what cluster munitions look like is an example; there are exemptions for that. The prohibitions themselves are set out in clause 6 of the bill. The actual offence provisions are in clause 17 of the bill, and the exclusions in various parts appear in clauses 7, 8, 11, which deals with the military cooperation issues that have been discussed, and clause 12, which deals with things like permitted research and training.

The offences themselves are consistent, in terms of the formulation of the offence and the punishment, with the Anti-Personnel Mines Convention Implementation Act. The same punishment applies. There are five-year maximum sentences, and they're hybrid offences that can be prosecuted on either summary procedure or on indictment, depending on the facts. That's a decision for the crown.

There are some additional jurisdictional rules in the bill. As with any Canadian offence, the offence proposed in the legislation will apply if it or any part of it takes place in Canada. If an offence happens in several places at once, if any one part of it is in Canada, then Canadian law applies and Canadian courts have jurisdiction. They also apply automatically to Canadians employed outside Canada as public servants under the Public Service Employment Act or as non-commissioned officers and attached civilians for the Canadian Forces under the National Defence Act Code of Service Discipline. That extraterritorial application happens automatically and it's not in the bill. But in order to make the exclusions in the bill match the automatic extension of jurisdiction under existing law, clause 11 of the bill extends the permitted exclusions on the same basis. You will find those references in clause 11 of the bill.

In ordinary Canadian criminal law, liability for conduct such as aiding and abetting other offences is also automatically addressed in the Criminal Code. If you enact an offence in another bill, the aiding and abetting—counselling, conspiracy, and so on—in the Criminal Code automatically applies under the Interpretation Act. But normally in Canadian law, the principle that applies is that what is—if I could use the example—aided and abetted has to actually be an offence. That means if someone is charged in Canada with aiding and abetting something in another country that's not an offence in that other country, it would not normally be a Canadian offence either.

● (1615)

The treaty asks us to go further than that, and the result is the last half of clause 6, which essentially excludes the application of the Criminal Code provisions and replaces them with specific enactments for aiding and abetting, counselling, conspiracy, attempting, and being an accessory after the fact. That means that if a transnational scenario happens in Canada, there will be a completed offence in Canada that can be prosecuted here.

In other words, in plain language, if I were to aid in Canada somebody in another country who was, for example, making cluster munitions, the Canadian offence is aiding in making cluster munitions, and I could be prosecuted for it here in Canada. The offence is complete. There is no jurisdictional extension necessary to make that happen.

In closing, I want to underscore one general observation that my colleague from foreign affairs has made about the overall scope. It's important to bear in mind that this is a criminal law bill. It implements only the small part of the convention that requires the use of criminal law to implement. The offence provisions are worded so that they have the general application that I just mentioned—they apply equally to everybody within Canadian jurisdiction. But the exclusions are much more narrowly crafted, as my colleague from foreign affairs pointed out.

The exclusions in clause 11, which deals with the permitted forms of military cooperation, apply only to Canadian officials and military personnel who are actually engaging in military cooperation, and that military cooperation has to involve at least one other state that's not a party to the convention. What that means is that as more and more countries ratify the convention, the scope of the exclusion will narrow until it closes completely. When that happens, most of what is now in clause 11 of the bill will become moot, and the only exclusions will then be in clause 12, which deals with defensive research and training peacekeepers and that sort of thing.

Thank you, Mr. Chairman.

● (1620)

The Chair: Thank you, Mr. Ram.

We're going to start our first round, which will be seven minutes of questions and answers. We're going to start with the opposition, Madam Laverdière, for seven minutes.

I understand you are going to split your time with Ms. Liu.

Ms. Hélène Laverdière (Laurier—Sainte-Marie, NDP): Yes, thank you, Mr. Chair.

I'll start with a question on the last comment that has been made, that clause 11 would become moot as more and more parties sign the convention. Should we understand here from the witnesses that it is expected that some of our allies, such as the U.S.A., Turkey, and Poland, will sign and ratify the convention shortly?

Ms. Sabine Nolke: We cannot, of course, comment on the policy intention of other states. This is a prospective provision, and we're not in a position to make a prediction as to the speed of that narrowing at this time. Generally, the ambit of humanitarian law conventions is ratification by the maximum number of states.

[*Translation*]

Ms. Hélène Laverdière: Thank you for those clarifications. I think that, in this context, it would be a good idea to consider clause 11 as a somewhat permanent provision.

I will discuss that clause. In a legal analysis by Virgil Wiebe, a law professor at University of St. Thomas, the following is stated:

> The clause would allow for Canadian personnel, in some situations, to call in cluster munitions strikes while commanding other forces or to request cluster munitions in defensive situations [...]

Do you agree with that statement?

[*English*]

Ms. Sabine Nolke: My colleague from the office of the judge advocate general will take that question.

LCol Chris Penny (Directorate of International and Operational Law, Office of the Judge Advocate General, Department of National Defence): If I understood the question correctly, it's looking at whether paragraph 11(1)(a) would authorize a member of the Canadian Forces to direct or authorize these cluster munitions. Yes, that is correct on the basis that the convention itself would allow for that because ultimately the policy decision to use cluster munitions in that circumstance would be a policy decision of a state that is not a party to the Convention on Cluster Munitions.

● (1625)

The Chair: Mr. Ram.

Mr. Christopher Ram: I was just going to add that, again bearing in mind the criminal law nature of the bill, the legislation doesn't permit anything. It just defines certain pieces of hardware. It creates some offences and then it specifies when those offences don't apply.

LCol Chris Penny: As a follow-up to that, I would note—and this is something that was stressed already—there is nothing in this legislation that would allow a member of the Canadian Forces or anyone else to violate existing legal obligations. This does not change in any way Canada's obligations under the Law of Armed Conflict, nor does it change in any way any other domestic legislation that would relate to a person in a command position like that, so there certainly would be no legal authority to authorize an indiscriminate attack using cluster munitions or any other munitions.

Ms. Hélène Laverdière: I'll pass for the time being because I know there are just a few minutes left. I'll come back to this issue. I'll pass to my colleague here.

[*Translation*]

Ms. Laurin Liu (Rivière-des-Mille-Îles, NDP): Thank you, Mr. Chair.

The convention's preamble states that a state party should never assist anyone to engage in a prohibited activity and should discourage the use of cluster munitions.

We have already heard witnesses in the Senate and stakeholders say that Bill S-10 did not specify that the prohibition to assist applied to direct and indirect investments in the production of cluster munitions and their components.

Although 25 countries—including the United Kingdom, Australia, New Zealand and France—have adopted a position whereby investment in the production of cluster munitions is seen as a type of assistance prohibited by the convention, Canada does not seem willing to follow suit.

Could you comment on this government's position? Should that matter be clarified in Bill C-6?

[*English*]

Ms. Sabine Nolke: Concerning the position on investment, in Canadian law that would be subsumed in the aiding and abetting provision.

I will let my colleague from the Department of Justice explain that a bit further.

Mr. Christopher Ram: The first thing regarding investment is that the convention itself doesn't require states parties to criminalize investment and a number of states parties probably would have had concerns if that had been suggested in the negotiation.

“Investment” is not a term that is all that well known to criminal law, and using it in a defence would have posed a great deal of drafting difficulties and potential over-breadth. In Canada there are also federal-provincial divisions of powers issues that would have had to be dealt with.

What has been done instead is to incorporate the law of aiding, abetting, and counselling in clause 6 of the bill. What that means in practical terms is if someone in Canada invests in a company either in Canada—a company in Canada would be prohibited from doing this anyway, but if someone invests in a company outside of Canada that is engaging in prohibited conduct, a question of remoteness would arise. If someone's pension plan has a few shares in a company that does a lot of things, that possibly makes cluster munitions, then criminal liability doesn't attach. If it is close enough that it constitutes aiding and abetting, that it meets the case law for aiding and abetting, then it would.

The Chair: That's all the time, but we'll be back for another round.

Thank you very much, Ms. Liu.

We'll move to the government side, to Mr. Anderson, for seven minutes, please.

Mr. David Anderson (Cypress Hills—Grasslands, CPC): Thank you, Mr. Chair.

I think it's clear to all of us that we're long past the time when we should be prohibiting the production and use of these munitions and encouraging their development and use. From the little I know about them, they seem to be disgusting because of their indiscriminate application. They seem to be devastating to non-military populations. They are appalling because of their long-term impacts on civilian populations.

When this is implemented, will the Government of Canada be supporting the use of cluster munitions in any way?

Ms. Sabine Nolke: No.

Mr. David Anderson: What does it ban besides production and use? Can you run through it again just to remind us of the things this bans in terms of aspects of cluster munitions?

● (1630)

Ms. Sabine Nolke: As I indicated in my statement, it bans the use, production, stockpiling, and transfer of cluster munitions. That's what the convention does. Specifically, it bans cluster munitions themselves, it sets deadlines for the destruction of stockpiles and clearance of contaminated areas, it assists victims, and it provides for international cooperation.

With regard to the specific elements of the provisions of Bill C-6 and how they implement that into Canadian domestic law, I'll pass the floor to my colleague from the Department of Justice.

Mr. Christopher Ram: Thank you, Mr. Chairman. I'll be quick.

The *actus reus* of the offences that would be created if this were enacted would be using a cluster munition; developing, making, acquiring, possessing a cluster munition; and moving a cluster munition—"moving" is the transposed version of transfer—and importing and exporting. So if you move it into or out of Canada, it's covered by the import-export offence. It you cause it, from within Canada, to be moved from one place to another outside of Canada, then it's covered by moving.

In addition, as I mentioned earlier, it's attempting to commit—aiding, abetting, counselling, or conspiring to commit. In paragraph 6(h), where it says "receive, comfort or assist", that is the language of the Criminal Code for being an accessory after the fact. It means helping the offender to hide evidence or escape justice.

Those are the criminal offences.

Thank you, Mr. Chair.

Ms. Sabine Nolke: It is important to note that the bill does not necessarily use the same words as the convention. That does not mean that Canada is not implementing the convention. We are implementing the objective and intent of the convention with language that is common to the Canadian Criminal Code and that will be understood by Canadian courts.

Mr. David Anderson: The intent of that convention is to ban all aspects of cluster munitions, is that correct?

Ms. Sabine Nolke: That's correct.

Mr. David Anderson: Okay.

We talked a little bit about exemptions. Do the exemptions we've spoken about constitute an exemption to any other offence? You talked about how they apply, but I'm just wondering if they allow an exemption to any other offence.

Ms. Sabine Nolke: No. The exemptions are very specific to the offences created by the bill. Any other offence....

For example, as my colleagues have indicated, indiscriminate use of cluster munitions would fall under the provisions of the Crimes Against Humanity and War Crimes Act concerning the indiscriminate use of any weapon of war. Those offences still remain. This act does not exempt anyone from the provisions of existing Canadian criminal law.

Mr. David Anderson: Do the exemptions provided in the legislation in any way amount to an authorization for Canadian Forces to use cluster munitions?

Ms. Sabine Nolke: No.

Mr. David Anderson: Okay.

I want to ask you one other thing. You talked a bit about how things are written and drafted; I think somebody brought up Australia.

Can you explain to me why we have some drafting differences from other countries? Perhaps you can take some time to explain that to us.

Ms. Sabine Nolke: I certainly can.

Obviously I cannot comment in detail on the legislation provided for other states. I'm simply not an expert in Australian or British law.

The intent to provide these exemptions is the same by all the states that have created legislation that provides for exemptions. When the convention was negotiated, a number of states required, in order to be able to ultimately sign the convention, the interoperability clause that includes exemptions. The states that include this are some of Canada's closest allies. I have the list here: Australia, the Czech Republic, Denmark, Finland, France, Germany, Italy, Netherlands, Sweden, Switzerland, and the United Kingdom.

All of these states have different ways, different legislative approaches, in terms of how they implement provisions of treaty in their domestic law. In Germany, for example, when they ratify a treaty it becomes automatically part of German law. They have to take no other steps. The United Kingdom, Australia, and Canada have different legal systems. We require domestic legislation.

We do, however, take different approaches to legislative drafting. In Canada we like to be as specific as possible. In the United Kingdom they take a slightly looser approach to legislation, leaving more of the interpretation to the courts. It's a question of approach and it's a question of legislative drafting policy.

In Canada we prefer to be precise. The bill that is before you today we believe satisfies exactly what the convention requires and permits us to do. It will assist Canadian courts in implementing and applying those provisions properly.

● (1635)

The Chair: David, you have less than a minute. Please make it a quick question.

Mr. David Anderson: In terms of the exception, do you expect that it will apply in some fairly common circumstances, or is it going to be applied extremely rarely?

Ms. Sabine Nolke: Since that is a question that deals with operations of the Canadian Forces, I will defer to my colleagues from National Defence to answer that.

As we evaluated the provisions of the convention and turned towards implementation, our assessment was that those exceptions would be relatively rarely applied.

I'll leave that to my colleague.

BGen Charles Lamarre: Thank you very much.

I'll start and then turn it over to Lieutenant-Colonel Penny as well.

There would be rare occasions. Whenever we get involved in operations, we tend to indicate right up front any limitations that there may be. This is common practice when you're dealing with a coalition to do specific operations. All of the nations come with their own exceptions on specific aspects of how they will conduct their business. That is of course respected by all the nations that form the coalition.

If we have any restrictions, either by law or by decisions that are made by the government, then at that time we communicate those clearly. We find it does not affect our interoperability with those nations.

The Chair: Sorry, that's all the time we have. We'll have to pick it up in the next round.

Thank you very much.

Mr. Garneau, you have seven minutes.

Mr. Marc Garneau (Westmount—Ville-Marie, Lib.): Thank you, Mr. Chair.

I'd like to ask my question to both foreign affairs and DND, if I may, and get an answer from them.

As they say about pregnancy, you're either pregnant or you're not. You're not half-pregnant. In the same way we are either supporters of the convention, which is to ban cluster munitions, or we are not. I don't think there is any in-between.

I'm going to focus on clause 11. For me, clause 11 is logically and morally problematic. One interpretation of it is that it allows the Canadian Forces to advocate and even order cluster munitions-related activities when on joint military operations with states that have not signed the convention. If we allow this bill to pass as it is without amending clause 11—and it's not sufficient to say there are only going to be rare instances where we might have to invoke those exceptions—then I think we're sending our soldiers mixed messages and putting them in a difficult position where they might propose the use of a weapon that is otherwise banned by Canada.

I'd like to hear your views on that, please.

Ms. Sabine Nolke: The convention as a whole includes the interoperability clause.

The convention was negotiated very much with states' requirements for security cooperation with non-state parties in mind. That was a starting point of the negotiations.

Canada and a number of other states made their position on that particular point very clear from the beginning. It was very clearly understood that there would be instances when interoperability might require members of the Canadian Forces, or of the forces of other states, to participate in the use of munitions in specific limited circumstances.

In terms of the mixed messages, the messages are very clear. The exemptions are extremely specific, very narrow, and they are further narrowed by the directive that my colleague from National Defence indicated will be put in place.

For this particular convention to have the maximum signatories and maximum participation, needed to pass at the international community level, that particular clause was required. It was an important compromise without which many states would not have been able to sign it at all. It is an important substantive element of the convention itself.

I pass the floor to my colleague from National Defence.

BGen Charles Lamarre: Thank you very much.

On that aspect of things, as we indicated in the opening statement, the CDS has banned the use of cluster munitions with the directive that was issued in 2008. Since then and before that, we have never used the cluster munitions.

One of the things we go to great pains to make sure of is that there is no ambiguity for the soldiers as they begin to take part in activities. To that end, the orders that are issued by the chief of the defence staff include any constraints or limitations on what they can do. The rules of engagement that are issued also give any further direction that may be required for the application of force, again with any constraints or limitations.

All of this process we go through is, of course, scrutinized by the judge advocate general to ensure we are respecting Canadian laws in our application.

● (1640)

Mr. Marc Garneau: Effectively, if I understood your answers, because interoperability is specifically mentioned in the convention, what you are saying is that although Canada abhors the use of cluster munitions, if it happens to be involved in joint operations with a country that does not ban cluster munitions and a Canadian is involved in a joint team where he or she is involved with the decision-making process, it is conceivable that they may condone the use of cluster munitions as part of these joint operations.

Ms. Sabine Nolke: As my colleagues explained earlier, and I believe it was General Lamarre in his statement, the important point here is at which point in the decision-making process the decision is taken. If a state policy decision is to use cluster munitions then that is not the decision of the Canadian member. That is where the distinction lies.

I think maybe Lieutenant-Colonel Penny could elaborate on that point.

LCol Chris Penny: I could begin with a general comment that goes back to the integral nature of article 21, to the overall fabric of the convention itself. It is not an exception to the convention, it is part of it. So when one looks at article 1 and its reference—and this goes back to an earlier question—to never under any circumstances engage in particular activities, that must be read as never under any circumstances except those permitted by the convention itself.

Mr. Marc Garneau: Excuse me, I only have a limited amount of time. If it is a joint operation quite often a joint staff makes decisions. A Canadian may be in that loop. Is that Canadian going to say we cannot use cluster munitions to achieve the following aim because my country does not approve of cluster munitions?

LCol Chris Penny: That Canadian himself would not be permitted to use cluster munitions.

Mr. Marc Garneau: But they are part of a joint staff and they may be in the decision-making chain—

LCol Chris Penny: That's right.

Mr. Marc Garneau: —and therefore they will not have the choice but to fall one way or the other.

LCol Chris Penny: That's correct. That's why during the negotiations Canada used the very scenario of an officer in a multinational headquarters as an example of why we needed article 21. That individual would, but for article 21 and but for clause 11 of the legislation, be put in—

Mr. Marc Garneau: That's just to protect that individual. It is not to make a decision about whether Canada will be part of a joint operation where cluster munitions are used.

LCol Chris Penny: That's correct. But as my colleague indicated in her opening presentation, the obligation to discourage use of cluster munitions by other states is and was intended to be undertaken at the diplomatic level. It was not intended that this burden be placed on individual soldiers in an operational or tactical setting.

The Chair: Thank you very much. That's all the time we have.

We're going to start our second round of five minutes for each intervention. We'll start with Ms. Brown.

Ms. Lois Brown (Newmarket—Aurora, CPC): Thank you very much, Mr. Chair.

Thanks so much for being here.

I have two questions. The first one is if we didn't have that interoperability clause what would happen? Maybe one of you can speak to that.

My other question is for Ms. Nolke. In your opening remarks you were speaking about what Canada is doing to assist other countries in getting rid of their cluster munitions. You talked about money that's been given to Mines Action projects, money that's been given to Laos. Can you tell us where we are in that process? What countries are we working in? How effective are we being?

● (1645)

Ms. Sabine Nolke: With regard to the first question, as I believe we have already indicated, without the interoperability clause, article 21, Canada would not have been in a position to sign or ratify the convention. The reason for that is simple. We have an extensive security cooperation with the United States, which is not a state party and may not become a state party for some time. Our security interests balance our interests in that particular regard. So we and 11 other states would not have been able to become a party to this convention.

Ms. Lois Brown: As a clarification, would that mean that we would not be able to enter any cooperative project with the United States army if that weren't there?

Ms. Sabine Nolke: Not “any”, but certainly—and again, on that particular question I should really defer to my colleagues in uniform—operations like the ones in Kosovo, Afghanistan, and most recently Libya. For any operation that involves bombing, I think that would certainly be the case.

But I'll defer to General Lamarre.

BGen Charles Lamarre: That would be exactly it. Whenever we're going off to conduct operations, most of the time they are multinational, coalition-based operations. And of course, with having non-state parties on that thing, they tend to also carry quite a bit of weight, particularly the United States, but they're not the only ones.

As we saw with other nations' also saying you need to have this interoperability clause, everybody's concerned about being able to continue with coalition operations. It facilitates things, it's logical, and like-minded people are connecting toward the same end states, if you will. So not having that ability would cause us some concerns.

Chris, can you add to this?

LCol Chris Penny: I would note on that basis that it's certainly important to stress that the likelihood in most scenarios of a Canadian armed forces member being involved in the authorization of use or calling in the use of cluster munitions would be rare. In my understanding, it did not occur in Afghanistan, for example.

There are other activities that would be seen as potentially assisting or encouraging use by another state that would be much more mundane and certainly more likely. Again, this is why during the negotiations Canada highlighted a variety of activities in conjunction with many other states where that prohibition on assistance might arise. Providing intelligence to another state, intelligence sharing, being involved in a multinational headquarters, participating in logistics chains, all inherent parts of multinational operations, could be seen in some circumstances as assisting those other states in the use of cluster munitions. So those would all be implicated.

Ms. Lois Brown: I know we're not getting to the second question, but I have another question then.

Does that mean that when we go to the United Nations and ask the United Nations to make a recommendation on a military action in a country, even though we are part of the United Nations, we would not be able to act with our partners to participate in a military action if we didn't have this interoperability clause here?

Ms. Sabine Nolke: That depends on the nature of the operation.

Ms. Lois Brown: Of course.

Ms. Sabine Nolke: The way the United Nations works at the Security Council is that it authorizes the use of force in a specific situation and then invites or encourages member states to participate. Then participation by such states is on a voluntary basis. Then, of course, we can assess the nature of the cooperation, the nature of the operation, whether we wish to participate, and in what manner.

Ms. Lois Brown: But we would not be able to if that interoperability clause were not there, because we wouldn't be able to put any of our forces—

The Chair: That's all the time.

Ms. Sabine Nolke: Yes, if the operation is of such nature that there might be a possible use, then that would be correct.

The Chair: Thank you very much, Ms. Brown.

We're going to continue with Madam Laverdière, for five minutes, please.

Ms. Hélène Laverdière: Thank you, Mr. Chair.

Maybe just as a note, we should still remember that in the case of the land mines treaty, we have been able to achieve a treaty without loopholes and still work with our partners who have not signed and ratified the treaty. So I think we should handle that with care.

Personally, I don't think it's as simple as saying that if we didn't have an interoperability clause we wouldn't be able to work with others anymore, because we have contrary examples of that. That being said, we do have article 21. Article 21 per se is not so much of a problem....

Before I get to that, I would just like to come back to a comment by Lieutenant-Colonel Penny that when we read article 1, we have to read it with article 21 in mind. From my brief diplomatic experience and my limited understanding of international treaties, in fact article 1 is kind of always the supreme article. It's the one that states the objectives. It's the other articles that have to be read keeping the first one in mind. So I would rather reverse your proposal and say that article 21 should be read keeping in mind article 1.

In this respect, our understanding, and the understanding of many experts, is that article 21 is intended to allow personnel to operate alongside personnel from countries that may use cluster munitions, but article 21 does not allow forces themselves to expressly order or participate in the use of the munitions.

I would like you to identify whether any of our allies—I'm thinking of Great Britain, for example—would allow one of its commanders of a multinational force to authorize or order the use of cluster munitions by non-party states. Have any of our allies gone so far in their interpretation of article 21?

● (1650)

BGen Charles Lamarre: What I can do is indicate how the coalition is working, how we just in recent operations had involvement from other nations as well.

Ms. Hélène Laverdière: If you don't mind, since we have such a short time here, I think my point is that....

[*Translation*]

My question was more about the interpretation made by various countries—our allies—of article 21 in their own legislation.

Do any other countries have laws that also allow their senior military personnel to authorize or even order the use of cluster munitions by countries not party to the convention.

[*English*]

Ms. Sabine Nolke: Before I give the floor to my colleague from the Department of Justice, I will comment on the note you made, Madam Laverdière, on the role of article 1 versus the remainder of the convention.

Yes, the first article of a convention tends to set out the scope of the convention, but each provision is equally legally binding. The treaty has to be read as a coherent whole. The adage in diplomatic circles, as I'm sure you remember, is that nothing is agreed until everything is agreed. The entire thing comes as a package.

I'll give the floor to my colleague from the Department of Justice.

The Chair: You have about 40 seconds.

Mr. Christopher Ram: I'll be very brief, Mr. Chairman.

I would just point out that the critical article for the purposes of the bill is actually article 9 of the convention, which is the obligation to implement some of what's in the convention using the criminal law. All that's in the bill is what Canadian officials, Canadian Forces members and so on, could be prosecuted and punished for. It doesn't speak to the general implementation of the convention by Canada.

I think that's very important to bear in mind.

The Chair: Thank you. That's all the time we have. We'll have to pick up any further follow-up in the next round.

Mr. Allen, the last question of this round goes to you. You have five minutes, sir.

Mr. Mike Allen (Tobique—Mactaquac, CPC): Thank you, Chair.

Thank you to our witnesses for being here today.

I'd just like to follow up on the some of the questioning with respect to how this actually works in the field. I'm just a lowly bean-counter. I'm not a lawyer, so I want to try to understand how this might actually work in the field.

Ms. Nolke, you said it's a state's policy decision on the use of these cluster munitions.

If we have a Canadian in charge of a specific effort, a multinational force, for example, which has non-party states in it, how does that work? If one of those non-party states happens to use cluster munitions in the course of its operations, how does our chief handle that? In addition to some of the operational practices you just talked about, are there ways we can influence that as head of such operations? Can we actually stop those states from using them?

● (1655)

BGen Charles Lamarre: First of all, in terms of the actual operational aspect, certainly a Canadian might be in charge, but then it comes down again to the policies enacted from the non-party state for what they're using. When we are giving directions as to what we want to achieve, we are always giving very clear directions and we give our rules of engagement. Every nation also issues rules of engagement to which its members will adhere.

When a commander is giving out instructions for how something is to occur, he or she will often speak in terms of effect. So if you were out there and you were commanding a large land force, if you will, you might ask an American or a British ally, or whoever, who is part of the coalition, to provide you with a blocking function on the left flank so you can conduct operations. How they will conduct that blocking function will become their business and really, it is done, and so they will continue to go ahead with their own rules and regulations on that. That's the best way I can describe that.

Over to you, Chris.

LCol Chris Penny: I don't have much to add to that, except to note that there is a provision in both the convention and Bill C-6 that would prevent a Canadian in that position from expressly requesting the use of cluster munitions, should the choice of munitions used be within the exclusive control of the Canadian armed forces. The circumstances that may arise, and would more often arise, in a multinational operation would be that Canada would not have exclusive control over the choice of munitions used by other states because their choice of munitions is made as a sovereign decision of theirs, and they are participating in that operation as an ally.

So there are certainly circumstances where, if a Canadian had exclusive control over these, he or she would be prohibited from it, and Canadians would be prohibited themselves from using cluster munitions in any event because those are policy decisions clearly within the exclusive control of Canada.

Mr. Mike Allen: Given that, what are some of the other countries doing? Are you aware of other countries that might be signatories and actually are party states that might be working with non-party states? How have they tried to deal with this, to implement the convention?

LCol Chris Penny: I wouldn't be comfortable speaking on other states' legislation, but I can point back to the negotiations themselves, where Canada was certainly not alone in highlighting the various scenarios in which interoperability was a legitimate and important function to protect in the context of the convention itself. Again, those positions are on record throughout the negotiations, including the scenario of a multinational combined headquarters.

Mr. Mike Allen: Ms. Nolke, in your comments, you talked about this. There's a line in there and sometimes words are important: it says, “Other provisions are carried out by other means and not necessarily through legislative mechanisms”, and I recognize that as part of this we're trying to get to the criminal aspect of this and trying to get this into Canadian law. But how are we implementing other aspects of this convention? Are there other ways we're trying to do this?

The Chair: Ms. Nolke, please be very quick, because we're almost out of time.

Ms. Sabine Nolke: Yes. For example, the advocacy on behalf of the implementation ratification of the convention and the reduction or elimination of use of the munitions, that was done through diplomatic channels. We provide programming—Ms. Brown, to your question—that allows states to destroy their stockpiles, to remove explosive remnants of war including cluster munitions.

So those are the provisions that call, for example, for technical assistance. We implement those through existing means and structures, but they don't require legislation.

● (1700)

The Chair: Thank you very much.

We're going to start a third round.

We're going to start with Mr. Goldring, please, for five minutes.

Mr. Peter Goldring (Edmonton East, CPC): Thank you very much.

My first question deals with the information from the library, I suppose, which alludes to the “constitutional requirements” for the implementation of this treaty. What section of the Constitution of Canada would be impacted by that, or where would there be a call for that?

Mr. Christopher Ram: I wouldn't describe it, I don't think, as a constitutional requirement per se, but if Canada as a state enters into an agreement in international law and agrees to ratify a treaty, it would presume on the supremacy of Parliament to do that if it required legislation. Canada would not ratify a treaty before the necessary criminal offences—in this case—that we're required to adopt are in place. It would presume on Parliament.

I'm not sure that I would describe that as a constitutional problem. It almost would be more of an international law problem, in the sense that Canada would not be in conformity with its legal obligations under the treaty if Parliament then decided not to enact the legislation necessary to complete the implementation package—if that answers the question.

Mr. Peter Goldring: Yes.

With the breakup of the Soviet Union.... Understandably, the United States and Soviet Union would have been making them, but with the breakup, these countries are now munitions manufacturers as well. What other countries around the world are manufacturing these? Have all of those countries signed on to ratify the agreement?

For munitions manufacturers, obviously it would take a high degree of advanced technology and a very technical delivery system, so there would be a limited number of countries that do manufacture them, but are there other countries that manufacture munitions and are impacted by this?

Ms. Sabine Nolke: Yes. I have a list of countries that manufacture cluster munitions: Brazil, China, Egypt, Greece, India, Iran, Israel, North Korea, South Korea, Pakistan, Poland, Romania, Russia, Singapore, Slovakia, Turkey, and the United States.

I haven't done a side-by-side reading to determine whether or not any of those states have signed or ratified the convention. I believe they have not, but I may be wrong. Certainly, if some of those states have moved to the side of the convention, then we'd be able to provide you that information in writing, if that is acceptable.

Mr. Peter Goldring: I had no idea that they were that broadly manufactured.

Ms. Sabine Nolke: Yes. There are 17 of them.

Mr. Peter Goldring: That is a real concern.

On the interoperability of it, and seeing that Australia has excluded that in their clause agreement, do you have a scenario where Canada is in a theatre and involved with one of these countries that manufactures them and that may have them in the theatre? Would this be a reason for Canada to decline the command of the theatre operations based on the fact that one of the participants is not a signatory to this agreement? Would it change or alter the structure of the command decision made by the Canadians to be involved as the command?

BGen Charles Lamarre: If I may respond on that one, first of all, every single decision for us to assume command is usually directed from government to us. It's not something that we undertake on our own. We get a political decision to go ahead, but it's after careful consideration of all the aspects, including who is participating and who is partaking.

For example, in a case where we have the United States that is not a party to this thing, would we consider that if it were something that met with Canada's objectives? Yes, we would. But in the case of other operations with other non-signatories, depending on who they are, it would be on a case-by-case basis.

Mr. Peter Goldring: Right, and if you were in an emergency situation in a theatre, knowing that one of the parties was the manufacturer and had the delivery system for it, do I understand that it would be permissible for that other party to call down munitions like this into the theatre?

The Chair: General, there is just about 30 seconds left.

BGen Charles Lamarre: Okay. I'll use a specific example to answer that.

If by chance you are working with allies in a place like Afghanistan and you happen to be out in a forward position being attacked, and the only air assets you have happen to be American air assets equipped with cluster munitions, your knowledge is not of what is going to be dropped on you at that point. But certainly you're going to call on the assets that are in the air and are specifically there to assist you.

If they're coming in and they drop a load of ordnance to provide some defence for you, it may well be cluster munitions or it might be high explosives. You're not in a position where you will provide direction at that time on the load of munitions, but you will have a call upon it.

● (1705)

The Chair: Thank you.

very briefly.

LCol Chris Penny: The legal challenge there is that although the policy decision to arm those aircraft with cluster munitions would be that of another state, once that aircraft shows up the pilot would likely be in communication with the individual on the ground and would be given the choice to authorize the strike or receive no strike. Therefore, that would invariably be seen as potentially assisting or encouraging or inducing the use of cluster munitions. That is one of the scenarios we used in negotiations as a rationale for article 21. That is why you see that protected in clause 11 as well.

The Chair: Madame Laverdière, you have five minutes, please.

Ms. Hélène Laverdière: Thank you very much, Mr. Chair.

I would like to come back to my previous question and I welcome your comments, Lieutenant-Colonel, on article 21. But what I want to focus on is not article 21, as the mandate of this committee is not to study the convention but to study the law implementing the convention, so I'm going to repeat my question. Among our main allies, can you identify any other state party or signatory that would allow one of its commanders in a multinational force to authorize or order the use of cluster munitions by a non-party state?

LCol Chris Penny: Again, I can't comment on the legislation or the policy decisions of other states to restrict their reliance on article 21. I can simply say that the convention itself permits that and that the permissions—again, not permissions of specific acts and specific scenarios but the protections from criminal liability—do exist in this context because the convention allows that.

Ms. Hélène Laverdière: I think we all know the issue here is that many experts and analysts—everybody, in fact—quite a few people argue that the interpretation of article 21 in this bill goes far beyond the intent of the article itself.

[*Translation*]

I would like to suggest the following. It would be worthwhile for our committee analysts to draw up with a table—at least a comparative one—of the provisions for the implementation of article 21, both from Canada and from some of our key allies. I am thinking of Great Britain and others. It would be useful to have such a table for the information of the committee members.

[*English*]

I have another very brief question; I'm just curious. We heard this afternoon about the indiscriminate use of cluster munitions. I seem to have heard it often. What would be a discriminate use of cluster munitions?

Ms. Sabine Nolke: Essentially, the law on conflict distinguishes between the means and methods of warfare. Obviously, my colleague from the judge advocate general's office would be more qualified to comment on that than I am, but discriminate use is legitimate use targeting a valid, legitimate military objective within the law on conflict.

LCol Chris Penny: That is correct, and the reference to indiscriminate attacks comes from Protocol I additional to the Geneva Conventions, and is as well part of customary international humanitarian law.

I think on this point more broadly, it is important to note that there are scores of different types of cluster munitions that vary by number of submunitions and the safeguards they have, and Canada has certainly stressed throughout negotiations that, as a class of munition, they are prone to indiscriminate effect, which is why the Canadian armed forces has committed not to use them. Our other allies have not necessarily made that policy choice, and again, any of the interoperability provisions here would only support working with those states in the context of discriminate attacks, and again, that will depend on the type of munitions that are used by those states.

The key thing to keep in mind, as well, is that this is a forward-looking convention and forward-looking legislation. Different states are moving towards ensuring the humanitarian nature of their weapons systems, if you will, but that doesn't necessarily bring them into compliance with the technical requirements of the Convention on Cluster Munitions. They may well be capable of use in a discriminate way but not meet those technical standards in future.

● (1710)

The Chair: Thank you, Colonel Penny.

We are going to finish up with Gary Schellenberger.

You have the last intervention, sir, of five minutes.

Mr. Gary Schellenberger (Perth—Wellington, CPC): Thank you, Chair.

Thank you very much for being here.

In the one presentation, General Lamarre, I think you said we have never used cluster munitions in any of our Canadian armed forces-led operations, and we are in process of destroying our remaining stockpiles.

If we've never used them, why do we have them?

BGen Charles Lamarre: At one point we thought it was a good idea. That's what it came down to, and so stocks were purchased. As a matter of fact, a significant amount of munitions were used, but as folks examined this, they decided not to employ them in any operations.

There was also a lack of operations, if you remember, during the Cold War. It wasn't as though we were lobbing a lot of things, but as time progressed and as we got closer and these discussions started to take place for the banning of cluster munitions, it was clear that was the way Canada was going. That is why the CDS in 2008 gave the order not to use them, to take them out of commission, and that's exactly what has taken place.

Now we are actually working with PWGSC to find contractors to conduct and finalize the destruction of these munitions that we have in our stocks.

Mr. Gary Schellenberger: Does this legislation allow transit of cluster munitions through Canada's territory?

BGen Charles Lamarre: I will take a first stab, and then I'm sure I'll be able to get a legal mind to help me out on that one as well, but the answer is yes.

For example, you may have an American aircraft that is transiting over top of Canada to go to a theatre of operation, flying over the North Pole or whatever the case may be. Any regulations right there really are nested in the Transport of Dangerous Goods Act. That is really why we have any sort of act that overlooks that and has to do with the safety of anything that is being carried, should there be a crash or any exposure to Canadians to that kind of material.

LCol Chris Penny: If I can add to that, the legislation does not prohibit transit because the convention itself does not prohibit transit. However, the legislation does not detract in any way from all of the applicable Canadian legislation that would apply to the transit of munitions through our territory.

Mr. Gary Schellenberger: Does this legislation allow for the import of cluster munitions from another country for the purposes of destruction, or where do we send our munitions to be destroyed?

LCol Chris Penny: Yes, it does. It allows for the importation of cluster munitions for the purpose of destruction.

My understanding is that there are no current facilities in Canada that would be interested in pursuing that, but the convention permits that, and so the legislation has been drafted to permit that.

The contracting process for Canadian armed forces munitions is still in process, but it would likely take place outside of Canada.

Mr. Christopher Ram: I would just add very quickly that the legislation also has a delegated authority. I believe it's for Governor in Council to make regulations in the event that it does happen, so it doesn't have to go back to Parliament.

If a Canadian company decides to go into the business of dismantling and destroying cluster munitions, the legislation permits them to be imported for that purpose, and there's a regulatory framework. We won't make regulations until it becomes necessary, but if it becomes necessary, then the Government of Canada can make sure they are destroyed and so forth.

Mr. Gary Schellenberger: The way I understand it, it's in process to destroy our munitions, the munitions that we have. Is there any way to accelerate that?

● (1715)

Ms. Sabine Nolke: Well, bureaucratic requirements on contracting have been imposed, and those take their time, but we are moving as quickly as we can toward the destruction of these munitions.

LCol Chris Penny: I would stress, though, sir, that those munitions have been removed from operational stockpiles since 2007.

Mr. Gary Schellenberger: Okay. Thank you.

Thank you, sir.

The Chair: I believe Laurin has one quick question, so why don't we just finish up with Laurin.

Ms. Laurin Liu: Thanks again to our witnesses for coming in to testify before committee today.

I just want to go back to my previous question on investments in the production of cluster munitions. My question wasn't specifically about why Canada's legislation doesn't mimic that of the countries I named—Australia, New Zealand, France—but about if, seeing as 25 countries have adopted the position that investment in production of cluster munitions is a form of assistance prohibited by the convention, Canada has taken a look at adopting the same position.

Mr. Ram, from your response, I take it the answer is no, but if you'd like to clarify, that would be very interesting.

Mr. Christopher Ram: We certainly did take a look at it. Again, the convention doesn't require us to put investment, per se, into a criminal offence, which would have been very difficult.

The way it's crafted now, there are 120 years of case law concerning what constitutes aiding and abetting and counselling and so on, and what degree of remoteness can associate criminal liability under the charter and so forth. By invoking that, we already have a self-regulating framework, if I could say, under the criminal law to accomplish that objective.

At some point, if I buy a company—I didn't have time to go into this before—and move my Canadian cluster munitions factory offshore, and I go to a company in another country and say, "I will invest heavily in your company if you build a factory and make cluster munitions", then, if I'm participating in the activity from within Canada, I'm probably committing the offence of "making", because I'm in Canada.

If not, if I make an investment on the condition that they make cluster munitions, I would be abetting.

If I make it much easier for them to make cluster munitions, I would be aiding.

If I urge them to do it, I would be counselling.

As I said, there are Supreme Court cases where the line is drawn between that and the scenario where a mutual fund has a few shares in a company that may suddenly engage in cluster munitions activities. We're talking about parts and components of cluster munitions. The word "investment" could become extremely remote. It was regarded as preferable to use the law of aiding and abetting, which we already know will work.

Ms. Laurin Liu: Would it be possible to define "investment" as it's been done elsewhere? Or would that be the only issue?

Mr. Christopher Ram: Nothing is impossible, but if you framed a bill—and we didn't do detailed advice on this—with an offence that included "investment", you would have to do a federal-provincial analysis, for example, because property and civil rights are provincial concerns. The criminal law is a federal concern. So there would have to be an analysis there.

Parliament may criminalize things, but it may not regulate investment, or there is a limit on how far it can go. Again, I haven't done the research on that. There is that issue.

There is also the question of uncertainty under the charter. My professional colleagues on Bay Street in Toronto probably know what "investment" means, but I'm not sure a Canadian criminal court judge would know. It would be very difficult.

Ms. Hélène Laverdière: Mr. Chair, as a quick, quick follow-up—sorry about that—I'd like to clarify something.

Let's say a financial institution—I'm thinking about a bank or something—invests directly in a company that's producing, or lends money to a company that's producing, cluster munitions. Would that be aiding and abetting?

Mr. Christopher Ram: In a situation like that, it doesn't depend as much on what the company does as on what it knows and what it intends. It's the mental element, the *mens rea* of the crime. It doesn't matter if it's a company, an organization, or an individual, a person like you or me, in Canada; if you give someone money with the intention of helping them, or with the knowledge that it will help them, then generally criminal liability will attach.

I can't go much further than that, but that's the kind of consideration a Canadian criminal court would apply. I think the investment community will understand that. They will be able to get legal advice, which will guide them on what they can do and what they cannot do in financial management.

● (1720)

The Chair: Okay. I want to thank our witnesses today from DFATD, from defence, and from justice for being here. We appreciate that, and with that we're going to adjourn the meeting.

Thank you very much.

The meeting is adjourned.