HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

Standing Committee on Foreign Affairs and International Development

FAAE • NUMBER 008 • 2nd SESSION • 41st PARLIAMENT

EVIDENCE

Tuesday, December 10, 2013

Chair

Mr. Dean Allison

Standing Committee on Foreign Affairs and International Development

Tuesday, December 10, 2013

● (1540)

[*English*]

The Chair (Mr. Dean Allison (Niagara West—Glanbrook, CPC)): I want to thank everyone. Welcome back.

Orders of the day, pursuant to the orders of reference of Friday, October 25, Bill C-6, An Act to implement the Convention on Cluster Munitions.

I want to thank our guests. We are just keeping cards now, so we have a place for you back there.

Mr. Ram, Ms. Nolke, and Colonel Chris Penny, thank you for coming back.

Last week, we agreed to hold back on clause 11 and then come back to it.

Where we're at right now, if we just—

Mr. Marc Garneau (Westmount—Ville-Marie, Lib.): Mr. Chair, I have a point of order.

The Chair: Yes, go ahead, Mr. Garneau.

Mr. Marc Garneau: I realize that we looked at clause 6 last week. At the time, I suggested an amendment. It was known as LIB-2. It dealt with knowingly providing or investing funds to be used in the development of cluster munitions.

You'll remember that the expert witnesses raised the issue that the meaning of the word “investment” presented some legal difficulty. At the time, I asked about removing the word “invest”. In the end, we didn't vote on that.

I would seek the unanimous consent of this committee to consider a new amendment that removes the word “invest”, so that clause 6 (d.1) reads—

The Chair: Mr. Garneau, I was going to get to that. Just give me one second.

Mr. Marc Garneau: Oh. Yes, sir.

The Chair: We're going to stand clause 2, because we need to go back to LIB-3.

(Clause 2 allowed to stand)

The Chair: But Mr. Garneau's right. He wants to present a new clause 6, but he needs unanimous consent for that.

Why don't we just start with that? Does he have unanimous consent to bring forward a new clause 6—

A voice: To reopen.

The Chair: —to reopen it, because it's already been passed?

Mr. David Anderson (Cypress Hills—Grasslands, CPC): I had no awareness of this. So, no, he doesn't.

The Chair: Okay.

All right, there's no unanimous consent to reopen that, Mr. Garneau.

(On clause 11—*Exceptions— military cooperation or combined military operations*)

We're going to move on to LIB-3.

You withdrew it last time. Did you want to reintroduce anything? You withdrew it at the time.

Mr. Marc Garneau: We're going to proceed with it.

The Chair: You're going to proceed with—

Mr. Marc Garneau: Debate.

The Chair: We're working on clause 11.

Mr. Marc Garneau: Yes, I'm reintroducing it.

The Chair: So is LIB-3 still withdrawn? That's where we were.

Mr. Marc Garneau: Yes.

The Chair: Okay. All right, then. Go ahead.

Mr. Marc Garneau: I'm reintroducing the amendment that deals with clause 11.

The Chair: Correct.

Okay, do you want to speak to LIB-3, then?

Mr. Marc Garneau: Yes, I would, if I may. As you know, the amendment that we are proposing, amendment LIB-3, introduces the concept of active assistance. We've drawn, by the way, on the language for the landmines legislation in this amendment.

We in the Liberal Party have stated that our preferred policy would be for Canada to insist that cluster bombs not be used at all in multinational operations that Canada is a participant in. But we accept the fact that the Canadian Forces may end up working with other countries that do use cluster munitions. In these cases, we believe the appropriate policy is to inform our allies that Canada will not participate in the use of cluster munitions, while simultaneously protecting our soldiers. We understand the need to protect our soldiers from legal prosecution for working with other countries.

The words “active assistance”, we believe, accomplish this—this is one of our amendments—by making it clear that the Canadian Forces cannot knowingly or intentionally assist in the use of cluster munitions. But they are protected from prosecution should they unknowingly or unintentionally assist in the use of these munitions.

You'll recall that Minister Baird made it clear when he appeared at committee that Canada never wants to see Canadian Forces use cluster munitions. The government members of these committees have stated that they see clause 11 not as permission to use cluster munitions, but as protection for Canadian soldiers. So that's the intent, to protect Canadian soldiers, as opposed to giving them permission to use these weapons.

We believe that the wording of clause 11, as we propose it, is a better reflection of the government's own position on this issue. We don't want Canadians to use these cluster munitions, but we do want to protect them in combined operations with countries that may use them.

Thank you, Mr. Chair.

The Chair: Just before we have any discussion, I want to mention that a vote on this Liberal-3 motion applies to Liberal-1, as they are consequential. If the Liberal-3 motion is adopted, then the Green Party-5 and the NDP-1 cannot be put. If this Liberal-3 motion is struck down, it will also apply to the Liberal-1 amendment as well.

Mr. Marc Garneau: Thank you, Mr. Chair.

Perhaps for the benefit of everyone, because you refer to Liberal-1, it defines active assistance. For us:

> “active assistance” means, in respect of a person, the intention of the person to assist another person in a prohibited activity and the knowledge that that other person is engaged in such an activity.

The Chair: Thank you, Mr. Garneau.

Is there any discussion at all?

Go ahead, Mr. Anderson.

Mr. David Anderson: Mr. Chair, we're going to be suggesting an amendment later that we think deals with most of the problems that have been brought up with clause 11, so we'll be supporting that later, but we won't be supporting this.

The Chair: Okay.

If there is no other discussion, I'll just call the question on Liberal-3.

(Amendment negatived)

The Chair: Liberal-3 is defeated, which means that Liberal-1 is also defeated. We will still deal with that clause 2 later, as we move on.

We're going to move now to Green Party-5. I will get Ms. May to introduce that to us.

Ms. Elizabeth May (Saanich—Gulf Islands, GP): Thank you, Mr. Chair.

I do want to again thank the government members—it was Deepak Obhrai—for pointing out that clause 11 is so significant that it needed its own time for review.

I would hope that we could move towards the kind of solution that Canada eventually found our way to in the relation to land mines. I think it's important to remember that this isn't the first time that we've gone down this road of wanting to work in military operations in collaboration with countries that have not ratified an important international treaty.

In this case with cluster munitions, I don't know why we would put ourselves in a position of loopholes and compromises when we have a workable solution that we've already had in relation to the Ottawa treaty on land mines. This is simply to say that we can participate in cooperative military operations with a country that isn't party to the convention on cluster munitions as long as Canadians are not actively assisting.

What I've attempted to do with this amendment, Green Party-5, is amend the *chapeau* paragraph, subclause 11(1), and to replace what now exists as language that wouldn't prohibit a person who is covered by the National Defence Act, or the Public Service Employment Act from participation in combined military activity with a state that is not party to the convention.

I've replaced the language—I propose, I should say , Mr. Chair, I haven't been able to replace it yet. I await the miraculous event in which a Green Party amendment to a committee of which I'm not a member passes. It's going to be fantastic, You all will be remembered when the movie comes out, Mike.

Anyway, here we go. This is the key language, the last clause of my amendment. It would replace the language with:

> if that participation does not amount to active assistance in a prohibited activity.

I think that accomplishes the same thing as the compromise that was found under the Ottawa land mines treaty. I would hope that we could favourably consider this amendment as more in keeping with Canada's commitment to this international convention, which we will be ratifying now five years after signing it, once we get this passed.

Thank you, Mr. Chair.

● (1545)

The Chair: Just before discussion, I want to point out that if Green Party-5 is adopted, then NDP-1, Bloc-2, Bloc-3, Liberal-4, Liberal-5, and Liberal-6 cannot be put.

Is there any discussion on this particular amendment?

(Amendment negatived)

The Chair: We are now going to move on to NDP-1 motion. I will get the NDP to read their motion and to speak to that, please.

Mr. Paul Dewar (Ottawa Centre, NDP): Thank you, Chair.

I also want to underline the importance of having had an opportunity to look at clause 11 of the bill. As you are probably aware, Chair, we were very concerned that this particular part of the bill was going to be problematic not just in terms of how we understand the treaty, but also the reputation of our country when it comes to international treaties. We also wanted to take the minister at his word when he came to committee and said that he wanted to be open to amendments.

Further to that, as important is the witness testimony we heard. Every witness we had who provided us with some background on the treaty said this had to be dealt with. So with that in mind, we decided we would take a look at understanding the feedback we were getting from government witnesses, as well as from the minister and some government members. If they weren't interested in the Ottawa language, and we heard some testimony as to why that was a problem, then certainly we could look at the treaty itself.

Article 21 of the treaty deals with this very issue of interoperability, and so we thought it made common sense to take the language in the treaty and apply it to the legislation. After all, this bill is about implementing the treaty, and if one of the issues...and Minister Baird identified this as a concern he had and wished we didn't have to have article 21 because of wanting to rid the world of cluster munitions *point final*, then indeed we should take him at his word and take a look at the treaty.

We know it was hard bargaining. I know that the lieutenant-colonel would probably have some tales he could tell us about negotiating section 21 of the treaty, and maybe he'll have a movie. But we know that was done, and we signed off on this, and we signed off on the treaty, and it included section 21.

That's the preamble to our amendment, which takes article 21 and applies it to the legislation and amends clause 11. Of course you know why we had problems.

In clause 11 of the bill the language itself says, and I'll read it into the record one more time:

> ...does not prohibit a person who is subject to the Code of Service Discipline under any of paragraphs 60(1)(a) to (g) and (j) of the National Defence Act...

Which means any Canadian soldier...does not prohibit them from:

> directing or authorizing an activity that may involve the use, acquisition, possession, import or export of a cluster munition...

Why I'm saying this again is that we have a treaty to prohibit the use of cluster munitions, but we have a section that says you can go ahead and use them. So for obvious reasons this was a problem for many of us.

It goes on to talk about, we would be able to:

> (b) expressly requesting the use of a cluster munition, explosive submunition or explosive bomblet....

Again this talks about the use of cluster munitions by our forces, notwithstanding the fact that we signed a treaty to ban cluster munitions.

It goes on to say:

> (c) using, acquiring or possessing a cluster munition, explosive submunition or explosive bomblet....

Again, it says that we can use them.

So there is a clear problem here when we had a treaty that says let's ban the use of cluster munitions on the one hand; on the other hand we have legislation that very clearly in black and white says we can use them. This is why we're focused on this particular aspect, that there's a problem here if you're trying to ban cluster munitions on the one hand, and then you have implementing legislation that says you can still use them. That's problematic and that's why we're focused on this.

With that in mind, the following amendment has been brought forward by the NDP:

> That Bill C-6, in Clause 11, be amended by replacing line 15 on page 6 to line 21 — which is all those descriptors—on page 7 with the following:
>
> participating in operations, exercises or other military activities with the armed forces of a state that is not a party [that's where our friends from the United States come in] to the Convention and that engages in an activity prohibited under section 6, provided that the person does not:

● (1550)

> (a) develop, produce or otherwise acquire cluster munitions;
>
> (b) stockpile or transfer cluster munitions;
>
> (c) use cluster munitions; or
>
> (d) expressly request the use of cluster munitions in cases where the choice of munitions used is within the exclusive control of the Canadian Forces.

In other words, we're proposing, from the official opposition, to take what was negotiated and signed off on in the treaty and put it in legislation, so that it's clear that notwithstanding that we are obligated to acknowledge our interoperability—particularly with our friends south of the border, but not exclusively—that we are able to have interoperability, ensuring that we will not be using, developing, stockpiling, or transferring cluster munitions.

I know that the government's going to come forward with an amendment about (c) and change that which is about the use of cluster munitions, which is great. It's a good start, but I think we need to incorporate all of those aspects of the treaty we negotiated and signed off on. That's why “stockpile or transfer” needs to be brought into the same mandate.

Finally, I want to share with you some feedback we got on this particular amendment. I'll read it into the record and then I'll finish off.

I asked to hear from one witness, and someone who's an expert on law, on our amendment. I got in touch with the Honourable Malcolm Fraser, former prime minister of Australia, and I asked him what he thought of our amendment. He said the following, Chair:

> If you can achieve the amendment you propose, it would be a great advance, and Canada would then stand as an international leader in relation to this important Convention. I emphasise that amending the Act as you propose, would not and could not inhibit any cooperation with the United States.... I hope very much that you will be successful in your efforts, efforts that would result in Canada's reputation being not only maintained, but strengthened as a world leader.

That's from former prime minister Malcolm Fraser.

Finally, from a legal perspective, Professor Attaran, who holds the Canada Research Chair in Law at the University of Ottawa said the following:

> ...in the event of a conflict, statute trumps treaty always. So it is a good practice to have the two be identical—

in other words, that the treaty be in the legislation:

> —as you have in mind [in your amendment]. Further, what objection can there be to legislating domestically that which you have already signed internationally, except possibly that—

Well, I won't say what he says here, that we could be liars and etc., and that our signature isn't worth it...but he says, finally:

> I like your approach of just copying the language; it avoids...pitfalls [that we've seen before].

I'm reading into the records these two points of view because I think it's really important to understand not only how we see this around this table but also how this is understood internationally.

I think most of us were compelled, particularly by former prime minister Fraser and by the ICRC, the International Committee of the Red Cross—who rarely ever speak out on legislation because of the way they operate. I think it was telling that we were able to have the attention of the government, to listen, to look at amending this legislation, but I would plead to the government to consider what I've just read into the record, what I think is a reasonable amendment, because it's actually the treaty we negotiated. I hope that they see fit to adopt this amendment, understanding that they are coming forward with another amendment, but it's in the same light. It's taking what was negotiated, but not fully, and amending it. That is the government's amendment.

I will stop there, Chair, but as I said to the minister, when we sign international agreements, it's important that we live up to our signature. It's important that the legislation we adopt does not undermine the treaty we negotiated and signed on to and accepted. To do that not only undermines the treaty itself, as was mentioned by former prime minister Fraser, it undermines the reputation of our country.

Thank you.

● (1555)

The Chair: Thank you, Mr. Dewar.

I've got Mr. Allen on the list.

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

I would like to ask a question of clarification from our witnesses, please, Mr. Chair. It's associated with paragraph (d) in the NDP amendment, which talks about expressly requesting the use of cluster munitions "where the choice of munitions used is within the exclusive control".

I would like to get you to compare how that relates to paragraph 11(1)(b) that is already in the bill, because to me it seems that if the choice of munitions used is not within the exclusive control, that kind of covers off the other side of that as well. I was very compelled by General Natynczyk's testimony and also some of the comments that were made about troops calling strikes in on themselves, which was actually very compelling and actually very scary in some cases.

With that, I'd just like you to explain paragraph 11(1)(b) in the context of this, where it says "expressly requesting the use of a cluster munition", and how that fits with "the choice of munitions...is not within the exclusive control of the Canadian Forces". Could you clear that up?

Like I said in the last meeting, I'm just a lowly accountant, not a lawyer, so if you could explain that to me, that would be great.

The Chair: Ms. Nolke.

Ms. Sabine Nolke (Director General, Non-Proliferation and Security Threat Reduction Bureau, Department of Foreign Affairs and International Trade): I'll take the first crack at this one, but I know that my colleagues will have comments as well.

The important thing to note if you're looking at the language in subparagraph 21(4)(d) of the convention, which is the same language that is imported into the NDP amendment in particular, you cannot look at that without also looking at the *chapeau* of paragraph 21(4), which refers to how "Nothing in paragraph 3 of this Article"—that is, the article of the convention—"shall authorize a State Party...[t]o expressly request the use...".

Now, it's a tricky concept that international law does not bind individuals. It only binds states, so the caution provided in paragraph 21(4), which says that "Nothing...shall authorise a State Party" to do X, Y, and Z, applies only to the state party itself. Whereas if you look at paragraph 11(1)(b), you see that it imports individual criminal liability to a person, that is, to a member of Canada's armed forces, not Canada itself.

If you then look at the policy behind paragraph 11(1)(b), you see again that the choice of munitions here is that of another state, not of Canada. That is the distinction. Then the exemption applies to the Canadian soldier who is essentially caught up in the practice of another state party for whom the use, etc., of cluster munitions is lawful.

There are two layers here. There is one, the state party and its policy concerning the use of cluster munitions, which Canada cannot regulate for other states. Canada cannot dictate to the United States what they can or cannot do. Again, that is a principle of international law. We can, however, regulate what our individuals do.

If you incorporate, however, the language of paragraph 21(4) holus-bolus into Canadian law, what you're really doing is you're mixing that apple with that orange. You're looking at the provisions for the state party and trying to match them up to the individual criminal liability provisions. That is the difficulty here.

With that, I'll hand this over to my colleague from JAG, and then I think Justice will have a comment as well.

● (1600)

Mr. Mike Allen: If you could just address "expressly requesting", who is the person that's protecting that—

Ms. Sabine Nolke: Yes, he will be doing that.

Mr. Mike Allen: Thank you.

Lieutenant-Colonel Chris Penny (Directorate of International and Operational Law, Office of the Judge Advocate General, Department of National Defence): To begin, I'll look as well at paragraph 4 of article 21 of the convention. Canada's position on this is that it constitutes an exhaustive list of the activities that are prohibited in the context of a combined operation with a non-state party.

Within that then, when we look at subparagraph 21.4(d), that isn't an absolute prohibition on expressly requesting the use of cluster munitions. It's a prohibition on doing so in the context where the choice of munition used is within the exclusive control of the state party, which is the Canadian Forces in this context.

That was a contentious aspect of the negotiations, and the words there were chosen for a very specific reason.

The key concern that led to that provision was that there may be circumstances in which an individual on the ground, who simply calls for "for effect" close air support or artillery support provided by another state will nonetheless be deemed to have, or could be seen to have, made an express request for the use of cluster munitions.

As an example, when a forward air controller—say a Canadian Forces member on the ground—calls in for close air support, they may well simply specify "for effect", but when the aircraft shows up to the location, there will likely be communication between the pilot in that aircraft and the individual on the ground who has requested close air support and who may be told what type of munition is going to be delivered and be asked to authorize that. So their authorization or their request would certainly be considered an express request to use cluster munitions, whether they used the words "cluster munitions" or not. But they wouldn't, in that context, have exclusive control over the choice of munition used. That choice would have been made by the non-state party when they armed the aircraft.

Similarly, an individual calling for artillery support may call for it "for effect". When the first round lands they'll know what they're getting, and if they provide revised coordinates or something further, that too might be seen as expressly requesting the use of cluster munitions. But again, the choice of munition used would be outside of the control of the Canadian Forces, or outside of the exclusive control, having been made by the non-state party.

That was the concern during the negotiations themselves and that's why subparagraph 21.4(d) doesn't simply read, "expressly request the use of cluster munitions". That's why that second part of the subparagraph 21.4(d) is there, to recognize that there may actually be circumstances in which an express request is either made or deemed to have been made.

The Chair: Mr. Ram.

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

Just very briefly, because my colleague from Foreign Affairs in particular has covered most of what I would have said.

Translating what was said by the other two witnesses here down into the practical realities of legislative drafting, our task in this bill has been to take the sorts of operational scenarios that the lieutenant-colonel has just explained and try to work out how those would apply in a Canadian criminal court.

With respect, when we draft legislation—especially criminal legislation—it has to meet charter requirements and clarity requirements and so on. It is very difficult a lot of the time for us to use treaty language because the words mean different things.

When we started with the cluster munitions convention in this particular case we took the language of the convention as a starting point and then we looked at how those words would be applied in a Canadian criminal court. As I said at an earlier session, stockpiling became possession because there's really no way without defining it of what an offence of stockpiling would look like. If you criminalize possession then if you've caught somebody who has one cluster munition or 100,000 it doesn't matter. It's a broader offence, but we're sure we're in conformity with the convention.

The concept of transfer in the convention.... First of all in any treaty if the treaty uses the word "transfer" it's generally talking about transfer between one state party and another state party. Whereas in Canadian law it might mean the sale of a house, or transfer of narcotics in the course of trafficking or something like that. So we had to rethink the whole concept of transfer. This particular convention had a very specific term that was targeted at stockpile movements, and stockpiles being controlled—being in one state and under the control of another. So we redefined that, we turned that into importing and exporting and movement instead. We deliberately avoided using the language of the convention so that we wouldn't be misinterpreted.

It is very difficult. Our task now is not, with respect, to draft for the international community. It's to draft for a Canadian criminal court. We want to make as certain as we possibly can that these offences will apply in the circumstances in which Parliament intends them—and how Canada as a state party to the treaty intends them to apply—and no further. That has been a very difficult exercise.

To use the lieutenant-colonel's example, if I call in an airstrike if I'm under fire, I am either counselling someone in the commission of an offence or I'm abetting them if dropping the munition is an offence. If I tell them where to drop it, I'm abetting in Canadian criminal law. If I'm in a room with four other people where a decision is made to do this I'm conspiring with them. If what we're discussing is a crime then discussing it is a conspiracy, and if I happen to be the only Canadian in the room I would be the only one criminally liable. The others, being from a non-state party, would not be subject to the same criminal offence.

So those are the sorts of scenarios that we had to deal with in crafting clause 11, Mr. Chairman. That's why we did not incorporate the language of the treaty more than we did. We did take some, but what is not there is not there for a reason.

Thank you, Mr. Chairman.

● (1605)

Mr. Mike Allen: Mr. Chair, thank you very much for your indulgence and the committee's indulgence as I went from general ledgers to a legal definition.

The Chair: Thanks, Mr. Allen.

Mr. Dewar.

Mr. Paul Dewar: I appreciate the evidence provided by our witnesses. I beg to differ slightly. The issue, I think, is that the bill needs to prohibit soldiers—we heard that from General Natynczyk—by the rules that bind the state parties.

We have to be clear and concise about what the rules of engagement are, or in this case non-engagement. If we don't have that explicitly in the legislation that enacts the treaty, I think it's problematic. We're about to adopt a motion from the government on the use. I find that interesting. We're going to amend part of clause 11 on the use, not all of it, but when it comes to article 21, maybe the experts are going to be not in favour of what we're about to adopt when we take out (c) of 11. I don't know. The fact is that the bill needs to prohibit soldiers from doing exactly what the convention prohibits state parties from doing. That's essentially what our amendment would do.

I listened deeply to our experts on the challenge they have, and I appreciate that. We've talked about this since we've been going through the debate on this particular bill. But I would also want to add one other aspect. When we are doing these arrangements with our allies, it's no surprise that we have caveats, as the general said. Caveats include what treaties we've signed onto and legislation we have implemented.

This is possible to do, Chair. Other countries have done it. I would suggest this is separate from or adjacent to—as my dad might have said—the debate we're having here, because we're asking certain people to look at it in a certain way.

At the end of the day, as parliamentarians, we are the ones who decide what happens. I would argue that, if this is a concern we have in terms of being explicit in understanding and trying to cover off all aspects of what we're hearing from our experts, it is up to us to guide and to lead what kind of arrangements we have with our allies in interoperability.

Caveats happen all the time. Being explicit about it is absolutely critical. And yes, applying it to our domestic law is important. But when you have the provisions in legislation that clearly identify what was in the treaty, and you also have directives—as we already heard is going to happen—about non-use, those same directives can happen in applying a treaty to our interoperability.

I want to put that on the table, and I respectfully submit that we all have different hats to wear. We've asked our witnesses to provide their expertise. But at the end of the day, we're the ones who decide how this treaty is going to be implemented. I think it's important to understand that we can also be explicit when we're working with our allies in the field—interoperability training, or even when it's in hot conflict. I want to put that on the record, because I know where this amendment's going, and not just say that, no, we can't do it, because clearly we can and clearly this treaty was negotiated with that in mind. This amendment would simply bring that into force through legislation.

Thank you, Chair.

● (1610)

The Chair: Go ahead, Mr. Anderson.

Mr. David Anderson: I have a quick response to that. I appreciate Mr. Dewar's and the opposition's attempt to amend this section, but the reality is that article 21 deals with interoperability. Our responsibility is to find that solution that covers the prohibitions but also protects our troops in the situations they find themselves in, in those joint operations. I don't think their amendment does that, so we will be opposing it.

The Chair: Go ahead, Mr. Garneau.

Mr. Marc Garneau: Thanks, Mr. Chair.

I asked at the last meeting and I'm going to ask it again today, that we record individual votes on this. This is a matter of such importance that I think we should all be on the record.

The Chair: Okay, thank you.

Is there any other discussion?

I'll point out before we vote that, if amendment NDP-1 is adopted, then amendments Bloc Québécois-2 and -3 and Liberal-4, -5, and -6 cannot be put.

Is there any more discussion?

(Amendment negatived: nays 6; yeas 5)

The Chair: We're now going to move on to the government amendment. I will turn it over to the government members to talk about their amendment and to give us any introduction before we open it up for discussion.

Mr. David Anderson: Are the other amendments we have here coming later or are they set aside?

The Chair: We'll continue on this. This is the appropriate place for this amendment.

Mr. David Anderson: Ours is fairly straightforward and simple, and hopefully, we'll get support from everyone on this:

> That Bill C-6, in Clause 11, be amended by replacing line 30 on page 6 with the following:
>
> (c) acquiring or possessing a cluster

It removes in (c) the word “using”, which we hope goes some of the way to alleviating the concerns that the oppositions have. We believe this would prohibit the direct use of cluster munitions by CF personnel on exchange as a matter of law. We believe it needs to stay in paragraph 11(1)(b) in order to ensure that our members are not held criminally liable while performing their jobs, and the word “use” must remain in those two sections to ensure that our members are protected from the offensive indirect use. I'll leave it at that, and perhaps if anyone wants the experts to explain a bit more of the implications of this, they can. But we think this is a good balance in trying to reach out to the opposition and come at least part way to the position that they've held.

The Chair: Mr. Garneau

Mr. Marc Garneau: Far be it for me to look a gift horse in the mouth. I think this is progress and I thank the Conservative government. However, it is only small progress. If we look at the change that the government is proposing, it means they are removing the exception of using a cluster munition “while on attachment, exchange or secondment, or serving under similar arrangement, with the armed forces of that state.” So there's an implicit recognition that it is wrong. It is not acceptable to use a cluster munition, explosive submunition, or explosive bomblet.

Yet if we look at paragraph 11(1)(b), they are not addressing the issue and consider it as part of the exceptions to expressly request "the use of a cluster munition, explosive submunition or explosive bomblet...if the choice of munitions used is not within the exclusive control of the Canadian Forces".

In other words, a Canadian soldier can still expressly request the use of a cluster munition. Or if we look at the section above it, paragraph 11(1)(a), a Canadian soldier can direct or authorize "an activity that may involve the use...of a cluster munition, explosive submunition or explosive bomblet by the armed forces of that state". So whilst the Canadian soldier cannot drop the bomb himself or herself, they can request the use of that munition. That to me, in my interpretation, is the equivalent of saying that it's acceptable for Canada to have its soldiers use cluster munitions.

So from my point of view, the amendment proposed by the government is a step in the right direction, but it contradicts itself in the sense that it is not consistently applied to the use. You can talk about indirect use, but the reality is that it is still implicitly.... As we know, if somebody commits a crime, but the other person suggests to him how to commit that crime, that person is also liable to prosecution as well.

● (1615)

The Chair: Mr. Dewar.

Mr. Paul Dewar: I mentioned that I was happy to see that the government was open to amending the bill. If you go back to the last session of Parliament—this did come from the Senate—it was no surprise to anyone that when it came from the Senate there was the attitude that there were to be no changes at all. That was clear. There were discussions with the minister. The point of view of the government was that we had all the hearings at the Senate and there was no need to change things.

I take the time because we'll probably be finishing things off soon to credit people for getting involved. There were a lot of people who put in a lot of time. These were people who were victims of cluster munitions. The minister himself bore witness to that. Something happened that caused the government to take a look at this. I want to underline what I said before. I welcome that and appreciate it. It doesn't always happen. It happens rarely, if ever. That should be noted.

The importance here is that enough people in this country, and internationally, understood the importance of this treaty. They got involved and decided that they should be active in trying to make this better. That's what we're all trying to do here. The fact that the government has brought forward this amendment is progress. It is suggesting that in the end what we'll have under clause 11 is that it does not prohibit a person who is subject to the code of service discipline under any of paragraph 60, etc., of the National Defence Act from acquiring or possessing a cluster. It takes away the element of use. It's akin to having something in front of you and being told you're not going to use it. I would have liked to have seen stronger language. In the last amendment we tabled, we wanted to be very clear, deliberative, and transparent about that.

If the government was willing to see this happen, I would hope that what we'll get to later is a reporting mechanism. That way, we'll be able to take a look at this in the future to say that maybe there is a possibility of looking at other subsections within section 11. The government obviously saw that there was an opportunity here to change. They did that. There were a lot of people who spent a lot of time trying to convince them to at least be open and we saw that happen. Great. Let's not lose sight of the fact that this is an incredibly important issue. It's about our reputation when it comes to arms control. It will affect other treaties in the future. One day we'll sign the arms trade treaty, I'm certain, and we'll be sitting around here trying to do a good job in implementing it. We'll understand that this is about people trying to make good law. Also, in thanking the government for attempting to change this for the better, I want to underscore the thanks I have for all the people who were involved in fixing the bill. They fixed it because they wanted to see not a political partisan win, but rather, good legislation to honour the treaty. I thank them for their efforts to do that. We'll support the motion. It's in process. Clearly, we can do better. I'll challenge the government to do that in the future.

I'll stop there.

Thank you, Mr. Chair.

● (1620)

Mr. David Anderson: I have a quick response to that.

We also acknowledge that there are a lot of people who are concerned about this. After the testimony that we heard, I don't think anybody around this table does anything but despise these munitions. We've made a commitment that we're going to try to convince non-signatories that it would be in their best interests to sign this as well. The best thing we could do is eliminate these munitions entirely, then we'd all be in agreement about what the solutions are.

The reality is that the opposition can take pretty much any position they choose. They have not taken a position that's irresponsible. They've tried to work with us on this and we appreciate that. As government, we need to find a realistic solution so that we strike a balance between article 21, interoperability, finding a place for our troops to be able to function, and yet not supporting the use of cluster munitions. That is what we've tried to do. That's what we believe we've been able to do for those few troops who will be affected by this.

I'll leave it at that. I want to thank all reasonable people for working together to try to find a reasonable solution.

The Chair: All right.

Is there any more discussion?

Then we'll do the roll call again on this particular one. Mr. Garneau, that's the way you want to proceed, right?

Mr. Marc Garneau: Yes, Mr. Chair.

(Amendment agreed to: yeas 11; nays 0)

The Chair: We're going to now move to amendment BQ-2, which is inadmissible. I don't see our Bloc members here, but it was deemed moved.

I'm just going to read the ruling here: That Bill C-6, An Act to implement the Convention on Cluster Munitions, which provides for exceptions to the prohibitions list in clause 6 of the bill.... One of these exceptions could be found in subclause 11(2), which does not prohibit a person from doing certain acts listed in clause 6. The amendment proposes to alter the wording from “does not prohibit” to “prohibits”.

As the *House of Commons Procedure and Practice, Second Edition* states on page 766:

> An amendment to a bill that was referred to a committee after second reading is out of order if it is beyond the scope and principle of the bill.

In the opinion of the chair, the amendment is contrary to the principle of the bill as it negates an exception provided in subclause 11(2) of the bill. The amendment is therefore inadmissible.

So that will be the ruling that I have on that one.

We've got amendment BQ-3, which is also been deemed to be inadmissible. I will once again read the ruling here.

That Bill C-6, An Act to implement the Convention on Cluster Munitions, which provides for exceptions to the prohibitions listed in clause 6 of the bill.... One of these exceptions can be found in subclause 11(3), which does not prohibit a person from doing certain acts listed in clause 6. The amendment proposes to alter the wording from “does not prohibit” to “prohibits”.

As the *House of Commons Procedure and Practice, Second Edition* states on page 766:

> An amendment to a bill that was referred to a committee after second reading is out of order if it is beyond the scope and principle of the bill.

Once again, in the opinion of the chair, the amendment is contrary to the principle of the bill as it negates an exception provided in subclause 11(3) of the bill.

Thank you very much for your indulgence on that.

We're now going to move to amendment LIB-4.

Mr. Garneau, if you'd like to read that and discuss that for us.

● (1625)

Mr. Marc Garneau: Thank you, Mr. Chair.

Again, in the exceptions it says clearly:

> Section 6 does not prohibit a person, in the course of military cooperation or combined military operations involving Canada and a state that is not a party to the Convention, from (a) aiding, abetting or counselling another person to commit any act referred to in paragraphs 6(a) to (d), if it would not be an offence for that other person to commit that act

In other words, what we're doing here is saying that it is acceptable for a Canadian soldier to aid, abet, and counsel another person to conceivably make use of cluster munitions. We have difficulty with that because this goes into the territory of being viewed as encouraging the use of cluster munitions by a Canadian soldier. So it's for that reason that we would like to delete paragraph 11(3)(a).

The Chair: Thank you, Mr. Garneau.

Are there any comments from any of the committee?

(Amendment negatived: nays 6; yeas 5)

The Chair: We'll now move on to amendment LIB-5.

Mr. Garneau, the floor is yours, sir.

Mr. Marc Garneau: Thank you, Mr. Chair.

In the interest of saving time, I won't repeat all of the same rationale. We're looking at paragraph 11(3)(b), which in this case is “conspiring with another person to commit any act referred to in paragraphs 6(a) to (d)...”.

I'm applying the same logic here as I did previously and for that reason would like paragraph (b) to be removed.

The Chair: Thank you, Mr. Garneau.

Is there any additional discussion on Liberal amendment 5?

(Amendment negatived: nays 6; yeas 5)

The Chair: We'll now move on to Liberal amendment 6.

Go ahead, Mr. Garneau.

Mr. Marc Garneau: Thank you, Mr. Chair.

Now we're dealing with paragraph 11(3)(c) and what we're proposing is that line 14 be replaced by the following, “receiving or comforting another person”.

In other words, removing “or assisting”, for the same reasons.

The Chair: Is there any discussion?

(Amendment negatived: nays 6; yeas 5)

The Chair: We're now going to move to the Green Party amendment 6.

Go ahead, Ms. May.

Ms. Elizabeth May: Thank you, Mr. Chair.

My attempt at an amendment here falls again within the rationale of what Paul Dewar and Marc Garneau have been ably arguing through this afternoon.

We certainly recognize that there is a slight improvement in removing the word “using” through the government amendment that has been carried unanimously in paragraph 11(1)(c), but we still find ourselves with a piece of legislation that allows the undermining of the purpose of the convention, and needlessly so.

My attempt at an amendment leaves in place.... I would have rather seen the amendments that were just put forward by Mr. Garneau pass. That would remove aiding, and abetting, or counselling, or conspiring with another person, and so forth, basically allowing Canadian Forces on the ground to do things that actively encourage the use of cluster munitions when working in a collaborative, cooperative military activity with a non-party state.

But given that those are still on the books, here's an idea that could work for everyone. That is, adding to clause 11 an additional subclause (4). I'll read it because it's pretty clear:

> For greater certainty, the exceptions referred to in subsections (1), (2) and (3) apply only if it has been conclusively demonstrated that all reasonable efforts have been made to dissuade the use, acquisition, possession, import or export of a cluster munition, explosive submunition or explosive bomblet by a state that is not a party to the Convention, in accordance with paragraphs 1 and 2 of Article 21 of the Convention.

So what's being anticipated in this amendment is that we found ourselves in the situation to which witnesses have referred. Canadian Forces are in a theatre of operations with a state that's not a party to the convention, and we find ourselves involved in the operational use of weapons that we have sworn under the articles of the convention that we want to ratify that we will work to completely eliminate from use.

So why not provide this additional safeguard that Canadian Forces on the ground in any of the circumstances anticipated in the earlier subclauses of clause 11 will only be carved out, from the purposes of the convention, to the extent that those personnel involved have done everything reasonable to persuade that non-party state from using cluster munitions or from all the different sub-verb headings: use, acquisition, possession, import, export? This is a way of living the purpose of the convention even in those circumstances that are anomalous where we're in a military operation with a non-party state.

I really would hope that perhaps in the spirit of compromise, since the government members have already brought forward removing the word “using”, this would go a long way towards improving the exceptions that remain in the legislation. Although I would rather they were deleted, since they're still here, I recommend my amendment, Green Party 6, to you.

● (1630)

The Chair: Okay.

I have Mr. Goldring.

Mr. Peter Goldring (Edmonton East, CPC): I fail to see how it can be demonstrated conclusively when you're in a war condition, a battle condition, and things are flying at you and you're trained to work in unison with the other party.

What could “conclusively” possibly mean under that scenario? I would think it would be putting on more restrictions. It would not allow for that freedom of interoperability that you're looking for in the rest of the bill by putting in an undefinable word saying to “conclusively” demonstrate.

The Chair: Is there any other discussion?

Go ahead, Ms. May.

Ms. Elizabeth May: Well, if Mr. Goldring would like, I'd be open to a friendly amendment.

If the governments members could pass it, we could just say “if it has been demonstrated that all reasonable efforts have been used”. If the word “conclusively” is the stumbling block, I would be happy—

Mr. Peter Goldring: It would be difficult to demonstrate it as well.

Ms. Elizabeth May: I don't think it would be difficult to demonstrate that all reasonable efforts had been used.

In all operations, especially in these days of electronic communication, one could easily make a note to a Day-timer, a calendar, even in a military operation, very quickly: "Spoke to the officer in charge. Urged that we not use cluster munitions." This can be noted at the time.

The Chair: Mr. Anderson.

Mr. David Anderson: Quickly, we heard testimony from the general when he was here, and as Mike said, it was very compelling.

I thought he opened a new world for many of us that we don't understand, in terms of what's happening on the ground when you're in a military operation.

I agree with my colleague that this would bring a different level of legal ambiguity to the situation that we don't think needs to be brought in here.

● (1635)

The Chair: Is there any more discussion on the Green Party amendment 6?

Go ahead, Ms. May.

Ms. Elizabeth May: Thank you, Mr. Chair. It's very kind of you.

All I would add is that all of the conditions under section 6 anticipate that Canadian Forces are in a situation in which we are potentially aiding, abetting, counselling, or conspiring. All of these actions take place in that same theatre, and surely all we have to do is turn them around and say that the efforts we make initially are to persuade people that cluster munitions should not be used and there is an alternative.

The Chair: If there's no more discussion, then I'm going to call the question on Green Party 6.

(Amendment negatived: 6 nays; 5 yeas)

The Chair: Now we need to vote on clause 11 as amended.

(Clause 11 as amended agreed to: 6 yeas; 5 nays)

The Chair: We're now going to go to proposed new clause 22.1, and Liberal-7 and Liberal-8.

Do you want to present them both, Mr. Garneau? Let us know what you—

Mr. Marc Garneau: Mr. Speaker, I'll withdraw Liberal-7, because I've reintroduced it as Liberal 8 with one additional small clause.

The Chair: Do we have unanimous consent to withdraw that?

A voice: He doesn't need that.

The Chair: Okay. Go ahead with number 8, then.

Mr. Marc Garneau: Thank you, sir. The purpose of amendment LIB-8 is to be compliant with one of the requirements of the convention, which is that we are supposed to not only undertake to do or not to do certain things with respect to cluster munitions, but we're also required to proactively try to discourage the use of cluster munitions by our allies and others who still have not signed on to the convention, particularly to:

(a) encourage states not party to the Convention to ratify, accept, approve, or accede to the Convention;

(b) notify the governments of all states not party to the Convention of Canada's obligations under the Convention;

(c) promote the norms the Convention establishes; and

(d) discourage states not party to the Convention from using cluster munitions.

These are implicit requirements. We have all agreed that these are ugly, nasty weapons, that we don't want to use them, and we don't intend to use them when we're in single operations. At the same time, we also all agree that we should make an active effort to discourage other countries from doing it, yet there didn't seem to be a mechanism within Bill C-6 to provide for that engagement by Canada as a country.

When I spoke about this amendment last time, we got some expert advice from the clerk's office that you cannot, in a sense, obligate the minister to comply, and so we added a final subclause 22.1(2), "(2) For greater certainty, a failure by the Minister of Foreign Affairs to comply with subsection (1) is not an offence"—just to make it very clear—"and, accordingly, the Criminal Code does not apply."

We would not want to make the minister a criminal if he did not report annually to Parliament, so that was essentially the amendment we brought in to our amendment. Essentially it addresses the issue of reporting to Parliament.

The Chair: Are there any comments?

Mr. Anderson.

Mr. David Anderson: I'm going to ask Mr. Garneau if he would consider withdrawing the amendment because we'd like to provide him with an option. We had a bit of a discussion about this, so hopefully we can reach agreement.

The convention already requires state parties to file annual reports and so we have been doing that and we're willing to do that. We're offering the opposition that we would be willing to strengthen those reports, if you want to call it that, or put a little more work into them and bring them to the committee here and allow committee members to call officials or call the minister if they chose to come to the committee. We would do an annual report focused on issues of such things as stockpiling, reporting on activities related to unexploded ordnance that we have in the country, advocacy efforts in general and, more specifically, Canadian advocacy efforts as well in dealing with this issue.

That's the offer we're making to them. If the opposition would like to make that into a report to Parliament we're comfortable with that.

I just joined this committee recently, but it looks as if it has done a good job of putting reports together on some of these smaller subjects, if you want to call them that, and being able to present them to Parliament. You just did that yesterday.

That's what we're offering. Rather than making this part of the legislative package, we'll make a government commitment to annual reports dealing with the issues I have talked about.

● (1640)

The Chair: Mr. Garneau, have you any comments or thoughts?

Mr. Marc Garneau: Yes, based on Mr. Anderson's comments, that is something that would go a long way to satisfy the requirement to let Canadians know through this committee what advocacy work —advocacy is really what I'm most concerned about because we've already committed to disposing of our stockpile, but it's hearing from the minister, bearing in mind that if Parliament dissolves these annual things go away. They have to be reintroduced, so I'm a little concerned that we'll have to get into a pattern of reintroducing this motion every once in a while, but if you're telling me that the minister would be willing, at our invitation, to come to this committee to tell us what progress we are making, particularly on the advocacy side, that would be well received.

Mr. David Anderson: I can't commit his attendance, but I can certainly commit to the fact that the committee has the right to invite him, and we'll certainly take that invitation forward as we do with every other invitation. We will be committed to filing the annual report on the general topics we have talked about here.

The Chair: Mr. Dewar.

Mr. Paul Dewar: I just want some clarification on what the government's committing to and under what guise.

Mr. David Anderson: We're required already to submit annual reports, particularly around the stockpiling. We're suggesting that we expand those reports. The committee can make them into what it would choose to make them into, I guess, but we'd cover the advocacy and be as specific as we want or as general as we want on that, and also cover any related activities. This is a bit on stockpiling as well as unexploded ordnances, and how we're handling those.

We've talked about the issue of transfer for destruction and those kinds of things. We would certainly be willing to have the committee explore those things.

Mr. Paul Dewar: Just to clarify, Chair, I'm hearing Mr. Anderson saying that the government would be willing to have this come before committee. I have nothing against the commitment that was made, but the committee can do that anyhow, so I'm just wondering what we're getting.

Mr. David Anderson: What I'm asking is whether you want to be actively involved in the annual report or you want to get a report. We are willing to work with the committee in order to file a report.

Mr. Paul Dewar: But you are the committee. This is all in goodwill. I'm just trying to understand. You're withdrawing that motion, and replacing it with one that says the government will commit to having the report come to committee so we can study it.

Mr. David Anderson: Sure, and we can actually have the committee participate if you want that. If you just want the reports... the reports right now deal with stockpiling. I guess what I'm talking about is the committee taking that report, calling witnesses if they choose to, taking a look at the issue, and then filing a report that can be tabled in the House of Commons if you choose to do that.

Mr. Paul Dewar: I would ask for indulgence. If we could have the motion to that effect pass through the committee when we come back so we could have some evidence on it, that would be great.

I thank the parliamentary secretary.

Mr. David Anderson: My word is good, but we will do that.

Mr. Paul Dewar: Your word is great. It's just the next guy who comes along.

The Chair: Mr. Garneau.

Mr. Marc Garneau: We don't doubt you, David, but we don't know about Deepak though...so....

Voices: Oh, oh!

Mr. David Anderson: You're not the only one wondering.

Voices: Oh, oh!

Mr. Marc Garneau: My question was along the same lines as Paul's. I trust your word, but can we formalize a little bit what you have said so we have this in a sense as a formal motion?

● (1645)

The Chair: What I'm hearing you say is you want to ask for unanimous consent to withdraw your amendment. Do I have unanimous consent for that?

(Amendment withdrawn)

The Chair: When we come back, we'll look at formalizing a motion. We'll word it out, and we can present that to the House as well.

That will take us now to our stood clause, which is 2, because both 3 and 1 were defeated.

Does clause 2 carry?

(Clause 2 agreed to)

The Chair: We'll now move to the schedule. Shall the schedule carry?

Some hon. members: Agreed.

The Chair: On the short title, shall clause 1 carry?

(Clause 1 agreed to)

The Chair: Shall the title pass?

Some hon. members: Agreed.

The Chair: Shall the bill as amended carry?

(Bill as amended agreed to: yeas 6; nays 5)

The Chair: Shall I report the bill as amended to the House?

Some hon. members: Agreed.

The Chair: Shall the committee order a reprint of the bill?

Some hon. members: Agreed.

The Chair: That concludes the work on Bill C-6. I want to thank everybody. I want to thank our witnesses, and I want to thank the committee members.

Since this is our last meeting before Christmas break, I want to take the time to thank our interpreters for the great work they do, and all the support staff around here who do great work, and of course our clerks and our analysts for the excellent jobs they do on a daily basis in a non-partisan way and very professional way.

[*Applause*])

That is it. We do not have any business in particular picked out for the new year yet. We're going to have to look at that when we come back, or we can have some discussion.

Mr. Dewar and then Ms. May.

Mr. Paul Dewar: I just want to clarify that we're continuing the work we've been doing.

The Chair: Absolutely. We haven't scheduled anything yet.

Go ahead, Ms. May.

Ms. Elizabeth May: Mr. Chair, I just wanted to thank you. I have been running from committee to committee under the new rules. It is the new Stephen Harper exercise plan I'm on. I run from committee to committee. I often miss things. Generally I run in order to be able to make a 60-second intervention, and I'm not allowed to answer questions. Anyway, your chairing of this and your use of your discretion as chair to allow me to participate more meaningfully is deeply appreciated.

Thank you.

The Chair: Thank you very much.

Is there anything else?

If not, I wish everyone a great Christmas season, safe holidays, and all the best.

No, there will be no meeting on Thursday.

With that, the meeting is adjourned.