

**Excerpts from Proposition No. 7 (2008-2009) to the Odelsting on a Bill relating to the implementation of the Convention on Cluster Munitions in Norwegian law and Proposition No. 4 (2008-2009) to the Storting on consent to ratification of the Convention on Cluster Munitions**

**Legislative provisions:**

Section 1

It is prohibited to use, develop, produce, acquire, stockpile or transfer cluster munitions in contravention of the Convention of 30 May 2008 on Cluster Munitions.

The King may issue further provisions for the purpose of fulfilling Norway's obligations under the Convention.

Section 2

This Act also applies to Svalbard, Jan Mayen and the Norwegian dependencies.

Section 3

Any person who contravenes this Act or regulations issued pursuant thereto is liable to a fine or to imprisonment for a term not exceeding two years. A negligent act is punishable by a fine or imprisonment for a term not exceeding six months. Aiding and abetting shall be subject to the same penalty.

Section 4

This Act enters into force on the date decided by the King.

Section 5

As from the date on which this Act enters into force, Act No. 10 of 22 May 1902 (the General Civil Penal Code) is amended as follows:

Section 12, first paragraph, 3 g), h) and new i) shall read as follows:

[Unless it is otherwise specially provided, Norwegian criminal law shall be applicable to acts committed:

(...)

3. abroad by any Norwegian national or any person domiciled in Norway when the act (...)]

g) is punishable pursuant to section 5 of Act of 17 July 1998 No. 54 relating to the implementation of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction;

h) is punishable pursuant to Act of 15 December 1995 No. 74 relating to a prohibition against genital mutilation; or

i) is punishable pursuant to section 3 of the Act of (...) 2008 relating to the implementation of the Convention on Cluster Munitions.

**From Proposition No. 7 (2008-2009) to the Odelsting:**

**1 Main content of the proposition**

The proposition includes a new bill on the implementation in Norwegian law of the Convention on Cluster Munitions, adopted in Dublin on 30 May 2008. It also includes a

proposal for amending section 12 (3) of the Penal Code (Act No. 10 of 22 May 1902) so that a penalty for contravening the implementation Act may also be imposed on Norwegian nationals and persons domiciled in Norway in cases where the contravention has taken place abroad, notwithstanding the requirement of double criminality. The bill is being put forward now in order to enable Norway to both sign and ratify the Convention on Cluster Munitions in connection with the signing ceremony to be held in Oslo on 3 December 2008. The request for consent to Norway's ratification of the convention was submitted to the Storting as a separate matter, cf. Proposition No. 4 (2008–2009).

The background to the bill is that parts of the Convention require amendments to Norwegian law. This applies to specific provisions concerning penalties for persons who violate the provisions of the Convention. The Convention prohibits the use, development, production, acquisition, stockpiling, retention and transfer of cluster munitions. It also covers encouraging others to engage in any activity prohibited under the Convention and otherwise aiding and abetting in such activity. It is therefore proposed that a bill that consolidates the provisions necessary for implementing the Convention be adopted rather than spreading the implementation provisions between other existing statutes. A similar solution was chosen in connection with the implementation of the Chemical Weapons Convention (cf. Act of 6 May 1994 No. 10) and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (cf. Act of 17 July 1998 No. 54).

## **2 Background to the bill**

### **2.1 The Convention on Cluster Munitions**

“Cluster munition” has been used as a general term for ammunition made up of a canister containing more than one explosive device (submunition). The need for a ban on cluster munitions grew out of experience of the use of such weapons, which has shown that in many cases such use constitutes a violation of the humanitarian law requirement that a distinction must be made between military targets and civilian persons and objects. Cluster munitions often cause unacceptable humanitarian harm, both at the time of use and long after a conflict has ended, in the form of abandoned and unexploded ordnance, known as explosive remnants of war, or ERW.

An international ban on cluster munitions has been on the international agenda for a number of years, and the issue has been a recurring theme in the political debate in Norway as well. The reason for this is the major humanitarian problems caused by the use of this type of munition. It was especially the bombing of areas in Southern Lebanon in summer 2006 that gave impetus to the campaign to ban cluster munitions. Norway arranged the first conference in what is known as “the Oslo process” in February 2007. This process led to the final negotiating conference in Dublin in May 2008, where the Convention on Cluster Munitions was finalised and adopted.

The Convention comprises a preamble and 23 articles. Article 1 specifies the scope of application and sets out a prohibition of the use, development, production, acquisition, stockpiling and transfer of cluster munitions. Article 2 contains definitions. Article 3 sets out requirements concerning the storage and destruction of cluster munitions. Article 4 includes provisions on the clearance and destruction of cluster munition remnants.

Article 5 requires the States Parties to provide assistance to cluster munitions victims. International cooperation and assistance in fulfilling the obligations under the Convention are governed by Article 6. Article 7 contains provisions on transparency measures, and Article 8, provisions on facilitation and clarification of compliance. Article 9 requires the States Parties to take national measures to implement the Convention, including the imposition of penal sanctions in response to violations of the Convention. Article 21 provides rules governing relations with States not party to the Convention, while Articles 10 to 23 contain administrative provisions.

The Convention prohibits any use, development, production, acquisition, stockpiling, transfer or retention of cluster munitions. The Convention's importance in terms of humanitarian law lies in the total ban on a whole category of weapons that have been documented to cause great human suffering. The Convention eliminates a category of weapons that constitutes a grave humanitarian problem today. The prohibition set out in the Convention is not weakened by exemption provisions, reservation rights or transitional arrangements. Thus, the Convention contributes to establishing a new and important international norm that will influence the conduct of all parties in future conflicts.

The Convention will enter into force six months after it has been ratified by 30 States.

## **4 Convention requirements with regard to national measures**

### **4.1 Introduction**

Under Article 9, Norway undertakes to take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent any activity prohibited under the Convention. The provisions of the Convention are to be implemented with respect to persons or territory under the jurisdiction or control of the Norwegian State. See section 4.2.7 below for an assessment of the need for specific implementation provisions.

## **4.2 Prohibitions and requirements applicable to private persons**

### **4.2.1 Use**

Article 1 (a) prohibits any use of cluster munitions. The term "use" includes all forms of activity enabling the fulfilment of the purpose of cluster munitions, i.e. to release a number of explosive submunitions from a canister. In other words, all forms of use of cluster munitions, whether by means of aircraft, missiles, artillery shells or other means, constitute use, regardless of the purpose of such use. The question of what qualifies as use, etc., in connection with others' use of cluster munitions in situations involving military cooperation is discussed below in section 4.2.6 on co-responsibility.

### **4.2.2 Development and production**

Article 1 (b) of the Convention also prohibits the development and production of cluster munitions. It is presumed that the development of cluster munitions covers the process up to production. In addition to production of the complete weapon, the prohibition on production applies to production of components of cluster munitions. Thus, depending on the circumstances, the production of components that can be used in the production

of cluster munitions may be covered by the prohibition. The question is how far-removed the component is from the final product, i.e. the cluster munition. If it is clear that the component can only be used in the production of cluster munitions, the production of such components is covered by the prohibition. In such cases, it is clear what the product is to be used for, and it is difficult to envisage it as having alternative uses. Other components, such as explosives or chemicals that can be used for many purposes other than the production of cluster munitions, do not, however, fall within the scope of the prohibition as long as it is not clear that the final use for which they are intended is the production of cluster munitions. The same must apply to multi-purpose materiel, for example a container that can also be used for cluster munitions or other munitions that do not fall within the scope of the prohibition, as long as the intended final use is unclear.

In the consultation, the *Norwegian Defence Research Establishment* pointed out that in developing a munition that fulfils the requirements set out in Article 2, para. 2 (c), of the Convention and that therefore does not constitute a cluster munition within the meaning of the Convention, the munition may have characteristics that bring it within the scope of the prohibition during one or more stages of the development process. It is also conceivable that the munition must be subject to realistic tests during such stages. For example, it may be necessary to test a munition that only has a self-destruction mechanism that complies with the requirements of (c) (iv) of the provision, but that has not yet been equipped with a self-deactivating feature as prescribed by (c) (v).

Similarly, when the munition is qualification tested, there may be a need to turn off the self-destruction mechanism or the self-deactivating feature in order to test each of them separately.

The Ministry of Foreign Affairs agrees with these considerations and would note that they may also apply more generally to the development and production of certain components of legal munitions that theoretically could also be used as components of a cluster munition, for example components that comprise a self-destruction mechanism. Thus, such actions are prohibited insofar as the components are intended to be included in the production of a cluster munition, but not otherwise.

The Ministry would also point out that the Council on Ethics for the Government Pension Fund – Global regularly excludes producers of cluster munitions from the Fund's portfolio. In a recommendation issued in June 2005, the Council described the components that warrant excluding producers of cluster munitions:

“Even the small explosive devices or bomblets are of course key components in a cluster munition. They consist, inter alia, of the explosives themselves, the surrounding canister and a detonation mechanism or fuse that makes the explosive charge detonate. These are also key components. The canister that contains bomblets is, as a rule, specially designed for this purpose and must therefore be regarded as a key component of a cluster munition. It also consists of several sub-components.

“All canisters have a mechanism or a fuse that makes the canister open and drop the smaller explosive devices. In many cases, both the canister and the bomblets

have guidance mechanisms that make it possible to steer them towards the target and ensure that they strike at the correct angle. Such guidance mechanisms make it possible to drop cluster bombs from great heights and therefore avoid anti-aircraft fire. They may therefore also be considered as key components.”

#### **4.2.3 Acquisition**

The acquisition of cluster munitions generally consists in purchasing them and is thus generally covered by the prohibition of transfer, cf. the discussion in section 4.2.5 below. According to Article 1, para. 1 (b), of the Convention it is prohibited to produce or “otherwise acquire” cluster munitions. It is therefore presumed that insofar as the acquisition of cluster munitions is carried out by other means than production and transfer, this is also prohibited.

According to Article 3, para. 6, of the Convention, the States Parties are permitted to acquire the number of cluster munitions that is absolutely necessary for the development of and training in cluster munition detection, clearance or destruction techniques, or for the development of cluster munition counter-measures. The prohibition of acquisition must be viewed in connection with this provision so that the acquisition of a minimum number of cluster munitions for the specified purposes in accordance with the Convention is not subject to the prohibition set out in Article 1.

#### **4.2.4 Stockpiling**

The stockpiling or retention of cluster munitions is also prohibited under Article 1 of the Convention. What is meant by the phrase “stockpile or retain” is not in principle subject to any doubt. Both those who have ownership of cluster munitions and those who otherwise exercise physical possession of them may in principle stockpile such munitions in contravention of the Convention. This applies both to the actual stockpiling and to facilitating stockpiling, for example by renting out storage space.

However, in order to be subject to criminal responsibility for stockpiling cluster munitions, the person concerned must have had, or should have obtained, knowledge of the unlawful nature of his conduct. According to Article 3 of the Convention, all stockpiles of cluster munitions shall be destroyed as soon as possible, but not later than eight years after the entry into force of the Convention for the State Party in question. Article 3, paragraphs 3–5, also sets out a procedure for extending this deadline in special cases, subject to the approval of a majority of the States Parties. Article 3, para. 6, also permits the States Parties to retain the number of cluster munitions that is absolutely necessary for the development of and training in cluster munition detection, clearance or destruction techniques, or for the development of cluster munition counter-measures. The prohibition of stockpiling must be viewed in connection with these provisions so that such stockpiling is not subject to the prohibition until the deadline specified for completing the destruction of such cluster munitions has expired, and so that the stockpiling of a minimum number of cluster munitions for the specified purposes in accordance with the Convention is not subject to the prohibition set out in Article 1. In such cases, the types of cluster munition that may be considered to be lawfully stockpiled pursuant to Article 3, para. 6, will be clear from the reports to the Meeting of States Parties, in which the States Parties shall, in accordance with Article 3, para. 8, submit a report not only on the type and quantity of stockpiled cluster munitions, but also on their lot numbers in order to facilitate identification.

In the consultation, *Norwegian People's Aid* pointed out that it is important that Norway take a leading role in efforts to prevent any abuse of the right to retain the minimum number of cluster munitions necessary for training purposes. If Norway is to avail itself of this opportunity, a critical assessment must be made of the need for using live munitions for such purposes. In most countries it is usual to use computer models and training munitions without explosives. Therefore, it should be made clear in the preparatory works for the implementation Act that the wording of the provision that the number of explosive submunitions retained or acquired shall not exceed "the minimum number absolutely necessary for these purposes" should be given a restrictive interpretation. The maximum number should be a few hundreds or thousands, but must not run into the tens of thousands.

The *Norwegian Trade Union Confederation* points out that the Convention permits the States Parties to retain a small stockpile of cluster munitions for the development and training in detection, clearance and destruction techniques. The organisation is concerned that Norway's stockpiles of such munitions should be kept to an absolute minimum.

The Ministry agrees that stockpiles of cluster munitions must be limited to the minimum number that is absolutely necessary for this purpose, and that the Convention does not permit larger stockpiles of cluster munitions than are needed for this purpose. At the same time, it is difficult in this proposition to specify with any certainty the number of cluster munitions the Norwegian authorities should allow to be stockpiled in accordance with Article 3, para. 6. Nor will the number of cluster munitions considered by Norway to be absolutely necessary be decisive for the number other States Parties are permitted to acquire or retain. Nonetheless, if Norway limits its stockpiles as much as possible, this could be of significance in a subsequent assessment of whether other States Parties' acquisition and retention pursuant to Article 3, para. 6, are in accordance with the Convention. There is reason to presume that the extensive reporting requirements set out in the Convention will have a moderating effect so that any obvious attempts to circumvent the Convention will be detected.

#### **4.2.5 Transfer**

Transfer is governed by Article 1 of the Convention. The term "transfer" is defined in Article 2 as follows:

“'Transfer' involves, in addition to the physical movement of cluster munitions into or from national territory, the transfer of title to and control over cluster munitions, (...).”

The definition of "transfer" in the Convention is in keeping with that used in previous international agreements. The term is defined in the same way both in the second Additional Protocol to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects, and in the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction. During the negotiations on the Convention on Cluster Munitions, a majority of the delegations wanted to keep this established definition of "transfer" despite the fact that

the wording is ambiguous. They argued that otherwise, doubts about interpretation could arise if similar international agreements were to use different definitions of what was to be prohibited. It is therefore presumed that there are good reasons for interpreting and applying the Convention's prohibition of transfer in the same way as the existing prohibition on transfer of anti-personnel landmines.

On page 3 of Proposition No. 72 (1997–98) to the Odelsting, the term "transfer" is interpreted as follows:

"From a purely linguistic point of view, this definition can be interpreted in different ways. One can either presume that physical transport across national borders and the transfer of title to and control over anti-personnel landmines are prohibited independently of each other, or that both physical transport across a national border and the transfer of title must have taken place in order for there to be a 'transfer' within the meaning of the Convention. If one chooses the latter interpretation, the mere transport of anti-personnel landmines across a national border or within a national territory is not prohibited under the Convention. (...)

"Thus it is possible to interpret the definition of 'transfer' both cumulatively and alternatively, despite the fact that the most obvious interpretation given the text is the cumulative one. It is clear that a number of NATO countries interpret this definition cumulatively, so that both conditions must be fulfilled in order for there to be a 'transfer'. This interpretation is in line with the intention that the provision should primarily cover the export and import of anti-personnel landmines. It is therefore presumed that 'transfer' should be interpreted cumulatively so that both physical transport and transfer of title of ownership and possession must have taken place."

In the interests of predictability and consistency, it is proposed that the implementation of the Convention's provisions in Norwegian law be based on a corresponding interpretation.

The right of the States Parties to acquire the number of cluster munitions necessary for training purposes under Article 3, para. 6, of the Convention restricts the scope of the prohibition of transfer set out in Article 1 correspondingly.

In its consultation comments, the *Norwegian Trade Union Confederation* advocates that the term "transfer" should be interpreted as not including the transit of cluster munitions over or through national territory by non-States Parties. The wording chosen is unfortunate in the sense that it could be interpreted as permitting non-States Parties to transport cluster munitions over national territory. It should be pointed out that this is not the case, and that Convention's provisions concerning assistance and co-responsibility also apply to transit.

*Norwegian People's Aid* states, inter alia, that the chosen interpretation is based on a cumulative interpretation of the definition of "transfer", so that both physical transport and transfer of title of ownership and possession must have taken place in order for "transfer" to have taken place. The organisation would, however, have preferred that the definition of "transfer" be interpreted alternatively, or that it be made clear that the

prohibition of transfer also includes the transit of cluster munitions over or through national territory by non-States Parties. The chosen interpretation is unfortunate in the sense that it could be interpreted as permitting the transit of cluster munitions by non-States Parties over or through Norwegian territory. In any event, it should be pointed out in the preparatory works for the Act that this is not the case.

The Ministry is aware of the possible different interpretations of the definition of “transfer”, but adheres to the proposed interpretation. This is in line with the interpretation previously used as a basis for identically worded provisions in other comparable international instruments. It also corresponds with a number of like-minded countries’ interpretation of the prohibition of “transfer”. One of the reasons underlying this established interpretation is the concern not to give the States Parties too broad responsibility with regard to actions and situations involving the exercise of authority by other States, and that the State Party in question cannot control or prevent. The Ministry would nonetheless stress that such an interpretation of the term “transfer” does not have any decisive consequences for the scope of the Convention’s prohibition in the light of the more general prohibition of co-responsibility for the use, transfer or stockpiling of cluster munitions. A deliberate action comprising transport or other involvement with cluster munitions must be considered in the light of this prohibition of co-responsibility. However, co-responsibility for such actions does not include complicity in actions by States not party to the Convention that are carried out outside the State Party’s jurisdiction or control, cf. Article 21 and section 4.2.6 below. The distinction between prohibited assistance and permitted participation in military cooperation involving the military forces of States not party to the Convention is particularly relevant in connection with international operations. Reference is made to the discussion of Article 21 of the Convention, on interoperability, to be found in Proposition No. 4 (2008–2009) to the Storting, section 3.5, pp. 11–13.

In the light of this, the Ministry considers that the interpretation of the prohibition of “transfer” discussed here, together with the interpretation of the prohibition of assistance, leads to a balanced solution in which consideration for the effective implementation of the Convention and consideration for interoperability in international operations and other situations involving military cooperation can be safeguarded.

#### **4.2.6 Co-responsibility**

According to Article 1, para. 1 (c), of the Convention, it is prohibited to “assist, encourage or induce” anyone to engage in any activity prohibited under the Convention. Such assistance, encouragement or inducement is subject to penal sanctions, cf. Article 9. This list of actions indicates that the prohibition of and criminal responsibility for aiding and abetting are predicated on a certain degree of activity. These are actions that must generally be regarded as aiding and abetting under Norwegian law and that would be subject to a penalty if aiding and abetting is made a separate criminal offence in its own right.

The question of the extent of liability for aiding and abetting in the use, stockpiling, etc., of cluster munitions is particularly relevant in connection with the participation of Norwegian military personnel in joint NATO or UN operations. Because of joint command and planning structures, particularly in NATO, it is difficult to guarantee that



Norwegian soldiers and officers will not become involved in situations that could arguably entail a degree of aiding and abetting others' use, stockpiling, etc., of cluster munitions. In many ways this situation is parallel to that discussed in connection with the ban on anti-personnel landmines. Proposition No. 72 (1997–1998) to the Odelsting, page 2, reads as follows: "According to the proposal, a prohibition of use in Norwegian criminal law would also apply to Norwegian soldiers abroad. The definition of use is restricted to physical deployment, among other things because soldiers often participate in joint military activities in connection with UN or NATO operations, where some of the allies are not bound by the prohibition set out in the Convention. The question has been raised whether allowing oneself to be protected by a minefield planted by others can constitute use in contravention of the Convention. In the Ministry's view, this cannot be classified as use within the meaning of the Convention. Nor does the definition of 'use' apply to the mere participation in joint military operations where non-party States might use mines prohibited by the Convention. Policy considerations dictate a definition of 'use' that ensures that Norwegian soldiers do not risk prosecution simply because they participate in joint operations."

Even though the military function of cluster munitions differs from that of anti-personnel landmines, the possibility of situations arising where cluster munitions are used by a multi-national force cannot be excluded, for example in connection with air or artillery support provided by a State that is not party to the Convention and thus not bound by its prohibition on cluster munitions. For this reason there was general agreement during the negotiations on the Convention on Cluster Munitions that the interpretation of the ban on anti-personnel landmines adopted by Norway and a number of allied States should also serve as a basis for the negotiations on a ban on cluster munitions. Unlike the Convention on Anti-personnel Landmines, where the limited scope of co-responsibility for military cooperation is implicit and is strengthened by the subsequent conduct of the States Parties, the Convention on Cluster Munitions makes explicit reference to such limitation in Article 21, which concerns relations with States not party to the Convention. According to this provision, it is clear that States Parties' participation in international military cooperation or international operations will not in itself entail responsibility even if such operations should involve actions or activities that are prohibited by the Convention but that are carried out by a non-party. This means that actions that are carried out during joint exercises and operations, and that only have a remote and indirect relationship to a non-State Party's use of cluster munitions, are not prohibited.

This limitation of the scope of responsibility does not allow Norwegian forces themselves to carry out actions prohibited by the Convention. On the contrary, this clarification is intended to facilitate an unambiguous interpretation of the Convention in such situations and thereby protect against an unintended and too far-reaching criminal liability for aiding and abetting in national criminal law. It is therefore proposed that a statutory provision be made concerning criminal liability for aiding and abetting that loyally complies with the Convention's obligations in situations involving international military cooperation or international military operations in which Norwegian forces participate together with the military forces of States not party to the Convention. The liability for aiding and abetting in the implementation Act is to be interpreted in the same way as in the Convention, so that it does not apply to participation in international military cooperation and international cooperation per se, unless Norwegian forces or

service personnel conduct themselves in such a way as to incur responsibility under international law for Norway as a troop-contributing State. This does not, however, apply to potential co-responsibility for aiding and abetting any action other than those specified here, for example an action that must be considered to be carried out outside the situations covered by Article 21, or in contravention of the mandate and established chain of command in an international operation.

According to section 24 of the Military Penal Code, persons subject to military criminal jurisdiction are not liable to a penalty if they have been ordered to carry out the action and they “have not known nor should they have known” that the action was unlawful. This is an exception to the rule that a mistake of law may not be used as a ground for exempting a person from criminal responsibility. In the preparatory works for the above-mentioned provision in Recommendation O. IX, 1901–1902, p. 13, it is stated:

“The Committee presumes that in military circumstances, it is only natural that a subordinate should be exempt from criminal responsibility in all cases where he has not known or clearly should not have known that an order was unlawful, and thus, in cases where these requirements are not fulfilled, he should be exempted from criminal responsibility on the ground of a mistake of law. This differs from the general provisions of the General Civil Penal Code in that a mistake of law is subject to much more lenient consideration, which is probably due to the special nature of the relationship between military commanders and their subordinates.”

However, refusal to obey orders is, in principle, a criminal offence, cf. section 46 of the Military Penal Code. Therefore, the soldier who refuses to obey orders must be reasonably certain that aiding and abetting would be unlawful and that he is thus right to refuse. An order to assist in killing civilians during hostilities is an example of a situation where a refusal to obey orders is necessary in order to relieve an individual of responsibility for war crimes. In a situation where a person is, for example, ordered to transport a crate containing cluster munitions, it is not equally clear that the action should result in criminal prosecution of the soldier concerned.

Refusing to obey orders is a drastic step and not only requires thorough knowledge of the legislation governing cluster munitions, but also thorough technical knowledge of ammunition, given that ordinary artillery shells, missiles and aerial bombs are not prohibited under international agreements. Thus the threshold for incurring liability for aiding and abetting is high for military personnel who carry out orders.

As regards transport, see the discussion above in section 4.2.4 concerning “transfer”. In principle, the Convention does not prohibit transport, but it can be argued that the act of transporting cluster munitions to the place they are to be used constitutes aiding and abetting transfer or use. The point at which an action goes from being transport to being aiding and abetting transfer or use must be assessed on the basis of the specific situation. It does not seem particularly expedient to draw up general guidelines for such discretionary issues. Transport and other services involved in transferring weapons and military equipment should be governed by the legislation on export control, see section 4.2.7 below.

In the consultation, *Norwegian People's Aid* expresses its support for the implementation of Article 21, relations with States not party to this Convention, and points out that Article 21 must by no means be interpreted as permitting a State Party to intentionally directly assist, encourage or induce anyone to engage in activities prohibited by the Convention. The *Norwegian Bar Association* and the *Norwegian Red Cross* are of the view that the actions mentioned in Article 21, para. 4 (d), of the Convention should be included in the description of the offences in section 1 of the Act, and the *Norwegian Red Cross* in general calls for a more extensive account of the concept of control in relation to the Convention's requirements concerning jurisdiction or control.

The *Norwegian Bar Association* also takes a critical view of the fact that the States may not incur co-responsibility in cases where they engage in operations together with other States not party to the Convention, a situation that could presumably have practical significance. The Bar Association points out that the International Security Assistance Force (ISAF) in Afghanistan does not use cluster munitions, despite the fact that several of the participating countries have not taken part in the negotiations on an international ban, but that such declarations do not create new law and can thus be subsequently changed. The Bar Association advocates that the liability for aiding and abetting be clearly specified in the implementation Act.

In this connection, the Ministry refers to section 4.5 below and the discussion of Article 21, on interoperability, in section 3.5 of Proposition No. 4 (2008–2009) to the Storting (pp. 11–13). The Convention prohibits aiding and abetting the activities listed in Article 1, even in cases where such activities are carried out by a non-State Party. Insofar as Norwegian personnel engage in military cooperation with the personnel of non-States Parties, the distinction must be assessed in the light of Article 21 read in conjunction with Article 1. The Ministry notes that the limits for prohibited acts under the Convention in these circumstances must be assessed against existing norms on international responsibility, including the requirement of effective control over the relevant situation or acts in question. Thus Article 21 cannot be interpreted as meaning that co-responsibility is generally excluded in international operations. The Convention does not entitle the States Parties themselves to carry out the activities prohibited thereby. For example, Norwegian forces may not request other parties participating in an international operation to use cluster munitions. In cases where, after having made such an assessment, it may be established that Norway is responsible for an activity prohibited by the Convention, it must also be established that the requirements of individual criminal liability in Norwegian criminal law have been fulfilled before charges may be brought against any individual.

As regards more specific operational requirements for fulfilling convention obligations in connection with international operations, it is presumed that the planning and implementation of Norwegian participation in international military cooperation are effected in such a way that Norway's international obligations are fulfilled in a satisfactory manner.

In other cases of possible aiding and abetting activities prohibited by the Convention, the scope of prohibition must be determined in accordance with the general provisions governing criminal responsibility for aiding and abetting in Norwegian law, including the requirement of individual guilt.

The consultation respondents also comment on the question of aiding and abetting in the form of investment. The *Norwegian Bar Association* notes that there is no mention of whether investment is considered to be prohibited under the Convention.

The *Norwegian Trade Union Confederation* is of the view that the prohibition of assistance set out in Article 1 must be interpreted as including a prohibition of investment in companies producing cluster munitions and points out that several countries have already explicitly prohibited such investment in their national legislation.

The *Norwegian Red Cross* maintains that whereas there is no specific mention of investment in Article 1 of the Convention, such an action must be prohibited under the provision governing aiding and abetting set out in Article 1, para. 1 (c). The organisation is of the view that this is not adequately incorporated into the bill. If explicit mention is made of the financing of or investment in cluster munitions in section 1, there will be no doubt as to whether such actions are punishable under the Act. Another possibility could be to specify in the preparatory works for the Act that the financing of or investment in, for example, companies that produce cluster munitions falls within the scope of the Act.

*Norwegian People's Aid* is of the view that the prohibition of assistance set out in Article 1, para. 1 (c), of the Convention must be interpreted as including a prohibition of investment in companies producing cluster munitions. Austria, Belgium and Luxembourg have already explicitly prohibited such actions in their national legislation. Therefore, in the preparatory works it should at least be made clear that the provision concerning aiding and abetting set out in section 3 of the Norwegian implementation Act includes a prohibition of investment in companies producing cluster munitions.

The Ministry notes that there is no explicit mention of financing or investment in Article 1 of the Convention, and that the scope of the prohibition of aiding and abetting others' production, development or acquisition of cluster munitions depends on how the provision concerning aiding and abetting in Article 1, para. 1 (c), is interpreted. The Ministry agrees that investment, for example, in companies that develop or produce cluster munitions may fall within the scope of the Convention's prohibition of aiding and abetting. Here reference is made to a previous assessment of this question made by the then Petroleum Fund's Advisory Commission on International Law (precursor to the Council on Ethics for the Government Pension Fund – Global) on 22 March 2002 in connection with the identically worded prohibition of aiding and abetting set out in Article 1 of the Convention on Anti-personnel Landmines:

“The question then is whether investments by the Petroleum Fund can be regarded as to ‘assist, encourage or induce in any way’ this production. According to the rules of the Petroleum Fund, the fund may not acquire more than 3% ownership of an individual company. This means that the Petroleum Fund normally will not acquire formal or real influence over companies in which the fund invests. (...) It cannot, however, be required that the investment be of a specific amount in order for it to be covered by the Convention. According to Article 31 of the Vienna Convention on the Law of Treaties, a convention shall be interpreted according to its wording and in accordance with its object and purpose. Neither the wording of the convention nor its purpose supports such a restrictive interpretation.

“Furthermore, the prohibition of assistance is not limited only to new offers of shares in order for the company to be supplied with ‘new’ capital. In the Advisory Commission’s view, the point is that any investment of money in a company may be regarded as a form of support to the company even though the sums, relatively speaking, are small. The mere fact that the Petroleum Fund invests in a company at all, could, for example, encourage other States and investors to follow suit. And even if an investment in a company was so modest that it probably would not reach the threshold of the prohibition against States assisting in landmine production, this would probably nevertheless be covered by the alternatives “encourage or induce in any way”. Owning shares in (...) as long as the company (or its subsidiary) continues to produce anti-personnel mines, may, in the view of the Advisory Commission, therefore fall within the scope of the provision concerning aiding and abetting set out in Article 1, para. i (c).”

In the Ministry’s view, this assessment is also true of the prohibition of aiding and abetting set out in the Convention on Cluster Munitions. Therefore, it cannot be excluded that private investment, for example, in companies that develop or produce cluster munitions, may be incompatible with the Convention. However, the question whether such private financing or investment exceeds the threshold for criminal aiding and abetting in Norwegian law must also be assessed in the light of the general requirement of individual guilt.

#### **4.2.7 Prohibition and criminalisation in relation to existing legislation**

The Convention imposes an obligation on the States Parties to criminalise completed offences (use), preparatory activities (development and production, acquisition, stockpiling and transfer), and activities involving aiding and abetting (assistance, encouragement and inducement).

Even today the use of cluster munitions in itself may be regarded as a war crime if such use is incompatible with the principle of distinction in international humanitarian law or causes unnecessary suffering. In the judgment of 12 June 2007 in the *Martić* case, the International Criminal Tribunal for the former Yugoslavia (ICTY) established that one instance of the use of cluster munition must be regarded as constituting a war crime since the weapon used, the rocket-launching system M-87 Orkan, is a non-guided high dispersion weapon and was deployed in what was considered to be a predominately civilian area. Chapter 16 of the Penal Code of 2005 contains penal provisions on genocide, crimes against humanity and war crimes. The bill relating to the implementation of the Convention on Cluster Munitions does not entail any limitations on the provisions of Norwegian law concerning what is to be regarded as a war crime.

Thus, the obligation to criminalise the use of cluster munitions is partly fulfilled by section 107 of the Penal Code of 2005, concerning war crimes involving use of prohibited means of warfare, which entered into force on 7 March 2008. The first paragraph (d) of the section prescribes a penalty for any person who “uses any other means of warfare that is incompatible with international law”. The provision replaces the previous provision in section 107 of the Military Penal Code and applies to armed conflict. This is to say that the prohibition of the use of cluster munitions applies both to Norwegian nationals and to foreign nationals, as well as to military personnel and

civilians, providing that they are operating in a situation involving armed conflict. It only applies to foreign nationals abroad insofar as there is a specific basis in international law for instituting a prosecution, cf. section 6 of the Penal Code of 2005, cf. section 4.5 below.

Act No. 1 of 9 July 1961 relating to firearms and ammunition and Act of 18 December 1987 No. 96 relating to control of the export of strategic goods, services, technology, etc., set out requirements for obtaining a licence, for example, for trading in and import and export of cluster munitions. Any violation of these Acts is punishable. A consistent refusal to grant applications for a licence could be said to serve as a prohibition of transfer.

In Act of 4 June 2002 No. 20 relating to fire and explosion prevention, cf. the previous Act of 14 June 1974 No. 39 relating to explosive goods, which still applies on Svalbard, a licence is also required for producing explosive goods. In practice, a prohibition of production could be implemented by consistently refusing applications for producing cluster munitions. It is, however, doubtful whether a total ban on cluster munitions would be compatible with the purpose of these statutes, which is not to prohibit arms or explosives, but rather to provide for administrative control mechanisms to ensure the proper administration of such goods.

According to sections 148 and 352 of the Penal Code of 1902, any person who uses or stockpiles (retains) cluster munitions in such a way as to endanger the life or health of others or destroys another's property is liable to a penalty. These provisions do not, however, impose a total ban on the stockpiling and use of cluster munitions as required by the Convention. Nor do the general penal provisions on homicide and offences against the person, or attempts and aiding and abetting these offences, entail a total ban on the use of cluster munitions. As Norwegian law does not contain general penal provisions for preparatory actions and aiding and abetting, there is also a need for a separate penal provision that prohibits actions covered by the Convention.

Thus the current legal situation does not fully satisfy the requirements of the Convention with regard to the prohibition and criminalisation of the use, development, production, acquisition, stockpiling and transfer of cluster munitions.

In the light of this, it is proposed that section 1 of the Act prescribe a general prohibition of the actions prohibited by the Convention. Such wording implies, for example, that it is permitted to import and use cluster munitions for training in clearance and destruction techniques in accordance with Article 3, para. 6, of the Convention. It is proposed that the penalty for violating the Act or regulations issued pursuant thereto be fines or imprisonment for a term not exceeding two years for cases where the perpetrator acts intentionally, and fines or imprisonment for a term not exceeding six months for negligent acts. The penalty limits proposed are lower than those prescribed for violations of the Chemical Weapons Convention, but they are in line with the penalties for violations of the Convention on Anti-personnel Landmines. In this way, a distinction is maintained between the penal sanctions for violating the prohibition of weapons of mass destruction and the penalty imposed for violating the prohibition of other types of weapons that have a more limited destructive potential.

It is also proposed that section 3 of the Act, which establishes the penalty limits, should also make aiding and abetting subject to a penalty. It is presumed that by adding a general reference to aiding and abetting in the provision on penalties for violation of the Convention, Norway would fulfil its criminalisation obligation until such time as section 15 of the Penal Code of 2005 enters into force. Once the new Penal Code, whose section 15 includes a general provision on aiding and abetting, has entered into force, the additional reference to aiding and abetting will be superfluous. The reference to aiding and abetting will, therefore, be deleted at that point in connection with the adaptation of special legislation to the Penal Code of 2005.

The above procedure is in keeping with that chosen in connection with the implementation of the Chemical Weapons Convention and the Convention on Anti-Personnel Mines.

(...)

#### **4.3 Control mechanisms**

Article 3, para. 8, and Articles 7 and 8 concern measures designed to ensure compliance with the provisions of the Convention.

Under Article 3, para. 8, and Article 7, the parties undertake to report to the UN Secretary-General on their compliance with the Convention in general terms, and to submit a detailed report on the type and quantity of cluster munitions produced and stockpiled, including munitions retained for training purposes, on the status and progress of programmes for the destruction of stockpiles, on efforts to clear and secure cluster munition contaminated areas, and on any assistance provided to other affected States Parties with a view to implementing the provisions concerning international cooperation. The obligation to report on measures taken to ensure that applicable safety and environmental standards are observed in the destruction of stockpiles, so that new and better methods for destroying cluster munitions can be developed and employed by other States Parties, is particularly important.

All aspects of the reporting obligation are related to information possessed by the respective governments themselves, particularly the military authorities. Therefore it is not considered necessary to lay down a statutory requirement for private persons to supply information in connection with this obligation.

According to Article 8, the parties may seek to resolve questions concerning another State Party's compliance with the Convention by submitting a request to the UN Secretary-General. Such requests shall be accompanied by information explaining why such clarification is being sought. It is explicitly stated that States Parties shall refrain from unfounded requests. If a well-founded Request for Clarification from one State Party to another is not responded to, this may lead to "sanctions" in the form of a Meeting of States Parties where it may be decided by a simple majority to adopt mechanisms for further clarification of the matter, or determined that the Convention has not been satisfactorily complied with.

Unlike the Convention on Anti-Personnel Landmines, the Convention on Cluster Munitions does not lay down rules on fact-finding missions. This means that it is

unnecessary to establish national implementation rules for such missions or for privileges and immunities of the members of fact-finding missions.

#### **4.4 Clearance and destruction of cluster munitions**

Article 3 requires States Parties to destroy existing stockpiles of cluster munitions as soon as possible and no later than eight years after the entry into force of the Convention for the State Party concerned. This requirement applies to all cluster munitions on territory under the State Party's jurisdiction or control. Article 4 requires States Parties to clear any cluster munition contaminated areas under their jurisdiction or control and ensure that any explosive remnants of such munitions are destroyed.

As regards existing stockpiles under Norwegian jurisdiction or control, the defence authorities will take the measures necessary to comply with the provisions on destruction. As Norwegian participation in international operations does not give Norway jurisdiction or control over the territory of another State, such participation does not trigger the obligation under the Convention concerning clearance, etc. It is, however, envisaged that assistance is to be provided to affected States and areas and to cluster munition victims through international cooperation as specified in the Convention. In the light of this, no statutory provisions concerning the obligation of private persons to engage in the clearance or destruction of cluster munitions have been proposed.

#### **4.5 The scope of the Act and the limits of competence of national authorities to prosecute**

As mentioned above, pursuant to Article 9 of the Convention, penal sanctions may be imposed on persons who are on territory that is under the jurisdiction or control of the State Party concerned, and on persons who are otherwise under its jurisdiction or control. Rules concerning the acts committed by Norwegian nationals or any person domiciled in Norway that constitute a criminal offence are set out in section 12 of the Penal Code of 1902, cf. the Penal Code of 2005, which sets out the general provision on the scope of application of Norwegian criminal law.

According to section 12, first paragraph (1), of the Penal Code of 1902, Norwegian criminal law is applicable to acts committed on Norwegian territory. Section 12, first paragraph (3), lays down rules on the acts committed abroad by "any Norwegian national or any person domiciled in Norway, that are punishable in Norway. Section 5, first paragraph (c), second and third paragraphs, of the Penal Code of 2005 extends the scope of this provision to include enterprises registered in Norway, persons who have become Norwegian nationals subsequent to the date on which the act was committed, persons domiciled in another Nordic country who are resident in Norway, and other persons resident in Norway in cases where the maximum penalty for the act exceeds one year's imprisonment. The general rule in the Penal Code of 1902 is set out in section 12 (3) (c), and in the Penal Code of 2005, in section 5, first paragraph (1). According to the latter provision, an act committed by a Norwegian national abroad is punishable according to Norwegian law in cases where the act is also punishable according to the law of the country in which it is committed. This means that there is a requirement of double criminality. A specific legal basis is required to punish Norwegian nationals for committing acts in countries in which acts that are punishable according to Norwegian law are not punishable according to the law of the country concerned.



Such specific legal basis has been provided in a number of cases, for example, as regards offences against the State and public authorities, offences committed while performing an official duty, a number of violent and sexual offences and violations of penal provisions implementing certain international agreements Norway has acceded to.

Therefore, if it is to be possible to convict Norwegian nationals or persons domiciled in Norway for contravening the penal provisions proposed in the Act relating to the implementation of the Convention on Cluster Munitions in cases where the acts are committed in countries that have not implemented penal sanctions against such activities, a specific legal basis must be provided.

It is therefore proposed that a new (i) be added to section 12, first paragraph (3), of the Penal Code of 1902 containing a reference to section 3 of the proposed implementation Act.

Once the new Penal Code has entered into force, the criminal offences specified in the proposed implementation Act and that are committed abroad will be punishable according to Norwegian law in cases where the perpetrator is resident in Norway, provided that the act is punishable according to the law of the country in which it is committed, i.e. when the requirement of double criminality is fulfilled. Otherwise, the limit of Norway's competence to prosecute will depend on how section 6, cf. section 2, of the Penal Code of 2005 is interpreted in the individual case. According to section 6, Norwegian criminal law also applies to acts that Norway, "according to any agreement with a foreign State or international law generally is entitled to or obliged to prosecute", whereas section 2 provides that "the criminal legislation shall apply subject to such limitations as derive from any agreement with a foreign State or from international law generally".

Article 9 of the Convention on Cluster Munitions requires the States Parties to impose penal sanctions for violations of the Convention undertaken by persons under their jurisdiction or control. In relation to the prohibitions set out in the Convention, persons subject to Norwegian criminal jurisdiction abroad are primarily those persons who act on behalf of Norway as a State and Norwegian forces participating in international operations. Norway retains criminal jurisdiction over Norwegian forces participating in international operations unless otherwise expressly provided. The draft implementation Act therefore applies to Norwegian forces abroad, but subject to the clarification of the scope of responsibility discussed above in relation to situations involving military cooperation. In cases where Norwegian officials are seconded to an intergovernmental organisation or other independent international organisation or structure, Norway will not have jurisdiction or control over the organisation or operation as such. Moreover, as regards acts performed by these entities in their official capacity, the competence to prosecute such acts before a Norwegian court could be limited in accordance with the rules of international law concerning functional immunity (immunity *ratione materiae*).

The Convention in itself does not provide a basis for extending the limits of national competence to prosecute to acts committed abroad. A mere violation of the Convention does not imply that such acts may be prosecuted as international crimes. Nor does the Convention provide an independent basis for establishing universal jurisdiction. This

may, however, change as time goes on if the ban on cluster munitions subsequently develops into a universal norm that has the status of customary international law. The limits of Norway's competence in the meantime to prosecute acts prohibited by the Convention, cf. section 6 of the Penal Code of 2005, depend on the limits of competence to prosecute that derive from international law in general.

According to the preparatory works for the new Penal Code of 2005, where the requirement of double criminality is not met, caution must be exercised in prosecuting acts committed abroad, cf. Proposition No. 90 (2003–2004) to the Odelsting, p. 192, section 13.5.6.4. In case of doubt, an assessment may be made of whether a prosecution is required in the public interest. In assessing whether a matter of public interest is involved, emphasis may be given, inter alia, to whether the perpetrator or the act has special ties to Norway that would make it natural or expedient to prosecute here. If the perpetrator is a foreign national, whether or not the person's country of origin is bound by the Convention on Cluster Munitions may also be taken into account.

Section 2 of the Penal Code of 2005, which is identical to section 1, second paragraph, of the Penal Code of 1902, also has independent significance in the assessment of criminal jurisdiction over acts committed by foreign nationals in Norway. In connection with the implementation of the Convention on Anti-personnel Landmines in Norwegian law, mention was made of situations where allied forces participate in military operations in Norway either as reinforcements or in connection with preparations (in the form of exercises) for such a situation, cf. Proposition No. 72 (1997–98) to the Odelsting, pp. 7-8. If allies that are not party to the Convention participate in such activities in Norway, their military forces will not be bound by the ban on cluster munitions. However, it is unlikely that military cooperation in Norway would entail engaging in activities prohibited by the Convention. According to Article 21 of the Convention, Norway will be required to discourage States not party to the Convention from using cluster munitions, and will also be unable to request that cluster munitions be used. Allied forces will be covered by status agreements that guarantee them immunity from prosecution in Norway without the consent of the sending State concerned. It is not considered necessary here to go into more detail on other limits to Norwegian authorities' competence to prosecute ensuing from international law. However, it may be noted that foreign States and intergovernmental organisations are entitled to invoke immunity in certain situations, and that existing rules of international law relating to immunity will also apply in interpreting the scope of Norwegian jurisdiction in cases of alleged violations of the implementation Act. By way of illustration, in principle Norwegian authorities will be unable under international law to prosecute certain acts presumed to have been committed on board a vessel of a foreign State, for example, a naval vessel or aircraft, including a military aircraft. Official duties performed by public servants of foreign States may also be exempt from prosecution before a Norwegian court. Therefore, it is not proposed that a special exemption from the Act should be granted with a view to establishing the limitations of the right to prosecute members of allied forces in Norway beyond the reference in the Penal Code to those that derive from agreements with foreign States and from international law generally.

(...)

**Excerpt from Proposition No. 4 (2008–2009) to the Storting:**

### **3 Important issues in the negotiations**

#### **3.1 Introduction**

The Convention comprises a number of key elements, including the obligations never under any circumstances to acquire, use, transfer or stockpile cluster munitions, to destroy existing stockpiles, to assist cluster munition victims, and to engage in international cooperation on the clearance of affected areas. Even before the conference in Dublin, agreement had been reached on these general principles for a new convention. The following is a brief account of the most important outstanding issues that had to be resolved in the negotiations at the conference.

#### **3.2 Definition of cluster munition**

At the time of the negotiations, there was no universally accepted legal definition of a cluster munition. In purely technical terms, a cluster munition is a type of weapon comprising a munition in the form of a canister or similar dispenser containing one or more explosive submunitions, bomblets or warheads. Cluster munitions work by dispersing or releasing explosive submunitions intended to detonate separately after they are released. Therefore, from a technical point of view, the term “cluster munition” could conceivably cover a number of different munition types, ranging from intercontinental missiles to certain types of anti-aircraft munition. The term could also conceivably include a number of munition types that do not contain explosives, such as smoke shells or flares.

From the beginning of the Oslo process, there was agreement that the ban should apply to “cluster munitions that cause unacceptable harm to civilians”, in line with the humanitarian rationale behind the initiative. This is why the negotiations in Dublin came to focus on the issue of what types of munition satisfy the criterion “cause unacceptable harm to civilians”.

The point of departure for the discussion was the objections against cluster munitions: It is an area weapon with high dispersal, which as experience shows has made it difficult to observe the principle of distinction in humanitarian law in a number of armed conflicts today. Moreover, cluster munitions leave behind a large number of duds in the form of unexploded submunitions, which as experience shows means that cluster munitions cause disproportionate harm and are thus incompatible with humanitarian law because of the lasting risk they pose to the civilian population, often long after the military conflict has ended.

Several of the delegations argued that this description only fits certain types of munition that have a large number of submunitions, or that lack mechanisms designed to ensure that there are no duds (self-destruction mechanisms). Some advocated that munitions guided towards a designated target (direct fire munitions) should be exempted, whereas others were of the view that technological advances involving the gradual phasing out of older types of cluster munitions might be a solution.

The events in Southern Lebanon in summer 2006, and the subsequent on-the-ground analysis of the failure rate of modern cluster munitions equipped with M85 self-destruction mechanisms conducted by the Norwegian Defence Research Establishment

and Norwegian People's Aid, showed that the failure rate does not necessarily correspond with the actual percentage of duds in situations of armed conflict. Norway and a number of other countries advocated that a maximum failure rate could not in itself be decisive for whether a type of munition was to be considered lawful. Norway also advocated that the number of submunitions alone could not be decisive for the lawfulness of the munition since it is the actual number of duds that constitutes the humanitarian problem. Nor could the manner in which the munition is delivered be accorded any significance in this context.

On the other hand the size of the individual submunitions is significant because the fact that duds are small make them difficult to detect, which makes them a particular problem for the civilian population and makes clearance difficult. The size of the submunitions also determines how many of them will fit in each shell, which directly affects the number of duds that are left behind. Norway therefore proposed a set of cumulative conditions combining requirements as to number, weight and target detection capability. Only those types of munition with explosive submunitions that fulfil all of these conditions are to be considered as falling outside the definition of "cluster munition" within the meaning of the Convention. One of the advantages of this solution is that the prohibition on the basis of weight applies to all types of cluster munition that have been employed in armed conflict to date, and that have thereby caused the unacceptable humanitarian consequences the Convention is intended to prevent. Moreover, this solution entails that the prohibition does not apply to other types of munition that, due to their precision and target detection capability, do not have any of the negative characteristics that pose a problem in terms of international humanitarian law.

On the basis of Norway's proposal, the Conference adopted a definition of "cluster munition" in Article 2, para. 2 (c), that prohibits all cluster munitions that do not satisfy all of the criteria as to: (i) maximum number of submunitions, (ii) minimum weight, (iii) target detection capability, (iv) electronic self-destruction mechanism, and (v) electronic self-deactivating feature.

Thus, the Convention sets out a total ban on all cluster munitions that fit this definition.

The definition implies, *inter alia*, that Norway's stockpiles of cluster munitions will be prohibited and must be destroyed. This is discussed in more detail in section 4.3 below.

### **3.3 Transitional arrangements**

Another important issue in the negotiations concerned the time frame for phasing out cluster munitions. Some delegations wanted the option of transitional arrangements or reservation rights that would enable them to retain and use their own cluster munition stockpiles during a transitional period until they had acquired other weapon types to replace the old ones. Norway and a majority of the participating States were opposed to exemptions or transitional arrangements as they feared that such provisions could dilute the ban on cluster munitions. This was also the final position arrived at by the Conference. The negotiating result therefore does not allow for national transitional arrangements or reservations. Together with Article 1, this implies that the prohibition is unconditional and does not allow for any form of exemption.

### **3.4 Cluster munitions for training purposes**

A third issue the delegations had to consider in Dublin was whether the parties were to be permitted to retain or acquire a limited number of cluster munitions or submunitions for training in clearance techniques and developing counter-measures. Several delegations were in favour of this because they were of the view that training requires a certain number of explosive munitions if it is to be effective. Norway and several other delegations were sceptical of the efficacy of such a provision and called attention to the danger that such an option could lead to circumvention of the convention, a problem that has become an issue in connection with the Convention on Anti-personnel Landmines. The result set out in Article 3, paras. 6 and 8, was a compromise where the parties are permitted to retain a limited number of cluster munitions and submunitions for the specified purposes, subject to the obligation to submit a detailed report to the Meeting of States Parties on the planned and actual use of these munitions and submunitions and their type, quantity and lot numbers.

### **3.5 Interoperability**

A fourth issue in the negotiations concerned the consequences of the Convention for military cooperation (interoperability) between States that adhere to the Convention and States that choose not to do so. Several delegations were of the view that the prohibition of co-responsibility set out in Article 1, para. 1 (c), goes a long way towards establishing that States Parties are responsible for activities prohibited by the Convention, even when such activities are carried out by other States that choose not to adhere to the Convention and that thereby are not bound by the ban on cluster munitions. It was pointed out that in international operations, for example under the auspices of the UN or NATO, it is usual that several troop-contributing countries participate in various functions and that it is not always possible to fully guard against activities prohibited by the Convention if such activities are carried out by non-States Parties that are participating in the operation. Such a consequence could make it difficult for States Parties to take part in future international operations and thus undermine the international community's ability to safeguard peace and security. Another consequence would be that the service personnel participating in international operations or other military cooperation with non-States Parties would be in a vulnerable position that could result in their being subject to criminal liability even if they are only remotely associated with others' involvement in activities prohibited by the Convention. In the light of this, it was advocated that there was a need for an exemption from Article 1 in specific situations involving military cooperation.

Up until now, it has not been usual to regulate relations with non-States Parties in instruments of international humanitarian law or human rights conventions. Like any other convention, the Convention on Cluster Munitions will be part of a broader international law context where other relevant rules, for example, on the kinds of activity each State Party is responsible for, on the status of international operations in international law, and on privileges and immunities, are essential for the interpretation and application of the Convention's provisions. The problems with regard to interoperability due to the fact that participating States have different international obligations are not new, and they have been resolved in practice between the States participating in military operations or other forms of cooperation. Nor is this problem unique to situations where there are different degrees of international obligations. National limitations can also reflect differences in national priorities, so that some

national contingents participating in an international operation may, for example, only be employed for specified purposes or in more closely defined geographical areas.

The point of departure for an analysis of international obligations vested in troop-contributing States and the concept of interoperability is that international responsibility is contingent upon the State's jurisdiction over its territory, persons and organs or control over specific activity that entails responsibility. Thus, participation in military cooperation raises questions as to who has the operational command and control of the situation or activity concerned. There is no doubt that as long as Norwegian forces abroad are under Norwegian command and control, they are an organ of the State, and Norway is responsible under international law for activities prohibited by the Convention. On the other hand, Norwegian troops that are provided to a UN-led operation are part of that operation, which is an organ of the UN, and Norway is not responsible under international law for any activities prohibited by the Convention that are carried out under UN command and control. If national troops were to contravene the operation's command structure, however, the result could be quite different. However, so far no cluster munitions have been used in any UN-led operation; nor is it likely they will be used in future operations given the further development of international humanitarian law standards embodied in the Convention.

The question of responsibility in connection with interoperability, on the other hand, arises in connection with international operations with a UN mandate and that are carried out by a coalition of troop-contributing States or, for example, under the auspices of NATO, under joint command and control. Here the question of responsibility under international law also depends on an assessment of who has effective control of the situation or the activities in question. According to the case-law of the European Court of Human Rights, it may be considered sufficient to attribute an action to the UN that the Security Council delegates authority and control of the implementation of an international operation to a State or other international organisation. Thus, the responsibility under international law of an individual State participating in an international organisation coincides with the exercise of effective national control of the activities in question.

The fact that personnel in international operations are accorded immunity from prosecution in the host State, and that the sending State retains exclusive criminal jurisdiction over its own personnel, does not change this picture.

During the negotiations, Norway in the light of this interpreted the proposed co-responsibility provisions in the Convention to mean that the prohibition of cluster munitions will not prevent States Parties from continuing to participate in military cooperation or international operations. This is the same interpretation that was used as a basis in the Convention on Anti-personnel Landmines, which has identical wording in the provisions on co-responsibility and national implementation measures, cf. Articles 1 and 9. Several allied countries, such as Canada and the UK, made a declaration concerning interpretation when they ratified the Convention on Anti-personnel Landmines.

In the negotiations in Dublin, it turned out that a sufficient number of delegations wanted a clarification of this principle included in the Convention on Cluster Munitions.

The result was the addition of Article 21, which governs relations with States not party to the Convention. The provision requires the States Parties to make their best efforts to discourage non-States Parties from using cluster munitions. Article 21 also confirms that States Parties may participate in military cooperation and military operations with States not party to the Convention that might engage in activities prohibited to a State Party. The exemption for military cooperation does not authorise the States Parties to engage in activities prohibited by the Convention.

Thus, Article 21 helps to alleviate some of the concern expressed that the Convention could impede future international operations or expose military personnel to a risk of prosecution in situations where a non-party participates in a joint operation. Perceptions of such a risk for military personnel were linked not least to a fear that the Convention's co-responsibility provisions would be subject to different practice without the clarification made in Article 21. This clarification of a general principle must be regarded as being in accordance with the interpretation used as a basis for the Convention on Anti-personnel Landmines and, in the Ministry's view, leads to the same result as regards the assessment of responsibility as derives from international law in general, cf. in particular the Vienna Convention on the Law of Treaties and the principles of international responsibility for States and international organisations.

In its final statement at the conference, Norway noted with satisfaction that there was broad support for the principle that continued participation in international cooperation should be allowed, and that the negotiating result does not circumvent other provisions of the Convention, which if it had, could have undermined confidence in the Convention. There is reason to stress that Article 21 deals with a situation that is presumably temporary. When the ban on cluster munitions becomes a universal norm with global scope, and as prohibited cluster munitions are gradually phased out of existing defence concepts and military stockpiles, the provision will be superfluous.

### **3.6 Transfer**

During the negotiations, there were divergent views on the definition of the term "transfer" in Article 2. A number of delegations wanted a definition corresponding to that set out both in the second Additional Protocol to the Convention on Certain Conventional Weapons and in the Convention on Anti-personnel Landmines, despite the fact that the wording is ambiguous. A key reason was that otherwise, doubts about interpretation could arise if similar international agreements were to use different definitions of the same term. This was also the outcome of the negotiations, despite the fact that Norway had put forward a proposal for simplifying and clarifying the provision in Conference Document CCM/73. In the light of this, it is presumed that there are good reasons for interpreting and applying the Convention's prohibition of transfer in the same way as the existing prohibition on transfer of anti-personnel landmines.

On page 3 of Proposition No. 72 (1997-98) to the Odelsting, the term "transfer" is interpreted as follows:

"From a purely linguistic point of view, this definition can be interpreted in different ways. One can either presume that physical transport across national borders and the transfer of title to and control over anti-personnel landmines are prohibited independently of each other, or that both physical transport across a

national border and the transfer of title must have taken place in order for there to be a 'transfer' within the meaning of the Convention. If one chooses the latter interpretation, the mere transport of anti-personnel landmines across a national border or within a national territory is not prohibited under the Convention. (...)

In the light of this earlier interpretation of the term "transfer", it is proposed that a corresponding interpretation be used as a basis for the Convention on Cluster Munitions. It should, however, be stressed that the interpretation of the term "transfer" does not have decisive consequences for the scope of the prohibition set out in the Convention in the light of the more general prohibition of co-responsibility for the use, transfer or stockpiling of cluster munitions. A deliberate action comprising transport or other involvement with cluster munitions must be considered in the light of this prohibition of co-responsibility. However co-responsibility for such actions does not include complicity in actions by States not party to the Convention that are carried out outside the State Party's jurisdiction or control, cf. Article 21 and section 3.5 above. Reference is also made to the discussion of Norwegian implementation provisions in Proposition No. 7 (2008-2009) to the Odelsting, pp. 10-13.

## **4 Assessment**

### **4.1 The Convention's importance in terms of humanitarian law**

The Convention's importance in terms of humanitarian law lies in the fact that it seeks, through its prohibition of use, production, stockpiling and transfer of cluster munitions, and its requirement that they be destroyed, to eliminate a category of weapons that constitutes a grave humanitarian problem today. The prohibitions set out in the Convention are not weakened by exemption provisions, reservation rights or transitional arrangements. Thus the Convention contributes to establishing a new and important international norm that will influence the conduct of all parties in future conflicts. The Convention underscores and clarifies the general principle of distinction in international humanitarian law. It could provide better protection to the civilian population in conflict-affected areas than previously, for one thing because it will prevent the use of the enormous quantities of cluster munitions now found in stockpiles around the world.

Together with the prohibitions, the provisions on international cooperation and assistance in clearance of affected areas, as well as victim assistance, make the Convention a practical tool in the efforts to put an end to the humanitarian suffering caused by cluster munitions. The clear provisions on enhanced international cooperation and assistance are not least important for developing countries and can facilitate efforts to gain support for the Convention. This helps to give the Convention moral weight. The broad support of all regions is particularly important if the Convention is to be able to play the role envisaged for it in international human rights law.

### **4.2 The significance of the Convention for security and defence policy**

The Convention raises a number of issues that have a bearing on a number of defence and security policy issues. Twenty of NATO's 26 Member States took part in the adoption of the Convention. Five of the remaining six Member States participated as observers, while the USA did not participate. In the integrated military cooperation



between allies, it is necessary to coordinate operational concepts to take account of countries that have different forms of adherence to various conventions and thus maintain effective military cooperation in NATO. The Rules of Engagement are designed to facilitate cooperation in operations and find practical solutions despite national variations in operational practices. This applies not least to NATO countries' participation in international peace support operations with non-allied countries. The aspects related to command and control are important in the light of the Alliance's integrated command structure. Article 21 specifies that the provisions of the Convention shall not impede military cooperation between States Parties and non-States Parties, and sets out detailed provisions for how the Convention's prohibitions are to be interpreted in a context where both States Parties and non-States Parties participate. Thus, the Convention will enable the continuation of close allied cooperation and a policy of participation in international operations.

#### **4.3 The significance of the Convention for the Norwegian Armed Forces**

As a consequence of the Convention, the Norwegian Armed Forces' existing stockpiles of cluster munitions must be destroyed. This is a matter of approximately 50 000 DM 642 and DM 662 artillery shells. These munitions were acquired in the period 1989–1990 for the purpose of defending Norwegian territory, and as noted above Norway has never employed this type of munition in military operations.

This type of munition, i.e. munitions corresponding to DM 662, equipped with M 85 submunitions, has only been used in conflict in two cases: by the UK in Iraq in 2003, and by Israel in Southern Lebanon in 2006. The experience gained from such use in Iraq has never been systematised or published. However, a report drawn up by the Norwegian Defence Research Establishment, Norwegian People's Aid, *et al.*, showed that the battle conditions affect the munition's reliability to a much greater degree than previously assumed. The result was a much higher rate of duds than that indicated by tests under controlled conditions. As already noted, this led to the Norwegian Government introducing a moratorium on the use of cluster munitions in 2006.

In addition to causing humanitarian harm, the percentage of duds also has significance for the military utility of the munition. This is both because larger quantities of munition must be used to achieve the desired result, and because the presence of duds in the terrain hampers mobility and poses a danger for military personnel as well. A more recent report by the Norwegian Defence Research Establishment also indicates that cluster munitions are less effective against certain types of target, including armoured targets, than previously assumed. This is partly due to recent technical advances in armoured equipment.

Experience gained from using cluster munitions in armed conflict has also led to a greater focus on the strategic utility of such munitions. This applies particularly to the enormous humanitarian and socio-economic costs incurred as a result of unexploded duds that affect civilians in large areas, impede relief efforts, reconstruction and development of affected areas, and contribute to greater poverty, which in turn may provide a breeding ground for new conflicts. This could undermine the very political objectives that the use of military force in international operations is intended to support, i.e. the promotion of peace and stability.

Thus, the ban on cluster munitions is in keeping with the defence authorities' recommendations. Nonetheless, there is no doubt that the phasing out of these munitions represents a significant reduction in the Norwegian Armed Forces' total inventory of artillery ammunition. It will be necessary to acquire alternative types of weapon in order to maintain the Armed Forces' defence capability. The alternatives are currently being studied by the defence authorities. Their assessment so far is, however, that it would be possible to replace the military effect of cluster munitions against most types of target by a combination of various alternative weapons types that are already available today.

Despite the fact that the Convention in principle prescribes an eight-year deadline for destroying national stockpiles, the Norwegian Ministry of Defence intends to complete this process as quickly as possible. At the same time, however, it is important to ensure that the destruction process is carried out in such a way as to safeguard health and environmental considerations. The defence authorities are therefore assessing how the destruction process should be conducted.

The prohibition of stockpiling on territory under a State's jurisdiction and control also entails a prohibition of such stockpiling (prestockage) by other States. This issue was raised in connection with the adoption of the Convention on Anti-personnel Landmines in 1997 because the US had stocks of such landmines in Norway. These landmines were subsequently removed, in 2002. As regards cluster munitions, corresponding stocks of US cluster munitions were removed and destroyed as early as 2006. According to the current agreement on the US Marine Corps Prepositioning Program in Norway, the stockpiling of certain types of weapons on Norwegian territory must be in accordance with Norway's international legal obligations.

Norwegian participation in international organisations does not give Norway jurisdiction or control over the territory of another State. Thus such participation does not trigger the Convention's obligations with regard to clearance, etc. However, the Convention allows for providing assistance to affected States and areas and to cluster munition victims through international cooperation.

## **8 Conclusion and recommendation**

The humanitarian objectives of the Convention are in line with Norway's foreign policy orientation. The international ban on cluster munitions is an important contribution to the further development of international humanitarian law, which is in keeping with Norway's image as a champion of international law. The aim of these efforts is to help to establish broad support for the international humanitarian norm enshrined in the Convention as quickly as possible. Norway's early signing and ratification of the Convention would be an important contribution in this respect, which would attract international notice and could inspire other States to give more priority to national ratification procedures so that the Convention can enter into force as soon as possible.

The Convention requires the States Parties to implement the prohibition of cluster munitions at national level. This will require national legislation implementing the prohibition of cluster munitions on Norwegian territory and in relation to persons under Norwegian jurisdiction or control. Therefore, a proposition to the Odelsting proposing

the necessary legislative amendments is being put forward parallel to this proposition to the Storting, cf. Proposition No. 7 (2008–2009) to the Odelsting.

**Proposal for a decision on consent to ratification of the Convention on Cluster Munitions**

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The Storting consents to signing and ratification of the Convention on Cluster Munitions.