

Human Rights Norms in Arms Export Controls

-Exploring the Process of Norm Implementation in Norwegian Arms Export Regulations.

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1 Introduction

1.1 The research question

The area of arms export controls has slowly evolved from being a tool purely for strategic security politics towards recognising the adverse effects of arms proliferation on the recipient community. A notion of complicity for the exporting states, moral if not legal, in human rights violations committed with their weapons, has been argued from peace and human rights activist groups.¹ A vague language of human rights has materialised in several arms trade agreements written from the mid -90's onwards.

Norway, a significant arms exporter per capita, is a party to all the relevant agreements. Additionally, it is a state with an explicitly stated image as a peace nation and human rights defender,² branding itself as a humanitarian superpower.³ The Norwegian peace movement has used these two international roles, as an example of contradictory foreign relations, arguing that the role as a major arms exporter is incompatible with the role as a humanitarian superpower. This thesis aims to analyse the way in which human rights concerns have been and are being incorporated into Norwegian arms export policies. Based on this potential contradiction as mentioned above, I find Norway to be a very interesting case for such an enquiry.

The theoretical framework for analysing this process is partly based on elements of the *spiral model* developed by Thomas Risse *et.al* in the book *The Power of Human Rights*. I thus propose the following hypothesis:

The evolving role of human rights norms in Norwegian arms export controls can be explained through utilising an adaptation of the spiral model developed by Thomas Risse et.al.

¹ For an overview, see www.controlarms.org.

² Recent examples can be found in speeches and declaration from the Minister of Foreign Affairs. An article called "Norway as a Peace Nation" written by the minister, Mr. Støre, is available from http://odin.dep.no/ud/norsk/aktuelt/taler/minister_a/032171-090580/dok-bn.html, and a speech on Norwegian facilitation of peace processes can be found here: http://odin.dep.no/ud/english/news/speeches/minister_a/032171-090557/dok-bn.html.

³ Branding Norway as a humanitarian superpower is part of the image building strategy of the Ministry of Foreign Affairs. *Executive Summary: Norway's Public Diplomacy: A Strategy*, available from http://odin.dep.no/archive/udvedlegg/01/06/ml10_018.pdf.

This model will be discussed, and the relevant elements of it and its main mechanisms mapped out in chapter three.

1.2 Literature review

The literature on the normative rationale behind arms transfer controls is quite sparse, and generally originating from the NGO community. It is accordingly somewhat proscriptive in nature, focusing mainly on what should be done in order for arms exports to be in line with existing norms. Examples of this are various documents from the Control Arms Campaign, such as *Shattered Lives* and *Guns or Growth*,⁴ both produced by Amnesty International.

The majority of literature addressing the effects of arms trade on human rights is limited to discussing small arms, such as the reports published by the Small Arms Survey.⁵ These reports are generally of a descriptive nature. An exception is an article by Glenn Mac Donald where the implementation of norms of a humanitarian nature is implemented in the discussion on small arms proliferation.⁶ However, the article is limited to the small arms discourse, and does not address normative developments in the domestic context. Barbara Frey has written several reports for the UN Sub-Commission on the Promotion and Protection of Human Rights addressing the effect of different aspects of small arms trade on human rights.⁷ These reports are very relevant to this thesis and will be addressed in chapter four. However, they are limited to small arms issues and do not address the domestic arms export control context. Ian Anthony does address the domestic context,⁸ however he mainly describes the empirical reality of the arms export regulations without analysing the normative framework on which they are based. Emanuela-Chiara Gillard discusses the difference between legal and illegal arms transfer on the basis of international law, including human rights law.⁹ This is to a limited degree relevant, however she does not address

⁴ Both reports are available from http://www.controlarms.org/find_out_more/reports/.

⁵ All reports from the Small Arms Survey are found at <http://www.smallarmssurvey.org/publications.htm>

⁶ Mac Donald, Glenn and Silvia Cattaneo, *Moving from Words to Action: Small Arms Norms, Development Denied*, Small Arms Survey 2003

⁷ Especially E/CN.4/Sub.2/2004/37, *Progress Report of Barbara Frey, Special Rapporteur on the prevention of human rights violations committed with small arms and light weapons*, 21 June 2004.

⁸ Anthony, Ian [ed.], *Arms Export Regulations*, Sipri and Oxford University Press, Stockholm 1991.

⁹ Gillard, Emanuela-Chiara, *What's Legal? What's Illegal?*, in Lumpe, Lorna [ed.], *Running Guns – The Global Market in Small Arms*, PRIO and Zed Books, London 2000.

the role of domestic export control in implementing regulations to avoid illegal transfers, or indeed whether her concept of illegality is supported by a majority of states.

This thesis thus represents a new perspective in the discourse on arms export controls. The perspective provided by it is important because arms export controls are a domestic concern. A coherent understanding of the changing perspectives on arms export regulations must therefore include an understanding of how the normative foundation of these regulations evolves within the individual states.

1.3 Definitions

It is necessary to lay down a precise definition of small arms and light weapons for the purpose of clarifying my argument. This is based on the importance that the current Control Arms Campaign, a campaign that will be central to my argument, attaches to the role of these weapons in human rights abuses. The thesis will not focus specifically on this group of strategic goods beyond the chapters discussing the NGO campaigns for stricter arms export control.

An authoritative definition is the one given by the UN Panel of Governmental Experts on Small Arms in their 1997 report.¹⁰ It states, “Broadly speaking, small arms are those weapons designed for personal use, and light weapons are those designed for use by several people as a crew”.¹¹ This definition also includes any ammunition designed for use by these weapons. It should be noted that there is no clear dividing line between these two categories, just as the dividing line between SALW and other types of conventional weapons is blurred.¹²

One technical aspect of arms export controls must be clearly defined for the benefit of clarity of argument. One way of ensuring domestic control with exported strategic goods is by demanding *end user certificates* from the recipient state. An end user certificate is a document which verifies the final recipient of the goods. It may take

¹⁰ UN General Assembly, *General and Complete Disarmament, note by the Secretary General*, document A 52/298, paras 24-26.

¹¹ *Ibid.* Para 25.

¹² For aesthetic purposes, throughout this paper small arms and light weapons, SALW and small arms will be used synonymously unless otherwise stated.

many different forms; however it will usually provide information about the state organ for which the goods are intended, often including the intended use of the weapons. Such certification is recommended by the UN and other international and regional organisations as a means for the exporting state to ensure that its goods do not reach an illegitimate recipient.¹³

This thesis is concerned with the implementation of a language of human rights in a specific body of laws and regulations, as well as the discourse of arms transfer controls. Thus, it is necessary to treat human rights as an abstract concept throughout most of the following discussions. This is necessary due to the way in which human rights is utilised in the debate which the thesis seeks to analyse. While some attempts, as explained in chapter four, have been made to establish the legal nexus between arms transfers and responsibility for potentially ensuing human rights violations, this argumentation does not dominate the domestic debate about what would be a satisfactorily strict arms export regime. Here, the debate is structured in terms of the moral validity of exporting arms that may be used for violations by others, or that the state cannot control possible re-exports of. Based on this, unless otherwise stated, the concept of human rights must be understood in these terms, as signifying a moral claim to not in any way facilitate or support potential human rights violations. It will then follow that the same must be assumed when I talk about norms in this framework.

Norms and norm adherence must be understood in terms of the structure of the debate, signifying the moral obligation to go beyond legal obligations to avoid risking the potential for Norwegian weapons facilitating human rights violations. A further elaboration of the functions of concepts of norms and human rights will be provided in chapter three when I define important theoretical concepts. Primarily, the incorporation of human rights that this thesis seeks to analyse is concerned with human rights as a basis for ethical standards, and legal protection of rights through arms export regulations is only one possible outcome of such a process.

¹³ A/CONF.192/2006/PC/CRP.17, *Preparatory Committee for the United Nations Conference to Review Progress Made in the Implementation of the Programme of Action to Prevent, Combat and*

1.4 The campaign to include human rights in arms export controls

The Control Arms Campaign,¹⁴ an ongoing campaign calling among for more human rights-sensitive arms export controls, is mainly focused on small arms.¹⁵ This is founded on the premise that, while weapons of mass destruction and even major conventional weapons systems may pose the greatest threat to national security, SALW are the weapons that are used for human rights violations on a daily basis.¹⁶ Based on their portability, availability and fairly uncomplicated design, SALW in general and handguns in particular lend themselves naturally to purposes of threat, intimidation and violent human rights abuses in the hands of official state forces as well as paramilitaries and irregular armed groups. In chapter two I will look both at the conceptual realm in which arms export considerations and human rights policies meet, and at theoretical explanations for the introduction of human rights principles to this issue.

The strong focus from NGOs on the issue of arms transfers is relevant also in that it provides ample background information on human rights violations committed with these weapons. The Control Arms Campaign, a coalition led by Amnesty International, Oxfam and IANSA¹⁷ have published several reports highlighting the diverse human rights-related problems associated by the proliferation and free flow of small arms. The report *Guns or Growth*¹⁸ focuses mainly on the effect of oversized military expenditures and the availability of small arms on development and prosperity in developing countries. In *Shattered Lives*¹⁹, the campaign's first comprehensive report, poverty, individual security and the role for small arms in facilitating human rights abuses is addressed and documented.

Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, Conference room paper submitted by the Chairman, p. 9.

¹⁴ See www.controlarms.org.

¹⁵ *Shattered Lives, The Case for Tough International Arms Control*, Amnesty International, Oxfam and IANSA, p. 19, available from http://www.controlarms.org/documents/arms_report_full.pdf.

¹⁶ Ibid.

¹⁷ IANSA is an umbrella organisation comprising about 500 civil society organisations working against gun-related violence. See <http://www.iansa.org/about.htm>.

¹⁸ *Guns or Growth: Assessing the Impact of Arms Sales on Sustainable Development*, available from http://www.controlarms.org/find_out_more/reports/.

¹⁹ *Shattered Lives: The Case for Tough International Arms Control*, available from http://www.controlarms.org/find_out_more/reports/

The Norwegian NGO attention paid to the human rights problems associated with arms trade in general and the proliferation of small arms in particular has been significant, especially since the start of the Control Arms Campaign in 2002. However, the inclusion of human rights references in international arms trade documents and in the Norwegian arms export rhetoric started significantly earlier. This observation is the background for the relevance of examining the explanations for this norm implementation in Norwegian arms control regulations.

1.5 Sources and Methodology Introduced

My first task will be to analyse the different regulations dictating Norwegian arms exports. This is necessary in order to map out the position of human rights in this field of policy. Assessing the development of this field provides an understanding of the process by which the position of human rights norms has changed. This analysis will be applied to domestic laws and regulations, international law and agreements, and norms to which the Norwegian government has expressed adherence. In accordance with my hypothesis, I will assess how the international changes relate to domestic changes, and how domestic law may reflect how Norway understands its international commitments in the human rights field related to its arms export regulations. The analysis of these relationships will be based on a theoretical foundation exploring mechanisms of norm adherence, which will be found in chapter three. Thus, the focus of this study will not be limited to arms control documents. Human rights law as well as other international standard-setting documents of various kinds will also be discussed as necessary. These legal aspects will be discussed in chapter 4 to the degree that they are able to provide a framework for the following discussion.

I thus do not intend to provide a broad-based or exhaustive legal analysis of the potential responsibilities that a state may incur for acts of arms exports to potential human rights violators. Rather, I wish to give a brief overview of traditional understandings of the scope of international human right instruments in order to illustrate the progressive nature of the latest development of the arms control debate. This will help the reader understand the context of the Norwegian debate as well as providing a broader context in which to understand the process of norm implementation.

The international texts will form a backdrop against which Norwegian laws and regulations will be discussed. These texts will be considered in light of how they relate to the human rights concept as it is framed in international commitments, and how they appear as an expression of the Norwegian understanding of how human rights norms are relevant to their arms export policies.

To get a clearer picture of the Norwegian practice some elements of the argument utilises an interview conducted with a member of the Section for Export Control at the Ministry of Foreign Affairs. The general lack of transparency in relation to arms export issues makes such an informal approach likely to be the best means of obtaining more detailed information on this practice. The interview was not standardised, but tailored to the specific capacity of the interviewee.

1.6 Scope and Limitations of the Thesis

This thesis is concerned with analysing the process of integrating human rights in the Norwegian arms export control regime. In order to adequately address this and to put it into a broader international human rights context, I will on two occasions provide background information to establish this framework. This is done in chapter three, which describes the existing regulatory framework of Norwegian arms export controls, including the international commitments that I consider to be of greatest significance to the thesis. In chapter four I discuss elements of international law that map out the scope of application of human rights treaties. This is done in order to illustrate the progressive nature of the arguments for more restrictive arms exports control being voiced by the relevant NGO community. I do not intend to provide an exhaustive discussion of this field, or to make any conclusions as to the merits of the different perspectives. Rather, it is meant as a framework for understanding the discussion of norm development that will follow in the last part of chapter four as well as in chapter five.

There are a number of international and regional documents that to a greater or lesser extent are relevant to the development of the role of human rights norms in arms

transfer regulations.²⁰ I have chosen to focus on a limited number of these due to limitations of space. The chosen documents are included because they play a key part both in the international development of these norms and in their implementation in Norway. Instruments not included here are also likely to be of relevance to the process of norm implementation, and their exclusion here does not entail a disregard for their importance on an international level.

²⁰ In addition to those that I have chosen to focus on, this includes the UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, the OSCE Document on Small Arms, the UN Firearms Protocol and several others.

2 Theoretical framework

2.1 The human rights aspect

It is increasingly legitimate to introduce human rights concerns as a relevant ethical standard in international affairs. This can especially be observed in the UN where there is a conscious ongoing process aimed at increasing cooperation between the human rights bodies and all other bodies of the organisation. It is the nature of human rights that they apply to all individuals at all times; this universality is the logic behind the trend towards the mainstreaming of human rights in both the UN and other relevant policy fora.²¹

Small arms are used on a daily basis both within and outside of regular armed conflicts, and are used by soldiers and police officers, as well as more irregular groups and criminals; groups that are often responsible for human rights violations and other atrocities. They are often used not just to commit violations, but also to facilitate them, in terms of threats and intimidations. This may apply for example to forced evictions and transfers of people, violations of rights to liberty and security, and so on.

A number of human rights violations could conceivably be facilitated through an act of arms export. I will not discuss this at length, as this topic has been sufficiently elaborated in various NGO documents.²² Suffice it to say that state organs such as the police or military forces are routinely violating human rights through the use of small arms. For these state organs to function properly and efficiently, and in order for them to be able to carry out violations of human rights, they need a reliable source of ammunition, weapons and spare parts to ensure their ability to perform their tasks properly.

²¹ There are many examples of this. See for example UN Human Rights Instruments document HRI/MC/2000/3, *Cooperation of Human Rights Treaty Bodies With United Nations Departments, Specialized Agencies, Funds, Programmes and Mechanisms and Non-Governmental Organisations*, 16 June 2000: [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/fc5cbcc5e6ed773ac125692000377226/\\$FILE/G0042744.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/fc5cbcc5e6ed773ac125692000377226/$FILE/G0042744.pdf).

²² Amnesty International: *Shattered Lives* and *Guns or Growth*, op.cit. and other documents from the Control Arms Campaign. Additionally, Barbara Frey, the Special Rapporteur on Human Rights Violations Committed by Small Arms and Light Weapons has written several reports where this is

This point can be illustrated by reference to a particular case study. Philip Verwimp discusses the specific weapons used during the Rwandan genocide in 1994.²³ There is a clear pattern showing who was killed with firearms rather than machetes or other less efficient tools and under which circumstances. Due to a shortage of firearms and especially of ammunition, these weapons were utilised only when they were thought to have the greatest effect or to target specific individuals. More precisely, they were used in situations where large groups were gathered in small, enclosed spaces so that more bullets were likely to have a lethal effect. Additionally, they were primarily used to take out young male individuals that were considered to be more of a threat, and more difficult to attack in a direct physical manner.²⁴ The firearms that did exist were to a large degree fed to Rwanda by a number of other states.²⁵ These findings show how ammunition and firearms are in fact not always as easy to obtain in the right quantity and quality. Furthermore, this leads to the more general conclusion that a state cannot always expect to be able to obtain all the weapons it may need and want, which shows the potential significance of arms export controls.

2.2 Introducing human rights to export controls

In order to discuss the development of a human rights-sensitive approach to arms export controls, it is necessary to establish a conceptual framework within which these two issues can interact. A natural starting point is identifying the connection between arms exports and human rights violations, which was established in sub-chapter 2.1 above. The next step is to provide a framework for the analysis of this process that is able to identify patterns of norm implementation. This theoretical framework will build on a model explaining the process of increasing norm adherence, created by Thomas Risse and other authors in *The Power of Human Rights*.²⁶ In line with my hypothesis, I will build on ideas from this model in order to analyse the process by which human rights have gained significance in Norwegian arms export policy. I will return to the theory after first defining and discussing some important concepts.

highlighted. See especially her preliminary report, E/CN.4/Sub.2/2003/29, 25 June 2003, as well as Frey, Barbara; *Specific Human Rights Issues*, E/CN.4/Sub.2/2004/37.

²³ Verwimp, Philip, *Machetes and Firearms: The Organisation of Massacres in Rwanda*, Journal of Peace Research vol. 43, no. 1, 2006.

²⁴ *Ibid.* p. 19.

²⁵ Goose, Stephen D. and Frank Smyth, *Arming Genocide in Rwanda*, in *Foreign Affairs* September/October 1994 vol. 73 no. 5, p 89.

²⁶ Risse, Thomas et.al., *The Power of Human Rights. International Norms and Domestic Change*, Cambridge: Cambridge University Press, 1999

2.3 Important concepts

Some concepts need clarification before we proceed to map out the theoretical approach of the thesis. The definitions given here are tailored to the use of these concepts in the context of arms export and human rights, and may not cover the full scope of their potential applications.

2.3.1 Mainstreaming of human rights

The concept of the mainstreaming of human rights describes a process of consciously incorporating human rights concerns in all relevant policy issues. It is primarily associated with the UN and Secretary General Kofi Annan, who introduced the concept as a way of emphasising the mutual interdependence of the goals set forth in Chapter 1 of the Charter of the United Nation.²⁷ The concept entails a comprehensive effort to incorporate human rights concerns in all aspects of the activities of an organisation, or for that matter, a country. In other words, it moves away from treating human rights as a subject of its own, standing alone as a policy concern, and approaches human rights norms as something which are more important as a standard of action incorporated in other activities. This concept is relevant for the topic of this thesis precisely because it describes a process of norm implementation in policies and activities where these norms have not previously been seen as relevant. Addressing the process of incorporating human rights concerns in arms export controls is an example of such a process of implementation. The concept of mainstreaming thus provides a historical and analytical framework for this discussion.

An element of the mainstreaming of human rights is what I brand increased human rights sensitivity. This entails a so-called “rights-based approach” to various spheres of policy, in this case arms exports.²⁸ Essentially, this means that actions are taken with a view, first of all, to protect and promote the human rights of the individuals that will be affected by that action. Additionally, it means that the equivalent of

²⁷ See the web-pages of the Netherlands Institute for Human Rights at Utrecht School of Law, <http://www.uu.nl/uupublish/homerechtsgeleer/onderzoek/onderzoekscholen/sim/english/research/20493main.html>, accessed 18.05.2006.

²⁸ One good definition, though tailored to development work, is provided by the WHO: “A rights-based approach [...] Integrates the norms, standards and principles of the international human rights system into the plans, policies and processes of development.”, from <http://www.who.int/reproductive-health/gender/rights.html>

breaking a few eggs to make an omelette, or sacrificing the rights of a few for the benefit of achieving a goal, is not an option. The concept of a rights-based approach is often associated with development work, but is increasingly used to describe human rights mainstreaming, especially within the UN.²⁹ When I use the expression “human rights sensitivity” in the thesis, it will reflect this underlying principle of rights-based approaches.

2.3.2 Due diligence

The concept of due diligence is used in several different contexts, including finance and criminal law. In this thesis, I utilise due diligence to the extent that it is being used in the relevant literature.³⁰ Barbara Frey, the Special Rapporteur on Human Rights Violations Committed by Small Arms and Light Weapons, defines due diligence like this: “The concept of due diligence is one that requires a State to take positive steps to carry out its obligations under international law”.³¹ It is stronger in nature than a general demand not to directly assist in the commission of a wrongful act or to knowingly be passive when one could act in order to directly stop that act. In the context of this discussion, due diligence is relevant as a concept which embraces calls for human rights-conscious behaviour to go beyond the mere duty to avoid breaching or directly assisting breaches of human rights norms. According to Frey’s analysis, “states are obligated by general principles of international law to use due diligence prevent transfers of small arms that will aid in human rights violations in recipient states.”³² This difference between a negative duty to avoid and a positive duty to prevent is significant in this context, as it entails a notion of responsibility for the effects of an act even if the act in itself is not a violation of the norm in question. This notion of responsibility implies that the exporting state in this case would be accountable for not showing due diligence, without sharing responsibility for the violation committed by the recipient state.³³

²⁹ As an example, UNESCO equals their efforts to mainstream human rights in their work with a rights-based approach, http://portal.unesco.org/shs/en/ev.php-URL_ID=7903&URL_DO=DO_TOPIC&URL_SECTION=201.html.

³⁰ Of particular relevance are the reports of Barbara Frey, the Special Rapporteur on Human Rights Violations Committed by Small Arms and Light Weapons. See especially her preliminary report, E/CN.4/Sub.2/2003/29, 25 June 2003, pp 10-11.

³¹ Barbara Frey, *Specific Human Rights Issues*, E/CN.4/Sub.2/2004/37, paragraph 30

³² *Ibid.* paragraph 22.

2.3.3 Complicity

The notion of complicity will be further elaborated in chapter five, when discussing the implications of the International Law Commission's Draft Articles on State Responsibility for Internationally Wrongful Acts. However, I find it necessary to briefly introduce it at this point. It is often traced back to the Nuremberg Principles, where Principle VII states "Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principles VI is a crime under international law."³⁴ It has evolved and broadened in scope, as illustrated by arguments about corporate complicity in human rights violations, which takes the concept beyond the narrow definition of gross violations of humanitarian law.³⁵ Complicity as a legal concept entails acts of aiding and abetting in the commission of a crime. In contrast to the way in which Frey interprets the concept of due diligence, complicity implies a level of shared responsibility for the wrongful acts committed. As such, complicity may be a fruitful framework for analysing the potential human right implications of transferring weapons to a violating state.

2.3.4 Principled idea

The concept of principled ideas describes the role of an idea as an underlying foundation for politics. As Kathryn Sikkink analyses the concept, it does not necessarily imply that this idea will trump all other interests in the process of policymaking.³⁶ As Judith Goldstein and Robert O. Keohane write, "[I]deas influence policy when the principled or causal beliefs they embody provide road maps that increases actors' clarity about goals or end-means relationships, when they affect outcomes of strategic situations in which there is no unique equilibrium, and when they become embedded in political institutions."³⁷

³³ Ibid. paragraph 39.

³⁴ Principles of the Nuremberg Tribunal, ¶VII, 1950, available from <http://deoxy.org/wc/wc-nurem.htm>, accessed 24 May 2006.

³⁵ See for example Elias, Juanita, and Celia, Wells, "Corporate Complicity in Rights Violations," in Alston, Philip, *Non-State Actors and Human Rights*, Oxford University Press, New York, 2005, or Jägers, Nicola, *Corporate Human Rights Obligations: in Search of Accountability*, School of Human Rights Research Series, Vol. 17, Intersentia, 2002

³⁶ Sikkink, Kathryn; *The Power of Principled Ideas: Human Rights Policies in the United States and Western Europe*, in Goldstein, Judith and Robert O. Keohane [eds.], *Ideas and Foreign Policy – Beliefs, Institutions and Political Change*, Ithaca: Cornell University Press, 1993 p. 140.

³⁷ Goldstein, Judith and Robert O. Keohane [eds.]; *Ideas and Foreign Policy – Beliefs, Institutions and Political Change*, Ithaca: Cornell University Press, 1993, p. 3.

It does, however, entail that the idea in question will be taken into consideration and have a bearing on decision making at all issues and levels. Sikkink's notion of human rights as a principled idea in foreign policy corresponds with a notion of mainstreaming of human rights, in that it may be used as an explanatory framework for the mechanisms behind the process of mainstreaming. I will utilise this idea in my analysis of the process of introducing human rights to Norwegian arms export controls. I believe this process to be a part of a general mainstreaming of human rights in Norwegian foreign policy that is driven by the relatively strong position of human rights as a principled idea in the field of arms export control.

2.4 A process of norm implementation

Introducing human rights concerns to arms export issues can be considered inherent in the process of mainstreaming of human rights. This is a function of the redefinition of national interest that started after World War II in which the protection of human rights came to be seen as a strategic interest in the promotion of peace and security.³⁸ This concern is also reflected in Chapter One of the Charter of the United Nations, as addressed in sub-chapter 2.3.1 above. This process can be observed through two interrelated phenomena. First, states are starting, at both unilateral and multilateral levels, to introduce human rights-sensitive approaches to their policies.³⁹

Second, human rights organisations are expanding their mandates beyond what has traditionally been considered human rights issues. An example is Amnesty International, which started out solely focusing on the rights of prisoners of conscience. Presently, their focus ranges from this to concern with discrimination in employment, European states allowing possibly covert CIA prisoner flights to use their air space and, of course, small arms proliferation.⁴⁰

This process of mainstreaming has also been observable in the context of arms export regulations. The previously described change in perspectives from looking at arms control issues as something of purely strategic interest to an issue related to the effects the weapons are likely to have in the recipient countries in terms of social and

³⁸ Sikkink, Kathryn, 1993 p. 140.

³⁹ *Ibid.* chapter six.

⁴⁰ Examples taken from www.amnesty.org, visited 30.01.2005.

humanitarian concerns fits this framework. There has been a continued push for more comprehensive controls of arms export, especially since the start of the Control Arms Campaign. There has also been an increase in political and to a certain degree legal commitments through international agreements on common guidelines for arms transfer, which I elaborate on in chapter three and four. This development corresponds with the position held by human rights as a principled idea, as described above. It can also be observed that these commitments have provided activists with the platform required to demand further implementation of human rights concerns in arms export policies, and perhaps also the change in behaviour towards real recognition of these principles. The development of this process in Norway will be the focus of the second half of this thesis.

The process of mainstreaming human rights in arms export controls in Norway is still at an early stage. The process can be understood as being at the stage of *norm emergence* as discussed by Sikkink and Finnemore,⁴¹ in which key figures or groups, called *norm entrepreneurs* attempt to convince policy makers of the need to embrace new norms. This will be based on arguments holding that the present situation is in some way “unjust” or “inappropriate”. The background for such “inappropriateness” will to a large degree be found in already existing norms.⁴² When I discuss norms and processes of norm implementation throughout the thesis, this will be the meaning attributed to it. While human rights norms already exist both as legal and political norms, the application of these norms to a new area represents a norm emergence. Thus, it is essential to differentiate between human rights norms as legal entities, which will be the way the concept is used when I discuss existing human rights law and human rights norms as they are attempted incorporated in arms export regulations, which will be the meaning of the term when this process is discussed.

2.4.1 A theoretical framework for norm implementation

The process by which norms and ideas are transformed into policy is the subject matter of Thomas Risse *et.al's* *The Power of Human Rights*⁴³ in which the authors attempt to identify the common traits of the process towards real norm adherence in a

⁴¹ Finnemore, Martha and Kathryn Sikkink, *International Norm Dynamics and Political Change*, in *International Organization* vol. 52 nr.4, autumn 1998, p 895.

⁴² *Ibid.* p. 897

number of states. This work resulted in a spiral theory explaining the mechanisms by which rhetorical acceptance of norms- especially if this acceptance includes a change in the state's discursive practice or an official codification of the norm-⁴⁴ leads to a legitimate platform for pressure towards real change, causing the State to be trapped in its own rhetoric. The focus of the book is mainly on how a network of national and international NGOs and interest groups together with Western states can facilitate change in the human rights performance of the target state through dialogue, argumentation and so-called "naming and shaming".⁴⁵

The model in itself is quite complex, taking into account a number of mechanisms that may either assist or limit the effectiveness of the normatively based pressure for political change. Rather than applying the model in its original version, I chose to focus on a few basic mechanisms. As mentioned above, the model was originally tailored to the specific circumstances of explaining democratisation and increased respect for human rights in authoritarian developing states. Such a model is not likely to be able to explain changing behaviour in relation to one isolated issue in a developed, democratic state. Still, the hypothesis of this thesis suggests that the logic of norm implementation follows the same basic stages also in democratic states, and that the codification provided by Risse *et.al.* is a highly useful framework for analysis. It goes beyond the purely realist approach of state behaviour towards recognising the importance of principled ideas and of norm based political pressure.

I thus suggest that the logic of the spiral theory is applicable also at a more general level of norm implementation. More specifically, I intend to utilise three basic mechanisms of the theory. First, the relationship between rhetorical concessions, expectations and pressure for norm adherence appears to be significant to the dynamics which the model seeks to explain. Rhetorical acceptance of the validity of the norms in question leads to heightened expectations of norm-consistent behaviour and as such, if the conditions are right, may lead to real change in policy and behaviour through the exploitation by pressure groups of these concessions. Even though Risse *et.al.* primarily focused on human rights norm adherence in the context

⁴³ Risse, Thomas et.al., 1999

⁴⁴ Ibid. p.15.

⁴⁵ Ibid. p. 17-19.

of authoritarian states moving towards greater openness, democratisation and norm adherence, I find the mechanism explained above to include universal features. As the development of norms and the understanding of what makes up norm consistent behaviour is a feature of Western liberal societies as well as repressive states, I intend to test the applicability of the adapted model on a specific situation of normative change in Norway. I propose that the logic of rhetorical entrapment may be applicable to states in different situations as well, and I wish to test that hypothesis through applying it to the process of introducing human rights concerns to arms export policies in Norway.

Second, the concept of *world time* is significant. This describes the international climate at the time of the attempted pressure for norm adherence. According to Risse, real norm adherence is most likely to occur if the “world time” is characterised by progressive efforts and a certain level of attention afforded to human rights implementation.⁴⁶ Risse *et.al.* deal with *world time* as different stages of development of human rights norms as a whole, assessing whether the timing of the pressure towards change was fortunate in terms of existing international attention to the subject. My argument is narrower than that of Risse in both space and time, and is concerned with developments in a state that is already a member of the so-called norm-abiding group. I will thus utilise the concept somewhat differently, looking not primarily at the broader climate for human rights norm developments, but at the conditions for discussing the specific issue at hand in the context of the states that are close allies of Norway. For this reason, I will not discuss *world time* as such throughout my thesis. However the importance of the international climate characterising the arms trade control discourse will be expected to hold the same significance for the relative success of normative pressure.

Third, the effect of what Risse *et.al.* brands as *naming and shaming*⁴⁷ could be significant also in the context of norm implementation in liberal states. Moral consciousness-raising in these situations would be tied both to the international reputation of a state and to the domestic effect on the public of appealing to the national image. As Norway as a state considers prides itself on an image as a “peace

⁴⁶ Ibid. p. 19-21.

nation” and a “humanitarian superpower”, I expect that challenges to this images will have a significant effect on the strength of a campaign for norm implementation which is in line with these perceptions and expectations.

I expect the applicability of the adapted model to be higher when the norm in question is generally accepted to be a principled idea within the respective societal context. According to Kathryn Sikkink, a co-author of *The Power of Human Rights*, human rights has evolved into a principled idea in some Western states.⁴⁸ A principled idea is in a sense paradigmatic in that it reshapes what can be considered as the national interest. In other words, when a state comes to shape its foreign policy in line with human rights, this is not as a result of that state considering human rights to trump national interest. Rather, it is a sign that human rights have come to be seen as part of the state’s national interest.⁴⁹ Sikkink argues that this redefinition has been taking place in the US and Europe after the Cold War as the dominating strategic interest at the time became insignificant.⁵⁰ This evolution of national interest can, according to Sikkink, manifest itself in two ways. Multilateral human rights policies are represented as accepting limits to the sovereignty of the state in accepting the jurisdiction of transnational human rights bodies such as the Human Rights Commission or the European Court of Human Rights over its human rights performance.⁵¹ External human rights policies are manifested in that human rights are seen as a goal in foreign policy.⁵² In other words, foreign policies are shaped so as to promote human rights adherence in other states. Here, the human rights adherence of other states is seen as being in the national interest of the first state.

With these theoretical considerations in mind, I will evaluate the Norwegian position on the role of human rights in arms export control in light of this understanding of norm implementation. I will seek to answer the following questions: Can recent developments in Norwegian policies on arms transfers be understood in light of the logic of the spiral model? Can the position of human rights in Norwegian arms

⁴⁷ Risse, Thomas et.al 1999, pp.11-15.

⁴⁸ Sikkink, Kathryn, 1993, p. 140..

⁴⁹ Ibid. p. 140.

⁵⁰ Ibid. p. 140.

⁵¹ Ibid. p. 142.

⁵² Ibid. p. 143.

exports be seen as a representation of the position of human rights as a principled idea in Norwegian foreign policy?

3 Norwegian arms export regulations

In order to satisfactorily address the nature of the development of Norwegian arms exports, it is necessary to map out the laws, regulations and principles governing these acts in detail. This chapter will focus on a mainly descriptive analysis of Norwegian arms transfers, with a limited number of theoretical observations included to emphasise the importance of each domestic development to the process that the thesis seeks to address. These empirical observations will be utilised in further theoretical analyses assessing the development of the law and practice in light of the adapted spiral model in chapter five.

3.1 An overview of the foundations of Norwegian arms export controls

The Norwegian arms export control system is codified under the Act of 18 December 1987 and subsequent regulations of 10 January 1989, and administered under the Ministry of Foreign Affairs. There are also some important official guidelines of 28 February 1992 describing how the Ministry manages applications for export licences. Additionally, there exists within the Ministry unofficial guidelines for the licensing of arms exports, but these are not available to the public. Taken together, this body of laws and regulations guide Norwegian arms exports, and are responsible for ensuring that this particular aspect of Norwegian international conduct is in compliance with both international law and official Norwegian standards.

The 1987 law regulating arms exports primarily codifies the principles of mandatory official licences for the export of strategic goods, technology and services, in addition to providing a framework for penal prosecution arising from breaches of the law. The arms export controls are based on a governmental declaration from 11 March 1959, which states that “Norway will not allow the sale of arms or ammunition to areas of war or where war is immanent, or to countries engaged in civil war.”⁵³ Based on this, the Parliament declared on the same day that they confirmed this principle and added that whether an export can take place will rely on “a thorough consideration of the

⁵³ Taken from *Stortingsmelding* (Report to Parliament) nr 57 1996-1997, p 4 (author’s translation).

foreign and domestic political situation in the relevant area. This consideration must, in the view of the Parliament, be of crucial importance for whether the export will take place.”⁵⁴

The law itself does not include any references to the 1959 declaration, or indeed to the principle that it codifies. Rather, the law is concerned with the strategic importance of arms exports and on the need for the government to control how Norwegian arms exports could improve the military power and strategic importance of other states. The main message is that the right is reserved for the king (i.e. the government⁵⁵) to establish certain rules, including the need for special permissions, when goods “that may be of significance for other countries’ development, production or utilisation of products for military use [...]”⁵⁶ are to be exported. Further, the law constructs the framework for enforcement of the law and subsequent regulations, and penal provisions associated with breaches of the law. In other words, the specific interpretations of which actions will be needed to satisfactorily control the export of strategic goods is left to the government to spell out in regulations implementing the act, as provided for in the last section of paragraph 1 of the law.

As the 1959 declaration is considered to be the backbone of Norwegian arms export policy,⁵⁷ the regulations incorporated this principle in its foundation. The declaration could arguably be said to have the status of customary law, an interpretation that can follow from the regular affirmation of the importance of this principle, found in all the recent *stortingsmeldinger*.⁵⁸ Additionally, the 1992 Guidelines state, when quoting the declaration from the parliament of 1959, that “the government considers the decision from Parliament to be legally binding, and that the export regulations are in place to ensure its enforcement.”⁵⁹ Thus, the 1959 declaration from Parliament holds the status of *opinio juris* in Norwegian law, one of the elements needed to establish the presence of a customary norm. In addition, while there have been some inconsistencies,

⁵⁴ Ibid.

⁵⁵ Due to constitutional custom, the government is referred to as “the king” in Norwegian law, as in “the king’s council.”

⁵⁶ Act of 18 December 1987 relating to Control of the Export of Strategic Goods, Services, Technology, etc. ¶ 1, section 1.

⁵⁷ Guidelines of 28 February 1992 ¶ 1(1)

⁵⁸ In the most recent report, *Stortingsmelding nr. 36*, this is found on page 1.

⁵⁹ Guidelines of 28 February 1992 ¶ 1(1) (my translation).

Norwegian practice generally respects this provision, adding the necessary requirement of general practice to form a customary law.

There is no reference to human rights in the law, regulations or guidelines. However, in a statement from 1997, the government made a formal interpretation of the scope of the 1959 declaration. The statement was short and has only been vaguely referred to in subsequent Reports to Parliament,⁶⁰ ascertaining that human rights concerns was to be inherent in the considerations made of the political situation in the recipient country. “The evaluation of these situations [political context as referred to in the 1959 declaration] by the Ministry of Foreign Affairs comprises a consideration of a number of political questions, including questions related to democratic rights and respect for basic human rights.”⁶¹ It did not provide any codification of how human rights should be protected through the licensing procedures, nor any delimitation of which human rights norms were to be relevant for these considerations.

I will next turn to the more specific elements of the existing arms export regime that I find relevant to my research question. Some aspects of the enforcement of the previously mentioned regulations are important for understanding the potential reach of the control mechanisms, and thus the potential for efficiently enforcing soft-law or political principles that are important for decisions to grant export licenses. In other words, this is where we can illustrate the degree to which rhetorical concessions may have led to a stronger change in behaviour towards more human rights-sensitive arms export controls.

3.1.1 What is controlled?

Having established these basic principles of Norwegian arms export control, we must turn to the specific subjects of the law. The first relevant question one must ask is exactly what the regulations cover. Thus, I must clarify exactly what the “goods, technology and services” that the law is set out to control the export of entails. In the wording of the law, the target is goods that “may be of significance for other countries’ development, production or utilisation of products for military use or that may directly serve to develop the military capability of a country, including goods and

⁶⁰ *Stortingsmelding* nr. 36 (2004-2005), p. 1.

technology that can be used to carry out terrorist acts.”⁶² The Ministry of Foreign Affairs operates with two lists specifying the goods for which an export license will be necessary in the case of a transfer. List 1 comprises “weapons, ammunition, other military materiel and appurtenant technology,”⁶³ while list 2 deals with “strategic goods and appurtenant technology not included in list 1.”⁶⁴ To further specify this, the Ministry has provided a comprehensive list of goods invoking license obligations. This part of the export regime is highly detailed, and it is easily accessible to the public, showing that the commodities invoking licensing obligations range from the obvious, such as rifles and ammunition, to the obscure, for example specific types of high-energy batteries to the seemingly harmless such as woollen socks and ski masks.⁶⁵

In line with the starting point of the law- controlling the export of goods of strategic, military significance- the lists are solely concerned with goods that have or might have a military use. The only exception to this is in the first category of List 1, namely handguns. Here, the export control is set out to cover “handguns etc. with military *or other* purposes.”⁶⁶ Listing a variety of goods that would be covered by the regulations, the list is left open-ended with the qualification that weapons covered are any “similar instruments firing explosive charges.”⁶⁷ Examples given include both weapons of an obviously military nature, such as machine guns, and more ambiguous goods, such as harpoon guns. This inclusion could signify an acknowledgement of the potential for these weapons to be utilised in a harmful way, influencing the security situation in the country in question and as such having a strategic effect. Exempted from licensing requirements are certain types of shotguns meant for hunting, which according to the MFA by virtue of their technical design have a limited potential for strategic use.

⁶¹ Ibid, author’s translation and comment.

⁶² Act of 18 December 1987, official translation. All citations from this Act and from the 1989 Regulation will be lifted from the official English versions, available from <http://odin.dep.no/ud/english/topics/security/export/bn.html>, visited 09.02.2006.

⁶³ Regulations relating to the implementation of control of the export of strategic goods, services and technology, 10 January 1989.

⁶⁴ Regulations of 1989.

⁶⁵ Commodity list from the Ministry of Foreign Affairs, available (in Norwegian) from <http://odin.dep.no/ud/norsk/tema/sikkerhetspolitikk/eksportkontroll/bn.html>, accessed 14.02.2006.

⁶⁶ Ibid. point 1, author’s translation and emphasis.

⁶⁷ Ibid.

3.1.2 Who are eligible to receive these goods?

In order to assess the risk involved for the potential facilitation of violations associated with a transfer of weapons, the export control section must by necessity look to the human rights record of the state in question at the time of the transfer. An insight into this aspect of the regulations is thus essential for getting the complete picture of the potential for human rights-sensitive arms export in the Norwegian system. In the 1992 Guidelines, three categories of potential recipient countries are mapped out. The categories refer to whether a state can receive material from both list 1 and list 2, only material from list 2 or no strategic goods at all from Norway. In the Guidelines, the groups are described like this:

“Country group 1 consists of the Nordic countries and the members states of NATO. Additionally, the group comprises other countries that *can be approved*⁶⁸ by the Ministry as recipients of weapons.

Country group 2 consists of states that are in an area of war or where war is imminent, or countries in which a thorough consideration of the domestic and foreign political situation of the relevant area suggests that exports of weapons and military equipment should not take place, or states under a UN Security Council embargo.

Country group 3 consists of states outside groups 1 and 2 to which Norway does not sell weapons and ammunition, but who can receive other equipment, designed or modified for military purposes.”⁶⁹

The categories are flexible to a degree that makes them rather unpredictable, as a state can theoretically move between the three different groups from license application to license application. The Export Council is particular in emphasising that they do not operate with country lists as such, but with categories in which they place countries on a case-by-case basis on the merits of the considerations made in relation to the license application.⁷⁰ What this means is that the categories are not, and are indeed not meant to be, tools for determining the eligibility of a state for receiving military equipment. Rather, it is a set of categories in which a state can be found *after* the license application has been considered. The categories are thus not country groups as such,

⁶⁸ Author’s emphasis.

⁶⁹ 1992 Guidelines p.2. Translation and emphasis mine.

⁷⁰ Interview with Jan Grevstad and Mario A. Bossoli at the Section for Export Control, 17.03.2006.

but a categorisation of the three different types of outcomes of an export consideration. While countries belonging to the specifically mentioned groups, the NATO and the Nordic countries, will be permanent members of group 1, Brazil⁷¹ and Malaysia⁷² are examples of states that have made appearances in this group.

3.1.3 How does Norway exercise its arms export control?

The specific methods for applying for licences are of limited importance, and I will only quickly mention the essential elements of them.

The regulations apply to all transfers of arms, with a few exceptions. In other words, their application is not contingent upon a case of the weapons being bought and sold. The main exceptions relate to the transfers of List 2 goods⁷³ for humanitarian assistance, return of borrowed List 2 goods, and List 2 goods in direct transit.⁷⁴ When applying for an export licence, the exporter must list the exact nature and quantity of the goods, as well as the identity of the buyer and, if different, the recipient. All documentations required by the regulations, such as end-user certificates, must be enclosed. A licence cannot be transferred from one exporter to another, or used for goods or recipients differing from the information required.

3.2 International agreements

Within the international arms export control regime, there are several texts that are specifically important for the position of human rights in the Norwegian arms transfer control system. This sub-chapter will address these agreements in light of their role in the development of this relationship, looking at what they represent in terms of rhetorical concessions and behavioural change.

3.2.1 OSCE

There are two documents under the auspices of the OSCE that are relevant to this discussion. Firstly, and primarily, there's the OSCE Principles Governing

⁷¹ Last in 2004, see *Stortingsmelding* 36 (2004-2005) p.25.

⁷² Last in 2003, see *Stortingsmelding* 41 (2003-2004) p. 29.

⁷³ As defined in sub-chapter 4.1.1.

⁷⁴ Regulations of 1989, ¶3.

Conventional Arms Transfers of 1993.⁷⁵ Additionally, there is a document of 24 November 2000 called the OSCE Document on Small Arms and Light Weapons. This document has been important in many aspects, not least as a standard-setting codification of the specific issues associated with small arms that would gain importance with the Control Arms Campaign. However, it is of limited importance for this discussion for two reasons. First, it does not bring any new or stronger codifications of the link between arms transfer and human rights commitments than what had already been stated in the OSCE principles or especially the EU Code of Conduct for Arms Transfers, which will be discussed below. Second, the specific focus on small arms makes it somewhat less relevant for the discussion at hand. Norway is not primarily a small arms producer, and the discussion of human rights norms in export controls is framed in a more generalised language. Thus, regardless of the importance attached to small arms by several NGOs, I chose not to include this document.

The OSCE principles were the first multilateral arms control document signed by Norway that expressly called for the human rights situation in the recipient country to be taken into account when a transfer is considered. It is only a politically binding document of reasonably weak language, which can be explained by the fact that it is an early effort in this field. Norway as well as all parties to the OSCE is a party to the document without the need for further ratifications.

The OSCE has no enforcement mechanism other than through meetings and diplomatic communication. However, there does exist a general call for information sharing inherent in the Principles, which facilitates communication between the States Parties on their domestic implementation of the document.⁷⁶ This information sharing may have the function of strengthening norm adherence through peer criticism and pressure. However, the secret nature of this reporting system causes it to be of limited value for this analysis, as the exact content of the reports cannot be accessed. For the most part, the document thus becomes a statement of intent and good will, but not something that the state needs to make any specific moves to adjust to other than what

⁷⁵ At the time of adoption, the OSCE was still known as the CSCE.

⁷⁶ *OSCE Principles Governing Conventional Arms Transfers*, Part III, Article 5 (C).

may be achieved through peer pressure based on reactions to inadequate regulations that may be exposed in the reports.

Additionally, the language is of a rather weak character when it comes to the elements dealing with human rights. In chapter 4 section (a) (I), it holds that a state should “take into account” the human rights situation in the recipient state before making a transfer. No codification of human rights or references to relevant human rights instruments is made, which keeps the formulation open for interpretation at a reasonably wide discretion of each state. In chapter 4, section (b) (I), the language is somewhat stronger, as it holds that states will not make the transfer if there is a likelihood of the weapons being used for human rights violations. Still, the lack of codification both of how one is to understand the likelihood of these weapons being used and the general nature of the wording of the paragraph prevent this from being seen as calling for any specific changes in state behaviour. This apparent weakness in the potential influence of the document suggests that it represents a rhetorical concession in the terminology of the theory used in this thesis. The lack of enforcement mechanisms and other control mechanisms such as specific and transparent reporting duties supports this understanding. However, the position of human rights in the document is significant as it ties the spheres of human rights and arms transfers together.

I regard this document as an initial sign of the position of human rights as a principled idea gaining ground in foreign political considerations in Europe in general, and also in Norway. It represents a development of this process in that human rights is introduced to a new aspect of foreign policy, namely arms transfer controls. As such, this observation may stand as a criticism of Sikkink’s discussion of principled ideas. While it recognises the fact that the idea will not always be of primary importance in all considerations, Sikkink does not provide any arguments for the development of the position of an idea in the broader field of foreign policy. While human rights have, as she correctly points out, been in the position of a principled idea in Western European foreign policy for decades, it has not been dominant or even relevant to all aspects of this field. The development of the rationale behind arms transfer policies towards including human rights criteria, as a representation of national interests, needs a more process-oriented approach than that provided by Sikkink. The process of

mainstreaming in my view is precisely a process of introducing a principled idea to an increasing number of spheres of policy.

3.2.2 The EU Code of Conduct for Arms Transfers

The EU Code of Conduct may well be the most ambitious and far-reaching document codifying ethical considerations relating to arms transfers. It lists eight criteria related to the situation in the recipient country, which ought to be considered before a transfer may take place. These criteria relate to international law, human rights and adherence to international resolutions and sanctions. At first glance, the Code of Conduct appears to be quite radical in the way it incorporates human rights concerns in the arms export agenda. It does not only call for a consideration of the human rights situation in the recipient country, but also proscribes a positive obligation not to transfer if there is a clear risk of the goods being used for violations.

CRITERION TWO

The respect of human rights in the country of final destination

Having assessed the recipient country's attitude towards relevant principles established by international human rights instruments, Member States will:

- a) not issue an export licence if there is a clear risk that the proposed export might be used for internal repression;
- b) exercise special caution and vigilance in issuing licences, on a case-by-case basis and taking account of the nature of the equipment, to countries where serious violations of human rights have been established by the competent bodies of the UN, the Council of Europe or by the EU.

For these purposes, equipment which might be used for internal repression will include, *inter alia*, equipment where there is evidence of the use of this or similar equipment for internal repression by the proposed end-user, or where there is reason to believe that the equipment will be diverted from its stated end-use or end-user and used for internal repression. In line with operative paragraph 1 of this Code, the nature of the equipment will be considered carefully, particularly if it is intended for internal security purposes. Internal repression includes, *inter alia*, torture and other cruel, inhuman and degrading treatment or punishment, summary or arbitrary executions, disappearances, arbitrary detentions and other major violations of human rights and fundamental freedoms as set out in relevant international human rights instruments, including the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights.

In Particular, Criterion two calls for an assessment of the human rights situation in the recipient country. This assessment will inform the decision to grant or deny an export

licence based on a consideration of the possibility that the exported goods will assist in the commitment of human rights violations. The criterion lists a number of violations as examples of internal repression, it includes “torture and other cruel, inhuman and degrading treatment or punishment, summary or arbitrary executions [...]” and a number of other human rights violations generally considered to be “serious violations”. The list is left open-ended, and closes with the words “and other major violations of human rights and fundamental freedoms as set out in relevant international human rights instruments [...]”. Usually, an open-ended list of this kind is considered to be a positive feature by lawyers of a reformist leaning. However, the code of conduct may represent an exception to this tendency. While an open-ended list may be preferred to a closed one, the qualification “major violations” has the potential to cause some concern, given that human rights texts do not clearly state which violations are to be included in this category.⁷⁷

While the Code of Conduct may be of a somewhat stronger wording than the OSCE Principles, it is still important to note that the demands put on the participating states are to a large degree based on them exercising their discretion in determining each situation of arms exports. While Criteria Two, as mentioned above, calls for a state not to transfer if there exists a “clear risk” for the goods to be used for internal repression, this is not as strong as it may appear. First, there is the situation of “clear risk”. It is left to the participating state to determine what constitutes a “clear risk.” Second, this clear risk must be directly connected to the proposed transfer. Thus, establishing the fact that there is a deteriorated human rights situation in the country is not sufficient. For a transfer to be in breach of the Code the state would need to have a knowledge of the exact use to which the weapons were to be put. The Code does not call specifically for the use of end user certificates, though it has been argued from NGOs that this would be necessary to ensure that the state has the information it needs for making these decisions.⁷⁸

⁷⁷ While different legal scholars may have their views upon this, and there is a general consensus on which norms are seen as peremptory international laws, neither the International Bill of Rights nor the European Convention on Human Rights specifically describes what is to be considered as major violations.

⁷⁸ In Norway, this is the argument of *Norges Fredsråd* (Norwegian Peace Council), for example in this document: *Norges Fredsråds Innstilling til Stortingsmelding 41* (Norwegian Peace Council’s recommendations to the Report to Parliament 41)

The Code does concern itself with the risk of diversion of arms, both within the recipient state and to ineligible recipients beyond its borders. Criterion 7 specifically lists four criteria to assist the exporting state in determining whether there is such a risk of diversion. These are:

- A) *The legitimate defence and domestic security interests of the recipient country, including any involvement in UN or other peace-keeping activity;*
- B) *The technical capability of the recipient country to use the equipment;*
- C) *The capability of the recipient country to exert effective export controls;*
- D) *The risk of the arms being re-exported or diverted to terrorist organisations (anti-terrorist equipment would need particularly careful consideration in this context)*

An interesting observation is that there is no need for the exporting state to consider the history of arms exports of the recipient state. While it does call for a consideration of the ability of that state to exercise effective export controls, it does not give any guidelines as to what these controls should consist of. As arms export controls are utilised as a strategic tool, a recipient state may well have an excellent export control in terms of efficiency, but operating on significantly different criteria than those listed in Criterion two. It is thus reasonable to suggest that a call for end user certification would be a way to ensure that the exported goods are not re-exported to an undesirable end user. However, this is only a possibility, not a demand within the EU Code.

4 Debating jurisdiction and the relevance for human rights norms in arms export controls

4.1 The relevance of the concept of jurisdiction

The development of the arms transfer control debates entered a new phase at the start of the new millennium, in which the arguments for human rights-based export controls appear in a legal, or at least pseudo-legal, form. This phase is dominated on the NGO side by the international Control Arms Campaign, and on the UN side by the reports published by Special Rapporteur Barbara Frey. It builds on developments in the conception of the scope of responsibility in international law. Arguments about the effects of arms trade on social and humanitarian conditions in the recipient countries are increasingly framed in a language of human rights, relying on an expanded understanding of the scope of responsibility under human rights law.

This chapter will address elements of international law and developments in that sphere, which serves to highlight how the role of human rights norms in arms exports regulations may be perceived. Highlighting examples of how the scope of responsibility has been understood in legal texts and interpreted by legal bodies serves as a foundation for understanding the evolution being observed in the more recent developments. By looking at law and practice as well as the arguments put forth by these actors, I will illustrate the debate about to which degree a state can be held responsible for the results of its actions beyond its own borders. This draws up a framework for how international law could conceivably be interpreted as giving strong moral guidelines for what constitutes legitimate arms transfers.

4.2 The traditional view of jurisdiction in human rights instruments

Essentially, differences in interpretations of the relevance of human rights law for arms exports has to do with how one understands the scope of the conventions, more specifically how broad the jurisdiction of these instruments are in terms of extra-territoriality. This sub-chapter addresses articles dealing with scope of responsibility in a few selected human rights instruments in light of their relevance for addressing acts of arms export. I will also briefly address an application to the European Court of Human Rights which sought to hold a state responsible for its arms transfers.

The Universal Declaration of Human Rights was the first human rights document completed under the auspices of the United Nations. As a declaration, it wasn't intended to be legally binding; rather, it came to make up the foundation of subsequent human rights legislation formulated in the organisation. The two main human rights Covenants were considered to be the legal expressions of the principles found in the Declaration. Nevertheless, there are discrepancies between the Declaration on the one hand and the two Covenants on the other. This is part of the reason why the document has retained a certain legal relevance in its own right. Based on the significant status of the Declaration, many of its provisions that didn't find their expressions in either of the Covenants are increasingly considered to be norms of customary international law. Many even claim that this is the status of the whole document as such, based on its strong normative bearings⁷⁹.

Jurisdiction is generally not discussed in the Declaration, which is only reasonable as it is a declaration codifying moral standards, not a document meant for legal use. Article 30, however, can be read as having relevance for the debate at hand:

“Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.”

This formulation is interesting precisely because it doesn't mention jurisdiction, but rather expresses a universal duty not to act contrary to the declaration. This is a duty not only upon states, but also upon all other actors capable of acting contrary to these principles. As a principled formulation, this is extremely strong. One limitation must, however, be pointed out. The article indisputably introduces a necessary criterion of intent for an act to be covered by it. At first glance, this may be reasonable. If there is no wrongful intent, if the act is so to speak an accident, it may seem unreasonable to be held accountable for it. The problem with this formulation however, is that it strongly holds that the act in question must be *aimed at* destruction of the rights. This is a very strong qualification indeed. Most acts that violate human rights do so as a

⁷⁹ Buergenthal, Thomas, Dinah Shelton and David Stewart, *International HumanRights in a Nutshell*, The Hague 2002, pp. 41-42 gives a good summary of these views.

means to an end, not as an end in itself. In fact, this formulation seems to remove the responsibility of the actors to have a human rights-sensitive behaviour.

The international bill of rights, or more precisely the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, serve as a starting point for mapping out the concept of jurisdiction in human rights law. These were the first legally binding international human rights instruments, and they form the basis from which most subsequent work in this particular area flows. The articles of these conventions mainly focus on the state as a duty-bearer towards individuals under its jurisdiction. Article 2(1) says, “*Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant*”. This article has been the subject of some discussion, especially considering the formulation “*within its territory and subject to its jurisdiction.*”⁸⁰ Does this mean that jurisdiction is strictly territorially defined, and that a state is only responsible for the rights of individuals on its soil? Why mention the concept of jurisdiction at all if the scope of the covenants was to be understood in territorial terms? It is conceivable that this formulation is intended to limit the responsibility of states for foreign diplomats on their territory, as these will be under the jurisdiction of their home states. According to Nowak⁸¹ however, the main reason for this formulation was to avoid the responsibility of states for individuals that were under their jurisdiction but not present on their territory, as such situations were usually dealt with through diplomatic channels.⁸²

In the European Convention on Human Rights, the corresponding article reads as follows: “*The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.*” It is not clear whether the lack of reference to the concept of territory as compared to the article in the Covenants is significant in this context. It can be argued that this has no function beyond avoiding confusion as to the importance of territory, which in itself is a clarification worth making. Still, the significance of both these articles is the need

⁸⁰ Emphasis added.

⁸¹ Nowak, Manfred, *CCPR Commentary*, N.P. Engel, Publisher, Strasbourg 1993

⁸² *Ibid.* p. 41.

for jurisdiction to be established before a state is responsible for protecting the human rights of the individuals in question. The European Convention can arguably be said to hold greater significance for the potential of holding a state responsible for acts outside of its territory as long as jurisdiction over the area in question can be established. This will mainly apply to situations of occupation if the article is interpreted in a strict manner. This article and its interpretation is the main point of contention in the Banković case, which will be discussed in the next sub-chapter.

4.2.1 The Tugar admissibility case

In a 1993 application, the ECtHR pronounced on the admissibility of a complaint launched by an Iraqi citizen against Italy for the failure of the latter to introduce regulations preventing arms transfers to states such as Iraq. In 1993, an Iraqi mine-clearer named Tugar filed against Italy after having lost a leg stepping on a mine of Italian origin earlier that same year.⁸³ He claimed that Italian failure to protect him from life-threatening injuries by way of effective arms transfer regulations amounted to a violation of the applicant's right to life under Article 2 of the convention. The commission⁸⁴ summarily dismissed the application, mainly based on the argument that the distance was too great between the act committed by Italy (the transfer, or rather the omission to instate effective export regulations) and the violation (the injury caused by an indiscriminate weapon). It stressed that no Italian authorities were involved in the violation committed against the applicant, given that the mines were placed on Iraqi territory by the Iraqi authorities.⁸⁵ The applicant argued, as I have done above, for the similarity between arms transfer situations and situations of extradition, which in certain instances evokes Convention obligations even though there does not as such exist any right not to be extradited. The commission however, dismissed this argument, holding that the Italian failure to regulate its arms transfers was "too remote" to invoke responsibility for the injury caused by the mine.

⁸³ Tugar v. Italy, Application No. 22869/93, European Commission of Human Rights.

⁸⁴ Until 1999, a commission considered admissibility before a case reached the Court.

⁸⁵ Tugar v. Italy p. 3.

4.3 Emerging interpretations based on the ILC Draft Articles on State Responsibility.

A document by the International Law Commission, which was ratified by the General Assembly in 2001, attempts to codify the scope of state responsibility for breaches of international law. This document has come to be an important justification for writers arguing for a broader scope of responsibility in international law generally, and also especially for those arguing for greater accountability in arms transfers.⁸⁶ Discussing this document is thus important in order to frame the process by which human rights has gained influence in the discourse on arms transfer controls.

Draft Articles on Responsibility of States for Internationally Wrongful Acts represents authoritative interpretations of the scope of responsibility of states under international law. Two articles are of great importance to the present discussion. Article 16 tries to define the responsibility incurred by a state if it aids or assists the commission of an “internationally wrongful act”, which is held to apply if

- (a) “The State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) The act would be internationally wrongful if committed by that state.”⁸⁷

What this article in effect is addressing is the scope of the concept “complicity in human rights violations,” as discussed in chapter 2.

Article 41(2), on “particular consequences of a serious breach of an obligation under this chapter” might in some instances be more relevant to acts of arms transfer.

“No state shall recognise as lawful a situation created by a serious breach within the meaning of article 40,⁸⁸ nor render aid or assistance in maintaining that situation.”

This work has the potential of being the “missing link” between positions advocating absolute responsibility for every involvement in a situation of breaches of international law and those arguing from the stricter interpretation of responsibility in terms of the jurisdiction of the state in question. In Human Rights law particularly,

⁸⁶ Both Barbara Frey and the Control Arms Campaign rely on this work, as will be discussed later.

⁸⁷ The International Law Commission; *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 2001

this document has the potential of clarifying some of the gaps between the morally perceived responsibility for human rights violations and the actual legal responsibilities incurred. Herein lays the importance of this evolution and reinterpretation of international law for understanding the human rights implications of arms exports. As the previous discussion of the existing approaches to jurisdiction in human rights instruments has shown, this approach falls short of taking into consideration the possibility of incurring responsibility for the adverse effects of a state's arms transfers. A potentially more viable approach may be through the concept of complicity and obligations to exercise due diligence in international relations, as laid out in chapter three. The existence of an authoritative document on which such responsibility can be argued can add necessary weight to pressure for more human rights sensitive arms export regulations. As will be shown, the NGOs involved in this debate tend to take State responsibility further than what this document allows for, which may be significant for future developments. This will be discussed further in sub-chapter 4.4 and chapter 5. The present section aims at mapping out some elements of the ongoing discussion on complicity in international crimes, as they may be relevant for the act of arms exports in relation to human rights.

What is the value added of utilising the complicity approach to tie the concept of human rights to the state action of arms transfers? It has already been shown in sub-chapter 4.2 that most traditional and authoritative interpretations of jurisdiction in international human rights instruments fall short of being relevant for acts of arms transfers. However, it is equally clear that certain arms transfers are able to facilitate violations of these treaties, leaving a lacuna between the moral understanding of human rights as codified in the treaties and the legal accountability of states for acts that are contrary to these principles. Using the concept of complicity in violations of international law to understand the scope of responsibility incurred by states through arms transfers is one way of attempting to fill this lacuna, narrowing the gap between the existing legal protection of human rights and the need for accountability from all actors involved in human rights violations.

⁸⁸ Referring to peremptory norms of general international law.

4.3.1 Discussing complicity in the context of arms transfers

The Economic and Social Council appointed Barbara Frey Special Rapporteur on the Prevention of Human Rights Violations Committed with Small Arms and Light Weapons in 2002 by resolution 2002/25.⁸⁹ Her subsequent reports have highlighted the empirical and legal connection between human rights abuses and small arms and light weapons, including the link between such violations and the act of arms transfer.⁹⁰ She uses the ILC Draft Article 16 as her framework for clarifying the responsibilities of the arms exporting state for human rights abuses committed with their weapons. In her preliminary report of June 2003, Frey contrasts the approach of the ILC with the previously discussed *due diligence* understanding⁹¹ of state-responsibility for human rights violations committed by private actors.⁹² In Frey's view, the *due diligence* approach is preferable as it goes further in accepting that human rights violations can take the shape of negligence and omission to act.⁹³

Her focus on the importance of the initial, legal transfer allows for a line of argument focusing on the responsibility of the state in a way that is difficult to achieve through the focus on illicit transfers which has been prevalent in the UN context.⁹⁴ The act of transferring weapons, or more specifically in this context, small arms and light weapons, cannot be exercised without taking into account the unique nature of these goods. As she somewhat simplistically holds, small arms are the tools used to violate human rights.⁹⁵ Even though this is a somewhat polemic statement given that on the one hand, human rights can be violated without small arms and on the other, small arms have uses which are not connected to the violation of human rights, it still makes one very important point. Weapons cannot be treated as any other commodity as they have a greater potential for harm and for being utilised in breach of international law than most other categories of commodities in the world. Thus, the potential effect of a

⁸⁹ Sub-Commission resolution E/CN.4/SUB.2/RES/2002/25, available from

http://ap.ohchr.org/documents/E/SUBCOM/resolutions/E-CN_4-SUB_2-RES-2002-25.doc.

⁹⁰ Barbara Frey; Specific Human Rights Issues – Prevention of Human Rights Violations Committed with Small Arms and Light Weapons, E/CN.4/Sub.2/2003/29, 25 June 2003, p. 15-17.

⁹¹ See chapter 3 for further reference.

⁹² Frey, Barbara; E/CN.4/Sub.2/2003/29, p. 12.

⁹³ Ibid. pp. 12-13.

⁹⁴ See especially the United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, UN Document A/CONF.192/15.

⁹⁵ Frey, Barbara; *Small Arms and Light Weapons: the Tools Used to Violate Human Rights*, Disarmament Forum vol. 3 2004, Human Rights, Human Security and Disarmament, pp. 37 and 45.

choice to transfer arms could be so severe that the exporting state cannot be relieved of all responsibilities for the ensuing wrongful act.

This understanding of the obligations associated with arms transfers clearly runs counter to and indirectly challenges the reasoning of the European Commission on Human Rights in the *Tugar v. Italy* admissibility case. Looking to a combination of the ILC Draft Articles and the notion of due diligence in international affairs, it is hard to sustain the argument that the act of arms transfer is “too remote” to incur any level of responsibility for subsequent human rights violations. While the commission is right in pointing out that all acts directly connected to the violations were those of Iraq, the Italian state played a facilitating role in allowing for the transfer. According to the principle of due diligence, international acts should be taken after a careful consideration of the facts relevant to it. Exporting mines of an indiscriminate nature to a regime infamous at the time for human rights violations in general and collective punishment in particular, which again is a crime under the Geneva conventions, can hardly be justified after such a “careful consideration.”

In an article published in the *International Review of the Red Cross*, Alexandra Boivin argues for the respective uses of article 16 and article 41(2) of the ILC Draft Articles in connection with the act of arms transfer. Based on the comments and clarifications published by the ILC itself to guide the interpretations of the document, she argues against focusing solely on article 16, as the Special Rapporteur tended to do in her first reports⁹⁶ due to the necessity of intent inherent in that article. While this criterion may not be obvious upon reading the document, it is clearly spelled out in the above-mentioned comments. They hold that for an act of aid or assistance to be covered under this article, it must be made with intent to do so.⁹⁷ This criterion is additional to the necessity of the acting state being aware of the circumstances making the act of the other state internationally wrongful.⁹⁸ Boivin criticises this based on the same logic as the previous criticism of Article 30 of the UDHR, namely how acting in breach of international standards will hardly be an end in itself. When it comes to

⁹⁶ E/CN.4/Sub.2/2004/37, Progress Report of Barbara Frey, Special Rapporteur on the prevention of human rights violations committed with small arms and light weapons, 21 June 2004.

⁹⁷ *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts*, ILC 53rd session, 2001, p. 156.

⁹⁸ *Ibid.*

arms exports, the exporting state will in many if not most instances make the transfer based on economic incentives. As Boivin points out, it would be an oversight to disregard the lucrative aspect of arms deals in this context.⁹⁹

The problem of the necessity of intent could make Article 41(2) more relevant for arms transfer situation.

Article 41: Particular consequences of a serious breach of an obligation under this chapter [...]

(2) No state shall recognise as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation.

Initially, it seems a less tempting option than utilising Article 16, as Article 41(2) is only relevant in cases of serious breaches of peremptory norms in international law. This will usually be taken to include crimes of aggression, slavery, genocide, torture and so on,¹⁰⁰ and only applies to situations that are systematic, widespread or particularly gross. While this limits the situations under which the article is applicable, it introduces a much wider understanding of the concept of complicity once the situation is grave enough. If applied to an act of arms transfers, this article could cover all transfers made to the violating state, regardless of intent. Additionally, and importantly, it could include not only transfers of weapons that made the wrongful act possible, but also any act that helps sustain it. Clearly, in a situation of grave breaches of peremptory human rights norms, all transfers of weapons could be seen as assistance in maintaining the wrongful situation. This is mirrored in the rationale for UN arms embargoes, in which states are called upon to stop all shipments of arms and military equipment to the state in question in order to put pressure on that state to cease its unlawful activities.

In relation to this, it is important to note that the article also addresses the unlawfulness of recognising such a situation as lawful. Initialising or continuing transfers of weapons could clearly be interpreted as a recognition of the situation as unproblematic, or at least as of no concern to the exporting state.

⁹⁹ Boivin, Alexandra; *Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons*, International Review of the Red Cross volume 87, no. 859, September 2005, p 471.

¹⁰⁰ Boivin 2005, p. 472.

In my view this logic could in fact be expanded in most situations covered by this article to be relevant for any transfers of strategically important goods. While these goods may not be directly involved in the human rights violations as such, they play a role in maintaining and strengthening the state body committing the violations. Continued transfers of strategic goods not necessarily involving weapons as such, but components, technology, radars and so on could also be seen as a failure to recognise the wrongfulness of the situation in the receiving state. I also argue that this logic is applicable at a broader level. The duty not to assist in the maintenance of internationally wrongful acts invokes the responsibility to exercise due diligence in international affairs. This cannot be limited to direct transfers, but should also include responsibility for taking the appropriate measures to assure that the state doesn't indirectly give such assistance. This could be argued as a case for a functioning system of end-user certificates in the transfer of strategic goods to ensure to the best of the state's capacity that their weapons are not re-exported to a state involved in such violations. The responsibility of states for the use of their weapons and strategic goods can't be unlimited, and should only be relevant for situations in which the state could realistically have acted to limit the possibility of their transfers having the effect of assisting the commission of an internationally wrongful act. If this logic is accepted, the efficient and universal use of end-user certificates including some level of monitoring appears to be a readily available tool for ensuring the exercise of due diligence in acts of arms transfers.

4.4 Perspectives of the NGO community

The Norwegian arms trade debate has, with a few exceptions, been following the international one as introduced in sub-chapter 1.3. Some attention was being paid to problems of transparency and issues of the lack of end user controls from the mid-90's, though from fairly marginal groups.¹⁰¹ In the contemporary context, the prevailing NGO approach to arms transfer controls, internationally as well as domestically, has primarily been concerned with mapping out the problems related to

¹⁰¹ The most vocal of these groups would be *Folkereisingning for Fred*, (the People's movement for peace). This article illustrates their role: Berg, Bjørnar; "Norsk forsvarseksport - verdens strengeste

proliferation of small arms, especially in third world societies. Reports have been written to argue for the link between availability of weapons, insecurity and development, emphasising statistics illustrating the opportunity cost to development represented by extensive arms procurements.¹⁰² Additionally, state responsibilities not to contribute to human rights violations or other breaches of international law have been held by NGOs as somewhere between a moral and a legal obligation.

The Arms Trade Treaty is the brainchild of a group of Nobel peace laureates with the expressed goal of limiting future occurrence of violence and war through an international standard on arms trade.¹⁰³ The Control Arms Campaign, a cooperative effort between Amnesty International, Oxfam and IANSA later picked up the initiative. The Control Arms Campaign holds that the establishment of an international legally binding Arms Trade Treaty based on existing legal obligations is the preferred means to alleviate suffering and structural problems arising in particular from small arms proliferation.¹⁰⁴ These concerns are also recognised in reports published by the Geneva-based Small Arms Survey. The authors of a publication titled *Humanitarianism Under Threat: The Humanitarian Impact of Small Arms and Light Weapons* present statistics and other findings demonstrating varying humanitarian consequences of small arms abuse, including the threat posed to basic human rights.¹⁰⁵

The Arms Trade Treaty takes the connection between human rights and arms transfers further than any previously existing document. Still, it claims as one of its fundamental strengths that it is built on existing legal obligations.¹⁰⁶ As was discussed in sub-chapter 4.3, this understanding of “existing obligations” relies crucially for its legitimacy on the work of the ILC. The subsequent Campaign in its turn has relied on the way Barbara Frey has formulated and clarified the role of these Draft Articles in

regelverk?” (Norwegian defence exports – the strictest regulations in the world?) Aftenposten 21.10.1996, available from <http://tux1.aftenposten.no/bakgr/961021/kronikk.htm>.

¹⁰² Control Arms Campaign, *Guns or Growth?* Amnesty International, Oxfam and IANSA, June 2004.

¹⁰³ See the Arms Trade Treaty web page at <http://www.armstradetreaty.com/att/aboutatt.php>.

¹⁰⁴ See especially the document in appendix 1 of the report *Shattered Lives*, Amnesty International and Oxfam 2003, which summarises the legal foundation for the proposed Arms Trade Treaty

¹⁰⁵ Muggah, Robert and Eric Berman, *Humanitarianism Under Threat: The Humanitarian Impact of Small Arms and Light Weapons*, Small Arms Survey and Centre for Humanitarian Dialogue, Geneva 2001. For reference to human rights, see p. 3.

¹⁰⁶ Arms Trade Treaty web page, <http://www.armstradetreaty.com/att/aboutatt.php>.

making a connection between existing human rights obligations and issues of arms trade.¹⁰⁷ It has been a common feature of most of the NGO rhetoric that it builds on already existing obligations, or, as will become apparent, on what they interpret to be existing obligations.

The main features of the proposed Arms Trade Treaty are concerned with domestic control over the export of arms through licensing procedures.¹⁰⁸ It goes further than calling for a halt in exports that may directly contribute to violations of human rights or other aspects of humanitarian law in at least two ways. First, it addresses the responsibility for the original exporting state for transfers that are likely to be diverted and used for such purposes.¹⁰⁹ This has by Norwegian NGOs been translated into a demand for end user certification for all transfers, challenging the Norwegian policy of not making such demands on allies. Second, the document in a somewhat weaker wording calls for a consideration of the general situation in the recipient country, or in countries that they may be diverted to. If the transfer is likely in a deteriorating way to affect levels of violence, political stability or sustainable development, “there shall be a presumption against authorisation.”¹¹⁰

5 The Process of human rights norm implementation in Norwegian arms exports

5.1 Tracing the norm implementation process

One of the major arms transfer control activist groups in Norway is and has been *Norges Fredsråd* (Norwegian Peace Council, usually referred to as NFR), which is an umbrella organisation covering 28 Norwegian peace organisations.¹¹¹ This organisation dominated the Norwegian arms export control discourse until among others Amnesty International Norway and Norwegian Church Aid initiated their campaigns in 2005. Amnesty International Norway had discussed the arms trade issue

¹⁰⁷ In addition to mirroring the same interpretations of state responsibility and on the adverse social and human effects of arms, her work is quote on several occasions. See for example *Shattered Lives*, p. 75 and 81, available from http://www.controlarms.org/downloads/shattered_lives.htm

¹⁰⁸ *Draft Framework Convention on International Arms Transfers*, Article 1

¹⁰⁹ *Ibid.* Article 3 (e).

¹¹⁰ *Ibid.* Article 4.

¹¹¹ This was the figure at the time of writing; see <http://www.nowar.no/>, accessed 23 May 2006.

as early as 2003,¹¹² however no significant campaigning took place before February 2005. NFR, and some of their members on their own initiatives,¹¹³ have released recommendations based on the annual reports to Parliament (*Stortingsmelding*) and have been involved with promoting the need for stricter arms export controls in the media, as well as direct lobbying. They initiated a working group to work specifically on these issues, arguing for greater transparency, for the introduction of end user certificates as a requirement for all license applications, and generally for a greater ability to avoid the potential of Norwegian arms being used for aggression, human rights violations and other atrocities.¹¹⁴ The first document available from the group was a recommendation based on the report to Parliament number 35 in 2003.

The campaign for stricter arms export controls gained momentum in 2005, as Amnesty International Norway initiated activities under the auspices of the Control Arms Campaign in collaboration with Norwegian Church Aid. The combined size and force of these two major organisations pushed the arms export control issue higher up on the agenda. The first significant contribution from Amnesty to the Norwegian arms export debate was a demonstration 26 February 2005, held under the Control Arms banner.¹¹⁵ It called for Norwegian endorsement of the ATT, based on the lethal statistics of international firearms-related deaths. Additionally, they utilised in their argumentation the fact that Finland, as a neighbouring country, was at the forefront of this development.¹¹⁶

The main point of contention between the arms control activists in Norway and the Norwegian authorities has been the policy towards arms transfers to NATO countries. Essentially, NGOs are concerned with how the Norwegian policy towards arms export to allied states is based on the rationale that military alliances are to be built on trust, removing the need for making demands or asking questions related to the sale of

¹¹² Amnesty International Norway; *Våpeneksport: Sendes norske våpen i gale hender?* (Arms exports: Are Norwegian Weapons sent to illegitimate recipients), 11.12.2003, available from <http://www.amnesty.no/web.nsf/pages/776A1BC8759B565AC1256DEC0039C01B>.

¹¹³ Especially Norges Fredslag, www.nowar.no/nfl/.

¹¹⁴ All documents from this group are available here: <http://www.nowar.no/AGvapenhandel.htm>, accessed 23 May 2006.

¹¹⁵ Amnesty International Norway, *Amnesty aksjonerer: - Jan Petersen må våkne* (Amnesty takes action: - Jan Petersen must wake up!), from <http://www.amnesty.no/web.nsf/pages/FE459E364D94032DC1256FB300486EF8>, accessed 15.03.2006

weapons to an ally.¹¹⁷ Thus, it is not considered necessary to ask for end user certificates when an arms transfer is destined for an allied state partner. This stance leads to two challenges to the perceived consistency of the policy, which is the background for much of this NGO-based criticism, which will be explained below.

The trust invested in NATO countries and other allies means that there is usually no need for a renewed consideration of the security situation of the state in question when an application for an export licence is considered.¹¹⁸ Similarly, no questions are asked nor any restrictions made regarding where and how the recipient put the weapons to use.¹¹⁹ The NGO community often points to the fact that NATO countries account for about 80% of Norwegian strategic exports,¹²⁰ accusing the government of giving issues of financial gain and protection of employment greater priority than protection of human rights and stability.¹²¹ As Norwegian exports to the US increased significantly between 2002 and 2003, this argument became more forceful. The NFR argued that “the value of Norwegian arms export appears to be dependent on the level of aggression in the foreign policies of our close allies. Food for thought for a peace nation?”¹²²

The two different voices of the NGO community on this case, represented by NFR and Amnesty, complement each other by focusing on different aspects of the validity and necessity of stricter export controls in general and specifically the adoption of an Arms Trade Treaty. Broadly speaking, it can be observed that NFR focuses on the need for universal demands for end user certificates based partly on the behaviour of other NATO countries and partly on existing obligations within arms trade agreements, especially the EU Code of Conduct. Amnesty International on the other

¹¹⁶ Ibid.

¹¹⁷ Exemplified by a report launched in 2006 by Amnesty International and the Norwegian Church Aid, as a part of their campaign, which was connected to the international Control Arms Campaign of which Amnesty International is a leading organisation. Marsh, Nicholas and Kyrre Holm; *Bullets Without Borders*, Amnesty International and Norwegian Church Aid 2006, pp.48-53. *Norges Fredsråd* also focuses on the NATO issue, for example in this recommendation: *Norges Fredsråds Innstilling til Stortingsmelding 41*, p. 1-3, available from http://www.nowar.no/documents/stmld41_nfr.doc.

¹¹⁸ Stortingsmelding nr. 41 (2003-2004) para. 4.1, p. 15.

¹¹⁹ Stortingsmelding nr. 36 (2004-2005) para. 3.3, p.12.

¹²⁰ Stortingsmelding nr. 36 (2004-2005), p. 1.

¹²¹ Oksnes, Linda; *Vår Lønnsomme Våpeneksport* (Our Profitable Arms Export), in Ikkevold no. 2/04, available from <http://www.nowar.no/documents/lindaoksnes.doc>.

hand focused on the devastating effects of especially small arms around the world and the desirability of limiting their proliferation through the implementation of the ATT. Their call was primarily based on the need for Norway to work for this internationally and less on the Norwegian behaviour, without ignoring this aspect altogether.

Both fractions utilised the Norwegian image as a “humanitarian superpower” in their rhetoric. NFR makes this point in their argument for an expanded use of end user certification: “Norway as a peace nation: It is essential that Norway at least attempts to be at the forefront in this field if it is to stand a chance at being taken seriously in its role as a peace nation and an international peace negotiator.”¹²³

Amnesty exemplifies their point by quoting a war-ridden Somali’s reaction to the opposition in the Norwegian MFA towards the ATT initiative: “That Norway, who gives great amounts of foreign aid, who works for the rights of women in conflict, who is portrayed abroad as a peace negotiator, doesn’t support the Arms Trade Treaty Initiative has to be an absurd contradiction.”¹²⁴

In particular, the war in Iraq illustrated the aspects of the Norwegian arms export policy towards NATO which the NGOs find problematic, and is thus a case which will assist in demonstrating the foundations for calls for stricter, more human rights-sensitive arms export regulations, as these demands are being put forward by elements of the NGO community. In Norway, the government expressed doubts about the legality of the war,¹²⁵ which provided a welcome foundation for the NGO community to launch arguments about Norwegian double standards given that arms exports to the invading powers continued.¹²⁶ As Norway saw a broad-based public opposition to the

¹²² Harang, Alexander, *Et Innlegg om Våpenhandel; -Hva Skjer, Hvorfor og til Hvilken Pris* (A Contribution on Arms Trade; -What, Why and at Which Cost?), available from NFR, <http://www.nowar.no/documents/kvpbok.doc>.

¹²³ Harang, Alexander; *Norsk Eksport av Forsvarsmateriell*, Balder Magasin, January 2005, p. 3, available from <http://www.nowar.no/documents/balderartikkel.doc>, accessed 20 May 2006, author’s translation.

¹²⁴ Glomm, Kaja, *Control Arms Kampanjen – Våpen og Vann* (The Control Arms Campaign – Weapons and Water), Amnesty International Norway’s newsletter 01.06.2005, available from <http://www.amnesty.no/web.nsf/pages/F8FD0195F4B4679CC1257011002CC720>.

¹²⁵ See press release from the office of the Prime Minister of 20 Mars 2003, available at <http://www.odin.no/odinarkiv/norsk/bondevikII/smk/pressem/001001-070774/dok-bn.html>, accessed 24 May 2006.

¹²⁶ See for example this article about the work of Norges Fredsråd in which they give 19 examples of Norwegian contributions to the war in Iraq: *Har 19 eksempler på norsk bidrag* (Has 19 examples of Norwegian contribution), Dagsavisen 14.11.2004, available from <http://www.nowar.no/documents/19eksempler.doc>.

war dominating the domestic discourse, the media attention towards acts undermining this opposition was significant, especially cases of Norwegian military equipment being rented out to the coalition forces.¹²⁷

NFR took the opportunity to utilise the discontent surrounding the ambiguous attitudes of the government towards Norwegian involvement in Iraq to criticise the existing export control mechanisms. The organisation held that this situation was a reason for reconsidering the NATO policy in the arms export regulations, as a war that was in violation of international law was being fought by two close allies that are major recipients of Norwegian arms.¹²⁸ It based this argument partly on the fact that basing a policy on trust when it has been proven that this trust is sometimes unfounded, but also on what they consider to be existing obligations within the EU Code of Conduct. “The EU Code of Conduct for Arms Exports of the 8 June 1998 can reasonably be interpreted towards an obligation to demand end user certifications in arms transactions.”¹²⁹

This argument was based on Criterion 7 of the Code, which was shown in sub-chapter 3.3.2 not to include a specific demand for this use of an end user certification. Thus, the NFR utilises existing international commitments in a combination with public discontent with governmental policies that threatened the image of Norway as a peace nation.

As article 5 in the North Atlantic Treaty clearly states that the exercise of collective self defence is to be as “recognised by Article 51 of the Charter of the United Nations”, the American aggression towards Iraq seems to fall outside of the scope of the NATO partnership. This is significant for the strength of the NGO arguments about Norwegian double standards. While a situation of legitimate self-defence by a NATO country will invoke the collective self-defence clause¹³⁰ and thus arguably make transfers of weapons between allies legitimate regardless of the situation of war,

¹²⁷ *Sendte militærutstyr til Kuwait før Irak-krigen* (Sent military equipment to Kuwait before the war in Iraq), *Nationen* 26.10.2004, available from <http://www.nationen.no/Innenriks/article1303420.ece>.

¹²⁸ *Norges Fredsråds Innstilling til Stortingsmelding 41*, p. 2.

¹²⁹ *Norges Fredsråds Innstilling til Stortingsmelding 35 (2002-2003)* (*Norges Fredsråds* recommendation to the Report to Parliament nr. 35 (2002-2003). 28 October 2003, p.2.

¹³⁰ Article 5 of the North Atlantic Treaty: “The parties agree that an armed attack on one of them in Europe or North America shall be considered an attack against them all [...]”

this clause is not invoked in a case of illegal aggression, which this invasion was generally perceived as by NGOs and political parties in Norway. In such cases, the founding principle of Norwegian arms exports¹³¹ should logically lead to the conclusion that no transfers should be made to the invading states. The issue for the NGOs, however, is that the law, regulations and practice as they stand do not demand an evaluation of the political situation of an ally in the case of an application for export licenses. One can of course still theoretically make such demands. However, the very basis for the decision not to make such demands towards allied states makes it highly unlikely that such demands will be made. Significantly, there are no mechanisms ensuring that re-evaluations of the relevant political situation are made vis-à-vis the allied recipient state when exceptional situations such as the attack on Iraq takes place. This is a significant point of criticism especially from the peace movement, as seen in the article *Norsk og Internasjonal Våpenhandel* written by Stian Christensen, member of the board of *Norges Fredsråd*. Here, the lack of scrutiny and debate around transfers to the UK, the United States and Australia immediately prior to and during the war was heavily criticised.¹³²

The second issue receiving attention from the NGO community related to exports to allies is the question of re-exports. Norwegian guidelines and practice suggest that it is not necessary to demand an end-user certificate for exports to so-called “list 1” states, based on the inherent trust on which alliances and cooperation with these countries is founded. The NFR has raised doubts as to whether Norway can trust that its allies applies the same standards to arms exports as is laid out in Norwegian arms export regulations and in international standard-setting documents that Norway has committed itself to.¹³³ In 2004, Norway denied requests for export licenses to 14 destinations. This information has only been available in the last two export reports, namely report 41 (2003-2004) and report 36 (2004-2005), and the information provided is very limited. It lists the countries to which exports were denied, but not the reasons for the refusal or which goods the license application covered. Additionally, the report stresses that the denial of a licence should not be seen as an

¹³¹ Represented by the 1959 declaration noting that Norwegian arms should not be exported to areas of war.

¹³² Christensen, Stian; *Norsk og Internasjonal Våpenhandel* (Norwegian and International Arms Trade), available from <http://www.nowar.no/documents/samtidenartikkel.doc>.

¹³³ Ibid. p. 3.

effective halt in exports to the country in question, and that each case is considered on its merits. For a reader of the report however, it is impossible to get an insight into these merits.

NFR has on several occasions raised this issue in articles and recommendations. They have pointed to several allied states that are involved in arms exports to states which Norway does not export arms to, and that are likely to be ineligible on account of insufficient respect for human rights. They have especially been concerned with exports from the United States to Colombia, Israel and other states with a problematic human rights record.¹³⁴ While not being able to prove that Norwegian weapons have been re-exported, the NFR frames its criticism in terms of risk, and in terms of the degree to which the existing control framework is sufficient for allowing the government to prevent such re-exports from taking place.

The international campaign for an Arms Trade Treaty and the domestic lobbying, initially dominated by the NFR, did stir a limited debate in the Norwegian Parliament. Primarily, challenges to the government, dominated by the Conservative Party, came from representatives from the Socialist Left Party. In a question to the Minister of Foreign Affairs, dated 27 October 2003, Representative Ingrid Opedal enquired about the government's attitude towards the need for a new, legally binding Arms Trade Treaty, and about their views on the present draft.¹³⁵ The response from the government was evasive, as they stated that it would be more productive to concentrate their efforts on already existing agreements and fora. This answer thus did not address the merits of the draft, and did not recognise its progressive features in terms of the increased state responsibilities which its utilisation of existing international law would entail. The response from the Minister implies that he did not see any value added from adopting the ATT as compared to working within existing frameworks such as the OSCE and the EU Code of Conduct.

A few weeks later, on 18 November 2003, a representative of the Socialist Left Party was the only parliamentarian to call for more restrictive arms export control

¹³⁴ Harang, Alexander, in *Balder Magasin*, January 2005, p. 1, also: *Norges Fredsråds Innstilling til Stortingsmelding 41*, p.1-3.

regulations.¹³⁶ The arguments forwarded in this context reflected the issues raised by the NGO community in relation to the invasion of Iraq and the continuation of arms exports to the US and the UK. The representative addressed the increase in exports to these two countries after the invasion, and called for “an honest debate as to whether or not this was in violation of the law and regulations.”¹³⁷

In spite of expressed intentions of being at the forefront of the development of international norms,¹³⁸ Norway was not among the states at the forefront in endorsing the proposal. Rather, the government focused on arguments holding that Norwegian arms export controls was already very strict with a strong humanitarian focus, which they held made this new treaty redundant in the Norwegian context. It took the endorsement of the ATT by several important allies before the Norwegian position was changed. Significantly, the Control Arms Campaign had been very vocal in the UK since the start of the campaign, putting significant pressure on the government. On 30 September 2004, Minister of Foreign Affairs Jack Straw voiced his support for the initiative in a public announcement.¹³⁹ Thus, only when several states with which Norway likes to compare itself expressed their support for the treaty did the Norwegian Minister of Foreign Affairs, Mr Petersen reconsider his position and came out in support of the ATT, on 23 June 2005.¹⁴⁰ Norwegian NGOs utilised the position of the UK to pressure Petersen to follow up on Straw’s position, referring to the close ties between Norway and the UK to make their point.¹⁴¹ High-level representatives of Amnesty International Norway argued for Norway to come out in support of the British move in international fora, directly quoting the perceived peace nation image as being on the line if Norway did not make such commitments.¹⁴²

¹³⁵ Skriftlig spørsmål fra Ingrid Opedal til utenriksministeren [Written question from Ingrid Opedal to the Minister of Foreign Affairs], Dokument nr. 15 (2003/2004), Spørsmål nr. 82, 27.10.2003.

¹³⁶ *Stortinget*, møte den 18. november kl. 10 2003 (Meeting in Parliament 18 November 10:00, 2003), p. 4-5.

¹³⁷ *Ibid.* p. 5.

¹³⁸ Johnson, Hilde Frafjord, Minister of Development, *Menneskerettigheter og Demokrati* (Human Rights and Democracy), speech delivered at Gulatingsseminaret 2003, Bergen

¹³⁹ *Ibid.* footnote 130.

¹⁴⁰ *Aftenposten* 23.06.2005; *Norge støtter våpenavtale* (Norway supports arms agreement), available from <http://www.aftenposten.no/nyheter/uriks/article1066211.ece>.

¹⁴¹ Amnesty International Norway press release, *Petersen må støtte våpenkontroll nå!* (Petersen must endorse arms control now!), available from

<http://www.amnesty.no/web.nsf/pages/6AB8ACAD8425DA6DC1257027002FC9F1>.

¹⁴² *Ibid.*

*-Norway often promotes itself as a peace-loving nation. An unqualified statement of support on this issue would help maintain that image.*¹⁴³

Petter Eide, Amnesty International Norway

As this sub-chapter has shown, the domestic debate changed significantly in 2005 as Amnesty International Norway as a member of the Control Arms Campaign started lobbying the Norwegian government. The effect of this was twofold. One, the campaign was shifted from a more technical level with focus on legal and political inconsistencies towards a more broad-based public awareness-raising campaign with a more simplified message. This part of the debate was characterised by more purely ethical arguments building on the Norwegian humanitarian image. Two, the campaign received greater media coverage, partly as a function of the broad-based campaigning strategy. It is still too early to assess the impact of this campaign on the behaviour of Norwegian authorities in the arms export question beyond the endorsement of the Arms trade Treaty Initiative. However, some observations can be made based on the last report to Parliament on arms exports, published 2 June 2006.¹⁴⁴

The report, *Stortingsmelding 19 (2005-2006)*, which gives account of Norwegian export of strategic goods in 2005, differs from previous reports in some interesting ways. In previous reports, references to human rights have been few and general, mainly repeating the statement from 1997 in which it is given that the consideration of the political context pertaining to the recipient country should include “questions related to democratic rights and respect for basic human rights.”¹⁴⁵ The new report, however, goes much further in discussing the role of human rights norms in arms export regulations. Importantly, the rhetoric has changed from the dismissive style exemplified above into what I interpret as an increased acceptance of the validity of human rights norms for arms export controls. A particularly relevant concession can be found in the discussion of the export regulations as such in chapter two of the report, after a statement emphasising that the Ministry places a great emphasis on the

¹⁴³ Ibid.

¹⁴⁴ Report to Parliament (*Stortingsmelding*) nr. 19 (2005-2006)

¹⁴⁵ Report to Parliament (*Stortingsmelding*) nr. 36 (2004-2005), p. 1.

human rights situation in the recipient country.¹⁴⁶ “The Ministry will nevertheless consider whether there is an added value in codifying international humanitarian law and human rights as conditions in the export regulations.”¹⁴⁷ The willingness to explore the possibilities for giving human rights a legal protection within the arms export regulations signifies a movement away from talking about human rights as merely an ethical standard to be considered when transfer decisions are made. Rather, it represents a move towards accepting the legal relevance of human rights law for arms export regulations. One interesting observation can be made in this context. This concession may represent a move towards accepting the broader scope of human rights obligations as argued for by Barbara Frey. Codifying human rights law in domestic arms export regulations represents an expanded notion of responsibility for the potential extra-territorial implications of arms transfers on a recipient country.

The report also includes an official expression of the endorsement of the Arms Trade Treaty,¹⁴⁸ though without providing any insight into the future implications this document may have on Norwegian arms export regulations, nor any indication that the endorsement has had any effect on the present arms export practice.

5.2 Analysing the norm implementation process.

The present Norwegian arms transfer regulations can be traced back to 1959, when Parliament unanimously voted in favour of a proposition from the government. The statement voted for in Parliament held that arms would not be exported to war zones or high-risk areas, and additionally that the political situation in the recipient state should be taken into account, as seen in sub-chapter 3.1. This loose framework was then to be interpreted and regulated by the lawmakers. Arms exports were mainly considered a strategic tool, and were for the most part regulated accordingly during the cold war. This is of course a simplification, however at an aggregated level one can say that human rights started becoming important in the 1990's, as security politics were no longer polarised and the division between who is an ally and who is an enemy became more blurred, as argued by Sikkink and referred to in sub-chapter 2.4.1.

¹⁴⁶ Report to Parliament (*Stortingsmelding*) nr. 19 (2005-2006), p. 10.

¹⁴⁷ Ibid. p. 10.

¹⁴⁸ Ibid. p. 21.

As one recalls from chapter 3, the adoption of the OSCE Principles Governing Conventional Arms Transfers of 1993 was the first explicit sign of human rights being given a role in Norwegian arms transfer policy, if only as a non-binding standard of behaviour. This incorporation is an early sign of human rights as a principled idea gaining ground in the sphere of arms export regulations. There are no requirements in the OSCE Principles that call for national Parliaments to be informed about the details of the domestic arms transfers. There is, however, a general call for transparency,¹⁴⁹ which may have had an effect on the Norwegian choice to start reporting on arms transfers.¹⁵⁰ However, only as late as 1996 was a report on Norwegian arms exports debated in Parliament, during which debate a representative of the Socialist Left Party (SV) voiced a concern for a lack of protection of human rights in the regulations.¹⁵¹ The Foreign Affairs Committee (*Utenrikskomiteen*) received reports from the MFA yearly from 1996. However, there was little activity and involvement from the parliamentarians before 2002. Only two political parties chose to include additional remarks in the response sent back to the MFA between 1996 and 2001.¹⁵² Some debate arose on a few occasions over case-specific transfers, most notably the sale of Penguin missiles to Turkey. However, in terms of debating the foundations of the arms export regulations the debate was limited before 2002. Thus, it can be observed a time lag between the international role of human rights as a principled idea relevant to arms export controls and the domestic parliamentary attention devoted to this development.

Two other significant events are worth mentioning in the Norwegian arms control discourse in the 1990s. First, in 1997, through a statement from the government,

¹⁴⁹ OSCE Principles Chapter 1, Article 3 (a).

¹⁵⁰ Another factor may be that Sweden started their reporting procedures at the same time.

¹⁵¹ Representative Paul Chaffey pointed out the lack of regulations avoiding weapons to go to human rights violators in his speech. Minutes from this meeting are available from <http://www.stortinget.no/stdid/1996/s961218-05.html>.

¹⁵² In 2000 and 2001, The Socialist Left Party (SV) commented that Norway should not be exporting arms to Turkey based on this state being involved in a civil war, as well as problems related to human rights violations. The Progress Party (*Fr.p*) requested more liberal regulations the same years. These comments are included in “Innst.S.nr.89 (1999-2000)” available from http://www.stortinget.no/cgi-wift/wiftldles?doc=/usr/www/stortinget/inns/inns-199900-089.html&emne=forsvarsmateriell&ting=innon+innog+innsn+inns&sesjon=1999-2000+,+1999-00&komite=utenriks*& and “Innst.S.nr.289 (2000-2001)”, available from <http://www.stortinget.no/cgi-wift/wiftldles?doc=/usr/www/stortinget/inns/inns-200001->

endorsed by Parliament, human rights was officially included as an element to be taken into consideration in arms transfer decisions. This was discussed in sub-chapter 3.1. Then, in 1998, Norway endorsed the European Union Code of Conduct for Arms Transfers, as discussed in sub-chapter 3.3.2. Two things are especially interesting here in light of the process of norm implementation. First, the 1997 statement seems to appear out of a vacuum. Some time had passed since the OSCE Principles had been signed, and there was, as described above, no particularly strong debate in Parliament around the issue beyond the comments from the Socialist Left Party. Additionally, as seen in sub-chapter 4.4, the mainstream NGO community was yet to take an interest in the subject. Second, the statement appeared before the conclusion and endorsement of the Code of Conduct. It may still be reasonable to expect that the Code of Conduct was relevant for the issuing of this statement, as the Norwegian MFA knew about the French/British initiative to establish a Code of Conduct within the EU.¹⁵³ This, in combination with how Norway one year later expressed voluntary commitment to the Code of Conduct in spite of not being a member of the EU could be understood as a need to be in line with important European allies on this issue. The initial attempts at mainstreaming human rights in the domestic arms control regulations thus seemed to be based more on international pressure than on domestic lobbying, given that this as mentioned was rather marginal at this time. This implies that at this point, the major driving forces behind Norwegian development in the field of arms export controls were related to the *world time* situation and the Norwegian national interest to be perceived as being in line with allies, or possibly ahead on human rights related issues.

Interestingly, no discernable difference could be found in Norwegian arms export regulations after making this concession. In fact, when discussing the Code of Conduct in the annual report to Parliament, the MFA expressly stated that they saw no obligations arising under the Code not already covered by existing regulations, and thus no need for making any changes to these regulations.¹⁵⁴

[289.html&emne=forsvarsmateriell&ting=innon+innog+innsn+innsg&sesjon=2000-2001+,+2000-01&komite=utenriks*&](#)

¹⁵³ This is referred to in *Stortingsmelding* 43 (1997-98), chapter 4. Available from <http://odin.dep.no/ud/norsk/dok/regpubl/stmeld/032005-040009/dok-bn.html>, accessed 15 May 2006.

¹⁵⁴ *Stortingsmelding* nr. 41 (2003-04), chapter 2.3.

The NFR reports and the criticism therein were based on the 2003 *Stortingsmelding*. Interestingly, in the next *Stortingsmelding*¹⁵⁵ it was stated that the 8 criteria in the EU code was already protected within the Norwegian regulations and that “*It is therefore considered to be unnecessary to explicitly include the eight criteria in the Norwegian regulations in order to ensure enforcement.*”¹⁵⁶ I find the fact that the MFA was compelled to emphasise how they didn’t see a need for further implementation of the criteria of the Code in the existing regulations to support my theoretically founded expectations. This act appears to be an example of the authorities attempting to avoid further concessions to be given as a result of pressure mounting from the initial rhetorical move consisting of the endorsement of the Code. This situation also illustrates a tendency in the arms control activist community generally to interpret the texts of the international arrangements as going further than what may be covered by the text, as illustrated by the statement from the NFR above.

There has not been any significant movement in the position of human rights in the Norwegian arms export control system after the 1997 statement. Seeing this statement as a rhetorical concession based on the international climate at the time seems to have its merits in this context. This refers not only to the documents emerging in the arms export control sector which incorporated human rights concerns, but also the general position of human rights in international relations as discussed by Sikkink.¹⁵⁷ However, the concessions represented by this statement, in addition to the support for the international documents in question, gave the activists in Norway a platform on which to voice their concern with what they saw as still unsolved problems with Norwegian arms exports. Internationally, a new phase in the discourse on human rights and arms exports began around 2002. In fact, this may be seen as the starting point for a real enquiry, initiated by Barbara Frey and adopted by the Control Arms Campaign, into the proper position of human rights norms and laws in the arms transfer regulations. The EU Code of Conduct and the OSCE Principles as discussed above incorporated human rights, but without discussing the legal significance of doing so, or exploring the potential nexus between arms transfers and human rights violations empirically. The first significant attempts at this were the documents of

¹⁵⁵ Report to Parliament (*Stortingsmelding*) nr. 41 (2003-2004)

¹⁵⁶ Ibid. p.12.

¹⁵⁷ As discussed in sub-chapters 2.3 and 2.4.

Barbara Frey, as discussed in chapter five. Building on the Draft Articles on State Responsibility of the International Law Commission, her work emphasises the potential for arms transfers to be in violation of international law when they have the potential for assisting in human rights violations. I consider this work as essential for establishing the role of human rights as a principled idea relevant to arms export regulations, as it establishes this connection based on interpretations of existing legal documents and principles.

This logic is subsequently found in the arguments from the Control Arms Campaign, especially in the campaign's arguments for the draft Arms Trade Treaty.¹⁵⁸ Here, the development of the discourse of arms export controls in international organisations preceded the development of arguments in the international NGO-community, which in my view added legitimacy to the arguments of the campaign. It has been an important part of the lobbying and awareness raising efforts of campaigners that the new legal text, the previously discussed Arms Trade Treaty, would be based on existing legal obligations. The validity of this perspective relies crucially on the work of the ILC and the Special Rapporteur. The subsequent practical importance of the works of these UN bodies however relied to a significant degree on the NGO community in order to exercise an influence over states' foreign policies. The first changes in state rhetoric and behaviour that reflected the arguments of the report of the Special Rapporteur came as a response to the Control Arms Campaign, as different governments started voicing support for the proposed Arms Trade Treaty. This signified a public endorsement of the principles of complicity and due diligence as put forth by Ms. Frey and utilised by the campaigners. Initially, states with a comparatively limited international influence voiced their support, for example Mali and Costa Rica. They were followed by Finland and the Netherlands among others, bringing support for the treaty closer to the Norwegian sphere.¹⁵⁹

The NGO community has considered the endorsement of the Arms Trade Treaty a victory. However, no change has been made towards greater mainstreaming of human rights in the Norwegian export policies since the statement incorporating human rights

¹⁵⁸ Recall that this proposed document is argued to build exclusively on existing legal obligations, as discussed in chapter 5.4.

was adopted in 1997. In an interview with the author, Jan Grevstad of the Export Council maintained that there had not been any change in the guidelines they received from the political leadership of the MFA after the endorsement of the proposed treaty. In other words, while Norway supports the establishment of a new treaty, no efforts has been made to make domestic behaviour consistent with the principles which the endorsement of this document represents support of.

Is it possible to discern a pattern in the way Norwegian political rhetoric and behaviour has changed with regards to the position of human rights in arms control policies? The OSCE principles can be seen as a starting point from which the participating states initiated a discursive trend within which human rights norms gained importance for arms export policies. As the document formulated among the members and as such a result of negotiations, compromises and consensus, it is uncontroversial as a normative starting point. However, the picture changes somewhat in the case of Norway. As Norway chose voluntarily to adhere to the Code, this adherence carries greater significance in terms of the behavioural and rhetorical change it represents. I see this move as a reflection of the need to be in line with the European community on questions regarding human rights, especially when the issue at stake is progressive compared to earlier policies. The fact that the expression of adherence in this context was pro-active, especially if one notes that non-adherence was unlikely to carry with it any sanctions or even criticism given that Norway is not a member of the EU, illustrates the importance in Norwegian foreign policy of being at the forefront of progressive developments of international law and agreements.

The importance of adherence to the Code is unclear, with at least two interpretations. One perspective is that as the Code is only politically binding, and as Norway is less than a full member of this political community, voicing support for this document did not need to carry any significance for the organisation of Norwegian arms exports. This notion is supported by the previously noted formulation in the reports to Parliament which rejects in a rather casual way any need for changes to Norwegian arms export regulations based on the commitment to the Code, offering no further argument or explanation. Another perspective maintains that one can see the

¹⁵⁹ See news report from the Control Arms Campaign,

importance of the Code in that it represents further rhetorical concessions, creating a platform for subsequent lobbying and political pressure.

One year before the completion of the Code, human rights were explicitly introduced to Norwegian arms export policy through the unanimously adopted statement from the government specifying how this was allowed for under the wording “foreign and domestic political considerations.” This can be seen as a domestic concession reflecting the existing OSCE principles and the forthcoming Code, the rough content of which was already known. However, I interpret this statement to be a mainly a tactical concession, as it does not codify the role human rights should play, nor did it lead to any change in laws, regulations or guidelines. Hence, while this statement does represent the starting point for mainstreaming of human rights in Norwegian arms export controls, it was mainly relevant as a signal of acceptance of the relevance of human rights norms in general for this political area. The discussion above points towards the importance of the code as a platform for NGO pressure as it was seen as a codification of the Norwegian position. Thus, the Code has been of importance beyond the limited obligations associated with endorsing it.

Interestingly, these concessions seem not to have produced any significant attempts by the NGO community at further pressure towards behavioural change in Norway. The Control Arms Campaign only really got started as late as 2002, coinciding with the reports of the Special Rapporteur. Thus, further international development establishing the role of human rights as a principled idea relevant for arms export controls appeared to be necessary for the Norwegian NGO community to get involved.

Once these concessions together with the internationally developed principles were utilised by the NGO community, the Norwegian government needed to address the challenge of the arguments founded on these developments. Initially, the main rhetoric consisted of insisting on keeping the arms trade control harmonisation efforts to the already existing agreements and fora, as discussed in sub-chapter 4.4.2. At the same time, Norway tied its efforts in arms export controls to its image as a peace

http://www.controlarms.org/latest_news/straw_pr300904.htm.

nation, with the ambition to be at the forefront of efforts to increase control over international arms trade.¹⁶⁰ The arms control activists built their case on the very same foundation; the Norwegian image of itself as a leading nation within peace and humanitarian issues. This made the government more vulnerable for the pressure from the NGO community, as their arguments built on the positions taken and defended by the state organs. When Petersen finally decided to express his support for the ATT on behalf of his government, this came to a certain degree after NGO pressure, however I find it unlikely that this concession would have come about at this time without the concession of especially the British, but to a lesser degree also the Finnish and Dutch governments. Looking at the history of the arms export control question in the Norwegian context, most significant change has come about as a result of changes in the international discourse and especially in the positions of key allies.

The endorsement of the ATT has been utilised by the NGO community to demand further concessions in practice and regulations. Amnesty International and Norwegian Church Aid have argued that this endorsement implies that "Norway should develop its own legislation and ensure that it explicitly includes reference to relevant international law."¹⁶¹ There have not been any developments towards such a change in the domestic regulations. In an interview with the author, Jan Grevstad of the Section for Export Control states that the regulations will not be re-evaluated before a possible treaty is implemented. The NGOs have thus adopted an understanding of human rights as a principled idea which should guide arms export controls, building on international developments justifying such a position, before the state either in rhetoric or in practice fully endorses this interpretation.

However, the recent developments represented by the changed rhetoric in the latest report to Parliament suggest a modification of this statement. Though the ATT is not specifically mentioned in the relevant section of the report, the expressed intention of considering a codification of relevant international law in domestic regulations echoes

¹⁶⁰ Ministry of Foreign Affairs; *Utviklingspolitikens Rolle i Fredsbygging- Strategisk Rammeverk* (The Role of Development Politics in Peace Building – a Strategic Framework) p. 6. This report expressively includes arms export controls, primarily in the context of small arms, in the peace building framework.

¹⁶¹ Marsh, Nicholas and Kyrre Holm; *Bullets Without Borders – Improving Control and Oversight over Norwegian Arms Production, Exports and Investments*, Amnesty International and Norwegian Church Aid 2006, p. 8.

the arguments from the Control Arms Campaign, as discussed in sub-chapter 4.4.2. Welcoming such an evaluation may thus represent a case in which the initially unbinding endorsement of the ATT has functioned as a rhetorical entrapment which may at a later stage contribute to a real change in regulations and behaviour.

The concessions included in the last report have several implications for the validity of the theoretical model. First, they represent a significant step towards real norm adherence and acceptance of the validity of human rights norms for the sphere of arms exports. Second, the wording of the concession on possible implementation of human rights norms in domestic regulations provides a strong foundation for further pressure by NGOs towards the realisation of the potential of such implementation. The expressed intention of exploring the *value added* of this implementation may be perceived by the NGOs who have been advocating the validity of human rights norm implementation in arms export regulations over the last years as an invitation to dialogue on the matter. Additionally, the report goes further in discussing the policy on not requiring end user certificates for transfers to allied countries than earlier reports have done. The principle of trust is not challenged, nevertheless one point of concession should be emphasised. On page 11 of the report, the MFA informs “The Ministry recently initiated a dialogue with a number of allies with a view to clarify the conditions that are placed on end user controls.” While not directly discussing the trust-based policy, this statement nevertheless appears as an acknowledgement of the importance of what these states do with weapons received from Norway. In terms of real change in regulations, this concession signifies a potential for the first codification of the mainstreaming of human rights in Norwegian arms exports, which was initiated as a policy intention. This acknowledgement may serve as a future platform for challenges from the NGO community against the policy towards allied states.

6 Conclusion

Norway is often considered to be a leading nation in the international quest for greater human rights accountability, and is a state in which foreign policy credentials are intimately tied to its role as a peace mediator and defender of humanitarian values. Most of all, this is the image preferred by the Norwegian authorities when asked about how they wish Norway to be conceived abroad. Against this background, it could be expected that it is in the interest of the Norwegian state to be at the forefront of the process of mainstreaming of human rights. Based on these presumptions, I formulated the following hypothesis:

The evolving role of human rights norms in Norwegian arms export controls can be explained through utilising an adaptation of the spiral model developed by Thomas Risse et.al.

I expected to find a structure of norm implementation that was based on the role of human rights as a principled idea in Norwegian foreign policy and a movement towards applying this to arms export regulations. This would in that case be an example of mainstreaming of human rights where this norm set was included as a relevant category in a new field of policy. Significantly, I expected the process of norm implementation to follow a logic of entrapment in which the government would initially give rhetorical concessions in line with expectations tied to their image as a “humanitarian superpower.” These concessions would then be utilised by the NGO community in order to push for further concessions including behavioural change.

The analysis over the past chapters should give an indication as to whether and to which degree these expectations were realised. I took as my starting point the adoption of the OSCE Principles Governing Conventional Arms Transfers, as this was the first multilateral arms transfer document to mention human rights as a relevant norm set, and also because the endorsement of this document was the first introduction of human rights to the Norwegian sphere of arms export regulations. Recall that this was a multilateral agreement, reached by consensus based on negotiations. Significantly, its formulations are weak and demands for follow-up are limited to a general call for information sharing. Thus, as a starting point for a

redefinition of what ought to be the basic foundations for arms transfer controls, this document represents a desire for regional harmonisation based on criteria that reflects the changed nature of international politics after the Cold War. This is in line with the observations made by Kathryn Sikkink regarding the increased role for the idea of human rights in European foreign policy following the shift in perspectives as the political paradigm of the Cold War lost significance.

The timing of the 1997 declaration from the Norwegian government stating that human rights considerations should be an integral part of transfer licensing considerations may appear rather awkward. It was neither preceded nor followed by any significant domestic debate in Parliament, nor significant NGO pressure or media attention. The most noteworthy change in the relevant political environment was the knowledge of the French/British initiative on a European Code of Conduct which aimed at harmonising European arms transfer regulations in a framework of notably greater political force than that of the OSCE Principles. Thus, the rationale for making such an apparently significant and unprovoked concession can be found in the desire to anticipate international developments. In line with the logic of the adapted model, this may have the following possible explanatory factors. One, it may be related to the image which Norway wishes to portray, namely one of a state at the forefront of international developments regarding protection of human rights and humanitarian values. Two, it could conceivably be that the limited domestic change, which one must keep in mind was a rather weak one given that it was not followed by changes to the existing law or regulations, was made with the notion that it could prevent further calls for domestic restrictions in arms export regulations once the Code was in place. Such an explanation incorporates the image-related explanation in that it suggests a conflict between the national interest related to Norway's international image, the perceived national interest invested in the arms industry, and the desire to retain as much control as possible over this sphere.

The next significant step in the evolution of the relationship between Norwegian arms exports and human rights norm came with the endorsement of the proposed Arms Trade Treaty in June 2005. The context of this change was different from the situation of the 1997 declaration in that it was preceded by several years of significant NGO activities pushing not only for further restrictions in the arms export sector, but

specifically for Norwegian support for the Arms Trade Treaty. As early as 2003, NFR produced a recommendation to Parliament on the occasion of their evaluation of the annual *Stortingsmelding* on arms exports. This recommendation included references to the proposed Arms Trade Treaty as well as suggestions towards bringing Norwegian export controls into compliance with the EU Code of Conduct. Amnesty International and subsequently other NGOs got involved at a somewhat later stage, early in 2005. The way in which these organisations utilised previous concessions given by the government in combination with arguments related to the Norwegian image as a “humanitarian superpower” in order to make their case ought according to theoretical expectations to have a significant impact. Still, the sudden change in rhetoric from the Minister of Foreign Affairs represented by the endorsement of the ATT was hard to predict. The government had been denying for some time any leading role for Norway in making the treaty a reality,¹⁶² and had received criticism both from the NGO community and elements of the opposition on this.¹⁶³

There are again several likely interplaying factors that can explain this change in governmental rhetoric. The significant lobbying from the NGO community surely plays an important role in this. Combined with the fact that this was an election year and the most vocal opposition parties were starting to utilise the attention given to the debate in order to challenge the incumbent parties, this is likely to have created pressure for the government to make these concessions in an attempt to curb the debate and the attention given to the subject. Another very important element is the fact that the UK, as an important Norwegian ally, had expressed support for and intentions to take a leading role in the promotion of the proposed treaty. While this significantly predated the Norwegian endorsement, there are grounds for suggesting that the behaviour of the British government made it much easier for Norway to make these commitments.

The last remaining question is thus: How helpful was the adapted spiral model in explaining the evolution of the role of human rights norms in the Norwegian arms export regulations?

¹⁶² As referred to in the Aftenposten article *Norge støtter våpenavtale* op.cit.

The analytical strength of the adapted version of the model is that it captures the mechanisms that allow for NGO pressure to translate into real change in state behaviour. Additionally, the concept of *world time* could be utilised in understanding the role played by the general international climate dominating a specific issue. The weakness, however, is in that the model does not incorporate the strategic importance that may follow from being in line with certain states on important issues of foreign policy. The fact that the model was initially meant for situations of domestic change in states that were out of line with the western states on issues of democracy and human rights to some degree precludes this. In cases such as the present one, where states that are already part of the “norm abiding” group are developing their policies towards greater norm adherence or a broader understanding of the scope of application of human rights norms, this seems to be of importance to the development of the process.

The case of Norway suggests that the mechanisms of norm implementation upon which the model builds also applies to “norm-abiding” states in which *norm entrepreneurs* are seeking to expand the scope of application of human rights norms. Some observations do however suggest a slight diversion from what would have been expected when utilising the adapted model. Most importantly, it may appear that the most significant explanatory factor for new concessions and political change has been the discursive climate in important allied states, or in the regional community with which Norway identifies. This is especially true when considering the 1997 declaration which coincided with knowledge of the development of new guidelines among important allies, and which was not preceded by significant media attention, NGO pressure or parliamentary debate. The endorsement of the Arms Trade Treaty came at a time that is somewhat harder to clearly define. The NGO and media attention was strongly present, in addition to the fact that several important allies, most notably the UK, had already expressed their support for the initiative. On this occasion, it is likely that the combination of NGO pressure and the upcoming election triggered the concession. However, without the existing support of the UK, Finland and other states, I hold it to be unlikely that the outcome would have remained the same. For the NGOs, a combination of arguments drawing on the Norwegian image as

¹⁶³ Ibid.

a humanitarian superpower and on positions taken by strategically important allies seems to have been the most potent recipe for change.

The success of applying the adapted spiral model to the case of implementation of human rights norms in Norwegian arms export controls has thus been limited. It has proven helpful in explaining how NGO pressure can assist in making the state endorse international commitments. However, beyond the 1997 declaration there has not been any significant changes to Norwegian regulations or behaviour. Thus, the model is of limited value in explaining the way in which these changes come about. The main explanatory factor for the most significant changes in Norway is the international context, a combination of what Risse brands as *world time* and the protection of the national interest invested in the Norwegian image as a peace-nation. NGO pressure may based on this be expected to be more forceful in calling for changes in behaviour and adoption of a new norm set if the NGO rhetoric is based on an existing international discourse defining what is the progressive position on the given issue. Additionally, lobbying and argumentation has a greater chance of succeeding if it coincides with a favourable attitude among important allies on the validity of the norms in question.

This thesis has provided an initial framework for discussing the process of norm implementation in arms export regulations. This is an early effort which explores the role of human rights in domestic arms export regulations from a new perspective. Exploring this field is essential for understanding the redefinition of the role of arms export controls in general, and the process of mainstreaming of human rights in this field of policy in general. Hence, there is a need for further research on this topic, and this thesis provides a possible framework for future enquiries.

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