Non-Proliferation and Disarmament Law

International non-proliferation and disarmament law forms part of international law and constitutes one of international law's many sub-regimes. It addresses very specific issues of major significance. However, the founding and functioning principles of non-proliferation and disarmament law are aligned with those of international law.

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The EU Non-Proliferation and Disarmament eLearning Course aims to cover all aspects of the EU non-proliferation and disarmament agenda. It's produced by PRIF with financial assistance of the European Union. The contents of individual learning units are the sole responsibility of the respective authors and don't necessariy reflect the position of the European Union.

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0. A Message from the Authors

A quick video introduction from the home office

IMAGE MISSING

UNSC conference. Huge roundtable with several rows of chairs and people. In middle a table with six persons sitting and discussing.
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A quick video introduction from the home office, as our planned video production was not possible due to Covid-19.

The authors would like to thank Thomas Brown, Associate Legal Officer at VERTIC, for his assistance with the development of this learning unit.

Hello! My name is Sonia Drobysz and I am programme director for national implementation at VERTIC.

And I am Yasemin Balci. I'm a senior legal officer with the national implementation measures programme at VERTIC. VERTIC is a non-governmental organisation based in London. We work on the verification and implementation of international instruments. In particular those on the non-proliferation and disarmament of chemical, biological and nuclear weapons and the security of related materials.

This learning unit builds on our work at VERTIC and will enable you to understand how the fundamental mechanism of international law govern and inform non-proliferation and disarmament. Due to the COVID-19 pandemic, we will present the multimedia parts of the learning unit in audio format only. I, Sonia Drobysz, will guide you through chapter one and three.

And I, Yasemin Balci, will guide you through chapters two and four with chapter five split between us. We hope that you will enjoy and that you will gain an understanding of international non-proliferation and disarmament law.

1. Introduction

International law is the body of norms governing the relations between its subjects. This includes states, first and foremost, but also others, such as international organisations.

Board of 4 Persons (High Representative of disarmamanet affairs, chairman, secretary, IAEA).

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International Non-Proliferation and Disarmament Law as Part of International Law (I)

What is international law?

International law is the body of norms governing the relations between its subjects. This includes states, first and foremost, but also others, such as international organisations.

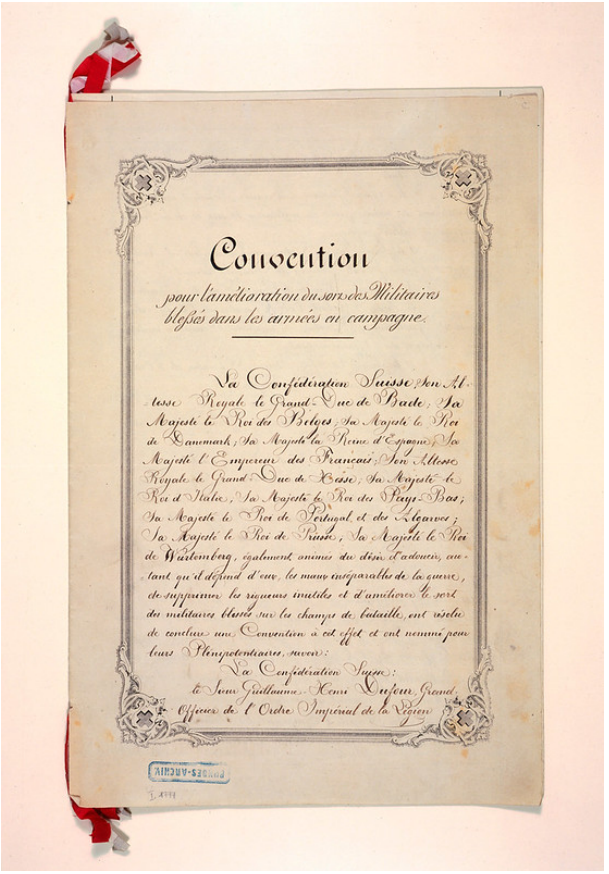
International law regulates different fields of cooperation ranging from terrorism, outer space and global communications to human rights, the environment and non-proliferation and disarmament.

How are international law and non-proliferation and disarmament law related?

International non-proliferation and disarmament law forms part of international law and is one of its many "sub-regimes". The founding and functioning principles of non-proliferation and disarmament law are therefore aligned with those of international law.

This holds true with regard to:

- the sources of international non-proliferation and-disarmament law
- its subjects
- its application



Scan of convention.

TODO (CC BY 2.0)

Do international law and international non-proliferation and disarmament law really work?

The flaws of international law often show in dramatic and difficult situations such as wars and severe political and social upheaval. These shortcomings receive much attention in the media, causing public opinion to question the usefulness, or sometimes even existence, of international law.

However, as noted by renowned scholar Louis Henkin,

> almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time. As the "100 Ways" project described in the next section demonstrates, almost all of the time we may just not be aware of it.
>
> Louis Henkin.

Moreover, even at such challenging times as armed or political conflict, states consistently seek to justify their acts on the basis of international law. This demonstrates that **states consider themselves bound** by the rules they have set, whatever the circumstances.

During certain periods of time or certain events, states may deny and defy international law, but this will almost always come at a political or economic cost in their relations with other states.

The 100 Ways project [https://www.asil.org/resources/100Ways] of the American Society of International Law shows that international law is so deeply and comprehensively **ingrained into everyday life** that its existence can be easily overlooked. The project gives a 100 examples of how international law works across eight areas: daily life, leisure, travel, commerce, health and the environment, personal liberty, safety and development, and peace and security.

To give one such **example**, mailing a postcard to any country across the globe is easy, because of the 1964 Constitution of the Universal Postal Union, which sets up a worldwide postal network and ensures that the stamp you bought is recognised for mail delivery by all other states.

As for peace and security, another example is "banning cruel and inhumane weapons such as sarin gas" (International Law: 100 Ways It Shapes Our Lives). This is done by a number of treaties including the **1993 Chemical Weapons Convention** and the **1972 Biological and Toxin Weapons Convention**. These treaties form part of international non-proliferation and disarmament law.

Sources of International Non-Proliferation and Disarmament Law

The sources of international non-proliferation and disarmament law encompass the full spectrum of the sources of general international law.

First, there are a number of relevant international conventions or treaties, which are the most important source of obligations in international law. Such international treaties cover different types of weapons (chemical, biological, radiological, nuclear or CBRN) and materials (toxic chemicals, biological agents and toxins, nuclear and other radioactive material).

These treaties prohibit a number of activities with those weapons and materials while encouraging the use of CBRN materials for peaceful purposes. They require the adoption of specific measures to protect such materials. They promote and require international cooperation in specific situations; and they provide for non-compliance mechanisms. They have varying number of states parties, in other terms states that have consented to be bound by these treaties.

The second source of international non-proliferation and disarmament law is international custom, defined as evidence of a general practice accepted as law. For example, the prohibition of the use of biological and chemical weapons in both international and non-international armed conflicts are norms of customary international law.

The third source of international non-proliferation and disarmament law contains general principles of law, for example the principle of good faith.

Judicial decisions, including those of the International Court of Justice or ICJ, and the teachings of the most highly qualified publicists are the fourth source of law.

Finally, decisions of international organisations such as the United Nations, the International Atomic Energy Agency and the Organisation for the Prohibition of Chemical Weapons, are relevant. This includes United Nations Security Council decisions, which members of the United Nations agreed to accept and carry out.

There are other instruments to consider that are not legally binding, but may become so if their content is included in a treaty or in national legislation, or that at least reflect the state of international non-proliferation and disarmament law.

These "soft law" instruments include international codes of conduct and guidelines, for example the IAEA "Code of Conduct on the safety and security of radioactive sources" and the "Guidance on the import and export of radioactive sources". Final documents of treaty meetings such as the Meeting of States Parties to the Biological and Toxin Weapons Convention and the Conference of the States Parties to the Chemical Weapons Convention, are also relevant as they may reflect the state of the law on the topic being discussed.

This video lecture covers the following topics:

- the legally binding sources of international non-proliferation and disarmament law
- the "soft law" sources of international law

Sources: Legally Binding and Non-Binding Instruments

Binding or "hard law":
Creates obligations and rights

- Treaties: eg. Chemical Weapons Convention
- Custom: eg Prohibition of use of biological weapons
- General principles: eg good faith
- Judicial decisions and teaching of the most qualified publicists: eg International Court of Justice cases

Non-binding or "soft-law": gives guidance and recommendations and may be incorporated into legally binding internationan or national instruments

- UN General Assembly resolutions: eg Resolution 74/66: Strengthening and developing the system of arms control, disarmament and non-proliferation treaties and agreements

Codes of Conduct, Guidelines
eg IAEA Code of Conduct on the Safety and Security of Radioactive Sources

Legally Binding Sources: Examples of Non-Proliferation and Disarmament Treaties

The treaties mentioned on this page aim to prohibit so-called 'weapons of mass destruction:' biological, chemical, nuclear and radiological weapons. They also aim to control the materials that may be diverted from peaceful activities in science, medicine and industry to make such weapons. They are legally binding on states that have joined them: they create rights and obligations for those states.

Biological weapons and materials

- **1925** Protocol for the Prohibition of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare
- **1972** Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction (BWC)

See also (LU 03: Biological Weapons) []

Chemical weapons and materials

- **1925** Protocol for the Prohibition of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare
- **1993** Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction (CWC) See also (LU2: Chemical Weapons) []

Nuclear and other radioactive material

- **1956** Statute of the International Atomic Energy Agency
- **1968** Treaty on the Non-Proliferation of Nuclear Weapons (NPT), and regional nuclear weapons free zones treaties
- **1980** Convention on the Physical Protection of Nuclear Material (CPPNM)
- **1996** Comprehensive Nuclear-Test-Ban Treaty (CTBT)
- **2005** International Convention for the Suppression of Acts of Nuclear Terrorism (ICSANT)
- **2017** Treaty on the Prohibition of Nuclear Weapons (TPNW)

See also (LU05:Nuclear Weapons II) [] and (LU07: CBRN Terrorism) [].

Legally Binding Sources: Focus on the Chemical Weapons Convention

The CWC is an interesting example of a legally binding source of non-proliferation and disarmament law. It prohibits an entire category of weapons. While **toxic chemicals** can be misused to develop these weapons, states have the right to undertake peaceful activities with these chemicals; including for industrial, agricultural, research, medical and pharmaceutical purposes. Moreover, the CWC establishes an international organisation tasked with verifying that chemical weapons have been destroyed and that states' activities with toxic chemicals remain lawful.

You can read more about the CWC's history in our learning unit on chemical weapons.

In comparison, the BWC also bans a category of weapons and encourages the peaceful uses of **biological agents** and toxins, but it does not create an organisation to verify its application. The NPT encourages the peaceful uses of **nuclear energy**, but it does not ban nuclear weapons for all states. It delegates verification activities to the IAEA , an organisation that pre-dates the treaty.

The CWC comprises 24 articles and 3 annexes for a total of 165 pages. In comparison, the BWC comprises 15 articles, and the NPT 11.

The CWC includes different categories of provisions:

- **provisions common to most treaties**: preamble, definitions, general obligations, settlement of disputes, amendments, duration and withdrawal, conclusion and entry into force, reservations, depositary (see Chapter 2) for more information about treaty law)
- **provisions specific to the subject matter**: declarations, chemical weapons, chemical weapons production facilities, activities not prohibited under the convention, economic and technological development, assistance and protection against CW, annexes on verification and confidentiality
- national implementation **measures**
- **mechanisms** to raise and redress situations **of non-compliance**
- **institutional provisions** establishing the Organisation for the Prohibition of Chemical Weapons, its mandate, structure, and privileges and immunities

Legally Binding Sources: Focus on UNSCR 1540 Decisions

UN Security Council Resolution 1540 was adopted in 2004 and addresses the non-proliferation of nuclear, chemical and biological weapons (as well as their means of delivery) to non-state actors.

UNSCR 1540 was adopted under **Chapter VII of the Charter of the United Nations** which authorises the UN Security Council to take enforcement action with respect to situations it considers threats to the peace, breaches of the peace, and acts of aggression. The proliferation of nuclear, chemical and biological weapons to non-state actors was considered a threat to international peace and security.

UNSCR 1540 is a resolution, not a treaty. However, it includes **legally binding decisions**. This is pursuant to **Article 25 of the UN Charter**, which stipulates that UN members agree to accept and carry out the decisions of the Security Council. The following are such decisions in UNSCR 1540:

- All States shall **refrain from providing any form of support** to non-state actors that attempt to engage with nuclear, biological and chemical weapons.
- All States shall **adopt and enforce laws** prohibiting any non-state actor to manufacture, acquire, possess, develop, transport, transfer or use these weapons and their means of delivery.
- All States shall **take and enforce measures** to establish domestic controls to prevent the proliferation of these weapons and their means of delivery.

UNSCR 1540 relationship with other non-proliferation and disarmament instruments: "None of the obligations set forth in the resolution shall be interpreted so as to conflict with or alter the rights and obligations of State Parties to the Nuclear Non-Proliferation Treaty, the Chemical Weapons Convention and the Biological and Toxin Weapons Convention or alter the responsibilities of the International Atomic Energy Agency or the Organisation for the Prohibition of Chemical Weapons"

Participants in International Non-Proliferation and Disarmament Law

Let us now consider the "subjects" of international non-proliferation and disarmament law, in other terms those to whom the law applies and who are established legal persons with rights and obligations.

These include states, but also international organisations such as the International Atomic Energy Agency, the Organisation for the Prohibition of Chemical Weapons, the World Health Organization, the United Nations; and regional organisations including the African Union, the Caribbean Community, the European Union, the Association of Southeast Asian Nations, and the Organization of American States.

Some of these international organisations have a specific non-proliferation and/or disarmament mandate. This mandate may have been developed by or in connection with a treaty partly or completely prohibiting a category of weapons, for example the IAEA and the NPT, or the OPCW and the CWC.

The non-proliferation and/or disarmament mandate may also be exercised in relation to a broader mandate on the maintenance of international peace and security, for example the United Nations.

You may now wonder about the place of individuals like you and me. Well, they are very much taken into account and affected by non-proliferation and disarmament law. For example, UN Security Council Resolution 1540 requires States to take measures to address the proliferation risk posed by non-state actors defined as an individual or entity, who is not acting under the lawful authority of any State in conducting activities which come within the scope of the resolution. Another example is that of the Chemical Weapons Convention: It requires states to prohibit, in their national penal legislation, any person from undertaking activities prohibited by the Convention. If such penal legislation is adopted by states, individuals can be prosecuted for CWC offences.]

This video lecture covers the following topic:

- the participants in international non-proliferation and disarmament law: states, international organizations, and individuals

Participants: Focus on the IAEA

1956 IAEA Statute

The IAEA Statute is the treaty establishing the IAEA. It provides for its objectives, functions, membership, structure and organs, activities, finance, privileges and immunities, and relationship with other organisations.

It was **approved on 23 October 1956** by the Conference on the Statute of the International Atomic Energy Agency, held at the Headquarters of the United Nations.

It came into force on 29 July 1957.

As of April 2021, there were 173 States Parties to the IAEA Statute, or in other terms **171 IAEA Member States**. For more information see also LU 05: Nuclear Weapons II .

IAEA functions

According to Article II of its Statute, the IAEA shall promote the **peaceful uses of atomic energy** while making sure it is not used to further any military purposes.

Non-nuclear-weapon States Parties to the Non-Proliferation Treaty (those that have not manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January 1967) have undertaken to conclude so-called "safeguards agreements" with the IAEA, for the exclusive purpose of verification of the fulfilment of their non-proliferation obligations under the treaty with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices.

NPT safeguards agreements are separate bilateral treaties concluded between NPT States Parties and the IAEA. They provide for the application of measures such as inspections.

IAEA as a legal person under international law

The IAEA possesses legal personality. It has the capacity (a) to contract, (b) to acquire and dispose of immovable and movable property and (c) to institute legal proceedings.

It enjoys **privileges and immunities** necessary for the exercise of its functions. This means, for example, that the property and assets of the IAEA cannot be the object of search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action. This also means that IAEA staff such as inspectors cannot be arrested or detained while exercising their functions.

Non-Compliance and Disputes in Non-Proliferation and Disarmament Law

To make sure international non-proliferation and disarmament law is being applied effectively, a number of mechanisms have been put in place to verify compliance with non-proliferation and disarmament obligations and to deal with cases of non-compliance, including by adopting international sanctions. Learning Unit 13 already addresses the rationale for non-proliferation and disarmament verification, the definition of non-compliance and other similar terms, the legal and political challenges concerning non-compliance, the enforcement role of the Security Council and the different types of sanctions measures that can be adopted. Learning Unit 13 also presents cases of non-compliance and current sanctions measures.

Let us now focus on other legal mechanisms to deal with cases of non-compliance. There are cases where an alleged breach of an international non-proliferation and/or disarmament obligation by a state, which would entail the responsibility of that state, gives rise to a legal dispute. A legal dispute exists when States hold opposite views concerning the question of the performance or non-performance of certain international obligations. It can be settled through different means:

Article 33 of the UN Charter provides that "the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."

Certain non-proliferation and disarmament treaties provide for a recourse to such procedures. For example, the Convention on the Physical Protection of Nuclear Material and the Chemical Weapons Convention provide that in the event of a dispute between two or more states parties, those states shall consult with a view to the settlement of the dispute by negotiation, or by any other peaceful means.

The dispute may be referred to the International Court of Justice, the principal judicial organ of the United Nations opened to States and, in some cases, international organisations.

For example, in 2014, the Marshall Islands brought cases against India, Pakistan and the United Kingdom, requesting the Court to adjudge and declare that those states had violated their disarmament obligations under international law.

In addition to its contentious function to solve legal disputes between states, the Court may be requested to give an advisory opinion on any legal question at the request of an authorised body. This happened in 1995, when the UN General Assembly asked the Court if the threat or use of nuclear weapons was in any circumstance permitted under international law1. Let's find out how the Court responded in the slide following this lecture. 1

This video lecture covers the following topics:

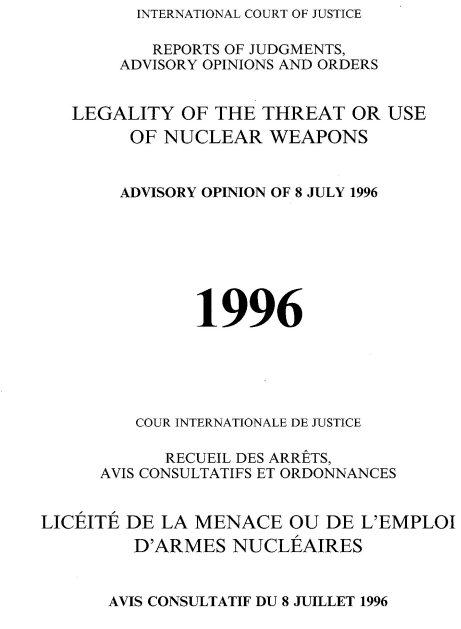
- reminder of LU 13: Compliance and Enforcement
- definition of legal dispute
- means to settle legal disputes
- the role of the International Court of Justice

The UN General Assembly resolution dates to 15 December 1994. It was received in the Registry by facsimile on 20 December 1994 and filed in the original on 6 January 1995.

The International Court of Justice's Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 8 July 1996 (I)

A divisive advisory opinion

The ICJ's Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons has received much attention in the international legal, as well as non-proliferation and disarmament communities. The Court's function was not to settle – at least directly – a specific dispute between states, but to offer legal advice on a specific question. Its divisive response was commented on by judges and scholars, but also governments of nuclear and non-nuclear-weapons states. As with other advisory opinions, many of the opinion's passages are given weight as a source of international law.


INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

LEGALITY OF THE THREAT OR USE
OF NUCLEAR WEAPONS

ADVISORY OPINION OF 8 JULY 1996

1996

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

LICÉITÉ DE LA MENACE OU DE L'EMPLOI
D'ARMES NUCLÉAIRES

AVIS CONSULTATIF DU 8 JUILLET 1996

The ICJ's Advisory Opinion of 8 July 1996. [insert link](See the full document here).

The institution and question before the Court

In its resolution 49/75K adopted on 15 December 1994, the **UN General Assembly** requested the ICJ urgently to render its advisory opinion on the question: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?"

Resolution 49/75K mentions the UNGA's conviction that the complete elimination of nuclear weapons is the only guarantee against the threat of nuclear war; it also recalls the need to strengthen the rule of law in international relations as well as the recommendation of the UN Secretary General to take advantage of the advisory competence of the ICJ.

The Court noted that the question had relevance to many aspects of the activities and concerns of the General Assembly; including those relating to the threat or use of force in international relations, the disarmament process, and the progressive development of international law.

The International Court of Justice's Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 8 July 1996 (II)

The applicable law

According to the Court, the following is the most directly relevant applicable law governing the question of the legality of the threat or use of nuclear weapons:

- law on the use of force, which includes the use of force by states in self-defence (see Chapter 2 for more information)
- law of armed conflict, also known as international humanitarian law (see Chapter 2 for more information)
- treaties on nuclear weapons, including the NPT and regional nuclear weapon free zones treaties (see Chapter 2 for more information on treaty law)

The Court noted the "eminently difficult issues" arising in applying the law to nuclear weapons.

The ICJ, The Hague. Church-alike building with belltower and arch at the entrance.

? (CC BY 2.0)

The Court's response

The Court addressed separate aspects of the question leading to its final following response which was adopted by seven votes to seven with the ICJ President's casting vote in favour:

> the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.
>
> ?.

The judges were unanimous in their response that their exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.

Further reading: J. Burroughs, 'Looking Back: The 1996 Advisory Opinion of the International Court of Justice', Arms Control Today, July/August 2016.

Specificities of International Non-Proliferation and Disarmament Law

International non-proliferation and disarmament law, as a sub-regime of international law, presents specific issues and problems. Among them is the technical nature of the subject matter and how this may shape the legal norms that regulate it. International non-proliferation and disarmament law needs to take into account technological developments; lawyers but also scientists and other technical experts need to be involved in the development of the law.

The technical nature also has implications in how the law is applied. In its Advisory Opinion on the "Legality of the Threat or Use of Nuclear Weapons", which you are now familiar with, the International Court of Justice noted that in order to correctly apply the relevant international law, it was, and I quote, "imperative for the Court to take account of the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come."

The importance of verification is another specificity, further to the famous proverb "trust but verify" as noted in Learning Unit 13. Consequently, the absence of a verification mechanism and international organisation to support compliance with a treaty is remarkable, as is the case with the Biological and Toxin Weapons Convention.

Another specificity lies in the number of sub-categories or sub-areas of non-proliferation and disarmament law corresponding to different types of weapons and materials. Nuclear law, for example, is presented

as a separate category and even has its own handbook, developed by the IAEA.

In addition, and as mentioned in the first audio lecture, international non-proliferation and disarmament law is comprised of a myriad of international instruments and the relationships between them sometimes need to be clarified. For example, UN Security Council Resolution 1540 contains a specific decision on the relationship between the obligations in the resolution and those in relevant treaties.

A myriad of international institutions is also involved, and the relationships between them need to be organised too, for example through co-operation agreements, but also treaty provisions that stipulate their respective mandates in case of non-compliance and their reporting obligations towards the UN Security Council.

Finally, non-proliferation and disarmament are closely linked to the maintenance of international peace and security which is the main responsibility of the UN Security Council. Consequently, international non-proliferation and disarmament law closely relates to international law on the use of force, but also other areas of international law.

This video lecture covers the following topics:

- technical nature of international non-proliferation and disarmament law
- the importance of verification
- the number of sub-areas of international non-proliferation and disarmament law
- the number of relevant international instruments and institutions

2. International Non-Proliferation and Disarmament Law

This video lecture covers international non-proliferation and disarmament law in relation to treaty law, specifically:

Introduction to Treaty Law

As you have learned in Chapter 1, non-proliferation and disarmament law forms part of international law. As such, there are other areas of international law that govern or relate to it. Treaty law is applicable to all non-proliferation and disarmament treaties, such as the Biological and Toxin Weapons Convention. Treaty law itself is rooted in a treaty, the 1969 Vienna Convention on the Law of Treaties, which is meant to codify customary international law concerning treaties.

Treaty law governs how subjects such as states can create legally-binding international instruments. A recent relevant example is the conclusion of the Treaty on the Prohibition of Nuclear Weapons.Treaty law also governs how states can join treaties. In treaty jargon, this occurs when a state expresses its 'consent to be bound.' For multilateral treaties, usually this does not happen with the president or the minister of foreign affairs signing the treaty during a ceremony or upon signing a national law approving the joining of the treaty. The moment a state joins a treaty is when it deposits an instrument of ratification or accession with the treaty's depositary, which is the person responsible for administering a treaty. Such an instrument is a short, signed document stating that the state wishes to be bound by the treaty. It is delivered to the treaty's depositary, which for example could be the UN Secretary-General.Once a state joins a treaty, the core notion about it, is that the treaty is legally binding on the parties. This is a general principle of law and often expressed with the Latin maxim, pacta sunt servanda meaning 'agreements must be kept'. While the word 'treaty' is commonly used, other terms such as 'convention', 'covenant', 'charter' or 'protocol' refer to the same concept of a legally-binding international instrument.

Treaty law governs when treaties enter into force, which rules apply for the interpretation of treaties, how they can be amended and, to come full circle, how they can be terminated or withdrawn from.

This video lecture covers international non-proliferation and disarmament law in relation to treaty law, specifically:

- role of the Vienna Convention on the Law of Treaties
- creation of treaties
- joining of treaties
- general principle of international law Pacta sunt servanda
- termination of treaties

Focus on Treaties I: Joining Treaties

What is a Treaty?

> an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation Vienna Convention on the Law of Treaties (VCLT), Article 2(1)(a)
>
> TODO

To join a **multilateral treaty** (a treaty that is open to three or more states), a state has to express its 'consent to be bound' by that treaty. This usually happens through either ratification or accession procedures:

1. If a state has signed or wishes to sign the treaty while it is open for signature, it will follow the ratification **procedure** (see section 1).
2. If a state has not signed the treaty while it was open for signature, it can join by going through the accession **procedure** (see section 2).

1. Consent to be bound by ratification

> The consent of a state to be bound by a treaty may be expressed by **[…]** ratification **[…]**. Article 11, VCLT.
>
> ?

- Step 1 – **Signature**: state signs the treaty, often during a ceremony
- Step 2 – **Domestic approval**: state seeks domestic approval for the ratification of the treaty
- Step 3 – **Deposit of Instrument of Ratification**: state deposits its 'instrument of ratification', usually a very short, signed document, with the depositary (who is responsible for administering the treaty), which establishes the state's consent to be bound

Signing the Chemical Weapons Convention
UN Photo / [Michel Claude](https://flic.kr/p/7qbPcJ)

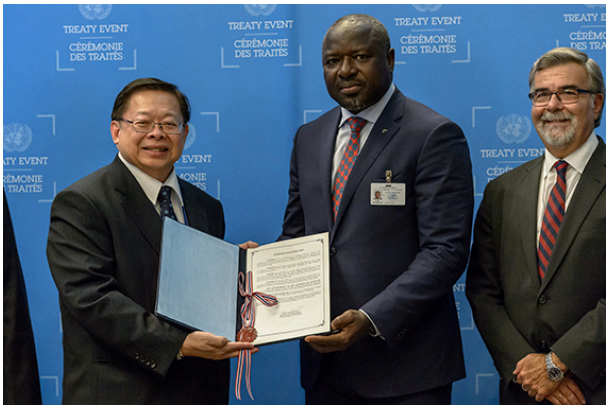
2. Consent to be bound by accession

> The consent of a State to be bound by a treaty may be expressed by […] accession […]. Article 11, VCLT
>
> ?

This procedure usually applies if a state has not signed a treaty, for example because the timeframe for signature has closed. In that case, ratification is no longer possible, but accession is.

Step 1 – **Domestic approval**: state seeks domestic approval for accession to the treaty

Step 2 – **Deposit of Instrument of Accession**: state deposits its 'instrument of accession,' usually a very short, signed document, with the depositary (who is responsible for administering the treaty), which establishes the state's consent to be bound



Thailand's Instrument of Ratification for the CTBT.
[CTBTO](https://www.flickr.com/photos/ctbto/31050724248) (CC BY 2.0)

Focus on Treaties II: Pacta sunt servanda

Entry into force

"Entry into force" of a treaty refers to the date on which the **treaty becomes binding** on the states that have expressed their consent to be bound it.

Multilateral treaties commonly require a **certain number** of states to have expressed their consent to be bound for the treaty to enter into force. The Comprehensive Test Ban Treaty, for example, even names the states whose consent to be bound is necessary for the treaty to enter into force (see CTBT, Article XIV, para 1).

Multilateral treaties usually also specify when the treaty shall enter into force for states that express their consent to be bound **after** a treaty has already entered into force (see for example CTBT, Article XIV, para 5).

Pacta sunt servanda (Latin for "agreements must be kept"): every treaty in force is binding upon its states parties. They must perform it in good faith (VCLT, Article 26).

Example: Comprehensive Test Ban Treaty
Article XIV:Entry into force

> 1. This Treaty shall enter into force 180 days after the date of deposit of the instruments of ratification by all States listed in Annex 2 to this Treaty, but in no case earlier than two years after its opening for signature. […]
> 2. For States whose instruments of ratification or accession are deposited subsequent to the entry into force of this Treaty, it shall enter into force on the 30th day following the date of deposit of their instruments of ratification or accession.
>
> ?

2018 BWC Meetings of Experts in Geneva, Switzerland
VERTIC (All rights reserved)

States who?

States that have signed, but not yet ratified a treaty are often referred to as **Signatory States**. As signatories, these states have the obligation to refrain from acts which would defeat the object and purpose of that treaty. VCLT, Article 18.

- states that have expressed their consent to be bound (by either ratification or accession) and for which the treaty is in force = **States Parties**
- states that have expressed their consent to be bound (by either ratification or accession), whether or not the treaty has entered into force = **Contracting States**
- Sometimes multilateral treaties establish international organisations. For example, the Chemical

Weapons Convention establishes the Organisation for the Prohibition of Chemical Weapons. States Parties to the CWC are then also **Member States** of the OPCW (Article VIII (2)).

Focus on Treaties III: Interpreting and Amending Treaties

General Rule of Interpretation of Treaties (VCLT, Article 31)
Treaties shall be interpreted in **good faith** and in accordance with the **ordinary meaning** of their terms. However, the ordinary meaning will also depend on a treaty's **context** and in light of its **object and purpose**.

Context refers to a treaty's:

- preamble
- annexes
- agreements and instruments made in connection with the conclusion of the treaty Together with the context, the following shall be taken into account:
- **subsequent agreements and practice** regarding interpretation of the treaty
- any **relevant rules of international law** applicable to states parties' relations

A **special meaning** to a term shall be given if it is established that the states parties so intended. This would require a high level of evidence.

Supplementary Means of Interpretation of Treaties (VCLT, Article 32)
Supplementary means of interpretation may be used as a recourse to confirm or determine the meaning of terms if the general rule of interpretation in Article 31:

A) Leaves the meaning ambiguous or obscure, or B) Leads to a manifestly absurd or unreasonable result.

Supplementary means of interpretation include the preparatory works of a treaty (known as *travaux préparatoires*) and the circumstances of the conclusion of a treaty.

CWC Conference of States Parties during which changes to the CWC's Annex on Chemicals were adopted.

Yasemin Balci (CC BY 2.0)

Amending Treaties

If states parties wish to alter treaty provisions, they can engage in a process to amend the treaty. In multilateral treaties, this process is usually outlined in one of the final articles of the treaty.

For example, States Parties to the Chemical Weapons Convention agreed to make changes to one of its annexes (amendments to annexes are referred to as 'changes' in the CWC). In November 2019, the Conference of States Parties agreed to add two families of toxic chemicals, known as novichok, to Schedule 1 of the Annex on Chemicals.

The procedure for these changes are outlined in Article XV of the CWC:

1. Any State Party may propose amendments to this Convention. Any State Party may also propose changes, as specified in paragraph 4, to the Annexes of this Convention [...].
2. All changes to the Annex on Chemicals shall be made in accordance with paragraph 5.

?.

Paragraph 5 establishes clear procedures for each step, including:

1. submission of the proposal for changes
2. circulation of the proposal to all States Parties
3. evaluation of the proposal
4. approval procedures
5. circulation of the adopted proposal
6. entry into force of the proposed changes

Focus on Treaties IV: Multilateral Treaty Life-Cycle

Discover the life cycle of a multi-lateral treaty step by step. Use the 'next' button below to begin.

1. Drafting and adoption of the treaty text
2. States express their consent to be bound by the treaty (i.e. states join the treaty)
3. Treaty enters into force (i.e. treaty becomes legally binding for those states that have already expressed their consent to be bound)
4. Pacta sunt servanda: Treaty is observed, interpreted and possibly amended
5. Not all treaties live forever. The treaty may be terminated or replaced by its States Parties by a new treaty

Example

1. The CWC was negotiated and **drafted** in the Conference on Disarmament and adopted on 3 September 1992. France organised a **signing** ceremony in Paris on 13 January 1993, after which the treaty remained open for signature. 165 states signed the CWC.
2. States started expressing their **consent to be bound** by the CWC. Fiji was the first state to express by depositing its instrument of ratification with the UN Secretary-General on 20 January 1993.

3. Hungary was the 65th state to express its consent to be bound by ratification on 31 October 1996. Per Article XXI(1) of the CWC, the CWC entered into force on 29 April 1997, 180 days after this 65th deposit, for all 65 states that had already expressed their consent.
4. Pacta sunt servanda: the CWC is applied and enforced in many different ways, from the destruction of chemical weapons stockpiles to the conduct of inspections by the OPCW and the adoption of implementation measures by its States Parties.
5. The CWC is of unlimited duration (Article XVI(1)) and is silent on termination. It could therefore only be terminated if all States Parties consent to it (VCLT, Article 54). The CWC today has 193 States Parties.

Law on the Use of Force

So far we have looked at treaty law as one of the areas of international law that applies to non-proliferation and disarmament law. Another area of international law that is relevant is the international law on states' use of force. Article 2 paragraph 4 of the UN Charter prohibits the threat or use of force by states, but there are exceptions to this rule. One is states' right to self-defence in response to an armed attack in Article 51 of the UN Charter. Another is the authorisation of the use of force by the UN Security Council under Article 42 in Chapter VII of the UN Charter. There are several prominent examples where international disarmament and non-proliferation law and the law on the use of force intersected, even if the legality of the use of force is debated. One example is the use of force by the United States, United Kingdom and others in light of Iraq's disarmament obligations in March 2003. Another is the use of force by the United States and others in response to the use of chemical weapons in Syria. As you have heard in Chapter 1, the International Court of Justice, or ICJ, gave an Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons. The Court considered the law on the use of force, but stated that it could not give a definitive answer whether the threat or use of nuclear weapons "in an extreme circumstance of self-defence" would be lawful or not.

This video lecture covers the following topic:

- international non-proliferation and disarmament law in relation to the international law on the use of force

Focus on Law on the Use of Force

The use of force by states in international law is governed by both customary and treaty law, with the UN Charter being the most relevant source:

Article 2(4) of the UN Charter **prohibits the threat or use of force**:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.
>
> ?

Exceptions to this prohibition exist:

> Nothing in the present Charter shall impair the inherent right of individual or collective **self-defence** if an **armed attack** occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security [...]. Article 51 of the UN Charter.
>
> ?

Chapter VII of the UN Charter provides for enforcement measures that can be taken by the UN Security Council, including the authorisation of the use of force.

United Nations Security Council

U.S. Department of State / [Glen Johnson](https://flic.kr/p/KvBbP1) (Public domain)

International Humanitarian, Criminal and Human Rights Law

Regardless of whether the use of force by a state is lawful or not, any resulting armed conflict is governed by international humanitarian law, or IHL, also known as the law of armed conflict. The International Committee of the Red Cross, or ICRC, acts as the 'guardian' of this body of law, which only applies during armed conflict, so not during peacetime. By balancing the principles of military necessity and humanity, IHL regulates the conduct of armed conflict in order to protect both civilians and combatants. The Geneva Conventions of 1949 and their Additional Protocols are well-known treaties of this area of law.IHL applies to both conventional and CBRN weapons. With regard to biological and chemical weapons, their use is prohibited by customary rules of IHL. With regard to nuclear weapons, in the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, the majority of the ICJ supported the view that, "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict." Another related IHL requirement with regard to CBRN materials is for example Article 56 of Additional Protocol I, which in principle prohibits attacks on nuclear power plants. Certain violations of IHL can amount

to war crimes. Individuals that are allegedly responsible for these crimes can be prosecuted in national and international courts according to the rules of international criminal law. For example, the Rome Statute establishing the International Criminal Court includes the use of poison weapons and biological weapons in armed conflict as war crimes. These crimes were included as amendments to the Statute in 2010 and 2017 respectively. Other international crimes are crimes against humanity, genocide and aggression. For example, the use of nuclear, biological or chemical weapons specifically directed against a particular group could amount to genocide. Finally, in peacetime and in armed conflict, international human rights law applies. This is the body of international law that grants protection to individuals, including for example every human being's right to life or right to a fair trial. There are various international and regional treaties that protect and enforce human rights. The European Convention on Human Rights is a regional treaty that establishes the European Court of Human Rights. A relevant case of this Court is Finogenov and others v. Russia, in which the Court determined that the use of toxic chemicals by the Russian authorities to incapacitate hostage takers in a theatre in Moscow did not amount to a violation of the right to life, but inadequate planning and conduct of the rescue operation and failure to conduct an effective investigation into the rescue operation did.

This video lecture covers international non-proliferation and disarmament law in relation to:

- international humanitarian law
- international criminal law
- international human rights law

Focus on International Humanitarian Law

Regardless of whether the use of force was lawful or not, any resulting armed conflict is governed by **international humanitarian law (IHL)**, also known as the **law of armed conflict (LOAC)**.

IHL only applies at the time of an armed conflict, so not during peacetime. It regulates the conduct of armed conflict in order to protect both civilians and combatants. While IHL does not prohibit the use of violence, regulating it provides some relief and protection to all parties involved.

The International Committee of the Red Cross (ICRC) acts as the 'guardian' of IHL. It promotes the development of IHL and its implementation in national law.

International Committee of the Red Cross, Headquarters in Geneva
Yasemin Balci (All rights reserved)

The **Geneva Conventions** and their Additional Protocols are treaties that form a crucial part of international humanitarian law.

With regard to CBRN materials, Additional Protocol I, for example, generally prohibits attacks on nuclear power stations.

In addition, customary international lawprovides relevant rules, including the prohibition of the use of chemical and biological weapons in armed conflict.

IHL also consists of principles , such as the principle of distinction between civilians, who are protected from attack, and combatants, who are permitted to directly participate in hostilities and may therefore be attacked.

Focus on International Criminal Law

The International Criminal Court (ICC)

The ICC is a permanent international criminal court based in The Hague, the Netherlands. It is established by the **1998 Rome Statute**, which currently has 123 States Parties.

International Criminal Court in The Hague
[OSeveno]
(https://commons.wikimedia.org/wiki/File:International_Criminal_Court_building_(2016)_in_The_Hague.png)/W
Commons (CC BY-SA 4.0)

The Court's Jurisdiction

The Court has jurisdiction over 'the most serious crimes of international concern'. These include:

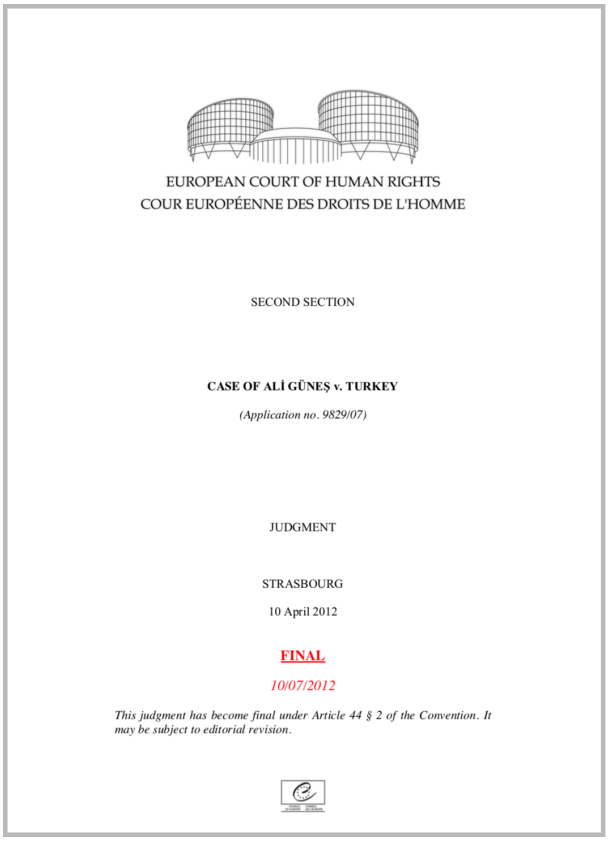
- the crime of **aggression**: the planning, preparation, initiation or execution of the use of force which constitutes a manifest violation of the UN Charter (see also page 27)
- **war crimes**: grave breaches and other serious violations of IHL (see also page 29)
- **crimes against humanity**: certain acts committed as part of a widespread or systematic attack against a civilian population. Unlike war crimes, crimes against humanity can also be committed during peacetime
- the crime of **genocide**: certain acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group. Like crimes against humanity, genocide can be committed during peacetime and armed conflict, but unlike crimes against humanity, genocide is targeted towards a specific group

Amendments

Article 8 of the Rome Statute was amended in 2010 to include the use of poison or poisoned weapons and asphyxiating, poisonous or other gases as war crimes in non-international armed conflict (i.e. an armed conflict between a state and a non-state armed group or between non-state armed groups).

Article 8 was amended again in 2017 to include the **use of biological and toxin weapons** as war crimes both during international and non-international armed conflict.

Focus on International Human Rights Law



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF ALİ GÜNEŞ v. TURKEY

(Application no. 9829/07)

JUDGMENT

STRASBOURG

10 April 2012

FINAL

10/07/2012

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

ECHR Judgment in 2012 in [Ali Güneş v. Turke] (https://hudoc.echr.coe.int/fre?i=001-110262).
ECHR (Public domain)

International human rights law IHRL grants **protection to all individuals**. It applies both during peacetime and armed conflict, although during the latter IHL takes precedence.

There are various international and regional treaties that protect and enforce **human rights**, including the European Convention on Human Rights which establishes the European Court of Human Rights ECHR in Strasbourg, France.

An example of the overlap between international human rights law and non-proliferation and disarmament law is the **use of riot control agents**.

While the Chemical Weapons Convention allows for the use of riot control agents for law enforcement purposes, such use is also governed by international human rights law. The ECHR noted this in, among other cases, Ali Güneş v. Turkey .

In this case, the Court held that the use of tear gas on a participant in a protest after his arrest was a violation of his right in **Article 3 of the Convention** to not be subjected to inhuman or degrading treatment.

Quiz

View quiz at `https://eunpdc-elearning.netlify.app/lu-17/`

3. National Implementation of Non-Proliferation and Disarmament Law

This video lecture covers the following top

Dean Calma / [IAEA](https://flic.kr/p/9yKgoD)

According to Article 27 of the Vienna Convention on the law of treaties, a state party may not invoke the provisions of its national law as justification for its failure to perform its obligations under a treaty. The process by which a state adopts appropriate and effective national legislative or regulatory measures to carry out and enforce its international obligations is called national implementation.

The relationship between international law and national law is often described in terms of dualism or monism. Dualist states treat the two as separate systems of law, while monist states view them as one body of law. In practice, this difference is less important, as international obligations usually require implementation in national legislation, regardless of dualism or monism. For example, the Chemical Weapons Convention requires its states parties to enact penal legislation and UN Security Council Resolution 1540 requires states to adopt and enforce appropriate effective laws.

Let us now have a look at the different categories of measures that need to be adopted to give effect to international instruments on non-proliferation and disarmament. These firstly include definitions of important terms such as biological weapons, nuclear material, and non-state actors. The second category comprises offences and penalties to prohibit and sanction all activities with CBRN weapons and certain activities with related materials. If possible, these offences should apply to both natural and legal persons (for example companies). The state should be able to prosecute alleged offenders if the crime occurred beyond its territory, for example on the basis of the nationality of the perpetrator or the victim. These are known as jurisdictional provisions.

The third category concerns measures to ensure the security and safety of CBRN materials. Specific measures include: the adoption of lists of items (for example biological agents) that will be subject to control and their physical protection.

The fourth category entails measures to control transfers (that is to say, import, export, re-export, transshipment and transit) of materials and equipment and technology. The last category consists of enforcement systems. This includes the establishment of national authorities, national inspections of activities with controlled materials, and criminal investigations. The categories I have just mentioned cover different areas of national law. They may be incorporated into criminal law, public health law, customs law, etc.

There are also different approaches to national implementation that are followed. States may opt for a stand-alone law covering most implementation measures for one type of weapon; they may alternatively choose to draft a “weapons of mass destruction law” with different chapters; or they may amend several laws and regulations. A few examples are given in the following slides. The status of national implementation of non-proliferation and disarmament instruments varies. Look at the statistics on the implementation of the CWC and UN Security Council Resolution 1540. A number of factors explain low levels of implementation in certain states, including the lack of political will and competing legislative priorities, but also a lack of expertise and resources.

As shown in a slide following this recording, there are nevertheless assistance programmes and tools available to assist states in developing implementing legislation on non-proliferation and disarmament.

This video lecture covers the following topics:

- definition of national implementation
- overview of national implementation measures for non-proliferation and disarmament instruments
- status and challenges of national implementation

Implementing the Biological Weapons Convention

According to IV of the Biological and Toxin Weapons Convention, each state party shall take any necessary measures, in accordance with its constitutional process, to prohibit and prevent the development, produc-

ical weapons. Let us see how states have been implementing their BWC obligations.

Some states have adopted a BWC implementing act.

- For example, the **United Kingdom** has a Biological Weapons Act that focuses on criminal measures to prohibit the development, production, stockpiling, acquisition, possession and transfer of biological weapons.
- The **Czech Republic** has adopted a longer Act on 'Measures Related to Prohibition of Bacteriological (Biological) and Toxin Weapons and on Amendments to Trades Licensing Act' ; it covers criminal measures, but also measures to handle biological agents and toxins for peaceful activities in a secure manner.

Some states have adopted specific legislation on biosafety and biosecurity to control peaceful activities with biological agents and toxins that could be diverted to non-peaceful uses.

- **Canada's** Human Pathogens and Toxins Act establishes a safety and security regime to protect the health and safety of the public against the risks posed by human biological agents and toxins. As such, it helps prevent the possibility of such agents and toxins being used as biological weapons.

Other states have opted for a "weapons of mass destruction" law including provisions on biological weapons.

- For example, **India** has a Weapons of Mass Destruction law to implement the BWC, but also the CWC and nuclear-related obligations.
- **South Africa** also has a Non-Proliferation of Weapons of Mass Destruction Act , with separate regulations on nuclear, chemical and biological weapons and materials.

Drafting Process for Implementing Legislation on Non-Proliferation and Disarmament

Identifying

- There are different national stakeholders (ministries, national authorities, parliament, international assistance providers etc) involved in drafting legislation. Usually the lead is the government
- The lead coordinates review of adherence to treaties and membership in institution to identify relevant international obligations to be inplemented at the national level
- The lead coordinates review of existing legislation to identify gaps

Adivising / Deciding on

- Legislative drafters advise on an approach to national implementation: stand-alone legislation, multiple laws and regulations, etc
- The lead coordinates the decision-making process for the timely drafting, review and adoption of draft legislation

Drafting

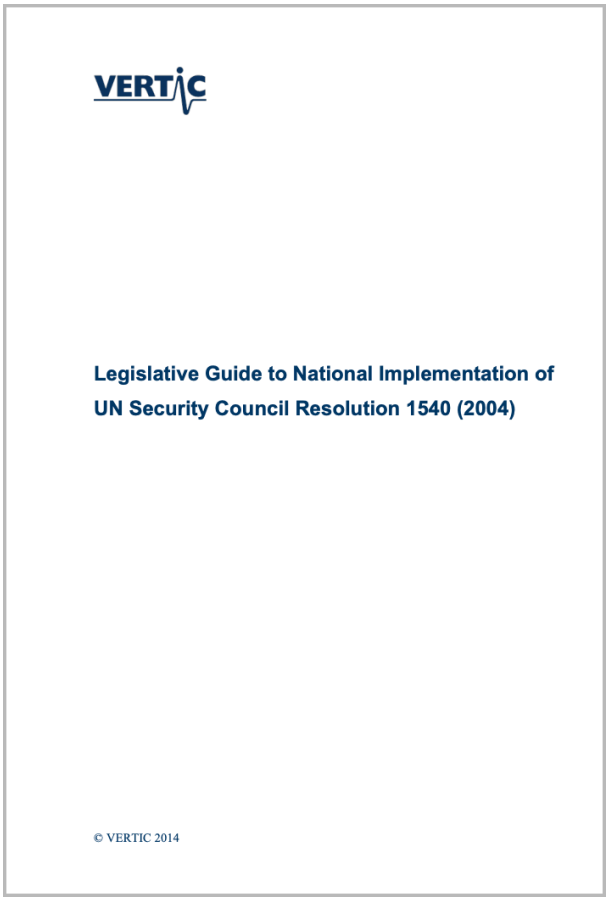
- A legislative drafting committee is formed at the national level
- The lead coordinates a national review process to review draft laws and regulations
- The drafting committee / government can request international legislative drafting and review assistance

Adopting

- Laws and regulations are adopted

Available Assistance and Tools to Draft Implementing Legislation

Drafting non-proliferation and disarmament legislation requires technical and legal expertise as well as financial and human resources that not all states may have. There are therefore a number of available tools and programmes to assist those states in developing their legislation.



Find the [complete guide here] (https://www.vertic.org/media/assets/nim_docs/NIM%20Tools%20(Guides%20Handbooks)/UNSCR_1540_NIM_GUIDE_EN_feb2014.pdf).
VERTIC (Public domain)

Legislative assistance providers
They provide assistance themselves. This is the role of intergovernmental organisations (IOs) and non-governmental organisations (NGOs) within the limits of their specific mandates, budgets and according to their processes – the latter may be more flexible for NGOs.

IAEA Legislative Assistance and Tools **CTBT** Legal Resources **OPCW** Legislative Assistance and Tools

- Internship Programme for Legal Drafters and National Authority Representatives
- National Legislation – Implementation Kit for the Chemical Weapons Convention
- VERTIC's National Implementation Measures Programme
- Parliamentarians for Global Action's Campaign for Universality and Implementation of the BWC and UNSCR 1540.

Legislative assistance brokers
They facilitate assistance provided by others.

- **BWC Implementation Support Unit**: acts as a clearing house for assistance with national implementation.
- **UNSCR 1540 Committee** group of experts: facilitates assistance between states, and between states and international organisations.

4. National Enforcement of Proliferation and Disarmament Law

This video lecture covers the following topics:

International Campaign to Abolish Nuclear Weapons / Tim Wright (CC BY 2.0)

Overview: National Enforcement of Non-Proliferation and Disarmament Law

In Chapter 3, you have seen that international non-proliferation and disarmament law will be implemented in a number of areas of national law.

To enforce both international and national non-proliferation and disarmament law at the national level, states often establish a national structure or authority. Such a national authority can monitor and enforce compliance with the law and communicate and cooperate with other states, relevant international organisations, and national stakeholders.

Enforcement at the national level often involves a form of national inspections in order to ensure compliance with national legislation by facilities authorised to work with CBRN materials. In principle, these are not different from other types of national inspections, such as fire hazard or health and safety inspections. However, due to their specificities and technical nature, inspections for CBRN materials will each have their differences.

Note, however, that national inspections take place separately from international inspections, such as those by the IAEA or the OPCW. Their inspectors check for compliance with their relevant treaties, not with national law.

National inspections could lead to determinations of non-compliance with legislation, which may be dealt with under administrative law, and could lead to administrative measures and sanctions. If the violation in question is of a more serious nature, however, this could lead to investigation by national law enforcement authorities, and could possibly result in criminal charges being brought to the facility or the people working for such a facility.

Importantly, national investigations can also be initiated independently, so regardless of an inspection system, as law enforcement agencies can usually start an investigation once there is a serious suspicion of criminal activity. Again, these need to be viewed separately from possible international investigations, such as those under the UN Secretary-General's Mechanism for Investigation of Alleged Use of Chemical and Biological Weapons.

International and national procedures could be happening at the same time, however. For example, the incidents involving toxic chemicals in Salisbury and Amesbury in the United Kingdom in 2018 were the subject of a national criminal investigation by UK law enforcement agencies. These were also analysed by teams from the OPCW. The teams from the OPCW worked independently and were not involved in the national investigation.

The next slides present three national enforcement cases involving CBRN materials which show how non-proliferation and disarmament law is enforced in domestic courts. What these cases have in common is that in each of them, individuals are held criminally liable on the basis of national legislation that has been adopted to implement international non-proliferation and disarmament law. The differences between the three cases concern, firstly the material in question. Secondly, the location, as they cover three different national jurisdictions. Finally, while these national jurisdictions have both monist and dualist tendencies in their relationship with international law, with the UK and US being more dualist and Germany being more monist, in practice all three have had to adopt national legislation to fully implement their international obligations.

This video lecture covers the following topics:

- national authority
- national inspections
- national investigations
- national enforcement in domestic courts

National Enforcement of Non-Proliferation and Disarmament Law

National authority

To apply a treaty or multiple treaties at the national level, states often establish **national structures** with

such authority.

In certain cases, establishment of such a national structure is required by the treaty. For example, under **Article VII (4) of the Chemical Weapons Convention**, each State Party must designate or establish a National Authority in order to fulfil its obligations under the Convention. Currently 191 (99% of) States Parties, have done so.

Similarly, **nuclear treaties** require the creation of a regulatory body to establish requirements and regulations concerning nuclear energy and/or the handling of radioactive sources.

National inspections

Inspections are a method to verify compliance with obligations.

Apart from **international inspections**, for example by the Organisation for the Prohibition of Chemicals Weapons or the International Atomic Energy Agency, states can create a **national inspection system** to monitor and verify compliance with national legislation.

National investigations

As with inspections, investigations can occur at the international and national level.

National law enforcement agencies will be the first to investigate any suspicious activity by individuals, groups or companies in the state's territory or control.

The following are hypothetical examples of situations that require national investigation:

- an individual poisoning another individual
- a group of individuals seeking to create a biological weapon for terrorism purposes
- a company not abiding with rules concerning the transfer of toxic chemicals

Case Study I: A Criminal Case in the United Kingdom

On 7 November 2014, a graphic designer from London was imprisoned for three years for acquiring the toxin abrin without a lawful justification. Exposure to abrin can be fatal and there is no known antidote.

This marked the first occasion in which a person had been convicted under the **United Kingdom's Biological Weapons Act 1974**. This act implements the Biological and Toxin Weapons Convention in the United Kingdom.

The BWC entered into force on 26 March 1975, which is also when it entered into force for the UK. Together with Russia and the United States, the UK is a Depositary of the Convention.

Since abrin is a toxin (a toxic chemical produced by living organisms) it falls under the Chemical Weapons Convention (CWC) as well. There is therefore some overlap between the BWC and the CWC.

The toxin abrin is found in the seeds of the rosary pea plant, commonly used as beads in rosaries and jewellery.

According to **Section 1(1)(a)** of the United Kingdom's Biological Weapons Act, the acquisition of biological agents and toxins, like abrin, is forbidden if there is no 'justification for prophylactic, protective or other peaceful purposes'.

A UK court established that the graphic designer had purchased the toxin with the intent of primarily using it to poison her mother, or alternatively, to commit suicide after a period of prolonged conflict between the two of them. She was therefore convicted for acquiring the toxin without a peaceful purpose.

Pursuant to Section 1(3) of the Biological Weapons Act, the maximum **penalty** for the offences relating to biological weapons in Section 1(1)(a) is life imprisonment.

In this case, there were **aggravating circumstances** such as the defendant's persistence in obtaining the toxin and the risk she created for third parties.

However, there were also **mitigating circumstances** including her previous good standing and the severe stress she had endured due to abuse by her mother. On balance, the court sentenced the defendant to **three years' imprisonment**.

Abrin is also classified as a 'dangerous substance' in the United Kingdom's **Anti-Terrorism, Crime and Security Act 2001**. Before abrin is kept or used at a premises, its occupier is under an obligation to notify the Secretary of State.

This is in line with the BWC, which requires states to not only **adopt criminal legislation** prohibiting the misuse of biological agents and toxins, but also to **adopt control measures** to prevent such misuse.

Source: First conviction under UK's BWC Act, Russell Moul and Yasemin Balci, Trust & Verify 147, October-December 2014.

Case Study II: A Criminal Case in German

In February 2019, the German Federal Public Prosecutor charged a couple in connection with **a plot to disseminate the toxin ricin as part of a planned terrorist attack**.

The toxin ricin falls within the scope of both the Biological and Toxin Weapons Convention and the

Chemical Weapons Convention. It is included in **Schedule 1 to the Chemical Weapons Convention** and therefore subject to the Organisation for the Prohibition of Chemical Weapons' control measures.

Germany became a State Party to the Biological and Toxin Weapons Convention in 1983. In that year, it also adopted the Law on the BWC. In 1989, it amended its **War Weapons Act** to criminalise activities with biological weapons.

The toxin ricin is found in seeds of the castor bean plant. It can be fatal to human beings and there is no known antidote.

[U.S. Federal Bureau of Investigation](https://multimedia.fbi.gov/item?type=image&id=3355) (Public domain)

The male defendant was charged, among other offences, with intentionally producing a biological weapon under **section 20 (1) of the War Weapons Act** and the preparation of a serious violent offence endangering the state under **section 89a of the Criminal Code**. The female defendant was charged with supporting these offences.

On 26 March 2020, the Higher Regional Court of Düsseldorf found the male defendant guilty and sentenced him to **10 years' imprisonment**. The Federal Court of Justice rejected his appeal on 10 December 2020.

The female defendant's case was prosecuted separately. She was sentenced to **8 years' imprisonment** on 29 June 2020. Her appeal is underway. Source: Couple charged with BW offence in Germany, Thomas Brown, Trust & Verify 164, Summer 2019

Case Study III: A Criminal Case in the United States

In October 2018, a political activist and former congressional candidate from Wisconsin, United States was charged with knowingly and unlawfully **attempting to possess radioactive material with intent to cause death or serious bodily injury** under Title 18 of the United States Code, Section 2332i(a)(1) and (3). The maximum penalty is life imprisonment and a fine.

Later another charge was added, namely that the defendant intentionally **attempted, without lawful authority, to receive and possess any nuclear material or nuclear byproduct material** and circumstances had been represented to the defendant to exist, that were likely to cause the death of or serious bodily injury to any person, under Title 18 of the United States Code, Section 831 (a)(1)(B) and (a)(8). The maximum penalty is 20 years of imprisonment and a fine.

The defendant was arrested after he had allegedly been trying to obtain **polonium** on the dark web. It appears he was seeking a lethal substance that would lead to a relatively painless death and would be "extremely difficult to procure so that people automatically suspect the government".

TODO (CC BY 2.0)

However, the person delivering the ordered radioactive material was an FBI agent. The defendant was therefore arrested shortly after receipt of the parcel.

The offence in 18 United States Code 2332i(a)(1) and (3) was created to implement the 2005 **International Convention for the Suppression of Acts of Nuclear Terrorism** in national legislation. In particular, Article 2 of the Convention makes it an offence to intentionally and unlawfully possess, or attempt to possess, radioactive material. Article 5 requires States Parties to establish the offence and an appropriate penalty under national law.

Similarly, the offence in 18 United States Code 831 was created to implement the 1980 **Convention on the Physical Protection of Nuclear Material**. Article 7 paragraph 1 of this Convention makes, among others, "the intentional commission of an act without lawful authority which constitutes the receipt, possession, use, transfer, alteration, disposal or dispersal of nuclear material and which causes or is likely to cause death or serious injury to any person or substantial damage to property" an offence. In paragraph 2, States Parties are required to establish appropriate penalties for these offences "which take into account their grave nature". On 12 February 2020, following a plea agreement in which

the first charge was dismissed, the defendant was sentenced for the second charge to **two years' supervised release and imprisonment for the time served**.

Source: Former US congressional candidate attempts to buy radioactive substance on the dark web, Leanna Burnard, Trust & Verify 163, Spring 2019.

View quiz at `https://eunpdc-elearning.netlify.app/lu-17/`

5. European Non-Proliferation and Disarmament Law

Article 2 (1): Dual-use items shall mean items,

National Authority

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Introduction: European Non-Proliferation and Disarmament Law

The role and policies of the European Union in the field of arms control, non-proliferation and disarmament are discussed in Learning Unit 14. In this Learning Unit's chapter, we focus on the law that the European Union has developed in this field, in accordance with its founding treaties. The 2003 EU Strategy against Weapons of Mass Destruction states: "The EU is committed to the multilateral treaty system, which provides the legal and normative basis for all non-proliferation efforts. The EU policy is to pursue the implementation and universalisation of the existing disarmament and non-proliferation norms."

Prior to this, in the nuclear sector, the EURATOM treaty of 1957 created a European Atomic Energy Community. It established its own safeguards system to ensure nuclear materials are not diverted from their intended uses. EURATOM is now a party to safeguards agreements concluded between EU Member States and the IAEA in the context of the Non-Proliferation Treaty. The EURATOM safeguards system coexists with the IAEA safeguards system.

The EU has adopted a number of decisions in support of various international instruments and organisations such as the BWC, the OPCW and UN Security Council Resolution 1540. Those decisions are binding on those to whom they are addressed and are directly applicable. Apart from decisions, the EU has adopted regulations relevant to non-proliferation and disarmament that are binding and as such must be applied in their entirety across the EU. For example, Regulation No 428 of 2009 was adopted to set up an EU regime for the control of exports, transfer, brokering and transit of dual-use items1. Dual-use items are those that can be used for both civil and military purposes and include CBRN materials.

A number of EU regulations have also been adopted to apply restrictive measures, better known as sanctions, against two states that have not complied with their non-proliferation obligations, namely Iran and North Korea. You can learn more about these cases in Learning Unit 13. The EU has transposed all relevant UN Security Council Resolutions adopted in response to these states' illicit nuclear activities. In addition, the EU introduced its own autonomous sanctions regime complementing and reinforcing UN measures. These can be more restrictive than UN measures. The EU also adopted restrictive measures against the proliferation and use of chemical weapons, including travel bans and freezing of assets for targeted individuals, entities or bodies.

As mentioned earlier, the EU is committed to multilateral instruments and institutions. There may nevertheless be cases where EU law may go further than international law, or even possibly conflict with it. In that case, Article 103 of the UN Charter states that in the event of a conflict of international obligations those under the UN Charter prevail. The EU guidelines on the implementation and evaluation of restrictive measures therefore note that a common approach should be developed to deal with any conflicts.

Please note that this regulation will be replaced by EU Regulation 821/2021, which was published on 11 June 2021 and will enter into force on 9 September 2021.

This video lecture covers:

- the relationship between international and European non-proliferation and disarmament law
- EURATOM
- the EU Regulation on transfer controls of dual-use items
- the EU's restrictive measures (sanctions)

Example of EU Law: EU Regulation 428/2009 on Transfer Controls of Dual-Use Items

Items covered

Article 2 (1): **Dual-use items** shall mean items, including software and technology, which can be used for both civil and military purposes, and shall include all

goods which can be used for both non-explosive uses and assisting in any way in the manufacture of nuclear weapons or other nuclear explosive devices. Annex I – **List of dual use items**: This list implements internationally agreed dual-use controls including the Wassenaar Arrangement, the Missile Technology Control Regime (MTCR), the Nuclear Suppliers' Group (NSG), the Australia Group and the Chemical Weapons Convention (CWC).

Article 15 (1): The **list** of dual-use items set out in Annex I **shall be updated** in conformity with the relevant obligations and commitments, and any modification thereof, **that Member States have accepted as members of the international non-proliferation regimes and export control **arrangements**, or by ratification of relevant international **treaties.**

Regime

- authorisation system for exports, transfer, brokering and transit of dual-use items
- customs procedures
- administrative cooperation
- control measures with registers or records

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National implementation

Article 24: **Each Member State shall take appropriate measures to ensure proper enforcement of all the provisions of this Regulation.** In particular, it shall lay down the penalties applicable to infringements of the provisions of this Regulation or of those adopted for its implementation. Those penalties must be effective, proportionate and dissuasive. Article 25 (1): Each Member State shall inform the Commission of the **laws, regulations and administrative provisions adopted in implementation of this Regulation**, including the measures referred to in Article 24. The Commission shall forward the information to the other Member States.

Please note that this regulation will be replaced by **EU Regulation 821/2021**, which was published on 11 June 2021 and will enter into force on 9 September 2021.

EU Regulation 428/2009: Administrative Law Case in the Netherlands

In 2011, researchers in the Netherlands succeeded in making avian influenza (H5N1), a highly deadly virus, transmissible between mammals.

The researchers were keen to publish their results in a scientific journal. However, according to the Dutch authorities, the researchers had to apply for an export permit before sending their article to the publishers in the United States, as that qualified as the (intangible) transfer of **dual-use technology**.

This requirement was based on **European Union Regulation 428/2009** on 'setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items and technology'.

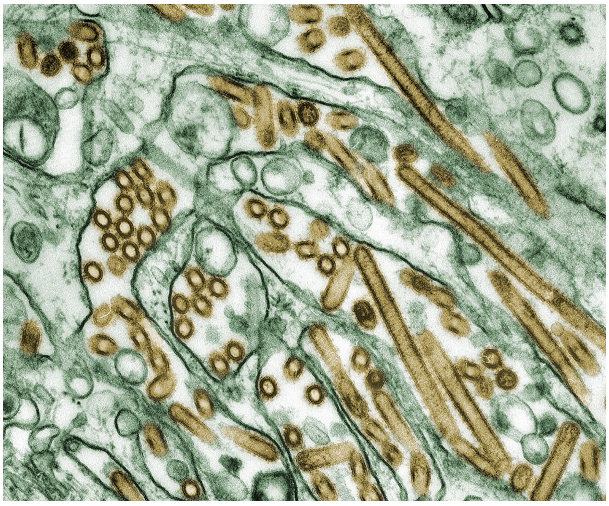
This Regulation requires an **export permit** for exports outside of the EU of dual-use items, including exports of technology.

Avian influenza is one of the animal pathogens listed as a dual-use item, including technology related to avian flu.

Dutch law implements the EU Regulation at the national level through the Decree on Strategic Goods, Law on Strategic Services and the Law on Economic Offences. The Dutch researchers did not agree that they were required to apply for an export permit. They argued that their research was 'basic scientific research'. According to the EU Regulation, there is an exception to the requirement of obtaining an authorisation for export of technology if the information in question is 'basic scientific research'.

However, the **court of first instance** did not agree with the researchers. It stated that the exception in the Regulation had to be interpreted narrowly in light of its non-proliferation aim.

After successfully applying for a permit, the researchers maintained their objection to being required to apply for a permit. However, the **court of appeals** held that the researchers had no litigation interest as they had obtained a permit without any conditions or restrictions, had made use of it, and published their manuscripts in the intended scientific journal. It therefore deemed the researchers' objection inadmissible and quashed the court of first instance's judgment.



Cynthia Goldsmith / [Centers for Disease Control and Prevention] (https://phil.cdc.gov/details.aspx?pid=1841) (Public domain)

The EU's Restrictive Measures

Restrictive measures , more commonly known as sanctions, are used by the EU as part of its foreign policy.

With regard to non-proliferation and disarmament, restrictive measures by the EU are taken directly in response to non-compliance with non-proliferation obligations, such as the DPRK and Iran. Moreover, the EU has adopted restrictive measures in response to chemical weapons proliferation and their use in Syria and in Salisbury, United Kingdom.

COUNCIL DECISION (CFSP) 2016/849

of 27 May 2016

concerning restrictive measures against the Democratic People's Republic of Korea and repealing Decision 2013/183/CFSP

[Read full document](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016D0849&from=EN)

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Weapons of mass destruction

DPRK:

- Council Decision (CFSP) 2016/849 of 27 May 2016 concerning restrictive measures against the DPRK
- Council Regulation (EU) 2017/1509 of 30 August 2017 concerning restrictive measures against the DPRK

Iran:

- Suspended since 16 January 2016 in light of the Joint Comprehensive Plan of Action:
- Council Decision 2010/413/CFSP of 26 July 2010 concerning restrictive measures against Iran
- Council Regulation (EU) No 267/2012 of 23 March 2012 concerning restrictive measures against Iran

Use of chemical weapons

- Council Decision (CFSP) 2018/1544 of 15 October 2018 concerning restrictive measures against the proliferation and use of chemical weapons (as amended)
- Council Regulation (EU) 2018/1542 of 15 October 2018 concerning restrictive measures against the proliferation and use of chemical weapons

These refer to individuals and entities in Syria and Russia.

The EU's Restrictive Measures: Criminal Case in Belgium

On 7 February 2019, an Antwerp court convicted three Belgian companies and their two managers for **exports of chemicals to Syria**. These chemicals have civil applications, but can also be used as chemical weapons.

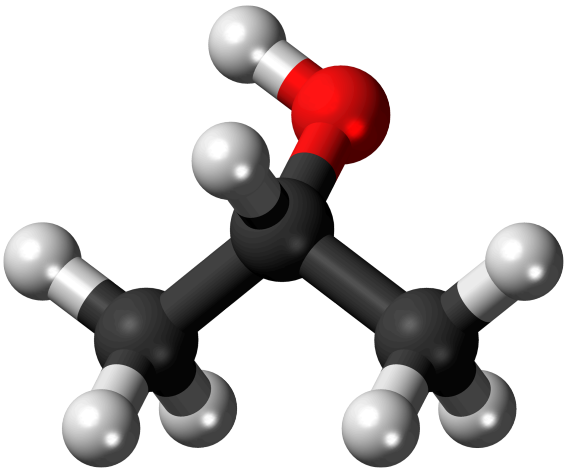
The three companies received **fines** of €346,443.31, €500,000 and €75,000 respectively. Their two managers were sentenced to **4 and 12 months' imprisonment** and fines of €346,443.31 and €500,000 respectively.

From May 2014 to December 2016 the defendants exported 167,960 kg of **isopropanol** and other chemicals to Syria, worth €346,443.31.

Isopropanol is a precursor to sarin, a highly toxic nerve agent. Sarin was used as a weapon in Syria in Ghouta on 21 August 2013, in Khan Shaykhun on 4 April 2017, "very likely" used in Ltamenah on 24 March 2017, and "more than likely" used in Ltamenah on 30 March 2017. However, there is no evidence of any connection between these exports and chemical weapons uses.

In their declarations to the Belgian customs authorities the defendants did not mention the export licences which have been required for these chemicals since 2012 under **Council Regulation (EU) No 36/2012 of 18 January 2012 concerning restrictive measures in view of the situation in Syria**.

The **court of first instance** established that the defendants had knowingly made incorrect declarations in violation of Article 231 of Belgium's **General Law on Customs and Excise**. The authorities' failure to detect these did not absolve the defendants of their obligation to make correct declarations.



Ben Mills and Jynto / [Wikimedia Commons] (https://commons.wikimedia.org/wiki/File:Isopropanol-3D-balls.png) (Public domain)

The exports were a violation of EU Regulation 36/2012 and related Belgian legislation, but not of legislation implementing the Chemical Weapons Convention. Sarin is a Schedule 1 chemical, the most tightly controlled chemical under the Convention. However, isopropanol does not appear on any of the Convention's schedules. According to chemical weapons expert Jean Pascal Zanders, this is because of the vast scale of isopropanol's use in civilian industries ranging from cosmetics to pharmaceuticals.

In June 2020, the court of appeals upheld the convictions of the three companies and their two managers.

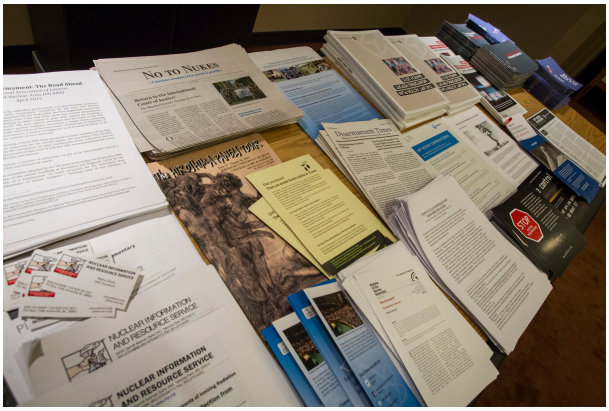
Source: Belgian companies convicted of chemicals exports to Syria, Yasemin Balci, Trust & Verify 163, Spring 2019.

Quiz

View quiz at `https://eunpdc-elearning.netlify.app/lu-17/`

6. Summary and Further Resources

International non-proliferation and disarmament law forms part of international law.



UN Photo / Loey Felipe (All rights reserved)

Summary

- International non-proliferation and disarmament law **forms part of international law**.
- It is also one of international law's many **sub-regimes**.
- The **founding and functioning principles** of non-proliferation and disarmament law are therefore aligned with those of international law.
- The **sources** (e.g. treaty law, customary law), **participants** (e.g. states, international organisations), **application and enforcement** (e.g. legal disputes regarding non-compliance) of international law apply in the same way to international non-proliferation and disarmament law.
- International non-proliferation and disarmament law is **related to other areas/sub-regimes of international law.**
- **Treaty law** applies to all non-proliferation and disarmament treaties.
- The **law on the use of force** can intersect with international non-proliferation and disarmament law.
- Use of CBRN weapons can amount to a violation of **international humanitarian law** and amount to war crimes under **international criminal law.**
- **International human rights law** will always apply, for example with regard to the fair trial rights of an alleged perpetrator of an offence related to CBRN weapons.
- **National implementation** of international non-proliferation and disarmament law is needed in order to carry out international obligations at the national level.
- Regardless of a state's relationship with international law (i.e. whether it is more monist or dualist), **national legislation** is often required in different areas of national law to be able to give practical effect to a state's international legal commitments on non-proliferation and disarmament.
- **National enforcement** of both international and national non-proliferation and disarmament law involves structures and procedures such as the establishment of **national authorities, national inspections, national investigations by police and court cases.**
- The **EU** has its **own legal order** within international law, and as such has developed relevant **treaties, regulations and decisions** that together form EU law on non-proliferation and disarmament.

Further Resources

General Resources

- UNODA / Areas of Work / Weapons of Mass Destruction
- UNODA Disarmament Treaties Database
- Biological Weapons Convention, Report on National Implementing Legislation, VERTIC's National Implementation Measures Programme, November 2016.
- VERTIC's BWC Legislation Database
- United Nations Audiovisual Library of International Law, Arms Control and Disarmament
- United Nations Treaty Handbook
- The ABC of EU Law, Klaus-Dieter Borchardt, 9th January 2018.

Good Reads

- The Law of Arms Control. International Supervision and Enforcement.
- Guido den Dekker, Martinus Nijhoff Publishers, The Hague, 2001, 404p.
- Arms Control. The New Guide to Negotiations and Agreements. Fully revised and updated second edition. Jozef Goldblat, Sage, 2002, 396p.
- A Guide to International Disarmament Law.
- Stuart Casey-Maslen, Tobias Vestner, Routledge, 2019, 252p.
- The Chemical Weapons Convention: A commentary (Third edition). Edited by Walter Krutzsch, Eric Myjer, and Ralf Trapp, Oxford University Press, 2014.
- Brownlie's Principles of Public International Law (8th edition). James Crawford, Oxford University Press, 2018.