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How are CBRN goods and technologies controlled?

International and national legal frameworks

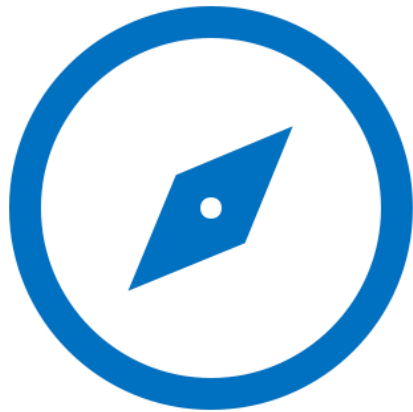
Dr Sonia Drobysz (Co-Programme Director for National Implementation, VERTIC)

Students' course

Taras Schevchenko National University

Kyiv, Ukraine, 3 May 2023

Outline



- Introductions
- International legal framework for CBRN transfers
- National legal frameworks for CBRN transfers
 - Approaches to national legislation for transfers
 - Benefits of national legislation for transfers
 - Ukraine' legislation
- Case studies

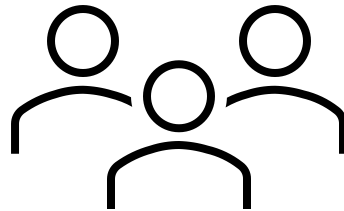
About VERTIC and the NIM Programme

- Verification Research, Training and Information Centre (VERTIC): independent non-profit organisation based in the UK, working globally on effective verification, implementation of and compliance with international agreements
- The National Implementation Measures (NIM) Programme provides assistance to states on the national legislative implementation of CBRN instruments
- Experience working on the BWC, CWC, UNSCR 1540, agreements related to nuclear security and other related international instruments
- Cooperation with international and regional partners



Credit: Carlton Stoiber

How about you?



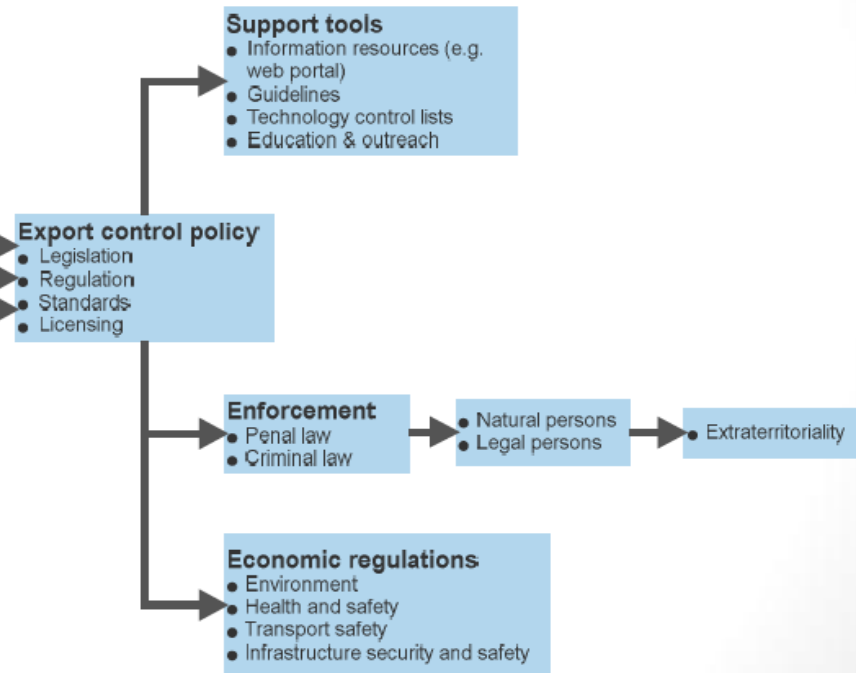
Scope of lecture

Legal foundations of an export control system

International instruments



State-level implementation



From Dr Jean Pascal lecture of
19 April 2023

International legal framework for CBRN transfers

- Norms...
- ...in instruments, including treaties, conventions, resolutions, codes of conduct, etc.
- adopted by states and/or international organisations
- ...governing the relations between states, but also international organisations, in the area of control of transfers of chemical, biological, radiological and nuclear weapons and related items including material



Questions

What are the main international instruments for CBRN transfer controls?

What are their nature?

What is their scope (material, geographical)?

Binding and non-binding instruments

Binding or “hard law”: creates obligations and rights

Chemical Weapons Convention (CWC)

Biological Weapons Convention (BWC)

Nuclear Non-Proliferation Treaty (NPT) and safeguards agreements

UN Security Council Resolution 1540 (2004)

Country-specific sanctions

Association Agreement between the EU and Ukraine – EU Regulation 2021/821

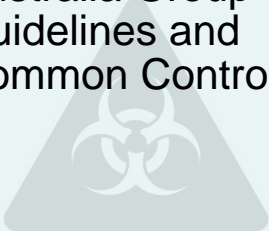
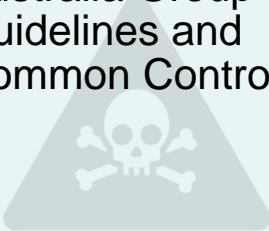
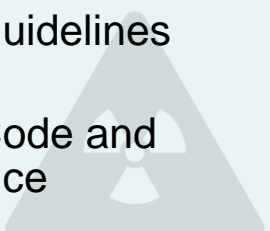
Non-binding or “soft law”: gives guidance and recommendations that may be incorporated into international or national legally binding instruments

IAEA Code of Conduct on the Safety and Security of Radioactive Sources and Guidance on the Import and Export of Radioactive Sources

Australia Group Guidelines and Common Control Lists

Nuclear Suppliers Group (NSG) Guidelines

C, B, RN instruments

Biological	Chemical	Radiological and Nuclear
<ul style="list-style-type: none">• BWC• Australia Group Guidelines and Common Control List 	<ul style="list-style-type: none">• CWC• Australia Group Guidelines and Common Control List 	<ul style="list-style-type: none">• NPT and safeguards agreements• NSG Guidelines• IAEA Code and Guidance 
<ul style="list-style-type: none">• UNSCR 1540<ul style="list-style-type: none">• Country-specific sanctions• EU-Ukraine Association Agreement<ul style="list-style-type: none">• EU Regulation No 2021/821		

Ukraine's status with regards to international instruments

- Ratified the CWC on 16 October 1998
- Ratified the BWC on 26 March 1975
- Acceded to the NPT on 5 December 1994, and concluded a Safeguards Agreement that entered into force on 22 January 1998, an Additional Protocol that entered into force on 24 January 2006
- Has made a commitment to the IAEA Code of Conduct and Guidance
- Is a member of the NSG and the Australia Group
- Legally bound by decisions in UNSCR 1540




Main categories of obligations in international instruments

- **Prohibit** the transfer of chemical, biological and nuclear **weapons**
- **Control** the transfer of chemical, biological and nuclear **materials** that could be used to develop chemical, biological and nuclear weapons
- Control the transfer of **dual-use goods, equipment** and **technology** that could be used to develop chemical, biological and nuclear weapons

Example: UNSCR 1540

- Operative paragraph 3

“Decides also that all States shall take and enforce effective measures to establish **domestic controls** to prevent the proliferation of nuclear, chemical, or biological weapons and their means of delivery, including by establishing appropriate controls over related materials and to this end shall: [...] (d) Establish, develop, review and maintain appropriate effective **national export and trans-shipment controls over such items**, including **appropriate laws and regulations to control export, transit, trans-shipment and re-export and controls on providing funds and services related to such export and trans-shipment such as financing, and transporting that would contribute to proliferation, as well as establishing end-user controls; and establishing and enforcing appropriate criminal or civil penalties for violations of such export control laws and regulations**”

A light blue callout box with a white border and a pointer pointing towards the text below. The text inside the box is centered and reads: "Control the transfer of material".

Control the transfer of material

Example: EU Council Regulation 2021/821

- EU Council Regulation 428/2009 establishes a Union **regime** for the control of exports, brokering, technical assistance, transit and transfer of dual-use items.
- Article 2: '**dual-use items**' means items, including software and technology, which can be used for both civil and military purposes, and includes items which can be used for the design, development, production or use of nuclear, chemical or biological weapons or their means of delivery, including all items which can be used for both non-explosive uses and assisting in any way in the manufacture of nuclear weapons or other nuclear explosive device
- Article 3. 1. An **authorisation** shall be required for the export of the dual-use items listed in Annex I.
- The regulation **also covers**: requirements for the transfer of non-listed items; export authorisation and authorisation for brokering services, transit, customs procedures, administration cooperation, control measures.

Control the transfer of material,
dual-use equipment and
technology

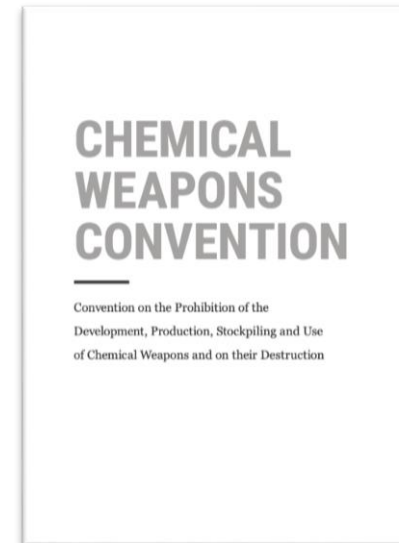
Conclusion on international instruments

- Various instruments: treaties, resolutions, codes, groups, etc.
- Varying nature: binding, non-binding
- Varying scope:
 - C, B, and/or RN
 - Weapons, good, equipment, technology
 - International, regional, bilateral, country specific
- Various obligations: prohibition, control



National implementation

National implementation = process by which a state adopts appropriate and effective national *legislative, regulatory* and other measures to carry out its international obligations in a treaty or in an international instrument such as a resolution containing binding decisions



National implementation measures

- Establish **scope** of control regime
- Define **key terms** in **national legislation**:
 - Export, transit, transfer, trans-shipment, etc.
 - Non-state actors, related materials, means of delivery, etc.
- Establish **domestic controls** over CBRN materials: measures to account for, secure, physically protect, including during **transport**
- Enforcement measures:
 - Criminal investigations
 - Training of law enforcement personnel, including **customs**
 - Co-operation on **international** judicial matters



Offences and penalties

States to adopt **prohibitions** and penalties under national criminal law...

- Prohibit activities related to CBRN weapons (e.g. transfer, production, possession, use, etc.);
- Prohibit unlicensed / unauthorized activities with CBRN related materials (export, import, transit, etc.)

Participatory offences:

Attempting, assisting, acting as an accomplice, or financing prohibited activities.

Jurisdiction:

- Territorial
- Personal
- Natural and legal persons

Transfer controls

States to adopt a legal framework to control transfers of related materials in order to prevent proliferation of CBRN weapons:

- Adoption of control lists
 - OP6: “Recognizes the utility in implementing this resolution of effective national control lists and calls upon all Member States, when necessary, to pursue at the earliest opportunity the development of such lists”
 - EU list of ‘Dual-use’ items
- Transfer licensing system: export, transit, trans-shipment, re-export, etc.
 - Relevant authority
 - Offences and penalties for violation
- End-user controls
- Catch-all clauses
- Border controls and capacities and points of entry
- Enforcement powers



Approaches to national legislation for transfer controls

No “one size fits all”: each state will decide the type of implementing measures it requires in accordance with its constitutional processes and national situation



Approaches to national legislation for transfer controls

1) **Combined CBRN strategic trade management law:**

- Covers the transfers of all CBRN materials

2) **Stand-alone C, B, RN laws**

- Separate laws dedicated to penal provisions for each C, B, RN
- May also include provisions on transfers in each law

3) **Implementation through several laws and amendments:**

- Criminal provisions in criminal code, counter-terrorism legislation
- Export control laws, customs codes, military/strategic/dual-use items legislation
- Enforcement through criminal procedure codes, police laws, extradition laws, mutual assistance in criminal matters laws
- Fill gaps through amendments to existing legislation

4) **Combination of the above:** e.g. adopting new stand-alone laws on CBRN weapons offences + amendments to existing laws to include other measures.

Ukraine's legislation



W A K O N A K R A I N G

On state control over international
transfers of military goods
and dual-use

(Bulletin of the Verkhovna Rada of Ukraine (VVR), 2003, N 23, st.148)

This Act regulates activities related to state control of international transfers of military goods and dual use, to protect national Ukraine's interests, compliance with international obligations proliferation of weapons of mass destruction, their means of delivery Gear restrictions conventional weapons, as well as implementing measures to prevent the use of these products in terrorist and other illegal purposes.

Ukrainian legislation: definition

Act on state control over international transfers of military and dual-use goods 2003, Article 1 Definitions

- Material
 - Dual use goods
- Persons
 - End users/ entrepreneurs
- Documents
 - Permit
 - End-user certificate
- Activities
 - International transfer of goods
 - Exports
 - Re-export
 - Imports
 - Transit

Ukrainian legislation: control lists

- *Act on state control over international transfers of military and dual-use goods 2003, Article 9 Lists of goods subject to state Export Controls*
- *Decree of the Cabinet of Ministers of Ukraine № 1 of 11.01.2018, Unified dual-use items list*



КАБІНЕТ МІНІСТРІВ УКРАЇНИ

ПОСТАНОВА

від 11 січня 2018 р. № 1

Київ

Про внесення змін до Порядку здійснення державного контролю за міжнародними передачами товарів подвійного використання

Кабінет Міністрів України **постановляє:**

1. Внести до Порядку здійснення державного контролю за міжнародними передачами товарів подвійного використання, затвердженого постановою Кабінету Міністрів України від 28 січня 2004 р. № 86 (Офіційний вісник України, 2004 р., № 4, ст. 167, № 44, ст. 2881; 2005 р., № 51, ст. 3197; 2006 р., № 22, ст. 1609, № 23, ст. 1727; 2007 р., № 33, ст. 1338; 2008 р., № 36, ст. 1207, № 76, ст. 2566; 2010 р., № 1, ст. 21; 2012 р., № 5, ст. 174, № 40, ст. 1548, № 85, ст. 3463; 2014 р., № 74, ст. 2091; 2017 р., № 28, ст. 814, № 50, ст. 1555, № 94, ст. 2856), зміни, що додаються.

2. Ця постанова набирає чинності через 90 днів з дня її опублікування.

Прем'єр-міністр України

В. ГРОЙСМАН

Інд. 21

Ukrainian legislation: licensing system

- Licensing requirements and procedure for listed materials and items

Act on State Control over International Transfers of Military and Dual-use Goods, Article 15 Permission.

Decree of the Cabinet of Ministers of Ukraine of 27 May 1999, No 920 On confirmation of the order of guarantees and implementation of state control over Compliance for use in the stated purpose of goods subject to state Export Controls

- Renewal

Act on State Control over International Transfers of Military and Dual-use Goods, Article 15 Permission

- Exemptions

Act on State Control over International Transfers of Military and Dual-use Goods, Article 20

Ukrainian legislation: licensing system

- Suspension/Revocation

Act on State Control over International Transfers of Military and Dual-use Goods, Article 16

- Catch-all clause

Act on State Control over International Transfers of Military and Dual-use Goods, Article 10

- End-use statement and end-user certificate

Act on State Control over International Transfers of Military and Dual-use Goods, Article 19

Ukrainian legislation: offences and penalties

Act on state control over international transfers of military and dual-use goods, 2003:

- Article 24. Violation of legal requirements in public export control
- Article 25. The responsibility of international actors transfer of goods - legal persons for violations legislative requirements in the field of export control
- Article 26. Imposing fines for violation of legislation in the field of national export control

Criminal Code

Article 333 Violation of the Procedure of Execution of International Transfers of Goods Subject to state export control

Article 44: prohibits WMD

Ukrainian legislation: enforcement

- Inspections

Law on the Protection of Population against Infectious Diseases , Article 28. Sanitary Protection of the Territory of Ukraine

New Law on Public Health (in force 2023) includes provisions on inspections

- Investigations and criminal proceedings

Act on state control over international transfers of military and dual-use goods 2003, and related regulations, Article 23. Prevention of crimes in public export control .

Criminal Procedure Code Article 214. Initiating pre-trial investigation.

- International cooperation

Act on state control over international transfers of military and dual-use goods 2003, and related regulations, Article 7. Exchange of information on the implementation of state export control

Ukrainian legislation: enforcement

New Law on Public Health (in force in October 2023) may include domestic controls over “dangerous factors” which include biological and chemical materials



ЗАКОН УКРАЇНИ

Про систему громадського здоров'я

Цей Закон визначає правові, організаційні, економічні та соціальні засади функціонування системи громадського здоров'я в Україні з метою зміцнення здоров'я населення, запобігання хворобам, покращення якості та збільшення тривалості життя, регулює суспільні відносини у сфері громадського здоров'я та санітарно-епідемічного благополуччя населення, визначає відповідні права і обов'язки державних органів та органів місцевого самоврядування, юридичних і фізичних осіб у цій сфері, встановлює правові та організаційні засади здійснення державного нагляду (контролю) у сферах господарської діяльності, які можуть становити ризик для санітарно-епідемічного благополуччя населення.

Benefits of national legislation for CBRN transfers

- Compliance with international obligations
- Can be included in international reports
- Deterrent effect of export controls for illegal activities
- Export controls as a means of trade facilitation: such controls give states access to key technologies, attract investors and enhance confidence



Case study: Princeton University export controls violation, USA

- Princeton exported strains and recombinants of animal pathogens to research institutions in 15 countries without the required BIS export licenses
- The exported items are included on the US Commerce Control List (CCL), Supplement 1 to EAR Part 774, which catalogues materials subject to export licensing authority of the BIS
- The U.S. Commerce Department, Bureau of Industry and Security (BIS) announced a settlement with Princeton University in connection with 37 alleged violations of the Export Administrations Regulation (EAR)
- Notable that Princeton itself informed national authorities about the alleged violations – voluntary self-disclosure reduced the final penalty to \$54,000
- Case demonstrates need for research institutions to be aware of transfer control legislation, even when exporting biological agents and toxins for peaceful purposes

See *Trust & Verify*, issue no. 168 (summer 2021) – [‘Princeton University fined over exports of pathogens without a license’](#), Thomas Brown, Legal Officer, VERTIC

Case study: Belgian companies convicted of chemicals exports to Syria 1/2

- From 2014 to 2016, three Belgian companies shipped 24 chemical consignments to Syria, including isopropanol.
- Isopropanol is a dual-use chemical that has a wide range of civilian uses but can also be used as a precursor for sarin. Not found on CWC schedules.
- The companies did not present any export licenses in the necessary customs documents and made a declaration using an incorrect code.
- This export control requirement stems from European Union Regulation 36/2012 “concerning restrictive measures in view of the situation in Syria” and related Belgian export control legislation.
- There was no evidence of a connection between the exports and chemical weapons uses.



Case study: Belgian companies convicted of chemicals exports to Syria 2/2

- On 7 February 2019, an Antwerp court convicted the companies of violations of export control legislation:
 - 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.
- The court noted that these serious offences had been carried for monetary gain only. There had been “no shrinking back from exporting potentially dangerous goods to a war zone where these could cause inhuman suffering to innocent people.”
- Case demonstrates need for companies to be aware of transfer control legislation and sanctions legislation, including updates.
- It also shows the need to obtain appropriate licensing and also be aware of the dual-use nature of goods.

See *Trust & Verify*, issue no. 163 (spring 2019) – [‘Belgian companies convicted of chemicals exports to Syria’](#), Yasemin Balci, Senior Legal Officer, VERTIC

Thank you!

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