International Export Control Law

Mapping the Field

Voetelink, J.

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Chapter 5
International Export Control Law—Mapping the Field

Joop Voetelink

Contents

Abstract Traditionally, the control of the export of arms and other military material is a national concern that flows from the principle of state sovereignty. As international public law developed, national rules and regulations were increasingly affected by a growing body of international law. Together, these rules and laws constitute an emerging subdiscipline of law impacting the international trade in military and dual-use goods, technology, and software and can be referred to as export control law. This chapter explores various well-established disciplines of public international law that form the constituent parts of international export control law.

Keywords Export control · arms control · non-proliferation · disarmament · dual-use · extraterritoriality · GATT · international humanitarian law · human rights · sanctions · UN · security · weapons of mass destruction

J. Voetelink (✉)
Faculty of Military Sciences, Netherlands Defence Academy, PO Box 90002, 4800 PA Breda, The Netherlands
e-mail: jed.voetelink@mindef.nl

Amsterdam Center for International Law, Amsterdam, The Netherlands

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5.1 Introduction

Throughout history, states and other territorial entities have restricted the export of arms and related military equipment, including maritime supplies and equipment, for reasons of national security. For example, in ancient times the Roman Empire prohibited the delivery of weapons to other nations[1] and during the Dutch Revolt[2] the Dutch Republic subjected the trade in arms and maritime equipment to a strict licensing system (see Chap. 16).[3] Such restrictions in international military trade have been developed in domestic policies and laid down in national rules and regulations. Today, states continue to regulate the export of military equipment. The scope of contemporary legislation, however, has broadened significantly over time and now also encompasses goods, technology, and software (in this chapter together referred to as items) that are civilian by design but may serve a military purpose as well (dual-use). Moreover, security concerns are not the sole basis for these particular trade restrictions anymore, as other considerations, such as foreign policy, human rights, and economy, increasingly influence decision-making. Another striking element of domestic export control legislation is the increasing importance of public international law. All domestic and international laws and regulations as well as policy rules and commitments that are applicable to and regulate the export, re-export, transit, and transfer in any manner of goods, technology, and software can be referred to as export control law. Although a term like this suggests that a new branch of law has emerged, export control law is not an established field of law in its own right. Each state still has the power to enact its own set of domestic laws, regulations, and policy rules, whereas the international component of export control law draws heavily on various subdisciplines of public international law. However, as a consistent and comprehensive set of rules is rapidly developing with a growing impact on international trade, discussion of international export control law as a distinct subdiscipline of law is warranted.

Export control law is a rather broad field of law potentially encompassing a wide array of topics. In this chapter it is narrowly interpreted to include only two core areas of export control, namely the rules with respect to the control of the export of military and dual-use items, and economic sanctions. Consequently, related topics such as bribery of foreign officials, securities law, foreign direct investments, and trust law will not be part of the discussion.

The chapter's aim is to analyse international export control law by exploring the various areas of international law relevant to export control law. The chapter starts by introducing export control and analysing some key terms before exploring the subdisciplines of international law that are most relevant to export control law in general. These subdisciplines include the laws of armed conflict (also referred to as international humanitarian law), sanctions law as part of international security

[1] Krause and MacDonald 1993, p. 708.

[2] Revolt of the Republic of the Seven United Netherlands against the rule of the King of Spain; also known as the Eighty Years' War (1568–1648).

[3] De Jong 2005, p. 153.

law, the law of arms control, and human rights law. Finally, this chapter offers a brief synthesis and conclusion. Domestic and regional (i.e., European Union) export control law will not be discussed in detail but may be referred to where appropriate.[4]

As may be apparent from the table of contents of this volume, export control law is inextricably linked to other research and policy areas such as ethics, economics and trade, and politics and international relations, all of which influence the legislator's choices. Export control laws and regulations are, therefore, the result of trade-offs made in all these interconnected areas. Since the aim of this chapter is limited to mapping the legal terrain, it will not probe the non-legal aspects of export control. The audience should, however, keep in mind the relevance and impact of other research and policy areas.

5.2 Export Control Law in General and Terminology

Under modern public international law, states are prohibited from threatening to or using force against other states. This is a rule of customary law, as well as one of the founding principles of the United Nations (UN) as laid down in Article 2(4) of the UN Charter, "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".[5] The Charter states two exceptions to this rule. First, states are allowed to use force based on their inherent right of individual and collective self-defence against an armed attack (Article 51 of the UN Charter). Second, states can use armed force to maintain or restore international peace and security when mandated by the UN Security Council under Articles 39 and 42 of the UN Charter (peace-enforcement and peace-operations).

The right to resort to armed force in self-defence, implies that States can maintain the means to act on that right. Consequently, absent specific treaty limitation States are entitled to possess arms and other military equipment,[6] without restrictions on the levels or types of armaments,[7] and, as a corollary thereof, can produce and trade them unless prohibited under international law. The right to possess arms has been confirmed by the International Court of Justice in its landmark Nicaragua Judgment, "in international law there are no rules other than such rules as may be accepted by the State concerned, by treaty or otherwise whereby the level of armaments of

[4] For an excellent overview of domestic and EU export control law, see Aubin and Idiart 2016.

[5] Charter of the United Nations; San Francisco, 26 June 1945; entered into force 24 October 1945. https://treaties.un.org/doc/Publication/UNTS/No%20Volume/Part/un_charter.pdf Accessed 16 February 2021.

[6] For example, a Netherlands policy evaluation regarding non-proliferation, disarmament, and export control of strategic goods notes that conventional arms serve the legitimate right to self-defence in accordance with Article 51 of the UN Charter. Parliamentary Paper 2018/19, 33694, No. 38, p. 34.

[7] Coppen 2016, p. 22.

a sovereign State can be limited, and this principle is valid for all States without exception".[8] The international trade in arms as a legitimate exercise of the right to self-defence is reflected in the Preamble of the Arms Trade Treaty by its reference to a number of international principles, including the right to self-defence as recognized in Article 51 of the UN Charter and "(t)he respect for the legitimate interests of States to acquire conventional arms to exercise their right to self-defence and for peacekeeping operations; and to produce, export, import and transfer conventional arms".[9]

As states can legitimately trade in arms, it is reasonable to keep checks on these goods and related items leaving the territory destined for another state. The reasons therefor may vary but will include the protection of national security and economic interests. Also, export control can be a key foreign policy tool as well as a State's contribution to the maintenance of international peace and security. In general, national checks on the export of military and dual-use items will focus on items that can be useful for purposes that are contrary to a State's interests. Often, these items are included in elaborate lists and subject to a system of prohibitions, exemptions, licenses, or other forms of authorization. Yet, unlisted items can become subject to export control authorization as well through the use of 'catch-all' clauses. Clauses of this type provide that the export of unlisted items still require a national authorization when the end-use or the end-user of an item are of concern as specified in that clause; e.g. use related to weapons of mass destruction.[10] Whether or not an authorization for the export of an item is required will, in general, be determined by answering the 'what', 'where', 'who', and 'how' questions.[11] What are the product specifications of an item and do they correspond with a listed item (*classification*)? Where is an item heading (*destination*); is that State subject to a sanctions regime? Who is ultimately the user of the item (*end-user*)? And finally, how will the item ultimately be used (*end-use*)?

Today, international commerce is characterized by the economic principle of free trade.[12] Export controls and sanctions do not seem to fit this principle. Nevertheless, they can be justified under international economic law instruments.[13] Article XXI of the 1994 General Agreement on Tariff and Trade (GATT)[14] contains 'security exemptions' allowing States to take "any action it considers necessary for the protection of its essential security interests". The exception applies, *inter alia*, with

[8] ICJ 27 June 1987, Case concerning Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v. United States of America), Judgement, Merits, [1986] ICJ Rep 1, para 269. Hereinafter: the Nicaragua Case.

[9] Arms Trade Treaty; New York, 2 April 2013; entered into force 24 December 2014 (Vol. 3013 UNTS, No. 52373).

[10] Haellmigk 2017.

[11] Cfm. Aubin and Idiart 2016, pp. 5–6.

[12] Trebilcock and Trachtman 2020, pp. 1–6.

[13] Aubin and Idiart 2016, p. 1.

[14] Annex 1A, General Agreement on Tariffs and Trade (GATT) of the Marrakesh Agreement Establishing the World Trade Organization; Marrakesh, 15 April 1994 entered into force 1 January 1995 (Vol. 1867 UNTS 1995, No. 31874).

respect to "the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of the supplying a military establishment" (Article XXI(b)(ii)).[15] Article 346(1)(b) of the Treaty on the Functioning of the European Union (TFEU)[16] includes a similar exception authorizing Member States to take "such measures as it considers necessary for the production of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes".[17]

As has been mentioned in the introduction to this chapter, export control law is not a self-contained or specialized[18] legal regime. Consequently, it lacks a single set of legal definitions of key export control terminology. So, the meaning of terms such as 'export' and 'military goods' may differ, depending on the applicable legal system and even, within that jurisdiction, on the specific statutory basis. For instance, under US law 'export' not only refers to the transfer of an item or a defense article out of the US but also to the release or transfer of technology or technical data to a foreign person even when that person is present in the US[19] The latter form of export is referred to as 'deemed export' in US export control law, but this expression is not used in EU export control law. Further, in the US legal system the terms 'item' and 'technology' are typical for the control of dual-use and less-sensitive military items (not including services) pursuant to the Export Control Act of 2018[20] and its implementing regulations: the Export Administration Regulations.[21] These terms are not used, however, in relation to military items which are regulated in the Arms Export

[15] A similar clause provision can be found in Article XIV bis, Annex 1B, General Agreement on Trade in Service (GATS) of the Marrakesh Agreement Establishing the World Trade Organization; Marrakesh, 15 April 1994 (Vol. 1867 UNTS 1995, No. 31874). Malloy 2003, pp. 379–380 points out that member States can invoke the security exception as a self-judging justification for the imposition of sanctions leaving States a wide margin of appreciation. In doing so, States must, however, observe the general principle of good; Para 7.132, Russia—Measures Concerning Traffic in Transit, WTO Panel report, Action by the Dispute Settlement Body, WTO Doc WT/DS512/7 of 29 April 2019.

[16] The Treaty on the Functioning of the European Union; Rome 25 March 1957; entered into force 1 January 1958. Consolidated version, OJ C 326, 26/10/2012, pp. 1–390.

[17] This provision is not applicable to dual-use items; V Randazzo (2014) Article 346 and the qualified application of EU law to defence. European Union Institute for Security Studies. https://www.iss.europa.eu/sites/default/files/EUISSFiles/Brief_22_Article_346.pdf Accessed 16 February 2021.

[18] Term as used in UN Doc A/CN.4/L.682 of 14 April 2006, Report of the Study Group of the International Law Commission on 'Fragmentation of international law: Difficulties arising from the diversification and expansion of international law, p. 81. Cf. Coppen 2016, pp. 25–26.

[19] 15 C.F.R. Sections 734.13 and 22 C.F.R. Section 120.17.

[20] Export Controls Act of 2018, Pub. L. 115–232, div. A, title XVII, subtitle B, part I (Sections 1751–1768), 132 Stat. 2209 (50 U.S.C. 4811 et seq.). Part of the Export Control Reform Act of 2018, Pub. L. 115–232, div. A, title XVII, subtitle B (Sections 1741–1781), Aug. 13, 2018, 132 Stat. 2208 (50 U.S.C. 4801 et seq.).

[21] 15 C.F.R. Sections 730 et seq.

Control Act of 1976[22] and its implementing regulations: the International Traffic in Arms Regulations.[23] Here, the preferred terms are 'defense article' and 'technical data'. For the purpose of this chapter, I will use goods, services, and technology in a generic way. Where appropriate, I will refer to the terms common to that jurisdiction.

5.3 International Law

As discussed above, the right of states to use force in self-defence and for peace-enforcement and peace-operations entails the right to possess and sell arms or otherwise transfer them abroad. The freedom of states to exercise the latter rights has been considerably limited as public international law developed over the past century. Currently, multiple subdisciplines of public international law increasingly impact the discretion of national legislators to control the export of military and dual-use items. The law of armed conflict prohibits and regulates the use of specific categories of weapons in armed conflict. Further limitations apply in peace-time where the law of arms control sets out rules on the production, testing, stockpiling, transfer, or deployment of certain types of weapons. In addition, sanctions law restricts the export of military and dual-use items to embargoed States and entities. Furthermore, human rights concerns increasingly are to be taken into account on every level of decision-making with respect to export control.

Most of the international rules on export control are laid down in international agreements (treaties) concluded between states or are part of international customary law. Additional non-legal commitments flow from informal arrangements, such as the export control regimes like the Wassenaar Arrangement (see Chap. 3). States are obliged to implement and enforce the rules as provided in the various instruments to which they are a party. Also, when a state does not comply with the provisions in the instruments, it may become subject to international sanctions, and it may cause other states to deny or restrict the transfer of military or dual-use items to the non-compliant state. For instance, the EU requires member states to take a number of criteria into consideration before granting an export license for military items.[24] The criteria include compliance with arms embargoes, obligations under non-proliferation treaties, commitments under the export control regimes, and respect for human rights and the law of armed conflict. This section provides an overview of these subdisciplines of public international law.

[22] Arms Export Control Act of 1976, Pub. L. 90–629, 82 Stat. 1320 (22 U.S.C. 2751 et seq.).

[23] 22 C.F.R. Sections 120–130.

[24] Council Common Position 2008/944/CFSP of 8 December 2008 defining rules governing control of exports of military technology and equipment (OJ L 335, 13.12.2008, pp. 99–103).

5.3.1 The Law of Armed Conflict

Perhaps the oldest subdiscipline of public international law relevant to export control is the law of armed conflict (or: international humanitarian law). This field of law is based on the idea that the horrors of armed conflict should be limited as much as is feasible by protecting the victims of armed conflict and restricting the means and methods of warfare. This body of law has expanded in its scope and application since World War II. Consequently, the scope of armed conflict is broad encompassing international armed conflicts between two or more states as well as internal (or: non-international) armed conflicts that take place between a state and organized armed groups or between such groups within its territory.[25] Warfighting has been subject to customary rules and religious norms for centuries (e.g., the prohibition of the use of slings and (cross)bows against Christians as stated in Canon 29 of the Second Council of the Lateran in 1139).[26] The codification of this field of law started in the second half of the 19th century and continues today. Two topics that are in particular relevant for international military trade are discussed below: neutrality law and weapons law.

5.3.1.1 Neutrality Law

States that do not participate in an international armed conflict are neutral and have the right not to be adversely affected by the hostilities.[27] This entails the right to continue international trade and maintain existing commercial relations with the parties to the conflict.[28] The principle of non-participation prohibits, however, neutral states to make available war materials to one or more of the parties to the conflict. The issue was addressed in the 1856 Paris Declaration, the very first treaty on the law of armed conflict. The Paris Declaration protects neutral maritime trade by prohibiting parties to a conflict from seizing enemy goods on neutral vessels or neutral goods on enemy vessels except for "contraband of war".[29] The 1906 Hague Convention XIII specifically prohibits neutral States to supply directly or indirectly "war-ships, ammunition, or war material of any kind whatever".[30]

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[25] "Armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State." 2 October 1995, International Criminal Tribunal for the Former Yugoslavia, Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction.

[26] Referred to by Boothby 2016, p. 9.

[27] Bothe 2013, p. 549. Neutrality rules are necessary to prevent escalation of a conflict.

[28] Subsequent changes in trade activities favouring one of the parties would be incompatible with the neutral status, however. Bothe 2013, p. 550.

[29] Point 2 and 3 of the Declaration Respecting Maritime Law; Paris, 16 April 1856. British State Papers 1856, Vol. LXI, pp. 155–158.

[30] Article 6 of the Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval Warfare; The Hague, 17 October 1907. https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=06A47A50FE7412AFC12563CD002D6877&action=openDocument Accessed 16 February 2021.

Closely related to neutrality law is the law of blockade. This part of the law of armed conflict deals with a method of economic warfare at sea aimed at preventing all vessels from entering or exiting enemy coastal areas or ports.[31] A historical example is the blockade by the Dutch Republic of Flemish port under the control of the Kingdom of Spain in 1584.[32] Initially, the Dutch activities were widely criticized as a violation of neutrality law because of their impact on the trade of neutral States with the Spanish held cities. However, as other naval powers were quick to follow suit the right to declare a blockade developed as a customary rule and was included in the Paris Declaration (point 4) in 1856.[33] Blockades are still relevant today[34] and are also mentioned as one of the actions the UN Security Council can take under Article 42 UN Charter to maintain or restore international peace and security (see Sect. 5.3.3).[35]

5.3.1.2 Weapons Law

Weapons law is the part of the law of armed conflict that essentially prohibits the use of certain weapons in armed conflict and restricts the circumstances in which other weapons may lawfully be used.[36] Moreover, States Parties to the Additional Protocol I to the Geneva Conventions[37] have to make sure that in the study, development, acquisition, or adoption of a new weapon international law does not prohibit its deployment (Article 36). Consequently, states considering importing new weapons must respect this obligation and incorporate it into their acquisition procedures.

Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land; The Hague, 17 October 1907. https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=71929FBD2655E558C12563CD002D67AE&action=openDocument Accessed 16 February 2021.

[31] Heintschel von Heinegg 2013, p. 532. Today, the law of blockade includes activities of aircraft.

[32] Drew 2017.

[33] Heintschel von Heinegg 2013, p. 533. In order for a blockade to be binding, it had to be effective, that is: maintained by a force sufficient to prevent access to the enemy coast.

[34] For example, the ongoing blockades of the Gaza Strip by Israel and Egypt and Yemen by Saudi Arabia and its allies.

[35] The law of blockade is also part of the non-legally binding San Remo Manual on International Law Applicable to Armed Conflicts at Sea of 12 June 1994. An important improvement are provisions on proportionality and the protecting of the civil population; para 96ff.

[36] Boothby 2016, p. 3; referring to the U.S. Department of Defense Law of War Manual of June 2015.

[37] Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I); Geneva 1977, entered into force 7 December 1978 (Vol. 1125 UNTS 1986, No. 17512).

Weapons law is based on the rationale that the means to conduct hostilities in armed conflict find their limits in humanitarian considerations.[38] The first international instrument in this field is the 1868 St Petersburg Declaration[39] prohibiting the use of certain explosive projectiles. Other instruments soon followed often concentrating on the codification of the customary prohibition of poisoned weapons (e.g., the Declaration concerning Asphyxiating Gases of 29 July 1899 and the Treaty of Versailles of 28 June 1919).[40] The use of various types of gases in World War I led to the adoption of the Gas Protocol in 1925,[41] prohibiting the use in armed conflict of "asphyxiating, poisonous or other gases, and of all analogous liquids materials or devices" as well "the use of bacteriological methods of warfare".

Building on this Protocol, that is still in force today, new agreements were concluded over the past few decades. In 1972, the Convention on the Prohibition of Biological Weapons[42] negotiated by the Conference on Disarmament[43] was opened for signature. The agreement prohibits the development, production, stockpiling, and otherwise acquiring or retaining of biological and toxin weapons,[44] making it the first multilateral treaty banning an entire category of weapons of mass destruction. By no longer focusing on the use of the weapons, an overlap has been created with the law of arms control, which will be further addressed in the next section.

The prohibition of chemical weapons was further developed in the Chemical Weapons Convention of 1993.[45] The agreement prohibits the development, production, stockpiling, and use of chemical weapons. In addition, States are required to

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[38] See the preamble of the St Petersburg Declaration of 1868, "that Commission having by common agreement fixed the technical limits at which the necessities of war ought to yield to the requirements of humanity".

[39] Declaration Renouncing the Use, in Time of War, of Explosive projectiles under 400 Grammes Weight; Saint Petersburg, 29 November/11 December 1868. https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=3C02BAF088A50F61C12563CD002D663B&action=openDocument Accessed 16 February 2021.

[40] Boothby 2016, p. 12 and p. 104.

[41] Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare; Geneva, 17 June 1925. https://ihl-databases.icrc.org/ihl/INTRO/280?OpenDocument Accessed 16 February 2021. The document was adopted as a separate document together with the Convention for the Supervision of the International Trade in Arms, Munitions and Implements of War; Geneva 17 June 1925, which did not enter into force.

[42] Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction; London, Moscow and Washington, 10 April 1972; entered into force 26 March 1976 (Vol. 1015 UNTS 1994, No. 14860).

[43] The "single multilateral disarmament negotiating forum of the international community", https://www.unog.ch/80256EE600585943/(httpPages)/BF18ABFEFE5D344DC1256F3100311CE9?OpenDocument Accessed 16 February 2021. The Conference also negotiated a number of other agreements discussed in this chapter.

[44] The Agreement does not prohibit the use of these weapons but the Member States have expressly accepted the prohibition on the use of biological weapons at a number of Review Conferences; Lentzos 2019, p. 3.

[45] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction; Paris, 13 January 1993; entered into force 29 April 1997 (Vol. 1974/1975 UNTS 2001, No. 33757).

destroy production facilities for chemical weapons as well as the weapons themselves (Article I). The Organization for the Prohibition of Chemical Weapons, established pursuant to Article VII, monitors compliance with the Chemical Weapons Convention.

Whereas the non-proliferation of nuclear weapons has already been addressed in various international instruments, as will be discussed in the next section, the threat or use of these weapons was not prohibited under international law.[46] This situation has changed with the entry into force of the Nuclear Weapon Ban Treaty on 22 January 2021, which prohibits the threat and use of nuclear weapons as well as other actions. Although none of the States currently in possession of this type of weapons is a party to the treaty, it signifies a further step towards nuclear disarmament.

In 1980, the Certain Conventional Weapons Convention[47] became the basis for restrictions to the use of certain conventional weapons as set out in protocols to the Convention. These Protocols cover weapons such as mines and booby-traps (Protocol II),[48] incendiary weapons (Protocol III),[49] and blinding laser weapons (Protocol IV).[50] The latter Protocol prohibits the use as well as the transfer of such weapons further strengthening the link between the law of armed conflict and the law of arms control. Outside the framework of the Certain Conventional Weapons Convention, States adopted several other agreements on conventional weapons, such as the Anti-Personnel Mine Ban Convention[51] and the Convention on Cluster Munition.[52] Parties to these treaties have agreed to neither use these weapons nor "to develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly" them. In the future, new and emerging technologies, such as artificial intelligence and nanotechnology, or items based thereon[53] may become subject of international agreements restricting their further development or use.

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[46] ICJ 8 July 1996; Nuclear Weapons Advisory Opinion, para 105.

[47] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects; Geneva, 10 October 1980; entered into force 2 December 1983 (Vol. 1342 UNTS 1992, No. 22495).

[48] Protocol (II) on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices. Geneva, 10 October 1980; entered into force 2 December 1983 (Vol. 1342 UNTS 1992, No. 22495).

[49] Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III). Geneva, 10 October 1980; entered into force 2 December 1983 (Vol. 1342 UNTS 1992, No. 22495).

[50] Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention); Vienna, 13 October 1995; entered into force 30 July 1998 (Vol. 2024 UNTS 2001, No. 22495).

[51] Ottawa Treaty: Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction; Oslo, 18 September 1997; entered into force 1 March 1999 (Vol. 2056 UNTS 2002, No. 35597).

[52] Convention on Cluster Munitions; Dublin, 30 May 2008; entered into force 1 Augustus 2010 (Vol. 2688 UNTS 2010, No. 47713).

[53] E.g., emerging technologies in the area of lethal autonomous weapon systems.

5.3.2 *The Law of Arms Control*

The ultimate goal of arms control is to preserve international peace and security by easing international tensions and reducing the likelihood of large scale armed conflicts. Therefore, the law of arms control not only prohibits the use of certain types of weapons, as the law of conflict does, but also covers the peacetime production, testing, stockpiling, or transfer thereof.[54] This field of law can be defined as "that part of public international law that deals both with the restraints internationally exercised upon the use of military force (in general) and on the use, transfer and/or the possession of armaments (in particular), including their component parts and related technologies, whether in respect of the level of armaments, their character or deployment and with the applicable supervisory mechanisms".[55] The definition casts the net quite wide, encompassing concepts such as disarmament and non-proliferation law.[56] As it is hard to keep these associated areas separated from one another, they will be discussed together under the umbrella term of arms control.

5.3.2.1 Development

As with export control law, the law of arms control has a long history. One of the early agreements includes the 1890 Brussels Conference Act,[57] the main purpose of which was to fight the slave trade. Part of the agreed measures was the restriction of the transfer of modern firearms to parts of the African continent. The agreement was not very effective and was supplemented and revised in the aftermath of World War I by the Convention of Saint-Germain-en-Laye.[58] The purpose of this treaty was to submit all members of the newly established League of Nations to the control of the trade in arms and ammunition pursuant to Article 23(d) of the League of Nations

[54] Boothby 2020, p. 372, quoting Roberts A, Guelff R (2000) Documents on the Laws of War, 3rd ed. Oxford University Press, Oxford, p. 37.

[55] Myjer and Herbach 2018, p. 209.

[56] In general, arms control is considered the broader concept whereas disarmament is aimed at reducing the number of arms or the eliminations of whole categories of weapons and non-proliferation deals with the prevention of the spread of weapons of mass destruction and conventional arms, such as missiles; North Atlantic Treaty Organisation 2020, Arms control, disarmament and non-proliferation in NATO. https://www.nato.int/cps/en/natolive/topics_48895.htm Accessed 16 February 2021.

[57] General Act of the Brussels Conference relative to the Africa Slave Trade (also known as the Convention Relative to the Slave Trade and Importation into Africa of Firearms, Ammunition, and Spiritous Liquors); Brussels, 2 July 1890; entered into force 31 August 1891. https://www.loc.gov/law/help/us-treaties/bevans/m-ust000001-0134.pdf Accessed 16 February 2021.

[58] Convention for the control of the trade in arms and ammunition; St. Germain-en-Laye, 10 September 1919 (8 LNTS 26; The American Journal of International Law, Vol. 15, No. 4, Supplement: Official Documents (Oct, 1921), 297–313)). https://archive.org/stream/jstor-2213279/2213279_djvu.txt Accessed 16 February 2021.

Covenant.[59] The agreement did not enter into force, however. Efforts to revive the Convention of Saint-Germain-en-Laye at a conference in Genève a couple of years later were unsuccessful.[60] Nonetheless, the conference was no total failure as it also adopted the Gas Protocol, discussed above.

The development of the law of arms control really took off in the post-World War II period. Key in its development were the rise and further development of nuclear weapons and missile technology.[61] It was, however, not until the end of the Cold War, when international relations became more balanced, that arms control matured and the law of arms control became a separate branch of public international law.[62] This field of law covers conventional weapons as well as weapons of mass destruction. Examples of treaties dealing with conventional arms and forces are the Treaty on Conventional Armed Forces in Europe[63] and the Treaty on Open Skies. Also, at this point, the Arms Trade Treaty may be mentioned which purpose is not to prohibit the international trade in arms, but to regulate the legitimate conventional arms trade.[64]

5.3.2.2 Nuclear Weapons

Today, attention is focused on the weapons of mass destruction. The previous section already discussed biological and chemical weapons. This section further focuses on nuclear weapons. The rules regarding nuclear weapons and technology are laid down in multiple multilateral treaties as well as bilateral treaties between the two leading nuclear powers of the past decades: the US and Russia. The cornerstone of international efforts to control the proliferation of nuclear weapons is the Non-Proliferation Treaty of 1968.[65] The five states in possession of nuclear weapons at the time of signing of the treaty (the nuclear-weapon states[66]) committed themselves to not transferring nuclear weapons or technology to any other State (Article I). The non-nuclear-weapon states, for their part, agreed not to manufacture or acquire

[59] The Covenant of the League of Nations; Versailles, 28 June 1919. https://avalon.law.yale.edu/20th_century/leagcov.asp Accessed 16 February 2021. Stockholm International Peace Research Institute 1971, p. 91.

[60] Stockholm International Peace Research Institute 1971, p. 95.

[61] Myjer 2020, p. 352.

[62] Myjer 2020, p. 354.

[63] Treaty on Conventional Armed Forces in Europe; Paris 19 November 1990; entered into force 9 November 1992 (Vol. 2442 UNTS 2007, No. 44001) limiting NATO and Warsaw Pact non-nuclear for forces in Europe. On 26 April 2007 Russia suspended its participation in the treaty, but did not withdraw; Woolf et al. 2020, p. 40.

[64] Conventional arms include: battle tanks, armored combat vehicles, large-caliber artillery system, combat aircraft, attack helicopters, warships, missiles and missile launchers and small arms and light weapons; Article 2(2) Arms Trade Treaty. Under the Treaty, States are not to authorize arms transfer that would violate a UN arms embargo or when they have knowledge that the arms would be used to commit war crimes.

[65] Grotto 2009. Treaty on the Non-Proliferation of Nuclear Weapons; London, Moscow and Washington, 1 July 1968; entered into force 5 March 1970 (Vol. 729 UNTS 1974, No. 10485).

[66] The US, the United Kingdom, France, Russia and China.

nuclear weapons (Article II) and to accept monitoring of their civil nuclear programs by the International Atomic Energy Agency, IAEA (Article III).

Article VI of the Non-Proliferation Treaty calls upon states to end the nuclear arms race and complete nuclear disarmament. As the nuclear-weapons states failed to make progress on nuclear disarmament, humanitarian initiatives led to the adoption of the Nuclear Weapons Ban Treaty in 2017. This instrument includes a set of prohibitions on participating in any nuclear weapon activities, such as developing, testing, producing, acquiring, possessing, stockpiling, using or threatening to use nuclear weapons (Article 1). Ultimately, it must lead towards their total elimination (Article 4).

Earlier treaties on nuclear non-proliferation, some preceding the Non-Proliferation Treaty, cover areas such as the prohibition of nuclear weapons tests and the establishment of Nuclear-Weapon-Free Zones. The Limited (or: Partial) Test Ban Treaty[67] restricts the testing of nuclear weapons in the atmosphere, underwater, and in outer space. It does, however, not prohibit nuclear test explosions underground. The latter issue is partly covered by the Threshold Test Ban Treaty between the US and Russia,[68] which prohibits nuclear tests having a yield exceeding 150 kilotons. Nuclear testing should definitely come to an end with the entry into force of the Comprehensive Test Ban Treaty which is to ban all nuclear tests world-wide.[69]

The prohibition on nuclear testing is also part of regional agreements on Nuclear-Weapon-Free Zones.[70] Their scope is much broader, though, and generally include bans on the development, manufacturing, control, possession, stationing or transporting of nuclear weapons in a given area. The first of such agreements was the Treaty of Tlatelolco signed by Latin American and the Caribbean States in 1967.[71] Other regional nuclear-weapon-free zones agreements cover areas in the South Pacific,[72]

[67] Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water; Moscow, 5 August 1963; entered into force 10 October 1963 (Vol. 480 UNTS 1965, No. 6964). Nuclear-Weapon States France and China are not party to the treaty.

[68] Treaty on the Limitation of Underground Nuclear Weapon Tests (with protocol dated at Washington on 1 June 1990); Moscow 3 July 1994; entered into force 5 March 1970 (Vol. 1714 UNTS 1999, No. 29637).

[69] Comprehensive Nuclear-Test-Ban Treaty, New York, 10 September 1996; not entered into force. https://www.ctbto.org/the-treaty/treaty-text/ Accessed 16 February 2021.

[70] Such a regional approach to nuclear non-proliferation and disarmament is allowed under Article VII of the 1968 Non-Proliferation Treaty.

[71] Treaty of Tlatelolco: Treaty for the Prohibition of Nuclear Weapons in Latin America; Mexico City, 14 February 1967; entered into force 22 April 1968 (Vol. 634 UNTS 1970, No. 9068).

[72] Treaty of Rarotonga: South Pacific Nuclear Free Zone Treaty; Rarotonga, 6 August 1985; entered into force 11 December 1986 (Vol. 1445 UNTS 1996, No. 24592).

Southeast Asia,[73] Central Asia,[74] and Africa.[75] Also, treaties for Antarctica,[76] Outer Space,[77] the Seabed,[78] and the Moon,[79] include provisions on denuclearization of areas that do not belong to a particular State.

As early as the Cold War era, the two major nuclear powers, the US and Russia (formerly the Soviet Union) entered into a number of agreements significantly reducing the number of nuclear weapons. Under the Intermediate-Range Nuclear Forces (INF) Treaty,[80] both States agreed to eliminate their intermediate-range and shorter-range ground-launched ballistic and cruise missiles with a range between 500 and 1500 kilometres. The number of strategic nuclear weapons of both States was reduced under the START 1 (1991),[81] the SORT,[82] and the New START (2010) agreements. In the latter agreement the US and Russia limit the number

[73] The Bangkok Treaty: Treaty on the Southeast Asia Nuclear Weapon-Free Zone; Bangkok, 15 December 1995; entered into force 27 March 1997 (Vol. 1981 UNTS 2001, No. 33873).

[74] The Semipalatinsk Treaty: Treaty on a Nuclear-Weapon-Free Zone in Central Asia; Semipalatinsk, 8 September 2006; entered into force 21 March 2009 (Vol. 2970 UNTS, No. 51633). The UN General Assembly has recognized the self-declared nuclear-weapon-free status of Mongolia in Resolution 55/33S, "Mongolia's international security and nuclear weapon free status".

[75] Pelindaba Treaty: African Nuclear-Weapons-Free Zone Treaty; Cairo 11 April 1996; entered into force 15 July 2009. https://www.iaea.org/publications/documents/treaties/african-nuclear-weapon-free-zone-treaty-pelindaba-treaty Accessed 16 February 2021.

[76] The Antarctic Treaty; Washington, 1 December 1959; entered into force 23 June 1961 (Vol. 402 UNTS 1962, No. 5778).

[77] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies; London, Moscow and Washington, 27 January 1967; entered into force 10 October 1967 (Vol. 610 UNTS 1970, No. 8843).

[78] Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof; London, Moscow and Washington: 11 February 1971; entered into force: 18 May 1972 (Vol. 955 UNTS 1983, No. 13678).

[79] Agreement Governing the Activities of States on the Moon and Other Celestial Bodies; New York: 18 December 1979; entered into force 11 July 1984 (Vol. 1363 UNTS 1992, No. 23002).

[80] Treaty between the United States of America and the Union of Soviet Socialist Republics on the Elimination of their Intermediate-Range and Shorter-Range Missiles; Washington, 8 December 1987; entered into force 1 June 1988, ceased to be in force on 2 August 2019, after the U.S. withdrawal (Vol. 1657 UNTS 2001, No. 28521).

[81] START I: Treaty Between the Union of Soviet Socialist Republics and the United States of America on the Reduction and Limitation of Strategic Offensive Arms; Moscow, 31 July 1991; entered into force 5 December 1994. Start II, banning the use of multiple independently targetable reentry vehicles (MIRVs) on intercontinental ballistic missiles (ICBMs) never entered into force (Treaty Between the Union of Soviet Socialist Republics and the United States of America on the Reduction and Limitation of Strategic Offensive Arms; Moscow, 3 January 1993; expired 5 December 2009 with the entry into force of the Strategic Offensive Reductions Treaty.

[82] Treaty between the Russian Federation and the United States of America on Strategic Offensive Reductions; Moscow 25 May 2002; entered into force 1 June 2003 (Vol. 2350 UNTS 2008, No.

of nuclear warheads on deployed intercontinental ballistic missiles, submarine-launched ballistic missiles, and heavy bombers to 1,550 shored up by a robust verification mechanism.[83]

5.3.2.3 Multi-layered System

The law of arms control is conventional in nature. It is based on a series of bilateral and multilateral treaties rather than customary law. It is further strengthened and supplemented by binding decisions of international organizations, in particular UN Security Council Resolution 1540,[84] and several soft law instruments called the export control regimes (see Chap. 3).[85] The final layer of the law of arms control can be found in the national legal systems as States are obliged to implement and enforce the internationally agreed rules in their domestic legal system. Of course, states parties to an international agreement are obliged to implement and enforce the agreement in accordance with its terms. Moreover, Resolution 1540 creates a universal obligation for all states to "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".[86]

Consequently, an expanding multi-layered system of interconnected legal norms has been created covering weapons of mass destruction, as well as conventional weapons and forces that have to be incorporated in domestic export control law. Despite the high level of regulation, the system faces multiple challenges. Some states still have weapons of mass destruction, and some even do not shy away from using them, as, for example, the chemical weapons attacks in Syria show. The US has withdrawn from the INF-treaty and the Treaty on Open Skies.[87] Other treaties have not entered into force yet, such as the Comprehensive Test Ban Treaty and the Adapted Conventional Armed Forces in Europe Treaty. Furthermore, the

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42195). The treaty was superseded by the New START on 5 February 2011: Treaty between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms; Prague 8 April 2010, entered into force on 5 February 2011 (TIAS 11-205).

[83] The U.S. and Russia have agreed to extend the treaty through 4 February 2026: Agreement between the United States of America and the Russian Federation Amending the Treaty of 8 April 2010; Moscow 26 January 2021 (TIAS 21-203).

[84] UN Doc S/RES/1540 (2004), 28 April 2004.

[85] The politically binding coordinating arrangements within the framework of the current export control regimes include: the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, the Nuclear Suppliers Group and the Zangger Committee (nuclear material and technology); the Australia Group (chemical and biological weapons), and the Missile Technology Control Regime.

[86] As the UNSC acted under Chapter VII of the UN Convention, this obligation is binding on all member States in accordance with Article 25 UN Charter.

[87] In May 2020 the U.S. announced its intention to withdraw from the treaty. The withdrawal took effect on 22 November 2010. Woolf 2020.

question arises whether the existing rules are sufficiently capable of dealing with emerging technologies, such as additive manufacturing, artificial intelligence, big data analytics, bio-technology, and nanotechnology.

5.3.3 Sanctions Law

Throughout history, states have used sanctions as a powerful political tool to exert influence on other states or even to coerce them into changing their behavior.[88] Typically, sanctions were imposed in the context of armed conflicts or disputes falling short of war.[89] Building on that practice, sanctions became part of the collective security system of the League of Nations as an alternative to the use of armed force.[90] One of the fiercest supporters of the sanctions paragraph in the League of Nations Covenant was US President Wilson. Addressing a House of Representative Subcommittee he stated, "Apply this economic, peaceful, silent, deadly remedy and there will be no need for force. It does not cost a life outside the nation boycotted, but it brings a pressure upon the nation which, in my judgment, no modern nation could resist".[91] The League invoked its authority to impose sanctions on several occasions with varying degrees of success, for example, after Italy had invaded Ethiopia in October 1935.[92]

5.3.3.1 UN Collective Security

The prohibition on the use of force as mentioned in Sect. 5.2 is the central element of the present system of collective security in which the international community has tasked the UN to maintain international peace and security (Article 1(1) UN Charter). Within the system, the UN Security Council plays a critical role. After determining

[88] Today, the reasons for sanctions range widely and include support for terrorism, narcotics trafficking, proliferation of weapons of mass destruction, and human rights abuses.

[89] Nevill 2016, p. 234.

[90] See Article 16 of the Covenant of the League of Nations, "Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall ipso facto be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not".

[91] Quoted in Elliott KA (1997) Evidence on the costs and benefits of economic sanctions. https://www.piie.com/commentary/testimonies/evidence-costs-and-benefits-economic-sanctions Accessed 16 February 2021. Padover 1942, p. 108.

[92] Fleming 1935 p. 22. Further League of Nations Sanctions: 1921 Yugoslavia, 1925 Greece, 1932–5 Paraguay and Bolivia, and 1935–36 Italy; Summary of economic sanctions episodes, 1914–2006, Peterson Institute for International Economics. https://www.piie.com/summary-economic-sanctions-episodes-1914-2006 Accessed 16 February 2021.

the existence of a threat to international peace and security (Article 39 of the UN Charter), the Council can take action and even authorize the use of armed force to restore peace and security. The use of force is, however, an *ultimum remedium* and the Council can refrain from military action and opt for less intrusive measures under Article 41 of the UN Charter, such as sanctions.

Modern sanctions can be described as "non-forcible (i.e., non-military) foreign policy measures adopted by states or international organisations and designed, possibly among other things, to influence other states or non-state entities or individuals to change their behaviour or take a particular course of action".[93] They generally take the form of financial sanctions, such as asset freezes and bans on the provision of financial services; trade and arms embargoes;[94] and travel bans.[95]

During the Cold War, the UN Security Council only managed to create two sanctions regimes.[96] The first was established in 1968, targeting Southern Rhodesia,[97] the second a decade later, targeting South Africa.[98] Right after the Cold War had come to an end, the Council became increasingly active. In 1990, it hit Iraq with a full trade embargo after the invasion of Kuwait,[99] followed in 1993 with sanctions on Haiti after the military coup in the country.[100] These comprehensive sanctions imposed by the UN turned out to be a 'blunt instrument'[101] and sometimes, as President Wilson had foreseen, a 'deadly remedy'. The sanctions had a disproportionate humanitarian impact of the civilian population contributing to increasing rates of infant mortality, disease, and malnutrition.[102] Consequently, the UN turned to more focused sanctions, now referred to as targeted or smart sanctions, aimed at specific groups and entities within the sanctioned State. Also, non-State actors, such as terrorist groups, have become subject to sanction regimes as the sanctions on Al-Qaida show.[103] Recently, sanctions programs have been established not so much targeting a particular state or actor, but rather a specific economy sector or topic, such as human rights[104] or cyber

[93] Gordon et al. 2019, p. 2.

[94] Usually preventing the sale, supply, or transfer of weapons to the sanctioned State; Gordon et al. 2019, p. 17.

[95] Gordon et al. 2019, pp. 2–3.

[96] A UN sanctions regime "is a particular package of sanctions measures adopted in relation to a particular state or situation"; Gordon et al. 2019, p. 6.

[97] UN Doc S/RES/253 (1968) of 29 May 1968.

[98] UN Doc S/RES/418 (197) of 4 November 1977.

[99] UN Doc S/RES/661 (1990) of 6 August 1990.

[100] UN Doc S/RES/841 (1993) of 16 June 1993.

[101] UN Doc A/50/60; S/1995/1 of January 1995, Supplement to an agenda for peace: position paper of the secretary-general on the occasion of the fiftieth anniversary of the united nations, para 70.

[102] Gordon et al. 2019, p. 29.

[103] UN Doc S/RES/1267 (1999); UN Security Council Resolution 1267 of 15 October 1999 establishing a sanctions regime to cover individuals and entities associated with Al-Qaida, Osama bin Laden and/or the Taliban.

[104] The UK Global Human Rights Sanctions Regulations 2020 of 6 July 2020 made under the Sanctions and Money Laundering Act 2018.

activities,[105] allowing for the sanctioning of persons and other entities regardless of their relationship with a particular State (horizontal sanctions).[106]

From a legal perspective, UN sanctions are a powerful instrument. As many of the sanctions regimes are established under Chapter VII of the UN Charter, the UN Security Council Resolutions imposing the sanctions are binding on all UN member states pursuant to Article 25 of the UN Charter. In addition, Article 48(1) of the UN Charter instructs the member states to take the necessary action to carry out the decisions of the Security Council. Last, but not least, Council decisions take precedence over other obligations of a member state under any international agreement (Article 103 UN Charter). Therefore, states will have to implement and enforce the UN sanctions in accordance with the terms of the relevant Resolutions and regardless of possible other arrangements the States have previously agreed upon.

5.3.3.2 Legality of Autonomous Sanctions

As the definition of sanctions mentioned above makes clear, the UN does not have the exclusive right to impose sanctions. Today, states, as well as international organizations, in particular the EU, have become very active in this field and have imposed sanctions in addition to or even absent a UN sanction as an alternative means of achieving their foreign and security policy goals. This type of sanctions is referred to as autonomous (or sometimes: unilateral) sanctions. Whereas the UN sanctions are part of the global collective security system and consequently firmly based on the provisions of the UN Charter, the legality of autonomous sanctions is less evident.

The starting point is that under international law, a sovereign state is not obliged to maintain economic relations with other states and, therefore, has the legal discretion to choose with which other states it will conduct business.[107] Consequently, it may unilaterally restrict or even terminate its international trade relations in the absence of a treaty commitment limiting that freedom. In international law, such a unilateral action can be qualified as retorsion. A retorsion does not violate any obligation owed to any particular state or the international community as a whole. Although it is often described as an unfriendly act of a state *vis-à-vis* another state, it is a lawful reaction to an unfriendly or unlawful act by that other state and therefore admissible.

As sanctions are coercive by nature they can be illegitimate on other grounds. Although typically they cannot be classified as use of force,[108] they may breach the principle of non-intervention[109] that denies states the right to intervene in the internal

[105] Council Regulation (EU) 2019/796 of 17 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States (OJ L 129I, 17.5.2019, pp. 1–12).

[106] Portela (2019) The spread of horizontal sanctions. CEPS Commentary, 7 March 2019. https://www.ceps.eu/the-spread-of-horizontal-sanctions/ Accessed 16 February 2021.

[107] Ohler 2012, para 14; Joyner 2016, p. 193.

[108] The use of force or the threat thereof is prohibited under international law, as was discussed in Sect. 5.2. Use of force normally entails some measure of military force. Obviously, economic sanctions do not meet that requirement.

[109] Study European Parliament 2020, p. 54.

or external affairs of any state.[110] Regarding the principle, the UN Declaration on Friendly Relations holds, "No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind."[111] Whether or not sanctions meet this fairly high threshold has to be decided on a case by case basis. In the Nicaragua-case, for instance, the Court held that it was unable to regard US economic actions with respect to Nicaragua, including a full trade embargo,[112] "as a breach of the customary-law principle of non-intervention".[113]

Sanctions may also be unlawful when issued in breach of a treaty obligation. Examples are trade provisions in bilateral 'treaties of friendship, commerce, and navigation' and 'bilateral investment treaties'.[114] With respect to the former, the International Court of Justice in the Nicaragua-case found that the US trade embargo of Nicaragua had violated Article XIX of the Treaty of Friendship, Commerce and Navigation between the two States.[115] Also, after the US had reimposed its sanctions against Iran following its withdrawal from the Iran Nuclear Deal[116] in 2018, Iran instituted proceedings against the US before the International Court of Justice.[117] In its application Iran claims that the re-imposition of the sanctions violates the Treaty of Amity, Economic Relations and Consular Rights between both states.[118]

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[110] Recently, China called US sanctions on Chinese officials over their alleged role in suppressing dissent in Hong Kong an interference with China's internal affairs and a violation of international law; Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on 30 November 2020. https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1836732.shtml Accessed 16 February 2021.

[111] UN Doc A/RES/2625(XXV) of 24 October 1970, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter.

[112] Adopted by the U.S. President by Executive Order on 1 May 1985; ICJ 27 June 1987; Nicaragua Case, para 279.

[113] Nicaragua Case, para 245.
Ohler 2012, para 21.

[114] Treaties of friendship, commerce, and navigation were typically concluded in the post-World War II era whereas bilateral investment agreements, focusing on the terms and conditions for private investments, have become more common today; Ohler 2012, para 20.

[115] Treaty of Friendship, Commerce and Navigation; Manugua, 21 January 1956 (Vol 367 UNTS 1960, No. 5224). Article XIX provides that "Between the territories of the two Parties there shall be freedom of commerce and navigation". Nicaragua Case, para 279.

[116] Joint Comprehensive Plan of Action; Vienna, 18 October 2015; came into effect 16 January 2016; Annexed to UN Doc S/RES/2231 (2015). Signatories: Iran, China, France, Russia, UK, U.S., Germany and the EU.

[117] Application Instituting Proceedings Filed in the Registry of the Court on 16 July 2018, Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v United States of America).

[118] Treaty of Amity, Economic Relations and Consular Rights; Tehran, 15 August 1955 (Vol. 284 UNTS 1959–1959, No. 4132).

The most important limitations on a state's discretion to limit international trade relations can be found in the GATT and the GATS,[119] in particular the provisions such as the most-favored nation clause;[120] tariff concessions;[121] the principle of national treatment;[122] the prohibition of quantitative restrictions;[123] and market access rules.[124] However, exceptions are allowed under the general exceptions clauses[125] and the security exceptions clauses (the latter are discussed in Sect. 5.2).

Sanctions that are unlawful in principle can, however, be justified when imposed in response to a previous violation by the targeted state of its international obligations towards the sanctioning state (an internationally wrongful act). Pursuant to the Draft Articles on state responsibility[126] these countermeasures must be aimed at the target state's compliance with its international obligations (Article 49(1)) and must be proportionate (Article 51). The other side of the coin is that secondary sanctions (discussed hereinafter) or sanctions legislation promulgated to further other policy goals, cannot be based on the rules of State responsibility.[127]

Finally, one particular type of sanctions, the so-called secondary or extraterritorial sanctions, has raised broad concerns as they can violate international law. Typically, a national sanctions law or regulation targets the sanctioned state and regulates the behavior of the sanctioning state's nationals, foreign persons present on its territory, and companies incorporated in the state. There is, in other words, a nexus between the regulating state and the person subject to the regulation. Secondary sanctions cast the net much wider and can also subject foreign persons and corporations abroad to the sanction regulations, without any real nexus between the state and these persons. The US in particular has regularly imposed such secondary sanctions[128] causing fierce critique from their trade partners. Several states and the European Union have enacted legislation to block the effects of these secondary sanctions (see Chap. 11).[129]

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[119] Ohler 2012, para 21; Malloy 2003, pp. 378–379. For a detailed analysis see Ruys and Ryngaert 2020.

[120] Article I GATT and Article II GATS.

[121] Article II GATT.

[122] Article III GATT and Article XVII GATS.

[123] Article XI and XIII GATT.

[124] Article XVII GATS.

[125] Article XX GATT and Article XIV GATS.

[126] Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/RES/56/83 (2002) of 28 January 2002.

[127] European Parliament 2020, p. 55.

[128] The Cuban Democracy Act of 1992, the Cuban Liberty and Democratic Solidarity Act of 1996, the Iran and Libya Sanctions Act of 1996 (renamed: the Iran Sanctions Act), the Iran Freedom and Counter-Proliferation Act of 2012, the Iran Threat Reduction and Syria Human Rights Act of 2012, the Cuban Assets Control Regulations and the Iranian Transactions and Sanctions Regulations, the Countering America's Adversaries Through Sanctions Act of 2017, the Protecting Europe's Energy Security Act of 2019, Protecting Europe's Energy Security Clarification Act of 2020, and the Hong Kong Autonomy Act of 2020.

[129] EU Blocking Statute: Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom (OJ L 309, 29.22.1996, pp. 1–6), as amended.

5.3.4 Human Rights Law

The final subdiscipline of international law impacting national export control law is human rights law. Human rights refer to the basic rights and freedoms to which all humans are entitled, such as the right to life, freedom of expression, the right to work, and the right to education. Although human rights did not become an international law topic until the second half of the 20th century, the fundamental rights of individuals have been part and parcel of the constitutions of many democracies since the Enlightenment. Historic examples include the US Bill of Rights, passed by the US Congress in 1789 and the French Déclaration des droits de l'homme et du citoyen adopted by the National Constituent Assembly in the same year.

Traditionally, individuals were not a primary concern of public international law. However, some international agreements did attempt to protect the rights of groups of individuals, such as the 1890 Brussels Conference Act pursuing to end slavery. That attitude changed in the wake of World War II, although initially somewhat hesitantly. Article 1(3) of the UN Charter identifies "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion" as one of the purposes of the new organization, without defining or clarifying the scope of the concept.[130] The UN Human Rights Commission took on the task to draft a document delineating the fundamental rights of all people, which the General Assembly adopted in 1948 as the Universal Declaration of Human Rights.[131] The Declaration covers two types of human rights. The first are the civil and political rights requiring the state to refrain from taking specific actions in order to respect the individual rights that include such matters as the right to life, the freedom of religion, the freedom of speech, the right to due process and a fair trial, and the prohibition of torture. The second type of rights are economic, social and cultural rights, which states are strongly encouraged to realize. These rights include the right to work, the right to education, and the right to health.

The Declaration is regarded as the foundation of international human rights law. Yet, as a resolution of the General Assembly, it lacks legal authority and does not create any legally binding obligations for the Member States.[132] Therefore, the Declaration was supplemented with two universal treaties: the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.[133] Together, the Universal Declaration of Human Rights and both Covenants are referred to as the International Bill of Human Rights. Soon, additional

[130] Further references to human rights are to be found in the Preamble and Articles 13, 55, and 56.

[131] UN Doc A/RES/217 (1948) of 10 December 1948.

[132] Today, the rights contained in the Declaration are considered to be part of international customary law.

[133] UN Doc A/RES/2200A (XXI) of 16 December 1966; International Covenant on Civil and Political Rights (ICCPR); New York, 16 December 1966; entered into force 23 March 1976 (Vol. 999 UNTS 1983, No. 14668) and the International Covenant on Economic, Social and Cultural Rights; New York, 16 December 1966; entered into force 3 January 1976 (Vol. 993 UNTS 1983, No. 14531).

international agreements followed, establishing a comprehensive network of interlocking human rights instruments. These include treaties covering specific human rights matters[134] as well as regional treaties.[135]

Human rights law has an increasing impact on export control law. The human rights situation in a state can be a ground to deny or restrict the transfer of specific military or dual-use items to that state. For instance, EU member states are obliged to assess an application for the export of military technology and equipment against several criteria, including the respect for human rights in the country of final destination.[136] Also, they may prohibit or impose an authorization requirement on the export of a dual-use item not listed in the EU Dual-Use Regulation.[137]

Also, human rights law affects other fields of international law relevant to export control law. In particular sanctions law is increasingly affected by human rights concerns. As mentioned above, human rights considerations caused the shift from comprehensive to targeted sanctions in the early 1990s. In turn, the new sanctions raised questions about the individual rights of the individuals who were designated under the sanctions regulations. Most targeted sanctions include measures such as assets freezes and travel bans which may affect the designated person's right to property,[138] right to family life, and the freedom of movement. Also, it is sometimes hard for an individual to legally challenge his designation and listing, which violates his right to effective judicial protection.[139]

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[134] Convention on the Prevention and Punishment of the Crime of Genocide; Paris, 9 December 1948; entered into force 12 January 1951 (Vol. 79 UNTS 1951, No. 1021); the United Nations Convention Against Torture; New York, 10 December 1984, entered into force: 26 June 1987 (Vol. 1465 UNTS 1996, No. 24841); and the Convention on the Rights of the Child; New York 20 November 1989; entered into force 2 September 1990 (Vol. 1577 UNTS 1999, No. 27531) just to mention a few.

[135] The European Convention for the Protection of Human Rights and Fundamental Freedoms; Rome 4 November 1950; entered into force 3 September 1953 (Vol. 213 UNTS 1955, No. 2889); the American Convention on Human Rights; San José, 22 November 1969; entered into force 18 July 1978 (Vol. 1144 UNTS 1987, No. 17955); and the African Charter on Human and Peoples' Rights; Nairobi, 27 June 1981; entered into force 21 October 1986 (Vol. 1520 UNTS 1997, No. 26363).

[136] Article 2(2) of Council Common Position 2008/944/CFSP of 8 December 2008 defining rules governing control of exports of military technology and equipment (OJ L 335, 13.12.2008, pp. 99–103).

[137] Article 8 of Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items (OJ L 134, 29.5.2009, pp. 1–296).

[138] Property rights are no universally recognized rights; it is however included in Article 1 of the Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[139] The UN has established an Ombudsperson (the sanctions regime under Resolution 1276 (1999)) and focal points (other sanctions regimes) to challenge a specific listing/designation. Under EU law sanctioned persons can challenge their listing before the EU General Court.

Moreover, states and international organizations can issue sanctions in response to human rights violations. In 2012, the US enacted the Magnitsky Act,[140] targeting Russian officials who were held responsible for the death of Sergei Magnitsky, a Russian tax lawyer who was imprisoned while investigating a multimillion fraud involving Russian officials. In prison, he was severely maltreated leading to his death in 2009.[141] In 2016 the Global Magnitsky Act[142] was signed into law, allowing the US to target individuals anywhere in the world responsible for committing human rights violations or acts of significant corruption. The EU[143] and several states followed suit and have similarly enacted 'Magnitsky laws'.[144]

5.4 Synthesis and Conclusion

Export control law can be described as the set of domestic and international laws and regulations as well as policy rules and commitments that are applicable to and regulate the export, re-export, transit, and transfer in any manner of goods, technology, and software. It forms a nascent, still developing field of law consisting of a domestic part, which is the traditional basis of this field of law, as well as an international part. The latter is the focus of this chapter, which explores the various established subdisciplines of public international law contributing to domestic export control law. The relevant international norms and rules are laid down in international agreements (treaties), are part of international customary law, set out in decisions of international governmental organization, and non-legal commitments flowing from the membership of export control regimes.

The various fields of public international law that export control law draws on, together form a set of related rules and norms that complement and reinforce one another. The law of armed conflict protects the victims of armed conflict and restricts the means and methods of warfare. Parts of this field of law relevant for export control law include neutrality law, which protects the rights of neutral states to continue international trade in armed conflict, and weapons law, that set limits to the use of certain weapons. The latter subset of rules is connected with the law of arms control, another subdiscipline of public international law, that covers the deployment

[140] Russia and Moldova Jackson–Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012, Pub. L. 112–208, 126 Stat. 1496 (19 U.S.C. 2101).

[141] Parliament of the Commonwealth of Australia 2020, p. 38.

[142] Global Magnitsky Human Rights Accountability Act of 2016, Pub. L. 114–328, div. A, title XII, subtitle F (Sections 1261 et seq.), 130 Stat. 2533 (22 U.S.C. 2656).

[143] The EU Global Human Rights Sanctions Regime is laid down in Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses (OJ L 410 I, 7.12.2020, pp. 13–19) and Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses (OJ L 410 I, 7.12.2020, pp. 1–12). The regime cannot be invoked with respect to corruption.

[144] Canada, Estonia, Latvia, Lithuania, and Kosovo: Parliament of the Commonwealth of Australia 2020, p. 41.

of certain types of weapons, as well the production, testing, stockpiling or transfer thereof.

The use of armed force by states, in general, is limited under the system of collective security in which the UN is the leading authority to maintain international peace and security. Upon determination of a threat to the international peace and security, the UN Security Council can decide to take far-reaching measures, including the imposition of arms embargoes or economic sanctions, which States have to implement and enforce when the Council has acted under Chapter VII of the UN Charter. The law of sanctions covers this type of coercive measures, also allowing States and other international organizations to impose sanctions in addition to or even absent an UN-imposed sanction. As international practice is growing steadily, new types of sophisticated sanctions, tailored to specific situations are developed,[145] raising questions about the legality of this practice. Also, sanctions may give rise to various human rights concerns and already have led to changes in the scope and application of sanctions and the development of human rights-focused sanctions.

(Member) States are obliged to incorporate the international rules in their national legal systems and subsequently implement and enforce them in accordance with the relevant terms of the international instruments. Over time, domestic and international export control law has developed into a challenging and dynamic legal discipline. Although it is not an established subdiscipline of law in its own right, it is critical to consider all mutual related parts of export control law together to understand its impact on international military trade.

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References

Aubin Y, Idiart A (2016) Export control law and regulations handbook: a practical guide to military and dual-use goods trade restrictions and compliance. Kluwer International, Alphen aan den Rijn

Boothby W (2016) Weapons and the law of armed conflict, 2nd edn. Oxford University Press, Oxford

Boothby W (2020) Control in Weapons Law. In: Bartels R et al (eds) Military Operations and the Notion of Control under International Law. Liber Amicorum Terry D. Gill. T.M.C. Asser Press, The Hague, pp. 36–392

Bothe M (2013) The law of neutrality. In Fleck D (ed) The Handbook of International Humanitarian Law, 3rd edn. Oxford University Press, Oxford

Coppen T (2016) The law of arms control and the international non-proliferation regime. Preventing the spread of nuclear weapons. Brill/Nijhoff, Leiden/Boston

De Jong MAG (2005) Staat van oorlog. Wapenbedrijf en militaire hervorming in de Republiek der Verenigde Nederlanden 1585–1621. Uitgeverij Verloren, Hilversum

Drew P (2017) The Law of Maritime Blockade: Past, Present, and Future. Oxford University Press, Oxford

[145] Gordon et al. 2019, p. 3.

Fleming DF (1935) The League of Nations and Sanctions, Proceedings of the Annual Session Southern Political Science Association, No. 8, December 26, 1935; 20–23
Gordon R, Smyth M, Cornell T (2019) Sanctions Law. Hart Publishing, Oxford/Portland
Grotto AJ (2009) Non-Proliferation Treaty (1968). Max Planck Encyclopedia of Public International Law
Haellmigk P (2017) Catch-all controls on non-listed goods in the EU and strategies for managing them. WorldECR 23 February 2017. https://www.worldecr.com/archive/catch-controls-non-listed-goods-eu-strategies-managing/ Accessed 16 February 2021
Heintschel von Heinegg W (2013) Special provisions concerning methods of naval warfare. In: Fleck D (ed) The Handbook of International Humanitarian Law, 3rd edn. Oxford University Press, Oxford
Joyner DH (2016) International legal limits on the ability of states to lawfully impose international economic/financial sanctions. In: Ronzitti N (ed) Coercive diplomacy, sanctions and international law. Brill Nijhoff, Leiden, 190–206
Krause K, MacDonald MK (1993) Regulating arms sales through World War II. In: Burns RD (ed) Encyclopedia of arms control and disarmament, Vol. 2. Charles Scribners's Sons, Macmillan Publishing Company, New York
Lentzos F (2019) Compliance and enforcement in the biological weapons regime. UN Institute for Disarmament Research, WMD Compliance and enforcement series, paper four
Malloy MP (2003) Ou est votre chapeau? Economic Sanctions and Trade Regulation. Chicago Journal of International Law, 4:2, 371–384
Myjer E (2020) The importance of arms control law. In: Bartels R et al (eds) Military Operations and the Notion of Control under International Law. Liber Amicorum Terry D. Gill. T.M.C. Asser Press, The Hague, pp. 349–368
Myjer E, Herbach J (2018) Arms control law as the common legal framework for CBRN security. In: Malizia A, D'Arienzo M (eds) Enhancing CBRNE safety & security: proceedings of the SICC 2017 conference. Springer, Cham. https://doi.org/10.1007/978-3-319-91791-7_24. Accessed 28 July 2021
Nevill P (2016) Sanctions and commercial law. In: Happold M, Eden P (eds) Economic sanctions and international law. Hart Publishing, Oxford, Portland
Ohler C (2012) Unilateral trade measures. Max Planck Encyclopedia of Public International Law
Padover SK (ed) (1942) Wilson's Ideals. American Council on Public Affairs, Washington
Parliament of the Commonwealth of Australia (2020) Criminality, corruption and impunity: Should Australia join the Global Magnitsky movement? An inquiry into targeted sanctions to address human rights abuses. House of Representatives, Joint Standing Committee on Foreign Affairs, Defence and Trade, Canberra. https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/MagnitskyAct/Report Accessed 16 February 2021
Ruys T, Ryngaert C (2020) Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Responses to, US Secondary Sanctions. British Yearbook of International Law 1-116, Oxford Academic (oup.com). Accessed 16 February 2021
Stockholm International Peace Research Institute (1971) The arms trade with the third world. Almqvist & Wiksell, Stockholm
Study European Parliament (2020) Extraterritorial sanctions on trade and investments and European responses. Policy Department for External Relations, Directorate General for External Policies of the Union
Trebilcock MJ, Trachtman J (2020) Advanced introduction to international trade law, 2nd edn. Edward Elgar Publishing, Cheltenham, UK/Northampton, US
Woolf AF (2020) The Open Skies Treaty: background and issues. Congressional Research Service, updated 23 November 2020
Woolf AF, Nikitin MBD, Kerr PK (2020) Arms control and non-proliferation: a catalogue of treaties and agreements. Congressional Research Service, updated 26 March 2020

Joop Voetelink is associate professor of Law at the Faculty of Military Sciences of the Netherlands Defence Academy. He defended his Ph.D. on Military Operational Law at the University of Amsterdam in 2012. Currently, his research focusses on export control law in general with a specific focus on sanctions, extraterritoriality, and emerging technologies.