

## **Weapons under international law – emerging principles for stifling tools of violence**

My talk today is about weapons and violence, and it is about law.

I am going to talk about many types of weapons: nuclear, chemical, biological, firearms, swords, and lasers.

Weapons are the intersection of humanity's proclivity for inter-species violence and our proclivity for making tools. Homo sapiens is a weapons-making species.

Weapons technologies have impacted our history, of course. Even more impactful has been the wisdom of how we should control weapons.

Today, I want to tell a good news story.

International law can claim some real success in controlling weapons. Much remains to be done, but recent accomplishments deserve praise.

More pointedly, I hope to persuade you that now is the time to press the advantage on behalf of world peace.

The level of global violence is declining, and my thesis today is that this is due in substantial part to better legal controls on who has weapons, which types of weapons, and ultimately on how weapons are used.

My thesis is that international law works.

From the beginning, weapons signified power, bestowing victory on whoever could use them best. Apollo gave Heracles the bow; Ares' son, Aetolus, created the spear. The Hindu hero Arjuna got his weapons from the god Siva. In mythology and in actual history, at civilization's beginning, the power to use weapons was law, and vice versa.

Legal principles emerged slowly.

Medieval theorists from Augustine thru Erasmus grappled with the realization that *force* and *violence* are opposite manifestations of the same behavior.

Evil exists, and the use of force to defend the community from lawless violence, protect the vulnerable and vindicate justice is a moral obligation.

Critically, these medieval theorists posited that sovereigns are inherently subject to international law at least as to war.

Under standards manifest by natural law, only by being properly authorized and carried out with respect for principles of proportionality and mercy may the legal use of force be distinguished from illegal violence.

Those medieval ideas were literally blown up by the discovery of gunpowder's force and the development of explosive weapons – guns and artillery, transforming warfare and thereby transforming governance.

To study the 16<sup>th</sup> and 17<sup>th</sup> Centuries is to see how explosive weapons made mass violence so compulsory as to impel millions of young men to walk into waves of bullets, generation after generation.

International law emerged from the explosive weapons revolution. For a moment, I want to set the context of the themes of my talk in Europe of 4 centuries ago. Simply put, international law failed to address the explosive weapons revolution and therefore left humanity exposed to centuries of weaponized violence.

With explosive weapons, the biggest and best equipped armies win. Necessarily, arsenals grew rapidly.

Production of huge quantities of precisely functioning weapons had to be routinized.

Explosive weapons became an industry; the one unalterable rule of this business was more business.

The only potential flaw in this system would have been the prospect of no more war.

The onset of nonviolence would stifle the survival of explosive weapons. They just uselessly take up space unless destroyed by other weapons.

But if the soldier is killed and his gun blown up, and if more replacements are incessantly forthcoming, then the demand for weapons is essentially insatiable.

And thus explosive weapons produced perhaps the most suicidal form of warfare ever devised.

Boys were trained to walk upright, performing intricate and repetitive loading and aiming maneuvers, all in the face of enemy fire.

Killing was reduced to a fairly abstract function, and the ethos of battle fell from something at least rhetorically chivalric into indiscriminate slaughter.

In the hundred years from 1561 to 1659, every year witnessed at least one battle with more than 5,000 casualties. Most years had many more.

During the Thirty Years War alone, throughout large swaths of central Europe, population declined by as much as a third – an attrition rate not even rivalled until World War II.

Into this crucible, international law was born.

The great founders of international law, Grotius, Gentili, Puffendorf, writing to stem the flood of violence spiraling around them, posited two legal propositions that continue to resonate and that deserve to be re-visited.

First is the principle of State primacy which holds that States are not subject to international governance except insofar as they consent.

Second is that war is a legitimate mechanism of the international order governed by different rules than peace; the normal rules of criminal law do not, therefore, apply.

Both of these principles, with regard to controlling modern weapons, should give way and are in fact giving way – a conclusion I'll support in a moment.

But to expound for a moment according to international law's founders, there can be no "international" governance system higher than States. Only national sovereigns could legally determine what military power was appropriate to vindicate its interests. Each State must have the unsupervised authority to prepare and undertake war.

Moreover, wronged States were entitled to seek relief through war. Thus war was seen as an appropriate way to remedy illegality -- an important legal mechanism in the international order.

All entities must be able to seek legal redress for wrongs done to them. But while individuals could seek redress for wrongs through judicial means, States lacked an equivalent capacity and must, therefore, enforce their rights militarily.

In this view, determining the legality of war was comparable to determining the legal rightfulness of any other claim.

War became lawsuits, and lawsuits became wars.

There could be as many causes of wars as there could be of lawsuits. And there were.

The international law of war was put forward to serve the same function as procedural rules for lawsuits -- both optimized the contest of claims.

The war-as-lawsuit analogy, however, ignored the horrendous fact that tens of thousands of young men were dying incessantly on battlefields all over Europe.

Whatever might be said about the woes of lawsuits, not even the most rancorous have comparable consequences.

On reflection, grounding the assertion that war was a legitimate dispute resolution mechanism into the very foundation of international law was a reversion to the concept of trial by might elevated to entire nations: the litigating State with better combat skills won.

It has thus been said that international law emerged as an intellectual balm to whatever pangs of conscience might have been felt over war's mounting death toll – an apology for violence that disregarded contemporary pleas to construct a peaceful society of nations.

Here was the basis for Immanuel Kant's contempt for international law's "sorry comforters" whose works were "dutifully quoted in justification of military aggression."

And most critically, international law's expansion of the legality of war disregarded the imperative of peace.

It is curious that, for centuries, among the thousands of pages written by international legal scholars, so few words were devoted to peace.

The definition of war was an important topic, but not the definition of peace.

The purpose of international law, it was explicitly asserted, was to identify a sovereign's responsibilities with regard to war, but apparently sovereigns had no responsibility with regard to peace.

War, all agreed, was an institution that law should regulate, but peace was ethereal without form or substance.

What international law did not do was to penetrate the dynamics that led sovereigns to engage in war and disincentivize the continuous reinforcement of warfare as a legitimate social activity. What international law did not do was stem the era's bloodshed.

No one can know if the extraordinary level of violence of the explosive weapons era might have been any more or less had Grotius or anyone else written a very different treatise on war and peace.

Perhaps the unprecedented levels of war of that era would have been exactly the same.

But international law would be a fairly useless contribution to humanity if its proponents denied that it bore any relation to the course of human events, especially on a matter so serious as war and peace.

International law must be accountable for what happens on at least an intellectual level.

Allow me now to move forward with two counter-propositions, counter to those put forward by international law's founders:

First, States should not have primacy with regard to war and with regard to weapons; as all humanity is necessarily affected by weapons, all humanity should participate in governance of them.

Second, international governance about weapons should be framed through the lens of criminal law; the idea of a separate legal condition of war should be abandoned.

The era of explosive weapons raged for five centuries, ending abruptly in August 1945 with the detonation of nuclear weapons. As before, these weapons transformed warfare and therefore transformed governance, but there the similarity to explosive weapons ends.

Use of nuclear weapons, unlike explosive weapons, would end demand for them. Their perpetuation compelled that they never be used.

And from this central imperative emerged the strategy of existential deterrence --a ritualized substitute for violence that set the foundation for decades of nuclear arms control.

Existential deterrence framed national (and therefore international) security as a matter of mutual perception: it depended not on the force used (indeed, the actual use of force contradicts deterrence) but upon convincing adversaries that breaches of a State's security would unleash a devastating retaliation utterly destroying the attacker.

The actual battlefield was replaced in strategic relations by holding hostage the very existence of human civilization in a mutual suicide pact.

At first, reducing risks associated with use of nuclear weapons seemed patently undesirable; the escalatory ladder so integral to existential deterrence had to be easily and surely climbed. For deterrence purposes, the greater the horror reflected upon the better.

Each superpower soon realized that deterrence compelled it to deploy forces with precise characteristics and capabilities that would sustain mutual perpetuation of the nuclear weapons standoff. Security came to be seen as mutual: the more secure one side felt, the greater the security of the other due to the reduced risk of preemptive attack.

Nuclear arms control's first task, therefore, was to regularize each side's planning in rough parity with the other side and prescribe methods by which leaders could change each other's attitudes and expectations through communication, military planning, and displays of intent.

From the hotline, to test-bans, to prevention of accidental or mistaken war, then to force parity, and eventually to force reduction, superpower nuclear arms control evolved by necessity. Cumulatively, these mechanisms must be considered a qualified success if for no other reason than we are here to talk about it.

More incisively, it is difficult to deny that nuclear weapons have lost much of their potency, especially for the P-5 States for whom more flexible and effective tools -- diplomatic, financial, and military -- have emerged to execute national strategies far better than do nuclear weapons.

Even proliferation dangers, while still major concerns, are evolving into a condition of stasis.

The Iranian nuclear enrichment program remains a grave challenge, and no one can know if some secure equilibrium is being reached. Yet, the technical leadership of the International Atomic Energy Agency and the policy governance of the UN Security Council has enabled cooler heads to prevail, demonstrating the significant value of international governance in this domain.

North Korea's abominable isolation from any international governance is a throwback to the doctrine of State primacy: by withdrawing from its NPT (Nuclear Nonproliferation Treaty) obligations, North Korea claims that the international community lacks authority to interfere. A stalemate perpetuates.

A similar albeit less incendiary comment could be made with regard to India, Pakistan, and Israel, each of whom has refused to enter the NPT in order to develop and to deploy nuclear weapons.

But here the proliferation dominos end; there is no other State anticipated to join the nuclear club. Since nuclear weapons were invented, the threat of new proliferants has never been so low.

Increasingly, the challenge of nuclear proliferation is viewed as a law enforcement function. International cooperation now focuses on how to ensure the security of nuclear materials and key equipment and how to prevent smuggling of these critical items to criminals and terrorists.

The upcoming Nuclear Security Summit in The Hague signals the international community's commitment to prevent nuclear smuggling.

The Summit will advance a criminal law approach to stanch the proliferation of nuclear weapons, impelling all States to harmonize their national legislation and strengthen police investigative capabilities everywhere.

Equally welcome is the global spread of nuclear weapons free zones that build trust among regional rivals that nuclear weapons will not be permitted by anyone for any purpose in the region.

Let me commend the ongoing discussions for establishing an Arctic Nuclear Free Zone.

Such a zone raises the as-yet unresolved issue of how to include (or not) nuclear weapons states.

The Arctic States include the four Scandinavian States, Canada, and the United States and Russia who presumably would have to declare that their territory (at least in or near the Arctic region) is nuclear weapons free.

Never before has a proposed nuclear weapons free zone included nuclear weapons states, and how such a zone can be effectively formed will say much about the future of nuclear weapons.

Before leaving nuclear weapons, I must draw attention to the biggest policy challenge. The five nuclear weapons States are obligated by Article VI of the Nuclear Nonproliferation Treaty to pursue negotiations to the goal of general and complete nuclear disarmament.

The Nuclear Weapons States each profess their compliance with this obligation, and, at least recently, total nuclear weapons stockpiles are reducing, but at an extremely slow pace.

The treaty says nothing about when any specific nuclear condition must be satisfied or threshold met.

How should compliance with that obligation be assessed? Right now, that question is unanswerable.

And as it is impossible to say by when any stage of general and complete disarmament must be achieved, the obligation has lost much of its legal significance.

In line with my criticism of the doctrine of State primacy – I suggest that it is time to revive the idea of United Nations control over nuclear weapons, an idea originally put forth by the United States in 1946.

Even if we grant that nuclear weapons continue to occupy a security-enhancing role by defining a ceiling of violence, there is no reason to perpetuate the unchallenged assumption that the most destructive weapons ever created must be under the exclusive dominion of several States.

For many reasons, the United Nations should gain capacity to exercise control over those weapons.

This should be seen as happening very incrementally: small steps that do not up-end the balance of international security built over the past seven decades. Principally, United Nations' institutional capabilities for appropriately guiding the transition from national to international control of nuclear weapons deserve careful analysis; something that hasn't happened since 1946.

I do not propose global disarmament. I advocate a transition to global governance of nuclear weapons. Here is a meaningful challenge for international law's next generation.

I must skip over chemical and biological weapons lest my time expire except to say that experience with international governance of these weapons demonstrates law's enormous value. Yes, Syrian use of chemical weapons last August is an awful rent in the system, made more repugnant by the apparent inability to hold anyone accountable.

Nevertheless, the Chemical and Biological Weapons conventions testify to the global commitment to entirely eradicate these weapons by not only prohibiting their use but by strictly overseeing the entire infrastructure and supply chain for producing these weapons which is the obvious precondition to their use, and by empowering law enforcers to pursue violators of the norms against these weapons.

The respective systems for eradicating chemical and biological weapons are international law's most robust and comprehensive weapons control systems. Looking forward, the world is safer from chemical and biological threats than ever, protected both by advancing emergency response capacities to limit consequences and, most important, by transnational cooperation to detect, investigate and stop these weapons ever being used again.

And now, let me return to a leftover challenge.

I said earlier that the explosive weapons era ended in 1945, but that obviously did not mean that the use of explosive weapons ended.

Indeed, in the last 70 years, explosive (now referred to as “conventional”) weapons have been and are responsible for the overwhelming majority of the world’s violence.

These are the weapons that kill.

Yet, despite this fact, arms control came late to address these weapons, only in 1997 when Oscar Arias and other Nobel Prize winners demanded that the UN General Assembly pay attention to the huge toll being taken by weapons residual from Cold War-incited arms races.

By 2001, the Firearms Protocol to the Convention on Transboundary Organized Crime was negotiated, impelling States to criminalize illicit trafficking of conventional weapons. The Program of Action to Combat the Illicit Trafficking of Firearms has encouraged States to establish systems for marking weapons so that they can be traced to their source. The International Tracing Instrument complements this effort as does the INTERPOL system for enabling law enforcers to track weapons used in crimes.

Yet, as of a year ago, no international legal mechanism held States accountable for transferring weapons that fuel most of the world’s violence and perpetuate the worst human rights violations.

Conventional weapons account for most of the world’s actual killing and destruction, yet the providers of weapons lived openly and lavishly with virtual impunity.

Until recently, it was very difficult to say that a State might violate international law by transferring weapons.

Manifesting the principle of State primacy, States had the unsupervised authority to determine the “licit-ness” of a conventional weapons transfer.

Any accountability was essentially circular: as the State authorized its conventional weapons transfers, they were, by legal definition, licit; but in truth there might be nothing whatsoever licit about the weapons being transferred or their recipients.

With this loop of logic, the conventional weapons market flourished as eager governments approved weapons transfers to recipients of questionable intentions.

And as to weapons smuggled without any authorization, prosecutors in most jurisdictions faced high hurdles in bringing culprits to justice.

In terms of international law, weapons traffickers could not be prosecuted if the State with jurisdiction over the trafficked arms did not care enough to pursue the matter.

Thus, the good news is that, last June, the Arms Trade Treaty (ATT) was adopted by the United Nations General Assembly by a vote of 154-3-23.



The ATT develops a very important proposition of international law.

For the first time, States are responsible not only for the weapons they use to commit aggression or grave crimes but also for supplying weapons to a foreign entity who so uses them.

Before, weapons were exclusively the legal responsibility of their users who, if they commit crimes, might be held accountable; but, from the prosecution of Nazi industrialists at Nuremburg until recently, weapons suppliers to States or non-States that commit heinous crimes have not been held liable for those crimes absent explicit evidence of participation in a joint enterprise.

The ATT, by asserting legal responsibility for supplying weapons in violation of international law or for use to commit grave international crimes and human rights violations, the ATT makes an important accretion to international law.

It means that to authorize such weapons transfers is to commit an international wrong, and every weapons transferring official is at risk of violating the ATT if authorized transfers of weapons are used horrifically.

Moreover, under the ATT, an exporting State cannot deny its legal responsibility for its weapons transfers. It may not argue that, under its export control system, it did not enquire about the risk that the recipient of the exported weapons will use them to violate international law. The defense of willful blindness is no longer available.

As to stopping weapons trafficking -- the movement of weapons without State approval, the ATT unfortunately does not cut new ground, merely reiterating obligations that could already be found in international law.

But in this context, I would draw your attention to the fact that many of the world's worst weapons traffickers now reside in United States' prisons. Viktor Bout, Monser al-Kassar, and numerous other weapons traffickers whose munitions were responsible for so much of the death and destruction of the 1990s have been prosecuted successfully.

It is significant that the United States asserted jurisdiction in these cases on the grounds that these traffickers knew that their weapons would be used to kill Americans. Under U.S. statutes, suppliers of weapons who know that those weapons will be used to kill Americans or harm American interests must face punishment under U.S. law.

It is time for every nation to enact laws asserting jurisdiction over unauthorized weapons traffickers if trafficked weapons are used to kill its nationals or threaten its interests.

The principle is clear: weapons trafficking must be an international crime, enforceable by every nationality. Every weapons trafficking transaction would entail substantial risk of arrest and prosecution, and, as the crime would be of common and mutual interest, extradition of culprits for prosecution would be more readily achievable.

In historic terms, this would be new. Never before have weapons sellers been prosecuted on the basis of a widespread consensus that their behavior is a crime. But there is increasing precedent for this proposition which, when thought about, should not be so controversial.

Finally today, I want to look into the future for just a moment and discuss high energy lasers and aerial /space missile launchers. These are weapons with enormously high capitalization requiring continuing *raison d'être*. Their development would, inherent in the technology, affect the entire world.

My proposition, therefore, is that the entire world should control their development.

Here there is a story to tell, and it is an ugly one: In 2007, China tested its anti-satellite weapons capabilities by launching a missile at a no longer functioning satellite of its own – the target had outlived its utility and was just floating in space. The missile instantly exploded it into a cloud of debris comprising at least 3,000 pieces larger than 10 cm. There may be as much as 150,000 pieces of debris too small to track, traveling at about 15,000km/hr, capable of sheering through a space suit or even a satellite's exterior, posing a serious threat to working satellites. Last year, debris from the explosion collided with a Russian satellite. The debris will expand for eternity, endangering generations who will scarcely understand the logic of what happened.

I raise this because Chinese scholars have asserted that China violated no treaty obligation and therefore what is not prohibited is, for States, allowed, and there can be no nonconsensual international governance of how a State chooses to pursue its security interests.

And thus we see repeated the claim that, with regard to weapons, States exercise primacy and there is no super-sovereign to say otherwise on behalf of humanity.

But this proposition must not hold. Globalization is a fact, and no one, whether State or non-State, should claim unsupervised authority to develop and use weapons of this scale.

Various nations, including my own, continue to pour vast resources into aerial and space lasers, although the good news here is Obama's recent cancellation of the Aerial Laser Weapons system.

But decisions regarding aerial and space-based laser and laser-directed anti-missile systems should not be left to national governments. If such systems are valuable, humanity should be charged. It is time to at least begin a discussion of how the United Nations might undertake that responsibility.

In summation, the world is flooded with weapons, dangerous and expensive vestiges of centuries of warfare followed by the superpower nuclear confrontation, and automatic rifles are everywhere. I propose this way forward: As to the largest weapons having the gravest and most widespread impact for humanity as a whole, humanity through the United Nations should increasingly exert dominion; as to all other weapons, they should increasingly be viewed as challenges of global law enforcement pursuant to applicable standards of due process of law.

Nothing should happen heedless of the countless nuances and intertwined dependencies of international security in this era. But it is far better to advance toward a defined goal than to perpetually re-invoke old fears and habits.

This much is clear: Never before has nonviolence been so deeply rooted in the fabric of humanity, and if there was ever cause for celebration, that's it. Yet, we have inherited weapons and law

from the past that continue to imperil our world. I think it is time to re-work these legacies, to retain all the valuable work that has been accomplished while jettisoning all the errant dogmas. And I think international law should be at the front of this effort.

Thank you for your attention.