

The Strange Difficulty of Establishing an Arms Trade Treaty

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In the last three years I worked as a doctor with Médecins Sans Frontières in various places in the Middle East, assisting victims of the violent conflicts there. For me personally the impact of this experience, not as a representative of MSF specifically, nor even as a doctor, but as an Australian observing first-hand what goes on in other parts of the world, was one of shocked, increased awareness, beyond anything I had previously realised, of the extent and intensity of long-term suffering that armed conflict leaves in its wake, and of how unfairly that suffering is allocated. Tens of thousands of victims of armed conflict wait for possible treatment in each of the countries where I worked, while MSF treats people by the twenties and thirties. Most of these victims, men, women and children, are ordinary people trying to lead ordinary lives despite the violence, rather than as willing participants.

Here is the story of one of my patients from Iraq, seen in Amman, Jordan, last year: forty-year-old Ahmad was attacked while driving a truck-load of onions into Baghdad in 2005, when he was thirty-three years old. He was driving the truck for his older brother who ran a market garden in their village to support the extended family. Ahmad had his ten-year-old son Hussein with him. Near the centre of Baghdad there was a traffic hold-up at a busy intersection. He was worried because no-one liked being stopped in Baghdad in those days. Suddenly American soldiers were there, shooting at people in their stationary vehicles. Little Hussein was killed by a bullet to his head. Ahmad lost his right eye and his lower jaw. After initial emergency treatment, Ahmad continued to suffer not only from the loss of his son, the loss of his eye and the gross facial injuries he had received, but also from recurrent infections and severe facial pain, both treated ineffectively. He was unable to speak until recently and eats only with great difficulty, not in front of other people. He has been brought by Médecins Sans Frontières for treatment on their reconstructive surgery program in Amman three times now and has had over forty surgeries. That is a lot of anaesthetics, sterilised instrument packs, theatre teams getting scrubbed up and surgeons working painstakingly for hours on end in response to an event of a few seconds' duration.

I also came to realise how little concern the world shows for most people like Ahmad, despite the world's involvement. Governments who perpetrate wars, or support wars for their own advantage – the American or Australian governments, for example – are simply not held accountable, by themselves or anyone else, for this incidental suffering. Military commanders are simply not accountable for disabling and disfiguring noncombatants for life, as a side-effect of their military operations. Those individuals or commanders or governments who use weapons recklessly are simply not accountable – nor discriminated against in the supply of arms, despite their misuse. Nor do we ask those who manufacture and profit from the trade in conventional weapons to bear any responsibility. They say they are not responsible for how weapons are used, they just sell them. They do advertise their wares and promote sales, however, and hold arms fairs, and persuade governments to buy their wares, and they do not discriminate in whom they sell their products to. What is more, although some governments purport to have rules, there is virtually no enforced regulation of their activities from any source. There is more regulation of the world trade in bananas than of the arms trade, for instance, while weapons are sold indiscriminately to regimes and groups of all kinds. This is an international free-for-all, a lawless zone, determined only by what is financially profitable. It includes everything from warships, to battle tanks, to fighter jets, to machine guns, as well as ammunition, frequently stockpiled and poorly stored. This international arms trade is worth an estimated \$70 billion, and the main players among the states of the world are all permanent members of the UN Security Council with the power to veto anything restricting their actions.

Fifteen hundred people die in armed conflict somewhere in the world every day, one per minute; and for every death there are up to twenty-eight people maimed or disfigured. Civilians are the vast majority of those killed, disabled or forced from their homes. Nineteen countries use tens of thousands of child soldiers, yet the world supplies them too. Others engage in ethnic cleansing, or persecution of minority groups, or other 'crimes against humanity', but can still buy weapons from any source. In addition, the destabilising accumulation, spread and misuse of arms contributes, to an inestimable degree, to the breakdown of law and order in many regions, adversely affecting good governance and socio-economic development.

International law is the legal framework which regulates the interaction between different nations or states – and which could regulate the arms trade but currently does not. It is like domestic law,

which is intended to ensure the principled running of an individual state, but also differs in significant ways. Its institutions are different, and it seeks to control the behaviour of its subjects differently. Domestic law can be drawn from a number of sources, including legislation and case law, for example, and international law is also established in a variety of ways. These include treaties, the customary ways states conduct themselves, and the decisions of international judicial bodies. Organisations such as the United Nations and some of its various organs, including the General Assembly and the International Court of Justice, facilitate its use.

International law is, however, more difficult to enforce than domestic law. States are not bound by it unless they agree to be bound, whereas individuals are always subject to the laws of the land in which they reside. International treaties, for example, cannot bind third parties without their consent. States are entitled to enter only into those treaties that suit them and their interests, and will rarely be willing to agree to treaties prohibiting actions they commonly take. Nor does a police force prevent states from violating international laws they are said to have agreed to, or breaching treaty obligations after signing. Even state membership of the United Nations, and constructive participation thereafter, for example, are voluntary, and, although an International Court of Justice exists, no state is forced to have its citizens tried before it. This voluntary nature of international law means that it is sometimes ineffective, but its importance lies in providing structure and precedence. It also carries the authority of international public opinion. There can be significant pressure, in fact, from the states who do agree to a particular measure or treaty, as well as from the UN and other bodies, encouraging dissenting states either to sign too, or at least to modify their behaviour.

Another weakness in the application of international law is that when states sign treaties they may or may not completely accept every provision of the treaty and may or may not be prepared to obey its rules unconditionally. Sometimes states accept some of the rights and obligations imposed, but not others. In this case, they sign the treaty with specific reservations. This saves them from being bound by those specific provisions of the treaty, or allows them to change their obligations with regard to the particular provisions. States who have entered reservations can always withdraw them at a later date, however, and this can be a face-saving way of eventually agreeing despite opposition by vested interests at home.

With regard to the lack of globally agreed rules governing the conventional arms trade specifically, many countries have voiced their concern. The UN has also been repeatedly confronted with the negative impact of lax regulations. The uncontrolled availability of weapons and ammunition is recognised by the UN as leading, in itself, to human suffering, political repression, crime and terror among civilian populations in all parts of the world. Irresponsible weapons transfers destabilise whole regions, enable the violation of Security Council arms embargoes and contribute to human rights abuses. Investment is discouraged and development disrupted in countries experiencing a high level of armed conflict, and the peaceful work of the UN in delivering food aid, for example, improving public health, eradicating poverty, protecting refugees, and so on, is repeatedly undermined. The UN has attempted to maintain a register, at least, of conventional weapons sales and ammunition stockpiled, but has had poor co-operation from member countries and has been dogged by a lack of transparency in arms and ammunition dealing.

International regulation might take the form of an Arms Trade Treaty, and such a treaty has, in fact, been negotiated between the world's nations for some years, under the auspices of the United Nations and with Australia as an active participant. It is about to be finalised in the next few months, after which it is expected to be signed and ratified by the majority of the world's governments, though you would hardly know it from the scant coverage this has been given in the Australian media despite its humanitarian importance and despite Australia's involvement.

A treaty, as defined by the Vienna Convention on Treaties, is 'an international agreement concluded between states in written form and governed by international law'. It can involve as few as two states, in which case it is known as a bilateral treaty. Otherwise it is known as a multilateral treaty. Many multilateral treaties involve well over a hundred states, and many of those related to weapons and warfare are widely subscribed to by the international community, though not completely. They can go by a number of names, including 'treaty', 'agreement', 'convention', 'protocol', 'covenant', 'memorandum of understanding' or 'exchange of letters'.

A number of bodies may be consulted in the wording and establishment of any treaty, including non-government organisations, subject-matter experts, and a variety of stakeholders. Resolutions of the United Nations General Assembly often initiate treaties, though not necessarily. The Arms Trade Treaty, accordingly, is the result of years of lobbying at the UN and elsewhere by various

NGOs and interest groups from many countries. It has its origins in Resolution 61/89 adopted by the UN General Assembly in December 2006. This requested countries to submit their views on a treaty of this kind, and set up a group of experts to deliver a report on the feasibility of the endeavour. More than 100 countries supported the idea and their views were collected in a UN Secretary General report issued in 2007. The UN subsequently approved their report and established a date for international negotiation of the treaty. As in the negotiation phase of any such treaty, states representatives need to gather to engage in discussions and make decisions about specific provisions.

In 2009 an ‘Open-Ended Working Group’ – open to all states – met twice. The UN General Assembly then decided to convene a full-blown conference on an arms trade treaty in 2012 ‘to elaborate a legally binding instrument on the highest possible common international standards to be adopted on the trade and transfer of conventional weapons.’ Four more meetings of the Open-Ended Working Group took place subsequently, with a change of name to the ‘Preparatory Committee Meetings’, the last one being in February, 2012.

Australia participated, but the Australian Government’s overall position on this, like that of many states, is somewhat murky and contradictory. While Department of Foreign Affairs and Trade (DFAT) personnel have worked towards securing ‘an open and transparent trade in arms’, the Department of Defence has negotiated a bilateral treaty with the United States that largely removes what little reporting currently exists in Australia’s weapons trade with the USA. We already know little of Australia’s ‘defence-related’ exports to the US, or anywhere else, and the 2007 Australia-US Defence Trade Cooperation Treaty ensures we know less. This treaty eliminates the need for export licences for an exclusive clique of wealthy defence-sector companies trading within an ‘approved community’. Foreign Minister Bob Carr says on Australia’s behalf at the multinational Arms Trade Treaty negotiations that ‘we are seeking a comprehensive agreement on arms control, enforceable through public reporting to the UN, leading to greater enforcement of UN arms embargos and sanctions’, while in Australian Defence Exports Control Office newsletters, however, our Department of Defence maintains that Australia has a strong export control system and does not want an Arms Trade Treaty that makes defence trade ‘unnecessarily burdensome for the defence industry’. The Department of Defence sees an ATT as being there to support the international trade in weapons as a legitimate

commercial activity, rather than curb it, by helping to build a level playing-field for the Australian industry to operate on, while making it more difficult for ‘rogue participants’ to conduct ‘destabilising trade’ in arms. They do not explain what they are worried might be ‘destabilised’ by the ‘rogue’ traders or what is ‘stabilised’ by our own trade.

Other countries are similarly, or more greatly, impeded in their ability to support the spirit of the Treaty. The United States, for example, has a huge arms industry to consider, compared to ours, as well as the opposition of the American gun lobby to a treaty of any kind that regulates the sale of guns by US manufacturers both domestically or internationally. The US also had a presidential election underway in 2012 during ATT talks. The planned UN Conference to negotiate the final wording of Arms Trade Treaty took place in New York in July 2012 and lasted for four weeks without reaching a final agreement. Agreement was intended to be reached by consensus of all participating states and the final draft under consideration was eventually a weak one, in addition, designed to accommodate multiple reservations of multiple participating states.

It was better than nothing, however, and the story is not yet over. No-one expected it to stop the trade in arms, nor stop armed conflicts, nor even stop the reckless use of dangerous weapons by those engaged in armed conflict. What it was intended to do is require subscribing governments, and their citizens who manufacture and trade in these weapons, to acknowledge that responsibility and accountability do exist, at least to some extent.

In October the UN General Assembly discussed the results of the conference, expressing disappointment that no agreement had been reached but noting that the draft document produced reflected some progress, and expressing determination to build on this. They decided to convene a further conference in New York in March 2013, with 157 ‘yes’ votes and 18 abstentions but no ‘no’ votes. This conference is to be governed by the same rules of procedure as the July 2012 conference, including a consensus requirement on agreements, to be based on the current draft treaty, and to be called the ‘Final Conference’ on the Arms Trade Treaty. It may well elaborate a more strongly-worded treaty and be more successful in coming to an agreement for various circumstantial reasons, but if no consensus is reached in March the ‘Final Conference’ draft document will be put to the vote at the UN General Assembly. There it will certainly be accepted

by the vast majority of states representing a majority of the world's population, but perhaps not by the key arms traders, who will nevertheless be put under some pressure by its acceptance at the General Assembly and subsequent signing by multiple states.

According to the draft arrived at by the July 2012 conference, each state when considering whether to approve arms exports *should consider taking feasible measures to avoid the arms being diverted to illicit markets, being used for gender-based violence or violence against children, or against ethnic minorities, or being used for transnational organised crime*. All hard to oppose, you might think, and the draft also emphasised the role of national governments, rather than some international body, in deciding how to interpret this, and contained various loopholes allowing noncompliance if it was in conflict with existing defence agreements or trade agreements between states, including the exclusion of state-to-state transfers and gifts from one government to another. Australia and the United Kingdom, and most others agreed to the draft, yet it was opposed by several other national governments including the United States backed by Russia and China, and the talks failed to obtain the required consensus. Amnesty International referred also to 'obstructive behaviour' by Algeria, Egypt, Iran, North Korea and Syria.

The opposition of the US was profoundly significant, of course. The US representative spoke favourably during the conference but said at the last minute that the US 'needed more time' to assess the draft treaty. This US line was backed by China and Russia. Some commentators have noted the irony in this, that one issue the three big powers can agree on is to support each other in trading in arms. They blocked a deal, and even if the United Nations General Assembly eventually passes it with an overwhelming majority, they can also block the motion with their vetoes in the United Nations Security Council. The behaviour of the US at the July conference was also seen by some as enigmatic, however. Was the US signalling, for example, that the US president did wish to support the treaty but not right now?

An Australian DFAT meeting in September expressed the urgency of recommencing negotiations immediately to ensure that enthusiasm and political will are not dissipated. This meeting favoured continuation of a consensus model, to keep all players on board. This is sometimes criticized as being something the US wants particularly in order that they can water down things they do not want, and the Australian government has been similarly criticized as

colluding with this by supporting the consensus approach. On the other hand, it is important to keep the US on board . It would be very difficult for the US to completely pull out of the process at this stage of the game having been quite active previously, it was also noted. The DFAT meeting also expressed an intention to protect the treaty so far proposed from being watered down further, and claimed that the general view of supportive states was that the text needed to be strengthened. They also stressed the importance of behind the scenes diplomacy to bridge difference and enable this strengthening of the text, and there has been some engagement with the US apparently since July. More recently Bob Carr said, in addition, that if Australia got its temporary seat on the Security Council, which it has done, he would be using this to pursue the ATT outcome.

Discussions in the UN General Assembly ending in a joint press statement by UN Diplomats on November 7th, 2012, which included this re-iteration of what is at stake: ‘Every day we are reminded of the need to bring the arms trade under control. In Syria, we have seen the death toll rise well over 30,000 with weapons and ammunition pouring into the country for months now. While agreeing on a deal next year is what’s needed, we do not want any Arms Trade Treaty. We need a treaty that will set tough rules to control the arms trade, that will save lives and truly make the world a better place.’

The current draft has a few ‘missing pieces’ which must be resolved to ensure it is an effective treaty. One major concern is that ammunition, a deadly trade of over US\$4 billion annually, which needs to be better regulated and monitored, is not yet properly included. Another clause could exempt weapons transfers from the treaty if they are labeled as part of a ‘national defense cooperation agreement’, leaving many current and future agreements outside the realm of an ATT. Campaigners are also worried that the threshold for denying an arms transfer is currently set too high, so that some irresponsible deals could still slip through the net.

Addendum: MAPW contributions:

MAPW made a relevant submission to our own government on the draft Australian Defence Trade Controls Regulations 2012, calling on the Australian government to respect the spirit of the ATT in anticipation, by ensuring that all our transfers of arms are risk assessed on a case-by-

case basis with no exceptions, and that all arms exports should be recorded and reported, and details made public. None of this currently happens in Australia. MAPW also submitted that the concept of 'commercial in confidence' should not apply, and indicated that MAPW opposes any legislation allowing transfers between so-called 'trusted partners' without an individual licence for the deal.

MAPW also supports the work of the Pacific Small Arms Action Group including its lobbying with regard to the ATT. Small arms were initially not included in the draft treaty, but now are.

MAPW's international affiliate, International Physicians for Prevention of Nuclear War has an 'Aiming for Prevention' Program with several projects in train, one of which is support for strengthening the terms of the ATT.

Amnesty International has been very active publicising the ATT in Australia, where it has been an uphill battle getting anything about it in the mainstream media. MAPW has supported these efforts and I have given talks at two different Amnesty International public forums in Melbourne.

I have also written an opinion piece which has been published on the internet by *Right Now*, an Australian Human Rights organisation run by volunteers at Melbourne University, which also produces a hard-copy magazine annually. MAPW hoped to get this piece in one of the major Australian newspapers but without success.

Amnesty International also staged a media stunt in Perth in early November 2012 when Hilary Clinton arrived for talks with Australian representatives about joint defence arrangements, with tomb stones, and people being dead bodies, outside the talks venue. They requested other civil society groups to join in, and their stunt was supported by Oxfam and Act for Peace as well as Perth members of MAPW, and made it onto the national television news that evening.