

# Back to Basics

## TRANSFER CONTROLS IN GLOBAL PERSPECTIVE

In December 2006, a large majority of UN member states voted to begin a process that could lead to the adoption of a legally binding Arms Trade Treaty (ATT). This capped a year marked by other important achievements, notably the adoption of *The Geneva Declaration on Armed Violence and Development (Geneva Declaration)*, and a major disappointment, the 2006 UN Programme of Action Review Conference (Review Conference). Although their focus has narrowed following the Review Conference setback, UN member states are now attending to fundamentals.

Much of the illicit small arms trade depends, in fact, on the control—or lack of control—of legal transfers. Key challenges in this area include clarifying existing responsibilities, deciding whether and how to address the question of transfers to non-state actors, and developing means of effectively implementing transfer licensing criteria.

The first part of the chapter reviews recent activity at the global level. Prominent among the factors that contributed to the Review Conference failure to reach a substantive outcome is the inability of the UN small arms process to accommodate aspects of the issue falling outside of the traditional arms control/disarmament paradigm. The 2006 session of the UN General Assembly's First Committee picked up some of the pieces left by the Review Conference, adopting several important resolutions that provided, among other things, for a continuation of the *Programme* process. At the same time, however, the committee's 2006 session confirmed and amplified the recent trend away from consensus adoption of the small arms resolutions.

**The subject of arms transfer controls has risen to the top of the UN agenda.**

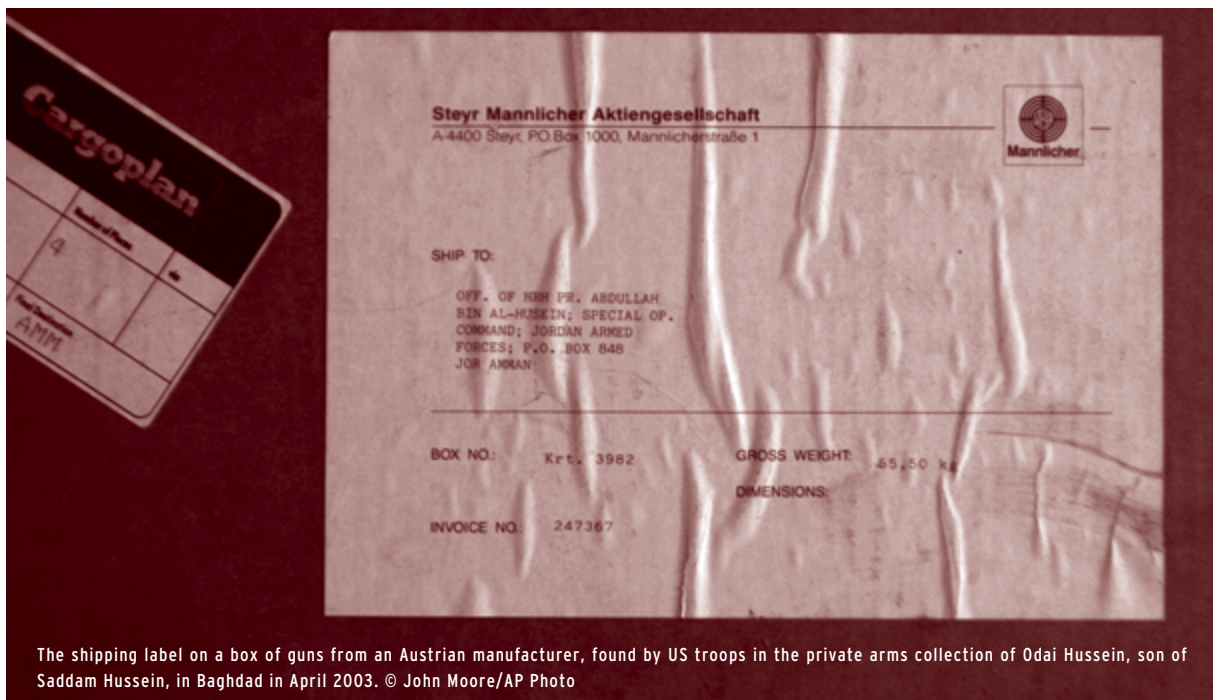


The UN, long the leading standard setter at the global level, now has competition. In June 2006, 42 states and 17 international organizations and NGOs from all parts of the world adopted the *Geneva Declaration*. This puts a more intricate—and potentially more dynamic—stamp on global small arms activity, though at the cost of its further fragmentation. Although not a problem as such, fragmentation of the global process carries certain risks. These include inconsistency among measures, as well as the possibility that the universal framework, still provided by the *Programme*, will be neglected.

For the moment, despite the loss of consensus support, UN member states are forging ahead on several fronts, including that of transfer controls. Championed by civil society at an early stage, governments are now prioritizing this issue. The second part of the chapter describes the latest transfer control initiatives and explores key questions and challenges in some depth.

**Existing responsibilities.** Paragraph II.11 of the *Programme* points out that national export licensing decisions must be 'consistent with the existing responsibilities of States

Child's drawing with Arabic script: 'Janjaweed and soldiers in West Sudan and other areas.' © Human Rights Watch



under relevant international law' (UNGA, 2001b). This, however, begs the questions, 'What are these "existing responsibilities"? What international law is "relevant"?' Government officials responsible for arms licensing decisions, along with their national legislatures, need more specific guidance than that provided by paragraph II.11. The chapter concludes that states' existing obligations in relation to small arms transfers are extensive. Relevant, binding legal norms include direct limitations on certain transfers, as well as the rule holding states 'complicit' in violations of international law committed with arms that they transfer notwithstanding a known (or knowable) risk of misuse.

**Non-state actors.** The question of banning the transfer of small arms and light weapons to non-state actors (NSAs), deeply divisive when the *Programme of Action* was adopted in July 2001, remains so today. What are NSAs? This seemingly simple question accounts for much of the polarization of the NSA issue. A series of discussions organized by the UK-based Biting the Bullet Project (BtB) in 2003–05 has helped clarify that only NSAs that are *not authorized* to import arms by the state where they are located are, in fact, a major concern.

Some governments nevertheless maintain that, in certain cases, the transfer of arms to unauthorized NSAs is justified. The BtB-led discussions considered several policy options: (1) a total ban on transfers to unauthorized NSAs; (2) a presumption of non-transfer with an international framework that would allow for 'hard case' exceptions; and (3) addressing NSA transfer concerns through regular licensing systems and principles. Through reference to cases from Rwanda and Afghanistan, the chapter highlights the practical difficulty of meeting criteria that might otherwise provide grounds for a 'hard case' exception.

**The 'existing responsibilities of States under relevant international law' are, in fact, extensive.**

**The challenge of implementation.** Whatever the outcome of discussions on global criteria, the critical challenge is arguably the effective implementation of such principles. Guidelines identifying factors to be considered when deciding whether to authorize a particular transfer can help states ensure these decisions are systematic, rigorous, and objective. The chapter presents new guidelines developed by the International Committee of the Red Cross designed to help states assess likely compliance with rules regulating the conduct of armed conflict before any arms transfer.

In its conclusion, the chapter notes that UN member states have much to consider as they attempt to come to terms, collectively, with their 'existing responsibilities . . . under relevant international law' as required by the *Programme of Action*. This includes the risk that the UN small arms process, recently revived, could again fade if the current focus on core transfer control commitments proves to be superficial. ■