Proposal on the Draft Arms Trade Treaty (CRP1) relating to international humanitarian law and human rights law

Article 3: Prohibited Transfers

Submitted by Austria, Costa Rica, Estonia, Ghana, Honduras, Liechtenstein, Lithuania, Netherlands, Malta, Mexico, Panama, Paraguay, Portugal, Switzerland, (...)


2. A State Party shall not authorize any transfer of conventional arms if the transfer would violate its relevant international obligations, in particular those relating to the international transfer of, or illicit trafficking in, conventional arms.

Explanation: Each State, irrespective of the ATT, is bound by its international obligations. These obligations do not derive solely from treaties to which one is a Party, but also from customary international law. CRP1 unduly restricts the obvious duty not to compromise one's international legal obligations by only mentioning treaty obligations ("under international agreements to which it is a Party"). Para. 2, as amended, merely restates the existing situation under international law. The elements "within the scope of this Treaty" and "international" before "transfer" are redundant.

3. A State Party shall not authorize any transfer of conventional arms if by the transfer it would aid or assist in the commission of genocide, crimes against humanity, or war crimes constituting grave breaches of the Geneva Conventions of 1949, or serious violations of Common Article 3 of the Geneva Conventions of 1949.

Explanation: The replacement of "a" with "any" at the beginning of the para. brings it in line with para. 1 and 2, both of which use the same introduction. As in para. 2, the element "within the scope of this Treaty" is redundant.

The formulation "for the purpose of facilitating" suggests that only if a State directly intends to facilitate the commission of one of the three core crimes would it be obliged to refuse an export. This direct standard of intent is too restrictive. It is not realistic to expect States to admit such an intention when assessing a given export.
Furthermore, it does not correspond to international law governing the responsibility of States or the obligations set out under the Genocide Convention. As amended, para. 3 makes reference to article 16 of the Articles on the Responsibility of States for Internationally Wrongful Acts of 2001, prepared by the International Law Commission (see annex to A/RES/56/83). Article 16, entitled “Aid or assistance in the commission of an internationally wrongful act”, provides that “A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.” This provision, as commented by the International Law Commission, has been recognized by the International Court of Justice as reflecting customary international law in its 2007 Genocide Case (Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Judgment of 26 February 2007, at para. 420). An alternative and equally valid formulation would be “where it is aware, or has reason to believe that, the arms transferred will be used in...”.

Para. 3 of CRP1 does not sufficiently capture all conduct that would be considered a war crime under international law. The notion of war crimes is well-recognized, and under international law goes beyond the codified treaty obligations mentioned in CRP1. As of now, CRP1 does not cover violations in relation to the conduct of hostilities – for example, intentionally directing attacks against the civilian population or individual civilians – whether committed during an international or non international armed conflict. Thus, it is more restricted than the already existing international obligations which apply to States under general international law. The proposed deletion of “constituting grave breaches...” would change this. The same result could be achieved by inserting the word “including” after “war crimes”. The para. would thus end with “war crimes including grave breaches of the Geneva Conventions of 1949...”.

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