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

Article 4: National Assessment

Submitted by Costa Rica, Ghana, Honduras, Liechtenstein, Panama, Paraguay, Switzerland, (...)

1. In considering whether to authorize an export of conventional arms within the scope of this Treaty each State Party shall assess whether the a proposed export would contribute to or undermine peace and security. If the proposed export is likely to undermine peace and security, the State Party shall not authorize the export.

Explanation: "A" proposed export would seem to be more correct than "the" in pure editorial terms. In the same vein, "within the scope of this Treaty" would seem to be redundant. The second sentence clarifies that if the assessment leads to the conclusion that the arms transfer would result in worsening the security of the receiving State or its surrounding region, denial of authorization should be the result.

2. Prior to authorization and pursuant to its national control system, the In considering whether to authorize an export of conventional arms, each State Party shall assess whether the a proposed export of conventional arms eeuud is likely to:

(a) be used to commit or facilitate a serious violation of international humanitarian law;

(b) be used to commit or facilitate a serious violation of international human rights law;

(c) be diverted to the illicit market or for unauthorized end use; or

(d) be used to commit or facilitate an act constituting an offence under international conventions and protocols relating to terrorism to which the transferring State is a Party.

Explanation: The phrase "Prior to authorization and pursuant to..." can easily be replaced by the same wording used in para. 1. It is more straightforward. Again, "a" proposed export would seem to be more correct than "the" in pure editorial terms. The use of "is likely to" clarifies that the consideration is one of specific risks, not hypotheses. Lit. c is taken from para. 6 below, as combating diversion of conventional arms is, beside responsible trade of conventional arms, one of the key objectives of the ATT.
3. In making the assessment, the exporting State Party shall apply the criteria set out in paragraph 2 of this article consistently, and in an objective and non-discriminatory manner, taking into account relevant factors, including information provided by the importing State.

4. In assessing the criteria set out in paragraph 2 of this article, the exporting State Party shall also consider taking risk mitigation measures available to it, including confidence-building measures and jointly developed programmes by the exporting and importing States.

Explanation: The introduction “In making the assessment...” in para. 3 and “In assessing the criteria set out...” in para. 4 are redundant. The switch from “may” to “shall” in para. 4 would appear to be appropriate given that what is called for is a mere consideration of measures. The addendum “available to it” recognizes that the number of risk mitigation measures available to an exporting State Party may be rather limited.

5. If, after conducting the assessment called for in paragraphs 1 and 2 of this article, and after having considered the mitigation measures provided for in paragraph 4 of this article, the State Party finds that there remains a substantial risk of any of the consequences under paragraph 2 of this article, the State Party shall not authorize the export.

Explanation: The term “overriding” risk is very ambiguous and implies that the exporting State party is free to balance the humanitarian consequences of an export with other, undefined interests. This would effectively eliminate the compulsory nature of article 4 and also undermine article 3. “Substantial” risk is the term that should be used instead. It is more objective, while still leaving a certain amount of discretion to authorities in determining what it implies in specific cases.

6. As part of the assessment, each State Party, when considering a proposed export of conventional arms under the scope of this Treaty, shall also take into account whether there is a substantial risk of any of the consequences set out in this paragraph, and in addition consider taking feasible measures available to it, including joint actions with other States involved in the a transfer, to avoid the that arms are:

(a) being diverted to the illicit market or for unauthorized end-use;

(b) being used to commit or facilitate armed violence, including gender-based violence or violence against children;

(c) being used for transnational organized crime;

(d) becoming subject to corrupt practices; or
(e) adversely impacting the development of the importing State.

Explanation: “As part of the assessment” is a shorter form of “when considering... under the scope of this Treaty”. The addition “also take into account whether there is a substantial risk that...” would make explicit that the adverse consequences identified in para. 6 should also be factored into the decision of whether or not to authorize an export. The ambiguous expression “feasible” is better replaced with the more objective “available to it”, as in para. 4. “A transfer” would appear to be the better formulation than “the transfer” at the end of the chapeau.

Lit. a on diversion to the illicit market is not lost but reinserted in para. 2 above. Lit. b on gender-based violence and violence against children, which deserve special mention, should be expanded to include the broader category of “armed violence”. If there is a substantial risk that arms exported would be used to unlawfully kill or injure persons, this should inform the consideration of whether to grant an export authorization and of whether any preventive measures can be taken.