



Syria: The legality of arming the rebels after the lifting of the EU arms embargo

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As death and destruction continue unchecked in Syria, there have been increasing calls from some quarters for a more active policy of support for the secularist opposition on the part of Western governments, especially since the interventions of some regional actors are said to be having a strong influence on the conflict, favouring Islamist forces and the Syrian Government.

The EU arms embargo was lifted at the end of May 2013, meaning that the transfer of arms, subject to certain conditions, could be legal under EU law. Questions of law, both UK and international, remain, however.

- Arming the rebels could be seen as an illegal use of force, contrary to Article 2(4) of the UN Charter
- It could be said to be a breach of the principle of non-intervention
- It is unlikely but not impossible that the UK would be culpable for any human rights abuses committed by others with UK-supplied weapons
- The Arms Trade Treaty, which the UK signed in June 2013, will probably not change the situation much when it comes into force, but it does require States to abide by their other international commitments, such as those in the UN Charter
- Any transfer would have to be judged against the UK arms export control rules, which impose significant conditions on applications to send weapons. Crown immunity would apply to government gifts but, in theory, these would still have to comply with the arms export criteria
- It has been suggested that sending arms to Syria could be interpreted as a criminal offence under UK anti-terrorist legislation but there are a number of obstacles to establishing this in court.

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1 EU law

1.1 Sanctions and an arms embargo on Syria

Wide-ranging sanctions, including an arms embargo, were originally imposed on Syria in May 2011.¹ In January and June 2012, further restrictions were imposed, including on equipment for monitoring and intercepting telecommunications and certain goods that might be used for the manufacture and maintenance of equipment which might be used for internal repression.² Another Decision in July required member states to inspect vessels and aircraft passing through their territory towards Syria if they had reasonable grounds to suspect that the cargoes were embargoed items.³

According to an EU External Affairs [Factsheet](#) of 28 February 2013 the arms embargo consisted of:

- Prohibition on the export and import of arms and related material to and from Syria.

Prohibition on the export of equipment which might be used for internal repression and export restrictions on certain other equipment, goods and technology that might be used for internal repression or for the manufacture or maintenance of such products. The measure includes a prohibition on related financial assistance as well as insurance and reinsurance. Non-lethal military equipment and technical assistance may be provided under certain conditions.

- Obligation for member states to inspect vessels and aircraft if there are reasonable grounds to believe they carry arms, related material or equipment which might be used for internal repression. This applies in member states' seaports, airports and in their territorial sea, in accordance with international law. Items that may not be exported from the EU to Syria must be seized.⁴

1.2 EU embargo lifted

On 27 May, after lengthy discussions, the EU Foreign Affairs Council decided to lift the arms embargo part of the package of restrictive measures on Syria. The council said that Member States had agreed to the following conditions for the transfer of arms to Syria:

- the sale, supply, transfer or export of military equipment or of equipment which might be used for internal repression will be for the Syrian National Coalition for Opposition and Revolutionary Forces and intended for the protection of civilians;
- Member States shall require adequate safeguards against misuse of authorisations granted, in particular relevant information concerning the end-user and final destination of the delivery;
- Member States shall assess the export licence applications on a case-by-case basis, taking full account of the criteria set out in Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment.

¹ Council Decision 2011/273/CFSP and Council Regulation No 442/2011

² Council Regulation (EU) 36/2012 18 January 2012 and Council Regulation (EU) 509/2012 16 June 2012

³ Council Decision 2012/420/CFSP (23 July 2012)

⁴ [The European Union and Syria](#), Factsheet, EU, 28 February 2013

Member States will not proceed at this stage with the delivery of the equipment mentioned above.⁵

The Council agreed to review the position before 1 August 2013 on the basis of a report from the High Representative and consultations with the UN about the attempts by the US and Russia to organise political discussions between the Syrian Government and the opposition.

2 Legality under international law

There is at present nothing that imposes a clear blanket ban on sending arms to Syria. The Security Council has failed to impose UN sanctions on Syria, and Russia, for example, has continued to supply arms to the government. The arguments against that have largely been political or security-related rather than legal.

The EU embargo being scrapped, the transfer of arms to the Syrian rebels is now legal, at least under EU law and subject to the conditions set out above. There are, however, still questions to be answered about the legality of arms transfers.

2.1 Would it be an unlawful use of force?

Supplying weapons to Syrian opposition groups could breach the UN Charter's prohibition on the use of force, unless one of the recognised exceptions applies.

Arming and training rebel groups could in some circumstances be considered a threat or use of force contrary to [Article 2\(4\) of the UN Charter](#). For example, the International Court of Justice (ICJ) held in the *Nicaragua* case that the US's alleged provision of arms and training to rebels "can certainly be said to involve the threat or use of force against Nicaragua." (Supplying funds to them, however, would not).⁶

Interestingly, in the *Nicaragua* case the ICJ also considered that supplying arms to rebels was not an "armed attack" that would trigger the right to self-defence by the state on the receiving end of the rebels' activity.⁷ The US, however, generally rejects such a distinction between "use of force" and "armed attack", so it might be concerned that if it supplies arms to the Syrian rebels, the Syrian government might attack the US in self-defence.⁸

There are three circumstances in which states can use force legitimately:

- the state in which the force is used consents
- the UN Security Council authorises it
- self-defence

Taking the first of these, clearly the current Syrian government would not consent to other states arming the opposition. But if the current opposition became the recognised government, the picture would change.

Secondly, there is no Security Council Resolution authorising states to arm the Syrian rebels. Indeed, doing so might in some circumstances be contrary to [UN Security Council Resolution](#)

⁵ [Council declaration on Syria](#), Foreign Affairs Council, 27 May 2013

⁶ [Military and Paramilitary Activities in and against Nicaragua \(Nicaragua v. United States of America\)](#). Merits, Judgment. ICJ Reports 1986, para 228

⁷ [Military and Paramilitary Activities in and against Nicaragua \(Nicaragua v. United States of America\)](#). Merits, Judgment. ICJ Reports 1986, para 238

⁸ See Ashley Deeks, "[Arming Syrian Rebels: Lethal Assistance and International Law](#)", *Lawfare*, 1 May 2013

2083 (2012), which prohibits supplying arms to persons or entities linked to al-Qaeda.⁹ Some rebel groups in Syria apparently have links with al-Qaeda.¹⁰

Thirdly, it might be hard to argue that a state supplying arms to the Syrian opposition was doing so in self-defence. It would have to show that:

- there had been an “armed attack”;¹¹
- the need for individual or collective self-defence was instant, overwhelming and immediate;
- there was no viable alternative; and
- the force used was proportionate to the threat.¹²

Some other possible exceptions include the principle of humanitarian intervention, the ‘responsibility to protect’ or support for self-determination. However, it is not clear that international law allows states to use force unilaterally under these principles.¹³

2.2 Would it breach the principle of non-intervention?

Support for rebel groups is likely to breach the customary international law principle of non-intervention in another state’s domestic affairs. The ICJ held that US support for the *contra* rebels in Nicaragua breached this principle, even when it did not amount to the use or threat of force.¹⁴

The UN General Assembly’s (non-binding) [1965 Declaration on the Admissibility of Intervention in the Domestic Affairs of States and Protection of their Independence and Sovereignty](#) prohibits any state from contributing in any way towards the violent overthrow of another state’s regime, or interfering in its civil strife.

However, it may be that “policy rather than law will determine a state’s decision to intervene” to support rebels (or indeed a government).¹⁵

2.3 Would it give the UK shared culpability?

There is a potential risk if states provided arms to either the Syrian regime or the opposition, knowing that the aid that they were giving was contributing or likely to contribute to the commission of crimes under international law. The foreign leaders might thereby be potentially culpable of aiding and abetting breaches of international criminal law.

However, it is not clear whether states can be complicit for aiding non-state actors. And the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia has

⁹ See André Nollkaemper, “[A Shared Responsibility Trap: Supplying Weapons to the Syrian Opposition](#)”, *EJIL: Talk!*, 17 June 2013

¹⁰ See International Crisis Group, “[Tentative Jihad: Syria’s fundamentalist opposition](#)”, Middle East Report N°131, 12 October 2012

¹¹ [UN Charter](#) Article 51

¹² See Rebecca MM Wallace and Olga Martin-Ortega, *International Law*, 7th edition, 2013, p299

¹³ See Dapo Akande, “[Would It Be Lawful For European \(or other\) States to Provide Arms to the Syrian Opposition?](#)”, *EJIL: Talk!*, 17 January 2013

¹⁴ [Military and Paramilitary Activities in and against Nicaragua \(Nicaragua v. United States of America\)](#). Merits, Judgment. ICJ Reports 1986

¹⁵ Rebecca MM Wallace and Olga Martin-Ortega, *International Law*, 7th edition, 2013, p299

recently ruled that there is a difference between contributions to the war effort generally and to the commission of specific crimes.¹⁶

If the Syrian opposition came to power, it could then be held responsible for wrongful acts committed when it was in opposition, under article 10 of the International Law Commission's [Draft Articles on State Responsibility](#) (which seek to codify international law on this subject). States that supplied arms to the then opposition might then be held to share that responsibility.¹⁷

2.4 Would the Arms Trade Treaty have any effect?

The Arms Trade Treaty,¹⁸ an international treaty on the regulation of arms transfers, was signed by the UK on 3 June 2013 and intends to ratify it within a year. Its provisions are comparable to those of the EU's provisions on arms transfers and the UK's export control regime.

The British Government would probably argue that the Arms Trade Treaty would have little or no effect on the transfer of weapons to armed non-state actors (ANSA) such as Syrian rebel forces. Some other states (specifically, those that place a higher premium on sovereignty and non-interference) might disagree.

In the Arms Trade Treaty, States parties agree not to authorize any transfer of conventional weapons — or their ammunition/munitions, parts or components — if the transfer will violate their chapter VII obligations of the UN Charter or other obligations under international agreements, or if they have knowledge that arms will be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions, attacks against civilians or other war crimes. If the export is not prohibited under article 6, the general list of prohibitions, each exporting State party, under article 7, agrees that, prior to authorization of exports, they will assess the potential that conventional arms or related items will undermine peace and security or be used to commit or facilitate a serious violation of international humanitarian or human rights law, or acts constituting terrorism or transnational organized crimes.

One commentator has written that the reference to the United Nations Charter could be interpreted as banning indirectly transfers to ANSAs because of Article 2(4), which prohibits the threat or use of force “against the territorial integrity or political independence of a nation”:

Despite calls by many States, the treaty does not *explicitly* prohibit any transfer to any armed non-state actor.

Arguably, however, transfers to ANSAs are unlawful under the prohibition in Article 2(4) of the United Nations Charter, which is brought under the scope of the treaty by Article 6(2) ('international agreements' to which a State Party to the ATT is also party). Arguably, Article 6(2) also incorporates human rights treaties to which a State Party to

¹⁶ [Prosecutor v. Momčilo Perišić](#), ICTY Appeal Chamber, Case IT-04-81-A, 28 February 2013. See Marko Milanovic, “[The Limits of Aiding and Abetting Liability: The ICTY Appeals Chamber Acquits Momcilo Perisic](#)”, *EJILtalk*, 11 March 2013

¹⁷ André Nollkaemper, “[A Shared Responsibility Trap: Supplying Weapons to the Syrian Opposition](#)”, *EJIL: Talk!*, 17 June 2013

¹⁸ [Arms Trade Treaty](#)

the ATT is also party. This was stated by 100 States in a joint declaration following the adoption of the treaty at the UN General Assembly.¹⁹

The UK Government would probably disagree with this argument, given that it does not take an absolutist position on state sovereignty where there are grave violations of international humanitarian and human rights law taking place.

Some have argued that the UK arms exports institutional and legal framework with relation to providing 'gifts' is not as strong as it could be (see below). But it can be viewed as stronger than the provisions of the Arms Trade Treaty, which in the end **do not specify gifts, loans or leases** as being within its scope (China was among those strongly opposed to their inclusion) - to the disappointment of many campaigners, who worry that some states might seek to circumvent their treaty commitments by designating a larger number of arms exports as such.

The Arms Trade Treaty has not yet come into force but the UK signed it on 3 June 2013. From the moment of signature, signatories are expected not to frustrate the purposes of international treaties that they will eventually ratify. Given that the UK was a strong backer, it would not be unreasonable to argue it should adhere to the treaty's provisions from the moment the text was approved by the UN General Assembly. But notwithstanding this fact, it remains likely that the UK Government would argue that the treaty provides little new guidance on the dilemma in question.

3 The UK export licensing regime

Any provision of lethal arms to the Syrian rebels would be subject to the UK's arms export licensing regime. EU member states have agreed that their export licensing regimes will be consistent with criteria agreed in 1991 and 1992 as set out in the EU Code of Conduct on Arms Export.²⁰

The following is a summary of the eight criteria guiding national licensing policies laid down in Common Position 2008/944/CFSP:

1. Respect for the international obligations and commitments of Member States, in particular the sanctions adopted by the UN Security Council or the European Union, agreements on non-proliferation and other subjects, as well as other international obligations.
2. Respect for human rights in the country of final destination as well as respect by that country of international humanitarian law.
3. Internal situation in the country of final destination, as a function of the existence of tensions or armed conflicts.
4. Preservation of regional peace, security and stability.
5. Behaviour of the buyer country with regard to the international community, as regards in particular its attitude to terrorism, the nature of its alliances and respect for international law.
6. National security of the Member States and of territories whose external relations are the responsibility of a Member State, as well as that of friendly and allied countries.

¹⁹ Stuart Casey-Maslen, 'The Arms Trade Treaty: a major achievement', OUPblog, 8 April 2013

²⁰ EU Code of Conduct on Arms Export, 1998

7. Existence of a risk that the military technology or equipment will be diverted within the buyer country or re-exported under undesirable conditions.

8. Compatibility of the exports of the military technology or equipment with the technical and economic capacity of the recipient country, taking into account the desirability that states should meet their legitimate security and defence needs with the least diversion of human and economic resources for armaments.²¹

The UKs regime is intended to be consistent with the EU policy.

Under the UK arms control regime, applications would be judged individually for compliance with the *Consolidated Criteria*, against which all arms exports are assessed by the Government. In summary, the criteria include consideration of whether the proposed export would:

- contravene the UK's international commitments
- be used for internal repression
- provoke or prolong armed conflicts or aggravate existing tensions in the destination country
- be used aggressively against another country
- adversely affect the national security of the UK or allies
- be diverted or re-exported under undesirable conditions
- seriously undermine the economy
- seriously hamper the sustainable development of the recipient country.²²

If the proposed export fails to meet one or more of the criteria listed above, then a licence will be refused.²³

Judgement of an export application for the Syrian rebels could, of course, could be highly contentious, given what the criteria say. It could be argued, among other things, that lethal equipment:

- could be used for internal repression or for the commission of human rights abuses
- could prolong the conflict (particularly if one of the arguments for sending arms is that the rebels are close to defeat)
- could be used aggressively against another country (some rebels have said that they will not observe the ceasefire with Israel and Hizballah positions in Lebanon could be a target).

²¹ European Union External Action, [Arms Export Control](#) [visited 18 June 2013]

²² Department for Business Innovation and Skills, [Assessment of export licence applications: criteria and policy](#), 12 December 2012

²³ For more information about the export licensing regime see the Library standard Note [UK Arms Export Control Policy](#), 10 January 2012

3.1 Crown immunity

It should also be noted that, if the provision is in the form of ‘gifts’ of government-owned equipment, as the recent ‘non-lethal aid’ was, the UK Government has **Crown Immunity** from the 2002 *Export Control Act* and is not required to obtain a licence (in effect, from itself).²⁴

Past and present Governments have said that they do in practice ensure that gifts are consistent with the *Consolidated Criteria* and provide publicly-available information about them, from the issuing of departmental minutes to Parliament (for gifts of over £100,000, or which are of an unusual nature), that must lie for 14 sitting days to allow Parliament the opportunity to object and have any objections addressed, to their inclusion in its quarterly and annual reports and strategic export controls.

Campaigners and parliamentarians have often over the years **questioned** the levels of transparency and accountability involved in the gift-making process, as in a 2007 report of the Qadripartite Committee (predecessor to the Committees on Arms Export Controls).²⁵

4 UK anti-terrorist legislation

There have also been suggestions that arming the rebels might breach UK anti-terrorist legislation. The Terrorism Act 2000 defines ‘terrorism’ as serious violent action “designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public [...] for the purposes of advancing a political, religious, racial or ideological cause.” The act specifically includes actions outside the United Kingdom and governments and publics other than the British.²⁶

Section 2 of the *Terrorism Act 2006* makes it an offence to provide assistance in the commission of terrorist acts.

There are a number of issues that might come up in any challenge to the legality under UK anti-terrorist legislation of arming the rebels, including:

- Crown immunity. The government is not necessarily bound by the arms export licensing regime, for example (see above). Here is a definition of Crown immunity provided in a [Home Affairs Committee report](#):

The legal doctrine of Crown immunity holds that unless Parliament intends otherwise, onerous legislation does not apply to the Crown. The Crown for this purpose is not limited to the monarch personally, but extends to all bodies and persons acting as servants or agents of the Crown, whether in its private or public capacity, including all elements of the Government, from Ministers of the Crown downwards. Government departments, civil servants, members of the armed forces and other public bodies or persons are, therefore, included within the scope of the immunity.

- The exercise of prerogative powers.²⁷ This has particular relevance to the deployment of armed forces by Ministers without reference to Parliament but might also be relevant to the situation in Syria.

²⁴ For more information see [Crown exemption for controlled military list equipment and technology owned by the UK MOD](#), Department for Business Innovation and Skills, 18 April 2013

²⁵ Qadripartite Committee First Report 2006-07, [Chapter 7: Gaps in the legislation](#), August 2007

²⁶ The *Terrorism Act 2000*, Section 1: definition of terrorism.

²⁷ For more information, see the Library Standard note [The Royal Prerogative](#)

- Whether the UK recognises the current Syrian regime as a Government for the purposes of the Act. The Act does not limit itself to actions 'designed to influence the government' but recognition or otherwise of a foreign government could be relevant.
- The willingness (or otherwise) of the Crown Prosecution Service to pursue any proceedings.