

Austria: Arming the Syrian Opposition Is Illegal

The Austrian government has issued an official position paper, now circulating among EU member states, in opposition to the British-French proposal for lifting the arms embargo against Syria. Dated May 13, the document is a cogent summation of the reasons why the lifting of the EU embargo would be politically and legally unacceptable. We excerpt here the portion titled “Lifting the Arms Embargo—Legal Aspects.” Ellipses are in the original.

1. The supply of arms to the Syrian opposition would amount to a breach of the customary principle of non-intervention and the principle of non-use of force under Art. 2 para. 4 of the UN Charter.

The principle of non-intervention is firmly established in international law. In 2007, former UK Legal Adviser Sir Michael Wood put it in a nutshell: “Intervention on the side of those opposing the Government [...] is clearly prohibited.”¹ In the 1984 *Nicaragua Case* the International Court of Justice (ICJ) rejected any alleged right for States to intervene in support of an internal opposition in another State, whose cause appeared particularly worthy for political or moral reasons: “The Court therefore finds that no such general right of intervention, in support of an opposition within another State, exists in contemporary international law (para. 209).” The ICJ also stated that acts constituting a breach of the customary principle of non-intervention would also, if they directly or indirectly involve the use of force, constitute a breach of the prohibition not to use force in international relations, as embodied in Art. 2 para. 4 of the UN Charter. The continuing relevance of the *Nicaragua Case* was confirmed by the ICJ in its 2005 judgment in the *Case Concerning Armed Activities on the Territory of the Congo*: “In the case concerning Military and Paramili-

tary Activities in and against Nicaragua (*Nicaragua v. USA*), the Court made it clear that the principle of non-intervention prohibits a State to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State (para. 164).”

2. The supply of arms to the Syrian opposition would violate EU Council Common Position 2008/944/CFSP on the control of arms exports by EU Member States.

All EU Member States have agreed to abide by Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment when assessing applications to export items listed in the agreed EU Common Military List. An objective assessment of the Criteria in Art. 2 of Common Position 2008/944/CFSP according to the agreed guidance of their interpretation and implementation in the EU Users Guide² must lead to a denial of any export licence applications for the envisaged supply of arms to the Syrian opposition:

- Criterion 2(c) (human rights and humanitarian law): Member States shall deny an export licence if there is a clear risk that the equipment might be used in the commission of serious violations of international humanitarian law. The UN Commission of Inquiry reported that “war crimes, including murder, extrajudicial killings and torture, were perpetrated by anti-Government armed groups.”³

- Criterion 3 (internal situation): Member States shall deny an export licence for military technology or equipment which would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination. The Users Guide does not foresee that arms would be supplied to opposition groups involved in an armed conflict and places particular attention on the role of the end-user in a conflict.

- Criterion 4 (regional peace, security and stability): Member States shall deny an export licence if there is a clear risk that the intended recipient would use the military technology or equipment to be exported aggressively against another country or to assert by force

1. The Principle of Non-Intervention in Contemporary International Law, Speech by Sir Michael Wood at a Chatham House International Law discussion group meeting held on 28 February 2007, see <http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/il280207.pdf>.

2. User’s Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment, Doc. 9241/09, 29 April 2009.

3. Cf. http://www.ohchr.org/Documents/HRBodies/HRCouncil/PRCoISyria15082012_en.pdf.

a territorial claim. Despite the 1974 cease-fire agreement, Syria and Israel remain in a state of war, which was recently reignited by Israeli air and missile strikes. The Syrian opposition has not declared to respect the cease-fire, the disengagement agreement or the area of separation.

- Criterion 5(b) (national security of Member States): Member States shall take into account the risk of use of the military technology or equipment concerned against their forces or those of Member States and those of friendly and allied countries. The agreed Users Guide expressly states that “if an export is liable to engender a direct threat to the security of the forces of a Member State [...], who are present either in the country of final destination or in a neighbouring country, the a priori assessment will be unfavourable. The same approach will be used to ensure the security of international peace-keeping forces.”

- Criterion 6 (behaviour of the buyer as regards its attitude to terrorism, the nature of its alliances and respect for international law): According to the Users Guide the term “alliance” should be interpreted in a wide sense and includes all agreements which are aimed at establishing a significant connection (common political aims). The Syrian opposition is operating in alliance with various extremist and terrorist groups united by a common political aim.

- Criterion 7 (risk of diversion): In assessing the impact of the military technology or equipment to be exported on the recipient country and the risk that such technology or equipment might be diverted to an undesirable end-user or for an undesirable end use, *inter alia*, the capability of the recipient to apply effective export controls shall be considered. No effective export or diversion control measures of the Syrian opposition are known to be in place.

3. The supply of arms to the Syrian opposition would amount to a violation of Security Council Resolution 2083 (2012) establishing an arms embargo against individuals and entities associated with Al-Qaida.

Under the arms embargo pursuant to OP 1(c) of Security Council Resolution 2083 (2012) all States shall take measures to prevent the direct or indirect supply of arms and related materiel to Al-Qaida and other individuals and entities associated with them. The so-called Al-Nusra Front, whose fighters are taking part in military operations with the Free Syrian Army (FSA),

is linked with Al-Qaida in Iraq and maintains allegiance to Al-Qaida leader Al-Zawahiri. When the group was designated by the US as a terrorist organisation in December 2012, numerous Syrian opposition groups signed a petition to support Al-Nusra and the coalition’s leader Al-Khatib called on the US to reconsider its decision. In view of the lack of clear separation between military operations of the FSA and the Al-Nusra Front on the ground, the supply of arms to the Syrian opposition would amount to an indirect supply of arms to Al-Nusra in violation of Resolution 2083 (2012).

4. Member States supplying arms to the Syrian opposition would incur State responsibility for aiding and assisting in the commission of internationally wrongful acts.

According to Art. 16 of the ILC [International Law Commission] Articles on State Responsibility⁴ a State which aids or assists another State in the commission of an internationally wrongful act is internationally responsible 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. The Commentary *inter alia* states “a State may incur responsibility if it [...] provides material aid to a State that uses the aid to commit human rights violations. In this respect, the UN GA has called on member States in a number of cases to refrain from supplying arms and other military assistance to countries found to be committing serious human rights violations” (para 9.) When applying these principles to the envisaged supply of arms to the Syrian opposition, it is to be considered that war crimes, including murder, extrajudicial killings and torture, are perpetrated by anti-Government armed groups in Syria, as reported by the UN Commission of Inquiry, as well as suicide bombings and attacks against and hostage-taking of UNDOF peacekeepers, as is known from the daily news. Should supplied arms be used by armed opposition groups in Syria in the commission of internationally wrongful acts, the States who had supplied these arms and had knowledge of these acts would incur State responsibility for their aid and assistance in the commission of such acts.

4. See http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.