

Arms for Syria?

Key Messages

- Transfers of arms to any and all parties to the conflict in Syria would be likely to violate the UK's obligations under international law.
- Arms transfers to armed opposition groups will not 'balance the equation' or make a political solution more likely. To the contrary, they are likely to make the current arms race in Syria worse and to prolong the conflict and increase displacement, death, and human suffering.
- International efforts should instead be focused on bringing the parties to the conflict together at the earliest possible moment to negotiate a political solution to the crisis.

Background

Over two years of fighting between the Government of Syria (GoS) and opposition groups has resulted in a humanitarian catastrophe that is getting worse by the day. More than 93,000 people have lost their livesⁱ and nearly 8 million require humanitarian assistance, including 1.7 million refugeesⁱⁱ and 4.5 million people displaced within Syriaⁱⁱⁱ. Infrastructure and basic services are collapsing. Explosive weapons are being used in densely populated areas, resulting in death, injury, and civilian displacement on a vast scale. The UN has reported that the Syrian army and pro-government militias have committed systematic and widespread violations of human rights law and the laws of war. The UN has also reported war crimes and abuses by Syrian opposition forces, although on a lesser scale than by government forces.^{iv}

Against this backdrop, the UK government is considering providing weapons to opposition forces. While not downplaying the role played by other states in escalating the Syrian conflict through arms supplies to both sides, the primary focus of this paper therefore is to examine whether such behaviour on the part of the UK government would, in the current circumstances, be advisable or legal. Also attached is an annex, which provides greater detail and analysis on the EU and international legal instruments and obligations that are relevant to the UK's arms-transfer decision-making process.

Along with the US and France, the UK government has argued that supplying arms to opposition-affiliated fighters can help 'level the playing field', allowing them to fight government forces on more equal terms, and in turn, increase the prospects for political negotiations. On the contrary, it is more likely that further supply of arms and ammunition to the conflict will instead exacerbate the dire humanitarian situation on the ground, and further complicate the political situation in Syria while increasing the potential for further regionalisation of the conflict. It is also likely to contravene UK national law, the EU Common Position on Arms Exports,^v and provisions of international law which apply to all States, whichever party to the conflict they support.

I. Risks of escalating the conflict

International backers of the differing sides in Syria have ensured that there is no shortage of arms and ammunition with which to continue the conflict. Iran^{vi} and Russia^{vii} are long-standing allies of the Government of Syria and are chief among those willing to continue providing it with arms. Russia has been Syria's main arms supplier for forty years and has said that it will continue to fulfil long-standing legal contracts with the Syrian government. Iran's alliance with Syria dates back to the latter's strong support during the Iran-Iraq war.

On the opposition side, states such as Saudi Arabia and Qatar^{viii} have reportedly been among the most active in supplying opposition forces. There are also credible reports that Croatia, prior to its accession to the EU, supplied thousands of tons of weapons via Saudi Arabia to Syria. Croatian anti-tank and anti-aircraft weapons have been observed being used in several Syrian battles by the Free Syrian Army (FSA) and others.^{ix} Support for the opposition is strong in some areas of Iraq, resulting in the supply of both arms and fighters to some opposition armed groups by Iraqi insurgent groups.^x The Government of Iraq itself, on the other hand, has close diplomatic ties to Iran and has refused to end use of its airspace by Iran to send arms to the GoS.^{xi}

The US announced in late June that it would begin to train and supply some Free Syrian Army (FSA) fighters with small arms and light weapons. Leaked CIA plans have revealed that the US is currently vetting groups in the FSA with a view to supplying them with weapons stored in warehouses in Jordan.^{xii} Until recently, EU Member States have shown considerable restraint and caution when considering supplying arms to the opposition. However, following pressure from the UK and France, the blanket EU arms embargo on weapons to all parties to the conflict in Syria was recently amended, despite strong opposition from a number of other Member States, to permit transfers to the Syrian National Coalition for Opposition and Revolutionary Forces where the arms are intended for the protection of civilians. The immediate response of Iran and Russia upon this revision suggested a willingness to respond to arms supplies to opposition forces with further transfers to the Syrian government.

Accordingly, while the UK now has the *option* to supply weapons to the Syrian Opposition Coalition, such a decision must be taken on the basis of this reality, the likely humanitarian impact and legal restrictions described below.

II. Humanitarian impact of arms transfers

The Syrian conflict, and related humanitarian catastrophe, has been fuelled by a ready supply of arms to all sides. Provision of more weapons into an already entrenched and bitter conflict could result in its further spread across the region. An end to the bloodshed, which must be the absolute priority for the international community, is more likely to be achieved if all states desist in allowing arms and ammunition to be transferred to any of the warring factions in Syria and instead pressure all sides to participate constructively in peace talks which must comprehensively represent and meet the needs of all Syrians.

III. Legality of arms transfers

In addition to the risks of escalating the conflict and the likely negative humanitarian consequences of supplying additional arms into the conflict, in the current context it is difficult to see how the transfer of weapons to any warring party would be lawful. As demonstrated below, the balance of available information on the situation in Syria, weighed against the UK's legal obligations indicate that no such transfers should be made.

UK and EU law

The UK is legally bound by both its national legislation and EU rules, i.e. the Export Control Act 2002 and the EU Common Position 2008/944/CFSP respectively. These each involve a broadly consistent list of criteria which set out the factors that must be considered before transfers of arms may be authorised and the circumstances where they must be denied.

The UK, and other EU Member States, must refuse transfers in the following contexts:

- **International obligations** – if approval would be inconsistent with the Member State’s international obligations.
- **Internal repression and international humanitarian law (IHL)** – if there is a clear risk that the arms might be used for internal repression - including significant human rights abuses - or serious violations of IHL.
- **The internal situation of the recipient** – if a transfer would provoke or prolong armed conflicts or aggravate existing tensions or conflicts within the recipient country.
- **Regional peace, security and stability** – if there is a clear risk that the intended recipient would use the arms aggressively against another country or to assert by force a territorial claim.

EU Member States must also take into account additional factors, including the risk to their forces or those of other Member States and friendly and allied countries, the record of the buyer country with regard to its support for terrorism, the risk of diversion of arms, including to terrorists, and the impact on sustainable development.

Other legal constraints

In addition to obligations that apply only to EU Member States, there are other important obligations in international law that also restrict the scope for any State to provide arms to any warring parties in Syria. These include:

- **Principle of non-intervention and prohibition of the use of force**—under customary international law, States are prohibited from intervening in support of an internal opposition in another State; this can include the provision of arms to opposition groups.
- **UN Security Council Resolution 2083 (2012)**—imposes a very strict sanctions regime on both Al Qaeda and on individuals, groups or entities associated with Al Qaeda; given the known links between Al Qaeda and some armed opposition groups in Syria^{xiii}, there is a serious risk that arms supplied to opposition groups would fall into the hands of proscribed entities.
- **Aid or assistance in the commission of an internationally wrongful act**—There is widespread evidence of systematic violations of human rights and humanitarian law committed by Syrian government forces and supporting militias, including the targeting of civilians. Given the ongoing nature of these abuses, which have been internationally condemned, the supply of weapons to the GoS violates the obligation not to aid or assist an internationally wrongful act. Similarly, given the evidence of IHL violations perpetrated by some opposition armed groups, supply to these groups could also violate this obligation.

All of the legal obligations of the UK cited above raise serious concerns about the legality of arming warring parties involved in the Syrian conflict. In particular, given that serious violations of international human rights and international humanitarian law have been committed by all sides, it is difficult to make a *prima facie* case in favour of arms transfers to Syria. It has been suggested that safeguards—such as post-transfer controls and training and monitoring programmes—could be put in place in order to reduce the likelihood of diversion and/or misuse of any transferred arms. However the fluid situation on the ground, the lack of effective command and control structures within the Syria Opposition Council-affiliated units, and the links between such units and Islamic extremist groups, means there can be very little prospect of any such safeguards working effectively. Unless such efforts effectively reduce the level of risk *in practice*, the legal requirements of the Common Position will not be satisfied.

The Arms Trade Treaty (ATT)

On 2 April 2013, an overwhelming majority of 156 states voted in favour of adopting the ATT, and as of 5 July, a total of 77 states including the UK have signed the treaty, with many more expected to do so in coming months.

This new treaty to control the global arms trade has clear humanitarian goals and explicitly prohibits arms transfers where an exporting state has knowledge that the weapons will be used for the commission of war crimes or crimes against humanity. Under this provision, any arms transfers to the Syrian government would therefore be prohibited. In addition, exporting states must make a thorough assessment of the risk that weapons would undermine peace and security, would be used to violate international human rights and humanitarian law, or would be diverted to unauthorised end-users.

Even though the ATT is not yet in force, its vital principles should guide arms exporting countries now. There is a legal obligation on signatories to refrain from actions which would defeat the object and purpose of the Treaty. There is also a clear moral imperative on the part of countries such as the UK that voted in favour of the treaty to do their utmost to implement its provisions, even before it becomes legally binding.

IV. Conclusion

As the conflict in Syria worsens and the human suffering increases, the pressure to 'do something' is also rising. Sending weapons, however, is the wrong course of action. The Syrian conflict, and the related humanitarian catastrophe, has been fuelled by a ready supply of arms. There is a clear risk that any further transfers of weapons to the warring factions, rather than protecting civilians and promoting peace talks, would spark a further arms race and prolong a conflict that has already inflicted catastrophic levels of destruction to civilian life and infrastructure. The further arming of an already entrenched and bitter conflict could also result in its spread across the region. Moreover, arms transfers may put the UK in breach of its obligations under national arms export requirements, EU law, UNSC resolutions, international humanitarian law, and customary international law.

Accordingly, UK Parliament should actively discourage the government from sending any weapons to any of the combatants, and instead urge it to encourage all states to immediately halt all arms supplies to all the warring parties in Syria. Instead of considering arms transfers, the UK must work with the international community to increase vital humanitarian aid to the millions of people affected by the crisis, and vigorously pursue efforts to bring all parties to the table in an inclusive process to discuss a political solution to the conflict that meets the needs of all Syrians.

ⁱ See http://www.latimes.com/news/world/worldnow/la-fg-wn-un-syria-death-toll-20130613_0,2953708.story

ⁱⁱ See <http://data.unhcr.org/syrianrefugees/regional.php>

ⁱⁱⁱ See <http://www.internal-displacement.org/countries/syria>

^{iv} See the report of the Independent International Commission of Inquiry on the Syrian Arab Republic, June 4, 2013, available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/ColSyria/A-HRC-23-58_en.pdf

^v The EU Common Position is used to control exports of a Military List of items, both lethal and non-lethal in nature. This briefing note focuses on lethal equipment: weapons and ammunition which kill and injure. Full text of the Common Position is available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:335:0099:0103:EN:PDF>

^{vi} <http://www.reuters.com/article/2013/03/14/us-syria-crisis-iran-idUSBRE92D05U20130314>

^{vii} <http://www.ibtimes.com/russias-arms-deals-syria-timeline-705522>. Russia has been Syria's main arms supplier since 1973, and has sold billions of dollars of arms to the Syrian government in the past few years. Arms exports to Syria are arranged by government controlled firm Rosboronexport. The best known example of Russian ammunition supplies came in January 2012,

when the MV Chariot was forced to dock in Cyprus en route to Syria. It was carrying 59,000 tons of ammunition and other military equipment. See <http://www.cyprusnewsreport.com/?q=node/5154>.

^{viii} See for example <http://www.nytimes.com/2013/06/30/world/middleeast/sending-missiles-to-syrian-rebels-qatar-muscles-in.html?pagewanted=all>. There is also evidence that Qatari arms supplied to Libyan rebels in Benghazi have now been rerouted to Syria, see for example <http://world.time.com/2013/05/29/libyans-arming-syrian-rebels/>. For detailed evidence of arms smuggling from Libya to Syria see <http://brown-moses.blogspot.co.uk/search?q=libya+arms+syria>.

^{ix} An estimated 3,500 tons of Croatian weapons allegedly purchased by Saudi Arabia have been shipped to Syria. <http://www.nytimes.com/2013/02/26/world/middleeast/in-shift-saudis-are-said-to-arm-rebels-in-syria.html?pagewanted=all&r=1&> Jabhat al-Nusra has been observed using Croatian arms: <http://brown-moses.blogspot.co.uk/2013/03/evidence-of-jabhat-al-nusra-with.html>. Croatian weapons have also been observed in use by FSA-affiliated fighters near Homs: <http://brown-moses.blogspot.co.uk/2013/03/croatian-weapons-arrive-in-homs.html>. Since joining the EU on 1 July 2013, Croatia is now obliged to apply the EU Common Position and it is not known whether their supplies to Syria continue.

^x <http://www.reuters.com/article/2012/02/14/us-iraq-syria-idUSTRE81D0NX20120214>

^{xi} Ibid

^{xii} See for example <http://www.reviewjournal.com/news/cia-lead-us-efforts-syria-war>. The LA Times has reported that the US has been training FSA fighters in the use of anti-tank and anti-aircraft weapons for six months: <http://www.latimes.com/news/world/worldnow/la-fg-wn-cia-syria-20130621,0,6346686.story>.

^{xiii} Jabhat al-Nusra and al Qaeda in Iraq merged in April 2013 – see <http://www.aljazeera.com/news/middleeast/2013/04/201349194856244589.html>. Before this Jabhat al-Nusra had its origins in Al Qaeda in Iraq and had declared its allegiance to Al Qaeda publicly by mid-2012 – see <http://world.time.com/2012/07/26/time-exclusive-meet-the-islamist-militants-fighting-alongside-syrias-rebels/>.

ANNEX:

Legal and Policy Framework—Can EU Member States supply arms to Syria?

Introduction

1. Early on 28 May 2013, after several hours of tense debate and under pressure from France and the UK in particular, EU Member States released a Council Declaration amending the EU arms embargo on Syria to allow the supply of lethal equipment to pre-approved combat units linked to the Syrian Opposition Coalition.^{xiv}
2. This does not, however, mean that it would necessarily be either wise or legal to supply such arms. The starting point in considering this must be the urgent need to prevent further violence and humanitarian harm in Syria. A reduction in levels of violence is essential in order to limit the humanitarian tragedy in and around Syria, and allow the opportunity for the proposed Geneva II peace talks to take place in a positive environment. As this annex explains, supplying further arms would instead be likely to prolong and exacerbate the conflict.
3. This perspective is widely shared across the political spectrum in many EU Member States, despite the EU embargo no longer itself prohibiting the supply of arms to units affiliated with the Syrian Opposition Council. French and UK government ministers and officials have said that at present they have no plans to send arms to these units, but have stated that the new *potential* for supplying them in itself offers support to the Syria Opposition Council, will encourage those representatives to participate in the putative Geneva II peace talks, and will help persuade President Assad that a military victory is not a realistic prospect.
4. The UK and French governments have also argued that they could potentially ‘level the playing field’ by supplying weapons to opposition fighters, allowing them to fight government forces on more equal terms. Neither they nor any other Western government, however, is suggesting the kind of massive arms flows that would give opposition fighters equal capability to government forces, such as tanks, artillery and combat aircraft. They are instead considering the supply of explosive weapons including anti-tank and anti-aircraft missiles which would allow a more intense level of opposition military activity, while still failing to change the balance of the war significantly, and thus – as this paper will go on to explain - prolong the conflict.
5. This note considers what the implications of amending the embargo mean in practice, in the context of relevant controls to which EU Member States, including France and the UK, are still subject, with a particular focus on the criteria set out in the EU Common Position.^{xv xvi}

EU Common Position 2008/944/CFSP: The EU Arms Export Control Regime

6. As a matter of EU Law, proposed arms exports must be judged against a number of criteria on a case-by-case basis before an EU Member State may lawfully grant permission for, or engage in, exportation. If a Member State were to fail to apply any of these criteria, it would be acting illegally under EU law. Criteria 1 to 4 set out the circumstances where a transfer must be denied, while criteria 5 to 8 set out risks which must be considered, in good faith, before making a decision whether to authorise a transfer.

Criterion 1

7. Criterion 1 prohibits the export of controlled items “if approval would be inconsistent with” the international obligations of the Member State from which the arms are to be exported. In the context of the possible supply of arms to any warring party in Syria, this must include adherence to International Humanitarian Law (IHL), including the 1949 Geneva Conventions, which States Parties are obliged “to respect and to ensure respect for.”^{xvii} The Office of the High Commissioner for Human Rights (OHCHR) Independent International Commission of Inquiry (IIC) on the Syrian Arab Republic asserts in its latest report^{xviii} that both sides in the Syrian conflict have committed war crimes, although the scale of crimes committed by Syrian government forces is greater than those committed by the opposition.

Application

8. If arms were to be supplied to Syrian Opposition Council-affiliated units, then EU Member States would be required to ensure those supplies were used in compliance with IHL. In principle, it may be possible for Member States to put in place rigorous safeguards to ensure this is the case. Measures taken typically involve the provision of training in IHL and its application on the battlefield, and monitoring to ensure compliance. However, if these measures would not be effective in “ensuring respect” for IHL, this criterion would not be satisfied. Within the current Syrian context, adequate and effective training and monitoring is likely to be hard to deliver, given the on-going conflict, the fractured and undisciplined nature of opposition military forces in Syria and the lack of coherent command and control on the ground. On this basis, there is a significant likelihood that, even with safeguards, the provision of arms to the Syrian opposition would support and encourage acts prohibited by IHL.

Criterion 2

9. Criterion 2 prohibits the export of controlled items where there is “a clear risk” that the controlled items “might” be used for “internal repression” or serious violations of international humanitarian law. “Internal repression” is defined in Article 2 (2) (b) of the Common Position as including, *inter alia*, torture and other cruel, inhuman or degrading treatment and other major violations of human rights and fundamental freedoms as set out in relevant international human rights instruments.

10. In addition, under Common Position Article 2 (2) (c) Member States shall deny an export licence if there is a “clear risk” that the military technology or equipment “might” be used in “serious violations of international humanitarian law”.
11. The references to a “clear risk” that the military equipment “might” be used for internal repression or serious violations of IHL, indicates that it is not necessary to show that the risk will definitely materialise. This is confirmed by the User’s Guide to the Common Position which states that the combination of “clear risk” and “might” requires a lower threshold of evidence than a clear risk that the weapons *will* be used.^{xix}

Application

12. Among other considerations, these tests require a thorough assessment of the recipient’s past and present record of respect for human rights and IHL, its intentions as expressed through formal commitments, and its capacity to ensure use will be consistent with the criterion.^{xx} The UN has reported that anti-government armed groups affiliated with the Syrian Opposition Coalition have committed war crimes, including murder, extrajudicial executions, torture, hostage taking, ethnic cleansing and pillage, and that they have put military units in civilian areas and used indirect mortar and artillery fire indiscriminately against civilian areas, including across international borders.^{xxi} In a context where these concerns have been raised at an international level, both the intention of the Syria Opposition Council-affiliated units and their lack of capacity to prevent misuse of arms are relevant to a decision under criterion 2, particularly as in many localities there is no clear leadership or control of these units. Mitigation measures may be undertaken, but they do not replace the requirement to comply with the criteria/tests. If the measures taken in mitigation do not reduce the level of risk *in practice*, this criterion will not be satisfied.
13. Since the Council Declaration allows the supply of arms to units affiliated to the Syria Opposition Council only for the purpose of the protection of civilians, extra weight should be accorded to strict application of this criterion. It is therefore incumbent on the supplier and those receiving arms to ensure full respect for all civilians. In this context, some activities attributed to SOC-affiliated units and reported by the IIC as described above are directly contrary to this purpose.

Criterion 3

14. This criterion prevents the sale of arms “which would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination.”

Application

15. The User’s Guide states that if there is an armed conflict or internal tensions in the country of destination, a careful analysis of the risk of the proposed export provoking or prolonging the conflict or aggravating the existing tensions and escalating them into a wider conflict should be carried out.^{xxii} If the analysis shows a risk of this happening, a restrictive approach should be

adopted towards the export licence under consideration. Particular attention should be given to the role of the end-user in the conflict.

16. The UK and French Governments argue that arming the opposition would shorten the conflict and would not breach this criterion. However, it is hard to see how the supply of arms to one side of a conflict, in order that they have greater military combat capacity, would not “aggravate” or intensify the conflict. And it is far more likely that further arms supplies would prolong rather than end the conflict. In any event, there must be a proper evidential basis upon which a conclusion that the supply of arms will neither prolong nor aggravate the armed conflict in Syria is founded. Moreover, any assessment must take full account of all available objective evidence. That support for the Syrian government from Iran increased immediately following and potentially as a consequence of the EU announcement should raise alarm bells about the risks associated with this position.

Criterion 4

17. Criterion 4 is concerned with the preservation of regional peace, security and stability. Member States are obliged to refuse transfers if there is a clear risk that the weapons would be used in pursuit, by force, of a territorial claim against another country or that “the intended recipient would use the weapons to export them aggressively against another country.” In making the assessment, the Common Position requires licensing authorities to take into account a number of factors, including the existence or likelihood of armed conflict between the recipient and another country, and whether the arms would be used other than for legitimate national security or defence.

Application

18. The statement by the Syria Opposition Council’s military commander, General Idriss, that he will hunt down Hezbollah in Lebanon, does not give confidence that this criterion will not be breached, especially since SOC-affiliated military units have been involved in indiscriminate shelling across the Lebanese border during June 2013^{xxiii}. Fighting between Syrian refugee opposition and government supporters in Tripoli, Lebanon and attacks launched by Syrian groups in Turkey, such as the Reyhanli bombing, are also of concern in this regard.^{xxiv} In the event of any arms transfers, Member States supplying arms could make it a condition of transfer that no arms would be used against any other State, and, according to the Council Declaration, must put in place adequate safeguards against such use of weapons supplied. It is unclear what these safeguards might comprise, however, and in any event, as noted above, imposing safeguards is not, in itself, enough to comply with criterion 4. If the safeguards do not effectively reduce the level of risk, this criterion will not be satisfied.^{xxv}

Criterion 5

19. Criterion 5 requires Member States to take into account the risk to their forces, or those of other Member States and friendly and allied countries.

Application

20. There is a risk to UN personnel including UN peacekeepers in the Golan Heights. The IIC has confirmed that Syria Opposition Council-linked fighters, on three occasions, kidnapped Austrian soldiers participating in the UN Disengagement Observer Force (UNDOF) Mission in the Golan Heights.^{xxvi} Austria decided on 5 June 2013 to withdraw its contingent from UNDOF after an opposition attack on a Syrian government position adjacent to UNDOF positions. There is also a risk to Israel of attacks from Syria: there have been numerous incidents of likely accidental fire into Israel, while according to the Israel Defence Forces there have been several instances of direct and deliberate fire from Syria on Israeli soldiers. The provenance of these attacks is uncertain, but appears to come from both opposition and government units. There is also a risk to other EU Member States' forces in the region, as well as to Turkey – a NATO member – which could lead to direct military involvement in the crisis. Turkey is reported as preparing contingency plans for a military incursion into Syria to protect Turkish border towns such as Reyhanli.^{xxvii} Application of this criterion would be unlikely on its own to block arms supplies. However, any decision to export arms must take into account the effect of such exports on friendly States, or the decision to export would be unlawful.

Criteria 6 and 7

21. Criteria 6 and 7 require, *inter alia*: consideration of the record of the buyer country with regard to its support for terrorism and the implementation of relevant arms control instruments; and consideration of the risk of diversion to an undesirable end-user or for an undesirable end-use, including the risks of diversion to terrorist organisations or to individual terrorists, respectively.

Application

22. The French and UK governments argue that it is possible to arm and train particular rebel groups, and to prevent the transfer of arms to groups they regard as terrorist.^{xxviii} Given the close links between many Syria Opposition Council-affiliated units and several insurgent Islamist groups, including the Jabhat al-Nusra, which is related to Al Qaeda in Iraq, as well as the lack of a well-defined and operational command and control structure within the SOC-affiliated units, concerns about the potential for access to British or French weapons by groups reputed to carry out terrorist attacks would be acute. The fluid nature of the membership of local and regional military units and alliances is also problematic, as is the way that the conflict crosses the borders of Iraq, Israel, Jordan, Lebanon and Turkey. In this context, it is difficult to see how effective measures could be taken to prevent the diversion of arms from intended recipients.

23. The Council Declaration obliges any state supplying arms to “require adequate safeguards against misuse”. The French and UK governments both argue that with appropriate monitoring the diversion of arms away from the intended recipient units can be prevented, but have not explained in any detail how this can realistically be accomplished. Moreover, monitoring efforts would not necessarily *prevent* the diversion of arms; in all probability they would only document any occurrence after the fact. In order to comply with the Council Declaration, a Member State would need to ensure that any safeguards would effectively prevent diversion of arms or their re-export. To do so, it would need to satisfy the concerns noted above.

24. Underlining concerns about diversion risks, *Reuters* has recently reported that for two months Saudi Arabia has, “on a small scale”, been channelling anti-aircraft missiles “obtained mostly from suppliers in France and Belgium” to Syrian opposition groups. The report also claims that “France had paid for the transport of the weapons to the region.”^{xxxix} In a possibly related case, a recent *Der Spiegel* article refers to a June 2013 secret report submitted to Germany's foreign intelligence agency, the BND, which references an alleged Saudi intention to “outfit the rebels with ‘man-portable air-defence systems’ (MANPADS) ... such as the French ‘Mistral’.”^{xxx} It is hard to see how any presumed ability to prevent diversion could be maintained for transfers that are being routed through intermediary governments, in which case these reports, if true, throw serious doubt on the assertions by the French government that arms have not yet been provided to SOC-affiliated units, let alone the capacity, to prevent diversion of transferred arms.

Criterion 8

25. Criterion 8 requires that Member States make decisions on exports taking into account *inter alia* “whether the proposed export would seriously hamper the sustainable development of the recipient country.”

Application

26. Syria was a relatively prosperous country in the years immediately preceding the war, with a per capita GDP of approximately US\$5,400, and was classed by the World Bank as an Upper-Middle Income Country.^{xxxi} However even then the country had relatively high military expenditure relative to GDP^{xxxii}, and growing economic problems including severe unemployment^{xxxiii}. Syria's ranking on the Human Development Index was 0.648 in 2012, below the regional average of 0.652.^{xxxiv} Since then, the war has severely degraded Syria's financial and physical resources, including electricity, water, sewerage treatment, health, and transport infrastructure.^{xxxv} The Syrian government is borrowing money so as to continue to purchase the arms necessary to prosecute the conflict.^{xxxvi} Former Syrian Planning Minister Abdullah al-Dardari has said that the economy of Syria has shrunk by some 35 per cent, losing \$60-80 billion in two years of fighting.^{xxxvii}

27. In the current circumstances there is a risk that supply of explosive weapons in particular will lead to an escalation of the conflict with increased damage to infrastructure, which will contribute to the ongoing destruction of the socio-economic resources of the country. While transfers of arms from EU Member States to the Syria Opposition Council are likely to take the form of gifts to the SOC, the true cost of such arms transfers will accrue from the prolonged and intensified conflict and attendant delayed post-war recovery. The cost of reconstruction is also likely to escalate further, with resources diverted from economic growth and well-being of Syria's citizens.

28. **Other factors**—Under criterion 5 of the EU Common Position, Member States are permitted to take into consideration the potential impact of any potential arms export on their defence and security interests as well as those of Member States and friendly and allied countries. For example, the French and UK governments consider that supplying arms may influence the

positions of the Syria Opposition Council to and in negotiations. However, importantly, the Common Position goes on to state that this: “cannot affect consideration of the criteria on respect for human rights and on regional peace, security and stability.” Thus an obligation to deny cannot be outweighed by national security or wider political considerations.

Other EU Law Instruments

29. Alongside the Common Position, Joint Action 2002/589/CFSP (EU’s contribution to combating the destabilising accumulation and spread of SALW) is also of relevance here. By virtue of Article 3 (b) of this Joint Action, the EU is obliged to work towards a consensus requiring exporting countries to “supply small arms only to governments...” Although it may not, in itself, prohibit the supply of arms by Member States to non-state actors, this is clearly an important objective of the Joint Action.

Other legal constraints

30. Outside the framework of EU Law, in international law, more generally, there exist a number of important obligations which circumscribe the circumstances in which it may be permissible to provide arms and material to opposition groups in Syria. These principles are briefly outlined below.

Obligation to Respect and Ensure Respect for International Humanitarian Law

31. There is a growing body of credible evidence documenting the perpetration of atrocities by all sides in the increasingly barbarous conflict in Syria.^{xxxviii} Such atrocities are prohibited under IHL, including Common Article 3 of the Geneva Conventions of 1949. Common Article 1 to the Geneva Conventions, and customary international law, requires States to “respect and to ensure respect” for IHL. This binds all States in their dealings with the parties to a conflict such as that engulfing Syria. Given the fractured and fluid situation on the ground in Syria and the evidence of abuses set out above, there is a likelihood that, even with safeguards, the provision of arms to the Syrian opposition would support and encourage acts prohibited by IHL. This would be inconsistent with the obligation to ensure respect for IHL.

Prohibition on Non-Intervention and Prohibition on the Use of Force

32. Customary international law imposes a prohibition on intervention and, relatedly, the use of force. Specifically, States are prohibited from intervening “directly or indirectly, with or without armed force, in support of an internal opposition in another State”.^{xxxix} This includes the provision of arms to opposition groups. Although there are exceptions, none would appear to apply in these circumstances.^{xl}

Obligation not to aid or assist the commission of an internationally wrongful act

33. Where weapons transferred are used for violations of international law, a transferring State could be responsible under international law for aiding and assisting those violations if it has knowledge of the relevant circumstances. The evidence of violations of IHL by Syrian

opposition groups noted above may constitute sufficient knowledge to give rise to the responsibility of an exporting State under international law unless it can very clearly control the destination/user/use. This will be extremely difficult in a context where there does not appear to be effective control or leadership.

Security Council Resolution 2083 (2012)

- 34.** UNSCR 2083 (2012) imposes a very strict sanctions regime on both Al Qaeda and on individuals, groups or entities associated with Al Qaeda. Given that there are known links between Al Qaeda and some armed opposition groups in Syria (including Jabhat al-Nusra) who have connections with Syria Opposition Council-affiliated units, there is a serious risk that arms supplied to the latter would fall into the hands of proscribed entities. If effective safeguards cannot be implemented in practice, the supply of arms to opposition groups in Syria would almost certainly violate the terms of UNSCR 2083.^{xii}

The Arms Trade Treaty (ATT)

- 35.** Since the ATT has not yet entered into force its provisions are not yet legally relevant to the discussion of whether or not it is permissible to arm units affiliated to the Syria Opposition Council. However, States are expected not to undermine the purposes of international treaties which they have signed and intend to ratify. Interpreting EU law to allow the supply of arms to the Syrian opposition at this time could have deeply undesirable downstream effects, in terms of potentially encouraging similar behaviour by other States in other contexts in future, thereby endangering the Treaty's effectiveness in securing its humanitarian goals. Some States are beginning to argue that the ATT will be pointless if major exporters continue to behave exactly as they would have before the Treaty was negotiated. It would be regrettable if EU Member States were to pursue a course of action in Syria that supported this argument, and that therefore damaged the credibility of the ATT at this time. At the very least a political decision to export arms to support one side in the Syrian civil war, just as the ATT has opened for signing, risks making other countries cynical about the potential effectiveness of the ATT, thereby reducing incentives to sign, ratify and rigorously implement the Treaty. States which have signed the Treaty should refrain from arming any parties to the conflict, and should be using the Treaty as a tool to explain to other States, including Russia, why arms should not be sent to Syria.

Conclusion

- 36.** Ultimately it is for governments to demonstrate that they can satisfy the demands of national arms transfer control requirements, of EU law, of UN Security Council resolutions, of international humanitarian law, and customary international law before any arms transfers take place.
- 37.** The balance of available information on the situation in Syria, when considered alongside Member States' legal responsibility to apply certain restrictive criteria when deciding whether to transfer arms to opposition groups in Syria, indicate a number of serious obstacles which

governments would need to overcome before proceeding with any supply. Serious doubts arise, under both EU Law and international law more generally, as to the legality supplying arms to any warring party in Syria. The onus for showing that safeguards can and will be put in place to allay the concerns which arise lies very firmly with those who propose to supply arms. However, given the fluid and evolving situation on the ground in Syria and the fractured nature of the opposition, there is reason to doubt the likely efficacy of any safeguards that might be put in place to prevent misuse or diversion.

^{xiv} The armed opposition is generally referred to in the West as the Free Syrian Army. However, this is a loose designation and implies a command and control structure which is largely non-existent. In addition, not all units identifying themselves as part of the Free Syrian Army are considered eligible by the UK and France to receive arms. Only those who accept orders from the Military Council of the Syrian National Coalition are currently being assisted, See for example, this statement by William Hague: <https://www.gov.uk/government/speeches/foreign-secretary-statement-to-parliament-on-syria--2> and a statement by French Foreign Minister Laurent Fabius: <http://www.20minutes.fr/ledirect/1119877/20130317-syrie-fabius-favorable-a-livraison-armes-a-coalition-syrienne>.

^{xv} Common Positions adopted under Title V, Treaty on the European Union (“TEU”) (CFSP) (as it then was) were adopted (by unanimity) and are legally binding under Article 11 (1), TEU (now Article 24 (3), TEU). Member States are under an obligation under Article 24 (3), TEU to comply with these obligations “actively” and “unreservedly” and “shall comply with the Union’s actions in this area”. The Council of the European Union and the EU High Representative for Foreign Affairs and Security Policy must ensure compliance with principles enunciated in Common Positions (Article 24 (3), TEU). The full text of the EU Common Position can be found at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:335:0099:0103:EN:PDF>

^{xvi} In the UK, the criteria governing whether or not the UK should allow an arms export to go ahead are contained in the Consolidated Criteria first published in Hansard in 2000 (see <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmintdev/419/41921.htm>). These have not yet been updated in accordance with the Common Position. However, the UK has confirmed that it is compliant with the Common Position. Further, where it has adopted more stringent policies, it will continue to apply its own policies. In particular, UK government policy is not to supply weapons which *might* be used to facilitate internal repression, without even applying the ‘clear risk’ test (see <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmquad/419/41913.htm>, paras 186-191 and www.official-documents.gov.uk/document/cm84/8441/8441.pdf, pp. 8-9). French law on licensing arms exports is laid out in the Code de La Defense, Livre II, Titre III, Chapitre V which can be found at <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006071307>. More detail on the licensing mechanism can be found in the most recent French government’s annual arms exports report at <http://www.defense.gouv.fr/actualites/articles/rapport-2012-sur-les-exportations-francaises-d-armement>.

^{xvii} For more details on this obligation see paragraph [27] below. The full text of the Conventions can be found at <http://www.icrc.org/eng/assets/files/publications/icrc-002-0173.pdf>.

^{xviii} Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, June 3, 2013. Available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A-HRC-23-58_en.pdf.

^{xix} <http://register.consilium.europa.eu/pdf/en/09/st09/st09241.en09.pdf>, p41.

^{xx} <http://register.consilium.europa.eu/pdf/en/09/st09/st09241.en09.pdf>, p. 44.

^{xxi} See reports of the Independent International Commission of Inquiry on the Syrian Arab Republic, *op cit*.

^{xxii} <http://register.consilium.europa.eu/pdf/en/09/st09/st09241.en09.pdf>, p55.

^{xxiii} See reports from media and the FSA itself including <http://www.presstv.com/detail/2013/06/12/308649/syria-militants-hit-lebanon-over-qusayr/>, <http://www.youtube.com/watch?v=6LUU4fudQ5Y> and <http://www.theaustralian.com.au/news/breaking-news/one-dead-as-syria-shells-hit-lebanon/story-fn3dxix6-1226651796364>.

^{xxiv} The Turkish Government blamed the Syrian Government for the bombing (See for example <http://www.google.com/hostednews/afp/article/ALeqM5h3pkwwjP3qNrAQ2LMMegT1z7kPGA?docId=CNG.35312fdddffaa8db e21016c28c9d5994f.601>). Others have blamed various elements of the Syrian opposition (See for example <http://www.thenational.ae/news/world/middle-east/turkish-mp-blames-al-nusra-for-border-town-attack> or <http://www.dw.de/who-was-behind-the-reyhanli-attack/a-16810386>). The actual perpetrator is unknown, the only evidence being that the cars containing the bombs were Syrian and came from Syria directly before the explosions. The area of Syria they came from, and the border crossing they used, were both controlled by the Syrian opposition.

^{xxxv} In the UK context, it should be noted that British governments have often argued against strict post-transfer controls on the basis that it is very difficult to monitor, let alone control, the use of weapons once supplied to a foreign buyer. This has been the UK position even in cases where the buyer is a settled foreign government with clear lines of command and control in a non-conflict context. The difficulties associated with the collection of evidence that could be used in assessing future arms export license requests has been frequently discussed in the combined Committee on Arms Exports Controls of the House of Commons. See their reports at: <http://www.parliament.uk/business/committees/committees-a-z/other-committees/committee-on-arms-export-controls/publications/previous-sessions/>.

^{xxxvi} Independent International Commission of Inquiry, *op cit*, p12.

^{xxxvii} For example, Turkey carried out a defence exercise on the border with Syria preparing for an attack from that country in May 2013. See <http://www.reuters.com/article/2013/05/06/us-syria-crisis-turkey-idUSBRE9450DW20130506>.

^{xxxviii} See for example UK Prime Minister David Cameron's insistence in the House of Commons that the government has systems in place to prevent equipment reaching the wrong hands. HC Deb, 12 June 2013, c332 which can be found at http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm130612/debtext/130612-0001.htm#130612-0001.htm_spm12.

^{xxxix} Amena Bakr, 'Saudi supplying missiles to Syria rebels: Gulf source', *Reuters*, 17 June 2013, <http://www.reuters.com/article/2013/06/17/us-syria-crisis-missiles-saudi-idUSBRE95G0DK20130617>.

^{xxx} Susanne Koelbl, Kurt Pelda and Christoph Reuter, 'Over the Red Line: West Considers Entering the Syrian Quagmire', *Der Spiegel*, 17 June 2013, <http://www.spiegel.de/international/world/the-west-considers-weapons-deliveries-to-a-chaotic-syria-a-906144.html>.

^{xxxi} The World Bank assesses countries with a per capita GDP of between US\$4,086 and US\$12,615 as upper-middle income. See <http://data.worldbank.org/about/country-classifications>.

^{xxxii} At the beginning of the 2000s Syria's defence expenditure was some 6.5 per cent of GDP. This had declined by 2010 to 3.9 per cent. (<http://data.worldbank.org/indicator/MS.MIL.XPND.GD.ZS>) The NATO average is just below 3 per cent, a figure which is distorted by the US spending some 4.7 per cent as a percentage of GDP. The UK in 2010 spent 2.6 per cent on defence as a percentage of GDP (see http://www.nato.int/cps/en/natolive/topics_49198.htm).

^{xxxiii} Employment to population ratio, population 25+ Percentage of the population ages 25 years or older that is employed. ILO (2012). ["Key Indicators on the Labour Market: 7th edition". Geneva: ILO.]. http://www.ilo.org/empelm/what/lang--en/WCMS_114240. Accessed March 2012. Syrian Arab Republic (2012): 45.8 (in other words, 45.8% of the population that is 25+ is employed...) From Human Development Index data from UNDP (<http://hdr.undp.org/en/data/explorer/>). Youth Unemployment population ages 15–24 that is not in paid employment or self-employed but is available for work and has taken steps to seek paid employment or self-employment. ILO (2012). ["Key Indicators on the Labour Market: 7th edition". Geneva: ILO.]. http://www.ilo.org/empelm/what/lang--en/WCMS_114240. Accessed March 2012. Syrian Arab Republic (2012): 40.2 (in other words, 40.2% of the population that is between 15 and 24 is unemployed...) From Human Development Index data from UNDP (<http://hdr.undp.org/en/data/explorer/>)

^{xxxiv} See indices available at <http://hdr.undp.org/en/statistics/>.

^{xxxv} See http://articles.washingtonpost.com/2013-06-30/world/40292848_1_foreign-currency-reserves-public-sector-government-minister.

^{xxxvi} For example, in January Syria borrowed US\$1 billion from Iranian banks to prevent currency collapse after national hard currency and gold reserves fell significantly. (see <http://www.strescom.org/briefings/weekly-briefings/item/590-wb1420012013.html>).

^{xxxvii} See <http://bigstory.ap.org/article/syria-ex-minister-leads-rebuilding-plan>.

^{xxxviii} See reports of the Independent International Commission of Inquiry on the Syrian Arab Republic, *op cit*. In addition, the Committee Against Torture has noted its "serious concern" about the allegations received concerning acts of torture, and cruel and inhuman treatment, summary executions and abductions committed by armed opposition groups" in Syria. See CAT Concluding Observations (Syria), para. 21, 29 June 2012, CAT/C/SYR/CO/1/Add.2. Other UN reports have also found credible evidence of opposition groups having been involved in the deliberate killing of civilians, enforced disappearance and a range of other serious violations of international humanitarian law. See Situation in the Syrian Arab Republic: Report of the Secretary General, 25 September 2012, A/HRC/21/32. A variety of human rights NGOs also indicate they have uncovered evidence of serious violations of the laws of war perpetrated by Syrian opposition forces. See, for example, reports from Human Rights Watch, at <http://www.hrw.org/news/2012/03/20/syria-armed-opposition-groups-committing-abuses>.

^{xxxix} See *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, ICJ Reports 165 (2005), para. 164; and *Nicaragua v. the United States (Military and Paramilitary Activities in Nicaragua)*, ICJ Reports 13 (1986), para. 206. Furthermore, in *DRC v. Uganda*, the ICJ made clear that acts which breach the principle of non-intervention "will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of the non-use of force in international relations".

^{xi} This includes the doctrine of humanitarian intervention and R2P. It has not been suggested by any government proposing the supply of arms that this provides, in the specific circumstances of Syria, a legal basis for arming the Syrian rebels. In any event, even if applicable, it would only justify conduct otherwise amounting to a violation of Syria's sovereignty. It would not justify actions which violated principles of international humanitarian law or EU law.

^{xii} See SYRIA: Austrian Position on Arms Embargo (as of 13 May 2013), p. 3, <http://www.guardian.co.uk/world/julian-borger-global-security-blog/interactive/2013/may/15/austria-eu-syria-arms-embargo-pdf>.