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The Legality of Weapons Delivery to Syrian Rebels under International and European Law

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Fokus

European States are discussing to deliver weapons to the Syrian opposition in order to support their fight against Syrian dictator Bashar al-Assad. Such delivery would be a clear breach of both international and European law.

Main sources:

Council Decision of 1 December 2011 concerning restrictive measures against Syria

Pierre Thielbörger, 'Die Anerkennung oppositioneller Gruppen in den Fällen Libyen (2011) und Syrien (2012)', HuV-I 1/2013, pp. 34-43

The civil war between the troops of Syrian dictator Baschar al-Assad and the Syrian rebels reaches ever greater levels of brutality every week. It is a largely unequal fight, as, by contrast to Assad's troops, the rebels rely on very light and simple weapons. European States are now debating the possibility of delivering weapons to the Syrian opposition. But would such delivery of weapons be in accordance with international and European law?

Since the Nicaragua case (*Case Concerning Military and Paramilitary Activities in and against Nicaragua*, 1986 ICJ 14, para. 247), it is recognised that the delivery of weapons to an opposition group can amount to a violation of the prohibition on the use of force (Art. 2 Nr. 4 UN Charter). Only few exceptions to this paramount norm are accepted in international law. Firstly, the UN Security Council can act under Chapter VII, if it determines a threat to international peace (Art. 39 UN Charter). However, such a resolution never came into being due to the continued veto of Russia and China in the Council. Secondly, a case of self-defence (Art. 51 UN Charter) is also not obvious as Assad directs all his aggression towards his own people. Thirdly, a curious case is that one of the humanitarian intervention, mirrored in the political concept of the responsibility to protect. More and more academics and Western States proclaim the emergence of such a norm, which would allow an intervention of last resort in case of severe and on-going human rights violation. Yet, a significant number of States remains sceptical about such exception to the prohibition on the use of force (The Group of 77, Declaration, Mn. 54). Fourthly, to justify the delivery of arms as a countermeasure (Art. 22, 49-55 Draft Articles on State Responsibility (ASR)) is also not possible. Regardless of whether human rights violations in their *erga omnes* effect (*Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, 1970 ICJ 3, paras. 33 ff.) give the right to apply countermeasures to all States or only to specifically affected ones, the delivery of weapons would be a violation of Art. 2 Nr. 4 UN Charter and thus a violation of *ius cogens*. The content of a countermeasure, however, can never be in violation of *ius cogens* (Art. 50 ASR). Lastly, the Syrian government could have invited the delivery of weapons to the rebels. Obviously the Assad regime is far from willing to extend such an invitation. The only question is: is the Assad regime still the Syrian government? The Syrian opposition, now unified in the 'National Coalition', can be considered by now as 'a' or even 'the' legitimate representative of the Syrian people (a terminology becoming more and more common in recognition statements). However, being the 'legitimate representative' is not the same as being the 'government'. It is, however, the government that must extend an invitation. Thus, the delivery of weapons to the Syrian rebels would be in violation of international law.

With regard to European law, the European Member States adopted in December 2011 a common position, stating that no weapons should be delivered to any actor within Syria – thus, neither to the government nor to the rebels (*Council Decision 2011/782/CFSP Concerning Restrictive Measures against Syria*). Generally, trade in manufactured goods falls under exclusive community competence; however, Art. 346 TFEU allows for embargoes relating to military goods to be implemented by Member States using national measures. Arms embargoes are regularly imposed by a common position and enforced through export control legislation of the Member States. The United Kingdom (UK) and France have pressed recently to re-negotiate this common position. However, as decisions in the second pillar (Common Foreign and Security Policy (CFSP)) require unanimity (Art. 31 TEU), such re-negotiations have proven difficult, if not impossible. The German government has made very clear that it would not be willing to change the previously agreed common position. Without such re-negotiation, the delivery of weapons would be in violation of EU law.

Will this bar States like France and the UK from delivering weapons to the rebels? It is hard to predict. At least, the European courts could not easily adjudicate such violation of EU law: most decisions under the CFSP are exempted from judicial review by these courts (Art. 24 (1) 6 TEU).

Verantwortung

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