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## **Recent Practice in Recognition of Governments: The Case of Libya since 2015**

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## Abbreviations

AU	African Union
EU	European Union
GNA	Government of National Accord
GNC	General National Congress
HoR	House of Representatives
ICD	Interim Constitutional Declaration
LIA	Libyan Investment Authority
LNA	Libyan National Army
LPA	Libyan Political Agreement
NOC	National Oil Company
NTC	National Transitional Council
UAE	United Arab Emirates
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNSMIL	United Nations Support Mission for Libya
USA	United States of America

## Introduction

According to Herodotus, when Xerxes, the King of Persia, wanted to be recognized by the Hellespont as the King of the World, he whipped the tides with 300 lashes<sup>1</sup>. In contemporary terms, Xerxes could be described as the Head of the State of Persia and the Hellespont as an entity refusing to recognize his status and his legal position; the whippings could be regarded as recognition practices. Even though this approach has been abandoned and the sea has remained unwhipped ever since, recognition is still a perplexed issue.

This thesis is a case study on the recent practice in recognition of governments, as developed within the particular framework of the Libyan rival governments from December 2015 till November 2020; the first government, the Government of National Accord is based in Tripolitania, while the second one, which will be called the ‘eastern government’ for the purposes of the present study, is based in Cyrenaica. It aims to provide a thorough and extensive presentation and analysis of their emergence and the subsequent reaction of the international community. Furthermore, their legal evaluation is presented. Issues of human rights, international humanitarian law, use of force, international criminal law and international responsibility remain outside the scope of the present study, and are examined only to the extent that they are connected with recognition of governments.

The thesis consists of two parts. The first one presents the domestic and international reactions to Libya’s rival governments. In particular, it analyzes the major events, which shaped Libya’s political landscape since the fall of Colonel Qaddafi and led to the fragmentation of the Libyan Government. Special emphasis is given to the domestic events that took place after the signature of the Skhirat Agreement in December 2015, and the subsequent emergence of two distinct and opposing ruling apparatuses. This sketching of the relevant historical, legal and political framework will be followed by the extensive presentation of the exact recognition approaches of the international community towards the rival entities. To this aim, the practice of eight states and three international organizations, which are most intensely involved in the dispute, is analyzed, through primary sources, like UN documents and Ministries of Foreign Affairs statements, while an attempt to draw similarities and differences over the examined approaches is made.

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<sup>1</sup> Ηρόδοτος, *Ηρόδοτου Ιστορίαι* 3, (Αθήνα: Ωκεανίδα, 2000), 129-130.

The second part of this thesis can be described as the empirical one. In this part, the application of the recognition of governments criteria on the specific case of Libya is attempted. Specifically, the Libyan rival governments and their potential to be recognized as the legitimate Government of Libya under international law, are examined in accordance with the effective control doctrine and the legitimacy doctrine. These criteria are further divided in more specific ones, like the territorial and institutional support and the legitimacy of origin and exercise. Regarding the structure of this part, it should be noted that in the beginning, the theoretical framework of each criterion and the relevant international practice are presented. Subsequently, the ad hoc circumstances of the Libyan rivals are analyzed. Finally, the application of the legal criteria on the specific Libyan factual framework takes place. The conclusions of both parts are presented in the end.

To begin with, recognition could be defined as a “unilateral expression of will formulated by one or more States, individually or collectively, acknowledging the existence of a de facto or de jure situation or the legality of a legal claim, with the intention of producing specific legal effects, and in particular accepting its opposability as from that time or from the time indicated in the declaration itself”<sup>2</sup>. It is a discretionary act formulated by states and international organizations<sup>3</sup> in conformity with international law and with the intention of creating certain legally binding, opposable and enforceable effects on the basis of specific facts, situations or claims<sup>4</sup>. It has to be mentioned that disputes concerning its character, as well as its nature have turned it into one of the most nebulous, controversial or even paradoxical subjects of international law<sup>5</sup>.

Its profound relationship with facts and the large (practically unlimited) quantity of concepts which are subject to it, have resulted in its inherently broad definition, where limits between facts and law are not easily distinguishable. Therefore, it has been often cited that recognition is “a matter of fact and not of law”<sup>6</sup>. Without doubt, it is inherently interwoven with factual situations, but this trait does not deprive it of its legal nature. In fact, recognition attaches a

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<sup>2</sup> International Law Commission, Document A/CN.4/534, *Sixth Report on unilateral acts of States* (2003), 63, par. 67. The term was defined for the first time as “the free act by which one or more States acknowledge the existence in a certain territory of a politically organized human society, independent of any other existing state and capable of observing the precepts of international law” by the Institut de Droit International, *La reconnaissance des nouveaux Etats et des nouveaux gouvernements*, Session de Bruxelles (1936).

<sup>3</sup> Recognition acts of international organizations are unilateral acts of collective origin, formulated by the organization’s competent organ in accordance with its rules, see ILC, *Sixth Report on unilateral acts of States*, 59.

<sup>4</sup> ILC, *Sixth Report on unilateral acts of States*, 63-65.

<sup>5</sup> Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile*, (Oxford: Oxford University Press, 1998), 21; Hans Kelsen, “Recognition in International Law: Theoretical Observations,” *American Journal of International Law* 35, no. 4 (1941): 605.

<sup>6</sup> Robert Jennings and Arthur Watts, eds, *Oppenheim’s International Law*, 9<sup>th</sup> edition, vol. 1 (Oxford: Oxford University Press, 2008), 677.

certain legal status to facts and states of affairs on the basis of certain rules<sup>7</sup>. As Waldock has stated, it could be better described as a “mixed question of fact and law”<sup>8</sup>.

Another controversy has arisen concerning its legal or political nature. Even though it is widely considered as being basically a question of (international) law<sup>9</sup>, various scholars have also argued that it has a purely political nature<sup>10</sup>. Their arguments are based on the fact that States usually take into account political considerations in order to recognize an entity<sup>11</sup>. However, this practice does not deprive recognition of its legal consequences. Kelsen distinguished between 2 acts of recognition; one political and one legal, where the former is arbitrary, declaratory and denotes the recognizing State’s willingness to enter into political relations with the recognized entities, while the latter is constitutive of the entity’s existence vis-à-vis the recognizing State and thus, relative<sup>12</sup>.

Talmon supports this view, distinguishing between political recognition, which is discretionary, potentially conditional, subject to unilateral withdrawal and brings on enhanced political relations and material, financial and moral support towards the recognized entity, while the incumbent government’s international standing and legal status is intact, and legal recognition, which establishes the fact that the recognized entity meets the necessary criteria in order to be considered as a government under international law and that the recognizing government will treat it in this capacity. This act is relative, unconditional and may be withdrawn only when factual situation (and as a result, accordance with recognition of governments criteria) is

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<sup>7</sup> James Crawford, *The Creation of States in International Law*, 2<sup>nd</sup> edition (Oxford: Oxford University Press, 2006), 5.

<sup>8</sup> Humphrey Waldock, “General Course on Public International Law (Volume 106)”, in *Selected Courses of the Hague Academy of International Law* (Hague: 1962), 146.

<sup>9</sup> Hersch Lauterpacht, “Recognition of Governments: I,” *Columbia Law Review* 45, no. 6 (1945): 816. Alexandrowicz-Alexander advocated recognition’s quasi-judicial character, see Charles Henry Alexandrowicz-Alexander, “The Quasi-Judicial Function in Recognition of States and Governments,” *The American Journal of International Law* 46, no. 4 (Oct. 1952): 632.

<sup>10</sup> Joe Verhoeven, “La reconnaissance internationale, déclin ou renouveau ?,” *Annuaire français de droit international* 39 (1993): 11.

<sup>11</sup> According to M. J. Peterson, “Political Use of Recognition: The Influence of the International System,” *World Affairs* 34, no. 3 (Apr., 1982): 328, political uses of recognition may be distinguished in those expressing friendship or hostility toward a new government and those granting recognition for a particular act or promise regarding recognized entity’s future policy.

<sup>12</sup> Kelsen, “Recognition in International Law: Theoretical Observations,” 605, 609. According to Lauterpacht, “Recognition of Governments: I,” 818, both the legal and political acts of recognition are governed by international law, applied by different organs; the former by the judiciary and the latter by the executive. It has to be noted that when US President Obama recognized the Syrian Opposition Coalition as “the legitimate representative of the Syrian people” in 2012, the State Department clarified his act as a “political and not a legal step”, see Brad R. Roth, “Whither Democratic Legitimism: Contextualizing Recent Developments in the Recognition and Non-Recognition of Governments,” *AJIL Unbound* 108 (2014-2015): 214.

overturned<sup>13</sup>. Nevertheless, recent theory has argued that it is a political act within a legal context, having significant legal consequences<sup>14</sup>.

Moreover, recognition has provoked one of the greatest doctrinal debates of international law. The issue at stake is whether recognition creates or not, a State's international legal personality. According to positivist theory, recognition has a constitutive character. Each coherent system of rules needs an entity which will determine its subjects. International system lacks a superior authority competent of this task. As a result, states (through their governments) are granted this competency. By recognizing new entities, they enable them be considered as subjects of international law, subjecting them to the body of rules of international law and conferring on them all relevant rights and obligations<sup>15</sup>. A major problem of this theory is that States could arbitrarily refuse recognition to entities entitled to claim it, in order to avoid their inclusion in the international system. This approach was particularly prominent during the colonial and post-colonial era, when western states used recognition to evaluate newly established political entities' maturity to join the "community of civilized nations"<sup>16</sup>. Thus, it has been stated that States have a legal duty to recognize an entity, as soon as the necessary prerequisites are met<sup>17</sup>.

On the contrary, adherents of natural law argue that recognition has a merely declaratory function, as the status of the recognized entity is achieved as soon as its necessary requirements are met. They link it to political reasons that are indifferent to its legal status<sup>18</sup>. However, it is a rather complex issue, which cannot be easily resolved. To be precise, one has to examine closely all functions accomplished by recognition. While it is true that acquisition of statehood cannot be laid upon the discretion of each state, recognition renders constitutive effects in relation to several specific matters, such as the exchange of diplomatic representatives<sup>19</sup>. As a consequence, one cannot dismiss categorically the one or the other theory, as both can be used to describe

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<sup>13</sup> Stefan Talmon, "Recognition of Opposition Groups as the Legitimate Representative of a People," *Chinese Journal of International Law* (2013): 231-234, 243.

<sup>14</sup> International Law Association, *Committee on Recognition/ Non-Recognition in International Law: Fourth (Final) Report* (2018): 14.

<sup>15</sup> Crawford, *The Creation of States in International Law*, 13.

<sup>16</sup> Emmanuelle Tourme-Jouannet, "The International Law of Recognition," *The European Journal of International Law* 24, no. 2 (2013): 668.

<sup>17</sup> Lauterpacht, "Recognition of Governments: I," 81; Louis Henkin (ed.), *Restatement (Third) of the Foreign Relations Law of the United States*, (St Paul, Minnesota: American Law Institute Publishers, 1987), par. 203.

<sup>18</sup> Crawford, *The Creation of States in International Law*, 23.

<sup>19</sup> Editors, *Law Review*, "Recognition in International Law: A Functional Reappraisal," *The University of Chicago Law Review* 34, (1967): 882. This view is dismissed by Crawford, *The Creation of States in International Law*, 27-28, who supports the declaratory view, once specific recognition criteria exist.

certain recognition functions. Nonetheless, nowadays, this dichotomy has been rejected as of limited importance<sup>20</sup>.

It has to be noted that recognition is an institution applied upon a great quantity of concepts; states, governments, territorial changes, administrative and judicial acts of governments can be recognized by subjects of international law<sup>21</sup>. Its diversified objects and the absence of an a priori restriction concerning their discretion to recognize every entity they decide to, are justified by the significance laid upon sovereignty in the international system<sup>22</sup>. However, states and governments have been regarded as its most important objects; States being the principal subjects of international law and governments acting as their principal organs. While recognition of states has been thoroughly examined in the past, this has not been the case regarding recognition of governments, which constitutes the main theme of the current thesis<sup>23</sup>.

Recognition of governments is a complex and rather obscure subject, where political considerations, legal doctrines and factual situations complement one another. In order to fully understand the subject's sense, one has to define its constitutive components and mainly, government. According to Kelsen, government is "the individual or body of individuals which by virtue of the effective constitution of a state, represents the state in its relations with other states, ie is competent to act on behalf of the state in its relations with the community of states"<sup>24</sup>. The international representation of the state is a very significant function of governments, since they act as proxies of states, being the organizational machineries, which enable states to take part in international relations, exercise their rights and fulfill their obligations<sup>25</sup>. While this definition focuses apart from the effective constitution, also on the entity's competence regarding its relations with states, Roth has proposed a more pragmatic definition, based on the factual situation, rather than on its international standing; he considers that an institution constituting the ruling apparatus over a territory and its population, is a government<sup>26</sup>.

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<sup>20</sup> International Law Association, 78<sup>th</sup> Conference, *Committee on Recognition/ Non-Recognition in International Law: Resolution 3/ 2018* (2018).

<sup>21</sup> International Law Association, *Committee on Recognition/ Non-Recognition in International Law: Fourth (Final) Report*, 1.

<sup>22</sup> Verhoeven, "La reconnaissance internationale, déclin ou renouveau ?," 11.

<sup>23</sup> A certain problem is that while there are specific criteria of statehood (based on the Montevideo Declaration), there are no equivalent criteria for "governmenthood", see Anne Schuit, "Recognition of Governments in International Law and the Recent Conflict in Libya," *International Community Law Review* 14, no. 4 (2012): 388. It has to be noted that this conclusion was also expressed in the ILA 2018 Resolution on Recognition.

<sup>24</sup> Kelsen, "Recognition in International Law: Theoretical Observations," 615.

<sup>25</sup> Siegfried Magiera, "Governments," *Max Planck Encyclopedia of Public International Law*, September 2007, [Oxford Public International Law: Governments \(ouplaw.com\)](https://www.ouplaw.com/) (accessed November 15, 2020).

<sup>26</sup> Brad R. Roth, *Governmental Illegitimacy in International Law* (Oxford: Oxford University Press, 2000), 8.

Combining the definition of recognition and government and placing the subject in its proper dimensions, it can be said that recognition of governments is the unilateral, discretionary act through which subjects of international law express their opinion regarding the legal status of an entity, which constitutes the effective ruling apparatus of a territory, as well as their readiness to establish official relations with it<sup>27</sup>. In other words, the acknowledgement of a certain legal position of the recognized government is accompanied by the recognizing state's intention to deal with this entity as the government of a state, establishing diplomatic relations and granting it immunities and privileges within its domestic legal order<sup>28</sup>. State practice has developed two main criteria for the assessment of a government under international law; the effective control doctrine, which takes into account the factual extent of control exercised by the government in question, and the legitimacy doctrine, which renders the legitimacy of a regime conditional upon its accordance with the domestic legal order.

This subject of international law rose into prominence during the first decades of the 19<sup>th</sup> century and mainly when the Spanish Provinces of Latin America proclaimed their independence. At this time, the creation of new states led to the simultaneous recognition of states and its governments, resulting in a theoretical confusion between the two terms.

Even though there is a close relation between these two types of recognition, they are not identical<sup>29</sup>. In many cases an entity meets the necessary statehood criteria, but recognition of its ruling apparatus is denied by other states due to political reasons. A typical example of this phenomenon is the unconstitutional change of government. In this case, other states may recognize the existence of the state, but withhold the recognition of its government. For example, both the British and the US Governments postponed the recognition of the Bolshevik Government, even though the Soviet Union constituted by all means a state and it met all necessary criteria<sup>30</sup>. On the contrary, a government may be recognized without being accompanied by recognition of a certain state. For instance, the US and the French Governments recognized the Czecho-Slovak National Council as a Provisional Czecho-Slovak Government after its declaration of independence on 18 October 1918, despite the fact that it did not exert

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<sup>27</sup> Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile*, 24, 29.

<sup>28</sup> Malcolm N. Shaw, *International Law*, 6<sup>th</sup> edition (Cambridge: Cambridge University Press, 2008): 455.

<sup>29</sup> James Crawford, *Brownlie's Principles of International Law*, 8<sup>th</sup> ed. (Oxford: Oxford University Press, 2012), 151.

<sup>30</sup> Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile*, 27, 35.

effective control over Czecho-Slovakian territory and even though, Czecho-Slovakia did not exist as a state at the time<sup>31</sup>.

Recognition of governments is distinguished in de jure and de facto recognition. De jure recognition means recognition of a de jure government, while de facto recognition amounts to recognition of a de facto government<sup>32</sup>. Historically, de jure recognition could be granted to new states and governments solely by their former sovereign. Until then, all other states could recognize them only de facto<sup>33</sup>. Contemporary theory rejects this approach and considers parent state's consent on recognition as unnecessary, if all the necessary criteria are met<sup>34</sup>.

These variants have various differences. First of all, a de jure government is exclusively the government of a state and thus, each state can only have one de jure government<sup>35</sup>. On the contrary, there may be more de facto governments in the territory of the same state. That is why, in *New York Chinese TV Programs v. UE Enterprises*, the US Circuit Court of Appeals ruled that due to the fact that both the People's Republic of China and the Republic of China (Taiwan) claimed to constitute the sole legitimate Chinese Government, whereas only the former did exercise effective control over the Chinese territory, its recognition as the de jure Government of China necessarily amounted to the de-recognition of Taiwan, since only one de jure government may exist in each state<sup>36</sup>. As a result, de jure recognition denotes a sovereign authority, while de facto recognition may indicate an array of governmental types; an effective regime, an unconstitutional government, a regime fulfilling only some recognition of governments requirements, a partially successful government or an illegal government under international law<sup>37</sup>. A typical example of a de facto government is the case of insurgents. According to

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<sup>31</sup> The Czecho-Slovakian State was recognized by the Allied Powers in a Treaty on 10 September 1919, see Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile*, 78.

<sup>32</sup> Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile*, 60. Nevertheless, many jurists consider this distinction as vague, see Charles L. Cochran, "De Facto and De Jure Recognition: Is there a Difference?," *The American Journal of International Law* 62, no. 2 (1968): 460.

<sup>33</sup> Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile*, 56.

<sup>34</sup> Zaim M. Nedjati, "Acts of Unrecognized Governments," *International and Comparative Law Quarterly* 30, no. 2 (1981): 389. However, Jure Vidmar, "Explaining the legal effects of recognition," *International and Comparative Law Quarterly* 61, no. 2 (2012): 368, 378, using the examples of Timor Leste and Bangladesh, considers that a new entity's recognition becomes universal, only after the expression of consent of its former sovereign.

<sup>35</sup> Lauterpacht, "Recognition of Governments: I," 823.

<sup>36</sup> Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile*, 105.

<sup>37</sup> Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile*, 60.

Lauterpacht, during civil wars, insurgents cannot be recognized de jure, but only de facto. This approach, he adds, constitutes an established principle of international law<sup>38</sup>.

Furthermore, de facto recognition produces limited effects in comparison with de jure recognition. As a de facto government does not amount to the government of a sovereign state, it is not entitled to jurisdictional immunities and cannot claim ownership over state assets outside its territory, as happens in the case of de jure governments. Moreover, the type of recognition granted to a government, affects the specific nature of relations between the recognizing and the recognized government. For example, de jure recognition usually amounts to the expression of preparedness for normal diplomatic relations, whereas de facto recognition expresses recognizing state's willingness to maintain limited diplomatic or consular relations with the recognized government<sup>39</sup>. Thus, Turkey appointed an ambassador in Libya, only after the NTC managed to exercise effective control over the capital and was recognized as the state's de jure government<sup>40</sup>.

In addition, recognition can be express or implied. In express recognition, states issue open, unambiguous and open communications<sup>41</sup>. Nonetheless, a government's recognition of another government may be deduced implicitly through the nature of dealings between the two entities, which indicate recognizing government's intention to accord recognition to the other one. For example, a message of congratulations to a new government or the formal establishment of diplomatic relations usually indicate this government's recognition. After all, even in recognition declarations, the use of the word "recognize" may be omitted and replaced by other words, denoting the same intention of the state<sup>42</sup>. Last but not least, there are cases, where a state does implicitly recognize another state or government, even though it expressly insists on its non-recognition towards that entity<sup>43</sup>.

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<sup>38</sup> Hersch Lauterpacht, "Recognition of Insurgents as De Facto Government," *The Modern Law Review* vol. III, no. 1 (1939): 20.

<sup>39</sup> Nedjati, "Acts of Unrecognized Governments," 388.

<sup>40</sup> "Bilateral Relations between Turkey and Libya," [Bilateral Relations between Turkey and Libya / Rep. of Turkey Ministry of Foreign Affairs \(mfa.gov.tr\)](http://mfa.gov.tr) (accessed November 15, 2020).

<sup>41</sup> Shaw, *International Law*, 462.

<sup>42</sup> Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile*, 4-5.

<sup>43</sup> For instance, according to Talmon, in spite of Turkey's express non-recognition of the Republic of Cyprus, it can be deduced by its overall behavior towards it, that it recognizes it implicitly as one of two sovereign states in Cyprus, see Stefan Talmon, "Chypre : écueil pour la Turquie sur la voie de l'Europe," *Annuaire français de droit international* 51 (2005): 89.

In the 1960s France and Belgium decided to abolish the practice of recognition of governments. Their new policy was expressly stated in their notes towards the Boumedienne Government of Algeria and the Qaddafi Government of Libya respectively, where both states declared that thenceforth they would recognize only states and not governments<sup>44</sup>. Various reasons brought on this decision and mainly, the practical difficulties caused by the political use of recognition in conjunction with the widespread belief that recognition of a new government amounts to its approval. As stated by Australian Minister of Foreign Affairs and Trade in 1988: “recognition of a new Government inevitably led to public assumptions of approval or disapproval of the Government concerned, and could thereby create domestic or other problems for the recognizing Government”<sup>45</sup>.

Subsequently, more States followed this example and issued similar declarations. In particular, the British Foreign Secretary announced in 1980 that the United Kingdom would not recognize thenceforth governments “in accordance with common international practice”<sup>46</sup>. It has to be noted that despite this trend, recognition of new states was never rejected<sup>47</sup>, because it has been stated that the existence of states provides the necessary framework to deal with governmental changes, without resorting to recognition of governments<sup>48</sup>. However, Talmon has argued that this change of state practice does not amount to the abolition of recognition of governments, but that it denotes a change in the way recognition is accorded. In other words, he concludes that the differentiation brought on by the abovementioned declarations is the replacement of express and formal recognition of governments declarations by more implicit practices<sup>49</sup>.

Nonetheless, this subject of international law regained its significance in the beginning of the second decade of the 21<sup>st</sup> century. Specifically, when revolutions against the Arab authoritarian

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<sup>44</sup> M. J. Peterson, “Recognition of Governments Should Not Be Abolished,” *American Journal of International Law* 77, no. 1 (January 1983): 42. Lauterpacht considered recognition of governments as a necessary and substantial act due to “the uncertainty, brought about by the events of the revolution, as to who is the holder of effective power”, see Hersh Lauterpacht, “Recognition of Governments: II,” *Columbia Law Review* 46, no. 1 (January 1946): 51-52.

<sup>45</sup> Minister for Foreign Affairs and Trade, Press Release 19 January 1988, reprinted in *Australian International Law News* (1988): 49. In particular, Australia wanted to find an easy and simple way to restore relations with the Fijian government, which had emerged by a coup d’etat previously criticized by the Australian government, see Hilary Charlesworth, “The new Australian recognition policy in comparative perspective,” *Melbourne University Law Review* 18 (1991): 2-3

<sup>46</sup> Colin Warbrick, “Recognition of Governments,” *Modern Law Review* 56, no. 1 (January 1993): 92. For an extensive presentation of this decision of the Government of the UK, see Colin Warbrick, “The New British Policy on Recognition of Governments,” *International and Comparative Law Quarterly* 30, no. 3 (July 1981): 568.

<sup>47</sup> New Zealand constitutes an exception, claiming that it has abolished the practice of making explicit statements on recognition of states. Nevertheless, according to Talmon, in this case express recognition has been replaced by the implied way of recognition, see Stefan Talmon, “New Zealand’s Policy of Implied Recognition of States: One Step Ahead or Falling Behind?,” *University of Oxford Legal Research Papers- Paper No 70/2010* (October 2010): 8.

<sup>48</sup> Peterson, “Recognition of Governments Should Not Be Abolished,” 31.

<sup>49</sup> Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile*, 3.

regimes began to spread all over the Middle East and North Africa, the international community had to confront a question; how to deal with rebels' political branches, which started to form ruling apparatuses, which were rivaling incumbent regimes and were claiming to constitute their respective countries' sole legitimate governments. In this context, various recognition formulas started to be invented, in order foreign states and international organizations to deal with these entities, support them, or even express their disapproval.

A typical example of this phenomenon was the case of Libya in 2011, when the international community had to decide if Qaddafi or the rebels could claim the position of Libya's Government. Whilst several approaches were followed, the revolution escalated into a conflict and later into a Civil War, which was hoped to stop with the UN-led unification efforts that resulted in the signature of the Libyan Political Agreement (or Skhirat Agreement) in December 2015. This Agreement was expected to provide an inclusive transitional framework, which would facilitate Libya's democratic transition, by leading the country to the organization of free and fair elections. However, this aim has not been accomplished to this day and Libya has not managed to be governed by a unified government. On the contrary, in the wake of the Agreement, two distinct ruling machineries were formed, and the international community tried to deal with them, by resorting to the recognition of governments criteria.

## **Part One: Libya's Rival Government(s): Domestic and International Reactions**

### **a) Background on Libya's Governmental Fragmentation**

Libya is a North African state, which had been governed by Colonel Qaddafi for almost 40 years. In the wake of the so-called "Arab Spring" movements in various Arab states, a revolution against Qaddafi's regime started in Benghazi, on 15 February 2011. Subsequently, demonstrations took place all over the country and rebels took control of various eastern areas and cities, such as Misrata. Qaddafi tried to suppress these protests violently and it was reported that he was deploying mercenaries in order to quell any resistance. Various atrocities were reported, as for example the deaths of 233 civilians<sup>50</sup>.

Following these acts of the Government of Libya, foreign governments began to recognize the National Transitional Council, which acted as the revolution's political branch, as "the legitimate representative of the Libyan people". This wording did not amount to the recognition of the NTC as Libya's government, but offered several practical advantages, while it acknowledged and supported the rebels' struggle against Qaddafi<sup>51</sup>.

Subsequently, states elevated NTC's status, considering it as Libya's legitimate government. In spite of the entity's lack of democratic origin through free and fair elections, its struggle against Qaddafi's authoritarian regime, its promise of the organization of elections and the fact that it was inclusive, encompassing the majority of Libyan society's factions, could be regarded as rendering it legitimate. However, its initial lack of effective control over a considerable part of Libyan territory made its status as Libya's government, dubious<sup>52</sup>.

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<sup>50</sup> Patrick CR Terry, "The Libya intervention (2011): neither lawful, nor successful," *The Comparative and International Law Journal of Southern Africa* 48, no. 2 (2015): 164.

<sup>51</sup> Stefan Talmon, "Recognition of the Libyan National Transitional Council", *University of Oxford Legal Research Paper Series, Paper No 38/2011* (2011): 2. The United Kingdom firstly recognized the NTC as the "legitimate political interlocutor" for the Libyan people, trying to support its cause. Subsequently, it altered its recognition position and recognized it as "the legitimate representative of the Libyan people" and finally, as "the legitimate governing authority in Libya", see Colin Warbrick, "British Policy and the National Transitional Council of Libya," *International and Comparative Law Quarterly* 61, no. 1 (January 2012): 250.

<sup>52</sup> Dapo Akande, "Recognition of Libyan National Transitional Council as Government of Libya," *EJIL: Talk!*, 23 July 2011, <https://www.ejiltalk.org/recognition-of-libyan-national-transitional-council-as-government-of-libya/> (accessed November 15 2020).

As the conflict escalated, the Arab League and the Organization of Islamic Cooperation highlighted the United Nations Security Council's specific responsibilities to protect civilians in Libya and urged it to take several measures, including the imposition of a no-fly zone on Libyan military aviation<sup>53</sup>. As a result, the UNSC faced international community's anticipation to take action against the Qaddafi regime.

Responding to this situation, the UNSC adopted Resolution 1970 pursuant to Chapter VII of the Charter on 26 February 2011. According to the Resolution, the case was referred to the Prosecutor of the International Criminal Court, arms embargo was imposed on Libya<sup>54</sup>, as well as travel ban and assets freeze on the Qaddafi family and their closest affiliates<sup>55</sup>. Subsequently, on 17 March 2011, the Council adopted Resolution 1973 pursuant to Chapter VII of the Charter, as well. In this Resolution, the Council took a step further, authorized Member States to take all necessary measures to protect civilians and civilian populated areas under threat of attack by the Qaddafi regime and imposed a no-fly zone on the airspace of Libya, in order to protect civilians<sup>56</sup>. Furthermore, it imposed assets freeze on several fundamental Libyan financial institutions, like the National Oil Corporation, the Libyan Investment Authority and the Central Bank of Libya, due to the control exercised on them by the regime. In addition, it established a Panel of Experts mandated to gather, examine and analyze information from states, UN bodies, regional organizations and other interested parties regarding the implementation of the measures decided in Resolution 1970 and Resolution 1973, to make recommendations on actions to improve implementation of the relevant measures and to provide reports to the Council on the situation in Libya<sup>57</sup>. In accordance with the Resolution, a NATO-led multi-national coalition began a military intervention in Libya on 19 March 2011<sup>58</sup>. This armed conflict could be described as mixed; an International Armed Conflict between the Qaddafi forces representing the

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<sup>53</sup> League of Arab States, "The Outcome of the Council of the League of Arab States Meeting at the Ministerial Level in Its Extraordinary Session on the Implications of the Current Events in Libya and the Arab Position", Resolution No. 7360/2011.

<sup>54</sup> The arms embargo was imposed to all arms transfer to the territory of Libya and not solely on the Libyan Government, Dapo Akande, "Does SC Resolution 1973 Permit Coalition Military Support for the Libyan Rebels?," *EJIL:Talk!*, 31 March 2011, <https://www.ejiltalk.org/does-sc-resolution-1973-permit-coalition-military-support-for-the-libyan-rebels/> (accessed November 15, 2020).

<sup>55</sup> UNSC, *Resolution 1970*, S/RES/1970 (2011).

<sup>56</sup> Akande, "Does SC Resolution 1973 Permit Coalition Military Support for the Libyan Rebels?," considers that UN Member States pursuant to UNSC Resolution 1973, could arm Libyan rebels solely on the ground of protecting civilians. Otherwise, they would violate the arms embargo imposed by UNSC Resolution 1970.

<sup>57</sup> UNSC, *Resolution 2011*, S/RES/1973 (2011).

<sup>58</sup> David D. Kirkpatrick, Steven Erlanger and Elisabeth Bumiller, "Allies Open Air Assault on Qaddafi's Forces in Libya," *The New York Times* March 19, 2011, <https://www.nytimes.com/2011/03/20/world/africa/20libya.html>. (accessed November 15, 2020).

State of Libya and the Coalition forces, and a Non-International Armed Conflict between Libyan Government and the rebels<sup>59</sup>.

The adoption of UNSC Resolution 1973 constitutes the first time that the UNSC invoked the ‘responsibility to protect’ principle, in order to authorize UN Member States to intervene (and even use force) in the internal affairs of a state<sup>60</sup>. According to the principle, protection of civilians is a primary responsibility of their respective state. Nevertheless, if that state is unable or unwilling to fulfil its obligation, responsibility is taken up by the international community collectively. This principle, firstly expressed by the UN Secretary General in 2004, links a state’s sovereignty to its responsibility to protect its own citizens and to meet its obligations towards the international community. If that is not possible, the international community itself on the basis of collective security shall take on and fill the gap. Powell considers this first initiation of the principle as a “multilateral constitutional moment”; multilateral, as action must be taken by many states and solution to the problem cannot be offered by any single state on its own, and constitutional, because it marks a normative shift concerning the interrelation between several UN Charter’s fundamental provisions, like the protection of human rights, sovereignty and the prohibition of interference in the internal affairs of a state<sup>61</sup>.

Under these circumstances, Libya’s envoys to the UN started to differentiate their position from the official government’s acts. To begin with, Libya’s ambassador to the UN, Mohamed Shalgham, condemned Qaddafi’s reaction against the protesters, who simply asked for their freedom and their rights. Thus, he asked the Libyan Head of State to ‘Leave Libyans alone’ and urged the UNSC to impose sanctions against the Qaddafi family and other high-profile regime officials. In parallel, the Libyan ambassador to the UN Human Rights Council informed the Council that thenceforth the Libyan mission would not represent the Libyan government, but the Libyan people, and pleaded for help.<sup>62</sup> In other words, Qaddafi’s brutal suppression of the protests led to the renunciation of the regime, even by its own appointees, who called the UN to take action.

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<sup>59</sup> Marko Milanovic, “How to Qualify the Armed Conflict in Libya?,” *EJIL:Talk!*, 1 September 2011, [How to Qualify the Armed Conflict in Libya? – EJIL: Talk!](#) (accessed November 15, 2020).

<sup>60</sup> Catherine Powell, “Libya: A Multilateral Constitutional Moment,” *American Journal of International Law* 106 (2012): 298.

<sup>61</sup> Powell, “Libya: A Multilateral Constitutional Moment,” 303.

<sup>62</sup> Powell, “Libya: A Multilateral Constitutional Moment,” 311.

On 16 September 2011 the General Assembly voted to approve the Transitional National Council as the only representative of Libya<sup>63</sup>. However, despite 114 Member States' votes in favor of the approval of the representation of Libya by the NTC, this government was not automatically recognized by them as Libya's Government in their bilateral relations, as well. In particular, a State representative's vote in favor of the entrance of a state in an international organization or of the replacement of an entity as a State's agent in the organization does not bind the State outside of that specific context, but is strictly limited within the specific operational framework of the organization<sup>64</sup>.

In that context, the UNSC adopted Resolution 2009, which established the United Nations Support Mission for Libya (UNSMIL) as an integrated special political mission in order to support Libya's transition to a democratic and more stable regime, on 16 September 2011<sup>65</sup>. Its mandate includes support to the legitimate transitional Libyan authorities and financial institutions, the exercise of mediation between the rival parties and reporting on human rights. UNSMIL's engagement in the mitigation of the Libyan conflict has been significant and it has co-operated constructively with all parties of the conflict, in order to promote unification efforts and ameliorate human rights conditions. The Mission is headed by UN Secretary-General's Special Representative in Libya. The first appointee was Ian Martin, succeeded by Tarek Mitri in 2012, Bernardino Leon in 2014, Martin Kobler in 2015, Ghassan Salame in 2017 and Stephanie Williams in 2020.

The UNSMIL was instrumental in the adoption of the Interim Constitutional Declaration (ICD) by the NTC. This Declaration constitutes Libya's transitional constitutional framework, which would amplify opponents' struggle for power and would provide them with a certain operational guide. Nonetheless, several ICD's key articles were amended after pressure from the Higher Interim Council of Barqa, or the so-called "federalist movement" of the East, which insisted on the decentralization of state institutions and on the equal representation of the east provinces in the distribution of power<sup>66</sup>. According to its provisions, it would be replaced by a permanent Constitution drafted by the Constitutional Drafting Assembly<sup>67</sup>.

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<sup>63</sup> UNGA, *GA/11137* (16 September 2011).

<sup>64</sup> Εμμανουήλ Ρούκουνας, *Διεθνές Δίκαιο* (Αθήνα: Νομική Βιβλιοθήκη, 2015), 434.

<sup>65</sup> The mission's mandate was extended consecutively with UNSC Resolutions 2022 (2011), 2040 (2012), 2095 (2013), 2144 (2014), 2238 (2015), 2323 (2016), 2376 (2017), 2434 (2018) and 2486 (2019).

<sup>66</sup> Democracy Reporting International, *At a Glance: Libya's Transformation 2011-2018; Power, Legitimacy and the Economy* (2018): 21.

<sup>67</sup> A Constitution Drafting Assembly was elected in order to write Libya's Constitution in February 2014. According to its mandate, it would present its first draft within 120 days after its first session. However, after a long delay and due to Saleh's intention to dissolve the Assembly, it presented a Draft Constitution in July 2017. Nonetheless, it was

On 7 July 2012, Libya held its first elections after 40 years of Qaddafi rule and a 200-member General National Congress (GNC) was elected. The distribution of seats was decided in accordance with the 3 main regions' population, and on the basis of political reasons; as a result, Tripolitania was represented by 106 seats, Cyrenaica by 60 seats and Fezzan by 34. 120 representatives were elected through direct vote, while the remaining 80 through a closed-list proportional representation system. The majority of the proportional seats (39 seats out of 80) was won by the National Forces Alliance, 39 seats by the Justice and Construction Party, 3 by the National Front and the remaining 120 by individual candidates<sup>68</sup>. Ali Zeidan was appointed as Libya's Prime Minister.

Despite its emergence as Libya's first elected body in 40 years, the GNC started introducing legislation initiatives that altered the democratic elements of the regime and cancelled hopes for a democratic transformation of Libya. In the beginning, it amended the ICD's provision which required a 134-vote threshold in order legislation to be passed, to 120 votes. Subsequently, it lowered the threshold even more, passing the fifth ICD amendment, which provided for the GNC's exceptional power to pass legislation with 101 votes. This act was condemned by both politicians and the public, as it was drafted under pressure from armed groups, revolutionaries and political Islamists. As a consequence, it undermined the GNC's position as an inclusive, democratically elected institution, which operated in favor of all Libyans.

The GNC was further criticized, after the introduction of the Political Isolation Act, which intended to prohibit Qaddafi's former supporters from taking part in the new Libyan political landscape. However, it was adopted amid a voting procedure marked by the blatant interferences of various armed groups, which even besieged the Ministry of Justice<sup>69</sup>. In this way, armed groups were turned into the most important players of the Libyan political scene, undermining the GNC's role and putting into question both its efficacy and its orientation towards the democratic transformation of Libya.

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challenged in front of the Bayda Court of Appeal, which found various procedural irregularities and annulled its vote. Subsequently, the Supreme Court in Tripoli overturned the Bayda decision and ruled in favor of the Constitution's validity. Nevertheless, the HoR's amendment of the ICD, resulted in an additional condition in order the draft Constitution to be put for a referendum; instead of requiring simply a two-thirds majority in the whole region, it required also 50% plus one votes in each one of the 3 voting districts of Tripolitania, Cyrenaica and Fezzan.

<sup>68</sup> Democracy Reporting International, *At a Glance: Libya's Transformation 2011-2018; Power, Legitimacy and the Economy*, 23.

<sup>69</sup> Democracy Reporting International, *At a Glance: Libya's Transformation 2011-2018; Power, Legitimacy and the Economy*, 24.

The situation was deteriorated, when Prime Minister Ali Zeidan resigned and Abdullah al-Thinni was appointed as caretaker Prime Minister. When Ahmad Mitig was appointed as Zeidan's successor, his appointment was challenged in front of the Supreme Court in Tripoli, which rejected it as unconstitutional. During this period, al-Thinni retained his position.

In the meanwhile, parliamentary elections were held on 25 June 2014, with a turnout of 18% of registered voters, amidst battles between armed groups on the outskirts of Tripoli. After the election of the new legislative body called the House of Representatives, the GNC refused to relinquish its power and stated that its term had not expired on the basis of the ICD. The international community recognized the HoR as the "sole legislative authority in the country"<sup>70</sup>. At the same time, caretaker Prime-Minister al-Thinni refused to resign in favor of new Prime Minister appointed by the GNC. As a result, al-Thinni and the House of Representatives relocated to Tobruk, forming a government parallel to the one already existing in Tripoli<sup>71</sup>. The al-Thinni-led and HoR-supported government was considered by the international community as the legitimate Libyan government.

According to its mandate, the HoR would promote the necessary procedure in order to hold presidential elections. However, it adopted an amendment to the relevant article of the ICD delaying the procedure, due to security reasons. Also, it ignored the fact that the High National Election Commission had the technical capacity to support the organization of elections. As a consequence, the Parliament and its Speaker Aguila Saleh assumed provisionally presidential powers. It has to be noted that 2 months after the HoR's election, its legitimacy was questioned in front of the Supreme Court of Tripoli due to the fact that it had not appointed or held presidential elections 45 days after its first session. The Court nullified its election, but the verdict was rejected by the HoR, which accused the GNC of meddling with the procedure<sup>72</sup>.

In March 2015, the HoR appointed Haftar, a former Libyan officer and later head of an armed group, as general commander of Libya's armed forces with the rank of field marshal. His armed

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<sup>70</sup> UNSMIL, *Briefing by Bernardino Leon SRSG for Libya*, 15 September 2014, [Briefing by Bernardino León SRSG for Libya - Meeting of the Security Council 15 September 2014 | UNSMIL \(unmissions.org\)](#) (accessed November 15, 2020).

<sup>71</sup> Democracy Reporting International, *At a Glance: Libya's Transformation 2011-2018; Power, Legitimacy and the Economy*, 27-28.

<sup>72</sup> It has to be noted that Justice in Libya is the sole state institution that has not been fragmented during the conflict. Thus, the Supreme Court of Libya is seated in Tripoli and we do not observe the formation of a parallel Supreme Court in other Libyan cities, as has happened with other Libyan state institutions, like the National Oil Corporation or the Central Bank.

forces have been given various names; Haftar refers to them as Libyan Arab Armed Forces<sup>73</sup>, his supporters as ‘al-jaysh’ (the army)<sup>74</sup>, the international community as Libyan National Army and the UN Panel of Experts as Haftar Armed Forces<sup>75</sup>.

In the meanwhile, UN envoys Bernardino Leon and later Martin Kobler attempted to convince all players to form a national unity government. They supported unification efforts, which led to a re-organization of the Libyan political scene. After various failures and amended drafts, members of the GNC and the HoR, as well as members of the civil society signed the Libyan Political Agreement on 17 December 2015 in Skhirat, Morocco<sup>76</sup>. They agreed that a Government of National Accord would constitute the sole executive authority of the State, while the House of Representatives would act as its sole legislative body and the High Council of State as the highest consultative Assembly of the State<sup>77</sup>.

The President of the Presidency Council would represent the State in its foreign relations, accredit representatives of states and foreign bodies in Libya, supervise the work of the Council of Ministers, and guide the Council of Ministers with regards to the performance of its terms of reference as well as preside over its meetings. In parallel, the Presidency Council of the Council of Ministers would assume the functions of the Supreme Commander of the Libyan army, would appoint and dismiss ambassadors and representatives of Libya in international organizations based on a proposal from the Minister of Foreign Affairs, appoint and remove senior officials, declare states of emergency, war and peace, and conclude international agreements and conventions provided that they are endorsed by the House of Representatives<sup>78</sup>. The Council of Ministers would exercise the executive authority and ensure normal functioning of public state institutions and structures by establishing and implementing the Government program for the

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<sup>73</sup> According to Rule 4 of Customary International Humanitarian Law, armed forces consist of all organized armed forces, groups and units, which are under a command responsible to a State party in an international armed conflict for the conduct of its subordinates. It has been argued that it may also apply to State armed forces in non-international armed conflicts, see Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, (Cambridge: Cambridge University Press, 2009), 14. Haftar deliberately uses the term “armed forces”, when referring to his group, as he wants to highlight its role as the official Libyan army.

<sup>74</sup> Tim Eaton, Abdul Rahman Alageli et al., *The Development of Libyan Armed Groups Since 2014: Community Dynamics and Economic Interests* (Chatham House, March 2020), 22-23.

<sup>75</sup> UN Panel of Experts, *Letter dated 29 November 2019 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council*, S/2019/914 (2019): 8.

<sup>76</sup> “UN welcomes ‘historic’ signing of Libyan Political Agreement”, <https://news.un.org/en/story/2015/12/518412-un-welcomes-historic-signing-libyan-political-agreement>; Patrick Haimzadeh, “Libya’s uncertain new government,” *Le Monde diplomatique*, March 2016, <https://mondediplo.com/2016/03/05libya> (accessed November 15, 2020).

<sup>77</sup> Libyan Political Agreement, 17 December 2015, <https://unsmil.unmissions.org/sites/default/files/Libyan%20Political%20Agreement%20-%20ENG%20.pdf> (accessed November 15, 2020): 4, 5.

<sup>78</sup> Libyan Political Agreement, art. 8.

duration of its term and by proposing the necessary draft laws for performing its tasks and submitting it to the HoR for endorsement<sup>79</sup>.

The HoR would undertake the legislation authority for the transitional period, granting the vote of confidence or no confidence to the Government of National Accord, adopting the general budget, performing oversight over the executive authority and endorsing the public policy submitted by the Government<sup>80</sup>. Moreover, the HoR would consult with the State Council, in order to reach consensus within thirty days after the endorsement of the Agreement, to agree on the incumbents of the position of Governor of the Central Bank of Libya, Head of the Audit Bureau, Head of the Administrative Oversight Authority, Head of the Anti-corruption Authority, Head and members of the High National Electoral Commission, Head of the Supreme Court and the Public Prosecutor<sup>81</sup>.

The Agreement marked a new era in the Libyan political scene and introduced a different institutional structure, which would help the transition to democracy. Fayez Al-Saraj, a HoR member from Tripoli was appointed as Prime Minister and President of the Presidency Council and he formed a Government temporarily hosted in Tunis<sup>82</sup>. According to the provisions of the Agreement, caretaker Prime Minister al-Thinni would resign, once the proposed GNA cabinet was accepted by the HoR. On 31 December 2015, Aguila Saleh, Speaker of the HoR, endorsed the Agreement and on 26 January 2016, the House voted in favor of the Agreement, but rejected draft article 8, which would enable the Presidency Council to appoint the head of the armed forces and which would put in danger Haftar's position as their general commander. Moreover, it rejected the proposed GNA cabinet and did not endorse the new Government<sup>83</sup>.

Despite the lack of endorsement by the HoR, the Government led by Fayez Al-Saraj arrived in Tripoli by sea in March 2016. During its first months, the GNA had to compete with the former GNC Government over control of the capital. Only after allying with local armed forces, it managed to gain control over the city and its institutions. However, Bayda's Court of Appeal declared that the emergence of the GNA is unconstitutional and that its acts are null and void, as

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<sup>79</sup> Libyan Political Agreement, art. 9.

<sup>80</sup> Libyan Political Agreement, art. 13.

<sup>81</sup> Libyan Political Agreement, art. 15.

<sup>82</sup> International Crisis Group, "The Libyan Political Agreement: Time for a Reset?," *Middle East and North Africa Report No. 170* (4 November 2016): 3.

<sup>83</sup> Democracy Reporting International, *At a Glance: Libya's Transformation 2011-2018; Power, Legitimacy and the Economy*, 33.

the Libyan Political Agreement was not concluded in accordance with the Interim Constitutional Declaration.

After the establishment of the GNA in Tripoli, the HoR continued to deny endorsing it, in spite of the fact that a renewed composition of the Presidency Council and the Cabinet was submitted regularly. This prolonged continuation of the dispute between the two bodies resulted in the eventual formation of two distinct governmental entities with complete state structure and fully formed institutions; the GNA, headed by Sarraj and based in Tripoli, and the eastern government, which is supported by the Tobruk-located HoR and whose Prime Minister is Bayda-based Abdullah al-Thinni. Both entities constitute the ruling apparatuses in their respective territories and can thus be considered as governments in international law.

In the following years, tension between the two rival governments escalated and attacks, offensives and military operations set the tone of the relations between them. This conflict has been classified by the UN High Commissioner as a non-international armed conflict between the “GNA, its affiliated armed groups and third States supporting it against the LNA”. Furthermore, the airstrikes allegedly conducted by third states in support of the LNA and against the GNA could be regarded as a parallel international armed conflict between the GNA and third states in support of the LNA<sup>84</sup>.

Various reconciliation attempts were made and talks were held in Vienna in 2016, in Paris, in Cairo and in Abu Dhabi in 2017, and in Palermo in 2018. Nevertheless, these meetings were not fruitful and their decisions on the implementation of a ceasefire between the two parties, were not implemented. In this context, Salame promoted a 3-point plan, which included ceasefire, implementation of the arms embargo and intra-Libyan dialogue. Finally, after initiatives of the German Government, a Conference was held in Berlin on 19 January 2020. 12 countries (Germany, China, France, Russia, the UK, Egypt, the UAE, Italy, the Congo, Turkey and Algeria) and 4 international organizations (the United Nations, the European Union, the Arab League and the African Union) attended the Conference. Also, both Sarraj and Haftar attended it, but they did not meet each other.

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<sup>84</sup> UN Human Rights Council, *Situation of human rights in Libya and the effectiveness of technical assistance and capacity-building measures received by the Government of Libya: Report of the United Nations High Commissioner for Human Rights*, A/HRC/34/75 (23 January 2020): 4. What has been disputed is which entity constitutes the Government of Libya and as a consequence, represents the State party to the conflict.

At the Conference, participating parties reaffirmed their strong commitment to Libyan-led and Libyan-owned political procedures, as the only feasible solution of the conflict. In addition, they supported the Libyan Political Agreement as the only viable framework for Libya, and called for the establishment of a functioning Presidency Council and the formation of a single, unified, inclusive and effective Libyan government approved by the House of Representatives. The ultimate aim of this procedure would be the organization of free, fair, inclusive and credible parliamentary and presidential elections, organized by an independent and effective High National Elections Commission. In addition, they called for the implementation of ceasefire between the two rival entities<sup>85</sup>. Nonetheless, military operations continued to take place in Libya.

In an attempt to mitigate the conflict, Sarraj called for the peaceful resolution of the crisis, which can be achieved by holding elections and reaching an agreement on a constitutional framework. On 6 May 2020, Abdulsalam Erhouma, the Head of the Constitutional Drafting Assembly, stated that a national referendum has to be organized, in order the constitutional proposal of 29 July 2017 to be evaluated by the people and the constitutional process to be concluded. In this context, the High National Elections Commission stated its readiness to organize elections followed by a constitutional referendum at any time<sup>86</sup>.

However, massive protests burst out throughout the country in August. The GNA suppressed them violently, while the Prime Minister of the eastern entity al-Thinni, submitted his resignation to the Speaker of the HoR Saleh on 14 September 2020. The resignation would be reviewed by the HoR in its next meeting, which has not been announced<sup>87</sup>. Moreover, the Parliament has not appointed a successor and it may be assumed that he continues to act as Prime Minister till this day. In parallel, Sarraj announced his intention to resign before the end of October. Nonetheless, he withdrew his resignation on 30 October 2020, stating that he would remain in his position until the intra-Libyan political procedures result in a unified government.

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<sup>85</sup> UN Security Council, *Letter dated 22 January 2020 from the Permanent Representative of Germany to the United Nations addressed to the President of the Security Council*, S/2020/63 (22 January 2020): 4.

<sup>86</sup> UN Security Council, *Report of the Secretary-General on the UN Support Mission in Libya*, S/2020/832 (25 August 2020): 2.

<sup>87</sup> Samy Magdy, "Officials say east Libya government resigns amid protests," *The Washington Post*, 14 September 2020, [Officials say east Libya government resigns amid protests - The Washington Post](#) (accessed November 15, 2020).

In October 2020, the Libyan crisis passed to the next level. On 23 October, both sides agreed to a permanent, country-wide complete cease-fire agreement, with immediate effect<sup>88</sup>. Subsequently, a new round of peace and unification meetings were held between the rival governments and the several factions of Libyan society. This series of meetings has been named the “Libyan Political Dialogue Forum” and aims to lead to elections, in order democratic legitimacy of Libyan institutions to be achieved. The Forum was held in Tunis from November 9-15 under the auspices of the UN. Amidst attempts to reach a political compromise and resolve the conflict, they tried to create the new constitutional framework for Libya. However, the only practical conclusion of the conference was the setting of 24 December 2021, as the date of elections in the country. It remains to be observed if this procedure will be followed by the rival entities, or they will continue to insist on the perpetuation of the conflict.

## **b) The International Community’s Reaction**

The international community’s reaction to the ongoing institutional division in Libya could be described as mixed. The majority of states promoted a political solution of the crisis, considering a unity government as the sole entity capable of representing and protecting all Libyans<sup>89</sup>. In particular, UK Foreign Minister Elwood described it as the only viable means ‘of establishing effective, legitimate governance, restoring stability and tackling the threats posed by Daesh and illegal migration’<sup>90</sup>.

In this framework, in November 2015, the French Government along with the Governments of Algeria, Germany, Italy, Morocco, Spain, Tunisia, the United Arab Emirates, the United Kingdom and the United States welcomed the support rendered on the formation of a Government of National Accord by the majority of the House of Representatives in Tobruk and the majority of the General National Congress in Tripoli, which constituted the two elected (and thus able to claim an element of legitimacy) entities in Libya. Furthermore, they encouraged all

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<sup>88</sup> Nick Cumming-Brush and Declan Walsh, “Libya Cease-Fire Raises Hopes for Full Peace Deal,” *The New York Times*, 23 October 2020, [Libya’s Two Main Factions Agree to a Cease-Fire - The New York Times \(nytimes.com\)](https://www.nytimes.com/2020/10/23/middleeast/libya-cease-fire.html) (accessed November 15, 2020).

<sup>89</sup> “Terrorist attack in Benghazi - Joint statement by the ambassadors and Special Envoys to Libya,” 27 October 2015, [Terrorist attack in Benghazi - Joint statement by the ambassadors and Special Envoys to Libya \(27.10.15\) - Ministry for Europe and Foreign Affairs \(diplomatie.gouv.fr\)](https://www.diplomatie.gouv.fr/fr/actualites/2015/10/27/terrorist-attack-in-benghazi-joint-statement-by-the-ambassadors-and-special-envoys-to-libya-27-10-15) (accessed November 15, 2020); “Libya - Meeting between Laurent Fabius and Martin Kobler, the United Nations Secretary-General’s Special Representative for Libya,” 25 November 2015, [Libya - Meeting between Laurent Fabius and Martin Kobler, the United Nations Secretary-General’s Special Representative for Libya \(25.11.15\) - Ministry for Europe and Foreign Affairs \(diplomatie.gouv.fr\)](https://www.diplomatie.gouv.fr/fr/actualites/2015/11/25/libya-meeting-between-laurent-fabius-and-martin-kobler-the-united-nations-secretary-general-s-special-representative-for-libya-25-11-15) (accessed November 15, 2020).

<sup>90</sup> “Foreign Office Minister urges support for UN process in Libya,” 13 December 2015, [Foreign Office Minister urges support for UN process in Libya - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/foreign-office-minister-urges-support-for-un-process-in-libya) (accessed November 15, 2020).

parties to form such a government in order to establish an effective, legitimate and stable governance of a united country<sup>91</sup>.

After the Skhirat Agreement and the formation of the Presidential Council, most foreign states withdrew recognition from the al-Thinni government and accorded it to the newly formed national unity government. In particular, in a Joint Statement, the ministers of Foreign Affairs of France, Germany, Italy, the United Kingdom and the United States and the High Representative of the European Union for Foreign Affairs and Security Policy recognized the Government of National Accord as the “only legitimate government” in Libya, having sole oversight of all the economic and financial institutions in Tripoli. This Statement highlighted the support granted to the Government by “a majority of members of the House of Representatives”, linking recognition to the fulfilment of the procedure set out by the Libyan Political Agreement<sup>92</sup>. Thus, German Foreign Minister Steinmeier called the Presidency Council to submit a new cabinet list for the government of national unity for parliament’s approval, while he called the parliament “in Tobruk” to endorse it. In this way, Germany expressed emphatically its view on the Parliament’s position as Libya’s legislative body, whose consent is necessary for the formation of a unity government<sup>93</sup>.

Shortly after the arrival of the GNA in Libya, official foreign visits began to set the tone of states’ approach towards the new entity. Specifically, in April 2016, the French Ambassador met with members of the Presidential Council and with the heads of Libyan public institutions, in an effort to express France’s support for the national unity government. Concerning the two countries’ diplomatic relations, he stated that the reopening of the French embassy in Tripoli was under consideration, but it was halted due to concerns over the security situation in the country<sup>94</sup>.

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<sup>91</sup> “Libya Statement,” 27 November 2015, [Libya Statement \(27.11.15\) - Ministry for Europe and Foreign Affairs \(diplomatie.gouv.fr\)](#) (accessed November 15, 2020). This call for unity under the GNA was repeated in a statement in October 2016, see “Libya – Occupation by force of the Libyan High Council of State,” 17 October, 2016, [Libya – Occupation by force of the Libyan High Council of State \(17.10.16\) - Ministry for Europe and Foreign Affairs \(diplomatie.gouv.fr\)](#) (accessed November 15, 2020).

<sup>92</sup> “Statement after the Ministerial Meeting in Paris on Libya,” 13 March 2016, [statement on libya 13th march cle82f4c6.pdf \(diplomatie.gouv.fr\)](#) (accessed November 15, 2020). This express recognition of the GNA as the “sole legitimate government” was repeated in a “Joint Communiqué on Libya,” 16 May 2016, [Ministerial Meeting for Libya Joint Communiqué, 16 May 2016, Vienna / Rep. of Turkey Ministry of Foreign Affairs \(mfa.gov.tr\)](#) (accessed November 15, 2020).

<sup>93</sup> “Foreign Minister Steinmeier following the Foreign Ministers meeting on the situation in Libya - Press release,” 13 February 2016, [Foreign Minister Steinmeier following the Foreign Ministers meeting on the situation in Libya - Federal Foreign Office \(auswaertiges-amt.de\)](#) (accessed November 15, 2020); “Foreign Minister Steinmeier on the current situation in Libya - Press release,” 24 February 2016, [Foreign Minister Steinmeier on the current situation in Libya - Federal Foreign Office \(auswaertiges-amt.de\)](#) (accessed November 15, 2020).

<sup>94</sup> “Libya – Visit by the ambassador of France to Libya,” 14 April 2016, [Libya – Visit by the ambassador of France to Libya \(April 14.04.16\) - Ministry for Europe and Foreign Affairs \(diplomatie.gouv.fr\)](#) (accessed November 15, 2020); “Libya – Telephone conversation between Jean-Marc Ayrault and Fayeza Serraj,” 29 April 2016, [Libya –](#)

In the same wavelength, in May 2016, Turkish Foreign Minister Çavuşoğlu visited Tripoli and met with the President and Members of the Presidency Council of the Government of National Accord, the Minister of Foreign Affairs and the Mayor of Tripoli<sup>95</sup>. In this way, the Turkish government stressed emphatically its support for the national unity government<sup>96</sup>.

On May 16, 2016, in a Joint Communiqué, it was highlighted that the institutional framework prescribed by the LPA is transitional, while the HoR's role as the legislative branch of the state was stressed. It has to be noted that every reference to the GNA's position as the legitimate government of Libya, has been complemented by the reference to the UNSC Resolution 2259 and to the ultimate aim of the formation of a "new, elected government"<sup>97</sup>.

This democracy-oriented approach and the need for democratic transition and organization of elections in Libya have been stressed by many states. In particular, US State Department Spokesperson Toner encouraged the GNA to oversee the transition to a new government through peaceful elections<sup>98</sup>. Subsequently, UK Foreign Secretary Johnson visited Libya and met with GNA Prime Minister Sarraj, Foreign Minister Siala and the President of Libya's High State Council Swehli, as well as with Agila Saleh and Ahmied Homa, President and second Vice-President of the House of Representatives, which is described as 'Libya's parliament'<sup>99</sup>. In this way, he tried to hold talks with every stakeholder of the Libyan political reality.

The need for an inclusive political solution was repeated by UK Permanent Representative to the UN, Ambassador Rykroft, who stated that "It's a real chance now for Libya to establish a truly

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[Telephone conversation between Jean-Marc Ayrault and Fayez Serraj \(29.04.16\) - Ministry for Europe and Foreign Affairs \(diplomatie.gouv.fr\)](#) (accessed November 15, 2020).

<sup>95</sup> "Foreign Minister Çavuşoğlu's visit to Libya," 30 May 2016, [No: 121, 30 May 2016, Press Release Regarding the Visit of Foreign Minister Çavuşoğlu to Libya / Rep. of Turkey Ministry of Foreign Affairs \(mfa.gov.tr\)](#) (accessed November 15, 2020).

<sup>96</sup> This approach was repeated during following years, as both Turkish and Italian governments regarded the exchange of visits as a means to express their ongoing support for the GNA. Specifically, when Italian Foreign Minister Di Maio received the Minister of Internal Affairs of the Libyan Government of National Accord, Fathi Bashaga, he intended to "confirm the Italian Government's support for the Libyan GNA", see "Note from the Italian Ministry of Foreign Affairs," 3 February 2020, [Note from the Italian Ministry of Foreign Affairs - Libya \(esteri.it\)](#) (accessed November 15, 2020). In the same wavelength, Çavuşoğlu paid an official visit to Tripoli on 22 December 2018 and expressed Turkey's support to the UN-led political process and to the unity and territorial integrity of Libya. In parallel, Prime Minister Sarraj Turkey twice in 2018 and made contacts with President Erdoğan.

<sup>97</sup> "Libya - Joint Statement by the Ambassadors of France, Germany, Italy, Spain, the United Kingdom, and the United States to Libya," 25 February 2017, [Libya - Joint Statement by the Ambassadors of France, Germany, Italy, Spain, the United Kingdom, and the United States to Libya \(25.02.17\) - Ministry for Europe and Foreign Affairs \(diplomatie.gouv.fr\)](#) (accessed November 15, 2020).

<sup>98</sup> "Press Statement on Recent Events in Tripoli," 10 February 2017, [On Recent Events in Tripoli - United States Department of State](#) (accessed November 15, 2020).

<sup>99</sup> "Foreign Secretary visits Tobruk," 5 May 2017, [Foreign Secretary visits Tobruk, Libya - GOV.UK \(www.gov.uk\)](#) (accessed November 15, 2020).

national government, one that will enjoy the support of both the House of Representatives and the High State Council, and one that will be able to deliver for all its citizens”, while he stressed that this structure is just transitional, in order “to promote national reconciliation, to agree a longer-term constitution and to prepare for elections”<sup>100</sup>.

Subsequently, he further repeated the UK’s support for the GNA as “the legitimate executive authorities under the Libyan Political Agreement” and the House of Representatives and the Higher Council of State as “Libya’s legitimate institutions”<sup>101</sup>. On 21 May 2018, Deputy Permanent Representative to the UN Allen elaborated the British government’s view on the preferred solution to the Libyan conflict. Specifically, he described it as “an inclusive political package” with three necessary elements; a constitution and parliamentary and presidential elections<sup>102</sup>.

In the same wavelength, French Minister for Europe and Foreign Affairs, Jean-Yves Le Drian visited Tripoli, Misrata, Tobruk, and Rajma on July 23, 2018, where he met with the main actors of the Libyan conflict<sup>103</sup>. Furthermore, Le Drian invited Ministers and high representatives of Libya, Tunisia, Algeria, Egypt, Morocco, Niger, Italy, the United States, the United Kingdom, China, Russia, the European Union, the African Union and the Arab League in New York on September 24, 2018 and held consultations with Prime Minister Fayez Sarraj and UN Secretary General Special Representative Ghassan Salame in order to work constructively towards the unification of Libya’s military and economic institutions and to chart a viable path to adopt a constitution and move forward credible, peaceful and well prepared elections as soon as possible

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<sup>100</sup> “Statement by Ambassador Matthew Rycroft, UK Permanent Representative to the UN, at the Security Council Briefing on Libya,” 16 November 2017, ["It's clear that Libya now faces a simple choice: a future of stability and security or a return to a past of violence and uncertainty" - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/statement-by-ambassador-matthew-rycroft-uk-permanent-representative-to-the-un-at-the-security-council-briefing-on-libya) (accessed November 15, 2020).

<sup>101</sup> “Statement by Ambassador Matthew Rycroft, UK Permanent Representative to the United Nations, at the Security Council meeting on Libya,” 19 April 2017, ["Libya needs urgent progress towards full political reconciliation now more than ever." - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/statement-by-ambassador-matthew-rycroft-uk-permanent-representative-to-the-united-nations-at-the-security-council-meeting-on-libya) (accessed November 15, 2020).

<sup>102</sup> “Statement by Ambassador Jonathan Allen, UK Deputy Permanent Representative to the UN, at the Security Council Briefing on Libya,” 21 May 2018, [A peaceful, secure, prosperous Libya through credible elections - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/statement-by-ambassador-jonathan-allen-uk-deputy-permanent-representative-to-the-un-at-the-security-council-briefing-on-libya) (accessed November 15, 2020).

<sup>103</sup> During his visit, Le Drian met with Prime Minister Fayez al-Sarraj, President of the House of Representatives Aguila Saleh Issa, President of the High Council of State Khaled Mechri, and Khalifa Haftar. He stressed the need for the adoption of a constitutional platform before September 16, the holding of legislative and presidential elections on December 10, and the unification of economic and security institutions under civilian authority. France’s emphasis on democratic transition was further stressed by Foreign Minister’s intention to support Libya’s High National Elections Commission, and the announcement of an increase in France’s financial contribution for the organization of Libyan elections, see “Libya – Visit by Jean-Yves Le Drian,” 23 July 2018, [Libya – Visit by Jean-Yves Le Drian \(23.07.18\) - Ministry for Europe and Foreign Affairs \(diplomatie.gouv.fr\)](https://diplomatie.gouv.fr/fr/actualites-libraires/2018/07/23-libya-visit-by-jean-yves-le-drian) (accessed November 15, 2020).

and call on the Libyan House of Representatives and its members to meet their responsibilities by adopting the appropriate electoral legislation<sup>104</sup>.

Another major parameter of the Libyan conflict is the unity of and control over key Libyan financial institutions, such as the Libyan Central Bank, the Libyan Investment Authority and the National Oil Corporation, which are considered as fundamental for Libya's viable future and which have been divided since the beginning of the conflict. In a Joint Statement of the Governments of France, Italy, the United Kingdom, and the United States in July 2018, emphasis is given on Libya's oil resources, which "must remain under the exclusive control of the legitimate National Oil Corporation and the sole oversight of the Government of National Accord". In the same Statement, the four Governments expressed their appreciation towards the LNA's contributions to restore stability in Libya's oil sector<sup>105</sup>.

In the same wavelength, the British government highlighted the need for unification of Libyan financial institutions and mainly, the Central Bank of Libya. Also, Minister for Middle East and North Africa Cleverly called for the unimpeded operation of the 'legitimate National Oil Corporation'. By this characterization, he expressed the view that the institutions appointed by and collaborating with the GNA constitute Libya's legitimate financial institutions. In addition, in a case concerning the legitimacy of the Libyan Investment Authority's board of directors, the UK Court of Appeal ruled in accordance with the one voice principle<sup>106</sup>. In particular, it accepted the GNA-appointed board of directors, in compliance with British government's support for the GNA as 'the legitimate executive authorities of Libya', which in accordance with the Libyan Political Agreement, exercise 'full oversight of national economic institutions'<sup>107</sup>.

In parallel, the US Government has emphasized the GNA-backed institutions' role as the sole legitimate Libyan institutions. In particular, it was stated that Libyan resources must remain under the exclusive control of the National Oil Corporation and the sole oversight of the

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<sup>104</sup> "Press Release: Chair's conclusions of the September 24, 2018, Meeting on Libya," 25 September 2018, [Press Release: Chair's conclusions of the September 24, 2018, Meeting on Libya \(25.09.18\) - Ministry for Europe and Foreign Affairs \(diplomatie.gouv.fr\)](#) (accessed November 15, 2020).

<sup>105</sup> "Libya - Joint Statement on Welcoming Libyan National Oil Corporation Resuming Production," 12 July 2018, [Libya - Joint Statement on Welcoming Libyan National Oil Corporation Resuming Production \(12.07.2018\) - Ministry for Europe and Foreign Affairs \(diplomatie.gouv.fr\)](#) (accessed November 15, 2020).

<sup>106</sup> According to the one voice principle, when a state's government has recognized a body as the government of a foreign state, that state's courts are bound to treat that government as the government of a sovereign state, in its determination of disputes before it. This approach is followed, because the recognition of foreign states and governments is constitutionally part of the function of the executive branch of the state, and the state must speak with one voice in its executive and judicial functions in this aspect of international relations.

<sup>107</sup> EWCA Civ 637, *Case No: A4/2019/1820 and A4/2019/1833*; Mahmoud v. Breish and Houssein (15/05/2020): 7.

Government of National Accord<sup>108</sup>. In addition, Tripoli-based Central Bank of Libya's position as 'Libya's only legitimate central bank' was highlighted<sup>109</sup>.

Furthermore, some states' historical, geopolitical and financial interests in Libya should not be underestimated. For instance, Italy is a neighboring country with many political, financial and strategic interests in Libya, which constituted an Italian colony until 1934. Since the formation of the GNA, the Italian Government has recognized and supported it, considering it as "the sole legitimate recipient of international security assistance" and the HoR as the legislative authority of the State<sup>110</sup>. Also, it maintains certain financial interests in the region and the ongoing conflict harms the interests of Italian Eni oil company, and increases the flow of migrants across the Mediterranean, who are viewed as a potential threat to Italian national security.

Turkey is another country that has developed strong ties with Libya. After all, Tripolitania and Cyrenaica were Ottoman provinces until 1912, when they were incorporated in the Italian colonial empire<sup>111</sup>. It is one of the few countries, which maintain an embassy and a consulate in Libyan soil<sup>112</sup>. From the beginning, the Turkish government supported the GNA as the 'sole legitimate government' of Libya<sup>113</sup> and has continued to do so ever since<sup>114</sup>. In parallel, Turkey maintains great financial interests in the country, as most Libyan public works have been taken on by Turkish companies. It has to be mentioned that 8 out of 16 cases raised against Libya in front of the International Chamber of Commerce, concern Turkish companies.

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<sup>108</sup> "Situation in Southern Libya," 14 February 2019, [Situation in Southern Libya - United States Department of State](#) (accessed November 15, 2020).

<sup>109</sup> "Seizure by Malta of \$1.1 Billion of Counterfeit Libyan Currency," 29 May 2020, [Seizure by Malta of \\$1.1 Billion of Counterfeit Libyan Currency - United States Department of State](#) (accessed November 15, 2020).

<sup>110</sup> "Joint Communiqué on Libya by Algeria, Canada, Chad, China, Egypt, France, Germany, Jordan, Italy, Malta, Morocco, Niger, Qatar, Russia, Saudi Arabia, Spain, Sudan, Tunisia, Turkey, the United Arab Emirates, the United Kingdom, the United States, the European Union, United Nations, the League of Arab States, and the African Union," 22 September 2016, [Joint Communiqué on Libya by Algeria, Canada, Chad, China, Egypt, France, Germany, Jordan, Italy, Malta, Morocco, Niger, Qatar, Russia, Saudi Arabia, Spain, Sudan, Tunisia, Turkey, the United Arab Emirates, the United Kingdom, the United States, the European Union, United Nations, the League of Arab States, and the African Union \(esteri.it\)](#) (accessed November 15, 2020).

<sup>111</sup> André Martel, "Le Royaume Sanusi de Libye (1951-1969)," *États et pouvoirs en Méditerranée (XVIe-XXe siècles). Mélanges offerts à André Nouschi. Tome I.* (Cahiers de la Méditerranée, n°41, 1, 1990): 144.

<sup>112</sup> The Turkish Embassy in Tripoli suspended its operations on 25 July 2014 due to security concerns, but resumed its services in January 2017, while the Turkish Consulate in Misrata has continued its operations without interruption. Both operate in GNA-controlled areas.

<sup>113</sup> "Joint Communiqué of the Ministerial Meeting for Libya," 13 December 2015, [Ministerial Meeting for Libya - Joint Communiqué \(Rome, Italy - 13.12.15\) - Ministry for Europe and Foreign Affairs \(diplomatie.gouv.fr\)](#) (accessed November 15, 2020).

<sup>114</sup> "Joint Statement by Foreign Ministers of Libya, Malta, and Turkey," 6 August 2020, [Joint statement by the foreign ministers of Libya, Malta, and Turkey \(gov.mt\)](#) (accessed November 15, 2020).

Furthermore, another country that has invested heavily in Libya, is Germany. It has supported financially the GNA, by allocating 7.5 million euros for the stabilization portfolio in 2018, and 11.5 million euros in 2019<sup>115</sup>. In addition, the French oil company Total owns 75 percent of drilling rights in the Al-Jurf oilfield, in addition to shares in the Waha, El Sharara, and Murzuq Basin fields, which are controlled by the eastern entity.

State practice concerning Libyan entities cannot exclude various important bilateral agreements signed between the GNA and other states. For example, the US Government signed a Memorandum of Understanding on cultural property protection with the GNA on 23 February 2017, and a Letter of Agreement defining mutual priorities for International Narcotics Law support to the Libyan Ministries of Justice and Interior, on 27 April 2018<sup>116</sup>. Most importantly, the GNA and Turkey concluded a maritime zones delimitation Memorandum of Understanding in November 2019<sup>117</sup>. This act brought on the reaction of Greece and Egypt, which considered that their maritime zones were violated as a result of the agreement<sup>118</sup>. These agreements were evidently concluded with the GNA in its capacity as the Government of Libya.

The aforementioned practice indicates the international community's insistence on the implementation of the Libyan Political Agreement, considering the GNA as (united) Libya's government and the HoR as its Parliament. This approach denotes these states' significant reliance on legitimacy as a criterion for recognition of governments. In other words, they are continuously referring to the UN-led and endorsed inclusive political agreement of Skhirat as the basis on which they establish their recognition practice towards the rival Libyan governments.

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<sup>115</sup> "Working together to help stabilise Libya," 13 November 2018, [Working together to help stabilise Libya - Federal Foreign Office \(auswaertiges-amt.de\)](#) (accessed November 15, 2020); "Libya and Germany: Bilateral relations," 1 June 2019, [Libya and Germany: Bilateral relations - Federal Foreign Office \(auswaertiges-amt.de\)](#) (accessed November 15, 2020).

<sup>116</sup> "United States and Libya Sign Cultural Property Protection Agreement," 20 February 2018, [United States and Libya Sign Cultural Property Protection Agreement - United States Department of State](#) (accessed November 15, 2020); "Bureau of International Narcotics and Law Enforcement Affairs: Libya Summary," [Bureau of International Narcotics and Law Enforcement Affairs: Libya Summary - United States Department of State](#) (accessed November 15, 2020).

<sup>117</sup> It has to be noted that since the LPA is presented by Turkey as Libya's only valid political framework, the Libya-Turkey Memorandum of Understanding, which constitutes an international agreement, had to be concluded according to the procedure prescribed by the LPA. However, it was not endorsed by the HoR, as required by art. 8 of the LPA.

<sup>118</sup> "QA-73, 1 December 2019, Statement of the Spokesperson of the Ministry of the Foreign Affairs, Mr. Hami Aksoy, in Response to a Question Regarding the Statements Made by Greece and Egypt on the Agreement Signed With Libya on the Maritime Jurisdiction Areas," 1 December 2019, [QA-73, 1 December 2019, Statement of the Spokesperson of the Ministry of the Foreign Affairs, Mr. Hami Aksoy, in Response to a Question Regarding the Statements Made by Greece and Egypt on the Agreement Signed With Libya on the Maritime Jurisdiction Areas / Rep. of Turkey Ministry of Foreign Affairs \(mfa.gov.tr\)](#) (accessed November 15, 2020).

In spite of the actual division between the GNA and the HoR, which have formed two distinct and rival governing apparatuses in their respective territories, western states continue to disregard facts and consider this struggle of power as a division of the same government's executive and legislative branches. According to their perception, there are not two rival governments in Libya, but one government, which suffers from an intergovernmental dispute. The use of the term "dispute" instead of "conflict" is preferred, as conflict usually denotes military action and is typically used in the context of international humanitarian law<sup>119</sup>. In the case of Libya, the abovementioned states do not oppose another government to the GNA, but an armed group, considering General Haftar and the LNA as GNA's military opponent.

International community's approach towards General Haftar is ambiguous. In particular, German Foreign Minister Steinmeier stated that General Haftar is "the key figure in Tobruk" who needs to be won over to support the GNA, while it was needed to integrate him into Libya's future political structures in order to prevent a split in the country<sup>120</sup>. This statement highlights the prominent role of Haftar as the real rival entity against the GNA, but also the need to include him in any political process. Moreover, on July 25, 2017, President Macron invited "the Chairman of the Presidential Council of the Government of National Accord, Fayeze Al Sarraj, and the Commander of the Libyan National Army, Khalifa Haftar" in Paris, where a Joint Declaration was issued<sup>121</sup>. It is rather interesting that despite the HoR's appointment of Abdullah al Thinni, as head of its executive branch, France considered Khalifa Haftar, who is the head of the Libyan National Army (which theoretically constitutes HoR's armed forces) as the GNA's main political opponent, distinguishing his regime from the HoR.

In parallel, Italian Foreign Minister Di Maio has met with both Sarraj and Haftar, stating that he (Haftar) "definitely has a role; it's not I but the facts that recognize it and this is something we

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<sup>119</sup> The term "armed conflict" is used in the context of article 2 of the Geneva Conventions of 1949, which concerns the application of humanitarian law in cases of international armed conflicts. In particular, according to Jean Pictet, *Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, (Geneva: ICRC, 1952) 32, "any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place". In the same wavelength, the International Criminal Tribunal on Yugoslavia ruled in *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para. 70, that armed conflict exists whenever there is a resort to armed force between States. Last but not least, the term is also used in the context of article 3, which refers to non-international armed conflicts.

<sup>120</sup> "Foreign Minister Steinmeier after the foreign ministers meeting on Libya," 16 May 2016, [Foreign Minister Steinmeier after the foreign ministers meeting on Libya - Federal Foreign Office \(auswaertiges-amt.de\)](https://www.auswaertiges-amt.de/en/foreign-minister-steinmeier-after-the-foreign-ministers-meeting-on-libya/1711144) (accessed November 15, 2020).

<sup>121</sup> "Libya - Joint Declaration," 25 July 2017, [Libya - Joint Declaration \(25.07.17\) - Ministry for Europe and Foreign Affairs \(diplomatie.gouv.fr\)](https://www.diplomatie.gouv.fr/fr/affaires-etrangeres/actualites/declarations-de-commun-accord/2017-07-25-libya-declaration-commun-accord) (accessed November 15, 2020); "Security Council Press Statement on Libya," 26 July 2017, [UN - Libya - Security Council Press Statement on Libya \(26.07.17\) - Ministry for Europe and Foreign Affairs \(diplomatie.gouv.fr\)](https://www.un.org/press/docs/2017/20170726.sc.p.slibya.shtml) (accessed November 15, 2020).

cannot ignore”<sup>122</sup>, while Greece invited him in Athens on 17 January 2020, recognizing his prominent role in the Libyan conflict<sup>123</sup>. This approach is adopted by the USA, as well. Specifically, the US delegation held regular talks with the LNA<sup>124</sup>. Moreover, in a briefing on the situation in Libya, Haftar is described as one of the ‘Libyan leaders’, while it was stressed that the US Government ‘did not ask him to surrender’, as ‘there is a role (for him) in shaping Libya’s political future’. It could be argued that these statements over Haftar’s military role in the conflict amount to recognition of belligerency. In this case, states acknowledge that an insurgent group, which is neither a state nor a government, has been turned into an effective, organized entity that conducts hostilities in accordance with humanitarian law and accepts responsibility for its wrongdoings. However, this practice is believed to have fallen into desuetude<sup>125</sup>.

This approach is substantially different than the one followed by many countries, which reject any political talks with Haftar and consider him merely as the head of an armed group<sup>126</sup>. For instance, Turkey does not accord any institutional role to Haftar, who is described as the ‘leader of the illegitimate armed forces in eastern Libya’, and ‘takes control of the Libyan state as the commander of the so-called “Libyan National Army”, because he ‘aims to create a military dictatorship in the country’, in opposition to ‘the Government of National Accord and all other legitimate institutions of Libya established with the Libyan Political Agreement’<sup>127</sup>. In a further effort to stress his illegitimacy, as well as his action out of and against any institutional

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<sup>122</sup> “Di Maio: «On Libya we need realism. Italy does not take sides in this war» (la Repubblica),” 19 December 2019, [Di Maio: «On Libya we need realism. Italy does not take sides in this war» \(la Repubblica\) \(esteri.it\)](https://www.esteri.it) (accessed November 15, 2020).

<sup>123</sup> “Interview of the Minister of Foreign Affairs, Nikos Dendias, on ERT evening news, with journalist Antriana Paraskevopoulou,” 17 January 2020, [Interview of the Minister of Foreign Affairs, Nikos Dendias, on ERT evening news, with journalist Antriana Paraskevopoulou \(17 January 2020\) - Top Story \(mfa.gr\)](https://www.mfa.gr) (accessed November 15, 2020).

<sup>124</sup> “Senior State Department Official on U.S. Engagement with Libya,” 28 February 2020, [Senior State Department Official on U.S. Engagement with Libya - United States Department of State](https://www.state.gov) (accessed November 15, 2020); “US call on LNA to observe cessation,” 21 March 2020, [The United States Calls on LNA To Observe Cessation of Hostilities in Libya - United States Department of State](https://www.state.gov) (accessed November 15, 2020); “U.S.-LNA Discussion on Militia Demobilization,” 2 July 2020, [U.S.-LNA Discussion on Militia Demobilization - United States Department of State](https://www.state.gov) (accessed November 15, 2020).

<sup>125</sup> Crawford, *The Creation of States in International Law*, 380-382, 419.

<sup>126</sup> An armed group is “the armed wing of a non-state party to a non-international armed conflict, and may be comprised of either dissident armed forces, or other organized armed groups, which recruit their members primarily from the civilian population, but have developed a sufficient degree of military organization to conduct hostilities on behalf of a party to the conflict”, see [Armed groups | How does law protect in war? - Online casebook \(icrc.org\)](https://www.icrc.org) (accessed November 15, 2020).

<sup>127</sup> “No: 94, Press Release Regarding the Statements of Haftar, the Leader of the Illegitimate Militia Forces in Libya, on 27 April 2020,” 29 April 2020, [No: 94, 29 April 2020, Press Release Regarding the Statements of Haftar, the Leader of the Illegitimate Militia Forces in Libya, on 27 April 2020 / Rep. of Turkey Ministry of Foreign Affairs \(mfa.gov.tr\)](https://www.mfa.gov.tr) (accessed November 15, 2020).

framework and mainly, the Libyan Political Agreement, he is described as a pirate<sup>128</sup>. In this way, the Turkish government expresses the view that the LNA constitutes an armed group, extraneous to the legitimate framework agreed in Skhirat.

It has to be noted that Talmon argues that the wording matters in recognition declarations, as there is a distinction between recognition ‘as something’, which denotes recognizing state’s view that the recognized government fulfills the necessary criteria of the status it is accorded, while recognition ‘of something’ without recourse to the de jure/de facto concept simply offers the recognizing state a way to enter into official relations with the recognized entity<sup>129</sup>. In the present case, GNA’s recognition ‘as Libya’s legitimate government’ indicates international community’s opinion that it fulfills all government requirements, whilst their acknowledgement ‘of’ Haftar’s role as a key player, who cannot be ignored, indicates their willingness to enter into relations with him. This approach may be considered as taking into consideration the effective control doctrine in recognition of governments and especially in its most extreme form. Whilst entities (GNA and HoR) claiming a certain degree of legitimacy are recognized as the state’s legitimate institutions, a certain perception of Haftar’s autonomous role in the context of the eastern entity and his control over a preponderant part of the territory leads to a limited recognition of his prominent place in the Libyan conflict.

However, support for the GNA as the de jure government of Libya should not be taken for granted. Specifically, it has to be noted that Greece is one of the few European countries that did challenge the GNA’s position as the de jure Government of Libya. First of all, the Greek Foreign Minister Dendias has invited both Haftar and Saleh in Athens. In addition, he met Saleh in Libya and expressed Greece’s intention to operate a Consulate in Benghazi<sup>130</sup>. Furthermore, he has been continuously referring to the GNA as “the government in Tripoli”<sup>131</sup>. In this way, he

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<sup>128</sup> “No: 218, Press Release Regarding the Inclusion of a Turkish Maritime Transportation Company within the List of Sanctions in connection with Libya at the Meeting of the EU Foreign Affairs Council,” 21 September 2020, [T.C. Dışişleri Bakanlığı Turkish Consulate General In Dubai \(mfa.gov.tr\)](https://www.mfa.gov.tr/T.C.Disissleri-Bakanligi-Turkish-Consulate-General-In-Dubai/mfa.gov.tr) (accessed November 15, 2020).

<sup>129</sup> Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile*, 40-41.

<sup>130</sup> “Statement of the Minister of Foreign Affairs, Nikos Dendias, following his meeting with the President of the Libyan House of Representatives, Aguila Saleh,” 1 July 2020, [Statement of the Minister of Foreign Affairs, Nikos Dendias, following his meeting with the President of the Libyan House of Representatives, Aguila Saleh \(Libya, 1 July 2020\) - Top Story \(mfa.gr\)](https://www.mfa.gr/en/statement-of-the-minister-of-foreign-affairs-nikos-dendias-following-his-meeting-with-the-president-of-the-libyan-house-of-representatives-aguila-saleh-libya-1-july-2020-top-story) (accessed November 15, 2020).

<sup>131</sup> “Interview of the Minister of Foreign Affairs, Nikos Dendias, on ERT evening news, with journalist Antriana Paraskevopoulou”; “Interview of the Minister of Foreign Affairs, Nikos Dendias, in the Athens daily Eleftheros Typos, with journalist Apostolis Chondropoulos,” 26 January 2020, [Interview of the Minister of Foreign Affairs, Nikos Dendias, in the Athens daily Eleftheros Typos, with journalist Apostolis Chondropoulos \(26 January 2020\) - Top Story \(mfa.gr\)](https://www.mfa.gr/en/interview-of-the-minister-of-foreign-affairs-nikos-dendias-in-the-athens-daily-eleftheros-typos-with-journalist-apostolis-chondropoulos-26-january-2020-top-story) (accessed November 15, 2020); “Interview of the Minister of Foreign Affairs, Nikos Dendias, on MEGA TV’s evening news, with journalist Dora Anagnostopoulou,” 27 July 2020, [Interview of the Minister of Foreign Affairs, Nikos Dendias, on MEGA TV’s evening news, with journalist Dora Anagnostopoulou \(27 July 2020\) - Top Story \(mfa.gr\)](https://www.mfa.gr/en/interview-of-the-minister-of-foreign-affairs-nikos-dendias-on-mega-tv-s-evening-news-with-journalist-dora-anagnostopoulou-27-july-2020-top-story) (accessed November 15, 2020).

expresses the opinion that the GNA does not constitute Libya's government, but a local de facto government in Tripoli. Regarding the Greek Government's intention to operate a Consulate in Benghazi, it should be mentioned that the establishment of consular relations between two governments usually indicates recognition. Nonetheless, this is not certain, as there are cases, where despite the maintenance of consular relations, a government expressly refuses to recognize the other one. For example, the UK maintains a Consulate in Taipei, but does not recognize the Taiwanese Government<sup>132</sup>. In any case, it could amount to de facto recognition of the eastern entity.

Alternatively, when referring to the memoranda signed between the GNA and Turkey, Dendias has been describing them as "the memoranda signed between Mr Sarraj and Turkey", highlighting Sarraj's personal influence over the entity and not its character as the government of Libya<sup>133</sup>. This term was repeated in a Joint Declaration adopted by the Ministers of Foreign Affairs of Cyprus, Egypt, France, Greece and the United Arab Emirates on 11 May 2020<sup>134</sup>. In parallel, he described the HoR as "the sole elected and internationally recognized state body" in Libya<sup>135</sup> and as the "country's only elected institution"<sup>136</sup>. This description stresses the HoR's legitimacy of origin stemming from the 2014 elections, which offers it an enhanced position in comparison with the GNA.

Another interesting point is several states' treatment towards the eastern entity, despite their official compliance with and support of the UN-led solution. In particular, Russia<sup>137</sup> has formally adhered to the UN-endorsed Libyan Political Agreement and has participated in the Berlin

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[2020\) - Top Story \(mfa.gr\)](#) (accessed November 15, 2020). The term "Tripoli-based officials" was used by the US delegation, which met with General Haftar on 25 November 2019, when it referred to their previous meeting with the GNA delegation, see "U.S. Delegation Meets with General Khalifa Haftar," 25 November 2019, [U.S. Delegation Meets with General Khalifa Haftar - United States Department of State](#) (accessed November 15, 2020).

<sup>132</sup> Shaw, *International Law*, 463.

<sup>133</sup> "Minister of Foreign Affairs N. Dendias' interview with the newspaper 'Le Figaro' and journalist Alexia Kefalas," 14 June 2020, [Minister of Foreign Affairs N. Dendias' interview with the newspaper 'Le Figaro' and journalist Alexia Kefalas \(14/06/2020\) - Top Story \(mfa.gr\)](#) (accessed November 15, 2020).

<sup>134</sup> "Joint Declaration adopted by the Ministers of Foreign Affairs of Cyprus, Egypt, France, Greece and the United Arab Emirates," 11 May 2020, [Joint Declaration adopted by the Ministers of Foreign Affairs of Cyprus, Egypt, France, Greece and the United Arab Emirates \(11.05.2020\) - Announcements - Statements - Speeches \(mfa.gr\)](#) (accessed November 15, 2020).

<sup>135</sup> "Interview of the Minister of Foreign Affairs, Nikos Dendias, in the Athens daily Eleftheros Typos, with journalist Apostolis Chondropoulos".

<sup>136</sup> "Statement of the Minister of Foreign Affairs, Nikos Dendias, following his meeting with the President of the Libyan House of Representatives, Aguila Saleh"

<sup>137</sup> According to Russian Prime Minister Dmitry Medvedev, regional conflicts "must be settled diplomatically based on the UN Charter and the supremacy of international law", while the conflict in Libya be resolved "peacefully and non-violently, through dialogue based on law" and without foreign interference, see "Dmitry Medvedev's interview with Algerian news agency APS," 9 October 2017, [News - The Russian Government](#) (accessed November 15, 2020).

Conference, signing its Conclusions. Russian Prime Minister Medvedev shed light on Russia's recognition approach, as he stated that "The only thing to which I should probably draw your attention to is that there are no simple solutions in all these conflicts, but there is a need, by using comprehensive approaches, relying on international institutions and invoking international law, to seek agreement, use all kinds of compromise solutions to achieve agreements and ultimately rely on the will of the people who live in these countries"<sup>138</sup>. This view highlights the importance of international law and UN-led procedures in resolving cases of duality of government, while it draws attention to compromising attempts and resorts to popular will, as the final test.

However, Prime Minister Medvedev has further stated that Libya "no longer exists as a full-fledged state", but it has been "divided into parts", while "there are several leaders who have gathered here (in Libya)", with Sarraj being "one of Libya's executive leaders"<sup>139</sup>. Medvedev's reference to "several" leaders of a state "divided into parts" and in particular, Sarraj's position as "one" of these leaders (rather than "the" executive leader of Libya) leads to the deduction that Russia does not consider the GNA as the sole government in Libya, but either argues that there are a de jure and a de facto government, or two de facto governments. This pragmatic approach over Libya's division and the acknowledgement of the emergence of more entities, is actually based on the effective control doctrine, which takes into consideration each government's extent of actual control over territory.

Moreover, Egypt and the UAE formally support the UN-led initiatives towards the mitigation of the conflict. Nevertheless, it has been reported that they supply the eastern entity with arms and military equipment<sup>140</sup>. Furthermore, Egyptian President Abdel Fatah al-Sissi has threatened to invade militarily in Libya, if the armed forces of the GNA cross a redline extending from Sirte to Jurfa<sup>141</sup>. This perception of a certain, limited territory which can be under the control of the GNA, indicates that according to Egypt it cannot raise claims over the whole Libyan territory and thus, that it cannot be considered as the de jure government of Libya. This view is reinforced by the concerns expressed by the Egyptian government over the extent of control exercised on

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<sup>138</sup> "Russia-Algeria talks," 27 April 2016, [The Ministry of Foreign Affairs of the Russian Federation \(mid.ru\)](https://mid.ru/en/press-center/news/11071/) (accessed November 15, 2020).

<sup>139</sup> "International conference on Libya," 13 November 2018, [The Ministry of Foreign Affairs of the Russian Federation \(mid.ru\)](https://mid.ru/en/press-center/news/11071/) (accessed November 15, 2020).

<sup>140</sup> UN Panel of Experts, "Letter dated 5 September 2018 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council," S/2018/812 (2018): 26; Akram Khariief, "Libya's proxy war," *Le Monde Diplomatique*, September 2020, <https://mondediplo.com/2020/09/04libya> (accessed at November 15, 2020).

<sup>141</sup> Heba Saleh, "Egypt threatens military action in Libya if Turkish backed forces seize Sirte," *Financial Times*, June 21, 2020, <https://www.ft.com/content/e6aa87b0-5e0b-477f-9b89-693f31c63919> (accessed November 15, 2020).

the GNA by Turkey. In other words, they doubt the efficacy and the independence of the government. Nonetheless, as the lack of the necessary requirements of a government deprives it of its recognition as a de jure government, Egypt's approach over the GNA's flaws indicates that it merely considers it as the de facto government of the western part of Libya.

Another significant parameter of the situation in Libya is the engagement of international organizations and most notably, the Organization of United Nations. The United Nations have been involved in the Libyan crisis since the first stages of the anti-Qaddafi revolution. The Organization mainly operates in the country through the UNSMIL.

One of its most notable achievements is the adoption of the Libyan Political Agreement, signed in Skhirat, Morocco, on 17 December 2015. Specifically, in January 2015, the UN launched the negotiations that would produce an inclusive political agreement in order to achieve a power-sharing deal to surmount institutional and military fractures. The process was led by UN Special Representative León, who was replaced by Martin Kobler in November 2015. This effort's aim was to create a unity government and lead gradually to a new constitution and the organization of elections. In the talks participated representatives of both rival parliaments, which were the House of Representatives and the General National Congress, independent personalities, representatives of armed groups, political parties, municipalities, women and other civil society organisations<sup>142</sup>.

The Libyan Political Agreement was endorsed by UNSC Resolution 2259 (2015), which welcomed the formation of the Presidency Council and called upon it to work to form a Government of National Accord, and to finalize interim security arrangements necessary for stabilizing Libya, and called upon Member States to respond urgently to requests from it for assistance. Furthermore, it endorsed the Rome Communiqué of 13 December 2015 to support the Government of National Accord as the 'sole legitimate government of Libya'. Thus, it requested that all Member States fully support the efforts of the Special Representative of the Secretary-General and work with the Libyan authorities and UNSMIL to develop a coordinated package of support to build the capacity of the GNA, and called upon them to respond urgently to requests for assistance from the GNA for the implementation of the Libyan Political Agreement. Last but not least, it called upon the GNA to protect the integrity and unity of key Libyan financial institutions and most notably, the National Oil Company, the Central Bank of Libya and the Libyan Investment Authority, and for these institutions to accept the authority of the

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<sup>142</sup> International Crisis Group, "The Libyan Political Agreement: Time for a Reset?," 1.

Government of National Accord<sup>143</sup>. It has to be noted that Resolution 2259 was not adopted pursuant to Chapter VII of the Charter and thus, it cannot be considered as binding upon Member States<sup>144</sup>.

The UNSC continued to express its support for the GNA in every occasion, considering the Libyan Political Agreement as the only viable framework to end the Libyan political crisis. It has to be noted that concerning LPA-created institutions, like the GNA, which were mandated to perform their duties within a precise period of time, the UNSC has stressed that the LPA constitutes the valid instrument throughout the entire transitional period and that incorrect deadlines simply undermine the UN's peace-building efforts in the country. Moreover, it acknowledged the HoR's significant role during this period and encouraged it to draft and approve a new electoral law, as well as to finalize a new Libyan Constitution<sup>145</sup>. In this context, it welcomed every effort towards the organization of elections in Libya. For instance, it welcomed the technical preparations initiated by the GNA and the High Electoral Committee, for national elections and stressed the need of elections as soon as possible, although it acknowledged that it necessarily required that "proper conditions are in place"<sup>146</sup>.

As the conflict deteriorated, the UNSC highlighted the importance of Libyan financial institutions' integrity and unity under the control of the GNA. In parallel, it condemned the involvement of parallel institutions in usurping Libya's wealth-producing resources, as for example in the case of illicit exports of petroleum in areas controlled by the eastern entity. The eastern entity's augmented exercise of control over the majority of Libyan financial resources and the subsequent lack of oversight by the national unity government is further acknowledged by the Council, which acting under Chapter VII, requested that the GNA confirmed to the Committee as soon as it exercised sole and effective oversight over Libya's 3 key institutions; the Central Bank of Libya, the National Oil Corporation and the Libyan Investment Authority<sup>147</sup>.

The wording used by the UN organs in order to refer to the main actors of the Libyan conflict is also indicative of the way they perceive each entity's standing, role and legitimacy. In particular, in the Reports of the UN Human Rights Council Special Rapporteur on the human rights of internally displaced persons in Libya, the GNA is called the "Government of Libya", while the

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<sup>143</sup> UNSC, *Resolution 2259*, S/RES/2259 (2015).

<sup>144</sup> Only UNSC's resolutions adopted pursuant to Chapter VII are considered binding upon Member States and the organs of the Organization, see Ρούκουνας, *Δημόσιο Διεθνές Δίκαιο*, 542.

<sup>145</sup> UNSC, *Statement by the President of the Security Council*, S/PRST/2017/24 (7 December 2017); UNSC, *Statement by the President of the Security Council*, S/PRST/2017/26 (14 December 2017).

<sup>146</sup> UNSC, *Statement by the President of the Security Council*, S/PRST/2018/11 (6 June 2018).

<sup>147</sup> UNSC, *Resolution 2509*, S/RES/2509 (11 February 2020).

eastern entity is referred to as the “Benghazi authorities”<sup>148</sup>. In this way, it clearly rejects their claim of legitimacy over the entirety of Libyan territory and simply reduces them to the status of a local de facto government based in Benghazi. Taking into consideration that the HoR’s seat is located in Tobruk, interim Government’s seat is in Al-Bayda and Haftar’s Headquarters are located in Benghazi, the choice of the latter as the rival authorities’ place of reference indicates the UN’s view of him as being the actual head of the eastern entity.

Moreover, it could be deduced that the UN distinguish between Haftar and the HoR. When Salame recalls his meetings with key Libyan actors, he refers to the talks he held with “General Haftar and politicians who support him”, and does not make a direct reference of the House of Representatives as the main political body, which supports Haftar<sup>149</sup>. Furthermore, the Panel of Experts initially referred to the eastern entity’s armed forces in its annual Reports as the ‘Libyan National Army’<sup>150</sup>. Nevertheless, in the 2019 report, it referred to them as “Haftar’s armed forces”<sup>151</sup>.

In 2020, the UNSC welcomed the Berlin Conference and endorsed its conclusions<sup>152</sup>, while Special Representative Williams accelerated her efforts in order to prepare the organization of the new intra-Libyan political procedure, called the Libyan Political Dialogue Forum. Thus, she had been holding talks with various factions of the Libyan society. The conference took place under the auspices of the United Nations. It has to be mentioned that out of 75 participants representing the main Libyan geographical, social and political constituencies, 26 were elected by the HoR and the High Council of State, and 49 selected by UNSMIL. The initiation of this series of talks and meetings under the supervision and support of Special Representative Williams, denote the continued interest of the UN on the resolution of the crisis.

The European Union is actively involved in the efforts for mitigation and resolution of the Libyan conflict, as well. In particular, it assists Libya’s political transition to stability and supports the UN-led mediation efforts. Thus, it works closely with the UNSMIL to support the implementation of the LPA and the organization of elections, which will lead to the country’s democratic governance. It has to be noted that the EU has formed, along with the UN, the

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<sup>148</sup> UN Human Rights Council, *Report of the Special Rapporteur on the human rights of internally displaced persons on her visit to Libya*, A/HRC/38/39/Add.2 (10 May 2018).

<sup>149</sup> UNSC, *Records of the 8667<sup>th</sup> meeting*, S/PV/8667 (18 November 2019).

<sup>150</sup> UN Panel of Experts, *Letter dated 5 September 2018 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council*, 9.

<sup>151</sup> UN Panel of Experts, *Letter dated 29 November 2019 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council*, 6.

<sup>152</sup> UNSC, *Resolution 2510*, S/RES/2510 (12 February 2020).

League of Arab States and the African Union, the Libya Quartet, which constitutes a group consisting of representatives of the aforementioned international organizations, that aims to coordinate their efforts to advance the political efforts and assist Libya during the transitional period<sup>153</sup>. To this end, the EU has highlighted the importance of inclusiveness of the political process, through the participation of all legitimate Libyan stakeholders<sup>154</sup>. However, it has recognized the GNA as Libya's de jure government, as José Antonio Sabadell, the EU Ambassador to Libya has handed over his credential to Prime Minister Sarraj on 10 October 2020 in Tripoli<sup>155</sup>.

Furthermore, the EU cooperates with the GNA in certain fields, like the protection of migrants, refugees and internally displaced people in Libya. Specifically, the EU has allocated €367.7 million through the European Union Trust Fund in Africa, in projects concerning the protection and assistance to migrants, refugees and internally displaced people, the stabilization of Libyan municipalities and an integrated border management. In addition, it has set up two missions under the Common Security and Defense Policy with relevance to migration. The former, the EU Border Assistance Mission in Libya constitutes an integrated border management mission, with the mandate of providing capacity-building, assistance and crisis management in the field of security sector reform with a focus on police, criminal justice, border security and migration. The latter, EUNAVFOR Med Operation Sophia was launched to counter human trafficking and smuggling by taking action against criminal networks and by disrupting their business model. Since June 2016, the operation also supports the Libyan Navy and Coastguard with capacity building and trainings, and contributes to the implementation of the UN arms embargo.

As Libya is an African country, one has to resort to the relevant practice of the African Union, in order to fully comprehend the international community's approach towards Libya's rival governments. Specifically, the Union has engaged in many working groups for the promotion of Libyan political dialogue and the amelioration of relations between the two entities, along with the United Nations and the European Union. Moreover, it has stressed the need of an inclusive solution to the crisis, which shall incorporate all different factions of the Libyan society, the

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<sup>153</sup> "Joint Communiqué of the Libyan Quartet," 23 May 2017, [https://eeas.europa.eu/headquarters/headquarters-homepage\\_en/26764/Meeting%20of%20the%20Libya%20Quartet:%20Joint%20Communiqu%C3%A9](https://eeas.europa.eu/headquarters/headquarters-homepage_en/26764/Meeting%20of%20the%20Libya%20Quartet:%20Joint%20Communiqu%C3%A9) (accessed November 15, 2020).

<sup>154</sup> "Libya and the EU," [https://eeas.europa.eu/delegations/libya/1447/libya-and-eu\\_en](https://eeas.europa.eu/delegations/libya/1447/libya-and-eu_en) (accessed November 15, 2020).

<sup>155</sup> "José Sabadell becomes new EU Ambassador to Libya," 21 October 2020, [https://eeas.europa.eu/delegations/libya\\_en/87297/Jos%C3%A9%20Sabadell%20becomes%20new%20EU%20Ambassador%20to%20Libya](https://eeas.europa.eu/delegations/libya_en/87297/Jos%C3%A9%20Sabadell%20becomes%20new%20EU%20Ambassador%20to%20Libya) (accessed November 15, 2020).

tribes and women<sup>156</sup>. In this framework, it considers the GNA as Libya's legitimate government, refers to Sarraj as the Prime Minister of Libya in its official website and has relocated its Office for Libya to Tripoli to operate as closely as possible to the realities on the ground and cooperate with the western authorities<sup>157</sup>.

In conclusion, the majority of the international community has recognized the GNA as Libya's legitimate executive branch, in an express way. In parallel, they have recognized the HoR as Libya's legitimate legislative body. This approach is taken by the United Nations, the European Union and the African Union, as well. The treatment of these two institutions, which have formed parallel and fully operational distinct structures, as components of the same apparatus in accordance with the Libyan Political Agreement, leads to the conclusion that the majority of the international community regards their alienation as an intergovernmental dispute. Moreover, their insistence on the implementation of the political agreement signed in Skhirat, can be considered as a recognition approach based on the legitimacy doctrine.

Nonetheless, the examination of several states' practice indicates that they do not follow this approach, but recognize the GNA as the local de facto government of Tripoli. This practice may be founded on the effectiveness doctrine, which acknowledges a government's effective control over its territory. Regarding General Haftar, who is the appointed by the HoR Head of the Army, the majority of states and international organizations regard him as an extraneous player, who leads an armed group in the country, without having an institutional link to the official structure of the state. The acknowledgement of his role as a key player in the conflict may be considered as simply serving the practical aim of establishing relations with him.

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<sup>156</sup> African Union, "Discours du Président de la Commission de l'Union africaine, S.E. Moussa Faki Mahamat à la réunion ministérielle sur la Libye," 5 October 2020, <https://au.int/fr/speeches/20201005/discours-du-president-de-la-commission-la-reunion-ministerielle-sur-la-libye> (accessed November 15, 2020).

<sup>157</sup> African Union, "Remarks by the Chairperson of the African Union Commission Moussa Faki Mahamat, at the opening of the Fifth Meeting of the High Level Committee of the African Union on Libya," 17 April 2018, <https://au.int/en/speeches/20180417/remarks-chairperson-african-union-commission-moussa-faki-mahamat-opening-fifth> (accessed November 15, 2020).

## **Part Two: Two Governments, One Libyan State? Resorting to the Recognition of Governments Criteria**

### **a) Recognition according to the Effective Control Doctrine**

The recognition of governments is a political act with major legal consequences, which conceptually emerges in the case of change of governments. Governments, acting as proxies of states, are comprised of individuals, who, as all human beings, have limited lifespans and act often in unexpected ways, resulting in unprecedented situations concerning the character, the duration and the formation of the ruling apparatuses in which they participate. This unstable nature has brought on the need for certain and objective criteria in order each governmental change to be assessed.

This necessity is further stressed by the absence of a centralized authority in the international legal system. The fact that there is no superior international legal authority and that sovereign equality has been considered as the foundation of the international system, has highlighted the significance of objective and ideologically neutral criteria in determining whether an entity will be recognized as a State's government. That is why, effective control over the territory, the state institutions and the governmental apparatus has been considered as the most secure criterion in order recognition to a government to be granted<sup>158</sup>.

Effectiveness can be defined as “the de facto control of the administrative structure of the State and the acquiescence of the State's population to the new government, expressed through the absence of armed resistance to the new authority”<sup>159</sup>. According to the effectiveness doctrine, “ex factis ius oritur”<sup>160</sup>. Lauterpacht considered that effective governments have a right to claim recognition, which is based on vast state practice, but also on the principles of independence of states and prohibition of intervention<sup>161</sup>.

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<sup>158</sup>It has to be stated that effectiveness is one of the components of statehood, as well. Roth argues that a state is not an effectively self-governing territorially based political community, but a territorially based political community, which has been decided by existing states that ought to be self-governing, see Brad Roth, “Secession, Coups , and the Effective Control Doctrine”, in Brad Roth, ed., *Sovereign Equality and Moral Disagreement* (Oxford: Oxford University Press, 2011), 176.

<sup>159</sup> Eduardo Jimenez de Arechaga, *Derecho Internacional Publico*, vol. II (Montevideo: Fundacion de Cultura Universitaria, 1995), 57.

<sup>160</sup> Crawford, *The creation of States in International Law*, 45.

<sup>161</sup> Lauterpacht, "Recognition of Governments: II," 38.

In 1936, Institut de Droit International stated that “to recognize a government is to attest on its own behalf of its effectiveness”<sup>162</sup>. In the same context, the Third Restatement of the Foreign Relations Law of the United States defines recognition of governments as the “formal acknowledgment that a particular regime is the effective government of a state and implies a commitment to treat that regime as the government of that state”<sup>163</sup>. Moreover, the majority of jurists has contended that effectiveness is the basis of recognition of governments<sup>164</sup>, while state practice has been structured on granting recognition to effective regimes, as well. Specifically, Japan, Brazil, France and the United Kingdom, among others, have considered effective control as a leading criterion in recognizing new governments<sup>165</sup>. This approach can be explained, as states mainly have wanted to conclude agreements and carry out activities with entities which have in fact the capacity to fulfil their obligations<sup>166</sup>.

Furthermore, the application of the effective control doctrine does not permit great discretion in granting recognition, since it is a rather strictly defined and easily assessed criterion. In this way, various political considerations and subsequent abuses can be omitted<sup>167</sup>. It is rather interesting that according to Lauterpacht, since the 17<sup>th</sup> and 18<sup>th</sup> century jurists like Grotius and Pufendorf supported the effective control doctrine as it was more convenient, in comparison with the legitimacy test, which nonetheless could be based on the divine rights of kings<sup>168</sup>. More recently in 1987, the American Law Institute expressed the view that “international law does not

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<sup>162</sup> Institut de Droit International, *La reconnaissance des nouveaux Etats et des nouveaux gouvernements*, art. 10.

<sup>163</sup> Henkin, *Restatement (Third) of the Foreign Relations Law of the United States*, par. 203.

<sup>164</sup> Hersh Lauterpacht, “De facto Recognition, Withdrawal of Recognition and Conditional Recognition”, *British Yearbook of International Law*, vol. 22 (1945): 172; Charles De Visscher, *Les effectivites du droit international public* (Paris: Pedone, 1967), 39-40; Santiago Benadava, *Derecho Internacional Publico* (Santiago: LexisNexis, 2001), 113; Pierre-Marie Dupuy, *Droit International Public* (Paris: Dalloz, 2002), 100.

<sup>165</sup> International Law Association Committee on Recognition/Non-Recognition, *Third Report Conference* (2016): 8; For the French practice, see Olivia Danic, “L’ evolution de la pratique francaise en matiere de la reconnaissance de gouvernement,” *Annuaire francais de droit international public*, vol. 59 (2013): 517.

<sup>166</sup> It has to be noted that effectiveness is a requirement of statehood, as well. In particular, the existence of a government in effective control of a defined territory to the exclusion of other entities is considered as fundamental in recognition of states, see Crawford, *The creation of states in international law*, 59.

<sup>167</sup> Peterson, “Recognition of Governments Should Not Be Abolished,” 39. Specifically, imposing various conditions on new governments has been considered as an abusive practice. For instance, many states and particularly the United States made recognition conditional on the new entities’ assurance to comply with their predecessors’ international obligations, see Charles G. Fenwick, “The Problem of the Recognition of de Facto Governments,” *Inter-american Juridical Yearbook* 1 (1948): 25. In this context, the European Community required “a Yugoslav republic to commit itself, prior to recognition, to adopt constitutional and territorial guarantees ensuring that it has no territorial claims towards a neighboring Community State and that it will conduct no hostile propaganda activities versus a neighboring Community State, including the use of denomination which implies territorial claims”, see Press Release 129/91, *Declaration on Yugoslavia*, Extraordinary EPC Ministerial Meeting, Brussels, 16 December 1991. This unusual recognition requirement was included in the Declaration after Greek pressures and it was presented as an aspect of European states’ discretionary power to accord recognition. Even though it was not illegal under international law, it was paradoxical, as it rendered European states both parties to and judges of the procedure, see Photini Pazartzis, “La reconnaissance d’ «une république yougoslave»: la question del’ ancienne République yougoslave de Macédoine (ARYM),” *Annuaire français de droit international*, vol. 41 (1995): 289.

<sup>168</sup> Lauterpacht “Recognition of Governments: I,” 830.

generally address domestic constitutional issues, such as how a national government is formed”<sup>169</sup>.

Moreover, the effective control’s role as a leading requirement of recognition of governments was stressed by Arbitrator Taft in *Tinoco Concessions Arbitration*, where he argued in view of the de facto character of the Costa Rican regime that “when recognition vel non of a government is, by such nations, determined by inquiry, not into its de facto sovereignty and complete governmental control, but into its illegitimacy or irregularity of origin, their non-recognition loses something of evidential weight on the issue with which those applying the rules of international law are alone concerned”<sup>170</sup>. This award is considered as a leading precedent in establishing the effective control doctrine as the fundamental condition of recognition of governments<sup>171</sup>. It has to be noted that during that arbitration, the British Government stated that the Tinoco Government was the only de jure and de facto government of Costa Rica, in spite of the fact that it had not recognized it formally and had not entered into official relations with it for political reasons<sup>172</sup>.

In another iconic decision, *Republic of Somalia v. Wodehouse Drake*, in front of the High Court, it was ruled that “the factors to be taken into account in deciding whether a government exists as a government of a state are a) whether it is the constitutional government of the state; b) the degree, nature and stability of administrative control, if any, that it of itself exercises over the territory of the state; c) whether Her Majesty’s Government has any dealings with it and if so, what is the nature of these dealings; and d) in marginal cases, the extent of international recognition that it has as the government of the state”<sup>173</sup>. In accordance with these criteria, the Court ruled that there was no effective government in Somalia.

In this case, despite an interim government’s existence, its emergence through an international conference and its recognition by several states and the UN, its lack of effective control over the country’s territory and the administrative apparatus deprived it of any claim to be recognized as Somalia’s government. The court stated that it would take into account only “considerations of

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<sup>169</sup> Henkin, *Restatement (Third) of the Foreign Relations Law of the United States*, par. 203.

<sup>170</sup> Arbitration between Great Britain and Costa Rica [1924] *American Journal of International Law* 18, 154.

<sup>171</sup> Cornelia Hagedorn, “Tinoco Arbitration Concessions,” *Max Planck Encyclopedias of International Law*, December 2006, [Oxford Public International Law: Tinoco Concessions Arbitration \(ouplaw.com\)](https://www.ouplaw.com/oxford-public-international-law/tinoco-concessions-arbitration) (accessed November 15, 2020).

<sup>172</sup> Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile*, 34.

<sup>173</sup> Maria Aristodemou, “Choice and Evasion in Judicial Recognition of Governments: Lessons from Somalia,” *European Journal of International Law* 5 (1994): 538.

legal characterization”, considering effectiveness as a legal criterion of government<sup>174</sup>. Aristodemou contends that this decision tried to draw attention to effective control, which is a legal concept, rather than to political decisions, that (should) constitute the real reason behind recognition decisions<sup>175</sup>.

Effective control’s significance is obvious, even in governmental statements concerning the abolition of recognition of governments practice. Specifically, Waldergrave, British Minister of State for Foreign and Commonwealth Affairs stated that following British Government’s decision to abolish recognition of governments, decisions on foreign governments’ status would be based on their ability to control their territory by themselves, along with the relevant British interests<sup>176</sup>. In the same wavelength, Swiss practice on recognition of governments is based on the effectiveness exercised by each entity claiming to be a state’s government, which influences the way the Swiss government interacts with it<sup>177</sup>.

Moreover, it is rather interesting that it has been argued that despite democratic legitimacy principle’s increased significance in the de-legitimization of a regime, this regime’s continued exercise of effective control over the state’s territory does not alter its status as that state’s government under international law<sup>178</sup>. As a consequence, any recognition of other entities as that state’s government amounts to premature recognition and (if accompanied by internationally wrongful acts against that state) may even result in the recognized state’s international responsibility<sup>179</sup>.

It has to be noted that the effective control test consists of various more specific elements, such as control over preponderant territorial parts of the country, control of the capital and main governmental institutions, popular support, a certain element of stability and permanence and the

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<sup>174</sup> Warbrick, "Recognition of Governments," 94.

<sup>175</sup> Aristodemou, "Choice and Evasion in Judicial Recognition of Governments: Lessons from Somalia," 549.

<sup>176</sup> Cited in Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile*, 7.

<sup>177</sup> Tribunal pénal fédéral, Numéro de dossier: RR.2018.241, Arrêt du 12 novembre 2019, Cour des plaintes : Entraide judiciaire internationale en matière pénale à la Libye (2019): 8.

<sup>178</sup> Talmon, "Recognition of Opposition Groups as the Legitimate Representative of a People", 239. In 2011, UK Foreign Minister Hague stated that he had signed a directive revoking Qaddafi’s diplomatic immunity. However, the directive, which constituted the necessary instrument under State Immunity Act, did not deprive Qaddafi of his immunity. According to Talmon, it would be extremely unusual to withdraw recognition from a Head of State still controlling effectively preponderant parts of the state, see Stefan Talmon, "De-Recognition of Colonel Qaddafi as Head of State of Libya," *International and Comparative Law Quarterly* 60, no 3 (July 2011): 760, 763

<sup>179</sup> Lauterpacht, "Recognition of Governments: I," 823; Schuit, "Recognition of Governments in International Law and the Recent Conflict in Libya," 399.

absence of decisive foreign interventions<sup>180</sup>. In particular, in 1927, the International Commission of American Jurists prepared a draft convention (which nevertheless remained unratified) following the standard practice, which provided that “a Government is to be recognized whenever it fulfills the following conditions: a) Effective authority with a probability or stability and consolidation, the orders which, particularly as regards taxes and military service, are accepted by the inhabitants, b) Capacity to discharge pre-existing international obligations, to contract others, and to respect the principles established by international law”<sup>181</sup>.

In this context, a British proposal in the UN General Assembly Ad Hoc Political Committee attempted to present effective control as the necessary requirement for the representation of the State in the UN, codifying it as follows: “the right of a government to represent the Member State concerned in the United Nations should be recognized if that government exercises effective control and authority over all or nearly all the national territory, and has the obedience of the bulk of the population of that territory, in such a way that this control, authority and obedience appear to be of a permanent character”<sup>182</sup>. Although the proposal was not accepted, it does shed light on the exact meaning of the doctrine and its perception by states.

### **i) Territorial and institutional control**

Control over Libyan territory is highly uncertain. The GNA arrived in Tripoli in March 2016 by sea, after failed attempts to land at Tripoli’s International Airport. In the beginning, it remained confined in a naval base, because the GNC Government led by Khalifa Ghwell opposed its arrival. The GNC still controlled governmental buildings, including the Ministries of Defence and Justice, as its loyal armed groups from Misrata controlled key districts of the capital. For instance, Ghwell reopened Tripoli’s Airport, organizing a much publicized ceremony, in order to declare his control over the capital’s most significant infrastructure<sup>183</sup>.

Furthermore, he created the National Guard, which was composed of “anti-Government of National Accord” armed groups from Misrata and Tripoli. This group, along with the Al-Marsa al-Kubra Brigade and groups supported by the former Libyan Islamic Fighting Group, clashed with groups from Tripoli, such as the Special Deterrence Force, the Abu Salim Brigade and the

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<sup>180</sup> Lauterpacht, "Recognition of Governments: II," 37; Schuit, "Recognition of Governments in International Law and the Recent Conflict in Libya," 389-391.

<sup>181</sup> Charles G. Fenwick, "The Recognition of De Facto Governments," *World Affairs* vol. 131, no. 3 (1968): 178.

<sup>182</sup> Roth, *Governmental Illegitimacy in International Law*, 258.

<sup>183</sup> UN Panel of Experts, *Letter dated 1 June 2017 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council*, S/2017/466 (2017): 10.

Tripoli Revolutionaries Brigade, which supported the GNA. Finally, the GNA managed to oust the rival government and its supporters from Tripoli<sup>184</sup>.

In the east and in the south, the eastern government has managed to control large areas. In particular, General Haftar has achieved relative military victories in the areas of Suq al-Hut, Busnayb and Sabri and by March 2017, he controlled most of Benghazi<sup>185</sup>. Gradually, he acquired control of Benghazi and Derna, and started moving his army westwards, conquering many regions previously controlled by the GNA. In this way, he managed to control vast areas of the Libyan territory.

In 2019 extensive conflicts between the two entities took place, when Haftar began taking control of the southern region. On 4 April 2019, Haftar launched operation “Flood of Dignity” with the aim of conquering Tripoli. GNA’s control was diminished, extending only in Tripoli and its immediate outskirts and it was widely considered that Tripoli’s conquest was a few weeks’ matter. However, after April 2020, GNA forces were reinforced by foreign troops and began to launch their counter-offensive, driving gradually LNA’s forces back to the east. They took control of al Watiya Air Base, an important operational base for the GNA’s Air Force. Also, they strengthened their positions around Tripoli, retook control of Tripoli International Airport and the town of Tarhouna.

On 5 June 2020, Haftar lost his last stronghold in the west and retreated his forces. GNA further pressed him to the east and approached Sirte, Qaddafi’s birthplace, which is located 450km east of Tripoli. As a result, the GNA has regained much of its pre-2019 territory, establishing its presence not only in Tripoli and its surrounding area, but in most of northwestern Libya. However, the UN Secretary-General expressed his concerns over the ongoing clashes between non-State armed groups in Tripoli, after the withdrawal of the LNA<sup>186</sup>.

In the south, power struggle between the two entities could be described as split, because in many communities, forces affiliated to the LNA control security and forces allied with the GNA

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<sup>184</sup> UN Panel of Experts, *Letter dated 1 June 2017 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council*, 9-10, where it was reported that the Presidency Council was internally divided, as well; Democracy Reporting International, *At a Glance: Libya’s Transformation 2011-2018; Power, Legitimacy and the Economy* (2019): 33.

<sup>185</sup> UN Panel of Experts, *Letter dated 1 June 2017 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council*, 13. In March 2017, armed groups supporting the GNC Government were ousted from the Qusur, Fallah and Qarqarish areas, see UN Panel of Experts, *Letter dated 1 June 2017 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council*, 15.

<sup>186</sup> UNSC, *Report of the Secretary-General: Implementation of Resolution 2491, S/2020/876* (2 September 2020): 6.

control public financing. These peculiarities may be explained, if one takes into consideration the fact that the Libyan social structure and the subsequent power struggle are based on the tribal system and not on formal state institutions<sup>187</sup>.

In conclusion, it has to be noted that neither the GNA nor the eastern entity can claim control over a preponderant part of the Libyan territory. Doubtless the eastern entity controls a greater and more extensive geographical area, but the GNA has managed to retain control over the capital and is advancing eastwards and southwards. Control over the capital has been considered as a decisive criterion in granting recognition to a government. In the cases of Kazavubu/Lumumba dispute in Congo/Leopoldville, Royalist/Republican forces in Yemen and Khmer Rouge/opposition forces in Kampuchea, control of the capital was regarded as the fundamental criterion, in order to maintain recognition of an already existing government as the State's de jure government, while the conquer of the capital by opposition forces led to the loss of this status by the former government and to the emergence of the opposition political body as the new de jure government of the state.

Another effectiveness criterion is the exercise of control over the state apparatus and the most crucial public institutions<sup>188</sup>. Specifically, an effective government does not control solely a state's territory, but has to discharge governmental functions and control the state's financial and wealth-producing resources. Thus, Taliban's effective control over Afghanistan and the establishment of governmental institutions led some scholars to consider the US-Taliban conflict as an international armed conflict between the USA and the State of Afghanistan, de facto represented by the Taliban regime<sup>189</sup>.

In Libya, even before 2016, key financial institutions were deeply divided in parallel entities. They were located in the west and in the east, but claimed legitimacy to act as Libya's sole financial institutions, while neither side exercised substantial control over infrastructure, assets and personnel<sup>190</sup>. In 2017, the UN Panel of Experts stated that it was difficult to identify appropriate Libyan interlocutors who can speak from a position of authority, as the GNA had

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<sup>187</sup> Eaton, Alageli et al., *The Development of Libyan Armed Groups Since 2014; Community Dynamics and Economic Interests*, 53.

<sup>188</sup> Warbrick, "Recognition of Governments," 94.

<sup>189</sup> Milanovic, "How to Qualify the Armed Conflict in Libya?"

<sup>190</sup> This fragmentation has resulted in reduced oversight and increased cases of misappropriation. For example, both entities have been accused of misspending, see UN Panel of Experts, *Letter dated 1 June 2017 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council*, 52-53.

weak operational capacity, and its control over the administration is very limited, while other power centers were active and supported from both the population and armed groups<sup>191</sup>.

One of Libya's most important institutions is the National Oil Corporation. It has been divided in two rival entities, backed by the GNA and the HoR and headquartered in Tripoli and Benghazi, accordingly. Several unification attempts were made between the heads of the two institutions, Mustafa Sanallah and Naji al-Maghrebi in Malta, Tunisia and Turkey, even before the GNA's arrival in Tripoli. Subsequently, a relevant agreement was signed in Vienna on 16 May 2016, followed by a technical agreement signed in Istanbul.

However, this effort was not successful for various reasons. First of all, the HoR did not support it, expressing concerns regarding the sharing of revenue and the representation of eastern officials in the unified board of governors. In addition, the eastern institution pressed the western to transfer its headquarters in Benghazi. Furthermore, the GNA faced internal disputes concerning appointments and the allocation of resources in the National Oil Corporation. Finally, the eastern institution withdrew from the agreement on 13 March 2017. As a result, both entities issued statements claiming their sole legitimacy over Libya's oil resources, but the western National Oil Corporation as of June 2017 seemed to play the leading role, both institutionally and technically<sup>192</sup>.

Nonetheless, the eastern institution attempted to illicitly export crude oil, signing contracts, which offer large discounts of up to \$5 per barrel below the reference price of the western institution. In addition, on 26 June 2018, the LNA transferred control of the oil facilities in the Gulf of Sirte to the eastern Corporation, which issued a letter welcoming the decision and stating that it was the sole entity authorized by law to sell crude oil. As a consequence, the western Corporation declared force majeure in the two terminals operational at the time, but regained control of the oil facilities on 11 July 2018, retaining its leading role both institutionally and in terms of control of facilities and infrastructure on the ground<sup>193</sup>. In 2019, the eastern government appointed a new Head of the eastern National Oil Corporation, as well as a board of directors of a new petroleum marketing company, which intended to take over distribution of oil in the east.

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<sup>191</sup> UN Panel of Experts, *Letter dated 1 June 2017 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council*, 7.

<sup>192</sup> UN Panel of Experts, *Letter dated 1 June 2017 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council*, 53.

<sup>193</sup> UN Panel of Experts, *Letter dated 5 September 2018 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council*, 37.

Nevertheless, the western Corporation continued to control institutionally and technically oil exploitation in Libya.

Another divided institution is the Central Bank of Libya. Its western branch is located in Tripoli and is headed by Sadik al-Kebir, while the eastern is headquartered in al-Bayda and led by Ali al-Hibri. Both claim the governorship of the unified Bank, but the western branch de facto controls the majority of staff and the Presidency Council's financing and manages the Bank's accounts and the revenue generated by oil exports<sup>194</sup>.

The western branch maintains a certain degree of autonomy towards the GNA and Prime Minister Sarraj, with whom it has disagreed in various occasions. The eastern branch, being supported by Prime Minister Al-Thinni and the HoR, had money printed by a Russian company. This action was accepted by the GNA, but the western Bank did not approve its circulation in Tripoli<sup>195</sup>. Last but not least, several unification attempts failed and as of December 2019, the division existed between the two competitive entities<sup>196</sup>.

Another major institution is the Libyan Investment Authority, which manages Libyan assets abroad and constitutes Libya's sovereign wealth fund. Since 2016, two rival institutions have emerged; the first one is located in Malta and is headed by Hassan Bouhadi, while the other in Tripoli and was governed by Abdulmagid Breish.

At first, the GNA maintained lines of communication with both entities, while the eastern Government arrested, intimidated and prevented the head of the Malta-based branch from travelling, in order to force him to approve the appointment of a new Chief Executive Officer. Subsequently, the GNA appointed a new "Interim Steering Committee" that would serve as both Chief Executive Officer and board of directors, until it managed to transfer the governance structure of the Authority to Tripoli through the correct formal procedure. However, the new Chief Executive Officer was refused access to the Authority's offices in Tripoli. Finally, he managed to enter with the assistance of armed personnel.

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<sup>194</sup> UN Panel of Experts, *Letter dated 1 June 2017 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council*, 56.

<sup>195</sup> UN Panel of Experts, *Letter dated 1 June 2017 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council*, 56.

<sup>196</sup> UN Panel of Experts, *Letter dated 29 November 2019 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council*, 43.

Former Tripoli-based Officer Breish took the case to the Tripoli Administrative Court, which rejected the appointment of the Steering Committee. He managed to regain access to the Authority's headquarters, being supported by reportedly armed men. According to the UN Panel of Experts, occupation of the Authority's offices is dependent on the assistance of armed personnel<sup>197</sup>. After the court ruling, the GNA replaced the "Interim Steering Committee" with an "Interim Management Committee" and appointed Ali Mahmoud Hasan as its head, prohibiting dealings with Breish.

Hasan submitted an application to the High Court of Justice of the United Kingdom, claiming to be the validly appointed Chairman of the LIA. Breish challenged this argument, but the High Court ruled that he was precluded from challenging the constitutionality of the GNA by the "one voice" principle<sup>198</sup>. According to the "one voice" principle, recognition is a prerogative of the executive branch. Thus, judicial authorities need to comply with governmental guidance on the matter. In the present case, the British Government had certified that it recognized the GNA as the government of Libya. On 15 May 2020, the Court of Appeals confirmed this position<sup>199</sup>. It has to be noted that all assets held outside of Libya prior to 2011 remain frozen, following sanctions imposed by Security Council's Resolution 1973<sup>200</sup>.

The eastern Investment Authority's viability was affected by the formation of the Military Authority for Investment and Public Works (MAIPW). This Authority intended to guarantee financial independence for the LNA and has taken on control and oversight over major agricultural and industrial projects. Moreover, in 2016 the HoR adopted the military investment law and the Interim Government created the Defence Committee with the aim of allocating funds for the LNA. In parallel, the eastern Central Bank of Libya allocated a third of its spending to the LNA from 2016 till 2018<sup>201</sup>.

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<sup>197</sup> UN Panel of Experts, *Letter dated 1 June 2017 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council*, 57.

<sup>198</sup> For an extensive presentation of the US recognition case law and the interaction between the US Government and the US Courts on matters of recognition of governments, see Mary Beth West and Sean D. Murphy, "The Impact on U.S. Litigation on Non-Recognition of Foreign Governments," *Stanford Journal of International Law* 26, no. 2 (Spring 1990): 435.

<sup>199</sup> EWCA Civ 637, *Case No: A4/2019/1820 and A4/2019/1833*; Mahmoud v. Breish and Houssein (15/05/2020): 25.

<sup>200</sup> Giorgio Sacerdoti, "Freezing sovereign wealth funds assets abroad under U.N. Security Council's Resolutions: The case of the implementation in Italy of asset freezes against Qadhafi's Libya," 20 May 2012, [Freezing Sovereign Wealth Funds Assets Abroad Under U.N. Security Council's Resolutions: The Case of the Implementation in Italy of Assets Freezes Against Qadhafi's Libya by Giorgio Sacerdoti :: SSRN](#) (accessed November 15, 2020): 1-2.

<sup>201</sup> Eaton, Alageli et al., *The Development of Libyan Armed Groups Since 2014; Community Dynamics and Economic Interests*, 28-31.

It has to be noted that 16 cases against the Libyan State have been brought in front of the International Court of Arbitration of the International Chamber of Commerce for adjudication, since 2011. They include the following cases; Ghenia (Turkey) v. Libya, Shinhan (Republic of Korea) v. Libya, Tekfen and TML (Turkey) v. Libya, Strabarg (Austria) v. Libya, Nurol (Turkey) v. Libya, Guris (Turkey) v. Libya, Etrak (Turkey) v. Libya, D.S. Construction (UAE) v. Libya, Ustay (Turkey) v. Libya, Simplex (India) v. Libya and Trasta (UAE) v. Libya, which are still pending, Al-Kharafi (Kuwait) v. Libya, Sorelec (Turkey) v. Libya, Olin (Cyprus) v. Libya and Cengiz (Turkey) v. Libya, which decided in favor of the investor, and Way2B (Portugal) v. Libya, which decided in favor of the State. It is noteworthy that the Court has not occupied itself with the dispute between the two parallel entities, but has taken the GNA's standing as the Government of Libya, for granted .

To sum up, effective control over a greater portion of the Libyan territory is exercised by the eastern entity. However, the GNA still controls the capital Tripoli and a significant portion of northwestern Libya. In addition, control over the financial institutions, which are crucial for the economic viability of each regime, is divided between parallel entities, with a certain lead of the western entities.

## **ii) Foreign interference**

Since the 19<sup>th</sup> and early 20<sup>th</sup> century, foreign intervention has been considered as a disqualifying factor in recognition of governments. In particular, Great Britain, France and the United States did not recognize the Rivas Government of Nicaragua, which was aided by American adventurers. Similarly, the United States did not recognize the Imperial Government of Mexico, which was established thanks to France's intervention<sup>202</sup>.

During the 1970s, foreign assistance had been used to justify the non-recognition of the Lon Nol and Heng Samrin governments of Cambodia in 1970 and 1979, respectively. In particular, these governments were installed in Cambodia (called Kampuchea at the time), thanks to the intervention of Vietnamese troops. In this case, it was reported that this regime's effective control does not amount to anything else than the foreign troops' effectiveness<sup>203</sup>.

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<sup>202</sup> Peterson, "Recognition of Governments Should Not Be Abolished," 37.

<sup>203</sup> Peterson, "Recognition of Governments Should Not Be Abolished," 38; Colin Warbrick, "Kampuchea: Representation and Recognition," *International and Comparative Law Quarterly* vol. 30, no. 1 (1981): 234-235.

Similarly, during the Angolan Civil War, 3 armed factions struggled for prevalence; the Popular Movement for the Liberation of Angola (MPLA) supplied by the USSR and Cuba, the National Front for the Liberation of Angola (FNLA), aided by Zaire and the USA, and the National Union for the Total Independence of Angola (UNITA), supported by China and South Africa. On 23 October 1975, South Africa intervened with 5,000 heavily armored fighters on the side of UNITA. In parallel, 24,000 Cuban troops arrived to aid the MPLA. Responding to the intervention, the UNSC held seven relevant meetings and condemned it in March 1976. Both the South African and the Cuban interventions raised concerns over the independence of the respective movements and led to their non-recognition by the international community. As depicted in the Cambodian and the Angolan precedents, the presence of foreign states' armed forces in a government's territory and their substantial contribution to its functional capability leads to its non-recognition by the international community.

In the case of Libya, it has been reported that both sides depend heavily on foreign financial and military support, in what has been described as a proxy war<sup>204</sup>. According to the UN Panel of Experts, the interference of foreign fighters in Libya is a direct threat to the security and stability of the country.

To begin with, both sides recruit foreign mercenaries and armed groups. Specifically, former commanders of the 'Sudan Liberation Army' confirmed that the LNA had approached major Darfuri commanders<sup>205</sup>. In January 2019, that group supported the LNA during its operations into the south. It composed of approximately 200 fighters and is located in the Fezzan region. 'Minni Minawi' is another 'Sudan Liberation Army' faction, which is allied with the LNA. It is composed of approximately 300 fighters based in Jufra, where it is tasked with defending the line of communication between Tripoli and Jufra. Moreover, another Sudanese group composed of approximately 500 to 700 fighters, supports the LNA and is organized in small units.<sup>206</sup>

Further 1,000 Sudanese fighters from the 'Rapid Support Forces' were deployed to Libya on 25 July 2019 in order to guard critical national infrastructure and free the LNA to conduct offensive operations. In addition, a contract was signed in Khartoum between General Dagalo, on behalf of the Transitional Council of Sudan, and the Canadian company Dickens & Madson (Canada) Inc.

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<sup>204</sup> Kharief, "Libya's proxy war".

<sup>205</sup> UN Panel of Experts, *Letter dated 1 June 2017 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council*, 18.

<sup>206</sup> UN Panel of Experts, *Letter dated 29 November 2019 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council*, 9.

on 7 May 2019. According to the agreement, the company would “strive to obtain funding for your Council from the Eastern Libyan Military Council in exchange for your military help to the LNA (Libyan National Army)”. Last but not least, the LNA is supported by the Chadian armed group ‘Front pour l’alternance et la concorde au Tchad’, which is composed of approximately 700 men based in Jufra and tasked to defend the surrounding area.

Another major problem is the deployment of many Russian security companies, which are recruited by the eastern government. Reportedly, a Russian security company, called Russian Security Systems (RSB Group), is in charge of operating the LNA’s air force. Moreover, personnel of the Wagner Group has been reported to take part in LNA operations against Tripoli<sup>207</sup>. The UN Working Group on the Use of Mercenaries has reported the support provided to the LNA by Russian private military personnel and particularly, the Wagner Group, whose fighters were used as snipers and directed artillery fire from at least September 2019 to May 2020, when it was reported that they had withdrawn<sup>208</sup>.

In parallel, the GNA also relies heavily on foreign troops in order to enhance its military presence in the battlefield. In particular, it recruited the ‘Justice and Equality Movement’, which is composed of approximately 160 fighters in order to operate in Tripoli and in the area between Zillah and Sebha. Also, the Chadian group ‘Conseil de commandement militaire pour le salut de la république’, composed of approximately 300 men, fights alongside the GNA and is reportedly based in the areas of Al Qatrun, Murzuq and Sebha, while it is allegedly involved in criminal and trafficking activities of all kinds, linking southern Libya to the Chadian region of Tibesti<sup>209</sup>. Another pro-GNA group is the Chadian ‘Union des forces de la résistance’. Finally, various groups are divided in factions supporting either the GNA or the LNA. For instance, the ‘Union of Forces for Democracy and Development’ composed of 100 fighters is distinguished in subgroups supporting both sides in the area of Waw al Kabir<sup>210</sup>.

Turkish military support for the GNA and its extent have also raised concerns. SADAT International Defence Consultancy, a Turkish security company collaborating with Turkish secret services is operating in Tripolitania. SADAT has taken on the training of Syrian fighters

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<sup>207</sup> Kharief, “Libya’s proxy war”.

<sup>208</sup> United Nations Human Rights: Office of the High Commissioner, *Libya: Violations related to mercenary activities must be investigated – UN experts*, 17 June 2020, [OHCHR | Libya: Violations related to mercenary activities must be investigated – UN experts](#) (accessed November 15, 2020).

<sup>209</sup> UN Panel of Experts, *Letter dated 29 November 2019 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council*, 10-11.

<sup>210</sup> UN Panel of Experts, *Letter dated 29 November 2019 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council*, 11.

‘imported’ by Turkey in December 2019 to reinforce GNA’s armed forces. UN Working Group on the Use of Mercenaries Rapporteur Kwaja stated that “These fighters were recruited through armed factions affiliated with the Syrian National Army that have been accused of serious human rights abuses in Syria”. Regarding allegations of recruitment of Syrian underage boys, he added that “We are concerned that these children come from an extremely vulnerable social and economic situation and are being exploited for the purpose of recruitment as mercenaries”<sup>211</sup>. According to a Pentagon’s Report on Counterterrorism, Turkey has deployed between 3,500 and 3,800 paid Syrian fighters to Libya over the first three months of 2020, changing the outcome of the conflict<sup>212</sup>. Turkey’s involvement has been considered as its “most forceful intervention” in the region, since the Ottoman era<sup>213</sup>. It has also been reported that Yemeni fighters from the Muslim Brotherhood party and equipped by Turkey, are operating in Libya<sup>214</sup>. In the same wavelength, during his visit in Libya on 4 July 2020, the Turkish Minister of Defence, Hulusi Akar, stated that Turkish forces in Libya were providing military training, cooperation and advisory functions<sup>215</sup>.

Furthermore, on 13 July 2020, the HoR asked officially the Egyptian Government to intervene in Libya. Subsequently, Egyptian President Sisi met with a delegation of tribal leaders from eastern Libya, who repeated this request. On 20 July, the Egyptian parliament authorized the deployment of Egyptian troops for combat missions outside the country with the aim of defending its national security against “criminal armed militias and foreign terrorist elements”<sup>216</sup>.

The request of the HoR constitutes an invitation for intervention. It has to be noted that a fundamental rule of international law is the prohibition of intervention of a state in the domestic affairs of another state. This rule is founded on article 2 par. 4 of the UN Charter, and has also acquired customary basis. Nonetheless, such acts are exceptionally permitted in cases of self-defence, authorization by the Security Council under Chapter VII of the UN Charter, actions by regional organizations approved by the Council and an invitation by an incumbent

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<sup>211</sup> UNHR, *Libya: Violations related to mercenary activities must be investigated – UN experts*

<sup>212</sup> Isabel Debre, “Pentagon report: Turkey sent up to 3,800 fighters to Libya,” *The Washington Post*, June 17, 2020, [Pentagon report: Turkey sent up to 3,800 fighters to Libya - The Washington Post \(accessed November 15, 2020\)](#).

<sup>213</sup> Declan Walsh, “In Stunning Reversal, Turkey Emerges as Libya Kingmaker,” *The New York Times*, May 21, 2020, [In Stunning Reversal, Turkey Emerges as Libya Kingmaker - The New York Times \(nytimes.com\) \(accessed November 15, 2020\)](#). Frédéric Bobin, “Guerre en Libye : le maréchal Haftar affaibli par l’implication croissante des Turcs” *Le Monde*, 17 April 2020, [Guerre en Libye : le maréchal Haftar affaibli par l’implication croissante des Turcs \(lemonde.fr\) \(accessed November 15, 2020\)](#).

<sup>214</sup> Kharef, “Libya’s proxy war”.

<sup>215</sup> UNSC, *Report of the Secretary-General on the UN Support Mission in Libya*, 4.

<sup>216</sup> International Crisis Group, “Averting an Egyptian Military Intervention in Libya,” 27 July 2020, [Averting an Egyptian Military Intervention in Libya | Crisis Group \(accessed November 15, 2020\)](#).

government<sup>217</sup>. Thus, determination over which entity is to be considered as the government of the state is of utmost importance, as only the internationally recognized de jure government is entitled to request and permit foreign military intervention in the state<sup>218</sup>. This permission is not granted to opposition groups, as the International Court of Justice in the *Nicaragua* case ruled that “Indeed, it is difficult to see what would remain of the principle of non-intervention in international law, if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition”<sup>219</sup>. However, it has also been argued that a state’s incumbent government, which has lost effective control over its territory and has been struggling to retain its power within the context of a civil war, cannot invite another state to intervene militarily, due to reasons of negative equality<sup>220</sup>.

Violations of the UNSC-imposed arms embargo are attributed to foreign intervention, as well. In particular, the Panel received information on the presence of large military cargo planes at Benina and Misrata airports and used satellite imagery to verify the information, which suggested that the planes were C-17 aircraft operated by the United States Air Force<sup>221</sup>. In 2017 and 2018, the United States launched air strikes against Daesh targets, in what has been presented as coordinated action with the GNA, in accordance with international law. Similar UAE military airplanes were spotted in LNA-operated air bases<sup>222</sup>. Moreover, the Panel has received information that Egypt has conducted air strikes to support the recapture by LNA of a number of oil terminals, an act denied by Egyptian government<sup>223</sup>.

In addition, the Panel noted that infantry armoured fighting vehicles and protected patrol vehicles, as well as anti-rocket systems, manufactured in Jordan, were used by the LNA. Jordan did not respond to clarification questions raised by the Panel<sup>224</sup>. Armoured vehicles manufactured by the UAE and Nigeria have also been used by LNA. Likewise, guided artillery

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<sup>217</sup> Gregory H. Fox, “Intervention by Invitation,” *Wayne State University Law School Legal Studies Research Paper Series No. 2014-04* (2014): 4.

<sup>218</sup> Erika de Wet, “The Modern Practice of Intervention by Invitation in Africa and Its Implications for the Prohibition of the Use of Force,” *The European Journal of International Law* vol. 26, no. 4 (2016): 982.

<sup>219</sup> ICJ, *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America), 1986, par. 209.

<sup>220</sup> Fox, “Intervention by Invitation,” 15-16.

<sup>221</sup> UN Panel of Experts, *Letter dated 5 September 2018 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council*, 22.

<sup>222</sup> It has been reported that pilots of these airplanes are provided by Reflex Responses (R2), a security company established in Abu Dhabi and not directly by the UAE Air Force, as any captured Emirati pilot would prove the UAE’s involvement in the conflict, see Khariief, “Libya’s proxy war”.

<sup>223</sup> UN Panel of Experts, *Letter dated 5 September 2018 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council*, 26.

<sup>224</sup> UN Panel of Experts, *Letter dated 29 November 2019 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council*, 26-27.

projectiles and air defence systems used by LNA were transferred to Libya by the United Arab Emirates<sup>225</sup>. Also, Turkey has delivered military materiel to Tripoli, in order to support the GNA.

In conclusion, both entities rely heavily on foreign military support and troops, in order to maintain and increase their control over Libya. It remains doubtful if they could have continued to participate in this power struggle, without the substantial aid of external players. The two governments' operational independence and the control exercised over them by foreign states interfering in the conflict, is also a matter of concern.

### iii) Popular support

Effective control over a territory requires the support of the inhabitants or at least, their obedience and lack of resistance against the regime. Popular acceptance is linked to popular sovereignty, which bears the 'pouvoir constituant' in every change of regime and constitutes the necessary basis on which, each regime attempts to justify its emergence. Thus, the determination of popular support towards a regime is another aspect of the "effective control through internal processes" doctrine in recognition of governments<sup>226</sup>. As ruled by the High Court of Lesotho in the case *Mokotso v. King Moshoeshoe II*, "Legality should be achieved, only if and when people accept and approve, for in them lies political sovereignty"<sup>227</sup>.

In the past, international law regarded de facto control over a given period as indicative of the general acquiescence of the people. The exact duration required in order general popular acquiescence to be deduced is determined ad hoc, by the circumstances of each case<sup>228</sup>. In particular, in *Mitchell v. Director of Public Prosecutors of Grenada*, the Grenadan Court of Appeal ruled that a revolutionary government is considered legitimate, when apart from being successful and firmly established, it has furthermore enjoyed general obedience based on consent and approval, rather than fear generated by the regime's oppressive and undemocratic practices. In the case of Grenada, prerevolutionary regime's win of one seat in the Parliament elected in the

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<sup>225</sup> UN Panel of Experts, *Letter dated 29 November 2019 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council*, 28.

<sup>226</sup> Brad Roth, "The Honduran Crisis and the Turn to Constitutional Legitimism, Part I: The Place of Domestic Constitutional Orders in the International Legal Framework," <https://www.ejiltalk.org/the-honduran-crisis-and-the-turn-to-constitutional-legitimism-part-i-the-place-of-domestic-constitutional-orders-in-the-international-legal-framework/> (accessed November 15, 2020).

<sup>227</sup> Cited in Roth, *Governmental Illegitimacy in International Law*, 139.

<sup>228</sup> Charles G. Fenwick, "The Recognition of New Governments Instituted by Force," *The American Journal of International Law* vol. 38, no. 3 (1944): 449.

subsequent elections indicated for a judge revolutionary regime's success and popular support, while for another one it depicted old regime's continued support<sup>229</sup>.

It has to be noted that evidence concerning a regime's popular support is rather difficult to be collected and even more difficult to be assessed. Nevertheless, what is more easily found out, is the people's withdrawal of support towards its governing authority (if it is assumed that it has ever enjoyed it).

In the case of Libya, since the beginning of the governmental fragmentation and the formation of the two rival entities, Libyan people waited for the resolution of the conflict and the reintroduction of stability in their country. However, various protests against both governments took place, and resentment over their adopted policies was augmented. As stated by Rida Ahmed al Tubuly, a Libyan women's rights activist, in front of the UNSC, when she presented the harsh conditions experienced by Libyan women and depicted Libyans' impression towards their government: "In the name of preventive diplomacy, state-building and peacebuilding, the international community supported troublemakers instead of peacebuilders. The international community gave power and legitimacy to a violent minority instead of empowering the peaceful majority"<sup>230</sup>.

Popular disagreement over the handling of Libyan affairs by the two governments was escalated and was externalized through massive protests in August 2020. In particular, since 23 August 2020 and during September and October, massive protests with an impressive participation of the younger generations, have been taking place in Tripoli, in Misrata and in Zawiya against the policies of the GNA, and in Benghazi, Tobruk and Al-Marj against the eastern entity. Financial instability, unemployment and the ever worsening conditions of living in Tripolitania and Cyrenaica, like the lack of water and electricity, constitute the main reasons that provoked the eruption of these protests. Moreover, these demonstrations are connected with rivalries between high-profile officials of both entities; western protesters are divided between the supporters of GNA's Prime Minister Sarraj and those of Minister of Interior Bashaga, while the eastern ones are split between those supporting General Haftar and the HoR Speaker Saleh<sup>231</sup>.

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<sup>229</sup> Cited in Aristodemou, "Choice and Evasion in Judicial Recognition of Governments: Lessons from Somalia", 548.

<sup>230</sup> UNSC, *Records of the 8667<sup>th</sup> meeting*, 6.

<sup>231</sup> Frédéric Bobin, "En Libye, l'émergence d'une société civile protestataire rebat les cartes politiques," *Le Monde*, September 16, 2020, [https://www.lemonde.fr/afrique/article/2020/09/16/en-libye-l-emergence-d-une-societe-civile-protestataire-rebat-les-cartes-politiques\\_6052438\\_3212.html](https://www.lemonde.fr/afrique/article/2020/09/16/en-libye-l-emergence-d-une-societe-civile-protestataire-rebat-les-cartes-politiques_6052438_3212.html) (accessed November 15, 2020).

The GNA's response to these protests has been condemned by human rights NGOs. Specifically, Amnesty International reported that at least six peaceful protesters were abducted and several others were wounded after armed men fired live ammunition and used heavy machine-guns to disperse a demonstration in Tripoli on 23 August. The attack happened in an area of Tripoli controlled by the al-Nawasi militia, operating under the Ministry of Interior of the GNA<sup>232</sup>. These allegations and the armed group's link to the GNA are further referred by Human Rights Watch, which expressly accused the GNA of the use of lethal force against protesters and their subsequent arbitrary detention, torture and disappearance<sup>233</sup>. It has to be noted that in what could be regarded as a confirmation of the significance of popular support, the Prime Minister of the eastern government resigned after the escalation of the protests.

Even though popular support and obedience to a government are not easily detected and evaluated, Libyans' recent protests against both entities and their subsequent violent suppression may indicate an ever growing divergence between Libya's two ruling apparatuses and their subjects. Nonetheless, the voluntary mitigation of these demonstrations or their further escalation will set the tone for any more secure deductions for the support enjoyed by both entities.

## **b) Recognition according to the Legitimacy Doctrine**

The issue of legitimacy in recognition of governments relates to the question whether an entity's accordance with a State's internal processes affects its recognition by other States. In other words, if a government has to be formed according to the requirements of the State's legal order in order to be considered as this State's legitimate government in international law.

In the 19<sup>th</sup> century, the US Secretary of State Jefferson stated in response to the French Revolution, that "It accords with our principles to acknowledge any government to be rightful which is formed by the will of the nation, substantially declared"<sup>234</sup>. This prerequisite was

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<sup>232</sup> Amnesty International, "Libya: Heavy weaponry used to disperse peaceful protesters demanding economic rights," 26 August 2020, <https://www.amnesty.org/en/latest/news/2020/08/libya-heavy-weaponry-used-to-disperse-peaceful-protesters-demanding-economic-rights/> (accessed November 15, 2020).

<sup>233</sup> Human Rights Watch, "Libya: Armed Groups Violently Quell Protests, 10 September 2020, [Libya: Armed Groups Violently Quell Protests | Human Rights Watch \(hrw.org\)](https://www.hrw.org/news/2020/09/10/libya-armed-groups-violently-quell-protests) (accessed November 15, 2020).

<sup>234</sup> Fenwick, "The Problem of the Recognition of de Facto Governments," 20. It has to be noted that at the same time as the Jefferson Statement and in the wake of the same Revolution, Austria and Prussia tried to take collective action in support of the restoration of the French Monarch on the basis of dynastic legitimacy. The establishment of governmental succession on a dynasty's legitimate right (which at the time constituted State's legal order) depicts another side of the legitimacy principle, see Roth, *Governmental Illegitimacy in International Law*, 143. According to this approach, the ruling dynasty has a fundamental right to sovereignty which can be either renounced voluntarily or cease to exist with the extinction of the dynasty, see Talmon, *Recognition of Governments in*

considered as a component of the effectiveness doctrine (galvanizing a government's stability and control over the population) until 1907, when 5 American States (Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua) agreed in a Treaty of Peace and Amity not to recognize any government formed in ways not prescribed by the State's domestic legal order, which has been created constitutionally by the freely elected representatives of the people<sup>235</sup>. This provision specified that the will of the nation was substantially declared only through its freely elected representatives. In accordance with this principle, Tobar, Foreign Minister of Ecuador proposed the non-recognition of de facto governments formed contrary to a State's constitution. His opinion, which was adhered to by many Latin American States is known as the "Tobar Doctrine".

However, Tobar's constitutionality condition aroused problems in cases where entities created contrary to a State's legal order, succeeded to prevail and afterwards, set their own fundamental law, enabling their successors to claim legitimacy according to that, in what was called the "dynastic succession of dictators"<sup>236</sup>. In order to prevent this phenomenon, the 1923 Peace and Amity Treaty concluded by the same parties as the 1907 Treaty, established the non-recognition of any government which rose into power by a coup d'etat or revolution, or which was legitimized by subsequent reorganization of the State's domestic legal order. In the same wavelength, US Secretary of State Stimson issued the non-recognition of States created as a result of aggression, by applying the principle "ex injuria jus non oritur".

This Central American practice was followed by US President Wilson, who withheld recognition of General Huerta's Government, formed after his revolution in Mexico on the ground of not recognizing those "who seek to seize the power of government to advance their own personal interests"<sup>237</sup>. However, this approach was considered by other American States as the US Government's concealed effort to intervene in their internal affairs and manipulate the expression of their peoples' will.

Subsequently, Mexican Foreign Minister Estrada declared that Mexico would not thenceforth recognize foreign governments, as this practice was considered insulting and offending in respect

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*International Law: With Particular Reference to Governments in Exile*, 54. Fox denied monarchical and popular legitimacy' status as a rule of international law at the time, focusing on the importance attributed to non-intervention in other states' domestic affairs promoted by Europe's leading forces, see Gregory H. Fox, "The Right to Political Participation in International Law," *Yale Journal of International Law* Vol. 17 (1992): 548.

<sup>235</sup> Murphy refers to Great Britain's non-recognition of the Confederacy as based partly on its lack of popular consent and disrespect of equal rights, and partly on other grounds, ie. the fear of war with the Union and public opinion's influence on the British Government, see Sean D. Murphy, "Democratic Legitimacy and the Recognition of States and Governments," *International and Comparative Law Quarterly* vol. 48, no. 3 (July 1999): 549-550.

<sup>236</sup> Fenwick, "The Problem of the Recognition of de Facto Governments," 26.

<sup>237</sup> Fenwick, "The Problem of the Recognition of de Facto Governments," 27.

of other nations' sovereignty, and an intervention in their internal processes. He expressed the view that recognition entailed inherently a judgement of the recognized regime, which fell out of foreign governments' authority, but laid solely on the ruled nation<sup>238</sup>. The Estrada Doctrine was widely adopted by the American States, resulting in the subsequent abandonment of (formal) recognition declarations, a practice followed after the 1960s by many European States, as well. Moreover, Wilson's approach was abandoned by the US Government several years after its initiation, in 1930 and the Jeffersonian practice was resumed<sup>239</sup>.

However, the legitimacy principle resurfaced during the Cold War period, when both alliances tried to establish an obligation to maintain each side members' political regime. Thus, they formed two ideological approaches known as the Brezhnev and Reagan Doctrines. The Brezhnev Doctrine advocated socialist states' obligation not to damage socialism's interests, while the Reagan Doctrine denied effective control's significance in recognition of governments, highlighting the consent of the governed and respect of their rights as its basic criteria<sup>240</sup>. Nevertheless, it has to be noted that these doctrines did not constitute legal approaches, but political considerations formed by the Cold War sides in order to justify their attempts of ideological intervention in other states.

After the dissolution of the Soviet Union, some interesting criteria were added to the traditional requirements for recognition of states. The United States argued that democracy and respect for the rule of law should be taken into account in recognizing a State<sup>241</sup>, while the European Community in its "Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union'" demanded prospective States to "have constituted themselves on a democratic basis", respecting inter alia, the UN Charter, the Helsinki Final Act and the Charter of Paris<sup>242</sup>.

In what is considered as the first contemporary case indicating legitimacy principle's significance, both the Organization of American States and the United Nations condemned elected Haitian President, Jean-Bertrand Aristide's overthrow by a military coup in 1991. Also,

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<sup>238</sup> Roth, *Governmental Illegitimacy in International Law*, 138.

<sup>239</sup> Fenwick, "The Problem of the Recognition of de Facto Governments," 27.

<sup>240</sup> Roth, *Governmental Illegitimacy in International Law*, 147. For an extensive analysis, see Michael Reisman, "New Wine in Old Bottles: The Reagan and Brezhnev Doctrines in International Law and Practice," *Yale Journal of International Law* vol. 13 (1988): 171.

<sup>241</sup> "Testimony by Ralph Johnson, Deputy Assistant Secretary of State for European and Canadian Affairs, 17 Oct. 1991," *Foreign Policy Bulletin* 2 (1991): 42.

<sup>242</sup> "Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union', 16 Dec. 1991," *European Journal of International Law* 4 (1993).

they took measures against the newly imposed regime, stressing the fundamental need of return to respect of the Constitution and human rights and to the reestablishment of the democratically elected government as the state's effective government<sup>243</sup>. In 1994, the Security Council passed UNSC Resolution 940, which constitutes the first resolution authorizing the use of force to restore democracy for a member nation<sup>244</sup>. It provided for the reinstatement of the Aristide government and created the United Nations Mission in Haiti, which would maintain order after the operation. Military action was assumed and an invasion called "Operation Uphold Democracy" took place. The operation ended with the transfer of power to the United Nations Mission command on March 31, 1995, and a peaceful election and transfer of power occurred on February 7, 1996<sup>245</sup>.

This policy was repeated in Sierra Leone, where a coup ousted President Momoh in 1991 and initiated a civil war, which came to a halt with the election of President Kabbah in 1997. However, he was overthrown by the army shortly after his election. The Military Observer Group (ECOMOG) of the Economic Community of West African States (ECOWAS) managed to restore Kabbah in power, providing a strong example of the importance attributed to the legitimacy principle in the modern era<sup>246</sup>. It is worth mentioning that in both cases, the UN Credentials Committee approved elected governments' credentials, despite their lack of effective control over their respective states' territories<sup>247</sup>.

Condemnations of coups took place also in the case of Sao Tome and Principe in 1995, of Niger in 1996 and of Paraguay in 1996, without resulting in the deployment of armed missions to

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<sup>243</sup> Thomas M. Franck, "The emerging right to democratic governance," *American Journal of International Law* v. 86, no. 1 (Jan. 1992): 46-47.

<sup>244</sup> According to Olivier Corten, "La resolution 940 du Conseil de securite autorisant une intervention militaire en Haiti: L'emergence d'un principe de legitime democratique en droit international?," *European Journal of International Law* 6 (1995): 129, intervention in Haiti does not constitute an indication of the existence of an international rule, which enables states to restore democracy by force, but must be read within the specific regional context of the OAS.

<sup>245</sup> "Intervention in Haiti, 1994-1995", *Milestones in the History of U.S. Foreign Relations: 1993-1996*, United States of America Department of State, <https://history.state.gov/milestones/1993-2000/haiti> (accessed November 15, 2020).

<sup>246</sup> President Kabbah's Government was considered by the British Foreign Secretary Cook as a "legitimate and democratic government", see Stefan Talmon, "Who is a legitimate government in exile? Towards normative criteria for governmental legitimacy in international law", in Guy Goodwin-Gill/Stefan Talmon (eds.), *The Reality of International Law. Essays in Honour of Ian Brownlie* (Oxford: Oxford University Press, 1999), p. 499. However, according to Roth, both Haitian and Sierra Leonean examples do not depict legitimacy's influence in recognition, but constitute applications of the effective control doctrine, because intervention based on the electoral result complies with effectiveness' requirement of "effective control through internal processes", see Roth "Whither Democratic Legitimism: Contextualizing Recent Developments in the Recognition and Non-Recognition of Governments," 215.

<sup>247</sup> Jean d' Aspremont, "Legitimacy of Governments in the Age of Democracy," *New York University Journal of International Law and Politics* vol. 38 (2006): 906.

restore democratic governance<sup>248</sup>. Nevertheless, in what was considered as a stepback, in the case of Laurent Kabila's refuse of elections in Zaire, international reaction was limited.

Both the Haitian and the Sierra Leonean cases highlight the growing effect of legitimacy in recognition of governments, which is to be judged by international rules and standards, democracy included<sup>249</sup>. Its link to the democratic structure and procedure has resulted in the contemporary perception of democratic legitimacy. Franck considered that the democratic entitlement, based partly on custom and partly on the collective interpretation of treaties evolved into a requirement of international law applicable to all<sup>250</sup>. In the same wavelength, d'Aspremont and De Brabandere suggest that the obligation to hold free and fair elections (which constitutes the procedural aspect of democracy) and in this way to adopt a democratic regime, is an obligation erga omnes<sup>251</sup>.

The legitimacy principle can be further divided in two categories; legitimacy of origin and legitimacy of exercise<sup>252</sup>. Both categories reflect the relationship between the government and its power. Nonetheless, they are measured from two different temporal and theoretical standpoints, as the former relates to the source of power, while the latter to the way that this power is exercised by the government. It could be said that legitimacy of origin is achieved through a government "by the people", while legitimacy of exercise by a government "for the people"<sup>253</sup>. In other words, while democracy and human rights form the common ground for both categories of legitimacy, each of them is developed in a different way. This dichotomy concerns the external legitimacy of governments, which relates to the considerations on the legitimacy of a regime by other governments. External legitimacy is distinguished from internal legitimacy which is formed by citizens' perceptions on the legitimacy of their government<sup>254</sup>.

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<sup>248</sup> Murphy, "Democratic Legitimacy and the Recognition of States and Governments", 574.

<sup>249</sup> d'Aspremont, "Legitimacy of Governments in the Age of Democracy", 889.

<sup>250</sup> Franck, "The emerging right to democratic governance", 47.

<sup>251</sup> Jean d'Aspremont and Eric De Brabandere, "The Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise," *Fordham International Law Journal* Vol. 34, Issue 2 (2011): 199-200.

<sup>252</sup> d'Aspremont and De Brabandere, "The Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise", 192.

<sup>253</sup> d'Aspremont, "Legitimacy of Governments in the Age of Democracy", 884.

<sup>254</sup> d'Aspremont and De Brabandere, "The Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise", 193.

## i) Legitimacy of origin

Legitimacy of origin is related to the rise of a government to power and requires certain procedural conditions. In particular, it is linked to the concept of popular sovereignty, where power is exercised by representatives of the “will of the people” as stated by Jefferson. However, in this context, the will of the people is not considered as proof and confirmation of a government’s effective control, but as its constitutive element. Doubtless the original expression of this will has to be guaranteed through certain procedural safety valves, which is mainly the organization of fair and free elections<sup>255</sup>. Freedom of election concerns the pre-election period and the exercise of relevant political freedoms, while fairness is linked to the correctness of the electoral procedure and the avoidance of manipulation by the parties concerned<sup>256</sup>.

Free, fair, genuine and periodic elections are contended as the primary tool of democracy and as a consequence, of legitimacy, as well. This view has been expressed in many international binding and non-binding instruments, such as in article 21 of the Universal Declaration of Human Rights, where it is stated that “the will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures”<sup>257</sup>. According to Roth, reference to multi-party elections was deliberately omitted, while the vague requirement of genuineness could be met even in cases where an effective regime organizes elections crafted in ways that suit it and where substantive democratic criteria are not met, as it could denote people’s obedience to the regime<sup>258</sup>.

This provision was repeated in the Declaration’s binding equivalent, that is the International Convention on Civil and Political Rights, which provides in article 25 that every citizen shall have “the right and the opportunity to take part in the conduct of public affairs, directly or through freely chosen representatives and to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free

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<sup>255</sup> Jean d’ Aspremont, “1989-2010: The Rise and Fall of Democratic Governance in International Law,” in James Crawford/Sarah Nouwen (eds.), *Select Proceedings of the European Society of International Law*, vol. 3 (Oxford: Hart Publishing, 2012), 4.

<sup>256</sup> d’ Aspremont, “Legitimacy of Governments in the Age of Democracy”, 897.

<sup>257</sup> UNGA, *Resolution 217A: Universal Declaration of Human Rights* (10 December 1948), art. 21.

<sup>258</sup> Roth, *Governmental Illegitimacy in International Law*, 164. The deliberate omission of reference to the existence of multiple parties can be justified by the political division of the post-war world in western and socialist states; western states considered pluralism of political parties as fundamental in democratic societies, while socialist states were based on single-party regimes. However, the Human Rights Committee has questioned single-party elections’ compliance with freedom and fairness of elections, see Fox, “The Right to Political Participation in International Law,” 556, 558.

expression of the will of the electors”<sup>259</sup>. The Human Rights Committee in General Comment 25 interpreted this provision as lying at the core of democratic governance and requiring certain reasonable and objective criteria in order conditions to be imposed on its exercise. According to the Committee, the periodic organization of elections is linked to the accountability of governors, while the electoral process should be supervised by an independent electoral authority on the basis of rules established prior to the elections<sup>260</sup>. Moreover, in a groundbreaking decision in as early as 1988, it found a violation of article 25 in the case of single-party regimes<sup>261</sup>.

It has to be noted that the need of holding free and fair elections has been repeated in many United Nations General Assembly’s Resolutions<sup>262</sup>. Also, regional organizations like the Council of Europe, the African Union, the Organization of American States<sup>263</sup> and the Council on Security and Cooperation in Europe have declared that democracy is the preferred form of government within their systems<sup>264</sup> and can achieved specifically, through the organization of free and fair elections<sup>265</sup>.

The organization of free and fair elections is conceptually connected with people’s right to participate in them. This is the so-called human rights approach to the democratic entitlement, which advocates that a representative government, elected in free and fair elections, constitutes a

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<sup>259</sup> UNGA, *Resolution 2200A: International Covenant on Civil and Political Rights* (16 December 1966), art. 25

<sup>260</sup> UN Human Rights Committee, *General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote) The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, CCPR/C/21/Rev.1/Add.7, (12 July 1996): 2, 4.

<sup>261</sup> *Bwalya v. Zambia*, Commun. No. 314/1988, 1988, [Chiiko Bwalya v. Zambia, Communication No. 314/1988, U.N. Doc. CCPR/C/48/D/314/1988 \(1993\). \(umn.edu\)](#) (accessed November 15, 2020).

<sup>262</sup> UNGA, *Resolution 43/157*, A/RES/43/157 (8 December 1988); UNGA, *Resolution 49/190*, A/RES/49/190 (23 December 1994); UNGA, *Resolution 56/159*, A/RES/56/159 (19 December 2001).

<sup>263</sup> The 1965 OAS Resolution on Recognition of De Facto Governments recommended to member states that, immediately after the overthrow of a government and its replacement by a de facto government, they should take into consideration whether or not the overthrow of the government took place with the complicity and aid of one or more foreign governments, whether the de facto government proposes to take the necessary measures for the holding of elections within a reasonable period, giving its people the opportunity freely to participate in the consequent electoral process; and whether the de facto government agrees to fulfill the international obligations assumed previously by its country, to respect the human rights expressed in the American Declaration of the Rights and Duties of Man, and to comply with the commitments assumed by the signatories of the Declaration of the Peoples of the Americas and the general principles of the Charter of Punta del Este, see "Organization of American States: Resolution on Recognition of De Facto Governments," *International Legal Materials* 5, no. 1 (January 1966): 155-156.

<sup>264</sup> *CSCE Charter of Paris for a New Europe* (1990); African Commission on Human Rights, *Resolution on the Military, Eighth Annual Activity Report of the Commission on Human and Peoples' Rights* (25 October- 3 November 1994); *Inter-American Democratic Charter* (11 September 2001)

<sup>265</sup> *First Protocol to the European Convention on Human Rights* (Article 3), *American Convention on Human Rights* (Article 23), *African Charter on Human and Peoples Rights* (Article 13), *International Convention on the Elimination of all Forms of Racial Discrimination* (Article 5(c)), and the *Convention on the Political Rights of Women* (Article 1).

human right of all citizens<sup>266</sup>. The significance of elections can be justified by various reasons; they constitute the easier tool which enables the international community to deduct the transition towards democracy, they teach the fundamental value of public participation in governance to the people, they act as an indicator of a regime's willingness to proceed with democratic reforms and they attract international attention, shedding light on the respect of human rights in general<sup>267</sup>.

The United Nations have endorsed the organization of elections and have got actively involved in many electoral procedures, in order to ensure their freedom and fairness. Specifically, in April 1992 a Unit for Electoral Assistance was established within the Secretariat, and it was soon upgraded into a Department, as it received 52 requests for assistance by member states in the first two years of its operation<sup>268</sup>. The UN's involvement and its subsequent practice in monitoring national electoral procedures have added further requirements to the conduct of the elections. First of all, the procedure ought to be supervised by an independent electoral commission. In addition, the freedom of organization, of assembly and of expression of political parties and the non-interference in their campaigns are fundamental. Finally, the equal access to all media and free access to the procedure and supervision of its organization by international organizations and NGOs have been highlighted<sup>269</sup>.

Even literature's widespread connection of recognition of governments with the unconstitutional changes of government denotes the existence of a link between the origin of power, the breach of the internal legal order and the recognition of the subsequent entity as the government of the State.

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<sup>266</sup> Gregory Fox, "International Law and the Entitlement to Democracy After War," *Global Governance*, vol. 9 (2003): 180.

<sup>267</sup> Fox, "International Law and the Entitlement to Democracy After War," 185.

<sup>268</sup> Gregory H. Fox, "Multinational Election Monitoring: Advancing International Law on the High Wire," *Fordham International Law Journal*, vol. 18, issue 5 (1994): 1661. The EU has assisted electoral procedures in 44 countries between 1990-1995, see Gregory H. Fox and Brad R. Roth, "Democracy and International Law," *Review of International Studies* vol. 27, no. 3 (2001): 330.

<sup>269</sup> Fox considers these criteria as constituting part of the customary rule of free and fair elections, see Fox, "International Law and the Entitlement to Democracy After War," 186-187. One of the most highly publicized cases concerning blatant flaws of the electoral process was the organization of elections in Belarus in 2001, when incumbent President Lukashenko managed to be re-elected after a procedure that was marked by governmental interference and did not meet even basic objective electoral criteria, see Ethan S. Burger, "The Recognition of Governments under International Law: The Challenge of the Belarusian Presidential Election of September 9, 2001 for the United States," *George Washington International Law Review* 35, no. 1 (2003): 126.

It has to be noted that legitimacy may be derived not solely through elections, but also through representative, inclusive, open, broad-based and permanent regimes<sup>270</sup>. In this context, President Obama considered the Syrian Opposition Coalition as “the legitimate representative of the Syrian people” after he decided that it was “inclusive enough, reflexive and representative enough of the Syrian population”<sup>271</sup>.

Nevertheless, the legitimacy principle and its status as an established (or even an emerging) rule of international law has been contested in literature. To begin with, Talmon rejects legitimacy of origin’s standing as a fundamental criterion for recognition, while he accepts legitimacy of exercise’s status, separating between legitimacy and governmental status and establishing the latter only on effective control<sup>272</sup>. Furthermore, he considers it a political term, which is not governed by international law<sup>273</sup>. Moreover, Murphy supports the view that democracy is an increasingly used policy element in recognition of governments, taken into account alongside other factors, like development and stability, but not being justified by state practice as the sole decisive requirement in order a government to be recognized<sup>274</sup>. Even d’Aspremont observes a decline in state practice regarding legitimacy of origin, whereas he contends that legitimacy of exercise gradually acquires a more important role in recognition of governments<sup>275</sup>.

Recent practice may also shed light on the perceptions concerning legitimacy’s position in assessing governmental changes and granting recognition. During the 1990s, apart from the cases of Haiti and Sierra Leone, state practice cannot not justify easily an unambiguous acceptance of the legitimacy principle. In particular, unconstitutional changes of government and coups in Myanmar in 1990, in Algeria in 1991, in Peru in 1992, in Cambodia in 1993, in Nigeria in 1993 and in Congo in 1997 resulted in the international community’s criticism of the aforementioned regimes, but did not affect governmental recognition or the status of diplomatic relations with other states<sup>276</sup>.

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<sup>270</sup> Talmon, “Recognition of Opposition Groups as the Legitimate Representative of a People”, 223, 240.

<sup>271</sup> Davin Dwyer, “Obama Recognizes Syrian Opposition Group”, 11 December 2012, [Obama Recognizes Syrian Opposition Group - ABC News \(go.com\)](#) (accessed November 15, 2020).

<sup>272</sup> Talmon, “Recognition of Opposition Groups as the Legitimate Representative of a People”, 238-239.

<sup>273</sup> Stefan Talmon, “The Difference between Rhetoric and Reality: Why an Illegitimate Government may still be a Government in the Eyes of International Law,” *EJIL:Talk!*, 3 March 2011, [The Difference between Rhetoric and Reality: Why an Illegitimate Regime May Still be a Government in the Eyes of International Law – EJIL: Talk!](#) (accessed November 15, 2020).

<sup>274</sup> Murphy, “Democratic Legitimacy and the Recognition of States and Governments”, 580.

<sup>275</sup> d’ Aspremont, “1989-2010: The Rise and Fall of Democratic Governance in International Law”, 8-9.

<sup>276</sup> Murphy, “Democratic Legitimacy and the Recognition of States and Governments,” 575-578.

In the specific African regional context, African Union, Africa's primary regional organization has included in article 4p of its Constitutive Act, "the condemnation and rejection of unconstitutional changes of government" as one of the Union's principles. In the Declaration of Lome, the Union identifies four types of unconstitutional change of government: "i) military coup d'etat against a democratically elected government, ii) intervention by mercenaries to replace a democratically elected government, iii) replacement of democratically elected governments by armed dissident groups and rebel movements and iv) the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections"<sup>277</sup>. The case of "Any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government" was added with the African Charter on Democracy, Elections and Governance<sup>278</sup>.

Moreover, the Charter provides for the suspension of states experiencing unconstitutional changes of government and prescribes the adoption of an array of measures, including economic sanctions<sup>279</sup>. The Union adopted these measures in order to deal with unconstitutional changes of government in Togo in 2005, in the Comoros in 2007, in Guinea in 2009, in Madagascar in 2009, in Egypt in 2012, in the Central African Republic in 2013 and in Burkina Faso in 2015.

Two outstanding cases concerning African States, where democratic legitimacy became the yardstick for the recognition of the elected government, may be singled out. These cases were the cases of Cote d' Ivoire and the Gambia. In particular, elections were held in Cote d' Ivoire in 2010, which resulted in the election of Alassane Quattara. However, incumbent President Gbagbo refused to hand over power to new President-elect. As a result, the AU suspended Cote d' Ivoire from its gulfs, while the UN Security Council urged pursuant to Chapter VII of the UN Charter, all Ivorian parties to respect the outcome of the election of Alassane Quattara as "President-elect of Cote d' Ivoire and representative of the freely expressed voice of the Ivorian people as proclaimed by the Independent Electoral Commission"<sup>280</sup>. In a similar move, when in 2016 incumbent President Jammeh of the Gambia refused to step down from the office in favor of President-elect Barrow, both the AU and the UN Security Council recognized the latter as the country's president. Both cases highlight the importance of democratic legitimacy and its

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<sup>277</sup> Lomé Declaration of July 2000 on the framework for an OAU response to unconstitutional changes of government (AHG/Decl.5 (XXXVI)).

<sup>278</sup> *African Charter on Democracy, Elections and Governance*, art. 23 par. 5.

<sup>279</sup> *African Charter on Democracy, Elections and Governance*, art. 25.

<sup>280</sup> Jean d' Aspremont, "Duality of government in Cote d' Ivoire," *EJIL:Talk!*, 4 January 2011, [Duality of government in Côte d'Ivoire – EJIL: Talk!](#) (accessed November 15, 2020).

consideration as a decisive criterion in recognition of governments, despite the lack of effective control over the state's territory and population<sup>281</sup>.

In spite of the aforementioned cases, de Wet rejects the formation of a consistent legitimacy practice in the context of African states<sup>282</sup>. She contends that the response of the Union to unconstitutional changes of government is not uniform, as for example it condemned the Sao Tome and Principe coup, but did not suspend the country from its activities. Furthermore, she mentions the recognition of the National Transitional Council of Libya as the country's legitimate government, despite its lack of democratic origin and on the basis of its effective control over portions of the territory<sup>283</sup>. Thus, she concludes that in African Union's context, democracy constitutes an element to be considered mainly in cases of President-elects' inability to take control of the state apparatus, but that effective control remains recognition of governments' primary requirement<sup>284</sup>.

The example of the most recent recognition of government dispute, concerning the Government of Venezuela, perplexes rather than elucidates the matter of recognition in accordance with the State's internal legal order<sup>285</sup>. On 20 May 2018, presidential elections were held in Venezuela. According to the National Electoral Council voter turnout reached 46,07%, a figure dismissed by the United Opposition, that places it to 25,8%. Incumbent President Nicolas Maduro was re-elected with a 67,8% percentage. However, the electoral process was rejected by the European Union, the Organization of American States, the United States and Australia, among others. The National Assembly considered the election illegitimate and refused to recognize Maduro as the Head of State. Assembly Leader, Juan Guaido announced that he assumed the role of interim

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<sup>281</sup> Samuel Issacharoff, "Fragile Democracies," *Harvard Law Review* vol. 120, no. 6 (2007): 1464, contends that democracy's real essence is governmental re-formation, according to majority's will. As a result, an incumbent government ought to comply with the electoral result and hand over power to the new government elected by the people.

<sup>282</sup> It is argued that such practice is developed in the context of the Organization of American States, see Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile*, 12. In particular, the OAS recognizes a right to democracy through the Santiago Commitment to Democracy and the Renewal of the Inter-American System, the General Assembly's statement on Representative Democracy and the Inter-American Democratic Charter, see Patrick J. Glen, "Institutionalizing Democracy in Africa: A comment on the African Charter on Democracy, Elections and Governance," *African Journal of Legal Studies* 5 (2012): 159.

<sup>283</sup> Okafor considers that the recognition of a transitional regime, which has expressed its intention to restore democracy is reinforcing democratic legitimacy's status as a binding rule in recognition of governments. He argues that while a relevant international customary rule has not been emerged, in the African regional context the existence of such a rule could be supported, see Obiora Chinedu Okafor, "Democratic Legitimacy as a Criterion for the Recognition of Governments: A Response to Professor Erika de Wet," *AJIL Unbound* (2015): 231-232.

<sup>284</sup> Erika de Wet, "The role of democratic legitimacy in recognition of governments in Africa since the end of the Cold War", *International Journal of Constitutional Law* vol. 17, issue 2 (2019): 474-478.

<sup>285</sup> See Federica Paddeu and Alonso Gurmendi Dunkelberg, "Recognition of Governments: Legitimacy and Control Six Months after Guaido," 18 July 2019, [Recognition of Governments: Legitimacy and Control Six Months after Guaidó - Opinio Juris](#) (accessed November 15, 2020).

president, under article 233 of the Constitution of Venezuela, until free elections would be held, being backed by the Assembly.

The international community's response was mixed. First of all, the United States, the United Kingdom, France and other 51 countries have recognized him as the acting President of Venezuela. The United States and Costa Rica, among others, have recognized his appointees as Venezuela's diplomatic mission and have requested from Maduro's ambassadors to leave the country and hand over the embassies. Moreover, there are states like France, Germany and the UK that recognized his envoys as his appointees as his personal representatives, considering his recognition as a political one, not affecting Maduro's recognition, as he exerted effective control in Venezuela. Other peculiarities include Brazil, which has recognized Guaido's envoy, without ordering Maduro's ambassadors to leave, and Chile that has recognized Guaido's appointee as "representative of the Venezuelan National Assembly", while maintaining Maduro's ambassador, as well. As far as membership in the United Nations is concerned, Guaido's representatives are not recognized by the Credentials Committee as the representatives of Venezuela.

From the aspect of legitimacy of origin, the case of Libya could be described as complicated. The eastern government incorporates the House of Representatives, which was elected through parliamentary elections on 25 June 2014. In parallel, its Prime Minister Abdullah al-Thinni was the caretaker Libyan Prime Minister, appointed in 2014. In addition, General Haftar was appointed as Head of the Libyan Armed Forces by the HoR in March 2015. As a consequence, his legitimacy is linked indissolubly with the legitimacy of the HoR. Nevertheless, the HoR's election was nullified by the Supreme Court of Libya in August 2014.

A second legitimacy basis is the Libyan Political Agreement, signed in December 2015. This agreement which was concluded after extensive talks between the majority of Libyan political stakeholders, intended to constitute Libya's new inclusive transitional political framework and introduced a different institutional structure with a precise allocation of power between State's executive branch (GNA) and its legislative one (HoR).

According to the Agreement, the Government is comprised by the Presidency Council of the Council of Ministers and by the Council of Ministers. The members of the GNA and its programme would be endorsed by the HoR, which would grant it a vote of confidence and adopt

its program in accordance with the legally stated procedures, within a period that would not exceed 10 days of its submission to it by the Prime Minister<sup>286</sup>.

Furthermore, the Agreement prescribed precise terms for the above mentioned bodies, in order any unjustifiable extension of the transitional regime to be avoided. In particular, the GNA's term would last for one year as of the date of acquiring a vote of confidence by the House of Representatives. In case the constitution was not finalized during its term, it would be renewed automatically for one additional year. In all cases, the term of the Government would end immediately after the formation of the executive authority as per the Libyan Constitution or the expiry of its specified duration, whichever was earlier<sup>287</sup>.

The legitimacy of origin of the Libyan entities can be examined in two different levels; the organization of free and fair elections and the emergence through inclusive political agreements. In respect of the Libyan entities, only the HoR can claim legitimacy deriving from elections, which is the procedural element of rendering democratic character to governments. However, the specific electoral process was marked by various blatant flaws, which affect both the procedure and its results. First of all, the participation was significantly low, as only 18% of registered voters voted<sup>288</sup>. Specifically, approximately 630,000 people out of 1,500,000 registered voters took part in the process. The number of registered voters is significantly lower than that of the 2012 elections, where 2,800,000 had registered to vote<sup>289</sup>. As a consequence, the electoral result could not be considered as truly representative of a preponderant part of society's will.

Moreover, some polling stations were closed due to security reasons in cities in the East and in the South. The fear of militias and the unstable security and political situation resulted in the rejection of the procedure and subsequently, in very high abstention rates. In any case, it remains doubtful in what extent voters' original will could be expressed under these circumstances.

Furthermore, it has to be noted that the HoR's role was to act as Libya's interim legislative body, which would prepare the democratic transition of the country by holding presidential and parliamentary elections within a certain period of time after its election. Specifically, it had to

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<sup>286</sup> Libyan Political Agreement, art. 3.

<sup>287</sup> Libyan Political Agreement, art. 1 par. 4.

<sup>288</sup> This percentage is much lower than the global average voters turnout percentage, which was 66% in 2016 and than Africa's percentage, which exceeded slightly 60%, see International Institute for Democracy and Electoral Assistance, *Voter Turnout Trends around the World*, 2016, 24-25.

<sup>289</sup> Kareem Fahim and Suliman Ali Zway, "Violence and Uncertainty Mar Libyan Election for a New Parliament," *The New York Times*, 25 June 2014, [Violence and Uncertainty Mar Libyan Election for a New Parliament - The New York Times \(nytimes.com\)](https://www.nytimes.com/2014/06/25/world/africa/libyan-election.html) (accessed November 15, 2020).

decide on the method to elect an interim President within 45 days of its first session. Speaker Shaleh assumed that role and the HoR did not proceed to the organization of elections. That was the reason that the Supreme Court nullified its election. In addition, because of the fact that a new constitution draft was not presented by the relevant Assembly, the HoR did not issue a general elections law and did not announce elections for a new legislative body, which would replace it. To sum up, the HoR (which emerged through an electoral process, marked by extremely low turnout and security concerns) seems to have tried to go beyond its temporal mandate and its interim role, while it did assume executive powers.

In a second level, legitimacy of origin can be derived through inclusive agreements between all relevant political actors and factions of society, which can offer a representative element to the body created by the procedure and on the basis of these agreements. The Libyan Political Agreement did constitute an inclusive framework, agreed by members of both rival governments of the time, the GNC and the HoR, with the participation of various members of the Libyan civil society. In other words, it was concluded by the majority of political and social players of the Libyan reality and its provisions could be considered as providing legitimacy for the agreed system of governance.

In particular, the Agreement defines precisely the GNA's role as the sole executive authority of the State and the HoR's character as its sole legislative body. In relation to these provisions, two problems arise; the HoR continuously insisted on the rejection of the proposed GNA cabinets, making the realization of the Agreement impossible, in what could be regarded as an abuse of its relevant authority and as a bid to encroach on the executive branch's authority. In parallel, the GNA has exceeded by far any temporal mandate prescribed by the Agreement, as in 2020, its mandate has been exceeded by 3 years. Nevertheless, the President of the UNSC stated that the GNA constitutes Libya's government for the entire transitional period and rejected any prescribed deadlines as incorrect<sup>290</sup>. As a result, both entities' legitimacy claims suffer certain flaws. Last but not least, even the validity of the LPA has been contested, as the Court of Appeal of Bayda ruled that the formation of the GNA is unconstitutional and its acts are null and void, stressing as reason the non-compliance of the conclusion of the Libyan Political Agreement with the requirements prescribed by the Interim Constitutional Declaration.

From a different perspective, since both entities are included in the Agreement, their conflict could be defined as a conflict between two official bodies. The international community has

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<sup>290</sup> UNSC, *Statement by the President of the Security Council, S/PRST/2017/24* (2017).

experienced similar situations in the past and possibly, their reaction at the time could provide us with a useful tool in order to sort out the best response to the problem. Specifically, in 1960 a constitutional crisis occurred, when President Kasavubu of Congo-Leopoldville dismissed Prime Minister Lumumba and authorized Army Head Joseph Mobutu to disperse the Parliament temporarily. Kasavubu justified his action by referring to the interim Constitution, *loi fondamentale*, which gave to him the power to dismiss the Prime Minister, while Lumumba was supported by the Parliament that convened to vote full powers to him and condemn Mobutu's action as *coup d'état*.

The difference was transferred in front of the UN Credentials Committee, as both sides wanted to appoint envoys of their choice as Congo-Leopoldville's delegates to the organization. Both the Credentials Committee and the General Assembly voted in favor of Kasavubu's delegation, stating that any other choice would constitute an intervention in the domestic affairs of the State. Although members of the General Assembly tried to interpret the *loi fondamentale* in order to understand whether the appointment of delegates to international organizations was included in President's or Prime-Minister's powers, the decisive criterion was Kasavubu's even slight reference to constitutional justification of his actions and his *de facto* control of the capital<sup>291</sup>.

Another case, where two officials took part in an internal struggle for power was that of Grenada in 1983. In particular, Governor-General Scoon constituted the Head of State under the Constitution of 1973. However, the Constitution had been suspended after a coup, which established a socialist single-party regime. Governor-General's powers became dependent on the will of the government and he was placed under house arrest. In 1983 the United States and a coalition of Caribbean States invaded the country and deposed the government, after an invitation to intervention by the Governor-General. Nevertheless, the international community condemned the invasion and pressed for the restoration of the government and the organization of elections. It has to be mentioned that Roth contended in view of the Honduran case in 2009 and the Ukrainian one in 2014, that when an elected President is ousted by an elected Parliament, his authority is under "objectively evident" constitutional doubt<sup>292</sup>.

The abovementioned examples highlight that in cases of conflict between two officials, who can claim a certain extent of legitimacy or popular support, the decisive criterion remains the even

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<sup>291</sup> Roth, "Governmental Illegitimacy in International Law", 268-274.

<sup>292</sup> Roth, "Whither Democratic Legitimism: Contextualizing Recent Developments in the Recognition and Non-Recognition of Governments," 216.

slight accordance of their with the domestic legal order and the actual effective control exercised by them in the state's territory. In this way, and taking into consideration that both entities can claim a certain degree of legitimacy of origin, we return to the basic question of control over the soil and the state apparatus.

All in all, various problems are presented in the case of Libya, from the aspect of legitimacy of origin. While both regimes can support that their emergence was conducted on the basis of legitimizing procedures either through the elections of 2014 or the provisions of the Libyan Political Agreement, certain substantial flaws seem to render these foundations unstable.

## ii) Legitimacy of exercise

While assessment of the origin and the implementation of certain procedural steps are necessary in order to evaluate a regime's legitimacy, the exercise of its authority after its emergence to power constitutes the second dimension of the legitimacy test in recognition of governments. Specifically, a government's democratic origin does not necessarily mean that it will exert its power in a democratic manner, respecting human rights and the rule of law. This requirement has a substantive nature, as opposed to the procedural character of legitimacy of origin's conditions<sup>293</sup>. It could be added that compliance with these substantive criteria in fact enhances even the organization of elections, as it the respect of basic political freedoms and mainly freedoms of assembly, thought, expression are fundamental in ensuring an electoral process' freedom and fairness<sup>294</sup>.

Due to different ideological approaches during the Cold War, democracy and human rights have been described as discrete terms. However, the democratic structure of a state and its fair function are inherently interwoven with respect of human rights<sup>295</sup>. They also seem to play an important role in recognition of governments. In 1966, the Republican Government of Yemen committed mass atrocities against insurgents, with the help of Egyptian expeditionary forces. As a result, Jordan and Tunisia withdrew recognition of this regime<sup>296</sup>. Nonetheless, this practice was not consistent, as when in 1977 the United Kingdom raised before the UN Commission on Human Rights the issue of blatant violations of human rights committed by the Khmer Rouge

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<sup>293</sup> Gregory Fox and Georg Nolte, "Intolerant Democracies," *Harvard International Law Journal* vol. 36, no. 1 (1995): 16.

<sup>294</sup> d' Aspremont and De Brabandere, "The Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise", 206.

<sup>295</sup> Fox and Roth, "Democracy and International Law," 333.

<sup>296</sup> Talmon, "De-Recognition of Colonel Qaddafi as Head of State of Libya," 765.

regime in Kampuchea, the Soviet Union reacted in what it called an “interference in the internal jurisdiction of Kampuchea”. It has to be noted that in 1979 the Soviet Union itself denied recognition of the Pol Pot regime after the Vietnamese invasion, due to lack of Khmer Rouges’ effective control over the country and its brutal policies towards the Kampuchean people<sup>297</sup>.

Recently, the term “illiberal democracies” has arisen and is used extensively, in order to describe democratically elected regimes, which nonetheless do not exercise their powers in accordance with democratic values and the rule of law. In this case, incompliance with basic democratic principles leads to the disqualification of that entity as the legitimate government of the country<sup>298</sup>. The yardstick is set by major international human rights conventions<sup>299</sup>. In the context of the African Union, a certain weakness can be traced; while great emphasis has been given on the legitimacy of origin of a new government, the way it exercises its power has not been properly and thoroughly established as a delegitimizing factor<sup>300</sup>.

In parallel, even long-term effective regimes have lost their legitimacy (often grounded on effective control, rather than elections), as a result of flagrant human rights violations. This effect was visible in the case of the Qaddafi regime of Libya and the Assad regime of Syria in 2011. In both cases, the excessive use of force against the respective countries’ populations led to massive declarations by the UN, the League of Arab States, the G8 and the US, which stated both regimes’ loss of legitimacy as a result of these acts. Talmon observed the emerging formation of consensus on governments’ de-legitimization due to excessive violence against their populations<sup>301</sup>.

In the case of Libya, various blatant violations of human rights committed by both sides have been reported by the UN Panel of Experts, especially concerning the treatment of detainees by armed groups affiliated with the eastern government or the GNA, which de facto control detention centers and prisons. It has been reported that they have committed serious human rights violations, including unlawful deprivation of liberty and torture that in some cases led to

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<sup>297</sup> Warbrick, “Kampuchea: Representation and Recognition,” 234-235.

<sup>298</sup> d’ Aspremont and De Brabandere, “The Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise”, 212; d’ Aspremont. “Legitimacy of Governments in the Age of Democracy”, 913.

<sup>299</sup> Jean d’ Aspremont, “The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks,” *The European Journal of International Law* Vol. 22 no. 2 (2011): 551.

<sup>300</sup> Joseph Kazadi Mpiana, “L’Union africaine face à la gestion des changements anticonstitutionnels de gouvernement,” *Revue Québécoise de droit international* vol. 25, no. 2 (2012): 113.

<sup>301</sup> Talmon, “Recognition of Opposition Groups as the Legitimate Representative of a People”, 238. However, the loss of legitimacy does not amount to loss of governmental status, which can be achieved only by de-recognition, see Talmon, “The Difference between Rhetoric and Reality: Why an Illegitimate Government may still be a Government in the Eyes of International Law”.

deaths, due to political, financial or religious reasons<sup>302</sup>. The problem of arbitrary and unlawful detention was highlighted by the Berlin Conference, as well<sup>303</sup>.

In particular, testimonies indicated the existence of a secret section of the Qarnadah prison, where victims kidnapped by armed groups and handed over to LNA were imprisoned. In this section, prisoners suffer from denial of access to sanitation, psychological torture and savage beating. According to the Report, other secret LNA detention centers exist in the rural areas of Benghazi, as well<sup>304</sup>. For instance, an armed group called Awliya' al-Damm Abu Hudaymah, affiliated with the LNA, runs an illegal detention center, where several individuals are arbitrarily detained, kept in inhumane conditions and subjected to torture, while their houses were confiscated. Some of them are still missing and cases of summary executions have been reported. In addition, members of LNA Brigade 152 were involved in two cases of torture and one case of death under torture in an illegal detention center held by the Brigade. The Panel reported the systematic arrests and disappearances of and threats against opponents of LNA in eastern Libya, especially in the context of the preparations for elections. Furthermore, local sources reported that 60 individuals were allegedly kidnapped in the weeks following the takeover by LNA of the oil crescent in September 2016.

Moreover, the Secretary-General in his report on the UN Support Mission in Libya, reported that 8,800 individuals (including 109 children) were held in prisons nominally under the GNA's Ministry of Justice<sup>305</sup>. In addition, the Panel received reports of torture and mistreatment of detainees suspected of affiliation with "terrorist organizations" in a detention center in Mitiga, run by the GNA Special Deterrence Force, but could not verify these allegations<sup>306</sup>. The Special Deterrence Force gave the Panel access to a register of sentenced prisoners held in the Tripoli rehabilitation and reform center, located in Mitiga. In October 2017, 2,600 detainees were held in that prison. Nevertheless, the Panel continued to receive testimonies from former detainees of severe violations of human rights (prolonged periods of solitary confinement, deaths in prison

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<sup>302</sup> In October 2017, 6,500 people were held in prisons under the nominal control of the judicial police.

<sup>303</sup> UNSC, *Letter dated 22 January 2020 from the Permanent Representative of Germany to the United Nations addressed to the President of the Security Council*, 10. According to the UN Human Rights Committee, *General Comment 35 on Article 9, CCPR/C/GC/35* (16 December 2014): 3, elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality are taken into consideration, when judging the "arbitrariness" of detention. In parallel, detention may be considered "unlawful", when it violates domestic law or is incompatible with the requirements of article 9, paragraph 1, or with any other relevant provision of the Covenant, see UNHRC, *General Comment 35 on Article 9*, 14.

<sup>304</sup> UN Panel of Experts, *Letter dated 1 June 2017 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council*, 19.

<sup>305</sup> UNSC, *Report of the Secretary-General on the UN Support Mission in Libya*, 6.

<sup>306</sup> UN Panel of Experts, *Letter dated 1 June 2017 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council*, 20.

due to torture or deprivation of access to medical care, denial of family visits, torture methods used, notably during the interrogation period in the first days or weeks of detention) during their detention in Mitiga prison between 2015 and April 2018.

The Special Deterrence Force insisted that all arrest operations are conducted with the knowledge of the Attorney General, in accordance with legal procedures.<sup>307</sup> Nonetheless, the Panel reported that at least 29 detainees were not presented to the Office of the Attorney General since June 2016. According to testimonies, they were allegedly tortured in detention. In parallel, the Panel has collected testimonies and documentation relating to at least one case of death under torture at Kararim prison in Misrata. The Anti-Crime Committee, a Salafi-leaning armed group, runs the prison. Testimonies revealed beatings, psychological and physical torture and dire detention conditions.

Legitimacy of exercise of power is evaluated on the basis of the relevant human rights treaties, signed and ratified by the state in question. As the abovementioned cases concern arbitrary detention and deprivation of life, the relevant human rights instrument is the International Covenant on Civil and Political Rights, which was ratified by Libya in 1970. The ICCPR prohibits arbitrary detention and deprivation of liberty in article 9, which recognizes and protects liberty and security of person<sup>308</sup>. In parallel, Libya is bound by the African Charter on Human and Peoples' Rights, which establishes the right to personal liberty and the protection of arbitrary arrest in article 6.

Regarding the denial of access of detainees to the Office of the Attorney General, it has to be noted that article 9, par. 3, requires that any person arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power. That requirement applies in all cases without exception. According to the Human Rights Committee, delays should not exceed a few days from the time of arrest. Specifically, it considers that 48 hours are ordinarily sufficient to transport the individual and to prepare for the judicial hearing, and that any delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances<sup>309</sup>. Both the GNA and the eastern government have not complied with this procedural requirement and have deprived the majority of detainees of the

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<sup>307</sup> UN Panel of Experts, *Letter dated 5 September 2018 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council*, 12.

<sup>308</sup> Liberty of person concerns freedom from confinement of the body, while security concerns freedom from injury to the body and the mind, or bodily and mental integrity, see UN Human Rights Committee, *General Comment 35 on Article 9*, CCPR/C/GC/35 (16 December 2014): 1.

<sup>309</sup> UNHRC, *General Comment 35 on Article 9*, 9-10.

access to justice. While the Attorney General, who is a public prosecutor, cannot be regarded as a judge under paragraph 3, denial of access even to his office, leads to the conclusion a *minori ad maius* that trials before a court are far from reality in the territories of both entities.

It could be argued that these detention centers in both cases are not run by the GNA and the eastern government themselves, but by armed groups. As the extent of control exercised over these groups by the two entities cannot be evaluated adequately on the basis of facts available, it should be noted that according to article 9, when private individuals or entities are empowered or authorized by a State party to exercise powers of arrest or detention, the State party remains responsible for ensuring adherence to article 9. It must rigorously limit those powers and must provide strict and effective control to ensure that those powers are not misused, and do not lead to arbitrary or unlawful arrest or detention. Nonetheless, even if it is assumed that these groups are not controlled by a State but act individually<sup>310</sup>, it should be added that states have the duty to take appropriate measures to protect the right to liberty against deprivation by third parties, like individual criminals, irregular groups, armed or terrorist groups, third states and even lawful organizations operating within their territory<sup>311</sup>.

It should be mentioned that Libya has been condemned by the African Court on Human and People's Rights for violation of article 6 of the African Charter, in 2016. Specifically, the Court found that the detention of Saif Qaddafi, son of Muamar Qaddafi, in a secret prison by a revolutionary brigade, his trial before an extra-ordinary court and the denial of access to legal representation, rendered the State of Libya (then represented by the GNC Government) responsible either for the acts of these rebels or for the omission to confront them<sup>312</sup>.

In any case and whichever government may be considered as constituting the sole *de jure* government of Libya and as a consequence, bearing Libyan State's duties and responsibility, this exercise of its power violates article 9 of the Covenant. In particular, it shall be deemed responsible for the violations of human rights committed by groups affiliated to it and considered

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<sup>310</sup> The extent of control exercised over a group in order this to be considered as a State's *de facto* organ under article 8 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts, ranges from "effective control" as ruled by the International Court of Justice in the *Nicaragua* case, to "overall control", as judged by the International Criminal Tribunal for the Former Yugoslavia in *Tadic* case, see Olivier de Frouville, "Attribution of Conduct to the State: Private Individuals," in *The Law of International Responsibility*, edited by James Crawford, Allain Pellet et al. (Oxford: Oxford University Press, 2010), 268-269.

<sup>311</sup> UNHRC, *General Comment 35 on Article 9*, 2.

<sup>312</sup> African Court on Human and People's Rights, *African Commission on Human and People's Rights v. Libya: Application 002/2013* (3 June 2016).

as operating under its control. It has to be noted that even if this government is considered as a de facto Government, the acts of its organs shall render it responsible.

Nonetheless, it shall not be responsible for the acts of groups operating outside of its control and against it. Specifically, it is a general and well-established principle of international law that no government can be responsible for the action of rebellious and insurrectional groups violating its authority, unless it can be accused for acting against good faith or showing negligence in suppressing it<sup>313</sup>. Also, according to article 10 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts, if an entity not initially considered as the government of Libya manages to become the ruling apparatus of the state, all the previous wrongful acts of its organs are attributed to the state. It should be mentioned that individual criminal responsibility of the members of these governments, who commit these violations of human rights, is a different matter<sup>314</sup>.

As for the allegations of torture by both sides, Libya is bound by article 7 of the ICCPR and by article 5 of the African Charter. According to the Human Rights Committee, torture may be physical or mental and the scope of the article covers every case of cruel, inhuman or degrading treatment or punishment<sup>315</sup>. The UN Panel of Experts has reported cases of torture taking place by members of both entities.

However, detention conditions and torture do not constitute the only field of human rights violations in Libya. Specifically, the Panel investigated cases of indiscriminate shelling and summary executions allegedly conducted by LNA forces in Darnah, where the indiscriminate shelling of residential districts has had the greatest impact on civilians, as there are video footages of summary executions of men in civilian clothing, allegedly by LNA soldiers<sup>316</sup>. The right to life is protected by both the ICCPR in article 6, and the African Charter in article 4. According to the last sentence of article 6 (2), the death penalty can only be carried out pursuant to a judgment of a competent court, established by law before the commission of the offence. The court should be independent from the executive and the legislative branches, and the death

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<sup>313</sup> ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries* (2001): 50.

<sup>314</sup> The International Criminal Court investigates crimes against humanity and war crimes in Libya, and has issued two warrants of arrest for Mahmoud al-Werfalli, officer of the LNA. The warrants relate to allegations that al-Werfalli executed 43 people in Benghazi, during the operation “Flood of Dignity”, see *Twentieth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to Resolution 1970 (2011)*, 10 November 2020, [201110-icc-prosecutor-report-unsc-libya-eng.pdf \(icc-cpi.int\)](https://www.un.org/press/en/2020/201110-icc-prosecutor-report-unsc-libya-eng.pdf) (accessed November 15, 2020).

<sup>315</sup> UN Human Rights Committee, *General Comment 20 on Article 7*, (10 March 1992): 1-2.

<sup>316</sup> UN Panel of Experts, *Letter dated 5 September 2018 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council*, 11.

penalty can be carried out only pursuant to a final judgment<sup>317</sup>. In the case of summary executions in Darna, there are no indications for the accordance of the implementation of death penalty with the procedure described in the General Comment 36.

Another problem arises by the extent of influence exerted by the LNA over the HoR and its impact on their territory's governance. Specifically, the HoR appointed a Military Governor in the Darnah-Bin Jawwad region. As a consequence, civil mayors were replaced with military staff. According to the Report of the UN Panel of Experts, decisions taken by the Military Governor, Abd al-Razzak al-Nadhuri, being also Chief of Staff of LNA, included significant restrictions on public liberties in eastern Libya, such as a decision to ban the holding of demonstrations in Benghazi without his written permission and also to ban unaccompanied women under the age of 60 from travelling. After protests against the discriminatory character of the measure, al-Nadhuri issued a new directive, imposing a security clearance permit for both women and men, willing to travel.<sup>318</sup> Moreover, the LNA detained or intimidated dozens of activists, members of the House of Representatives and justice and security personnel in order to silence political opposition.<sup>319</sup> In this way, serious doubts over the democratic governance of these regions are raised, in conjunction with fears of the usurpation of civil state functions by the army.

Another major problem is both entities' management of the ever-increasing number of migrants in their territories. According to the UN Secretary-General's Report on the Implementation of Resolution 2481, several violations of migrants' rights were reported in detention facilities managed by the Directorate for Combating Illegal Migration. Reported violations include child rights violations in detention centres run by pro-GNA armed groups. In addition, hundreds of migrants and refugees have been held in camps by traffickers and smugglers. Some of those camps, which are usually run by foreign nationals, are under the control of Libyan armed groups, including groups affiliated either with the LNA or with the GNA.<sup>320</sup> While Libya is not a party to the 1951 Convention relating to the Status of Refugees, it has signed and ratified the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems

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<sup>317</sup> UN Human Rights Committee, *General Comment 36 on Article 6* (CCPR/C/GC/36), (3 September 2019): 10.

<sup>318</sup> Eaton, Alageli et al., *The Development of Libyan Armed Groups Since 2014; Community Dynamics and Economic Interests*, 26.

<sup>319</sup> UN Panel of Experts, *Letter dated 1 June 2017 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council*, 11.

<sup>320</sup> UNSC, *Report of the Secretary-General: Implementation of Resolution 2491 (2019)*, 6.

in Africa. However, Libya has not yet adopted asylum legislative provisions, nor has it established certain asylum procedures<sup>321</sup>.

It should be noted that according to the Human Rights Committee, detention for the control of immigration is not per se arbitrary, as long as it is reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time.<sup>322</sup> Any necessary detention should take place in appropriate, sanitary, non-punitive facilities and should not take place in prisons, while children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account various reasons, such as their best interests, the extreme vulnerability and need for care of unaccompanied minors<sup>323</sup>. These requirements do not seem to be followed by both entities as far as management of the migratory tides is concerned.

More blatant human rights violations took place in August 2020, when massive protests started in many Libyan cities, like Tripoli, Misrata, Benghazi and Tobruk, and both regimes tried to suppress them. Nevertheless, armed groups linked to the GNA have been accused of using lethal forces against the protesters, of arbitrarily detaining and torturing them<sup>324</sup>. This way of suppressing protests, reminds of the way Qaddafi acted against Libyans during the protests of February 2011, which eventually led to his de-recognition by the international community. In addition, it violates article 21 of the ICCPR and article 11 of the African Charter, which protect the right of peaceful assembly.

In parallel, the Panel has reported various violations of international humanitarian committed by both sides, as well. In particular, the GNA fired medium-range surface-to-air missiles in an indirect fire role against civilian neighborhood in Tripoli on 13 June 2019. Moreover, it launched a mortar attack against Mitiga international airport during civilian air operations. In parallel, the LNA delivered explosive ordnance, from what was reportedly an aircraft under the group's direction and operational control, during an air strike against the Dhaman military compound in Tajura, which impacted on a detention centre of the Department for Combating Illegal Migration on 2 July. Similarly, it launched four air strikes against Tebu civilian neighborhoods in Murzuq on 5 August. Last but not least, it delivered cluster munitions against Zuwarah airport and a

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<sup>321</sup> UNSC, *Report of the Secretary-General: Implementation of Resolution 2491 (2019)*, 5.

<sup>322</sup> UNHRC, *General Comment 35 on Article 9*, 5.

<sup>323</sup> UNHRC, *General Comment 35 on Article 9*, 6.

<sup>324</sup> Amnesty International, "Libya: Heavy weaponry used to disperse peaceful protesters demanding economic rights"; Human Rights Watch, "Libya: Armed Groups Violently Quell Protests".

rocket attack against Mitiga international airport. In these cases, the Panel found violations of rules 7 (the principle of distinction between civilian objects and military objectives), 11 (indiscriminate attacks), 14 (proportionality in attack) and 15 (the principle of precautions in attack) of customary international humanitarian law<sup>325</sup>.

To sum up, the blatant violations of human rights and humanitarian law committed by both entities may be considered as having the necessary gravity, in order to result in their delegitimization. Especially the violations of the international humanitarian law by the GNA and the eastern government, which brought on civilian casualties, the summary executions by the eastern government and the violent suppression of peaceful protests, with the use of arms by the GNA, may be regarded as approaching the threshold, which is required by international law, in order a government to lose its legitimacy. Nonetheless, it should not be disregarded that a regime may lose its legitimacy, only if it was deemed legitimate in the first place.

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<sup>325</sup>UN Panel of Experts, *Letter dated 29 November 2019 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council*, 14-15.

## Conclusions

The case of Libya constitutes a typical example of the renewed significance of recognition of governments in international law. Specifically, the Libyan governmental fragmentation, brought on during the first years of the conflict and maintained in a different form after the conclusion of the Libyan Political Agreement in 2015, presents some complicated recognition questions. The problematic is often overlooked by reference to the GNA as “the internationally-recognized government of Libya”. This wide perception may justify the fact that the examination of the duality of governments in Libya in the specific time period by the literature, has been inadequate.

Nevertheless, recognition questions have always been rather difficult to be answered and the present case is not an exception. This difficulty is increased, if one takes into account that it represents a dynamic and on-going situation, where facts are in a state of flux and the international community’s approaches are being constantly modified. In addition, its highly political nature poses further problems in any attempts to comprehend the legal parameters of the specific nature of each government. Thus, a thorough and timely analysis of all the available data had to be conducted.

In this framework, it has been evident through the examination of the relevant practice of states and international organizations, that the Libyan governmental crisis cannot be described by reference solely to the “internationally-recognized Government”, as certain trends and recognition approaches have been extracted. In particular, it is true that the majority of states and organizations examined, has recognized either expressly or implicitly the GNA as the *de jure* Government of Libya in accordance with the Libyan Political Agreement. However, they perplex things, by regarding the HoR as a rival body within the same government. This approach can be described as being excessively founded on the legitimacy principle, considering the struggle between the GNA and the HoR as an intergovernmental dispute and disregarding the actual fragmentation and conflict between two distinct and fully formed governments. In this way, recognition of governments trends in Libya since 2015 can be distinguished from the previous practice, as facts are not taken into account, in an effort to preserve legitimacy and the integrity of the agreement concluded between the rival parties. Nonetheless, there are several states that do not follow the abovementioned approach, but take into account the effective control exercised by each government. Thus, they mainly recognize the GNA implicitly as the *de facto* government of Tripoli.

Concerning the recognition of General Haftar, it should be noted that the majority of states and international organizations consider him as the opponent of the GNA in the battlefield and do not include the eastern civilian authorities in the armed conflict. He seems to be considered the head of an armed group, outside the official Libyan institutional context. Any recognition of his prominent role in the conflict is limited and could be described as a means of initiating and maintaining channels of communication with him.

In the second part, the examination of the case of Libya in accordance with the effective control doctrine leads to certain deductions. First of all, from the aspect of territorial control, neither the GNA nor the eastern entity can claim control over the majority of Libyan soil. The eastern entity controls a larger part, but the GNA has regained much of its previously lost territory and controls the capital. Furthermore, the GNA exercises more stable control over Libya's financial institutions and wealth-producing resources. Nevertheless, both governments' heavy reliance on foreign aid and support, and the lack of popular support as denoted by the recent protests, render their stability and permanence doubtful.

Furthermore, recognition of the rival governments in accordance with the legitimacy principle presents certain problems, as well. Firstly, both the eastern government and the GNA can claim that the origin of their power is legitimate in principle, through the elections of 2014 and the inclusive Libyan Political Agreement. Nevertheless, both governments suffer certain flaws, as they have exceeded the temporal limits set out for their operation and their emergence has been annulled before the Libyan Courts. In parallel, both governments have been accused of flagrant human rights violations, which could even provoke their de-legitimization.

All in all, recognition of governments is a highly complicated subject of international law, where facts, politics and law are combined indissolubly. This interrelation is more evident in the case of Libya, which tends to be modified from day to day, rendering any definite conclusions impossible. As a consequence, the deductions of this case study should be regarded as describing the situation in a certain time period, whereas they should be further evaluated in the future and especially, when the Libyan conflict comes definitely to an end.

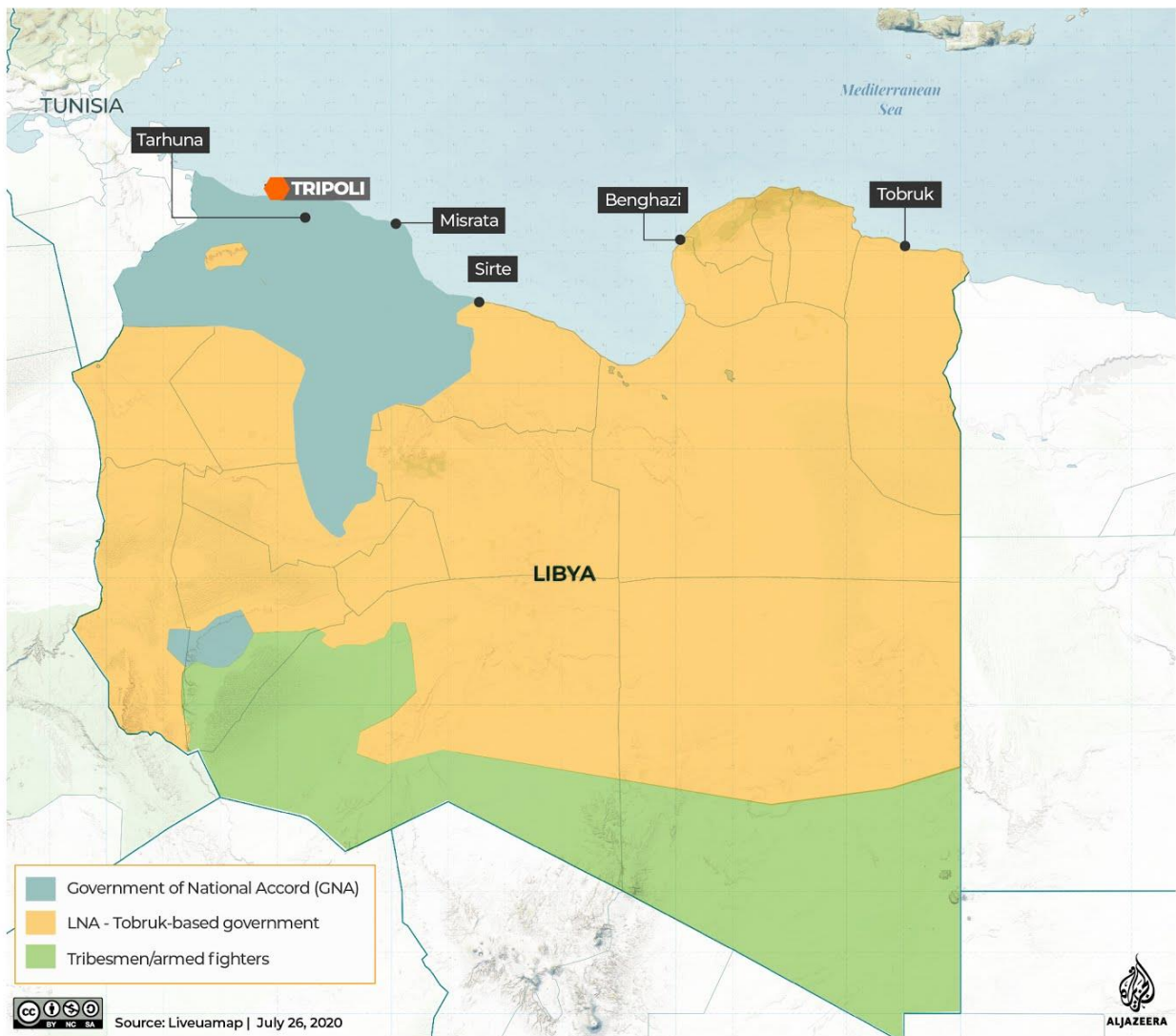
## Annex

Each Government's areas of control:

### LIBYA

## Areas of control

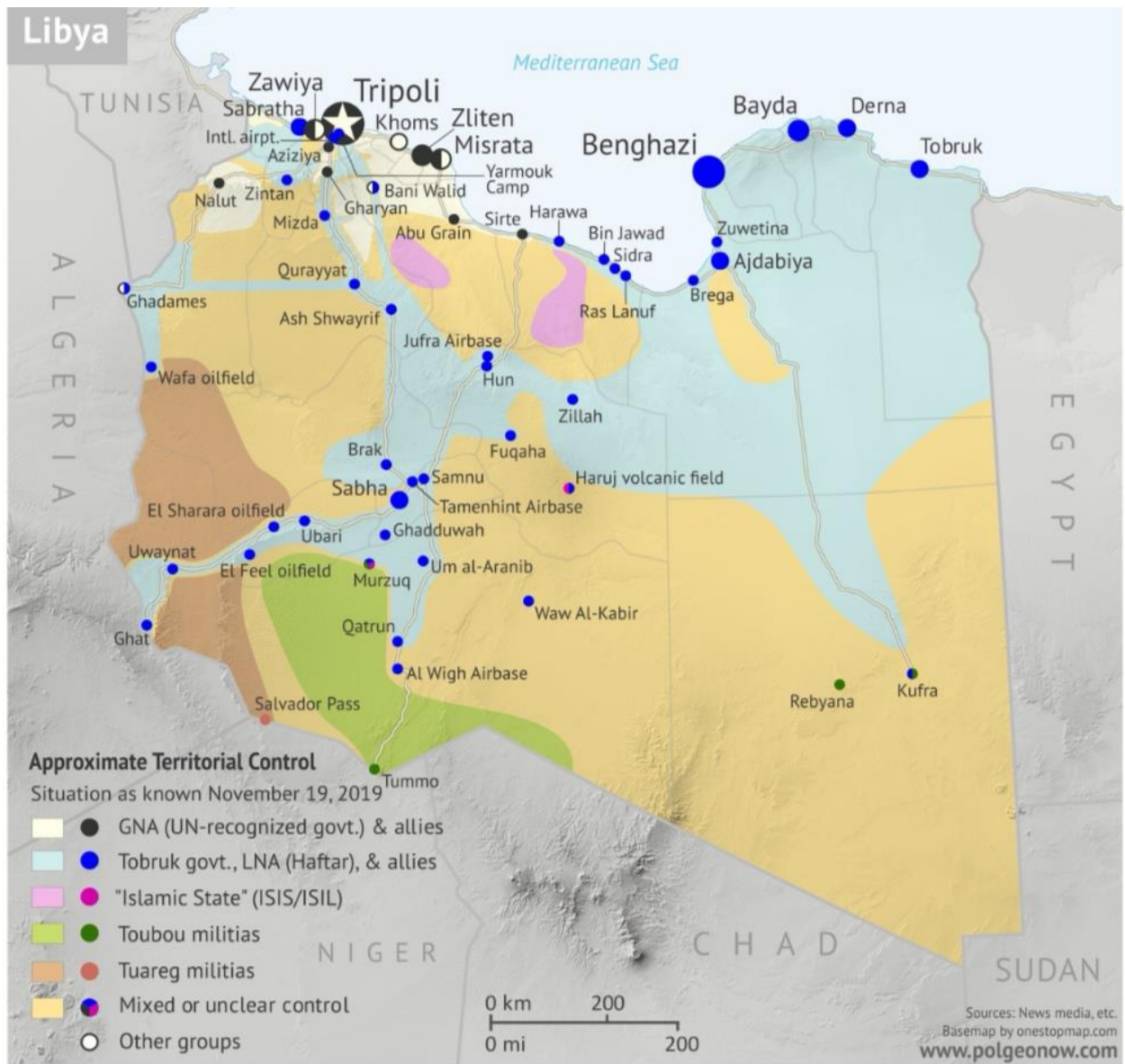
Libya, a major oil producer, has been mired in conflict since the 2011 NATO-backed uprising against longtime ruler Muammar Gaddafi.



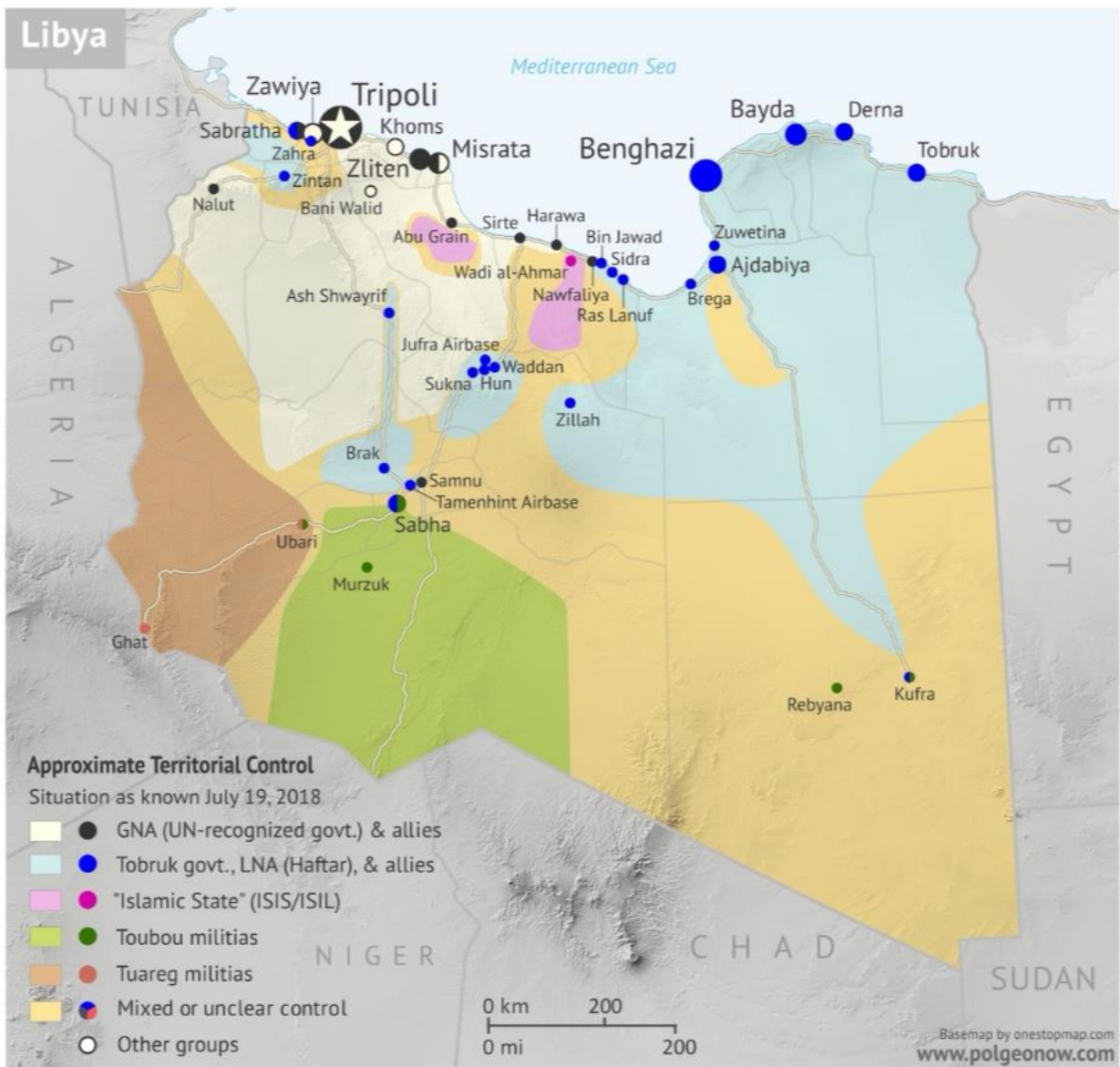
**Map 1.** The situation on 26 July 2020: source: <https://www.aljazeera.com/>



**Map 2.** Situation on 29 May 2020: source: [Political Geography Now: libya \(polgeonow.com\)](http://Political Geography Now: libya (polgeonow.com))



**Map 3.** Situation on 19 November 2019: source: [Political Geography Now: libya \(polgeonow.com\)](http://Political Geography Now: libya (polgeonow.com))



**Map 4.** Situation on 19 July 2018: source: [Political Geography Now: libya \(polgeonow.com\)](http://PoliticalGeographyNow.com)

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