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The Lawfulness of Recognising Non-State Armed Groups as Governments

The Effect of State Practice in Libya and Syria

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Table of contents

1. Introduction

Is the recognition of a non-state armed group as the government of another state a violation of international law? Much has been written about the rights and responsibilities of non-state armed groups participating in civil wars. However, this usually pertains to the application of international humanitarian law (IHL) or international criminal law. The issue of recognition of non-state armed groups as the government of a state has received somewhat less attention.

This is perhaps because, on the face of it, the international law is quite straightforward on this issue. The principles of state sovereignty and non-intervention require states to refrain from interfering in the internal matters of other states, including their political independence. These are fundamental principles of international law, upon which the contemporary system of international law is built. But, as is so often the case, things are less clear at the periphery, or where there is tension or conflict with other principles of international law. Indeed, state practice in this context tells a rather different story to the established law.

Almost as soon as the current rules were established (or confirmed) in 1945 in the Charter of the United Nations (UN), the process of decolonisation and the *realpolitik* of the Cold War resulted in a divergence between the letter of the law and state practice. Decolonisation efforts throughout the global south in the 1960s and 1970s brought the principle of state sovereignty into tension with the principle of self-determination, and, by and large, self-determination gained priority in that specific context.[1] This arguably extended to external states providing support to national liberation movements.[2] The principles of non-intervention and political independence received further challenge during the Cold War, when political, economic and even forcible intervention with the goal of regime change by the United States in Central and South America and the USSR in Eastern Europe and Central Asia were a common occurrence.[3]

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[1] See for example the *Declaration on the Granting of Independence to Colonial Countries and Peoples* (1960) and the *Declaration on Friendly Relations* (1970). However, there was some resistance from colonial powers, particularly in regards to the question of whether national liberation movements could use force in order to exercise their right to self-determination: see Gray *International Law and the Use of Force* (2008), 59-64.

[2] Ibid. Similarly, the question of whether *forcible* support to liberation movements by foreign states is lawful under international law has not been definitively resolved, with the US and colonial powers forcefully refuting any attempt to recognise such a right.

[3] See for example Gray, ibid, 56, and; Akande 'Classification of Armed Conflicts' (2012), 56-7.

While the end of the Cold War brought some relief, there have been instances since in which foreign states have recognised a non-state armed group as the government of a state at the expense of the established government, or otherwise provided support to such rival 'governments'. The recent, and prominent, examples of Libya and Syria will be discussed in detail below. It is not uncommon for governments to change in an 'unconstitutional' manner, such as by *coup d'etat* or through civil war. When this happens, other states will generally be pragmatic, and maintain relations with the government they perceive to be in control of the state by necessity, regardless of the legitimacy of the manner in which the government came to power.[4] But when these conflicts between rival 'governments' are protracted, foreign states may attempt to influence the outcome. Given the importance of government to the legal and practical life of the state, it is important to understand where the legal boundaries of recognition are.

1.1. Research Question and Scope of Paper

Accordingly, this paper seeks to determine the circumstances in which the recognition of a non-state armed group during an ongoing civil war is lawful, as opposed to a violation of the principle of non-intervention and prohibition of the threat of force. This will be done through analysis of the legal limits on recognition of governments, in terms of both the criteria for recognition and the interaction between norms of recognition and other principles of international law. Peaceful or constitutional changes of government are beyond the scope of this paper. Nor does this paper seek to address other legal issues regarding civil conflicts, such as the application of IHL. Other forms of support to non-state armed groups, such as financial or military support, will only be addressed peripherally to the main question of recognition.

1.2. Terminology and Definitions

The term 'non-state armed group' does not have a universally applied definition. In the context of this paper, non-state armed groups are formal organisations that employ large-scale violence to overthrow the incumbent government. This may include secessionist, insurgent and rebel groups; it however excludes criminal groups whose goals are primarily economic, as well as most terrorist groups. The term 'opposition group' will be used interchangeably with 'non-state armed group' in this paper, implicitly meaning armed opposition.

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[4] Schaller 'Siding With Rebels' (2016), 254 and Schuit 'Recognition of Governments in International Law and the Recent Conflict in Libya' (2012), 393-4.

Under international law, it is sometimes necessary to distinguish between *de jure* and *de facto* governments. A *de jure* government is the government 'by law', or the legitimate government of a given state. A *de facto* government is the effective government of all or part of the territory of the state, usually having come to power by unconstitutional means.

The term 'regime change' is used to denote a policy of deliberately influencing the political life of another state with a view to changing its government. It usually refers to forcible intervention, but may include other actions as well.

1.3. Structure and Methodology

In addressing the research question posited above, this paper will consist of five chapters. Following this Introduction, Chapter 2 contains a review of the applicable international law, concerning norms regarding international recognition of governments, the principle of non-intervention and the prohibition of the threat or use of force. A positivist approach utilising the sources of law enumerated in Article 38 of the Statute for the International Court of Justice[5] will principally be used, though some elements social constructivism may be discerned, particularly in discussion on the development, context and purpose of the relevant law.[6] Recognition of governments in particular operates at the crossroads of law and politics, so references to political context and theory are necessary to understand the application of the law in practice.

Two case studies will be presented in Chapter 3. The first concerns recognition of the National Transitional Council (NTC)[7] in Libya, during the civil conflict against the incumbent Qadhafi government in 2011. The second concerns the recognition of the National Coalition for Syrian Revolutionary and Opposition Forces (NCSROF), better known as the Syrian Opposition Coalition (SOC), in the early stages of the conflict in Syria against the incumbent Assad

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[5] (1998).

[6] The social constructivist theory emphasises that law is dependent on socio-historical context, as opposed to being inherent in the natural law sense. It thus conceptualises (international) law as existing because it is regarded as law by its addressees; and as a social construct it is a continuous process (or 'struggle to shape the law'). See Focarelli *International Law as a Social Construct* (2012), 35, 55-6 and 64-5.

[7] Also called the Transitional National Council (TNC) or Libyan National Council (LNC) in some media and scholarly sources. This paper will refer to the group as the NTC.

regime that also began in 2011. These will contain factual accounts of the actions of the territorial state, relevant non-state armed groups, and the international community, based upon information publicly available at the time. This will be followed by a critical analysis of recognising states' conduct in the case studies, as considered against the relevant law established in Chapter 2.

Chapter 4 considers the effect of state practice in Libya and Syria. It will consider reasons for the gap between the law and state practice, and whether divergent state practice reflects a new means of lawfully recognising armed opposition groups. Finally, the author will present a brief *de lege ferenda* argument, focused on the interests of the international community at large. While the discussion will not be explicitly put forward in a theoretical framework, arguments reflecting various legal and political philosophies and methodologies, including realism, social constructivism and the New Haven school, will be incorporated into the analysis. Finally, a summary of the key findings and some concluding remarks will be provided in Chapter 5.

2. Applicable Law

There are several principles and doctrines of international law relevant to the question of the legality of recognising a non-state armed group as the government of a state. This chapter will briefly summarise the legal norms regarding the recognition of governments, the principle of non-intervention and the prohibition of the threat and use of force.

2.1. Recognition of Governments Under International Law

Recognition is a difficult concept under international law. It can be used in different contexts, but this paper will only address the recognition of governments. As a starting point, it should be noted that the existence or identity of a state's government has no bearing on the international legal personality of the state itself. The state bears rights and obligations under international law regardless of the existence or status of its government.[8] The government is the sovereign authority of the state, or the holder of an exclusive right to represent and act on behalf of the state under international law.[9] A government exists as a matter of fact under in-

[8] Shaw *International Law* (2014), 330.

[9] Talmon *Recognition of Governments in International Law* (1998), 67.

ternational law if it holds 'effective control' over the state, regardless of international recognition.[10]

2.1.1. The Legal Act of Recognition

The recognition of governments is difficult to address under international law because it is an inherently political act that has legal consequences.[11] Recognition can be described as the discretionary acknowledgement by a state that a particular entity in a foreign state constitutes a government in fact and accepts the legal implications of such an acknowledgement.[12]

Recognition is a unilateral act. This has several consequences for the process of recognition. Firstly, it means states have a very broad discretion to recognise a government or not. There are few legal norms regulating the recognition of governments in terms of what entities can be recognised and in what manner. Secondly, there is no duty or obligation for states to recognise foreign governments. Conversely, there is no right of recognition for entities claiming the status of government.[13]

This broad discretion at law renders the decision of whether to recognise a government or not largely political. This is further exacerbated by the perception that recognition equates to approval of the entity being recognised. This perception, when accurate, is problematic as a potential 'government' requiring the political approval of foreign states would undermine the sovereign right of the state in question to independently manage its political affairs.

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[10] See the *Tinoco* Arbitration. The Arbitrator found that that the Tinoco administration, which came to power by *coup d'etat*, had been the government of Costa Rica under international law as "its power was fully established and peaceably exercised" (at 379). This was so despite non-recognition by several states on the grounds of its constitutional illegitimacy: "[s]uch non-recognition for any reason, however, cannot outweigh the evidence disclosed by this record before me as to the *de facto* character of Tinoco's government, according to the standard set by international law" (at 381).

[11] Shaw, n8, 329; Blay *et al Public International Law* (2005), 197.

[12] There is no set definition of recognition generally, or recognition of governments specifically. However, most definitions include the elements of unilaterality, acknowledgement of a particular factual situation and the intent to produce certain legal effects: see ILC 'Sixth Report on Unilateral Acts of States' (2003), paras 48-9.

[13] Schuit, n4, 385.

Flowing on from this, states generally do not explicitly recognise governments.[14] In the ordinary course of events, that is after a constitutional change of government (such as election or succession), recognition will be implicit in acts such as the continuation of diplomatic relations with the new government. As such, the issue of recognition today tends to only arise in exceptional circumstances, such as during a civil war when more than one regime claims government status.

2.1.1.1. Parameters of Recognition

This brings us to the question of how states determine which regime has the better claim to government when this status is contested. States have resisted attempts to formalise criteria and methods for recognition, so the parameters of recognition are only limited by customary international law and non-binding political convention. State practice is reasonably, though not universally, consistent in regards to the application of criteria for recognition of governments.

The only criteria for the recognition of governments arguably established as custom is effective control.[15] Effectiveness became generally accepted doctrine in the nineteenth century, and has continued into the UN era.[16] Of course, the question of what exactly constitutes 'effective' control is somewhat subjective, but some indicators have emerged through state practice. The first indicator of effective control is territory: the regime claiming to be the government of a state must control all, or at least the majority of, the territory of the state, and with the likelihood of permanence.[17] The territory held should include the capital city of the state, to demonstrate that the regime controls the organs and institutions of government, but this is not in itself determinative of effective control.[18] The governing regime must also hold the territory independently, that is, without foreign assistance.[19] This goes to the purported govern-

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[14] This approach is known as the 'Estrada Doctrine'. For discussion of the Estrada Doctrine and its application, see Shaw, n8, 331-2 and Harris *Cases and Materials on International Law* (2004), 155-7.

[15] Schuit, n4, 389 and Schaller, n4, 254.

[16] Frowein 'Recognition' (2015), para 3.

[17] Talmon 'Recognition of Opposition Groups as the Legitimate Representative of a People' (2013), 232.

[18] Ibid, 232-3.

[19] Schuit, n4, 389.

ment's claim to be the sovereign authority of the state. Another indicator is whether the population generally conforms to the claimed governmental order.[20] Effective control is regarded as a question of fact, in the sense that it does not matter how the regime that effectively controls the territory came to do so, it only matters that it does.[21] Accordingly, governments established by unconstitutional means, such as civil war or *coup d'etat* can still be properly recognised under international law.[22]

In contrast, the legitimacy doctrine posits that only regimes that come to power by 'legitimate' means ought to be recognised as the government.[23] The meaning of legitimate in this context usually means 'constitutional' or 'democratic'.[24] The legitimacy doctrine necessarily requires foreign states to make a normative judgement on the way in which the relevant regime came to power, which undermines the political independence of the state in question. The legitimacy doctrine is thus generally regarded as a political, rather than legal, consideration for recognising states.[25] It therefore does not have the same status as the doctrine of effective control, but continues to be sporadically invoked, such as in the below case studies on Libya and Syria.[26]

2.1.2. Distinguishing Legal and Political Recognition

Adding further complexity to the issue, the term recognition is also used outside this legal meaning. While this paper is primarily concerned with formal, or legal, recognition, it is not

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[20] Ibid, 390. For a discussion on the link between obedience and consent or popular will, see Roth *Governmental Illegitimacy in International Law* (1999), 138-42.

[21] Shaw, n8, 329.

[22] For example, the international community (implicitly) recognised new governments in Fiji and Thailand after successful *coup d'etats* in 2006 and 2014 respectively.

[23] Schuit, n4, 391.

[24] However, the earliest uses of the legitimacy doctrine actually protected monarchies against popular democratic revolutions in eighteenth century Europe (called 'dynastic legitimacy'). See Roth, n20, 135.

[25] Shaw, n8, 330.

[26] Other examples include Haiti in 1991, Sierra Leone in 1997, Honduras in 2009, Côte d'Ivoire in 2010 and Gambia in 2016. These will be discussed in Sub-Section 4.1 below.

uncommon for states to grant non-state armed groups informal, or political, recognition.[27] This form of recognition differs from legal recognition in that it does not generate legal obligations for either party. It usually denotes political or moral support for the opposition, and/or a willingness to enter into political relations with it. It also does not affect the legal status of the incumbent government, as only the legally recognised government may act on behalf of the state. In practical terms, a body given political recognition may receive moral support from the recognising state, but it will not be treated as a sovereign authority: It will not be able to represent the state in treaty negotiations with the recognising state; it will not bear the legal obligations of the state in its relations with the recognising state; it will not have recourse to, or be able to represent the state in, the domestic courts of the recognising state; it will not be able to access state assets or property within the recognising state; and its representatives will not benefit from immunities or other legal privileges within the recognising state.

It can be difficult to ascertain whether 'recognition' is political or legal in a given situation. There is no set process for legal recognition, and states often use ambiguous language that is easily misinterpreted.[28] Political recognition can be distinguished from legal recognition by the wording used and conduct of the recognising state. For example, terms such as "acknowledge" or "accept" may be used instead of "recognise".[29] Speaking of the recognised group in the plural (for example, "legitimate representatives") or with an indefinite article ("a representative" rather than "the representative") are indicators of political recognition only, as they imply multiple political representatives while there can only be one legally recognised government.[30]

Further, the actions of the recognising state can help determine the type of recognition. For example, continuation of formal diplomatic relations with the incumbent government indicates political recognition of the opposition only. On the other hand, if the recognising state moves to expel the former government's diplomatic representatives and allows the new government access to the embassy, that would mean the act of recognition had legal effect.

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[27] In this paper, the term 'recognition' means legal recognition; political recognition will be explicitly identified as such.

[28] Talmon, n17, 229.

[29] Ibid, 226.

[30] Ibid, 227-8.

It is therefore important to consider each statement of 'recognition' on its merits. The words and actions of the recognising state must be analysed to determine whether it has granted legal or political recognition. States have a broader discretion over political recognition and the establishment of informal political relations with non-state armed groups, but legal recognition and establishment of formal government-to-government relations ought to be based primarily on the doctrine of effective control.

2.2. The Principle of Non-Intervention

The principle of non-intervention is a norm of customary international law. Despite being fundamental to the current system of international law, it has no universally agreed definition or scope.

2.2.1. Sources and General Principles

Intervention in the affairs of other states was considered to be a legitimate tool of international relations until at least the nineteenth century, when the concept of prohibiting or limiting the rights of states to interfere in each others' affairs began to emerge.[31] Notably, the traditional concept of 'intervention' referred only to forcible measures.

The watershed moment in the development of the current principle of non-intervention was the adoption of the UN Charter in 1945. It was then that the principle of non-intervention was broadened to its current meaning, which includes non-forcible means of interference in the sovereign affairs of another state. Although the UN Charter does not explicitly refer to the principle of non-intervention, it can be implicitly derived from the principle of state sovereignty as presented in Article 2(1).[32] This is because the principle of state sovereignty would be rendered ineffective without a corollary duty of non-intervention.[33] There are also two *lex specialis* Charter provisions relating to the principle of non-intervention: The prohibition of the threat or use of force, effectively a prohibition against forcible intervention, in Article 2(4), and; the prohibition of intervention by the UN in the domestic affairs of member states

[31] Kunig 'Prohibition of Intervention' (2015), para 14.

[32] See Fassbender 'Chapter 1 Purposes and Principles, Art 2(1)' (2012), especially 145-9.

[33] Kunig, n31, para 9.

in Article 2(7).[34] After the Charter was adopted the international community was quick to articulate the principle in explicit terms: In 1949 the International Law Commission included the "duty to refrain from intervention in the internal or external affairs of any other state" in its *Draft Declaration on the Rights and Duties of States*.[35]

The principle of non-intervention has been reinforced through several UN General Assembly resolutions which, although not legally binding in themselves, are widely accepted as codifying existing customary international law on this matter.[36] The International Court of Justice (ICJ) confirmed this approach in the *Nicaragua* case, in which it referred to the *Declaration on Friendly Relations* as reflective of the prevailing customary law on non-intervention.[37]

In the *Nicaragua* case, the ICJ found that interventions are prohibited when they use methods of coercion in regard to matters that each state is permitted to decide freely. This includes choices as to political, economic, social and cultural systems, and the formulation of foreign policy. The ICJ emphasised the element of coercion, and noted that coercion will be obvious in cases of forcible intervention.[38]

Further to this, there is wide—though not universal—acceptance in the literature of a set of criteria to help identify prohibited interventions. An intervention is unlawful "when it occurs in fields of State affairs which are solely the responsibility of inner State actors, takes place through forcible or dictatorial means, and aims to impose a certain conduct of consequence on a sovereign State."[39] While these criteria are helpful to an extent, the reference to "affairs which are solely the responsibility of inner State actors" is particularly problematic. With the exponential growth of international law into many different areas of life and government function, there are very few issues or functions that sit "solely" within the domestic sphere. This leaves the principle open to considerable abuse, as it could give other states *carte blanche* to intervene in ever more matters as new international law develops. This is clearly

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[34] For characterisation of Art 2(7) see Nolte 'Chapter 1 Purposes and Principles, Art 2(7)' (2012), para 7.

[35] Art 3.

[36] See for example *The Essentials of Peace* (1949) Articles 2 and 3; The *Declaration on Intervention* (1965) Art 1, and; The *Declaration on Friendly Relations*.

[37] *Nicaragua* Case, para 202.

[38] Ibid, para 205.

[39] Kunig, n31, para 1.

inconsistent with the spirit and intent of the principle. For this reason, the ICJ's formulation ("bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely"[40]) is preferred as it recognises the reality that states retain sovereign concern over matters that are subject to varying degrees of international cooperation.

2.2.2. Political Intervention

There are, broadly speaking, three types of intervention: military (forcible) intervention (discussed in Subsection 2.3 below); economic intervention, and; political intervention. Political intervention is most relevant to the issue of recognition. This form of intervention is particularly difficult to identify, as states have a sovereign right to act in their own political interest. It can be difficult to draw the line between legitimate, if robust, efforts to promote the interests of the state, and unlawful pressure on other states. However, each state has the sovereign right to determine its own political, economic, social and cultural systems,[41] so external interference in order to change any of these systems through coercive means would violate the principle of non-intervention.

The ultimate act of political intervention is regime change, that is, interfering in another state with the intent to secure a change of government. The *Declaration on Friendly Relations* expressly states that regime change is unlawful: "No State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed toward the violent overthrow of the regime of another State, or interfere in civil strife in another State." On its ordinary meaning, this provision is quite broad, prohibiting both direct and indirect actions, as well as both forcible and non-forcible measures.

Curiously, the ICJ seems reluctant to recognise regime change as a discrete type of intervention. While only briefly addressing Nicaragua's allegations of attempted regime change by the US, the ICJ found that it is not necessary to show intent in order to prove an act of intervention,[42] thereby declining to address the question of regime change per se.[43] It followed a simi-

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[40] *Nicaragua* Case, para 205.

[41] *Declaration on Friendly Relations*.

[42] *Nicaragua* case, para 241.

[43] That is, the ICJ applied an objective test, and found that the discrete actions of the US (such as financing and training the Contra rebels) were themselves acts of intervention, without considering the intent or broader pattern of actions as a whole.

lar approach in the *Armed Activities* case, finding acts such as support to rebels an unlawful intervention, but not considering them in the context of regime change.[44] Notwithstanding this, the international community appears to overwhelmingly consider regime change unlawful, not least because it often entails the use of force.

2.3. The Prohibition of the Threat or Use of Force

Forcible intervention is the most serious form of intervention against a foreign state, and is subject to a set of norms discrete from those applying to intervention generally. The current law in regards to forcible intervention is grounded in the prohibition of the threat or use of force, which was the culmination of a long process of the delegitimisation of war as a tool of international relations.

2.3.1. Sources and General Principles

As briefly noted in Sub-Section 2.2.1 above, 'intervention' by way of war was considered a legitimate means of conflict resolution, or advancing states' interests, for much of human history. This legitimacy has, however, gradually eroded over time, particularly since the early twentieth century.[45]

Since 1945, the starting point for determining the legitimacy of any military activity has been Article 2(4) of the UN Charter.[46] Known as the 'prohibition of the threat or use of force', the article provides that member states must refrain from the use or threat of force in their international relations. The prohibition is comprehensive, and makes illegal actions that were previously permitted under customary international law, such as reprisals and the doctrine of self-help.[47] It is supplemented by an obligation for Member States to settle "international disputes by peaceful means".[48]

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[44] See para 163.

[45] See for example the *Covenant of the League of Nations* (1919), Preamble and Art 10, and the Kellogg-Briand Pact (1928) Arts I and II.

[46] Gray, n1, 6.

[47] Weller 'Introduction' (2015), 18.

[48] UN Charter Art 2(3).

The prohibition includes two black-letter exceptions: the collective security system under Chapter VII of the UN Charter, specifically Article 42, which allows member states to use force if authorised by the Security Council, and; Article 51, which allows for individual and collective self-defence. Commensurate with the primacy of state sovereignty, states may also use force on foreign territory when invited or authorised to do so by the territorial government.

The prohibition, as enumerated in the UN Charter, is also reflective of customary international law.[49] Noting the brevity of the relevant Charter provisions, it is also supplemented by additional international customary law rules, many of which have been codified in UN General Assembly resolutions. General Assembly resolutions, when adopted by consensus, are also considered authoritative interpretations of the Charter rules.[50]

Through this development of customary law, and observance of state practice, we can determine that the term 'use of force' refers to physical attack by military means,[51] including actions such as armed attack, reprisals, organising or encouraging irregular forces in a foreign country and state-sponsored terrorism.[52]

2.3.2. Threat of Force

In contrast, there have been very few attempts to give shape to the prohibition on the threat of force.[53] Even the deliberations on the text of the UN Charter are of little assistance, as the threat of force was included "with scant consideration" as delegates were focused on the

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[49] *Nicaragua* Case, para 34.

[50] The General Assembly has thus been able to provide guidance and clarification on the scope of Art 2(4). For example, the *Declaration on Friendly Relations* refers to "the duty to refrain from acts of reprisal" and "the duty to refrain from organising or encouraging the organisation of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State", and; the *Definition of Aggression* (1974) includes a list of acts that constitute aggression at Art 3.

[51] Weller, n47, 19.

[52] *Nicaragua* Case, para 191. Note the ICJ refers to the *Declaration on Friendly Relations* in its description of acts that would constitute "use of force".

[53] Stürchler *The Threat of Force in International Law* (2007), 2.

scope of the use of force.[54] However, 'threat of force' can be said to mean "a signalled intention to use force if certain events occur".[55] To commit a prohibited threat of force, a state must credibly communicate its readiness to use force in a particular dispute. A 'credible' threat is one that appears rational to implement, and carries a serious commitment to the use of force (or risk thereof).[56]

There is little state practice (in terms of acceptance or condemnation by the international community following a *prima facie* threat of force) to provide evidence of where the exact boundaries of the prohibition might lie. The application of the law regarding the threat of force is difficult to implement in practice. Threats are often equivocal and difficult to prove. The perception of threat is inherently subjective, and it can be difficult to determine a link between a threat and the subsequent behaviour of the threatened state.[57] Nonetheless, certain behaviours can be identified as potential threats of force. Stürchler's analysis finds that there are, in practice, three broad categories of prohibited threats:

1. ultimata;
2. open, explicit or verbal indications (such as public or diplomatic statements), and;
3. demonstrations of force (such as deployments, troop build-ups, and military manoeuvres signalling hostile intent).[58]

Another area of ambiguity is whether there needs to be a link between a threat and a prohibited use of force—that is, whether the type of force threatened must be prohibited in order for the threat itself to be prohibited (and, conversely, whether a threat is necessarily lawful if the actual use of force would be lawful). There is little evidence of a customary rule either way, and limited discussion of this issue in the literature. The ICJ appears to consider threats and uses of force linked, though little reasoning was provided to explain this stance.[59] But while this approach makes perfect sense at first glance, it can be problematic in application. For example, threats can sometimes be used to uphold international peace and security by bringing

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[54] Ibid, 23.

[55] *Nuclear Weapons* Advisory Opinion, para 47.

[56] Stürchler, n53, 259; Report of the Independent International Fact Finding Mission on the Conflict in Georgia (2009), 232.

[57] Sadurska 'Threats of Force' (1988), 241.

[58] Stürchler, n53, 258-62.

[59] *Nuclear Weapons* Advisory Opinion, para 47.

belligerent states into line without having to use actual force, or can otherwise avert the actual use of force by raising the stakes of such action.[60] This means that a less stringent prohibition on the threat of force could, somewhat counterintuitively, actually support the prohibition on the use of force. In this context, we find a discrepancy between the letter of the law and (limited) state practice. Both threats and uses of force are included in the Charter prohibition without any sign of differentiation between them, yet this approach requires completely different standards to be applied. It is submitted that allowing states a broader right of threat of force undermines the spirit and intent of the Charter by permitting unilateral action in a system based on the concept of collective security. If there is a threat to international peace and security, the UN Security Council has a very broad discretion to take both forcible and non-forcible measures, including threats of force, to address it.[61] In practice, however, the collective security model does not always function as intended, and states will often tolerate, if not approve of, threats of force that are undertaken to maintain peace or are otherwise made in the interests of the international community as a whole.[62] The near absolute prohibition on threats of force in the Charter thus appears to be tempered by a pragmatic, possibly extra-legal, tolerance of threats that are perceived to further the pursuit of international peace and security.[63]

In conclusion, states jealously guard the principle of non-intervention and the prohibition against the use of force, but disagree on their exact scope and application. This leads us to the question of how these principles interact with the norms regarding recognition.

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[60] For example, the deployment of US naval vessels to the Taiwan Strait in 1950 and 1995 and the 'over the horizon' deployment of US Marines off Timor-Leste in 1999 could be considered threats of force but arguably prevented large-scale conflicts from breaking out. Sadurska refers to threats of force being used as a 'ritualised substitute' for violence. Sadurska, n57, 246-7.

[61] An authorisation to use force adopted in accordance with Art 42 of the Charter could be made conditional upon certain action or inaction by the target state (effectively a threat of force in the form of an ultimatum). An example of this is Security Council Resolution 678 (1990), regarding Iraq. Thus the threat of force, like the use of force, is centralised and regulated by the UN system of collective security. See also Tsagourias 'The Prohibition of Threats of Force' (2013), 83-4.

[62] For example, NATO's threats of force against Yugoslavia, with the stated purpose of forcing Yugoslavia to participate in talks for a peaceful resolution to the 1999 Kosovo crisis, were met with little condemnation from the international community. Threats of force by the US and UK in the 1990s to secure Iraq's compliance with its Security Council-mandated disarmament obligations were similarly met with little resistance from the international community. Tsagourias, ibid, 71-3.

[63] Sadurska, n57, 239-40.

2.4. The Nexus Between Intervention and Recognition

As noted above, the issue of recognition of governments is usually unproblematic. Governments change in accordance with the law of the land, and states continue to engage with each other within the framework of the international legal system. But in the event of an internal challenge to the government of a state, the correct (that is, lawful) course of action for other states wishing to maintain relations with the affected state can become unclear.

In practice, many states will simply continue to engage with the incumbent government until the outcome of the conflict is known.[64] Only if the rebellion is decisively successful in terms of gaining effective control over the territory of the state, will other states then begin engaging with the new government. From a legal perspective, this is the safest course of action as it negates the risk unlawfully intervening in an ongoing civil conflict.

However, in a protracted civil conflict, such as those in Libya in 2011 and Syria from 2011 to the present, it may not be feasible or desirable to wait and see which party emerges victorious. Other states may need to engage with the government for practical reasons, such as trade. The international community may also want to facilitate a diplomatic resolution to the conflict (for which it is necessary to identify key parties) or determine responsibility for breaches of international human rights and humanitarian law, for which it is necessary to identify the government at the time of the alleged violations.

Therefore the remainder of this chapter will address the lawfulness of the recognition of a non-state armed group while government status is contested during a civil conflict (also called 'premature recognition').

2.4.1. Recognition of Non-State Armed Groups as an Act of Intervention

Although states have a very broad discretion to recognise governments, this discretion is limited by other norms of international law, including the principle of non-intervention.[65] It is clear that states may not unilaterally intervene to provide military, financial or political as-

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[64] There is a bias toward the status quo in regards to recognition of governments. This can also be framed as a systemic bias toward states, the primary subjects and objects of international law, and against non-state actors, which are subject to fewer international legal rights and duties.

[65] Schuit, n4, 385.

sistance to a non-state armed group in a civil war.[66] But does the act of recognition of the opposition as the government constitute 'political assistance'? If so, how does this affect the sovereign right of the recognising state to conduct its international relations as it sees fit?

As noted in Section 2.2.1 above, intervention entails coercion over matters that states are entitled to decide freely upon. States are certainly entitled to decide their political system, including means of legitimate transfers of government power.[67] States are entitled to select their own government as a matter of sovereign concern. The *Declaration on Friendly Relations* identifies prohibited modes of political support for non-state armed groups, including assistance, incitement or toleration. Depending on the circumstances, premature recognition may fit any of these categories. Recognising a non-state armed group that is trying to to violently overthrow the incumbent government would therefore constitute interference in a matter the state is entitled to decide freely.

Intervention also requires the element of coercion. Recognising the opposition could be said to be coercive as it can help to effect an actual change in government. Although states often attempt to separate recognition from approval, the act of recognition of a non-state armed group during a civil conflict allows external states to award legitimacy the opposition in the eyes of both the international community and the domestic constituency. This may in turn provide political momentum to the opposition at the expense of the established government, and affect the outcome of the conflict. Recognition of non-state armed groups can therefore be a legitimating force for unconstitutional changes of government.

Recognition of an opposition as the government has certain second-order consequences also. Noting that states may provide support to the government in certain circumstances during a civil conflict, but never to the opposing forces, recognition can be a way for external actors to legitimate the provision of other assistance—economic or military—to the non-state armed group. The act of premature recognition may thus be a way for states to legitimise support to the opposition that would otherwise be unlawful.

It should be noted that despite this limitation on states' discretion to recognise opposition groups, states retain an absolute discretion as to the conduct of diplomatic or other formal re-

[66] Although there is evidence that several states provided military and financial support to Libyan and Syrian rebels, detailed analysis of these interventions is outside the scope of this paper.

[67] Fox 'Regime Change' (2015), para 12.

lations with the government in question. If a state wishes to signal its lack of support to the incumbent government, it may downgrade relations with the target state, for example by expelling diplomats, without violating the principle of non-intervention.

2.4.1.1. Political Recognition and Intervention

Like legal recognition, political recognition concerns a matter the target state is entitled to decide upon freely. However, an act of political recognition alone is not inherently coercive, in that it does not inhibit the target state from exercising its sovereign right to decide its own government. Unlike legal recognition, political recognition in itself does not prejudice the legal rights of the incumbent government, so is unlikely to constitute an act of intervention.[68] However, if coupled with material support to the armed opposition,[69] or part of an effort to enact regime change,[70] it may then constitute an act of intervention.

2.4.2. Could Recognition of a Non-State Armed Group Constitute a Threat of Force?

If premature recognition constitutes an unlawful intervention in the internal affairs of a state, can it also constitute a threat of force? This question is largely unconsidered in the literature, as analysis regarding the prohibition against force usually focuses on the use, rather than threat, of force. The act of recognition is certainly not a *use* of force, as it is not a physical attack using military means. But the question of whether a statement of recognition could, in some cases, constitute a *threat* of force is quite different.

As found in Sub-Section 2.3.2 above, a threat of force consists of "a signalled intention to use force if certain events occur". Therefore if the act of recognition, in the particular circumstances, implies that force will be used if the incumbent government does not surrender, then it could constitute a threat of force. This is consistent with the ICJ's dicta that it "would be unlawful for a State to threaten force to secure territory from another State, or to *cause it to follow or not to follow certain political or economic paths* [emphasis added]".[71]

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[68] Talmon, n17, 247.

[69] Ibid.

[70] Schaller, n4, 260.

[71] *Nuclear Weapons* Advisory Opinion, para 47.

The threat of force must also be credible to be prohibited. Again, this will depend on the circumstances in which the threat is issued. If the recognising state is, for example, openly calling for regime change and demonstrating a willingness to use force to that end (such as by preparing troops for deployment), the threat may be considered credible.

A prohibited threat must also be linked to a prohibited actual use of force. There is no doubt that using force, directly or indirectly, to assist a non-state armed group to overthrow an incumbent government would be a prohibited under international law. Provision of arms and logistical support to rebels can also constitute a prohibited use of force,[72] so threatening to do so would also be prohibited.

While premature recognition may constitute a threat of force, it is important to note that this will not always be the case. Recognition may simply stand alone, with no intent to provide any further support of any kind to the non-state armed group. This would likely be an act of intervention, but nothing more. However, in practice, the recognition of a non-state armed group as the government is often indicative of a commitment to the success of the group in the conflict. Withdrawing recognition and legitimacy from the incumbent government puts the recognising state in a very awkward position should the incumbent government ultimately win the war. Simply put, the recognising state "cannot allow the opposition to fail. Recognition thus becomes an implicit commitment to regime change".[73] In such a case, further intervention in the conflict is a likely consequence. If that further intervention includes military support that can be attributed to the recognising state, the prohibition of the threat of force may be triggered.

The application of the prohibition of the threat of force to the recognition of a non-state armed group will now be tested against two case studies: Libya and Syria.

3. Recent State Practice

Two case studies will now be considered, demonstrating how the principle of non intervention and the discretion to recognise governments interact in practice to establish the lawfulness of recognition of non-state armed groups.

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[72] *Nicaragua* Case, para 195.

[73] Talmon, n17, 251.

3.1. Libya

The first case study is Libya, which descended into civil war in February 2011. An opposition coalition, the NTC, soon established itself as a rival government.

3.1.1. The Creation of Rival Governments in Libya

Colonel Muammar Qadhafi[74] came to power in Libya by *coup d'etat* in 1969. Qadhafi's government was widely regarded as an authoritarian dictatorship. The government entirely revolved around Qadhafi, who dissembled governmental institutions and famously did not employ a unified national army in order to prevent the existence of a rival centre of power that could displace him.[75] His government has been described as a "corrupt, exploitative, and repressive regime controlled by an absolute ruler who was known for being deeply mentally unbalanced."[76] Systemic violence against civilians, both within and without Libyan territory, was a longstanding and pervasive reality for Libyans under Qadhafi's government.[77]

It was in this context, and following 'Arab Spring' uprisings in Tunisia and Egypt, that protests against the Qadhafi government began. Large demonstrations against the government (called the "Day of Rage") in the Eastern city of Benghazi were planned for 17 February 2011. After a series of pre-emptive arrests by the Qadhafi government, the protests commenced early, on 15 February.[78] By 20 February large-scale demonstrations were taking place around the country, and the government attempted to suppress the protests with violence.[79] The initial protests demanded accountability for human rights violations and political reforms. It was only after the protests were met with state violence that activists began calling for a new government.[80] Opposition to the government crystallised after the crackdowns, and large, un- or loosely-affiliated rebel forces began operating to overthrow the government. In response to the violence, the UN Security Council authorised an arms embargo and sanctions

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[74] Alternative spellings include Qaddafi, Gadhafi, Gaddafi.

[75] Bassiouni *Libya: From Repression to Revolution* (2013), 127-8; and MacFarquhar 'An Erratic Leader' (2011).

[76] Bassiouni, ibid, 123.

[77] Ibid.

[78] Ibid, li.

[79] Ibid.

[80] Ibid, 126.

against senior members of the Qadhafi government on 26 February.[81] The following day the NTC, as the political body of the armed opposition, formally established its headquarters in Benghazi.[82] On 5 March the NTC declared itself the government of Libya.[83]

In March, the Arab League called for a no-fly zone over Libya to help stem the violence, and on 17 March the UN Security Council passed Resolution 1973, which authorised member states to use "all necessary measures" to enforce a no-fly zone and protect civilians in cities such as Benghazi.[84] The resolution explicitly did not authorise a foreign occupation force in Libya.[85] An international coalition operation, led by France and the United Kingdom (UK), commenced two days later to implement the Security Council Resolution,[86] and NATO assumed command and control of the operation soon after.[87] Many foreign states, including Western powers and Russia, were openly calling for Qadhafi to step down by the end of May.[88] Rebel groups benefitted from the NATO airstrikes,[89] and by the end of August controlled the majority of Libyan territory, including the capital.[90] The UN General Assembly voted to accept the NTC as Libya's representative on 16 September.[91] Fighting continued until

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[81] UNSC Res 1970 (2011).

[82] Bassiouni, n75, lii.

[83] Ibid.

[84] UNSC Res 1973 (2011).

[85] Ibid.

[86] Bassiouni, n75, liii.

[87] NATO 'NATO Takes Command in Libya Air Operations' (2011).

[88] Bassiouni, n75, 175.

[89] The NATO mission had the practical effect of assisting the armed opposition as government troops and assets were targeted. It can also be argued that over time there was 'mission creep' into a regime change operation. See United Kingdom House of Commons Foreign Affairs Committee 'Libya: Examination of Intervention…' (2016), para 6 and White 'Libya and Lessons from Iraq' (2011), 221-2, 226-8.

[90] NATO 'Evolution of the Frontlines in Libya' (2011).

[91] UNGA 'General Assembly Seats National Transitional Council of Libya as Country's Representative for Sixty-Sixth Session' (2011), passed with 114 votes in favour, 17 against and 15 abstentions.

Qadhafi was captured and killed by rebels on 20 October.[92] The NTC declared victory on 23 October, and the NATO operation came to a close by the end of that month.[93]

3.1.2. International Recognition of the Opposition as the Government of Libya

Noting that the NTC did not control the majority of Libyan territory until approximately the end of August, nor claim a decisive victory in the war until mid-to-late October, we must now consider when states began recognising the NTC as the government of Libya. Dozens of states gave political or partial *de facto* recognition to the NTC between March and August 2011, but this section will focus on those that gave unequivocal legal recognition.

The first state to recognise the NTC was France. On 10 March 2011, President Sarkozy announced that France had granted the NTC political recognition.[94] France's recognition of the NTC was then upgraded on 7 June 2011, when the French Ministry of Foreign and European Affairs stated that the NTC was the "sole repository of governmental authority, in France's relations with the Libyan state and the entities under it."[95] This is a clear statement of legal recognition.

The Foreign Minister of the United Arab Emirates (UAE) issued a statement on 12 June in which it said it would establish a "government-to-government" relationship with the NTC.[96] This was followed by the UAE Foreign Ministry advising the Libyan Ambassador that he must leave so that the Embassy could be handed over to a representative of the NTC.[97] The words and actions of the UAE clearly constitute a legal recognition of the NTC as the government of Libya.

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[92] Fahim *et al* 'Violent End to an Era as Qaddafi Dies in Libya' (2011).

[93] NATO 'NATO Secretary General Statement on End of Libya Mission' (2011).

[94] Jacinto 'Rebel Benghazi to get Ambassador' (2011).

[95] Juppé 'Libya/National Transitional Council - Statement by Alain Juppé' (2011).

[96] Talmon 'Recognition of the Libyan National Transitional Council' (2011), quoting WAM-Emirates News Agency article [article no longer available online]; see also Gulf News 'Libyan Consulate in Dubai Resumes Basic Services' (2011).

[97] Middle East Online 'Libyan Rebels Earn More International Recognition' (2011) and Gulf News, ibid refer to the new NTC-appointed Ambassador.

After previously granting the NTC political recognition, the United States (US) formally recognised the NTC on 15 July. The Secretary of State said that the US "will help the TNC sustain its commitment to the sovereignty, independence, territorial integrity and national unity of Libya."[98] The US also announced it would allow the NTC to access US$30 billion in Libyan state assets held in the US.[99]

Similarly, the UK consistently provided political recognition to the NTC, but did not elevate it to legal recognition until 27 July 2011. On that date, the Foreign Secretary stated that the NTC was the "sole governmental authority in Libya", meaning that "we will deal with the NTC on the same basis as other governments around the world".[100] The UK also expelled Qadhafi-appointed diplomats to make way for NTC-appointed representatives.[101]

The lawfulness of the actions of the above states—France, the UAE, US and UK—will now be considered against the norms of recognition and the principle of non-intervention.

3.1.3. The Lawfulness of Recognition in the Libyan Context

As is the case in many civil wars, the existence of a government—as a question of fact—was difficult to determine at various points of the Libyan civil war. Reliable information was difficult to acquire, especially in real time. However, statements of recognition can be assessed against what was known at the time.

3.1.3.1. The Existence of Effective Control

As noted in Subsection 2.1.1.1 above, the primary consideration for determining effective control is the extent of control over the territory of the state. For much of the conflict, the majority of territory, including the capital, was held by Qadhafi forces. Both sides were entrenched in a particular region (the government in the West, around Tripoli; the rebels in the East, around Benghazi). Momentum in the conflict, and key cities and towns, vacillated back and forth between the government and rebels throughout the conflict, so at any given time it

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[98] Arsu and Erlanger 'Libya Rebels Get Formal Backing, and $30 Billion' (2011).

[99] Ibid.

[100] United Kingdom Foreign and Commonwealth Office 'Libyan Charge d'Affaires to be Expelled from the UK' (2011).

[101] Ibid.

was difficult to say whether territory was being held with any likelihood of permanence. The majority of territory did not decisively shift toward the rebels until the second half of August. After Tripoli fell to the rebels on or around 27 August, it was considered to be a matter of time before Qadhafi's forces were defeated, and this did in fact occur when Qadhafi's last stronghold (and hometown) of Sirte fell and Qadhafi himself was killed on 20 October. In terms of popular support, it was difficult to determine what proportion of the general population backed the NTC specifically. There were a multitude of rebel groups, unified only by their desire to overthrow the Qadhafi government. Not all rebel groups that held territory were affiliated with or represented by the NTC,[102] which undermined its claim to be the true government of Libya. Indeed, the new government began to fracture almost immediately, and was clearly unable to control many of the militias throughout the country.[103] And finally, the assistance of NATO air and sea strikes to the rebels raises the question of whether the territory was held independently—that is, without foreign assistance. There is considerable doubt as to the rebels' ability to take and hold territory (outside of its stronghold in the East, at least) without that foreign military support.[104]

As such, states could not have recognised the NTC as the government of Libya with any real certainty until the war was won on 20 October. It can, however, be said that statements of recognition were defensible from the end of August when the rebels had taken the majority of territory, including the capital, and looked likely to be able to hold it.[105]

To consider the statements of recognition identified above, none was supported by the facts on the ground. When France and the UAE recognised the NTC in early to mid June, the government held the clear majority of territory, and the rebels were struggling to hold territory won outside Benghazi and the Nafusa Mountains region between Tripoli and the Tunisian border. The rebels held more territory when the US and UK recognised the NTC in mid to late July, but still not the majority of territory, not the capital, and not with the likelihood of permanence. In sum, "[i]t became clear that the support of the NTC from outside States was

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[102] Bassiouni, n75,143-4.

[103] Ibid, 184-5.

[104] See for example, Ibid, 173.

[105] For an opposing view, Shaw states that recognition of an armed opposition is premature so long as the incumbent government is "still in existence and carrying on the fight in some way." If this standard is applied, all acts of recognition prior to 20 October would have been premature. Shaw, n8, 337.

based more on its character, it was perceived as a body committed to democracy (and it was not Gaddafi), than on its effectiveness."[106]

3.1.3.2. The Principle of Non-Intervention

Given the facts did not support the recognition of the NTC on the basis of effective control, we must now ask whether the acts of recognition constituted interventions in the domestic affairs of Libya.

On the face of it, support to an armed opposition group is a violation of the principle of non-intervention. Support does not need to be material; assistance, incitement and toleration of armed oppositions are also prohibited.

The acts of recognition by France, the UAE, UK and US assisted the rebels in several ways. Firstly, they did much to legitimate the armed opposition, both domestically and internationally. Notably, three of the four states are permanent members of the UN Security Council, giving their recognition additional clout. Secondly, it gave the NTC access to all Libyan state assets and property in the recognising states. The US, for example, gave the NTC access to US$30 billion in state funds after recognising it. The UAE and UK expelled Qadhafi-appointed diplomats and handed Libyan diplomatic missions over to the NTC. While no state was under any obligation to maintain formal diplomatic relations with Libya,[107] the act of establishing such a relationship with the armed opposition was problematic as it occurred before the NTC actually had effective control over the Libyan state.

The recognition announcements were also supplemented by statements such as "It's time for Qadhafi to go."[108] Given the context within which these statements were made, that is in light of formal recognition of the opposition and the foreign military campaign that targeted government forces and assets, it is not unreasonable to interpret these statements as incitement for rebel forces to overthrow the incumbent government, and to encourage other states to bring pressure to bear on the Libyan state to change its government. They also indicate the element of coercion: these states were not mistakenly recognising rebels that did not in fact possess effective control, they were explicitly trying to force the incumbent government out.

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[106] Warbrick 'British Policy and the National Transitional Council of Libya' (2012), 250.

[107] Diplomatic relations are entirely discretionary, requiring acquiescence of both parties.

[108] UK FCO, n100.

Finally, it is worth noting that the UN Security Council did not endorse regime change in Libya. Resolution 1973 authorised limited force to maintain a no-fly zone and protect civilians only, and explicitly precluded a foreign occupation force. The five Council members that abstained from the vote all voiced concern about the exact scope of force that was being authorised and the territorial integrity of Libya.[109] The exact scope of the mandate to "protect civilians" was certainly unclear, but to consider Resolution 1973 an authorisation for member states to assist rebel forces to overthrow the established government is reading far too much into its text and intent.[110]

Accordingly, the premature recognition of the NTC by France, the UAE, UK and US was unlawful intervention in the domestic affairs of Libya.

3.1.3.3. The Threat of Force

This brings us to the question of whether recognition of the NTC also constituted a threat of force against Libya.

As noted above, recognition of a non-state armed group may constitute a threat of force depending on the circumstances. The statements of recognition made by France, the UAE, UK and US did not explicitly threaten force if Qadhafi did not step down. However, threats are rarely explicit, but designed to be read 'between the lines'. As such, the statements of recognition must be considered in their context. All four states were participating in the NATO-led operation, meaning they were already using force in Libyan territory (albeit with UN Security Council authorisation). Coalition participants openly cooperated with non-state armed groups that were attempting to violently overthrow the government, and almost exclusively targeted government forces and assets. There could therefore be little doubt as to the willingness of these states to use force in Libyan territory. Further, representatives of all four states repeatedly demanded Qadhafi step down, before and after recognising the NTC. In this context, France, the UAE, US and UK formally recognising the NTC could be interpreted as a threat to use force if Qadhafi did not stand aside. Indeed, all four states, on the basis of their recognition of the NTC, went on to provide military support, such as arms and training, to rebel

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[109] UN Security Council 'The Situation in Libya' (2011), 83-4.

[110] See for example Schaller, n4, 257.

forces.[111] Support of this nature constitutes an indirect use of force. Therefore, taken in context, the recognition of the NTC could be considered a threat of force against Libya.

3.2. Syria

We now turn to the early period (2011-13) of the ongoing civil war in Syria. Protests against the Assad government began in March 2011, and by May the situation had deteriorated into a civil war.

3.2.1. The Creation of Rival Governments in Syria

In June 2000, President Bashar Al-Assad of Syria succeeded his father Hafez Al-Assad, who had ruled since 1970. The rule of both Presidents Assad has been marked by large-scale repression domestically, and sponsorship of terrorism internationally.[112] Although Syria was reasonably stable and tolerant of different religious communities, it had a poor human rights record, particularly in regards to political opposition and dissidence. As in Libya, anger and a desire for accountability built up after decades of repression and state violence, then manifested into protests and civil war during the Arab Spring.

The origin of the civil war can be traced to the arrest and torture of 15 schoolchildren in the southern city of Daraa.[113] The boys had written pro-Arab Spring graffiti on the wall of their school, and their subsequent treatment at the hands of authorities sparked protests in the city on 18 March 2011. Security forces shot at the protesters, resulting in two fatalities. Unrest swelled in response, gradually spreading throughout the country.[114] The Assad government made concessions, such as releasing some political prisoners, to try to quell the unrest, but demonstrations continued. In May, army tanks were deployed to several cities, including Daraa, Homs and the capital Damascus, to quash the nascent uprising. Over time, the largely peaceful demonstrations gave way to armed attacks on security forces by local, ad hoc mili-

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[111] There was international disagreement as to whether states could provide arms to rebel forces after the adoption of Resolution 1973, noting the arms embargo established in Resolution 1970 continued in effect.

[112] BBC ‘Syria Profile’ (2017).

[113] Al-Jazeera ‘Syria’s Civil War Explained from the Beginning’ (2017).

[114] Ibid.

tias. As such, there was no coherent political or military leadership in the Syrian opposition.[115] However, political opposition to the Assad government began to coalesce in October, when the Syrian National Council (SNC) brought together Syrian activists from within and without the territory. By that time many rebel groups were loosely affiliated under the banner of the Free Syria Army (which effectively became the armed wing of the SNC), but overall military opposition to the government remained fragmented and alliances regularly changed.[116] Also in October, a UN Security Council Resolution calling on the Assad government to cease its human rights abuses and violence against civilians was defeated after China and Russia exercised their veto powers, fearing foreign intervention in Syria.[117]

Fighting in cities, including Homs (then under rebel control), intensified in February 2012, and in March the UN Security Council adopted a non-binding peace plan for Syria.[118] In July, the Free Syria Army seized Syria's largest city, Aleppo.[119] The SOC was formed in November 2012, replacing the "divided and ineffective" SNC as the key opposition political group.[120] In December 2012, Kurdish forces (which were anti-government but also had a poor relationship with key rebel groups) held most of the north-east, while the populated regions of western Syria were split between government and rebel forces.[121] Rebels took control of some military bases and suburbs around Damascus in December, but the capital was largely held by Assad forces. Despite some rebel gains at the end of 2012, the tide turned in early 2013 and government forces recaptured many key towns.[122]

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[115] Erlich *Inside Syria* (2014), 16.

[116] Ibid, 93-4.

[117] UN Security Council 'The Situation in the Middle East' (2011), 157.

[118] Two permanent members of the UN Security Council, China and Russia, declined to endorse a binding resolution.

[119] BBC, n112.

[120] Ibid and BBC News 'Gulf States Recognise Syria Opposition' (2012).

[121] Political Geography Now 'Syria Uprising Map: December 2012' (2012).

[122] BBC News 'Syria: Mapping the Conflict' (2015).

3.2.2. International Recognition of the Opposition as the Government of Syria

Recognition of the Syrian opposition was applied differently to Libya, in that only one state gave the SOC legal recognition during this early period of the war. Many countries extended political recognition to the SOC, but only the earliest recognisers will be addressed here.

On 12 November 2012, only one day after the establishment of the SOC, it was recognised as "the legitimate representative of the brotherly Syrian people" by Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the UAE.[123] This constituted political recognition, as it does not recognise the SOC as the government or create any international legal obligations to it. However, on 13 February 2013 Qatar accepted the credentials of a SOC-appointed Ambassador and turned the Syrian Embassy over to the SOC.[124] This was an implicit legal recognition of the SOC, as it had the effect of treating the opposition as the sovereign authority of Syria.

On 13 November 2012, France recognised the SOC as "the sole legitimate representative of the Syrian people" and "the future provisional government" of Syria.[125] While this may sound like a formal recognition of the opposition, President Hollande clarified that it was not when addressing the issue of providing arms to rebel groups: "With the coalition, as soon as it is a legitimate government of Syria, this question will be looked at by France…". Therefore, the statement should be read as an interim political recognition, with legal recognition anticipated to follow at a later date.

We will now turn to the legality of these recognition statements under international law, noting only Qatar extended legal recognition to the SOC. The political recognition of the opposition by the Gulf states and France will also be considered against the principle of non-intervention.

3.2.3. The Lawfulness of Recognition in the Syrian Context

The conflict in Syria became more complex as it went on, with more parties, both internal and external, becoming involved over time. The existence of multiple competing rebel groups

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[123] BBC, n120. These states are members of the Gulf Cooperation Council, and will be referred to collectively as 'the Gulf states'.

[124] BBC News 'Qatar Handing Embassy Over to Opposition' (2013).

[125] France24 'France Recognises New Syrian Opposition Coalition' (2012).

within Syria meant there was no unified opposition, and complicated the analysis of effective control.

3.2.3.1. The Existence of Effective Control

The facts on the ground on 13 February 2013, when Qatar recognised the opposition, did not support the claim that the SOC had effective control over the territory of Syria. The SOC had control over some parts of Syrian territory, specifically parts of the west and a swath of territory from the north to the south east along the Euphrates River.[126] However, noting the frequency with which territory was changing hands at that time, it cannot be said that even those areas were being held with any likelihood of permanence. Furthermore, the government retained control over most of Damascus and fighting continued in Aleppo. In fact, rebels did not hold a single provincial capital at that time.[127] It should also be noted that not all rebels actually holding territory were affiliated with the SOC: "The Cairo-based coalition's control over insurgent groups is tenuous at best. Some of the most militarily effective, such as the al Qaeda-linked Nusra Front, openly reject its authority."[128] Finally, in the context of fragmented military opposition, the degree of popular support for the SOC was unclear. While there was widespread (though certainly not universal) popular support for the removal of the Assad government, that is not the same as supporting a specific regime's claim to replace it. Accordingly, the legal recognition of the SOC by Qatar on 13 February 2013 was not supported by the facts on the ground.

As a question of law, it is not necessary to assess the political recognition of the SOC by the Gulf states and France in November 2012 against the doctrine of effective control. Because those statements were political acts without direct legal consequences, states have a broader discretion.[129] However, as a question of fact it is noted that the SOC did not have effective control in November 2012, for the same reasons as applied in February 2013. Despite not be-

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[126] Political Geography Now 'Syria Uprising Map: March 2013' (2013).

[127] Ibid.

[128] Bayoumy and Doherty 'Syrian Opposition Opens First Embassy' (2013).

[129] Talmon posits that state practice in the cases of Libya and Syria indicates there are four general criteria for political recognition: that the established government has lost legitimacy, and that the opposition is representative, broad, and has a likelihood of permanence. See Talmon, n17, 237-42. However, these criteria do not have the status of customary international law, as state practice is not sufficiently broad, nor is there any evidence of *opinio juris*.

ing strictly limited by the doctrine of effective control, acts of political recognition are still subject to the principle of non-intervention.

3.2.3.2. The Principle of Non-Intervention

Similarly to the case in Libya, it is likely that premature recognition of the SOC by Qatar constituted an illegal intervention in the domestic affairs of Syria. Syria had the sovereign right to choose its own government, and Qatar (like many other states) conducted an apparent policy of regime change. The act of recognition was an attempt to legitimate the SOC in the eyes of the international community, though in practice one may question how much influence recognition by a single state would have. The context of the recognition statement is also relevant, as Qatar was allegedly providing funds and arms to rebel groups at the time.[130] Of course these acts would likely constitute acts of intervention in themselves, but as relates to the act of recognition, they indicate an intent to coerce the Syrian government to step down. Qatar's premature recognition of the SOC also prejudiced the legal rights of the *de jure* government by handing state property over to the opposition.

The question of whether premature political recognition constitutes intervention is more difficult. As noted in Subsection 2.4.1.1 above, political recognition does not, in itself, constitute an unlawful intervention in the affairs of the target state. While its purpose is usually to bring political pressure to bear on the incumbent government, it is not inherently coercive. One must look to the particular facts of the situation to determine if there is sufficient coercion to trigger the principle of non-intervention.

It can be noted that Western and regional states pushed for the establishment of a unified opposition body that could be used as a conduit for financial and military aid.[131] This means that foreign states used their influence to help organise the opposition so they could recognise it and thus provide it with material support. This pattern of behaviour could certainly qualify as assistance or incitement of an armed opposition. Further, many of the recognising states explicitly supported regime change. The Chief of the Gulf Cooperation Council said that the group was supporting the opposition "in order to achieve the aspirations of the Syrian people in hope that this will be a step towards a quick political transfer of power."[132] When granting

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[130] Bayoumy and Doherty n128.

[131] BBC, n120.

[132] Al Jazeera 'GCC Recognises New Syrian Opposition Bloc' (2012).

political recognition French President Hollande referred to the SOC as "the future provisional government of a democratic Syria which paves the way to put an end to Bashar Assad's regime."[133]

As such, while political recognition in itself does not *prima facie* meet the threshold of intervention, the political recognition of the SOC by the Gulf states and France could, in the circumstances, be considered to constitute intervention in the domestic affairs of Syria on the basis that it was intended to facilitate regime change.

3.2.3.3. Threat of Force

We now turn to the question of whether the premature recognition of the SOC by Qatar constituted a threat of force against Syria. For this to be the case, the act of recognition would need to be an implied ultimatum that Qatar would use force against Syria if Assad did not step down. Qatar was widely believed to be one of the biggest supporters to the Syrian opposition in terms of financial aid and provision of arms.[134] The provision of arms to a rebel group is a prohibited use of force.[135] The act of recognition could, therefore, be an implicit threat that this use of force would continue unless the Assad government stepped aside. However, in this context the potential threat of force is overtaken by the actual use of force that is already underway. It could also be said that threat was already implicit even without the formal recognition of the SOC, so it had no practical effect in the context of use of force.

In regards to the states that gave the SOC political recognition, there is little to support a claim of threat of force. There does not appear to be an implicit threat to use force in the act of political recognition—to the contrary, France for example explicitly stated it would not consider providing weapons to the opposition until it was given legal recognition.[136]

Therefore, it is unlikely that the prohibition of the threat of force was triggered by the premature recognition of the SOC. In the case of Qatar, even if recognition did constitute a threat, it was of no practical consequence. Further, political recognition by the Gulf states and France did not constitute a threat of force.

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[133] France24, n125.

[134] Khalaf and Fielding-Smith 'How Qatar Seized Control of the Syrian Revolution' (2013).

[135] *Nicaragua* Case, para 195.

[136] France24, n125.

In the next chapter, the longer-term effect of state practice in Libya and Syria will be considered.

4. The Effect of State Practice in Libya and Syria - The Return Normativity in Recognition Decisions?

This chapter will consider whether state practice in the cases of Libya and Syria has had any effect on the law relating to recognition of governments, or the balance between the discretion to recognise and the principle of non-intervention.

4.1. State Practice Regarding the Application of Normative Criteria to Recognition Decisions

Noting that the NTC in Libya and SOC in Syria were not recognised by foreign states on the basis of the effective control doctrine, one must ask the basis upon which they were recognised. Statements by government officials indicated that recognition in these cases was largely based on normative considerations. It could be said that the legitimacy doctrine was applied, albeit with an expanded definition of 'legitimacy' that includes adherence to international human rights norms.

Recognising states indicated that the Qadhafi government lost legitimacy due to large scale human rights abuses and violent repression of citizens. For example, the French Foreign Minister stated that "[h]aving committed the most serious crimes against the Libyan people, in defiance of international law, the authorities under Colonel Gaddafi can claim no role of any kind in representing the Libyan State."[137] In July 2011, the 32 member states and seven member organisations of the Libya Contact Group agreed that "the Qaddafi regime no longer has any legitimate authority in Libya and that Qaddafi and certain members of his family must go."[138] However, as a question of law, it must be noted that a government that has forfeited legitimacy does not automatically forfeit its legal status as the government.[139]

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[137] Juppé, n95.

[138] Libya Contact Group 'Chair's Statement' (2011), para 4. Members included France, the UAE, UK and US, as well as the UN, NATO, League of Arab States, Organisation of Islamic Cooperation and Gulf Cooperation Council.

[139] Schaller, n4, 254.

The ‘de-legitimisation’ of the incumbent government also does not mean that there is a viable, unified opposition, or that the opposition itself is ‘legitimate’. The NTC was clearly not legitimate in the sense of being a constitutional government—it came to power by violently overthrowing the established government. Nor was it democratic in the conventional sense of the term, meaning that it did not possess clear popular sovereignty. It was, however, regarded as ‘democratic’ in the sense that it was committed to establishing democracy in Libya. Key Western states were clear that their recognition of, and other support to, the NTC was contingent on its commitment to democracy and human rights in Libya:

> This decision reflects the NTC’s increasing legitimacy, competence and success in reaching out to Libyans across the country. Through its actions the NTC has shown its commitment to a more open and democratic Libya—something it is working to achieve through an inclusive political process. This is in stark contrast to Qadhafi, whose brutality against the Libyan people has stripped him of all legitimacy.[140]

The US Secretary of State also emphasised assurances received from the NTC that it would “pursue democratic reform that is inclusive geographically and politically, and to uphold Libya’s international obligations…”.[141] Indeed, elections were held in Libya in 2012, and power peacefully transferred from the NTC to the new parliament, known as the General National Council (GNC). However, there were concerns at the time that holding elections so soon was a risk given that Libya had no democratic traditions or functional government institutions. Unfortunately, these concerns were proven prescient, as Libya has since struggled to establish an effective government due to regionalism and further violence. In the face of doubts as to the capacity of a ‘government’ to actually govern, one must question whether it is sufficient to say it is legitimate.

The reasons for the political recognition of the SOC in Syria were similar. At the Fourth Ministerial Meeting of the Group of Friends of the Syrian People, participants “reiterated that Bashar Al Assad has lost legitimacy and should stand aside to allow the launching of a sustainable political transition process…”[142] The French President, when granting political

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[140] UK FCO, n100.

[141] Arsu and Erlanger, n98.

[142] Group of Friends of the Syrian People ‘Chairman’s Conclusions’ (2012), Art 10. Member states include France, the UAE, Italy and Turkey, as well as the United Nations, League of Arab States, Organisation of Islamic Cooperation and Gulf Cooperation Council.

recognition to the SOC, referred to the SOC as "the future government of a democratic Syria making it possible to bring an end to Bashar Al-Assad's regime."[143] This approach was also taken by states that extended political recognition to the SOC later: The US President stated that the US only granted political recognition once it believed the SOC was inclusive, reflective and representative of the Syrian population.[144] The UK granted political recognition after receiving assurances from the SOC that it was committed to democracy and human rights.[145] However, various non-state armed groups have been accused of human rights and IHL violations throughout the conflict,[146] potentially undermining legitimacy arguments for its recognition.

Many states have made formal statements that using recognition of governments to convey approval is inappropriate, usually in the context of announcing that they will cease to formally recognise governments.[147] However, normative considerations are occasionally invoked with varying degrees of support (or acquiescence) within the international community, albeit in very different factual circumstances. For example, Warbrick notes the approach taken in Libya reflected that taken during the breakup of Yugoslavia in the 1990s.[148] Although it concerned recognition of new states, rather than governments, European Community states conditioned their recognition of newly established states on commitments to human rights, particularly minority rights, and democracy.[149] Also in the 1990s, Western states continued to recognise the Aristide government of Haiti and the Kabbah government of Sierra Leone, despite the fact they had lost effective control of their territories in *coup d'etats* in 1991 and 1997 respectively. The administrations that resulted from the successful ousters were not recognised, despite having effective control, because they were deemed constitutionally ille-

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[143] France24, n125.

[144] Talmon, n17, 223.

[145] BBC News 'UK Recognises Opposition' (2012).

[146] See for example BBC News 'Syria Opposition Groups Accused of Human Rights Abuse' (2012).

[147] See for example Shaw, n8, 331.

[148] Warbrick, n106, 250.

[149] See European Community: Guidelines on the Recognition of New States (1992), and; Badinter Commission, Opinions 4-7 (1992). Normative criteria, such as the capacity to maintain democracy and human rights, are also applied to determine eligibility for EU membership, see the Copenhagen Criteria (1993).

gitimate.[150] The *coups* were also deemed a threat to international peace and security by the UN Security Council.[151]

More recently, in 2009, the Honduran military staged a *coup d'etat* against the democratically-elected president, forcing him into exile. Despite some small-scale clashes between security forces and groups loyal to President Zelaya, the military (and the interim leader it installed) clearly had effective control over Honduran territory.[152] Therefore, the *coup* was successful and the new government ought to have been recognised in accordance with the effective control doctrine. However, the international community condemned the *coup* and continued to recognise the incumbent Zelaya government-in-exile as the constitutionally and democratically legitimate government of Honduras.[153]

The legitimacy doctrine also played a part in Côte d'Ivoire in 2010-11, when the incumbent government refused to enact a peaceful transfer of power after an election. Former Prime Minister Ouattara was declared the winner of the Presidential runoff, a conclusion supported by the head of the United Nations Operation in Côte d'Ivoire (UNOCI), which was mandated to provide support to the electoral process. The Ivorian Constitutional Council, however, declared large numbers of votes invalid and declared the incumbent President Gbagbo victorious, and he thus refused to step down.[154] Fighting soon broke out between groups supportive of the two candidates, and neither party could be said to have exercised effective control over the country. However, many states and international organisations, following the lead of the Economic Community of West African States (ECOWAS), recognised Ouattara's regime as the legitimate government on the grounds that it was the constitutional government.[155] Constitutional and democratic legitimacy also played a part in a similar situation in Gambia in 2016. After the opposition won a democratic election, the incumbent President disputed the results. The member states of the African Union recognised the opposition leader Adama Barrow as

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[150] Roth 'The Honduran Crisis and the Turn to Constitutional Legitimism, Part I' (2009).

[151] See for example UN Security Council Resolution S/RES/841 (1993) and UN Security Council Resolution S/RES/1132 (1997)

[152] Malkin 'Honduran President is Ousted in Coup' (2009).

[153] UN General Assembly A/RES/63/301 (2009). This General Assembly Resolution was adopted unanimously.

[154] United Nations Operation in Côte d'Ivoire 'Post Election Crisis' (undated).

[155] D'Aspremont 'Duality of Government in Côte d'Ivoire' (2011).

the head of the Gambian government from the date the post-election handover of power was planned, despite President Jammeh calling for a new election.[156]

In each of these cases normative considerations were emphasised over effective control, but it is noted that they concern very different fact situations. The situations in Haiti, Sierra Leone and Honduras can clearly be distinguished from civil war situations such as Libya and Syria as they concern successful *coups*, following which the new governments had effective control as a matter of fact. Côte d'Ivoire and Gambia can also be distinguished from the situations in Libya and Syria as they did not concern an incumbent government and insurgency in civil war, but two competing administrations claiming constitutional legitimacy following democratic elections. It must therefore be questioned whether there has developed a general rule giving normative considerations the same status as effective control in recognition decisions, or whether there are exceptions to the primacy of effective control based on particular facts or circumstances.

4.1.1. The Effect of State Practice: Extra-Legal Acts or Evolving Law?

The state practice referred to above does not conclusively support general acceptance of the legitimacy doctrine or other normative considerations. Referring to Haiti and Sierra Leone, Roth notes that "[e]xceptions arose where the vast diversity of international actors, cutting across the international system's plurality of interests and values, could perceive in common a population's manifest will to restore an ousted government."[157] Indeed, the essence of this statement could also apply to Honduras, Côte d'Ivoire and Gambia. In all of these cases, the ousted (or otherwise usurped) government had either recently been democratically elected, or won the next democratic election held after the *coup*, making the existence of popular sovereignty or popular acquiescence reasonably clear. This will not always be the case, however, and it is noted that this approach was not consistently applied by the international community to subsequent *coups*,[158] indicating that these cases were an exception rather than the norm. It is illustrative that although the leader of the Honduran *coup* was barred from addressing the 2009 session of the UN General Assembly (as was a *coup* leader from Madagascar), the lead-

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[156] Maasho and Jahateh 'African Union will not recognise Gambia's Jammeh from Jan. 19' (2017).

[157] Roth, n150.

[158] Roth 'Successions, Coups and the International Rule of Law' (2010), 430.

ers of twelve other nations that had come to power by *coup* did address the Assembly.[159] It is thus submitted that, at most, this state practice reflects an emerging acceptance that normative considerations may supersede effectiveness in recognition decisions only in circumstances in which: a democratic government is overthrown or constitutional democratic processes not adhered to, and; the popular will of the population is manifest through democratic processes in favour of the ousted government. There does not appear to be much evidence of state practice outside these parameters, so it is submitted that this does not constitute a general rule. Cases of premature recognition during civil wars (the focus of this paper) are readily distinguished from these cases.

In contrast, the premature recognition of the Libyan and Syrian opposition groups on legitimacy grounds was far from universal, or even broad-based. In the case of Libya, the vast majority states refrained from granting recognition to the NTC until the Qadhafi government had definitively fallen, thereby applying the effective control doctrine. This occurred despite a number of those states being overtly sympathetic to the struggle of the Libyan opposition and facing pressure from politicians and civil society groups to recognise the NTC.[160] Similarly, most states were reluctant to formally recognise the SOC in Syria in the early stages of the war. It is acknowledged that there may be many reasons for states to withhold recognition, not all of them legal considerations, but it is significant that the overwhelming majority of states adhered to the existing norm. Framed in this way, the claim that state practice in regards to Libya and Syria represents a shift in the law looks very weak indeed: Four states may have prematurely recognised the NTC on the basis of democratic and human rights considerations, but approximately 190 states did not. In the case of Syria, all but one state refrained from premature recognition. Further, some states specifically condemned premature recognition as a violation of international law. Responding to France's political recognition of the SOC, the Russian Prime Minister said that "[f]rom the point of view of international law, this seems to me absolutely unacceptable".[161]

It is also notable that the states that recognised the NTC or SOC prematurely still refer to the primacy of the effective control doctrine. For example, when explaining why the US initially only extended political recognition to the NTC, a State Department representative acknowl-

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[159] Ibid, 438.

[160] Talmon, n96.

[161] As quoted in Talmon, n17, 246.

edged that legal recognition ought only be granted when effective control is evident.[162] This does not indicate a belief that international law generally permits recognition of an opposition group on the basis of normative considerations alone, despite the US' later stance on Libya.

Further, the protection of human rights and promotion of democracy are of course fundamental goals of the UN,[163] but they do not, in and of themselves, automatically prevail over the principle of non-intervention.[164] External states (and international organisations) may intervene for the purpose of protecting human rights or democracy only to the extent permitted by international legal agreements entered into, or by customary international law. Unsurprisingly, there are no human rights treaties permitting the overthrow of a government on the grounds it has committed egregious human rights violations,[165] so custom will be the focus here.

Although democracy, human rights and constitutionalism are generally promoted within the international community, states remain free to choose their own political, cultural and economic systems. Notwithstanding the UN's commitment to the promotion of democracy, the ICJ has found that forcing a state to adhere to a particular governmental doctrine would be an act of intervention.[166] Further illustrating the point, UN General Assembly documents regarding electoral assistance are careful to note that states are free to determine their own political system, and assistance is only provided at the request of the state.[167] There is also no unilateral right of intervention when states commit war crimes during the conduct of non-international armed conflicts.[168] There is no evidence of a general unilateral right to intervention

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[162] Ibid, 233.

[163] UN Charter, Preamble.

[164] Roth 'The Honduran Crisis and the Turn to Constitutional Legitimism, Part II (2009) and Shaw, n8, 840. Although referring to forcible humanitarian intervention, Shaw notes that intervention to restore democracy is not lawful under the UN Charter.

[165] The *Universal Declaration of Human Rights* notes that human rights should be protected by the rule of law lest people "be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression" (Preamble). It is outside the scope of this paper to provide a full analysis of this provision, but suffice to say it does not, on its ordinary meaning, provide a unilateral right for states to overthrow, or help to overthrow, foreign governments because of human rights violations.

[166] *Nicaragua* Case, 133; see also Roth, n158, 424.

[167] Ibid, 426.

[168] *Additional Protocol II* Art 3.

on the basis of democratic, or other normative, concerns.[169] It is submitted that without fundamental changes to the principle of non-intervention and the rights of sovereign states to determine their own political life, the application of normative considerations when recognising non-state armed groups simply cannot be justified as being the main criterion under international law.

It is therefore likely that the decisions to apply normative considerations to the premature recognition of the NTC and SOC were made on the basis of political, rather than legal, considerations. Despite the actions of a few states in regards to Libya and Syria, it would appear that normative considerations do not have the same status as the doctrine of effective control under international law. Without the existence of effective control, the recognition of an armed opposition group as the government remains a violation of the principle of non-intervention. The application of normative considerations in Libya and Syria could therefore be considered a conscientious violation of the principle of non-intervention in the face of grave human rights abuses, but unlawful nonetheless.

4.2. Should Normative Considerations Be a Basis for Recognition of Non-State Armed Groups?

State practice thus indicates that recognition of non-state armed groups during civil war is only lawful if granted in accordance with the effective control doctrine. Despite having broad support, the effective control doctrine has some shortcomings that must be acknowledged.

Firstly, the 'fact' of government is not always evident. Particularly in cases of civil war, there will be parts of the territory and parts of the population over which the purported 'government' has ineffective, if any, control. Short of a fast, overwhelming victory, it can be difficult to identify where exactly the line of 'effective control' should be drawn. This is further complicated by the difficulty of acquiring timely and accurate information from active war zones. Linked to this is the contention that the doctrine of effective control also creates a false sense of objectivity, as the interpretation of the facts may be coloured by the recognising state's atti-

[169] This of course does not preclude the collective right of states to intervene if the UN Security Council authorises measures to protect human rights or democracy where the situation constitutes a threat to international peace and security. This is consistent with the application of the Responsibility to Protect doctrine, whereby the Security Council may authorise the use of force to stop grave human rights abuses but states may not do so unilaterally.

tude toward the target state, or the recognising state may simply not want the legal obligations that follow recognition.[170]

Secondly, applying the effective control doctrine exclusively can have undesirable consequences. The inability to consider the manner in which an administration comes to power can have the effect of rewarding the violent and brutal: "Insofar as it perceived as little more than an imprimatur for 'might makes right' at the local level, this 'effective control doctrine' is manifestly offensive to a rule of law sensibility."[171] In cases such as Libya and Syria, where popular uprisings sought to dislodge oppressive authoritarian administrations, the position that the rights of the state—an abstract legal creation—supersede the rights of the people within it seems antithetical to the principles of human rights and democracy enshrined in the UN Charter and countless other international treaties.[172]

However, despite these shortcomings, it is submitted that on balance the effective control doctrine should remain the primary criterion for recognition. It is not appropriate or desirable for states to generate international legal consequences on the basis of which foreign administration they want to be in power, regardless of who actually wields the power and apparatus of government. Expanding the criteria upon which governments are recognised creates scope for abuse, inviting states to intervene in each others' political systems. The principle of non-intervention between states is not emphasised here for its own sake; it is jealously guarded by the international community because the international legal system and the cause of international peace and security largely depend on it.[173] Though there are violations of the principle, no state categorically denies the existence, or importance, of the principle of non-intervention. It is the best protection smaller, weaker states have from the excesses of large and powerful states. The principle of non-intervention, particularly in regards to the political independence of states, is fundamentally pluralist.[174] Each state is free to determine its own political system, and although that system ought to reflect the popular will, the manner in which that occurs is

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[170] Shaw, n8, 321.

[171] Roth, n158, 394.

[172] See UN Charter Preamble and Articles 55(c) and 56. Key international human rights treaties include the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*.

[173] Roth, n158, 395.

[174] Roth, n20, 35.

a matter for the relevant state alone. Non-intervention was not intended to be a shield for despots, it was intended to give states (or more specifically, the people within states) the freedom to determine their own political system without being pressured to conform to the preferences of other states.[175]

Allowing states to justify premature recognition on the basis of somewhat nebulous concepts as democracy and constitutionalism may also have a destabilising effect: "Because democracy and constitutionalism are themselves open-textured and contested concepts, their application to recognition questions has the potential to yield equally arbitrary, but far less stable and predictable, outcomes [than the effective control doctrine]."[176] The concept of 'legitimacy' is constantly changing and expanding, from constitutional, to democratic and now, given practice regarding Libya and Syria, possibly to human rights-based legitimacy. While these are positive ends in themselves, they give a very broad, and expanding, scope to intervene which increases the risk of abuse.

Further, as with the effective control doctrine, there are practical challenges in the application of normative criteria to recognition decisions. Particularly in the case of civil war, it can be difficult to establish democratic legitimacy as both sides in the conflict may lay claim to popular sovereignty. External states are often not in a position to determine the popular will of the people, for any number of reasons. Information on popular opinion may be difficult to come by, or other states may not fully appreciate the social, cultural and historical context in which the popular will within a given state is developed. The question of constitutional legitimacy may not be as straightforward as it first appears either, as the unpopularity of existing constitutional arrangements may be the cause of the uprising in the first place (such as where the people seek to replace a monarchic constitutional order with a democratic one). One must also question whether it is appropriate for the international community to act as a *de facto* constitutional court through the process of recognition. In terms of human rights, it can also be difficult to determine the normative 'credentials' of non-state armed groups, noting they will usually have little to no track record of human rights adherence. In the case of Libya and Syria, both government and opposition forces were subject to allegations of human rights and IHL violations during the respective conflicts. This meant recognising states de-recognised the incumbent governments on the basis of their human rights records, only to recognise

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[175] This can also be linked to the right of self-determination, see for example *International Covenant on Civil and Political Rights* Art 1(1).

[176] Roth, n158, 396.

groups that were also under a cloud of abuse allegations in the hope they would perform better in peacetime.

This is not to suggest that normative considerations have no place in international law or international relations more broadly. In cases such as Libya and Syria where authoritarian regimes with poor human rights records are challenged by citizens seeking democracy and accountability for abuses, the international community is not mandated by international law to stand by and do nothing. Even if circumstances are such that the incumbent government remains (for the time being at least) in effective control, precluding recognition of an opposing non-state armed group, states may take lawful measures to encourage adherence to international human rights norms, domestic constitutional norms or adoption of more democratic modes of government. Where the international community acts collectively, such as through the UN Security Council, there is a very broad range of forcible and non-forcible options that can be adopted and implemented lawfully. Where collectivism fails, unilateral measures are also possible, though the options are fewer. These may include diplomatic measures, such as lobbying, 'naming and shaming', or the suspension of diplomatic relations, or economic measures, such as suspension of foreign aid. In the longer term, the responsibility to protect doctrine provides a framework for the prevention of, and response to, the gravest human rights abuses which may also help to prevent the kinds of civil conflicts that give rise to these issues.[177]

Therefore, the author submits that it is in the interests of the international community to maintain the effective control doctrine as the primary criterion for recognition governments, particularly in the case of civil war. It is worth re-emphasising here that, under international law, a government exists as a question of fact and its existence generates certain legal rights and obligations regardless of recognition by other states. States are not obligated to recognise any foreign governments, or to maintain formal relations with them, so it remains open to them not to engage with regimes of which they do not support or approve. There are a number of lawful methods available to states to bring pressure to bear on unconstitutional, undemocratic or human rights-poor governments.

The existing law is sufficiently restrictive as to prevent interventions against less powerful states, but limited exceptions may exist to enable the international community to address egregious injustices. While it is not always effective due to the veto powers of a few states,

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[177] See 2005 World Summit Outcome, particularly paras 138-9.

the broad discretion of the UN Security Council provides the international community with a mechanism to respond collectively when the domestic instability of a state threatens international peace and security. The international community is also willing to demonstrate some flexibility in difficult cases, as interventions against governments that offend core normative considerations are generally not condemned in practice.

5. Conclusions

The issue of recognition of governments is usually straightforward, and most states do not explicitly recognise governments. However, during protracted civil wars the status of government may be contested, forcing external states to decide which authority possesses the sovereign authority of the state. In such cases, international law regarding recognition, non-intervention and the prohibition of the threat or use of force applies.

Although the recognition of governments is a political act, it has legal consequences. As such, it is proper that the broad discretion of states to take political action is tempered by international legal rules. Specifically, states' discretion to recognise governments is limited by the principle of non-intervention. If the recognition of an entity as a government is not supported by the fact of effective control, the act of recognition will constitute an unlawful intervention in the domestic affairs of the target state. Effective control is primarily evidenced by independent control of the territory of the state and the acquiescence or obedience of the population. The legitimacy doctrine, in various invocations, has periodically come into and fallen out of fashion, but has not reached the same status under international law as the doctrine of effective control and is thus unlikely to protect a recognising state from a claim of intervention.

The principle of non-intervention is a norm of customary international law that applies to coercive action over matters that states are entitled to decide freely upon. There is no doubt that states are entitled to freely determine their own political system, including methods of transfer of power. Premature recognition is regarded as inherently coercive as it can help to effect a change in government. It also enables the recognising state to provide material support to the opposition that would otherwise (and more properly) be unlawful. In some circumstances, premature recognition may imply a willingness to use force if the incumbent government does not step down. In such a case, the prohibition of the threat of force, as found in Article 2(4) of the UN Charter, may be violated.

Identifying how the law of recognition and the principle of non-intervention interact is particularly fraught when government status is contested in a protracted civil war. Two recent examples were provided to illustrate the issues. In 2011, France, the UAE, UK and US recognised the opposition NTC as the government of Libya before it had definitively established effective control over the state. At the time the NTC was recognised by these states, the government still controlled a substantial proportion of Libyan territory, and the opposition was only able to hold territory with foreign assistance. Despite this, recognition of the NTC was justified on the basis of the incumbent Qadhafi government's poor human rights record and the democratic assurances of the opposition. Recognition by these four states was thus premature, and an unlawful act of intervention against Libya as it was a coercive act pertaining to an issue of sovereign concern. The author submits that, in the circumstances, premature recognition of the NTC also constituted a prohibited threat of force, as the recognising states were clear in their objective of regime change and had demonstrated their willingness to use force against the government.

Similarly, Qatar recognised the opposition SOC of Syria while the civil war was underway, in which many different groups sought to overthrow the incumbent government. At the time, forces linked to the SOC did not hold the majority of territory, and popular support appeared to be split between the government and several different opposition groups. This was an unlawful intervention in the political affairs of Syria, and possibly an unlawful threat of force. The political recognition of the SOC by the Gulf states and France could also be considered an unlawful act of intervention in the circumstances, as it was a coercive act intended to assist or incite the overthrow of the government. Again, these acts were justified on the basis that the incumbent government forfeited its legitimacy by committing large-scale human rights violations on its own people. This stance may be questioned however, noting there have been persistent allegations of human rights and IHL abuses by various opposition groups throughout the war.

Despite recognising states occasionally inferring that normative considerations somehow supersede the effective control doctrine, this position has no clear basis in international law. It remains unlawful to recognise an armed opposition during a civil conflict. The international legal system, anchored in the UN Charter, emphasises the sovereign equality of states and, by extension, the principle of non-intervention. These principles are regarded as foundational principles of the contemporary system of international law because they crucial to the maintenance of international peace and security. Without them, small, less powerful states would be at the mercy of larger, more powerful states. This is particularly relevant in the case of civil

war. The international community has unanimously, and repeatedly, committed to refrain from intervening in civil conflicts or seeking to violently overthrow each others' governments. There is thus no general unilateral right of states to intervene in the affairs of other states on the basis of normative considerations, including by recognising a non-state armed group as government.

While there is a growing body of state practice in which democratic governments overthrown against the popular will (as perceived a broad cross-section of the international community) are recognised despite not possessing effective control over the state, this does not equate to a general rule of international law. Situations of civil war can be distinguished from *coups* or the refusal of an incumbent government to cede power following the loss of a democratic election. Further, the substance of international law—particularly custom—is not found in exceptional acts, but in routine obedience to accepted norms. The vast majority of states continue to act in accordance with the doctrine of effective control, especially where government status is contested in civil war. Normative considerations may go to a state's decision to engage in diplomatic or other relations with a state, and states may seek to lawfully influence (but not coerce) adherence to various norms through diplomatic and economic measures. But these actions do not change the fact that under international law the regime in effective control of the state is the government.

It must be acknowledged that adherence to the doctrine of effective control can generate perverse outcomes, particularly as it is blind to the means by which the governing party came to power. Criticism that the doctrine endorses a 'might makes right' approach is reasonable. However, allowing states to base recognition decisions on normative considerations could result in even more arbitrary outcomes. External states may not be in a position to evaluate the domestic situation of the relevant state. It should not be left to others to determine the popular will within another state, or judge the legitimacy of that will. It is not desirable for the international community to act as a *de facto* constitutional court, interpreting and evaluating whether transfers of power are legitimate *vis a vis* another state's constitution. It can also be difficult to establish the human rights credentials of opposition groups that have not necessarily borne human rights duties in the past.

There are always complex dynamics at play in situations of civil war, and it can be difficult to determine the 'right' response. It is submitted that in regards to the recognition of governments, the best approach is to maintain the primacy of the traditional and pragmatic emphasis on effective control. While this may result in the recognition of regimes that do not comply

with international norms such as democracy and human rights, it does protect the integrity of the international legal system as a whole. Emphasising the principle of non-intervention may on occasion have the effect of shielding malevolent actors, but the integrity of the international legal system and international rule of law depend on the legal rights of all states being protected equally.[178] Despite the primacy of the effective control doctrine, it is important to remember that states are not obligated to recognise governments at all, nor are they required to engage with other states. There are other measures that can be invoked, collectively or unilaterally, to encourage conformity with international norms such as democracy, constitutionalism and human rights. For the sake of international peace and security, it is paramount that states adopt lawful measures to encourage adherence to international norms, as the consequences of unilateral or arbitrary action, however well intended, may be even less desirable.

[178] Roth, n164.

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