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## Recognition of the Libyan National Transitional Council

By Stefan Talmon



### Introduction

Recognition of the Libyan National Transitional Council (“NTC”) by over a dozen States has recently made the headlines and, as it seems, given rise to considerable confusion. According to media reports, Germany became the 13th nation to “recognize” the NTC following Australia, Britain, France, Gambia, Italy,

Jordan, Malta, Qatar, Senegal, Spain, the United Arab Emirates (“UAE”), and the United States.<sup>[1]</sup> The news was widely reported by major networks, each describing Germany’s announcement differently.<sup>[2]</sup> However, none of these statements is legally correct. The German Foreign Minister, during a visit to the rebel stronghold of Benghazi, had simply stated: “The national council is the legitimate representative of the Libyan people.”<sup>[3]</sup> The word recognition was not used at all. So, was this recognition? And if it was, what does it signify as a matter of international law?

### The Meanings of Recognition

The term “recognition,” when used in the context of recognition of governments, rebels or *de facto* authorities in international law, may have several different meanings. It may indicate the recognizing State’s willingness to enter into official relations with a new group, or manifest its opinion on the legal status of the group, or both. Alternatively, recognition may simply be a means of expressing political support or approval.

The subject has been complicated by the use of several variants of the term, such as “*de facto* recognition,” “diplomatic recognition,” “*de jure* recognition,” and “full recognition.” Like “recognition,” these terms can be given meaning only by establishing the intention of the State using them within the factual and legal context of each case. “Diplomatic recognition” is usually used to indicate a willingness to enter into formal diplomatic relations (i.e., exchange ambassadors, establish embassies, and so forth).

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### ORGANIZATIONS OF NOTE

Recognition is a unilateral act performed by the recognizing State's government. It may be express or implicit. The act of recognition does not necessarily require the use of the terms recognition or recognize. Recognition is more than a word. A State may simply say that it acknowledges, regards, considers, deals with, or treats a group in a certain capacity, in order to convey its recognition.[4]

## Recognition as What?

The imperative question in legal terms is not recognition per se but recognition as what. In 1943, British Prime Minister Churchill wrote to President Roosevelt: "What does recognition mean? One can recognize a man as an Emperor or as a Grocer. Recognition is meaningless without a defining formula." [5] A rebel group such as the NTC can be recognized in many different legal capacities—as insurgents, belligerents, the (sole) legitimate representative of the Libyan people, the local *de facto* government of parts of Libya, or as the government of Libya. The capacity in which a group is recognized may also change over time.

### 1. Recognition as Representative of the Libyan People

France became the first country to recognize the NTC as "the legitimate representative of the Libyan people." [6] Similar recognition was accorded by Qatar, the Maldives, Gambia, Senegal, Turkey, Jordan, Spain, and Germany. Such recognition is reminiscent of the recognition of the Palestine Liberation Organization and other national liberation movements in the 1970s as the "sole legitimate representative" of their respective peoples. In these cases, it was made clear that this action was not meant to signify recognition as the government of a prospective Palestinian State and did not include the exercise of any sovereign rights.

Recognition of a rebel group as the legitimate representative of the people, as a rule, confers several advantages: (1) it legitimizes the struggle of the group against the incumbent government; (2) it provides international acceptance; (3) it allows the group to speak for the people in international organizations and represent it in other States by opening "representative offices"; and (4) it usually results in financial aid. In the case of the NTC, there may be an additional advantage. In Resolution 1970 (2011), the United Nations Security Council decided that all Member States shall freeze all funds and other financial assets owned or controlled by members of the Qaddafi family and expressed its intention to ensure that those frozen assets should at a later stage be made available to and for the benefit of the people of Libya. [7] If such assets were to be made available to the Libyan people in the future, they could be channeled through their legitimate representative—the NTC.

Recognition of the NTC as the legitimate representative of the Libyan people leaves intact the international legal status of the incumbent Qaddafi government as the government of Libya. While a State cannot have two *de jure* governments at the same time, it can have a *de jure* government and a local *de facto* government or a representative of the State's people. This explains why States, which have recognized the NTC as legitimate representative of the Libyan people, can nevertheless continue to recognize the diplomatic role and status of Qaddafi-appointed ambassadors and accept his representatives in international organizations as the representatives of Libya. As long as the Qaddafi government continues to be the government of Libya, it remains the only authority that can

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legally dispose of Libyan State assets abroad (as opposed to frozen assets of the Qaddafi family), can accredit ambassadors, and validly transfer title to State-owned natural resources such as oil and gas.

## 2. Recognition as Representative of Libya

Recognition statements are normally drafted with great care in the legal adviser's department of foreign ministries, and it usually makes a difference whether a State recognizes the NTC as the representative of the "Libyan people" or as the representative of "Libya." The latter would usually indicate some capacity of representing the State. Italy's statement on April 4, 2011, that it recognized the NTC "as the country's only legitimate interlocutor on bilateral relations,"<sup>[8]</sup> thus seems to have gone beyond the recognition by France and others. This was confirmed later when Italy declared that it recognized the NTC "as holding governmental authority in the territory which it controls."<sup>[9]</sup> France also upgraded its recognition, stating that from now on it considered the NTC as "the only holder of governmental authority in the contacts between France and Libya and its related entities."<sup>[10]</sup> This, in effect, amounted to recognition of the NTC as the government of Libya. On June 12, the UAE also recognized the NTC "as a legitimate Libyan government." The country's foreign minister explained: "Based on this, UAE's dealing with the TNC [Transitional National Council] will take the form of a government-to-government relationship in all issues relating to Libya."<sup>[11]</sup>

Recognition of the NTC as *de jure* government of Libya automatically entails the de-recognition of the Qaddafi government. States that recognize the NTC as the government of Libya have to hand over to it the Libyan embassy; end the diplomatic status of Qaddafi-appointed diplomats, if requested to do so by the NTC; and grant it access to Libyan State assets situated in their territory, subject to the restrictions imposed by United Nations Security Council.<sup>[12]</sup> These States have to close their embassies in Tripoli or end any arrangements for the protection of their interests by other diplomatic missions, but may open an embassy or a consulate in NTC-controlled Benghazi. They may lawfully buy Libyan State-owned oil from the NTC and provide it with assistance, subject to the United Nations imposed sanctions against Libya. They will usually also object to the representation of Libya in international organizations by delegations from Tripoli. De-recognition of the Qaddafi government may, however, have negative side effects, such as absolving Qaddafi and his followers from their international responsibilities as the government of Libya.

### Legality of Recognition of the NTC

While politics and law are closely intertwined in the question of recognition, this does not mean that recognition, in the sense of expressing an opinion on the legal status of a rebel group, is a purely political act within the unfettered discretion of the recognizing State. In the 1960s, the Organization of African Unity's Coordinating Committee for the Liberation of Africa developed certain standards, albeit vague, for the recognition of national liberation movements fighting the incumbent government as the sole legitimate representative of a people which, it is suggested, may equally be applied to the recognition of the NTC.<sup>[13]</sup> Thus, for the NTC to be recognized as the legitimate representative of the Libyan people, it must be the United Action Front against the Qaddafi government, i.e., it must be broadly based, have effective following and popular support throughout Libya, and must have reasonable fighting strength. The fact that the Qaddafi government may have lost its

legitimacy and the right to govern by committing crimes against humanity against its own people does not make these standards obsolete. Any recognition of a rebel group lacking broad-based support among the people as the legitimate representative of that people would, some will argue, constitute an illegal interference in the internal affairs of Libya which may, ultimately, give rise to State responsibility.<sup>[14]</sup> While it is tempting to sympathize with and even root for the NTC, the breadth of its support among the Libyan people is not well understood. Any special or singular status for the NTC, it may be argued, may exclude other political actors in Libya with some claim to legitimacy. This may explain why so far many States, including the United States and the United Kingdom, have shied away from granting the NTC recognition as the legitimate representative of the Libyan people.

The main criterion in international law for the recognition of a rebel group as the government of a State is its exercise of effective control over the State's territory. As long as the NTC's control is limited to the eastern parts of Libya, with the capital Tripoli and western parts remaining under the control of Qaddafi forces, it may be recognized only as the local *de facto* government of the territory which it controls. Any recognition of the NTC as the *de jure* government of the State of Libya, while Qaddafi forces are still in control of the capital, seems premature and would arguably constitute an illegal interference in the internal affairs of Libya.

### **The Politics of Recognition**

As in the first four months of the Libyan civil war the factual and political situation in Libya was uncertain, States were very reluctant to grant any legally relevant recognition to the NTC. This led States to invent a new form of recognition of the NTC as a "legitimate and credible interlocutor," "legitimate political interlocutor," or "valid interlocutor" for the Libyan people. These terms apparently signified that the NTC was an "official negotiating counterparty," a "relevant partner for dialogue," a "discussion partner," or a "credible voice for the Libyan people."

Unlike recognition as the representative of a people or as a government, such recognition is without significance in international law. This becomes clear from the fact that several States, whose policy is to recognize only States, not governments (such as Australia, Canada, Germany, Netherlands, and United Kingdom), had no problem with granting such "recognition." The main purpose of this action seems to have been to express various degrees of political support. While in March 2011 the NTC was initially recognized only as "a" political interlocutor among others, or simply as interlocutors, this denomination was later changed to "the" political interlocutor. The change from indefinite to definite article was interpreted by the United States in June as a signal that its support for the NTC was "deepening." However any such recognition was still limited "to this interim period."<sup>[15]</sup>

States that recognize the NTC as the legitimate interlocutor for the Libyan people have sent "special representatives," "diplomatic representatives," "diplomatic envoys," or "special ambassadors" to, and established permanent liaison offices in, Benghazi. While these representatives may have a diplomatic function, they do not have formal diplomatic status (which would require the NTC's recognition as the government of Libya).<sup>[16]</sup> Thus, the French Foreign Minister told reporters at a conference in London on March 29 that the French diplomat sent to the NTC was "not an ambassador because we have not formally

recognised a state through the Transitional National Council.”<sup>[17]</sup> States have also invited the NTC to open a “representative office” in their capital. Such offices are, however, not diplomatic missions and, for that reason, do not enjoy diplomatic status as of right. States are, however, free to grant NTC’s representatives working in their territory certain diplomatic privileges and immunities. In most countries, the grant of diplomatic privileges and immunities to non-diplomats requires special legislation. This may explain why the United Kingdom and others have so far granted the NTC only certain “administrative concessions” on minor issues such as access to parking spaces. Unless States recognize the NTC as the government of Libya, they cannot allow the representative of the NTC to set up office in the existing Libyan embassy without violating their obligations towards Libya under the Vienna Convention on Diplomatic Relations.<sup>[18]</sup> Indeed, several of the States recognizing the NTC as the legitimate interlocutor for the Libyan people continue to recognize the Qaddafi government as the government of Libya and host its diplomatic agents.

## Conclusion

On April 27, 2011, the U.S. ambassador to Libya replied to the question of why the United States, unlike France and others, had not yet recognized the NTC: “Recognition remains a legal and an international obligations issue . . . [W]e’re a very legalistic country, and we’re looking at all the different complexity of . . . that question.”<sup>[19]</sup> Considering that recognition is an area of international relations in which law and politics are closely interwoven, it is somewhat surprising how prominent a role international law plays. Despite being generally sympathetic to the cause of the NTC, sustained calls for its recognition by leading politicians and civil society groups, and only a remote chance of any recognition decision ever being challenged in a domestic or international court, the United States and other countries have been very conscious of the international law implications of a decision to formally “recognize” the NTC in any legally relevant manner and, so far, have—it is submitted, correctly—refrained from doing so.

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## Endnotes:

[1] Germany recognized the NTC on June 13, 2011. See *Germany Recognizes Rebel Leadership in Libya*, DEUTSCHE WELLE, June 13, 2011, <http://www.dw-world.de/dw/article/0,,15150852,00.html> (all internet sites last visited on June 13, 2011).

[2] See *Germany Recognises Libya Rebels as Sole Government*, BBC NEWS, June 13, 2011, <http://www.bbc.co.uk/news/world-europe-13753422>; *Germany Gives Diplomatic Recognition to Libyan Rebels*, VOICE OF AMERICA, June 13, 2011, <http://www.voanews.com/english/news/middle-east/Germany-Gives-Diplomatic-Recognition-to-Libyan-Rebels-123756209.html>; and Judy Dempsey, *Germany Officially Recognizes Libyan Rebel Government*, N.Y. TIMES, June 13, 2011, <http://www.nytimes.com/2011/06/14/world/europe/14libya.html>.

[3] See *Germany Recognises Libya Rebels as Sole Government*, *supra* note 2.

[4] On the meanings of recognition and its variants, see STEFAN TALMON, *RECOGNITION OF GOVERNMENTS IN INTERNATIONAL LAW* 21-111 (1998).

[5] FOREIGN RELATIONS OF THE UNITED STATES, Vol. II, at 173.

[6] See Statements Made by the Ministry of Foreign and European Spokesperson (Mar. 10, 2011), <http://www.ambafrance-us.org/spip.php?article989#5>.

[7] See S.C. Res. 1970, ¶¶ 17, 18, U.N. Doc. S/RES/1970 (Feb. 26, 2011), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/245/58/PDF/N1124558.pdf?OpenElement>. That the frozen assets should, at a later stage, as soon as possible be made available to and for the benefit of the people of Libya was affirmed in S.C. Res. 1973, ¶ 20, U.N. Doc. S/RES/1973 (Mar. 17, 2011); <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/268/39/PDF/N1126839.pdf?OpenElement>.

[8] Press Release, Italian Ministry of Foreign Affairs, Focus-Libya: Frattini, the NTC is Italy's Only Interlocutor (April 4, 2011), [http://www.esteri.it/MAE/EN/Sala\\_Stampa/ArchivioNotizie/Approfondimenti/2011/04/20110404\\_FocusLibia\\_frattini\\_Cnt.htm](http://www.esteri.it/MAE/EN/Sala_Stampa/ArchivioNotizie/Approfondimenti/2011/04/20110404_FocusLibia_frattini_Cnt.htm).

[9] *Italy Gives Libyan Rebels Greater Recognition, Opens Consulate*, BBC MONITORING EUROPE-POLITICAL, June 1, 2011, available at Lexis Nexis News Service.

[10] Press Release, French Ministry of Foreign and European Affairs, Libyan National Transitional Council: Statement by Alain Juppé (June 7, 2011), [http://www.diplomatie.gouv.fr/en/country-files\\_156/libya\\_283/lybian-national-transitional-council-statement-by-alain-juppe-07.06.11\\_15850.html](http://www.diplomatie.gouv.fr/en/country-files_156/libya_283/lybian-national-transitional-council-statement-by-alain-juppe-07.06.11_15850.html).

[11] See *UAE Recognises Libya's TNC*, WAM-EMIRATES NEWS AGENCY, June 12, 2011, <http://www.wam.ae/servlet/Satellite?c=WamLocEnews&cid=1289993951803&p=1135099400124&pagename=WAM%2FWamLocEnews%2FW-T-LEN-FullNews>.

[12] See S.C. Res. 1973, ¶ 19, *supra* note 7.

[13] See *General Report of the Goodwill Mission of the Coordinating Committee for the Liberation of Africa to the Angolan Nationalists*, Léopoldville, July 13-18, 1964, reprinted in JOHN A. MARCUM, *THE ANGOLAN REVOLUTION VOL. 2: EXILE, POLITICS AND GUERRILLA WARFARE* (1962-1976), Appendix 2, at 304-307 (1978).

[14] See Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, princ. 2, U.N. Doc. A/RES/2625 (Oct. 24, 1970), [http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/RES/2625\(XXV\)&Lang=E&Area=RESOLUTION](http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/RES/2625(XXV)&Lang=E&Area=RESOLUTION).

[15] Press Release, U.S. State Department, Press Availability, Hillary Rodham Clinton, Secretary of State, Emirates Palace Hotel, Abu Dhabi, United Arab Emirates (June 9, 2011), <http://www.state.gov/secretary/rm/2011/06/165351.htm>.

[16] The head of a diplomatic mission must receive the agrément of the government of the receiving State, and the appointment of diplomatic agents must be notified to the Ministry of Foreign Affairs of the receiving State; see Vienna Convention on Diplomatic Relations arts. 4, 10, Apr. 18, 1961, 500 U.N.T.S. 95 (entered into force Apr. 24, 1964), [http://untreaty.un.org/ilc/texts/instruments/english/conventions/9\\_1\\_1961.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf).

[17] *Prise de fonctions d'un représentant de la France à Benghazi*, FRANCE24, Mar. 29, 2011, <http://mobile.france24.com/fr/20110329-ambassadeur-francais-antoine-sivan-prise-fonctions-benghazi-libye-diplomatie-kadhafi> (translation provided).

[18] See Vienna Convention on Diplomatic Relations, *supra* note 16, art. 22.

[19] Press Release, U.S. State Department, The Political Situation in Libya, Special Briefing, Gene Cretz, Ambassador to Libya (Apr. 27, 2011), <http://www.state.gov/p/nea/rls/rm/161878.htm>; see also U.S. State Department, Daily Press Briefing, Statement by Mark C. Toner, Acting Dept. Spokesman (May 12, 2011), <http://www.state.gov/r/pa/prs/dpb/2011/05/163280.htm> (stating that “[i]n terms of recognition, we continue to look at that . . . I know there are legal hurdles to it.”).