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Cover picture: Musa, a 25-year-old Kurdish marksman, stands atop a building as he looks at the destroyed Syrian town of Kobane on the Turkish frontier on 30 January 2015, after Kurdish forces recaptured the town from the jihadists on 26 January of that year.

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This has the added benefit of the reports being fully searchable, thereby better serving the needs of scholars and practitioners.

Part I
Contemporary Armed Conflicts and
Their Implications for International
Humanitarian Law

Chapter 1

Government Recognition and International Humanitarian Law Applicability in Post-Gaddafi Libya

Jose Serralvo

Abstract This article explores the relationship between the issue of government recognition and the applicability of international humanitarian law. Using the existence of competing governments in post-Gaddafi Libya as a case study, the article re-examines the meaning of the term “government” under public international law and proposes a distinct reading of what it means to be an effective government. It then considers how effectiveness can be used to differentiate between a *de jure* and a *de facto* government, and the international legal obligations of these two types of entities. Finally, the article applies this framework to the realm of the laws of war. In particular, it analyses how the existence of competing governments affects the scope of application of Additional Protocol II to the Geneva Conventions and the possible existence of an international armed conflict.

Keywords Government recognition • *De facto* government • *De jure* government • Effectiveness • Legitimacy • International humanitarian law • Scope of application • Additional Protocol II to the Geneva Conventions • Third state intervention • Government consent • International armed conflict

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The views expressed in this article reflect the author’s opinions only.

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“La république française ne veut point être reconnue;
elle est en Europe ce que le soleil est sur l’horizon:
tant pis pour qui ne veut pas la voir et ne veut pas en profiter”.

Napoléon Bonaparte¹

“What does recognition mean?”

One can recognize a man as an emperor or as a grocer.

Recognition is meaningless without a defining formula”.

Winston Churchill²

1.1 Introduction: The Deceitful Death of Recognition

For over half a century, ever since Lauterpacht and Chen published their seminal monographs on recognition under international law,³ scholars have paid little consistent attention to this issue, “with more recent work tending merely to integrate some more contemporary examples into old conceptual frameworks”.⁴ This trend arguably reached its peak in the late 1980s, when a renowned publicist solemnly declared “the death of recognition”.⁵ According to Henkin, the figure had “created havoc in the world of fact” and—although lingering in diplomatic jargon—it did not “belong in the language of law”.⁶ In his view, long academic debates on who could be recognized, and by whom, and as what, made little or no sense. The argument was simple: “An entity that is in fact a State is a State”⁷; “A *régime* that governs in fact is a Government and must be treated as such”.⁸

¹ “The French Republic no more needs recognition in Europe than the sun requires to be recognized in the horizon: too bad for those who do not want to see it and do not want to take advantage of it”. Thibaudeau 1828, p. 291.

² Kimball 1987, p. 334.

³ Lauterpacht 1947; Chen 1951.

⁴ Roth 2001, p. 121.

⁵ Henkin 1990, p. 30.

⁶ *Ibid.*, pp. 30–31.

⁷ *Ibid.*, p. 31.

⁸ *Ibid.*, p. 32.

And if recognition of States was an expendable corpse, recognition of governments was little more than an irritating phantom. In the second half of the twentieth century, with a view to avoiding this cumbersome *ignis fatuus*, more and more States kept pledging that they would stop recognizing governments as part of their foreign policy.⁹ For instance, in April 1980, the British government made the following announcement to the House of Lords:

[...] we have decided that we shall no longer accord recognition to Governments. We have [...] concluded that there are practical advantages in following the policy of many other countries in not according recognition to Governments.¹⁰

The USA, France or Australia was just some of the dozens of countries that decided to go down the same road.¹¹ In fact, the approach kept gaining momentum in the following couple of decades, to the point of prompting the European Union to make a similar declaration in 1999:

The Union recalls that it does not recognise governments, and even less political personalities, but States, according to the most common international practice.¹²

The main reason for this policy was always straightforward. The public has generally seen recognition of a particular government as a synonym for approval of the entity in question. Every time a change of *régime* came about after a bloody insurgence or had a doubtful human rights record, the recognizing government inevitably saw itself in an embarrassing situation.¹³ Needless to say, States also saw a policy of non-recognition of governments as a cautious way to avoid hasty decisions and the risk of positioning themselves on the side of the wrong contender.

Despite its much-anticipated advantages, the policy was never implemented. Talmon has convincingly demonstrated that all this rhetoric “signif[ie]d only a change in the method of according recognition, not the abolition of the recognition as such”.¹⁴ States adopting this view simply resorted, as a rule, to the so-called implicit recognition of the new authorities in power, i.e. they started dealing with such authorities as though they were indeed the government.

The alleged (and deceitful) death of recognition—and all the gibberish surrounding it—has resulted in at least two major conundrums. First, nobody seems

⁹ Talmon 1998, pp. 3–6; Doswald-Beck 1984, p. 371: “it is no longer the habit of States to officially recognize governments”.

¹⁰ Cited in Warbrick 1981, pp. 574–575.

¹¹ Charlesworth 1991; Galloway 1978, pp. 124–125. Galloway (rightly) concludes that the US policy on abandoning recognition has been only partially respected: “In cases in which the United States does not perceive major policy interests at stake, it will [...] deemphasize the entire recognition process. In the few instances in which the United States perceived major political interests at issue, the United States has shown a tendency to revive the use of recognition to pursue policy goals”.

¹² European Commission 1999, p. 60.

¹³ Shaw 2014, p. 331.

¹⁴ Talmon 1998, p. 3.

to be paying attention to the fact that the very same States who (voluntarily) pledged to stop recognizing governments have kept doing it not only implicitly, as shown by Talmon, but also *explicitly*. To give one recent example, in March 2016, the Ministers of Foreign Affairs of France, Germany, Italy, UK and USA and the High Representative of the European Union for Foreign Affairs and Security Policy “express[ed their] full support to [Libya’s] Government of National Accord” and recognized it “as the sole legitimate government in Libya”.¹⁵

Second, and more importantly, the meaningful influence of recognition upon certain branches of international law, and above all upon international humanitarian law (IHL), has gone largely unnoticed. This is both surprising and incomprehensible. Difficulties in the domain of government recognition usually arise either during or in the immediate aftermath of an armed conflict—a domain mostly governed by IHL.¹⁶ It is therefore difficult to understand why so little has been written on the way in which recognizing a particular government (or not), as well as the mere existence of competing claims to represent the State, may affect the scope of application of the laws of war. Arguably, this gap is partly due to the failure of IHL scholars to address international law as a coherent and holistic corpus—or to the failure of publicists to see IHL beyond a final, self-reliant chapter at the end of their manuals. In reality, since IHL is but a branch of international law, clearly defining pivotal concepts, such as what it means to be a government, should be a precondition for conducting an accurate IHL analysis. The situation in post-Gaddafi Libya is just one among many recent examples in which this type of cross-fertilization is needed.

The purpose of this article is to shed some light on the question of how—in view of the existence of competing governments claiming to represent the State—certain IHL rules apply to the different armed conflicts in Libya. In particular, it aims at clarifying whether any of the non-international armed conflicts in Libya is governed by Additional Protocol II to the Geneva Conventions¹⁷ and whether any of the multiple instances of foreign intervention in the country, e.g. by Egypt or the USA, amounts to an international armed conflict. Before that, Sect. 1.2 will present an overview of the current factual situation in Libya. It will provide some key information to understand the fracture between its two main governments: the House of Representatives and the General National Council. In addition, the role of two other key actors, the Government of National Accord—the *third* entity

¹⁵ Ministers of Foreign Affairs of France, Germany, UK, Italy, USA and EU 2016.

¹⁶ Although other branches of international law also apply in armed conflict, IHL is considered *lex specialis*. See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, (2004) ICJ Rep 136, para 106.

¹⁷ As it will be shown later, the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) (Additional Protocol II) only applies when governmental armed forces fight with an organized armed group. Hence, elucidating who is the government becomes a question of paramount importance.

currently claiming to represent the State of Libya—and the Islamic State Group, will be briefly outlined. Section 1.3 will focus on the meaning of the word “government”, as well as on the main criterion to understand who the government of a State is at a given moment, namely the level of effectiveness of the body in question. Although effectiveness is also the cornerstone of one of the many doctrines on recognition, it is submitted that seeing effectiveness as the main constitutive element of a government—and not just as one among many doctrines on recognition—will contribute to clarify the current situation in Libya. Then, Sect. 1.4 will address the main aspects of recognition under public international law, including its legal implications and the difference between *de jure* and *de facto* government recognition. In this sense, the article will put forward an innovative approach that should help IHL practitioners and scholars when it comes to dealing with the existence of competing governments. Finally, the last part of this study will analyse the issue of IHL applicability to the clashes taking place in Libya, paying particular attention to the two questions mentioned above: the scope of application of Additional Protocol II and the possibility to trigger an international armed conflict through foreign involvement.

1.2 A Tale of Two (or Three) Governments

1.2.1 *House of Representatives v. General National Congress*

Since the death of Colonel Gaddafi in August 2011, Libya’s instability has been increasing steadily. The proliferation of a myriad of militias, with either conflicting or overlapping agendas, has often been paraded as both cause and consequence of the absence of a central authority in the country.¹⁸ Be it as it may, the truth is that lack of a strong political and security environment led not only to successive failures in all transitional governance arrangements, but also to a multilayered armed confrontation.¹⁹ Clashes reached a new peak in May 2014, when General Haftar’s self-proclaimed Libyan National Army launched Operation Dignity, a military campaign against Islamist militias in Benghazi.²⁰ According to Haftar, his objective was to “eliminate extremist terrorist groups”.²¹ However, and although a

¹⁸ UN High Commissioner for Refugees (2015) Position on Returns to Libya: Update I. <http://www.refworld.org/docid/561cd8804.html>. Accessed 21 March 2016, paras 2–3.

¹⁹ Ibid.

²⁰ El Gomati A (2016) Khalifa Haftar: Fighting terrorism or pursuing political power? <http://www.aljazeera.com/indepth/opinion/2014/06/khalifa-hifter-operation-dignity-20146108259233889.html>. Accessed 21 March 2016.

²¹ Anderson J (2015) The Unravelling. <http://www.newyorker.com/magazine/2015/02/23/unravelling>. Accessed 21 March 2016.

detailed account of all the motives underlying today's violence in Libya goes well beyond the scope of this article, it should be noted that the reasons are much more complex than the Islamist v. Anti-Islamist oversimplified dichotomy offered by the media. General Haftar's coalition includes, *inter alia*, ex-Gaddafi officials that participated in the 2011 uprising but mistrust the revolutionary leadership and Gaddafi loyalists who blame Islamist groups for the rampant disorder and bad governance.²² Their main common feature is not so much their Anti-Islamism, but rather their strong opposition to the marginalization of civil servants from the former *régime*, as proposed by the Political Isolation Law.²³ On the other hand, the Islamist faction—which includes the Muslim Brothers and the Salafis—also comprises entrepreneurs and other minority groups. This bloc has two unifying threads: the fact of having fought together in 2011 and their desire to transform the State inherited from Gaddafi.²⁴ Only some of the groups within the Islamist faction actively advocate for the imposition of Islamic law across Libya—among them is Ansar-al Sharia.

In June 2014, legislative elections led to the creation of a new parliament in Libya, the House of Representatives (HoR), which was set to replace the previous General National Congress (GNC). Nationalist and liberal factions won the majority of seats, while the Islamist groups were reduced to approximately 30 seats (out of a total of 200).²⁵ However, only 18% of the electorate turned out to the polls.²⁶ This result fuelled on-going clashes between Islamist groups and the so-called pro-secular militias. Prime Minister al-Thani and his cabinet moved to Tobruk in August 2014, after Islamist militias took control of Tripoli.²⁷ Despite the turmoil, the HoR, i.e. the new parliament, was inaugurated that very same month in Tobruk. Together, the HoR and the cabinet of Prime Minister al-Thani constitute the bulk of the eastern (or Tobruk-based) government. From mid-2014 until late 2015, al-Thani's administration was often referred to as “the internationally recognized government”. Indeed, at least for a (hard to circumscribe) period of time, it enjoyed recognition by a majority of States, including the USA, most European countries and the members of the Organization of Petroleum Exporting Countries (OPEC).²⁸ It was also the entity representing Libya at the United Nations (UN).

²² International Crisis Group 2016, pp. 7–8.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ Xinhua (2014) Libya publishes parliamentary election results. <http://www.turkishweekly.net/news/169449/-libya-publishes-parliamentary-election-results.html>. Accessed 21 March 2016.

²⁶ Al-Jazeera (2014) Libyans mourn rights activists amid turmoil. <http://www.aljazeera.com/news/middleeast/2014/06/libyans-mourn-rights-activist-amid-turmoil-2014626161436740827.html>. Accessed 21 March 2016.

²⁷ Jackson L (2014) Sudanese minister meets rival Libyan factions in mediation bid. <http://www.reuters.com/article/2014/11/10/us-libya-security-sudan-idUSKCN0IU11820141110>. Accessed 21 March 2016.

²⁸ Fox S (2014) OPEC picks a side in Libya's Battle of the Governments. <http://www.middleeast-eye.net/news/opec-picks-side-libya-s-battle-governments-1012742004>. Accessed 21 March 2016.

Since October 2014, General Haftar, as well as the like-minded Zintani Brigades (operating in the West of the country), began referring to themselves as Libya's official army.²⁹ In January 2015, the Tobruk-based government publicly recalled General Haftar for army duty, thus recognizing his "Libyan National Army" as the official armed forces of Libya.³⁰ However, some analysts continued to see Haftar's forces as just "another militia, rather than the official security forces loyal to the State".³¹

Dismissing the results of the June 2014 elections, a coalition of Islamist militias, dominated by the Misrati Brigades and regrouped under the name of Libya Dawn, launched a successful attack against Tripoli. Political figures linked to the Misrati Brigades reconvened the GNC, the predecessor to the HoR, which appointed Omar al-Hassi as Prime Minister of a new government, based in Tripoli.³² Turkey, Qatar and Sudan recognized al-Hassi's government as the legitimate representative of the State of Libya.³³ At least four other countries, namely Jordan, Kuwait, Belarus and Serbia, also expressed at some point their support for the GNC.³⁴ During the period examined in this article, i.e. June 2014 to March 2016, neither of the two governments exercised effective control over the whole of the territory. That said, some analysts seem to believe that "the theoretically 'illegitimate' government of the GNC control[led] far more territory, money and arms than its partially 'legitimate' opponents in the HoR".³⁵

²⁹ Pack J (2014) Situation Report: Libya. <http://tonyblairfaithfoundation.org/religion-geopolitics/country-profiles/libya/situation-report>. Accessed 21 March 2016.

³⁰ Laessing U (2015) Libya recalls former general Haftar for army duty. <http://www.reuters.com/article/2015/01/19/us-libya-security-idUSKBN0KS1SH20150119>. Accessed 21 March 2016. The government of Tobruk went a step further in its endorsement when it officially named General Haftar head of the Libyan army: BBC News (2015) Libya names anti-Islamist General Haftar as army chief. <http://www.bbc.com/news/world-africa-31698755>. Accessed 21 March 2016.

³¹ Oxford Analytica Daily Brief (2015) Libya beheadings strengthen anti-Islamist agenda. <https://dailybrief.oxan.com/Analysis/DB197699/Libya-beheadings-strengthen-anti-Islamist-agenda>. Accessed 21 March 2016.

³² The Economist (2015) Libya's civil war: That it should come to this. <http://www.economist.com/news/briefing/21638123-four-year-descent-arab-spring-factional-chaos-it-should-come>. Accessed 21 March 2016. In March 2015, Khalifa al-Ghawi replaced al-Hassi as acting Prime Minister of the GNC.

³³ The Economist (2015) Libya: The next failed State. <http://www.economist.com/news/leaders/21638122-another-front-global-mayhem-emerging-not-helped-regional-meddling-and-western>. Accessed 21 March 2016.

³⁴ Middle East Eye (2014) Libya recalls 7 ambassadors for recognizing Islamist government. <http://www.middleeasteye.net/news/libya-recalls-7-ambassadors-recognising-islamist-government-1969719678#sthash.3zIOmpNC.dpuf>. Accessed 21 March 2016.

³⁵ Pack, above n 29. Nevertheless, at least some of the abundant cartography that has proliferated to try to circumscribe the areas of influence of each of the two governments has given the upper hand to the Tobruk administration. See, e.g., BBC News (2015) Libya urges UN to lift arms embargo to tackle IS. <http://www.bbc.com/news/world-middle-east-31523944>. Accessed 21 March 2016.

To complicate matters even further, the Supreme Court ruled in November 2014 that an amendment made in March 2014 to Libya's transitional constitution was illegal. The amendment had paved the way for the June 2014 elections, which were consequently declared void by the Supreme Court.³⁶ In other words, the Supreme Court, located in Tripoli, stripped the Tobruk-based HoR of its main claim to constitutional legitimacy.

The internal political outlook has also been encumbered by foreign involvement in the country. Egypt and the United Arab Emirates reportedly launched air strikes against weapon depots in Tripoli in August 2014.³⁷ Moreover, Egypt's air force attacked Islamist positions in Benghazi in October 2014.³⁸ None of those attacks were openly admitted by either of the involved authorities. Nonetheless, in February 2015, after the Islamic State Group (ISG) beheaded 21 Egyptian Coptic Christians, Egypt publicly acknowledged that it had launched air strikes against this group both in Derna and in Sirte. Egyptian warplanes hit ISG's training bases and weapons stockpiles, killing over 60 ISG fighters.³⁹ Although the Tobruk-based government gave its consent to this foreign intervention, the Tripoli-based GNC "strongly condemn[ed] the Egyptian aggression", considering it "an assault against Libyan sovereignty".⁴⁰ The USA has also launched a series of air strikes inside Libya, including one against an Al-Qaeda-affiliated target in June 2015⁴¹ and at least two against the ISG (one in November 2015 and one in February 2016).⁴²

And just when it seemed that things could not get more convoluted, a new actor emerged and an old one started gaining importance.

³⁶ The Guardian (2015) Libya Supreme Court rules anti-Islamist parliament unlawful. <http://www.theguardian.com/world/2014/nov/06/libya-court-tripoli-rules-anti-islamist-parliament-unlawful>. Accessed 21 March 2016.

³⁷ Pack, above n 29.

³⁸ Ibid.

³⁹ Malsin J and Stephen C (2015) Egyptian Air strikes in Libya Kill Dozens of Isis militants. <http://www.theguardian.com/world/2015/feb/16/egypt-air-strikes-target-isis-weapons-stockpiles-libya>. Accessed 21 March 2016.

⁴⁰ LBC Group (2015) Tripoli-based parliament says Egyptian strike assault on sovereignty. <http://www.lbcgroup.tv/news/201401/libyan-air-force-commander-says-at-least-40-milita>. Accessed 21 March 2016.

⁴¹ Schmitt E (2015) U.S. Airstrike in Libya Targets Planner of 2013 Algeria Attack. http://www.nytimes.com/2015/06/15/world/middleeast/us-airstrike-targets-qaeda-operative-in-libya.html?_r=0. Accessed 21 March 2016.

⁴² Stewart P (2015) U.S. Wage Air Strike on Islamic State Leader in Libya. <http://www.reuters.com/article/us-usa-libya-strike-idUSKCN0T315920151114>. Accessed 21 March 2016; Raghavan S, Ryan M and Murphy B (2016) U.S. Strike on Libya Camp Escalates Campaign Against Islamic State. https://www.washingtonpost.com/world/reports-airstrikes-target-suspected-islamic-state-base-in-libya/2016/02/19/e622c12a-d6f7-11e5-be55-2cc3c1e4b76b_story.html. Accessed 21 March 2016.

1.2.2 Government of National Unity and the Rise of the Islamic State Group

In November 2014, the black flags of the ISG started waving over public buildings in the Libyan city of Derna—barely 160 kilometres away from Tobruk. At that time, it was estimated that the group had approximately 800 fighters in Libya.⁴³ Many of them had arrived directly from Syria and Iraq, but the majority belonged to former jihadist networks that were present in the area and had decided to pledge allegiance to the ISG.⁴⁴ Since then, the group has made steady gains in the country. At the time of writing, in March 2016, it is believed to be in control of a stretch of territory to the east of Sirte of more than 250 kilometres and to possess training camps, storage areas, fortifications and operational cells all around the country, including in its two largest cities—Tripoli and Benghazi.⁴⁵ Moreover, the ISG now commands an estimated 5000 fighters⁴⁶ and has launched hit-and-run operations against forces and infrastructure associated with both the HoR and the GNC governments—including some of Libya's major oil ports.⁴⁷

The threat of the ISG, in turn, led Western leaders and the United Nations Support Mission in Libya (UNSMIL) to push ardently for the creation of a government of national unity reassembling the executives of Tripoli and Tobruk.⁴⁸ A political solution to the governance crisis seemed suddenly as the only viable alternative to put an end to the resolute expansion of the ISG. This logic was based on a two-prong assumption. First, a unified government would be able to devote its military capabilities to fighting the jihadists, instead of focusing on fighting each other. Second, a unified government would also facilitate any future foreign intervention. Although—as mentioned above—some countries have already carried out air strikes inside the country, the European Union has repeatedly stated that it

⁴³ Cruickshank P, Robertson N, Lister L and Karadsheh J (2014) ISIS Comes to Libya. <http://www.cnn.com/2014/11/18/world/isis-libya/>. Accessed 21 March 2016.

⁴⁴ Ibid.; Banco E (2015) ISIS Establishes Stronghold in Derna. <http://www.ibtimes.com/isis-establishes-stronghold-derna-libya-1721425>. Accessed 21 March 2016.

⁴⁵ El Amrani I (2016) How Much of Libya Does the Islamic State Control? <http://foreignpolicy.com/2016/02/18/how-much-of-libya-does-the-islamic-state-control/>. Accessed 21 March 2016; UN Security Council (2016) Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2016/182, paras 24–29.

⁴⁶ The Economist (2016) The Next Front Against the Islamic State. <http://www.economist.com/news/middle-east-and-africa/21690057-libyas-civil-war-has-given-caliphate-fresh-opportunities-western-military>. Accessed 21 March 2016.

⁴⁷ Ibid. See also El Amrani, above n 45.

⁴⁸ BBC News (2015) Libya UN Envoy Leon Urges Unity Government Within Weeks. <http://www.bbc.com/news/world-africa-33872355>. Accessed 21 March 2016; Reuters (2015) France, Italy See Need to Stop Islamic State in Libya. <http://www.reuters.com/article/us-libya-security-italy-france-idUSKBN0TF13820151126>. Accessed 21 March 2016; Stephen C (2015) Western Leaders Urge Libyan Factions to Allow Bombing of ISIS Fighters. <http://www.theguardian.com/world/2015/dec/19/libya-urged-unity-airstrikes-against-islamic-state-isis>. Accessed 21 March 2016.

would not intervene on Libyan soil until it obtained the consent of a government of national unity.⁴⁹

Against this backdrop, it is easy to understand why in September 2015, after more than a year of failed negotiations, the United Nations Security Council (UNSC) called for “the immediate formation of a Government of National Accord”.⁵⁰ Three months later, on December 17, an agreement was signed in Morocco between “representatives” of the HoR and the GNC. The so-called Government of National Accord was formed as a result of this agreement. Nevertheless, both of the rival parliaments in Tripoli and Tobruk have subsequently rejected the outcome of the negotiations and “insisted that the signatories represented only themselves”.⁵¹ This did not prevent the UN from appointing a Presidential Council which took upon itself the task of naming a third government, led by Prime Minister Sarraj and based in Tunis.⁵² Hence, Libya has now three governments: the Tobruk-based government linked to the HoR that came out of the June 2014 elections, the Tripoli-based government linked to the GNC that contested the June 2014 elections and the Tunis-based Government of National Accord that came out of a controversial deal brokered by the UN. Unlike the latter, both the HoR and the GNC control a substantive part of the national territory. They both have their own parliament, their own set of ministries and their own courts and exercise a certain degree of law enforcement within their respective spheres of influence. Not only is the Government of National Accord an ineffective entity in a foreign territory, but the latest developments seem to indicate that their ambitions to establish their headquarters in Tripoli will not be fulfilled anytime soon. Khalifa al-Ghawi, the new Prime Minister of the Tripoli-based government, has threatened to arrest the members of the Government of National Accord if they set foot in the Western part of the country.⁵³ And yet, despite having been born in exile and enjoying zero effectiveness at the domestic level, the European Union and the USA have opted for recognizing the Government of National Accord as the “sole legitimate government” of Libya.⁵⁴

⁴⁹ Middle East Eye (2015) Western Nations Plot Fresh Military Intervention in Libya. <http://www.middleeasteye.net/news/western-nations-plot-fresh-military-intervention-libya-say-military-sources-619439313#sthash.OAOIBMPG.dpuf>. Accessed 21 March 2016; Zampano G (2016) Italy Wary of Libyan Intervention. <http://www.wsj.com/articles/italy-wary-of-libyan-intervention-1457530385>. Accessed 21 March 2016.

⁵⁰ UN Security Council (2015) Resolution 2238 (2015), UN Doc. S/RES/2238, para 2.

⁵¹ The Economist, above n 46.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ministers of Foreign Affairs of France, Germany, United Kingdom, Italy, USA and EU 2016.

Interestingly, the UN not only pushed for the creation of the Government of National Accord, but it also backed its recognition in a rather unprecedented manner.⁵⁵ Needless to say, throughout the last few decades, the organization has endlessly striven to bring civil wars to an end by bolstering one of the contenders.⁵⁶ However, it is arguably the first time in which the UN has initially acknowledged the legitimacy of one of two parties to a dispute, in this case the Tobruk-based HoR,⁵⁷ it has then moved to “artificially impos[ing]”⁵⁸ the creation of a third party, i.e. the Government of National Accord, and has finally ended up disregarding the alleged legitimacy of the entity it had initially endorsed. A UNSC resolution approved on 23 December 2015 can be mentioned as an example of the latter. The resolution only uses the word “government” when referring to the Government of National Accord. The HoR, which until September 2015 had been considered the effective government of Libya by that same organ, was suddenly

⁵⁵ The UN has traditionally held the view that the organization itself “does not possess any authority to recognize either a new State or a new government of an existing State” and that “the linkage of representation in an international organization and recognition of a government is a confusion of two institutions which have superficial similarities but are essentially different”, see UN Security Council (1950) Letter Dated 8 March 1950 from the Secretary-General to the President of the Security Council Transmitting a Memorandum on the Legal Aspects of the Problem of Representation in the United Nations, UN Doc. S/1466, pp. 2–3. There is no systematic study of the practice of the UN with regard to the recognition of governments. In fact, the only scholar who has conducted any in-depth research into the link between the UN and the notion of recognition decided to focus on recognition of States only, consciously avoiding the issue of recognition of governments (see Dugard 1987, pp. 2–6). Nevertheless, in the case of Libya, the UN has arguably gone beyond its usual policy and acted as assertively as—and in some cases even more assertively than—its Member States. Suffice to recall that the Special Representative of the Secretary-General and head of UNSMIL, Martin Kobler, has himself called “on the international community to work with the Government of National Accord as the sole legitimate authority and to support the GNA in assuming its responsibilities to exercise sole and effective oversight over Libyan financial institutions”, see UN Support Mission in Libya (2016) Martin Kobler Welcomes Libyan Political Dialogue Statement: Libyans Eager to Have Strong Accord Government. <https://unsmil.unmissions.org/Default.aspx?ctl=Details&tabid=3543&mid=6187&ItemID=2099517>. Accessed 21 March 2016.

⁵⁶ For recent examples thereof, see the UNSC “support for the legitimacy of the President of Yemen, Abdo Rabbo Mansour Hadi”—UN Security Council (2015) Resolution 2216 (2015), UN Doc. S/RES/2216, Preamble; or its recognition of President Ouattara in Ivory Coast—UN Security Council (2011) Resolution 1975 (2011), UN Doc. S/RES/1975, para 1.

⁵⁷ See, e.g., UN Security Council (2015) Resolution 2213 (2015), UN Doc. S/RES/2213—apart from the explicit reference to the Tobruk-based HoR in the preamble, all calls to cooperate with the Libyan government univocally refer to the eastern administration in Tobruk.

⁵⁸ Pack J (2016) Forging a Libyan Anti-IS Coalition Should Trump a Unity Government. <http://www.middleeasteye.net/columns/forging-libyan-anti-coalition-should-trump-unity-government-1330204379>. Accessed 21 March 2016.

out of the picture and demoted to being a petty component of a generic “all parties in Libya”.⁵⁹

At the time of writing, it is simply impossible to foresee how the political (and military) situation will evolve. Whatever the future might bring, it will hardly leave external observers more bewildered than the current state of affairs. Plenty of questions surround the ill-matched triumvirate. Is Libya a three-government State with no effective representative? Or are all the three entities simultaneously representing the State? And who was in charge in 2015, before the creation of the Government of National Accord? To answer these questions, it is first necessary to delve into the ordinary and legal meanings of the word “government”.

1.3 Effectiveness and the Question of Being (or not Being) a Government

Any attempt to define the notion of government would be incomplete if it did not start by setting it apart from the notion of State. According to the most widely accepted definition, a State is a person of international law which “possess[es] the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States”.⁶⁰ Thus, a government is a prerequisite for statehood.⁶¹ In other words, a government is one of the constitutive elements of a State. But once a State is established, it continues to have international legal personality even if one of these elements, and in particular the existence of a government, is temporarily absent.⁶² A civil war, a foreign occupation or a natural disaster might all disrupt the effectiveness of the government, but this does not by itself indicate the extinction of the State under international law. On the contrary, there is “a strong presumption”⁶³ that these changes do not put an end to statehood, not even when the country undergoes

⁵⁹ UN Security Council (2015) Resolution 2259 (2015), UN Doc. S/RES/2259, paras 5 and 18. It is true that in October 2015, the mandate of the HoR came to an end, see, e.g., Pack J and Klass B (2015) Talking With the Wrong Libyans. http://www.nytimes.com/2015/06/15/opinion/talking-with-the-wrong-libyans.html?_r=0. Accessed 21 March 2016. But in view of the fact that this mandate had been contested since the very beginning, not least of all by the Libyan Supreme Court, it is hard to believe that the October deadline had anything to do with this change of policy.

⁶⁰ Montevideo Convention on the Rights and Duties of States, opened for signature 26 December 1933, 164 LNTS 19 (entered into force 26 December 1934), Article 1.

⁶¹ Crawford 2006, p. 33.

⁶² Jennings and Watts 1992, pp. 122–123; Crawford 2006, p. 33; Evans 2010, p. 222; Brownlie 1999, p. 71.

⁶³ Crawford 2006, p. 33.

extended periods of internal turmoil, as it happened, for example, in Lebanon during the 1970s.⁶⁴ In the same vein, there have been certain cases in which a State has come into being despite the absence of a government *ab initio*. Both Crawford and Evans cite, by way of illustration, the case of the Democratic Republic of the Congo, which became an independent State in 1960 despite the absence of anything resembling an effective government.⁶⁵ When Belgium granted its independence to the former Belgian Congo (now known as the Democratic Republic of the Congo), the country was in turmoil and lacked an effective administration. However, the international community had no doubt as to its statehood. Crawford concludes therefrom that “the requirement of ‘government’ is less stringent than has been thought, at least in particular contexts”.⁶⁶

Scholars unanimously mention independence as another of the basic prerequisites of statehood. However, the way in which they incorporate the idea of independence varies in each case. Brownlie and Shaw portray independence as the essence of—or an equivalent to—being able to enter into relations with other States.⁶⁷ If a State really possesses the capacity to engage with other States, it is presumed to also have a sufficient level of independence to make its own decisions without unduly succumbing to external pressures. Oppenheim and Evans, on the other hand, see independence as an essential appendix to normal governmental attributes; a government is not really a government if it is not independent.⁶⁸ Both interpretations are analogous. In the first case, independence is seen as a hallmark of statehood and in the second one as one of the distinguishing marks of a government. What seems clear is that it is not enough that a government exists. It must also be able to exercise autonomous authority and make its own decisions without the interference of foreign actors.

The other key element of a government is its level of effectiveness. Being an “effective” entity is seen as a *condition sine qua non* to be considered the government of a State.⁶⁹ Although authors also differ on the exact meaning of effectiveness, it is generally believed that a government is effective when it enjoys the habitual obedience of the bulk of the population and is able to maintain law and order and establish basic institutions.⁷⁰ Paraphrasing Weber, some authors under-

⁶⁴ Evans 2010, p. 222.

⁶⁵ *Ibid.*, pp. 221–222; Crawford 2006, pp. 56–57.

⁶⁶ Crawford 2006, p. 57.

⁶⁷ Brownlie 1999, pp. 71–72; Shaw 2014, p. 147.

⁶⁸ Jennings and Watts 1992, p. 122 (emphasis in the original): “be a *sovereign* government [...] independence all around, within and without the borders of the country”; Evans 2010, p. 221: “independent government”.

⁶⁹ Shaw 2014, pp. 328–332; Evans 2010, pp. 221–223; Brownlie 1999, pp. 90–91; Kaczorowska 2010, p. 222; Ferraro and Cameron 2016, para 234: “Under international law, the key condition for the existence of a government is its effectiveness”.

⁷⁰ Jennings and Watts 1992, p. 150; Ferraro and Cameron 2016, para 234; Crawford 2006, p. 59; Lauterpacht 1970, p. 324. Lauterpacht adds that this obedience is “not necessarily willing”.

stand effectiveness as having the “power to assert a monopoly over the exercise of legitimate physical violence within the territory”.⁷¹ The latter is obviously not strictly met in many situations, including in the event of an internal armed conflict, where at least one of the parties will be an organized armed group interfering with the State’s monopoly on physical violence. International law does not establish specific requirements as to the nature and extent of governmental control over the territory.⁷² As mentioned above, a government might remain a government even if it is unable to impose law and order in *certain* regions and—logically—even if it does not enjoy the habitual obedience of the *whole* of the population.

It is impossible to provide a closed list of archetypical governmental activities. As referred to by the International Law Commission, “what is regarded as ‘governmental’ depends on the particular society, its history and traditions”.⁷³ That said, it is important to note that—even though some authors tend to overlook it—whatever the functions of a government, they cannot be circumscribed to the national territory. On the contrary, “[e]ffectiveness is the ability to exert State functions internally and externally, i.e. in relations with other States”.⁷⁴ Keeping this in mind is of paramount importance in understanding the issue of government recognition. As a general rule, States participate in the benefits of international law through the medium of its government.⁷⁵ One could even say that a government is the main and “for most purposes the only” organ by which the State acts in international relations.⁷⁶ Representing the State outside its borders is thus a governmental function *par excellence*. It is possible to imagine a *Grundnorm* attributing the ordinary administration of the country to well-defined territorial entities. In such a State, the daily tasks of a central government might have little to do with ensuring law and order, or running basic institutions throughout the land, or asserting a monopoly over violence. And yet, the central government would always retain a major role—and often an exclusive one—in dealing with other States. Governmental effectiveness must always be seen from both an internal and an external perspective. These two aspects constitute the basic binomial of sovereignty. At the same time, the existence of external sovereignty presupposes—and is based upon—the presence of internal one. If a central government does not have

⁷¹ Evans 2010, p. 221.

⁷² Crawford 2006, p. 59.

⁷³ UN General Assembly (2001) Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, UN Doc. A/56/10, p. 43.

⁷⁴ Ferraro and Cameron 2016, para 234. See also Quoc Dinh 2002, p. 416 (emphasis in the original): “Exigence de l’effectivité gouvernementale.—L’effectivité signifie ici la capacité réelle d’exercer toutes les fonctions étatiques, y compris le maintien de l’ordre et de la sécurité à l’intérieur, et l’exécution des engagements extérieurs”.

⁷⁵ Lauterpacht 1970, p. 309.

⁷⁶ Crawford 2006, pp. 33 and 60.

any authority over the population it claims to represent, it cannot speak on behalf of the State in the international scene.⁷⁷

In conclusion, a government is the representative of a State. It must be independent and effective. Effectiveness includes not only the possibility to operate inside the territory, but also the capacity to represent the State outside its own borders *vis-à-vis* other States. Unfortunately, things are not always that clear. Problems immediately arise when two or more entities claim to represent the same State, or when a partially ineffective entity claims to be a government. It is in this context that the notion of government recognition reveals all its significance.

1.4 Government Recognition in International Law

1.4.1 Recognition: Meaning, Nature and Theories

Recognition simply means the acceptance by the recognizing State of the existence of a particular entity or situation.⁷⁸ A State can recognize another State, or a government, or a belligerent, or an insurgent group.⁷⁹ In principle, a government should be recognized as the representative of a State when it is effective—in the way it has been described in the previous section. However, when it comes to the recognition of governments, the first thing to keep in mind is that it is often a conspicuously political act, based on political considerations.⁸⁰ Many States have not even pretended to hide the political nature of the act. When in 1948 Syria questioned the recognition of Israel by the USA, the US representative to the UN answered as follows:

I should regard it as highly improper for me to admit that any country on earth can question the sovereignty of the United States of America in the exercise of that highly political act of recognition [...] Moreover, I would not admit here, by implication or by direct

⁷⁷ Fauchille 1923, p. 225 (emphasis in the original): “L’autonomie ou souveraineté intérieure est la base, le support de la souveraineté extérieure. Le deuxième ne saurait exister sans le première [...] L’une est la condition *sine qua non* de l’autre. Une association d’hommes qui ne jouerait pas dans son sein du pouvoir souverain, qui n’exercerait pas sur elle-même la souveraineté intérieure, l’*imperium* et la *jurisdictio*, manquerait de l’individualité nécessaire pour posséder et exercer la souveraineté extérieure”.

⁷⁸ Shaw 2014, p. 329; Peterson 1997, p. 1.

⁷⁹ Peterson 1997, p. 1.

⁸⁰ Shaw 2014, p. 329: “Political considerations have usually played a large role in the decision whether or not to grant recognition”; Evans 2010, pp. 238–240; Verhoeven 1975, p. 65: “D’un examen sommaire de la pratique internationale, se dégagent d’emblée deux constatations élémentaires concernant les reconnaissances de gouvernement: d’abord qu’elles sont statistiquement les plus nombreuses, ensuite qu’elles sont *a priori* extrêmement politisées”.

answer, that there exists a tribunal of justice or of any other kind, anywhere, that can pass judgement upon the legality or the validity of that act of my country.⁸¹

The political nature of recognition might open the door to lack of transparency, uncertainty and arbitrariness. That is one of the reasons why scholars like Henkin have questioned the alleged legality of recognition and argued instead that if a *régime* actually governs, it must simply be treated as a government.⁸² Authors have also held that States cannot claim “unlimited discretion” when it comes to making recognition decisions. If a government does not exercise effective control, the assumption goes, and recognition should not be granted.⁸³ But there are examples galore to the contrary.⁸⁴ One does not need to look back at the decade-long recognition of Chiang Kai-Shek’s administration as the government of mainland China to understand that the effectiveness rule—i.e. granting recognition merely on the basis of effectiveness—is loaded with exceptions. The initial recognition of President Ouattara in Côte d’Ivoire in 2011, the continuous endorsement of President Hadi in Yemen in 2015 or the recent recognition of the Tunis-based Government of National Accord as the “legitimate government” of Libya in 2016 clearly demonstrate that the effectiveness criterion is not always heeded—and sometimes even glaringly disregarded. And whether one likes it or not, this seemingly discretionary act has substantive legal consequences. It affects, for instance, the diplomatic and consular status of the agents of the recognized government, its access to foreign courts, the possibility to benefit from existing treaty arrangements, the respect of immunities from foreign prosecution, the establishment of trade relations or the right to claim State funds on deposit in the recognizing State.⁸⁵

The Libyan Investment Authority (LIA) provides a good example of the latter. With assets valued at an estimated \$67 billion, the LIA was created in 2006 to manage the income from Libya’s oil wealth.⁸⁶ In January 2014, the chairman of

⁸¹ Cited in UN Security Council, above n 55, p. 3. The US refers here to the discretionary nature of the act of recognizing a State and not a government. Interestingly, although both acts are opened to a great margin of interpretation, scholars have usually considered that the recognition of States is subjected to more objective criteria—and it is hence less political—than the recognition of governments (see Shaw 2014, p. 328; Gamboa and Fernández 2006, p. 119): “Así como en el reconocimiento de los Estados nuevos la cuestión política tiene gran importancia y mueve esencialmente a los demás Estados que reconocen, en el reconocimiento de Gobiernos influye en mayor medida el interés político”.

⁸² Henkin 1990, pp. 31–33.

⁸³ Peterson 1997, p. 35.

⁸⁴ Note that the following examples refer to instances in which more or less ineffective entities have been recognized as the government of a State. This does not necessarily mean that they were the real government. As it will be reiterated later, being recognized as the government is not always a synonym for being the actual government.

⁸⁵ Menon 1990, p. 157.

⁸⁶ Delaney J (2016) Libya’s Sovereign Fund May Hold Key to Country’s Civil War. <http://www.institutionalinvestor.com/article/3518495/investors-sovereign-wealth-funds/libyas-sovereign-fund-may-hold-key-to-countrys-civil-war.html>. Accessed 21 March 2016.

this wealth fund filed a suit in the UK against Goldman Sachs and Société Générale, claiming that both banks were selling complex instruments that had resulted in the LIA losing billions of dollars.⁸⁷ In October 2014, the Tobruk-based HoR appointed a new chairman to preside over the fund. Throughout 2015, two different chairmen—one backed by the government of Tobruk and the other one backed by its rival in Tripoli—fought for control of the LIA. Finally, in March 2016, a justice at the High Court in London adjourned the question saying it would be “premature” for him to make a decision.⁸⁸ According to Justice William Blair, he received a letter from the British government claiming that it expected Libyan authorities to clarify the leadership of the fund in a matter of weeks.⁸⁹ Regardless of the final result of this case, it is interesting to note that the Foreign and Commonwealth Office claimed in its letter that it had not recognized either the government of Tobruk or that of Tripoli. Instead, British authorities claimed that its “highest priority” was to support the UN-backed Government of National Accord.⁹⁰ The lawyer of the chairman appointed by Tobruk, in turn, argued that “the unity government does not yet exist and so the Tobruk government is the rightful government for now”. Without entering (yet) into the details of who is the effective government, it is important to emphasize at this stage that even if/when recognition is primarily based on political considerations, it can—and does—give rise to concrete legal consequences.

However, the fact that the discretionary act of recognition triggers a series of legal consequences does not necessarily mean that the whole fate of the government in question is subjected to the whim of a third State. The nature of recognition is key in understanding this. Indeed, it is the nature of recognition that will allow us to propose a basic theory thereof—one that will hopefully elude the obscurity of most of the existing doctrines.⁹¹

⁸⁷ Ibid.

⁸⁸ Clark S and Coker M (2016) U.K. Judge Adjourns Tug-of-War Case Over Libyan Sovereign Wealth Fund. <http://www.wsj.com/articles/u-k-judge-adjourns-tug-of-war-case-over-libyan-sovereign-wealth-fund-1457366498>. Accessed 21 March 2016.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Brownlie 1986, pp. 627–628: “In the case of ‘recognition’, theory has not only failed to enhance the subject but has created a *tertium quid* which stands, like a bank of fog on a still day, between the observer and the contours of the ground which calls for investigation. With rare exceptions, the theories on recognition have not only failed to improve the quality of thought but have deflected lawyers from the application of ordinary methods of legal analysis”; Verhoeven 1975, p. 65: “[I]l n’empêche que la fréquence et la politisation des reconnaissances de gouvernement ont alimenté les incessantes controverses doctrinales qui se nourrissent de leurs ambiguïtés”. This author agrees with the previous statements. It is submitted that if we focus on the different theories of recognition, we will not be able to see the forest for the trees. As it can be deduced from Sect. 1.3 and as will be further clarified later on, this article simply adheres to the doctrine of effectiveness. For an analysis of the main doctrines, from Tobar to Estrada, from effectiveness to legitimism, from the new democratic legitimism to *de factoism*, see, e.g., Menon 1990, pp. 164–176; Roth 2001, pp. 124–199; Peterson 1997, pp. 51–85.

Scholars have discussed in length whether recognition is constitutive or declaratory. The constitutive theory dates back to Hegel. Its proponents argue that it is the act of recognition by other States that actually creates a new State or a new government.⁹² According to this theory, a new government would not become a new government once it is effective, but rather when others consider that it is effective and decide to endorse it.⁹³ The declaratory view, on the other hand, holds that States and governments exist as soon as they become a reality, i.e. as soon as they fulfil the conditions of statehood or become an effective government.⁹⁴ Both theories are partially true—and partially false. Shaw best summarizes this in his analysis of the *Tinoco* arbitration case:

[W]here the degree of authority asserted by the new administration is uncertain, recognition by other States will be a vital factor. But where the new government is firmly established, non-recognition will not affect the legal character of the new government [...]. Taft's view of the nature of recognition is an interesting amalgam of the declaratory and constitutive theories, in that recognition can become constitutive where the factual conditions (i.e. the presence or absence of effective control) are in dispute, but otherwise is purely declaratory or evidential.⁹⁵

Neither Shaw nor the arbitrator of the *Tinoco* case seems to provide a straightforward legal explanation for the “amalgam of the declaratory and constitutive theories”. The author of this article would like to put forth a simple argument in favour of this mixed theory. Under international law, a government becomes a government once it is effective⁹⁶—all other theories of recognition do not seem to

⁹² Lauterpacht 1947, pp. 38–41.

⁹³ Ibid. See also Shaw 2014, pp. 322–333.

⁹⁴ As mentioned in the introduction and earlier in this section, Louis Henkin is one of the supporters of this theory (see Henkin 1990, pp. 31–32).

⁹⁵ Shaw 2014, pp. 329–330. See also UN 2006, p. 381: “The non-recognition by other nations of a government claiming to be a national personality, is usually appropriate evidence that it has not attained the independence and control entitling it by international law to be classed as such. But when recognition *vel non* of a government is by such nations determined by inquiry, not into its *de facto* sovereignty and complete governmental control, but into its illegitimacy or irregularity of origin, their non-recognition loses something of evidential weight on the issue with which those applying the rules of international law are alone concerned [...] Such 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”.

⁹⁶ Kelsen 1941, p. 615. See also Menon 1990, p. 159: “The principle of effectiveness of control is a fundamental concept and uncontroverted. Recognition of a government which is not in effective control of the territory would constitute premature recognition and would be considered intervention with the domestic affairs of the State”.

hold ground.⁹⁷ As mentioned in the previous section, being effective means having the ability to exert State functions both internally and externally. For the most part, a government can only operate as a government outside its borders if other States have recognized it. But if a government is fully effective internally, then it is a government no matter what. (Henkin is right, and the declaratory theory becomes unobjectionable.) Lack of recognition might affect the relationship between the non-recognizing State A and the effective government of the State B, but it will not affect the status of the latter under international law. On the other hand, if a government is only partially effective internally, or if there are two or more entities claiming to be the government, then the act of recognition could become constitutive. This is so because by receiving the support of a critical mass of States, a government that is not fully effective internally gains in much needed external effectiveness. In such a scenario, recognizing the partially ineffective government (or one of the competing entities claiming to be a government) can help to tip the

⁹⁷ Current State practice seems to indicate that the legality of a government or its constitutional continuity (the so-called legitimacy doctrine) is not decisive criteria when it comes to recognition (see, e.g., Lauterpacht 1947, pp. 102–106, and in particular p. 105): “Its application is clearly illogical in a world in which all governments owe their origin to a revolutionary event in a more or less distant past”. There are simply too many instances of recognition of unconstitutional governments as to pretend that legitimacy is anything else but a tool to underpin the State’s own discretion. Furthermore, there are good reasons to repudiate the legitimacy doctrine. First, it can lead to the interference of foreign powers in the internal affairs of the State. Second, foreign powers will not always have the means to pass judgement upon the constitutional order of another State. The case of Libya shows this in a very clear manner: Who was the legitimate government in 2015? The Tobruk-based HoR stemmed from democratic elections, but the Supreme Court declared the elections void. Foreign powers would hardly have the means, nor the legal expertise, to ascertain whether the Supreme Court of Libya is right or wrong—in which case, basing the act of recognition of either the government of Tobruk or that of Tripoli on their respective levels of legitimacy becomes simply impossible. Third, the doctrine of legitimacy allows foreign powers to arbitrarily decide whether a government is a government on the basis of its own values. The fact that some authors have argued that the Nazis were not the government of Germany during Second World War or that the Taliban were not the government of Afghanistan in the late 1990s is a good example of how the doctrine of legitimacy can be used to manipulate factual realities. One might think that not recognizing an effective but “illegitimate” government (in the absence of a treaty on collective recognition, what is or is not legitimate is simply left opened to interpretation) is actually favourable for the population of the State. Some authors have even advocated for the use of non-recognition of governments as a means to boycott regimes with a lousy human rights records (see Berlin 2009; Auron 2013). But the truth is that using effectiveness as the ultimate criterion for recognition is the best way to ensure that the international order is respected. The fact of denying recognition to a fully effective government can lead to counterproductive and undesirable results, especially in two interrelated domains of great importance, namely the use of force and the treatment of detainees during armed conflict. For instance, it can lead a foreign power to arbitrarily intervene in another State under the assumption that the effective government is not actually the government—i.e. the entity that can consent or oppose to the foreign intervention in the first place. The latter, in turn, could not only violate the prohibition against the use of force (*jus ad bellum*), with all its human consequences, but might also pave the way for legal fictions that could end up depriving human beings of some of their entitlements under IHL (*jus in bello*). We will come back to this in the last part of this article.

balance in its favour. In other words, the endorsement of a sufficient number of third States can help to *constitute* it as the government of the State if its internal effectiveness is equivocal.⁹⁸ Two well-known examples can help to clarify this situation.

In the late 1990s, the Taliban were in control of 90% of Afghanistan.⁹⁹ Despite their level of internal effectiveness, only three States recognized them as the legitimate government of Afghanistan: Saudi Arabia, Pakistan and the United Arab Emirates.¹⁰⁰ In this case, any act of recognition (or non-recognition) is merely declaratory. It has an impact on the possibility to establish diplomatic relations (or not) with the Taliban, but it does not change the fact that the Taliban were in fact the government of Afghanistan for the purposes of international law.¹⁰¹ On the other hand, in the 2000s, Somalia had no internally effective government. For most of the decade, both the Transitional National Government (TNG) (2000–2004) and the Transitional Federal Government (TFG) (2004–2012) were circumscribed to certain neighbourhoods of Mogadishu and some other major cities. Al-Shabab, an organized armed group, controlled large parts of the territory. In addition, Somaliland—a northern region—claimed to be independent and was *de facto* administered by a different authority. And yet, the international community considered that first the TNG and then the TFG were the legitimate governments of Somalia. If one had only taken into account the level of internal effectiveness, it would seem that Somalia either was a failed State with no government—as perhaps it was—or was in fact governed by Al-Shabab. But when internal effectiveness is doubtful, either because one government is partially ineffective at the internal level, or because there are two or more entities fighting over the control of the State, then recognition can become constitutive. This is so because the act of recognition allows the recognized government to be more effective from an external point of view. Nevertheless, it must be reiterated that external recognition by itself would *a priori* be insufficient to argue that an entity with zero internal effectiveness is indeed the government—which is one of the reasons why it is debatable whether Somalia was a failed State (i.e. one with no government at all) during at least part of the 2000s, when its internal effectiveness was close to non-existent.¹⁰²

There is no clear-cut formula to quantify the impact of recognition in each particular case. Suffice to say that recognition might contribute to consolidate—or maintain—a precarious government, provided that the recognizing State “is not

⁹⁸ Of course, this interpretation assumes that some internal effectiveness exists in the first place.

⁹⁹ Bellal, Giacca and Casey-Maslen 2011, p. 49.

¹⁰⁰ Ibid.

¹⁰¹ This is demonstrated, *inter alia*, by the fact that the immense majority of scholars and practitioners classified the US-led invasion of Afghanistan in October 2001 as an international armed conflict. See, e.g., Bellal et al. 2011, pp. 51–52; see also the analysis made by Milanovic and Hadzi-Vidanovic on this same case: Milanovic and Hadzi-Vidanovic 2013, pp. 279–280.

¹⁰² Khayre 2014, pp. 208–233.

acting in a merely opportunistic way”.¹⁰³ In the case of two (or more) competing entities, recognition by a critical mass of States might tip the balance in favour of one of them. The opposite also holds true: when one of two (or more) competing entities is not completely effective internally and has not been recognized by a critical mass of States—i.e. it is not effective externally either—then there seems to be no legal reason to see that entity as a government. An example of this particular scenario is provided by the recent situation in Yemen. In February 2015, the Houthis took control over the Yemeni capital, Sana’a, dissolved the parliament and installed a transitional government.¹⁰⁴ However, despite administering—or partially administering—the capital, the Houthis were far from exercising effective control inside the country. Since they enjoyed zero international recognition, their contested internal effectiveness was paired with an absolute absence of external effectiveness. In view of such circumstances, the Houthis’ transitional government could hardly be considered a government in the sense of public international law. The real question—which this author would not dare to answer—was whether President Hadi remained the representative of Yemen, a conclusion possibly underpinned by its external effectiveness, or whether Yemen was in fact a failed State due to President Hadi’s very limited effectiveness inside the country.¹⁰⁵

As a conclusion, governments should be recognized when they are effective.¹⁰⁶ In practice, however, States often base their decision to grant governmental recognition (or not) to a given entity upon political considerations. If the government is clearly effective at the internal level, non-recognition will not affect its status under international law. On the other hand, if there are doubts as to its internal effectiveness, recognition might provide the entity in question with ancillary external effectiveness, turning it into the government of the State. But sometimes, as in the case of Libya, the existence of competing entities can also give rise to two different types of government. Examining the modes of recognition can shed light on the legal obligations of each of these governments.

¹⁰³ Crawford 2006, p. 93. A third State would be opportunistic if it bases its decision to recognize a government solely on political considerations, without heeding the actual effectiveness of the entity in question.

¹⁰⁴ Al-Jazeera (2015) Yemen’s Houthis Form Own Government in Sanaa. <http://www.aljazeera.com/news/middleeast/2015/02/yemen-houthi-rebels-announce-presidential-council-150206122736448.html>. Accessed 21 March 2016.

¹⁰⁵ The consequences of being a failed State will be briefly outlined further below.

¹⁰⁶ Lauterpacht argues that there is an international legal obligation to recognize effective governments, but most scholars do not see recognition of effective entities as a duty. State practice clearly supports the latter view. See, e.g., Institut De Droit International 1936, Article 10 (emphasis added): “The recognition of the new government of a State which has been already recognized is the *free act* by which one or several States acknowledge that a person or a group of persons are capable of binding the State which they claim to represent, and witness their intention to enter into relations with them”.