

## De Facto Regimes in International Law

Jonte van Essen

### Keywords

*De Facto* Regimes, Recognition, International Legal Personality

### Abstract

The ambiguous position of *de facto* regimes in international law has long been the subject of scholarly debate and a source of political conflict. An assessment of the current standing of these regimes in international law and the consequences of actions by international actors on this status has, however, been long overdue. The manner in which *de facto* regimes are regarded internationally has serious consequences for the individuals under the influence of this legal grey area. Therefore, the study into this problem and possible solutions is of great significance. The 2011 developments in Northern Africa underline the need of contemporary research into this area. This essay aims to clarify the position of *de facto* regimes in international law and the influence on their status by actions of international actors. The author first argues that *de facto* regimes have rights and obligations under international law, which provide them with (some form of) international legal personality. He then pleads for a reconsideration of the contemporary legal treatment of these regimes. The author argues against the current system of government recognition and proposes a system that better addresses the needs of both *de facto* regimes and the international community.

### Author Affiliations

Utrecht University School of Law, LL.M. Public International Law (2011); Utrecht University School of Law, LL.B. (2010).

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## I. Introduction<sup>1</sup>

The Ivorian election crisis of late 2010 marked the beginning of an interstate conflict between the seated government under President Laurent Gbagbo and the regime under the contested winner of the elections, Alassane Ouattara.<sup>2</sup> Clashes between the forces loyal to the two men resulted in the death of more than a thousand and the displacement of over a million persons. Under the influence of measures taken by the international community, Ouattara's regime was later installed as the Ivory Coast's official government.<sup>3</sup> In 2011, Libya was in the grip of a civil war between forces loyal to the seated government under Moammar Gadhafi and opposition forces seeking to depose him.<sup>4</sup> These opposition forces had organized themselves as the 'National Transitional Council' ('NTC'), controlling large parts of the Libyan territory.<sup>5</sup> In its struggle to become Libya's official government, acts by international actors have played an important role.

These situations give rise to numerous issues of international law. Firstly, because the primary actors in international law are states, international law principally applies to the governments of these states. Regimes that are not governments of states, but do exert control over territory, are left with an ambiguous position in the system of the international community. Because the actions of these regimes may have enormous (humanitarian, economical, social and political) consequences, it is important to examine their status in the international legal order. Secondly, actions by members of the international community may affect the status of these regimes. Categorization of these actions and their effects is needed to accurately portray the current international legal order in which both regular states and 'irregular' regimes are placed.

These legal complications have long been the focus of scholarly debate, but an assessment of the current system with regard to these regimes and the influence of international actors on them has long been overdue. Since the first half of the 20<sup>th</sup> century, with mainly European legal scholarship, the position of *de facto* regimes and the practice of governmental recognition has been ignored, or at least not been given the attention it deserves.<sup>6</sup> Because these legal difficulties have severe consequences for the people in situations under the influence of this legal grey area, the study of these problems (and their possible solutions) is of great significance. The recent developments in Northern Africa underline the need of contemporary research into these areas. In this essay I hope to clarify the position of *de facto* regimes and how other international actors influence their status.

Part II provides an overview of the nature of *de facto* regimes. It introduces the reader to the entity that is the focus of this essay. Part III considers the application of international law to these regimes. The problematic position of *de facto* regimes in the international legal system forms the main point of focus in this section. I will argue that *de facto* regimes do have rights and obligations under international law, which provides them with international legal personality. In part IV, I assess the nature of governmental recognition and its effects on *de facto* regimes. I will argue against the system of recognition as it is currently used and propose a system that better addresses the needs of both *de facto* regimes and the international community. In the conclusion to this essay, I will plead for a reconsideration of the contemporary legal treatment of *de facto* regimes.

## II. The *De Facto* Regime

Before considering the position of the *de facto* regime ('DFR') in international law and the international community -and the consequences of this position- it is necessary to define what is meant exactly by the term '*de facto* regime'. For the purposes of this essay, I will adhere to the definition that is most generally agreed on by international legal authors. By this definition, a DFR is an entity which exercises 'at least some effective [...] authority over a territory within a state'.<sup>7</sup> This degree of effective authority is coupled with a certain degree of political and organizational capacity. Moreover, this entity intends to represent the state of which it partially or completely controls the territory in the capacity of official government. In order for a DFR to attain official government status, it is argued, some form of agreement or recognition is needed from the actors that constitute the international community.<sup>8</sup> Prior to an expression of agreement or recognition by these entities, the DFR remains in its '*de*

1 This paper is an adapted and abridged version of the doctoral thesis by Jonte van Essen, entitled '*De Facto* Regimes in International Law', which was completed at the Faculty of Law, Economics and Governance of Utrecht University on 15 August 2011 under the supervision of Dr. Cedric Ryngaert. For the full version of this essay, comments or questions please contact the author at [jontevanessen@gmail.com](mailto:jontevanessen@gmail.com).

2 Allan Little, 'Q&A, Ivory Coast Crisis' *BBC News* (London, 13 April 2011) <<http://www.bbc.co.uk/news/world-africa-11916590>> accessed 10 August 2011.

3 'UN backs Cote d'Ivoire's Ouattara' *Al Jazeera* (Doha, 24 December 2010) <<http://english.aljazeera.net/news/africa/2010/12/20101223234713942681.html>> accessed 9 August 2011; A Nossiter, 'In Belated Inauguration, Ivory Coast's President Urges Unity' *The New York Times* (New York, 21 May 2011) <<http://www.nytimes.com/2011/05/22/world/africa/22ivory.html>> accessed 9 August 2011.

4 BBC News (n 2).

5 Libyan National Transitional Council <<http://www.ntclibya.com>> accessed 6 August 2011.

6 H Kelsen, 'Recognition in International Law: Theoretical Observations' [1941] 35 *AJIL*; H Lauterpacht, *Recognition in International Law* (reprinted from Yale Law Journal 1947); J Frowein, *Das de facto-Regime im Völkerrecht* (Carl Heymanns Verlag 1968).

7 M Schoiswohl, 'De Facto Regimes and Human Rights Obligations-The Twilight Zone of Public International Law?' [2001] *Austrian Review of International and European Law* 50.

8 This notion will be elaborated below. See *infra*, sections III and IV.

*facto* position, the words '*de facto*' signifying the regime's factual control but illegal (or extralegal) foundations.

It is useful to distinguish DFRs from entities that are similar, but which differ in several crucial aspects. Firstly, the DFR should be distinguished from the *de facto* state. A *de facto* state is a geographical and political entity that has all the features of a state,<sup>9</sup> but is 'unable to achieve any degree of substantive recognition and therefore remains illegitimate in the eyes of international society'.<sup>10</sup> The entity that constitutes a *de facto* state seeks 'full constitutional independence and widespread recognition as a sovereign state'.<sup>11</sup> Examples of *de facto* states are the Republic of Somaliland<sup>12</sup> and the Republic of Kosovo. The entity that constitutes a DFR, on the other hand, aspires to be recognized by the international community as being the official government of an already existing state.<sup>13</sup> The important difference, therefore, between the *de facto* state and the *de facto* regime is the ambition behind its organization. While the *de facto* state pursues secession or independence from the parent state, the DFR seeks to be recognized as the official government, leaving the parent state and its territories intact.

Similarly, DFRs can be distinguished from national liberation movements. While national liberation movements strive for the liberation of a repressed 'people',<sup>14</sup> this is not necessarily the case for DFRs.<sup>15</sup> The DFR should also be distinguished from the *de facto* government. Although the terms are often used interchangeably, I would argue that this practice is not (in all instances) accurate. A *de facto* government is an entity that is in factual control over the complete territory of a state, but is not recognized as that state's government by the international community. The *de facto* regime, however, is an entity that does not necessarily control the entire territory of a state; its influence can also be less substantial.<sup>16</sup> The DFR's degree of control can range from power over small parts of the state to full control of the whole territory, after which it can also be identified as a *de facto* government. The distinguishing factor here is the degree of effective control over the respective state's territory. When an entity is in effective control of only certain parts of a state, it cannot be accurately labeled as the '*de facto* government' of that state, but it can be identified as a DFR. Only when an entity is in full control of a state, but not recognized as a member of the international community, can the terms '*de facto* government' and '*de facto* regime' be used interchangeably. This means that a *de facto* government can always be identified as a *de facto* regime, but not vice versa.

Finally, DFRs can be differentiated from belligerent and insurgent groups. The difference here is the degree of political organization exercised by the group. Belligerents or insurgents do not (necessarily) require political motives and an effective organization to achieve their status, as is the case with DFRs.<sup>17</sup> This means that belligerents and insurgents can under certain circumstances acquire the status of DFRs (if the group exercises a certain degree of political authority and organizational ability), but that these groups cannot automatically be labeled as being DFRs.

To conclude, the DFR is a politically organized entity that exercises effective control over parts of a state with the aim of becoming the official government of that state. Because the regime is not (yet) part of the international community, it exercises its authority '*de facto*' (signaling its illegal or at least extralegal foundation). Within this basic definition, individual DFRs exist in a myriad of forms that can change over time.

### III. The Application of International Law to *De Facto* Regimes

#### A. De Facto Regimes and International Law

The identity of international actors -their international legal personality ('ILP')- is of central importance in determining how international law applies to them. Since its conception in German legal scholarship in the late 17<sup>th</sup> century,<sup>18</sup> ILP has been used in international law to 'distinguish between those social actors the international legal system takes account of and those

9 S Pegg, *International Society and the De Facto State* (Ashgate 1998) 26.

10 *ibid.*

11 *ibid.*

12 See M Schoiswohl, *Status and (Human Rights) Obligations of Non-Recognized De Facto Regimes in International Law: The Case of 'Somaliland'* (Martinus Nijhoff 2004).

13 Frowein (n 6) 7.

14 I Brownlie, *Principles of Public International Law* (Oxford University Press 2008) 63. Brownlie describes the typical national liberation movement as 'a non-self-governing people engaged in a process of national liberation upon the colonial (or dominant) power'.

15 The DFR is characterized by its wish to be recognized as the official government. The motive behind this goal does not define an entity as a DFR.

16 A Ross, *Lehrbuch des Völkerrechts* (Kollhammer Verlag 1951) 100. Ross distinguishes between the 'local *de facto* government' (lokale *de facto*-Regierung), which controls parts of the state's territory, and the 'general *de facto* government' (allgemeinen *de facto*-Regierung), which controls the complete territory.

17 Brownlie (n 14) 62-63; A Cassese, *International Law* (Oxford University Press 2005) 140-142; Ross (n 16) 99.

18 J Nijman, *The Concept of International Legal Personality: An Inquiry Into the History and Theory of International Law* (TMC Asser Press 2004) 29.

being excluded from it'.<sup>19</sup> As in any legal system this division was, and is still, necessary to clarify which parties fall under the law's authority and which do not.<sup>20</sup> Therefore it is argued that the international legal system 'has to determine whom it endows with the rights and duties contained in it and whose actions it takes account of by attaching legal consequences to them'.<sup>21</sup> ILP was created as a device that indicates whether an entity exists under international law and is 'recognized as having a separate legal identity'.<sup>22</sup>

Historically, international law (and the rights and duties emanating from it) extends fully only to entities possessing complete international legal personality. Because of this, the principal addressees of international law have since its origin been states.<sup>23</sup> Statehood and ILP have at times even been 'regarded as synonymous'.<sup>24</sup> However, scholarly discourse has indicated that despite states being the primary and most undisputed international legal persons, it can be argued that other entities also (partially) possess ILP. Among these potential candidates are international organizations,<sup>25</sup> transnational corporations<sup>26</sup> and even individual persons.<sup>27</sup> These actors are bound to different sets of rights and obligations and therefore differ in their legal personality. According to the International Court of Justice ('ICJ') in the *Reparations* case: 'the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community'.<sup>28</sup> In the remainder of this section, I will argue that DFRs possess at least some form of ILP and have to be regarded as relevant (legal) actors in the international community.

In understanding the degree of ILP that DFRs possess and in determining their place in the international community, an assessment needs to be made of the freedoms and responsibilities accorded to them. This seems contradictory; the title that gives DFRs their rights and duties in the international community is dependent on these rights and duties themselves.<sup>29</sup> However, these attributes are needed to create (and give personality to) an entity that is capable of acting on an international level. They are benchmarks that attest to the 'maturity', acceptance by other entities, and therefore, the ILP of the body in question. Although international law places DFRs in an indeterminate position, 'it does –in different forms– vest rights and obligations upon them'.<sup>30</sup> To fully understand the place taken by DFRs in the international judicial system, an assessment of these legal rights and duties is needed. Only after such an investigation can a definitive answer be given as to the degree of ILP DFRs possess, how international law applies to them and what their legal position is in the international community. In this investigation, a conclusion on the degree of ILP is not of ultimate importance. Of primary concern is the assessment of the international rights and duties accorded to DFRs.

Due to the ambiguous status of ILP accorded to DFRs, categorizing the legal rights and obligations of DFRs in the international community and in the domestic sphere is not without complications. This, however, does not mean that DFRs have no international rights or obligations: 'international law has (...) developed some rudimentary mechanisms to ensure that the developments on the ground are not entirely left to the (domestic) "laws" of anarchy'.<sup>31</sup> In the following paragraphs, I will first consider the rights and duties of DFRs in relation to other international actors. After that I will consider the application of international law to the domestic environment of DFRs. Finally, I will consider whether DFRs possess ILP and, if so, in what capacity.

## B. *Legal Rights and Obligations in the International Community*

### 1. International Humanitarian Law

International humanitarian law ('IHL') is recognized as one of the most basic categories of international law and can partially be identified as customary international law.<sup>32</sup> IHL is defined as 'a set of rules which seek, for humanitarian reasons, to limit

19 R Portmann, *Legal Personality in International Law* (Cambridge University Press 2010) 5.

20 See M Shaw, *International Law* (Cambridge University Press 2008) 195-197.

21 Portmann (n 19) 7.

22 Nijman (n 18) 3.

23 M Shaw (n 20) 197.

24 Portmann (n 19) 9.

25 *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Reports 1949 179-180.

26 Shaw (n 20) 249-250.

27 Nijman (n 18) 473.

28 *Reparations case* (n 25) 178.

29 Brownlie (n 14) 57.

30 Schoiswohl (n 12) 52.

31 Shaw (n 20) 55.

32 *ibid* 1167-1168. See also J Henckaerts et al., *Customary International Humanitarian Law Volume 1: Rules* (ICRC 2005).

the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare'.<sup>33</sup> As DFRs often originate and exist in situations of (internal) conflict, with the opposing party usually being the parent state's government or another non-state entity, IHL deserves special attention. As set out below, DFRs are bound by rules of IHL. International criminal law, like IHL, includes basic and universal norms of international law often relied upon in situations of armed conflict. International criminal law applies to those crimes that are regarded as so grave that they 'constitute offence against the world community'.<sup>34</sup> As this includes war crimes, crimes against humanity and torture, an examination of its applicability to DFRs is necessary.<sup>35</sup> I will first consider the applicability of IHL to DFRs as entities and then proceed to briefly consider whether individuals who are part of these regimes are liable for prosecution under international criminal law.

The 1949 Geneva Conventions and their Protocols are seen as the primary codification of the laws of war. Together, they constitute 'the body of international law that regulates the conduct of armed conflict and seeks to limit its effects'.<sup>36</sup> The majority of the provisions found in the Conventions apply to armed conflict on an international scale. A smaller portion of its rules applies to internal armed conflicts. These provisions require attention, as many DFRs are in armed conflict with the forces of their parent state. Common Article 3 to the Geneva Conventions is seen as the absolute basis of IHL in the context of internal armed conflict.<sup>37</sup> This article provides that, during armed conflict, distinction should be made between those who take active part in hostilities and those who do not.<sup>38</sup> Accordingly, those not taking part in hostilities are protected against the most brutal forms of violence and acts that constitute grave violations of human dignity. The view that Common Article 3 binds 'each party' to an internal armed conflict (including DFRs), as its text suggests, is not self-evident, for States Parties to the Geneva Conventions are the entities primarily obliged to respect Common Article 3.<sup>39</sup> Holding DFRs that take part in an internal conflict accountable for violation of the standards of this article has therefore to rely on other foundations.

The most convincing evidence that the provisions of Common Article 3 are to be applied universally is the fact that the article is a customary rule.<sup>40</sup> As reiterated by the ICJ in the *Nicaragua* case, Common Article 3 provides a 'minimum yardstick' in any armed conflict and reflects 'elementary considerations of humanity'.<sup>41</sup> Some authors go further and argue that Common Article 3 constitutes a 'general principle of humanitarian law'<sup>42</sup> and even *jus cogens*.<sup>43</sup> This indicates that Common Article 3 can be universally applied to all types of conflict. The universal legal nature of the article, coupled with its text, establishes its applicability to DFRs. The text of Common Article 3 requires 'each party to the conflict' to apply its provisions.<sup>44</sup> In his commentary to the first Geneva Convention, Jean Pictet (1952) reflects on the binding nature of Common Article 3 to non-state entities by stating:

Until recently it would have been considered impossible in law for an international Convention to bind a non-signatory Party -- a Party, moreover, which was not yet in existence and which was not even required to represent a legal entity capable of undertaking international obligations. Each of the Parties will thus be required to apply Article 3 by the mere fact of that Party's existence and of the existence of an armed conflict between it and the other Party. The obligation is absolute for each of the Parties, and independent of the obligation on the other Party.<sup>45</sup>

As a reaction to the doubt expressed that non-state entities like DFRs can be bound to Article 3, Pictet further contends: 'if the responsible authority at their head exercises effective sovereignty, it is bound by the very fact that it claims to represent

33 ICRC, 'What is International Humanitarian Law?' [2004] <<http://www.icrc.org/eng/resources/documents/legal-fact-sheet/humanitarian-law-factsheet.htm>> accessed 12 July 2011.

34 G Partin, 'International Criminal Law' [2011] <<http://www.asil.org/crim1.cfm>> accessed 19 July 2011.

35 Cassese (n 17) 436.

36 ICRC, 'The Geneva Conventions of 1949 and their Additional Protocols' [2010] <<http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm>> accessed 26 July 2011. 'The Geneva Conventions and their Additional Protocols are international treaties that contain the most important rules limiting the barbarity of war.'

37 L Moir, *The Law of Internal Armed Conflict* (Cambridge University Press 2002) 31.

38 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS, Art 3.

39 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, Art 26. 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'

40 Moir (n 37) 56; Cassese (n 17) 431; Schoiswohl (n 12) 58.

41 *Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Reports 1986 14, para 218.

42 Brownlie (n 14) 564.

43 Moir (n 37) 56-57.

44 Geneva Convention (n 38) Art 3.

45 J Pictet, *Commentary on the I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field* (ICRC 1952) 51.

the country, or part of the country'.<sup>46</sup> The fact that Article 3 is of a customary nature and its provisions are 'legally binding on all parties to an (internal) armed conflict'<sup>47</sup> means that it is applicable to DFRs.<sup>48</sup> Article 3 applies regardless of whether their adversaries are represented by the parent state, or by other non-state entities.

Other fundamental provisions of IHL, as customary law, can also be universally applied to all parties in any conflict. This includes the prohibition of chemical weapons<sup>49</sup> and provisions included in Protocol II to the Geneva Conventions.<sup>50</sup> These universal rules of IHL bind combatants in any armed conflict and are applicable in both an internal and international context. DFRs and their counterparts are therefore bound to respect them. It goes outside the scope of this essay to produce an exhaustive list of IHL provisions that bind DFRs through their inclusion in customary law or otherwise. However, the above shows that DFRs do indeed have, albeit rudimentary, obligations under IHL in both internal and international armed conflict.

## 2. International Criminal Law

As with IHL, certain provisions of international criminal law ('ICL') apply to DFRs or, more accurately, individuals who are part of DFRs. As with IHL, norms of ICL are regarded as representing minimal standards of humanity. The crimes punishable under these central legal notions are seen as so abhorrent that prosecution of them must be generally available. These types of crimes, which are regarded as central to ICL and universally punishable, have been codified in Article 5 of the Statute of the International Criminal Court ('ICCst'). Article 5 of the Statute contains 'the most serious crimes of concern to the international community as a whole'.<sup>51</sup> Its provisions are regarded as general principles of international criminal law and customary international law.<sup>52</sup> The international crimes contained in this Article are: the crime of genocide, crimes against humanity, war crimes and the crime of aggression.<sup>53</sup> As ICL primarily applies to individuals, there are no direct difficulties applying most of the provisions of Article 5 to members of DFRs in the same way as they would apply to members of states.<sup>54</sup> Individuals who are part of DFRs are thus prohibited from committing genocide or war crimes, regardless of their membership in an entity with limited ILP. Enforcement of these measures does, however, presuppose jurisdiction of the ICC over the territory in which the DFR is situated. For instance, the members of the forces under Ouattara during their campaign against the military of the seated Ivorian government were prohibited from, *inter alia*, taking hostages or torturing.<sup>55</sup>

The provisions of the ICCst define crimes against humanity as crimes committed 'pursuing or furthering a State or organizational policy to commit an attack against a civilian population'.<sup>56</sup> Because of this policy element, it was seen as necessary 'to include groups which constitute non-state actors as qualifying for the legal capacity to formulate such a policy'<sup>57</sup> so that the individuals of these groups can be prosecuted under the ICCst. Documents by international organizations and the practice of international tribunals have confirmed that non-state actors do indeed possess the capacity to devise and carry out policy as described in the articles of the ICCst.<sup>58</sup> The non-state actors now considered prosecutable under the ICCst 'must have some of the characteristics of state actors, which include the exercise of dominion or control over territory or people, or both, and the ability to carry out a "policy" similar in nature to that of "state action or policy"'.<sup>59</sup> As most DFRs possess these characteristics, it follows that individuals in these groups who commit crimes against humanity are liable for prosecution under the provisions of the ICCst, despite the limited ILP of their organization. The fact that the commission of crimes against humanity requires policy-making abilities does not exclude members of DFRs from the prohibition's scope. Therefore, international criminal law does apply to DFRs and its members.

The situation in Libya before the end of August 2011 can be used to illustrate the notions set out above. Firstly, the Libyan

46 *ibid* 51-52.

47 Moir (n 37) 58. Colons added.

48 T Meron, *Human Rights in Internal Strife: Their International Protection* (Grotius 1987) 39.

49 Cassese (n 17) 432.

50 L Zegveld, *The Accountability of Armed Opposition Groups in International Law* (Cambridge University Press 2002) 20-21, 146-147.

51 1998 Rome Statute of the International Criminal Court, 2187 UNTS 3, Art 5.

52 Brownlie (n 14) 589; A Cassese et al., *The Oxford Companion to: International Criminal Justice* (Oxford University Press 2009) 54; Cassese (n 17) 436.

53 Rome Statute of the International Criminal Court (n 51) Art 5.

54 M Cherif Bassiouni, *Introduction to International Criminal Law* (Transnational 2003) 68. 'The responsibility of non-state actors is not a new category of subjects in ICL, because international criminal responsibility is individual'.

55 Rome Statute of the International Criminal Court (n 51) Art 8(2)(a). Both hostage taking and torturing are regarded as war crimes under the Statute.

56 Cassese (n 17) 287.

57 Cherif Bassiouni (n 54) 69.

58 UN Doc. S/1994/674 (1994) on Crimes against Humanity Committed by DFRs in Yugoslavia; UN Doc. E/CN.4/1998/119 (1998) on the Activities of Non-state Entities in Liberia; *Prosecutor v Tadic* (Merits) IT-94-1 (ICTY, 2 October 1995); *Prosecutor v Dragon Nikolic* IT-94-2-R61 (ICTY, 20 October 1995), para 26.

59 Cherif Bassiouni (n 54) 71.

conflict featured ‘protracted armed violence between governmental authorities and organized armed groups within a state’,<sup>60</sup> as the Libyan government under Gadhafi and the NTC had been engaged in armed conflict since February 2011. As illustrated above, the NTC fell under the definition of ‘DFR’ and possessed organizational capacity. Furthermore, the NTC was an active party to the conflict, performing structured attacks against the Libyan military, which made them culpable as a group for illegal military action and individually for the perpetration of international crimes. These circumstances made the NTC, like other DFRs, bound by at least the basic provisions of IHL and ICL. It would, for instance, have been legally prohibited for the NTC’s forces to purposely attack or torture unarmed civilians, make use of chemical weaponry or commit crimes against humanity.

To conclude, under international law, DFRs must respect at least some of the rules developed under IHL and ICL. Although these basic provisions only protect against the most barbarous forms of warfare and attacks on human dignity, they provide ‘for a minimum set of humanitarian standards, which remain applicable in times when core human rights are endangered the most’.<sup>61</sup>

### 3. The Prohibition of the Use of Force

The prohibition of the use of force, as set out in Article 2(4) of the UN Charter, prohibits the ‘threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations’.<sup>62</sup> The provision is ‘regarded [...] as a principle of customary international law’<sup>63</sup> and, according to some, ‘even as *jus cogens*’.<sup>64</sup> It is disputed whether the customary character of the prohibition of the use of force in itself binds entities other than states.<sup>65</sup> Corten (2010) notes: ‘at present, there is nothing to show that any *general agreement* has been observed in favour of the applicability of article 2(4) to situations that do not pertain to relations among States’.<sup>66</sup> This does not, however, mean that DFRs are never bound by the prohibition of the use of force.

In drafting the text of Article 2(4), several states proposed to explicitly ‘extend applicability of the rule to all “political entities”’,<sup>67</sup> including DFRs. The proposition met with ‘firm opposition’ from other states.<sup>68</sup> The fact that the literal inclusion of these groups was rejected in drafting the text of article 2(4), coupled with the consideration of state practice, lead Corten (2010) to conclude: ‘Ultimately, no group of States has consistently defended an extension of the notion of ‘international relations’ as an essential element of the prohibition of the use of force’.<sup>69</sup> Conversely, Frowein (2009) argues: ‘State practice, especially within the United Nations, clearly proves that the prohibition of the use of force applies [...] to all independent *de facto* regimes’.<sup>70</sup> He bases this assumption on the UN Friendly Relations Declaration,<sup>71</sup> the General Assembly’s Resolution 3314 and state practice.<sup>72</sup> Frowein concludes that DFRs are both protected by and bound to the prohibition of the use of force.<sup>73</sup>

Although there does not seem to be unanimity in hard law, state practice, or literature, I would agree with Frowein that DFRs are (at least) partially bound by the prohibition of the use of force.<sup>74</sup> This assumption is supported by the scholarly discourse on the applicability of the use of force to actions of and reactions to the Taliban regime.<sup>75</sup> According to Wolfrum (2002) the Taliban, in its status as a DFR, enjoyed the right ‘not to become the target of force as referred to in Article 2 para. 4 of the UN Charter’.<sup>76</sup> Wolfrum further notes that ‘acts carried out by [...] the Taliban [...] could be made the target for actions of self-defence’.<sup>77</sup> This means that the prohibition of the use of force applied to the Taliban both as a right and a duty, as it does to

60 Tadic (n 58), para 70.

61 Schoiswohl (n 12) 62. Human rights obligations of DFRs will receive closer attention in paragraph III.C.

62 1945 Charter of the United Nations. 1 UNTS XVI, Art 2(4).

63 Shaw (n 20) 1123.

64 Evans et al., *International Law* (Oxford University Press 2010) 617.

65 Cassese (n 17) 157. According to Cassese, the customary nature of the prohibition of the use of force would indeed be enough to bind non-state entities.

66 O Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart 2010) 159. Italics added.

67 UN Doc. A/AC.134/L.17 (1969).

68 UN Doc. A/AC.134/SR.58 (1970); A/C.6/SR.1206 (1970).

69 Corten (n 66) 160.

70 J Frowein, ‘*De Facto Regime*’ (2009) <<http://www.mpepil.com>> accessed 14 July 2011, para 4.

71 UN Doc. A/RES/2625 (1970) 121. ‘Every State [...] has the duty to refrain from the threat or use of force to violate international lines of demarcation. Consider: J Frowein (n 70), para 5. ‘This includes the borders of [...] *de facto* regimes’.

72 Un. Doc. A/RES/1134 (1974); J Frowein (n 70), paras 4-5.

73 J Frowein (n 6) 69. ‘[d]ie sich in einer befriedeten internationalen Stellung befinden’.

74 H Blix, ‘Contemporary Aspects of Recognition’ [1970] *Recueil de Cours* 618.

75 See R Wolfrum et al., ‘The Status of the Taliban: Their Obligations and Rights Under International Law’ [2002] *Max Planck Yearbook of United Nations Law*.  
ibid 585. Wolfrum adds that this protection only applies ‘between the *de facto* regime and third states not engaged in the [internal] conflict’.

77 ibid 596.

other DFRs. To conclude, I would argue that recent state practice and scholarly discourse support at least partial applicability of the prohibition of the use of force to DFRs.

### C. *Legal Rights and Obligations in the 'Domestic' Sphere*

As indicated above, DFRs are bound to minimum obligations of IHL and ICL. These norms, especially those of ICL, do not only protect those under the control of other states and non-state actors, but also those in territory under control of the DFR. The principles of IHL and ICL applicable to DFRs provide its inhabitants protection from the most brutal forms of conduct by these regimes. Whether DFRs have obligations towards the individuals living under their authority besides these basic norms is less clear. Protection of persons in a domestic context is normally provided by human rights.<sup>78</sup> However, 'international human rights obligations still address mainly states as the primary guarantors (and violators) of human rights'.<sup>79</sup> Again, the level of ILP accorded to DFRs is problematic in the application of otherwise normal guarantees of human rights standards enjoyed by inhabitants of entities with full ILP.

Despite the ambiguous treatment of DFRs in international law and the 'reluctance to incorporate [them] into its framework', the international community is 'to the same extent reluctant – particularly in an area of major concern to human beings – to explicitly exclude [DFRs] from any "responsibility" for the harm inflicted [upon its inhabitants]'.<sup>80</sup> As is the case with international responsibility, effectiveness (and not legal rules) may be regarded as 'the primary criterion for the attribution of wrongful conduct'<sup>81</sup> towards individuals inside the DFR's territory. A development towards considering effectiveness and 'secondary rules'<sup>82</sup> as a source of obligations for DFRs is confirmed to some degree by international jurisprudence and state practice. In *Ahmed v Austria*, the European Court of Human Rights ('ECHR') confirmed that DFRs are capable of violating human rights just like normal governments.<sup>83</sup> Besides being a valuable starting point, the worth of *Ahmed v Austria* (and similar judgments)<sup>84</sup> towards according human rights obligations to DFRs needs not be overstated. State practice offers a more reliable foundation for the applicability of human rights norms to DFRs. Firstly, the UN Security Council,<sup>85</sup> the UN Commission on Human Rights<sup>86</sup> and the Inter-American Commission<sup>87</sup> have all condemned actions by DFRs contrary to international human rights standards. Schoiswohl (2001) offers another argument for binding DFRs to human rights obligations, by comparing them (by their limited ILP) with international organizations. He concludes that 'to the extent these organizations are assuming and administering functions which bear the capacity to eventually compromise fundamental rights of individuals, they appear to be constrained by international law and its general human rights [...] obligations'.<sup>88</sup> Schoiswohl continues by stating that 'such a "functional" approach might [...] be equally adopted to establish that *de facto* regimes face international (human rights) obligations in so far as their legitimate tasks of local governance might endanger the human rights of individuals living under their authority'.<sup>89</sup> Although these parallels can be disputed by pointing out that international organizations are created by states while DFRs are constituted in an illegal or extralegal manner, comparison is possible on the grounds of their similar level of ILP.

Although the above arguments for the imposition of human rights obligations on DFRs are not conclusive, it seems that the international community expresses a desire to hold DFRs to basic internal human rights norms. The limited ILP of DFRs does not take away from their potential liability in the field of human rights violations. While 'States remain the main providers and guarantors of human rights [...] they do not hold a monopoly as evidenced by international organisations or *de facto* authorities exercising a similar degree of effectiveness which enables them to equally guarantee or violate human rights'.<sup>90</sup>

78 Cassese (n 17) 375-396; Shaw (n 20) 265-341.

79 Schoiswohl (n 12) 67.

80 *ibid* 68.

81 *ibid* 68. See also the above on state responsibility; compare in particular the *Namibia* case judgment.

82 *ibid* 63.

83 *Ahmed v Austria* [1996] ECHR 1996-VI, paras 10, 47. It was argued that if the applicant would be sent back to Austria, he would likely be the subject of human rights violations by a local DFR. This means that the ECHR recognized that DFRs are capable of human rights violations.

84 Schoiswohl (n 12) 68-71.

85 UN Doc. S/RES/1193 (1998), para 14. The Security Council 'urges the Afghan factions to put an end to the discrimination against girls and women and to other violations of human rights'; UN Doc. S/RES/1213 (1998), para 7. The Council calls on UNITA (a former Angolan rebel army) to 'respect international humanitarian, refugee and human rights law'.

86 Zegveld (n 50) 48.

87 Zegveld (n 50) 47.

88 Schoiswohl (n 12) 82.

89 *ibid* 82.

90 *ibid* 87-88.

In the system of international legal personality, the position of DFRs is not easily defined. It is generally accepted that DFRs possess a limited degree of ILP, evident from the expectations of other international actors, but they are not accorded the same position that sovereign states and recognized governments have on the international legal plane. As the above has indicated, DFRs, 'which for one reason or the other cannot be regarded as States proper',<sup>91</sup> do indeed have the capacity to possess international rights and obligations. International norms regarding IHL and ICL, but also norms of international responsibility and 'domestic' protection of human rights, have been found to be applicable to *de facto* regimes. The need for order and the desire to bind DFRs to at least some international obligations has surpassed the reluctance of states to include them in the international community. As Schoiswohl (2001) argues, the application of international law to DFRs is inconsistent with denying these entities at least some degree of ILP.<sup>92</sup> Whether the accordance of rights and duties to these regimes is born more out of necessity and practical concern or out of ethical considerations and the willingness to include DFRs in international procedure is not critical in this assessment. The fact that DFRs are bound by international rights and obligations is in itself an indication of ILP, regardless of the acceptance of these regimes by other international actors into the international community. By this view, ILP is determined by the fact that entities like DFRs are expected to perform a certain way on the international plane, rather than ILP being a superimposed status that brings with it international rights and duties.<sup>93</sup>

Portmann (2010) explains this by using the 'formal' and 'actor' conceptions of ILP. By the 'formal' conception, 'personality in international law is [...] not a precondition for holding international obligations or authorizations, but it is the consequence of possessing them'.<sup>94</sup> Furthermore, ILP is in this conception regarded as 'a merely descriptive device belonging to the realm of legal doctrine and as such being without concrete legal implications: being an international person thus simply reflects the sum of legal norms addressing a certain entity'.<sup>95</sup> The 'actor' conception as used by Portmann further deconstructs the idea of ILP as an *a priori* title that provides its subject with international rights and duties. It even avoids the concept of ILP and 'considers all entities exercising "effective powers" in the international "decision-making process" as being 'participants' or 'actors' in the international community'.<sup>96</sup> This participation on an international level is thus 'not based on legal rules or specific acts of recognition, but on effective power to participate'.<sup>97</sup>

The above has shown that the contemporary system of international law allows for the inclusion of regimes that are not in complete possession of (the classic form of) ILP. This proposition can be based on different arguments and explained by understanding ILP in different forms (*e.g.*, the 'formal' and 'actor' conceptions). These arguments and conceptions differ in their denial of the importance and norm-creating nature of ILP, but a common thread can be distinguished from the variety of theorems. This commonality is the notion that full ILP, as used before, is currently not considered necessary for an entity to function in international law. Whether states agree on the inclusion of DFRs in the international community or not, and whatever label is preferred to indicate their competence, their mere presence requires the international community to vest them with certain rights and duties. These rights and duties do, as shown above, accord DFRs with a status that can be considered ILP.

The decreased importance of ILP and the necessity of its possession as a prerequisite of participation in the international community also have important ramifications for the international practice of government recognition, as will be examined below.

#### IV. **Recognition of *De Facto* Regimes**

##### A. *Recognition of De Facto Regimes in International Law*

###### 1. Definitions

Above I have considered the legal position of regimes that exist in a *de facto* capacity, which is to say that their governance relies on effective control and on an illegal or extralegal basis. In this section I will consider acts by international entities

91 *ibid* 85.

92 *ibid* 83.

93 J Crawford, *The Creation of States in International Law* (Oxford University Press 2006) 30. 'No further implications may be drawn from the existence of legal personality: the extent of the powers, rights and responsibilities of any entity is to be determined only by examination of its actual position.'

94 Portmann (n 19) 174.

95 *ibid* 174.

96 *ibid* 208.

97 *ibid* 213.

concerning these regimes and the effects that these acts have on their standing in the international community.

As DFRs seek to replace the seated government of their parent state, (partial) success in this pursuit brings about change in the international community. This shift of power is often unconstitutional and sometimes by force, and the international community has found it necessary to respond to these disruptions of the international order. Governmental recognition in international law is one such method governments use to respond to these changes. Shaw (2008) understands the recognition of governments in the following terms:

Recognition of an entity as the government of a state implies not only that this government is deemed to have satisfied the required conditions [of governance] but also that the recognizing state will deal with the government as the governing authority of the state and accept the usual legal consequences of such status.<sup>98</sup>

This duality, in the recognition of a factual situation and the willingness of the recognizing state to enter into relations, is supported by Talmon (1998): ‘recognition of a government will express both the recognizing government’s willingness to enter into official relations with it and its opinion that the government recognized exists *as such*’.<sup>99</sup> If states previously expressed doubts about a DFR’s capacity to govern or perform actions on an international level, these doubts are removed by recognition. Recognition puts recognizing states in a position towards the DFR, which does not leave room for any limitations that might previously have been allowed. After recognition, the regime is seen by the recognizing state as the official government of its parent state, which has important consequences. As Peterson (1997) notes: ‘those who rule domestically also serve as the state’s agents in international affairs – exercising its rights, ensuring fulfillment of its obligations, and committing its resources and reputation in relations with other states and other types of actor on the world scene’.<sup>100</sup> As the ambition of a DFR is to become the government of its parent state, recognition is of importance not only to that regime, but also to those who will cooperate with the regime in its capacity as an official government. A state’s decision to recognize a DFR, vesting them with rights in relation to the recognizing state, is thus not taken lightly and is made only after careful deliberation.

The theory of government recognition has since its conception been the subject of debate. According to Freeman (1950) this controversy is the result of the political aspects of governmental recognition: ‘the subject [of recognition] is one of enormous complexity, principally because it is an amalgam of political and legal elements which is unusual even for international law’.<sup>101</sup> The fact that government recognition opens the door to all kinds of legal interaction between states and new governments (former DFRs) seems to imply that it is indeed a legal practice. However, it cannot be denied that governmental recognition is also a highly political affair. Kelsen (1941) acknowledges this duality and separates governmental recognition in its capacity as a political and a legal act.<sup>102</sup> The political act provides that ‘the recognizing state is willing to enter into political and other relations with the recognized [...] government’.<sup>103</sup> This political act, according to Kelsen, ‘has no legal effect whatsoever’ and is therefore ‘not constitutive for the legal existence of the recognized state or government’.<sup>104</sup> The legal aspect of recognition has the effect ‘that the recognized community becomes in its relations with the recognizing state in itself a [...] a subject of rights and obligations stipulated by international law’.<sup>105</sup> It is therefore ‘the establishment of a fact; it is not the expression of a will’.<sup>106</sup> This view accurately reflects the manner in which government recognition is used, while providing for both the political and legal side of its process.

Government recognition is, mainly because of its political affiliation, a highly disputed legal problem. Its solution or the creation of universal guidelines for recognition is made more difficult by the fact that it ‘leads in the practice of states to [...] paradoxical situations’.<sup>107</sup> Nonetheless, understanding the various forms and consequences of governmental recognition is crucial in understanding the position of DFRs in the international community and their relations to other international entities. In the next sections I will assess the current process of governmental recognition, highlight its ambiguities and propose a more useful system.

98 Shaw (n 20) 455.

99 S Talmon, *Recognition of Governments in International Law; with Particular Reference to Governments in Exile* (Clarendon 1998) 33.

100 M Peterson, *Recognition of Governments: Legal Doctrine and State Practice, 1815-1995* (Palgrave Macmillan 1997) 1.

101 A Freeman, ‘Current Notes’ [1950] 44 AJIL 378.

102 Kelsen (n 6) 605. ‘The term “recognition” may be said to be comprised of two quite distinct acts: a political act and a legal act’.

103 *ibid.*

104 *ibid.*

105 Kelsen (n 6) 608; Kelsen supports this notion by stating that: ‘It is a fundamental, though often overlooked, principle of jurisprudence that in the province of law there are no absolute, directly evident facts, facts “in themselves,” but only facts established by the competent authority in a procedure prescribed by the legal order.’

106 *ibid.*

107 *ibid.* 605.

## 2. Forms and Misconceptions

Governmental recognition can be seen as a category, which includes different individual forms.<sup>108</sup> It can, in its different capacities, be used in different ways that reflect the opinions and motivations of the recognizing government.

Historically, recognition has been divided into *de jure* and *de facto* recognition. Recognition *de jure* can be regarded as the 'pure' and full form of recognition. *De jure* recognition 'follows where the recognizing state accepts that the effective control displayed by the [new] government is permanent and firmly rooted and that there are no legal reasons detracting from this'.<sup>109</sup> *De facto* recognition is regarded as a second form of recognition. *De facto* recognition is used to indicate a hesitance on the side of the recognizing state in according *de jure* recognition.<sup>110</sup> It is further used as 'a simple acknowledgement that a government exists and wields effective control over people and territory'.<sup>111</sup> As a disputed category of recognition, it poses difficulties in understanding the legal system of government recognition. *De facto* recognition disconnects, as it were, the dual function of recognition (the acknowledgement that the new government exists and the willingness to enter into diplomatic relations with it). This means that *de facto* recognition is usually accompanied by disapproval of the recognizing state towards the new regime, or at least the expectancy of certain improvements before *de jure* recognition is granted. *De facto* recognition is also regarded as being open to withdrawal, as opposed to *de jure* recognition.<sup>112</sup>

Lauterpacht (1947) defends the notion and practice of *de facto* recognition. He argues that '*de facto* and *de jure* recognition are [both] legal acts' and 'terms expressive not of any judgment upon the legitimacy of the recognized authority from the point of view of the constitutional law of the State concerned, but upon its claim to be considered as validly and effectively representing the State or territory in question'.<sup>113</sup> I would, however, argue that *de facto* recognition is not a legal practice and that it is solely used to express political opinions under the pretense of international law.<sup>114</sup> *De facto* recognition does not create a new legal relationship between the recognizing state and the recognized DFR (which is precisely the aim of *de facto* recognition). It does not create any obligations for any of the parties, but is somehow regarded as holding the key for cooperation that is otherwise not possible. I would argue that *de facto* recognition is in fact an extension of the choice between recognition and abstention from recognition. Whereas the recognizing government expresses favoritism towards one of the rivaling groups,<sup>115</sup> abstention from recognition achieves the same legal position as *de facto* recognition (namely, expressing reservations to recognition) and leaves the door open for political contact that would be available in the context of *de facto* recognition. Talmon (1998) states that '*de facto* recognition must have a meaning other than the mere negation of *de jure* recognition'.<sup>116</sup> He bases this on the fact that some states express that they 'do not (want to) recognize a certain government [...], either *de jure* "or" *de facto*'.<sup>117</sup> According to this view, states that recognize *de facto* indicate something above non-recognition, but below *de jure* recognition. However, the fact that states have different intentions when they express *de facto* recognition than when expressing *de jure* recognition does not make it viable as a legal practice. I would argue that this grey area between full recognition and its denial is neither productive, nor legally sustainable. It indicates the opinion of the recognizing state towards the DFR and its diplomatic intentions, but it does not in itself create binding relations between the entities. Furthermore, *de facto* recognition seems to presume that, without it, the factual situation on the ground does not exist. As Brown (1942) states: 'if people have grouped together for a political purpose, on a given territory, and are independent, it would be obviously absurd to say that they do not exist'.<sup>118</sup> Therefore, *de facto* recognition is not necessary because the *de facto* situation (and, as has been shown above, the DFR itself) exists regardless of recognition by another entity.

For these reasons, *de facto* recognition can be considered as a way to identify the opinion expressed by a government towards a DFR, but nothing more. Rather than a menu from which governments choose a method of recognition, it can be used as a chart on which the position of a government towards a DFR can be placed. *De facto* recognition (as a 'label') is therefore useful in situations where two factions (usually the government and a DFR) are contesting effective control over an area. *De*

108 Shaw (n 20) 459.

109 *ibid* 460; See also paragraph 1. The descriptions of recognition can be used as examples of *de jure* recognition.

110 Talmon (n 99) 47-49.

111 *ibid* 88.

112 Lauterpacht (n 6) 346.

113 *ibid* 330.

114 With this I mean that *de facto* recognition has no (legal) purpose, other than the expression of disapproval of a new regimes and unwillingness to enter into relations with it. Brownlie (n 14) 91. 'The distinction [between *de jure* and *de facto* recognition] occurs exclusively in the political context of recognition of governments'; See also M Akehurst, *A Modern Introduction to International Law* (Routledge 1970) 85.

115 Peterson (n 100) 92. 'Recognition of governments [...] has been cast in binary form: a new regime is either recognized as the government of its state or it is not. Yet there have been efforts to escape binary reasoning'.

116 Talmon (n 99) 82.

117 *ibid* 81.

118 P Brown, 'The Effects of Recognition' [1942] 36 AJIL 107.

*facto* recognition should be understood as abstention from recognition, coupled with acknowledgement of a factual situation. In this manner, it can be used by governments to indicate which entity is regarded as the dominant or favored one in their struggle for dominance. It is not a legal practice, as it does not produce legal consequences for either of the parties. However, despite its controversial nature, *de facto* recognition is still practiced in the international community.<sup>119</sup>

Unfortunately, but unsurprisingly, the varying application of governmental recognition has recently caused confusion in the international press and among the general public. At the heart of this ambiguous situation is the fact that there can be only one legitimate and recognized government of a State at only one point in time.<sup>120</sup> Therefore, it is not possible for a government to have full (legal) international relations with both a DFR and the government of its parent state. This is further complicated by the fact that recognition is often presumed before it has been officially given by governments. What is generally perceived as full or *de jure* recognition often is not full government recognition. An example of this was the diplomatic reaction of governments to the situation in Libya in 2011 and its reception in the international press. The major problem in this case was that the condemnation of the Gadhafi regime, coupled with the willingness to open consular or diplomatic relations with the National Transitional Council (which presumed acknowledgement of a degree of effective control on the side of the NTC), was conceived as (*de jure*) governmental recognition. This presumption is not correct, for the mere approval by government officials of the NTC in combination with the disapproval of the Gadhafi government is in itself not enough to create any legal effects between the approving government and the DFR. When, for instance, German Foreign Minister Westerwelle stated in June 2011 that Gadhafi's government had 'lost legitimacy'<sup>121</sup> and that 'the national council is the legitimate representative of the Libyan people',<sup>122</sup> this was not an expression of recognition.<sup>123</sup> When the German government 'recognized' the Libyan rebels, it did so to express its preference for the NTC and disapproval of the Libyan military. It did not intend to create any legal relation between itself and the NTC. Although presented as *de jure* recognition by international media,<sup>124</sup> the sole expression of approval of the NTC's actions and the willingness to negotiate with its leaders is not sufficient for it to constitute an act of recognition on behalf of the German government. I would argue that the practice of *de facto* recognition can be useful in 'labeling' certain actions by governments and categorizing a group of ambiguous motivations expressed towards the recognized subject, but not as a legal practice. As seen above, regarding *de facto* recognition or methods other than *de jure* recognition as legally viable causes unnecessary confusion. Below, I will consider more useful approaches to government recognition.

As opposed to *de facto* recognition, *de jure* recognition does have a legal effect on the relation between the recognizing state and the DFR. For instance, the statements made by French officials during the Libyan conflict concerning the NTC can be seen as expressions according *de jure* recognition to the Libyan DFR. The French Minister of Foreign Affairs, Alain Juppé, stated on 7 June 2011:

Ever since its creation, France has considered the Libyan National Transitional Council to be its legitimate political partner and intends to provide it with its full support in building a free, united and democratic Libya. [...] The National Transitional Council is the only holder of governmental authority in the contacts between France and Libya and its related entities.<sup>125</sup>

This statement undoubtedly expresses a willingness to enter into full diplomatic relations with the NTC and recognition of factual control over Libyan territory exercised by the Council. Therefore, this statement (and others made by the French government) can be regarded as an expression of recognition, as opposed to those made by Germany in June 2011 and by other states.<sup>126</sup>

*De jure* recognition has legal implications and substantially changes relationships in the international order. It creates clarity and is not open to unreliable promises by uncertain governments, as is the case with *de facto* recognition. DFRs

119 Talmon (n 99) 89.

120 *ibid* 105.

121 'Deutschland erkennt libyschen Rebellenrat an' *Der Spiegel* (Hamburg, 13 June 2011) <<http://www.spiegel.de/politik/ausland/0,1518,768219,00.html>> accessed 3 August 2011. 'Der Machthaber habe "jede Legitimation" verloren'.

122 'Germany recognises Libya rebels as sole government' *BBC News* (London, 13 June 2011) <<http://www.bbc.co.uk/news.world-europe-13753422.html>> accessed 3 August 2011.

123 S Talmon, 'Recognition of the Libyan National Transitional Council' [2011] 15 ASIL: Insights. The word 'recognition' was not used by Westerwelle.

124 J Dempsey, 'Germany Officially Recognizes Libyan Rebel Government' *The New York Times* (New York, 13 June 2011) <<http://www.nytimes.com/2011/06/14/world/europe/14libya.html>> accessed 14 July 2011; 'Libyan Rebels Push West from Misrata' *Voice of America* (Washington DC, 13 June 2011) <<http://www.voanews.com/english/news/middle-east/Germany-Gives-Diplomatic-Recognition-to-Libyan-Rebels-123756209.html>> accessed 1 July 2011.

125 French Ministry of Foreign Affairs (2011) <[http://www.diplomatie.gouv.fr/en/article\\_imprim.php3?id\\_article=15850](http://www.diplomatie.gouv.fr/en/article_imprim.php3?id_article=15850)> accessed 3 August 2011.

126 Consider the *de facto* recognition of the NTC by the UK in February 2011. See S Talmon, 'Has the United Kingdom De-Recognized Colonel Qadhafi as Head of State of Libya?' [2011] EJIL: Talk.

often find themselves in situations that cannot be left open to consideration or expressions of a mostly political nature; ‘the accompanying violence and the resulting period of unsettlement demand an answer to the question whether the new government claiming to represent the State is in fact the government of the country’.<sup>127</sup> *De jure* recognition provides this answer; *de facto* recognition does not.

### 3. ‘Capacity’ Recognition

Government recognition is used in different ways to express an opinion on the factual situation created by the DFR and on the degree of willingness to enter into relations with the DFR. A productive way to understand government recognition, as opposed to using the black-and-white models of *de jure* and *de facto* recognition, is to consider the motives of the recognizing government in acknowledging DFRs. As Brownlie (2008) notes: ‘the distinction between “*de jure* / *de facto* recognition” [...] is insubstantial, more especially as the question is one of intention and the legal consequences thereof in the particular case’.<sup>128</sup> The recognizing government’s motives can collectively be considered to represent its stance towards a DFR. Instead of deducing the opinions and legal expectations of the recognizing government from the (supposed) form of recognition, it is more useful to consider the intent and to draw conclusion from this.

A way to deduce the motives of recognizing states and to clarify their desired legal relation is examining what capacity is accorded to the DFR by the recognizing government. As Talmon (2011) argues: ‘the imperative question in legal terms is not recognition per se but recognition as what’.<sup>129</sup> Talmon goes on to quote Winston Churchill when he stated: ‘one can recognize a man as an Emperor or as a Grocer. Recognition is meaningless without a defining formula’.<sup>130</sup> This holds true for international relations; governmental recognition in itself is non-specific. One needs context and knowledge of the recognizing government’s attitude towards the DFR to make meaningful conclusions about the legal effect. Therefore, it is important to understand the capacity in which a DFR is accorded recognition.

Firstly, DFRs can be recognized as being the ‘representative of a people’.<sup>131</sup> This accords them the possibility of (basic) consular relations with the recognizing government and indicates that the recognizing government sees the DFR as a separate entity from the parent state’s government. This practice does not, however, amount (and is not intended to amount) to any legal form of governmental recognition. It is simply a statement by a government indicating its willingness to negotiate with a DFR. It is often used to express disapproval of an old government and the willingness towards a DFR to enter into negotiations. It can often also be seen as a first step towards (official and legal) recognition, in which the recognizing government sets out its conditions for possible future recognition *de jure*. However, this form of recognition has no (legal) effect on the relationship between the recognizing state and the government of the DFR’s parent state. Again, a state can have only one government at a time. When Russian Foreign Minister Lavrov recognized the NTC as ‘a legitimate partner at the talks about Libya’s future’,<sup>132</sup> this left ‘intact the international legal status of the incumbent Qaddafi government as the government of Libya’.<sup>133</sup> According to Talmon (2011), recognition of a DFR as the legitimate representative of a people does hold several advantages for the recognized party:

- (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.<sup>134</sup>

These effects are not legal or binding, but do indicate a willingness to open diplomatic or even (basic) consular relations. Therefore, recognition as representative of a people is useful in clarifying the intentions of the recognizing government towards the recognized DFR. This makes the practice of *de facto* recognition obsolete. The form of recognition discussed here does not require any legal relations of any sort and does not pretend to create any.

Secondly, governments can recognize DFRs in the capacity of representative of their parent state. In doing this, a government intends to open full consular relations with the new government and to close relations with the old government.<sup>135</sup> Moreover,

127 Lauterpacht (n 6) 98.

128 Brownlie (n 14) 91.

129 Talmon (n 123) 1.

130 *ibid* 2.

131 *ibid*.

132 D Akande, ‘Recognition of Libyan National Transitional Council as Government of Libya’ [2011] EJIL: Talk 2.

133 Talmon (n 123) 2.

134 *ibid*.

135 Talmon (n 99) 76. ‘*I.e.* to have normal government-to-government relations with it as between one sovereign authority and another’.

it considers the DFR's capacity to fully represent its parent state and considers its ability to perform all its international rights and duties. Recognition of a DFR as the representative of its parent state amounts to full (*de jure*) recognition. As opposed to the form of recognition considered above, it does have legal implications.<sup>136</sup> Following the 'London Conference on Libya' in March 2011, the Libya Contact Group ('LCG') was instituted, comprising more than 20 individual governments including those of the United Kingdom, the United States and Germany.<sup>137</sup> On 15 July 2011, the group met in Istanbul to consider its standpoint towards the seated Libyan government under Gadhafi and the aspiring Libyan government under the NTC. At this meeting, the LCG:

reaffirmed that the Qaddafi regime no longer has any legitimate authority in Libya and that Qaddafi and certain members of his family must go. Henceforth and until an interim authority is in place, participants agreed to deal with the National Transitional Council (NTC) as the legitimate governing authority in Libya.<sup>138</sup>

By collectively issuing this statement, the governments that comprise the LCG seemed to have accorded *de jure* recognition to the NTC. Akande (2011) finds that this statement 'is clear recognition, by members of the Contact Group, of the NTC as the government of Libya'.<sup>139</sup> As the Group regarded the reign of Gadhafi illegitimate and recognized the NTC as the sole representative of the Libyan state, this was indeed the case. For some countries, like Germany, this meant a change in their policy towards the government under Gadhafi and the NTC as they earlier accorded only *de facto* recognition to the NTC. Accordingly, political and legal bonds had to be severed between the Group's members and the Gadhafi regime, and opened with the NTC.

One could argue that considering 'as what' DFRs are recognized, is no different from using the practice of *de facto* recognition versus *de jure* recognition. When a government recognizes *de facto*, it seems to recognize a DFR as being a *de facto* government (and thus having the capacity of a *de facto* government). There are, however, important differences. First of all, *de facto* (or *de jure*) recognition is in and of itself not the same as 'capacity' recognition. As Chen (1951) notes: '*de facto* (or *de jure*) recognition is descriptive of the character of the act of recognition'.<sup>140</sup> Recognition as having a certain capacity (being the representative of a people or of the parent state) is 'descriptive of the character of the thing recognized'.<sup>141</sup> Chen continues by stating: 'to say that a *de facto* recognition is recognition as a *de facto* government is an obvious contradiction in terms'.<sup>142</sup> There are other reasons to prefer the 'capacity'-method of recognition to *de facto* (and *de jure*) recognition.

When a government recognizes a DFR as a representative of a people, it provides clarity in its intentions towards that regime. It indicates a willingness to negotiate and recognizes the factual existence of the DFR. When a DFR is recognized as a *de facto* government, this can be meant as an expression of several differing (sometimes conflicting) intentions and opinions.<sup>143</sup> *De facto* recognition, moreover, does not indicate the intentions of the recognizing state, other than its refusal to recognize fully. When a government is recognized as the representative of a people, this ambiguity is avoided. The DFR is simply acknowledged for what it is and the recognizing state expresses its willingness to cooperate with it to a certain degree. Therefore, in examining the reactions of governments to DFRs, the 'capacity' methods of recognition are preferable to the forms of *de facto* and *de jure* recognition.

## B. Legal Effects of Governmental Recognition

After considering the methods of recognition and their merits, it is necessary to examine the legal effects of recognizing DFRs. In examining these effects, I will mainly concentrate on the full form of recognition, as this type of recognition has substantial legal effects (as opposed to other methods of recognition).

### 1. Declaratory and Constitutive Theories

The discourse on the effects of recognition has traditionally been divided between those adhering to a constitutive and those adhering to a declaratory view. The constitutive view holds that 'an entity's very legal existence as part of the international

136 See paragraph IV.B of this essay on the effects of recognition.

137 UK Foreign and Commonwealth Office, 'Libya Contact Group: Chair's Statement' (13 April 2011) <<http://www.fco.gov.uk/en/news/latest-news/?view=News&id=583592582>> accessed 4 August 2011.

138 Turkish Ministry of Foreign Affairs, 'Fourth Meeting of the Libya Contact Group Chair's Statement' (15 July 2011) <[http://www.mfa.gov.tr/fourth-meeting-of-the-libya-contact-group-chair\\_s-statement\\_-15-july-2011\\_-istanbul.en.mfa](http://www.mfa.gov.tr/fourth-meeting-of-the-libya-contact-group-chair_s-statement_-15-july-2011_-istanbul.en.mfa)> accessed 4 August 2011.

139 Akande (n 132).

140 T Chen, *Recognition* (Oxford University Press 1951) 273.

141 *ibid* 273.

142 *ibid* 274.

143 Talmon (n 99) 60.

system is “constituted” by the recognition of the other entities making up that system’.<sup>144</sup> In this view, DFRs are effectively transformed into a state’s government by the actions of other governments. Conversely, those defending a declaratory standpoint argue that ‘the authority of a new Government exists prior to recognition and the act of recognition is merely a formal acknowledgement or admission of an already existing fact’.<sup>145</sup> Here, the DFR first acquires a dominant position vis-à-vis the former government of its state, which is later confirmed or denied by third states. It goes outside of the scope of this article to consider in full the scholarly debate between supporters of the two theories. It is, however, constructive to use both views in analyzing recent state practice and discourse. This clarifies the contemporary effects of government recognition on the status of DFRs.

International legal personality can be used in considering the contemporary merits of both theories and in clarifying the position of governmental recognition. If the ILP of DFRs changes after recognition by existing governments (*i.e.* the DFR attains a higher level of ILP after recognition), such would evidence a constitutive system. If governmental recognition does not change the ILP of a DFR, this would indicate a declaratory system. The importance of this consideration lies more in the change of ILP after recognition than in concluding which of the two systems is more in line with current legal realities. The actual effects of recognition are more important than the label used to categorize these effects.

Are declaratory views more in line with state practice and contemporary legal reality than constitutive views? As with any legal consideration on the basis of practice and discourse, it depends on what weight is given to which aspects. As seen in earlier sections, DFRs have certain rights and duties under international law, providing them with a certain form of ILP. In this section I will consider whether recognition is required for a DFR to attain full ILP in the international community. In doing so, it is necessary to consider the effects of recognition in both bilateral and multilateral relations. In this assessment it is important to realize that once a DFR is recognized as the government of its parent state, this automatically means that its old government is no longer recognized. This means that recognition not only creates norms, but also severs ties with formerly recognized governments.

## 2. Recognition in Bilateral Relations

As argued above, when a government recognizes a DFR, it expresses both the acceptance of the factual existence of the regime as a state’s government as well as a willingness to enter into diplomatic relations with it in this capacity. As Kelsen (1941) argues: ‘the recognized community becomes in its relation with the recognizing state itself (...) a subject of rights and obligations stipulated by general international law’.<sup>146</sup> But what exactly changes in the relationship in the instance of recognition? Which rights and obligations are created between the recognizing and newly recognized governments that did not exist before? I will mainly consider two practices that are crucial for the day-to-day cooperation between governments: diplomatic and consular relations. I will also devote special attention to an important ramification of the change in diplomatic relations in a bilateral context: the acceptance of immunities between the two governments.

Firstly, recognition by a government is an expression of a willingness to have full and unconditional diplomatic relations. Therefore, ‘the recognized [government] acquires the capacity to enter into diplomatic relations [...] with the recognizing State’.<sup>147</sup> These relations are more significant than those existing after recognition as a representative of a people, or *de facto* recognition, and tolerate more than low-level negotiations or basic consular relations. It is, for instance, possible after recognition for a recognized state to enter into bilateral treaties with a recognizing government; a practice that is not available before full recognition.<sup>148</sup> Aside from the ability to conclude treaties, consular relations are an important aspect of international diplomatic relations. Consular relations available after recognition differ from those that are possible before recognition. Consider, for instance, the opening of German offices in Benghazi before Berlin recognized the NTC, compared to the relations between the UK and the Libyan opposition after recognition. When Germany opened its ‘liaison office’ in Benghazi in June 2011, this was done to ‘establish continuous contact with the Interim National Council there and to assist the German support measures for the population of eastern Libya’.<sup>149</sup> This consular representation was, however, one-sided. The NTC was not given the chance to open similar offices in Germany. Also, Germany at the time maintained consular

144 B Roth, *Governmental Illegitimacy in International Law* (Clarendon 2000) 124. See Lauterpacht (n 6); Kelsen (n 5).

145 P Menon, *The Law of Recognition in International Law* (Edwin Mellen Press 1994) 18; See also J Kunz, ‘Critical Remarks on Lauterpacht’s “Recognition in International Law” [1960] 44 AJIL.

146 Kelsen (n 6) 608.

147 Menon (n 145) 200.

148 *ibid* 200. Above I have stated that entering into treaties with (unrecognized) DFRs is possible under some circumstances. This excludes, however, bilateral treaties on subjects other than administrative or technical subjects.

149 German Federal Foreign Office, ‘Establishment of a German Liaison Office in Benghazi’ (12 May 2011) <[http://www.auswaertiges-amt.de/EN/Aussenpolitik/Laender/Aktuelle\\_Artikel/Libyen/110512-Verbindungsbuero-Bengasi.html](http://www.auswaertiges-amt.de/EN/Aussenpolitik/Laender/Aktuelle_Artikel/Libyen/110512-Verbindungsbuero-Bengasi.html)> accessed 8 August 2011.

relations with the Gadhafi government, effectively blocking recognition and the possibility of full consular relations with the NTC. When the UK Minister of Foreign Affairs William Hague expressed official recognition of the NTC, however, he opened the door to consular relations of a status superior to the relations between the Germany and the NTC. In the end of July 2011, Libyan governmental representatives (under the Gadhafi government) were told by the UK's foreign office to leave the country. At the same time, the NTC was invited to appoint a 'new diplomatic envoy'.<sup>150</sup> Severing ties with the Gadhafi government's representatives, in concert with the invitation for the NTC to take its place, supposes full and unconditional diplomatic relations. Similar developments took place after recognition of the Ouattara government during the Ivory Coast election crisis.<sup>151</sup> The relations between the German government and the NTC in June 2011 were of a more rudimentary nature. Although there are possibilities for relations with non-recognized regimes, these are based mostly on 'technical or otherwise non-political' issues.<sup>152</sup> Full consular and diplomatic relations thus seem to require (and are effects of) recognition.

The concept of immunities of state organs and leaders for wrongful acts 'performed in the exercise of [their] functions' is related to the opening of consular and diplomatic relations brought about by recognition.<sup>153</sup> The granting of immunities to the officials of the new government and automatic retraction of immunities from officials of the old government potentially has very serious ramifications, because 'forcible and other measures, not permitted to persons in a private capacity but licensed where authorized by sovereign authority to further "public order", may become criminally punishable once the putative government is displaced'.<sup>154</sup> For example, recognition of the NTC in the Libyan situation ended the diplomatic status of Gadhafi-appointed officials.<sup>155</sup> This had the consequence that actions by Gadhafi and his officials done in an official capacity became punishable by judiciaries other than those of the ICC.<sup>156</sup>

To conclude, recognition significantly affects bilateral relations. The recognized government attains new legal rights and duties vis-a-vis the recognizing government, which in turn means that its ILP has changed in its relation towards the recognizing government. In this paragraph I have not considered a change in the degree of fundamental rights and duties in the international system other than that of diplomatic relations and immunities. Some would argue that recognition also affects other aspects of intergovernmental relations, *e.g.* the use of force.<sup>157</sup> In choosing to only examine diplomatic relations, I would refer to earlier sections in which I argue that most basic international obligations and freedoms already exist between DFRs and governments. Recognition is not essential for these principles to apply to international actors, but it is essential to create ties with the newly recognized government and to sever ties with the old government.

### 3. Recognition in Multilateral Relations

Recognition in bilateral relations directly affects relations between the recognizing government and the recognized DFR. When multiple governments recognize a DFR, it not only changes the status between the individual government and the newly recognized government, but also between the newly recognized government and the recognizing states collectively. For example, when several (mainly Western) states recognized the Libyan NTC, it affected the relations between all the states in the LCG and the NTC. Collective recognition seems to be based on majority decisions. Peterson (1997) notes:

If enough [members of the international community] [...] do not recognize, then a new regime's request for participation is likely to be refused. If only a few refuse recognition while a sufficient majority accept the new regime's participation, then the non-recognizers have to accept the new regime as a co-participant for the multilateral activity involved unless they want to withdraw themselves in order to avoid all contacts.<sup>158</sup>

The effects of recognition in multilateral relations are most significant in three areas: participation in multilateral treaties, participation in intergovernmental organizations and the possession of property previously held by the former government.

As indicated above, participation in multilateral treaties is to some degree possible for DFRs. However, this only includes participation in treaties on administrative and technical issues. Multilateral treaties requiring direct contact between

150 'UK Expels Gaddafi Diplomats and Recognises Libya Rebels' *BBC News* (London, 27 July 2011) <<http://www.bbc.co.uk/news/uk-politics-14306544>> accessed 8 August 2011.

151 J d'Aspremont, 'Duality of Government in Cote d'Ivoire' [2011] EJIL: Talk.

152 Peterson (n 112) 121.

153 Cassese (n 17) 110. This includes official acts of state organs; See also *ibid* 117.

154 Roth (n 144) 122.

155 Talmon (n 123) 3.

156 *ibid* 3.

157 Roth (n 144) 122.

158 Peterson (n 100) 123.

governments are only open to recognized governments. Therefore it can be presumed that when a majority of parties to a multilateral treaty accept a former DFR as a member of the international community (as the new government of an existing state), it is also accepted as a party to that treaty. The same is true for participation in intergovernmental organizations. Full participation on a political level should be possible only after recognition by a majority of the organization's members.<sup>159</sup>

Another area in which the succession of governmental powers plays an important role is in the control over a state's assets. After recognition, control over the state's assets is presumed to be transferred from the former government of a state to the newly recognized government. This is especially important since these assets might be frozen during the time in which a DFR and the government of its parent state are contesting sovereignty. In the case of both Libya and the Ivory Coast, the country's assets were frozen while the states' military were in conflict with the DFRs under Ouattara and the NTC.<sup>160</sup> The unfreezing of these assets after collective recognition has tremendous effects for the newly recognized government, as it may concern large monetary sums.

#### 4. Recognition and International Legal Personality

As observed in earlier sections, DFRs have international rights and duties before recognition as the new government of their parent state. Therefore some argue that governmental recognition has little effect on the status of DFRs and does not extensively change their legal rights or duties. As Peterson (1983) states: 'At present [...] because the effects of nonrecognition are relatively narrow, many observers believe that recognition of governments seems to make little difference'.<sup>161</sup> However, the above has also demonstrated that for full and formal participation in the international community, some degree of recognition by other governments seems to be needed. The possession of complete and uncontested ILP, bringing with it rights and duties under international law, seems to emanate primarily from recognition by actors that have previously attained this status themselves. The 2011 developments in Libya and the Ivory Coast seem to support this notion. It is hard to contest the enormous influence of the decision to recognize the Ouattara government by the UN,<sup>162</sup> for it seems improbable that the governmental powers from the Gbagbo government would have been transferred without this recognition. Likewise, when the NTC attained the status of official Libyan government, it was only after collective recognition by major western powers.<sup>163</sup>

Thus, contemporary international law and state practice have produced a system that attests more to a constitutive than a declaratory view. This being said, I would agree with Roth (2000), who argues that:

the debate between the declaratory and constitutive views of recognition in the end reduces to the old query, "If a tree falls in the forest and nobody hears it, does it make a sound?" [...] An entity that fulfills the legal criteria for [...] governance [...] has a valid claim to legal existence, but in the absence of recognition, either it has no legal existence or else its legal existence is inefficacious.<sup>164</sup>

It seems almost impossible to suggest that any DFR can attain full international legal personality without being recognized by any government. Only when other governments are willing to have relations with a DFR as a new government is it able to function in the international community.<sup>165</sup>

#### C. *Criteria for Recognition*

Keeping in mind the effects of recognition, governments use different criteria to determine whether to recognize a DFR. While the exercise of effective control has always been important for recognition, recent development attest to the importance of other criteria guiding a government's judgments.

159 *ibid* 130-137.

160 Akande (n 139) 3; BBC News (n 197). The freezing of these assets was done under the influence of the UN. When a majority of its (most important) member states recognize a regime, it may result in the unfreezing of state assets.

161 M Peterson, 'Recognition of Governments Should Not Be Abolished' [1983] 77 AJIL 36.

162 UN Doc. S/RES/1975 (2011) 2. 'The Security Council [...] urges all the Ivorian parties and other stakeholders to respect the will of the people and the election of Allassane Dramane Ouattara as President of Cote d'Ivoire, as recognized by ECOWAS, the African Union and the rest of the international community'.

163 See paragraph IV.A.3 of this essay.

164 Roth (n 144) 129.

165 *ibid* 129. 'What is important is that international law operates to protect the interests of an entity only once the entity gains widespread legal (as opposed to political) recognition by other states. In that sense, recognition is clearly constitutive; beyond that, the debate begins to resemble a discussion of metaphysics'.

## 1. Effective Control

Exercise of effective control has traditionally been the primary criterion for governmental recognition. In particular, the fact that a regime controls the majority of a state's territory has been regarded as the most important indication of the need to recognize that regime. Some find that effective control is not only necessary, but also sufficient, to determine governmental recognition.<sup>166</sup> Proponents of this concept argue that 'if [...] confusion among acknowledgement of status, communication and approval is to be avoided, recognition decisions must be based solely on whether the new government has control of its state'.<sup>167</sup> They allege, moreover, that recognition based on other considerations and in the absence of effective control is premature and illegal under international law.<sup>168</sup>

However, the view that presupposes effective control yields several practical difficulties. Firstly, in situations of civil war or contest between a DFR and the seated government of its parent state, it might be unclear who is in effective control over the majority of the state's territory. Also, recognition based solely or mostly on 'effectivité' disregards the possibility of other considerations that might influence the recognition decision. Furthermore, it favors the rights of the strongest party in contests over sovereignty, which may not be the most important consideration in a given situation.<sup>169</sup> State practice has indeed proven that while 'the effective control of a new government over the territory of a state is [...] an important guideline to the problem whether to extend recognition or not [...] it was no more than that and in many cases appeared to yield to [other] considerations'.<sup>170</sup> Governments have found it important to be able to base their decisions to recognize DFRs on other considerations that are sometimes more important than effective control.<sup>171</sup> Often, governments rely on the degree of popular support enjoyed by the regime, or the effect that recognition would have on the stability of the international community.

## 2. International Stability

International stability and the role of justice and peace often have weight in recognition decisions. The decision to recognize on account of justice and peace can be based on the nature of the regime itself or for the sake of justice and peace in the wider, international context. Buchanan (1999) argues that 'satisfaction of [...] minimal requirements of justice is necessary for recognition'.<sup>172</sup> Buchanan understands these 'minimal requirements of justice' as being 'respect for basic human rights, both within the state and in the state's interactions with those beyond its borders'.<sup>173</sup> Nattichia (2005), on the other hand, argues for a 'pragmatic approach' that supports recognition of regimes 'if and only if cooperating with them and giving them international support would be the best means of achieving [...] global peace and justice'.<sup>174</sup> This approach does not require the regime itself to 'satisfy minimal requirements of internal and external justice'.<sup>175</sup> While both authors argue that one of the theories can be disregarded in favor of the other, a combination of both is also possible. Recognition of one regime over another may be done because that regime is more just in itself and recognition of it would also promote global stability. Ability and willingness to fulfill international obligations by a DFR can also be used as criteria for recognition.<sup>176</sup>

## 3. Contemporary State Practice

The situations in 2011 in Libya and Ivory Coast are examples of the fact that 'effectivité' is no longer the most important criterion for recognition. Although regimes might be in partial control (Libya) or not yet in complete control (the Ivory Coast) over a state's territory, they are recognized based on other criteria. Recognition of the Ouattara regime, as argued before, seemed to center around the alleged electoral victory, not the effective control of Ouattara's forces. As d'Aspremont (2011) states: 'These developments further underpin the [...] idea that the "effectivité" of [...] governments is increasingly being outweighed by other parameters – like electoral legitimacy – as the primary criterion to determine the authority entitled to speak and act on behalf of a State'.<sup>177</sup> In recognizing the NTC to the detriment of the Gadhafi government,

166 Peterson (n 100) 36.

167 *ibid* 50.

168 Shaw (n 20) 460-462; Talmon (n 123) 4. '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'.

169 B Roth, 'Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine' [2010] 11 Melbourne Journal of International Law 439.

170 Shaw (n 20) 455.

171 Peterson (n 100) 51.

172 A Buchanan, 'Recognition Legitimacy and the State System' [1999] *Philosophy & Public Affairs* 46-47.

173 *ibid* 47.

174 C Nattichia, 'Recognizing States and Governments' [2005] *Canadian Journal of Philosophy* 28.

175 *ibid* 28.

176 Peterson (n 100) 68-71.

177 d'Aspremont (n 151) 5.

disapproval of the Gadhafi regime coupled with considerations for justice, peace and stability were given more weight than effective control. While some argue that decisions of recognition based on something other than effective control are illegal and premature, recent state practice seems to confirm that factors such as popular support and stability of the international community outweigh the (possibly outdated) legal principle of ‘effectivité’.

## V. Conclusions

The presence of *de facto* regimes continues to pose challenges to the international community. While their existence cannot be denied, the extent of their international rights and duties remains open to debate. Moreover, appropriate responses by established governments in the form of recognition, which is necessary to definitively secure a position in international law, is not always provided. The position of DFRs is not only a question of legal semantics but also has consequences for those under the control of the regime (or the seated government of its parent state) and for international stability.

*De facto* regimes are subjects of international law and possess a certain degree of international legal personality. DFRs have both rights (*e.g.* the protection from the use of force), which they can invoke against actors that violate them, and duties under international law (*e.g.* IHL obligations), to which they can be held responsible. Still, DFRs are not accorded full ILP. Governments seem to find it necessary to express their disapproval of these regimes by not (fully) including them in international decision-making. Such policies will continue to prevent DFRs from being fully operational international actors, blocking meaningful cooperation with them and making it impossible to expect their full adherence to international norms. Only if DFRs are given a meaningful place in the international legal order, *i.e.* by according them full ILP, can they be held fully responsible for international standards deemed obligatory for other international actors. According DFRs full ILP is not just in the interest of other international actors whose rights might be violated, but also the individuals living under their control. It is only through according DFRs full ILP that ‘the international community will finally lift its rather hypocritical *veil of ignorance* and abandon its prevailing reluctance to denounce as well as to impeach *de facto* regimes, which defy international (human rights) standards to the detriment of the individual living under *de facto* subjugation’.<sup>178</sup>

As of now, a DFR’s only opportunity to be included in the international community is through recognition as the parent state’s government. It is only after recognition that the DFR attains full ILP as the government of a state. Recognition is only meaningful in a *de jure* capacity for precisely this reason. When a DFR is recognized *de facto* it is recognized as the thing that it already is, namely a *de facto* regime, making *de facto* recognition a pointless exercise and not a legal practice; it is merely an expression of the political attitude of the recognizing government towards a DFR and its parent state. Because governments, apparently, find it necessary to be able to have control over which entity they want to include in their community and with which group of persons they want to negotiate, governmental recognition is not likely to disappear. It is hoped that in the future, this practice will be used in a way that creates transparency for all actors involved and will be used more as a legal than a political practice. The confusion among the general public and government officials in regards to the recognition of the NTC as Libya’s official government as well as the ousting of Gbagbo in favor of Ouattara should inspire a reconsideration of the legal practice of governmental recognition and the international position accorded to *de facto* regimes. ■