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# CURRENT DEVELOPMENTS

## PUBLIC INTERNATIONAL LAW

Edited by Dominic McGoldrick and Sarah Williams

- I. British Policy and the National Transitional Council of Libya**
- II. The Palmer Report and the Legality of Israel's Naval Blockade of Gaza**
- III. Australian Asylum Policy all at Sea: An analysis of *Plaintiff M70/2011 v Minister for Immigration and Citizenship* and the Australia–Malaysia Arrangement**

### I. BRITISH POLICY AND THE NATIONAL TRANSITIONAL COUNCIL OF LIBYA<sup>1</sup>

#### *A. Introduction*

In February 2011,<sup>2</sup> an uprising began in Benghazi in eastern Libya against the long-established Gaddafi<sup>3</sup> Government. After initial military success by the rebels in the east, the government responded forcefully. In the light of threats made by the government to the lives of people in Benghazi, the Security Council authorized 'any necessary measures' to protect civilian lives in Libya and to enforce a no-fly zone over Libya's air space.<sup>4</sup> Acting on this authorization, NATO forces intervened to enforce the no-fly zone and to protect civilians. The resolution precluded the occupation of Libya, so the NATO action was confined to aerial and some naval bombardment of regime targets in Libya. The combined effects of operations by the irregular forces of the rebels and the bombing by NATO eventually led to the defeat of Government forces and the death of President Gaddafi on 20 October 2011. However, the overthrow of the regime was principally the work of groups in the west and south-west, not formally associated with the original insurrection in the east. This note is not concerned with matters of legality of the use of force or the way in which the campaign was conducted by any of the participants.<sup>5</sup> It deals with the diplomatic aspects of the development of relations between the United

<sup>1</sup> There is much which is tentative about this note. This reflects the still unresolved conclusion of events in Libya and the surprising resort to the recognition of governments power by the British government to deal with the unfolding situation there. I am very grateful to Roger Masterman of the Durham Law School for discussions about aspects of this paper. He has saved me from error but is not implicated in any which remain.

<sup>2</sup> The 'National Transitional Council', which is a key institution in this story, was founded on 27 February 2011.

<sup>3</sup> I have used the most usual transliteration 'Gaddafi' for the name of the former president of Libya. Some of the documents quoted in the note used a different form.

<sup>4</sup> Security Council resolution 1973, paras 4 and 8.

<sup>5</sup> See Security Council resolution 2016 paras 5 and 6; NATO statement by Secretary-General, <[http://www.nato.int/cps/en/natolive/news\\_80052.htm?mode=pressrelease](http://www.nato.int/cps/en/natolive/news_80052.htm?mode=pressrelease)>; C Henderson, 'International Measures For The Protection Of Civilians In Libya And Côte D'ivoire' (2011) 60 ICLQ 767.

Kingdom, the Gaddafi Government of Libya and the 'National Transitional Council' (NTC). It raises some speculation about the implications in domestic law of the way British policy was conducted.

During the conflict, various States and international organizations had had dealings with the rebels (and had modified their relations with the Gaddafi Government), using various terms to describe the NTC, the interim body representing the rebels.<sup>6</sup> Before the conflict started, the UK and Libya had ordinary, inter-State diplomatic relations, each recognizing the other's Government and maintaining an embassy in the other's capital.<sup>7</sup> After the rebellion began, the UK implemented the sanctions provisions of Security Council resolution 1970<sup>8</sup> and took part in the armed operations within NATO under the authorization in resolution 1973. The earliest acknowledgement of the status of the NTC by the British government was that the NTC was regarded by the UK as the 'legitimate political interlocutor' for the Libyan people.<sup>9</sup> Later events took an unanticipated turn in July 2011, when against its well-established policy, the British Government recognized the NTC as the Government of Libya.<sup>10</sup> It is this decision which is the principal focus of this note.

In the previous Current Developments section, Professor Stefan Talmon dealt with the early developments about the status of the authorities in Libya after the disturbances there had commenced and after the Security Council had authorized action against the Gaddafi Government.<sup>11</sup> He supplemented this in a later article which examined the reactions of various States to the events, pointing out the diversity of responses that there had been and indicating how difficult the matter was for those States which had adopted a policy of not recognizing governments, among them the British Government.<sup>12</sup> He did not anticipate, few could have done, that the British Government would soon abandon its frequently reiterated policy and expressly recognize the National Transitional Council as the Government of Libya. This note sets out the UK practice which led up to that decision and the consequences of it. There were uncertainties about the international legality of some aspects of the policies adopted by States, a point taken by the Gaddafi Government itself about the British decision to recognize the NTC as the Government of Libya.<sup>13</sup> In addition, the government's decision raises matters of domestic public law, which bear consideration, even if the resolution of their difficulties is elusive. Just as it was impossible to foresee that there would be a recognition decision, one cannot know whether the recognition of the NTC was a single, ad hoc deviation from the established policy or whether it will be a device used more frequently in future when a British Government is faced with the

<sup>6</sup> S Talmon, 'De-recognition of Colonel Qadhafi as Head of State of Libya?' (2011) 60 ICLQ 759.

<sup>7</sup> The constitutional ad hocery of the arrangement under Gaddafi was extraordinary. Despite the local nomenclatures, I shall refer to the administration as 'Government', its legation in London as its 'embassy' and its senior representatives there as 'ambassador' or 'chargé d'affaires', whichever was appropriate at the time.

<sup>8</sup> For the original implementation regime in the UK, see UK note to the Chair of the Sanctions Committee under res 1970, paras 9–13, S/AC.52/2011/7, 17 June 2011 (which was modified as later resolutions required).

<sup>9</sup> <<http://www.fco.gov.uk/news>>, 19 April 2011, Foreign Secretary.

<sup>10</sup> See below, Section E.

<sup>11</sup> Talmon (n 6).

<sup>12</sup> Talmon, ASIL Insights, Recognition of the Libyan Transitional Council, 15/16, 16 June 2011 <<http://www.asil.org/pdfs/insights/insight110616.pdf>>.

<sup>13</sup> See below, Section I.

awkward choices which internal conflicts within another State often present to other States not directly engaged in the fighting.

### *B. Existing relations between the UK and Libya*

Before the uprising began, the Gaddafi Government was the sole authority in Libya with which the British Government had inter-governmental relations and President Gaddafi was regarded as the Head of State of Libya, whatever peculiarities attended his position in Libyan domestic law. There was a Libyan embassy in London, with an ambassador and staff appointed by the Gaddafi Government, and Libyan Government property and activity in the UK. There was a UK embassy in Tripoli, with an ambassador and staff from the British diplomatic service. Although there had been no direct statement by the British Government that it 'recognized' the Gaddafi authorities as 'the government of Libya', the nature of its dealings with them (and the absence of any dealings with anyone else) left no doubt about the status of the Libyan Government as a matter of UK law, if the question had arisen. Although there were differences between the two Governments, even friction in the odd case, UK-Libyan relations appeared to fall within the broad notion of normality which prevails in diplomatic life. For instance, one issue (which will be referred to later<sup>14</sup>) was that there was in the UK a substantial amount of Libyan currency, printed for the Libyan Government by a British company, the sort of mundane matter which indicates a certain degree of confidence between the two administrations. Arms sales between the two countries appear to have proceeded in normal ways. The British Government did not endorse every activity of the Libyan Government, especially in the field of human rights,<sup>15</sup> but these differences were nowhere near serious enough to cast any doubts upon its view of the legitimacy, still less the legality, of the regime in Tripoli.

### *C. The conflict(s) in Libya*

In the immediate aftermath of the start of the bombing campaign by NATO, the British embassy in Tripoli (along with those of several other States) was destroyed by a mob attack on 30 April 2011, which the local authorities appeared to do nothing to prevent. The British ambassador and his staff left Libya and the Libyan ambassador in London was ordered home.<sup>16</sup> The embassy in the UK remained under the authority of a chargé d'affaires and inter-governmental relations continued. The orthodox nature of these continuing relations was demonstrated, though in an unusual fashion, when the UK declared two members of the Libya mission *persona non grata* by reason of their activities in London against supporters of the NTC, without this prejudicing the continuation of the remainder of the staff and the mission itself.<sup>17</sup> From the outbreak of fighting, the Gaddafi Government made clear its intention to resist the rebellion. If anything the intensity of its actions, certainly the vehemence with which its intentions

<sup>14</sup> See below, Section H.

<sup>15</sup> See, for example, Human Rights and Democracy: FCO Report 2010: Countries of Concern – Libya, <<http://fcohrdreport.readandcomment.com>>.

<sup>16</sup> HC Deb 9 May 2011 Vol 527 c989W.

<sup>17</sup> Libya described its embassy in London as the 'Libyan People's Bureau' but nothing turned on the denomination, HC Deb 5 May 2011 Vol 527 c624WS; also HC Deb 20 June Vol 530 c22W.

were expressed, intensified after the NATO raids began. While the foreign States engaged in operations against Libya eschewed regime change as an object of their campaign and while they maintained inter-governmental relations with the Gaddafi authorities, their expectation that the Libyan government would be replaced was made manifest.<sup>18</sup> A problem they faced was that the early successes of the rebels in the east were not repeated and, although the NTC enjoyed authority in large parts of eastern Libya, its writ hardly extended at all in other parts of the country, especially in Tripoli. Once upon a time, a British government might have recognized the NTC as the de facto government in the areas which it controlled; at an even earlier time, the NTC might have been recognized as insurgents but no decisions like this were forthcoming. It became clear that the support of the NTC from outside States was based more on its character, it was perceived as a body committed to democracy (and it was not Gaddafi), than on its effectiveness. Support was given to the NTC to secure its effective control in Libya, not because of it, a tactic redolent of the use of recognition of States in the disintegration of Yugoslavia, for Bosnia-Herzegovina, certainly.<sup>19</sup>

#### *D. Recognizing governments—British policy*

The British policy of not recognizing governments was set out in a parliamentary answer in 1980. The Foreign Secretary wrote:

... we have decided that we shall no longer accord recognition to Governments. . .

Where an unconstitutional change of regime takes place in a recognized State, Governments of other States must necessarily consider what dealings, if any, they should have with the new regime and whether and to what extent it qualifies to be treated as the Government of the State concerned. . .

We shall continue to decide the nature of our dealings with regimes which come to power unconstitutionally in the light of our assessment of whether they are able of themselves to exercise effective control of the territory of the State concerned, and seem likely to continue to do so.<sup>20</sup>

The policy seems to address a single (and, it should be said, largely uncomplicated) situation, where a rebel movement completely supersedes an existing effective authority within a recognized State. It does not in its terms purport to decide what the Government should do in the period prior to the success of a revolution, and in circumstances such as this, even recourse to de facto recognition of the rebels in the east might have been unlikely given the limited territorial scope of their authority and the resistance of the Government. The new policy allowed for procrastination and ambiguity up to and beyond the time when, under the previous policy, a recognition decision would have been required. The 1980 policy has been very largely adhered to.<sup>21</sup> It has been reiterated almost as a matter of course whenever a British Government has been asked for its

<sup>18</sup> HC Deb (n 16).

<sup>19</sup> See R Rich, 'Recognition of States: The Collapse of Yugoslavia and the Soviet Union' (1993) 4 EJIL 36.

<sup>20</sup> HL Debs 28 April 1980 Vol 408 cs1121–1122.

<sup>21</sup> UKMIL 2008, 5/31, (2008) 79 British YBIntL 617. See S Talmon, 'Recognition of Governments: an Analysis of the New British Policy' (1992) 63 British YBIntL 231.

stance on the recognition of this or that foreign Government.<sup>22</sup> After 1980 until the Libyan case, there were no examples of the Government making a statement recognizing a government in even the most intractable civil war, though forms of words were often found to indicate clearly where the Government stood. The same policy was followed in those few occasions when the question of the status of a foreign authority arose in judicial proceedings in the UK. Once, the British Government would have issued an executive certificate saying whether or not a foreign institution had been recognized as a government by HMG and that certificate would have been conclusive on the matter to which it spoke.<sup>23</sup> Under the new arrangement, the Government would present evidence of its dealings with the foreign authority, evidence which carried powerful weight but which, nonetheless, might be challenged or contradicted by other evidence brought by a party disobliged by the result which would have followed from the Government's uncontested evidence.<sup>24</sup> It is for a British court finally to determine whether or not the authority is, as a matter of fact, the Government of another State.

Subject to what will be written shortly, so long as effectiveness or the existence of inter-governmental relations were, respectively, the basis for recognition decisions or the identification of foreign governments, the British position was assessed against objective factors without regard to the nature or the conduct of the foreign authority. With respect to foreign States, British policy has been conducted similarly, save that reference is now occasionally made to a disqualifying element, sometimes with an international legal basis,<sup>25</sup> sometimes on policy grounds.<sup>26</sup> This has resulted in the UK not recognizing as States entities the objective characteristics of which would otherwise have resulted in it doing so. There is less evidence<sup>27</sup> that the British Government has adopted what seems to be a developing practice of accepting a less stringent test of effectiveness when deciding to recognize States where the impact of other international rules, notably self-determination, points to the inevitability of a particular solution, even if for the time being to be delayed. Both these factors—the negative and positive ones, *mutatis mutandis*, appear to have been at work as the British Government struggled with its relationships with the Gaddafi government and the emerging NTC in Libya. The Foreign Secretary restated the 'no recognition of governments' policy quite late in the piece. On 16 May 2011, he said:

We have not given them [the NTC] official recognition; we recognise states, not Governments. We recognise the state of Libya. We say for now—at this moment—that they [the NTC] are the legitimate representatives, as Gaddafi has lost legitimacy, and we have invited them to open an office but not an embassy here in London... we have a diplomatic mission in Benghazi that is working with them daily.<sup>28</sup>

<sup>22</sup> Id 5/32 (Kenya), (2008) 79 British YBIntlL 618 and HC Deb 16 May 2011 Vol 528 c61 with respect to Libya.

<sup>23</sup> E Wilmschurst, 'Executive Certificates: the United Kingdom' (1986) 35 ICLQ 157.

<sup>24</sup> *Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA* [1993] QB 54.

<sup>25</sup> For instance, the 'Turkish Republic of Northern Cyprus', see UKMIL 2008 5/41, (2008) 79 British YBIntlL 622 referring to Security Council resolutions 541 and 550.

<sup>26</sup> For example, Somaliland, see UKMIL 2009 5/7 and 5/13, (2009) 80 British YBIntlL 710 and 712.

<sup>27</sup> But not none at all, for example the recognition of Kosovo, UKMIL 2008 5/16, (2008) 79 British YBIntlL 604.

<sup>28</sup> HC Deb 16 May 2011 Vol 528 c61.

Notwithstanding the ‘loss of legitimacy’ of the Gaddafi regime, the British Government still dealt with it as a government. The Libyan Embassy in London remained open and staffed by Gaddafi appointees.<sup>29</sup>

The British embassy in Tripoli had been destroyed by demonstrators on 30 April 2011, a consequence of which was the expulsion of the Libyan ambassador in London. There was no UK representation in Tripoli and the ‘diplomatic mission’ in Benghazi was not a replacement embassy—the rather ambiguous term seems to have indicated only that the office was staffed by diplomats. Similar ambiguity attached to the status of the NTC. An FCO Minister wrote in a Parliamentary answer:

It is clear that Gaddafi no longer has legitimacy and so he should heed the calls of the Libyan people and the international community to leave immediately. We recognise the National Transitional Council as *the legitimate representative* of the Libyan people and welcome their efforts to include all Libyans and to prepare for a political transition in which Libyans can decide on their own future (emphasis added).<sup>30</sup>

The use of ‘recognition’ here is dubious for something less than a government, ‘accept’ or ‘acknowledge’ would have been better. The notion of ‘legitimate representation’ belongs to discourse from the field of colonial self-determination rather than effective administration. The status of the NTC was based on its relatively territorially limited and fragile control (each of which the British Government were hoping would be corrected). This, perhaps, indicated that in situations analogous to those which the British Government would previously have treated as ones of colonial self-determination or ones like the ad hoc notion of self-determination which was invoked in the reconfiguration of Yugoslavia, that less than full usurpation of a government’s authority by rebels might be enough to allow acceptance or even recognition of degrees of status up to—and as it was to turn out—including - recognition as a government, this at least as a matter of British policy. Without the backing of the principle of colonial self-determination, it is, of course, a policy carrying the risk of challenge against the standards of international law by an incumbent government as an act of unjustified intervention in its State’s internal affairs. Nonetheless, the British Government pressed on with its policy of engagement with the NTC. On 15 July 2011, the FCO said:

The Contact Group’s<sup>31</sup> decision to deal with the National Transitional Council (NTC) as the legitimate governing authority in Libya, reflects the NTC’s increasing legitimacy, competence and success in reaching out to all Libyans. In contrast, Qadhafi has lost all legitimacy in the eyes of the Libyan people and the international community.<sup>32</sup>

### *E. Recognizing the NTC as the Government of Libya*

The dramatic change in UK policy was announced on 28 July 2011. Speaking after a meeting of the Libya Contact Group, the Foreign Secretary said:

At the latest Libya Contact Group in Istanbul the international community sent an unequivocal message to Qadhafi: that he had no legitimacy and there was no future for Libya with him in power. As part of this it decided ‘to deal with the National Transitional Council

<sup>29</sup> HC Deb 24 May 2011 Vol 528 c586W; HC Deb 20 June 2011 Vol 530 c22W.

<sup>30</sup> HC Deb 27 June 2011, Vol 530 c566W.

<sup>31</sup> The ‘Libya Contact Group’ was an informal and changing group of States which were opposed to Gaddafi’s continuing in office and which supported the cause of the NTC. It met in various places. <sup>32</sup> <<http://www.fco.gov.uk/news>>, 15 July 2011.



(NTC) as the legitimate governing authority in Libya'. This was a significant development, and today I will outline the action that the UK will now take in response.<sup>33</sup>

The point to note here is that the decision of the Contact Group did not constitute recognition of the NTC by each of the participant States, nor did the UK individually act on the assumption that its participation in the decision amounted to recognition of the NTC. Instead, discrete UK action was required. The Foreign Secretary continued:

The Prime Minister and I have decided that the United Kingdom recognises and will deal with the National Transitional Council as the sole governmental authority in Libya. This decision reflects the NTC's increasing legitimacy, competence and success in reaching out to Libyans across the country. Through its actions the NTC has shown its commitment to a more open and democratic Libya—something that it is working to achieve through an inclusive political process. This is in stark contrast to Qadhafi, whose brutality against the Libyan people has stripped him of all legitimacy.

The NTC is a focal point for people throughout Libya who want a better future for their country. Our decision also reflects the responsibilities that the NTC has taken on in the areas under its control. It means we will deal with the NTC on the same basis as other governments around the world.<sup>34</sup>

These words constitute the revival of the pre-1980 policy of making decisions on the recognition of governments, although the circumstances which would prompt such a decision in this case appear to have been quite out of line with those which would have had to have prevailed before 1980.<sup>35</sup> It is to be emphasized that the motivation for the decision to recognize the NTC as the Government of Libya is explained as its success 'in reaching out to Libyans across the country' and 'its commitment to a more open and democratic Libya'. The recognition is said to reflect 'the responsibilities that the NTC has taken on in the areas under its control'. This is much less demanding than a requirement that the authority has demonstrated effective governmental control over the State territory with a prospect that its authority will be permanent. Later in the statement, the Foreign Secretary confirmed that the control of the NTC was far from complete, when he said:

The momentum has shifted against him and those around him. There is steady progress across the board, in particular around Misrata, Brega and Jebel Nafusa where the opposition is driving Qadhafi's forces back. Reports suggest that morale amongst the regime's forces is low. Economic sanctions are restricting his ability to wage war on Qadhafi's own people.<sup>36</sup>

However, the Gaddafi forces were far from defeated and the extent of the NTC's control did not extend to Tripoli. The Foreign Secretary continued his recognition remarks:

I am making this announcement today to reflect the facts on the ground and increase our support for those fighting and working for a better future in Libya. We will sustain our actions for as long as is necessary. Our recent decision to deploy an additional four Tomados to Libya is a concrete illustration of this end.<sup>37</sup>

This is quite at odds with the insistence that recognition 'should not depend on whether the character of the regime is such as to command His Majesty's Government's approval'.<sup>38</sup> It took quite some time for the NTC forces to establish complete control in Libya. As late as 26 September 2011, Libya's representative told the Security Council:

<sup>33</sup> <[www.fco.gov.uk/news](http://www.fco.gov.uk/news)>, 27 July 2011.

<sup>34</sup> *ibid.*

<sup>35</sup> See HC Deb 21 March 1951 Vol 485 cols 2410–2411.

<sup>36</sup> FCO news (n 33).

<sup>37</sup> *ibid.*

<sup>38</sup> HC Deb (n 35).

Although some people think that the Al-Qadhafi regime fell with the fall of the capital and other cities, it is still true that the mission is far from accomplished. Al-Qadhafi's battalions continue to kill innocent civilians in three distinct regions of our country—in Sirte, in Bani Walid and yesterday in Ghadamis—and therefore the very foundations of resolution 1973 (2011) remain valid. In that regard, we would like to thank NATO for its decision to extend its mission for an additional 90 days.

Secondly, Al-Qadhafi is still at large and possesses huge amounts of money and gold. The simple fact that he is still free and that he has such wealth at his disposal means that he is still capable of destabilizing the situation, not only within my country but also in the Sahel region and the African desert. It is no exaggeration to say that even beyond the African continent, Al-Qadhafi, with the means and assets he has available to him, could resume his terrorist practices by distributing arms across the continent in order to justify his prediction that his absence from the political stage would be synonymous with the expansion of Al-Qaida and extremism throughout Africa.<sup>39</sup>

The Foreign Secretary then explained what some of the consequences of the decision were:

In line with this decision we therefore summoned the Libyan Charge d'Affaires here to the FCO this morning and informed him that he and other regime diplomats from the Qadhafi regime must leave the UK.<sup>40</sup> We no longer recognise them as the representatives of the Libyan Government, and are inviting the NTC to appoint a new Libyan diplomatic envoy to take over the Libyan Embassy in London.<sup>41</sup>

In line with UNSCRs 1970 & 1973, the UK has continued to explore how to unfreeze assets to support the NTC. At the request of the Arabian Gulf Oil Company [AGOCO], a Libyan oil company, the UK is ready to make available £91 million of the Company's assets in the UK.

AGOCO is operating under the control of the NTC and we are assured that its activities will not benefit any listed entity under the sanctions. We will issue licences for the use of its frozen funds to meet its basic needs. This will help to ensure that the crucial provision of fuel is maintained. We will work hard with our international partners in the coming weeks to unfreeze further Libyan assets frozen in the UK for the benefit of the Libyan people, including stocks of Libyan currency and other assets of the Libyan Central Bank, in line with UNSCRs 1970 and 1973. We are also discussing with partners what funds we can make available for the benefit of the Libyan people to alleviate the hardships they face. . .<sup>42</sup>

The Foreign Secretary referred specifically to the financial difficulties of Libyan students in the UK who depended upon payments from accounts operated by the Libyan mission in London, a matter which was soon to reach the courts.<sup>43</sup>

From the domestic perspective, it is worth underlining that this statement is the revival of an apparently discarded policy for recognizing governments abandoned in 1980 but that, in its resuscitated form, the circumstances which will apparently trigger a 'recognition of government' decision are greatly changed from those which previously prevailed.

Among the consequences of an authority being recognized by the British Government as the government of a foreign State is that the authority becomes entitled to State property in the UK. This includes the Embassy and associated diplomatic premises but, importantly, includes bank accounts to the credit of the foreign State and

<sup>39</sup> Security Council, S/PV.6622, p 6.

<sup>40</sup> The ambassador had been expelled earlier, (n 16).

<sup>41</sup> The new ambassador appointed by the NTC was received on 10 August 2011.

<sup>42</sup> FCO news (n 33). <sup>43</sup> See below, Section H.

government and its instrumentalities. In the present case of Libya, there was a significant complication affecting financial assets belonging to the State because of the sanctions which had been imposed by the Security Council on Libya at the beginning of the uprising against the Gaddafi government. As part of Security Council resolution 1970 (which is a Chapter VII resolution), the Council decided that States should freeze funds owned or controlled by certain named individuals or entities from Libya, with the power of the Sanctions Committee set up under the resolution to designate further persons and institutions for the same treatment, an obligation reinforced by resolution 1973.<sup>44</sup> The combined effect was very wide reaching, touching all financial resources 'owned or controlled, directly or indirectly by the Libyan authorities'. Although there might have been an argument that the resources of the 'old' Libyan authorities were now owned and controlled by the 'new' Libyan authorities, the line taken was that the asset freezing obligations persisted, even as Gaddafi's territorial control diminished and the authority of the NTC was acknowledged by an increasing number of States. In this connection, the Foreign Secretary was asked in Parliament in June 2011:

Given that the Foreign Secretary had said that the NTC represented the legitimate aspirations of the Libyan people, he was asked if he believed that the \$53 billion-worth of frozen Libyan assets, including the \$182 million-worth allegedly held by the Royal Bank of Scotland, would be released to the NTC for it to dispose of as it wished.

He said:

It is not possible to release those assets under the current UN resolutions—of course we have looked at this matter, but all the advice that we have been given is that it is not possible to do that. Other countries have received the same advice and, certainly, all other European countries are in the same position. It is very important that we stay within the UN resolutions and retain the moral authority of operating within international law, even though that is inconvenient in some respects and requires us to do some things differently from how we might wish. So that is a higher priority than finding a way around the UN resolutions. If it is possible to change them at any stage, we would be ready to do so.<sup>45</sup>

As events developed in Libya, the situation about Libyan property changed. On 31 August 2011, the Royal Air Force delivered 280 million dinars (c£140 m) to the Central Bank of Libya in Benghazi. The newly minted banknotes were part of a stock of 1.86bn dinars printed in the UK, which had been frozen under Security Council resolution 1970 at the start of the crisis in Libya in order to prevent them falling into the hands of the Gaddafi Government. They were unfrozen by an unpublished decision of the Sanctions Committee on Monday 29 August 2011.

Following the delivery of the cash, the Foreign Secretary said:

I am delighted to announce that today the RAF delivered 280 m Libyan dinars to the Central Bank of Libya in Benghazi. The banknotes will be used to pay the wages of Libyan public sector employees, including nurses, doctors, teachers and police officers; provide support for those on social security who have not been paid for a number of months; provide aid for refugees displaced by the conflict; pay for medicines and subsidies for food supplies; and will be transferred to commercial banks in order to make currency available to the general public for their basic living expenses. This is particularly important at the time of Eid.

Returning money to the Libyan people is part of our commitment to help the NTC rebuild Libya and help create a country where the legitimate needs and aspirations of the Libyan

<sup>44</sup> See UK note (n 8).

<sup>45</sup> HC Debs June 2011 Vol 529 c47.

people can be met. It follows and was authorised by the UN's decision to unfreeze 1.86bn Libyan dinar banknotes printed in the UK. Further deliveries of the remaining funds will be made shortly.<sup>46</sup>

More substantial progress on releasing Libyan assets was delayed until 16 September 2011 when the Security Council approved resolution 2009. By this date, the NTC had been recognized by a large number of States and the credentials of its representative approved by the General Assembly credentials committee.<sup>47</sup> Also, progress was being made on the ground in defeating the fighters who remained loyal to Gaddafi. Tripoli was declared secure on 9 September 2011<sup>48</sup> and leaders of the NTC appeared in Tripoli, to be followed by a visit there from the leaders of the NATO States which had headed the aerial action against the Gaddafi forces on 15 September 2011. Of political importance in the course of events was the recognition by the African Union of the NTC as the 'de facto' Government of Libya. Some African States had been among the most critical of the strategy of the air campaign and the most protective of the status of the Gaddafi Government.<sup>49</sup>

*F. Is the recognition of the NTC the revival of the pre-1980 policy of recognizing governments?*

When, in 1980, the Foreign Secretary announced the new policy of not recognizing governments, the change of policy was not prompted by considerations of international law but by the government's assessment that the existing policy was seen as conferring a mark of political approval on the recognized entity and that the coordination of decisions on the status of foreign authorities with the UK's allies was made difficult because of the automatic way in which recognition of governments had been practised by British Governments in the past. The new policy allowed a nuanced and pragmatic response to events in a foreign State and replaced the practically instant recognition of a rebel regime as soon as it had obtained effective control in its State. The previous policy was the exercise of a prerogative power of the government, a power which could be implemented in domestic law by the issuing of an executive certificate, explaining the use of the power in a particular case, which the courts regarded as conclusive as to the facts to which the certificate attested, including the crucial fact the British Government recognized (or did not recognize) authority Y as the government of State Z. There were, thus, two kinds of fact relevant to a decision to recognize a government—first, the fact of effective control, which prompted the second, the decision to recognize. It should be noted that recognition was, as a matter of international law, a qualified discretion of States—there was no duty to recognize a foreign authority, no matter how strong its own domestic position. However, British practice was such that it would have constituted a faithful execution of any duty, had one existed. That would not have been true about the policies of most other States.<sup>50</sup>

<sup>46</sup> <<http://www.fco.gov.uk/news>>, 31 August 2011.

<sup>47</sup> General Assembly resolution A/66/3.

<sup>48</sup> A British diplomatic mission had been 're-established' in Tripoli on 5 September 2011, <[www.fco.gov.uk/news](http://www.fco.gov.uk/news)>, 5 September 2011.

<sup>49</sup> <<http://www.bbc.co.uk/news/world-africa-14986442>>.

<sup>50</sup> See in general, M Peterson, *Recognition of Governments. Legal Doctrine and State Practice, 1815–1995* (Macmillan 1997).

Quite apart from the international ramifications of any recognition decision, it had significant consequences in domestic law. As a matter of English<sup>51</sup> law, a recognized government would be entitled to have its status respected and protected in English law, for instance to be able to control State property in the UK and to use the English courts to protect its rights. It would be entitled to immunity for itself and its diplomatic representatives. Its acts and decrees would be recognized and applied, subject to the rules of the English conflict of laws, to actions involving individuals to which the foreign laws were germane.<sup>52</sup> The policy on the recognition of governments was given a gloss to meet the circumstances where there was more than one authority exercising authority in a State, occasionally, even where one of the competing entities had been totally expelled from its territory. This was the situation where a rebel group achieved some success in its ambitions to overthrow the prevailing regime (which, as far as the UK were concerned) would usually have been the government then recognized as the *de facto* government of the State by the British Government. Where an authority had established its governmental control over the whole of its territory with the prospect of permanence to this state of affairs, the UK decision was described as ‘recognition *de iure*’. A government so recognized, enjoyed all the privileges and powers, domestic and external, available to the government of that State. It continued to benefit from this position, even in the face of internal disorder up to the point where the rebels exercised actual authority in the State. If the rebels established an effective regime, they might be ‘recognized *de facto*’, which gave them a limited status in UK law.<sup>53</sup> In the meantime, the authority of the *de iure* government would prevail in its area of control and it would be entitled to exercise the extra-territorial powers of the State, for example, with respect to property in England.<sup>54</sup> If and when the rebels consolidated their control to such an extent that the previous government lost all authority, in general, they would be recognized *de iure*. A doctrine of the retrospective effect of recognition resulted in the acceptance of the validity of acts of the rebels from the time which they had first exercised government authority in fact<sup>55</sup> (but which did not serve to invalidate the otherwise legitimate activities of the displaced government).<sup>56</sup>

Before 1980, the way in which the decisions to recognize governments were taken by the British Government and the facility of securing conclusive effect of those decisions in domestic law provided a considerable degree of certainty to the legal position following changes of government, especially important in commercial matters. After the change of practice in 1980, few problems have arisen but the absence of the executive certificate conclusively certifying to the fact of recognition has shifted decision-making away from government to the courts. The evidential inquiries the courts are required to make are more complicated, the outcomes less certain, than they were previously.

<sup>51</sup> When one looks at the domestic consequences of recognition decisions (which is a United Kingdom matter) for judicial proceedings, they will be determined by the legal system in which the litigation proceeds. It is a matter of convenience to use ‘English’ as the example.

<sup>52</sup> M Shaw, *International Law* (6<sup>th</sup> ed, CUP 2008) 472–482; DPO’Connell, *International Law* (2<sup>nd</sup> ed, Stevens 1970) 167–172.

<sup>53</sup> *The Arantzazu Mendi* [1939] AC 256.

<sup>54</sup> *Haile Selassie v Cable and Wireless (No 2)* [1939] 1 Ch 182.

<sup>55</sup> *Gdynia Ameryka Linie v Boguslawski* [1953] AC 11.

<sup>56</sup> *Civil Air Transport v Central Air Transport* [1953] AC 70.

*G. Recognition, 'de-recognition', withdrawal of recognition*

When a government was recognized *de iure* or when governmental relations with an authority in another State were conducted exclusively with a particular regime, the previous authority lost its status. It would be unusual for there to be a specific 'de-recognizing' statement to accompany this process. It would also be unusual for 'de-recognition' to occur other than where a new authority had established itself effectively within a State—effectiveness of a government would ordinarily only be lost by actions which established the control of an alternative authority. As has been explained, other things being equal, the UK would recognize or establish relations with the new powers as a matter of course. It is possible to envisage situations which do not fit this factual paradigm exactly: the departure of the Siad Barre Government from power and from Somalia in 1991 left behind several contestants for power, none of which were able to establish a prospect of permanent control, even over quite confined areas. There was no government to be recognized or with which to establish relations.

However, from, say, about 1970, another factor has been added to those relevant to a recognition decision. It is the claim that a displacing authority, even if effective, is tainted by some international illegality, which allows or even requires it not to be recognized, whatever degree of control it exerts within the territory. The most prominent instances have concerned claims to statehood, where the issue of actual governmental effectiveness has been merely one of the issues of concern: it is the way in which effectiveness were achieved which might raise matters of its international legality. Foreign intervention, especially, open, troop assistance to the rebels, does suggest that the intervention is unlawful and that foreign States are obliged not to recognize the consequences of this serious illegality, which includes not recognizing any authority established as a result of the illegal action. The one instance where British policy was influenced by these considerations was its decision in 1979 to withdraw recognition from the defeated government of the Khmer Rouge in Cambodia but not to recognize the effective new authority of Heng Samrin because he had attained power only as a result of the armed support of forces from Viet Nam. In some instances, any obligation arising under general international law will have been supplemented or made more explicit by a decision of the Security Council, binding States not to recognize or have diplomatic relations with the illegally installed government. However, recent developments have rather turned these considerations on their head. Attention has shifted to the nature and activities of an established government, in some instances, the case being made that a government has lost its legitimacy, maybe even its legality, by reason of its atrocious conduct in office. That is to say that its authority comes into question precisely because of its effective but excessive control, rather than because such control is ebbing away. Where this is the case, other States might wish to foster the efforts of forces within the State, which potentially would form a new government untainted by the misdoings of the existing one. What the foreign States want is the overthrow of the 'illegitimate' regime by the rebels and they use recognition to try to help that process come about by conferring on the rebels the advantages which recognition brings. Clearly, there are international legal considerations here which are beyond the scope of the present discussion but their problematic quality may be reduced where there is Security Council authorization for action against the incumbent and in favour of the rebels. The enduring theme of British recognition policy that it does not depend upon the nature of either of the contending factions for governmental status does

not square readily with this new circumstance. Before I speculate about its consequences, I shall look at a case which reached the High Court with extraordinary speed as the events unfolded in Libya.

*H. British Arab Commercial Bank v National Transitional Council of the State of Libya*<sup>57</sup>

On 19 August 2011, less than a month after the decision to recognize the NTC, the High Court was asked to adjudicate on the nature and effects of that decision. The urgency was brought about by the need of the Bank for certainty about who might authorize payments from an account it held to fund Libyan students studying in the UK. The funds had been deposited by the Gaddafi regime and its diplomatic representatives held mandates authorizing withdrawals from the account. The Bank sought a declaration that it was now entitled to make payments on the authority of the representative of the NTC, lately accredited to the British government after the recognition decision. The British Government was represented in the proceedings but the Gaddafi regime was not, its legal representative being unable to obtain instructions and the court being unwilling to adjourn to enable him to do so.

There had been conversations between the Bank and the British Government from early in May about dealings with the Libyan accounts at the Bank. The Bank was told that it could accept instructions from the head of the (Gaddafi) mission in London in early May 2011 but the Bank was concerned when it became acquainted with the prospect of recognition of the NTC by the British Government. After the recognition decision, the Libyan embassy told the Bank not to affect withdrawals from most of its accounts and that provision was being made for the accounts to be administered by the Libyan Foreign Ministry in the near future. The account for paying student stipends was not one of those frozen by the Libyan embassy but the Bank would not act on an instruction from it to make the regular payments at the end of July.

The first statement by the British Government to the Bank after recognition of the NTC, issued on 8 August 2011 at the request of the Bank, contained elements of both the revived recognition policy and the established ‘not recognizing’ practice, attesting to both the act of recognition and the practice of inter-governmental dealings. It said:

I can confirm that, as announced by the Foreign Secretary on 27 July, the UK recognises and is now dealing with the National Transitional Council (NTC) as the sole governmental authority in Libya. We therefore no longer have diplomatic relations with the Qadhafi regime, nor do we accept that they have the authority to accredit diplomatic representatives of Libya to the UK. On 4 August 2011 the Government accepted the nomination of Mr Mahmud Nacua as the Libyan Chargé d’Affaires ad interim, and will accredit him accordingly.<sup>58</sup>

After the Libyan Foreign Bank, the majority shareholder in the British Arab Bank and still controlled by Gaddafi representatives, had written to the Bank asking it to freeze the disputed accounts, the FCO wrote again on 12 August 2011:

Further, the Foreign and Commonwealth Office can confirm that Mr Mahmud Nacua is at liberty to assign roles within the mission as he sees fit. As Chargé, he has oversight of the

<sup>57</sup> [2011] EWHC 2274 (Comm).

<sup>58</sup> *ibid* para 10.



Embassy and Cultural Affairs section, and the FCO has no objection to British Arab Commercial Bank Plc accepting instructions from him on behalf of the mission.

HMG considers the sole legitimate governing authority of Libya to be the National Transitional Council of Libya, and not the illegitimate Qadhafi regime. HMG considers that only the legitimate governing authority of Libya or persons so authorised by that authority are entitled to give instructions in relation to the Libyan Embassy's bank account in the UK.<sup>59</sup>

This adds the element of 'de-recognition' or the abandonment of inter-governmental relations between the UK and Gaddafi authorities—the conclusion being that there was no residual or parallel authority in the old regime, either in Libya or to exercise any external authority of the State. The letter speaks to legal consequences of the British government action, on which the FCO might have an opinion but, unlike the act of recognition, its statement would not be conclusive in legal proceedings. Because the NTC were recognized as the governing authority of Libya, it would have been entitled to immunities under the State Immunity Act 1978, but its legal representatives were instructed to accept service from the Bank and no issue of immunity was raised.

The Bank began proceedings against the NTC on 19 August 2011, seeking a declaration that it was entitled to act on the instructions of the NTC mission in London, being concerned particularly about the position of the Libyan students who depended upon payments from the Bank. The Bank asked the court to seek a certificate from the FCO addressing the status of the NTC. In the absence of a certificate, the Bank argued that the court should investigate the factual position, which, Blair J said:

... would have involved consideration of issues such as whether the NTC is the constitutional government of Libya, the degree, nature and stability of administrative control that it of itself exercises over the territory of the state, whether HMG has any dealings with it and, if so, what is the nature of those dealings, and the extent of international recognition that it has as the government of the state... That might be a difficult exercise given the conditions that appear to prevail in Libya at the time of this judgment (26 August 2011).<sup>60</sup>

This raises the most interesting aspect of the UK recognition decision in July. If a certificate were issued (as it was), it might have been the case (as it was) that the court would have regarded it as conclusive on the matter of which authority was the government of Libya for the purposes of English law. This would have been (and was) the revival of the pre-1980 statement practice and the attendant law: the matter would effectively have been decided by the executive. After the 1980 statement, a new judicial practice emerged (as it had to) of the court itself undertaking an investigation to see if a claimant authority really was the government of a foreign State. The relevant evidence and the purposes for which it was required were set out with some skill by Hobhouse J (as he then was) in *Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA*.<sup>61</sup> As Blair J acknowledged, the evidential inquiry would be very difficult, given the conditions in Libya at the time of the hearing, a conclusion which might tempt one to think that the security of any control exercised by either claimant to governmental status in Libya was rather precarious, hardly indicative of 'government in fact'. Of course, the evidence from the British government about the nature of its dealings with the two

<sup>59</sup> *ibid* para 14. NTC officials began to work from the Libyan embassy in London from 9 August 2011.

<sup>60</sup> *ibid* para 22.

<sup>61</sup> [1993] QB 54; also *Sierra Leone Telecommunications v Barclays Bank* [1998] 2 All ER 821.



claimants would have carried considerable weight, as Hobhouse J had acknowledged it would have in *Republic of Somalia*. But the significant point is that the decision would have been for the court and not exclusively for the executive, which clearly had a view about the desirability of one outcome compared with the other.

By the time of his judgment, Blair J had been provided with a terse certificate from the FCO. It said:

CERTIFICATE

In the matter of

British Arab Commercial Bank Plc v. The National Transitional Council of the State of Libya

I, the Rt. Hon. William Hague MP, Her Majesty's Secretary of State for Foreign and Commonwealth Affairs, refer to the above proceedings and issue the following certificate:

- (1) Her Majesty's Government recognise the National Transitional Council as the Government of Libya.
- (2) Her Majesty's Government do not recognise any other Government in Libya. In particular, they no longer recognise the former Qadhafi regime as the Government of any part of Libya.<sup>62</sup>

The certificate is in proper form, referring only to facts peculiarly within the Government's knowledge on matters falling within its competence. It speaks to recognition and to 'de-recognition'. The act of recognition enabled Blair J to distinguish *Republic of Somalia* and the certificate allowed him to avoid a potentially awkward factual inquiry. He said:

... the important point is that the government of the United Kingdom recognises it [the NTC] as the legitimate government of Libya.<sup>63</sup>

The FCO certificate 'is conclusive' as to whether the NTC is the Government of Libya, because, the judge went on, 'in the field of foreign affairs, the Crown in its executive and judicial functions speak[s] with one voice'.<sup>64</sup> This is familiar language but it is worth emphasizing that it affects only the matter of recognition. What matters is that Blair J then applied the old common law rule that recognition would determine who was the government and who was to be recognized as that government's representative in the UK for the purposes of English law. Because he regarded the matter as clear, the judge accepted as the UK's position the letter of 4 August, quoted above, but that letter was not a certificate and was not otherwise conclusive—it was the evidence which established the authority of the charge d'affaires. As a matter of principle, he said, the charge d'affaires could give instructions to the Bank about accounts in the name of the Libyan embassy in London, though the formalities were for the Bank to establish and satisfy itself. The judge ordered the declaration, although its precise terms were not revealed.

It is worth asking why the Bank made so much of this matter, given the recognition statement of 28 July 2011. The reason surely is because the factual circumstances in

<sup>62</sup> *British Arab Bank* (n 57).

<sup>63</sup> *ibid* para 24.

<sup>64</sup> The judgment refers to *Gur Corporation v Trust Bank of Africa* [1987] 1 QB 599, para 604, per Steyn, J; *The Arantzazu Mendi* (n 53) p 264, per Lord Atkin; and *Sultan of Pahang, R (on the application of) v Secretary of State for the Home Department* [2011] EWCA Civ 616, paras 14 and 30, per Maurice Kay and Moore-Bick LJJ.

Libya did not accord fully with the British decision. The Gaddafi Government, as it then was, had made clear its resolve to fight off the rebellion and was resisting rebel advances in many parts of the country, including Tripoli itself. It could not be known for certain what view the courts would take of the reincarnation of the 'recognizing governments power': was it lawful? what were its effects? For if the courts had had doubts about the answers to these questions, the *Republic of Somalia* judgment would have been relevant. It would have been a bold prediction to say with the certainty that commercial relations demand that the outcome of a *Republic of Somalia* inquiry would have accorded exactly with the terms of the Foreign Office certificate, especially as to the exercise of extraterritorial prerogatives of the State. The Bank faced the problem under the 'not recognizing governments' policy (which remained in place at the time of its first concern) that it might be concluded that there were no longer intergovernmental dealings between the UK and the Gaddafi regime but, at the same time, intergovernmental relations had not been established with the NTC: there would have been no-one with authority to sign the cheques. From an academic point of view (and perhaps from the point of view of future practice), it is a matter for regret, though entirely understandable, that the position of the Gaddafi authorities was not put forcefully to the court.

### *I. Recognition and legality*

At the time of the British recognition decision, the Libyan Government declared that it was illegal and that the government would seek redress in whichever court it could find with jurisdiction over the matter, international or domestic.<sup>65</sup> It is hard to imagine that there could have been an international jurisdiction in which the question could have been raised. However, it was only the failure to obtain instructions which pre-empted the representation of Libya in the *British Arab Commercial Bank* case. What might it have argued if it had been able to communicate with its lawyer?

The first argument might have been that the recognition was unlawful under international law as an interference in the internal affairs of Libya—the Libyan Government was fighting to preserve its authority against an unlawful uprising and other States had a duty to keep out of the conflict. Once upon a time, this claim would have been good in international law and it might still be. The question is whether it would have any purchase in a case in the UK. Years (and years) ago, I argued that executive certificates should be reviewable to see if the government decision to which the certificate testified was compatible with the United Kingdom's international obligations.<sup>66</sup> The assertion had little impact then and there has not been much since to encourage me that the courts would modify the deferential position they take with respect to executive certificates. A Libyan claim on this ground, even if sustained against the standards of international law, would have been very unlikely to have helped the Libyan cause before an English court. It is, though, an act of governmental policy about which Libya (or a disappointed private litigant in other circumstances) would have been challenging. Other things being equal, the basic principles of public law

<sup>65</sup> See D Akande, 'Can Libya sue the UK on Recognition of the National Transitional Council?' <[www.ejiltalk.org](http://www.ejiltalk.org)>, 30 July 2011.

<sup>66</sup> C Warbrick, 'Executive Certificates in Foreign Affairs: Prospects for Review and Control' (1986) 35 ICLQ 138.

should apply. Given the frequency and vehemence with which the British Government had reiterated its 'not recognizing foreign governments' policy (even in the present situation), might any applicant not have had a legitimate expectation that the policy would have been adhered to? If the Government wanted to revert to the old recognition policy, then notice ought to have been given. This would have been particularly pertinent to any events occurring before the recognition decision, when anyone dealing with the Libyan authorities might well have reached the conclusion that the Gaddafi regime remained the 'government' of Libya. Such persons ought not to have been disadvantaged by any application of the retrospective effects of recognition. More importantly and central to an orthodox legitimate expectations claim, the procedure for determining who was the government of Libya under the declared prevalent policy would have been the courts; under the revived 'recognition of governments' policy, it was the executive. It deserves underlining that at the time the British Government recognized the NTC, it was by no means clear that it had the reach of effective territorial control which would have entitled it to be so regarded. It was its democratic aspirations which motivated the British Government, not the totality of its military success. On the other hand, the British Government might have had an effective response to this claim, even if it were otherwise made out. It is this. The power to recognize governments is an aspect of the prerogative to conduct foreign affairs. Since even legislative action in the same field as an admitted prerogative power does not necessarily replace completely the prerogative power,<sup>67</sup> neither can the mere adoption of an alternative policy by a government (as the 1980 statement was). The recognition power remained in being, available, not to resuscitation, but simply to use if a government found it expedient to do so. This argument was not needed but the tenor of Blair J's judgment makes it pretty clear that he would have acceded to it—he expresses no doubt about the lawfulness of the recognition decision nor of its consequences in domestic law. The orthodoxies of the 'one voice' doctrine would probably have persuaded him.

### *J. Conclusion*

As it was, at one level, the judgment might seem all very obvious and very satisfactory, particularly from the point of view of the British Government and the NTC. Apart from the issue in the case, the judgment did lay the ground for the British government to take steps to secure the unfreezing of certain Libyan funds affected by Security Council sanctions measures, funds which were released to the NTC and which helped in the consolidation of its exercise of authority in Libya. It is ironic that the policy of British governments over the years that recognition decisions were to reflect the actual situation in foreign States and not to indicate approval for the character of any authority, a policy imperative which played its part in refashioning the means by which the policy was pursued after 1980, has been so casually but instrumentally abandoned. We must wait to see whether the incident of Libya and NTC turns out to be an anomalous revival of an abandoned option or whether the attractiveness of the peremptory character of the recognition decision will appeal to future British Governments with the precise object of influencing events in other States.<sup>68</sup> If it does become an active tool of foreign policy,

<sup>67</sup> *R v Home Secretary ex p Northumbria Police Authority* [1988] 1 All ER 556.

<sup>68</sup> Announcing a meeting between the Foreign Secretary and representatives of the Syrian opposition to be held on 21 November 2011, FCO officials made it clear that this did not signal that

rather than a reactive one, Parliament might want to consider whether or not it should have a say on how the policy works.

### *Postscript*

Although not strictly germane to the thrust of this note (which was completed in mid-November 2011), it is perhaps worth bringing the remainder of the story up-to date. The NTC declared the conflict in Libya over on 23 October 2011 with the fall of Sirte. In the course of its final stages, Gaddafi was captured and killed in the custody of rebel forces. The interim leader of the NTC resigned and an NTC 'government' took over in Tripoli. The Foreign Secretary opened a new British embassy in Tripoli on 17 October 2011. Following Security Council resolution 2016 which withdrew the authorization to use force in Libya, NATO concluded its operations on 31 October 2011.<sup>69</sup> A Prime Minister of the interim Libyan government was elected on 31 October 2011 but a transitional administration (one of the tasks of which was to prepare for elections for a new government) had not been appointed by mid-November.

COLIN WARBRICK\*

## II. THE PALMER REPORT AND THE LEGALITY OF ISRAEL'S NAVAL BLOCKADE OF GAZA

### *A. Introduction*

On 3 January 2009 Israel deployed a naval blockade against Gaza in order to prevent materials entering or leaving Gaza that could be used by Hamas in its ongoing armed conflict with Israel.<sup>1</sup> With the humanitarian crisis in Gaza worsening, on 31 May 2010 a flotilla of vessels carrying humanitarian aid expressed its intention to violate the naval blockade and deliver the aid to Gaza. Before violating the blockade and whilst still on the high seas, Israel sought to enforce its blockade and capture the vessels. This occurred largely without incident except in relation to the *Mavi Marmara* (a vessel sailing under the flag of the Comoros), which resisted capture by the Israeli special forces and continued to sail in the direction of Gaza. As Israel special forces boarded the *Mavi* violence ensued, with nine crew members of the *Mavi* being killed and dozens of others injured (principally Turkish nationals). Several members of Israel's special forces

they were being recognised as a government, a step made necessary by what had happened with the NTC, *The Independent*, 19 November 2011, p 1; see also <<http://www.fco.gov.uk/news>>, 21 November 2011. If this is the start of a revival of the old policy, it is something of a vindication for M Peterson, 'Recognition of Governments should not be Abolished' (1983) 77 AJIL 31.

<sup>69</sup> There is considerable background information on British activities with respect to Libya from February to October 2011 at <<http://www.fco.gov.uk/en/global-issues/mena/libya/website>>.

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<sup>1</sup> Number 1/2009 Blockade of the Gaza Strip 3 January 2009, publicized by the Israeli government at <[http://en.mot.gov.il/index.php?option=com\\_content&view=article&id=124:no12009&catid=17:noticeofmariners&Itemid=12](http://en.mot.gov.il/index.php?option=com_content&view=article&id=124:no12009&catid=17:noticeofmariners&Itemid=12)>.