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The Re-Emergence of the Legitimate Representative of a People: Libya, Syria, and Beyond

Matthias Edtmayer*

ABSTRACT

In the context of the civil wars in Libya and Syria, a legal term which was well-known during the decolonisation process re-emerged in statements issued by different foreign ministries. Libyan and Syrian opposition groups were recognised by States as ‘the legitimate representative’ of their people. Since, little scholarly attention has been paid to this development. The recognition was perceived as political rhetoric rather than an act of legal significance. Even the re-emergence of the concept of ‘the legitimate representative of a people’ in a United Nations General Assembly (‘UNGA’) resolution passed unnoticed, with its analysis still missing in the existing literature. This article argues that the re-emergence of the concept of ‘the legitimate representative of a people’ in cases outside the decolonisation process might hint at the beginning of a legal development, which allows the assistance and supply of arms to opposition groups recognised as the legitimate representative of a people. It provides an analysis of the statements made by States in regard to UNGA Resolution 67/262 and contends that the legal concept of ‘the legitimate representative of a people’ could evolve in those future cases in which democratically elected groups have been barred from access to power or ousted by coups d’état.

INTRODUCTION

This article discusses the re-emergence of the concept of the legitimate representative of a people. It is divided into three sections. The first outlines the development of the recognition of Libyan and Syrian opposition groups as the respective legitimate representative of their people. It reviews the origins of the concept and the recognition of national liberation movements as the corresponding legitimate representative of their people. Next, the consequences

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of being recognised as the legitimate representative of a people will be examined. This second section analyses the implications of the concept in the cases of Libya and Syria for the recognition of governments, intervention, and the use of force. In doing so, the section scrutinises State practice and *opinio iuris*. It incorporates an analysis of United Nations General Assembly ('UNGA') Resolution 67/262.¹ The final section looks beyond Libya and Syria to suggest how this re-emerging concept might be shaped in future cases. The section contends that the concept could *de lege ferenda* thrive in cases in which democratically elected groups have been barred from access to power or ousted by *coups d'état*.

I. THE RE-EMERGENCE OF THE LEGITIMATE REPRESENTATIVE OF A PEOPLE AND ITS ORIGINS

The Libyan National Transitional Council ('NTC'), which opposed the Gaddafi government, was established on 27 February 2011. On 10 March 2011, France was the first State to recognise the NTC as 'the legitimate representative of the Libyan people'.² In contrast to France, the position of the UK was initially more hesitant, though it evolved quickly thereafter. Initially, the UK referred to the NTC as an 'important and legitimate political interlocutor'.³ By May 2011, however, the UK referred to it as 'a legitimate representative of the Libyan people' and, at the end of June of that same year, it viewed the NTC as 'the legitimate representative of the Libyan people'.⁴ The development of the terms in which the

¹ UNGA Res 67/262 (15 May 2013) UN Doc A/RES/67/262 (voted 107-12-59).

² Giuseppe Nesi, 'Recognition of the Libyan National Transitional Council: When, How and Why' (2011) 21 *Italian Y B Int'l L* 45, 45-53; Stefan Talmon, 'Recognition of the Libyan National Transitional Council' (2011) 15 *ASIL Insights* 2; 'Libye: Paris Juge L'opposition Légitime' *Le Figaro* (Paris, 10 March 2011) <www.lefigaro.fr/flash-actu/2011/03/10/97001-20110310FILWWW00448-libye-le-cnt-legitime-paris.php> accessed 20 July 2017.

³ Foreign and Commonwealth Office, 'Foreign Secretary Meets Libyan Interim Transitional National Council Special Envoy' (29 March 2011) <www.gov.uk/government/news/foreign-secretary-meets-libyan-interim-transitional-national-council-special-envoy> accessed 20 July 2017.

⁴ Foreign and Commonwealth Office, 'Head of the Libyan National Transitional Council Visits UK' (12 May 2011) <www.gov.uk/government/news/head-of-the-libyan-national-transitional-council-visits-uk> accessed 20 July 2017; Foreign and Commonwealth Office, 'UK Provides Equipment to the National Transitional Council

UK referred to the NTC expresses different levels of support. The same pattern can be observed in the case of Syria.

In November 2012, the Syrian National Council merged with other opposition groups to form the National Coalition of Syrian Revolutionary and Opposition Forces ('SOC').⁵ Talmon points out the different wording of the statements made by States in support of the SOC. States 'recognised', 'accepted', 'acknowledged' or 'considered' the SOC as

- (i) a legitimate representative for [of] the aspirations of the Syrian people;
- (ii) legitimate representatives of the aspirations of the Syrian people;
- (iii) a legitimate representative of the Syrian people;
- (iv) legitimate representatives of the Syrian people;
- (v) the legitimate representative of the Syrian people;
- (vi) the sole legitimate representative of the Syrian people.⁶

The small differences in the wording matter and Talmon accordingly identifies three levels of support. Recognition as a legitimate representative for the aspirations of a people is the weakest form of support, indicating that the group does not directly represent the people themselves. Recognition as a representative or as representatives of a people means that the group is not perceived as the only representative by the recognising State and that there might be others that enjoy equal recognition. Recognition as *the* representative of a people is the strongest form of support, indicating that the group is the *only* representative of the respective people.⁷

The Arab States of the Gulf Cooperation Council, Turkey, and Western States, including France, the UK, and the US, were the ones to recognise the SOC as *the* legitimate representative of the Syrian people. However, not even all EU

in Libya' (30 June 2011) <www.gov.uk/government/news/uk-provides-equipment-to-the-national-transitional-council-in-libya> accessed 20 July 2017.

⁵ Stefan Talmon, 'Recognition of Opposition Groups as the Legitimate Representative of a People' (2013) 12 CJIL 219, 219-221.

⁶ *ibid* 226-228.

⁷ *ibid*, 'Opposition Groups' (n 5) 227-230.

Member States could agree on this strong form of support. The EU itself recognised the SOC as legitimate representatives of the Syrian people.⁸

While the nuances in the wording of statements in support of the SOC express the level of political support, these nuances might also matter legally. ‘The legitimate representative of a people’ is neither a new term in international politics nor in public international law. The term originates from the international law of self-determination and was used to refer to national liberation movements (‘NLMs’) in cases of colonial domination, alien occupation, and racist regimes. In the decolonisation context, the phrase, while clearly being used on the political stage, also carries legal consequences.⁹

Roth shows that providing assistance and arms to NLMs during the decolonisation period was international custom. The NLMs were not recognised as governments during their time of struggle for independence. Instead, the UNGA referred to them and recognised them respectively as the legitimate representative of their people. For example, in the case of Namibia, the UNGA called upon Member States to ‘render increased and sustained support and material, financial, military and other assistance to the South West Africa People’s Organization’, which it had previously recognised as ‘the sole and authentic representative of the Namibian people’.¹⁰ Roth concludes that the State practice and the ‘utter lack’ of *opinio iuris* opposing such assistance means that arming the NLMs is not a breach of Article 2(4) of the United Nations (‘UN’) Charter.¹¹

The concept of the legitimate representative of a people has so far been confined to cases related to the decolonisation process. The re-emergence of the term in the conflicts of Libya and Syria leads to wider questions about the potential legal consequences of recognising a group as the legitimate representative of a people outside the decolonisation context. The wording of

⁸ *ibid* 219-230, 253 (for a list of States that recognised the SOC).

⁹ Dapo Akande, ‘Self Determination and the Syrian Conflict – Recognition of Syrian Opposition as Sole Legitimate Representative of the Syrian People: What Does this Mean and What Implications Does it Have?’ EJIL: Talk! (6 December 2012) <www.ejiltalk.org/self-determination-and-the-syrian-conflict-recognition-of-syrian-opposition-as-sole-legitimate-representative-of-the-syrian-people-what-does-this-mean-and-what-implications-does-it-have/> accessed 20 July 2017.

¹⁰ UNGA Res 35/227A (3 March 1981) UN Doc A/RES/35/227A (voted 114-0-22) 42.

¹¹ Brad R Roth, *Governmental Illegitimacy in International Law* (OUP 1999) ch 6, 201-242. Talmon is more cautious whether such a rule of customary international law developed, see Talmon, ‘Opposition Groups’ (n 5) 237.

recognition statements is thus crucial. Only recognition as *the* legitimate representative of a people could potentially entail legal consequences.

II. THE CONSEQUENCES OF BEING RECOGNISED AS THE LEGITIMATE REPRESENTATIVE OF A PEOPLE: POLITICS WITHOUT LEGAL IMPLICATIONS?

The Recognition of Governments

The recognition of the NTC and the SOC as the legitimate representative respectively of the Libyan and Syrian people indicates the loss of legitimacy of the government in power. It, then, leads one to the question of whether these groups can politically and/or legally represent their people.

States are legally represented by their government. Logically, one State can only have one government. Problems arise when different groups claim to be the government. The recognition of governments is sometimes linked to the recognition of States, eg, in the case of a potential secession. The question of the recognition of the seceding group as being the government is naturally tied to whether there even exists a new State, which the group claims to represent, under international law.¹² This is, however, not the focus of this paper as secession has not been an aim of either the NTC or the SOC. The analysis that follows focuses on instances in which competing groups claim to represent the State as a whole.

The test for the recognition of governments in public international law is traditionally linked to the notion of effective control over the whole or most of the territory of the State. How this control is established is an internal matter of the State. International law generally does not protect the lawful transfer of power under domestic law. Lauterpacht, in that regard, points out that international law is indifferent to the domestic illegality of changes of government. Revolutions, *coups d'état*, or other unconstitutional changes of government are traditionally not a subject of international law.¹³ A competing test for the recognition of

¹² There is a certain interdependency as one of the generally accepted criteria for statehood is an independent and effective government. See Hersch Lauterpacht, *Recognition in International Law* (CUP 1948) 26-48; James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2007) 37-89, 374-419; Brad R Roth, 'Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine' (2010) 11 *Melb J Int'l L* 393, 393-421.

¹³ Lauterpacht (n 12) 87-174; Roth, 'Secessions' (n 12) 422-427.

governments is the test of legitimacy. While the source of legitimacy was originally held to be a dynastic claim to govern, its source is now the legality of the transfer of power under domestic constitutional law and democratic governance. In the recent past, there have only been a small number of cases in support of the legitimacy test.¹⁴ In other words, for the majority, the test for the recognition of governments remains effective control.¹⁵

In the case of a conflict in which two groups claim to be the government of the State as a whole, both the established government and the opposition group might exercise effective control over parts of the territory of the State. In this case, there is a presumption under international law in favour of the established government.¹⁶ That so, the established government continues to legally represent the whole State even though it has lost effective control over some parts of the territory. Such a presumption in favour of the established government will continue as long as it resists the opposition group and the resistance is not ‘ostensibly hopeless or purely nominal’.¹⁷ Recognition of an opposition group as the government by a foreign State before this point is reached, equates to an unlawful intervention and, as such, is a violation of international law. According to the test of effective control, the opposition group becomes the government and can be lawfully recognised as such by other States when it effectively controls the entire (or most of the) State territory with a ‘reasonable prospect of permanency’.¹⁸

In relation to the use of force, the aforementioned presumption in favour of the established government has important consequences under international law. According to the doctrine of intervention by invitation, the government of a State can lawfully ask a foreign State to intervene on its territory to assist in the fight against opposition groups. This, as one can imagine, can decide the outcome

¹⁴ For a discussion of the cases of Haiti, Sierra Leone, Côte d’Ivoire and The Gambia, see text at n 107 and 108.

¹⁵ Lauterpacht (n 12) 102-109; Roth, *Governmental Illegitimacy* (n 11) 142-149; Roth, ‘Secessions’ (n 12) 427-440.

¹⁶ Lauterpacht refers to the Spanish government during the Spanish Civil War which continued to legally represent Spain, *inter alia* in front of the Permanent Court of International Justice, despite a significant loss of territory. For further references, see Lauterpacht (n 12) 93-94.

¹⁷ *ibid* 94.

¹⁸ *ibid* 87-174.

of a conflict.¹⁹ The presumption in favour of the established government is crucial because, without it, States could recognise opposition groups that exercise effective control over a part of the State territory as the new government and, in doing so, de-recognise the established government. In this scenario, the de-recognised government would lose its status and the opposition group, as the new government of the State, could invite foreign States to help it fight the political group of the de-recognised administration.²⁰

Many States, including the US and the UK, do not accord formal recognition to governments anymore, but recognise States only.²¹ However,

¹⁹ A controversy remains whether the government loses this privilege when a conflict has developed into a civil war. According to the Institut de Droit International resolution ‘The Principle of Non-Intervention in Civil Wars’ (1975), assistance to either the government or the opposition would then be prohibited. On this controversial principle of negative equality, see Gregory H Fox, ‘Intervention by Invitation’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) ch 37. However, State practice and *opinio iuris* of States in the case of Syria do not indicate support for the principle of negative equality. Russia has been intervening in Syria upon an invitation issued by the Assad government since 2013 when it started arming the Assad forces. Since 2015, it directly intervened with its own forces on Syrian territory. Russia claimed and emphasised that it believes to be in compliance with international law. Other States have not challenged this claim. For example, a joint declaration by the US, the UK, France, Germany, Qatar, Saudi Arabia, and Turkey concerning the Russian intervention was mute on the lawfulness of Russia’s actions. In fact, some of these States also rely on the doctrine of intervention by invitation to legally justify the intervention in the civil war in Yemen. See Prime Minister’s Office, ‘Press conference: the Prime Minister and President Vladimir Putin’ (16 June 2013) <www.gov.uk/government/speeches/press-conference-the-prime-minister-and-president-vladimir-putin> accessed 20 July 2017; Foreign and Commonwealth Office, ‘Joint Declaration on Recent Military Actions of the Russian Federation in Syria’ (2 October 2015) <www.gov.uk/government/news/joint-declaration-on-recent-military-actions-of-the-russian-federation-in-syria> accessed 20 July 2017; Foreign and Commonwealth Office, ‘A Political Solution in Yemen Remains the Best Way to Counter the Growing Threat from Terrorist Groups’ (14 April 2015) <www.gov.uk/government/speeches/a-political-solution-in-yemen-remains-the-best-way-to-counter-the-growing-threat-from-terrorist-groups> accessed 20 July 2017.

²⁰ Lauterpacht (n 12) 93-95.

²¹ Mexico already stated this policy (the ‘Estrada doctrine’) in 1930. The US ended its practice of according recognition to governments in 1977 and the UK did so in 1980. See Hilary Charlesworth, ‘The New Australian Recognition Policy in Comparative Perspective’ (1991) 18 MULR 1, 8-13; Nesi (n 2) 56. On the meaning of *de facto* and *de jure* recognition, see Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (OUP 1998).

exceptions remain, as will be observed in the case of Libya. The Gaddafi administration quickly lost its status as government soon after States had recognised the NTC as the legitimate representative of the Libyan people. On 27 July 2011, the UK recognised the NTC as ‘the sole governmental authority in Libya’.²² Warbrick correctly notes that at the time when the UK recognised the NTC as the government of Libya, Gaddafi’s army had not yet been defeated and still controlled the capital, Tripoli. While the ‘momentum (...) shifted against’²³ Gaddafi at this time, it is still questionable whether its recognition as the government was lawful under the effective control test.²⁴

By the end of August 2011, the NTC conquered Tripoli. On 16 September 2011, the UNGA adopted a resolution²⁵ approving the unanimous report of the Credentials Committee which accepted the credentials of the representatives sent by the NTC to the UN. While this is not an explicit recognition of the NTC as the government, it is nonetheless an important acknowledgement by a majority of UN Member States that the NTC legally represents Libya. The United Nations Security Council (‘UNSC’), for the first time, also took note of the NTC in a resolution on 16 September 2011.²⁶ The NTC declared the liberation of Libya after conquering Sirte in October 2011. After it appointed a new cabinet on 22 November 2011, the UNSC welcomed ‘the establishment of the transitional Government of Libya’ on 2 December 2011.²⁷

In the case of Syria, the Assad administration is still recognised as the government of Syria and benefits from the presumption under international law

²² Foreign and Commonwealth Office, ‘Libyan Charge d’Affaires to be Expelled from UK’ (27 July 2011) <www.gov.uk/government/news/libyan-charge-d-affaires-to-be-expelled-from-uk> accessed 20 July 2017.

²³ *ibid.*

²⁴ Colin Warbrick, ‘British Policy and the National Transitional Council of Libya’ (2012) 61 ICLQ 247, 252-256.

²⁵ UNGA Res 66/1 (16 September 2011) UN Doc A/RES/66/1 (voted 114-17-15). Notably, all five permanent members of the Security Council voted in favour of the resolution in the UNGA but none of them contributed to the official debate, see UNGA Verbatim Record (16 September 2011) UN Doc A/66/PV.2.

²⁶ UNSC Res 2009 (16 September 2011) UN Doc S/RES/2009.

²⁷ UNSC Res 2022 (2 December 2011) UN Doc S/RES/2022; Warbrick (n 24) 253-264; Nesi (n 2) 48-56; ‘Libya’s NTC Announces New Cabinet’ *Al Jazeera* (Doha, 22 November 2011) <www.aljazeera.com/news/africa/2011/11/20111122182321109582.html> accessed 20 July 2017.

in favour of the established government. At the time when States started recognising the NTC and the SOC as the legitimate representative of their people, the same States still viewed the Gaddafi and the Assad administrations as governments. Talmon correctly notes that recognising a group as the legitimate representative of a people does, however, not change the legal status of the respective government.²⁸ Recognition as the government and recognition as the legitimate representative of a people are separate issues and a group can be recognised as the latter without impeding the status of the former. This parallel co-existence of two entities confused the media, however.²⁹

Such co-existence is in line with the cases related to the decolonisation process. Notably, NLMs were not recognised as governments during their struggle against the colonising government and intervention upon an invitation issued not by a government, but by the legitimate representative of a people, was not accepted as a legitimate legal basis for any such intervention. An invasion by a foreign military in support of an NLM, in other words, would have violated Article 2(4) of the UN Charter.³⁰ The same applies to the cases of Libya and Syria.

The government of a State should normally also be the legitimate representative of its people. The splitting of these roles and their parallel co-existence indicates that even when a government is perceived as illegitimate, States still adhere to the test of effective control and to the presumption in favour of the established government in the case of civil war.³¹ Yet the recognition of the NTC as the Libyan government by the UK, which was premature under the test of effective control, falls into a wider pattern of the increasing role of legitimacy. Legitimacy might have tipped the scales but it was nonetheless the expected territorial gains of the NTC that made recognition arguable for the UK government.

²⁸ Talmon, 'Opposition Groups' (n 5) 229-250.

²⁹ The BBC confused the recognition as the legitimate representative of a people with the recognition as the government and reported that France had recognised the NTC as the government on 10 March 2011. In fact, France did not recognise the NTC as the government until June 2011. See Anne Schuit, 'Recognition of Governments in International Law and the Recent Conflict in Libya' (2012) 14 Int C L Rev 381, 381-396; 'Libya: France Recognises Rebels as Government' *BBC News* (London, 10 March 2011) <www.bbc.com/news/world-africa-12699183> accessed 20 July 2017.

³⁰ Roth, *Governmental Illegitimacy* (n 11) 215-217.

³¹ Talmon, 'Opposition Groups' (n 5) 229-250.

Akande notes that the legitimate representative of a people is regarded by recognising States as a ‘government in waiting’.³² There seems to be a strong presumption among States that the legitimate representative of a people will be recognised as the government once it exerts ample effective control. French President Hollande presumed that the legitimate representative of a people would be recognised as the government at a later point in time. He stated that ‘France recognizes the National Syrian Coalition as the sole representative of the Syrian people *and therefore* as the future provisional government of a democratic Syria’.³³ Egypt indicated with respect to the NTC and the resolution approving the report of the Credentials Committee:

(...) Now comes the moment of truth, when the will of the Libyan people has to be respected. That is why the Credentials Committee unanimously approved the request of the National Transitional Council to represent Libya at the United Nations. Arguing against that would only prolong the suffering of the Libyan people and delay achieving justice, particularly since close to 90 States Members of the United Nations have recognized the Libyan National Transitional Council as the only representative of the Libyan people — a number that is rising every day.³⁴

However, this presumption is merely of a *political* nature. Recognition as the legitimate representative of a people increases the legitimacy of a group and expresses support for its future role as the government. It does not, however, entail a *legal* right to be recognised as the future government.³⁵ Effective territorial control is still the crucial test that a group needs to pass. Until then, the legitimate representative of a people might claim to *politically* speak for its people but does not *legally* represent them.

³² Akande (n 9).

³³ Talmon, ‘Opposition Groups’ (n 5) 221-229 (emphasis added).

³⁴ UN Doc A/66/PV.2 (n 25) 11-12.

³⁵ Talmon, ‘Opposition Groups’ (n 5) 229-250.

Intervention and the Use of Force

Recognising a group as the legitimate representative of a people does not mean recognition as the government of the State. Thus, the legitimate representative of a people cannot lawfully invite foreign States to *directly* intervene with their forces. The most important legal consequence of the recognition of the NLMs as the legitimate representative of a people within the decolonisation context was the lawful supply of assistance and arms by foreign States to such groups. In this regard, the development of customary international law has had a profound impact on how the principle of non-intervention and the prohibition on the use of force, enshrined in Article 2(4) of the UN Charter, were applied.³⁶

Without the special status as the legitimate representative of a people, funding or supplying arms to opposition groups is unlawful under international law. In *Nicaragua*,³⁷ the International Court of Justice ('ICJ') held that funding opposition groups is a violation of the principle of non-intervention.³⁸ However, it does not constitute an unlawful use of force.³⁹ Nonetheless, arming and training opposition groups is not only an unlawful intervention, but also a violation of the prohibition of the use of force.⁴⁰

Two questions need to be answered to clarify whether the rule of customary international law, which makes the supply of arms to the legitimate representative of a people lawful, also applies to the cases of Libya and Syria. First, does the international law of self-determination apply to the people in Libya and Syria? Second, if so, does this rule of customary international law apply to all groups recognised as the legitimate representative of a people or only to NLMs in cases related to the decolonisation process?⁴¹

Common Article 1(1) of the International Covenant on Civil and Political Rights and of the International Covenant on Economic, Social and Cultural Rights 1966 ('Common Article 1') reads that '*All* peoples have the right of self-

³⁶ Roth, *Governmental Illegitimacy* (n 11) 201-242.

³⁷ *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 1986, 14.

³⁸ *ibid* [228], [239]-[243].

³⁹ *ibid* [228].

⁴⁰ Akande (n 9); Dapo Akande, 'Would It Be Lawful For European (or Other) States to Provide Arms to the Syrian Opposition?' *EJIL: Talk!* (17 January 2013) <www.ejiltalk.org/would-it-be-lawful-for-european-or-other-states-to-provide-arms-to-the-syrian-opposition> accessed 20 July 2017.

⁴¹ *ibid*; Akande, 'Self Determination and the Syrian Conflict' (n 9).

determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.⁴² Cassese asserts that the right of self-determination, enshrined in Common Article 1, is a legal right of all peoples and not just of colonial peoples.⁴³ That said, the content of the right of self-determination is unclear outside cases related to the decolonisation process – one might even say it is *lex obscura* – but it nonetheless remains a right of all peoples.⁴⁴

Talmon posits that only the recognition of an opposition group that represents a people under colonial or alien subjugation as the legitimate representative entails legal consequences. In contrast, the recognition of an opposition group representing 'a single people constituting a sovereign and independent State' as the legitimate representative would not carry any legal consequences. The former would have a legal status in public international law and the latter would not.⁴⁵ Talmon claims the following:

A single people which has exercised its right of external self-determination by establishing a sovereign and independent State no longer has any rights or obligations under international law independent of the rights and obligations of its State. In other words, the people has been "mediatized" by the State, i.e. the people as a legal person has been subsumed into the State. In particular, a single people constituting a State, as distinct from individuals, minority groups, indigenous peoples, or several peoples within a State, does not have any rights under international law against its own State or government (...) In particular, a single people within a State does not enjoy a right of internal self-determination against its own State or

⁴² International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (emphasis added).

⁴³ Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (CUP 1995) 47-61.

⁴⁴ James Crawford, 'The Right of Self-Determination in International Law: Its Development and Future' in Philip Alston (ed), *Peoples' Rights* (OUP 2001) 7-67, 10.

⁴⁵ Talmon, 'Opposition Groups' (n 5) 234-237.

government. While the right of internal self-determination, i.e. the right of a people freely to determine its political status and to pursue its economic, social and cultural development, also applies to peoples of independent and sovereign States, it is available only to peoples in independent multinational States, i.e. States composed of more than one people.⁴⁶

Talmon bases his conclusion on two presumptions. First, he claims that the right of self-determination is exhausted through the exercise of external self-determination. However, many scholars disagree with this interpretation. Cassese emphasises that the right of self-determination, enshrined in Common Article 1, is a continuing right.⁴⁷ Akande also notes, in regard to Common Article 1, that it 'is well recognised that all the peoples of independent States continue to have the right of self-determination'.⁴⁸ Second, Talmon claims that only peoples in multinational States have the right of internal self-determination. On this point, Cassese highlights that the Covenants 'enshrined the right of the whole population of *each* contracting State to internal self-determination, that is, the right freely to choose their rulers'.⁴⁹ Franck goes further to even suggest that the international law of self-determination contributed to an emerging right to democratic governance.⁵⁰

Although the concept of the legitimate representative of a people clearly originates from the international law of self-determination, States have not explicitly expressed, in the case of Syria, that the recognition of the SOC as the legitimate representative of the Syrian people means that they view the Syrian revolution as a struggle for self-determination to which the law of self-determination applies.⁵¹ However, in the case of Libya, Nicaragua notably stated

⁴⁶ *ibid* 235-236.

⁴⁷ Cassese (n 43) 54-55.

⁴⁸ Akande, 'Self Determination and the Syrian Conflict' (n 9).

⁴⁹ Cassese (n 43) 65 (emphasis added).

⁵⁰ Thomas M Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *AJIL* 46, 57-60; Crawford (n 44) 40-47.

⁵¹ Akande, 'Arms to Syrian Opposition' (n 40); Akande, 'Self Determination and the Syrian Conflict' (n 9).

with respect to the Libyan NTC and the resolution approving the report of the Credentials Committee that:

Nicaragua has been and remains a fervent defender of the self-determination of the peoples of the world. (...) Nicaragua will always respect the will of the peoples – the only teachers of their future, the only sovereigns of the political, social and economic model that they wish to choose for themselves, free from any hegemonic caprice of any Power. (...) Free determination must be of the peoples, and not of the North Atlantic Treaty Organization. Revolutions cannot but be authentic. They cannot be carried out by proxy (...).⁵²

While Nicaragua expressed opposition to the intervention by the North Atlantic Treaty Organization ('NATO') States, it still seems to be of the opinion that the revolution in Libya, despite not being a case related to the decolonisation process or external self-determination, is (or at least could have been if it were not for intervention by NATO) a case of self-determination.

In the literature, there is allusion to the irony that some Western States now recognise opposition groups as the legitimate representative of a people and are the main supporters of the re-emergence of the term, while they abstained from recognising NLMs as such.⁵³ However, the greater irony might be found in the case of Syria. Already in 1952, the Syrian Representative at the UNGA emphasised that the principle of self-determination has 'two aspects': while one aspect is independence, the other is 'self-government, that is to say a people's right to adopt representative institutions and freely to choose the form of government which it wished to adopt'.⁵⁴ On the first question as to whether the international law of self-determination applies to the people in Libya and Syria, it should be noted that while the content of the right of self-determination is *lex obscura*, there are strong indications that the people of Libya and Syria have a continuing right of internal self-determination.

⁵² UN Doc A/66/PV.2 (n 25) 11-12.

⁵³ Akande, 'Self Determination and the Syrian Conflict' (n 9).

⁵⁴ UNGA Verbatim Record (21 January 1952) UN Doc A/C.3/SR.397; Cassese (n 43) 60.

Talmon ends his analysis with the questionable conclusion that the Syrian people do not have a right of self-determination and, consequently, that the recognition as the legitimate representative of a people is a mere political act without legal implications. As to the question regarding the applicability of customary international law to all groups recognised as the legitimate representative of a people or only to NLMs in cases related to the decolonisation process, Talmon notes that if this rule of customary international law exists, it would not automatically apply to cases of internal self-determination.⁵⁵ However, customary international law is not static and can develop. The principle of non-intervention as a principle of customary international law can be modified. A new exception to the general principle can develop through general practice supported by the *opinio iuris* of States.⁵⁶ The below analysis will scrutinise State practice and *opinio iuris* with respect to providing assistance and arms to the NTC and in particular to the SOC.

In the case of Libya, the UNSC quickly acted and took the lead. Before any State recognised the NTC as the legitimate representative of the Libyan people, the UNSC adopted Resolution 1970,⁵⁷ imposing various restrictive measures, including an arms embargo, on Libya. On 17 March 2011, the UNSC adopted Resolution 1973, imposing a no-fly zone and authorising States ‘to take all necessary measures (...) to protect civilians and civilian populated areas under threat of attack’.⁵⁸ On 19 March 2011, the first Western air strikes started.⁵⁹ There is little to analyse State practice and *opinio iuris* for or against providing assistance and arms to the NTC, based on its recognition as the legitimate representative of

⁵⁵ Talmon, ‘Opposition Groups’ (n 5) 236-237.

⁵⁶ The ICJ held in the *Nicaragua case* that ‘[t]he significance for the Court of cases of State conduct prima facie inconsistent with the principle of non-intervention lies in the nature of the ground offered as justification. Reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law. (...) In particular, as regards the conduct towards Nicaragua which is the subject of the present case, the United States has not claimed that its intervention, which it justified in this way on the political level, was also justified on the legal level, alleging the exercise of a new right of intervention regarded by the United States as existing in such circumstances.’ See (n 37) [207]-[208].

⁵⁷ UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970.

⁵⁸ UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973.

⁵⁹ ‘Battle for Libya: Key Moments’ *Al Jazeera* (Doha, 30 April 2017) <www.aljazeera.com/indepth/spotlight/libya/2011/10/20111020104244706760.html> accessed 20 July 2017.

the Libyan people following the action of the UNSC. The resolutions of the Security Council had prohibited arms transfers and had provided a legal basis for the use of force even before most States, including the UK, recognised the NTC as the legitimate representative of the Libyan people.

In the case of Syria, however, State practice and *opinio iuris* concerning the assistance and supply of arms to the SOC is richer. Many States have provided funding and so-called ‘non-lethal’ assistance to the SOC, but only a few have supplied the SOC with arms. Next to that, it has been reported that the US started to train and arm Syrian rebels through the CIA in 2013. The programme was halted in 2017 under the Trump administration.⁶⁰ Turkey, Saudi Arabia, and Qatar are also believed to have been arming various groups in Syria.⁶¹

In May 2013, the Council of the EU partly lifted its arms embargo on Syria to allow the potential supply of arms to the SOC by Member States. The UK pushed for this lift. Although most Member States are believed to have opposed the move, the total sanctions regime would have expired without a unanimous agreement of all Member States. The Council, thus, agreed on the renewal of the sanctions regime, including the export and import restrictions, but with the exception of arms.⁶² ‘With regard to the possible export of arms to Syria, the Council *took note* of the commitment by Member States to proceed in their national policies [and that] military equipment (...) will be for the Syrian National Coalition for Opposition and Revolutionary Forces’.⁶³ Notably, the Council of

⁶⁰ Greg Jaffe and Adam Entous, ‘Trump Ends Covert CIA Program to Arm Anti-Assad Rebels in Syria’ *The Washington Post* (Washington, 19 July 2017) <www.washingtonpost.com/world/national-security/trump-ends-covert-cia-program-to-arm-anti-assad-rebels-in-syria-a-move-sought-by-moscow/2017/07/19/b6821a62-6beb-11e7-96ab-5f38140b38cc_story.html?tid=a_breakingnews&utm_term=.ac67f31e4903> accessed 20 July 2017.

⁶¹ Tom Perry and Suleiman Al-Khalidi, ‘Gulf Crisis Seen Widening Split in Syria Rebellion’ *Reuters* (14 June 2017) <www.reuters.com/article/us-gulf-qatar-syria-idUSKBN19517O> accessed 20 July 2017.

⁶² Tom Ruys, ‘Of Arms, Funding and “Non-lethal Assistance” - Issues Surrounding Third-State Intervention in the Syrian Civil War’ (2014) 13 *CJIL* 13, 14-20; Ian Traynor, ‘UK Forces EU to Lift Embargo on Syria Rebel Arms’ *The Guardian* (London, 28 May 2013) <www.theguardian.com/world/2013/may/28/uk-forced-eu-embargo-syria-rebel-arms> accessed 20 July 2017.

⁶³ Council of the European Union, ‘Council Declaration on Syria’ (3241st Foreign Affairs Council Meeting, 27 May 2013)

the EU had not recognised the SOC as *the* legitimate representative of the Syrian people at the time of this decision, but only as legitimate representatives.⁶⁴ Austria opposed the lift of the arms embargo and stated that the supply of arms to the Syrian opposition would be a violation of the principle of non-intervention and of Article 2(4) of the UN Charter.⁶⁵ In the end, the UK appears to have never armed Syrian opposition groups, according to a 2016 report of the UK House of Commons Defence Committee. However, the UK has provided training and non-lethal support to opposition groups.⁶⁶

State practice of arming the SOC is limited. What is more, like in previous armed conflicts, the State practice of arming politically favoured rebels has generally been clandestine and no respective *opinio iuris* alleging a right to arm the rebels has been put forward.⁶⁷ The US viewed the recognition of the SOC as the legitimate representative ‘important politically and it’s also important practically in terms of offering opportunities for increased assistance’.⁶⁸ But the US did not view it as a legal step.⁶⁹ Thus, alleging a right to arm the SOC was not and could not have been put forward.

An analysis of UNGA practice with respect to the SOC, in particular of Resolution 67/262,⁷⁰ is so far absent in academic literature. It would offer valuable insights into the Member States’ political and legal understanding of the concept of the legitimate representative of a people. On 15 May 2013, the UNGA adopted

<www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/137315.pdf> accessed 20 July 2017 (emphasis added).

⁶⁴ Council of the European Union, ‘Foreign Affairs’ (27-28 May 2013) Press Release 9977/13, 9

<http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/137317.pdf> accessed 20 July 2017.

⁶⁵ Ruys (n 62) 16-20; Julian Borger, ‘The Austrian Position on Arms Embargo in Syria - Official Document’ *The Guardian* (London, 15 May 2013) <www.theguardian.com/world/julian-borger-global-security-blog/interactive/2013/may/15/austria-eu-syria-arms-embargo-pdf> accessed 20 July 2017.

⁶⁶ Defence Committee, *UK Military Operations in Syria and Iraq (second report)* (HC 2016-17) [72].

⁶⁷ Akande, ‘Arms to Syrian Opposition’ (n 40).

⁶⁸ Carrie Lyn D Guymon (ed), *Digest of United States Practice in International Law 2012* (Office of the Legal Adviser, United States Department of State), 281-282.

⁶⁹ Talmon, ‘Opposition Groups’ (n 5) 230.

⁷⁰ UN Doc A/RES/67/262 (n 1).

Resolution 67/262 on '[t]he situation in the Syrian Arab Republic'.⁷¹ The resolution is highly critical of the Assad regime, expressing '*grave concern*' at the violations of human rights and international humanitarian law.⁷² The resolution further stresses that political transition is 'the best opportunity' for a peaceful solution of the conflict.⁷³ In paragraph 26 of Resolution 67/262, the UNGA

Welcomes the establishment of the National Coalition for Syrian Revolutionary and Opposition Forces on 11 November 2012 in Doha as *effective representative interlocutors* needed for a political transition (...) and *notes* the wide international acknowledgement, notably at the fourth Ministerial Meeting of the Group of Friends of the Syrian People, of the Coalition as *the legitimate representative of the Syrian people* (emphasis added).

This paragraph is central to the analysis that follows. The UNGA welcomed the establishment of the SOC, but only as representative interlocutors. An interlocutor is obviously a weaker form of support than recognition as the legitimate representative of a people. While possibly getting 'a seat at the table', an interlocutor will not be the only one regarded as representing the people. The UNGA itself, therefore, did not recognise the SOC as the legitimate representative of the Syrian people, but noted its wide international acknowledgement as such. The resolution was adopted by 107 votes to 12, with 59 abstentions.⁷⁴ Even though the UNGA did not recognise the SOC as the legitimate representative of the Syrian people, the explanations of the vote, given by Member States in the discussion of the resolution, are nonetheless insightful. The Syrian Representative, as one can imagine, strongly opposed the resolution. Early in his speech he made the point that the resolution would be

(...) setting a dangerous precedent in international relations in its attempt to legitimize the provision of weapons to terrorist groups in Syria and to illegally recognize a certain

⁷¹ *ibid.*

⁷² *ibid.*

⁷³ *ibid.*

⁷⁴ UNGA Verbatim Record (15 May 2013) UN Doc A/67/PV.80, 24.

faction of the external opposition as “the legitimate representative of the Syrian people”⁷⁵

The Russian Representative, voting against the resolution, stated that the resolution

(...) seeks to impose on the United Nations one-sided attempts to trample on the tenets of international law in order to effect regime change (...). The fact that the so-called National Coalition for Syrian Revolutionary and Opposition Forces is highlighted in the text as the only legitimate representative of the Syrian people is an attempt to prepare the ground for conferring the authority to represent Syria in the international arena⁷⁶

The Iranian Representative highlighted that the resolution ‘creates a dangerous precedent that violates the most elementary principles of international law’.⁷⁷ Nicaragua also warned against setting a precedent which ‘tomorrow could be used against any legitimate Government represented here’.⁷⁸ The Representative of Venezuela stated that the resolution

(...) proposes that the United Nations recognize the National Coalition for Syrian Revolutionary and Opposition Forces as legitimate representatives of the Syrian people. That potential recognition, as set out in the draft resolution, would (...) entail ignoring a legitimate Government and set a terrible precedent for international law. (...). The draft resolution seeks to legitimize the rights of certain States to provide the Syrian opposition with all means necessary, including military means, to overthrow

⁷⁵ *ibid* 3.

⁷⁶ *ibid* 8.

⁷⁷ *ibid* 13.

⁷⁸ *ibid* 19.

the Government. It would thereby endorse the illegal supply of arms⁷⁹

The high number of abstaining States so too shows the scepticism toward the resolution. This scepticism is best exemplified by the statements of Uruguay, Indonesia, and Argentina. The Uruguayan Representative, for example, was concerned that the aspects of the resolutions go ‘beyond the consensus and principles applicable to the concept of recognition of Governments’.⁸⁰ The Indonesian Representative, in turn, clarified that ‘implied recognition of who constitutes the legitimate representatives of the Syrian people would not be consistent with Indonesia’s national practice, which accords recognition only to States and not to Governments’.⁸¹ The Argentinian Representative abstained as ‘it is up to the Syrian people, through free and fair elections, and not the General Assembly, to determine the democratic legitimacy of its representatives’.⁸² The view that the legitimate representative of the Syrian people cannot be determined by the UNGA, but only by the Syrian people, was also taken by the abstaining representatives of Brazil and India.⁸³

Although the language of the resolution does not imply a recognition of the SOC as the legitimate representative of the Syrian people, multiple States voting in favour, including Chile, Guatemala, Thailand, Peru, Mexico, and Colombia still clarified that their vote does not confer any recognition. Some of the States voting in favour also emphasised that it is not for the UNGA to determine the legitimate representative of a people.⁸⁴

The resolution represents, nonetheless, an important development. It was the first time that the UNGA discussed the concept of the legitimate representative of a people outside the cases related to the decolonisation process.

⁷⁹ *ibid* 14-15.

⁸⁰ *ibid* 18.

⁸¹ *ibid* 20.

⁸² *ibid* 21-22. This is not a new argument. In the debate about the resolution concerning the legitimate representative of the Namibian people, this point was made by the *abstaining* Western States including *inter alia* the UK, the US, and France on whose behalf the UK Representative stated: ‘the people of Namibia have the right to choose their own Government through free and fair elections’. See Roth, *Governmental Illegitimacy* (n 11) 215; Akande, ‘Self Determination and the Syrian Conflict’ (n 9).

⁸³ UN Doc A/67/PV.80 (n 74) 25-26.

⁸⁴ *ibid* 27-32.

Although the number of votes against the adoption of the resolution was relatively low, the votes in favour of the resolution were not in an overwhelming majority either.⁸⁵ The amount of States abstaining and the fact that even States voting in favour felt the urge to clarify or limit the interpretation of Resolution 67/262 indicates that many States remained sceptical or at least cautious towards the re-emergence of the concept of the legitimate representative of a people.

The statements issued by States during the discussion of Resolution 67/262 show that there is no *opinio iuris* among States that arming opposition groups recognised as the legitimate representative of a people is legal under public international law (outside cases related to the decolonisation process). Nonetheless, the statements made by some representatives indicate that this term is not perceived as purely political. The opponents of Resolution 67/262 clearly feared that a parallel could be drawn between the case of Syria and those cases related to the decolonisation context to invoke the rule of customary international law which makes assisting and arming the legitimate representative of a people lawful. States feared that this resolution might be the first ‘dangerous precedent’⁸⁶ of such a development. As the concept has re-emerged outside its traditional context, Resolution 67/262 might indeed have been the early beginning of a potential new development of customary international law.

When it comes to Libya and Syria, no new exception to the principle of non-intervention, supported by general State practice and *opinio iuris*, can be identified. States did *politically justify* their intervention in Syria, but did not claim that the recognition of a group as the legitimate representative of a people would *legally justify* intervention. The rule to assist and arm the legitimate representative of a people developed in a narrower set of cases related to the decolonisation process and, as such, does not extend to the NTC or the SOC.

Resolution 67/262 has so far been the highlight of the re-emergence of the concept of the legitimate representative of a people. With respect to Syria and the SOC, the term seems to have quietly disappeared in the years that followed.

⁸⁵ Votes against: Belarus, Bolivia, China, Cuba, Democratic People’s Republic of Korea, Ecuador, Iran, Nicaragua, Russian Federation, Syria, Venezuela and Zimbabwe. Iran and Syria are falsely omitted in the official records at (n 74) 24. For the correct list of votes against, see UN Department of Public Information, General Assembly Meeting Coverage GA/11372 <www.un.org/press/en/2013/ga11372.doc.htm> accessed 20 July 2017.

⁸⁶ Iranian Representative, see text at n 77.

The UNGA never recognised the SOC as the legitimate representative of the Syrian people. The hope, which some policymakers might have held in 2012, for a quick political transition and the recognition of the SOC as the new Syrian government, such as in the case of Libya, soon faded. Russia's military intervention in Syria in support of the Assad regime changed the facts to the detriment of the SOC. Most importantly, unity within the SOC was fragile and its representativeness of the Syrian people remained questionable.⁸⁷ Its lack of representativeness, for example, became obvious in December 2015 when the High Negotiations Committee ('HNC') was formed under Saudi Arabian leadership, as a new platform to include more opposition groups than the SOC had previously encompassed.⁸⁸ The SOC is, however, a major part of the HNC, alongside other groups such as the National Coordination Body.⁸⁹ The HNC represents the Syrian opposition in the Intra-Syrian Peace Process led by UN Special Envoy for Syria, de Mistura. That said, not all opposition groups are included in the HNC either. For example, the Kurdish Democratic Union Party (also known as PYD) was not invited to join.⁹⁰

On 18 December 2015, the UNSC adopted Resolution 2254, which assigns a role in the political transition to both the 'representatives of the Syrian government and the opposition'.⁹¹ On 9 December 2016, more than three years after Resolution 67/262, the UNGA again adopted a resolution on '[t]he situation in the Syrian Arab Republic'.⁹² In a striking difference to its 2013 predecessor, Resolution 71/130 does not mention the term 'the legitimate representative of

⁸⁷ See Khaled Y Oweis, 'Qatar-backed Bloc Says to Rejoin Syrian Opposition Coalition' *Reuters* (10 March 2014) <www.reuters.com/article/syria-crisis-opposition-qatar-idINDEEA2901T20140310> accessed 20 July 2017; Karen Zraick, 'Syria Talks Are Complicated by Competing Opposition Groups' *The New York Times* (New York, 29 January 2016) <www.nytimes.com/2016/01/30/world/middleeast/syria-talks-geneva-opposition.html> accessed 20 July 2017.

⁸⁸ Zraick (n 87).

⁸⁹ European Commission, 'Elements for an EU Strategy for Syria' JOIN (2017) 11 final, 10.

⁹⁰ Zraick (n 87).

⁹¹ UNSC Res 2254 (18 December 2015) UN Doc S/RES/2254. See also UNSC Res 2118 (27 September 2013) UN Doc S/RES/2118.

⁹² UNGA Res 71/130 (9 December 2016) UN Doc A/RES/71/130 (voted 122-13-36). Note that the UNGA adopted other resolutions on specific issues concerning Syria during this time, see the resolutions adopted at <<http://research.un.org/en/docs/ga/quick/regular/71>> accessed 20 July 2017.

the Syrian people'. The resolution only speaks of the 'representatives of the Syrian authorities and the opposition'.⁹³ Notably, 'the legitimate representative of the Syrian people' was also not mentioned by any State in the debate preceding the resolution.⁹⁴

Although Western States support the HNC, recognition as the legitimate representative of the Syrian people has not been issued. Instead, Western foreign policy statements on the situation in Syria refer to the 'Syrian opposition',⁹⁵ a term which carries less weight and indicates that the opposition groups only represent a part of the Syrian people. In fact, 'Syrian opposition' was one of the terms used to refer to the Syrian National Council due to its perceived lack of representativeness before it formed the SOC with other opposition groups in November 2012.⁹⁶

While France was the first Western State to recognise the SOC as the legitimate representative of the Syrian people in November 2012,⁹⁷ President Macron stated in June 2017 that Assad's departure is not a 'pre-condition for everything because nobody has shown me a legitimate successor'.⁹⁸ The growing sentiment of *Realpolitik* among newly elected policymakers in the West that peace in Syria might not be possible without Assad⁹⁹ and the infighting between the

⁹³ *ibid* [7].

⁹⁴ UNGA Verbatim Record (9 December 2016) UN Doc A/71/PV.58.

⁹⁵ See eg the EU position at n 89, 10. For the UK position, see Foreign and Commonwealth Office, 'UK and the High Negotiations Committee of the Syrian Opposition' (6 September 2016) <www.gov.uk/government/news/uk-and-the-high-negotiations-committee-of-the-syrian-opposition> accessed 24 July 2017. For statements made by US Secretary of State John Kerry, see Carrie Lyn D Guymon (ed), *Digest of United States Practice in International Law 2016* (Office of the Legal Adviser, United States Department of State) 713-739.

⁹⁶ Talmon, 'Opposition Groups' (n 5) 228-229.

⁹⁷ *ibid* 221.

⁹⁸ John Irish, 'France's Macron Says Sees No Legitimate Successor to Syria's Assad' *Reuters* (21 June 2017) <www.reuters.com/article/us-mideast-crisis-syria-france-idUSKBN19C2E7> accessed 20 July 2017. However, France will continue to support the HNC in the Geneva talks, see Ministry for Europe and Foreign Affairs, 'Syria – Resumption of Geneva Negotiations (10 July 2017)' <www.diplomatie.gouv.fr/en/country-files/syria/events/article/syria-resumption-of-geneva-negotiations-10-07-17> accessed 24 July 2017.

⁹⁹ Irish (n 98); Deb Riechmann and Bassem Mroue, 'US Seeks Syrian Solution, But Assad Doesn't Have to Go First' *US News* (Washington, 20 July 2017)

opposition groups¹⁰⁰ make a recognition of any opposition umbrella platform as the legitimate representative of the Syrian people unlikely in the near future.

The disappearance of the concept of the legitimate representative of a people in the case of Syria seems to be rooted in the specific factual circumstances surrounding the Syrian opposition. The concept might re-emerge in a near-future case, as (regrettably) there is no shortage of intra-State conflicts between governments and opposition groups around the world. The cases of Libya and Syria are far from establishing a firm precedent, however the re-emergence of the concept in these cases is nonetheless noteworthy and might hint at the potential beginning of a conceptual development. This is discussed in the next section.

III. BEYOND LIBYA AND SYRIA

Akande is cautious about extending the rule of customary international law, which makes the supply of arms to the legitimate representative of a people lawful, to cases of self-determination outside the limited context of decolonisation in which the rule developed. He warns against the potential abuse if the rule would apply to all self-determination cases. The risk of abuse is high because there are no defined criteria by which to determine the legitimate representative of a people. This would make it possible for States to easily undermine the principle of non-intervention and the prohibition of the use of force by arbitrarily recognising opposition groups as the legitimate representative of a people.¹⁰¹

Outside the decolonisation context, States have so far not made the case for the legality of arming an opposition group based on its recognition as the legitimate representative of a people. However, this might have been due to the factual circumstances in the case of Syria, rather than due to legal considerations. If the foreign ministries of States draft recognition statements ‘with great care and the wording employed (or not employed) is of great legal and political

<<https://www.usnews.com/news/politics/articles/2017-07-20/us-seeks-syrian-solution-but-assad-doesnt-have-to-go-first>> accessed 24 July 2017.

¹⁰⁰ A united Syrian opposition is further threatened by the escalating dispute between Saudi Arabia and Qatar, which are both strong supporters of different opposition groups. See Perry and Al-Khalidi (n 61).

¹⁰¹ Akande, ‘Arms to Syrian Opposition’ (n 40); Akande, ‘Self Determination and the Syrian Conflict’ (n 9).

significance',¹⁰² why would they choose a term which entailed legal consequences in the past if they just want to express political support? For a politician or spokesperson of a ministry, 'the legitimate representative of a people' does not roll off the tongue. So why would civil servants in the foreign ministries suggest using this term, if not for underlying (legal) considerations? One could consider that the legal teams within the ministries must have been aware that the concept originates from the international law of self-determination and must have considered the potential legal consequences of the concept. The lack of representativeness of, and international support for, the SOC might not have been quite convincing enough to make a new legal argument. After all, not even all Member States of the EU could find the consensus to recognise the SOC as the legitimate representative of the Syrian people. What is more, the SOC was never recognised as the legitimate representative of the Syrian people by the UNGA. While the UNGA has no monopoly on the recognition of groups as the legitimate representative of a people, such recognition would have added substantial weight to the legal argument, if it would have been made. Recognition by the UNGA would make it easier to draw a parallel to the cases related to the decolonisation process. The SOC never managed to acquire UNGA recognition. The fact that States have not made the case for the legality of arming an opposition group following its recognition as the legitimate representative of a people might be due to the anticipated weakness of the argument in the case of Syria.

The mills of customary international law grind slowly and the international custom of providing assistance to NLMs was also not formed overnight. The re-emergence of the concept of the legitimate representative of a people in cases outside the decolonisation context indicates that a conceptual development, which has yet to take shape, could occur. In future cases in which the representativeness of the respective opposition group is less questionable and the facts on the ground are more transparent (than in the case of the SOC), the UNGA might be more willing to recognise a group as the legitimate representative of a people. The UNGA could also be more willing to assume this role if the group or its leader have been legitimised through democratic elections but barred from access to power or ousted by a *coup d'état*. In such a scenario, the people themselves would have determined their legitimate representative as demanded by many Member States that abstained from voting for Resolution 67/262. The

¹⁰² Talmon, 'Opposition Groups' (n 5) 226.

statements made by the abstaining States suggest that they would recognise a group as the legitimate representative of a people if the group has been elected in a free and fair election.

Reisman famously pointed at a scenario that highlights a malfunction in the collective security system and in Article 2(4) of the UN Charter.¹⁰³ When a group succeeds in a *coup d'état* and exercises effective control over the State territory, it may be recognised as government, even if the coup does not represent the will of the people. As the government, it can then invite foreign States to lawfully intervene to aid in the suppression of popular protests against the coup and to maintain effective control. Due to the maintenance of effective control, it may remain recognised as the government. In contrast, a foreign State that intervenes on behalf of the ousted government or the people in this scenario violates international law. This 'rapes common sense', according to Reisman.¹⁰⁴ He claimed that '[e]ach application of Article 2(4) must enhance opportunities for ongoing self-determination'.¹⁰⁵ Franck, who argued for an emerging right to democratically participate in governance, still strongly opposed unilateral intervention in the name of democracy outside the UN framework.¹⁰⁶ Neither Reisman nor Franck considered the potential role of the concept of the legitimate representative of a people in their arguments, as the term had not yet re-emerged outside the decolonisation context. It might be that the concept could develop and be further shaped in a scenario similar to that described by Reisman.

There have been exceptional cases in which this malfunction was corrected either by the UNSC or by States relying on the doctrine of intervention by invitation. In the case of Haiti, the UNSC authorised the use of force. In Sierra Leone, the UNSC did not explicitly authorise the use of force and intervening States relied on the invitation issued by the ousted president. When it comes to the Côte d'Ivoire, the UNSC only authorised a peacekeeping mission for the protection of civilians and the events that followed finally resulted in the resignation of the sitting president, who had refused to transfer power to the winner of the elections.¹⁰⁷ In The Gambia, where the sitting president also refused

¹⁰³ W Michael Reisman, 'Coercion and Self-Determination: Construing Charter Article 2(4)' (1984) 78 AJIL 642.

¹⁰⁴ *ibid* 645.

¹⁰⁵ *ibid* 643.

¹⁰⁶ Franck (n 50) 83-85.

¹⁰⁷ Roth, 'Secessions' (n 12) 427-440; Fox (n 19) 834-841.

to transfer power upon losing the election, the UNSC did not authorise the use of force. The UK and Russia stated that the winner of the presidential elections, Barrow, could issue an invitation to intervene on his behalf, even though Barrow did not possess effective territorial control.¹⁰⁸ The *Institut de Droit International* holds that legitimacy through democratic elections can, as an exception, become relevant to offset a lack of territorial effectiveness.¹⁰⁹ Even if this notion is accepted, it is questionable how long democratic legitimacy could offset a lack of territorial effectiveness. A democratically elected group would still need to establish effective territorial control to remain recognised as government in the long run. If it fails to do so, States cannot lawfully intervene by relying on the doctrine of intervention by invitation, as the group would not represent the government. The general rule that the group which holds effective control over the territory is recognised as the government and can invite a foreign State to intervene still holds. If the UNSC does not authorise the use of force, there would be no legal basis to intervene in this scenario.

Cooling relations between powerful permanent members of the UNSC and the return of proxy wars might hinder the resolution of future intra-State conflicts through the UNSC. If the UNSC is deadlocked in the scenario described by Reisman, the UNGA could assume a key role. Democratic legitimacy could be a strong argument for the recognition of a group as the legitimate representative of a people and could convince a majority of Member States at the UNGA to recognise the group as such. States might be more willing to assist an already democratically elected group in fighting a *coup d'état*, rather than assisting a group claiming to fight for democracy in a revolution. In this scenario, the UNGA could be more assertive than it was with respect to the SOC. The rule which, as an exception, allows assisting and arming opposition groups recognised as the legitimate representative of a people, might *de lege ferenda* be modified in the future to extend to a narrow set of cases related to democratically elected groups which have been barred from access to power or ousted by a *coup d'état*.

¹⁰⁸ For a detailed analysis, see Claus Kreß and Benjamin Nußberger, 'Pro-democratic Intervention in Current International Law: The Case of The Gambia in January 2017' (2017) 4 *Journal on the Use of Force and International Law* 239.

¹⁰⁹ Institut de Droit International, 'Present Problems of the Use of Force in International Law sub-group D: Intervention by Invitation' (10th Commission, 2009, Rapporteur: Gerhard Hafner) 324.

CONCLUSION

This article has shown that recognition as the legitimate representative of a people and recognition as the government are separate issues. The parallel co-existence of the two underlines that the test for recognition as the government remains effective control. The article has rejected the view that the people of Libya and Syria do not have a continuing right of internal self-determination. However, the rule of customary international law, which made the assistance and the supply of arms to an opposition group recognised as the legitimate representative of a people lawful, does not extend to cases outside the decolonisation context. No *opinio iuris* in support of such an exception to the principle of non-intervention could be identified with respect to the NTC and the SOC. Nevertheless, UNGA Resolution 67/262 is an important milestone in the re-emergence of the concept of the legitimate representative of a people, with the UNGA discussing the concept outside the context of decolonisation for the first time.

The article has so too argued that there might be a conceptual development in a narrower set of cases in the future. In cases in which democratically elected groups have been barred from access to power or ousted by *coups d'état*, the doctrine of intervention by invitation cannot be invoked if the elected group does not establish effective control. If the UNSC does not authorise the use of force in this scenario, there will be a need for a further conceptual development. States could be more willing to make exceptions in allowing the assistance and supply of arms to opposition groups, recognised as the legitimate representative of a people, in this limited set of cases. As *coups d'état* and intra-State conflicts worldwide are, unfortunately, not rare occurrences, the UNGA might again discuss the concept of the legitimate representative of a people in the near future.