

The ITPCM

International Commentary



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LIBYA

A SECURITY CROSSROADS

EUROPEAN PERSPECTIVE
& BEYOND

Dear Reader

We are happy to send out this second issue of *ITPCM International Commentary*, entirely devoted to recent events in Libya, analysed from the European

security perspective. During the last academic year, the Scuola Superiore Sant'Anna organised a series of lectures, workshops and research collo-

quia - *Debating European Security* - in the framework of the *Jean Monnet Programme* and financed by the European Commission through the Education,

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Audiovisual and Culture Executive Agency (EACEA). The purpose of the programme, designed by Prof. Strazari, Dr. Coticchia and Dr. Pishchikova was to foster interactive fora to debate the different facets of European security, exploring a number of issues that range from foreign policy and international relations to the emergence of a home security industry.

It was on the occasion of one of these colloquia, last June 2011, that we decided to produce an issue focussing on the rapidly evolving situation in Libya. While discussing impacts and implications of the revolution, we agreed to take stock of political analysis, relevant academic research and journalism debated during the colloquium and to re-elaborate them in the form of op-eds, briefings and articles. All contributors, invited scholars as well as researchers, PhD candidates and students of the Scuola, are to be equally praised for their efforts, invaluable insights and help. Thanks to their effort and availability we managed, maybe, to have enlightened crucial aspects and disclosed relevant knowledge that otherwise would have remained confined to the strict circle of the research colloquia attendees.

The *ITPCM International Commentary* is meant to be an open space for knowledge sharing and dissemination. An opportunity to draw attention and interest to less debated or often overlooked issues beyond the mere political, social or international column. We hope, with this issue, to have taken a further step towards those achievements.

At the end of the publication our readers will find as usual a list of main activities and trainings on the ITPCM agenda, many dealing with similar issues in a more concrete and operative way. Our website remains the main reference point.

Our warmest regards and best wishes for what we hope to be a peaceful and recovering Christmas break and happy New Year 2012 to all of you.

Andrea de Guttry

Andrea de GUTTRY
ITPCM Director

the ITPCM
International Commentary

Editor in chief:

Francesco Ceccarelli

Director and Scientific Supervision:

Professor Andrea de Guttry

Editor:

Michele Gonnelli

Contributors to this issue:

Barbara Nicoletti, Kateryna Pishchikova,

Andrea Prontera, Oladapo Kayode

Opasina, Giulio Maria Raffa, Alice

Riccardi, Dario Sabbioni, Simone

Tholens

Graphic Design:

Michele Gonnelli

Security matters.

Libya has almost disappeared from international fora, suddenly forsaken by media spotlights or embedded journalism. As if the Libyan *question* had been resolved and then dismissed along with Muammar Gaddafi's body. The man dead, the country overlooked. 6.5 million people, half of whom under 24 years old, abandoned to their destiny. Apparently. The western world, Europe in the first place, is too occupied to tackle the financial crisis to draw its *official* attention at this 'secondary' issue now. The mainstream media acts accordingly. The aftermath of a revolution in a politically pacified (?) country seems left uncovered, but it is far from being unattended. It is true that the *energy, security* and the *counter-extremism diplomacies* are still at work, undisturbed, trying to secure the smoothest and most convenient transition possible. Because security matters, and security is a twofold concept – hard and “soft” – whose vague borders can be pulled indefinitely along internal and external dimensions, vertically, within the country, and horizontally, beyond the national borders.

Muammar Gaddafi was killed on the 20th of October, 2011. It was the end of an era, of a 42 years' long experiment, the failure of the Great Socialist People's Libyan Arab *Jamahiriyah*. A regime that claimed to be inspired partly by Islamic socialism and Arab nationalism, partly by the principles of direct democracy. Revolutionary committees – accounting for 10 to 20 percent of Libyans – used to survey the population and repress any political opposition. Since 1969, Libya never witnessed free elections. Still, even more surprising, according to the CIA's World Factbook of 2011, the average life expectancy of a Libyan is 77.6 years. One year less than that of an EU citizen. The median age of the country is 24.5 (that of Italy is 43.5). The literacy rate reaches quota 82.6 %. Hence, here is the Libya country profile: young, healthy, well educated people, deprived for years of the basic rights and freedoms, with about another 50 years to live (in average) and experiencing a wave of enthusiasm, after having succeeded in the revolution.

The NTC is ruling over this people (or most of it). The question is whether and to what extent this political body is representing and matching with that country profile. How internal security 'threats' are tackled by the interim government while being wooed by the international institutions and the European countries, again for *security reasons*. Reasons that in part overlap and in part clash with each other under the given *emergency* circumstances. While the international community is setting the pace with a view to next democratic elections, the NTC agenda is full of challenges and incoherencies.

If political prisoners held by the Gaddafi regime have been released, about 7000 new detainees are now currently held in prisons, under the control of revolutionary brigades, with no access to due process (according to the last UNSMIL report). Militias never thought seriously to give up their weapons, *en tant que* 'guardians of the revolution'. Osama al-Juwali, the head of the military council in Zintan, has now been appointed to lead the Defense Ministry and will have to bring them together under the same umbrella.

Seif al-Islam el-Qaddafi and Abdullah Senussi, the last fugitive son and the intelligence chief for Colonel Gaddafi, respectively, will not be handed over to the International Criminal Court, and to prosecutor Luis Moreno Ocampo, until a formal national government will be formed (in the best case scenario).

The country is a powder keg. 26500 sorties of the NATO operation *Unified Protector* could not destroy nor reach the largest known stockpile of man-portable defence systems of any non-manpad-producing country. If once it was about arming Gaddafi's Libya, then the anti-Gaddafi revolution, now it is about securing and neutralising those same weapons.

Prime minister Abdel Rahim el-Keef is in charge now. Assisted by the UNSMIL and all those western powers that played a significant role on the long road to Tripoli. A *moderate* Islamic government seems to be the best compromise for everybody. On the

horizontal dimension, as mentioned above, while the European Security and Defence Policy failed the Libyan test, immigration, energy, political and humanitarian issues raised or deepened by the conflict are being addressed, in one way or another. Corporate interests, single countries initiatives, or regional and international organisations other than the EU took the lead and settled the matter.

In this issue we make an attempt, to deal with at least part of these aspects and their impact on European and international level. Internal threats to security, in the globalised era, can constitute or easily be interpreted – often instrumentally – as external ones, and vice versa. The terms become interchangeable.

Given this intricate scenario, and right after the conclusion of the Third Arab Bloggers Meeting – which was held in Tunis last October – the words from a couple of Libyan posts that we quote at last, instinctively inspired by a sort of *people history* approach. These words are revealing and predicting, more than any analysis from outside.

Last February 28, 2011:

“I am terrified that when all the ashes from the uprisings that are consuming us settle down we become blinded by the celebratory mood and find ourselves having exchanged one agenda for another whose nature would be like an octopus: soft but with many slippery tentacles”

Last December 9, 2011:

“In the past two days Tripoli has witnessed major demonstrations in Martyrs Square demanding a weapon free zone in the city. Since the liberation of Tripoli many militias and armed fighters were everywhere; some for safety reasons and some just for the sake of milking the glorification of the victory of 17th February revolution. In other words it is about time for them to go home to their cities and come back weapon-less and replace them with the national Libyan army. Tripoli is the capital to all Libyans but with no weapons.”

Michele Gonnelli

Contributions

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ARAB SPRING OR REVOLUTION?

by **Kateryna Pishchikova**

Research Fellow
at Scuola Superiore Sant'Anna

WESTERN AND EASTERN PERSPECTIVES OVER THE TRANSITION. OLD PARADIGMS AND NEW UNPREDICTABLE SCENARIOS.

*Every time I run into a Tunisian, Egyptian, Libyan, Syrian, Bahraini or Yemeni, I ask them how they refer to their own political actions. Their answer is an almost universal: "revolution" (thawra, in Arabic). (...) They also use descriptor collective-nouns such as the Arab "uprising" (intifada), the Arab "awakening" (sahwa), or the Arab renaissance (Nahda), the latter mirroring the Arab Awakening against Ottoman and European domination in the early years of the 20th Century.**

* Rami G. Khouri, Spring or Revolution? 2011 <www.ramikhouri.com>, August 17, 2011

*The unfolding "Arab Spring" was not expected to be a promenade. This expression, used by Westerners to describe the Arab revolutions, is very mild and does not express the bloody sacrifices made every day in order to honour the fight against fierce rogue regimes.***

** Fatima El Issawi, "Did the Arab Spring Find its Roots in the New Iraq?" *Open Democracy*, 2011 <www.opendemocracy.net>, October 4, 2011

Naming tells us something about the expectations and the place attributed to events on the collective cognitive map. The fact that the "West" calls recent popular revolts in North Africa and Middle East differently from how Arabs themselves do is extremely telling. It is telling for a number of

reasons. First, it is reminiscent of the "disconnect" between Eastern expectations and Western approach that characterised Eastern European transitions in 1990s¹ and serves as a useful

¹ Janine Wedell, *Collision and Collusion: The Strange Case of Western Aid to Eastern*

reminder that when shared rhetoric is not accompanied by shared practice, even the best of intentions may fail. Second, it alerts us to the fact that this time the "disconnect" may go even further as there may not even

Europe, Palgrave, 2001.

be shared rhetoric on many crucial issues. Third, it reminds us that the difficulties of external engagement in regime change and transition go beyond straightforward issues of success or failure of project implementation and involve finding shared ideas and a common language.

By drawing on recent debates among experts and academics as to the nature and prospects of the recent uprisings in the Arab world as well as on the academic literature on democratisation and regime change more generally, this brief commentary offers a number of conceptual points and broad guidelines that should be kept in mind when projecting the future in these countries and discussing ways of getting engaged. What have we learnt from regime changes and transitions elsewhere that could help us understand these events and their aftermath, in Libya and in the region as a whole? The discussion below focuses on the following main arguments:

- what we have witnessed so far have been a series of attempts at regime change that have been more or less violent and at the moment of writing, have not succeeded in every place they were tried, so more humility is needed when talking about possible future trajectories of these countries and especially when labelling them as “democratising” or “in transition to democracy”;
- external actors have proven to have limited impact on democratisation elsewhere, so we should stop looking for a magic bullet for Libya and for other countries in the region;
- no outcome of these revolts will be similar to another and the commonalities of Arab revolts may stop just at that – their timing and their initial character;
- what really matters is the aftermath and so what we are witnessing is just the beginning of a long and painful transformation that may still degenerate into civil war, sectarian violence or another authoritarian regime.

Another 1989? What have we learnt from regime change elsewhere

The Arab Spring of 2011 may thus be more akin to the 1848 failed revolutions

*than to the democratic transitions set in motion by the crumbling of the Soviet Union in 1989.*²

Has this been another “wave” of democratization similar to the ones of 1970s, 1989, 2003-2005? The answer is yes, maybe, and for some aspects definitely not.

Yes is the answer because of the large numbers of ordinary people (some experts talk about “leaderless” revolutions) participating in mostly non-violent protests that broke up quite unexpectedly. Another similarity is the “wave”-like character of these events because of the cross-country contagion that has been one of the key characteristics.

Maybe is the answer to whether or not these are waves of *democratization*. What the experience elsewhere teaches us is that democratization is not a linear process. Early 1990s have seen the rise and consolidation of the so-called “transition paradigm” that dominated the thinking about regime change of policy-makers and academics alike.³ At the heart of this paradigm there was a belief that all the countries emerging from a previously authoritarian regime pass through a sequence of standard steps on their way to democracy – transition, democratization and consolidation. What the trajectories of different countries in the former Soviet Block have taught us is that the “transition paradigm” does not hold. The process of change is not linear and does not necessarily lead to democracy. With the hindsight of more than two decades of the so-called “triple transition” that was unleashed by the break-up of the Soviet empire, we now know that regime change can lead to the recurrent escalation of violence and civil wars in some countries (think the Balkans and the Caucasus), to re-constitution and re-concentration of power for the ruling elite, old or new (think Central Asia) and to the rise of new forms of authoritarianism that have been consolidated behind a façade of supposedly democratic elections (think

Belarus). Moreover, some of those countries that have been showing certain progress are still in danger of falling back onto the authoritarian track (think Russia or Ukraine).

No is the answer as far as the expected outcomes are concerned. These are very different countries in terms of their political system and history and the only thing they have in common is popular discontent with socio-economic and political stalemate. However, many of the structural factors behind these failures are different in each of these Arab countries, some being resource-rich others resource-poor, some monarchies, and still others tribal states. These and many other factors will determine the months and years to come and so no outcome of these Arab revolutions will be similar to another.

Other differences from “waves” of democratization in Europe have to do with the geopolitical context. Each country in North Africa and the Middle East is subject to several conflicting geopolitical interests (US, Saudi Arabia, the Gulf states, several European states, notably France and Britain). It is likely that the aftermath of revolutions will be subject to a “divide and rule” approach at least by some of these big actors, as is already evident from the recent policies of Saudi Arabia. In addition, as far as their relations with the “West” are concerned, those countries will no doubt continue to suffer from intense securitisation of the whole region.

There is also lack of consensus – both externally and internally – as to what kind of politics and economies these have to become and which ideal they have to aspire to. While Eastern European revolutionaries were clear in their ambition to join the rest of Europe, in fact, they draw their inspiration from their own “European” past, this is not the case in the present-day Arab world. As Thomas Carothers of the Carnegie Endowment for International Peace notes, “we should be acutely aware that (...) local political actors in the Arab world harbour enormous and often bitter scepticism of our democratic bona fides”.⁴

² Robert Springborg, “Whither the Arab Spring? 1989 or 1848?”, *International Spectator*, Vol. 46, No. 3, September 2011, pp. 5-12

³ Thomas Carothers, “The end of the transition paradigm.” *Journal of Democracy*, Vol.13, No. 1, 2001, pp. 5-21

⁴ Thomas Carothers, “How Not to Promote Democracy in Egypt”, *Washington*

While Richard Youngs of Spain-based think tank FRIDE is even more harsh, saying that "Arab protests are in the name of freedom *from* the West and not in aspiration of joining a 'Western project.'"⁵ This scepticism is not only driven by cultural difference. The US and the EU have seriously damaged their credibility in the region by supporting autocratic leaders in order to guarantee security on their borders and stability of their oil contracts. The US particularly has had Egypt and Israel as top recipients of its foreign aid for decades. It now has to reconcile its geostrategic interests with its pro-democracy rhetoric.

Critical points for democratisation and lessons for the international community.

*It is not enough to cheer for the revolution while it is happening. The aftermath, the transition process from authoritarianism to democracy, is the crucial moment; and this is when a country needs most help. This is also the time when people power alone cannot guarantee a change in the right direction, and when bad management in a critical period can backfire.*⁶

Post, February 24, 2011

5 Richard Youngs, "The EU and the Arab Spring: From Munificence to Geo-strategy" *FRIDE Policy Brief*, No. 100, October 2011

6 Nadim Shehadi, "The Arab Revolt: Transformation to Transition" *Open Democracy*

Indeed, transition is a long uphill battle on multiple fronts where no pre-cooked solutions are going to be useful. The aftermath of any revolution is characterised by re-thinking of individual and collective positions. While the presence of a strong ruler unites the opposition in a shared contestation, his fall is the beginning of a long and painful process of facing and learning to manage the differences of those who rioted united. Different actors will have to learn to reconcile conflicting visions for the country's future, to build coalitions and to agree on a common institutional framework. Some of those most involved in the protests will even disappear from the public life as their revolutionary profile and approach might be at odds with the new imperatives of political transition (as indeed we have seen happen in Eastern Europe and the former Soviet Union). Indeed, as Nadim Shehadi rightly argues, "after so many years of semi-comatose political existence, it is only natural that at a certain point the awakening will be disoriented and look in different directions. What is needed is a mechanism to manage the diversity."⁷

Other tensions will also emerge such as between the elite, new and old, and the grassroots as well as tensions

2011 <www.opendemocracy.net> February 22, 2011

7 Ibid

within the political elite. Most of these countries have strong military and police that still have to be persuaded to put limits on their power and reach. Moreover, some of the nastier conflicts might come to the fore, such as tribal rivalries that were suppressed during the Gaddafi regime as well as some extremist groups.

Can there be any guideline for the international community despite the challenges outlined above? No pre-cooked solutions can or should be offered. This is the first and most important guideline. The biggest challenge is the one of knowing how to foster the strengths and help with the weaknesses of each single Arab state that succeeds in a regime change and starts a period of transition. Substantive investments should go into practices of public dialogue between different types of actors and across communities, creating an enabling environment for these processes to flourish. This also means that different civic and political groups should be offered equal access to any funding or assistance, regardless of just how close their rhetoric is to that of a given donor. The goal should be the one of strengthening the public sphere based on dialogue and tolerance rather than a particular set of actors whose agendas might appeal to the "West".



Libyan ruins after NATO raids, cc, www.flickr.com



by Dario Sabbioni

Political Science and I
nternational Relations Student,
at Scuola Superiore Sant'Anna

LIBYAN CIVIL WAR STEP BY STEP

FOR A TIMELINE

17 February 2011

On the "Day of Rage", a massive crowding in Benghazi streets took place, and protesters showed for the first time in years the solidarity and willingness to action of an almost entire population, following the arrest of human rights activist Fethi Tarbel, which will later be appointed Youth and Sport Minister of the interim government.

22 February 2011

Never surrendering to the numerous Gaddafi announcements on State television (since the very beginning he started using the national media as a means to its purposes, even also, as it has famously reported, calling for the first time his adversaries the *stray dogs*), the so-called *rebels* conquered Misrata and Tobruk by the end of February, putting a precarious end to loyalists resistance in these cities

in the early days of March. A loyalist *révanche* was strong during the following months, but never diminished or critically hit the rebels' advancements. Resistance spread all around the country, leaving only few areas undisputed, the enormous *solitudes* in the South and tribe zones loyal to Gaddafi such as those in Bani Walid and Sirte. Also Tripoli came close to be burnt by the battle rage but the fire was never lit, leading to a fierce perse-

cution by police forces, due also to the fire against the People's Hall, where the legislative branch of the General's People Congress resides.

27 February 2011

The formation of the National Transitional Council (NTC) chaired by the former justice minister Mustafa Mohammed Abdul Jalil was a major step towards the full consciousness of the revolt, and it was recognized by France just a week later, and by Qatar one month later, on the 28 of March. Many protests took place throughout the world during this period up to mid-March, most notably the Topple the Tyrants occupation of Saif Al-Islam's home in Hampstead London, but there were also many mediation proposals by Hugo Chavez and other "compromised" political leaders, given the popularity by which Gaddafi was still experiencing throughout the world. As an example, the acknowledged achievements of his Gaddafi International Charity and Development Foundation (GICDF).

Early March

Following major requests by Western public opinion and opinion leaders, international aid came to the weak rebel forces. When the loyalists were approaching the rebel town of Benghazi after the retaking of Ras Lanuf, Brega and Ajdabiya, it became clear that even Khamis Gaddafi's brigade would be able to put in place a massive slaughter which would have ended the whole rebellion in a graveyard. There were numerous efforts by the international community to weaken the Gaddafi assets, for example by freezing more than US\$30 billion belonging to the Libyan government and the suspension of Libya from the major international forums. The menaced charge by the International Criminal Court against Gaddafi didn't relieve the rebel forces, which were still suffering common problems for every incipient revolution, as it had happened few days before in Egypt.

17 March 2011

Remarkable events brought hope to the pulling out anti-Gaddafi forces. United Nations Security Council Resolution 1973/2011, which came after a very difficult debate throughout the SC where the leading (and still little recognized) role was played by U.S.

Ambassador Susan Rice, authorized member states "to take all necessary measures [...] to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya [...], excluding a foreign occupation force of any form on any part of Libyan territory". The so-called no-fly zone had been established and the Coalition intervened in different forms, under the name Operation Odyssey Dawn for U.S., Italy, Denmark and Belgium, Opération Harmattan for France, Operation Ellamy for the UK and Operation Mobile for Canada.

23 March 2011

NATO took over the military operations (Operation Unified Protector), deploying its forces in a bunch of days, with some tangible achievements since the very beginning. The Gaddafi aviation, composed mainly by U.S. and USSR Cold war aircraft, was neither given the possibility to spread its weak forces or to constitute a threat for the rebel advances. In these fragments of war some prominent actors emerged of what would later be the "free Libya": Mahmoud Jibril Head of the NTC executive board, Ali Issawi NTC foreign affairs Minister and last but not least Abdel Hakim Belhaj, ancient fighter in Afghanistan and later the besieger and taker of the Gaddafi's compound in Tripoli, nowadays also the man in charge of the military committee responsible for the people of Tripoli.

Early April

There were suggestions that CIA and MI6 intelligence officers were in Libya trying to evaluate the situation and giving strategic hints both to the advancing rebels and to the Allied aviation. Under the point of view of aid to the rebels, it is notable that mainly in the first days of April a continuous air-dropping of arms and food supplies began, and this was accompanied also by the announcements of the envoy of military advisors by France, UK and Italy on the 19 and 20 April.

May

The clashes during whole April and early May were characterized by the resistance of the loyalists against the persistent attacks in the East (where there finally was a stalemate) and in the West. Lessons learned from the second loyalist offensive (29 – 31

March) proved to be meaningful but the battles of Brega, Brega-Ajdabiya Road and Misrata demonstrated how long the path was up to the long awaited Tripoli. As Moussa Ibrahim eventually reported, on 30 April 2011 Saif Al-Arab, sixth Gaddafi's son, was killed with three of its nephew and nieces in an air attack by NATO, a raid which was considered with many controversies because of the bloody and indiscriminate assassination of innocents that it had brought to. It was not the first neither the last. It was during the early phases of NATO attacks' intensification, i.e. May and early June when also Coalition's helicopters entered into action, that the major threats for the civilian population were persistently felt, leading to a psychological demise for many of the combatants. Under the aegis of Western political leaders it was first put out that an innocuous Gaddafi would be better than a massive slaughter due to the constant contrast between the counterparts. The factions of the "Free Libya", fatally preconceiving the tragic end of Gaddafi, immediately opposed this argument.

28 July 2011

Another event showed to the eyes of the Western world how the Arab Spring still had the potential to become something critical and also a terrible feud: the rebel army chief and former Minister of Interior until 22 February 2011 Abdul Fatah Younis was put under arrest by the NTC and then executed without a fair trial, shedding light on the inconsistency of true democratic ideals by the rebel forces.

Early August

When the situation was evolving into a "fierce stability" and it tended to become clear that the future of Libya was dependent upon a "position war" which was conducted under the auspices of the NATO raids, the rebels from Nafusa mountains at the border with Tunisia (Yafran and Bir Ghanam battles, 6 August) and those from Misrata and Zliten began to advance and reached a new frontline near Tripoli. They encountered a strong resistance by Gaddafi loyalists but up to 15 August they had attacked and conquered Sorman, Sabratha, and Gharyan, eventually reaching Zawiyah, the last refuge before Tripoli. Since 20 August,

Allied countries started the launch of light arms and long-range weapons, which were used by the rebels in the battle of Tripoli (operation Mermaid Dawn).

23 August 2011

Following the continuing road battles, international agencies reported the palpitating moments that cast a final stone on the 42 years long Gaddafi regime, mocking its excesses and luxury objects which had been found in his bunker in Bab al-Aziziya and in his numerous palaces with reportages by international media. The rebels had entered the once sacred halls of power of Gaddafi's power.

20 October 2011

The same *verve* of the Tripoli victory can be found in the handycam-taken moments of Gaddafi's death, when Sirte was conquered and the leftovers of the Great Socialist People's Libyan Arab Jamahiriya finally fell into the Libyan sand. The dictator was over, as well as his son Mutassem Billah, who was later killed. Reconstruction was about to begin.

To the case of Libya belong very typical traits among the other Arab revolutions, one of which has been exem-

plified by NTC officials in a document developed since mid-October which contains the "road map" for the necessary dismantlement of over 40 militias and 60,000 soldiers and also the creation of a "Minister of Outplacement" for the peaceful times.

31 October 2011

Abdurraheem el-Keib, a dual U.S.-Libyan citizen and professor in various American and Gulf universities, was chosen by the members of Libya's National Transitional Council (NTC) as the country's new prime minister. He reportedly received 26 out of 51 votes of the NTC members, in the same day of Secretary-General of NATO Anders Fogh Rasmussen's visit to the new free Libya after the liberation, when he quite unexpectedly announced the ending of the NATO mission.

19 November 2011

Following the suggestions by British intelligence, Saif al-Islam Gaddafi was captured near the town of Ubari, 640 km far from Tripoli, and his imprisonment by the NTC forces was confirmed by the ICC. The same fate happened to the last important political figure of the regime, "The execu-

tioner" Abdullah Senussi, brother-in-law to Gaddafi and Head of Libyan Military Intelligence (LMI), which was captured near Sabha and has a fresh accusation of crimes against humanity.

22 November 2011

Shortly after the unveiling of the new government, there have been widespread consensus among the Western countries on the 24 lay political figures which emerged from the Revolution, such as the Defense Minister Osama al Juwali, Zintan Brigade Chief, and the Oil Minister Abdulrahman Ben Yazza, former manager of the Italian oil company ENI. Most notable is the absence of the already mentioned Belhaj, which was feared by many as the prominent Islamist figure of the new Libya. During his visit in Tripoli, José Luis Moreno Ocampo, Prosecutor of the ICC, reassured that Saif al-Islam and Abdullah Senussi would face in future a fair trial on the Libyan soil, an important step towards a pacific democratization despite the continuing struggles and clashes among militias reported by the international agencies.





by Simone Tholens

*PhD candidate at
European University Institute*

WEAPONS EXPORTS TO LIBYA

THE EU COUNTRIES AND THEIR MARKET SHARE OF THE ARMS TRADE:
BEFORE & DURING THE WAR

Introduction

In UN Security Council Resolution 2017 of 31 October 2011 the world watch dog expressed concern over the possibility that looted stockpiles of small arms, light weapons, and

MANPADS (man-portable air defence systems) in Libya could fuel regional terrorist networks such as the Al Qaeda in the Islamic Maghreb, but also Tuareg rebellions in Mali and

Niger, and Hamas in the Gaza strip. These security concerns come as a second thought to the massive arming of first Colonel Gaddafi's regime, and then civilian militias under the

leadership of the National Transitional Council (NTC). What, we may ask, is the European perspective on the role of weapons supply and control to reach a political goal in contemporary conflicts?

EU arms export to Libya

Libya was a *paria* in international politics throughout the latter part of the Cold War, and subject to various sanctions including a UN arms embargo from 1992 until its suspension in 1998 and lifting in 2003. Upon accepting responsibility for the Lockerbie bombing and other support to international terrorism, Libya was welcomed in from the cold by the international community. As an oil-rich, regional power, Libya became a popular recipient of European weapons. In the period between 2004 and 2009, the EU granted licenses worth €834.5 million from to Libya, of which Italy (€276.7 million), France (€219.1 million), UK (€119.3 million), Germany (€83.4 million), and Malta (€79.7 million) represented the lion's share.¹ The Maltese export figures are the most curious in this respect, Malta not being an arms producing country. The Italian company Beretta had used a Maltese licence in order to divert attention from the 79 million euro worth of small arms – likely to be used for crowd control in non-democratic Libya.

In the period from 2003 onward, one may describe the situation as resembling an arms bonanza in Libya. European arms exporting countries had a vested interest in participating in this process, and actively cultivated ties to the eccentric government of Colonel Gaddafi. Illustratively, the *Libdex* arms fair in Tripoli attracted 100 companies from at least 24 countries in November 2010.² The competition over Libyan arms purchases was high, and the sales efforts often politically supported, with leaders of France, Italy, Russia and the United Kingdom paying visits to Libya while accompanied by representatives of national arms companies. Sales covered all categories of weapons; chemical weapons e.g. tear gas, military planes, small arms, anti-tank rockets, and ammunition.³ In addition, the EU supplied Gaddafi with electronic jamming equipment used

to control mobile networks and limit freedom of expression. However, no major weapons, such as the licensed but not delivered Russian S-300s and British Jernas Surface to Air Missile systems, had reached Gaddafi before the civil war broke out in February 2011. The arms bonanza ended just short of creating a militarily significant Gaddafi.

Arming Libyan militias

As the uprising began in Libya in February 2011, and security forces replied with force and brutality against protesting crowds, UN Resolution 1970 imposed an arms embargo and other sanctions against the Libyan regime. This was reinforced with UN Resolution 1973, which authorised Member States “to take all necessary measures notwithstanding paragraph 9 of resolution 1970 [arms embargo requirement] to protect civilians and civilian populated areas, under threat of attack”.⁴ The US contested the general view that this prohibited supplying weapons to Libyan rebels in the name of protecting civilians. Legally speaking, it seemed that an explicit arms embargo still provided loopholes for those states wishing to supply weapons for defence purposes.

Despite UN Resolution 1973, there are two hitherto known cases of external arms supplied to the rebel forces: French airdrop of weapons in the mountains of Western Libya⁵, and Qatari shipments of assault rifles and anti-tank missiles.⁶ These breaches of the UN arms embargo were criticised by Russian and South African/African Union governments on grounds of geopolitical interference and further fuelling violence. But in the EU, few loudly opposed arming rebels under NTC command.

The details of how international actors trained and supplied the rebel forces in Libya have yet to unravel. What seems certain is that European arms exporting countries were able to lawfully deliver weapons to Gaddafi prior to the Arab Spring, and also to shift side and supply weapons to the new forces in Libya during and after the recent civil war. As such, the case of Libya has been a win-win situation both politically and financially for Europe.

European motivations: *realpolitik* or idealism?

It is no exaggeration to claim that Europe has acted hypocritically vis-à-vis Libya. Within weeks of the popular uprising in North Africa, European states shifted position, and turned against the autocratic leaders they had courted for decades. The weapons they had supplied to Gaddafi were turned against demonstrating people, and Libyan security forces now openly attacked civilians on the streets of Tripoli and Benghazi. Up until that moment, dissidents had been imprisoned, tortured and killed silently, away from the public eye and certainly far from international attention. Now, atrocities committed against demonstrations and dissidents with weapons provided by European allies were disseminated via mobile cameras and social media to a shocked public on both sides of the Mediterranean. Reality had caught up with European leaders' hypocrisy.

There are several perspectives through which we can read the European pragmatic – to use a well-known euphemism – approach. I will focus on three: first, weapons are integral to the nation state system, and exporting and importing weapons for the purpose of defending the polity is a legal and legitimate practice. In the period 2003–2011, there were few voices against the international engagement with the Libyan leadership. Selling weapons were simply just one of many forms of interaction, and often accompanied political agreements on more controversial issues, such as immigration and oil or gas contracts. From this perspective, the most compelling effect has probably been that procurement of large quanta of weapons emboldened Gaddafi, to the point where his defeat came in the form of thousands of deaths, including his own, rather than a bloodless surrender. Weapons can have played a role as symbols of power, and enhanced the belief that the regime could withstand internal threats to its rule.

Second, the European Union has been at the forefront of developing export control mechanisms during the last 15 years. This was manifested first in 1998 with the EU Code of Conduct on Arms Export, which sought to

harmonize arms export regulations among its Member States. In 2008, the Code was updated and reviewed, accumulating in the Common Position on governing the control of exports of military technology and equipment, including dual-use technology. Ensuring that the final user of exported weapons does not engage in unlawful human rights violations is a core principle of EU export control mechanisms. So how could arming of Gaddafi and other authoritarian leaders in the Middle East and North Africa thrive parallel to the development of these Codes of Conduct? The simple answer is that the idea of Europe as a 'normative power' is entirely self-fabricated fiction, designed to legitimize supranational institutions and framing external policy according to moral principles. A more complex view contend that there is a disconnect in Europe, and that EU-level control mechanisms are fiction inasmuch as they give clout to the idea that the EU exists as an entity, while real decision on security and defence policy is still being made at the national level in individual Member States, or in more powerful alliances, such as NATO. Germany's fierce stand against involvement in Libya testify to this image of the EU and its regulations as fictive, idealist clothing on what is

in essence a collection of deeply self-interested states with utilitarian national policies.

A third perspective is a potential geopolitical contradiction. Europe has supported a regime change in Libya, and encourages democracy in the MENA region at large. At the same time, they have fuelled this region with weapons for decades. UN Resolution 2017 captures this tension: when autocratic regimes fall, states' control over the monopoly on force is at risk in the short to medium term. Weapons are likely to proliferate into regional black markets, which in turn may fuel the activities of armed groups, as identified by the UN Security Council Resolution. Preventing regional black markets through tight border control and transparency in registering and stockpiling weapons arsenals will surely be one of the first challenges for the new leadership in Tripoli. But the shifting political situation in the region is likely to affect existing conflict patterns of non-state groups operating in the bordering Sahel region and other adjacent conflict complexes.

Europe has acted according to a long tradition of *realpolitik* in the case of its weapons export to Libya. The bonanza was led by export-hungry European states, without regard for regional

control mechanisms or international principles of human rights. However, it remains to be seen whether European states' sudden turn to idealism will lead to the somewhat naive vision identified by the President of the UN Security Council: "when people disarm, peace follows".

1 Council of the European Union, Twelfth Annual Report According To Article 8(2) Of Council Common Position 2008/944/CFSP Defining Common Rules Governing Control Of Exports Of Military Technology And Equipment (2011/C 9/01)

2 Pieter D. Wezeman, "Libya: Lessons in Controlling the Arms Trade," SIPRI, March 11, 2011, www.sipri.org/media/newsletter/essay/march11.

3 Der Spiegel, "Guns to Gadhafi: Libyan Arms Deals Come Back to Haunt Europe" February 24, 2011, <http://www.spiegel.de/international/world/0,1518,747440,00.html>

4 United Nations Security Council Resolution 1973, "On the Situation in Libya", S/RES/1973 (2011)

5 New York Times, "France Says It Gave Arms to the Rebels in Libya", June 29, 2011, <http://www.nytimes.com/2011/06/30/world/europe/30france.html>

6 Al Jazeera, "Gaddafi forces 'intercept arms from Qatar'", 5 July, 2011, <http://www.aljazeera.com/news/afrika/2011/07/2011755223504921.html>



028, by Nasser Nouri, cc, www.flickr.com



*Libyan Coastline,
taken by NASA
astronaut Ron Garan
fromSpace 8/24/11
on an historic day of
transition. Fragile
Oasis, cc,
www.flickr.com*

by Andrea Prontera

*Research Fellow
at University of Macerata*

LIBYAN ENERGY FUELLING EUROPE

INTERNAL ENERGY, EXTERNAL GOVERNANCE?

Overview

Libya has been an OPEC¹ member since 1962. The country oil and gas

production represents only a minor fraction of world energy production - about 2% of crude oil production and 0.5% of natural Gas production - but Libya holds the largest oil proved re-

serve in Africa. With its 46.6 billion barrels Libya is the eighth country in the world for proven reserves, and it is the 22th for natural gas reserves. In addition, the proximity and physical

¹ Organization of the Petroleum Exporting Countries

linkage of Libya to European energy markets and the quality and cheapness of its oil make this country an important actor in the global energy landscape.

According to the International Energy Agency (IEA) in 2010 the majority of Libyan oil is sold to European countries, namely, Italy (28%), France (15%), Germany (10%), Spain (10%), Greece (5%) and UK (4%). Only 3% of its production is sold to the US. A growing role is played by China, that buys 11% of Libyan oil, corresponding to 3% of Chinese internal demand. Natural gas exports to European countries have increased significantly over the past years, due to the building of the Greenstream pipeline in 2004. Greenstream is operated by Eni in partnership with the Libyan National Oil Corporation. It brings the gas from Melitah to Gela in Sicily, and then to the Italian mainland. About 90% of Libyan gas export comes to Italy through Greenstream, which represents the main gateway for Libyan energy resources to European markets. Other gas is exported to Spain in the form of LNG.

With regard to the EU-27 oil imports, the total incidence of the Libyan oil has increased from 6.6 % in 2002 to 9.4% in 2009; with regard to natural gas imports the Libyan share has increased from 0.2% in 2002 to 3% in 2009. The Libyan contribution to European security of supply is not impressive, but in a context of rising competition for energy resources that country can play an important role in the diversification of supplies and in the reduction of EU dependence from Russian oil and gas. Moreover, some important European countries have a stronger dependence from Libyan resources. Countries like Italy, France, and Spain in 2010 relied on Libya for as much as 25 %, 16 %, and 13 % of total crude oil consumption respectively – a supply not easily replaced on short notice. Italy represents a special case because it is extremely dependent also on Libyan gas, which corresponds to 12.5 % of national consumption. Italy's initial inaction with respect to the Libyan crisis was motivated also by an attempt not to put in danger its privileged relationship with the Gaddafi regime, and by the fear of growing instability in such an important country for national ener-

gy security (migration issues played an important role too).

Libya's economy is strongly dependent on the energy sector. According to the International Monetary Fund in 2010 over 95% of Libya's export earnings and about 80% of its fiscal incomes derived from oil and gas production. The importance of the energy industry for Libyan economy can well explain that one of the first

exportation's activities².

The impact of the Libyan war on energy markets

The events in Libya resulted in the first oil supply disruption since the outbreak of Arab uprising. The Libyan disruption took place amidst robust demand growth – driven mainly by non-OECD countries – while the global economy was consolidating its recovery from the 2008 financial

Fig. 1. EU imports of crude oil, by country of origin - 2009.
Source: EU statistics.

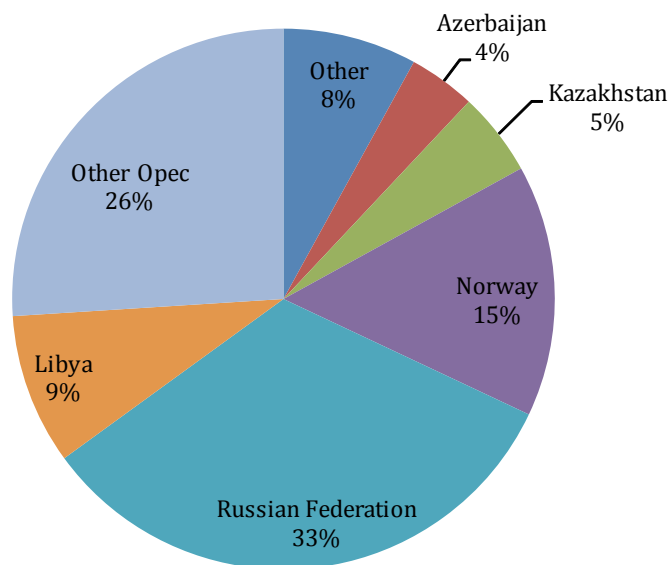
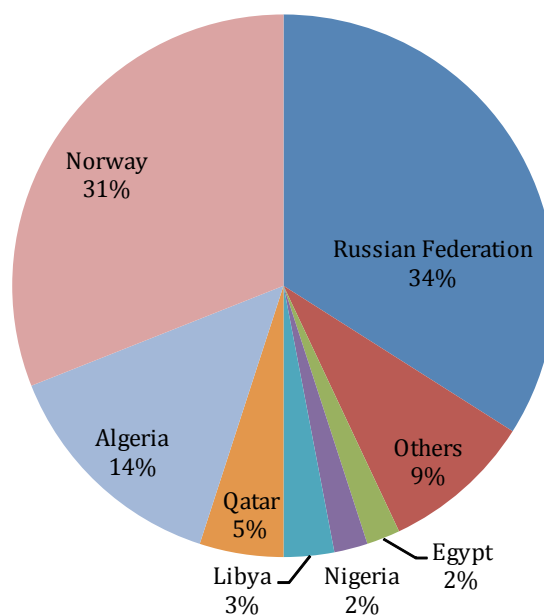


Fig. 2. EU imports of gas, by country of origin - 2009. Sources: EU statistics.



concerns of the NTC is to restore as soon as possible the production and

² *Libyan Council wants oil firms to return quickly*, Reuters interview with Ahmed Jehan, 2 September 2011.

crisis. Nevertheless, OPEC's surplus capacity in 2009-2010 was relatively high due to a decline in global oil demand in the aftermath of the financial crisis, and the coming on stream of

market has shown great resilience in dealing with the Libyan output loss through price adjustments, the use of spare capacity, and a shift in trade flows across regions³.

Fig. 3. OPEC Total Spare Crude Oil Production Capacity 2003-2010 (md/d). Source: EIA statistics

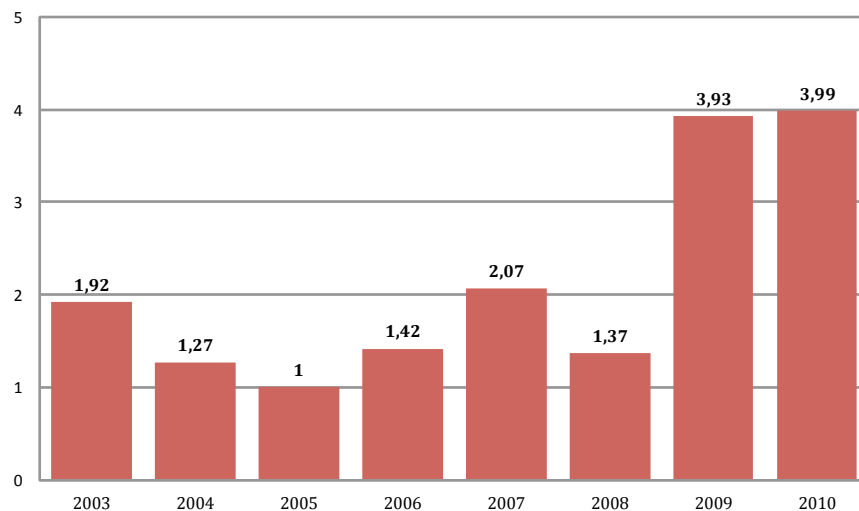
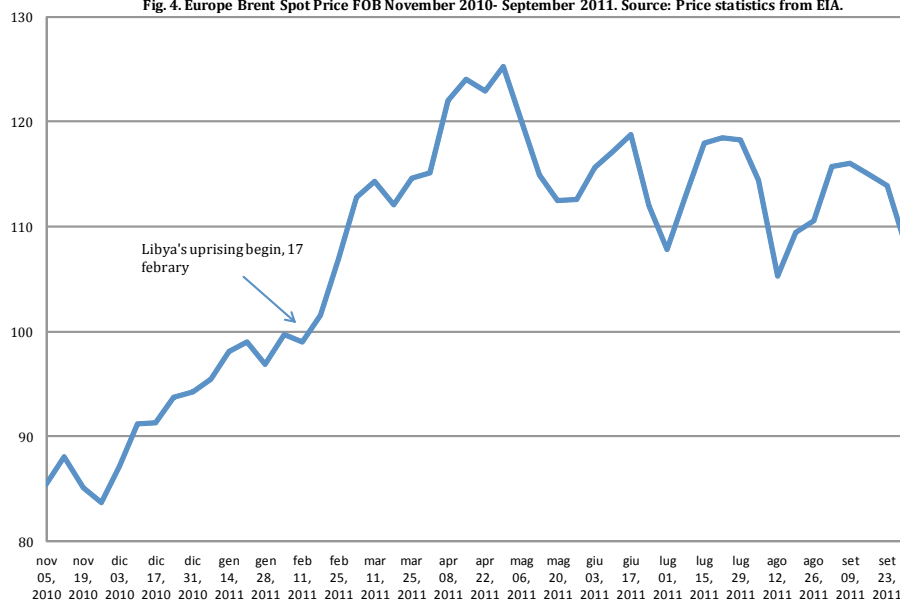


Fig. 4. Europe Brent Spot Price FOB November 2010- September 2011. Source: Price statistics from EIA.



new projects in Saudi Arabia in 2009. Prior to the Libyan crisis surplus capacity was close to 4 million b/d.

At the beginning, the oil price began to rise at the end of the year 2010, before the Arab uprising, mainly in response to the growth of oil demand in non-OECD countries. This trend was reinforced by the events in Tunisia, Egypt and Bahrain, with a final rush after the Libyan uprising. Nevertheless after the first months the oil

As regards the gas market, the shutdown of the Greenstream pipeline represented the most severe disruption in the MENA region. Neverthe-

³ H. Darbouche e B. Fattouh, *The Implications of the Arab Uprisings for Oil and Gas Markets*, Oxford Institute for Energy Studies, September 2011.

less the impact of the loss of Libyan gas supply on the European and Italian markets has been minimal. In particular, ENI has been able to replace Libyan gas without much difficulty. In fact since 2009 the country has been oversupplied and gas storages were plenty. As a result, the gas price has been only limitedly affected by the Libyan war. Yet, in the first half of the year 2011 the Russian gas supplies to Italy increased by over 50% (when compared to the corresponding period in 2010) in order to compensate the shortage of Libyan gas⁴.

Prevention and management of the Libyan energy crisis: which role for the EU?

In the short run, Libyan war has not affected significantly the oil and gas markets. As noted before, some market fundamentals are able to prevent a more incisive shock. However, in the long run the situation can be different. The effect of the revolution and regime change on the Libyan oil and gas production and exportation will depend on the capacity of the new government to restore as quickly as possible the energy industry and to build a stable political and legal framework for the foreign companies operating in the country⁵.

Libya is an important country for EU security of supply. Due to the divergent interests of the leading member states and the unwillingness to concede more power to European institutions, the traditional EU energy external policy has been based mainly on a 'market-governance' approach to crisis prevention⁶.

This institutional architecture had some success in integrating the energy markets of some Eastern and South European countries, but it was largely insufficient in enforcing the EU role in front of the main oil and gas producers in the MENA region, or

⁴ EU Directorate General for Energy, *Quarterly Report on European Gas Markets*, Market Observatory for Energy, vol. 4, issue 1, march 2011.

⁵ On 14 October 2011, ENI has begun to restore the gas transit from Greenstream.

⁶ R. Youngs, *Europe's External Energy Policy: Between Geopolitics and the Market*, CEPS Working Document n. 278, November 2007.

in front of Russia. According to a long established strategic approach to security of supply, the traditional bilateral relationship between European governments and producers - sometimes supported by direct connections between the respective oil and gas companies - has been the rule in the energy crisis prevention in MENA regions. This applied also in the case of Libya, as shown by the special relationship between Tripoli and Rome strengthened with the Treaty of Friendship signed in 2008⁷.

The EU role in crisis management has also been very limited. Every EU action has been constrained by the NATO military role, by the diplomatic activism of certain European states - in particular France and UK - and by the IEA intervention in the oil market. In fact, on 23 June 2011 the IEA decided to release 60 million barrels of oil from emergency stock in response to "the ongoing disruption of oil supplies from Libya"⁸. However, the release of strategic reserve was not part of a coordinated effort between producers - blocked by the stronger tension and political disagreement in

the OPEC - and consumers. As a result, the announcement sent a confusing signal to the market, and the IEA's stock release had a brief impact on the oil price level⁹.

In the end, and leaving aside military concerns, the possibility of an EU intervention in the crisis management has been limited. The 'policy space' has been occupied by national diplomatic efforts and by well-established, even if not well-effective, international institutions such the IEA.

EU external energy governance: something new after Libya?

The Libyan war has shown that Washington is no longer a guarantor of European energy interests. As Secretary of Defense Robert Gates put it: "Libya is not a vital interest to US"¹⁰. In the forthcoming decades EU energy dependence will grow, and the concern for security of supply from the South of the Mediterranean will be more and more important. The fact that the EU needs a coherent energy policy is well known in Brussels. With the Lisbon Treaty some steps forward have been made in the direction of a more consistent internal and external energy policy. Nevertheless, the divergence

of interests of member states and the traditional national policy approach to energy security have prevented a real innovation in EU energy policy. In this context, the Libyan war has given new impetus to EU efforts. In September 2011 the European Commission has adopted a new Communication on Security of Energy Supply¹¹. Three main aspects point to an important development in EU' external energy action: the sharing of information on bilateral contracts between members states and producers, and the involvement of the Commission in intergovernmental agreements; the expansion of the Energy Charter Treaty to North African countries (including Libya); and the creation of a Strategic Group for International Cooperation, formed by member states and EU representatives aiming at improving the coordination in international institutions and fora such as the IEA and the G8/20. Is too soon to say if these proposals would entail a real change in EU external energy governance; a similar development will depend on the degree in which the principal member states recognize that their energy interests in the long period would be better guaranteed by a stronger cooperation at EU level.

⁷ Gaddafi regime wasn't really interested in a stronger cooperation with EU institutions, Libya has been in the Euro-Mediterranean Energy Partnership as observer since 1999.

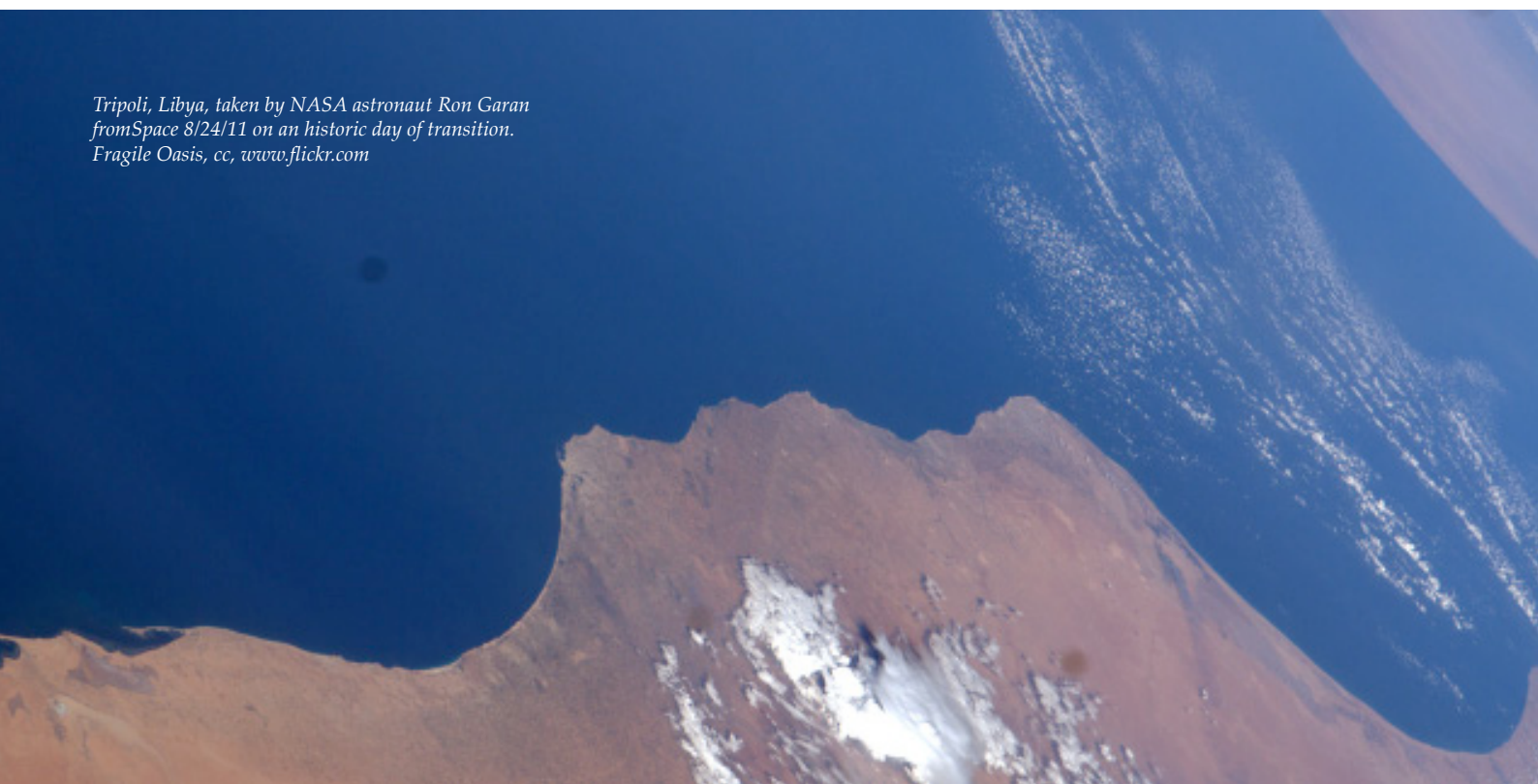
⁸ IEA makes 60 million barrels of oil available to market to offset Libyan disruption, IEA Press Release, 23 June 2011.

⁹ H. Darbouche e B. Fattouh, *The Implications of the Arab Uprisings for Oil and Gas Markets*, Oxford Institute for Energy Studies, September 2011.

¹⁰ *The Wall Street Journal*, online edition, 27 March 2011.

¹¹ *The EU Energy Policy: Engaging with Partners beyond Our Borders*, EC COM (2011) 539.

Tripoli, Libya, taken by NASA astronaut Ron Garan from Space 8/24/11 on an historic day of transition. Fragile Oasis, cc, www.flickr.com



On 26 March 2011 ETNA rescued a stricken boat off the Libya coast with 300 migrants. Photo cc, NATO, press briefing on Libya.



Oladapo Kayode Opasina

*PhD Candidate
at Scuola Superiore Sant'Anna*

TAKING FLIGHT FROM LIBYA

DID RECIPIENT COUNTRIES VIOLATE THE PRINCIPLE OF
NON-REFOULEMENT?

Introduction

The revolutionary wave of protest that unfolded across the Middle East and North Africa, known as the “Arab Spring”, took the entire world by surprise. In Libya, a mere demonstration that began on February 17, 2011, culminated in an armed conflict. Many

observers have decried the grave situation and resultant implications of the Libyan war. Consequently, the United Nations refugee agency declared a humanitarian emergency as several thousands of Libyans fled their war-torn country.

The seemingly complicated migration crisis that emerged as a significant feature of the Libyan war became one of the most contentious security issues. A potential flow of migrants, particularly on a large scale, is considered a security threat. There were re-

ports of a massive influx of migrants from North Africa into Europe, which had put the security, protection and reception systems of many European Union (EU) member states, most especially Italy and Malta under great strain.

In March 2011, some 2,000 Libyans arrived on the island of Lampedusa, Italy by boat. This added to the over 15,000 migrants, mainly Tunisians who had arrived at the beginning of 2011. In a swift response, the Italian Government temporarily suspended transporting migrants from Lampedusa to reception centres in Sicily and on the mainland. Furthermore, Italy and the EU border control agency, Frontex, began conducting a joint operation called *Hermes 2011*. The joint operation was launched on February 20, 2011, following a formal request from the Italian Government. The operation was aimed at helping Italy cope with ongoing and potential migratory flow from North Africa. The EU had created the border management agency, Frontex, in order to ensure the operational cooperation between EU member states, as regards the security of external borders.

Quite a number of analysts have queried the perception of migration as a threat to national security. Some argue that the human rights of migrants, refugees and asylum seekers are threatened when migration is perceived as a security issue. When then, does migration becomes a security threat? This commentary also examines the critical connections between migration and security from a European perspective.

Situational Assessment on Libyan Migration

The International Organization for Migration (IOM) report indicates that, between February 20 and November 16, 2011, a total of 777,990 migrants had crossed Libya's borders and this figure includes 316,035 Third Country Nationals (TCNs) and 27,465 migrants who had crossed to Europe¹. Migrants fleeing Libya entered Tu-

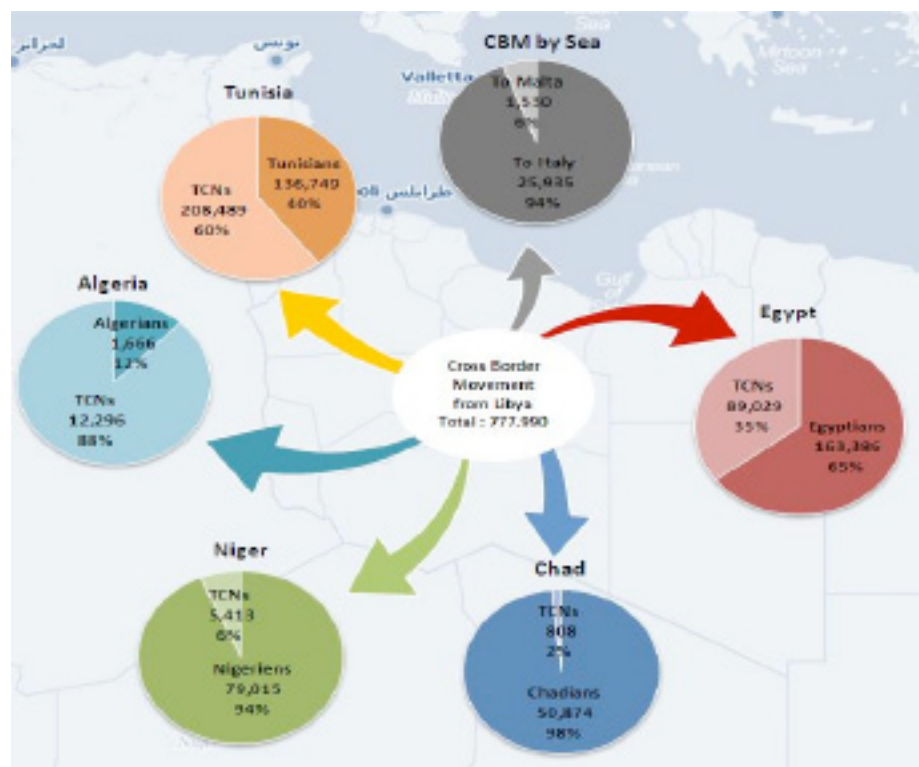
nisia, Egypt, Algeria, Niger, Sudan, Chad, Italy and Malta.

Within Libya, a significant population of Internally Displaced Persons (IDPs) has been recorded as a result of the armed conflict. The United Na-

'New' Migration Patterns in North Africa

The humanitarian crisis in Libya introduced new migration patterns into North Africa. Libyan authorities claimed that between one to two million foreigners were resident in

Cross-Border Movements from Libya



Source: IOM Daily Statistical Report, November 18, 2011

nisia High Commissioner for Refugees (UNHCR) put the total number of IDPs in Libya at between 100,000 and 150,000, primarily in the zones around Bani Walid, Sirte, Misrata and Tarhouna, as well as in areas around Tripoli and Benghazi². Following the official declaration of national liberation by Libya's National Transitional Council (NTC), quite a number of IDPs and other Libyan migrants have returned to Libya. Nonetheless, there are growing concerns over the situation of certain IDPs and tribes known to be loyal to Gaddafi's Government. Another issue is the serious risk posed by the significant presence of landmines and other explosives around the conflict zones.

the country before the outbreak of the crisis. At least 360,000 foreigners fled Libya during the first six weeks after fighting broke out. Male migrant workers, mainly from neighbouring Tunisia and Egypt, as well as from West Africa and South Asia constitute the major group³. Moreover, there have been large-scale return migrations from Libya, causing economic migrants to become forced migrants and forced migrants to enter irregular migration channels in the search for survival⁴.

The group, "Third Country Nationals" actually has gained more prominence because of the transformation migrants in this group have under-

1 International Organization for Migration, Migration Crisis from Libya – IOM Middle East and North Africa Operations. Daily Statistical Report, November 18, 2011.

2 Internal Displacement Monitoring Centre (IDMC), Libya: Many IDPs return but concerns persist for certain displaced groups, Norwegian Refugee Council, 2011.

3 Urs Fruehauf, EU-Libya Agreements on Refugees and Asylum Seekers: The Need for a Reassessment, Heinrich Böll Stiftung, 2011.

4 Ayla Bonfiglio, North Africa in Transition: Mobility, Forced Migration and Humanitarian Crises, Oxford Department of International Development Report, May 6, 2011.

gone from being foreign workers to being forced migrants. Such migrants for instance, find themselves in a refugee-like situation but they cannot be treated or given the same protection as refugees because they have an option of returning safely to their countries of origin.

In a comparative perspective, North African migrants from Libya outnumbered those of Sub-Sahara migrants. This suggests that Sub-Saharan migrants may have been stranded in Libya and thereby, becoming “involuntarily immobile”⁵. Many reasons can be attributed to the involuntary immobility of the Sub-Saharan migrants. One is the potential life-threatening danger involved in crossing land borders and sea, and also, lack of financial resources. Furthermore, the Libyan war generated an unexpected refugee crisis in the region, with a significant population of Libyan migrants fleeing to neighbouring countries like Tunisia and Egypt.

Migration-Security Nexus: A European Perspective

The EU migration policy moves to create a connection between migration and security. In the aftermath of the 9/11 terrorist attacks, the fight against terrorism topped the international agenda and subsequently, the EU made moves at strengthening its migration policy. Thus, the securitization of migration in Europe has resulted in the creation of the EU Agency for the Management of External Border Controls, Frontex, and the strengthening of maritime surveillance. This expresses the preoccupation with keeping irregular migrants as distant as possible and out of national territory, if at all possible.

Irregular migration can legitimately be viewed as undermining the exercise of state sovereignty, as any state has the right to control who crosses its borders and is resident on its territory⁶. A striking example is the Libyan migrants who arrived in Lampedusa, Italy, at the peak of the Libyan war. As

a result, the Italian and Maltese Governments faced the challenges of both distinguishing refugees from other migrants, and managing migrant arrivals at a time when many parts of Europe claim to be struggling to recover from the global economic crisis.

Consequently, the Italian Government called on the EU to establish a “special solidarity fund” in order to deal with the large influx of migrants. Also, the facilities at the reception centres became overwhelmed by the sudden influx of new arrivals. Migrants who arrived during the first few months of the crisis described the conditions at the reception centres as “Prison-Like”. This clearly shows that the Italian Government was unprepared for such a massive influx of migrants.

Hundreds of Libyan migrants drowned in the Mediterranean Sea *en route* to Europe, after their boats capsized. Hence, the EU Mediterranean states (mainly Italy, Greece, Malta and Spain) have been criticized for their failure to render assistance at sea, as provided by Article 98 of the United Nations Convention on the Law of the Sea, and by the International Conventions on Maritime Search and Rescue, and Safety of Life at Sea. Such actions could be connected to the adoption of a defensive approach, aimed at pushing back irregular migrants.

Prior to the Libyan upheaval, the EU and Libya had signed a ‘migration cooperation agenda’ on October 4, 2010 in Tripoli. The terms of the agenda included cooperation on border surveillance, mobility, migration and asylum. The EU-Libya cooperation followed a separate agreement between Italy (the former colonial power) and Libya, which dates back to August 2008. Italy and Libya had signed a ‘Treaty of Friendship, Partnership and Cooperation’, in which Italy agreed to pay 5 billion Euros in infrastructure projects over 25 years in compensation for abuses during its colonial rule and also in order to strengthen Libyan border controls.

There is a clear tension between securitization of migration, on the one hand, and the principle of proportionality and protection of human rights

and freedoms on the other⁷. Indeed, the refugee issue was at the core of relations between Libya and the EU, since the European states planned to systematically send back migrants who left the Libyan coasts and to let ‘mixed flow’ and asylum requests be managed in Libyan territory. However, this action was in contravention of the 1951 UN Convention Relating to the Status of Refugees, which prohibits the return of persons to their countries of origin, when there is a well-founded fear of persecution (principle of *non-refoulement*). On the other hand, Libya is still not a signatory to the 1951 UN Refugee Convention or its 1967 Protocol and consequently, Libya does not officially recognize refugees on its soil.

Conclusion

The multiple crises in North Africa have brought thousands of migrants and asylum seekers to the shores of Europe. The EU has come in for heavy criticism due to its role in fortifying its borders, at the expense of the human rights of migrants and asylum seekers. The EU recognized that, as long as the crises in North Africa and Libya in particular persisted, there would be continued irregular migration, which could pose a serious security threat to member states. Linking migration to ‘hard’ security concerns such as terrorism, smuggling, trafficking and organized crime, and the notion that the arrival of large numbers of migrants, especially from different social or cultural backgrounds has serious implications for social cohesion, have both negatively affected the image of migrants, most especially those fleeing persecution.

In terms of strengthening its borders, the European Parliament voted on September 13, 2011, for the deployment of European border guard teams and empowerment of the European border agency, Frontex, to develop a code of conduct that would guarantee respect for human rights in all its missions and adherence to the principle of *non-refoulement*.

⁵ Ibid.

⁶ Khalid Koser, When is Migration a Security Issue? The Brookings Institution, 2011, at www.brookings.edu/opinions/2011/0331_libya_migration_koser.aspx (accessed October 3, 2011).

⁷ Annette Freyberg-Inan & Mathijs van Dijk, Securing Migration to the EU: Law and Order Critical Connections, Jean Monnet Lecture, Scuola Superiore Sant’Anna, Pisa, Italy, 2011.



by Barbara Nicoletti

Research Fellow
at Scuola Superiore Sant'Anna

THE EU DEFENCE POLICY IN LIBYA. TEST FAILED

NATIONAL GOVERNMENTS AND AGENDAS MOLD AND DOMINATE THE
EU COMMON SECURITY POLICY?

Similarly to 1991, when the 'hour of Europe' seemed to have come and the EU was expected to play a leading

role in managing Yugoslavia's violent collapse, the 2011 crisis in Libya has been loudly calling EU's attention

as the perfect case for its newly potentiated Security and Defence Policy to be tested.

All through the past 20 years the EU has been trying to remedy its incapacity to manage regional crises by creating and strengthening security policy institutions, trying to improve its civilian and military capabilities, adjusting decision-making procedures, establishing top positions in view of coherence and coordination improvement. Although the reforms brought about by the Lisbon Treaty have eventually given the EU the institutional setup for taking an adequate stand in the management of regional crises, the Libyan case has unfortunately showed that this would not suffice. Yet the crisis in Libya fulfilled all the conditions for an EU initiative to be taken under its Common Security and Defence Policy, which could have taken the shape of either a EU military operation or a EU, rather than single EU member states, contribution to NATO military operations. In the first place, EU vital interests were clearly at stake in the Libyan crisis, as the whole of the Mediterranean basin from Turkey to Morocco is comprised in what the EU calls its “Neighbourhood”. Even ignoring the moral responsibility for the protection of civilians that the EU should feel as inherently attached to its value-based foreign policy, EU interests were evidently in need of being safeguarded, namely trade routes, the supply of energy, the “control” over migration policies and fluxes. The higher ambition of proving itself a strategic actor, as affirmed by the 2003 European Security Strategy, could also have been considered, yet this was far too extraneous to prevailing considerations of contingent nature. Also, regional support existed in the form of an explicit request for intervention from the Arab League that had called on the United Nations Security Council to impose a no-fly zone over Libya in a bid to protect civilians from air attack. But above all, what is usually considered to be the main (and most difficult to obtain) condition for intervention, i.e. a UN Security Council resolution clearly authorizing the use of force, was in place in the case of Libya. As the United Nations Security Council

Resolution 1973/2011 authorized member states “to take all necessary measures [...] to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya [...], excluding a foreign occupation force of any form on any part of Libyan territory”, the EU could have acted in full compliance with an existing UNSC authorization to the use of force, which would grant full legitimization also in the eyes of the EU public opinion.

The US expectations for the EU to play a leading role in dealing with the crisis did not add significant pressure on member states to act as EU. In fact, despite the fact that key EU member states such as France and Great Britain took a leading role in the military operations, the question of framing the intervention in Libya as a CSDP operation was never raised.

What then about the reforms brought by the Lisbon Treaty in 2009 that were to create an institutional engineering able to give the Union the means to tackle international crises in a coherent and robust manner? Institutional factors do not seem to have played a decisive role in shaping EU’s and EU member states’ response to the crisis, up to the point that commentators highlighted how “Institutional Europe has not faced up to the challenge. In the North African saga it does not exist. It is incapable of agreeing on how to act, on whether to recognize the Libyan opposition and most of all on the legitimacy of the use of force. The disunity is total and particularly striking when it is a question of deciding on war [...]”¹. Action under CSDP was in fact not contemplated at all, nor did decision makers care to justify why this option had been neglected, as if the Lisbon Treaty had not existed. Most probably instead they simply realized how the expectations for the Treaty’s ability to resolve the constraints of EU security and defence policy by institutional arrangements were far too unrealistic.

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1 Quoted in Menon A., *European Defence Policy from Lisbon to Libya*, in *Survival. Global Politics and Strategy*, Vol.53/3, June-July 2011, p. 76.

In fact, the role played by EU Member states in the Libyan crisis has showed that national governments fully dominate EU security policy. National governments have demonstrated the will and resolve to act on the crisis individually rather than united. Notwithstanding EU collective diplomatic reactions asking for an ‘immediate end to violence’², as well as the positions expressed by institutions’ representatives in the same vein, no EU initiative was put on the table.

But political divisions over the appropriateness for military intervention were not the only factor to determine EU inaction, although the most evident. Member states awareness of lack of EU capabilities for intervention played a decisive role. The process of generating sufficient military capabilities to strengthen the EU’s role as an international actor in the area of security, although further regulated by the Lisbon Treaty, has proved very hard to be pursued. Main constraints are the fact that military spending by EU member states does not seem to be coherent with the requirements of modern warfare, which is expeditionary and multifunctional, that personnel provided by member states, including trainers, is insufficient and that there is a serious lack of airlift capacity and common communication systems, to mention a few. These factors all heavily affect the capacity of the EU to perform a credible military operation like the one requested by the Libyan situation. Although the European Defence Agency should exercise an oversight function on member states in order to coordinate their spending in defence, the way national governments choose to use the money they allocate to defence is still often inefficient and EDA recommendations on the point are not taken completely seriously³.

Still political will and resolve to act as a whole, through the EU, remain

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2 Foreign Affairs Council, 21 February 2011.

3 See on this point Menon A., *op.cit.*

the main missing elements in this picture. Regardless of the fact that the chosen military option has been that of NATO, the EU as such should have had a leading role in the command and control framework of the military operations. As rightly pointed out by Sven Biscop, "as far as Europe is concerned the foreign policy actor directing the operation at strategic level will always be the EU, for it is through the EU that we make our long-term policies towards these priority regions. [...] Up to the EU, not to a coalition of the willing, to assume strategic control and political direction of all actions, even though the military operations are under NATO command"⁴.

Both from the point of view of EU capabilities' shortfalls and the lack of EU political direction to participating member states in the NATO Operation Unified Protector, the Libya case has showed that, despite the institutional set up being satisfactorily fixed by the Lisbon Treaty, the EU still needs to work hard on its member states to get them to think strategically and collectively also in the realm of security and defence. In other words, EU member states should stop blaming the institutional EU and start working on their role and behavior, as they still bear major responsibilities for the most severe problems in this areas⁵.

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⁴ Sven Biscop, *Mayhem in the Mediterranean: Three Strategic Lessons for Europe*,

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⁵ See Menon A. *op.cit.*, p.81.



Tarabulus city centre. Central Tripoli with the impressive El Fatah Tower, by [gordontour](http://gordontour.com), www.flickr.com



by Alice Riccardi

*PhD candidate
at Scuola Superiore Sant'Anna*

CRIMES AGAINST HUMANITY & RES. 1970

THE USE AND THE LEGAL IMPLICATION OF RES. 1970 FOR THE
INTERNATIONAL CRIMINAL COURT

From 16 February 2011 onwards peaceful protests took place in the Libyan Arab Jamahiriya (Libya) against the Gaddafi regime. Following the briefing of the United Na-

tions (UN) Under-Secretary-General for Political Affairs to the UN Secu-

rity Council (UNSC),¹ who reported

¹ UNSC, Official communiqué of the 6486th (closed) meeting of the Security Council, S/PV.6486, 22 February 2011, at 1.

the demonstrators' quell by heinous means, on 25 February the Secretary-General called for the UNSC to "take effective action to ensure real accountability" of those individuals allegedly responsible for the violent repression.² The day after, pursuant to article 13(b) of the Rome Statute (RS) of the International Criminal Court (ICC),³ the UNSC decided unanimously to refer the Libya situation to the ICC Prosecutor since 15 February 2011 through Resolution 1970/2011. Vis-à-vis the outbreak of the crisis in the country hence – erupted merely eleven days before the adoption of Resolution 1970/2011 – the UNSC promptly reacted to the alleged commission of crimes under international law through an "immediate referral" – which has been claimed to be able to "deter individuals from supporting or otherwise assisting the regime".⁴

Consequently, on 3 March 2011 the Prosecutor announced the opening of an investigation in Libya. On 27 June 2011 ICC Pre-Trial Chamber I (PTC I) issued arrest warrants against Gaddafi himself, his son Saif and Al-Senussi for crimes against humanity of murder and persecution. Then, on 22 November 2011, PTC I terminated the case against Gaddafi following his death. On the contrary, the Prosecutor reported that (i) the collection of evidence continues with regard to the case against Saif and Al-Senussi and (ii) investigation are undertaken concerning allegations of other crimes committed by (a) pro-Gaddafi forces and (b) NATO and NTC-related forces.

Notwithstanding the peculiarities of recent events, it is worthy to analyse the act through which ICC jurisdiction was triggered, i.e. Resolution 1970/2011 – which timely approval: (i)

reveals something regarding the role the UNSC meant to assign to the ICC vis-à-vis States failure to protect their own population; and (ii) produced controversial legal consequences, originating from its compromise nature.

The ICC "preventative mandate"⁵

The fifth *considerando* of the RS Preamble mentions the ICC objectives. Among those, it introduces the concept of 'prevention by enforcement'⁶ – i.e. it purports that putting an end to impunity for crimes under international law would "contribute to the prevention of such crimes". The RS Preamble acknowledges therefore the permanent nature of the ICC as a tool in the hands of the international community to affirm that the rule of law is upheld and reinforced, and prevent that the ICC protected interests – the "peace, security and well-being of the world", as provided for by the third RS preambular *considerando* – are threatened.

The timely UNSC referral of the Libya situation mirrors such affirmative and preventative role foresaw by the Preamble – and in that it sharply departs from Resolution 1593/2005 that referred to the ICC Prosecutor the situation in Sudan, adopted by the UNSC *one year* after it originally expressed "grave concern over the deteriorating humanitarian and human rights situation in the Darfur region."⁷

A jurisdictionally limited referral

Contrariwise, the Libya referral recalls and amplifies one of the most contentious aspect of the Sudan one, in that it attempts to limit the ICC jurisdiction *ratione materiae* and *personae*. Generally speaking, the UNSC may refer a situation to the ICC regardless of whether the State on the territory

of which the crimes appear to have been committed ratified the RS. A 'situation' is meant to "comprise proceedings in single countries, but do not concern proceedings against individual persons."⁸ It follows that the UNSC is in principle not empowered to impose *a priori* boundaries to the Prosecutor future investigation tailoring its referrals. In the case at hand, on the contrary, the UNSC shaped the referral materially and personally. It is here held that both limitations are contrary to international law.

A limitation *ratione materiae*?

According to article 5 RS, ICC jurisdiction covers (i) the crime of genocide, (ii) war crimes and (iii) crimes against humanity. When a situation is referred to the Prosecutor, article 54 RS binds him to conduct "effective investigation (...) of crimes under the jurisdiction of the Court" – i.e. of *all of them*. A contextual appraisal of article 54 RS and the sixth *considerando* to Resolution 1970/2011 – which provides that "the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to *crimes against humanity*" [emphasis added] – is troubling. A legalistic reader of the mentioned sixth *considerando* could indeed claim that the UNSC requested the Prosecutor to limit his investigation only to the alleged commission of crimes against humanity – excluding both war crimes⁹ and genocide. Such standpoint is indefensible as contrary to (i) the RS, (ii) the notion of situation embraced by ICC jurisprudence and (iii) the practice of the ICC Office of the Prosecutor (OTP).

8 S. von Schorlemer, *ICC – International Criminal Court*, in H. Volger (ed.), *A Concise Encyclopedia of the United Nations*, Kluwer Law International, 2002, at 279.

9 It cannot be contended that with the occurrence of an armed conflict the ICC jurisdiction would not be anymore operative. First, jurisdiction is extended to crimes committed after the referral "in so far as they are sufficiently linked to the situation of crisis referred to the Court as ongoing at the time of the referral", as provided for in ICC, *Prosecutor v. Mbarushimana*, ICC-01/04-01/10, Decision on the Prosecutor's Application for a Warrant of Arrest Against Callixte Mbarushimana, 28 September 2010, at para. 6. Second, the UNSC and its members reiteratively made reference to the possibility of an evolution of the crisis into an armed conflict.

2 UNSC, 6490th Meeting, S/PV.6490, 25 February 2011, at 3.

3 According to which "[t]he Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if a situation in which one or more of such crimes appear to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations."

4 See United Kingdom and Nigeria declarations in UNSC, 6491st Meeting Record, S/PV.6491, 26 February 2011, at 2-3.

5 See H. Olasolo, *The Role of the International Criminal Court in Preventing Atrocity Crimes through Timely Intervention*, Inaugural Lecture as Chair in International Criminal Law and International Criminal Procedure at Utrecht University, delivered on 18 October 2010.

6 O. Triffterer, *Preamble*, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Law*, Second Edition, C.H. Beck-Hart-Nomos, 2008, at 10.

7 UNSC, Statement of the President of the Security Council, S/PRST/2004/18, 25 May 2004, at 1.

As for the exclusion of the ICC jurisdiction over war crimes specifically, a further element – stemming from a contextual and teleological interpretation of Resolution 1970/2011 – reinforces the abovementioned.

First, article 13 RS establishes that the ICC jurisdiction is triggered “with respect to a crime” [emphasis added] when the UNSC refers a situation “in which one or more” of the crimes under its jurisdiction appear to have been committed;¹⁰ it follows that once a situation is referred – even if the UNSC made reference to a specific crime – the Prosecutor shall investigate with regard to each and every crime committed within it. Second, ICC jurisprudence established that a situation is defined in terms of its “territorial, temporal and possibly personal parameters”;¹¹ clearly, it falls outside the scope of such definition any subject-matter limitation. Third, OPT practice demonstrates that so far any attempt of the referring entity to limit the Court’s jurisdiction failed,¹² whereas principles of investigative independence, impartiality and objectivity¹³ entail that investigation must be conducted “in the same manner irrespective of whether the Office receives a referral from a State Party or the Security Council or acts pursuant to article 15”.

As for, specifically, the exclusion of the ICC jurisdiction over war crimes, both the third *considerando* to Resolution 1970/2011 and its second paragraph address the need to respect international human rights (HR) and in-

10 According to article 5 RS, the ICC has jurisdiction over genocide, crimes against humanity, war crimes and the crime of aggression.

11 ICC, *Prosecutor v. Lubanga*, ICC-01/04-01-06, Decision on the Prosecutor’s Application for a warrant of arrest, Article 58, 10 February 2006, at para. 21.

12 See for instance the Prosecutor’s refusal to limit the investigation in Uganda only to crimes allegedly committed by members of the LRA, as requested by Uganda in its self-referral. ICC, ICC-02/04-1, *Letter from the Prosecutor to President Kirsch dated 17 June 2004 annexed to Decision Assigning the Situation in Uganda to Pre-Trial Chamber II*, 5 July 2004, at 4.

13 See article 54(1) RS, according to which the Prosecutor must investigate “incriminating and exonerating circumstances equally”.

ternational humanitarian law (IHL), i.e. the law that applies in times of war: therefore, the circumstance that the crisis in Libya could have turned into an armed conflict was taken into due account by the UNSC. Such presumption is confirmed by UNSC members declarations which consistently referred to the need to respect both HR and IHL.¹⁴

Accordingly, it can be concluded that the Prosecutor is by no means bound to limit his investigation to crimes against humanity.

A limitation *ratione personae*.

Embedded in paragraph six of Resolution 1970/2011, the limitation of the ICC jurisdiction *ratione personae* establishes that “nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute” shall be subjected to the “exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council” – i.e. shall be immune from ICC jurisdiction. In other words the UNSC, aware of the fact that it could have subsequently authorized an operation pursuant to article 42 of the UN Charter – as it eventually did through Resolution 1973/2011 – limited *ab initio* the referral as to shield from ICC jurisdiction nationals, officials and personnel of RS non-party States that were expected to participate in future military operations in the Libyan territory.

Such clause is not new in the UNSC practice: indeed, it is detectable in the Sudan referral, as well as in Resolutions 1422/2002, 1497/2003 and 1487/2003¹⁵ – which already attracted the critics of large part of the doc-

14 See South Africa, Nigeria, Lebanon, Bosnia Herzegovina and UN Secretary General declarations in UNSC, 6491st Meeting Record, S/PV.6491, 26 February 2011, at 3-4, 6, 8.

15 For a comparative analysis of mentioned Resolutions see M. Roscini, *The Efforts to Limit the International Criminal Court’s Jurisdiction over Nationals of non-State Party States: a comparative study*, in *The Law and Practice of International Criminal Tribunals* 2006, vol. 5, at 459 ss.

trine.¹⁶ Yet two aspects of today Resolution 1970/2011 make paragraph six even more worrisome.

First, at the time of the adoption of the four mentioned Resolutions, a large number of UNSC member States firmly complained against the inclusion of the *ratione personae* limitation – e.g. affirming that “the jurisdictional immunity provided for in the text we have just adopted obviously cannot run counter to other international obligations of States”¹⁷ – and even objected that the limitation was “inconsistent in international law”.¹⁸ Regrettably, today merely Brazil expressed its “strong reservation concerning paragraph 6”,¹⁹ in the silence of all other UNSC members, including the traditionally ICC like-minded States.

Second, paragraph six includes a novelty able to extend limitlessly its applicability. Indeed, in the past immunity from ICC jurisdiction was granted only whether the relevant State (i) had not ratified the RS and (ii) *did* contribute to the operation authorized or established by the UNSC²⁰ – whereas the latter element lacks in the Libya referral. It follows that those nationals, officials and personnel from those States that did not ratify the RS but *have not* participated in the operation authorized by the UNSC

16 See among others C. Stahn, *The Ambiguities of Security Council Resolution 1422 (2002)*, in *European Journal of International Law* 2003, at 85 ss.; and G. Gaja, *Immunità squilibrate dalla giurisdizione penale in relazione all’intervento armato in Liberia*, in *Rivista di diritto internazionale*, 2003, at 762 ss.

17 Declaration of France, UNSC, 5158th Meeting Record, UN Doc. S/PV.5158, 31 March 2005, at 8.

18 Declaration of Brazil, UNSC, 5158th Meeting Record, UN Doc. S/PV.5158, 31 March 2005, at 11. See also declarations of Canada, New Zealand, Denmark, Costa Rica, Brazil, Mexico, and Germany in UNSC, 4568th Meeting Record, S/PV.4568, 10 July 2002, at 3, 5, 8, 14, 21 and 26.

19 Declaration of Brazil, UNSC, 6491st Meeting Record, UN Doc. S/PV.6491, 26 February 2011, at 7.

20 See for instance paragraph six of Resolution 1593/2005 which provides that “current or former officials or personnel from a contributing State outside Sudan which is not party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State” [emphasis added].

through Resolution 1973/2011 would be covered by immunity, with the aberrant consequence that it would be granted, for instance, to mercenaries nationals of RS non-party States operating in the Libyan territory.²¹

It is here argued that paragraph six is inconsistent with international law as for the following material and formal arguments.²² Materially, it is contrary

21 In this regard, see A. Cassese, *Hanno vinto le pressioni europee, adesso serve una sentenza rapida*, in *la Repubblica*, 28 February 2011, at 7.

22 It falls out of the scope of the present comment to address the following two issues, which are nonetheless relevant for a comprehensive evaluation of paragraph six, i.e. the notions of: (i) "current or former officials or personnel" and (ii) "alleged acts or omissions arising out of or related to operations". As for the first, the borders of the notion itself and the legal qualification of the link between the individual and the State are totally unclear. As for the second, conflicting interpretations have been suggested, some that extensively believe that "the very fact that the conduct was carried out by a peacekeeper renders it 'related' to the force or the operation, even if it does not fall within the mandate or has not been authorized by the UN" (M. Roscini, *supra note* 15, at 503), others that purport that crimes such as rape would fall out of the limitation as not arising out of or related to operations (S. Zappalà, *Are Some Peacekeepers Better Than Others? Security Council Resolution 1497 (2003) and the ICC*, in *Journal of International Criminal Justice*, 2003,

to the 1949 Geneva Conventions and their Additional Protocol I²³ which establish that States have universal jurisdiction with regard to the prosecution and punishment of individuals responsible for grave breaches of IHL. Indeed, paragraph six, providing for the *exclusive* jurisdiction of the relevant State, prevents the exercise not only of the ICC one, but also of States' universal jurisdiction over the abovementioned individuals.²⁴

Formally, it is contrary to the RS – wherefore, it would not be able to create obligations upon the ICC. The ICC is indeed bound by UNSC resolutions as far as the obligations arising from them find their legal basis in the RS. The only arguable legal basis for paragraph six under the RS would be article 16, which entitles the UNSC to *defer* – i.e. to request the Prosecutor the interruption of – an investigation or prosecution.

at 676).

23 See First Geneva Convention, article 49; Second Geneva Convention, article 50; Third Geneva Convention, article 129; Fourth Geneva Convention, article 146; Additional Protocol I, article 85(1).

24 See R. Kolb, *Droit international pénal*, 2008, Helbing, at 250-251.

Actually, two arguments run counter such proposition. First, a deferral can be requested by the UNSC only for a renewable period of twelve months, whereas paragraph six provides for a permanent limitation. Second, a deferral must be adopted under Chapter VII of the UN Charter, i.e. the *on-going* investigation or prosecution must be qualified by the UNSC as a threat to peace. Therefore, a merely potential and future initiation of an investigation would not satisfy article 16 RS requirements. Consequently, the Prosecutor would not be bound by paragraph six.

Conclusion

Resolution 1970/2011 entails two types of effects. From one side, the timing of its adoption is significant and catches the RS Preamble vision of a preventative ICC. On the other, ICC advocates will barely look at it as a success. Indeed, the distort use the UNSC makes of the ICC jurisdiction is likely to contribute to the creation of a practice contrary to the spirit of the RS. The ICC is a judicial body, which must be left apart from political decisions. The UNSC should avoid to use the ICC jurisdiction to decide who to shield, and who to target.





Hands off Libya, 1 March 2011,
Beghazi, by Frank M. Rafik, cc, www.flickr.com

by Giulio Maria Raffa

Political Science and International
Relations Student,
at Scuola Superiore Sant'Anna

SIC TRANSIT GLORIA MUNDI. AND NOW WHAT?

SECURITY CHALLENGES & POLITICAL SCENARIO IN THE POST-GADDAFI ERA

Introduction

The death of Colonel Muammar al-Qaddafi on October 20, 2011¹ has

¹ Al Jazeera, *Battle for Libya: Key Moments. Timeline of decisive battles and political developments in Libya's uprising against Muammar Qaddafi* (<http://english.aljazeera.net/indepth/spotlight/libya/2011/10/20111020104244706760.html>).

been greeted with jubilation by many Libyans: the 'killing of the tyrant' at the hands of rebel forces has finally ended four decades of autocratic rule and a bloody eight-month civil war within the country. However, the death of Col. Qaddafi and the end of his power create new questions about

«Libya's daunting path²» towards its own future. Although it is too early to precisely describe the shape of post-Qaddafi Libya, it is nevertheless pos-

² Council on Foreign Relations, *After Qaddafi, Libya's Daunting Path*, Expert Round-up, October 20, 2011 (<http://www.cfr.org/libya/after-qaddafi-libyas-daunting-path/p26249>).

sible to identify a number of immediate issues that will have a significant influence in the short and medium term. In particular, this article seeks to briefly outline those features and challenges which seem to most likely to undermine the post-war Libyan stabilization and transition process that will be led primarily by the National Transitional Council (NTC), the fledgling temporary governing body created by the February 17th revolutionary movement³.

Security first

The first and most critical problem the Libya's NTC must cope with is to establish and ensure a safe and secure environment within the country. In the aftermath of the war Libya is awash with weaponry and in all likelihood the majority of Libyans are still armed. In particular, several armed brigades set up by the revolutionaries are still very evident across Libya and remain a law unto themselves. For example, according to recent first-hand reports from Tripoli, there is a «persistent problem of armed people arriving from different parts of the country trying to move into empty homes that once belonged to Qaddafi loyalists⁴». Moreover, several sources attest that some rebel armed groups are still picking up ammunition and weaponry for their own purposes⁵ and, above all, bloody revenge killings are still taking place in dangerous and, sometimes, mysterious circumstances⁶. Also, according to the

3 Libyan National Transitional Council (NTC), *Overview*, (<http://www.ntclibya.com/InnerPage.aspx?SSID=32&ParentID=3&LangID=1>).

4 BBC, *Libya: The challenges ahead*, October, 21 2011 (<http://www.bbc.co.uk/news/world-africa-15407475>).

5 LiveLeak, *Victorious Righteous Rebels Cruising Tripoli Ring Road and Go Shopping at Arms Dump*, Current event, (http://www.liveleak.com/view?i=74e_1314718743).

6 The New York Times, *Revolution Won, Top Libyan Official Vows a New and More Pious State*, October 23, 2011 (http://www.nytimes.com/2011/10/24/world/africa/revolution-won-top-libyan-official-vows-a-new-and-more-pious-state.html?_r=2&ref=libya), in which a Human Rights Watch's direct testimony of at least fifty-three executions perpetrated by the rebels is quoted. See also BBC, *Libya Militia 'terrorises' pro-Qaddafi town of Tawargha*, October 31, 2011 (<http://www.bbc.co.uk/news/world-africa-15517894>).

latest reports from Libya, in the areas of Bani Walid and its surroundings, Qaddafi loyalists are still fighting for their fallen leader: in particular, several tribesmen «are already trying to regroup into a new insurgency movement in and around the strategic desert town south of the capitol, Tripoli⁷». In summary, as it has been recently noted by a reporter for Reuters, «Libya is plunging into a cycle of tribal violence and retribution which, if left unchecked, could undermine the authority of its new leaders, spur new forms of insurgency and throw the country back into chaos⁸».

Therefore, in light of all of the above, it seems clear that the collection of weapons and fully disarming and demobilizing the various factions across the country⁹ will not only be one of the most critical, but also one of the toughest tasks facing the new leaders. Indeed, this fact has already been recognized both by the NTC itself as well as the UN and NATO¹⁰. Ultimately, this will need to be a necessary precondition for any foreseeable peaceful settlement of disputes between different factions across the country¹¹. Although harsh criticism has been recently raised against the NTC's incapability in «melding the myr-

7 Reuters, *Gaddafi loyalists fight on as Libya tries to unite*, October 26, 2011 (<http://www.reuters.com/article/2011/10/26/us-libya-bani-walid-idUSTRE79O71U20111026>).

8 Reuters, Analysis by Maria Golovnina, *Cycle of revenge hangs over Libya's fragile peace*, October 31, 2011 (<http://www.reuters.com/article/2011/10/31/us-libya-revenge-idUSTRE79U10F20111031>).

9 In particular, someone argues that «the involvement of Western air forces meant that the rebels never had to form a unified force (...). That is why they now lack an army with which to bring the country under control». See Al Jazeera, Opinion by Tarak Barkawi, *Peace may be war in post-war Libya*, October 21, 2011 (<http://english.aljazeera.net/indepth/opinion/2011/10/20111021412582958.html>).

10 See, for example, NATO, *Securing Libya's Weapons*, October 19, 2011 (http://www.nato.int/cps/en/natolive/news_79684.htm) and UN, *Post-Qaddafi Libya needs 'focused, measured' international support*, UN Special Envoy reports to the UN Security Council, October 26, 2011 (<http://www.un.org/News/Press/docs/2011/sc10422.doc.htm>).

11 See also Foreign Affairs, James Dobbins and Frederic Wehrey, *Libyan Nation Building After Qaddafi*, August 23, 2011 (<http://www.foreignaffairs.com/articles/68227/james-dobbins-and-frederic-wehrey/libyan-nation-building-after-qaddafi?page=show>).

riad armed militias that still roam the country into an official national army¹²», there are also some positive signals being given in some of the latest developments. In Misrata (one of the city which most has suffered from the regime's brutal repression) it has been reported that no one wants to give up his weapons «until there is a united government and a national army¹³», whilst in other parts of the country there are also rebel armed groups which are ready to defend their fair share of power in the next Libya «not by weapons of course, but by talks, negotiations and so on¹⁴» without turning their guns on their fellow revolutionaries. Moreover, as Mr. Ian Martin - the Special Representative of the United Nations Secretary-General and the Head of the United Nations Support Mission in Libya (UNSMIL)¹⁵ - recently reported to the United Nations Security Council «the first handovers of weapons by the armed groups took place as part of liberation ceremonies in Benghazi and Tripoli» and even if «they were symbolic and limited in nature», they however «sent a message that the issue was a priority, with broad consensus on the need to immediately remove all heavy weaponry from city centres, to be followed by the collection of light arms¹⁶». Finally, the capture of Saif al-Islam Qaddafi¹⁷ on November 19, 2011 has to be consid-

12 Ali Tahrouni in Reuters, *Libya leaders supported by "money, arms, PR": ex-premier*, November 24, 2011 (<http://www.reuters.com/article/2011/11/24/us-libya-idUSTRE7AN1W420111124>).

13 Abdulbaset al-Haddad quoted in BBC, *Vying for a slice of power in the new Libya*, October 5, 2011 (<http://www.bbc.co.uk/news/world-africa-15191986>).

14 Abdulwahab Ezzintani quoted in BBC, *Vying for a slice of power in the new Libya*, October 5, 2011 (<http://www.bbc.co.uk/news/world-africa-15191986>).

15 UNSMIL, *Mission Leadership*, <http://unsmil.unmissions.org/Default.aspx?tabid=3546&language=en-US>.

16 UN, *Post-Qaddafi Libya needs 'focused, measured' international support*, UN Special Envoy reports to the UN Security Council, October 26, 2011 (<http://www.un.org/News/Press/docs/2011/sc10422.doc.htm>).

17 The Wall Street Journal, *Gadhafi's Son Is Captured in Libya*, November 20, 2011 (<http://online.wsj.com/article/SB10001424052970203611404577047712839617168.html?KEYWORDS=libya>).

ered a «boon for all Libyans¹⁸», since he could have potentially led a prolonged and destabilizing insurgency against the new leaders and the stabilization process promoted by them¹⁹.

Who will govern the next Libya with legitimacy: «A magic power-sharing formula between local militias and seasoned technocrats²⁰»?

While small military battles are still being fought across the country, Libya's political struggle for power has already begun. Beyond the widespread fears of the abovementioned revenge killings, increasing tensions are «evident between Islamists and secularists, and between technocrats

returning from abroad and those who stayed and opposed the regime at enormous personal expense²¹».

In particular, great attention must be paid to the recent creation of the new interim government. In fact, on November 24, 2011 Libya inaugurated an interim government headed by Abdurrahim El-Keib that will have to lead the country to elections in seven months according to the NTC's draft constitutional charter²². The composition of the cabinet and the designation of the ministers, however, highlight the tribal and regional factionalism and rivalries undermining the Libyan political stability²³. The legitimacy of the government, indeed, has been immediately contested by the so-called Libyan Amazigh (i.e. Berber) Congress²⁴ and put under strong pressure

by some key militias groups like the Zintanis, who captured Saif al-Islam, and the Misratans, who killed Col. Qaddafi, which had both tried to obtain key posts in the new government²⁵.

In particular, it is to Abdel Hakim Belhadj²⁶ - also known as Abu Abdullah Al-Saliq in the jihadi world - that many are pointing to as a major but 'unpredictable' player in the future political field. In fact, as the leader of the Tripoli Military Council he is arguably one of the most powerful man in Libya, having also managed during the war fundamental technical and tactical military agreements with important foreign States²⁷. Belhadj is

18 BBC, Jason Pack and Shashank Joshi, *Gaddafi's son capture complicates struggle over cabinet*, November 19, 2011 (<http://www.bbc.co.uk/news/world-africa-15798274>). See also the statement by Navi Pillay, the United Nations High Commissioner for Human Rights, where she welcomed the «enormous significance [of the Saif al-Islam's arrest] for the future of justice in Libya», November 21, 2011 (<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11628&LangID=E>).

19 The Economist, *Libya's Militias. Hard to control the cocky gunmen*, November 26, 2011 (<http://www.economist.com/node/21540298>).

20 BBC, Jason Pack and Shashank Joshi, *Gaddafi's son capture complicates struggle over cabinet*, November 19, 2011 (<http://www.bbc.co.uk/news/world-africa-15798274>).

21 Council on Foreign Relations, *Op-ed* by Isabel Coleman, *Why Libya Has a Real Shot at Democracy and Stability*, October 21, 2011 (<http://www.cfr.org/libya/why-libya-has-real-shot-democracy-stability/p26259>).

22 Reuters, *Libyan interim government sworn in*, November 24, 2011 (<http://www.reuters.com/article/2011/11/24/libya-government-idUSL5E7MO3NT20111124>).

23 For a brief biography of the new Ministers see Reuters, *Ministers in the new Libyan government*, November 23, 2011 (<http://www.reuters.com/article/2011/11/23/us-libya-government-idUSTRE7AM2N320111123>).

24 Reuters, *Libyan tribes protest at the*

new government line-up, November 23, 2011 (<http://www.reuters.com/article/2011/11/23/us-libya-idUSTRE7AL0JM20111123>).

25 BBC, Jason Pack and Shashank Joshi, *Gaddafi's son capture complicates struggle over cabinet*, November 19, 2011 (<http://www.bbc.co.uk/news/world-africa-15798274>).

26 BBC, *Profile: Libyan rebel commander Abdel Hakim Belhaj*, September 5, 2011 (<http://www.bbc.co.uk/news/world-africa-14786753>).

27 See The Guardian, Ian Black, *Qatar admits sending hundreds of troops to support Libya rebels*, October 26, 2011 (<http://www.guardian.co.uk/world/2011/oct/26/qatar-troops-libya-rebels-support?INTCMP=SRCH>); see also The Wall Street Journal, *Tiny's Kingdom Huge Role in Libya Draws Concern*, October 17, 2011 (<http://online.wsj.com/article/SB10001424052970204002304576627000922764650.html>); see also The



also considered the leader of the country's Islamist camp - he has spoken on several occasions as the 'voice' of the Islamist camp, publicly warning that Libyan Islamist groups «will not allow» secular politicians to exclude or marginalise them in the intensifying battle for power in the post-Qaddafi era²⁸. Moreover, whilst his past ties to jihadi groups have sparked much controversy around the world²⁹, the national visibility he gained leading the victorious military assault against Col. Qaddafi's notorious Bab Al-Azizia compound has been seen with some concern by secular Libyans. However, he himself remarkably adopted a more moderate and less assertive tone by publicly claiming that «there is room in Libya for the various parties and political persuasions to be represented, and Libyans must be allowed to listen to diverse opinions so they can decide who they want to elect to lead the country in the next stage» and that «all Libyans are partners in this revolution and all should be part of building the future of this country³⁰».

Despite this, however, in a set-back to Belhadj's camp, the post of the Ministry of Defence in the new cabinet has been allocated to Osama Al-Juvali, the head of the Military Council of Zintan and a close ally of the Zintan militia's leader Abdullah Naker, who had previously strongly opposed to «any role in government or a national Libyan army for Belhadj³¹».

Economist, *Libya and its allies. All too friendly*, November 12, 2011 (<http://www.economist.com/node/21538208>).

28 See The Guardian, Ian Black, *Libyan Islamists must have share in powers, warns leader*, September 25, 2011 (<http://www.guardian.co.uk/world/2011/sep/27/libyan-islamists-power-share-warning?INTCMP=SRCH>).

29 See The Guardian, Ian Black, *The Libyan Islamic Fighting Group: from al-Qaida to the Arab Spring*, September 5, 2011 (<http://www.guardian.co.uk/world/2011/sep/05/libyan-islamic-fighting-group-leaders?INTCMP=SRCH>); see also The Wall Street Journal, *Discorde Riddles Libyan Factions*, October 8, 2011 (<http://online.wsj.com/article/SB10001424052970204294504576617033312060742.html?KEYWORDS=belhaj>).

30 The Guardian, Abdel Hakim Belhaj, *The revolution belongs to all Libyans, secular or not*, September 25, 2011 (<http://www.guardian.co.uk/commentisfree/2011/sep/27/revolution-belongs-to-all-libyans>).

31 Reuters, *Libyan militia briefly holds Libya Islamist chief*, November 24, 2011 (<http://www.reuters.com/article/2011/11/24/libya-bel>

Beyond the abovementioned political cleavage between secular and Islamist Libyans, in the medium and long term another important feature has to be acknowledged in trying to determine the next stage of the democratization process embraced and pursued by the NTC's leadership³², i.e. the 'unique' Qaddafi *Jamahiriyah's* legacy to the country. Whilst it is generally agreed that «for a democracy to take hold, a country needs parties and civic organisations that bridge national divides³³», in Libya «the long shadow of Muammar al-Qaddafi's incoherent and contradictory *Jamahiriyah* system, which claimed to be a direct rule of the masses, but in reality involved containing tribal and regional allegiances through force and money while preventing the emergence of parallel political or religious power bases³⁴» has not allowed the emergence nor the consolidation of any 'national' experience with participatory politics³⁵. Indeed, the implementation of Qaddafi's singular *Third International Theory*³⁶ has left the country without active and widespread political parties nor civil society organizations (CSOs). In light of this, the task of creating representative and legitimate institutions able to unite and bring together all Libyans in spite of their regional and tribal differences and divisions will be a tough challenge for the NTC, if it wants to avoid the danger of any so-called «regional-

hadj-airport-idUSL5E7MO46X20111124).

32 See Libyan National Transitional Council, *A vision of a democratic Libya* (<http://www.ntclibya.com/InnerPage.aspx?SSID=4&ParentID=3&LangID=1>).

33 Foreign Affairs, Dawn Brancati and Jack L. Snyder, *The Libyan Rebels and Electoral Democracy*, September 2, 2011 (<http://www.foreignaffairs.com/articles/68241/dawn-brancati-and-jack-l-snyder/the-libyan-rebels-and-electoral-democracy?page=show>).

34 Foreign Policy, Alex Warren, *Libya's Post-Qaddafi Party*, September 21, 2011 (http://www.foreignpolicy.com/articles/2011/09/21/libyas_post_qaddafi_party?page=full).

35 Foreign Affairs, James Dobbins and Frederic Wehrey, *Libyan Nation Building After Qaddafi*, August 23, 2011 (<http://www.foreignaffairs.com/articles/68227/james-dobbins-and-frederic-wehrey/libyan-nation-building-after-qaddafi?page=show>).

36 The New York Times, Neil MacFarquhar, *An Erratic Leader, Brutal and Defiant to the End*, October 20, 2011 (http://www.nytimes.com/2011/10/21/world/africa/qaddafi-killed-as-hometown-falls-to-libyan-rebels.html?_r=1&ref=neilmacfarquhar).

ist triumphalism³⁷».

Ultimately, important political developments in Tunisia³⁸ and Egypt³⁹ will have significant influence over Libya's future. In particular, although between Tunisia, Libya and Egypt there are substantial differences, all the three countries, however, not only have very similar agendas in their path from authoritarian regimes to electoral democracies, but also they all have several common and remarkable challenges to face, among which the most meaningful is the rise and the entry in the political arena of different forms of political islam⁴⁰.

The international community: a renewed role for the United Nations

The United Nations Security Council on October 27, 2011 ordered the end to authorized international military action in Libya⁴¹ and, therefore, the activities of the NATO-led operation in Libya (*Operation Unified Protector*⁴²) ended at 11.59 local time in Libya on 31 October. Whilst at the moment there are some rumours about a new alliance of «Libya's friends» which will replace NATO⁴³ after a previous NTC request for a prolonged international military commitment in the country⁴⁴,

37 The Guardian, Jason Pack, *Post-Qaddafi Libya should think local*, October 23, 2011 (<http://www.guardian.co.uk/commentisfree/2011/oct/23/post-qaddafi-libya-local>).

38 See Issandra El Amrani and Ursula Lindsey, Middle East Research and Information Project, *Tunisia Moves to the Next Stage*, November 8, 2011 (<http://www.merip.org/mero/mero110811>).

39 See Nate Wright, Middle East Research and Information Project, *Egypt's Intense Election Eve*, November 10, 2011 (<http://www.merip.org/mero/mero111011>).

40 See Jeffrey Fleishman, Los Angeles Times, *Political islam at a crossroads in Egypt*, November 25, 2011 (<http://www.latimes.com/news/nationworld/world/la-fg-egypt-muslim-brotherhood-20111125,0,1441739,full.story>).

41 UN News, *Libya: Security Council ends mandate for international military operations*, October 27, 2011, (<http://www.un.org/apps/news/story.asp?NewsID=40221&Cr=libya&Cr1=>).

42 NATO, *Nato and Libya - Operation Unified Protector*, (http://www.nato.int/cps/en/SID-B318D726-64EA2A1F/natolive/topics_71652.htm?).

43 Reuters, *New Alliance to back Libya, replacing NATO: Qatar*, October 26, 2011 (<http://www.reuters.com/article/2011/10/26/us-libya-qatar-idUSTRE79P7JB20111026>).

44 Reuters, *NATO support for Libya welcome until end-2011: NTC*, October 26, 2011 (<http://www.reuters.com/article/2011/10/26/uk>

it seems clear that in the medium and long term it will be the UN-deployed mission to the North African country that will bring enormous benefits to Libyans and to the NTC-led stabilization and transition period.

In fact, the UN Security Council mandate given to the United Nations Support Mission in Libya (UNSMIL)⁴⁵ on September 16, 2011 comprises a list of 'focused and measured' tasks which may better help the NTC face the difficult challenges previously mentioned in this article. In particular, UNSMIL will *assist* and *support* Libyan national efforts to restore public security and order and promote the rule of law; to undertake inclusive political dialogue, promote national reconciliation and embark upon the constitution-making and electoral process; to extend state authority, promote and protect human rights and support transitional justice; to

take immediate steps required to initiate economic recovery⁴⁶. Indeed, not only will UNSMIL be a crucial player in coordinating all the actors present in Libya (both national and international), but will also decisively assist and support Libyan national efforts to rightly implement the numerous provisions enlisted in the *Constitutional Declaration* of August 10, 2011⁴⁷.

46 See UNSMIL Mandate in S/RES/2009 (2011), (http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2009%282011%29).

47 In particular, after the Declaration of Independence of October 23, 2011, «the establishing of an interim Government within 30 days, adopting electoral legislation and establishing an electoral management body within 90 days, and within 240 days holding elections for a National Congress to give democratic legitimacy to a new Government and the body that would draft a Constitution», reported by Mr. Ian Martin in UN, *Post-Qaddafi Libya needs 'focused, measured' international support*, UN Special Envoy reports to the UN Security Council, October 26, 2011 (<http://www.un.org/News/Press/docs/2011/sc10422.doc.htm>); see also Tunisia-live.net, *NTC announces Constitutional Declaration*, August 11, 2011 (<http://www.tunisia-live.net/2011/08/11/the-ntc-issues-the-constitutional-declaration-for-the-transitional-period/>).

«So far, so pretty good»⁴⁸?

The last eight-month history of Libya has been followed with anxiety and apprehension all over the world. The death of Col. Muammar Qaddafi at the hands of the rebels signaled a crucial moment for the end of the civil war and a key moment for the dawn of a new era. However, for Libya's new rulers and for the future of the country the way ahead is full of obstacles and challenges.

Nevertheless, «amid trepidation, the new regime is making a remarkably hopeful start⁴⁹» and, as it has been highlighted in this article, there are good signs from both currently developing events within Libya and from the fact that international community is laying down the proper basis for the 'right' beginning of the post-Qaddafi era.

libya-nato-idUSTRE79P26Z20111026).

45 See UNSMIL Website, (<http://unsmil.unmissions.org/Default.aspx?tabid=3543&language=en-US>).

48 The Economist, *So far, so pretty good*, September 10, 2011 (<http://www.economist.com/node/21528654>).

49 *Ibid.*

Prayer and protest in Bengazi, Libya, by David Degner



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THE ITPCM

Staff members & Contacts:

Director:

Prof. Andrea de Guttry
deguttry@sssup.it

Peace Keeping Branch:

Emanuele Sommaro
Research Fellow
esommar@sssup.it
Barbara Nicoletti
Research Fellow
b.nicoletti@sssup.it
Annalisa Creta
Research Fellow
a.creta@sssup.it
Alessia Lenci
Project Officer
a.lenci@sssup.it
Rossella Altamura
Project Officer
ro.altamura@sssup.it

Decentralised Cooperation Branch:

Annarosa Mezzasalma
Project Officer
annarosa@sssup.it
Ilaria Dal Canto
Project Officer
i.dalcanto@sssup.it
Serena Rossignoli
Project Officer
s.rossignoli@sssup.it
Luisa Nardi
Research Fellow
l.nardi@sssup.it
Fabrizio Coticchia
Research Fellow
f.coticchia@sssup.it



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Editing, Communications & Graphic Design:

Michele Gonnelli
Communication Officer
m.gonnelli@sssup.it

Secretariat & Logistics:

Federica Faldella
profile@sssup.it
Pasqualetta Campus
itpcm@sssup.it

Address:

Via Cardinale Maffi, 27 56127 Pisa - ITALY
tel: +39 050 882685
fax: +39 050 882665
email: itpcm@sssup.it
www.itpcm.sssup.it



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