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Dazed And Confused: The Cengiz v. Libya Award on State Responsibility for Conduct of Rebels in Situations of Civil Wars

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Under Article 10(1) of the [ILC Articles on State Responsibility](#), acts committed by rebels (or any other type of ‘insurrection movements’) during a successful insurgency aimed at establishing a new government are attributable to the State after their victory. After the civil war, and once the rebels have formed a new government, the State will have to provide appropriate compensation to foreign investors and third States for damages arising from the commission of wrongful acts (such as acts of expropriation, destruction or damage to property) caused by the rebels during the insurgency. It should be highlighted that a State cannot be considered ‘responsible’ for acts committed by rebels given that they are not organs of the State. This is therefore a matter of ‘attribution’ of the conduct of rebels to the State. The theoretical foundation of this special rule is based on the existence of an ‘organic’ or ‘structural’ continuity between the insurgents and the new government. It should be added that under Article 10(3), the new government remains responsible for the acts committed by the previous government while fighting the rebels. I have recently examined the question in a [recent book](#) published in 2021.

Until very recently, Article 10 was one of the ILC provisions which had been the least used and referred to in State practice and case law. Apart from the 1990 decision in [Asian Agricultural Products Ltd. v. Sri Lanka](#), investment tribunals have rarely addressed questions of State responsibility and attribution arising in the context of rebels’ conduct in situations of civil wars. However, this is no longer the case in the wake of ongoing (or very recent) civil wars in Syria, Libya, and Yemen. For instance, several foreign investors have filed [arbitration claims](#) under BITs entered into by Libya with other States whereby they are claiming compensation for damages suffered in the context of the civil war. Claims have also been recently filed in the context of the wars in Syria and Yemen. One recent award is [Strabag SE v. Libya](#). While the Tribunal made some interesting findings on matters of responsibility arising from a State’s failure to discharge its due diligence obligation of vigilance and prevention towards foreign investors in relation to the conduct of unsuccessful rebels, I have [noted elsewhere](#) that the award does not refer at all to Article 10.

Another recent award is [Cengiz İnşaat Sanayi ve Ticaret A.S v. Libya](#). The case

involved the Turkish Claimant's locally-created entity which entered into construction contracts with a Libyan State entity. The Tribunal awarded some US\$50 million to the investor on the grounds that Libya breached its full protection and security obligation under the Libya-Turkey BIT in the context of incidents which occurred during the civil war in 2011 and 2014. The award examined acts of violence, destruction and robbery committed in August 2011 by troops loyal to the Gaddafi regime at the WAH Main Camp as well as similar acts by other groups at the Sebha Main Camp. While the reasoning of the Tribunal regarding this due diligence obligation [can be praised](#), the same cannot be said about [its application of Article 10 of the ILC Articles](#).

The Tribunal considered that, at the time when the attacks by troops loyal to the Gaddafi regime took place (at the end of August 2011), the rebels of the Libyan National Transitional Council ('NTC') had already been successful at defeating the Gaddafi regime. It concluded that the NTC was now forming the new government. This is a very controversial conclusion that is not in line with the criteria that are generally applied by tribunals to determine when a rebellion can be considered to be successful. In any event, the Tribunal considered that the troops loyal to Gaddafi were themselves now rebels fighting the newly established government set up by the NTC. Logically, the Tribunal should have therefore analysed issues of State responsibility and attribution from the angle of wrongful acts having been committed by rebels (troops loyal to Gaddafi) in the context of their *unsuccessful* attempt at overthrowing the NTC government. While the Tribunal correctly identified the rule underlying Article 10 (paras. 423, 430-1), it nevertheless made a number of confusing and questionable assertions that are contrary to the ILC Articles.

For instance, the Tribunal expressly 'agreed' with the Respondent's position that 'Libyan military units which attacked the WAH Main Camp were in fact loyal to the *previous* Government of Colonel Gaddafi and must be considered as *unsuccessful* insurrectional forces seeking to displace the *new* government of Libya' (paras. 426-7, emphasis added). Yet, the Tribunal also added that it nevertheless 'disagrees with the conclusion' drawn by the Respondent, i.e. that the acts of Gaddafi-aligned forces 'cannot be attributable to Libya' because they were 'unsuccessful insurrectional forces' (para. 412). The conclusion reached by the Tribunal on this point is contrary to one basic rule embodied in Article 10 of the ILC Articles: when the rebels are not successful in their attempt to establish a new government, as a matter of principle, the acts committed by them during the insurgency are *not* attributable to the State once the insurgency has failed. The Tribunal then made this surprising statement:

'It is likely that the Libyan military units which attacked the WAH Main Camp were at that time defending the Gaddafi regime. But that is irrelevant for the purposes of attribution: these units belonged to the regular Libyan army, as such they were an organ of the Libyan State, and their actions, under international law, were attributable to the State. Whether these units were loyal to the Gaddafi or the NTC Government does not affect the principle of attribution. The Libyan State, including its regular armed forces, never ceased to exist, even if one Government was toppled by the Libyan Revolution and a new Government was instated. The Libyan State must assume responsibility for the looting performed by

its regular armed forces - independently of purpose or political affiliation’ (para. 428).

This statement is incorrect for three reasons. It is simply wrong to affirm that whether the attacks were done by rebel troops still loyal to Gaddafi or the NTC Government ‘does not affect the principle of attribution’. Under Article 4 of the ILC Articles, only the acts of the army are attributable to the State, not those of rebels. Second, the troops loyal to Gaddafi could not be qualified as units which ‘belonged to the regular Libyan army’. According to the Tribunal’s own account of events, these troops were now rebels. An entity cannot be qualified as both rebels and the regular army *at the same time*. Third, it follows that these pro-Gaddafi rebels could not be considered as ‘an organ of the Libyan State’ under Article 4 of the ILC Articles. As such, the award is wrong to conclude that ‘their actions, under international law, were attributable to the State’. Under Article 10, the actions of the pro-Gaddafi rebels would have been attributable to the State only if they were ultimately *successful* in their attempt to overthrow the new government of the NTC. But the rebels were not successful and were defeated a few months later. Logically, the Tribunal should have come to the conclusion that the acts committed in the WAH Main Camp by (unsuccessful) rebels during an insurgency were *not* attributable to the State. Such a finding would not have changed much in terms of responsibility given that the Tribunal held that Libya was anyway responsible for the attacks committed later in 2014 at the Sebha Main Camp by ‘a militia controlled by the Libyan government’ (paras. 390, 409, 422).

In fact, in my view the Tribunal could have avoided this confusion by simply interpreting the sequence of events differently. Thus, it would have been reasonable to assume that when the attacks took place on the WAH Main Camp at the end of August 2011 the Libyan army (loyal to the Gaddafi regime) had not yet been defeated and that the NTC had not yet firmly established itself as the new government. The Tribunal could have then simply applied the basic principle set out under Article 10 whereby the new government of the NTC once in power is responsible for the wrongs committed by the previous government (the Gaddafi regime) while fighting the rebels. At the end of the day, the Tribunal could have made better use of Article 10 of the ILC Articles to solve these questions.

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