

Client Alert: The Libyan Supreme Court on State Liability for Civil War-related Damages

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In a ground-breaking decision issued on 14th January 2020¹, the Libyan Supreme Court held that the Libyan state is not liable for damages resulting from belligerent activities during the 2011 lead-up to the overthrow of the Ghaddafi Regime. Unless a claimant can establish that a specific wrongdoing is attributable to the state or its representatives, the Supreme Court ruled such damages are the result of force majeure.

The Facts of the Case

The claimant is a Libyan company that operates a chicken farm, which was damaged in 2011 as a result of aggressive actions preceding the overthrow of the Ghaddafi Regime. In 2013, the Council of Ministers established a committee to oversee compensation for property damage. When the claimant's application for compensation was rejected, the company claimed compensation in court.

The case is one of many concerning companies who suffered damages and losses in connection with the Arab Spring in Libya. These cases raise a whole set of legal issues, such as whether a state can be held responsible for civil war damages, whether acts of insurgents and non-governmental militia are attributable to the state, and whether a government has an obligation to uphold security and protect private property.

On the international level, most cases are brought by foreign investors, based on investment treaties, and are heard by international tribunals. The present case stands out because it was brought by a Libyan company and heard by a municipal court.

The Decision of the Libyan Supreme Court

In dismissing the company's claim, the Supreme Court argues that civil liability is limited to the causes of action prescribed by law:

The government, as any individual, is not liable other than if it is established that the damage was caused by its fault and the liability is excluded if it is established that the damage was due to an extraneous cause [...], such as an unexpected event, force majeure or the fault of the victim, or the fault of a third party, as long as there is no provision in the law that provides for something else.

¹ Rendered by the Seventh Civil Circuit of the Libyan Supreme Court in Civil Cassation no. 245/64 JY.

This reasoning means that the case at hand is governed by the general principles of liability in tort which presupposes the tortfeasor's "fault," unless strict or "imposed" liability applies.

The Supreme Court proceeds to argue that there is no explicit legislative provision providing for compensation for damages resulting from belligerent activities. Compensation for such damages, according to the ruling, can only be granted on the basis of explicit legislation, guided by the principle of social solidarity. In particular, the Supreme Court argued, "*[It] cannot be derived from the principles of abstract justice and that the state was under the obligation to provide protection and security under all circumstances for all citizens or foreigners.*"

Strict liability without a statutory basis for civil war-related damages, the Supreme Court continues, would endanger the state budget. Consequently, any liability of the state presupposes the state or one of its representatives is at "fault." According to the Supreme Court, fault was not established in the case at hand; therefore, there are no grounds to hold the state responsible for the damage.

What is the Scope of the State's Obligation to Protect?

The Supreme Court's decision remains a matter of critical discussion in Libya. The critics refer mainly to Law 29/2013 on Transitional Justice and the UN-brokered Political Agreement² of December 2015, which both acknowledge, in principle, the state's obligation to grant compensation for damages incurred during the Ghaddafi regime and the belligerent activities leading up to its downfall. Moreover, critics also argue that most of the armed groups active in 2011 were later integrated into the official Libyan army with the effect that their actions are retroactively attributable to the state.

Given that the principles of tort law are shared, more or less, across the MENA region, this case may also provide guidance for similar issues arising in other post-Arab Spring jurisdictions, such as Yemen and Syria. In this respect, the most critical issue is the "obligation to protect", which the Supreme Court does not dismiss altogether. Instead, it merely declines to apply it in the present case, but without defining its boundaries. The case, therefore, is unlikely to be the last word on the issue. In view of the restrictive approach adopted by the Supreme Court, moreover, international investors seeking compensation are advised to look at the possibility of bringing claims under bilateral investment treaties.

If you would like more information about this topic, please contact us.

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² Also referred to as Shkirat Agreement.

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