

Client Alert: The Libyan Supreme Court Rules on State Liability for Acts by Irregular Armed Forces

By Hussam Mujally

On 17th November 2020, the Libyan Supreme Court issued a decision holding that the Libyan State is responsible for damages incurred by civilians caused by belligerent activities undertaken by the Libyan regular army as well as irregular armed forces fighting alongside the army. Through its decision, the court set the standards for the State regarding supervisory duties over irregular armed forces.

Background

This case is one of many court cases in Libya in which civilians and companies sought compensation for damages to their property from belligerent activities during the 2011 revolution and, later, during the ongoing civil war, which began in 2014.

Compensation for civilians and non-involved third parties mainly raises two legal issues: (1) whether, and how far, a state is responsible for civil war damages; and (2) whether acts of irregular armed groups could be attributable to the state. The latter issue has been very relevant as a multitude of militias has emerged in Libya since 2011, many of which are affiliated with political parties or with individuals holding official functions. This phenomenon intensified further when the country split under two parallel governments in 2014.

Earlier this year, in a [groundbreaking and controversial decision](#) regarding the state's liability, the Libyan Supreme Court ruled that the Libyan state is under no general responsibility for damages that occurred during the 2011 revolution and those still occurring due to the ongoing civil war, which started in 2014. The state's liability underlines the principles of civil liability i.e. the state liability is established if wrongdoing is attributable to the state or its representatives. According to the court, the state's liability cannot be derived from a general obligation to provide protection and security to its residents at all times and under any circumstances.

In the underlying decision, the court seems to affirm its position as it found the state liable under the principles of vicarious liability, which under Libyan law is a strict, secondary liability that holds principals liable for their agents' wrongful acts. Article 177 of the Libyan Civil Law provides that the principal is liable for damages caused by its agent's wrongdoing whenever such wrongdoing is committed during or arising from the agent's performance of its duties. Yet the Supreme Court emphasized that the state is under the obligation to respect the safety of their citizens. It further discussed the state's responsibility regarding irregular armed forces and its supervisory duties where irregular armed forces are fighting alongside regular forces.

The Facts of the Case

In January 2014, the head of the General National Congress, the first elected legislative body in post-Ghaddafi Libya, in his capacity as "the supreme commander of the Libyan Army" ordered the defense minister to form a military force consisting of Libyan army units and

“revolutionaries’ formations” to secure the western area (cities and villages to the west of Tripoli) and clear it of insurgents fighting against the Libyan state’s sovereignty. The armed offensive escalated and used heavy and middle weaponry. Libyan and International human rights organizations accused the armed forces of committing possible war crimes and other serious violations of International humanitarian law as well as human rights abuses.

The claimant is a Libyan citizen residing in a small city to the west of Tripoli. He fled his home when belligerent activities began. When he returned, he found that his home had been burned down and looted. The claimant managed to establish that setting fire to his home had been a deliberate act and sued the Prime Minister, Minister of Interior and Minister of Defense in their official capacities seeking compensation for both pecuniary and non-pecuniary damages. The courts of first and second instance granted the claimant compensation.

The Libyan Supreme Court’s Decision

The Supreme Court, while reducing the amount of compensation, upheld the decision under appeal.

The defendants (the appellants) argued, among others points, that vicarious liability wasn’t established because the Libyan state is not liable for the acts of the irregular forces that set the claimant’s house on fire. The Supreme Court dismissed the defendants’ argument and ruled that they are liable for the acts of the armed forces involved in the military offensive, including both regular soldiers as well as the revolutionaries, as it stated:

As for the liability of the first, second and third appellant – the principals – the Head of the General National Congress in his capacity as the supreme commander of the Libyan Army issued decision 18/2014 ordering the formation of a military force consisting of military units and revolutionaries’ formations to enhance security in the western region. Based thereon his agents followed the orders rendered to them by means of a widespread military operation which caused great material and nonmaterial damages. Because the responsible authorities did not take the required measures and procedures necessary to safeguard people’s life and their properties.

As a matter of principle, the liability of the principal under vicarious liability is based on an irrebuttable presumption that the latter did not select its agents diligently or breached its supervisory obligations over its agents and thus caused the agent’s wrongful act which in turn inflicted the damage upon aggrieved party. The Supreme Court specified the breach on the part of the Libyan State as it criticized Decision 18/2014 and the handling of the military operations in particular regarding the involvement of irregular armed forces:

[...] Hence the force assigned to implement it [Decision 18/2014] was not a regular force according to the international and regional established military laws and customs for it to adhere to regulations, rules and instructions. Besides, the decision lacked any guarantees that conclude its observance for the sanctity of life and property. Additionally, the decision did not include the type of weapons which the agents of the appellants are permitted to use. But rather left this issue unrestricted which means that it was an implicit permission for the assigned force [to act] according to their whims and desires. The authority that issued the decision as well as the one assigned to implement it did not issue any public statement concerning the observance of property and private sanctities. Although the operation was characterized as an operation to secure and clear, yet excessive force and heavy and medium weaponry were used on a large

scale. This along with the defendants' non-compliance with their duties to supervise and monitor their agents especially after the expansion of the area of operations and its [the operations'] exceedance of all previously stipulated outcomes. All this leads to the establishment of the element of fault on the part of the defendants in their capacity beside their non-coordination with the local city councils. The main fault of the appellants is to involve other individuals in conducting the operations, the non-performance of their supervisory duties upon their agents including soldiers and revolutionaries, not taking measures that ensure the proper implementation of instructions and providing the necessary measures for protecting the appellee, his family members and properties.

The Supreme Court affirmed the lower courts' findings and its reliance upon, among other things, a report issued by Amnesty International documenting the violations that took place during the said military operation. It found their conclusion to be correct in that:

[...] the liability in tort based thereon is given and established on the part of the appellants and their agents considering that the damage inflicted upon the appellee was a result of the fault of the aforementioned, which results in the liability of the appellants in their capacities on ground of their legal liability for the acts of their agents.

Consequently, the Libyan state was held liable in tort for the damages inflicted on the claimant by the army and the irregular armed groups.

The Supreme Court further concluded that a military operation of this nature should have been assigned to elite units of the regular army rather than to irregular armed forces in order to avoid any damages to citizens and to observe the safety of citizens and their properties. This, according to the court, is the state's duty, which must be respected under any circumstances. As for the legal basis of such duty, the Supreme Court states:

This duty is manifested in the constitutional documents as well as the municipal laws or under the state's obligations resulting from its ratification of international treaties which transcend even the municipal laws as to its enforceability such as: The Universal Declaration of Human Rights, The International Covenant on Civil and Political Rights, The African Charter on Human and Peoples' Rights and The Arab Charter on Human Rights.

Outlook

This is a remarkable case, the importance of which extends beyond Libya, for the following two reasons:

First, it clearly establishes state liability for "irregular armed forces" even when they are not formally integrated into the regular army apparatus. The use of militias and/or irregular military features heavily in countries experiencing civil wars. Libya and other Arab countries are no exception. However, militia affiliation with state actors and/or to one of two contestant governments and their chain of command's structure is not always clear. This lack of clarity makes it hard to establish a link and, consequently, the state's liability for militias' actions when they fight alongside the regular army.

Secondly, the Supreme Court resorted to human rights treaties when specifying the principal's standard of care and made clear that the state's obligations arising from ratified human rights treaties transcend municipal law. In a country in the middle of a devastating civil war, this point is certainly a welcome development.

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

Hussam Mujally

Associate

Berlin

mujally@amereller.com

BERLIN | Amereller Rechtsanwälte | Kurfürstenhöfe | Spreeufer 5, 10178 Berlin | Germany
Tel: +49 30 609 895 660

CAIRO | MENA Associates in association with Amereller | GIC Tower | 21 Soliman Abaza St. | Mohandessin | Giza | Egypt
SHEIKH ZAYED (new): B 7-3-1, Polygon Business Park | SODIC-West | Sheikh Zayed | Cairo | Egypt
T: +20 2 376 26 201

DUBAI | Amereller Legal Consultants | One at Business Bay, 14th Floor | P.O. Box 97706 | Business Bay | Dubai | UAE
t: +971 4 432 3671

TRIPOLI | Amereller in association with P&A Legal | Tutat bin Jaber Street | Zawiyat Dahmani | Tripoli | Libya
t: +218 916 836 370

This client alert is a public document for informational purposes only and should not be construed as legal advice. Readers should not act upon the information provided here without consulting with professional legal counsel. This material may be considered advertising under certain rules of professional conduct.

Copyright © 2020