

The Evaluation of the Most Suitable Systems of Civil Liability To Compensate Victims of the Crime of Genocide According to the Iraqi Civil Code/ A Comparative Study With Some Well-Established Standards in the Comparative Law

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Abstract

This article of research is concerned with studying as well as evaluating the most suitable civil liability system for compensating the victims of the crime of genocide from the damage resulting from genocidal acts, according to the rules of the Iraqi civil Code No. (40) of 1951. In comparison with some well-established standards in the comparative law, particularly the English law, the most important of which are the reasonable foreseeability of the risk standard, and the standard of the created non-reciprocal risk. This study evaluated three types of the civil liability systems, to identify the most appropriate legal system for compensating the victims of the crime of genocide. These systems are the civil liability arising from personal acts, according to the general rules in articles (204) and (202) of the Iraqi civil Code. The vicarious liability of the genocidal acts can also arise. Whereas the third system is the strict-liability, which is based upon the damage, according to the first article of the law on compensation for victims of war operations, military Errors, and terrorist operations No. (20) of 2009. This system of civil liability is known in the Islamic jurisprudence as the principle of the "Cujus est commodum ejus

debet esse incommodum", and in the western jurisprudence as the theory of the "created risks". This legal system may be the best for in compensating the victims of the crime of genocide. The problem of the research lies in the determination and evaluation of most suitable civil liability system for compensating victims of the crime of genocide, war operations, military errors and terrorist operations according to the Iraqi law. This study has adopted the analytical comparative research methodology. The main finding of this study is that the strict-liability may be the best system of the civil liability to compensate the victims of the crime of genocide. With the possibility of making use of the two legal standards of the comparative law. The researcher suggests some relevant recommendations to the Iraqi legislator.

Keywords: Crime of Genocide, Civil Liability from Personal Genocidal Acts, Vicarious Liability, Strict-Liability, Genocidal Intent, Reasonable Foreseeability Standard.

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تقييم نظم المسؤولية المدنية الأكثر ملاءمة لتعويض ضحايا جريمة الإبادة الجماعية وفقاً للقانون المدني العراقي/ دراسة مقارنة ببعض المعايير الراسخة في القانون المقارن

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المستخلص

يُعنى هذا البحث بدراسة وتقييم نظم المسؤولية المدنية الأكثر ملاءمة لتعويض ضحايا جرائم الإبادة الجماعية وفقاً للقانون المدني العراقي رقم (40) لسنة 1951، مع مقارنتها ببعض المعايير الراسخة في القانون المقارن ولا سيما القانون الإنكليزي العرفي المبني على السوابق القضائية، ومن أبرزها معيار التوقع المعقول للخطر، والخطر المستحدث غير المتبادل. وقد قامت هذه الدراسة بتقييم ثلاثة أنواع من نظم المسؤولية المدنية، لتحديد النظام القانوني للمسؤولية الأكثر ملاءمة لتعويض ضحايا جرائم الإبادة الجماعية. ومن أبرز هذه النظم نظام المسؤولية المدنية الناجمة عن الأعمال الشخصية وفقاً للقواعد العامة في المادتين (204) و (202) من القانون المدني العراقي. كما يمكن أن تنهض مسؤولية المتبوع عن أعمال تابعه. أما النظام الثالث من نظم المسؤولية فهو نظام المسؤولية الموضوعية التي تُبنى على أساس الضرر، من دون الحاجة إلى إثبات ركن الخطأ أو الإهمال، وفقاً للمادة الأولى من قانون تعويض المتضررين جراء العمليات الحربية والأخطاء العسكرية والعمليات الإرهابية رقم (20) لسنة 2009. ويعرف هذا النظام في الفقه الإسلامي بمبدأ الغرم بالغنم، وفي الفقه الغربي بنظرية المخاطر المستحدثة. وربما يكون هذا النظام القانوني من نظم المسؤولية المدنية من أفضل النظم في الوقت الحاضر لتعويض ضحايا هذا النوع من أنواع الجرائم. وتكمن مشكلة البحث في تحديد وتقدير نظام المسؤولية المدنية الأكثر ملاءمة لتعويض ضحايا جريمة الإبادة الجماعية والعمليات الحربية والأخطاء العسكرية والعمليات الإرهابية وفقاً للقانون العراقي، وما إذا كان يمكن عد نظام المسؤولية الموضوعية النظام القانوني الأفضل من نظم المسؤولية المدنية في تعويض ضحايا جرائم الإبادة الجماعية عن الأضرار التي يتعرضون لها في الوقت الحاضر. وقد تبنت الدراسة منهج البحث العلمي القانوني التحليلي الوصفي والمقارن في بعض جزئيات البحث. أما أهم نتيجة توصلت إليها الدراسة فهي أن نظام

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المسؤولية الموضوعية قد يعد النظام القانوني الأفضل من نظم المسؤولية المدنية في تعويض ضحايا جرائم الإبادة الجماعية. مع إمكانية الإفادة من المعيارين القانونيين السالفي الذكر في القانون المقارن. كما أوصى الباحث المشرع العراقي ببعض التوصيات ذات الصلة بالموضوع.

الكلمات المفتاحية: الإبادة الجماعية, جرائم الإبادة الجماعية, المسؤولية المدنية عن الأعمال الشخصية المتعلقة بالإبادة الجماعية, مسؤولية المتبوع عن أعمال تابعه, المسؤولية الموضوعية, نية الإبادة الجماعية, معيار التوقع المعقول للخطر.

Introduction

The introduction of the study includes the following points:

First: The Introductory Preface to the Topic: this research has studied the crime of genocide and genocidal acts in conformity with the second and third articles of the convention on the prevention and punishment of the crime of genocide of 1948 , as well as the article (6) of the Rome Statute of the International Criminal Court. And evaluated the most suitable civil liability system for compensating the victims of the crime of genocide from the damage resulting from war operations, military errors and terrorist operations, according to the general rules of the Iraqi civil Code No. (40) of 1951. The study highlighted the system of the civil liability arising from personal acts, in the line with the article (202, 204 and 186) of the Iraqi civil code. The system of the vicarious liability in keeping with the article (219), and the system of the strict-liability based on the damage, according to the first article of the law on compensation for victims of war operations, military Errors, and terrorist operations No. (20) of 2009. The research also compared the legal standards used by the Iraqi civil code to establish and prove the civil liability with some well-established standards in the English common law, especially reasonable foreseeability of the risk standard, and the standard of the created, abnormally dangerous, non-reciprocal and harmful to all the society risk.

Second: The Importance of the Research: The importance of this research is represented by the study of the evaluation of the most suitable civil liability system for compensating the victims of the crime of genocide from the damage resulting from war operations, military errors and terrorist operations.

Third: The Aim of the Research: The aim of this research is the attempt to identify the most suitable civil liability system for

compensating the victims of the crime of genocide from the damage resulting from war operations, military errors and terrorist operations, and to make use of it.

Fourth: The Problematic and Questions of the Research:

The problem of this research lies in the difficulty and ambiguity of establishing the legal basis of the civil liability, which is most suitable for compensating victims of the crime of genocide, war operations, military errors and terrorist operations according to the Iraqi law. The problem of the study can be summarized by the following question: are the well-established standards in the English common law, particularly the reasonable foreseeability of the risk standard, and the standard of the created, abnormally dangerous, non-reciprocal and harmful to all the society risk useful and practical, in identifying the most suitable civil liability system for compensating the victims of the crime of genocide from the damage resulting from war operations, military errors and terrorist operations?.

Fifth: The Research Methodology: This research has followed the analytical comparative research methodology, by studying and analyzing the concept of the crime of genocide, and identifying the most suitable civil liability system for compensating the victims of the crime of genocide from the damage resulting from war operations, military errors and terrorist operations, according to the rules of the Iraqi law, as well as comparing the legal standards used by the Iraqi civil code to establish and prove the civil liability with some well-established standards in the English common law.

Sixth: The plan of the Research: This research has been divided into two sections. The first section discusses the concept of the crime of genocide and the closely-related system of civil liability. Whereas the second section is concerned with studying the evaluation of the optimal system of the civil liability to compensate

victims of the crime of genocide and some closely related acts and operations as follows:

First Section: The Concept of the Crime of Genocide and the Closely-Related System of Civil Liability.

First Topic: The Definition of the Crime of Genocide And its Differentiation From the Crime of Aggression.

Second Topic: The Basic Elements of the Crime of Genocide.

Third Topic: The Concept of the Civil Liability in the Iraqi Civil Code

Second Section: The Evaluation of the Optimal System of the Civil Liability to Compensate Victims of the Crime of Genocide and some closely related acts and operations.

First Topic: The Civil Liability from Personal Harmful Acts of Genocide perpetrators And Military Error Actors.

Second Topic: The Vicarious Liability From the Crime of Genocide And Military Errors.

Third Topic: The State's Strict-Liability From The Damage Caused By Genocidal Acts Military Errors.

First Section

The Concept of the Crime of Genocide and the Closely-Related Systems of Civil Liability

This section will be devoted to study and investigate the concept of the crime of genocide and the closely-related systems of civil liability. Therefore we shall underline these concepts by defining the crime of genocide and distinguishing it from the crime of aggression. Then we should study the basic elements of the crime of genocide, in accordance with both the convention on the prevention and punishment of the crime of genocide of 1948, and the Rome Statute of the International Criminal Court. As well as studying briefly the concept of the civil liability in conformity with the rules of the Iraqi civil code No. (40) of 1951 as follows:

First Topic

The Definition of the Crime of Genocide and its differentiation from the crime of aggression

The article (6) of the Rome Statute of the International Criminal Court defined the crime of genocide as the acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group. It determined these acts and provided that (For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group). It has also been defined (Khalid Mustafa Fahmi, 2011, p.232) as an aggression against the interests protected by the international criminal law. It has also been defined by the same author or scholar as the act or omission considered as a violation or prejudice of the rights or interests protected by the international criminal law, whether the act is committed or perpetrated by a certain group of people or government , against another group or government in peace or wartime. It is clearly indicated from these definitions that the crime of genocide is a systematic criminal conduct perpetrated by a certain group of people to dominate another group, by killing, seriously harming their members, deliberately inflicting on that group conditions of life considered to bring about its physical destruction in whole or in part. Or preventing births within that group (Khalid Mustafa Fahmi, 2011, p.236). Furthermore the crime of genocide can be clearly distinguished from the crime of aggression. Although they are

similar in that they are both considered as an aggression, but the difference is very obvious between them. The crime of genocide is represented by the above-mentioned acts contained in both the second article of the convention on the prevention and punishment of the crime of genocide of 1948, and the article (6) of the Rome Statute of the International Criminal Court .Whereas the crime of aggression is embodied by a completely different acts such as (Ibrahim Al-Darraji, 2005, p.358): 1- invasion, armed attack, occupation and annexation. 2- bombardment. 3-Blockade of parts and coasts. 4-Attack on land, sea and air. 5-use of armed forces within the territory of another state. 6-The action of state in allowing its territory at the disposal of another state. 7-sending armed bands, groups and mercenaries (Ibrahim Al-Darraji, 2005, p.359). There is also another point of difference between the two crimes related to the mental or moral element (*mens rea*). The mental element of the crime of genocide is the genocidal intent, whereas the mental element of the crime of aggression is identified by two standards: according to the subjective standard this element is embodied by the aggressive intent. But in conformity with the objective standard, this element is governed by two sub-standards: the standard of priority and standard of territoriality (Ibrahim Al-Darraji, 2005, p.433).

Second Topic

The Basic Elements of the Crime of Genocide

To start with, it can be said that the crime of genocide is made up of two basic or fundamental elements: the material element and the moral or mental element. The second article of the convention on the prevention and punishment of the crime of genocide of 1948 determined the acts which can be considered as the genocide, if they are committed or perpetrated with the intent to destroy or genocidal intent. And provided that (In the present Convention,

genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group). It has been clearly indicated that this article encompasses five types of genocidal act, which embody the material element of the crime of genocide, and they are: 1. Killing members of the group; 2. Causing serious bodily or mental harm to members of the group; 3. Deliberately inflicting on the group conditions of life which bring about its physical destruction or annihilation in whole or in part; 4. Imposing measures preventing birth of children within the group; 5. Forcibly transferring children of the group to another group (Khalid Mustafa Fahmi, 2011, p.256). The same is true for the above-mentioned article (6) of the Rome Statute of the International Criminal Court, which outlined these five types of the genocidal act, as representing the material element of this crime. It is to be noted that the third article of the convention on the prevention and punishment of the crime of genocide of 1948 underlined five punishable acts, ranging from the crime of genocide itself to the complicity in this crime (Khalid Mustafa Fahmi, 2011, p.237). Including the conspiracy to commit this crime, direct and public incitement to commit it, and the attempt to commit the crime. It provides that (The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide). As far as the moral or mental element of the crime of genocide is concerned, the article

(30) of the Rome Statute of the International Criminal Court, determined this element, and provided that (1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. 2. For the purposes of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. 3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly). The moral or mental element in the crime of genocide is regarded as a special but not general element. Is always referred to as the intent to destroy, which can be defined as the offender's mentality or criminal's state-of-mind, represented by the genocidal intent. It is worth-noting that the moral or mental element in the crime of genocide often expresses the intention to bodily (physically) or mentally harm members of a certain group within the international community. The genocidal intent also means the perpetration of the various forms of this crime with the intent to destroy, exterminate or annihilate the national, ethnic, racial or religious system of a certain group of people, affiliating to a certain nationality, ethnicity, race or religion. Therefore one of the authors and jurists (Khalid Mustafa Fahmi, 2011, p.246) of the international criminal law defines the genocidal intent as the intention to destroy wholly or partially a certain group of people affiliating to a certain nationality, ethnicity, race or religion.

Third Topic

The Concept of the Civil Liability in the Iraqi Civil Code

It is relevant to say that the civil liability in civil laws general, and in the Iraqi civil code in particular is sub-categorized into two main sub-divisions: the contractual liability and the non-contractual tort or negligent liability (Extra-contractual liability). One of the most famous and highly-qualified Iraqi civil code jurists (Abdul Majeed Al Hakim, 1963, P.401) defined the civil liability as the sanction or penalty imposed or inflicted on the breach or violation of the engagement, undertaking, commitment or obligation arising from the contract, or from a harmful, wrongful, illegal or unlawful act which may cause an injury or harm to the third party. The contractual liability can be defined as the penalty imposed for the breach of a contractual undertaking (obligation). Whereas the non-contractual tort liability (Extra-contractual liability) can be defined (Abdul Razaq Al Sanهوري, 2004. p.618) as the penalty imposed for the breach of one unchangeable legal obligation of not causing harm or not harming anyone, which arises from the unlawful act. It is pertinent to mention here that the breach of the contractual obligation will generate the contractual liability, whereas the breach of the legal obligation will originate the non-contractual (extra-contractual) obligation. But while the contractual obligation can either be an obligation of result or an obligation of conduct (Munther Al-Fadhel, 2006. p.225). The legal obligation, is always an obligation of conduct (Abdul Majeed Al Hakim et al , 1980. P.215). The illegal or wrongful act is defined (Abdul Majeed Al Hakim, 1967. p.58) as a harmful or unlawful act emanating from the debtor to impoverish the creditor. Generally speaking, the non-contractual tort liability (Extra-contractual liability) can be sub-categorized into four fundamental sub-divisions: The civil liability from the personal acts, the vicarious liability of the employers from harmful acts of their employees, The liability from mechanical machines or other things which require special care for protection

against their harm. Besides the strict-liability which is based upon the element of the damage, and does not require to prove the element of the fault. It is noteworthy also that the Iraqi civil code, in the sphere of the civil liability in general and extra-contractual liability in particular, embraced the principles and followed up both the Islamic jurisprudence, embodied by the journal of juristic rules of 1869 (Mejallat-Al-Ahkam), which is regarded as a European-style Ottoman codification of Islamic legislation of the Hanafite school of doctrine (Dan E. Stigall , 2006. P.7), from which the Iraqi code borrowed most of its rules. besides the Egyptian civil law No.131 of 1948. As a consequence the Iraqi civil code adopted the trespass, transgression or encroachment as the basic or fundamental element of the civil liability emanating from the unlawful acts (Ismat Abdul Majeed Baker, 2011. P.613), rather than the element of the fault, in addition to the damage and the causal link between them. It does not adopt, at least superficially or apparently, the basic element of the fault (Suleiman Morcos, 1992. P.183). This is inferred or deduced from the formulation of the article (204) which provided that (Every trespass or transgression which causes other than the injuries mentioned in the preceding Articles entails payment of compensation). unlike the article (163) of the Egyptian civil law No. (131) of 1948. Which adopted and embraced obviously the element of fault, and provided that (Every fault which cause injury to another, imposes an obligation to make reparation upon the person by whom it is committed). Some authors and jurists (Abdul Majeed Al Hakim et al , 1980. P.260 and 220) of the Iraqi civil code defined the trespass a the deviation from the conduct or behavior of the reasonable person surrounded and encircled by the same external circumstances of the perpetrator or wrongdoer. They have clearly distinguished or drawn a distinctive line between the fault and the

trespass, which is considered as merely the material element of the fault, which is made up of two elements: the material element, that is to say, the trespass, and the moral element, the prudence and discernment (Abdul Majeed Al Hakim et al , 1980. P. 220).

Second Section

The Evaluation of the Optimal System of the Civil Liability to Compensate Victims of the Crime of Genocide And Some Closely Related Acts And Operations

We shall discuss and evaluate in this section this civil liability to compensate the victims of the crime of genocide in general, and weighs the optimal system of civil liability to award damages and remedies to the victims of the crime of genocide and terrorist operations, perpetrated by the terrorist members of the so-called ISIS in particular, or even the victims of the military errors or faults committed by the state during war operations. In conformity with the general rules of the Iraqi civil code, as well as taking into account two well-founded standards in the comparative law which facilitate the compensation of the victims of the crime of genocide: that is to say, the well-established reasonable foreseeability of the risk standard, besides the abnormally dangerous and non-reciprocal risk standard, underlying the principle of the strict-liability system in the English common law. Therefore we shall focus on three types of extra-contractual or non-contractual civil liability in the Iraqi civil code, which are the most appropriate for the genocidal acts perpetrated by the terrorist members of ISIS, to a larger extent, or even errors or faults committed by the state during war operations, to a limited extent, and exclude or rule out the fourth type, embodied by the liability from mechanical machines or other things which require special care for protection against their harm, which is inappropriate for compensating victims of the crime of genocide perpetrated by terrorist members of ISIS. And we shall

study the three other systems of the civil liability, which are appropriate for compensating victims of the crime of genocide committed by terrorist members of ISIS. That is to say, the civil liability from the personal acts of genocide actors, the vicarious liability of the employers from harmful acts of their employees, and the strict-liability as follows:

First Topic

The Civil Liability from Personal Harmful Acts of Genocide perpetrators And Military Error Actors

Although the Iraqi civil code dedicated or devoted thirty two articles (186-217) to deal with the civil liability from personal acts (Abdul Majeed Al Hakim, 1963, P.424), but the articles which can be practically applied to establish the legal basis of the civil liability from personal acts, to compensate victims of the crime of genocide perpetrated by terrorist members of ISIS, or of military errors or faults committed by the state during war operations are the texts (186, 202 and 204) of the Iraqi civil code (Ismat Abdul Majeed Baker, 2011, P.530). As we have said earlier that the above-mentioned article (204) determined three basic or fundamental elements on which the civil liability from personal acts is based: the encroachment, damage and the causation or causal link between the encroachment (trespass) and the damage. Now we shall discuss briefly these fundamental elements and compare the standards used to determine them with the legal standard of reasonable foreseeability, adopted by the English unwritten common law, based on judicial precedents, customs, and the rules of equity (John Cartwright, 2013, P.4), then the legislations enacted later (Cathy J. Okrent, 2015. P.3) :

First: The basic element of the encroachment, trespass or transgression: as we have commented earlier, the encroachment or trespass is the deviation from the conduct or behavior of the

reasonable person encircled by the same external circumstances of the perpetrator (Abdul Majeed Al Hakim et al , 1980. P.220). Although the Iraqi civil code regulated the general rule which governs the civil liability from personal acts in the article (204), but it regulated another general rule encompassing the wrongful acts that are injurious or harmful to the person's oneself, in accordance with the article (202), which provided that (Every act which is injurious to persons such as murder, wounding, assault, or any other kind of inflicting injury entails payment of damages by the perpetrator). We can consider that this text is the most appropriate for establishing the basis of the civil liability from personal harmful acts of military errors or faults committed by the state during war operations, or of genocide perpetrated by the terrorist members of ISIS, and regarded as a part of the crime of genocide committed by this terrorist organization. Because murder, wounding and other types of harm and injury can be classified among the genocidal acts included in both the above-mentioned article (2) of the convention on the prevention and punishment of the crime of genocide of 1948, and the article (6) of the Rome Statute of the International Criminal Court. It is to be noted that the deviation perpetrated or committed by the terrorist members of ISIS and genocide criminals is measured by an objective standard or test, in other words, the reasonable person test. The encroachment (trespass) in the Iraqi civil code is sub-categorized into two branches (Abdul Majeed Al Hakim, 1963, P.429): the positive one which refers to the deviation of limits, and the negative one referring to the negligence and carelessness. The objective standard is more appropriate than the subjective one. Because the subjective standard takes into account the personality of the tort-feasor, wrongdoer or the unlawful act perpetrator (damaging party), and this may lead to the emergence of the civil liability or accountability, although perpetrating the

smallest and simplest deviation of conduct (Abdul Majeed Al Hakim, 1963, P.430). Therefore, this standard is considered as unjust. Whereas the objective standard is more equitable, because it measures the deviation of the conduct of the illegal act perpetrator (wrongdoer), and compares it with the typical conduct of the reasonable person surrounded by same external circumstances of the perpetrator (Abdul Majeed Al Hakim, 1963, P.431). Without taking into account the internal circumstances. The external circumstances include both the temporal (time) and spatial (place) circumstances. It should be noted also that the first paragraph of the article (186) of Iraqi civil code is also considered as an appropriate or suitable for establishing the civil liability and compensating victims of the crime of genocide perpetrated by terrorist members of ISIS. This article keeps abreast of both the above-mentioned paragraph (c) of the second article of the convention on the prevention and punishment of the crime of genocide of 1948, and the article (6) of the Rome Statute of the International Criminal Court . Which regarded deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, as a type of the crime of genocide. The first paragraph of the article (186) of the Iraqi civil code provided that (A person who willfully or by trespassing, as a perpetrator or abettor, has directly or indirectly caused damage to or decreased the value of the property of another person shall be liable). It means that both of these two provisions or texts of the convention on the prevention and punishment of the crime of genocide of 1948, and the Rome Statute of the International Criminal Court come into keeping with or into line with the first paragraph of the article (186). Because the deliberately infliction or imposition on a group of people conditions of life which cause physical destruction in whole or in part, can equals to cause damage

to or decrease the value of the property of another person. Analyzing the first paragraph of the article (186), we can reach a conclusion that it requires that the intentional willfulness or purposefulness be available, as well as the trespass or transgression for the extra-contractual or negligent liability from personal acts to arise, and the transgressor or trespasser will be obliged to compensate. In brief we can infer that the article (186) refers to the fault rather than to the mere transgression or trespass itself, because it requires that two basic elements be satisfied. And the combination of both the willfulness and trespass or encroachment means the perpetration of the basic element of fault (Hasan Ali Al-Thannon, 2006. P.142). And these two elements should be combined together or available in the liability (guaranteeing) of both the perpetrator of the wrongful act and the abettor. Therefore, this article will go within the scope of our study, because of its suitability for the physical destruction provided for in both the convention on the prevention and punishment of the crime of genocide of 1948, and the Rome Statute of the International Criminal Court.

Now if we compare the objective standard of the reasonable person test, used to measure the fundamental element of encroachment in the Iraqi civil code, which is influenced or affected by the Islamic jurisprudence with the principle of reasonable foreseeability in the English common law, we can find that good use can be made of the reasonable foreseeability of the risk standard, to determine the liability from the tort of negligence. The reasonable foreseeability standard is beneficial in the distinction between the reasonably foreseeable and unreasonably foreseeable risks. Since all human acts encompasses some degree of risks, but not all of them justify the emergence of the wrongdoer's liability, except for reasonably foreseeable risks. The reasonable foreseeability means that care

must be taken in respect of the risk that is reasonably foreseeable. What explains this is the fact that nearly all human actions involve some risk of damage, but not every risky act will result in liability (John Cooke , 1999. P.92). In order for the duty of care to exist, it should be reasonably foreseeable that probability of risk of damage or injury would be caused by the particular defendant. This reflects the strong relationship between the risk of injury and the degree of foreseeability (Simon Deakin et al, 2013.P.210).

Second: The fundamental element of the damage: it is considered as the second fundamental element of the of the extra-contractual civil liability from personal acts. The damage is the hurt or injury from which the aggrieved or injured (damaged) plaintiff suffers. Therefore, no liability will emerge without damage (Abdul Majeed Al Hakim, 1963, P.455). Furthermore, It is sub-classified into material and moral damage. The material damage is the hurt or injury which befalls the plaintiff's body, property, right or a legal interest. Whereas the moral damage is the injury which befalls the plaintiff's feelings, emotions, honor, reputation, social standing, financial position (credibility), or other affairs of moral importance, in keeping with the first paragraph of the article (205) of the Iraqi civil code.

Third: The fundamental (basic) element of the causal link or the causation: it refers to the close connection between the wrongful act and the damage. Therefore nobody will be liable for any act committed by a third party, because this is neither acceptable legally nor logically (Hasan Ali Al-Thannon, Part.3, 2006. P.6). The causal link is usually broken, cut-off or disrupted by the extraneous cause. And the debtor will be adjudged to pay damages for non-performance of his obligation, unless he proves that the impossibility of the performance was due to an extraneous cause. In accordance with the article (168) of the Iraqi civil code, which

provides that "If it is impossible for the obligee of a contract to perform his obligation specifically he will be adjudged to pay damages for non-performance of his obligation unless he establishes that the impossibility of the performance was due to a cause beyond his control; the adjudication will be the same if the obligee has delayed (was late in) the performance of his obligation". In short the causal link or the causation within the concept of the extra-contractual civil liability means that the damage is the direct consequence of the breach or the violation of the legal obligation of not harming anyone (Ahmed Salaman Shuhaib Al-Sa'adawi and Jawad Kadhum Jawad Sumaisem, 2017, P.313). As far as the situation of the English common law is concerned, the liability from the tort of negligence depends on what the reasonable person would have foreseen (Paula Giliker and Silas Beckwith, 2011. P.34). While the defendant is not negligent if the consequences of his or her conduct were unforeseeable (Vera Bermingham, 2003. p.36), but he or she will not be liable for all foreseeable consequences, except for when the damage or injury is brought about by a reasonably foreseeable risk (John Cooke , 1999. P.92), which is caused by the breach of the duty of care leading to the accident (Tony weir, 2004. P.141) . To achieve this end the courts must take into account the magnitude of the risk. In order to decide what the reasonable person would have done in the circumstances as precautionary measures to minimize or eliminate the risk. It is worth-bearing in mind that the magnitude of the risk necessitates that the degree of care which the law determines must be commensurate or proportionate with the risk created (Vera Bermingham, 2003. p.37). If the degree of care is incommensurate with the risk created, the defendant will not be liable for negligence, even if the risk is foreseeable. In the judicial precedent (Bolton v. Stone HL 1951) the defendants were aware of the risk

which was foreseeable. But they were held not liable because the risk was so small that they were justified in not taking further measures to eliminate it. In other words the magnitude of the risk is so small that it is incommensurate with the degree of the care to be taken. Put another way, the probability or likelihood of the risk is smaller than degree of the care taken. This means that the probability or likelihood of the damage caused by the risk is incommensurate with the degree of the care. Because such damage happened only six times in the preceding thirty years (Vera Bermingham, 2003. p.37). The causation or causal link refers to the proximate cause, or the cause unbroken by any new and independent cause, which produces an event that otherwise would not have occurred.

Second Topic

The Vicarious Liability from the Crime of Genocide and Military Errors

The vicarious liability is defined as the accountability or responsibility of the employer from his or her employee's harmful act. Analyzing the legal rules of this type of extra-contractual liability in the Iraqi civil code, we can also conclude that, on the one hand, it is difficult for two reasons to apply these rules, for establishing the vicarious liability of the terrorist ISIS for its terrorist operations, and compensating victims of the crime of genocide perpetrated by terrorist members of ISIS on this legal basis. First the first paragraph of the article (219) of the Iraqi civil code determined the concept of the employer as narrowly as possible (Munther Al-Fadhel, 2006. p.361), and restricted it to a limited number of bodies and persons. Strictly speaking, the government, municipalities, other institutions rendering a public service, and any person exploiting an industrial or commercial enterprise. Rather than providing for a general rule which considers

any employer liable for the damage caused by his or her employee's unlawful act, in the course, or as a result of his employment. as it is the case with the first paragraph of the article (174) of the Egyptian civil law No. (131) of 1948. The second difficulty is that it is difficult, if not impossible, to consider ISIS as an employer, Because it does not enjoy or entertain a legal personality .because ISIS is only a terrorist organ or group, which has not been recognized for any legal personality, whether it be local or international. But on the other hand, the principle or the doctrine of the vicarious liability can easily and smoothly apply on the state's responsibility as an employer for the military errors or faults committed by its employees during war operations, if three basic or fundamental requirements are satisfied, according to the first paragraph of the article (219) of the Iraqi civil code which provided that "government, municipalities and other institutions which perform a public service as well as every person who exploits an industrial or commercial enterprise are liable for the damage (harm) caused by their employees, if the injury resulted from an encroachment committed by them in the course of their service). It has been clearly indicated from this text that the materialization of the vicarious liability of the state as an employer for the military errors or faults committed by its employees during war operations in the Iraqi civil code entails three requirements to be satisfied (Abdul Majeed Al Hakim et al , 1980. P. 260 and 262) :

First: The existence of the relation of the subordination between the employer and employee (Munther Al-Fadhel, 2006. p.362), on the basis of the authority imposed by the master on the servant (Dara'a Hammad, 2016. p.403). And this type of relation is available between the state and its employees and military forces, due to their military errors and faults.

Second: The error or fault committed by the employee: the second requirement for the state's vicarious liability to emerge is the military errors or faults committed by its employees during war operations. This fault is embodied by the illegal act perpetrated by the employee (Sabri Hamad Khater, 2024, p.377). The fault of the employee may either be rebuttable or irrebuttable. But it should always be rebuttable, in accordance with the second paragraph of the article (219) of the Iraqi civil code.

Thirdly: The error or fault should be committed in the course of employment: This means that the Iraqi legislator restricts the realization of the vicarious liability to the case in which the commission of the fault by the employee takes place in the course of his employment to the employer (Munther Al-Fadhel, 2006. p.363). If the employee commits the error or fault or the personal illegal act, because of the employment, but not in its course or during it. According to the article (219) of the Iraqi civil code, as opposite to the article (174) of the Egyptian civil law No 131 of 1948. Which considers the employee liable, even though the fault was committed due to the employment. finally it can be said that while the employee is liable for his personal harmful acts, the legal basis of the employer's liability is the principle or doctrine of the (Cujus est commodum ejus debet esse incommodum), and he will be strictly liable (Abdul Majeed Al Hakim, 1963, P.502).

Third Topic

The State's Strict-Liability from the Damage Caused By Genocidal Acts Military Errors

Understandably, the strict-liability is established on the fundamental element of the damage (hurt), rather than the element of the error (fault), on which the civil liability from personal illegal acts is established. The victim or the aggrieved party is only required to prove three fundamental elements or requirements for

the strict-liability to arise: the abnormally or exceptionally risky act leading to the damage, the damage itself, upon which the strict-liability is based, and the causal link or causation between the damage and the risk-driven act. Therefore one of the Iraqi civil code jurists or scholars defines (Hasan Ali Al-Thannon, 2006. P.9) the strict-liability as a type of civil liability, which rules out completely or eliminates the concept of the fault (error), and is established only on the concept of the damage, without proving the element of fault, on which the fault-based liability is established. It is clearly indicated from this definition that the principle of the strict-liability can be applied regardless of the element of fault or negligence. And is aimed at eliminating totally this element. Therefore the injured party is only required to prove the causal link or causation between the damage and the abnormally or exceptionally risky act leading to the damage (Hasan Ali Al-Thannon, 2006. P.110). It is worth-noting here that although the principle of the strict-liability, featured by its material or objective tendency, is applied as narrowly as possible, according to the general rules of the Iraqi civil code, on the liability of the minor or any one in his or her status in the article (191), but the law on compensation for victims of war operations, military Errors, and terrorist operations No. (20) of 2009 based the compensation of the victims or the damaged parties, from the terrorist acts and operations of ISIS, or even from military errors or faults committed by the state during war operations, on the basic element of the damage. In order to protect the victims from the difficulty of proving the basic element of the fault or error. According to the first paragraph of the first article of this law, which provides that " This law aims to compensate every Iraqi natural or moral person suffering from the damage caused as a result of the war operations, military mistakes and terrorist operations, and determine the

damages, their gravity, standards for compensation and means of claiming". It should be noted here that the establishment of this liability on the element of the damage only, and the obligation of the state to pay damages and compensation became a social necessity, and transformed this type of liability into "social liability". Therefore the compensation is not based on the proof of the fault (error), but on a social basis, aimed at assisting individuals against the risks of both the terrorist acts and military operations (Thaer Saad Abdullah, 2022. P.382). It can be concluded that this legal system may be the best and the most optimal for the time being, in compensating the victims of the crime of genocide and terrorist operations, perpetrated by the terrorist members of ISIS, or even the victims of the military errors or faults committed by the state during war operations. It is worth-noting that in order for the strict-liability to emerge or emanate and the defendant to be strictly liable, three basic elements or fundamental requirements must be satisfied: the plaintiff must prove the abnormally or exceptionally risky act, and must also prove that the damage or harm is caused by the risk-driven act. As well as proving the causation or causal link between risky act and harm.

First: The abnormally or exceptionally risky act: the first requirement to be satisfied, in order for the strict-liability to arise is the risk-driven act. That is to say, it must be abnormally or exceptionally dangerous or risky, which means it implies the probability or likelihood of causing the damage. Therefore, the risk is defined (George E. Rejda, 2022, p.68) as the uncertainty concerning the occurrence of a loss, and the conditions under which the individual can estimate the probabilities or likelihood of certain outcomes. Because the Iraqi civil code is highly influenced or affected by the Islamic jurisprudence, the principle or doctrine of the (*Cujus est commodum ejus debet esse incommodum*) can be

applied (Abdul Majeed Al Hakim, 1963, P.507), so as to consider the state strictly liable for the damage caused by both the terrorist acts and operations of ISIS, or by military errors or faults committed by the state during war operations. It is common ground that when the abnormally or exceptionally risky act generates the damage, or the damage itself is caused by the risk-driven act, the strict-liability will originate, and is based on the risk-driven damage, rather than being based on the fault (error) or negligence (Abdul Majeed Al Hakim, 1963, P.502). Finally if we compare the fundamental element of abnormally or exceptionally risky act in the Iraqi civil code, influenced or affected by the Islamic jurisprudence with its counterpart in the English common law, we can find that the risk-driven act leading to the damage as a basis of the strict-liability, is characterized by five distinctive features which constitute the standards of the risk underlying the strict-liability: 1- the abnormality of risk : the abnormal risk refers to the abnormally dangerous risk, which justifies the application of the strict liability, even when a defendant is neither negligent nor has any intent of wrongdoing (Linda Edwards et al , 2012, P.316), particularly in situations involving abnormally dangerous activities (John wilman, 2005, P.208). If the act is characterized by this feature, the defendants will be held liable for causing harm, even if they were not negligent or at fault (Catherine Elliott and Frances Quinn, 2011. P.5). And without needing or having to prove negligence" (Vera Bermingham, 2003. p.123), or any additional state of mind, such as malice or intention (John Cooke , 1999. P.9). 2- Risk–creation or Created Risk: **this** requirement means that the defendant must have actively created or generated the risk, and introduced it into society. Therefore the Strict-liability doctrine will not be applied, unless the defendant's conduct, behavior or activity generates or creates a risk of harm that would not otherwise

exist. And not merely because an accident has happened or taken place. In other words the probability or likelihood of the risk or the hazardous activity is not a matter of common usage (Linda Edwards et al , 2012, P.321). 3- Non-reciprocity of risk or nonreciprocal risk: this standard implies that the risk generating or justifying the generation of the strict liability must be **one-sided**. In other words, other people in society should suffer from it, without enjoying any reciprocal benefit or imposing similar risks in return. This means that strict liability is only justifiable when a defendant has caused damage to the plaintiff through non-reciprocally risky behavior (Heidi M. Hurd, 2003, p.716). A nonreciprocal risk exists when the defendant's act creates a significant and disproportionate risk to the plaintiff, while the plaintiff does not pose a similar or symmetrical risk to the defendant, because of the "inappropriateness of the activities of these two parties (Linda Edwards et al , 2012, P.321). Therefore, the defendant who is strictly liable is commonly known as the asymmetrical or nonreciprocal risker, that is to say, the person who imposes or inflicts a unique danger on others without facing a similar risk. this would be nonreciprocal risk generating strict liability. Whereas the symmetrical or reciprocal risker will not be strictly liable, because he will be expected to cause harm as much and as often as he sustains harm (Heidi M. Hurd, 2003, p.720). 4- Risk–benefit: English courts usually weigh and decide whether the **benefits of the activity** to society justify exposing others to the risk. If an activity has **little social utility** compared to the dangers it creates, strict liability would be justified and applied. But if the activity has a very high utility, the risk may be tolerated, and the strict liability would not be applied. Because the value of the activity to the society outweighs its dangerousness (Linda Edwards et al , 2012, P.321). 5- Risk–profit: The party who **profits from**

creating the risk should also suffer or endure the costs when the risk realizes (Linda Edwards et al , 2012, P.321). This embodies the principles of fairness and equity. if a person gains financially from an inherently dangerous activity, he or she should suffer or endure its costs. This standard is likewise represented in both the Iraqi civil code and the Islamic jurisprudence by the doctrine of the (*Cujus est commodum ejus debet esse incommodum*).

Second: The damage inflicted on the plaintiff : it is common knowledge that the strict-liability is based upon the fundamental element of the damage (Abdul Majeed Al Hakim, et al , 1980. P.217), rather than the element of the fault, upon which the civil liability from personal wrongful acts is based. Therefore the strict-liability in the Iraqi civil code is a type of civil liability, which rules out completely or eliminate the concept of the fault (error), and is based only upon the concept of the damage, without needing to prove the element of fault, upon which the fault-based liability is established (Hasan Ali Al-Thannon, 2006. P.9). And this is clearly embodied by above-mentioned first paragraph of the first article of the law on compensation for victims of war operations, military Errors, and terrorist operations No. (20) of 2009, which based the compensation on the element of the damage.

Third: The causation or causal link between abnormally or exceptionally risky act and damage: finally the victim of the damage or the aggrieved party is required to prove the causal link or causation between the damage and the abnormally or exceptionally risky act. If he or she succeeds in proving this link, the defendant's strict liability will emanate (Ismat Abdul Majeed Baker, 2011. P.606). Because no one would be liable for the results of the acts committed by the third party, which is neither acceptable legally nor logically (Hasan Ali Al-Thannon, 2006. P.6).

Conclusions

The conclusion is made up of both the findings and recommendations and as follows:

First: Findings: The study has reached the following findings:

- 1- The crime of genocide is considered as the acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group. it is made up of two basic or fundamental elements: the material element and the moral or mental element.
- 2- The material element is embodied by the acts listed in the second article of the convention on the prevention and punishment of the crime of genocide of 1948, and the article (6) of the Rome Statute of the International Criminal Court. Whereas the moral or mental element is the intent to destroy, or the offender's mentality or criminal's state-of-mind, represented by the genocidal intent.
- 3- The article (202) of the Iraqi civil code is the most appropriate for establishing the basis of the civil liability from personal harmful acts of genocide perpetrated by the terrorist members of ISIS, and regarded as a part of the crime of genocide committed by this terrorist organization. Or even from military errors or faults committed by the state during war operations.
- 4- The study has reached to a conclusion that it is difficult for two reasons to apply the general rules in the Iraqi civil code, for establishing the vicarious liability of the terrorist ISIS for its terrorist operations, and compensating victims of the crime of genocide perpetrated by terrorist members of ISIS on this legal basis: First the first paragraph of the article (219) of the Iraqi civil code determined the concept of the employer as narrowly as possible. The second difficulty is

that it is difficult, if not impossible, to consider ISIS as an employer, Because it does not enjoy or entertain a legal personality .because ISIS is only a terrorist organ or group, which has not been recognized for any legal personality, whether it be local or international.

- 5- But the principle or the doctrine of the vicarious liability can easily and smoothly apply on the state's responsibility as an employer for the military errors or faults committed by its employees during war operations, if three basic or fundamental requirements are satisfied, according to the first paragraph of the article (219) of the Iraqi civil code.
- 6- The strict-liability is a type of civil liability, eliminates the concept of the fault (error), and is established only on the concept of the damage, without needing to prove the element of fault, on which the fault-based liability is established.
- 7- The study has reached to another important conclusion that the doctrine of strict-liability may be the best and the most optimal for the time being, in compensating the victims of the crime of genocide and terrorist operations, perpetrated by the terrorist members of ISIS, or even the victims of the military errors or faults committed by the state during war operations.
- 8- The law on compensation for victims of war operations, military Errors, and terrorist operations No. (20) of 2009 based the compensation of the victims of the terrorist acts and operations of ISIS, or even from military errors or faults committed by the state during war operations, on the basic element of the damage, according to the first paragraph of the first article of this law.
- 9- The study has also reached to a conclusion that the well-established standards in the English common law,

particularly the reasonable foreseeability of the risk standard, and the standard of the created, abnormally dangerous, non-reciprocal and harmful to all the society risk are useful and practical, in identifying the most suitable civil liability system for compensating the victims of the crime of genocide from the damage resulting from war operations, military errors and terrorist operations.

Second: Recommendations: After reflecting the outcomes of the study, the researcher suggests two significant recommendations:

- 1- The researcher suggests that the Iraqi law-maker adopt the standard of the non-reciprocity of risk or nonreciprocal risk, to measure and determine the abnormally or exceptionally risky act leading to the damage, as a cause to generate and justify the application of the strict liability, and establish the liability of the element of the damage, without needing to prove the fault (error). Therefore the researcher suggests that the Iraqi legislator adopt the following text, and include it in the law on compensation for victims of war operations, military Errors, and terrorist operations No. (20) of 2009 : (the defendant will be strictly liable for his or her asymmetrical nonreciprocal risky act leading to the harm, whenever the victim of the war operations, military Errors, and terrorist operations proves the damage, which is caused by asymmetrical or nonreciprocal risker (defendant), irrespective of the defendant's fault (error)).
- 2- The researcher suggests that the Iraqi legislator adopt the standard of the abnormally dangerous risky act, as a cause of the damage, which is considered as the basis of the strict liability, without needing to prove the fault (error). Therefore the researcher suggests that the Iraqi legislator adopt the following text: (the defendant will be strictly liable for his abnormally dangerous risky acts, emanating from war

operations, military Errors, and terrorist operations, which lead to the harm, whenever the injured party proves the damage, irrespective of the fault (error)).

- 3- The researcher recommends that the Iraqi law-maker adopt the standard of the magnitude of the risk to help the court decide the degree of care which must be commensurate or proportionate with risk created. Therefore the researcher suggests that the Iraqi legislator adopt the following text: (the standard of the magnitude of the risk must be taken into account, in order for the court to decide what degree of care should be commensurate or proportionate with risk created).

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