



Recruiting Rules of Tort Liability to Compensate Those Affected by the Terrorist Act

تطويع قواعد المسؤولية التقصيرية لتعويض المتضررين من الاعمال الإرهابية

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الملخص

تُعد الاعمال الإرهابية من اخطر الجرائم في الوقت الحالي، لما يترتب عليها من اضرار كبيرة، سواء كانت جسدية او مالية او معنوية، فضلاً عن اثاره الرعب في داخل المجتمع، وآثر الاضرار الناتجة عن هذه الاعمال لا تصيب شخص واحد بل انها تصل في بعض الأحيان الى مئات الأشخاص، ويزداد الامر صعوبة اذا علمنا ان من يقوم بها اشخاص غير معروفين او اشخاص تنتهي حياتهم عند تنفيذ العمل الإرهابي، وهذا ما يحول دون حصول المضرور على التعويض من مرتكب العمل الإرهابي، وإزاء قصور القواعد العامة في تعويض المتضررين من هذه الاعمال، اكد المشرع العراقي في قانون تعويض المتضررين جراء العمليات الحربية والاختفاء العسكرية والعمليات الإرهابية رقم (20) لسنة 2009 المعدل، على ان التعويض حق للمضرور يستطيع مطالبة الدولة به، ولكن ما هو الأساس القانوني لهذا الالتزام هل هي المسؤولية التقصيرية؟ ام ثمة أساس آخر؟ ومن اجل بيان جميع المواضيع المذكورة أعلاه قسمنا هذا البحث الى ثلاث مباحث: المبحث الأول: مفهوم العمل الإرهابي والمتضررين منه، المبحث الثاني: الأساس القانوني في تعويض المتضررين من العمل الإرهابي، المبحث الثالث: تقييم موقف التشريع العراقي من التزام الدولة بتعويض المتضررين من العمل الإرهابي.

الكلمات المفتاحية: الاعمال الارهابية، تعويض المتضررين، قواعد المسؤولية التقصيرية، مسؤولية الدولة المدنية، المسؤولية المدنية.

Abstract

Terrorist acts represents one of the most dangerous crimes nowadays because of the physical, financial, or moral damage they cause. This damage does not affect one person but hundreds of people. What complicates the situation is the fact that these actions are carried out by unknown persons whose lives end upon the execution of the terrorist act, which is why the injured does not get a compensation from the perpetrator of the terrorist act. Concerning the failure of general rules to compensate those affected by terrorist acts, the Iraqi legislator

emphasized in the revised law of compensation for those affected by war operations, military errors and terrorist operations No.20 in 2009 that compensation is a right of the injured that can claim it from the state. However, what is the legal basis for this obligation? Is it tort liability or something else? In order to explain all the issues stated above we divided this study into three sections: first, the concept of terrorist action and those affected by it; second, the basis of compensation law for those affected by the terrorist act; and third, evaluation of the view of the Iraqi legislation regarding the state's obligation to compensate those affected by the terrorist act.

Keywords: Terrorist acts, compensation for those affected, rules of tort liability, state civil liability, civil liability

Introduction

General background

Modern world has not witnessed any crime worse than terrorism because number of affected people increases parallel to the development of weapons and tools used by terrorists. One terrorist act can kill tens of people, wound hundreds of unarmed citizens, and destroy possessions. That is why the whole world opposes terrorism in order to stop it and to compensate the innocent affected people.

Iraq is witnessing an unexpected wave of terrorist acts which calls for amendments to the Terrorism Victims Compensation Law in force to provide justice and compensate some of the losses to the victims.

Iraq has been facing terrorism, sadness, and death since it has got its freedom. That was why the Iraqi legislature felt that Penal Code No. 111 of 1969 and its amendments are not sufficient any more to confront terrorism or its new mechanisms. Thus, the legislature has legislated anti-terrorism law No. 13 in 2005 to reduce terrorist acts. On the other hand, the legislature has found that referring the compensation of the affected to the general rules of TORT liability makes it difficult to get a suitable compensation due to the insufficiency of the general rules of TORT stipulated in the Iraqi civic law concerning aspects of the terrorist act, not to mention mechanisms used in the civil judiciary and in courts of first instance, appeal and cassation, and not recognizing criminals in most cases which makes it impossible to compensate the affected. Then, Council of Ministers issued order No. 10 in 2004 (published in Al-Waqa'i Al-Iraqia, Issue 3989 in 11/11/2004) followed by directions of the Ministry of Finance No. 3 in 2005 (published in Al-Waqa'i Al-Iraqia, Issue 4001 in 19/7/2005). These



directions stayed in force until the enactment of The Law of Compensating Victims of War Operations, Military Errors, and Terrorist Operations No. 20 in 2009 which limited compensation to the state, with the statement of Article 8 (it is not allowed to combine the compensation stated in this law and compensating the same damages based on another law. In case the affected got less than what he deserves according to this law, then he gets the difference based on this law). However, the law did not state a specific mechanism to compensate the affected by terrorist acts by criminals, which represented one of the criticisms of this law as we discussed in the body of this study. Furthermore, the compensations were not big and did not match the size of the effect.

This law stayed in force until the control of ISIS on Mosul, the issuance of the fatwa of holy jihad from the supreme religious authority, and the formation of the Popular Mobilization Forces. Hence, the law was amended based on the law (first amendment of the law of compensating the affected from war operations, military errors, and terrorism operations) No. 57 of 2015, which included in its Article wounded of the Popular Mobilization Forces and Peshmerga. Then Article No. 2 of 2020 (second amendment of the law of compensating the affected from war operations, military errors, and terrorism operations No 20 of 2009), which is the law in force enacted to simplify procedures of settling the transactions of the affected from terrorist acts.

Since changing the international policy rules after the fall of the Soviet Union, it seems that rules of law are going to be affected. The effect is represented by the law recently voted by the US Congress (i.e. Justice Against Sponsors of Terrorist act (JASTA)) which empowers U.S. courts to try any state or organization that supports terrorist acts which threaten the safety of U.S. citizens or their possessions (Arabic Sky News). The gate opens here for researchers in order to investigate the compensation of Iraqis affected by terrorist acts supported and funded by some neighboring countries which facilitated the access of terrorists to Iraq since the U.S. forces were inside Iraq in 2003-2011 as coalition forces that support the Iraqi security entities and responsible for part of the security file.

In the current study, we have faced several difficulties one of which was that the core of the study lied between public and private law because both criminal and civil laws

are shared in the issue of compensation. The complexity increased by

approaching international law to research the possibility of trying foreigners who live outside Iraq in Iraqi courts to oblige them to pay compensation. Moreover, the abundance of Iraqi legislation and their amendments delays them in 2020 and complicated our study.

Importance of the study

Compensation of any physical or abstract damage caused by terrorist acts, providing legislation to these compensations, and binding the perpetrators of compensating the affected from terrorist acts are very important to do justice to this slice of the society which gave blood to form a third river in this country.

Problem of the study

The current study investigates the possibility of compensating the affected from terrorist acts based on the general rules of TORT liability, state compensation of this group, basis of such compensation, and forming suggestions that should be added to the in force laws to provide the affected with the suitable compensation.

Sections of the study

Based on the previous introduction, we divided the study into three sections preceded by the introduction and followed by a conclusion which discusses the results and recommendations. The sections of the study are as follows:

Section one: the concept of the terrorist act and the affected

- 1- Definition of terrorist act
- 2- Definition of the affected from the terrorist acts

Section two: the legal basis of compensating the affected from the terrorist act

- 1- The applicability of TORT rules on the obligation of compensating the affected from the terrorist acts.
- 2- The applicability of physical liability rules on the obligation of compensating the affected from the terrorist acts.

Section three: assessment of the perception of the Iraqi legislation of obliging the state of compensation the affected from the terrorist acts

- 1- The Iraqi state's commitment to compensating the affected from the terrorist acts



2- Suggestive solutions to a best compensation for the affected from the terrorist acts.

The Concept of the Terrorist act and the Affected

The occurrence of the terrorist act causes physical or financial damages to some people who are called ‘the affected from the terrorist act’. They can bring a lawsuit to the judiciary, which is why it is necessary to specify the concept of terrorist act and the affected. First we will explain the definition of the terrorist act which requires a compensation, then we specify the affected from this act.

Definition of terrorist act

Arabic dictionaries states that the word ‘terror’ refers to fear (Ibn Mandhour, 1995:p.1374). In terms of terminology, there were many attempts to define terrorist act because the judiciary did not settle on a comprehensive definition. There is even an opposing view to define terrorist act led by the jurist Fred Lander who thinks that there is no need to define terrorist act for two reasons. First, it is a normal crime that could happen in any civilized country. Second, describing terrorism is easier than defining it because a definition requires specifying features of the act (Jasim, 2015: p. 537).

However, the trend in favor of a definition is prevalent in judiciary. Thus, a terrorist act is defined as “the systematic use of extraordinary violence means to achieve political goals such as seizing, maintaining, or practicing power, implemented by a political organization to impact individuals and create an unsafe atmosphere.” (Al-Zarqad, 2007: p.17-18). Others define terrorist act as “an organized and connected violence aims at creating a public threat to a state or a political group committed by an organized group to achieve political goals.” (Al-Maria: p.6). The judiciary adopted the definition which sees terrorist act as “organized military political violence between the state and individuals to achieve a political goal.” (Al-Fatlawi, 2002: p.15).

Furthermore, International Law Commission defined terrorist act in Act 19 of its project submitted to the fortieth round of the United Nations General Assembly as “any criminal act directed toward a specific state to create terror for

its power or for a specific group.” (official site of the United Nations General Assembly).

At the level of Arab legislation, Act 2 of the Egyptian Anti-terrorism law No. (97) in 1992 defined terrorist act as “using violence, threatening, or intimidation to do an individual or group criminal project aiming at disturbing the public order or threatening the safety of the community by hurting people, terrorizing them, exposing their lives or security to danger, harming the environment, communication, transportation, funds, buildings, public or private property, obstructing public authorities, religious houses, or scientific institutes, and disrupting the application of the constitution or laws.”

The Syrian legislation is considered one of the oldest Arabic legislations regarding terrorism as an independent crime. Act 304 of the Syrian Penal Code in 1949 defined terrorist act as “any act which aims at creating terror and committed by means such as bombs, war weapons, burning tools, poisoning products, or epidemiological and bacteriological items which can cause public harm.” (Shabbi, 2005: p.38).

As far as the Iraqi legislature is concerned, the directions of the Ministry of Finance of (compensating martyrs and injured of terrorist acts No.3 in 2005) defined terrorist act as “any criminal act from an individual or an informal group which leads to the martyrdom or disability of citizens to terrorize Iraqi people, incite violence, or harm citizens.” The legislature neglected the most important goal of terrorism, which is achieving political ends, because it is unreasonable for the terrorist to commit these acts just to stir up chaos or harm citizens. On the other hand, Act 1 of the in force anti-terrorism law No.13 in 2005 defined terrorist act as “any criminal act committed by an individual or an organized group to target a person, groups, and official or non-official institutes and harming public or personal money to breach the security situation to achieve terrorism acts.” However, this definition is not safe from criticism because it considers that a terrorist act aims at achieving terrorism acts. The legislature should have omitted the last statement of this definition.

We see that the concept of terrorism act may overlap with converging concepts such as political violence or aggression. We can conclude the following definition based on the discussion above: (terrorism act is any act that harms people or possessions. It is committed by organized groups or independent individuals to achieve political or non-political gain. Such act causes terror and fear to innocents and threatens safety of people regardless of the medium).



Definition of the affected from the terrorist acts

The affected from the terrorist act is any person harmed by the illegal act. But what is the type of this harm? (it should be noted that harm is divided into physical and moral. However, the judiciary prefers to create a third kind, which is bodily harm, and considers it an independent type although it is divided into physical and moral kinds too.) (Al- A'miri, 1981: p.56; Bakir, 2011: p.591). Does absolute harm require compensation in TORT? The Iraqi Civil Law did not specify a particular kind of harm that requires compensation. It required compensation for physical and moral harm (Act 205 of the Iraqi Civil Law states the following: 1- compensation includes moral harm. Any infringement on the person's freedom, honor, reputation, social or financial status makes the culprit responsible of compensation, 2- compensation may go to spouses or relatives of the affected person in case of his death, 3- compensation of moral harm is not transferred unless it is specified by a final verdict.) in three conditions:

- 1- The damage is verified.
- 2- The damage is direct, whether expected or not.
- 3- The damage affects a right or a financial interest of the affected.

Based on the general rules, the following categories deserve a compensation for the damage caused by a terrorism act:

The victim or the affected

The victim is the person who faced a physical or moral damage. The victim deserves compensation when the three conditions mentioned above are available. In fact, we prefer the term 'affected' instead of 'victim' because the former is comprehensive since the victim is not the only one affected by the terrorism act.

Heirs of the affected

The heir can ask for a compensation due to the death of the affected by a terrorism act. In fact, the heir here asks for his right of compensation because the terrorism act caused a physical and abstract harm to him. Perhaps, the most categories deserving of compensation is the heirs whether the affected dies or had a permanent disability. This right is not transferred to the heirs of the heir if he dies unless he asks for his right prior to his death (Jabur, 1998: p.67; Al-U'ji, 2016: p.657).

Reflective affected with financial relations

Creditors do not deserve compensation for the harm that happens to the debtors because (anyone who lends money for a specific time is not considered a reflective affected because the debtor died before paying back his loan since there is no cause connection between the harmful act and the harm. The creditor can get his right from the legacy of the creditor based on the rule “no legacy before paying back debts”) (Jabur, 1998: p.108). Al-Sanhori scholar thinks that (if the legacy is affluent the creditor can take back his right from it. If it is insolvent then the debtor is proved to be insolvent before his death and the creditor is not harmed by the death) (Al-Sanhouri: p.857). We think that there is one case when the creditors can ask for compensation, but in the name of the affected to seduce his financial assets in case of the inaction of the heirs of the affected to ask for compensation. Thus, the legacy might be affluent and creditors can get their debts. Finally, we can define the affected of the terrorist act as any person who is harmed by a terrorist act even if he is not the victim whether this harm is physical or moral.

The Legal Basis of Compensating the Affected from the Terrorist Act

Any society aims at static environment which guaranties safety, which requires the organization of circumstances according to certain principles. Responsibility is one of these principles, including the state responsibility of compensating the affected from terrorist acts because of the large number of these acts and their physical or financial damages. The affected from these acts do not get compensations from the criminals because they either escape or die. Thus, the state is committed to compensate the damage. However, a question might be asked about the lawful basis of this responsibility. Is the state considered negligent in its duty, then it is a mistake and the responsibility becomes a TORT liability? Or is there another basis to follow? We will clarify that in the following sections.

The applicability of TORT rules on the obligation of compensating the affected from the terrorist acts

The importance of compensating the affected from the terrorist acts is not related to the negligence of the criminal liability in achieving deterrence and restraint and not even to the importance of the compensation. It is, rather, related to the nature of the harmful act because the criminal stay anonymous so provisions of criminal and civil liability do not apply. At the same time, the



affected could be left without compensation, which is why rules of compensating the affected are important (Al-Zarqad, 2007: p.32- 33). Before the issuance of the anti-terrorism law No.13 in 2005, the Iraqi legislator was not aware of the terrorism crime as an independent crime that differs from the crimes of the penal law. That was natural because terrorism raved Iraq in 2003 after the change of the last regime. The first terrorist act witnessed in Iraq was bombing the United Nations building in Baghdad on August 19, 2003 when 22 persons killed and a hundred were wounded. The representative of the Secretary-General of the United Nations in Iraq was also killed in this incident and Al Qaeda terrorist organization announced it was responsible for the act. Few days later the big explosion occurred when a large crowd was killed including the martyr Grand Ayatollah Mohammed Baqir Al-Hakeem after Friday

prayer in the Shrine of Imam Ali (P) in Najaf. Then terrorist acts rolled. When the first elected National Assembly was formed based on Iraqi state administration law for the transition phase, the Anti-Terrorism Act No. 13 in 2005 was enacted. Thus, the Iraqi legislator started to recognize the terrorist act as a special kind of crimes.

Since these acts cause harm to people, the right to claim compensation from the defendant should be based on an error in TORT liability. We clarify the application of the rules of this liability on the topic of this study as follows:

First: TORT liability of personal acts in Islamic law

The concept of TORT liability in Islamic law is connected with the idea of guarantee, which means in this context contract guarantee, hand guarantee, or damage guarantee. In this study we are interested in damage guarantee (Abdullah, 2005: p.29; Jabur, 1998: p.13). Furthermore, Islamic law differentiated between crimes of souls and crimes of property. In case of soul crimes there is blood money (i.e. cash paid when the retribution penalty is dropped) (U'oda, 2009: p.215), and government of justice (i.e. compensation is estimated by the judge to any harmful act targeting the soul, whether purposefully or not) (Jabur, 1998: p.14).

Generally, Islamic legislature is summarized by a guarantee to any damage despite willfulness or infringement, which means perception and discrimination (Al-Hakeem, 2007: p.496-497) and the general rules set by Islamic law legislators concerning commitment of compensation when doing damage (the

damage is removed, private damage is heard to pay the public one) (Amin, 2007: p. 2002).

Second: TORT liability of personal acts in the Iraqi civil law

Iraqi civil law specified for TORT liability of personal acts Acts No. 186-217. In order to promote TORT three rules should be achieved. They are damage to the creditors, error of the debtor, and a causal relationship between the damage and the error (Shaheeb & Kadhim, 2017: p.275). The Iraqi legislator starts by examples of TORT trying to match Islamic law with civic law rules. Some of these applications are interesting regarding the topic of this study such as Act 186, Article 1: if somebody damaged the possessions of others he should be guarantor if the action was on purpose. Moreover, Act 202 obliges anyone who does an illegal act on the soul by stating the following: “any action which harms the soul such as murder, injuring, or hitting, or any other kind of harm enjoins the doer of compensations”. Act 203 expanded the scope of compensations by including people supported by the affected. It states that “in case of murder, death from a wound, or any other harmful action, the person who caused the damage is responsible for compensating persons supported by the affected when they are deprived from the support as a result to the murder or death”. To redress the issue, the Iraqi legislator came with Act 204 which states that “any trespass causing harm other than what was mentioned in the previous Acts requires compensation”.

Then, pillars of TORT are three: error from the debtor, harm affecting the creditor, and causal relationship between the error and the damage. Concerning compensating terrorist acts in the current study, error stated in Article 2 of Anti-Terrorism Code No.13 of 2005 stated the following acts as terrorist ones:

- 1- Violence or threat which aims at terrorizing people, threatening the safety of their lives or freedom of danger, or threatening their property with destruction whatever their motives or purposes are. It is committed to achieve an organized individual or group terrorist project.
- 2- Awareness of violence and threat of sabotage, demolition, spoliation, or intentional damage of public property, governmental interests, governmental entities, private or state directorates, or public spaces used by the public and trying to seize these places or depriving people of using them to stir stability and safety.
- 3- Organizing or heading an armed terrorist group which plans for the act and participating in that act.



- 4- Using violence and threatening to stir sectarian strife, civil war, or sectarian fight by arming citizens or inciting and funding them to arm each other.
- 5- Gun assault on army or police departments, volunteer centers, security departments, military camps, or national communication lines.
- 6- Terrorist gun assault on embassies and diplomatic entities in Iraq, Iraqi institutes, Arabic and foreign companies and organizations in Iraq that work in a contract in force.
- 7- Using explosive or incendiary devices to kill or terrorize people in any way including booby-trap, poisonous chemical materials, biological materials, etc.
- 8- Kidnapping or political, sectarian, national, or any other kind of blackmail which threatens national unity and encourages terrorism.

That is why the image of error is clear. The affected has to prove the damage and to specify the wrongdoer because causal relationship in this context assumes an unprovable presumption of the contrary.

Then, if the affected tries to go to court to get compensation he will face obstacles summarized by the following:

First: realistic obstacles

They are represented by the complex situation of the Iraqi society and features of the terrorist crime. These obstacles include the following:

1- Not knowing the perpetrators

Most of the time the investigating authorities cannot specify perpetrators of terrorist acts thus the affected has no particular person to oblige him of compensation (Al-Zarqad, 2007: p.57).

2- Death of perpetrators

The prominent aspect of terrorism is suicide operations that lead to the death of perpetrators. Most of the time it is impossible to recognize the criminals specifically if they are foreigners or burned to death. Moreover, we cannot depend on data published on the internet by the terrorists to identify the perpetrators of terrorist operations.

3- Multiple nationalities of the perpetrators

Many terrorists are foreigners which makes it difficult to sue them, not to mention their death after the terrorist act.

4- Insolvency of the perpetrators

Poverty and lack of job opportunities is one of the sources of terrorism (Al- Hasnawi,

2011: p.131). Usually, terrorism grows in poor environment. Poverty encourages youth to join terrorist organizations especially when they add a religious frame to their activities. Thus, insolvency of perpetrators is considered a cause for not getting any compensation

Second: lawful obstacles

They are summarized as follows:

- 1- Waiting for the criminal case to be resolved. Act 26/2 of Criminal Procedure Law No.23 of 1971 states that “the civil court should suspend the adjudication of the case until getting the decision issued in the criminal case. The civil court has to decide the precautionary and urgent measures”, which means that the civil court cannot decide on the civil lawsuit of crime before the issuance of the decision from the criminal court in order to avoid the conflict of provisions. We should mention that the affected can file a civil case in the criminal court as a shortcut of time and effort. However, this is applicable in terrorist crimes when the accused dies or if the criminal court finds that an additional investigation is needed (amended Act No.19 of criminal trials No.23 of 1971).

- 2- Costs carried by the affected

Usually, the affected are poor; which makes filing a lawsuit expensive since it requires hiring a lawyer and paying executive fees.

- 3- Long and complicated civil procedures

Civil procedures takes a long time and they are complicated because they may be postponed more than once. Moreover, compensation cases are often referred to an expert to estimate the compensation, and opponents can object the decision of the expert (Order of the Court of Cassation No.2161/ Appellate Body/ 2013 on September 15, 2013 “the compensation court decision is not based on one side of the opponents but rather the court decides based on the report of the expert.”). Then cassation may take a long time. After the court decision, another complicated procedure starts for executing the decision. With the insolvency of the perpetrators, it becomes very difficult to enact the compensation decision. All of this exhausts the affected and wastes his time.

- 4- Assign the plaintiff to prove the error sometimes

The damage action can be proved in criminal courts (Shaheeb & Jawad, 2017:p.262), but sometimes the criminal lawsuit expires for any reason and the affected has nothing other than going to the civil courts (Act 28 of the revised criminal courts law No.23



of 1971). In the civil courts the affected have to prove the error, the damage, and the causal relationship based on Iraqi Law of Evidence No.107 of 1979, Article 7.

These are some of the obstacles faced by the affected from terrorist acts when they try to get compensation through civil courts with the aid of TORT liability.

The applicability of physical liability rules on the obligation of compensating the affected from the terrorist acts

After clarifying the negligence of TORT liability in compensating the affected, it becomes necessary to find alternatives such as state responsibility since it guarantees the safety of its citizens and residents of its sovereign region. Without this protection, chaos reigns. Thus, punishment is not enough without removing the damage by a compensation. The state becomes responsible if the perpetrator cannot afford it or in case of terrorist detonating himself. That is what we will clarify in the following section in two parts. Part one clarifies material liability and part two explains the perception of judiciary and legislation concerning the state's commitment of compensating the affected from terrorist acts.

The concept of material liability

The judiciary tried to define material liability but not in detail because it is confused with legal liability. However, both are based on the damage; but material liability is more comprehensive. Legal liability requires an action or the possession of something dangerous, unlike material liability which occurs without an action (Al-Abboudi: p.5; Abdullah, 2005: p.28).

Although definitions of material liability differ, but the jurists agree on the content of this liability. Some of them (Taha, 1979: p.143) defines it as "the liability of any person who commits an act that harms others without a need to look for the error."

Others (Marqas, 1988: p.120) defines it as "the responsibility for the damage without looking at the behavior or the goal of the perpetrator."

It is also defined as "the responsibility which requires the doer to compensate the affected even if he did not do an error." (Althanoon, 1984: p.35).

Others defined it as "the responsibility which is based on the damage and it does not admit error as part of liability. The affected has to prove the damage and the causal relationship between the damage and the harmful act." (Salman, 1983: p.268).

Another definition states that it is the “responsibility which requires the responsible to compensate any damage even if he commits no error.” (Al-Abboudi, 2010:p.5).

This liability is not based on error, damage, or causal relationship; but rather on the existence of the damage because civil liability is far from the idea of punishment. The goal is not to punish the doer but to redeem the action and remove the effects of the damage.

Jurisprudence and legislations position from the state’s commitment to compensate the affected from terrorist acts

The state’s activity is not anymore limited to its traditional duty in terms of security, politics, and economy. It rather covers all sides of life; which is why all executive and lawful bases were reformed. Hence, the judiciary is divided into two points: one sees it possible to sue abstract persons on a civil bases; and the second thinks it is impossible to do that. Thus, the state’s commitment to compensate the affected from terrorist acts led to a wide argument because some jurists are affected by the Islamic law and Hammurabi law and they support material compensation, whereas others do not. This argument is reflected on the legislation; which is why we will discuss all these points.

First: Hammurabi law

Act 23 of Hammurabi law required the governor to help the victims of robbery by paying a compensation if the thief was unknown or if he was escape (Amin, 2007: p.18). Moreover, Act 24 of this law required the governor to pay the family of the victim if the murderer is unknown (p.18).

Second: Islamic law

Muslims’ treasury paid the blood money if the culprit was unknown or insolvent, or if his family cannot afford to pay, based on the principle of social solidarity and the prophet’s saying “I am the heir of the one who has no heir.” (Al-Maria: p.11).

Third: the judiciary position

Margery Fray was the first to call for state’s responsibility towards victims of war crimes because of its negligence in keeping security. Then there was a requirement to have the state compensate these victims. Several conferences were held to discuss this issue on top of which was the International Prisons Conference



in Paris in 1895. Then there was the International Prisons Conference in Belgium in 1900 which recommended the states' commitment of compensating the victims. On the other hand, the ministerial committee in the European council in 1977 recommended that governments of member states consider cases when it is impossible for victims to get compensation (Al-Maria: p.11-13). Concerning the perception of the Arabic judiciary, it was divided into two divisions. The first opposes the idea of compensating the affected from terrorist acts by the state (Al-Qaisi, 2011: p.23; Saiyab, 2012: p.42). Followers of this view assure the sufficiency of the compensation system of the personal liability of the culprit. This view is based on the following justifications:

- 1- The state's commitment of compensating the affected from terrorist acts discriminates other affected people from natural disasters, work dangers, idleness, etc.
- 2- Innocent people bear the compensation of damages that occurred to others based on social solidarity. Not all people are victims, and this compensation may burden the state's budget.
- 3- Wasting the principle of individual liability which is based on error and aims at deterring wrongdoers because when the culprit knows that the state will compensate, he will keep up doing these acts.

The other view (Al-Fiqhi, 2003: p.68-79; Al-Abboudi, 2010: p.544) supports the state's compensation the affected from terrorist acts because these acts causes huge damages to people. The state does not necessarily commit an error. It is committed according to the law because this is a material responsibility since the damage occurred due to military and terrorist operations. This view is based on the following justifications:

- 1- Inadmissibility of individuals getting justice to themselves because the state is committed to protect the system and the security. If a crime takes place, it means a breach in the state's obligation.
- 2- The state is the heir to the one who has no heir, which obliges the state to compensate the damage.
- 3- The basis of state's compensation responsibility is legal. In other words, compensation is a pure right of the affected who can ask the state to provide it despite the affected financial needs. The state has no right to pretend it has many financial burdens.

We should enquire here: what is the state's error which obliges it of compensation? Are terrorist operations the fault of the state? To answer these two questions we think that the error is "a negligence of a legal duty not to harm others." (Al-Hakeem, 2007: p.489). based on this type of error, does the state commit an error that requires compensation when a terrorist operation takes place? Here we should define facility error committed by the management, which is "the management error represented by lack of follow up and supervision." (Al-Tammawi, 1961: p.901). Thus, the state's negligence in doing its duty is considered as an error. Arbitrarily, safety and public order is one of the historical duties of the state. Recently, there appeared the idea of the guarding state since every terrorist operation is considered a negligence in the duty of the state in securing safety. This duty belongs to the state solely and individuals cannot achieve it. That was before issuing the first amendment of Code No.20 of 2009. After the amendment, martyrs of the Public Mobilization Force and Peshmerga were added to victims of terrorism and military mistakes. In other words, the law seeks lifting injustice and damage. This is the core of material liability.

We, in our turn, support the second view because the state's commitment of compensating the affected aims at removing injustice. The basis of state's responsibility results from two things:

First: hypothesis of the material liability

The state is obliged to compensate anyone who is affected by a terrorist act because this liability aims at removing the damage by compensating it.

Second: the idea of social insurance

This is the position of Islamic law because it considered the insolvency of the perpetrator as an obligation to the state to compensate victims.

Assessment of the perception of the Iraqi legislation of obliging the state

of compensation the affected from the terrorist acts

Terrorist acts represent a prominent topic in Arabic environment because of the big number of armed violence incidents committed by terrorist organizations. Iraq is one of the countries which have undergone such acts. Compensation is the least to offer to the affected to redeem their damage. Thus, this section is divided into two parts. The first one explains the commitment of the Iraqi state to compensate the affected from the terrorist act. The second one investigates the mean to give a fair suitable compensation to the affected.



The Iraqi state's commitment to compensating the affected from the terrorist acts

Chaos, instability, and insecurity occur unless every person becomes responsible of his acts because whenever lack of commitment is available chaos appears and security deteriorates. Logically, whenever a new phenomenon appears, law should progress to cover all damages especially these affecting thousands of people. In this section we will discuss the perception of the Iraqi legislation to reduce terrorist acts and compensate the affected.

First: compensating terrorism victims according to Order No.10 of 2004

With the fast pace of terrorist operations, the ministers' council issued order No.10 of 2004 which included five items. The first two items were specified to martyrs and wounded of the security forces and their families. Item three discussed compensating citizens who die or get injured in a terrorist act while they were at the gates of the army and police centers. Item four is concerned with citizens in general. It states that "any martyr from citizens, or anyone who gets a permanent disability due to a terrorist act gets a suitable compensation after determining the concept of the terrorist act and the amount of compensation according to directions from the Minister of Finance approved by the prime minister." However, it was best if the definition of the terrorist act was the same because it has to include citizens in the compensation.

Based on this order, the Minister of Finance issued directions No.3 of 2005 (i.e. directions of compensating martyrs and wounded of terrorist operations) whose first Act defined terrorist act and its second Act specified the amount of compensation which is approximately 2.500.000 IQD to the family of the martyr, 2.000.000 IQD to the person with disability, and 500.000 IQD to the one who has 50% disability based on a formal medical report. What is taken against these directions is the small amount of compensation which does not match the big loss of the family of the martyr.

Second: compensation according to law No.20 of 2009

This law (of compensating the affected by war operations, military mistakes, and terrorist operations) was more detailed than order No.10 of 2004. Its new principles are:

- 1- Determining compensation for ordinary people. Its first Act states that "the goal of this law is to compensate an ordinary person who is affected by war operations, military mistakes, and terrorist operations; determine the damage,

its compensation, and the way of asking for it.” Which means the law does not approve compensation of abstract persons who are affected in their property.

- 2- The law limited five forms of damages to be compensated according to Article They are:
 - a. Martyrdom and loss in the operations mentioned in this law.
 - b. Total or partial disability based on an expert medical report.
 - c. Other injuries which need temporary treatment based on the special medical committee report.
 - d. Property damages.
 - e. Damages related to study and work.
- 3- The law stated the formation of a central committee and sub-committees in provinces and in Kurdistan region to verify paperwork and submit recommendations regarding compensations.
- 4- Act 8 states the impermissibility of combining compensations if the previous compensation is less than the state will pay the difference.
- 5- Beneficiaries of the martyr include parents. Sons, daughters, spouses, and siblings. The legislature here is criticized concerning other categories such as creditors, etc.
- 6- Increase the compensation compared to Order No10 of 2004.

Third: compensation according to the first amendment of law No.20 of 2009

Law No.57 of 2015 was the first amendment of the first law of compensating the affected by war operations, military mistakes, and terrorist operations No. 20 of 2009. It did not change the general framework of the law. Its main amendments are:

- 1- Act 1/1st gives abstract persons compensations like ordinary people. Thus, it redeemed the criticism of the first law due to neglecting the compensation of abstract persons.
- 2- Add wounded of PMF and Peshmerga to the list of beneficiaries according to Act 1/1st of the law.
- 3- Create a department in the martyr institute to follow up issues of martyrs and wounded included in the provisions of the law.
- 4- Grant the right to object for the affected and the court decision is subject to



appeal before the Supreme Administrative Court.

- 5- Allocate a monthly salary up to three times the minimum of the retirement salary stated in the united retirement law No.9 of 2014 to the family of the martyr or the injured who is 75%-100% disabled. If the injured dies the salary goes to his beneficiaries.
- 6- Allocate a house, an apartment, or a piece of land to the martyr's wife and children. Moreover, a piece of land is allocated to the martyr's parents. If the implementation is not possible then beneficiaries get 50.000.000 IQD with an exemption from the Real State registration fees.
- 7- Allow the martyr's family to select work place once. Moreover, the law obliges ministries of allocating 10% of jobs to martyr's families. The same percentage is allocated to study seats, and they are exempted from travel expenses once for study or treatment purposes.
- 8- As a moral compensation, Act 12/1st created 'martyrdom medal' to the martyr's family.

Note that this law considered the moral compensation. Furthermore, compensations are larger than they seem suitable in term of the current economy.

Fourth: compensation according to the second amendment of law No.20 of 2009

Law No.2 of 2020 was the second amendment of the law of compensating the affected by war operations, military mistakes, and terrorist operations No. 20 of 2009 (published in Al-Waqai'I Al-Iraqia, issue 4571 on January 13, 2020). It is the law in force which deals with compensating victims of terrorism. It came as an amendment to the previous law. Its main amendments are:

- 1- Increase number of central committees specialized in compensating the affected. They are three instead of one (Act 1/1st of Law No.2 of 2020), making sure that the committees meet three weekly meetings instead of once (Act 3 of the same law).
- 2- Create sub-committees, one in each province, and three committees in provinces where war operations or terrorist operations took place. Furthermore, create secretarial offices in these committees directed by a staff member from the Martyrs Foundation (Act 1/2nd and Act 4/3rd of the same law).
- 3- The right to oppose the compensation decisions of the central committee in front

of the Administrative Court. The court's decision is subject to appeal before the Supreme Administrative Court. Moreover, the objection time is extended to 60 days instead of 30 (Act 5 of the same law).

- 4- Include indirect siblings of the martyrs in the retirement salary if the martyr was bachelor, divorced, widower, or his parents died before him.
- 5- The married widow of the martyr who has no job and has kids from the martyr deserves a retirement salary equals the minimum of the united retirement salary. If the re-married widow is unemployed and has no kids she deserves a retirement salary equals the minimum of the united retirement salary if the martyr's parents are dead and the rest goes to the siblings. If she is unmarried she gets half the minimum of the united retirement salary and the rest goes to the siblings (Act 7/3rd of the same law).
- 6- If the martyr has more than one wife, each one of them and her children take the same rights of the family (Act 7/4th of the same law).
- 7- Increase privileges to every included person in the provisions of Law No.20 of 2009 such as the right to change job title based on the degree and evaluation of the graduate degree is exempted from directions No.5 of 1976.
- 8- Oblige the Directorate of Studies and Planning in the Ministry of Higher Education and Scientific Research to give all categories of martyrs (the last regime, terrorism victims, PMF, and Peshmerga) 10% of study seats in the morning studies and 10% in the evening studies (Act 8 of the same law).
- 9- Facilitate the issuance of death certificates if his family cannot issue them (Act 4/2nd of the same law).
- 10- Oblige sub-committees of submitting recommendations to the prosecutors to verify if they meet the law (Act 11 of the same law).

To conclude, this law simplified the procedures of compensating the affected from terrorist acts by increasing number of central and sub-committees to receive applications. Thus, the basis of the state's commitment to compensate the affected relies on the rules of material liability which aims at achieving social justice. The state guarantees safety of all people and their compensations.



Suggestive solutions to a best compensation for the affected from the terrorist acts

After studying all the obstacles facing the affected to get appropriate compensation, and after exploring the way Iraqi state compensates the affected, its laws, and their amendments, there remains the question whether the state alone carries the burden of compensation; and whether reasons and lawful obstacles are sufficient to exempt the terrorist of his responsibility towards the affected. The logical answer should be negative because part of the error is carried by the state whereas the other part should be compensated by the wrongdoer.

The first amendment of Law No.20 of 2009 included martyrs of the PMF and Peshmerga to the victims of terrorism and military mistakes to lift injustice and damage.

The international political circumstances and the position of Iraq against the struggles do not allow the legislation of a law similar to JASTA law legislated lately by the American congress. JASTA gives the American judiciary the power to sue terrorism supporters. However, we can amend current laws to get an easier compensation process. These amendments, though, cannot be applied retroactively on lawsuits which got final judgements. We should also argue the possibility of trying foreigners and obliging them of compensation since many of them have Arabic identities. This issue raises an enquiry about getting a compensation from these criminals without legislating a law like JASTA. To answer this enquiry we stated the following:

- 1- Iraqi criminal courts have full jurisdiction over crimes committed in Iraq, then they can try non-Iraqi terrorists and oblige them of compensation. The mechanism of this compensation is explained in item 4 below.
- 2- Iraqi courts have full jurisdiction over crimes committed outside Iraq if they affect the country's internal or external security.
- 3- Civil courts have full jurisdiction over incidents inside Iraq.
- 4- Concerning the enactment of Iraqi courts' provisions in an Arabic state, Iraq approved the contract on October 30, 1985 which refers to cases where Acts of Arabic states are not applied in other states.

We have tried to deal with the possibility of compensation judgement over the foreign terrorist. We suggest three amendments to some Acts in force to

facilitate the compensation of the affected and to solve some problems and obstacles. The suggestions are:

First: automatic award of compensation

The crime of rape, if the victim is virgin, is a cause for compensation which is judged automatically without a request from the victim (Act 394/3 of the Iraqi panel law No.111 of 1969). The amendment we suggest is to add what is similar to this Act to the Anti-Terrorism Law No.13 of 2005 to oblige the court to issue compensation decision with a criminalization decision against terrorists. What if the judgement was sentenced in absentia because the authorities could not arrest the criminal? Act 254/D of the Criminal Courts Origins No.23 of 1971 answers this question by stating the following: "the judgement can be sentenced in absentia for compensation. The accused can submit a warranty unless he is exempted by the court." Act 4 of the Anti-Terrorism Law No.13 of 2005 can be amended by adding the penalty of confiscation of movable and immovable property of the terrorist and compensating the affected out of this property to shorten time and implementation procedures and to deter terrorists.

These two amendments avoid the complications of the civil judiciary and lead to the debtor insolvency, thus there is no need to civil compensation enquiry. It is sufficient to confiscate his property and state the compensation at the same court decision. We have three cases here. If the confiscated property is equal to the compensation, then it goes all to the compensation. If it is bigger, then the rest goes to the public treasury. If the confiscated property is less than the compensation, then the state pays the rest of the compensation.

Second: plead the affected by the legal department in the Martyrs Foundation Act No. 57 of 2015 (1st amendment of the law of compensating the affected from war operations, military mistakes, and terrorist operations No.20 of 2009) stated in Article 2 of Act 1 "providing care and facilitation to those included in the provisions of this law...". The main facilitations in the law side is providing lawyers to ask for compensation because in most cases the culprit is dead, which causes the expiration of the criminal case. Then, the criminal court cannot judge automatic compensation. Thus, the affected has no choice other than the civil court. Adding an amendment to law No.20 of 2009 to oblige the legal department in the Martyrs Foundation to provide lawyers to plead the affected can lift this burden.



Third: oblige the state of additional compensation if the perpetrators run away or in case of their insolvency

We suggest an amendment of giving additional compensations if the security services cannot seize the criminals. This compensation, as we see, is related to the state's TORT liability in doing its duty and to the idea of social solidarity.

Conclusion

In this section, we presents the main results and suggestions of the study.

Results

- 1- The best definition of terrorist act states that “it is any act which causes damages to souls and property committed by an organized group or individualsto gain political or non-political benefits. This act can spread terror and fear among the innocents and can threaten security and safety of people despite themean used to do it.”
- 2- The victim is the person who faces material or moral damage. Victims deservecompensation. We prefer say ‘affected’ instead of ‘victim’ because the formerterm is more comprehensive since the victim is not the only one who is affectedby the terrorist act. Thus, the affected from the terrorist act is “any person whois harmed by a terrorist act even if he is not the victim, whether this damage ismaterial or moral.”
- 3- Negligence of TORT rules to comprehend the compensation of the affected from the terrorist act and their protection because it is difficult to prove the error of the wrongdoer who is unknown.
- 4- The hypothesis of the material responsibility in compensating the affected is one of the recent hypotheses which does not care for anything other than obliging the state of compensating the affected.
- 5- There are many practical and lawful obstacles and problems which face the affected when he goes to civil courts to ask for compensation, which is why itis necessary to find alternative means for compensation.

Suggestions

We hope that the Iraqi legislator does the required amendments to the laws in force to do more justice to the victims of terrorist operations through the following:

- 1- State a description to the Iraqi civil law as a general description of compensation as follows:
 - a. The state is responsible for compensating the affected for any harm if the he cannot get compensation. The state can go to the person who caused the damage. The state is the only entity which is responsible for compensation according to the application of the provisions of material liability which is based on justice and social insurance.
 - b. It is not possible to agree on exemption from material liability. Any agreement which opposes the statement is inactive.
- 2- Amend the Anti-Terrorism Law and state automatic compensation through criminal law. The verdict is enforced after the final court decision.
- 3- Amend the law of compensating the affected from war operations, military mistakes, and terrorist operations No.20 of 2009 to make the legal department in the Martyrs Foundation responsible of providing lawyers to plead the affected and ask for compensation.
- 4- Consider changing effect because the case of the affected may deteriorate after filing the case.
- 5- Include families of the lost persons in the allocation of houses and lands.
- 6- Treat the injured outside Iraq as an abstract compensation for the damage and reconstruct damaged houses.
- 7- Encourage the Ministry of Foreign Affairs and the Ministry of Justice to enact the Arabic Riyadh Agreement of Judiciary Cooperation by applying the provisions of the Iraqi judiciary on civils property by compensations from the Arabic nationalities.



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