

Vicarious Liability as a Path to Justice: Overcoming ISCT's Reparation Failures in the Case of Barzani Genocide

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Abstract

The 1983 Barzani genocide stands as a dark chapter in the history of the Kurdish people in Iraq, marking a brutal campaign that targeted thousands of innocent members of the Barzani community. This tragic event is one of the most catastrophic episodes experienced by the Kurdish people in the late twentieth century. Following the outbreak of the Iran-Iraq war, the Ba'athist regime saw an opportunity to suppress the Kurdish movement, particularly the leadership of the Barzani family. The regime aimed to send a chilling message to the entire Kurdish population, warning that similar atrocities could befall them if they continued to pursue their national liberation movement. After the Ba'athist regime was overthrown in 2003, survivors of the genocide began to hope for justice, anticipating that those responsible for the atrocities would be held accountable. The establishment of the Iraqi Supreme Criminal Tribunal (ISCT) was intended to address the mass human rights violations committed by the regime between 1968 and 2003 and to ensure that justice would finally be served. However, despite the high expectations and the profound significance of the Tribunal's mission, the victims' right to reparation was ultimately neglected. This research, employing an analytical qualitative method, investigates the socio-political circumstances that led to the creation of the ISCT. It argues that to address the gap left by the failure to provide reparations, an alternative approach is needed. This alternative is reflected in the concept of the state's vicarious liability, which could serve as a means to deliver the justice that has so far eluded the survivors of the Barzani genocide.

Key words: Barzani genocide, vicarious liability, reparation, responsibility, compensation.

1. Introduction:

In earlier times, a state's primary responsibilities were centered on protecting its citizens from foreign aggressions and maintaining social order¹. The concept of sovereign immunity emerged from this framework, effectively prohibiting individuals from bringing 'claims against government without its own consent'². As H. al-Zanoon argues, during the codification of the French Civil Code in the early nineteenth century (1804), the prevailing view of individuals' rights in relation to the state was markedly limited. In the event of a natural disaster or a catastrophe beyond human control, individuals had little recourse other than to express their grief through lamentations and minor displays, hoping for emotional sympathy and condolences from others. In the face of unpredictable and disastrous calamities that impacted individual or collective interests, the idea of government-provided administrative assistance was not yet part of the state's responsibilities. Instead, any involvement by state-backed agencies or charitable institutions was viewed as voluntary humanitarian aid and a gesture of collective condolence rather than an expression of state accountability. Consequently, these agencies were not legally obligated to provide tangible reparations or supportive remedies to those affected, reflecting a broader understanding of state responsibility that was limited to defense and order rather than the welfare of its citizens

¹ Nauman Ahmed al-Khatib, *The Mediator in Political Systems and Constitutional Law*, 12th ed. (Jordan: Dar al-Thaqafe, 2012), 102.

² John W. Miller II, "Sovereign Immunity: The King Can Do No Wrong", *American Journal of Trial Advocacy* vol. 8, no. 3 (Spring 1985): 472.

in times of crisis.³

However, in the past two centuries, the state-centered paradigm has undergone significant transformation, increasingly shifting in favor of individual rights. Many civilized nations have prioritized individual interests over the once-omnipotent power of the state, achieved through democratic or other mechanisms. This shift has led to a notable recognition of legal frameworks that empower citizens to hold state officials and employees accountable for unlawful actions. It also imposes an obligation on state institutions to provide adequate reparations in cases of human rights violations. Given the current landscape, it is evident that this shift is crucial at both national and international levels. Among other changes, this transformation has included the implementation of robust legislative measures to prosecute state actors for misconduct and to ensure victims receive appropriate compensation.⁴

In recent Iraqi history, nevertheless, this right has not been recognized. Despite more than fifty years passing since the implementation of the Iraqi Civil Code (1951-2003), the Statute of the Iraqi Special Tribunal (ISCT), established in 2003 to prosecute senior officials of the former regime for their actions during the Barzani genocide, failed to incorporate the imperative of reparation under either national law (Civil Code) or the principles of international law. This omission has created a significant legal gap that needs to be addressed to ensure justice for the victims of genocide in Iraq. To tackle this issue, this article examines the Iraqi legal system as the primary source of the right to reparation, assessing the applicability of national laws in addressing genocidal actions relevant to the Barzani case. It will then critically analyze the Iraqi state's adherence to international law standards concerning the right to reparation for gross human rights violations and propose a national strategy to rectify this issue.

Given the shortcomings outlined below, this study explores several critical issues concerning the right to reparation in Iraq, with a particular focus on the ISCT's failure to uphold this right. It examines the contextual factors that led to the creation of the ISCT and identifies the flaws within its jurisdictional framework. The research also confronts the harsh realities of genocide and the absence of reparations, exploring the Iraqi government's liability and the right to reparation. Additionally, it investigates the intersection of state liability and the right to reparation, specifically addressing the legal framework of vicarious liability for human rights abuses. This exploration seeks to establish the applicability of the doctrine of civil liability in this context, acknowledging legal responsibility for the actions of others. The article further discusses the state's vicarious liability under the Iraqi Civil Code, detailing its requirements and scrutinizing issues of complicity and the consequences of applying this doctrine in the case of the Barzani genocide.

2. Examining the ISCT's Failure to Uphold the Right to Reparation

The following sections will explore the legacy of the ISCT. It aims to contextualize the factors that led to its establishment and explains why the jurisdiction of the Tribunal is not flawless, specifically in its approach to administer right to reparation for genocide survivors.

2.1. The Contextual Factors that Led to the Establishment of the ISCT

According to the Statute of the ISCT,⁵ the primary objective behind its establishment was to facilitate and advance the ongoing reconciliation process among Iraq's diverse ethnic groups. Additionally, promoting peace within the Iraqi community, though perhaps not overtly stated, appears to have been a significant goal of the Tribunal, achieved by confronting the nation's violent and tumultuous past. This objective is a critical element of transitional justice following regime changes, and is often emphasized, explicitly or implicitly, by all ad hoc tribunals. However, this strategic aim has not been adequately realized in the years since. In this context, it is important to briefly discuss the nature and scope of the international crimes committed against the Kurds, which demanded both personal and governmental accountability before a national tribunal.

Iraq did not emerge through a conventional process and has never fully embodied the aspirations of all its citizens. Throughout its history, the central government has consistently practiced injustice and human rights abuses against certain groups. Following its establishment and full independence from British mandate in 1932, Iraq was beset by complex internal tensions and tribal-based conflicts, largely driven by political motives.⁶ These conflicts led to severe humanitarian crises

³ Maysoon Ali Abd Al-Hadi, "The Administrative Responsibility based on the Ground of Vicarious liability", Article, May 2019. Available at: <https://www.researchgate.net/publication/332936134/pdf>, 3-4.

⁴ The long-standing notion that 'the king could do no wrong', which had been accepted worldwide for centuries, was overturned. This marked a significant shift towards accountability, as the king was no longer allowed to commit cruel acts with impunity. Under the new paradigm of law and human rights, the king was obligated to rectify any wrongdoings committed by his staff or apparatuses. This concept is drawn from John W. Miller II, "Sovereign Immunity", 471.

⁵ Article 1, Statute of the Iraqi Special Tribunal.

⁶ To conduct comprehensive investigations into the bloody history of Iraq and its political instability throughout history, the following resources are helpful: Baqir Yaseen, *History of Bloody Violence in Iraq: Facts, Grounds and Solutions* (Beirut: Al-Kuniz Al-adabiya,

for the country's ethnic and religious communities, perpetuating a cycle of segregation in political and governance processes. This pattern of division was especially pronounced during the Ba'athist regime, which maintained a firm grip on power from July 1968 until March 2003. For over three decades, Saddam Hussein and his regime established a tightly controlled fascist system under the guise of Ba'athism.⁷ They employed brutally aggressive state strategies, including a distinctive policy of 'terror and reward,' leading to the disappearance of over 300,000 Iraqis, including many Kurds, as reported by the International Center for Transitional Justice (ICTJ).⁸

The Kurdish population in southern Kurdistan faced systematic and unprecedented aggression from the central government. The state not only sought to restrict the Kurds' way of life in their homeland but also engaged in widespread sabotage, leading to the destruction of nearly 4,000 out of 4,655 Kurdish villages. These villages, which were the heart of Kurdish agriculture and culture, were systematically demolished, and their residents were forcibly displaced. When the Ba'athist regime realized that the international community would not hold them accountable for their atrocities against the Barzanis in 1983, they escalated their brutality. Thousands of innocent civilians in Halabja were subjected to horrific chemical attacks and bombardments, resulting in the immediate deaths of 5,000 Kurdish men, women, and children.⁹ By July 1988, 45,000 out of 75,000 square kilometers of Kurdistan had been ravaged.¹⁰ The genocidal campaign, known as the Anfal operation, involved intensive military assaults on Kurdish highland areas from 1977 to 1988, leading to the deaths of over 182,000 Kurds. Additionally, between 1969 and the 1980s, the regime forcibly displaced 11,694 Kurdish families,¹¹ along with other ethnic groups, from the oil-rich province of Kirkuk. These displaced populations were replaced by Arabs from southern Iraq, further exacerbating the demographic and cultural upheaval in the region.¹²

In the early 1990s, Human Rights Watch (HRW) asserted that the international community had a legal obligation to prosecute those responsible for the Kurdish genocide and to take all necessary measures to prevent its recurrence.¹³ Based on their findings, HRW identified two potential mechanisms for holding the Iraqi state accountable. One option was to file a petition against the Ba'athist regime before the International Court of Justice (ICJ). The alternative was to urge the UN Security Council to act promptly under the Genocide Convention, which assigns the Council the responsibility for preventing genocidal acts committed by member states, as outlined in Articles I and VIII of the Convention.

Regrettably, all attempts to garner international and regional support for prosecuting the perpetrators of the Kurdish genocide were unsuccessful.¹⁴ Western countries, prioritizing their own political interests, firmly opposed such prosecutorial measures. Their focus remained on implementing containment strategies against the Iraqi regime, a stance that persisted until the seismic shift in U.S. and allied policies following the September 11, 2001 attacks. The U.S. adopted a position of forceful intervention in Iraq, driven by its strategic interests.¹⁵ Conversely, Iraq's judicial system functioned more like a network of special courts than a system of constitutional courts accessible to all citizens with fairness.¹⁶ The routine application of capital punishment and the pervasive surveillance by Ba'athist security networks underscored the judiciary's passivity. In this context, holding high-ranking Iraqi officials accountable became crucial for establishing justice during the transitional phase after Saddam Hussein's removal in 2003. To address this need, the U.S.-led Coalition established the Iraq Special Tribunal (IST). However, the politicization and lack of independence that characterized Iraq's bureaucratic institutions continued to plague the judicial system even after the Ba'athists were ousted. Consequently, the IST faced significant political and ethnic challenges in achieving its goals of justice and reconciliation among Iraq's diverse ethnic groups.

1999), in particular chapter eight from p. 267 onwards; [Edwin Black](#), *Banking on Baghdad: Inside Iraq's 7,000-year History of War, Profit, and Conflict* (New Jersey: John Wiley & Sons, Inc., 2004), specifically the third and fourth parts of the book.

⁷ For understanding of the ideological principles of Ba'athism, see: Suzan Karim Mustafa, *Ba'athism and the Kurds* (Sulaymaniyah: Bir u Hoshiyari, 2007), 75-107.

⁸ *International Center for Transitional Justice*, ICTJ Briefing Paper Creation and First Trials of the Iraqi Supreme Criminal Tribunal, October 2005, 4.

⁹ Michael Rubin, "Are Kurds a Pariah Minority?" *Social Research*, vol. 70, no. 1 (2003): 295-330.

¹⁰ Gareth R. V. Stansfield, *Iraqi Kurdistan: Political Development and Emergent Democracy* (London: Routledge Curzon, 2003), 46.

¹¹ Hazhar Aziz Surme, *Kurds, Genocide and Apartheid: International Law Perspective* (Kurdistan: Mukryani Publishing Institution, 2006), 63-66.

¹² Karim, *Ba'athism*, 242.

¹³ Human Rights Watch, *Genocide in Iraq: The Anfal Campaign Against the Kurds, A Middle East Watch Report* (USA: Human Rights Watch, 1993), xviii.

¹⁴ *Ibid*, xviii-xix.

¹⁵ Hamid al-Bayati, *From Dictatorship to Democracy: An Insider's Account of the Iraqi Opposition to Saddam* (USA: University of Pennsylvania Press, 2011), 7.

¹⁶ Surme, *Kurds*, 53-55.

2.2. Unpacking the Flaws in the Iraqi High Tribunal's Jurisdictional Framework

As Judge Saedi would contend, following the removal of the Ba'ath regime from power in Iraq, there was a pressing ethical obligation to prioritize the 'superiority of the law' over acts of retribution. In response to this imperative, the IST was established with the aim of administering justice and holding high-ranking Iraqi officials accountable for their crimes.¹⁷ While the dismantling of tyrannical regimes is undoubtedly crucial, it is equally important to address another key issue: the need for a robust and effective mechanism to administer justice and provide victims with both financial and moral compensation. This issue must not be relegated to a secondary concern, as ensuring justice and upholding the rights of victims are fundamental to the integrity of the transitional justice process.

In reality, the inception of the IST in 2003 represented a significant milestone for international criminal justice advocates, continuing the legacy of the international community's institutional efforts¹⁸ to impose individual criminal liability that began with the Nuremberg and Tokyo tribunals.¹⁹ Following the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) in the early 1990s, the IST marked a notable advancement in addressing the criminal accountability of those involved in Saddam Hussein's regime. It appeared to signal a major transformation in national justice frameworks. However, the IST fell short of adopting a victim-centered approach. Its focus largely excluded remedial measures and the state's civil liability to compensate for the pecuniary and non-pecuniary losses incurred during the Kurdish genocide. This narrow approach to justice, which emphasized prosecution over redress, contributed to a pervasive sense of disillusionment and hindered genuine reconciliation. The lack of comprehensive support for victims not only prolonged their suffering but also broadened the scope of their ongoing hardships.

Obviously, Genuine reconciliation cannot be achieved without embracing a holistic conception of justice, which encompasses not only reparation for mass atrocities but also penal punishments.²⁰ In general terms, reconciliation involves more than simply prosecuting perpetrators through ordinary or special tribunals to prevent future atrocities. It extends to a comprehensive process whereby former adversaries set aside their grievances, renounce vengeance, and commit to a shared ideal of community.²¹ In this sense, effective post-conflict reconciliation initiatives must include efforts to restore the 'self-identity' of victims by addressing non-pecuniary losses and supporting their psychological and emotional recovery. This entails implementing measures to rehabilitate mental health and honor the victims' self-conception following trauma. Such initiatives are essential for fostering a genuine and lasting reconciliation that acknowledges and repairs the deep-seated wounds of past conflicts.²²

Thus, preparations for judicial prosecutions against Ba'athist officials began with the announcement by the Coalition Provisional Authority (CPA) on July 13, 2003, establishing the Iraqi Governing Council (IGC). The IGC later assumed responsibility for setting up a special tribunal. During this period, numerous proposals and significant international deliberations were considered regarding the model of justice for post-Saddam Iraq. Both Iraqi representatives and the Coalition Provisional Authority (CPA) meticulously examined these proposals to determine the most effective approach to administering justice in the new political landscape.²³

Initially, considerable efforts and advocacy from human rights groups were directed toward the idea of prosecuting Ba'ath Party officials before an international tribunal.²⁴ Many prominent legal experts also supported the creation of an internationalized criminal tribunal, believing it could address the challenges posed by Iraq's debilitated and corrupt

¹⁷ Ra'id Juhi al-Saedi, "Investigative Integration of the Code of the Higher Iraqi Criminal Court and the General Principles of the Iraqi Penal Code: Basic Outcomes", *Case Western Reserve Journal of International Law*, vol. 40, Nos 1.,2, (2007-2008): 265-270.

¹⁸ Ilias Bantekas, "The Iraqi Special Tribunal for Crimes against Humanity", *International and Comparative Law Quarterly*, vol. 54, no. 1 (2005): 237.

¹⁹ Anna Triponel, "Can the Iraqi Special Tribunal Further Reconciliation in Iraq?", *Cardozo Journal of International and Comparative Law*, vol. 15, no. 2 (2007): 280.

²⁰ Although the importance of reparative programmes has been retained and is increasing recognition worldwide to alleviate the tribulations that have aggrieved victims and disrupted their course of life irrecoverably, the ISCT avoided seeking this objective of justice to bolster the process of reconciliation.

²¹ Laurel E. Fletcher and Harvey M. Weinstein, "Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors", *Berkeley Journal of International Law*, vol. 18 (2000): 149.

²² Triponel, "Can the Iraqi Special Tribunal Further Reconciliation?", 281.

²³ Sarah Williams, *Hybrid and Internationalized Criminal Tribunals: Jurisdictional Issues* (Durham University, PhD thesis, 2009): 70; Aoife Drudy, "Supreme Iraqi Criminal Tribunal: A Victory of Justice or Victors' Justice", *University College Dublin Law Review*, vol. 6, no. 1 (2006):142.

²⁴ Jennifer Trahan, "A Critical Guide to the Iraqi High Tribunal's ANFAL Judgment: Genocide against the Kurds", *Michigan Journal of International Law*, vol. 30, no. 2 (2009): 308; Human Rights Watch, *Human Rights Watch World Report 2004: Human Rights and Armed Conflict* (USA: HRW, 2004), 29.

infrastructure and the fragile post-war conditions impacting the Iraqi judiciary. They argued that the extensive international crimes and mass atrocities committed by the former regime necessitated a robust justice system to handle these complex cases effectively.²⁵ Despite these proposals, the establishment of the IST to prosecute senior officials of the deposed regime did not include discussions about the UN Security Council's involvement in creating an ad hoc criminal tribunal, similar to those established for the former Yugoslavia and Rwanda.²⁶ The five permanent members of the Security Council firmly opposed the idea, making it clear that they would veto any efforts to establish an international tribunal for Iraq. Their stance effectively halted any prospects of an international tribunal, leading to the creation of the IST under different arrangements.

Among the various ideological concerns, one key factor that solidified the permanent members of the Security Council's stance against adopting the ICTY and ICTR models for Iraq was their awareness of the shortcomings and challenges associated with such ad hoc tribunals. The experiences with these previous tribunals highlighted several issues: the lengthy duration of trial processes, the substantial financial costs involved, and the overall inefficacy in delivering justice, both criminally and civilly. These drawbacks underscored the difficulties of achieving timely and effective justice through such bodies, leading the Security Council members to reject the idea of a similar international tribunal for Iraq.²⁷ The option of prosecuting Ba'athist officials and addressing victims' right to reparation through the International Criminal Court (ICC) in The Hague was also excluded from consideration. As Iraq was not, and remains as of 2024, a signatory to the ICC Statute, the Court lacked jurisdiction over crimes committed by the Ba'athists. Additionally, the ICC's jurisdiction only extends to crimes committed after the Court's establishment in July 2002, thus precluding it from reviewing crimes that occurred prior to this date. This limitation rendered the ICC model legally impractical for addressing the full scope of the atrocities committed by the Ba'athist regime.²⁸

The second option explored by some states and national parties was the creation of a hybrid court model, combining domestic and international judges to address the injustices suffered by Iraqis. This hybrid court would operate under the auspices of relevant international human rights bodies and states involved in the Iraq invasion, akin to the transitional justice model implemented in Sierra Leone.²⁹ The proposed court would integrate both domestic and internationally appointed judges to ensure a balanced approach to justice. However, this suggestion faced strong opposition and ultimately failed to gain international support. Political factors played a significant role in this rejection. Concerns about potential interference by coalition forces and conflicting interests between the U.S. and its allies, along with emerging human rights issues, contributed to the dismissal of the hybrid tribunal idea. Additionally, the legal and political controversy surrounding the Iraq invasion itself, viewed by some as a breach of international law, may have influenced major powers like China, France, and Russia to veto the establishment of an international tribunal for Iraq.

On the other hand, the U.S.'s previous reluctance to ratify the ICC Statute and become a contracting party to it created a contradictory stance. Supporting an international tribunal would have exposed the U.S. to criticism and weakened its position on international legal solutions in this context. On the other hand, incorporating an international element into the proposed tribunal faced significant challenges due to international policies and moral controversies surrounding the death penalty. Iraqi ethnic communities, through their representatives, advocated for the death penalty for perpetrators, complicating the UN's involvement in a tribunal that might issue such capital sentences. The Iraqi authorities' strong preference for applying the death penalty, as permitted under national law, posed a major obstacle to including UN participation in a hybrid tribunal.³⁰ The Iraqi public largely favored prosecuting officials responsible for their suffering in a national tribunal without international involvement.³¹ Similarly, the suggestion to entrust the investigation and prosecution to the occupation powers, particularly the U.S.-led Coalition, was also rejected.³² Political factions were reluctant to delegate such responsibilities to the Coalition, reflecting deep-seated mistrust and concerns about impartiality. This reluctance further complicated efforts to establish an effective and accepted judicial mechanism for addressing the crimes committed by the Ba'athist regime.

²⁵ Williams, *Hybrid and Internationalized Criminal Tribunals*, 71.

²⁶ Danilo Zolo, "The Iraqi Special Tribunal - Back to the Nuremberg Paradigm", *Journal of International Criminal Justice*, vol. 2, no. 2 (2004): 313; M. Cherif Bassiouni, Michael Wahid Hanna, "Ceding the High Ground: The Iraqi High Criminal Court Statute and the Trial of Saddam Hussein", *Case Western Reserve Journal for International Law*, vol. 39, no. 1 (2007): 38.

²⁷ Raid Juh al-Saedi, "Regime Change and the Restoration of the Rule of Law in Iraq", *International Law Studies. US Naval War College*, vol. 86, no. 1 (2010): 71.

²⁸ Article 11/1 of the Statute stipulates that 'the Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute', which started on 1 July 2001 (Art. 126).

²⁹ Zolo, "The Iraqi Special Tribunal", 313.

³⁰ Bassiouni, Hanna, "Ceding the High Ground", 71.

³¹ John C. Johnson, "The Iraqi High Tribunal and the Regime Crimes Liaison's Office", *Army Lawyer*, no. 7 (2008): 38.

³² Zolo, "The Iraqi Special Tribunal", 313.

Given the above considerations, the third option, establishing a purely national tribunal, became the primary objective of the G.W. Bush Administration. The United States declared that justice should be pursued through an “Iraqi-led” tribunal, designed to align with the existing national legal framework.³³ The proposal to create a comprehensive and independent domestic tribunal, supported by the international community and human rights organizations in technical matters, was unanimously approved. This tribunal would be tasked with prosecuting senior Ba’athist officials.³⁴

The US-led Coalition favored establishing an Iraqi tribunal as the most suitable mechanism for several reasons. They believed that such a tribunal would allow Iraq, newly freed from the grip of dictatorship, to take responsibility for holding its senior state officials accountable for crimes against its citizens through effective trials. This initiative was seen as a groundbreaking step towards developing a robust national legal system and judiciary, grounded fundamentally in the rule of law. Another key objective was to send a strong message to future generations that systematic, state-sponsored violations, such as the repression of minorities or political dissidents, would not be tolerated under any circumstances.³⁵ As Sarah Williams argues, research indicates that both the Iraqi Governing Council (IGC) and a significant portion of the Iraqi population also supported entrusting the task of investigations to a reformed national tribunal, while seeking legal and technical support from the international community and relevant bodies.³⁶

In this context, December 20, 2003, marked a significant step forward in implementing the strategy when the Iraqi Governing Council (IGC) adopted the Statute of the ISCT. This Statute provided the legal framework and established the foundational structure for a judicial institution with full authority to adjudicate cases involving perpetrators of international crimes.³⁷ The Statute defined the Court’s jurisdiction to prosecute acts of genocide, war crimes, and crimes against humanity committed in Iraq or elsewhere from July 17, 1968, to May 1, 2003.³⁸ This provision clearly demonstrated the commitment of both the international community and the Coalition Provisional Authority (CPA) to address major historical human rights violations committed by members of the Ba’ath Party and its affiliates during the transitional justice phase.

In line with these developments, the Coalition Provisional Authority (CPA) issued Order No. 48 in December 2003, empowering the Iraqi Governing Council (IGC) to establish the Iraqi Special Tribunal, which was later renamed the ISCT. According to Statute No. 1 of 2003 issued by the IGC, the Tribunal was designed to function independently from the existing judicial system (Article 1/1). In August 2005, Iraq’s Transitional National Assembly (ITNA) repealed the original statute, but the Iraqi government subsequently re-enacted it in September 2005 with certain amendments. To fulfill its mandate, the Statute of the Tribunal specified that:

The Tribunal shall have jurisdiction over every natural person, whether Iraqi or non-Iraqi resident of Iraq, accused of committing any of the crimes listed in Articles 11, 12, 13 and 14 of this law, committed during the period from 17 July 1968 to 1 May 2003, in the Republic of Iraq or elsewhere, including the following crimes: A. Genocide;

B. Crimes against humanity; C. War crimes; and D. Violations of Iraqi laws listed in Article 14 of this law.³⁹

As Bassiouni aptly put it, this represented ‘Iraq’s first major step on the path of post-conflict justice.’ Accordingly, the Tribunal was granted jurisdiction over individuals’ direct or indirect involvement in any of the specified crimes, as outlined in Articles 11 to 14 of the Statute, regardless of whether they resided inside or outside the country. Furthermore, the Tribunal was empowered to review all crimes committed by affiliates of the Ba’athist regime, irrespective of their territorial locations, provided these crimes occurred during the designated period (1968–2003). This broad jurisdiction was intended to extend the Court’s authority and discretion to include crimes related to the Iran-Iraq war (1980–1988) and the invasion of Kuwait in 1990.⁴⁰

³³ Trahan, “A Critical Guide”, 308.

³⁴ Bassiouni, Hanna, “Ceding the High Ground”, 39; Ali Adnan Al-feel, “Iraqi Special Tribunal under International Humanitarian Law”, *Journal of East Asia and International Law*, vol. 2, no. 1 (2009): 21.

³⁵ Williams, *Hybrid and Internationalized Criminal Tribunals*, 71.

³⁶ Ibid, 71.

³⁷ Although the ISCT structure is a reflection of Iraq’s civil law regime, it is nevertheless independent from the regular Iraqi judiciary system. The Tribunal consisted of an Investigative Chamber, Trial Chambers, an Appeals Chamber, a Prosecution Department, and an Administration Department. For comprehensive discussion of the mechanism of the work, roles of judges, functions of the Tribunal and its construction, see: Johnson, “The Iraqi High Tribunal”, 39 onwards.

³⁸ See: Law of the ISCT, Article 1/2. *Official Gazette of the Republic of Iraq*, No. 4006, 18 October 2005. In August 2005, Iraq’s Transitional National Assembly abrogated the original statute and adopted instead a revised statute to which certain amendments were added. The Iraqi Government re-enacted it in September 2005. Trahan, “A Critical Guide to the Iraqi High Tribunal’s Anfal Judgment”, 308.

³⁹ *The Iraqi High Criminal Court Statute*, Art. 1, para. 2.

⁴⁰ M. Cherif Bassiouni, “Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal”, *Cornell International Law Journal*, vol. 38, 2 (2005), 358.

In 2004, the Tribunal began operating on multiple fronts with the support of substantial financial resources. By the autumn of 2006, significant progress had been made in administering and reviewing the claims presented to the Tribunal's five federal and regional chambers located in Baghdad, Sulaymaniyah, Erbil, Najaf, and Basra.⁴¹ In this context, when conducting criminal prosecutions, the Statute of the ISCT encouraged the application of national law in cases where the court's applicable law and complementary rules did not provide sufficient guidance. The Statute specified that general principles of criminal law, as outlined in the following regulations, should be applied to the prosecution and trial of any accused persons:

1. For alleged crimes committed between July 17, 1968, and December 14, 1969, the Baghdadi Penal Code of 1919 would take precedence.
2. For crimes committed between December 15, 1969, and May 1, 2003, Penal Code No. 111 of 1969, as it stood in the 1985 (Third Edition), would be applied, regardless of any later amendments to the Code.
3. Additionally, the Military Penal Code No. 13 of 1940 and the Code of Military Procedure No. 44 of 1941 could also be applied if necessary.⁴²

More importantly, the Statute specifies that 'the Tribunal shall follow the rules of procedure provided in the Criminal Procedure Law No. 23 of 1971 and the Rules of Procedures and Evidence appended to this Law, of which it shall be considered an integral part.' (Art. 16).⁴³ Additionally, Article 17(2) allows the competent Chambers to interpret Articles 11, 12, and 13 of the Statute by referring to the relevant decisions of international criminal tribunals, such as the ICC, in handling the consequences of international crimes. Notably, the Statute also clarifies that the international crimes outlined in Articles 11, 12, 13, and 14 'shall not be subject to any statute of limitations,' irrespective of the time elapsed or any other restrictions (Art. 17/4).

On the other side, the Tribunal's work and approach necessitated thorough introspection and critical analysis regarding victims' rights and the progression of corrective justice in post-conflict Iraq. Drawing from a comprehensive collection of documents detailing Saddam Hussein's involvement in genocide and war crimes, criminal prosecutions were largely successful, resulting in many senior perpetrators receiving death sentences or life imprisonment. However, the right to reparation for victims was largely overlooked by the ISCT. Political parties and ethnic groups often resisted efforts to address past atrocities in Iraq, undermining the agenda for redress. Neither the General Prosecutor, who was responsible for upholding and updating the judicial rights of society as a whole, nor the Tribunal itself acknowledged this painful reality, nor were the victims assisted in addressing how to remedy their past injuries. As a result, there was little attention paid to reparations for survivors, such as the Barzanis, or other notable cases of genocide, and no comprehensive approach was developed while the Statute was being drafted and implemented. Meanwhile, both national and international law strongly affirm the right to reparations for victims of gross human rights violations. The following sections will further explore these principles.

In the post-Saddam era, efforts by Iraq's judiciary to promote and establish a reparation program were hindered by a growing wave of sectarian discrimination, which systematically obstructed any potential progress towards transitional justice based on redressing historical violations as part of national reconciliation. Reflecting on this legal void, Ihsan argued that the trials conducted by the ISCT failed to consider the ultimate goal of prosecuting criminals in Iraq after the 2003 invasion,⁴⁴ which was to reconcile Iraq's multi-ethnic society by fully restoring the rights of genocide victims, particularly through reparations as defined in modern international law.⁴⁵ In this context, Article 22 of the Statute allowed surviving relatives of victims who had suffered moral and financial harm, as well as injured parties who might be Iraqi nationals, to file 'civil suits against the accused for damages resulting from acts that constitute crimes under this Law.' The article further stipulated that 'the Tribunal shall have the authority to adjudicate such claims in accordance with the Code of Criminal Procedure No. 23 of 1971 and other relevant laws.'⁴⁶ Similarly, Article 10 of the Iraqi Code of Criminal Procedure recognizes the right to reparation for individual victims, allowing them to sue defendants. It clearly states that if a person

⁴¹ Al-Saedi, "Regime Change", 12.

⁴² See: Article 17.

⁴³ Article 10 of the Criminal Procedure Law of 1971 provides that 'A person who has suffered direct material or ethical damage from any offence has the right to bring a civil case against the accused and the person responsible under civil law for the actions of the accused, under the provisions of Article 9'.

⁴⁴ Mohammed Ihsan, *Nation Building in Kurdistan: Memory, Genocide and Human Rights* (UK: Routledge, 2017), 17.

⁴⁵ Ofra Bengio, *The Kurds of Iraq: Building a State within a State* (USA: Lynne Rienner Publishers, 2012): 281-282.

⁴⁶ Article 22 provides that 'Relatives of victims and harmed persons who are Iraqi nationals may bring civil suits against the accused for damages resulting from acts which constitute crimes under this Law. The Tribunal shall have the power to adjudicate such claims in accordance with the Code of Criminal Procedure No. 23 of 1971 and other relevant laws'.

has experienced direct financial, psychological, or moral damage due to the wrongful actions of another, they have ‘the right to bring a civil case against the accused and any person held liable under civil law for the actions of the accused, as per the provisions of Article 9.’⁴⁷

Related to this, Article 10 significantly guarantees victims the right to reparation in cases of human rights abuses and other recognized violations perpetrated by state agents acting as individuals, rather than as representatives of the state, for whom vicarious liability might otherwise be considered.⁴⁸ It empowers aggrieved parties to seek justice by filing lawsuits against the defendant in either criminal or civil courts.⁴⁹ However, as previously noted, this provision offers a limited opportunity for genocide survivors, focusing primarily on individual cases rather than incorporating the concept of state vicarious liability. Consequently, while Article 10 provides a pathway for seeking reparation, its scope is quite restrictive and may not fully address instances of systemic abuse or hold the state accountable for its actions.

2.3. The Ineffectiveness of Article 22 in Addressing Reparations

In this section, I will present a compelling argument that elucidates the prejudices faced by victims regarding their right to adequate reparation. The discussion will focus on how the ISCT statute, particularly Article 22, was drafted in a manner that appears to undermine a victim-centered approach and principles of justice. It is the researcher’s view that the reliance on Article 10 of the Iraqi Code of Criminal Procedure likely serves to absolve the state of its responsibility and international obligation to compensate victims of genocide, including the Barzanis, rather than reinforcing this responsibility. In practice, this reference to Article 10 seems ineffective and may even obstruct efforts to secure reparation from the defendants. Although Article 22 of the Statute might initially appear to offer a pathway for victims to claim reparation before the Tribunal, a critical examination reveals significant practical obstacles and shortcomings. The article seems more designed to hinder rather than uphold victims’ rights, with its intended objectives falling short for several reasons. Ultimately, this approach to reparation lacks effective implementation, and its superficially stated goals are not being realized for the following reasons.

First: Article 22 reveals a significant contradiction regarding victims’ rights to reparation and the state’s liability for addressing the actions of state officials. On the one hand, it requires that claims for material compensation or civil petitions be made against individuals who acted on behalf of governmental institutions from 1968 to 2003. However, it fails to establish the state’s vicarious liability to provide reparations for both moral and material damages, as would be expected under the doctrine of vicarious liability. This is particularly important given that the Barzani genocide was not solely the result of individual actions but was a systematic, long-term process orchestrated by state agents. Therefore, while it is reasonable to pursue the perpetrators for their involvement in international crimes, their financial resources are insufficient to address the scale and severity of the mass atrocities as envisaged by the article.

Second: The ISCT’s approach to addressing victims’ right to reparation appears to imply a form of state immunity akin to individual rights. This perspective conflicts with international developments in the field of human rights, which emphasize that justice must be achieved in a way that holds states accountable, beyond just inter-state relations. International and regional advancements call for states to be responsible for providing financial compensation to victims of internationally prohibited crimes. This responsibility should not rest solely on the perpetrators but should also include the obligation of the state concerned to compensate those affected by such crimes.

Third: It is evident that in many genocide-related cases, individual defendants often have their financial assets seized or are left with insufficient funds before they even face justice. In some instances, defendants may be completely impoverished by the time they are prosecuted, rendering them incapable of meeting their obligation to compensate victims. It should have been apparent to the judges, legal experts, and scholars involved in drafting the ISCT Statute that the major perpetrators eventually convicted by the Tribunal were unlikely to have any substantial assets available for civil claims. Even if these individuals had some financial resources or property, these would likely be inadequate to fulfill the compensation demands of the survivors.

Finally: Many individuals convicted for their role in the Kurdish genocide and crimes against humanity either faced the death penalty or managed to evade justice.⁵⁰ Given these and other politically motivated factors, the researcher is convinced

⁴⁷ An English translation is available from the Kurdistan Center for International Law: <https://kcinterlaw.org/web/viewer.html?file=https://images.kcinterlaw.org/root/root/images/.pdf>.

⁴⁸ Wadi Suleiman Mazzouri, *Explanation of the Criminal Procedure Code: Theory and Practice* (Erbil: Maktabat Tabāyā, 2015), 51-52.

⁴⁹ Fatima Mekbel, Fahima Masoudan, *The Practice of Subsidiary Civil Action* (Abdelhamid Mehri University, Master thesis, 2014), 31.

⁵⁰ Several masterminds of the genocide are still (2023) at large in European countries, in the absence of arrest warrants issued by the

that Article 22 was deliberately included in the Statute for political reasons. It appears that the Kurdish representatives in Baghdad either were not aware of this or did not advocate effectively for an expanded scope. In reality, Article 22 has significantly impeded the delivery of justice, acting as a clear barrier that prevents genocide victims in Kurdistan, including survivors of the Barzani genocide, from asserting their rights before the ISCT. Consequently, it is crucial to develop a more effective and accessible mechanism for addressing these issues, especially following the abrogation of the ISCT Statute in 2011.⁵¹

3. The Grim Reality of Genocide and the Lack of Reparation

The genocide in Kurdistan was not an isolated incident but a systematically orchestrated plan embedded in the country's history. The tragedy of the Barzanis was viewed as a significant achievement by the state. Saddam Hussein took pride in openly admitting that thousands of male members of the Barzani community were sent to their deaths in retaliation for his defeat by Iran. In September 1983, just one month after the mass disappearance of the Barzanis, Saddam addressed an audience about their fate, declaring that they had 'gone to hell' as punishment for their supposed crimes. His remarks confirmed what had previously been suspected and intensified the moral pressure on Kurds to abandon their long-denied aspirations for independence and liberation from dictatorship.⁵² To summarize their harrowing ordeal, over the course of less than a decade (1983–1990), the Ba'athist regime systematically massacred approximately 8,000 Barzani males using methods of brutality reminiscent of the Holocaust. The regime's military junta executed death sentences by digging large trenches capable of holding hundreds of people and forcibly burying arrested males and children alive in remote Iraqi deserts, leaving no trace of their existence.⁵³

On October 9, 2008, the Iraqi House of Representatives passed Legislative Decision No. 26 of 2008. This decision notably recognized the Kurdish tragedies as genocide, categorizing them as the crime of crimes. The Barzani massacre was included among the cases identified as genocide. This parliamentary decision was grounded in constitutional principles related to human rights and was issued in accordance with Article 61/First of the 2005 Iraqi Constitution and Article 138, Fifth/A. It underscored that 'the massacres and mass killings of the Kurdish people in Iraqi Kurdistan constitute genocide by all international standards,' reaffirming the legal recognition of these atrocities despite the time elapsed.⁵⁴

On May 3, 2011, Chamber I of the ISCT established a court to adjudicate the Barzani genocide case. The Court recognized the guilt of former regime officials for mass disappearances and summary executions of the Barzanis, which were classified as genocide under international law.⁵⁵ Despite seven years of proceedings, the Tribunal did not address the right to reparation for the victims. In the same year, the Iraqi parliament voted to dissolve the ISCT with the passage of Law No. 35 of 2011, which took effect on January 23, 2012. This decision left the survivors of the genocide disheartened and without redress.⁵⁶ Given the ISCT's failure to address the crucial issue of victim reparation, the challenge of addressing their suffering within the framework of Iraqi national regulations remains significant. The lack of accessible international mechanisms further complicates this issue. In the following sections, I will examine a potential solution by exploring state responsibility under national regulations as the sole remaining legal recourse for addressing the victims' grievances.

It is crucial to understand that imposing criminal penalties on former regime officials forms the basis for the state's tort liability under Iraqi law.⁵⁷ Criminal liability, whether applied to states or individuals, primarily aims to impose legally justified penalties on perpetrators and prevent further public wrongs. However, effectively implementing legal rules requires integrating tort principles to address private wrongs, regardless of the perpetrators' status or the scale of the crimes. From this perspective, achieving justice for the survivors of the Barzani genocide demands a comprehensive approach that addresses both criminal and civil liabilities of the state and its officials. This approach ensures that justice is served holistically, acknowledging the complexities of state responsibility and the necessity for thorough reparations. Specifically,

Iraqi government and their cases not being transferred to Interpol for conviction.

⁵¹ Article 132(2) of the Iraqi Constitution of 2005 guarantees compensation to the families of those killed or injured as a result of terrorist acts. However, victims of genocide and war crimes are not mentioned anywhere in the Constitution or the Statute, which is a significant omission that contradicts the principles of justice and fairness that the Constitution is meant to uphold.

⁵² Ihsan, *Nation Building*, 159-160.

⁵³ Ibid, 156.

⁵⁴ *Iraqi Gazette*, Issue No. 4087, 22 September 2008.

⁵⁵ Rebwar Ramazan Barzani, *The Genocide of the Fathers: Barzanis Genocide* (Erbil: Dara Printing Company, 2016), 150.

⁵⁶ *Iraqi Gazette*, No. 4227, 23 January 2012, 1.

⁵⁷ Article 10 of the Criminal Procedural Code provides that 'A person who has suffered direct material or ethical damage from any offence has the right to bring a civil case against the accused and the person responsible under civil law for the actions of the accused, under the provisions of Article 9'. Article 13 reads: 'A civil case against those responsible under civil law may be brought either collectively or individually in accordance with criminal procedures'.

the application of vicarious liability is essential for addressing the full scope of state accountability and providing comprehensive reparation to victims of mass atrocities.

4. Beyond Individual Responsibility and Exploring the Doctrine of Vicarious Liability

Under Iraqi law, the theory of administrative liability is not applicable to the Barzani genocide. This raises pertinent questions about why and how the state, rather than just individual perpetrators, should be held accountable for providing remedies to victims. What are the legal grounds and persuasive arguments for assigning such responsibility to the state? These issues will be examined in detail in the following sections.

4.1 Recognizing Legal Responsibility for the Acts of Others

Under civil law systems, it is a widely accepted principle that individuals are liable for civil damages if they fail to fulfill their obligations and duties, leading to negative consequences and violations of recognized rights.⁵⁸ In this context, vicarious liability is considered an exceptional doctrine. It extends beyond individual responsibility to encompass others who may not have directly caused the harm but have a legal relationship with the person who committed or assisted in the wrongful act. This doctrine not only broadens the scope of recognized public rights but also enhances individual entitlements and obligations.⁵⁹ The concept of vicarious liability has its roots in Roman law, a foundation of Western legal traditions. This historical lineage underscores the doctrine's role in addressing complex cases where responsibility extends beyond direct actions, reflecting a commitment to ensuring comprehensive accountability for harms caused.⁶⁰

The Justinian judiciary established a significant framework by identifying a specific category of obligations known as *obligationes quasi ex delicto*, which arise from quasi-delicts.⁶¹ This framework proposed the concept of responsibility for acts where the offender was not directly involved in causing harm.⁶² This principle of vicarious liability is a time-honored legal doctrine that has evolved in response to ethical and universal justice considerations, advocating for the imposition of strict liability. Its importance is particularly pronounced in the context of state liability, as it holds individuals or groups accountable for tortious actions committed by others, even when they were not directly responsible for the resulting harm.⁶³

Vicarious liability is a well-established principle in global legal systems, valued for its emphasis on human rights and justice. Both civil law and common law systems recognize its significance in safeguarding rights. Under this doctrine, liability is imposed on a defendant for the wrongful acts of someone acting on their behalf, ensuring that appropriate remedies are provided. This form of accountability is particularly effective in contexts where a relationship of agency or employment exists, such as between an employer (e.g., a military junta) and an employee (e.g., state representatives like the Ministry of Defense). Legal reasoning dictates that an employer must address any damages, whether moral or material, resulting from tortious acts committed by an employee, provided these acts occur in the course of their duties. Although the employer is not personally involved in the wrongful act, their legal relationship with the tortfeasor (the individual who committed the tort) creates their obligation to remedy the situation.⁶⁴ Thus, in such cases, the plaintiff can pursue both the direct wrongdoer and the employer or principal. This could be a natural person, a commercial entity, or state agents, depending on the context. Vicarious liability, therefore, represents a crucial aspect of legal accountability, ensuring that victims have recourse to justice through multiple potential defendants.

On the other hand, the framework governing state vicarious liability for the tortious acts of its employees in Iraq

⁵⁸ See, for instance, French Civil Code, Article 1382; Egypt Civil Code, Articles 173-175; Germany Civil Code Article 831; Emirates Civil Code, Article 313.

⁵⁹ Comprehensive discussions on the concept of vicarious liability could be reached in: Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (UK: Cambridge University Press, 2010).

⁶⁰ Francesco Parisi, "The Genesis of Liability in Ancient Law", *American Law and Economics Review*, vol. 3, no. 1 (2001):113.

⁶¹ The concept of *quasi-delictum* would denote 'a wrongful act that did not qualify as a delictum but which nevertheless engendered an obligation between the aggrieved person and the actor, even though the latter may not in fact be blameworthy'. George Mousourakis, *Fundamentals of Roman Private Law* (Heidelberg: Springer, 2012), 266.

⁶² Justinian would divide quasi-delicts into four sorts of unlawful actions, three of which were apparently analogous to the modern understanding of vicarious liability. The exclusively categorized quasi-delicts would include: a judge's liability for unfairly issued sentences (a personal one); liability of the building occupiers from whose residences damaging objects were thrown; liability for objects suspended from the top of occupied buildings that would pose a danger to pedestrians; and finally, liability of the master of a ship for tortious commissions such as theft and damage to the possessions of their clients perpetrated by their employees or slaves on board, inn-keepers, and stable-keepers. George Mousourakis, *Fundamentals of Roman Private Law* (Heidelberg: Springer, 2012), 266-67. See also: Parisi, "The Genesis", 113.

⁶³ Phillip Morgan, "Recasting Vicarious Liability", *The Cambridge Law Journal*, vol. 71, no. 3 (2012): 617.

⁶⁴ Giliker, *Vicarious Liability*, 1; John Bell, "The Basis of Vicarious Liability", *The Cambridge Law Journal*, vol. 72, no. 1 (2013):17.

predates the removal of the Ba'athist regime. Thus, Dan E. Stigall's assertion that vicarious liability does not exist under Iraqi law can be contested.⁶⁵ This research contends that while Iraqi law has been more influenced by the *Mejelle*⁶⁶ than by French civil law, the principle of vicarious liability has deep roots in Islamic law and holy scriptures dating back to the seventh century. Although the formal codification of vicarious liability occurred with the *Mejelle* in the late 19th and early 20th centuries,⁶⁷ this principle is not alien to Islamic jurisprudence, which significantly shapes the Iraqi Civil Code.⁶⁸ Additionally, the principle of prioritizing the responsibility of the direct perpetrator over that of an abettor (*Muttesebbib*) is not an absolute rule in Iraqi law, applicable in every case. Rather, this principle should be interpreted within specific contexts where the perpetrator's actions exceed permissible limits. As Zalmi argues, in such situations, accountability should indeed rest with the actual perpetrator.⁶⁹

To conclude, the legal framework in Iraq not only accommodates the possibility of vicarious liability for superiors, custodians, and senior state officials but also mandates it. Under the Iraqi Civil Code, officials and employers are held accountable not only for their own wrongful acts but also for damages caused by their employees or those under their control. This framework encompasses three main categories of liability: personal wrongful acts (*fait personnel*), injuries caused by third parties (reflecting modern vicarious liability), and liability for damages caused by animals, objects, and buildings. This comprehensive approach demonstrates that vicarious liability is a deeply ingrained legal principle in Iraq, with roots in both Islamic law and the Iraqi Civil Code.⁷⁰ The legal foundation for the right to reparation in Iraqi law is thus firmly established through these historical and contemporary mechanisms.⁷¹

4.2. The State's Vicarious Liability under the Iraqi Civil Code

The development of a comprehensive system of personal liability for torts in Iraq is anchored in Articles 219-220 of the Civil Code. These articles broaden the scope of tort provisions and their consequences,⁷² aiming primarily to protect human rights and dignity by enabling victims to seek reparations when legal protections fall short. This legislative framework not only reinforces the traditional principles of administrative law by equating natural persons with government institutions in terms of legal status but also integrates Islamic legal principles of strict liability into the Civil Code. Additionally, the Civil Code introduces the concept of 'specific' liability, which ensures that the individual who directly commits a wrongful act is held accountable for their actions, rather than shifting the responsibility to those who facilitated or requested the act. This approach aligns with Islamic legal traditions while providing a clear framework for addressing tortious conduct.⁷³

Article 186 of the Iraqi Civil Code establishes the principle of specific liability, which confines civil liability to individuals who directly commit wrongful acts and cause damage to recognized rights without justifiable reasons. This principle appears to contradict the vicarious liability concept, which holds employers or supervisors accountable for the wrongful actions of their employees.⁷⁴ As such, the principle of specific liability seems to exclude the application of

⁶⁵ See: Dan E. Stigall, "Iraqi Civil Law: Its Sources, Substance, and Sundering", *Journal of Transnational Law & Policy*, vol. 16, no. 1 (Fall 2006): 44.

⁶⁶ The *Mecelle-i Ahkâm-ı Adliye*, commonly referred to as the *Mejelle*, holds significant historical importance as the civil code of the Ottoman Empire during the late 19th and early 20th centuries. This legal document marked the first systematic effort to codify a portion of the Sharia-based law within an Islamic state, which had a lasting impact on the development of legal systems in the Muslim world.

⁶⁷ Article 92 of the *Mejelle* reads: 'A person who performs an act, even though not intentionally, is liable to make good any loss caused thereby'. This Article is an obvious reflection, in terms of codification, of Article 1382.

⁶⁸ See: Article 1 of the Civil Code, which explicitly recognized all Islamic schools of law and acknowledged both Sunni and Shi'ite jurisprudential traditions.

⁶⁹ Mustafa Ibrahim Zalmi, *Obligations in Light of Logic and Philosophy* (Erbil: Shahab Publisher, 2011), 329.

⁷⁰ For a comprehensive discussion, see: Abdul Basir bin Mohamad, "Vicarious Liability: A Study of the Liability of Employer and Employee in the Islamic Law of Tort", *Arab Law Quarterly*, vol. 15, no. 2 (2000): 197.

⁷¹ Since the second pattern of liability, which is related to things and animals, is outside the scope and objectives of this research, discussions will be limited to elaboration of the first vicarious liability for employees or servants' wrongful actions.

⁷² The Law on Human Rights Trials Guarantees in Iraq historically included provisions on vicarious liability, which stated that anyone who employs individuals to carry out public, constructional, commercial, or industrial functions will be held responsible for any damage caused by those employees while performing their duties. This liability can be avoided only if the employer can demonstrate that they took all necessary precautions to prevent the damage, and that the damage was caused by external forces or *force majeure* events beyond their control (Art. 5 of the Law on Human Rights Trials Guarantees No. 54 of 1943). This provision appears to have been influenced by Article 831 of the German law, which similarly states that a person who uses another person to perform a task is liable for any damage caused by the employee while carrying out the task.

⁷³ Dan E. Stigall, "A Closer Look at Iraqi Property and Tort Law", *Louisiana Law Review*, vol. 68, no. 3 (2008): 812.

⁷⁴ Asmat Abdel Mageed Bakr, *Negligence Liability in Arab Civil Laws* (Lebanon: Zain Publisher, 2016), 129.

vicarious liability in cases such as genocide. However, Iraqi law does provide significant exceptions to the principle of specific liability that align with modern legal standards. The Civil Code incorporates a 'respondeat superior' doctrine, which imposes liability on employers, including governmental entities, for damages caused by their employees in the course of their employment under certain conditions. This doctrine ensures that employers, including the state, are held accountable and responsive to those harmed by the actions of their employees, thus bridging the gap between specific liability and the need for broader accountability in cases involving wrongful acts.⁷⁵

In the context of this research, Article 219/1 stands out as a pivotal provision, establishing the groundwork for vicarious liability within Iraqi law. This article is particularly noteworthy for its broad application, extending liability to government institutions, including municipalities and similar entities, as well as to commercial establishments for injuries caused by their employees during their employment, irrespective of their assigned roles. According to Article 219/1, government municipalities, public service institutions, and entities involved in commercial or industrial enterprises are held accountable for any damage or injuries resulting from their employees' misconduct or violations committed during their employment.⁷⁶ This principle ensures that civil and military governmental institutions, along with state-supported organizations, bear full responsibility for tortious injuries caused by their employees or legal representatives while performing their work duties.⁷⁷ This broad application of vicarious liability underscores the commitment to ensuring accountability across both public and private sectors within the framework of Iraqi law.

This principle underpins the ability of survivors of genocidal atrocities to seek justice by holding the state accountable for human rights violations. It establishes a solid foundation for the state's duty to address these violations and empowers affected individuals to pursue civil actions against state officials for wrongful acts committed by their employees during the course of their service. According to Article 219, it is clear that the government is vicariously liable for the actions of its employees, irrespective of the nature of the employment contract, whether permanent, temporary, or otherwise. The state, represented by its executive branch, bears responsibility for the wrongful acts of its employees, regardless of the contract's duration. The essence of this liability model lies in the legal relationship between the government and its employees, emphasizing that accountability is rooted in the government's oversight and control over its personnel.

Against this background, a notable limitation of Iraqi law regarding human rights violations is the lack of a comprehensive general rule for vicarious liability, unlike the more developed legal systems of Egypt⁷⁸ and Jordan.⁷⁹ Iraqi law specifically designates which persons and government institutions can be held accountable for the actions of others in cases of criminal violations, rather than providing a broad framework for vicarious liability. The scope of the respondeat superior doctrine in Iraq can be criticized for its narrow application. It is limited to a specific set of entities and individuals, excluding various categories such as craftspeople, NGOs, and principals who are not held liable for the actions of their apprentices, employees, or agents. Consequently, under the Iraqi Civil Code, vicarious liability applies primarily to two groups: 1) government institutions and municipalities responsible for public services, and 2) individuals who assume administrative responsibility for industrial or commercial entities. This restrictive approach means that many potential sources of vicarious liability are not covered, potentially limiting the ability to address human rights violations comprehensively.⁸⁰

Despite the aforementioned criticisms, the Iraqi judiciary has recently reaffirmed the doctrine of vicarious liability, particularly concerning uncorroborated military violations. Following the 2003 invasion of Iraq, numerous Iraqis experienced both criminal and civil damages that infringed upon their rights to safety and property. This situation led affected individuals to seek reparations through national courts, invoking the provisions of Article 219. In response, the

⁷⁵ Liability for the acts of third parties and for property is outlined in Articles 218-230 of the Civil Code.

⁷⁶ The text of Article 219 of the Civil Code reads: 'Government municipalities and other institutions which perform a public service as well as every person who exploits an industrial or commercial enterprise are responsible for the damage (injury) caused by their employees if the injury resulted from an encroachment committed by them in the course of their service'.

⁷⁷ For example, see Civil Judgment No. 340/Expanded Civil Chamber/2017, issued on 18 December 2017 by the Federal Cassation Court.

⁷⁸ Aqeel Ghaleb Hussein Al-Baa'aj, *The Basis of Vicarious Liability: A Comparative Study* (Egypt: Dar Al-Kutub Wal-Dirasat Al-Arabiya, 2020), 55. See also: Article 174 of the Egyptian Civil Code.

⁷⁹ Ibid., 55. See also: Article 288 of the Jordanian Civil Code.

⁸⁰ Iraqi law distinguishes between natural and juristic persons through Article 47 of the Civil Code, which establishes the conception of legal personality. However, it is important to note that the 'state' has always had priority among recognized juristic persons in terms of its essential duties and specific rights. In practice, the state is synonymous with the term 'government' as articulated under Article 219 of the Constitution. Accordingly, the government is responsible for exercising constitutionally determined obligations associated with the idea of sovereignty, including its liability to employees' unlawful conduct.

Federal Court of Cassation upheld this interpretation in a notable decision, affirming the Ministry of Defence's obligation to honor the right to reparation for civilians who suffered harm. The court noted that while members of the Iraqi National Guard and Iraqi Army had civil and criminal immunity under Coalition Authority Order No. 3, 2003, this immunity did not absolve the Ministry from liability. The court emphasized that, as the principal party, the Ministry was required to compensate victims for damages caused by military personnel. This decision reinforced that the principal remains accountable for the actions of its subordinates, adhering to the principles established in Article 219.⁸¹

In conclusion, Article 186 of the Iraqi Civil Code, which delineates specific liability, limits civil responsibility to the individual who directly committed the wrongful act and caused the damage. This restriction stands in contrast to the broader concept of vicarious liability. Nevertheless, the Civil Code incorporates exceptions to this principle, notably through the establishment of a respondeat superior regime. This regime imposes liability on employers for damages caused by their employees during the course of their employment under certain conditions. Despite its considerable limitations, Article 219 of the Civil Code was designed to advance human rights and challenge the authoritarian supremacy and impunity that sovereignty often affords individuals. However, a significant drawback of Iraqi law concerning human rights violations is the absence of a comprehensive general rule for vicarious liability. Nonetheless, the Iraqi state may still face vicarious liability for the Barzani genocide. The issues related to administrative liability and the ISCT have not fully addressed this matter. Even in the absence of a general rule for vicarious liability, the requirements for holding the state vicariously liable are present in this case, as will be discussed in further detail below.

4.3. Requirements for State Vicarious Liability

To establish the state's vicarious liability, several specific legal conditions must be met for individuals to successfully sue the state. Primarily, the plaintiff must provide sufficient evidence demonstrating that the defendant, who committed the tortious acts, was acting within the course of their employment or official duties. This involves showing that the defendant's actions fell within the scope defined by their employment contract or service agreement with the state. Additionally, it may be necessary to prove that the state was aware of the individual's actions and failed to take appropriate measures to prevent the resulting harm. Only when these conditions are met can the state be held vicariously liable and required to provide redress for the injured parties.

4.3.1. The Requirement of an Employment Relationship

The initial requirement for imposing vicarious liability on a principal, such as the state in this context, is the presence of a valid employment relationship that demonstrates a clear subordination to the state's directives.⁸² For liability purposes, employees are defined as individuals who act on behalf of the state (the principal) and whose roles and actions are subject to direct oversight and control by state institutions.⁸³ The key criterion is whether the employee or agent was genuinely obligated to adhere to the directives and instructions of the employer, based on the established employment relationship.⁸⁴

The application of vicarious liability to governmental or other entities may not always hinge on the presence of a formal contractual or employment relationship,⁸⁵ as demonstrated by the judiciary in France.⁸⁶ An individual might provide services to a corporation or a state-administered institution for a limited period, or even work as a volunteer without remuneration, with the goal of advancing the principal's interests. If the employer has requested or accepted the individual's assistance and harm occurs while the employer retains sufficient control over the individual, the courts may recognize a 'causal link' and hold the employer vicariously responsible.⁸⁷ Consequently, the principal should not be deemed vicariously

⁸¹ Civil Judgment Number: 24/Compensation for Damages/2007, Date of Issue: 29 October 2007, Issuing Authority: Federal Cassation Court. Also, Civil Judgment Number: 1345/Immunity/2008, Date of Issue: 18 May 2008, Issuing Authority: Federal Cassation Court.

⁸² Abdulqader Al-Far, *Sources of Obligation, Sources of Personal Rights in Civil Law* (Jordan: Dar Al-Thaqafa, 2005), 212.

⁸³ Murad Qejali, "Liability of the Principal for the Acts of its Agent in Algerian Civil Law", *Ma'arif Journal*, vol. 4, iss. 6, 91-101 (2001): 93; Anwar Sultan, *Sources of Obligation in Civil Law: A Comparative Study with Islamic Jurisprudence* (Jordan: Dar Al-Thaqafa, 2017), 366.

⁸⁴ Helmut Koziol, Reiner Schulze, eds. *Tort law of the European Community*. (Germany: Springer, 2008), 403; the servant in this context has been conceived as any 'person who is subject to the command of his master as to the manner in which he shall do his work'. See: Emily Charlotte White, *A Critical Analysis of the Legal History of Vicarious Liability and its Application* (UK: Sheffield Hallam University, Master's thesis, 2017), 13; Al-Far, *Sources of Obligation*, 212.

⁸⁵ Younes Salehuddin Al-Mukhtar, "Liability of the Principal for the Acts of its Agent in English Law: A Comparative Analytical Study with Iraqi and Emirati Laws", *Journal of Sharjah University for Legal and Social Sciences*, vol. 14, 2 (2017): 125.

⁸⁶ Sultan, *Sources of Obligation*, 365.

⁸⁷ White, *A Critical Analysis*, 13; Al-Mukhtar, "Liability of the Principal", 124.

liable for the actions or omissions of individuals who do not have a clear and specific connection to the state.⁸⁸ Additionally, it is not required for employers to be aware of every specific detail or nuance of their employees' actions; rather, the focus is on the overarching framework that governs the scope and conditions of employment. Two key elements are essential in this context: 1) there must be a relationship, though not necessarily a formal or contractual one,⁸⁹ between the employee and the employer, characterized by the employee's full subordination to the employer's directives and agendas. 2) The employer (principal) must have actual control over the employee while the employee is performing their duties or adhering to the employer's rules. These elements are critical in determining the extent of vicarious liability.⁹⁰

4.3.2. The Requirement of a Wrongful Act⁹¹

The requirement of wrongful conduct is central to the doctrine of vicarious liability in both common law⁹² and civil law systems.⁹³ As Paula Giliker notes, 'liability will not arise unless the victim can prove the commission of a specific tort.'⁹⁴ In Iraq, this principle is reflected in Article 202 of the Civil Code, which stipulates that "Every act that injures persons, such as murder, wounding, assault, or any other form of injury, entails the payment of damages by the perpetrator." This rule underscores that the employee's conduct must amount to a punishable tort that harms the aggrieved party. The exception to this rule is the principle of vicarious liability, which, as established in civil law, shifts the responsibility for rectifying culpability or compensating for damages to a third party, specifically, the state in this context.⁹⁵ To hold the state vicariously liable, the plaintiff must demonstrate the existence of clear wrongful conduct that satisfies the requirements of Article 202 of the Iraqi Civil Code.⁹⁶ This aligns with the provisions in Article 1382 of French law, which addresses issues of intentional faults or negligence.⁹⁷

Thus, in addition to the prerequisite of a relationship between the employer and their employees or subordinates, vicarious liability necessitates the presence of fault on the part of the employee, whether through negligence or intentional conduct.⁹⁸ This requirement for the existence of a 'fault' is a feature recognized in French,⁹⁹ Egyptian,¹⁰⁰ and Jordanian law,¹⁰¹ which stipulates that both the material and moral elements of torts, i.e., actual damage and the awareness or perception of the wrongful act, must be present to establish civil liability.¹⁰² In contrast, Iraqi law requires only that the employee be practically at fault, addressing only the material aspect of torts without the need for awareness or maturity. This approach integrates the French doctrine of fault-based liability with the Islamic law perspective that holds individuals responsible for actions performed on behalf of their employers or principals. Consequently, Iraqi law places greater emphasis on the requirement of fault or actual wrongdoing, rather than on the necessity of awareness or perceptual elements.¹⁰³

4.3.3. The Requirement of Acting in the Course of Employment

It is not enough for a subordinate to have committed a delict or deviated from their official responsibilities; further considerations must be taken into account regarding the timing of the torts. The third requirement is that the employees must have breached their obligations during their regular work hours, thereby acting in pursuit of the employer's interests.

⁸⁸ Ibid, 124; Amjad Muhammad Mansour, *The General Theory of Obligations: Sources of Commitment - A Comparative Study* (Jordan: Dar Al-Thaqafa, 2019), 311.

⁸⁹ Sultan, *Sources of Obligation*, 369.

⁹⁰ Mustafa Gamal, Ramadan Mohamed Abu Saud and Nabil Ibrahim Said, *Sources and Obligations Provisions: A Comparative Study* (Lebanon: Al-Halabi Legal Publications, 2006), 326.

⁹¹ This sub-title was extracted from Giliker, *Vicarious Liability*, 27.

⁹² White, *A Critical Analysis*, 12.

⁹³ Mohamed Hassan Abdul Rahman, *Sources of Obligation, Comparative Study*, 2nd ed. (Cairo: Dar Al-Nahda Al-Arabiya, 2012), 456.

⁹⁴ Giliker, *Vicarious Liability*, 27.

⁹⁵ Munthir Al Fadel, *Mediator in Explaining the Civil Law: Sources of Obligation and their Provisions, a Comparative Study* (Erbil: Aras, 2006), 354.

⁹⁶ Sultan, *Sources of Obligation*, 367.

⁹⁷ Article 1382 of the French Civil Code reads: 'Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it'.

⁹⁸ Mansour, *The General Theory of Obligations*, 311; Al-Far, *Sources of Obligation*, 214.

⁹⁹ Article 1382.

¹⁰⁰ Article 174.

¹⁰¹ Article 288.

¹⁰² Al-Far, *Sources of Obligation*, 214; Sultan, *Sources of Obligation*, 367.

¹⁰³ Islamic law has developed a general rule in this regard which mandates that whoever obtains the benefit of something must bear its harm, i.e., the costs and financial losses that stem from actions of or from something possessed by someone are to be redressed by the one who benefits from it according to Shariah law. See: Al-Ba'aj, *The Basis for the Subordinate's Recourse*, 61.

¹⁰⁴ Essentially, the key criterion is that the employment should have enabled or facilitated the commission of the delict. ¹⁰⁵ In the context of state liability, this principle is particularly significant. For instance, employees might not engage in severe crimes, such as genocide, without their affiliation with a sovereign or juridical entity that grants them the power to violate human rights more readily. ¹⁰⁶ To hold the principal liable in such cases, it is crucial that the employees were acting within the scope of their professional duties and governmental responsibilities. This holds true regardless of the underlying factors or incentives that may have motivated them to engage in wrongful conduct. ¹⁰⁷

From the researcher's perspective, there are scenarios, such as those involving military service, where the employer, specifically the government, should be held liable for any damage resulting from an employee's actions or omissions, even if the employee acted contrary to given instructions. In such cases, it is crucial for the government to enforce prohibitions against vandalism and other wrongful acts, as failure to do so can lead to liability for any resultant harm. This is especially significant in situations where human rights violations might occur incidentally to military duties, such as breaches of the laws of war. Without rigorous oversight, soldiers might engage in abusive behavior or damage private property, as seen in past conflicts where civilians were targeted under the guise of maintaining public order and asserting sovereignty. For instance, the targeting of Barzani civilians during ethnic hostilities exemplifies the extreme consequences of inadequate control and accountability in military operations.

On the other hand, Article 219 of the Civil Code clearly stipulates that employers are responsible only for the harm inflicted by their employees during the course of their service. However, the scope of vicarious liability for the government under this Code is narrower compared to the liability of parents, guardians, or masters for the wrongful acts of their children or servants. ¹⁰⁸ Article 219 specifies that the principal is not liable for civil wrongs committed by their subordinate unless these violations occurred while the subordinate was performing tasks assigned for the principal's benefit. The language of Article 219 indicates that it is not enough for the state's vicarious liability to be established merely because the employee committed the torts during their official working hours. If the employee's wrongful actions were solely for personal gain and did not fall within their professional duties or the scope of their service, the government or other employers will not be held liable. ¹⁰⁹ This contrasts with the broader scope of vicarious liability found in Egyptian and Jordanian law, which extends further in holding principals accountable for their subordinates' wrongful acts. ¹¹⁰

Iraqi law addresses the requirement of 'work hours' by holding the government responsible for injustices or injuries caused by its employees, provided that the harm resulted from actions committed during the course of their service. ¹¹¹ If employees were authorized to use state properties or perform their duties within a specific timeframe, and they acted improperly outside of these hours, the government would not be held vicariously liable, as the time limitation for encroachment during the commission of torts is the sole criterion considered by the law. From a justice perspective, it seems fair to argue that the government should remain accountable even if the tortious actions of employees or servants do not directly align with their official duties, provided these actions are reasonably incidental to their role and no evidence of bad intention is present. This approach ensures that accountability is maintained in scenarios where wrongful conduct occurs within the broader context of an employee's duties, even if it occurs outside formal work hours.

Finally, to establish state liability for an individual's tort, it must be demonstrated that the individual was acting within the scope of their employment and committed a punishable tort. This necessitates the presence of a valid employment relationship, clear evidence of wrongful conduct, and a breach of obligations occurring during work hours for the benefit of the employer. Additionally, the employer must have had actual control over the employee's actions. These criteria will be relevant to the discussion of the Barzani genocide, which will be examined in the next section.

¹⁰⁴ Ramadan Abu Saud, *Sources of Obligation* (Alexandria: Dar Al-Jami'a Al-Jadida, 2003), 423; Al-Far, *Sources of Obligation*, 214.

¹⁰⁵ Khaled Abdel Fattah Mohamed, *Civil Liability in Light of the Decisions of the Court of Cassation* (Egypt: Legal Books House, 2009), 432.

¹⁰⁶ Accordingly, the employer will likely not be held accountable if the employee happens to do something which is entirely related to his own business or otherwise benefits and which does not constitute part of his assignments as an employee operating in that enterprise.

¹⁰⁷ Nada Al-Badawi Al-Najjar, *Provisions of Liability* (Lebanon: Al-hadith Publishing House, 1997), 420.

¹⁰⁸ Compare Article 219 with Article 218 of the Iraqi Civil Code.

¹⁰⁹ Al Fadel, *Mediator in Explaining the Civil Law*, 363.

¹¹⁰ Article 174 of the Egyptian Civil Code and Article 288 of the Jordanian Civil Code address the issue of vicarious liability. For instance, if a military commander hires a group of soldiers to engage in tribal retaliation as part of their military service, the government (employer) will not be vicariously liable according to the operative regulations unless the soldiers commit acts of genocide or similar mass atrocities. Similarly, if an employee engages in a robbery during office hours, encourages violence or murder against another employee, or assaults a stranger, the institution in question will not be held vicariously liable.

¹¹¹ Article 219/1.

5. Applying Vicarious Liability for the Barzani Genocide

In accordance with national legal norms, the state is not only prohibited from committing or allowing egregious acts such as mass killings, physical harm, psychological torture, and forced displacements against vulnerable populations, but it is also obligated to penalize any actions that result from officials' abuse of power, which may include providing fair reparations. This positive obligation is vital for ensuring equal rights and opportunities for all individuals, irrespective of their race, religion, or ethnicity. The principle of the state's exclusive responsibility has been upheld by the International Criminal Tribunal, as demonstrated by its recognition of the Barzani genocide.¹¹² Therefore, it is imperative for the Iraqi government to acknowledge its role in these atrocities and assume responsibility, thereby fostering accountability and justice for the victims through the concept of vicarious liability.

In line with the aforementioned principle, the doctrine of vicarious liability assigns full accountability to a principal, such as a state or its representatives, for wrongful acts committed by its employees or agents, provided that specific criteria are met. As outlined earlier, the primary criterion for imposing vicarious liability is the existence of a legitimate employment relationship between the principal and the individual who committed the wrongful act. In the context of the Barzani genocide, it is evident that such a relationship was present. The Republic's orders to the military junta to execute genocidal campaigns against the Barzani community on 31 July and 10 August 1983 clearly illustrate that the junta acted as agents of the Republic in perpetrating the genocide.

On the other hand, a thorough examination of the preceding discussions reveals that the second requirement for establishing state vicarious liability—active involvement in a wrongful act—is clearly met in the case of the Barzani tragedy. The Iraqi government's direct participation in the genocidal acts against the Barzani community in 1983 is well-documented and acknowledged by both the parliament and constitutional provisions. The scale of human rights violations perpetrated against this group was nearly unprecedented at the time, akin to the mass disappearances of the Fayli Kurds, and starkly contravened universal principles. These brutalities not only violated Iraqi national law and relevant regulations, such as the Penal Code of 1969 and the Civil Code of 1951, but also constituted some of the most severe international crimes. Although atrocities against the Kurdish people in Southern Kurdistan were frequent throughout the twentieth century, the late 1970s and early 1980s saw these violations reach their zenith in the devastating events of 1983. The international crimes committed have profound implications under the Civil Code, as the Iraqi government's involvement in these heinous acts is undeniable and must be addressed. Moreover, the global repercussions of these atrocities, and their grave breaches of international law, should have provoked significant shock and condemnation from the international community, including major powers and human rights advocates.

The third requirement for establishing vicarious liability in the context of genocide is that the perpetrator must have acted within the scope of their employment; in other words, the wrongful acts must have been carried out during and as part of their official duties. In the case of the Iraqi forces, this criterion is unequivocally met. Historical records demonstrate that these forces not only committed genocidal atrocities in the course of their duties but also that the preparatory actions leading up to these campaigns were part of a meticulously planned and systematic effort aimed at the elimination and total destruction of the Barzani community. The Iraqi military units were specifically trained and prepared for this mission, with the genocidal campaigns being the result of a coordinated series of attacks rather than isolated incidents. These campaigns, which spanned several years and culminated in 1983, were clearly part of a broader strategy orchestrated by the state. The systematic nature of the genocidal actions further substantiates that the Iraqi forces were acting in their official capacity.

Given the established basis for state responsibility under the doctrine of vicarious liability, it is legally imperative for the Iraqi government to be held accountable. This includes providing redress and awarding appropriate reparations to the victims, encompassing both moral and material damages, as mandated by the Civil Code.

6. Conclusion:

In conclusion, the establishment of the ISCT in 2003 was a significant step towards recognizing human rights values and international customary law principles on mass human rights violations. In this sense, holding senior Ba'athist officials accountable for their involvement in genocidal acts, crimes against humanity, and war crimes committed under the regime's rule was part of rebuilding the state and bringing peace back to its paces. The ISCT's Statute made it clear that the primary objective behind the Tribunal's formation was to promote justice and reconciliation among Iraq's various ethnic groups. This goal would play an extremely important role as far as the Kurds rights were concerned, particularly in

¹¹² The Supreme Criminal Court of Iraq, 4, First Instance, 2009, 3 May 2011, Preamble of the Decision.

recognizing the Kurdish genocide and holding the state fully accountable which was a national aspiration. However, despite its initial promises to serve justice in a fair manner, the ISCT encountered several challenges and limitations in achieving its primary goal. Under the Tribunal's jurisdiction, majority of Kurdish rights were abandoned in terms of redressing genocide catastrophes. One critical aspect that hindered the realization of justice, and awarding reparation to genocide survivors, reflected in the inadequacy of Article 22 of the ISCT Statute. The Article, designedly referred victims' civil rights to national law. This approach, consequently, paved the way to the complete abandonment of right to reparation. Since under national law, the responsibility for redressing genocide survivors is attributed to individual criminals who would not have such financial ability to restore victims' rights. Thus, the ISCT failed to establish state vicarious liability for such reparations, and its practical application was ineffective. Moreover, the broader Iraqi judicial system's politicization and lack of independence persisted even after Saddam's removal from power in 2003, and the reluctance of Western countries to support the establishment of an international or hybrid tribunal further complicated the situation.

True reconciliation between ethnic groups and nations living within Iraq requires assuming a far more holistic approach to justice that encompasses furnishing proper reparations for victims to complete the criminal prosecutions' objective. While the Tribunal's efforts in pursuing the later aspect of justice and prosecuting senior officials were relatively commendable, it nevertheless fell short in addressing the comprehensive needs of victims, specifically Barzani genocide implications. To achieve genuine reconciliation, the Iraqi state shall be held vicariously liable for its role in mass atrocities. This also ensures that adequate financial resources are available for redressing victims in a relatively acceptable manner. Additionally, this victim-centered approach will consider both psychological and mental rehabilitative measures to help survivors heal from trauma and rebuild their lives.

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