

EXHIBIT N

REPORT ON IRAQI LAW
BARAGONA ET AL. V. KUWAIT GULF LINK TRANSPORT COMPANY ET AL.

Dr. Abdullah F. Ansary

The Honorable Raid Juhi Al-Saedi

EXECUTIVE SUMMARY

I. Factual Background

A tort action has been brought by the parents (the Plaintiffs) of Dominic F. Baragona (Baragona), a 42-year-old Army Lieutenant Colonel who was killed in an automobile accident on May 19, 2003 near Safwan, Iraq, when his Humvee collided with a jackknifed tractor-trailer owned by the Kuwait Gulf Link Transport Company ("Kuwait Gulf") and driven by Mahmoud Muhammed Hessain Serour ("Serour"), a "Kuwait Gulf" employee (both are the Defendants in this case).¹

The United States District Court for the Northern District of Georgia, Atlanta Division, (the Court) asserted jurisdiction over the action against "Kuwait Gulf" due to its extensive business contacts with the state of Georgia under the Georgia long-arm statute.²

A. Georgia's Conflicts Rules

The Court determined that the forum state's choice-of-law principles should apply.³ Under Georgia law, "the *lex loci delicti* determines the substantive rights of the parties."⁴ However, Georgia's *lex loci* rule is subject to a public policy exception if the harm occurred in a foreign state and the foreign state's rule "[c]ontravenes our established public policy, or the recognized standards of civilization and good morals . . ."⁵ The public policy exception applies where "the foreign statute is designed to redress an injury, but prescribes a form of redress which is radically dissimilar to anything existing in our own system of jurisprudence."⁶

B. Georgia and Iraqi Law at the Time of the Accident

Because Iraq is the place of the harm, Iraqi law governs under Georgia conflicts law unless it contravenes Georgia public policy:

¹ Baragona et al. v. Kuwait Gulf Link Transport Company et al., 1:05-cv-1267-WSD (2007).

² O.C.G.A. § 9-10-91(1).

³ Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

⁴ Risdon Enterprises, Inc. v. Colemill Enterprises, Inc., 324 S.E.2d 738, 740 (Ga. Ct. App. 1984).

⁵ Alexander v. General Motors Corp., 446 S.E.2d 607, 661 (Ga. Ct. App. 1995), r'vd on other grounds at 478 S.E. 2d 123 (Ga. 1996).

⁶ Id.

1. Georgia Law

If Georgia Law ought to be applied, the Court determined that under Georgia law, damages for wrongful death can be recovered in the amount of “the full value of the law of the decedent.”⁷ The full value of the wrongfully ended life “consists of both the economic value of the deceased’s normal life expectancy as determined by his expected lifetime earnings,” as well as non-economic factors “incapable of exact proof” or even exact definition.⁸

2. Iraqi Law

If Iraqi Law ought to be applied the Court determined that the law of civil damages (governed by the Iraqi Civil Code of 1951 and Code of Civil Procedure) in force in 2003 should apply to Lt. Col. Baragona’s damages claim.⁹

II. Briefing Requested by the Court

The Court specifically requested that the Plaintiffs provide a briefing on the relevant Iraqi law so that the Court could make appropriate determinations about what law applies, and whether the Plaintiffs have satisfied the minimal showing to obtain a default judgment under the relevant law.

To address the conflicts analysis, and to determine whether the Plaintiffs have alleged a substantive cause of action under Iraqi law, the Court asked the Plaintiffs to provide the Court with Iraqi law on three crucial issues:

- (1) whether Iraqi law permits recovery for wrongful death rather than mere injury;
- (2) whether Iraqi law permits an adult decedent’s parents, particularly a mother, such as the Plaintiffs in this case, to recover for the wrongful death of an adult; and
- (3) what measure of damages, if any, Iraqi law awards for wrongful death cases.¹⁰

This briefing attempts to address all questions posed by the Court. In order to give an integrated picture of Iraqi law applicable in this case, the answer to these questions will invoke the following Iraqi statutes:

- (1) Iraqi Civil Code (No. 40) of the 1951;
- (2) Iraqi Code of Civil Procedure No. (83) of 1969;

⁷ O.C.G.A. § 51-4-2(a).

⁸ Dept. of Human Resources v. Johnson, 592 S.E.2d 124, 131 (Ga. Ct. App. 2003).

⁹ Baragona et al. v. Kuwait Gulf Link Transport Company et al., 1:05-cv-1267-WSD (2007).

¹⁰ Id.

(3) Iraqi Law of Personal Status (No. 188) of 1959; and

(4) Iraqi Penal Code (No. 111) of 1969.

III. Introduction

Under Iraqi Law, the wrongful death of Baragona constitutes a felony that is punishable by law, and requires the Defendant (Serour) to be held personally accountable for his act. In addition, Iraqi Law allows civil recovery for an act that constitutes both a tort and a felony, in this case wrongful death, which is remedied by Iraqi courts with payment of compensation (damages), to be paid to Baragona's beneficiaries by the Defendant Kuwait Gulf, the employers of Serour, for damages for injuries caused by their employee's negligence.

IV. Iraqi Law

Under Iraqi Law it is the commission of a tort that vests a right of action in a claimant. Iraqi law determines the extent of any punishment or remedy flowing from the tort as follows:

A. Felony Case:

The Iraqi Penal Code No. (111) of 1969 clearly states the provisions of the Iraqi Penal Code are enforceable with regard to offences committed in Iraq. Article 6 of this Code provides that:

The provisions of this Code are enforceable in respect of offences committed in Iraq. An offence is considered to have been committed in Iraq if a criminal act is committed there or if the consequence of that act is realized or is intended to be realized there. In all circumstances, the law applies to all parties to the offence of which all or part occurs in Iraq even though any of those parties are abroad at the time and regardless of whether he is a principal or accessory to the offence.¹¹

Article 7 provides that:

Iraq's regional jurisdiction includes the territory of the Republic of Iraq and all areas under its control including its coastal waters and airspace as well as any foreign territory occupied by the Iraqi army in so far as any offence affects the security or interests of the army. Iraqi ships and aircraft are subject to the territorial jurisdiction of the Republic of Iraq wherever they may be.¹²

B. Tort Action

Article 27 of the Iraqi Civil Code provides that:

¹¹ Article 6 of the Iraqi Penal Code (No. 111) of 1969. (English Trans. available at the U.S. Department of State).

¹² Id. Art. 7.

(1) Non-contractual obligations will be governed by the law of the state wherein the act giving rise to the obligation took place.¹³ (2) The provisions of the preceding paragraph shall not however apply in regard to obligations arising from an unlawful act (tort) to events which take place abroad and are lawful in Iraq even when they are considered as unlawful in the country wherein they had occurred.¹⁴

Article 27 asserts that non-contractual obligations are governed by the laws of the state in which the act giving rise to the obligation took place. However, this rule does not apply to matters regarding acts or torts committed abroad which are considered unlawful in the place they were done but which are lawful in Iraq.

C. Liability

Article 219 of the Iraqi Civil Code elaborates on the responsibility of the governments and institutions for damages caused by their employers. It states:

(1) 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.¹⁵ (2) The employer will be able to relieve himself of the responsibility if he establishes that he had exercised the necessary care to prevent the injury or that the injury would have happened had he exercised the necessary care (caution).¹⁶

This Article clearly states that governments, municipalities, and other institutions that provide public service, or any person providing any industrial or commercial enterprises are responsible for the damage caused by their employees, if the damage is caused by them while they perform their services. Employers can avoid liability if it has been proved that he/she did whatever he/she could to prevent harm, or the damage would happen anyway even if he/she took all cautions.

In addition, the Court held that employers are particularly liable for damages for injuries caused by their employees' negligence.¹⁷ In support of the Court's opinion, Article 227 of the Iraqi Civil Code provides that "every person has the right of passage on the public road provided he (observes) the safety (precautions) so that he will not cause injury to a third party or to himself in the cases where (safety) precautions may be taken." According to this Article, the Plaintiffs in this case have been violated because a Kuwait Gulf truck was driven unsafely, resulting in Lt. Col. Baragona's death.

¹³ Article 27(1) of the Iraqi Civil Code (No. 40) of the 1951. Text translated by NICOLA H. KARAM, BUSINESS LAWS OF IRAQ, (Middle East Business Law Series, Graham & Trotman eds., 1990), attached as Exhibit I.

¹⁴ Id. Art. 27(2). Text translated by NICOLA H. KARAM, *supra* note 13.

¹⁵ Id. Art. 219(12). Text translated by NICOLA H. KARAM, *supra* note 13.

¹⁶ Id. Art. 219(2). Text translated by NICOLA H. KARAM, *supra* note 13.

¹⁷ Baragona et al. v. Kuwait Gulf Link Transport Company et al., 1:05-cv-1267-WSD (2007).

V. Question 1: Recovery for Wrongful Death?

Iraqi Civil Law allows civil recovery for Wrongful Death. The Iraqi Civil Code contains a general article stating: "Every act which is injurious to persons such as murder, wounding, assault, or any other kind of [infliction of injury] entails payment of damages by the perpetrator."¹⁸ Article 203 of the Iraqi Civil Law provides that: "In case of murder and in case of death resulting from wounds or any other injurious act renders the perpetrator liable to pay compensation to the dependant of the victim who have been deprived of sustenance on account of the murder or death."¹⁹ Article 203 affirms that in cases of murder or injuries resulting in death, the perpetrator is obligated to pay compensation to dependants of the victim who were deprived of sustenance because of the wrongful act. In addition, Article 204 of the same code provides that every assault which causes damage other than damage expressly detailed in other articles also requires compensation. The Article states that "Every assault which causes other than the injuries mentioned in the preceding articles entails payment of compensation".²⁰ Moreover, as we will discuss shortly, the right to compensation for wrongful acts under the Iraqi Code entails redress for moral injuries, impingements on freedom, as well as offenses to one's morality, honor, reputation, and social standing.²¹

VI. Question 2: Decedent's Parents as Parties to the Lawsuit

To answer this question we should explore two of the Iraqi Codes to determine who is entitled to be a party to the lawsuit pending before the Court -- the Iraqi Code of Civil Procedure No. (83) of 1969 defines which parties have the right to seek a legal remedy. In addition, since this tort action brought by the parents of Baragona seeks damages arising from the death of their son, and since the parents of Baragona are heirs under Iraq Law (entitled to receive a share of the decedent's property via the rules of inheritance in Iraq which is the jurisdiction where the decedent died), the Iraqi Law of Personal Status No. (188) of 1959 should be explored to clarify the rights of the heirs in this case.

An heir can be one of the Defendants or the Plaintiffs in a civil action brought against or for the deceased. Article 5 of the Iraqi Code of Civil Procedure provides that: "It is legally valid that one of the heirs can be adversary in the lawsuit for or against the dead, however, the adversary with regards to the property in the heritage is the heir who is possessing this property."²² Thus the parents could act as the Plaintiffs in this case and according to Article 5 any of the heirs could represent the Plaintiffs in this lawsuit. In addition, the Iraqi Code of Civil Procedure expressly affirms that heirs have the right to pursue any claims against the parties in the lawsuit upon the death of their relative. Article 84 of the Iraqi Code of Civil Procedure provides that the proceedings shall be abated by the death of the plaintiff. It states that:

¹⁸ Id. Art. 202. Text translated by NICOLA H. KARAM, *supra* note 13.

¹⁹ Id. Art. 203. Text translated by NICOLA H. KARAM, *supra* note 13.

²⁰ Id. Art. 204. Text translated by NICOLA H. KARAM, *supra* note 13.

²¹ Id. Art. 205.

²² Article 5 of the Iraqi Code of Civil Procedure No. (83) of 1969. Text translated by MUHAMMAD F. HAIMOUR, (The Arab American Language Institute, Sept. 28, 2007), attached as Exhibit 2. Exhibit 2 is a PDF copy of Mr. Haimour's translation and certificate of translation.

By power of law, the lawsuit is to be discontinued upon the death of any of the adversaries, or upon the loss of any of the adversaries of their capacity as adversary, or upon the cessation of the legal capacity of the authorized legal representative of the adversary, unless the lawsuit is in order for a final verdict.²³

However, proceedings may be revived if the plaintiff's heir(s) appeared before the court to revive it. Article 86 of the same law states:

...(2) The court shall also continue the lawsuit if the hearing is attended by the heir of the dead, or by the person who is acting on behalf of the adversary whose capacity as adversary came to an end, or on behalf of the person whose capacity came to an end and opted to pursue the lawsuit.²⁴

In defining who is an heir under Iraqi Law, Article 89 of Iraqi Law of Personal Status defines the heirs of a person as parents and the children...grandfathers, grandmothers, brothers and sisters and nephews and sisters, uncles, aunts (on father's side), uncles and aunts (on mother's side)...etc. Article 89 states:

Heirs by kinship and the method of inheriting:

1. Parents and sons and daughters according to the rule of the male will have twice the share of the female
2. Grand-fathers, grand-mothers, brothers, sisters, nieces, and nephews.
3. Uncles, aunts, and blood relatives.
4. Sibling sister is considered equal to a sibling brother in case of exclusion from inheritance.²⁵

In addition Article 203 of the Iraqi Civil code states clearly that in cases of murder or injuries resulting in death, the perpetrator is obligated to pay compensation to dependants of the victim who were deprived of sustenance because of the wrongful act.²⁶ Thus, every dependant of the victim is entitled to recovery. However dependency of any individual who is not an heir of the deceased is always difficult to prove in Iraqi Court.

In addition to redress the physical injury, the right to compensation for wrongful acts under Article 205 of the Iraqi Civil Code entails redress for moral injuries, impingements on freedom, as well as offenses to one's morality, honor, reputation, and social standing. Financial damage to third parties also merits compensation. Damages may be awarded to spouses and immediate relatives of the family of the victim resulting from moral injury caused by disease.²⁷ The Iraqi Civil Code in Articles 38 to 39 defines a person's family as being composed of people of common ancestry. Relationships with family members are defined as direct or collateral. Article 38 of the same law states: "A person's family comprises all his/her kinship, and every

²³ Id. Art. 84. Text translated by MUHANNAD F. HAIMOUR, *supra* note 23.

²⁴ Id. arts. 84 – 86. Text translated by MUHANNAD F. HAIMOUR, *supra* note 23.

²⁵ Article 89 of the Iraqi Law of Personal Status (No. 188) of 1959.

²⁶ Article 203 of the Iraqi Civil Code (No. 40) of the 1951.

²⁷ Id. Art. 205.

person coming from the same common decent is considered as kinship. Article 39 of the same law states:

1. Direct kinship is the relationship between the root and the branches. Marginal kinship is the relationship among persons of the same descent without being connected through a root-branches relationship.
2. In measuring the degree of direct kinship, considering every branch a level of kinship from the root, with the exclusion of the root. In measuring marginal kinship, the levels of kinship are to be decided by traversing from the root up towards the root, then down from the root to the other branch, where every branch is considered a level of kinship with the exclusion of the common root.
3. The relatives of any of the spouses are on the same level of kinship relation to the other spouse.²⁹

Thus Article 39 clearly states that direct relatives are those with a direct connection between the ancestors and descendants. All others are considered to be the same kind of relative in the same kind and degree.

VII. Question 3: Measures of Damages for Wrongful Death Cases.

According to Article 207(2) of the Iraqi Civil Code, courts are to calculate damages commensurately with: the damages sustained by the claimant (injury, death, etc), and the loss sustained by the victim, provided the loss was a result of the unlawful act. This calculation includes the loss of benefits of things, lost wages, etc. Article 207 states:

- (1) In all cases the court will estimate the damages commensurately with the injury and the loss of gain sustained by the victim, provided that the same was a natural result of the unlawful act.³⁰ (2) Deprivation of gain (loss of) benefits of things will be included in the estimation of the damages and the liability may cover the wage (fee/remuneration).³¹

Iraqi courts have wide discretion in estimating "the damages commensurately with the injury" and "the loss of gain sustained by the victim". The damages sustained by the injured person are those material damages inflicted by the death of any family member which cannot be sustained in the future, such as occupying a higher position or producing any creative work in any field, in addition to his own personal and care of his family. Damages also include his personal talents, whether social, political or professional. Damages also include his personal talents, such as sports or music and what can be reaped through such talent, in addition to his prestige and social relations (depending on his age and health conditions). Estimating "the loss of gain" is a purely computational approach, related to the victim's profits. Estimates are based on the deceased person's assets and future career, work, and economic life, as well as on work and economic

²⁸ Id. Art. 39. Text translated by MUHAMMAD F. HAJMOUR, *supra* note 23.
²⁹ Id. Art. 39. Text translated by MUHAMMAD F. HAJMOUR, *supra* note 23.
³⁰ Id. Art. 207(1). Text translated by NICOLA H. KARAM, *supra* note 23.
³¹ Id. Art. 207(2). Text translated by NICOLA H. KARAM, *supra* note 23.

variables that could affect his social and economic progress. In addition, Iraqi courts have wide discretion in determining the percentage share of the damages awarded, which may differ between parties to the lawsuit, taking into consideration the plaintiff's dependency on the deceased, deprivation of sustenance, poverty, and other relevant factors.

Thus, similar to Georgia law, a court in Iraq calculates both the economic value of the deceased's normal life expectancy as determined by his expected lifetime earnings (e.g., age, life expectancy, precocity, health, mental and physical development, family circumstances, and the experience and knowledge of human affairs), and additional intangible value (e.g., various positive attributes and hopes for the victim future).³²

In addition, a court calculates other moral injuries such as impingements on freedom, as well as offenses to one's morality, honor, reputation, and social standing. Article 205 of the Iraqi Civil Code states:

(1) The right to compensation also covers moral injury: any encroachment (assault) on the freedom, morality, honor, reputation, social standing, or financial position (credibility) of a third party renders the perpetrator liable for compensation (damages). (2) Damages may be adjudged to spouses and the next of kin of the family in respect of the moral injury sustained by them as a result of the victim's disease. (3) Damages for moral injury do not pass to a third party unless its value has been determined pursuant to an agreement or a final judgment.³³

Moreover, according to Article 208 of the Iraqi Civil Code, when for some reason damages cannot be adequately estimated, a court may reserve for the victim the right to apply for reconsideration of the estimate within a reasonable time.³⁴ Furthermore, Article 209 of the same code states:

(1) The court will determine the method of payment of the damages according to the circumstances; the damages may be payable in installments or as a revenue in the form of a salary in which case the debtor may be required to provide a security.³⁵ (2) The compensation (damages) will be estimated in case; the court may, however, depending on the circumstances and upon application being filed by the victim (injure) order that the situation be reinstated to its original state or adjudge performance of a certain specified matter or restitution of a similar thing of the fungibles by way of compensation.³⁶

This Article clearly states that the amount of damages to be paid is normally calculated in monetary amounts, though a court may, in certain circumstances, order that a party restore the

³² Compare *Williams v. Worsley*, 235 Ga. App. 806, 808 (4) (510 SE2d 46) (1998).

³³ Id. Art. 205. Text translated by NICOLA H. KARAM, *supra* note 13.

³⁴ Article 208 states: "Where it is not possible for the court to estimate the damages adequately it may reserve a right to the victim to apply within a reasonable period for reconsideration of the estimate." Id. Art. 208. Text translated by NICOLA H. KARAM, *supra* note 13.

³⁵ Id. Art. 209(1). Text translated by NICOLA H. KARAM, *supra* note 13.

³⁶ Id. Art. 209(2). Text translated by NICOLA H. KARAM, *supra* note 13.

situation to the status quo ante or perform a certain act. When monetary compensation is ordered, the court may determine the method of payment, such as ordering payment in installments or in the form of a salary to be paid to the victim.

Finally, it is worth mentioning that all court assessments can be guided by the views of experts to determine the economic and moral damages. Article 133 of the Iraqi (Prove) Law (No. 107) of 1979 states:

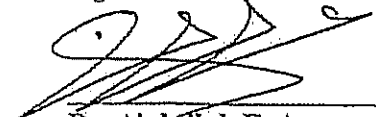
Should the subject of the lawsuit require consulting the opinion of experts, the court shall require that the two parties agree on an expert or more, provided the number of experts is an [uneven] number, and that the experts can be from among those whose names are, or not, included in the list of experts. In the case of the two parties' failure to reach an agreement on a specific expert, the court shall undertake the assignment of the expert.³⁷

Article 140 of the same law states that a court may utilize the expert's opinion as a reason for its judgment. However, the expert's opinion does not restrict the court's discretion. If the court chooses not to rely on an expert's opinion, it should state the reasons that necessitate the exclusion of part or all of the expert's opinion.³⁸ This Article clearly shows that the Iraqi courts have wide discretion in determining what is proper in terms of assessing, collecting and determining the percentage share of the damages awarded.

VIII. Conclusion

Iraqi Civil Law allows civil recovery for wrongful death. Decedent's Parents are heirs under Iraq Law entitled to receive a share of the decedent's property via the rules of inheritance in Iraq. Every dependant of the victim is entitled to recovery. In addition, damages may be awarded to spouses and immediate relatives of the family of the victim resulting from moral injury. Iraqi courts calculate damages commensurately with the damages sustained by the claimant, and the loss sustained by the victim, provided the loss was the result of the unlawful act. In addition, Iraqi courts calculate other moral injuries such as impingements on freedom, as well as offenses to one's morality, honor, reputation, and social standing.

Signed and subscribed to:



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³⁷ Article 133 of the Iraqi (Prove) Law (No. 107) of 1979. Text translated by MUHANNAD F. HAJMOUR, *supra* note 23.

³⁸ Id. Art. 140. Text translated by MUHANNAD F. HAJMOUR, *supra* note 23.