

**Background Paper by
Asghar Al-Musawi
Deputy Minister of Migration**

In The Name of Allah the Most Gracious the Most Merciful

Dr. Sermid:

Regarding the cases included in your letter and the legal treatments in accordance with the Iraqi legislation:

In general, there are two types of legal treatments for most of the legal cases included in your letter. The acts set forth in the mentioned cases are considered violations of rights protected by criminal laws as well as civil laws:

First: the legal protection of property and possession in the criminal law:

The legal conformation of the case No. (1), and the hypothetical example is (displaced families which returned back to find that their homes are occupied by other displaced families from a region that they might not return to. In addition, these families have divided the house to accommodate 5 families instead of one.)

We believe that the lord of the displaced family which dwelled in the house of the other family has breached several rights protected by the law (several legal punitive provisions are applicable to such act in accordance with the Penal Code No. 111 for 1969) including the violation of the sanctity of a place intended for housing (Article 428)¹. In addition, the act of (the house division) constitutes another crime according to the provisions of Article 477 if the act of sabotage is committed by a group of less than five persons, and in accordance with the provisions of Article 478 if the act is committed by five persons or

¹ The mentioned Article states that (1- the following shall be punishable by imprisonment for a period not exceeding one year and a fine of not more than one hundred dinars, or by either penalty:
A- a person who enters an inhabited place or ready for habitation or any attachment thereof without the consent of the owner and in circumstances other than those authorized by the law.
B - a person found in a place stated above, disguised from the eyes of those who have the right to get him out.
C - a person who lawfully enters such places and stayed therein against the will of the person who has the right to get him out.
2 - If the intention behind entering the place or the disguise or stay therein is to prevent possession by force or commit a crime therein, the penalty shall be imprisonment for a period not exceeding two years and a fine of no more than two hundred dinars, or either penalty. The penalty of imprisonment shall be effected if the crime was perpetrated between sunset and sunrise or by breaking or climbing or by a person carrying a visible or concealed weapon or by three or more persons or by a person who impersonate a public character or claim to do public service.

more². Furthermore, the Resolution of the dissolved Revolutionary Command Council No. 36 for 1994 published in the Iraqi Waqaea- issue No. 3505 dated 11/4/1994, is also applicable to the act of the family that dwelled in the house of the other displaced family, which reads as follows (pursuant to the provisions of paragraph (A) of Article 42 of the Constitution, the Revolutionary Command Council has resolved the following:

1 - Any dweller without prior permission or contract of a house or apartment that belongs to others shall be punishable by imprisonment for a period not less than three years and not more than ten years. The penalty shall be imprisonment for not less than ten years if the house or apartment belongs to the state.

2 - The perpetrator of the crime set forth in paragraph (1) of this resolution shall be obliged, in addition to the established penalty, to pay double the original charge and double the damages resulting from living in the house or apartment.

3 - Any text in contrary to the provisions of this resolution shall not be applicable.

4 - The competent ministers and relevant parties shall implement this resolution.

After this brief overview of the legal articles that could be applied to the mentioned case, an important question arises: Which legal articles can be applicable to the mentioned case? Based on the general rules of law interpretation and adaptation of legal facts, we

² 1 - (2) Both Articles state that: (Article 477) Without prejudice to any harsher penalty set forth by the law:

1 - Any one who destroy, ruin or damage a property not owned by him or made it unfit for use or incur damages or defects thereto by any means whatsoever shall be punishable by imprisonment for a period not exceeding two years and a fine of not more than two hundred dinars, or either penalty.

2 - The penalty of imprisonment shall be effected if the offence results in disruption of a public utility or an activity of a public interest utility or results in jeopardizing lives, health or security of people.

The same shall be sentenced to anyone who deliberately damages or ruins any building established for the use of public or a statue in a public court.

3 - If the crime results in death of a human being, the penalty of imprisonment shall be effected.

Article 478

Without prejudice to any harsher penalty prescribed by law:

1 - Any member of a gang composed of at least five persons, which demolish, damage or destroy properties owned by others, make the same unfit for use or cause damages or defects thereto in any manner whatever shall be punishable by imprisonment.

2 - The penalty of imprisonment for up to seven years shall be imposed if the offence is committed using violence against persons.

3 - If the perpetrators take the opportunity of agitation, riot, sedition or disaster to commit the crime, they shall be subject to the penalty of imprisonment for a period not exceeding ten years.

find that the text worthy of being applicable to the first case is the resolution of the dissolved Revolutionary Command Council, being a special provision that deals with such cases, as outlined, as well as being subsequent to the date of the general provision set forth in the Penal Code. One may think that the family which stayed in the house was forced to live there and that necessity is considered one of responsibility obstacles. However, such statement may not be applicable because the conditions of necessity which prevents establishing the criminal liability in accordance with the provisions of Article (60/3) of the Iraqi Penal Code are not effective.

We conclude that the householder or the family which lived in the displaced person's house, shall be legally held responsible and shall be punished with the most sever penalty (felony) set forth in the mentioned Resolution as per Article 141 of the Penal Code, as long as the family stayed at the home without the consent or approval of the house owner.

With respect to the legal criminal procedures or (the steps to be taken by the owner of the house to restore his property), the Code of Penal Procedures sets forth the way to file a complaint³.

In the example above, the owner of the house or his representative (such as his attorney or his guardian if he is under guardianship or his custodian if he is not fully competent) shall inform one of the parties set out in paragraph (a) Article (1) of the Code of Penal Procedures, either orally or in writing. Such complaint is usually established in writing to the investigation magistrate⁴, who in turn instructs the investigator (mostly a police officer) to conduct the investigation and record the testimony and evidences of the claimant. The investigating magistrate may also record the witnesses' testimonies and conduct inspection of the incident location. If he is convinced of the validity of the claimant's allegation, he would decide to summon the defendant or arrest him at his discretion, and write down the defendant's testimony in the presence of his lawyer and hear his sayings. Based on this investigation, the investigation magistrate will take a decision of referring the defendant to the competent court or close the investigation if reasons thereof are available, such as the inadequacy of evidences against the suspect to refer him to court.

³ Paragraph (a) of Article (1) of the Code of Criminal Procedures states that (the criminal case shall be filed either orally or in writing to the investigation magistrate, investigator, any official at the police station or any of the members of the judicial control by those affected by the crime or their legal representative or any person who is aware of the occurrence thereof or by notification presented to any of them from the public prosecution unless otherwise provided by the law. The complaint may be filed in the case of flagrante delicto to whoever present of police officers and commissioners.

⁴ This is prevailing, or the complaint is submitted to the Center officer, who in turn prepares minutes of the complainant's statements and offers the same to the investigation magistrate, while the latter takes the same procedures mentioned above.

Given that the penal complaint is also governed by territorial jurisdiction⁵, i.e. the general principle is that the competent court must proceed with considering and investigating the complaint. The same is true regarding the trial court (Criminal Court or misdemeanors court, as the case may be), which is the court where the crime was committed within its spatial jurisdiction. For example, if the offence occurred in the Karkh, then Karkh investigation Court is the competent party to decide upon the case. In the event the complaint is filed before another court, such court would refer the investigation documents to Karkh court, being the competent party to decide upon the case. Indeed, I have investigated many of the complaints filed by displaced persons to Hamdaniya district from minorities such as Assyrians, Chaldeans and Turkmen who left Mosul city after their houses were destroyed or their properties were lost while they are unable to file their complaints in Mosul courts for fearing threats of killing. I heard to their sayings, wrote down their testimonies, attached evidences with the investigation papers (photos of the demolished house and documents proving ownership) and forwarded the investigation papers to the competent court in the Mosul city. Some other times, I used to write down testimonies of displaced people to Hamdaniyah areas on the basis of resolutions of investigation judges in Mosul, by delegating Hamdaniyah Court to record their

⁵ Article (53) of the Code of Criminal Procedure states that: the investigation jurisdiction is determined by the place where the crime is totally or partially committed, or any complementary action thereof or any resulting conclusion therefrom or an act that is a part of a compound, continuing or sequential crime. The jurisdiction is also determined by the place where the victim was found or where the money for which the crime was committed was found after being transferred by the perpetrators or by a person knowing thereof. B - if the crime occurred outside Iraq, then investigation will be proceeded by the investigating judges delegated by the Minister of Justice.

C - if the magistrate found that he was not competent to investigate the crime, he has the right to pass the investigative papers to the competent investigating judge under paragraph (a).

D - If the investigating judge to whom the papers were referred to, finds that he is not competent to investigate the case, he shall take the case to the Court of Cassation, with reasons to enable the court render its decision to appoint a competent judge urgently. He must continue the investigation until the time when the Court of Cassation adjudicates the issue.

E - procedures and decisions of the investigating judge are never void for issuance in contravention of paragraph (a). Article 54.

A - if the complaint has been filed against the suspect at two competent bodies or more of the investigation bodies, the investigative papers shall be referred to the body that received the complaint first.

B - in case of multiple suspects in a crime and the complaint against some of them was filed to the competent body while another complaint against others was submitted to another competent investigation body, the investigative papers shall be committed to the body who received the complaint first.

statements and complete investigation due to the inability of complainants or witnesses to attend before the mentioned court because of threats of killing. The importance of such procedures lies in the fact that filing the complaint maintains the rights of the complainant so he will be able, until security prevails, to complete the complaint procedures and judiciary claim, especially that such cases do not expire by time due to the failure of complainant to track his lawsuit during a certain period.

If the investigating court is satisfied that the evidence is sufficient to commit the extorter of the house that relates to the evacuee, it will refer the case to the Criminal Court, (provided that the court has adapted the case according to resolution 36 for 1994). The Criminal Court sets a date for trial and informs the lawsuit parties thereof, and then passes a judgment according to evidence. The important question is that this court rules on the criminal case-class basis, and has the right to rule on civil right as well; depending on the criminal case. And judges in addition to the penalty determined thereby, by double similar wage and double the value of damages resulting from occupying said house or apartment, and this is the civil right created by rule of law owing to committing the criminal act, or it leaves the adjudication to courts of first instance and this is common practice for a criminal court to add a legal paragraph to the penal judgment granting the complainant the right to revert to civil courts in order to obtain compensation for damages and loss of utility according to said resolution. Noting that making the punitive complaint contains a request for civil compensation for damages, according to the rules of the Iraqi Code of Criminal Procedure unless the complainant waives the civil right thereof.

Once the complainant has received the judgment whether from civil or punitive courts, which contains the compensation and restoration of property, the competent execution department shall carry out the final judgment, and the complainant may regain said property through said department according to the established ways as set out in law.

Second: Property Rights Civil Protection

Article 197 of the Iraqi Civil Code states that (should a real estate be extorted, the extorter shall return it to its owner with a similar wage and if damaged or impaired even without outrage, the extorter shall compensate the owner therefore). It is clear from the text that the property extorter is bound to return it in addition to pay compensation to the owner or the legal acquirer for the damages inflicted on the property and also compensate for the loss of benefit for the property during extortion period. This is the general principle in the civil law. In the presented hypothesis (evacuated family returned home to find its house occupied by another displaced family from an area it may not be able to go back to. Furthermore, the said family have divided the house to accommodate 5 families instead of one). We said that the displaced family, owner of said real estate, has the right to file a criminal complaint against the property extorter and that provision of Resolution 36 for 1994 provides, in paragraph (2), for compensating the relevant family, and that the Criminal Court may rule on the civilian rule in the penalty ruling, or refer the m on the civil judgment in the punitive judgment resolution or refer the matter to civil courts as we have previously explained.

The head of the displaced family may decide not to file a criminal complaint, and

settle for a claim before the civil courts to lift overrun caused by the family occupying the house, which belongs to the first family. Then, the head of the family shall take legal action against the extorting family before civil courts. The competent court for this case is the court of first instance which said real estate falls within its jurisdiction. For instance, if the location of real estate is in the city of Mosul, the Court of first instances in Mosul is the competent court to hear the case (6). The claim lawsuit shall be filed by a petition from the claimant or his legal representative to the judge of court of first instance who in turn, signals it and refers to the judicial assistant to set a date for pleading and inform the concerned parties after collecting the legal fee. On the pleading date, the court hears defenses and words of both parties and their grounds in accordance with Evidence Act . The court may inspect the real estate in question to complete its conviction on the way to make its decision. Having completed the evidence procedures, the court shall decide to explain end of the pleading and then issues its decision. The parties then understand the court decision and have the right to appeal the decision according to the legally established ways (see attachment, which explains the details of pleadings and court proceedings in two models for the special judgment to lift the overrun). Having the decision acquired peremptory degree, the case winner has the right to implement the decision through the competent execution directorate that in turn shall carry out the resolution in accordance with the legally established methods, thus the head of the family had gained his right according to law.

The question arises whether the claimant can claim the civil right as set forth in resolution 36 for 1994 independently without filing a penal case? This is not possible as the compensation in the mentioned resolution is linked with the act of murder, where Paragraph (2) of the said resolution provides for (the mentioned crime perpetrator in paragraph (1) of this resolution is bound in addition to the decided penalty to pay double the similar wage and double the value of damage resulting from living in said house or apartment) and the phrase (the crime perpetrator) requires evidence for the actus reus against the extorting family, and to convict it accordingly so that the extorted property owner can claim double similar wage and double the value of damages caused by extorting act applying the idea (that the accused is innocent until proven guilty) and that conviction is not proven unless peremptory judgment is issued by the competent court.

As for the fate of improvements or additions (if any) set up by usurping family in the extorted real estate, it is connected to the legal adaptation of the act of the displaced family that has occupied said house. Apparently, it is evident that the family has extorted the property. The legal judgment in such case requires re-establishing the situation back to its origin before the extortion. If the removal of additions is detrimental to the real estate, the property owner may claim such additions while fit for extraction, that is, cost of additions while fit for extraction on the ground that the extorter had bad faith. However, if the family that has occupied said property believes that occupying the property was on legal grounds that is, if said family did so in good faith, then found it was not so and that the property belongs to another person (for example, that this family had bought the house from a person who had false registration records for said real estate and sold the property to this family and then the latter family has created improvements to the property), then, the property owner possesses such improvements and additions on the grounds that the family when initially occupied the house did not act in bad faith and never knew about the forgery (these provisions are stipulated in Articles 1117 to 1122 of the Iraqi Civil Code) ,

taking into consideration tenure provisions in civil law(7) in other cases where tenure is not for the family that lost possession of the house as a result of evacuation but possessing the property legally.

As for the rest of families that has occupied said house upon dividing it by the extorter, there are two hypotheses, first, whether these families knew that the house belongs to others and that the house is extorted, their verdict is the same as that of the first family, but if said families did not know or thought the house belongs to the extorting family, in this case, provisions of resolution 36 do not apply to them and they shall not be deemed extorters except from the date they become aware that the property belongs to others, and that their existence in the house beyond that date has no legal ground.

Article 36 of the Code of Civil Procedure provides for the lawsuit to be established in the court where the property is located if related to in-kind right. In the event of multiple properties, the case can be established in one location.

Cases outlined above presume the owner knows the extorter, or the person who created damages in the house, but what is the judgment if the evacuee family did not know the person who created damages or stole furniture or exploded the house?

Standard procedure in such cases is to submit notification to the competent investigative bodies about the case, write down his testimony, and present evidence and sources so that the investigative bodies shall assume the function to know criminals. In case the perpetrator were not found, the judge shall close said investigation temporarily based on the provisions of paragraph (c) of Article 130 of the Code of Criminal Procedures.

These are the procedures in place in the judiciary claim to restore the real estate extorted by others, in normal conditions.

Under the current circumstances, could the owner of a property that is extorted by a person or a family, without his consent, restore his property with the normal above mentioned ways?

It is really difficult for many families who lost property to file a criminal complaint through legal ways for making criminal complaints or civil lawsuits, perhaps among such difficulties is the inability of the displaced person to access the property in question for the purpose of assessing the damage and know the real estate occupier and his name and then take legal action before the competent court, in his area, fearing for his life as explained earlier, as well as the weakness of the executive body and its inability to carry out the courts decisions. I noticed in many police stations accumulation of notifications without informing the accused, in addition to the administrative corruption, and in some cases, the persons' confidence in the executive body is weakened, evacuation of some families to the neighboring countries leaving homes behind without knowing the fate of their properties and perhaps there are other reasons that prevent the displaced from using legal methods to restore their property which lead some people to sell their properties at low prices or exchange said properties for another in other areas or resort to non-government powers to get their

houses back (e.g. militias ,parties or clans). In areas covered by the plan to impose the law, the army helped restore some extorted houses, based on the emergency law published in the Iraqi Waqaea, volume 3987, in September 2004 where Article (3) of said Act granted powers to enable the executive body represented by the government to take such action to preserve public order and stop trespassers on real estate, and managed to resettle some displaced families in some areas. Recently, we have noticed several resolutions on the evacuation of government buildings that were occupied by the parties or citizens in the cities of Basra and in Mosul and finally In the governorate of Missan, as trespassing on government property is considered an aggravating circumstance for purposes of applying the dissolved Revolution Command Council Decree No. 36 for 1994. In short, the opportunities for recovery of extorted real estate to the displaced families in the present time are few and restoration opportunities increase by virtue of improved security situation and rule of law. The need still stands for compromise and elimination of causes of displacement, such as sectarian tensions and ethnic rivalry and the fighting between various forces in order to enable displaced families to return to their areas and to intensify government efforts towards achieving national reconciliation and pass laws that will achieve just distribution of wealth. The government is actually doing that at the present time and has achieved many successes during the last period, and is still working on this approach.

For the second case contained in the letter, it does not significantly differ from the first case in terms of legal rules applicable to the case mentioned, except in terms of adding another element to the act of the extorting family that is (the threat) set to be incriminated in articles 430 and 431 of the Penal Code, and I think that In such cases, the applicable punitive text to the case is the resolution by the Revolutionary Command Council with reference to article 142 of Iraqi Penal Code as the harshest punishment (10 years). As for the civil side, this case takes follows the first case, and the landlord has nothing to do except resorting to the authorities to report the threat to his life and on the looting of his belongings and his property. It is inevitable that he gets his rights back once the strong state is able to strengthen its bodies and authorities and extend the rule of law to criminals and outlaws, as the general principles of law do not presume the presence of another authority other than the power of law.

For the third case, which assumes (displaced families returned to find that her house had been sold or rented out without their permission and the proceeds have gone to a person or group that may not be found. One family member was killed and the family believes that there are people in the neighborhood who are either accomplices to the murder or aware of its perpetrators.)

Legal actions on real estate, particularly the sale, must be registered in the Land Registration Department, in addition to the other pillars of the sales contract, (satisfaction and store and why). The registration is for some an element of the contract while others think it is a necessary description to enforce the sale on contractors and others. In short, the sale of real estate without the formality imposed by law which is the sale registration in the real Estate Registration Department is legally deemed null and void and this sale is not enforced on the original owner of the house in accordance with the provisions of the Civil Code and the Land Registration Act. Therefore, the mentioned sale of the displaced person's house is deemed null and void by law, and the act of the person who sold the house or rented it out to others

constitutes a crime according to the text of Article (457) of the Iraqi Penal Code where the article stipulates that (a sentence of imprisonment shall be passed to anyone who disposes of movable property or real estate which he knows is not his or he has no right to dispose thereof with his knowledge of his disposal with the intention to harm others).

As for killing the said family member, where this family suspects certain people in the neighborhood, the Iraqi law has granted the victim the right to complain, thus, he can report to the competent authorities on his suspicions that the actors are said persons or that they are accomplices to the crime or that they know the perpetrators. The investigative bodies shall duly questioning said persons.

Case No. (4) concerning partial or whole demolition without knowing the actor: we have previously referred to that, and I would like to add that the case shall be recorded against unknown and closed temporarily and then finally resolved after 2 years from the date of temporary closure decision. In fact, there is no legal obligation on the government to compensate the victim in such cases but may be a moral obligation or a will to help these families to avoid discontent, moreover, one of the functions of the Ministry of Immigration is to resettle displaced families to terminate cases of evacuation that are exceptional and that the requirements of the voluntary repatriation, rehabilitation and reintegration and return with dignity is to assist displaced families to return with dignity, and on this basis the Ministry of Immigration provides some concessions to these families, such as helping displaced persons to return to their jobs by providing supporting letters to their departments, in-kind and cash assistance and urging competent authorities to provide services to them. As for the case of the child birth, it has been dealt with by the Ministry of Immigration by providing the displaced applicant with letters to the concerned departments to register births bearing in mind that the Iraqi nationality is granted to whoever is born in Iraq from Iraqi parents based on the blood right and region right (original nationality and not naturalization) Under Article 3 / a of the Nationality Law, but if the birth occurred outside Iraq, this will not affect the child's right to Iraqi nationality as long as the birth had been by Iraqi parents (based on the right of blood). For procedures, the birth in general is a material proof that can be evidenced and the displaced family may obtain a birth certificate from Iraqi courts when they get back to Iraq based on the birth certificate issued in the foreign country if such document where admissible under Iraqi Law.

In case No. 6, these families fall within the attention of our Ministry noting that the Iraqi law makes no distinction in criminality whether crimes occur between individuals or groups of people, but rather the committing crimes by an organized group outside the law is deemed an aggravating condition in terms of the relevant penalty. Therefore, the act of the militia is an offence under the law and no punishment shall be imposed on the family because it was forced to live in the house, and the duress is deemed a reason for permission under the Iraqi law. In the mentioned hypothesis, we have two cases, the first is a family displaced by militias under coercion, and the second involves placing a family in a house that belongs to others, which also constitutes a crime. Both families are victims of violence and thus are groups under the attention of the Ministry. The Ministry provides them with assistance as mentioned in the subsequent paragraph.

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Case No. 7 also is deemed a group under the attention of the Ministry and receives aid. The Ministry provided camps in several areas, the last of which is the national stadium where displaced families were received from Sadr and Shola cities. Food, drink and basic living needs were made available in addition to health care and cash assistance by 150000 dinars grant on monthly basis for six months. The Ministry also distributed foodstuffs to the displaced families all over Iraq, such as blankets, shoes...etc. The Iraqi government is trying with the Ministry of Immigration in particular to help families that lost their houses or whose houses were damaged through the military operations in certain areas by providing cash assistance to rebuild these houses and repair damages or at least rehabilitate the house. For example, the Cabinet established the compensation committee to receive applications from the affected families in Sader and Shola. Big money was allocated for compensation. The Iraqi government granted one million dinar for the family that returns home in Baghdad and the Ministry is about to circulate this try to all returned families all over Iraq. The Ministry of immigration developed an integrated policy on the displacement and return and has drawn executive plans including ensuring the return of the displaced families with dignity and humanity, help them to integrate with the society like providing in-kind and cash assistance on monthly basis for a certain period of time (6 months) and pave the way for the voluntary return by providing the essential services and creating a safe atmosphere in coordination with the competent bodies, preparing reports and studies on the displacement and return. This is in brief a description of the procedures of the Ministry for taking care of its groups, in addition to the compensation law that guaranteed the compensation to this group against the damages inflicted them. The law is being enacted. One of the most important features of the proposed law is to compensate the affected groups from the terrorist operations like injuries and death whether civilian or military. This could be part of the answer to your question about type of assistance the Ministry provides.

As for the eighth case: the origin of legal actions (contract and single will) is to be issued by a mature sane person and his will is not blemished and since content is one pillar of the sale contract, in addition to the place and cause, and that content is the sound will, therefore, the Iraqi civil law considered (exploitation) is a defect that confines the will without eliminating it as in coercion. Judgment of coercion lacks legal force of behavior, while the situation in the hypothesis mentioned in the eighth case is reflected in the exploitation of the buyer to the landlord need and buying his property at a small amount and thus the seller was badly injured and has the right to claim within one year to lift defraud to a certain reasonable limit. This is the judgment of article 125 of the Iraqi civil code. The original property owner may not restore the property he already sold but he may claim to lift the defraud caused by the captioned sale. For the family that rented the house, the lease is correct and in force and may not be affected by the claim for lifting defraud between the old landlord and the new one.

