

**Occupation and Refugee Status:
State Responsibility Arising out of War, Intervention,
and Prolonged Foreign Territorial Control**

Panel Discussion sponsored by
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The Case of the PMOI and the People of Ashraf

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I. Introduction

Disclosure: I have acted as counsel to the National Council of Resistance of Iran, and to the U.S. Committee for Camp Ashraf Residents, and have twice visited Camp Ashraf since the American invasion of Iraq in 2003.

I should also make clear that the Secretary of State has listed the NCRI and all of its affiliated groups as “Foreign Terrorist Organizations” pursuant to U.S. law. The United Kingdom and the European Union had entered similar designations of the PMOI – the People’s Mojahedin Organization of Iran, one of the constituent members of the NCRI – but both were revoked as a result of court decisions. An action to reverse the designation in the U.S. is pending before the U.S. Court of Appeals for the D.C. Circuit.

I appear today not as an advocate, but as someone who has tried very hard to apply international law principles to the particular problems and issues faced by my clients, and in particular by the People of Ashraf and those who must make decisions about their fate. I do not intend to try to defend here the proposition that the People of Ashraf are a legitimate opposition movement that offers hope for a democratic, non-nuclear Iran (although I firmly believe those things to be true).

Still, the conundrums presented by Ashraf have implications for our understanding of the norms that govern in such situations. So I propose to discuss this case by way of example, and I will suggest conclusions about the current state of the law in this area.

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II. Ashraf: the basic facts

The PMOI – a member organization of the NCRI – established bases throughout Iraq in the mid-1980s. Their objective, then as now, is to promote a particular political philosophy, favoring a pluralist and secular republic, which they hope will be adopted by the people of Iran.

Among the encampments built by the PMOI in Iraq, the largest and most advanced was Ashraf. The base is a small city in the desert, which as of this date features mosques and parks, exhibition halls and meeting rooms, a museum, a cemetery, and two swimming pools. One of the parks contains an artificial lake with a bridge over it: I am told that it is a replica of a park in Tehran.

Under Iranian law, it is a serious and even capital offense to be associated with the PMOI. Indeed, although the Iranian regime regularly tells the media that the People of Ashraf would be welcome to return to their country if they repudiate their apostasy, since the sham elections of last year numerous dissidents inside Iran have been tried, convicted, and sentenced to death for their supposed affiliation with the PMOI.

In 2003, the United States invaded Iraq. In the course of the invasion, bombs were dropped on Ashraf and other PMOI compounds, resulting in loss of life and destruction of property. The Multi-National Force-Iraq “consolidated” all of the PMOI members then in Iraq at the base at Ashraf, and demanded their surrender.

The People of Ashraf refused to surrender to the Americans, for the simple reason that they were not at war with the United States or with its “Coalition of the Willing.” Instead, after intense negotiations, the PMOI and the United States signed a memorandum of understanding in May 2003 to govern their ongoing relations. In accordance with that MOU, the PMOI members gave up their arms, and agreed to remain inside the perimeter of Camp Ashraf.

In the first half of 2004, United States Government agencies conducted individual interviews with all 3,500 residents of Ashraf, mainly to determine whether there was evidence that any had been involved in prosecutable offenses. That exhaustive process resulted in a declaration on behalf of the Commanding Officer of the MNF-I that the People of Ashraf had committed no crimes, and were civilians entitled to classification as Protected Persons within the Fourth Geneva Convention. That classification was communicated by official announcement, and by individual letters to each Ashraf resident, “congratulating” them on their status.

And the U.S. Government did more than offer congratulations. It also prepared, and asked each member of the PMOI at Ashraf to sign, an agreement indicating that the PMOI would remain unarmed and cooperative with U.S. authority, in exchange for which the American military would protect the People of Ashraf “until final disposition decisions could be made.”

From mid-2004 until early 2009, the U.S. and the MNF-I lived up to their commitments. While there were occasional attempts by Tehran to disrupt the Camp, and although the Iraqi government has in more recent years blocked the delivery of fuel, food and other services, the People of Ashraf lived peacefully, going about their business of promoting their political and

religious philosophy. At the beginning of last year, as part of the withdrawal of U.S. and allied forces from combat positions, the U.S. formally handed over control of Ashraf to the Government of Iraq.

It is said – although the documents are apparently classified – that the U.S. demanded and received assurances from the Iraqis that the People of Ashraf would be treated humanely, with respect for their human rights, and in particular that they would not be forcibly repatriated to Iran in violation of the universal norm of *non-refoulement*. Yet in the summer of 2009, the Iraqi security forces invaded Camp Ashraf, on the pretext of wanting to establish a police garrison there. Some 11 residents were killed, and 500 were injured.

The Maliki government has made no effort to conceal its objective: it wants the PMOI out of Ashraf and out of Iraq. The Prime Minister has said this in almost those very words. In addition to the armed invasion, his security forces attempted, toward the latter part of 2009, to “relocate” the People of Ashraf to a remote prison camp in the south of the country. This is a place so far from anywhere that it would be impossible to provide properly for the safety of its residents, especially where, as here, they have mortal and powerful enemies nearby. He openly described this as the first step toward expulsion.

The defenders of Ashraf called this move “constructive *refoulement*.” If *non-refoulement* is a *jus cogens* norm, then it should defy such obvious evasion. While the Geneva Conventions do permit the internal relocation of protected persons under certain circumstances – such as to provide for the protection of their or public safety – those circumstances do not obtain here.

The initial efforts to force the move out of Ashraf were stymied. And they have not been resumed . . . yet.

III. The Legal Issues

Let me suggest some of the legal issues that arise in connection with this, with a sentence or two on either side of the question how they should be resolved.

A. Once an occupying power declares a population to be “protected persons” under Geneva IV, what are the ongoing obligations of that occupying power when the occupation ends, and there is no longer a state of international armed conflict?

1. May the (former) occupier simply transfer control over the population to the territorial sovereign, along with the return of other assets and indicia of possession? An affirmative answer has the advantage of consistency (the former occupier may disengage from all aspects of its participation in the war now ended), but it opens the door for wholesale mistreatment – even on a collusive basis – of a population with a genuine claim to refugee status. On the other hand, a negative answer suggests continuing obligations on the part of the former occupier, which it may not have the resources, the political will, or the military wherewithal to carry out.

2. Is the transferor state meant to act as some kind of guarantor of the behavior of the transferee? What if there is a change in political alignment of that state? And if the transferee

state behaves so badly as to violate fundamental norms of human rights law, is there a basis for assigning responsibility for these violations to the transferor? If so, on what basis? What burden must the transferor bear to show that it had no role in the bad conduct?

B. Article 45 of the Fourth Geneva Convention – the only one that seems to be relevant to these circumstances – is very far from a model of clarity. It provides, in relevant part, as follows:

- a) Protected persons shall not be transferred to a Power which is not a party to the Convention.
- b) Protected persons may be transferred by the Detaining Power only . . . after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the present Convention.
- c) If protected persons are transferred under such circumstances, responsibility for the application of the present Convention rests on the Power accepting them, while they are in its custody.
- d) Nevertheless, if that Power fails to carry out the provisions of the present Convention in any important respect, the Power by which the protected persons were transferred shall, upon being so notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the protected persons.
- e) Such request must be complied with.
- f) In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.

1. When Article 45 speaks of “transfer,” should that word be understood as limited to physical transfers? What about transfer of control over a population – such as the People of Ashraf – that has remained *sur place*? A strict reading of the term, requiring physical movement, would permit obviously unacceptable behavior to be overlooked. But a more expansive reading would invite debate about when a transfer of control has taken place. Is this to be determined by effective or nominal (*de facto* or *de jure*) control?

2. As the transferee of the People of Ashraf, Iraq presumably has obligations under this provision, and in particular “to apply the present Convention.” But what does that mean? What if the Convention is no longer applicable because there are no longer hostilities (certainly the **original** designation of “protected person” status is dependent on the existence of hostilities: *see* Article 27 *et seq.*). How should Iraq “apply” a Convention that, by its own terms, is not applicable? But if Article 45 meant simply to impose obligations to honor basic norms of human rights (of the sort set out in common Article 3), why didn’t it say so?

3. The use of the word “notified” in paragraph (d) seems to contemplate the situation in which the transferee is overwhelmed, and voluntarily reports its inability to live up to its obligations. But is the Convention meant to be limited in that way? What purpose would be served by distinguishing between cases in which the transferee **cannot** honor its commitment, and those where it, even deliberately, **will** not? Can a transferor state voluntarily blind itself to

the mistreatment of the former protected persons, even if it is taking place in plain sight, unless and until the transferee openly confesses its failure? Would that requirement make any sense?

4. What are we to understand by the obligation on the transferor to demand – let’s cut through the fog, a “demand” is a “request” that “must be complied with” – the “return” of the protected persons? How do we read this together with the concept of transfer *sur place*? If no physical movement has occurred, can this really impose an obligation on the transferor to resume some aspect of its now-terminated occupation?

5. Finally, why did the drafters feel it necessary to reiterate, in Article 45, the basic rule of *non-refoulement*? Is there an implicit suggestion that the only obligation whose violation triggers the Article is this very basic one, which has now probably passed not only into customary law but into *jus cogens*?

C. And finally, outside of the four corners of the Geneva Conventions, what do we make of the doctrine of “constructive *refoulement*”? Assuming that it is forbidden by implication, what should be the response of the world community, and of the United States as transferring power in particular, to the proposed internal displacement of the People of Ashraf?

IV. Conclusion

As I mentioned, these issues are novel, and there probably exists very little precedent that would offer clear and conclusive answers. But there are some conclusions we can draw, at least in the case of Ashraf:

A. The United States claims to have received a solemn commitment from Iraq to treat the People of Ashraf humanely, and in accordance with their rights protected by international law. Armed invasions of the homes of unarmed civilians, running them down with armored personnel carriers, do not constitute humane treatment. Under the doctrine of *pacta sunt servanda*, the United States can and must insist that the promises it received be honored.

B. Whether or not the United States has affirmative legal obligations under Article 45, it certainly has a moral obligation to ensure that a structure it created at Ashraf does not lead to the wholesale denial of the rights of the people there. The current situation is a direct result of the U.S. invasion, and of U.S. decisions regarding the treatment of the PMOI members at Ashraf.

C. The role of the United States is not circumscribed by whatever conclusion lawyers reach about Article 45. The U.S. also made its own solemn commitment to the People of Ashraf, promising them that it would be responsible for their safety until final disposition decisions were made. That has not happened yet. There was no explicit or implicit reference to the end of the occupation, although it was obvious that at some time the occupation would end.

D. The United Nations also has a role to play, both because of its general responsibilities to be carried out by the High Commissioners for Refugees and for Human Rights, but also because of the specific duties of the U.N. that have been delegated to UNAMI on the ground in

Iraq. However, UNAMI monitoring will not be a sufficient response to active measures aimed at *refoulement*.

E. Finally, all members of the international community have the right and the duty to object when basic human rights are being violated on a systematic basis. It is for that reason that the House of Representatives has before it a Resolution, co-sponsored by more than 230 members, calling on the United States to take “all necessary and appropriate steps” to honor its commitments under international law.

Ashraf presents important questions concerning Occupation and Refugee Status: State Responsibility Arising out of War, Intervention, and Prolonged Foreign Territorial Control. They do not seem to have obvious answers. I hope my presentation has shown those listening why these issues have implications that transcend Ashraf itself.

But at the same time, we cannot avoid the humanitarian issues presented by Ashraf simply because they are difficult. Too much is riding on them.