

**The People of Camp Ashraf:
Constructive *Refoulement*
and
The Ongoing Responsibility of the United States**

Presentation by
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I. Introduction

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. [Greetings to the People of Ashraf who may be watching!]

My remarks today will focus on two legal issues, both narrow in scope: (1) can the current situation at Ashraf be characterized as “constructive *refoulement*,” and if so, what does international law have to say about it? and (2) does the United States, as the former occupying power in Iraq, have any continuing obligation to the People of Ashraf?

I will assume that the audience is familiar with the basic facts of Ashraf, and with the nature and purpose of the People’s Mojahedin Organization of Iran. The PMOI – removed pursuant to judicial decrees from the official lists of terrorist groups in the European Union and the United Kingdom, and still awaiting such liberation in the United States – is a legitimate resistance movement, offering the people of Iran the prospect of democratic change from the current authoritarian theocracy to an open, free, and prosperous future.

All are aware of the fact that, in early 2009, the United States purported to hand over control of Camp Ashraf and its residents to Iraqi security forces. The United States at the highest levels of government represented publicly that it had assurances that the new custodians of the People of Ashraf would act in conformity with their rights, both domestic and international.

Yet sadly, the Iraqi authorities have not lived up to their commitments. They have mounted increasing pressure on Ashraf, including armed invasion and psychological operations verging on torture. And they have not concealed their objective, which is to cause the People of Ashraf to leave their Camp and to leave the country.

The questions presented here turn not the specific objectives of the PMOI. They depend not on the content of its views, but on its right to express them through peaceful means.

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II. Constructive *refoulement*

A. Constructive refoulement is illegal in international law

Non-refoulement first gained international recognition as a binding obligation on states over 60 years ago, in the period immediately following World War II. The 1951 United Nations Convention Relating to the Status of Refugees (“the 1951 Convention”) is the first significant treaty expressly stating the principle. This Convention declares that:

No Contracting State shall expel or return (*‘refouler’*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

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. Indeed, members of the families of Ashraf residents have suffered similar fates merely for visiting their loved ones there.

Article 7 of the 1966 International Covenant on Civil and Political Rights (“ICCPR”), to which Iraq is a signatory, provides that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” The United Nations Human Rights Committee has definitively construed this Article to include a *non-refoulement* component:

States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion, *or refoulement*.

By signing the ICCPR in February 1969, Iraq bound itself to protecting individuals in its territory from exposure to torture by not returning them to their country of origin. Thus, by virtue of a treaty it has signed and ratified, Iraq has a legal duty of *non-refoulement* towards the People of Ashraf.

Nor is the requirement of non-refoulement grounded only in treaties: it is an element of customary international law, and even of *jus cogens*, a “peremptory norm of general international law” from which no derogation is permitted regardless of circumstances.

Iraq may claim that it has done and is doing nothing to force the People of Ashraf to return to Iran, and is therefore in compliance with the *jus cogens* principle of *non-refoulement*. Such a claim ignores the reality that **constructive refoulement** is prohibited by international law just as much as the act of transporting individuals to territories where their lives will be threatened. A “constructive” wrong is a wrong committed not directly or expressly, but by circumspection. Constructive *refoulement* can be understood by drawing analogy to domestic law constructs. Assume that a landlord wants his tenant to depart from the premises during the term of the lease,

or an employer wishes to terminate the services of her employee during the term of the employment contract. Actively evicting the tenant, or firing the employee, would breach their respective contracts. The legal bar to breaching the agreements also prohibit the landlord or employer from contriving a situation in which the conditions of the tenancy or of the employment will be so unacceptable that the tenant or employee has no choice but “voluntarily” to end the relationship.

In a constructive eviction, the tenant is not physically ousted from the leased premises, but the wrongful acts or omissions of the lessor substantially interfere with the lessee’s use and enjoyment of the premises. The landlord may fail to abate, or may actively encourage, health hazards, may create or continue patterns of harassment, or may in other ways not permit the tenant to enjoy his rights. Similarly, in a constructive discharge, the employee is not actively terminated by her employer, who instead creates an “abusive working environment . . . so intolerable that her resignation qualified as a fitting response.” In such cases, the wrongful conduct of the other party to the contract, is for all practical purposes as much a breach as that party’s unilateral act would have been.

Just so, actions of a host state can be so hostile to refugees within its territory as to constitute constructive *refoulement*. This would be the case were the host state to set about to make life intolerable, as by imposing arbitrary restrictions on the basic activities of life, by denying access to goods and services, or by subjecting the refugees to unacceptable risks. Even if it is the refugees who ultimately take the step of returning to a place where they fear persecution because that is preferable to living under the conditions created by the host state, it cannot be said that such a decision is voluntary, and the host that has acted in violation of its non-*refoulement* obligations in international law.

Amnesty International has described constructive refoulement as occurring “where economic, social and cultural rights are deliberately denied and have the indirect effect of forcing people to return to their country of origin where they face serious risk of human rights abuses.” Similarly, in a statement to ExCom, the representative of the World Council of Churches stated that:

For return [to one’s home territory] to be voluntary, the following conditions should be met: The rights, including social, economic and cultural rights, of refugees, particularly as they relate to material conditions in the host country, are not reduced or otherwise changed in order to encourage returns by making it difficult for people to remain in the host country. Such measures would amount to ‘constructive’ *refoulement* and would be in violation of customary international law.

More specifically, Amnesty International USA has pointed to detention conditions having “the indirect effect of forcing people to return to a situation where they risk facing serious human rights abuses” as constituting constructive *refoulement*, which it concludes is “prohibited by customary international law”. That is, *refoulement* is illegal, and the illegality is not mitigated by hiding behind the fiction that the refugees “freely chose” to return to their place of origin because to do so was preferable to continuing to suffer the deprivations and harassment visited upon them by the host state.

B. The Iraqi government is engaged in the constructive *refoulement* of Ashraf residents

The Iraqi Government's commitment to a policy of involuntary repatriation has been loud, consistent, and inflammatory. Literally dozens of statements by its officials reinforce this view. On 17 June 2008, half a year before the Multi-National Force-Iraq formally handed sovereignty over Diyala Province back to Iraq, the Council of Ministers adopted a "Directive" (No. 216) providing, *inter alia*, that the PMOI "must be expelled as a terrorist organization from Iraq." That decision was reiterated by Iraq's Foreign Minister, Hoshyar Zebari, who is quoted by the Mehr News Agency as declaring on 9 July 2008: "The Government of Iraq has decided to expel the terrorist Mojahedin e-Khalq (*Monafeqin*) grouplet from Iraqi soil. . . . The file on the terrorist Monafeqin grouplet will soon be in its final stage, *i.e.*, expulsion from Iraq."

Since then, the public pronouncements of the various Iraqi Ministers and Ministries have been of the same ilk. The leading proponent of this view, especially intemperate in his remarks, has been the former National Security Adviser to the Prime Minister, Muwaffaq al-Rubaie. On 23 January 2009, just days after the resumption of Iraqi sovereignty over Camp Ashraf, Rubaie announced that the People of Ashraf would have ten days to leave the country. "The only choices open to members of this group," he helpfully added, according to Agence France Presse, "are to return to Iran or choose another country."

Prime Minister Maliki himself told Al-Iraqiya television on 31 July 2009, "Even if Iran stays silent before this organization and compromises with it," "we won't compromise and will not accept it in our land."

Even more ominously, Rubaie told Al-Forat Television on 1 April 2009, that the People of Ashraf "do not have legal status. They are neither political refugees nor humanitarian refugees." This very point was reiterated by Ali Dabbagh, spokesman for the Government, who said on July 29 (according to the BBC Arabic section), "[T]hey do not have any legal status. ICRC and other human rights organizations have acknowledged this fact."

This last claim, incidentally, is arrant nonsense: there has never been such an "acknowledgment" by the ICRC or anyone else outside Tehran and Baghdad.

Iraq's governors have, in this respect at least, been true to their word. They provoked an armed invasion of the Camp in July 2009, resulting in 11 deaths and hundreds of injuries. Later in 2009, the Maliki Government announced its plan to move the People of Ashraf to Neqr al-Salman, an abandoned military prison in the desert, near Basra. No credible explanation was offered as to why this drastic step was necessary, appropriate, or legal.

Since then, the harassment has continued and has dramatically increased in intensity and frequency. There are now over a hundred loudspeakers on the Ashraf perimeter fence, broadcasting at all hours a battery of shouted insults, threats, and invective. There have thus been limitations on the availability of basic necessities, as well as such items as medicine. Visits to doctors, even for urgent medical treatment, has been blocked. The gainful activities of the People of Ashraf have been interrupted because supplies are not being delivered. As was true of the July invasion and the relocation plan, there is no rational justification for this kind of

treatment. Yet all of these are of a piece: they are all intended to make it “intolerable” to remain at Camp Ashraf.

That is precisely what is intended by the concept of constructive refolement, and it is precisely what is forbidden as a matter of customary and conventional international law. Nor should anyone be fooled into believing that the People of Ashraf might peacefully and safely return to Iran. Although it regularly denounces the PMOI in the strongest terms, the Iranian regime periodically announces that rank-and-file members of the PMOI are welcome to return without penalty; assuring that only the leadership might be subject to criminal investigation and trial. Such an “assurance” is worth exactly as much as other assurances from the regime, such as those offered regarding the scope and purpose of its nuclear program: precisely nothing. Moreover, such a claim by the Iranian regime is belied by its actual practice

III. The United States has obligations to the People of Ashraf.

In the first half of 2004, the United States formally recognized that the People of Ashraf were civilians entitled to classification as Protected Persons within the Fourth Geneva Convention. That classification was communicated by pronouncement, and by individual letters to each Ashraf resident, “congratulating” them on their status.

The Geneva Convention permits a protecting power to transfer control of such persons to another state, as, for example, when the condition of occupation ends. But the transferee state must agree to continue to protect their rights. Article 45 specifically provides that if the transferee fails to honor its obligations to protected individuals, the transferring party – here the United States – must “take effective measures to correct the situation, or shall request the return of the protected persons.” To underscore the seriousness of this requirement, it adds, “Such request must be complied with.”

Nor is Article 45 the end of the story. When the declaration of protected person status was issued in July, 2004, each person at Ashraf was required to sign a document headed “Agreement for the Individuals of the PMOI.” That document reflects assent on the part of each such person to repudiate terrorism, not to possess weapons, to reject violence, and to obey the laws of Iraq. The Agreements also state that each person shall, until “viable disposition options” become available, “remain under the protection of Multi-National Forces-Iraq at Camp Ashraf.” At least implicit in this undertaking is a correlative commitment of the United States to provide the level of protection that the individuals were required to accept. The Agreement was intended, after all, to reflect a bilateral meeting of the minds, imposing obligations and conferring rights on both parties.

The United States has not offered the promised level of protection. It may well be that at the time these documents were signed, it was contemplated that final disposition arrangements would have been made before the U.S. stood down from providing military assistance at Ashraf. But the documents do not say that. In exchange for a promise of protection until disposition options were explored and arranged, the People of Ashraf were asked to offer consideration, and they did so. The United States has not lived up to its side of the bargain.

That, in essence, is the case for the continued responsibility of the United States to the People of Ashraf. I am aware, of course, that political realities dictate the great difficulty for the Obama Administration to resume a military presence in Iraq, much less a military deployment for the purposes of protecting a group that it still – for the moment, at least – considers a foreign terrorist organization. But political pressures are one thing, and legal rights another. Even if the United States is unable or unwilling to deploy armed force to carry out its international legal obligations, it has at least the duty to proclaim loudly and to all the world that the Iraqi stance with respect to Ashraf is unacceptable.

IV. Conclusions

There are some conclusions we can draw 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, and psychological torture do not constitute humane treatment. The United States can and must insist that the promises it received be honored.

B. The United States has an affirmative legal 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. 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. Ashraf presents important legal questions, but more fundamentally it raises questions of life and death for 3,400 individuals. We cannot avoid the humanitarian issues presented by Ashraf simply because they are difficult. Too much is riding on them.

Thank you.