INTERNATIONAL STANDARDS FOR DENIAL OF POLITICAL ASYLUM AND ARTICLE 21(3) OF THE IRAQI CONSTITUTION

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I. Introduction: Executive Summary

Article 21 of the Constitution of Iraq sets out the basic rules for extradition and the grant of political asylum. In particular, it forbids extradition of Iraqi nationals to third states, and establishes that the right to asylum will be governed by legislation. But it stipulates that no one will be eligible for asylum if that person has been "accused of" (official translation) or "charged with" (correct translation) having committed "terrorist crimes."

Some 3,400 members of the People's Mojahedin Organization of Iran (PMOI) reside at Camp Ashraf, Iraq. Since 2003, they have been protected by units of the Multinational Force-Iraq, and in 2004, they were officially declared to be "protected persons" under the Fourth Geneva Convention.

While the PMOI has been designated a "foreign terrorist organization" by the United States Department of the State, an equivalent designation under English law has now been set aside by the Courts, and the listing in the European Union has also been successfully challenged. There is no evidence, and there has been no substantiated accusation, that the PMOI or any member of the Organization has committed a terrorist act on Iraqi soil or anywhere else for that matter at least since 2001.

There is concern that the language of Article 21 of the Constitution, and especially Article 21(3), might be invoked to deny asylum to the members of the PMOI, and therefore to justify their involuntary expulsion from the country, and/or their repatriation to Iran. The history of that country sadly but unequivocally demonstrates that, should these people be forced to return, their lives would be in imminent danger.

This paper demonstrates that the use of Article 21(3) of the Iraqi Constitution to justify the denying the members of PMOI currently in Iraq political asylum or refugee status if and when they apply for it and their consequent repatriation or expulsion would be a violation of conventional and customary international law obligations that are binding and enforceable. In particular, provisions of the Refugee Convention and Protocol, and the Convention Against Torture, absolutely forbid the *refoulement* of refugees or potential refugees to a place where they might be persecuted or tortured. Those provisions have become customary international law. In addition, the International Covenant on Civil and Political Rights also includes a prohibition of *refoulement*. These rules have become jus cogens, meaning that no derogation is ever acceptable, regardless of a state's adherence or non-adherence to any specific treaty.

International rules, moreover, require that any decision to repatriate a refugee necessitate a final and independent judicial determination that she or he has committed a serious crime in the country of refuge, and that his or her continued presence there poses an unacceptable threat to the order and security of that country. None of these elements is present with respect to the PMOI or the People of Ashraf.

For all of these reasons, as is more fully set out below, a reading of Article 21(3) of the Constitution of Iraq as justifying the denial of refugee status to, and expulsion of, the PMOI members from Iraq to Iran would be an egregious violation of fundamental norms of international law, which would and should draw the severe condemnation of the entire world community.

II. Article 21 of the Iraqi Constitution, and Its Potential Effect on the PMOI

A. Article 21 Denies Asylum to Certain Categories of People.

Article 21 of the Constitution of Iraq, adopted by referendum in 2005, provides in Article 21, according to its "official" English translation, as follows:

> First: No Iraqi shall be surrendered to foreign entities and authorities.
>
> Second: A law shall regulate the right of political asylum to Iraq. No political refugee shall be surrendered to a foreign entity or returned forcibly to the country from which he fled.
>
> Third: No political asylum shall be granted to a person **accused of** committing international or terrorist crimes or any person who inflicted damage on Iraq.

Emphasis added.

Article 21(3) is especially problematic, since it appears to justify denial of asylum to otherwise deserving individuals, even legitimate refugees, on the basis of a mere "accusation."

This "official version," however, contains a fundamental mistranslation from the Arabic original. A better translation of this language would be as follows:

> First: No Iraqi shall be surrendered to foreign entities and authorities..
>
> Second, A law shall regulate the right of political asylum to Iraq. No political refugee shall be surrendered to a foreign entity or returned forcibly to the country from which he/she has fled.
> Third: No political asylum shall be granted to a person **charged with** committing international or terrorist crimes or any person who inflicted damage on Iraq.

Emphasis added.

There is, of course, a substantial difference in common English usage between being "accused of" and being "charged with" having committed a crime. Anyone can mount an

"accusation," which may be founded or fanciful, signed or anonymous, legitimate or retaliatory. A "charge," however, suggests that a formal procedure has been initiated. A person is "charged" only when government authorities have satisfied themselves that there is at least some demonstrable basis for the belief that he or she in fact committed the criminal act in question. Newspapers or gossipers can "accuse" a person of anything; prosecutors, investigating magistrates, or grand juries must be involved before there can be a formal "charge."

Yet a "charge" remains a unilateral prosecutorial act: a formal indication by the organs of the state that an individual is believed to have violated the law. It does not reflect the outcome of an impartial proceeding intended to determine the facts. It does not contemplate that the "charged" person has yet had an opportunity to address the "charge": to deny the operative facts, or to request an objective judicial review of whether the law has been interpreted correctly.

Regardless, then, of which translation of the Arabic words making up Article 21(3), the Iraqi Constitution would deny the right to asylum on the basis of the state's belief that a person has committed "international or terrorist crimes," even absent proof that **either** (a) she or he in fact performed the acts supposedly constituting such crimes, **or** (b) those facts, if proved, would be sufficient to bring the acts within a normative principle properly adopted, fairly read, and consistently applied.

B. The Denial of Asylum Is Tantamount to Permission for Expulsion.

The Constitution does not say what disposition the Iraqi state may make of an individual denied asylum for the reason that she or he has been either "accused of" or "charged with" "international or terrorist crimes." But if a foreigner is on Iraqi soil and is found not entitled to asylum, then the person is at grave risk of involuntary expulsion or other denial of fundamental rights protected by international law. The state is not obligated to permit such a person the freedom to live amidst the general population. Even democratic states with elaborate systems of immigration law permit the deportation or incarceration of individuals who are deemed "inadmissible," and who are unprotected by the regime applicable to refugees.[1]

It is reasonable to conclude, from the content and the placement of Article 21(3) of the Iraqi Constitution, that it contemplates the forced expulsion of foreign nationals who are deemed not entitled to political asylum. Such expulsion, it must be remembered, may be triggered by the existence of a "charge" that a person has committed an "international crime" or a "terrorist crime," neither of which term is defined in the Constitution itself. The risk of deportation based on flimsy evidence or baseless charges is, therefore, all too real.

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[1] *See*, for example, *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981), in which a United States Court of Appeal explored the legal rights of individuals who had no claim to political asylum and who were deemed "excluded aliens" under the immigration laws. The case concerned several of the thousands of undocumented Cubans who arrived in the U.S. as part of the "Mariel Boatlift," and who confessed to having committed "crimes of moral turpitude" in Cuba. The Government took the position that these people were entitled to no legal rights of any kind, and were even subject to permanent imprisonment without trial, although the Court of Appeals rejected that argument as inconsistent with binding norms of international human rights law.

C. Expulsion of the People of Ashraf to Iran Would Subject Them to a Real Risk of Torture and Other Ill-Treatment.

There can be no doubt that the 3,600 Iranian residents of Camp Ashraf in Iraq, were they to be forcibly returned to Iran, would be at risk of torture and worse. While in recent times spokesmen for the Tehran regime have publicly stated that the rank-and-file members of the PMOI welcome to return (although they make no pretense of such a promise regarding the leadership), there is no reason to believe that such statements have any purpose other than spreading disinformation. Numerous leaders of the regime have, over the years, announced that mere membership in the PMOI is a capital crime under the theocratic Iranian "legal system." In fact, according to Article 186 of the "Islamic Punishment Act," "all members and supporters" of the PMOI, "who in one way or the other are effectively involved in advancing its aims, are 'Mohareb' (guilty of waging war on God)."[2] Article 190 of the same Act stipulates that the punishment for 'Mohareb' is "killing," "hanging," "amputation the right hand and then the left leg," or "internal exile." A religious "judge" chooses which punishment to apply. And the readiness of the Mullahs to torture, and even to murder, their political opponents is a fact to which the entire world has borne witness for nearly three decades.[3]

In this connection, it should be noted that the Grand Chamber of the European Court of Human Rights recently rejected a United Kingdom policy that accepted even solemn diplomatic assurances of whether potential transferees would be subjected to mistreatment on their return to their home countries. In *Saadi v. Italy*, the Court found that deportation of a detainee was a violation of international law despite such assurances, since the U.K. Government had not undertaken its own, independent assessment of the risks.[4]

It is hard to conceive of a clearer case than this one in which individuals are unwilling to return to their countries of origin because of a "legitimate fear of persecution," based on their political beliefs, and their membership in an organization that promotes such beliefs. It is no exaggeration to say that, for at least a substantial number of the People of Ashraf, repatriation to Iran would be a death sentence. To the extent, then, that Article 21(3) provides the Iraqi government with a legal "cover" to justify the involuntary expulsion of the People of Ashraf to Iran, it poses a real and immediate threat to their very lives.

For the reasons set out below, however, such a reading of Article 21(3) would be inconsistent with binding norms of customary and conventional international law. The return of the People of Ashraf to Iran against their will would be an unacceptable, criminal act, violative of the most fundamental norms of the international legal system.

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[2] Office of State Laws and Regulations, The Collection of Islamic Punishment, Government Punishments and the Fight Against Narcotics (Javidan Publishers), summer 1997.

[3] Well over 100,000 members and supporters of the PMOI are reliably believed to have been killed by the Iranian regime, many of them tortured to death in the notorious Evin Prison.

[4] Application No. 37201/06, Judgment of the Grand Chamber (28 Feb. 2008).

III. *Non-Refoulement* Is an International Legal Duty with (Limited) Exceptions Not Relevant Here

A. The Obligation under the Refugee Convention.

The 1951 Convention Relating to the Status of Refugees ("the Refugee Convention") and its 1967 Protocol ("the Refugee Protocol") set out the modern legal embodiment of the ancient and universal requirement that sanctuary be offered to those at risk and in danger. Although these instruments articulate the core principles on which the international protection of refugees is built, neither makes any direct reference to the concept of asylum as such. The conditions for the lawful admission of foreigners remains within the discretion of sovereign states.

What is not open to those states under the guise of sovereignty, however, is violation of the principle of *non-refoulement*, as laid down in Article 33(1) of the Convention:

> No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers or 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.

The obligation of "*non-refoulement*" is attaches to all claiming refugee status, even if their entitlement to such status has not yet been definitively determined.[5] Thus, it protects asylum seekers, like the People of Ashraf, and not only those who have satisfied the requirements of local law that they are entitled to asylum.

The Vienna Convention on the Law of Treaties requires that treaties be interpreted in accordance with the ordinary meaning of their terms. Article 33 is clear and unambiguous; it may be understood without reference to anything other then the text itself.[6] The ordinary meaning of the text of the Refugee Convention underscores the non-derogable nature of the principle of *non-refoulement*. Subsequent agreements, the texts of other human rights treaties, and related jurisprudence all ratify this view.

Although Iraq is not a party to the Refugee Convention or to the Refugee Protocol, the *non-refoulement* obligation has become a rule of customary international law. No state may, through domestic legislation or even through provisions of its constitution reserve the right to contravene this principle.

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[5] Tom Clark "Rights based refuge, the potential of the 1951 Convention and the need for authoritative interpretation." 16, Int'l J. Refugee L. 584, 588.

[6] Robert L. Newmark, "Non-Refoulement Run Afoul: the Questionable Legality of Extraterritorial Programs," 71 Wash. Univ. L.R. 833, 861.

B. The Obligation under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("the CAT") also includes an absolute, non-derogable obligation of *non-refoulement* in circumstances in which a person may be at risk of mistreatment forbidden by the Convention. According to Article 3:

> 1. No State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

According to the Committee Against Torture, which is charged with making definitive interpretations of the CAT, Article 3 does not allow exceptions or derogations.[7] A state may not return a person to another country in which he or she is likely to be tortured. Nor may the host state concern itself with the nature of the activities in which the person concerned may have engaged, when it makes a determination under Article 3.[8] Thus, for example, in the case of *Paez v. Sweden*, the Committee Against Torture held that the alleged acts of a member of Sendero Luminoso in Peru, widely considered to be a terrorist organization cannot be a material consideration in determining his right to be protected under Article 3 of the Convention against Torture.

It should be noted that the *non-refoulement* obligation in the CAT applies even to situations that the Convention and the Protocol may not cover.[9] The Refugee Convention and Protocol require that a person establish that she faces persecution because of her nationality, political opinion, group membership, religion, or race. By contrast, the CAT does not impose this obligation. The threat that a person will be tortured at the hands of government officials need not be grounded in any of these concerns.

An alien may not be returned to a country where she faces torture, even if that individual has been convicted of a serious crime. Although Iraq has not signed the CAT, as in the context of the Refugee Convention it is bound by those of its provisions that have become customary international law.

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[7] *Paez v. Sweden* (28 April 1997), Committee Against Torture, no. 39/1996, at 14.5.
[8] *Id*.
[9] *Mutombo v. Switzerland*, Communication No. 13/1993, Views 27 Apr. 1994, U.N. doc. CAT/C/12/D/13/1993; *Elmi v. Australia*, Communication No. 120/1998, Views 17 Nov. 1998.

C. The Obligation under the International Covenant on Civil and Political Rights.

Iraq is party to the International Covenant on Civil and Political Rights ("the ICCPR"). According to Article 7, a fully binding obligation as a matter of treaty law, no one may be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The Human Rights Committee, which monitors states' compliance with the ICCPR, has held that the prohibition against torture contains an implicit obligation of *non-refoulement*: "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*."[10] No exceptions are permitted.

The Human Rights Committee has also stated that the prohibition against torture allows no limitations or derogations, even in situations of public emergency such as those referred to in article 4 of the Covenant. The obligation of non-refoulement is, again, absolute: "if a state extradites a person within its jurisdiction in circumstances such that as a result there is a risk that his rights under the Covenant will be violated in another jurisdiction, the State itself may be in violation of the Covenant."[11]

In advisory and contentious proceedings, the Committee has consistently held that non-citizens must be protected from forcible return when cruel treatment would predictably result.[12] Again, Iraq is a state party to the ICCPR, whose provisions are binding as a matter of law.

D. The Obligation under Customary International Law.

The prohibition of *refoulement*, like the general prohibition on torture and similar ill-treatment, has become a rule of customary international law. In a legal opinion prepared for the United Nations High Commissioner for Refugees in 2001, Elihu Lauterpacht and Daniel Bethlehem described "the essential content of the principle of *non-refoulement* as customary law" as follows:

> No person shall be rejected, returned or expelled in any manner whatever where this would compel them to remain in or return to a territory where substantial grounds can be shown for believing that they would face a real risk of being subjected to torture, cruel, inhuman or degrading treatment or punishment. This principle allows of no limitation or exception.[13]

Irrespective, then, of the details of the treaty regimes to which it is not a party, Iraq, like every other member of the international community, is bound by the obligation of *non-refoulement*. Derogation is permissible only in the face of overriding concerns for national

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[10] Human Rights Committee, General Comments number 20, at 9 (1992).
[11] *C. v. Australia*, no. 900/1999 (Human Rights Committee), at 8.5 (13 November 2002).
[12] *Ng v. Canada*, Communication No. 469/1991, Views 7 Jan. 1994, UN Doc. CCPR/C/49/D/469/1991; *Judge v. Canada*, Communication No. 829/1998, Views 20 Oct. 2003, U.N. Doc. CCPR/C/78/D/829/1998.
[13] Sir Elihu Lauterpacht and Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement*, Opinion for UNHCR's Global Consultations, para. 253 (June 2001).

security or public safety, or where the threat of persecution does not pose the risk of torture or cruel, inhuman, or degrading treatment or punishment.[14] The application of these exceptions is conditional on strict compliance with principles of due process of law.

E. The *Non-Refoulement* Obligation is Arguably a *Jus Cogens* Norm.

The UNHCR has observed that *non-refoulement* is a customary norm, and may have risen to the level of *jus cogens*.[15] It has been repeatedly reaffirmed at the global, regional, and national levels, and may now fairly be characterized as a preemptory norm.[16] Its fundamental importance within the scheme of refugee protection has also been repeatedly affirmed by Resolutions of the General Assembly.[17]

The obligation of *non-refoulement*, therefore, may well be argued to have taken its position alongside the prohibition against torture as an established *jus cogens* norm, which is therefore always applicable and which binds all states.[18]

IV. No Exceptions to the General Rule Apply to the PMOI Members at Ashraf

Article 33(2) of the Refugee Convention provides that the benefit of *non-refoulement* may not be claimed

> by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particular serious crime, constitutes a danger to the community of that country.

Given the seriousness of the risks, and the universality of the underlying prohibition of refoulement, these exceptions must be interpreted restrictively and applied with particular caution.[19]

A. Exceptions Apply to Individuals Only, and Must Be Based on Actual Conduct.

Article 33(2) permits the expulsion or return of an individual under certain circumstances, for reasons of national security or public order. ICCPR provisions allowing the suspension of

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[14] Turk and Nicholson, "Refugee Protection in international law: an overall perspective" UNHCR.
[15] Report of the UNHCR, U.N. GAOR, 43rd Sess., Supp. No. 12 at 6, U.N. Doc. A/43/12 (1988). A *jus cogens* principle is "a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." U.N. GAOR Conference on the Law of Treaties, 24th Sess., U.N.Doc. A/Conf.39/27 (1969), reprinted in 8 I.L.M. 679 (1969).
[16] Guy S. Goodwin-Gill, *The Refugee In International Law* 18 (1983) ("This principle…can be regarded as the cornerstone of refugee law.")
[17] *E.g.*, A/Res/48/116 (24 March 1994), para. 3; A/Res/50/152 (9 Feb. 1996), para. 3; A/Res/55/41 (12 Feb. 2001), para. 10 ("The General Assembly … condemns all acts that pose a threat to the personal security and well-being if refugees and asylum-seekers, such as *refoulement*.").
[18] Jean Allain, "The Jus Cogens Nature of *Non-Refoulement*," 13 Int'l J. Refugee L. 538 (2001.)
[19] Rene Bruin, Kees Wouters "Terrorism and the Non-Derogability of *Non-Refoulement*," 15 Int'l J. Refugee L. 5 (2003.)

rights, however, in Article 4, require a higher threshold: there must be a declared public emergency "which threatens the life of the nation" before derogations from ICCPR obligations may be justified.[20] Therefore, returning a refugee who faces a foreseeable risk of death or torture, even if it could be brought within Article 33(2) of the Refugee Convention, would still violate non-derogable ICCPR (and CAT) obligations rights.[21]

By its terms, Article 33(2) applies to those who are recognized as refugees and who would otherwise benefit from protection against *non-refoulement*. Such an individual must, however, either be a danger to the security of the country of refuge or, having been definitively convicted by a court of a particularly serious crime, must constitute a danger to the community of that country. Generally, Article 33(2) apples to crimes committed in the country of refuge, not the individual's country of origin.[22] And, just as claims to refugee status must be assessed individually, exceptions from the protection of *non-refoulement* must be determined individually, taking into account the specific circumstances of each case.

As Article 33(2) requires the existence of a danger to the country of refuge, overt acts or threats in other states fall outside its scope.[23] A person living outside her or his usual state of residence because of opposition to its government *ipso facto* poses no danger to the country of refuge.[24] Even raising funds to buy arms to promote violence in a foreign state, though it might indicate the refugee is a danger to the security of that country, does not demonstrate any threat to the security of the nation of refuge, and therefore does not implicate Article 33(2). Supporting even an armed opposition group in another nation does not remove a refugee from the shelter offered by the guarantee of *non-refoulement*.[25]

In any event, it is clear from its language and context that Article 33(2), where it does apply, requires a determination specific to the individual whose rights are affected. Its *travaux préparatoires* endorse the view that the drafters intended determinations under Article 33 to apply to individuals and not groups. As the French delegate stated "[n]o matter where a crime was committed, it reflected upon the personality of the guilty individual." The importance of individual assessment of cases was emphasized by the Conclusion No. 30 of the Executive Committee in respect to the problem of manifestly unfounded or abusive applications of refugee status or asylum.[26] Noting the problem caused by such application, the "grave consequences" for

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[20] "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties… may take measures derogating from their obligations … to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their obligations under international law and do not involve discrimination solely on grounds of race, color, sex, language, religion or social origin." ICCPR, Art. 4.

[21] As a general principle, the ICCPR, as the later in time, governs in the event of any conflict with the Refugee Convention, at least as to states that are parties to both. *See* Vienna Convention on the Law of Treaties, Article 30.

[22] Geoff Gilbert "Current Issues in the Application of Exclusion Clauses," paper commissioned by UNHCR (2002).

[23] Rene Bruin, Kees Wouters, "Terrorism and the Non-Derogability of Non-Refoulement," 15 Int'l J. Refugee L. 5 at 17.

[24] *Id.* at 460.

[25] Leader, "Free Speech and the Advocacy of Illegal Action in Law and Political Theory," 82 Columbia L. R. 412 at 428 (1982).

[26] Executive Committee, Conclusion No. 30 (XXXIV) at para. (e)(i) (1983). Indeed, the president "suggested that the French text of paragraph 1 should refer to refugees in the singular."

the applicant of an erroneous determination, and the resulting need for such decisions to be accompanied by appropriate procedural safeguards, the Executive Committee recommended that

> as in the case of all requests for the determination of refugee status or the grant of asylum, the applicant should be given a complete personal interview by a fully qualified and, whenever possible, by an official of the authority competent to determine refugee status.[27]

The inclusion by the Executive Committee of the reference to a personal interview even in case of manifestly unfounded or abusively application provides conclusive support for this view.

There is no prescribed method for determining when an individual may be repatriated or deported under Article 33(2). Yet Article 32 clearly shows the commitment of the Convention to due process of law, and the strong presumption against expulsion to a place where a person may be at real risk of harm:

> 1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
>
> 2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

The requirement that individual circumstances be considered conditions precedent to denial of *non-refoulement* protection applies even in situations of mass influx. Read in the light of the humanitarian objective of the Convention and the fundamental character of the principle, there is a strong presumption against involuntary expulsion. The Executive Committee, considering application of the non-refoulement principle to situations in which people cross borders in substantial and even overwhelming numbers, warned: "In all cases the fundamental principle of *non-refoulement* — including non-rejection at the frontier — must be scrupulously observed."[28]

Given that "national security" in Article 32 is broader concept than "danger to the security of the country" of refuge referenced in Article 33(2),[29] and that loss of *non-refoulement* protection is more far-reaching and dangerous than expulsion, it is justifiable to require that any determination with respect to Article 33(2) not only apply the procedural safeguards of Article 32, but do so with heightened care. Further, due process demands that the refugee should have access to the evidence against her or him. Although the state may well argue that national

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[27] *Id*.
[28] Conclusion No. 22 (XXXII) (1981).
[29] Gilbert, note 20 *supra*, at 460, citing L. Lustgarten and I. Leigh, *In from the Cold: National Security and Parliamentary Democracy* (1994).

security issues require that its evidence should be withheld on the basis of public policy, it cannot be consistent with governing human rights standards that a person's life or freedom could be threatened without the chance to challenge that evidence.[30]

The drafters of the Refugee Convention believed that the interest of countries of refuge in securing the safety of their communities must be balanced with the interest of refugees in not being returned to countries where they face persecution.[31] An individualized evaluation of the circumstances of each particular case, as opposed to the formalistic use of general criteria, is necessary to comply with Convention.[32] The assessment of the danger needs to be case-specific and *ex futuro*. *Refoulement* is excluded in all cases if it entails the risk of an individual being subjected to torture or inhuman or degrading treatment or punishment.

B. Exceptions require hard evidence that a crime has been committed.

1. In general, this means a conviction by a court of competent jurisdiction.

The protection of *non-refoulement* may be lost by a refugee convicted by a final judgment of a particularly serious crime and who constitutes a danger to the community. The ordinary meaning of this provision leaves little room for debate or interpretation. And the *travaux préparatoires* show the care taken by the drafters to limit the exception to cases in which the crime is serious, and the conviction non-appealable.[33] And the security threat must be local: even conviction of a serious crime in the country of refuge, unless there is also evidence that the refugee poses a danger to that nation in the future, does not satisfy Article 33(2).[34]

Refugees who do pose such a danger, and who otherwise qualify, may be expelled in pursuance of a decision reached in accordance with due process of law. But the threat to the country of refuge must be very serious. And there must be a rational connection between the removal of the refugee and the elimination or reduction of the danger. *Refoulement* must be the last possible resort, and the danger to the country of refuge must outweigh the risk to the refugee upon refoulement.[35] In such cases, the procedural safeguards of Article 32 apply.

2. More than a "charge" or "accusation" is always needed.

The evidentiary standard for denying protection under Article 33(2), "reasonable grounds," is high. Article 33(2) applies to refugees who in principle have a right to be protected. Therefore, the exception needs to be applied restrictively. In the 1997 Note on the Principle of Non-Refoulement, UNHCR wrote:

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[30] *Id*. at 461.
[31] Office of United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees para. 151, at 36 (2d ed. 1988.)
[32] *Id*.
[33] Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Thirty-fifth Meeting. The British delegate urged that the word "trial" in paragraph 2 should read "final."
[34] Gilbert, note 20 *supra*, at 462.
[35] Turk and Nicholson, *supra* note 13, at 12.

> In view of serious consequences to a refugee of being returned to a country where he is in danger of persecution, the exception provided for in Article 33(2) should be applied with the greatest caution. It is necessary to fully take into account all the circumstances of the case.

Article 33(2) requires conviction, not accusation or charge. It requires a final conviction, no longer appealable, of a crime against local law and order. And it requires that, in obtaining that conviction, the state of refuge has honored all of the defendant's due process rights. Then, and only then, does international law permit the exclusion of an alien who would otherwise be entitled to the full measures of protection, under treaties and customary law, against repatriation.

3. This is consistent with the law and practice of many nations.

The Supreme Court of Canada in *Suresh v. Canada* concluded that international law generally rejects deportation to a place where a person may be subject to torture, even where national security interests are at stake.[36] In a key passage, the Court held:

> In our view, the prohibition in the ICCPR and the CAT on returning a refugee to face a risk of torture reflects the prevailing international norm. Article 33 of the Refugee Convention protects, in a limited way, refugees from threats to life and freedom from all sources. By contrasts, the CAT protects everyone, without derogation, from state-sponsored torture. Moreover, the Refugee Convention itself expresses a "profound concern for refugees" and its principal purpose is to "assure refugees the widest possible exercise of … fundamental rights and freedom" (Preamble). This negates the suggestion that the provisions of the Refugee Convention should be used to deny rights that other legal instruments universally make available to everyone.[37]

The Court also stressed that both domestic and international jurisprudence suggest that torture is so abhorrent that it will almost always be disproportionate to interests on the other side of the balance, even security interests.[38]

The corresponding provisions in Article 3 of the European Convention on Human Rights (ECHR) ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment") has been interpreted by the European Court of Human Rights as prohibiting *refoulement*. In *Chahal v. United Kingdom*, a case involving a deportation to India of a Sikh separatist on grounds that "his continued presence in the United Kingdom was unconducive to the public good, reasons of national security, including the fight against terrorism."[39] In the

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[36] *Suresh v. Canada (Ministry of Citizenship and Immigration)*, [2002] SCC 1 (11 Jan. 2002), available at http://www.lexum.umontreal.ca/csc-scc/en/rec/html/surech.en.html.
[37] *Id*. para. 71.
[38] *Id*., para. 76.
[39] *Chachal v. UK*, 108 Int'l L. Rep. 385, at para. 75 (1997).

course of its analysis leading to the conclusion that there had been a violation of Article 3 of the ECHR, the Court addressed the issue of expulsion in the following terms:

> [I]t is well established in the case-law of the Court that expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to expel the person in question to that country. . . .
>
> Article 3 enshrines one of the most fundamental values of democratic society. The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct.

Similarly, in *Ahmed v. Austria*, the Court concluded that a prospective applicant could not be expelled by virtue of Article 3 of the ECHR, despite the fact that Article 33(2) barred him from claiming protection under the obligation of *non-refoulement* laid down in Article 33 (1) of the Refugee Convention.[40]

This analysis has been applied consistently in circumstances concerning the expulsion or *refoulement* of asylum seekers. In *T.I. v.United Kingdom*, a Sri Lankan national claimed the existence of substantial grounds to believe that, if removed from the United Kingdom to Germany as was proposed, he would be returned from there to Sri Lanka, where he faced a real risk of treatment contrary to Article 3 of the ECHR.[41]

On February 20, 2008 the Grand Chamber of the Court reasserted its existing jurisprudence, interpreting Article 3 of the ECHR to prohibit return or extradition of individuals to states in which they faced a "real risk" of torture, inhuman, or degrading treatment.[42] The Court noted unanimously that even alleged involvement in terrorism did not affect an individual's absolute right under Article 3:

> As the prohibition of torture and inhuman or degrading treatment or punishment is absolute, irrespective of the victim's conduct … the nature of the offence allegedly committed by the applicant is thereof irrelevant for the purpose of Article 3.[43]

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[40] *Ahmed v. Austria*, European Court of Human Rights, App. no. 25964/94 (17 Dec. 1996).
[41] *T.I. v. United Kingdom*, Application No. 43844/98, Decision as to Admissibility, [2000] INLR211 at 228 (7 March 2000).
[42] Application No. 37201/06, Judgment of Grand Chamber (28 Feb. 2008).
[43] *Id*., para. 127.

The conclusions of the European Court on this matter echo conclusions of the Human Rights Committee in General Comment No. 20 (1992) on the interpretation and application of Article 7 of the ICCPR.[44] The compatibility of expulsion or extradition with the terms of Article 7 has been considered by the Committee in a number of cases. These have largely turned on an appreciation of whether particular criminal penalties, or the likelihood of particular criminal penalties being imposed, raise questions concerning the application of Article 7. And the Committee has in each case affirmed that expulsion in circumstances in which there is a real risk of a violation of Article 7 in another jurisdiction comes within the purview of that Article.

Ng v. *Canada*, for example, concerned the proposed extradition of the complainant from Canada to the United States where he faced capital charges and hence the possibility of a sentence of death in the gas chamber. The Committee concluded that

> execution by gas asphyxiation, should the death penalty be imposed on [Ng], would not meet the test of "least possible physical and mental suffering," and constitutes cruel and inhuman treatment, in violation of Article 7 of the Covenant. Accordingly, Canada, which could reasonably foresee that Mr. Ng, if sentenced to death, would be executed in a way that amounts to a violation of article 7, failed to comply with its obligations under the Covenant, by extraditing Mr. Ng.[45]

C. The people of Ashraf have not committed terrorist acts.

A correct reading of each of the legal norms binding on Iraq, and the interpretation of those norms by international tribunals and other bodies, leads to the inescapable conclusion that Iraq may not reserve to itself the right to refouler any Iranian resident of Camp Ashraf to Iran unless she or he has first been convicted of a serious crime against public order in Iraq. Whatever offenses the rulers of Iran may imagine that such a person has committed, or might commit, against the Iranian regime are entirely irrelevant. Nor is this conclusion changed by the liberal invocation of the epithet "terrorist" to describe the PMOI or any of its members.

There is no evidence, of course, that any member of the PMOI, whether at Ashraf or elsewhere, has ever committed a crime against the security or community of Iraq. No such accusation has ever been leveled at the PMOI on Iraqi soil. No member of the PMOI has, in particular, committed any act of terrorism in Iraq.[46] And while it remains true that the United States continues to list the PMOI as a "foreign terrorist organization," the United Kingdom Government was directed by the Court of Appeal to delist it (the Court affirmed an administrative determination that the listing was "perverse"). And the Court of First Instance of the European Communities has determined that the terrorist designation under EU law was also a violation of fundamental rights.

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[44] Turk and Nicholson, *supra* note 13, at 157-158.
[45] *Chitat Ng* v. *Canada*; Communication No. 539/1993.
[46] There is good reason to conclude that the PMOI at Ashraf have been the victims, not the perpetrators, of terrorism. Indeed, several of them have been kidnapped, and their water supply has been bombed, all after the designation of the People of Ashraf as "protected persons" within the Fourth Geneva Convention.

No court anywhere in the world has ever concluded that the PMOI is a terrorist organization, or that any member of the group is guilty of a terrorist act, after a fair trial at which the defense was given an opportunity to submit evidence. Certainly no member of the PMOI now in Iraq has been convicted of any such offense. And so even if it can be said that the PMOI has been "accused" of terrorism, no such "accusation" has ever been translated into a formal "charge," much less a conviction by a competent court.

D. Membership in the PMOI is not a basis for an exception to the obligation.

Even if there were evidence for the view that the PMOI as an organization supports or endorses terrorism — and there is no such evidence — mere membership in a group cannot constitute a basis for invoking Article 33(2), which (as has been seen) is the broadest authorization for expulsion of a refugee. Membership in the PMOI cannot possibly be said to pose "a danger to the security of [Iraq]." No person at Camp Ashraf has "been convicted by a final judgment of a particular serious crime" in Iraq. Still less is there any shred of evidence to support the contention that any of the People of Ashraf "constitutes a danger to the community of [Iraq]."

It would be, therefore, entirely inconsistent with legal obligations binding on Iraq — whether obligations deriving from the Refugee Convention and the CAT as they have been translated into customary law, or whether duties under treaties directly binding on Iraq, such as the CAT — for that nation's authorities to use Article 21(3) of its Constitution to attempt to justify a forced repatriation of the People's Mujahedin Organization of Iran, or of any of its members, to Iran, where they are sure to face persecution, torture, and, in many cases, likely death at the hands of the ruling regime.

V. Conclusion

For all of the foregoing reasons, the invocation of Article 21 of the Constitution of Iraq to justify denying political asylum to, or expulsion of, the People of Ashraf, or their involuntary repatriation to Iran, would be a violation of fundamental conventional and customary international law norms binding on the Government of Iraq. That Government remains under a legal obligation to consider applications for asylum on an individual basis, and it may not deny such applications on the grounds of a person's membership in an organization that has been "accused" of terrorism, absent any proof that she or he has in fact committed a serious crime threatening the security of Iraq. No such proof exists in the case of the PMOI: indeed, no such accusation has ever been brought against any resident of Camp Ashraf, Iraq.

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