Legal Opinion on the Legal Status under International Law of the Members of the People's Mojahedins Organization of Iran Presently in the Territory of Iraq

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Introduction

The People's Mojahedins Organization of Iran (PMOI, hereby referred to as the "Mojahedins"), were founded in 1965 with the aim of overthrowing the dictatorial regime of the Shah. In 1979, the organization joined forces with the followers of Ayatollah Khomeini in the revolution and the setting up of a new government. Few years later, the Regime of the Mullahs began a campaign of retaliation against the Mojahedins which led to the mass arbitrary arrest of some 100'000 of them and the execution of another 40'000. At that time, the Mojahedins fled to exile, mostly in Europe. Eventually, in 1986, they established military bases in Iraq. Their stated goal is to overthrow the regime of the Mullahs in Iran. The National Liberation Army of Iran was formed in June 1987 in the camps of Iraq and used this base to conduct hundreds of military operations against the Iranian Army. When the Gulf War broke out (1990-1991), the Mojahedins were not involved and did not take part in any military activity for either side. Before the breaking of the most recent armed conflict (2003), the Mojahedins declared that they would remain neutral and would stay in their camps. During and after the conduct of the hostilities between the members of the Coalition and the Iraqi army, the United States reassembled the Mojahedins in the Ashraf camp in Iraq. They were also decommissioned.

The purpose of this legal opinion is to clarify the legal status of the members of the Mojahedins, which are presently in the territory of Iraq. For the Geneva Convention (IV) official Commentary the necessity of the determination of legal status of individuals in time of an armed conflict or in time of occupation is a "general principle" of law embodied in all four 1949 Geneva Conventions:

> *Every person in enemy hands must have some status under international law*: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. ' *There is no ' intermediate status; nobody in enemy hands can be outside the law.* We feel that that is a satisfactory solution -- not only satisfying to the mind, but also, and above all, satisfactory from the humanitarian point of view.[1] (emphasis added)

[1] *ICRC Commentary*, *Fourth Geneva Convention*, 1958, at p. 51.

One of the cornerstone principles of the laws of war is the cardinal distinction between combatants and civilians. This legal opinion argues that the Mojahedins should not be regarded as combatants, but as civilians. It further states that the United States (as the Occupying Power) should implement the relevant protection offered by the Geneva Conventions to the Mojahedins.

I The Mojahedins are not Combatants under the Geneva Conventions

A Reasons leading to the Conclusion that Mojahedins are not Combatants

The relevant legal instruments dealing with this point are the Additional Protocol (I) of 1977 and the Third Geneva Convention. It should be noted at this juncture that the Additional Protocol (I) has not been ratified by the United States. However, the provisions referred to in the Additional Protocol (I) only concerns the definition of combatants under the laws of war. This definition is not contested by the United States. Furthermore, the definition of combatants contained in Additional Protocol (I) is a reflection of customary international law on the issue and is therefore binding on all states, including the United States.

Under Article 43(2) of Additional Protocol (I), the "members of the armed forces of a Party to a conflict" are deemed "combatants" for the application of the laws of war.[2] As the Commentary to the Protocol explains "All members of the armed forces are combatants, and only members of the armed forces are combatants".[3] Article 43(2) provides that:

> Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

[2] 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 12 December 1977.

A definition of what is exactly meant by the expression "members of the armed forces of a Party to a conflict" is found at Article 43(1) of Additional Protocol (I), which states that:

> The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct or its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.

There are therefore two distinct groups which are considered as "combatants" under the Geneva Conventions and the Additional Protocols:

- The *regular* members of the armed forces of a Party to a conflict;
- The members of other *irregular* groups belonging to the armed forces of a Party to the conflict.

The following paragraphs will show that on both accounts, the Mojahedins cannot be considered as combatants.

a) The Mojahedins are not *Regular* Members of the Armed Forces of a Party to a Conflict

Article 43(2) of Additional Protocol (I) speaks of "organized armed forces", while Article 4 (A) 1) of the Third Geneva Convention refers more simply to the "armed forces". In fact, both provisions actually refer to the *regular* armed forces of a state.

There is no doubt that, firstly, the Mojahedins cannot be considered as *regular* members of an army. The Mojahedins are a rebels group composed (mostly) of Iranian nationals with no formal link with the *regular* army of Iraq. As it will be discussed later, they are clearly not part, or incorporated, in the regular Iraqi army. In particular, the Mojahedins are not part of the chain of command of the Iraqi army as

[3] Sandoz *et al*. (eds): Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949. International Committee of the Red Cross, Geneva, 1987, [Hereinafter referred to as the Commentary to the Additional Protocol (I)], at p. 515.

they trained themselves and possess their own weapons. This point will be further developed below.

Secondly, the Mojahedins cannot be considered as members of an army "party to a conflict". Article 2 of the Third Geneva Convention defines the term "party to the conflict" in the following way: "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them". In the present case, the two parties to the conflict were the United States (and the other members states of the Coalition) and Iraq. The Mojahedins never took part in the conflict between the Coalition and Iraq.

The Mojahedins have made it clear from the outset of the conflict (between the Coalition and Iraq) that they would remain *neutral*. This is clear from a letter sent by Mr. Mohaddessin, Chairman of the Foreign Affairs Committee of the National Council of Resistance of Iran (NCRI) (a coalition which includes the PMOI), to U.S. Secretary of State Colin Powell on 4 February 2003. Similar letters were also send by Mr. Massoud Rajavi, President of the National Council of Resistance of Iran to British Foreign Secretary Jack Straw (25 February 2003), French Foreign Secretary Dominique de Villepin (late February 2003), and German Deputy Chancellor and Foreign Secretary Mr. Fischer (23 February 2003). All letters expressed the view that the Mojahedins would not take part, on one side or another, in the conflict opposing the Coalition and Iraq.

b) The Mojahedins are not Members of Other *Irregular* Groups Belonging to the Armed Forces of a Party to a Conflict

Different terms have been used in the legal instruments to define this category of combatants. Article 4 (A) 2) of the Third Geneva Convention refers to members of "militias", "volunteer corps" or members of an "organized resistance movements". Article 43(1) of Additional Protocol (I) refers to "groups and units". The actual qualification of these different irregular groups is not relevant here. What is important

for them to be deemed combatants in the context of the application of the laws of war is that they “belong” to a Party to the conflict.

i) <u>The Mojahedins do not Belong to the Iraqi Army</u>

The concept of “belonging” to a Party to the conflict is expressed in many ways in the different legal instruments. Thus, Article 4 (A) 1) of the Third Geneva Convention makes use of this formula: the “members of militias or volunteer corps” which are “forming part of” of the armed forces of a Party to the conflict. Article 4 (A) 2) of the Third Geneva Convention speaks of the “members of other militias and members of other volunteer corps, including those of organized resistance movements” which are “belonging to a Party to the conflict”. Finally, Article 43(1) of Additional Protocol (I) refers to “groups and units which are under a command responsible to” the armed forces of a Party to the conflict. Whether these members of irregular groups are “forming part”, “belonging to” or “under a command responsible” of the armed forces of a Party to an armed conflict, the idea is the same: what is essential is some sort of *subordination* between the irregular group and the regular army of a Party to an armed conflict.

The Mojahedins are not “belonging” or “forming part” of the Iraqi Army. The Mojahedins have never been integrated in the Iraqi Army. They have always remained totally independent, and such special status was specifically recognised by Iraq.

The Commentary to Article 4 of the Third Geneva Convention indicates that:

> “It is essential that there should be a 'de facto' relationship between the resistance organization and the party to international law which is in a state of war, but the existence of this relationship is sufficient. It may find expression merely by tacit agreement, if the operations are such as to indicate clearly for which side the resistance organization is fighting.[4]

[4] *ICRC Commentary*, *Third Geneva Convention*, 1958, at p. 57

There is certainly *some* 'de facto' relationship between the Mojahedins and Iraq, in particular with consideration to the location of their camps in Iraq. But that "relationship" remains strictly limited to only such ordinary and practical aspects of neighbourliness (*bon voisinage*).

In a footnote, the Commentary to Article 4 of the Third Geneva Convention further indicates that "tacit agreement" resulting from the military operations "may be indicated by deliveries of equipment and supplies, as was frequently the case during the Second World War, between the Allies and the resistance networks operating in occupied territories".[5] In the present case, Iraq has delivered equipments and supplies to the Mojahedins. However, such deliveries were not in the *context of the present armed conflict with the Coalition forces*, but with the specific aim of reversing the Mullahs Regime in Iran. Besides, the Mojahedins are trained by their own staff and are partially equipped with material either seized in the hands of the Iranian army or bought in foreign countries. It is submitted that such delivery of material is quite irrelevant in the context of the recent conflict between the Coalition forces and Iraq. This is all the more so since such material was anyway not used by the Mojahedins *against the Coalition forces*.

ii) Iraq has no Effective Control over the Activities of the Mojahedins

In order to determine whether the Mojahedins can be considered as an irregular military group which "belong" to the Iraqi army, it may be helpful to consider the criteria developed in the context of state responsibility for the commission of internationally wrongful acts.[6] The following development is, of course, only applicable *by analogy* to the particular case of the Mojahedins since they have *not committed any internationally wrongful acts*.

The issue is dealt with by the International Law Commission Final Articles on state responsibility for the internationally wrongful acts at its Article 8:

[5] Footnote 24.
[6] This for instance the analysis developed by Eric David, *Principes de droit des conflits armés*, Bruxelles, Bruylant, 2002, 3th ed., at p. 423 & 144 et seq.

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting *on the instructions* of, or *under the direction* or control of, that State in carrying out the conduct. (emphasis added)

The notion of "control" that a state may have over the acts of a group has been further developed in the *Nicaragua case* before the International Court of Justice (I.C.J.), where the question to be decided was:

> "Whether or not the relationship of the *contras* to the United States Government was so much one of *dependence* on the one side and *control* on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government."[7] (emphasis added)

The reasoning of the Court on the element of effective control is as follows:

> In the view of the Court it is established that the contra force has, at least at one period, been so dependent on the United States that it could not conduct its crucial or most significant military and paramilitary activities without the multi-faceted support of the United States. This finding is fundamental in the present case. Nevertheless, adequate direct proof that all or the great majority of contra activities during that period received this support has not been, and indeed probably could not be, advanced in every respect. It will suffice the Court to stress that a degree of control by the United States Government, as described above, is inherent in the position in which the contra force finds itself in relation to that Government.[8]
>
> The Court has taken the view (paragraph 110 above) that United States participation, even if preponderant or decisive, in the *financing, organizing, training, supplying and equipping* of the *contras*, the selection of its military or paramilitary targets, and the *planning* of the whole of its operation, is still *insufficient in itself*, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. For this conduct to give rise to legal responsibility of the United

[7] *Military and Paramilitary Activities* (Nicaragua/United States of America) Merits. Judgement of 27 June 1986, I.C.J. Reports 1986, p. 14, at p. 62.
[8] *Ibid*., at p. 63.

> States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.[9] (emphasis added)

The reasoning of the Court is pertinent here in the context of the question whether Iraq had any control over the Mojahedins. It would seem that in order for an act of the Mojahedins to be deemed that of Iraq (or the Iraqi Army), it needs to be proven that Iraq "directed or enforced the perpetration" of acts committed by the Mojahedins. In other words, what needs to be shown is that Iraq has an "effective control of the military or paramilitary operations" of the Mojahedins; mere assistance by Iraq to the Mojahedins, even if it results in a "high degree of dependency", would not be sufficient. According to the Court, the "participation, even if preponderant or decisive" of Iraq in the "financing, organizing, training, supplying and equipping" of the Mojahedins, as well as "the selection of its military or paramilitary targets, and the planning of the whole of its operation" would still be insufficient in itself for the purpose of attributing to Iraq the acts committed by the Mojahedins.

The degree of *effective control* that a State needs to have on a group was also discussed in the *Tadic Case* which was decided by the Appeal Chamber of the International Criminal Tribunal for the Former Yugoslavia (I.C.T.Y.). The "effective control" test propounded by the I.C.J. in the *Nicaragua Case* was criticised by the Appeal Chamber, arguing that it was at variance with international judicial and State practice where a *lower degree of control* is usually requested with regard to military or paramilitary groups (as opposed to activities of individuals).[10] The Appeal Chamber nevertheless applied a test requiring a rather high degree of control. This is the reasoning of the Chamber:

> Precisely what measure of State control does international law require for organised military groups? Judging from international case law and State practice, it would seem that for such control to come about, it *is not sufficient for the group to be financially or even militarily assisted by a State.* This proposition is confirmed by the international practice concerning national liberation movements. Although some States provided movements such as the PLO, SWAPO or the ANC with a territorial base or with economic and military assistance (short of sending their own troops to aid them), other

[9] *Ibid.,* p. 64-65.
[10] Para. 124-125.

> States, including those against which these movements were fighting, did not attribute international responsibility for the acts of the movements to the assisting States.[11] (emphasis added)
>
> In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State *wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity*. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.[12] (emphasis added)

In applying the reasoning of the Appeal Chamber in the *Tadic Case* to the situation of the Mojahedins, it would not be sufficient for them to be "financially or even militarily assisted" by Iraq for the latter to be held responsible for the acts committed by the former. What would need to be proven is that Iraq "wields overall control over" the Mojahedins "not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity".

It may be that Iraq might have helped the Mojahedins in the past with such activities as partially supplying and equipping them. In any case, such activities would be insufficient to show that Iraq "wields overall control over" the Mojahedins. Similarly, the fact that Iraq allowed the Mojahedins to have a territorial basis in its territory is not, in itself, a determinant element. In reality, Iraq never did coordinate or even helped in the general planning of the military activities of the Mojahedins. In other words, Iraq never had an effective control of the military or paramilitary operations conducted by the Mojahedins. The Mojahedins acted independently.

From the moment the Mojahedins set up their camps in Iraq in 1986, this independence and freedom of action was the cornerstone of its relationship with the government of Iraq. This is for instance clear from the reading of this declaration by the President of the Republic of Iraq in June 1986:

> "The Iraqi leadership respect the Iranian Resistance and its political and ideological independence and freedom of action of this Resistance in its

[11] Para. 130.
[12] Para. 131.

> actions and movement to achieve this objectives. The relations between Iraq and the Iran resistance are based on peace, mutual respect to national sovereignty and respect for each nation's ideological and political choice."[13]

This acknowledgement of the "independent political force" of the Mojahedins was also recognised by the President of the Republic of Iraq in July 1988.[14] Similarly, in a letter dated 9 December 2002 signed by Major General Hussam Mohamed Amin, Director General of the National Monitoring Directorate of the Republic of Iraq, reference is made (with approval) to one of his previous statement (made on 5 December 1998), whereby he said that:

> "Sites belonging to the People's Mojahedin Organization of Iran are sites that the government of Iraq has allowed this organization to use *without any interference*". (emphasis added)

The independence of action was not only acknowledged and respected by the government of the Republic of Iraq, but it was also recognised by the UNSCOM in the context of their weapons inspections missions in Iraq. Thus, in his 15 December 1998 Report to the UN Security Council, the UNSCOM Executive Chairman indicted that sites belonging to the People's Mojahedins Organization of Iran were not visited for the reason that they were *not under the authority of the Iraqi government*, and that therefore UNSCOM had to enter into discussion *directly* with the Mojahedins to have access to the site. This is full quote:

> During the reporting period, teams conducted no-notice inspections at a number of sites that had not been declared by Iraq. Access to these sites was provided and inspections took place with one exception which was at a facility occupied by the People's Mojahedin Organization of Iran (PMOI). *The site of this facility was declared as being not under the authority of Iraq. Discussions over access were left to the Commission and that organization.* A dialogue has begun on this matter and the PMOI has accepted, in principle, that its sites are subject to access by the Commission.[15] (emphasis added)

[13] Iraqi Media, 15-16 June 1986.
[14] Iraqi Media, 1-2 July 1986.
[15] *Letter Dated 15 December 1998 From The Secretary-General Addressed To The President Of The Security Council*, S/1998/1172, 15 December 1998.

Recently, the Mojahedins and the United States Army (Major General Odierno) entered into a "cease fire" agreement. It should be noted that this agreement was not, in the technical legal sense of the word, a "cease fire" agreement since it did not mark the end of any hostilities between the Mojahedins and the United States Army. This agreement however shows the high degree of autonomy that the Mojahedins have in their relationship with the United States.

Lastly, the ICRC was negotiating directly with the Mojahedins with respect to questions relating to Iranian prisoners of war, without any interference whatsoever from the Iraqi government.

It is submitted that the clear fact that Iraq had no control over the activities of the Mojahedins is further proof that they are not an armed group that is "belonging" to the Iraqi Army.

c) Since the Mojahedins are not Members of a Regular Army or of an Irregular Group Belonging to an Army of a Party to a Conflict, it is not Necessary to Examine whether they Fulfil any of the Conditions Characterising Combatants under the Laws of War

It is further submitted that since the Mojahedins are not an armed group that is "belonging to a Party to the conflict", it become *unnecessary* to examine whether they fulfil any of the conditions set out at Art. (A) 2 of the Third Geneva Convention and Article 43 of the Additional Protocol (I). It is therefore not relevant for the purpose of this legal opinion to determine whether the Mojahedins are in practice "commanded by a person responsible for his subordinates"; that the Mojahedins have "a fixed distinctive sign recognizable at a distance"; that the Mojahedins are "carrying arms openly"; that the Mojahedins are "conducting their operations in accordance with the laws and customs of war"; or put slightly differently, that they are "subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict".

It is yet argued that the Mojahedins would have fulfilled these conditions.

Finally, to the extent that the Mojahedins were *not combatants at all* in the context of the present conflict between the Coalition forces and Iraq, the Mojahedins cannot be qualified as "unlawful combatants" for not fulfilling these above-mentioned conditions.

B Because of their Status as Non-Combatants, the Mojahedins cannot be Qualified as Prisoners of War

Under the Geneva Conventions only the combatants may become prisoners of war. It is precisely because one is deemed as a combatant (and has the right to participate directly in hostilities, but also the obligation to respect the laws of war) that it can be regarded as a prisoner of war.[16] Thus, according to Article 44 of the Additional Protocol (I), "Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war."

It is submitted that to the extent that the Mojahedins should not be considered combatants under the Geneva Conventions, they should, consequently, not be regarded as prisoner of war.

C Even if the Mojahedins Could be Deemed as Prisoners of War, they Should be Immediately Released as a Result of the End of the Military Operations in Iraq

It has so far been submitted in this legal opinion that the Mojahedins are not combatants and that therefore they cannot be qualified as prisoners of war. However, even if it could be envisaged, solely for the sake of argument, that the Mojahedins could indeed be regarded as prisoners of war, it is submitted that they could no longer be detained by U.S. military forces as a result of the end of the hostilities in Iraq.

Indeed, Prisoners of war should be released and repatriated without delay after the cessation of active hostilities. This obligation is set out at Article 118 of the Third Geneva Convention. There exists only one exception to that rule provided for at Article 119 (5), which indicates that "prisoners of war against whom criminal

proceedings for an indictable offence are pending may be detained until the end of such proceedings, and, if necessary, until the completion of the punishment" and that "the same shall apply to prisoners of war already convicted for an indictable offence".

On 1st May 2003, U.S. President Georges W. Bush announced that "major combat operations in Iraq have ended".[17] Therefore, even if the Mojahedins were to be qualified as prisoners of war (which is rejected in the present legal opinion), they should be released "without delay" since the hostilities have ceased four months ago.

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[16] Eric David, *Principes de droit des conflits armés*, Bruxelles, Bruylant, 2002, 3th ed., at p. 415-416.
[17] United States Government, Office of the Press Secretary, Press Release dated 1st May 2003: http://www.whitehouse.gov/news/releases/2003/05/iraq/20030501-15.html.

II The Mojahedins are Civilians under the Geneva Conventions

In the previous section we came to the conclusion that the members of the Mojahedins which are presently in the territory of Iraq should not be considered as "combatants" or "prisoners of war" under the Geneva Conventions. Therefore, and as a *direct consequence of this finding*, this legal opinion argues that the members of the Mojahedins should be deemed as "civilians" under the Geneva Conventions. This is in conformity with the solution adopted by the ICTY in the *Delalic* case, where it was decided that:

> "[...] If an individual is not entitled to the protections of the Third [Geneva] Convention as a prisoner of war (or of the First or Second Conventions) he or she necessarily falls within the ambit of [Geneva] Convention IV, provided that its article 4 requirements are satisfied."[18]

This solution is also in harmony with the point of view adopted by the Geneva Conventions Commentary, for which "Every person in enemy hands must have some status under international law" and that "there is no intermediate status; nobody in enemy hands can be outside the law".[19]

A The Application of the Fourth Geneva Convention to the Present Situation of Occupation in Iraq

Both Iraq and the United States are parties to the Fourth Geneva Convention dealing with the protection of civilian persons in time of war.[20]

According to Article 2 of the Fourth Geneva Convention, the Convention applies "to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties" and it "also appl[ies] to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance".

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[18] ICTY, Judgment, *The Prosecutor v. Delalic* et al., IT-96-21-T, 16 November 1998, para. 271.

[19] *ICRC Commentary*, *Fourth Geneva Convention*, 1958, at p. 51.

[20] Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949. Iraq ratified it on 14.02.1956, while the U.S. on 02.08.1955.

The present situation in Iraq is resulting from an "armed conflict" between Iraq and the Coalition Forces led by the United States and the United Kingdom. The presence of the United States and the United Kingdom troops in Iraq should be described as an "occupation", notwithstanding any consideration of *jus ad bellum*.

Indeed, Article 42 of the 1907 Hague Regulations states that a "territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." The 4th Geneva Convention does not define occupation.

It seems to be largely agreed in the international community that the current situation in Iraq is indeed one of occupation. Thus, U.N. Security Council Res. 1483, in its preamble refers to the Coalition powers in Iraq as "occupying powers": "recognizing the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers." This is also the opinion of U.N. Secretary-General.[21]

The United States troops having *de facto* effective control of (at least part) of the territory of Iraq, where the Ashraf camp lies, the situation is clearly one of occupation, and consequently, the law on belligerent occupation applies.

B In principle, all Mojahedins are "Protected Persons" under the 4th Geneva Convention

The present situation of the Mojahedins must be examined under Article 4 (1) of the Convention, which states:

> "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."

[21] Jonathan Fowler, 'US Bridles as UN's Kofi Annan Calls It "Occupying Power"', *Associated Press,* April 24, 2003.

This provision, as straightforward as it may be, nevertheless requires further explanation in order to determine to what extent, and in which way, it applies to the Mojahedins.

The first interpretation issue arising out of this provision is the meaning of the words "in the hands of a Party to the conflict or Occupying Power". The question here is whether the Mojahedins are "in the hands" of U.S. troops occupying Iraq. In the official Commentary to this Article it is indicated that:

> The expression 'in the hands of' is used in an extremely general sense. It is not merely a question of being in enemy hands directly, as a prisoner is. *The mere fact of being in the territory of a Party to the conflict or in occupied territory implies that one is in the power or 'hands' of the Occupying Power.* It is possible that this power will never actually be exercised over the protected person: very likely an inhabitant of an occupied territory will never have anything to do with the Occupying Power or its organizations. In other words, the expression "in the hands of" need not necessarily be understood in the physical sense; it simply means that *the person is in the territory which is under the control of the Power in question.* [22]

Such wide interpretation of the words "in the hands of" seems to cover the situation of the Mojahedins. Thus, the Mojahedins are indeed in the territory which is under the control of the United States (and others members states of the Coalition). In particular, the main camp of the Mojahedins, Ashraf, clearly lies in the part of Iraq which is *effectively controlled* by U.S. forces. Besides, the Mojahedins agreed to be decommissioned and are presently under the protection of the U.S. Army.

Another preliminary aspect posed by Article 4 (1) of the 4th Geneva Convention is the reference to the words "at a given moment and in any manner whatsoever". In the Commentary these words have been interpreted as to refer "both to people who were in the territory before the outbreak of war (or the beginning of the occupation) and to those who go or are taken there as a result of circumstances: travellers, tourists, people who have been shipwrecked and even, it may be, spies or saboteurs."[23] This provision therefore clearly applies either to the Mojahedins who were in the territory of Iraq *before* the start of the armed conflict and remain so in the present period of

[22] *ICRC Commentary*, *Fourth Geneva Convention*, 1958, at p. 47 (emphasis added).
[23] *ICRC Commentary*, *Fourth Geneva Convention*, 1958, at p. 47.

occupation, or to those Mojahedins who fell in the hands of the Occupying power thereafter.

It should therefore be concluded at this point of our analysis that, *in principle*, Mojahedins have the status of "protected persons" (i.e. civilians) under the 4th Geneva Convention. The fact that the Mojahedins were armed before the "cease fire" agreement between them and the United States Army does not make them non-civilians.

C Some Categories of Mojahedins are not "Protected Persons" under the 4th Geneva Convention

There are *three categories* of Mojahedins that are not "protected persons" under the Convention. These exceptions are provided for at Articles 4 (1) and 4 (2) of the Convention.

a) The Mojahedins Nationals of the Occupying Power

Article 4 (1) of the Convention reads as follows:

> "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or *Occupying Power of which they are not nationals*." (emphasis added)

The Occupying Power in Iraq is presently (mainly) the United States. This provision thus excludes the application of the Convention to those Mojahedins who are nationals of the United States.

To exclude some Mojahedins from the application of the present Convention, what seems to be relevant is not so much that the Mojahedins have the nationality of a "party to the conflict" or the nationality of an "Occupying Power", but that they are actually "in the hand" of this party or occupying forces. Since, the camps in Iraq where the Mojahedins are presently "detained" is controlled by United States troops,

it can be safely concluded that this limitation of Article 4(1) is only relevant to those Mojahedins who have U.S. nationality.

b) The Mojahedins Nationals of States which are not Bound by the Conventions

Article 4(2) reads as follows:

> "Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are."

According to Article 4(2), those Mojahedins, who are "nationals of a State which is not bound by the Convention" are not protected by the 4th Geneva Convention. Iran is a party to the Convention since 20 February 1957. 191 States have so far ratified the Geneva Conventions, including the United States.[24]

c) The Mojahedins Nationals of Co-belligerent States in the Conflict

The Commentary to Article 4(2) provides a clear vision as to the scope of this provision in dealing with the nationals of a neutral State to the conflict. It indicates that:

> "Paragraph 2 also defines the position of nationals of neutral States; in *occupied territory* they are protected persons and the Convention is applicable to them; its application in this case does not depend on the existence or non-existence of normal diplomatic representation. In such a situation they may therefore be said to enjoy a dual status: their status as nationals of a neutral State, resulting from the relations maintained by their Government with the Government of the Occupying Power, and their status as protected persons."[25] (emphasis added)

[24] The list of the states party can be found at the Internet site of the ICRC: http://www.cicr.org/ihl.nsf/WebNORM?OpenView&Start=1&Count=150&Expand=43.1#43.1. On 8 May 2003 Eastern Timor became the 191st member.

[25] *ICRC Commentary*, *Fourth Geneva Convention*, 1958, at p. 48

Therefore, the Mojahedins who have the nationality of states which have declared themselves "neutral" in the recent conflict between the Coalition and Iraq would in any case *be protected* by the Convention. The expression "neutral states" here is a reference to all those states which have not participated (actively through sending troops, or more passively by sending equipment and funding) in the armed conflict. It would thus include states such as Switzerland, France, Germany, Belgium, Canada, etc. Since Iran declared itself "neutral" in the recent armed conflict between the United States and Iraq, the Mojahedins who have the nationality or Iran would be "protected persons" under the 4th Geneva Convention.

The sake of the Mojahedins nationals of a co-belligerent States is specified by the Commentary:

> They are not considered to be protected persons so long as the State whose nationals they are has normal diplomatic representation in the belligerent State or with the Occupying Power. It is assumed in this provision that the nationals of co-belligerent States, that is to say, of allies, do not need protection under the Convention.[26]

Therefore, in principle, the Mojahedins who have the nationality of a co-belligerent States in the recent conflict would *not be protected* by the Convention. The list of States which were members of the "Coalition" can only be approximate. The United States spoke of a Coalition of 44 States.[27] However, in reality, apart from the United States and Great Britain, only Poland and Australia actually contributed combat forces, the other States may have provided logistics assistance or simply voiced political support.[28] Of more significant importance to the present case are Australia, Denmark, Italy, Netherlands, Ukraine and Spain. Article 4(2) contains a (mostly theoretical) limitation to this exclusion. Thus, only the Mojahedin that have the nationality of a co-belligerent States, which "has normal diplomatic representation in the State in whose hands they are" should be excluded. In reality, to the extent that all

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[26] *ICRC Commentary*, *Fourth Geneva Convention*, 1958, at p. 49.

[27] This is an (unofficial) list of States which are part of the Coalition: Afghanistan; Albania; Angola, Australia, Azerbaijan, Bulgaria, Colombia, Costa Rica, Czech Republic, Denmark, Dominican Republic, El Salvador, Eritrea, Estonia, Ethiopia, Georgia, Honduras, Hungary, Iceland, Italy, Japan, Kuwait, Latvia, Lithuania, Macedonia, Marshall Islands, Micronesia, Mongolia, Netherlands, Nicaragua, Palau, Panama, Philippines, Poland, Portugal, Romania, Rwanda, Singapore, Slovakia, Solomon Islands, South Korea, Spain, Turkey, Uganda, Ukraine, Uzbekistan.

states member of the coalition co-belligerent States most certainly have "normal diplomatic representation" in the United States, this limitation of the exclusion really is only theoretical.

d) The Particular Problem of the Mojahedins who have Dual Nationality

The above-mentioned three exclusions would only apply to those Mojahedins who happens to *no longer have the nationality of Iran*, and therefore are the beneficiary of *only* the nationality of the United States, United Kingdom or any other member States of the Coalition. As previously observed, those Mojahedins who are nationals of Iran are protected under the Convention.

The question is more complex in the cases of Mojahedins *who still are nationals of Iran*, but *also have another nationality*, such as that of the United States, United Kingdom or any other member States of the Coalition. In such cases, where the Mojahedins are dual-nationals, one may arguably invoke a general principle of law applicable in humanitarian law according to which the person may benefit from the nationality which provides for the best possible protection. Under this principle, Mojahedins who still have the nationality of Iran should rely on this nationality in order to remain protected by the 4th Geneva Convention based on the ground that Iran was a *neutral state* in the context of the present armed conflict between the Coalition and Iraq (Article 4(2)).

Another useful principle of international law, which may find application in dealing with dual national Mojahedins is that of the dominant and effective nationality doctrine. The principle was developed by the International Court of Justice in the 1955 *Nottebohm Case*,[29] and was subsequently adopted by many international adjudication bodies, including the Iran - United States Claims Tribunal, which specified that:

[28] S. Murphy, "Contemporary Practice of the United States Relating to International law: The Use of Military Force to Disarm Iraq", 97 AJIL, 2003, at p. 428.
[29] *Nottebohm Case*, (Liechtenstein v. Guatemala) Second Phase, Judgment, I.C.J. reports 1955.

> In determining the dominant and effective nationality, the Tribunal will consider all relevant factors, including habitual residence, center of interests, family ties, participation in public life and other evidence of attachment.[30]

It is submitted that should the principle of effective nationality be applied to the present situation of dual nationals Mojahedins who are presently in Iraq, it is their Iranian nationality, and not their other Western nationalities, which will arguably be deemed dominant.

It is not clear from the reading of Article 4(1) who is to actually determine the proper nationality of each of the Mojahedins who are present in the camps in Iraq. In the Commentary to this article mention is made of the particular problem of those who have fled their country. It is indicated that:

> [I]t will be for the Power in whose hands they are to decide whether the persons concerned should or should not be regarded as citizens of the country from which they have fled.[31]

It therefore seems that it will be for the United States military authorities in Iraq to identify the nationality of each Mojahedin that have fled from Iran and to decide whether they should still be regarded as nationals of Iran. Another unanswered question is who is to determine the more complex problems of those Mojahedins who have dual nationality.

e) The Particular Problem of the Mojahedins who are Stateless

The Mojahedins who are no longer nationals of Iran and do not have the nationality of another state are Stateless. Stateless persons are considered as "protected persons" under the 4th Geneva Convention. This was specifically recognised by the ICTY in the *Tadic case* decided by the Appeals Chamber on 15 July 1999.[32]

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[30] The Iran - United States Claims Tribunal, Case A/18, 6 April 1984, Decision Concerning Jurisdiction over Claims of Persons with Dual Nationality.
[31] *ICRC Commentary*, *Fourth Geneva Convention*, 1958, at p. 47.

f) The Types of Protection Existing Under the Laws of War for those Mojahedins who are not "Protected Persons" Under the 4th Geneva Convention

In the previous section, it has been observed that some Mojahedins, who do not fulfil the nationality criteria set out at Article 4 of the 4th Geneva Convention, should not be deemed as "protected persons" under that Convention. The present section will examine what kind of protection exists for them under the laws of war.

The minimum guarantees applicable to all persons in the power of a party to conflict are exposed in Article 75 of Additional Protocol (I):

> "1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons."

This provision ensures that no person in the power of a Party to an international armed conflict is outside the protection of international humanitarian law; it provides the minimum guarantees under customary international law.[33] This minimum guarantees of protection includes several acts which are "prohibited at any time and in any place whatsoever", including collective punishments, as well as "threats to commit" such collective punishments (Article 75(2) d & e of Additional Protocol (I)). Another relevant type of protection is offered at Articles 75(3) and 75(6) of Additional Protocol (I) to persons "arrested, detained or interned", which is the present situation of the Mojahedins:

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[32] See at para. 164.

[33] KNUT DÖRMANN, "The legal situation of 'unlawful/unprivileged combatants'", IRRC March 2003, Vol. 85 No. 849, at p. 70; G. Aldrich, "The Taliban, Al Qaeda, and the determination of illegal combatants", *American Journal of International Law*, Vol. 96, 2002, at p. 893; Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, OEA/Ser.L/- V/II.116 Doc. 5 rev. 1 corr., 22 October 2002, para. 76.

Article 75(3): “Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.”

Article 75(6): “Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.”

D The Types of Protection Offered to the Mojahedins as Civilians under the 4th Geneva Convention

a) General Protection

Part III of the 4th Geneva Convention stipulates the types of protection offered to the “protected persons”. The general provision is Article 27, which states that:

"Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.

Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.

However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war."

Apart form this general provision some other types of protection are relevant here:

- Prohibition against “physical or moral coercion” and “in particular to obtain information from” protected persons (Article 31);
- Prohibition of collective penalties to a group (Article 33);

- Prohibition of torture (Article 32).

In the following paragraphs, three specific provisions of the 4th Geneva Convention will be examined in details.

b) Article 48: the Right for the Mojahedins to Leave Iraq

Article 48 is applicable to "Protected persons who are not nationals of the Power whose territory is occupied" and nor nationals of the Occupying Power and its allies. It thus applies to those Mojahedins which are "protected persons" under the 4th Geneva Convention. The Commentary also specifies that "persons of doubtful nationality" and "stateless" are also covered by this provision.[34] This is very important specification which is likely to be of great help in the present case of the Mojahedins.

Under Article 48, the Mojahedins "may avail themselves of the right to leave the territory" in accordance with the procedure set out at Article 35. The Commentary also specifies that the Occupying Power is entitled to object to the departure of a protected person only when "its national interests of the State [i.e. the Occupying Power] makes this absolutely necessary".[35]

It is submitted that the burden is on the United States to prove that on *an individual basis* some members of the Mojahedins do indeed constitute a threat to its national interests. Moreover, the United States would need to show that such threat exists *in the context of its mission as the Occupying Power in Iraq.* It is arguably quite irrelevant that the Mojahedins may be considered *in the United States* as a "terrorist" group. The fact that the organization of the Mojahedins may be qualified as a terrorist group *collectively* by the United States does not result in the finding that each Mojahedin *individually* poses a threat to the national interest of the United States *in Iraq*. These two situations should clearly be distinguished. At any rate, it is largely recognised in doctrine that even if an organization is qualified as a "terrorist" group,

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[34] *ICRC Commentary*, *Fourth Geneva Convention*, 1958, at p. 276.

[35] *ICRC Commentary*, *Fourth Geneva Convention*, 1958, at p. 277.

its members should still benefit from the protection offered by humanitarian law, including the 4th Geneva Convention in the context of occupation.[36]

One important aspect of Article 48 is whether the Mojahedins would only be entitled to go back to Iran, or could choose to go to another country instead. The Commentary (to Article 35) makes it clear that this provision allows to leave to *any* State, and not only their country of origin:

> People whose right to leave the territory is recognized generally wish to return to their own country. That is not a condition, however, for the word "repatriation" does not appear in the provision; it lays down that they are entitled to leave, but does not say what their destination is to be. A belligerent is therefore also bound to authorize the departure of protected persons who wish to go to a country other than their home country, to a neutral State for example.[37]

Under Article 35 of the 4th Geneva Convention, applications of protected persons to leave "shall be decided [by the Occupying Power] in accordance with regularly established procedures and the decision shall be taken as rapidly as possible". The Commentary to Article 35 indicates that "there must be safeguard to prevent arbitrary decisions".[38] The procedure must include an opportunity for the applicant of submitting an application and to explain the grounds on which it is founded. It is further requested that the responsible authority "will make decisions impartially, as rapidly as possible, and with reasons stated."[39] The provision further provided that "if any such person is refused permission to leave the territory, he shall be entitled to have such refusal reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose."

c) <u>Article 49 (1) (2): the Prohibition Against Transfers and Deportation of the Mojahedins to other Countries, Especially Iran</u>

[36] Jan Klabbers, "Rebel with a Cause? Terrorists and Humanitarian Law, EJIL, 14(2), 2003, at p. 311; Gerard L. Neuman, "Humanitarian Law and Counterterrorist Force", EJIL, 14(2), 2003, at p.298; KNUT DÖRMANN, "The legal situation of 'unlawful/unprivileged combatants'", IRRC March 2003, Vol. 85 No. 849.
[37] *ICRC Commentary*, *Fourth Geneva Convention*, 1958, at p. 235.
[38] *ICRC Commentary*, *Fourth Geneva Convention*, 1958, at p. 236.
[39] *ICRC Commentary*, *Fourth Geneva Convention*, 1958, at p. 236.

Article 49 (1) of the 4th Geneva Convention provides as follows:

> Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

This provision is straightforward: it would prohibit the United States to transfer by force the Mojahedins individually or in groups to "any other country", including Iran. Such forced transfer is prohibited "regardless" of the motive behind it. The Commentary indicates that "the prohibition is absolute and allows of no exception, apart from those stipulated in Para. 2 [of Article 49]".[40] Under Para. 2 of Article 49:

> Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons do demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

The Commentary clearly indicates that cases of "evacuations" are different from cases of "transfers" and "deportations" in so far as evacuations have a "provisional character" and are "often taken in the interests of the protected persons themselves".[41] In order to rely on Para. 2 of Article 49, the United States would have to show that the "security of the population" (i.e. the security of the Mojahedins themselves) or "imperative military reasons" demands that the evacuation of the Mojahedins is required. Furthermore, any such evacuation cannot, in principle, be made "outside the bounds of the occupied territory". The only exception where the Mojahedins could be evacuated outside Iraq would be if "for material reasons it is impossible to avoid such displacement". It is hard to see which "material reason" would prevent to evacuate, for their own protection, the Mojahedins inside Iraq. The United States could therefore find no justification in this provision to "evacuate" the Mojahedins back to Iran, which would certainly (to say the least) not be in their own interests.

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[40] *ICRC Commentary*, *Fourth Geneva Convention*, 1958, at p. 279.
[41] *ICRC Commentary*, *Fourth Geneva Convention*, 1958, at p. 280.

It can therefore only be concluded that Article 49 (1) finds application here and that, as the Commentary explains, the prohibition against the transfers or deportation of the Mojahedins to other countries is absolute and allows for no exceptions whatsoever. The only measure that can be taken by the Occupying power is internment and assignment to residence, which are covered by Article 78, and which will be examined below.[42]

The prohibition against transfers and deportation has been reiterated on many occasions in the context of the Israel-Palestinian conflict. Thus, several U.N. Security Council resolutions and UN General Assembly resolutions have condemned Israel for not respecting Article 49 (in particular para. 6 of the Article dealing with the problems of the Israeli colons in the Palestinians occupied territories).[43] This situation led the UN General Assembly to ask Switzerland to convene a Conference of High Contracting Parties to the Fourth Geneva Convention and to issue a Statement on 5 December 2001, where it is reiterate that the 4th Geneva Convention prohibits the forcible transfer or deportation of protected persons from the occupied territory.[44] The concrete application of Article 49 of the Convention was also examined by the Government of Switzerland, which is depository of the Geneva Conventions, in the context of the deportation of Palestinians activists from the West Bank (a territory under Israeli occupation since 1967) to Lebanon. It was concluded that Article 49 prohibits any individual or masse forcible transfer and that this provision had an absolute character.[45]

[42] *ICRC Commentary*, *Fourth Geneva Convention*, 1958, at p. 368.
[43] The question of prohibition of deportation and transfer in the context of the Israel-Palestine conflict was examined in doctrine: Dinstein Yoram, « The Israel Supreme Court and the Law of Belligerent Occupation: Deportations », *Israel Yearbook on Human Rights*, vol. 23, 1993, pp. 1-26; LaPiDoth Ruth, « The Expulsion of Civilians from Areas which Came under Israeli Control in 1967: Some Legal Issues », in European Journal of International Law, vol. 1, 1991, pp. 97-109.
[44] On this point see in doctrine: Pierre-Yves Fux & Mirko Zambelli, « Mise en œuvre de la quatrième Convention de Genève dans les territoires palestiniens occupés: historique d'un processus multilatéral (1997-2001) », *Revue internationale de la Croix-Rouge* No.847, p. 662-695.
[45] Note of the Directorate for Public International Law of the Federal Dept. of Foreign Affairs, 20 January 1988, in: Marco Sassoli and Antoine Bouvier, *How does law protect in war*? ICRC, 1999, at p. 870.

It is widely held in doctrine that the prohibition against deportation is a customary rule of international law, and as such applies to all States.[46] There is no doubt that such is the case with respect to "en masse" deportation. The customary nature of *individual* deportation has been challenged by the Supreme Court of Israel, which concluded that Article 49 was limited to mass deportations and that the expulsion of highly dangerous individuals was not contrary to this provision.[47] Yet, the position of Israel and its interpretation of Article 49 has been criticised by the UN Security Council and General Assembly,[48] by the International Committee of the Red Cross,[49] by the United States,[50] and by various authors in doctrine.[51] It is submitted here that in the light of these unambiguous criticisms, no distinction should be made between individual and en masse deportation: they are both prohibited.

d) Article 78: the Limited Right of the Occupying Power to Intern or to Assign at Residence the Mojahedins

i) The Substantive Rule

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[46] *ICRC Commentary*, *Fourth Geneva Convention*, 1958, at 279, which states that `... this point ... may be regarded today as having been embodied in international law. This is also the opinion of Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989), at 48-49.

[47] The cases of H.C. 785/87, H.C. 845/87, H.C. 27/88, before the Supreme Court of Israel, 10 April 1988, in: 29 ILM 1990, pp. 139-181, also in: Marco Sassoli and Antoine Bouvier, *How does law protect in war?* ICRC, 1999, 833 at p. 846. However, see the opinion of Justice Bach: [t]he language of Article 49 is unequivocal and explicit. The combination of the words `*Individual or mass forcible transfers as well as deportations*' in conjunction with the phrase `*regardless of their motive*', (emphasis added), admits, in my opinion, no room to doubt that the article applies not only to mass deportations, but also to the deportation of individuals as well, and that the prohibition was intended to be total, sweeping and unconditional - `regardless of their motive'

[48] United Nations General Assembly Resolution 43/58 of 6 September 1988, Section B; Security Council Resolution No. 607, of 5 January 1988

[49] International Committee of the Red Cross, *Annual Report* (1989), atp. 88.

[50] H.J. Hansel, "the legal adviser to the State Department", in: 72 *AJIL* (1978), at p. 911; U.S. Department of State, *Country Reports on Human Rights Practices for 1987*, 100th Congress, 2nd Session 1189 (1988).

[51] See, e.g., Eric David*, Principes de droit des conflits armés*, Bruxelles, Bruylant, 2002, 3th ed., at p. 514-516; Roberts, "Prolonged Military Occupation: The Israeli-Occupied Territories since 1967", 84 *AJIL* (1990), 44, at at 66; Dinstein, "The International Law of Belligerent Occupation and Human Rights", 8 *Israel Yearbook on Human Rights* (1978) 105, at 107; Meron, "West Bank and Gaza: Human Rights and Humanitarian Law in the Period of Transition", 9 *Israel Yearbook on Human Rights* (1979) 106, at 108-119; Meron, "Applicability of Multilateral Conventions to Occupied Territories", 72 *AJIL* (1978) 542, in note 31, at 548-549; Bothe, "Belligerent Occupation", in R. Bernhardt (ed.), 4 *Encyclopedia of Public International Law*, (1982) 64, at 65; E. Cohen, *Human Rights in the Israeli-Occupied Territories 1967-1982* (1985) 51-56; idem, "Justice for Occupied Territory? The Israeli High Court of Justice Paradigm", 24 *Columbia Journal of Transnational Law* (1986) 471, at 497; Boyd,

Article 78 provides as follows:

> If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.
>
> Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power.
>
> Protected persons made subject to assigned residence and thus required to leave their homes shall enjoy the full benefit of Article 39 of the present Convention.

This provision and the use that the Occupying force can make of it is quite limited. The United States would have to show that "imperative reasons of security" make it "necessary" to assign at residence or intern the Mojahedins. It is submitted that the United States would need to prove that the Mojahedins are posing a threat to its "security", or in the words of the Commentary, to "consider them dangerous to its security".[52]

Such threat or danger to its security would also need to be specifically shown in the context of its role as the Occupying Power *in Iraq*. It would therefore be insufficient for the United States to rely on the fact that the Mojahedins are listed as a "terrorist" group in the United States to demonstrate any danger to its security *in Iraq*. The alleged threat would further need to be current, imminent, and at any rate be specifically linked to the present military occupation resulting from the armed conflict between the Coalition and Iraq. It would not be sufficient for the United States to apply this provision based on "imperative reasons of security" referring to alleged crimes committed *outside of Iraq* and/or committed *before* the start of the armed conflict between the Coalition and Iraq.

"The Applicability of International Law to the Occupied Territories", 1 *Israel Yearbook on Human Rights* (1971) 258-261.

[52] *ICRC Commentary*, *Fourth Geneva Convention*, 1958, at p. 368.

In other words, the United States would have to put forward evidence that the Mojahedins are *presently* constituting a danger for its security *in its role of Occupying Power in Iraq*. The threshold is indeed very high. For the Commentary, "such measures can only be ordered for real and imperative reasons; their exceptional character must be preserved."[53] This is all the more so considering that the Mojahedins are already decommissioned and confined to a limited geographical area (a camp), where their actions and movement are carefully monitored by the United States. The possibility of any anti-U.S. action by the Mojahedins is all the more improbable considering that the Mojahedins *do not oppose* the current situation of occupation of Iraq by the United States.

A further limitation to the use by the United States of this provision is contained in the Commentary, where it is indicated that "there can be no question of taking collective measures: each case must be decided separately."[54] This rule against collective punishment is also recognised in a number of other instruments of international humanitarian law and should be regarded as a rule of customary international law.[55] Thus Article 50 of the Annex to 1907 Hague Convention IV, affirms that "No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of acts of individuals for which they cannot be regarded as jointly and severally responsible." The 1919 List of War Crimes prepared by the Responsibilities Commission of the Paris Peace Conference expressly affirms the customary prohibition of "[i]mposition of collective penalties."[56]

Thus, even provided that the United States could indeed suspect that the Mojahedins as a group may pose any danger to its own security, it would not be allowed to act *collectively* against them. It would be required under Article 78 to limit this measure of internment only to those individuals who are allegedly endangering its security.

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[53] *ICRC Commentary*, *Fourth Geneva Convention*, 1958, at p. 368.
[54] *ICRC Commentary*, *Fourth Geneva Convention*, 1958, at p. 367.
[55] Jordan J. Paust, "The U.S. as Occupying Power Over Portions of Iraq and Relevant Responsibilities Under the Laws of War", *ASIL Insights*, April 2003.

ii) Procedural Aspect of the Rule

Para. 2 of Article 78 indicates the procedure to be followed by the Occupying Power in implementing such security measures. It is for the Occupying Power to decide which procedure will be followed to deal with the internment measures.[57] But in doing so, the Occupying Power must observe the stipulation of Article 43, which details the procedure to be followed for the internment of protected persons.[58] Article 43 provides as follows:

> "Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit.
>
> Unless the protected persons concerned object, the Detaining Power shall, as rapidly as possible, give the Protecting Power the names of any protected persons who have been interned or subjected to assigned residence, or who have been released from internment or assigned residence. The decisions of the courts or boards mentioned in the first paragraph of the present Article shall also, subject to the same conditions, be notified as rapidly as possible to the Protecting Power."

In a paper on the situation in Iraq, Amnesty International recently made the following recommendations to the Unites States (as the Occupying Power) with respect to the application of Article 78.

> "Amnesty International recognizes that temporary restrictive measures such as those allowed by the Fourth Geneva Convention may be necessary, especially in response to widespread disorders. However, it calls on the USA and the UK to hold any detained civilians for the shortest possible time and release them unless they are to be charged with a recognizably criminal offence and brought to trial.
>
> Amnesty International believes that judicial review of temporary detention should be on a frequent, individualized basis. All detainees must have the ability to seek judicial – not just administrative – review at any time of the

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[56] Crime number 17, *reprinted in:* Jordan J. Paust, M. Cherif Bassiouni, Michael Scharf, *Et Al.*, *International Criminal Law* (2d ed. 2000) at pp. 32-33.
[57] *ICRC Commentary*, *Fourth Geneva Convention*, 1958, at p. 368.
[58] *ICRC Commentary*, *Fourth Geneva Convention*, 1958, at p. 368.

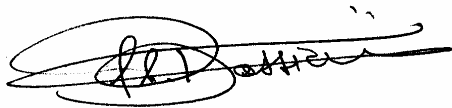
legality of their detention and to be released if the detention is unlawful, as guaranteed by Article 9 (4) of the ICCPR."[59]

Conclusion

This legal opinion argues, firstly, that under the laws of war applicable to the present situation of occupation of Iraq, the Mojahedins should not be regarded as combatants, but as civilians. Thus, the Mojahedins were never part of the Iraqi regular Army. They remained neutral in the present conflict opposing the member States of the coalition and the Republic of Iraq.

This legal opinion argues, secondly, the United States (as the Occupying Power) should implement the relevant protection offered by the Geneva Conventions to the Mojahedins. In particular, the Fourth Geneva Convention establishes a clear prohibition against any transfer and deportation of the Mojahedins to Iran and also provides for a limited right for the Occupying Power to intern or to assign them at residence.

Finally, it should be reminded that in accordance with Article 147 of the Fourth Geneva Convention any "unlawful deportation or transfer or unlawful confinement of a protected person" is considered a grave breaches of the laws of war.



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[59] Amnesty International, *Iraq: Responsibilities of the occupying powers*, MDE 14/089/2003, 16 April 2003, at p. 13.