

## **Legal Opinion**

### **The Protection of Members of the People's Mojahedin Organization of Iran (PMOI) under International Law**

1. The purpose of this document is to provide a Legal Opinion regarding the present status of the members of the POMI in Iraq as 'protected persons', 'resident aliens' and 'refugees', as well as regarding the corresponding obligations of the Republic of Iraq under international humanitarian law, general international law, refugee law and human rights law.
2. A summary of the basic relevant principles appears below at paragraph 62.

1. Introduction and background

3. The People's Mojahedin Organization of Iran (PMOI) was founded in 1965, 'with the aim of overthrowing the dictatorial regime of the Shah. In 1979, the organization joined other forces in the Revolution. A 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.'<sup>1</sup>

4. Yet the intention of the Mojahedin to work within a political framework has been attested. In a December 1984 report submitted to the House Foreign Affairs Committee, the State Department noted:

'The Mujahedin have never accepted the Khomeini regime as an adequate Islamic government. When Khomeini took power, the Mujahedin called for continued revolution, but said they would work for change within the legal framework of the new regime. The Mujahedin also entered avidly into the national debate on the structure of the new Islamic regime. The Mujahedin unsuccessfully sought a freely elected constituent assembly to draft a constitution. The Mujahedin similarly made

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<sup>1</sup> See common introduction to Legal Opinions of Professor Cherif Bassiouni on the 'Legal Status under International Law of the Members of the People's Mojahedins Organization of Iran Presently in the Territory of Iraq', 29 September 2003; and Professors Eric David, Marco Sassoli and William A. Schabas, on 'The Legal Status of the PMOI upon the Entry into Force on 30 June 2004 of the Law of Administration for the State of Iraq for the Transitional Period', 22 April 2004.

an attempt at political participation when Mujahedin leader Massoud Rajavi ran for the presidency in January 1980. Rajavi was forced to withdraw when Ayatollah Khomeini ruled that only candidates who had supported the constitution in the December referendum – which the Mojahedin had boycotted – were eligible. Rajavi’s withdrawal statement emphasized the group’s efforts to conform to election regulations and reiterated the *Mujahedin’s intention to advance its political aims within the new legal system.*’ (emphasis added).

5. The continuing suppression of the PMOI by the Iranian regime and the arrest and execution of its members has been documented by the press and by independent observers, such as Amnesty International.

## 2. Status of the Members of the PMOI under the Geneva Conventions

### 2.1 Status as ‘protected persons’ under the Fourth Geneva Convention

6. At present, the PMOI residents of Ashraf have been determined by the United States of America to be ‘protected persons’ within the meaning of the Fourth Geneva Convention 1949 in their capacity as civilians.<sup>2</sup>
7. But International Humanitarian Law also protects the members of the PMOI in their capacity as refugees who do not in fact enjoy the protection of their own government. The Fourth Geneva Convention and the First Additional Protocol regulate the status of refugees and stateless persons. Article 44 states that ‘the Detaining Power shall not treat as enemy aliens exclusively on the basis of their nationality de jure of an enemy State, refugees who do not, in fact, enjoy the protection of any government.’
8. Additional Protocol I, Article 73, which applies by virtue of customary international law, also treats as protected persons, *inter alia*, those who were considered as refugees before the beginning of hostilities ‘under the relevant international instruments

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<sup>2</sup> For a detailed exposition of the status of the PMOI as civilians under the Geneva Conventions, see Legal Opinion of Professor Cherif Bassiouni on the ‘Legal Status under International Law of the Members of the People’s Mojahedins Organization of Iran Presently in the Territory of Iraq’, 29 September 2003; and Legal Opinion of Professors Eric David, Marco Sassoli and William A. Schabas, on ‘The Legal Status of the PMOI upon the Entry into Force on 30 June 2004 of the Law of Administration for the State of Iraq for the Transitional Period’, 22 April 2004.

accepted by the Parties concerned *or* under the national legislation of the State of refuge or State of residence' (emphasis added).

9. The US authorities have acknowledged the refugee status of the residents of Ashraf camp by consistently recognizing that the 'rights and protections' of the PMOI include 'the right to refuse to return to their country of nationality, regardless of their legal status in the country in which they are protected', thus underlining the absolute prohibition under Article 45 of the Fourth Geneva Convention of the transfer of a protected person 'to a country in which he or she may have reason to fear persecution for his or her political opinions or religious beliefs'. The US authorities have determined the status of the PMOI as protected persons under the Fourth Geneva Convention by a Proclamation of 2 July 2004.<sup>3</sup>
10. The ICRC has confirmed that, 'PMOI members in Iraq fall in general under the protection of the Fourth Geneva Convention. Persons protected by this Convention benefit from a number of safeguards, including the prohibition of individual or mass forcible transfers, as well as deportation from Iraq to the territory of the Occupying Power or to that of any other country, regardless of their motive' (referring to Article 49 of the Convention).<sup>4</sup> Article 49 is considered to be one of the central provisions of the Fourth Geneva Convention and also figures in the list of grave breaches of the Convention which entails individual responsibility. It will be noted that the clear and categorical prohibition which it contains covers both individual and mass forcible transfers and to any country whatsoever. It also is now considered to be declaratory of customary international law.<sup>5</sup>

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<sup>3</sup> See Proclamation by the Commander, Multi-National forces, Iraq, on the signing of the 'Agreement for the Individuals of the PMOI at Ashraf, Iraq', dated 2 July 2004.

<sup>4</sup> Letter of Georges Comninos, ICRC, to National Council of Resistance of Iran, 20 April 2004. See also letters of 24 May and 10 August 2006, also addressed to the National Council of Resistance of Iran. Article 49 of the Fourth Geneva Convention reads 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.' It is also reflected in Article 85 of Additional Protocol I.

<sup>5</sup> See Jean-Marie Henckaerts & Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, vol. I, Cambridge University Press, 2005, pp. 457 *et seq.*; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law*, Oxford University Press, 1989, pp.48-49. See also *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Appeals Chamber, Judgement of 17 September 2003, §§ 217-223, available at [www.un.org/icty/](http://www.un.org/icty/).

11. In short, as ‘protected persons’ under the Fourth Geneva Convention, the members of the PMOI in their capacities as civilians and refugees are protected from *refoulement*, individual and mass forcible transfers and deportation.

## **2.2 The continued applicability of the Fourth Geneva Convention to the Multinational Force (MNF)**

12. This protected status under international humanitarian law extends beyond the end of the occupation in accordance with mandatory UN Security Council decisions adopted under Chapter VII of the UN Charter. While the Coalition Provisional Authority (‘CPA’) which exercised full legislative, executive and judicial authority in Iraq from 1 May 2003 ceased to exist on 28 June 2004 when an Iraqi interim Government assumed full powers, the relevant provisions of the Fourth Geneva Convention continue to apply to the Multinational Force which has been authorised under UNSCR 1511 (2003) and 1546 (2004) to perform certain functions at the request of the Iraqi government ‘to contribute to the maintenance of security and stability in Iraq ...’ – a mandate which has been extended to December 2006 and which will undoubtedly be renewed in view of the current situation in Iraq and until Iraqi forces assume full responsibility for the maintenance of security and stability (UNSCR 1637 (2005)). UNSCR 1637 affirms, moreover, ‘the importance for all forces promoting the maintenance of security and stability in Iraq to act in accordance with international law, including obligations under international humanitarian law, and to co-operate with relevant international organizations’.<sup>6</sup>
13. Moreover, under Article 6, paragraph 4, of the Fourth Geneva Convention, ‘protected persons whose release, repatriation or re-establishment may take place (after the end of the application of the Convention) shall meanwhile continue to benefit by the present convention’
14. It is to be noted that the status of the members of the PMOI under International Humanitarian Law is incremental to and not incompatible with any other status they may have under applicable refugee law and human rights law. The complementarity

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<sup>6</sup> See also Letter dated 29 October 2005 from Condoleezza Rice, Secretary of State of the United States of America to the President of the Security Council (UNSCR 1637 (2005) Annex II) and Letter dated 5 June

of human rights and humanitarian law has been affirmed by human rights courts and human rights treaty bodies.<sup>7</sup> The concurrent application of international refugee law and international humanitarian law and therefore the dual protection accorded to refugees has also been consistently affirmed.<sup>8</sup>

### **2.3 International humanitarian law as part of the legal framework for Iraq**

15. International humanitarian law also, *inter alia*, continues to act as a framework for Iraq as a whole, in accordance with mandatory UN Security Council resolutions. Moreover, under the Law of Administration for the State of Iraq for the Transitional Period of 8 March 2004, 'The laws, regulations, orders, and directives issued by the Coalition Provisional Authority pursuant to its authority under international law shall remain in force until rescinded or amended by legislation duly enacted and having the force of law' (Article 26 C).<sup>9</sup> This can be extended to cover official statements made by the military authorities in Iraq during this period.

### **3. Status of the Members of the PMOI as Resident Aliens and Refugees in Iraq**

16. As has been stated above, the protection which the PMOI enjoys under the Fourth Geneva Convention is incremental. Its members do not thereby forfeit any other legal status they may have under Iraqi and international law. As set out below, the PMOI additionally enjoy in Iraq the status of resident aliens, as well as refugee status.

#### **3.1 Status as resident aliens**

17. The previous government of the Republic of Iraq allowed the members of the PMOI to enter and to reside lawfully in Iraq for over two decades. The PMOI did not engage in any combat in either the first or the second Gulf wars. The members of the PMOI

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2004 from Colin L. Powell, Secretary of State of the United States of America to the President of the Security Council (UNSCR 1546 (2004), Annex.

<sup>7</sup> See, for example, Human Rights Committee, General Comment No. 31, 29 March 2004, para.11 (CCPR/C/21/Rev.1/Add.13).

<sup>8</sup> See, for example, Stephane Jaquemet, 'The cross-fertilization of international humanitarian law and international refugee law', *International Review of the Red Cross*, vol. 83, 2001, pp.651-674.

<sup>9</sup> See also CPA Order no. 100 of 28 June 2004.

were perceived by the Iraqi Government as posing no threat to the Republic of Iraq as such, challenging neither law and order, nor national security. They were therefore allowed considerable freedom of action and a certain autonomy to run their own affairs. As long-standing or habitual residents, the members of the PMOI have benefited from certain acquired rights, including the right to property. Such acquired rights under international law are attached to the person and are not affected by changes of government or sovereignty.<sup>10</sup>

18. The PMOI have possessed the rights enjoyed by nationals and aliens alike under the International Covenant on Civil and Political Rights (ICCPR66) to which Iraq is a party. In principle, they enjoy the right to return to their country of residence, and the right to family unity. They also enjoy rights of due process in respect of individual expulsion. Collective expulsion of aliens in international law is prohibited under customary international law.<sup>11</sup> The Human Rights Committee has stated that, '[t]he rights enshrined in the Covenant belong to the people living in the territory of the State party...once the people are accorded the protection of the rights under the Covenant, such protection devolves with the territory and continues to belong to them, notwithstanding change in government of the State party ...'<sup>12</sup>

### **3.2 Status as refugees under Iraqi law**

19. Iraq has been one of the few countries in the Middle East to include a right of asylum in its constitution and to have a law on refugees. Article 34 of the 1970 Iraq Constitution provided as follows:

- (a) The Iraqi Republic grants the right of political asylum for all militants, persecuted in their countries because of defending the liberal and human principles which are assumed by the Iraqi People in this Constitution.
- (b) The extradition of political refugees is prohibited.

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<sup>10</sup> This is a classic principle of international law affirmed as early as 1923 by the Permanent Court of International Justice in its advisory opinion on *Settlers of German Origin in Territory Ceded by Germany to Poland*, PCIJ, Ser. B, no. 6, at 36; the doctrine of 'acquired rights' was also invoked by Judge Weeramantry in his Separate Opinion, in the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia-Herzegovina v. Yugoslavia) (Preliminary Objections), ICJ Rep. (1996), pp.643-644, in relation to the continuing application of human rights in the context of State succession.

<sup>11</sup> See Preliminary Report on the Expulsion of Aliens, Maurice Kamto, Special Rapporteur, International Law Commission, 2 June 2005: UN doc. A/CN.4/554.

<sup>12</sup> HRC, General Comment 26 (61) on Issues Relating to the Continuity of Obligations to the International Covenant on Civil and Political Rights, UN doc. CCPR/C/21/Rev.1/Add.8/Rev.1, 8 December 1997, § 4.

20. Under the Loi sur les réfugiés politiques n° 51 (1971) = Political Refugee Act, No. 51(1971),<sup>13</sup> a refugee was defined as any person who sought asylum in the Iraqi Republic for political or military reasons: ‘Celui qui se réfugie auprès de la République irakienne pour des raisons politiques ou militaires’ (article 1).
21. This law included a *non-refoulement* provision which was absolute (Article 4(1) ‘Le réfugié ne peut en aucune façon être renvoyé dans son pays d’origine.’). Article 8 provided further:
1. Les dispositions de la loi sur le séjour des étrangers ne seront pas appliquées aux personnes:
    - (a) qui ont été reconnues en tant que réfugiés en Irak;
    - (b) qui entrent en Irak pour demander l’asile...
22. Refugees with asylum in Iraq benefited from the following rights, as set out in Article 11:
1. Les réfugiés bénéficient des mêmes droits que les citoyens irakiens dans les domaines suivants:
    - (a) ils bénéficient de tous les services médicaux, culturels et sociaux;
    - (b) ils exercent des professions libérales;
    - (c) ils reçoivent des terres cultivables conformément à la loi sur la réforme agraire, ces terres ne pouvant toutefois pas être inscrites à leur nom avant qu’ils n’obtiennent la nationalité irakienne;
    - (d) ils peuvent être fonctionnaires ou employés de l’Etat, après l’accord du Ministre.
  2. Le Président de la République, d’après la recommandation du Ministre, peut accorder à tous les réfugiés, ou à certains d’entre eux, les mêmes droits que ceux qui sont accordés aux ressortissants irakiens.
  3. Ils peuvent amener leur famille en Irak si elle est à leur charge.
23. Given the circumstances leading to their departure from Iran in search of refuge, the members of the PMOI clearly qualified under the definition of a refugee laid down in Iraqi legislation, both in terms of the origins of their flight and in the fact that they could not be returned to Iran under any circumstance. Moreover, they were also treated as refugees, in accordance with relevant Iraqi law. The fact that they were not treated as enemy aliens during the Iran-Iraq war in accordance with Article 44 of the

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<sup>13</sup> Loi sur les réfugiés politiques no. 51 (1971). Unofficial French translation available on UNHCR, *RefWorld*, DVD-CDRom, 15<sup>th</sup> edn., 2006; the official (Arabic) text was published in the official Gazette, *Al-Waqayi al Iraqiya*, No. 1985, on 10 April 1971.

Fourth Geneva Convention is further proof of their refugee standing in the eyes of the then Iraqi government.

24. The legal framework now governing refugee issues may be found in the new Iraqi constitution of September 2005. It states in Article 21(2): '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.' Undoubtedly, the PMOI conforms to these provisions. Its members plainly continue to face likely persecution if returned to Iran. This has been attested by numerous human rights organizations, including Amnesty International.<sup>14</sup> Moreover, they do not fall within the ambit of the exception from political asylum laid down in Article 21(3) for those 'accused of committing international or terrorist crimes' or who have 'inflicted damage on Iraq'. In this respect, it has to be emphasized that various United States agencies screened all PMOI personnel for over a year and were unable to discover any links between them and terrorism or any other crime. This has been properly reported on 27 July 2004 by the *New York Times*: 'Senior American officials said extensive interviews [of the PMOI members] by officials of the State Department and the Federal Bureau of Investigation had not come up with any basis to bring charges against any members of the group'.
25. As the above facts show, over the last two decades PMOI members have been effectively recognized and treated as refugees in Iraq and under Iraqi law. Irrespective of any formal determination, their status reflects the reasons why they were initially admitted to Iraq after being subjected to persecution in Iran, while their long residence and the continuing impossibility of return to their country of origin constitutes recognition of the fact that they have enjoyed and continue to enjoy the protection of Iraqi constitutional and domestic legal norms. As is shown below, the treatment

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<sup>14</sup> See Introduction to this Legal Opinion; and Letter from Secretary General of Amnesty International Canada, dated 19 December 2003. Amnesty International has on different occasions attested that any association or affiliation with the PMOI carries the death penalty in Iran (see for example Amnesty International, 'Iran: Urgent need for effective investigations into deaths in custody', AI Index: MDE 13/099/2006 (Public), News Service No: 233, 7 Sept. 2006; Amnesty International, 'Iran: Worrying trends in use of death penalty', AI Index: MDE 13/020/2006 (Public), News Service No: 049, 27 Feb. 2006). Article 186, Part 7, of Iran's 1991 Islamic Penal Code states that any person who is involved with or supports a group or association staging an armed opposition against the Islamic State and the divine rule is subject to capital punishment even though such person may not be involved in military activities. Article 186, together with Article 190 which prescribes the penalties, have notoriously been made applicable both to members and to supporters of the PMOI.



- accorded collectively to PMOI members and their acceptance as refugees under Iraqi domestic law conforms also with the requirements of general international law.
26. Indeed, the considerable freedom of action and acquired rights they have been granted exceed that normally accorded to political refugees. Their domestic legal standing as refugees flows from a special verbal agreement between the previous government of Iraq and the PMOI, and is implicit in the conduct towards them over the years of the previous Iraqi government.<sup>15</sup> It is also attested to by the Opinion of the Directors of the Legal Consultation Office.<sup>16</sup>
27. There are no legal or factual grounds at present which would justify cessation of this long-recognized refugee status. Consequently, it is submitted that the present Iraqi government may not lawfully revoke the refugee status of the members of the PMOI, but should formally confirm this status.
28. Finally, Iraq has undertaken obligations under UN Security Council resolutions to provide a framework under which the human rights of all individuals will be guaranteed and human rights guarantees have been incorporated into the new Constitution. A Ministry of Human Rights has been created with the responsibility to 'work to establish... conditions conducive to the protection of human rights and fundamental freedoms in Iraq, and the prevention of human rights violations in Iraq', as well as to request 'appropriate support from external sources, including non-governmental and other international organizations, the United Nations, and the Multinational Force operating in Iraq pursuant to United Nations Security Council Resolutions 1511 and 1546.' Non-respect of the acquired rights of the PMOI and withdrawal of refugee status obtained under the former regime could well constitute infringements of the human rights of its members under the Iraqi constitution and, as shown below, under international law; it could also amount to a prohibited discrimination in respect of other groups resident in Iraq. In a letter of 7 October 2005, Major General William H. Brandenburg included among the rights outlined for the residents of Camp Ashraf, 'the right to fair treatment under the law, in accordance with Iraqi domestic law and international standards'.

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<sup>15</sup> See Opinion on the 'Legal status of the Organization of the People's Mojahedin of Iran in Iraq within the framework of the Iraqi's law', by Dr. Malek Dohan Al-Hassan and Dr. Fazel Mohammad Javad, Directors of the Legal Consultation Office, dated 27 October 2003.

#### 4. International Refugee Law

29. The question now to be considered is the status of this group under international law and, in particular,

- (1) whether members of the group are to be considered as refugees in international law;
- (2) the legal basis for any such determination, taking account of the fact that Iraq is not a party to the 1951 Convention/1967 Protocol relating to the Status of Refugees;
- (3) possible objections to consideration of the group or individual members of the group as refugees, by reason of their opposition to the Government of Iran;
- (4) the rights and obligations of Iraq in regard to refugees on its territory;
- (5) the responsibilities of the Office of the United Nations High Commissioner for Refugees.

##### 4.1 Refugee status in international law

30. A refugee is a person who is outside their country of origin and unable or unwilling to return by reason of a well-founded fear of persecution or other relevant harm, such as torture. The refugee is protected in turn by the principle of *non-refoulement*, also a principle of customary international law, which obliges the State in which the refugee is present not to return him or her to the frontiers of territories in which such prohibited treatment is likely. This also includes an obligation not to send a refugee to a third country where he or she may in turn face *refoulement*.
31. In principle and in practice, consideration of the status of members of the PMOI as refugees may be undertaken by reference to the circumstances of the group as a whole, for example, in light of the facts which led to flight and of information on present conditions in the country of origin, with regard in particular to the likely fate of members of the group, if they were to be returned.<sup>17</sup>

##### 4.2 The legal basis for refugee status

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<sup>16</sup> Ibid.

<sup>17</sup> See Amnesty International, 'Iran: Urgent need for effective investigations into deaths in custody', AI Index: MDE 13/099/2006 (Public), News Service No: 233, 7 Sept. 2006; Amnesty International, 'Iran: Worrying trends in use of death penalty', AI Index: MDE 13/020/2006 (Public), News Service No: 049, 27 Feb. 2006.

32. Although Iraqi constitutional law has recognized the practice of ‘asylum’, Iraq is not a party to the basic international instruments on refugees, namely, the 1951 Convention/1967 Protocol relating to the Status of Refugees.<sup>18</sup> Iraq’s international legal obligations towards refugees must therefore be found in customary international law and in international human rights law; Iraq’s own practice towards refugees will also be relevant.
33. In addition, it will be necessary to consider whether the members of the PMOI fall within the mandate of the Office of the United Nations High Commissioner for Refugees. The UNHCR Statute defines a refugee as a person who is outside their country of origin and unable or unwilling to return there owing to well-founded fear of persecution for reasons of race, religion, nationality, or political opinion. The UN General Assembly has also accepted that UNHCR has protection responsibilities for a broader category of refugees, sometimes known as ‘persons of concern’ to UNHCR, who may have other ‘valid reasons’ for not returning to their country of origin.
34. Given the circumstances of their flight from Iran and the absence of any meaningful change of circumstances in the meantime, there can be little doubt members of the PMOI, as a group, fall within the category of refugees, whether considered from the perspective of customary international law or that of the UNHCR Statute.

#### **4.3 Possible objections or obstacles to recognition of refugee status**

35. Both the UNHCR Statute and the 1951 Convention provide for the *exclusion* from refugee status of individuals who are not considered to ‘deserve’ protection. The UNHCR Statute, for example, provides that the High Commissioner’s competence shall not extend to anyone,

‘In respect of whom there are serious reasons for considering that he has committed a crime covered by the provisions of treaties of extradition or a crime mentioned in article VI of the London Charter of the International Military Tribunal or by the provisions of article 14, paragraph 2, of the Universal Declaration of Human Rights.’

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<sup>18</sup> Iraq in fact was actively involved in the 1951 Geneva Conference of Plenipotentiaries which took

36. The information so far presented does not indicate the existence of serious reasons to consider that any member of the PMOI would be extraditable and therefore to be excluded from the protection mandate of the UNHCR. Iraq, like most other States, also recognizes that *political offences* should not be the basis for extradition. For example, at the 1960 Colombo Meeting of the African-Asian Legal Consultative Organization on principles concerning the extradition of fugitive offenders, it was agreed (Article 3) that political offenders should not be extradited, and Iraq joined with Burma, India, Japan, Pakistan and the United Arab Republic in expressing its formal support for this principle.
37. Article 14(2) of the Universal Declaration of Human Rights provides that the right to seek and to enjoy asylum may not be invoked, 'in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.'
38. The Security Council, in turn, has declared that 'terrorism' is contrary to the purposes and principles of the United Nations and that asylum seekers who have committed acts of terrorism should therefore be denied refugee status. Significantly, however, the PMOI has not been included in any of the Security Council official lists of terrorist organizations and, while the PMOI was 'listed' by the EU on 17 June 2002, this not only substantially predates the latest developments, but also disregards the particular circumstances of the PMOI's flight from Iran and later resistance.
39. In any review of the status of the PMOI and its members it is therefore essential to recall, first, the background and circumstances which led the organization and its members to seek refuge in another country, and to counter any allegation of exclusion based on involvement in or association with terrorist activity. In this regard, it should be noted that it is a basic principle of international refugee law that membership of a group or association said to be involved in terrorism or to be a threat to national security is not itself a sufficient basis to deny, let alone withdraw, refugee status. What matters in each case are the conduct and circumstances of the individual; moreover, in the case of withdrawal of refugee status, the burden is clearly on the refugee status authority or the government to prove its case; see, in particular, the

UNHCR 2003 *Guidelines on the Application of the 'Exclusion' Clauses*.<sup>19</sup> Of particular relevance to the personal situation of PMOI members is the US military's classification of PMOI as 'protected persons' in July 2004, the screening of all PMOI personnel by US authorities and confirmation of the finding that there was no basis on which to charge any individual with offences against United States law.

40. These principles were clearly recognized by the *Verwaltungsgericht Köln* in its decision of 22 September 2005 in the case of *Fariba Hessabi*.<sup>20</sup> The Court made it clear that the withdrawal of the appellant's refugee status (in fact, status as *Asylberechtigter*, or 'person entitled to asylum') was unlawful because the Federal Agency for Migration and Refugees had failed to take the circumstances of the individual into account. Instead, it had acted on the basis of generalized assumptions concerning the organization with which it was claimed she was associated. Moreover, there was no evidence to show that she herself was in any way a danger to the security of the State.
41. Secondly, a clear distinction must be drawn between opposition movements engaged in resistance and self-defence and terrorist groups. As the background information confirms, the PMOI and its members have been targeted for persecution by the Iranian regime and have been denied all forms of legal redress.<sup>21</sup>
42. With a view to ensuring appropriate response at all levels, it will be necessary to emphasize, for example, that UNHCR's *Guidelines on Exclusion* confirm that ex-combatants are not *per se* excludable, but only if there are serious reasons to consider that they, as individuals, have committed acts or offences falling within Article 1F of the 1951 Convention.<sup>22</sup>

#### 4.4 Rights and obligations of Iraq as a country of asylum

43. Although Iraq is not a party to the 1951 Convention/1967 Protocol relating to the Status of Refugees, it is bound by certain rules of customary international law in regard to the treatment of refugees.

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<sup>19</sup> UNHCR, 'Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees', HCR/GIP/03/05, 4 September 2003, para. 20.

<sup>20</sup> *Verwaltungsgericht Köln*, Beschluss vom 22.09.2005 – 16 K 6059/03.A.

<sup>21</sup> See the Amnesty International press releases cited above in note 17.

44. In particular, Iraq is obliged as a matter of international law not to *refoule* refugees, that is, not to return or send them to a country in which their life or liberty would be at risk, in which they would be persecuted, or exposed to risk of torture. The full extent of this obligation will require to be considered also in light of Iraq's ratification of the International Covenant on Civil and Political Rights and the effect of Article 7.
45. Iraq is entitled to rely on the clear rejection of violence by the PMOI and to continue to grant and to maintain asylum for the PMOI, notwithstanding any complaint by the Government of Iran. The General Assembly has repeatedly confirmed that the grant of asylum is a peaceful and humanitarian act, which should not be regarded as unfriendly by any State.
46. The rights due to refugees granted asylum require careful consideration. However, although Iraq is not a party to the 1951 Convention/1967 Protocol, since 1971 it has been a party to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and the terms of these instruments support the position on the 'rights and protections' to which PMOI members are entitled, which was expressed by Major-General Brandenburg in his communication of 7 October 2005.
47. Moreover, Iraq has also participated in the African-Asian Legal Consultative Organization and in the adoption at the 2001 40<sup>th</sup> Session in New Delhi of the final text of the 1966 Bangkok Principles on the Status and Treatment of Refugees.<sup>23</sup> Although not formally binding, these principles are commonly referred to as evidence of where the States concerned consider that the law now stands. For example, Article V provides:
3. A refugee shall not be deported or returned to a State or Country where his life or liberty would be threatened for reasons of race, colour, nationality, ethnic origin, religion, political opinion, or membership of a particular social group.
  4. The expulsion of a refugee shall be only in pursuance of a decision reached in accordance with due process of law.

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<sup>22</sup> UNHCR, 'Guidelines Application of the Exclusion Clauses', above note 19, para. 20.

<sup>23</sup> In fact, both Iraq and Iran participated in the consensus adoption of the Bangkok Principles; see Report of the 7<sup>th</sup> General Meeting, 24 June 2001.

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 the competent authority or a person or persons specially designated by the competent authority.

48. Like any other State, Iraq remains entitled to protect its security.<sup>24</sup> Where refugees are concerned, however, international law limits expulsion to very exceptional cases. For parties to the 1951 Convention/1967 Protocol, these limited, security-based circumstances are set out in Article 32 on expulsion and Article 33(2) on exceptions to the principle of *non-refoulement*. It is a characteristic of each provision that decisions to expel or remove require justification in each individual case, and that due process guarantees must be in place. Moreover, international human rights law (including Article 7 ICCPR66 and Article 3 of the 1984 Convention against Torture, together with the customary international law prohibition of torture and return to torture) imposes yet further limitations, and effectively requires that no refugee be returned to his or her country of origin, even on so-called security grounds.
49. Mass expulsion is prohibited by customary international law, by reason of its inherently discriminatory character and lack of due process. It also poses a burden on other States.

#### **4.5 The responsibilities of UNHCR**

50. The Office of the United Nations High Commissioner for Refugees has been charged with the responsibility to provide international protection to refugees. In principle, therefore, UNHCR should be actively involved in ensuring that the PMOI (1) are not *refouled* to their country of origin; and (2) are protected in their country of refuge and able to enjoy basic human rights and to maintain a livelihood in decent conditions.
51. UNHCR's responsibilities towards the PMOI and its members are triggered by their meeting the international legal criteria for recognition of refugee status. As indicated above and in the relevant background information, the circumstances in which the

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<sup>24</sup> Art. X of the Bangkok Principles provides that, 'A refugee shall not engage in subversive activities endangering the national security of the country of refuge, or any other country or in activities inconsistent with

group left Iran, the treatment accorded to members of the group who stayed behind, and the present attitude of the Government of Iran and its treatment of political dissidents, provide the necessary factual basis which justify and require the provision of international protection to the group as a whole.<sup>25</sup>

## 5. International Human Rights Law

52. In relation to the protection of the PMOI under international human rights law, two questions in particular arise: (1) the status of the group as non-citizens in Iraq; and (2) the applicability of the 1966 Covenants and principles of customary international law.

### 5.1 The human rights of non-citizens in Iraq

53. As indicated above, the rights due to members of the PMOI may be determined by their recognition as refugees. Nevertheless, even in the absence of such recognition, the human rights of non-citizens must be ensured and protected. Certain 'political' rights may be restricted to citizens, and non-citizens in principle remain liable to removal or expulsion; however, fundamental human rights and due process must be protected, while the PMOI's long and lawful presence in Iraq may have raised an acquired right to remain.

### 5.2 The applicability of international human rights law

54. There is a large area of overlap between general international human rights law and that aspect which is concerned particularly with the position of refugees and displaced persons.

55. An important preliminary question concerns the scope of the general human rights obligations binding upon Iraq. The three principal general legal instruments in this context are the Universal Declaration of Human Rights 1948, the International Covenant on Civil and Political Rights 1966, and the International Covenant on

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or against the principles and purposes of the United Nations.' The information presently available does not indicate that either the PMOI or its members fall within this provision.

<sup>25</sup> This does not exclude the possibility of individual determinations of refugee status, although this should not be necessary other than in exceptional cases, given the circumstances of the group and acceptance of its members in fact as refugees over the past two decades.



Economic, Social and Cultural Rights 1966. The last two treaties are only binding on States which have become parties to them, as Iraq did in 1971.<sup>26</sup>

56. Rights and obligations in a treaty may also be rights and obligations in customary international law. Whether any particular treaty right or obligation has this dual quality is a matter for enquiry in each case, depending upon whether the right or obligation satisfies the requirements for the existence of a rule of customary international law – in effect, that it represents a general practice accepted as law. It is probable that many of the rights and obligations set out in the treaties in question would satisfy that test.
57. The Universal Declaration of Human Rights is not a treaty, but was adopted by the General Assembly Resolution 217 (III) (1948). While the Universal Declaration is formally not legally binding, there has been growing acknowledgment that it does now have some legally binding force, whether as customary international law, or as an authoritative exposition of the UN Charter's references (which do constitute legal obligations) to human rights (see Charter, Articles 1, 55, 56, 62, 68 and 76). Thus breaches of the Universal Declaration can be argued to constitute either breaches of customary international law binding on Iraq, and/or breaches of Charter obligations binding on Iraq.
58. Where certain general human rights obligations in the three principal instruments referred to above are binding on Iraq, the further question arises as to who is entitled to rely on those obligations as against Iraq. The normal rule is that a State may only present a claim in respect of a breach of an international obligation causing loss or damage to itself or to one of its nationals (or other individuals whom it may have a right to protect). However, this general rule is subject to the special case of obligations *erga omnes* – that is, obligations of such a kind that all States have an interest in the protection of the rights involved and may thus raise a claim in respect of their violation even if the 'nationality of claims' rules are not satisfied. Although there is no agreed enumeration of rights and obligations *erga omnes* and the law in this area is still developing, those deriving from the principles and rules concerning the basic rights of the human person are generally considered to fall within this

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<sup>26</sup> Iraq is also party to the 1966 International Convention on the Elimination of All Forms of Racial

category. It is therefore probable that any other State would have a sound basis for asserting a claim against Iraq in respect of violations of basic international human rights obligations, irrespective of the nationality of the persons concerned.

59. On the basis of a preliminary review of the facts, it would seem that (with reference to the basic concepts of the Universal Declaration) the following obligations are potentially at issue, particularly if steps are taken to expel or 'encourage' the departure of the PMOI from Iraq:

- (a) non-discrimination (Article 2);
- (b) right to life, liberty and security (Article 3);
- (c) equality before the law and equal protection of the law (Article 7);
- (d) right to effective remedies for violations of fundamental legal rights (Article 8);
- (e) right to a fair and public hearing by an independent and impartial tribunal in the determination of rights and obligations (Article 10);
- (f) right to freedom of movement and residence within the borders of the State (Article 13).

60. The particular circumstances of the PMOI indicate also that their rights may in fact be put at risk by the denial to them of the treatment which they have hitherto enjoyed, and by the threat of expulsion.

61. The articles of the Universal Declaration referred to above indicate the general range of possible human rights violations. This may be supplemented by the precise terms of the 1966 International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights.

## **6. Summary of basic principles**

62. The following is a summary of applicable principles emerging from this review of the facts and the law.

1. As civilians, the PMOI residents of Ashraf are 'protected persons' within the meaning of the Fourth Geneva Convention 1949.
2. The members of the PMOI are also protected by international humanitarian law in their capacity as refugees who do not in fact enjoy the protection of their own government.

3. As 'protected persons', the members of the PMOI are protected from *refoulement*, individual and mass forcible transfers and deportation.
4. The status of the PMOI under International Humanitarian Law is incremental to and not incompatible with any other status they may have under applicable refugee law and human rights law.
5. As long-standing or habitual residents, the members of the PMOI benefit from certain acquired rights, including the right to property.
6. At the time of admission to Iraq, the PMOI clearly qualified under the definition of a refugee in Iraqi legislation, both in terms of the origins of their flight and in the fact that they could not be returned to Iran under any circumstance. For over two decades they have also been treated as refugees, in accordance with relevant Iraqi law, and have enjoyed and continue to enjoy the protection of Iraqi constitutional and domestic legal norms.
7. The current legal framework continues to provide that no political refugee shall be surrendered to a foreign entity or returned forcibly to the country from which he fled. On the evidence presently available, the PMOI continue to face likely persecution if returned to Iran, and do not fall within any exception provision.
8. There are no legal or factual grounds which would justify cessation of the PMOI's long-standing refugee status.
9. Members of the PMOI, as a group, also fall within the category of refugees defined in international law.
10. The information presently available does not indicate the existence of serious reasons to consider that any member of the PMOI would be extraditable and therefore to be excluded from the protection mandate of the UNHCR.
11. In considering any objection to protection based on 'exclusion', it is relevant to recall, first, the background and circumstances which led the organization and its members to seek refuge in Iraq; and to note, among other matters, the 10 May 2003 agreement of 'mutual understanding and coordination' between the PMOI and the Coalition regarding disarmament and consolidation, as well as the formal rejection of terrorism by every member of PMOI in early 2004.
12. UNHCR's Guidelines on Exclusion confirm that ex-combatants are not per se excludable, but only if there are serious reasons to consider that they, as individuals, have committed acts or offences falling within Article 1F of the 1951 Convention.
13. Although Iraq is not a party to the 1951 Convention/1967 Protocol relating to the Status of Refugees, it is bound by certain rules of customary international law in regard to the treatment of refugees.
14. Iraq is obliged as a matter of international law not to *refoule* refugees, that is, not to return or send them to a country in which their life or liberty would be at risk, in which they would be persecuted, or exposed to risk of torture.

15. The grant of asylum is a peaceful and humanitarian act, which should not be regarded as unfriendly by any State.
16. Where refugees are concerned, international law limits expulsion to very exceptional cases.
17. International human rights law further limits expulsion or removal, and requires that no refugee be returned to his or her country of origin where there is a serious risk of persecution or torture, even on so-called security grounds.
18. Mass expulsion is prohibited by customary international law
19. UNHCR should be actively involved in ensuring that the PMOI (1) are not *refouled* to their country of origin; and (2) are protected in their country of refuge and able to enjoy basic human rights and to maintain a livelihood in decent conditions.
20. UNHCR's responsibilities towards the PMOI and its members are triggered by their meeting the international legal criteria for recognition of refugee status.
21. Even in the absence of formal recognition of refugee status, the human rights of non-citizens must be ensured and protected.
22. The particular circumstances of the PMOI indicate also that fundamental rights and their entitlement to due process may be put at risk by the denial to them of the treatment which they have hitherto enjoyed, and by the threat of expulsion.



**GUY S. GOODWIN-GILL**  
**Professor of International Refugee Law**  
**All Souls College**  
**University of Oxford, Oxford**



**VERA GOWLLAND-DEBBAS**  
**Professor of Public International Law**  
**Graduate Institute of International Studies**  
**Geneva**

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