

**The Legal Obligations of the United States to Protect the Members of
the People's Mujahedin Organisation of Iran now in Camp Ashraf**

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1. Introduction

This paper examines the legal obligations of the United States to protect the members of the People's Mujahedin Organisation of Iran (PMOI) that are now in Camp Ashraf, focusing in particular on the obligations arising under international humanitarian law. The United States (which assumed protection of the PMOI in 2003 when, following the Organisation's disarmament, it took over responsibility for the security of their camp), is currently under pressure to transfer control of Camp Ashraf to the government of Iraq. In June 2008 Iraq's Council of Ministers agreed a number of measures in relation to the PMOI, including a demand that the Multi-National Force 'abandon this Organisation and hand over to relevant Iraqi authorities all control points and issues that relate to the members of this Organisation.'¹

The PMOI are refugees from Iran. Without the protection of the United States they would be very likely to be repatriated to Iran. There are well founded grounds for fearing that they would be persecuted there: the suppression of the PMOI by the Iranian regime and the arrest and execution of its members has been documented by independent observers such as Amnesty International.² The PMOI would also be vulnerable to attacks whilst still in Iraq; the government of Iraq would not be able to protect them. The abandonment and handing over to Iraqi authorities of the PMOI would also place the PMOI at grave risk of serious violations of their human rights at the hands of the government of Iraq, including the right to life, to freedom from torture and inhumane treatment, deportation, unlawful transfer to another State where they would be at risk of persecution, unlawful confinement and the imposition of punitive measures without being granted the right to a fair hearing. Violations of this nature constitute grave breaches of the Geneva Conventions.³

The legal bases of the IHL obligations of the United States towards the PMOI are complex. This is not surprising given the novel circumstances in which the United States currently exercises military authority in Iraq, and the equally novel circumstances in which the PMOI came to be under the protection of the United States. Although the conflict was clearly international in 2003, it now has elements of both

¹ The Republic of Iraq, Secretariat of the Council of Ministers, Ratification of the Council of Ministers No. (216), 27th Ordinary Session, 17 June 2008, [4].

² Guy Goodwin-Gill and Vera Gowland-Debbas, Legal Opinion The Protection of Members of the People's Mojahedin Organisation of Iran (PMOI) under International Law 20 November 2006, [5].

³ Article 50 Geneva Convention I; Article 51 Geneva Convention II; Article 130 Geneva Convention III; Article 147 Geneva Convention IV.

types of conflict and fits neither the international nor non-international model well. Some leading academics, such as Sir Adam Roberts, take the view that the conflict should continue to be regarded as international.⁴ Conversely the International Committee of the Red Cross (ICRC) has adopted the view that the conflict is now non-international on the grounds that the Multi-National Force (MNF) is now present with the consent of the government of Iraq. However, even if the conflict in Iraq is viewed as having become non-international at some point subsequent to the removal of Saddam Hussein from power, some of the key provisions of the Fourth Geneva Convention remain applicable, in particular, art. 6 para. 4 of the IVth Geneva Convention, which provides that “Protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention.” Indeed, it would be contrary to the purposes and principles of international humanitarian law to deny the obligations due to refugees who had the status of ‘protected persons’ during the early stages of an ongoing conflict (and whose position has not materially changed) on the grounds that the conflict is no longer international. This principle was effectively acknowledged by the United States when in July 2004 (hence after the ‘transfer of sovereignty’ to the transitional government),⁵ it confirmed the status of the PMOI as ‘protected persons’ under the Fourth Geneva Convention and communicated that confirmation to the ICRC. The United States repeated its confirmation that the PMOI are ‘protected persons’ under that convention on a number of occasions in 2005 and 2006, together with assurances to them of its commitment to their protection.

⁴ A Roberts, ‘The End of Occupation: Iraq 2004,’ 54 ICLQ 27, 46; Professor Roberts reiterated his view that the conflict in Iraq remains an international one, at a seminar on The Law on Military Occupation: Its Relevance in Twenty-First Century Conflicts (Geneva Academy of International Humanitarian Law and Human Rights, Geneva 27 August 2008).

⁵ Security Council Resolution 1546 of 8 June 2004.

2. The Threat to the People's Mujahedin Organisation of Iran

The People's Mujahedin Organisation of Iran ("PMOI") is an Iranian political organisation, and the largest member of the National Council of Resistance of Iran ("NCRI"), a coalition of nationalist and democratic groups and individuals promoting the replacement of the theocratic regime currently in power in Tehran with a secular, democratically-elected government. Following mass arbitrary arrests and executions of them in large numbers in the 1980s, the Mojahedin fled to exile, many to Europe, but some to Iraq. In Iraq they established their own military camps independent of the control of the Iraqi government, from which they waged their campaign against the Iranian regime. In 2001 the Organisation made a firm commitment to eschew military tactics and the use of force and has done so ever since; but their members continued to reside in the camps and continued to wage a political campaign. Their weapons (which included not only the ordinary light weapons that all Iraqis carry but also several hundred tanks and several hundred light armoured vehicles), were retained for defence and because a safe and reliable means of weapons disposal would have required a proper decommissioning process and guarantees of safety.

The PMOI camps, which were the equivalent of cities in size and infrastructure, were within the territory of Iraq but were entirely self-governing⁶ as is indicated by a proclamation made by the president of Iraq in 1988 stating that:

The Iraqi leadership respects the Iranian Resistance and its political and ideological independence and freedom of action of this Resistance in its actions and movement to achieve these 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.⁷

The independence of the PMOI was also recognised by the UNSCOM in its 1998 weapons inspection report on Iraq in which it indicated that the PMOI camp was effectively outside the jurisdiction of Iraq, and access for inspection depended on securing agreement with the PMOI (which was granted):

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 Organisation 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 Organisation. A dialogue has begun on this matter and the PMOI has accepted, in principle, that its sites are subject to access by the Commission.⁸

⁶ Guy Goodwin-Gill and Vera Gowland-Debbas, Legal Opinion The Protection of Members of the People's Mojahedin Organisation of Iran (PMOI) under International Law 20 November 2006, [17]

⁷ Iraqi Media, 15-16 June 1986, cited in Legal Opinion of Professor Cherif Bassiouni on the 'Legal Status under International Law of the Members of the People's Mojahedin Organisation of Iran Presently in the Territory of Iraq,' 29 September 2003, [11].

⁸ Iraqi Media, 1-2 July 1986 cited in Legal Opinion of Professor Cherif Bassiouni on the 'Legal Status under International Law of the Members of the People's Mojahedin Organisation of Iran Presently in the Territory of Iraq,' 29 September 2003, 12; Professor Bassiouni also notes that the ICRC negotiated

In 2003, when coalition forces invaded Iraq, the PMOI declared their neutrality but were bombed by United States forces (for which the United States later apologised) and subsequently surrounded by them. The PMOI then concluded a decommissioning agreement with the United States. Every weapon was given to, and listed by, United States forces. Therefore they now have no weapons at all of any sort; most Iraqis have some arms and have always done so as carrying a gun is traditional. The PMOI would therefore be in an extremely vulnerable position were it not for the fact that the United States undertook their protection and moved all the PMOI members to one camp, Camp Ashraf, which has been under United States authority and protection ever since. Currently United States' tanks surround the camp. Even a symbolic United States' presence would probably provide effective protection since an attack against the PMOI in defiance of the United States' presence would be politically very damaging to the party that undertook it.

In response to the residents' concerns with regard to their security, the United States has repeatedly assured them of their status as protected persons under the Fourth Geneva Convention and of its commitment to ensuring that they receive the benefits accorded them under international humanitarian law. In July 2004 the Commander of MNF-I issued a proclamation to the residents of Camp Ashraf informing them that the:

United States has confirmed your status as 'protected persons' under the Fourth Geneva Convention and has communicated that determination to the International Committee of the Red Cross in Geneva.⁹

Major General Miller, Deputy Commanding General of the MNF-I then wrote to the 'People of Ashraf' to 'congratulate each individual living in Camp Ashraf on their recognition as protected persons under the Fourth Geneva Convention.'¹⁰ In October 2005 (hence after the Iraqi elections for a new government) the MNF-I commander, Major-General Brandenburg wrote to the residents of Ashraf affirming their status as protected persons under the Fourth Geneva Convention and setting out for clarification a list of specific rights that they are entitled to, including the 'right to protection from danger, violence, coercion and intimidation' and 'the right to refuse to return to their country of nationality.'¹¹ In February 2006, Major General John Gardner, the deputy commander of the MNF-I, wrote to the residents of Ashraf in response to their concerns over the possibility of their non-voluntary repatriation to Iran, stating that:

Multi-National Force Iraq appreciates our responsibilities with regard to the Geneva Convention Relative to the Treatment of Civilian Persons (GCIV) 1949. In particular we are sensitive to the requirements under Article 45 which prohibit 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.

directly with the Mojahedin with respect to questions relating to Iranian prisoners of war, without any interference whatsoever from the Iraqi government (page 13).

⁹ Proclamation by the Commander, Multi-National Force-Iraq, on the Signing of the 'Agreement for the Individuals of the Peoples' Mujahedin Organisation of Iran (PMOI),' at Ashraf, Iraq, 2 July 2004.

¹⁰ Letter to the People of Ashraf from Major-General Geoffrey D Miller, Deputy Commanding General of Multi-National Force-Iraq, 21 July 2004.

¹¹ Letter to the People of Ashraf from Major-General William H Brandenburg, Commander of Multi-National Force-Iraq, 7 October 2005.

Finally, I would like to assure you that the coalition remains deeply committed to the security and rights of the protected people of Ashraf and the principle of non-refoulement.¹²

However, the government of Iraq is now asserting pressure to try and persuade the United States to abandon these commitments and hand over all 'control points and issues' relating to Camp Ashraf. On 17 June 2008, the Council of Ministers of the Government of Iraq made clear its intention expel the PMOI and to implement various measures which, if followed through, would result in very serious violations of their human rights. The Cabinet, in its 27th ordinary session approved the following measures:

1. All the previous ratifications that had been approved previously that the Mojahedin-e Khalq Organisation must be expelled as a terrorist Organisation from Iraq is hereby underscored;
2. The Mojahedin-e Khalq Organisation which is present on Iraqi territory will come under the full control of the Iraqi government until it is expelled from Iraq. This Organisation will be treated according to the laws of Iraq;
3. Any cooperation with the terrorist Mojahedin-e Khalq Organisation by any Organisation, party, institution or persons, (whether Iraqi or alien) in Iraq is prohibited and anyone who cooperates with them will be subject to the laws of the war on terrorism and will be referred to the judicial system according to the said laws.
4. It is incumbent on the Multi-National Force-Iraq to abandon this Organisation and hand over to relevant Iraqi authorities all control points and issues that relate to the members of this Organisation.
5. Judicial lawsuits against those groups of members of the terrorist Mojahedin-e Khalq Organisation who have committed crimes against the people of Iraq will be activated;
6. Coordination will be made between the Government of Iraq and the International Committee of the Red Cross to find fundamental solutions for the problem of the presence of the said Organisation in Iraqi territory and the implementation of the decisions taken to expel them from Iraq.¹³

Obvious issues of concern are the insistence that the PMOI will be expelled even though they are refugees;¹⁴ that anyone who co-operates with them, whether Iraqi or alien, will be subject to 'the laws of the war on terrorism and referred to the judicial system according to the said laws;' and that judicial lawsuits against 'those *groups* of members of the terrorist Mojahedin-e Khalq Organisation who have committed crimes against the people of Iraq' will be activated.¹⁵ Given the polemical tone of the Council's statement, the references to prosecution of '*groups* of members of the

¹² Letter to PMOI Secretary General Madame Sedigheh Hosseini, Ashraf from Major-General John D Gardner, Deputy Commanding General of Multi-National Force-Iraq, 16 February 2006.

¹³ The Republic of Iraq, Secretariat of the Council of Ministers, Ratification of the Council of Ministers No. (216), 27th Ordinary Session, 17 June 2008.

¹⁴ For analysis of their legal position as refugees see Guy Goodwin-Gill and Vera Gowland-Debbas, Legal Opinion: The Protection of Members of the People's Mojahedin Organisation of Iran (PMOI) under International Law, 20 November 2006, [7-9].

¹⁵ The Republic of Iraq, Secretariat of the Council of Ministers, Ratification of the Council of Ministers No. (216), 27th Ordinary Session, 17 June 2008; Emphasis added.

terrorist' Organisation and to the 'laws of the war on terrorism' and to 'crimes against the people of Iraq,' without any reference to due process on an individual basis, is disturbing. In December 2008 the residents of the camp were 'instructed that the government has plans to shut down the Camp and non-forcibly move its inhabitants to their country or to a third country and that staying in Iraq was not an option for them.' The residents were also told that they 'are prohibited to engage in any political, public relations, cultural or religious or social activity in Iraq with political groupings or personalities or Iraqi tribes and non-Iraqis.'¹⁶

It is worth noting, that although the PMOI is listed as a proscribed Organisation in some countries, it is not proscribed by the Security Council¹⁷ and in 2004 a 16 month review by the United States found no evidence of terrorist activity.¹⁸ In 2007 the Proscribed Organisations Appeal Commission in the United Kingdom and in 2006 and 2008, in three different judgments, the Court of First Instance of the European Communities held that there are no grounds for proscribing the PMOI.¹⁹

¹⁶ Press release, Office of the National Security Advisor, Iraq, December 21, 2008.

¹⁷ Guy Goodwin-Gill and Vera Gowland-Debbas, Legal Opinion: The Protection of Members of the People's Mojahedin Organisation of Iran (PMOI) under International Law, 20 November 2006, [38]

¹⁸ New York Times, 'U.S. Sees No Basis to Prosecute Iranian Opposition "Terror" Group Being Held in Iraq,' 27 July 2004.

¹⁹ *Lord Alton of Liverpool and Others (In the matter of the People's Mojahedeen Organisation of Iran) v Secretary of State for the Home Department* Proscribed Organisations Appeal Commission, Appeal No: PC/02/2006, Judgment 30 November 2007; Judgment of the Court of First Instance Case T-256/07, *People's Mojahedin Organisation of Iran v The Council of the European Union*, 23/10/2008, annulling decision 2007/868 and T-284/08, annulling decision 2008/583, freezing the assets of the PMOI.

3. The United States Obligations towards the PMOI under Security Council Resolutions 1770 and 1790

Under Security Council resolution of 1770 of 10 August 2007 and resolution 1790 of 18 December 2007 the United States was required to take all feasible steps to protect civilians in Iraq under the terms of its mandate. Resolution 1770 emphasized that ‘all parties should take reasonable steps to ensure the protection of civilians.’ Resolution 1790 affirmed this and underscored that the obligation also applied to foreign forces. The resolution states in its preamble that the Council affirms:

the importance for all parties, including foreign forces, promoting the maintenance of security and stability in Iraq to act in accordance with international law, including relevant obligations of international humanitarian law, human rights law and refugee law, and to co-operate with the relevant international Organisations, welcoming their commitments in this regard, and underscoring that all parties, including foreign forces, should take all feasible steps to ensure the protection of civilians.

The mandate provided for in resolution 1790 terminates in December 2008 but the protection obligations of the United States do not cease at the termination of the mandate. Resolution 1790 merely makes explicit, for the purposes of clarification, protection obligations that would be binding on the parties even without reference to them in the mandate. A Status of Forces agreement has been signed between the United States and Iraq but international humanitarian law will nevertheless continue to be applicable to the United States if it continues to engage in combat operations in Iraq. A Status of Forces agreement cannot grant the United States exemption from compliance with international humanitarian law (particularly the obligations relating to the protection of civilians). The same principle applies to peacekeepers (and other forces engaged in peace support) that are deployed with the consent of the ‘host’ State but that are engaged in combat operations. The ICRC has repeatedly affirmed this principle and the Secretary-General endorsed it in his 1999 Bulletin on the ‘Observance by the United Nations Forces of International Humanitarian Law.’²⁰ The Bulletin deals with UN peacekeeping forces but the principle would be equally applicable to Multi-National Force-Iraq.

²⁰ UN Doc ST/SGB/1999/13; The Bulletin is an internal document of the UN. It is binding on UN troops only and does not in itself create direct legal obligations for States: Report of Experts Meeting on Multi-National Operations, 11-12 December 2003 (ICRC Geneva), 2.

4. The United States Obligations towards the PMOI under International Humanitarian Law

4.1 Common Article 1: The Obligation to ‘Ensure Respect’ for the Conventions

Under common article 1 of the Geneva Conventions, which is also a rule of customary international law, the United States must ‘ensure respect’ for the provisions of the Conventions ‘in all circumstances.’ This obligation is especially pertinent to violations committed against persons whose protection the United States’ forces has assumed.

The nature of common article 1 is such that it entails peacetime obligations as well as obligations during an armed conflict. The reason for this is that in order to be able to ‘ensure respect’ for the Conventions when there is an armed conflict, the High Contracting Parties must be vigilant and proactive during peacetime in putting in place all that is necessary to ensure that the Conventions will be respected if conflict were to break out. As the ICRC explains in its 1957 Commentary to the article:

The Contracting Parties do not merely undertake to respect the Convention, but also to *ensure respect* for it. The wording may seem redundant. When a state contracts an engagement, the engagement extends to all those over whom it has authority, as well as to the representatives of its authority; and it is under an obligation to issue the necessary orders. The use in all four Conventions of the words ‘and to ensure respect for’ was however deliberate: they were intended to emphasize the responsibility of the Contracting Parties...It would not be enough for example for a state to give orders or directions to a few civilian or military authorities, leaving it to them to arrange as they please for their detailed execution. It is for the state to supervise the orders it gives. Furthermore if it is to fulfil the solemn undertaking it has given, the state must of necessity prepare in advance, that is to say in peacetime, the legal material or other means of ensuring the faithful enforcement of the Convention when the occasion arises.²¹

The ICRC commentary on common article 1 concludes that ‘Article 1 is no mere empty form of words, but has been deliberately invested with imperative force. It must be taken in its literal meaning.’²² Its literal meaning would certainly encompass ensuring that people in camps that are under the authority of the State’s armed forces are protected from abuse in violation of the Conventions, in so far as this is possible. In this case the PMOI camp is under the authority of the United States, which has assumed responsibility for its protection. Therefore when planning for change in the role of its armed forces in Iraq the United States must ‘prepare in advance the... means of ensuring the faithful enforcement of the Convention when the occasion arises,’²³ at least in so far as any change would affect persons currently subject to United States authority and benefiting from United States protection, as is the case with the PMOI.

²¹ J Pictet (ed) *The Geneva Conventions of 12 August 1949. Commentary IV Geneva Convention* (ICRC Geneva 1958), Article 1.

²² Ibid.

²³ Ibid.

Therefore, the commanders of Camp Ashraf are under an obligation to ensure that the PMOI receive the benefits that are due to them under international humanitarian law.

Moreover, Common article 1 is a rule of customary international law that carries exceptional weight²⁴ The International Court of Justice in the Nicaragua case stated that the obligation in:

Article 1 of the Geneva Conventions, to ‘respect’ the Conventions, and even to ‘ensure respect’ for them ‘in all circumstances,’ ... does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give expression.²⁵

It reiterated this view in its *Advisory Opinion concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, in which it held that:

Every State party to that Convention, [Geneva Convention IV] whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.²⁶

The principle is encapsulated in Rule 144 of the ICRC’s Study on Customary International Humanitarian Law. Under Rule 144 States ‘must exert their influence,’ to the degree possible, to stop violations of international humanitarian law.’²⁷ The ICRC has carried out extensive analysis of case law and practice in this regard²⁸ from which it concludes that States are obliged to respond to violations of humanitarian law by other parties, (using peaceful means except where authorized by the Security Council)²⁹ even when they are not involved in the conflict.

Since article 1 is a norm of customary international law that has attained a status of exceptional importance it is binding on the United States, and on its forces, even if the United States force is deployed with the consent of the government of Iraq and subject to a Status of Forces agreement. A State cannot consent to allow foreign forces present on its territory to violate core norms of international humanitarian law and of customary international law that are intended to protect civilians, particularly an obligation that ‘does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give expression.’

²⁴ Rule 144 of the ICRC’s Rules of Customary International Humanitarian Law: J-M Henckaerts and L Doswald-Beck *Customary International Humanitarian Law* (Cambridge University Press Cambridge 2005), Volume 1, 509.

²⁵ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgement, ICJ Reports (1986), 14, [220].

²⁶ *Advisory Opinion concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, 9 July 2004, [158].

²⁷ J-M Henckaerts and L Doswald-Beck *Customary International Humanitarian Law* (n 24), Volume 1, 509; The report is the result of 10 years of research in consultation with experts from different regions;

²⁸ *Ibid*, Volume 1, 509-513; Volume II, Chapter 41, Section A.

²⁹ *Ibid*, Volume 1, 512.

4.2 The United States' Obligations under Common Article 3 of the Geneva Conventions and Article 75 of Additional Protocol 1

The provisions that must be respected under common article 1 would always include Article 3 common to the four Geneva Conventions of 1949 and Article 75 of Additional Protocol 1 since these constitute customary international law. Common article 3 and article 75 of Additional Protocol 1 set out minimum standards of humane treatment and fair trial procedures and are applicable in all armed conflicts, both those to which the laws of international armed conflict apply and those to which it does not. It is clear that were the US to 'abandon' the PMOI 'and hand over to relevant Iraqi authorities all control points and issues that relate to the members of this Organisation' serious violations of both common article 3 and article 75 of Protocol I would be very likely to occur.

4.2.1 Common Article 3 of the Geneva Conventions

Article 3 common to all four of the 1949 Geneva Conventions, prohibits, 'at any time and in any place whatsoever,' with respect to persons taking no part in hostilities: violence to life and person, including murder, cruel treatment and torture; the taking of hostages, outrages upon personal dignity; and the passing of sentences or carrying out of executions 'without previous judgment by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilized peoples.'

The US Supreme Court has held that common article 3 is applicable in all conflicts, including non-international armed conflicts arising outside of civil war.³⁰ In *Hamdan v Rumsfeld* Justice Stevens, citing the ICRC Commentaries, stated that 'the scope of the Article must be as wide as possible.'³¹ The US Law of War Handbook 2004, citing the judgment of the International Court of Justice in the Nicaragua case, states that Common Article 3 'serves as a "minimum yardstick of protection in all conflicts, not just internal armed conflicts."' ³² Justice Kennedy of the US Supreme Court observes that:

By Act of Congress, moreover, violations of Common Article 3 are considered "war crimes," punishable as federal offenses, when committed by or against United States nationals and military personnel. See 18 U. S. C. §2441.³³

4.2.2 Article 75 of Additional Protocol I

Article 75 of Additional Protocol I requires that all persons who are in the power of a party to the conflict and who do not benefit from more favourable treatment under the Geneva Conventions or Additional Protocols be treated humanely. Murder; torture of all kinds whether physical or mental; corporal punishment; mutilation; outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault; the taking of hostages; collective punishments; and threats to commit any of the foregoing acts, are all prohibited. Article

³⁰ *Hamdan v Rumsfeld* 548 US, 29 June 2006.

³¹ *Ibid*, Justice Stevens, 68.

³² U. S. Army Judge Advocate General's Legal Centre and School, Dept. of the Army, Law of War Handbook 144 (2004) quoting *Nicaragua v. United States*, 1986 I. C. J. 14, 218, 25 I. L. M. 1023

³³ *Hamdan v Rumsfeld* (n 30), Justice Kennedy, 7.

75 also guarantees a minimum standard of treatment for detainees and rights to a fair trial.

The US accepts that Article 75 is customary international law, and is therefore ‘binding law notwithstanding the earlier decision by our [the United States] Government not to accede to the Protocol.’³⁴ Since Article 75 is customary international law, it can be strongly argued that it is binding in all circumstances to which international humanitarian law is applicable and in which persons who do not benefit from more favourable treatment under the Geneva Conventions are in the power of a force belonging to a party other than its own or an ally of its own. This includes forces deployed under a Security Council mandate, or a mandate from a regional Organisation, even if they are not, or are no longer, parties to the conflict in the strict sense of the term. It would therefore encompass obligations of the United States towards persons in its ‘hands’ or the ‘hands’ of a party to the conflict.

4.3 The Protections due to the PMOI as Refugees and ‘Protected Persons’

In the light of the stated intentions of the government of Iraq, as evidenced *inter alia* by the measures announced on 17 June 2008, the transfer of Camp Ashraf to that government would violate the United States’ obligations under international humanitarian law, human rights law and refugee law. In particular it would breach the principle of *non-refoulement*.

Non-refoulement, a principle enshrined in Article 33 of the 1951 Convention relating to the Status of Refugees, which is declaratory of customary international law, prohibits the taking of measures that would result in persons being transferred to into the control of other States in circumstances where they have a well founded fear that such transfer will lead to their persecution. It ‘encompasses any measure attributable to the State which could have the effect of returning an asylum seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened, or where he or she is at risk of persecution, including interception, rejection at the frontier or indirect refoulement.’³⁵ The principle of *non-refoulement* is also reflected in Rule 129 of the ICRC’s Rules of Customary International Humanitarian Law,³⁶ Article 7 of the International Covenant on Civil and Political Rights, and Article 3 of the 1984 Convention against Torture. On 9-11 August 2008 MNF-Iraq conducted a census of the residents of Ashraf, which included private interviews with every single resident. When asked about being repatriated or going under the protection of Iraqi forces all Ashraf residents expressed strong fears of persecution. Reports by non-governmental

³⁴ *Hamdan v Rumsfeld* (n 30), Justice Kennedy, 19; Justice Stevens states at page 70 that ‘it appears that the Government “regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled.” Taft, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 *Yale J. Int’l L.* 319, 322 (2003).’

³⁵ *The Principle of Non-Refoulement*, Cambridge Round Table UNHCR/IOM/08/2002 Annex 3 (United Nations High Commissioner for Refugees and the Lauterpacht Research Centre for International Law 9-11 July 2001).

³⁶ Rule 129 of the ICRC’s Rules of Customary International Humanitarian Law: J-M Henckaerts and L Doswald-Beck *Customary International Humanitarian Law* (n 24) Volume 1, 457; Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949; International Covenant on Civil and Political Rights, 19 December 1966; Convention against Torture or other Cruel, Inhuman or Degrading Treatment, 10 December 1984; See also UN General Assembly Resolution 2675 (XXV) (adopted by 109 votes in favour, none against and 8 abstentions).

Organisations such as Amnesty International and the Iraqi governments own stated intentions towards the PMOI as evidenced by the measures announced in June,³⁷ clearly show that these fears are well founded.

In addition to the risk of unlawful transfer to Iran where they would very likely be persecuted, there are also well founded grounds for fearing that, if transferred to the government of Iraq, the PMOI would be subjected to serious violations of their human rights, including the right to life, and to freedom from torture and inhumane treatment; as well as fears that they would be subjected to the imposition of punitive measures without being granted the right to a fair hearing. Violations of this nature constitute grave breaches of the Geneva Conventions, as set out in Article 147 of Geneva Convention IV.³⁸ The change in the nature of the conflict in Iraq from international to non-international cannot exempt the United States from its responsibility to ensure respect for the prohibition on war crimes.³⁹

4.3.1 *The Protections due to the PMOI as ‘Protected Persons’*

The Geneva Conventions are regarded as being, in large part, declaratory of customary international law. The Secretary-General in his Report on the setting up of the International Criminal Tribunal for the former Yugoslavia (ICTY) referred to the Geneva Conventions, The Hague Convention and the Charter of the International Military Tribunal of 8 August 1945 as ‘part of conventional international law which has beyond doubt become part of international customary law.’⁴⁰ The International Criminal Tribunal for the former Yugoslavia held, in the *Tadic* case, that with the development of customary international humanitarian law, many of the rules that previously applied only in international armed conflict, or at least the general essence of those rules, may now be applicable in non-international armed conflict.⁴¹ Leading academics such as Theodor Meron have also concluded that many of the provisions in the Geneva Conventions constitute customary international law.⁴²

One of the core means by which the Geneva Conventions attempt to secure protection of the civilian population from discriminatory attacks and abuse is through the provisions relating to ‘protected persons.’ Paragraph 1 of Article 4 of the Fourth Geneva Convention defines ‘protected persons’ as:

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.

Paragraph 2 of Article 4 provides that:

³⁷ The Republic of Iraq, Secretariat of the Council of Ministers, Ratification of the Council of Ministers No. (216), 27th Ordinary Session, 17 June 2008.

³⁸ Also Article 50 Geneva Convention I; Article 51 Geneva Convention II; Article 130 Geneva Convention III.

³⁹ 1998 Rome Statute of the International Criminal Court, Articles 8 (c) (i), (ii), (iv) and 8 (e) (viii)

⁴⁰ Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. SCOR, 48th Sess., UN. Doc. S/25704.

⁴¹ ICTY *Prosecutor v. Dusko Tadic (Jurisdiction)* No IT-94-1-AR72, [126].

⁴² T Meron *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press Oxford 1989), 46 - 47; David Kretzmer, *The Occupation of Justice* (State University of New York Press Albany 2002) 43; MJ Kelly *Restoring and Maintaining Order in Complex Peace Operations* (Kluwer The Hague 1999), 157-159.

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.

Other than those that are US nationals or nationals of co-belligerent States in the conflict,⁴³ the PMOI currently have the status of ‘protected persons.’ In July 2004, the United States military designated the PMOI as protected persons under Geneva Convention IV,⁴⁴ and Major General Geoffrey D. Miller, who was deputy Commanding General of the MNF-I in Iraq, wrote ‘to congratulate each individual living in Camp Ashraf’ on their status.⁴⁵ Over the ensuing years the United States has repeatedly assured the PMOI of its commitment to honouring its obligations to them as ‘protected persons,’ thus effectively acknowledging that even in the changed environment of a non-international armed conflict the obligations towards ‘protected persons’ must still be respected.

‘Protected persons’ status is intended to ensure that persons in the hands of a party of which they are not nationals are protected from discrimination leading to serious violations of their human rights. For example Article 31, prohibits physical or moral coercion to obtain information from protected persons or from third parties; Article 32, prohibits corporal punishment, a prohibition that encompasses not only murder and torture but ‘any other measures of brutality whether applied by civilian or military agents’ and Article 33, prohibits punishment of a protected person for ‘an offence he or she has not personally committed.’ Article 33 also prohibits collective penalties and reprisals against protected persons and their property.

If control of the PMOI were to be transferred to the Iraqi authorities they would still be in the ‘hands’ of a party of which they are not nationals and therefore would fulfill the criteria for qualifying as ‘protected persons’ set out in paragraph 1 of Article 4; but since many of them are Iranian, and Iran restored diplomatic relations with Iraq in 1990, many of the PMOI would be excluded from the category of ‘protected persons’ under the terms of the second paragraph of Article 4. (Those of them that are stateless would still be ‘protected persons.’) However, Article 4 should be interpreted in such a way as to give proper effect to its intentions. The purpose of the provisions on ‘protected persons’ is to ensure that persons who find themselves ‘at a given moment and in any manner whatsoever’⁴⁶ in the hands of a Party of which they are not nationals (and thus may not benefit from them the protections accorded by States to their own nationals), and whose own State is unable to provide for their protection (because it does not have normal diplomatic relations with the State in whose power its nationals find themselves) are given explicit protection because of the vulnerable position in which they find themselves. The PMOI are refugees and have been

⁴³ These are excluded under paragraph 2 of Article 4.

⁴⁴ Proclamation by the Commander, Multi-National Force, Iraq, on the signing of the ‘Agreement for the Individuals of the PMOI at Ashraf, Iraq’ dated 2 July 2004 cited in Guy Goodwin-Gill and Vera Gowland-Debbas, Legal Opinion *The Protection of Members of the People’s Mojahedin Organisation of Iran (PMOI) under International Law* 20 November 2006, [9].

⁴⁵ New York Times, ‘U.S. Sees No Basis to Prosecute Iranian Opposition “Terror” Group Being Held in Iraq,’ 27 July 2004.

⁴⁶ Geneva Convention IV, [4].

recognised as such by the United States and by leading academic experts on refugees.⁴⁷ Because the PMOI are refugees the fact that Iran has normal diplomatic relations with Iraq does not offer them any protection, rather the reverse, as is clear from the statement by the Council of Ministers of the government of Iraq, setting out the measures it intends to adopt towards them.⁴⁸

Jean Pictet discussed the problem of refugees in his comments on Article 4 and also Articles 44 and 45 in the ICRC's 1958 *Commentary to Geneva Convention IV*. He stated that:

In the actual course of the discussions, [at the Diplomatic Conference of Geneva 1949] however, certain speakers observed that the term "nationals" ('ressortissants,' in the French version) did not cover all cases, in particular cases where men and women had fled from their homeland and no longer considered themselves, or were no longer considered, to be nationals of that country. Such cases exist, it is true, but it 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. The problem presents so many varied aspects that it was difficult to deal with it fully in the Convention. Nevertheless, Article 44, which is applicable to the territories of the Parties to the conflict, lays down that the Detaining Power is not to treat refugees who do not, in fact, enjoy the protection of any Government, as enemy aliens "exclusively on the basis of their nationality de jure of an enemy State."

The PMOI are in the hands of the United States and therefore according to the Commentary it is for the United States 'to decide whether the persons concerned should or should not be regarded as citizens of the country from which they have fled.' The ICRC suggests that in interpreting the status of refugees under Article 4 account should be taken of Article 44.⁴⁹ Article 44 makes clear that since refugees do not in fact enjoy the protection of any government, their treatment by the State in whose 'hands' they find themselves should not be determined 'exclusively on the basis of their nationality de jure.' The ICRC's Commentary to Article 44 observes that because of the complexity of the problem and the variety of cases that may occur in practice, the conference had to confine itself to laying down rules of a flexible character but that 'it is to be hoped that belligerents will apply this Article in the broadest humanitarian spirit, in order that the maximum use may be made of the resources it offers for the protection of refugees.'⁵⁰ The same principle of applying the 'broadest humanitarian spirit' to the interpretation of provisions affecting refugees would apply to Article 4, as the ICRC (through its reference to Article 44 in its Commentary on Article 4, and through its statements that the 'problem presents so many varied aspects that it was

⁴⁷ Guy Goodwin-Gill and Vera Gowland-Debbas, Legal Opinion, 'The Protection of Members of the People's Mojahedin Organisation of Iran (PMOI) under International Law' 20 November 2006, [9] [19-51].

⁴⁸ The Republic of Iraq, Secretariat of the Council of Ministers, Ratification of the Council of Ministers No. (216), 27th Ordinary Session, 17 June 2008.

⁴⁹ Article 44 provides that 'In applying the measures of control mentioned in the present Convention, 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.'

⁵⁰ J Pictet (ed) *The Geneva Conventions of 12 August 1949. Commentary IV Geneva Convention* (n21), Article 44.

difficult to deal with it fully in the Convention,' which occur in the commentaries to both articles) implies.

The International Criminal Tribunal for the former Yugoslavia stated in 1999, in the *Tadic* case, that

Article 4 of Geneva Convention IV, if interpreted in the light of its object and purpose, is directed to the protection of civilians to the maximum extent possible. It therefore does not make its applicability dependent on formal bonds and purely legal relations. Its primary purpose is to ensure the safeguards afforded by the Convention to those civilians who do not enjoy the diplomatic protection, and correlatively are not subject to the allegiance and control, of the State in whose hands they may find themselves. In granting its protection, Article 4 intends to look to the substance of relations, not to their legal characterisation as such.⁵¹

If the substance of relations is considered, rather than their formal legal characterisation as Iranian nationals in Iraq, the PMOI clearly come within the category of 'protected persons,' whether they are in the 'hands' of the United States or of Iraq and regardless of whether or not the conflict in Iraq is now non-international.

Moreover under Article 6 'protected persons' whose release or reestablishment may take place after the Convention has ceased to be applicable 'shall meanwhile continue to benefit from the present Convention.'⁵² The purpose of this was to ensure protection continued in the interim period after the Convention ceased to be applicable but before the 'protected persons' were in a position to be able 'to resume a normal existence.'⁵³ Article 3 of Additional Protocol 1 contains a very similar provision.⁵⁴ Article 6 clearly intends that in the event of a change of circumstances (such as the termination of the conflict, or as in this case a change in the conflict's legal characterization) that may bring to an end the formal applicability of the provisions of the Fourth Geneva Convention, 'protected persons' should continue to benefit from the protections to which they had previously been entitled until such time as they are able to establish a normal existence.

Article 45 provides that if a 'protected person' that is in the 'hands' of a Power, is subsequently transferred to another Power, and that other Power fails to respect the obligations due to 'protected persons' under the Convention 'the Power by which the protected persons were transferred shall...take effective steps to correct the situation or shall request the return of the protected persons.' Moreover, '[i]n no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political or religious beliefs.'⁵⁵ Since the PMOI are

⁵¹ ICTY, *Prosecutor v Dusko Tadic* (IT-94-1-A), 15 July 1999, [168].

⁵² Geneva Convention IV, [6].

⁵³ J Pictet ed. *The Geneva Conventions of 12 August 1949, Commentary, Geneva Convention IV* (n 21), Article 6, [4].

⁵⁴ Additional Protocol 1, [3].

⁵⁵ Geneva Convention IV, [45]; 'The provisions of this Article do not constitute an obstacle to the extradition, in pursuance of extradition treaties concluded before the outbreak of hostilities, of protected persons accused of offences against ordinary criminal law.' The ICRC's Commentary notes that the constraints under Article 45 on the transfer of 'protected persons' from one Power to another are 'general in character' and apply to all 'protected persons' within its 'hands' whatever their status may be and

refugees from Iran at high risk of persecution of returned there the United States cannot transfer the PMOI to Iran; such a transfer would also breach the customary law principle of *non-refoulement*.⁵⁶ A more difficult question is whether Article 45 permits the United States to transfer the PMOI to the government of the ‘host’ State in which it is deployed, or whether it should refuse to do so given that there is a high probability that the Iraqi government will not afford them the PMOI the protections due to them as ‘protected persons.’

The general essence of Article 45 of Geneva Convention IV is clear; a State continues to have a responsibility to ensure that ‘protected persons’ that were previously in their hands, continue to be accorded the protections due them under the Geneva Conventions, if it transfers them into the hands of another State. As the ICRC’s Commentary states:

The Power which has transferred the protected persons must not, however, cease to take an interest in their fate. Although they are no longer ‘in its hands’ it remains responsible for them in so far as the receiving Power fails to fulfil its obligations under the Convention ‘in any important respect’⁵⁷

If the State to whom the ‘protected persons’ are transferred fails to treat them according to Convention standards, the State that transferred them must ‘take effective steps to correct the situation or shall request the return of the protected persons.’ Statements made by the government of Iraq clearly indicate that if transferred the PMOI will not be accorded the rights of ‘protected persons.’ The ICRC’s Commentary states that protected persons cannot be transferred if ‘the Detaining Power has reason to fear that certain categories among the persons transferred may be subjected to discriminatory treatment by the authorities of the country receiving them.’⁵⁸ The Commentary to paragraph 4 of article 45 reiterates this point even more strongly. It states that ‘the Detaining Power cannot transfer protected persons unless it is absolutely certain that they will not be subject to discriminatory treatment’ and notes that this provision is of particular relevance to refugees.⁵⁹

It may be argued that for a former occupant to refuse to transfer protected persons in its ‘hands’ to the legitimate government of the State in which it is deployed

include ‘persons who are not subject to restrictions on their liberty, internees and refugees.’ J Pictet ed. *The Geneva Conventions of 12 August 1949, Commentary, Geneva Convention IV* (n 21), Article 45, [1].

⁵⁶ Rule 129 of the ICRC’s Rules of Customary International Humanitarian Law: J-M Henckaerts and L Doswald-Beck *Customary International Humanitarian Law* (n 24), Volume 1, page 457. Article 49 of Geneva Convention IV prohibits deportations from occupied territory but Article 45, which prohibits transfer to a power that is unlikely to secure the rights of the ‘protected persons’ does not explicitly prohibit parties to the conflict (other than occupants) from expelling aliens, including protected persons, from their territory. However the ICRC in its Commentary noted that ‘practice and theory both make this right [to expel aliens] a limited one.’ J Pictet ed. *The Geneva Conventions of 12 August 1949, Commentary, Geneva Convention IV* (n 21), Article 45, General. Expulsion cannot take place if to do so would breach the principle of *non-refoulement* or customary international humanitarian law, for example Rule 129 of the ICRC’s Rules on Customary International Humanitarian Law.

⁵⁷ J Pictet ed. *The Geneva Conventions of 12 August 1949, Commentary, Geneva Convention IV* (n 21), Article 45, [3] B. *Responsibilities*.

⁵⁸ Ibid, Article 45, [3] A. *Preliminary safeguard*.

⁵⁹ Ibid, Article 45, [4] The Commentary states that ‘This clause, which was inserted in the Convention by the XVIIth International Red Cross Conference, should be compared with the preceding Article [44, discussed above] on refugees.’

would violate that State's sovereignty; but respect for State sovereignty cannot override obligations under international humanitarian law. Article 45 should be read in conjunction with Article 147 of Geneva Convention IV dealing with grave breaches. Transfer into the hands of Iraq would place the PMOI at high risk of violations of the right to life, to freedom from torture and inhumane treatment, unlawful transfer to another State where they would be at risk of persecution, and the imposition of punitive measures without being granted the right to a fair hearing; all of these are prohibited as 'grave breaches' under Article 147. They also constitute violations of customary international humanitarian and human rights law. Humanitarian law is binding on each and every soldier as well as the High Contracting Parties; superior orders do not exempt soldiers from compliance. If orders from their own commanders cannot exempt soldiers from compliance with their international humanitarian law obligations, respect for State sovereignty cannot do so either.

The United States' obligation not to transfer the PMOI is also supported by Rule 144 of the Rules of Customary International Humanitarian Law compiled by the ICRC, and common Article 1 of the Geneva Conventions. Rule 144 requires States to 'exert their influence, *to the degree possible*, to stop violations of international humanitarian law.'⁶⁰ Logically the obligation of States to prevent violations international humanitarian law, particularly where there is a high risk that war crimes may be perpetrated, is even stronger where the State is, or has been, involved in the conflict, and especially so where the State concerned has assumed responsibility for the 'protected persons' security; and is currently protecting them; and has also declared its intention to continue to ensure that they receive the protections due to them as refugees and 'protected persons.'

Moreover the Iraqi government is in power as a consequence of an intervention that facilitated regime change. That intervention unintentionally placed the PMOI in a very vulnerable position; it is now disarmed and dependent on the protection of the United States. Given that the fears of the PMOI relate to the potential transfer of 'protected persons' from a former occupying power, Article 45 should also be read in conjunction with Article 47, which provides that protected persons must not be deprived 'in any case or manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation into the institutions of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power.' This provision was included because of the danger of the occupant putting pressure on the legitimate authority to conclude agreements prejudicial to 'protected persons.'⁶¹ The United States has never sought to deliberately deprive 'protected persons' of the benefits they currently enjoy under the Convention. Nevertheless the regime change facilitated by the 2003 intervention, whose purpose was in part to improve the human rights situation of the people of Iraq, has unintentionally placed the PMOI in a position of grave vulnerability. Moreover it is now an established norm of international law that sovereignty implies a 'responsibility to protect' and that all States have a responsibility to prevent (within the constraints of the United Nations Charter on the rules on the use of force) serious violations of human rights where these are foreseeable, and where the State in question is in a position to do

⁶⁰ J-M Henckaerts and L Doswald-Beck *Customary International Humanitarian Law* (n 24), Volume 1, 509.

⁶¹ J Pictet ed. *The Geneva Conventions of 12 August 1949, Commentary, Geneva Convention IV* (n 21), Article 47, [3].

so.⁶² The obligations of the United States in the wake of its 2003 intervention and the subsequent regime change in Iraq should also be viewed within the ‘responsibility to protect’ context, particularly since the former regime’s human rights violations were a major factor in the decision-making processes leading to the United Nations’ legitimization of the United States’ presence there.

⁶² See section 5 below.

5. The United States Obligations towards the PMOI under 'The Responsibility to Protect'

The United States intervention into Iraq in 2003 was premised on a threat to international peace and security based primarily on the belief, subsequently found to be ill-founded, that the Baghdad regime possessed weapons of mass destruction; and secondarily (as indicated by statements to the media and in parliamentary institutions) on human rights violations by that regime.⁶³

In 2005 at its World Summit meeting the General Assembly undertook to take collective action (on a case by case basis) in response to genocide, war crimes, ethnic cleansing and crimes against humanity.⁶⁴ This provision was affirmed by the Security Council in its third resolution on the Protection of Civilians in Armed Conflict, Resolution 1674, adopted unanimously on 28 April 2006.⁶⁵ These resolutions were adopted in the context of an emerging 'responsibility to protect' norm by which States, international and regional Organisations, have undertaken to prevent serious violations of human rights.

Whilst these resolutions focus on a commitment to take collective action on a case by case basis, the significance of the resolutions is not limited to intervention but also affects forces already deployed into a situation in which serious human rights violations are already taking place or are predicted. This is because the International Commission on Intervention and State Sovereignty in developing the 'responsibility to protect norm' on which the relevant paragraphs of these resolutions are based,⁶⁶ deliberately moved away from traditional arguments focused on the right of States to intervene on humanitarian grounds, to a position focused on responsibility. The 'responsibility to protect' is an ongoing responsibility and it encompasses taking proactive steps to prevent serious violations of fundamental human rights as well as reacting to such violations once they have occurred.⁶⁷ Louise Arbour has posited that 'because of the power they wield and due to their global reach, the members of the Security Council, particularly the Permanent Five Members (P5) hold an even heavier responsibility than other States to ensure the protection of civilians everywhere.'⁶⁸ The United States has particular responsibilities towards the PMOI since they came under its control as a consequence of the 2003 intervention and the United States subsequent occupation of Iraq, and of the United States' promotion of regime change on human

⁶³JM Welsh 'Conclusion: Humanitarian Intervention after 11 September' in JM Welsh (ed) *Humanitarian Intervention and International Relations* (Oxford University Press Oxford 2004) 176, 183; The Independent, A Grice and B Russell, 'Now Blair cites regime change as basis for war. So was it legal?' (15 July 2004) 5.

⁶⁴ A/RES/60/1, 24 October 2005, [139].

⁶⁵ S/RES/1674, 28 April 2006, [4].

⁶⁶ International Commission on Intervention and State Sovereignty (ICISS) *The Responsibility to Protect* (Ottawa International Development Research Centre 2001); Report by the Secretary-Generals' High Level Panel on Threats, Challenges and Change 'A More Secure World: Our Shared Responsibility,' (2004) www.un.org/secureworld/; Secretary-General's Report *In Larger Freedom; towards development, security and human rights for all* A/59/2005 21 March 2005.

⁶⁷ ICISS, *The Responsibility to Protect* (n 66), [2.28-2.29].

⁶⁸ L Arbour, 'The responsibility to protect as a duty of care in international law and practice' 34 *Review of International Studies* (2008), 445,453.

rights grounds. Having disarmed the PMOI the United States undertook their protection. To abandon them now would be inconsistent with its avowed aims in promoting regime change and with its endorsement of the ‘responsibility to protect’ norm. As the Institut de Droit International observed in its resolution on the *Application of International Humanitarian Law and Fundamental Human Rights in Armed Conflicts in which non-State Actors Are Parties* ‘[r]espect for international humanitarian law and fundamental human rights constitutes an integral part of international order for the maintenance and re-establishment of peace and security.’⁶⁹

6. Conclusion

For so long as the United States continues to be engaged in combat operations in Iraq it must comply with international humanitarian law.

The PMOI remained neutral in the Gulf War and in the 2003 conflict. Since the PMOI did not participate in the conflict and are not part of the Iraqi armed forces and have never had any relationship with that government they are entitled to the humanitarian law protections accorded to persons taking no part in hostilities.

Under common article 1 of the Geneva Conventions the United States must ‘ensure respect’ for the provisions of the Conventions ‘in all circumstances.’ This is reflected in Rule 144 of the ICRC’s Rules of Customary International Humanitarian Law, which provides that States ‘must exert their influence, to the degree possible, to stop violations of international humanitarian law.’⁷⁰ These obligations are especially pertinent to violations committed against persons whose protection the United States’ forces has assumed.

In particular the United States must take all steps possible to prevent violations of the principle of *non-refoulement*; of Common Article 3 of the Geneva Conventions and of Article 75 of Additional Protocol 1; and of the customary law rules and principles concerning ‘protected persons,’ particularly where, as in the case of the PMOI, those persons are at risk of being subjected to war crimes, including those set out in Article 147 of Geneva Convention IV dealing with ‘grave breaches.’

The principle of ‘*non-refoulement*’ prohibits the transfer of refugees into the ‘hands’ of another State or into another territory if circumstances are such that they have a well founded fear that if they are transferred to that State they will be persecuted. The principle also prohibits transfer of refugees to a State or territory if circumstances are such that the refugees may be transferred on from the State that has received them, in violation of the principle of *non-refoulement*, to another State or territory where they fear they will be persecuted. This well established principle of

⁶⁹ The Institut de Droit International adopted a resolution on 25 August 1999 on the Application of International Humanitarian Law and Fundamental Human Rights in Armed Conflicts in Which non-State Actors Are Parties (Fourteenth Commission, Berlin Session 1999, 25 August 1999), I, II

⁷⁰ J-M Henckaerts and L Doswald-Beck *Customary International Humanitarian Law* (n 24), Volume 1, 509.

customary law also finds expression in Article 33 of the Convention relating to the Status of Refugees 1951; Rule 129 of the ICRC's Customary Rules of International Humanitarian Law; and Article 45 of Geneva Convention IV which sets out the responsibilities of a 'Detaining Power' in relation to the transfer of 'protected persons' in its 'hands,' to another 'Power.' The PMOI are 'protected persons' currently in the 'hands' of the United States. The United States formally declared that the PMOI are 'protected persons' in July 2004, and communicated that declaration to the ICRC.⁷¹ The ICRC's acceptance of the United States declaration suggests that it supports the designation of the PMOI as 'protected persons.' The United States has reaffirmed that the PMOI are 'protected persons' on a number of occasions in 2005 and 2006, and has also acknowledged its obligations under Article 45.⁷²

Paragraph 4 of Article 6 of Geneva Convention IV provides that 'protected persons' whose 'release, repatriation or re-establishment' may take place after the end of the period in which the Convention is formally applicable 'shall meanwhile continue to benefit by the present Convention.' The ICRC's Commentary notes that 'establishment' in this context refers to such time as the protected persons 'are able to resume a normal existence.'⁷³ The PMOI, being refugees, should be treated as 'protected persons' for as long as there continues to be an armed conflict in Iraq, regardless of whether or not they are in the 'hands' of the United States or of Iraq.

Thus the United States has continuing responsibilities to the PMOI, under customary law and as a consequence of humanitarian obligations that first arose during the United States occupation. These require that it take all feasible steps to ensure that key provisions of international humanitarian law relating to the security of the PMOI as refugees and as 'protected persons' continue to be respected until such time as they are able 'to resume a normal existence.'⁷⁴ In the light of these obligations and of the well-founded fear of persecution of those in Camp Ashraf if transferred to the government of Iraq, the United States should continue to protect the PMOI for as long as its forces remain in Iraq. When it does leave it should ensure that the PMOI will continue to receive the protections due to them as refugees and 'protected persons,' after its forces depart.

In conclusion, the transfer of the protection of the residents of the Camp to the Iraqi government should only take place under the following conditions:

- a) The United States has given written guarantees that the authority to which it is transferring their protection respects their rights according to international law, including international refugee law and international humanitarian law and will treat them based on the provisions which

⁷¹ Proclamation by the Commander, Multi-National Force-Iraq, on the Signing of the 'Agreement for the Individuals of the Peoples' Mujahedin Organisation of Iran (PMOI),' at Ashraf, Iraq, 2 July 2004; Letter to the People of Ashraf from Major-General Geoffrey D Miller, Deputy Commanding General of Multi-National Force-Iraq, 21 July 2004.

⁷² Letter to Secretary General Madame Sedigheh Hosseini, Ashraf from Major-General John D Gardner, Deputy Commanding General of Multi-National Force-Iraq, 16 February 2006; Letter to the People of Ashraf from Major-General William H Brandenburg, Commander of Multi-National Force-Iraq, 7 October 2005.

⁷³ J Pictet ed. *The Geneva Conventions of 12 August 1949, Commentary, Geneva Convention IV* (n 21), Article 6, [4].

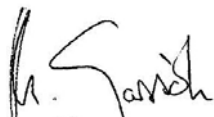
⁷⁴ *Ibid.*

apply to 'protected persons.' This is because the PMOI are refugees whose final disposition is not yet determined and therefore should be accorded the protections due to 'protected persons' under article 4 of the Fourth Geneva Convention.

- b) The Iraqi government's restrictions on Camp Ashraf, including the denial of food, fuel and medicine rations, have been lifted.

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