The United Nations Must Work to Prevent the Illegal Constructive *Refoulement* of the People of Ashraf

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Washington, D.C.
25 May 2010

Executive Summary

The 3,400 men and women who live at Camp Ashraf, Iraq, are Iranians dedicated to the cause of restoring secular and democratic government to their homeland. They have lived at Ashraf since 1986. In 2001, the People's Mojahedin Organization of Iran ("PMOI"), of which they are members, rejected violence. And in 2003, after the U.S. invasion, they voluntarily disarmed and accepted the protection of the Multi-National Force-Iraq ("the MNF-I").

The U.S.-led MNF-I recognized the status of the People of Ashraf as "protected persons" under the Fourth Geneva Convention in July 2004. Five years later, the United States formally transferred the obligation to protect the People of Ashraf to Iraq, despite concerns expressed at the time by the residents and their lawyers about whether the Government of Iraq had the capability or the intent to honor that obligation.

Now, the Iraqi Government has announced that the PMOI are not welcome on its soil, and is undertaking a campaign to expel the group from the country. It has said that it will do so without violating the letter (while of course ignoring the spirit) of the international prohibition against *refoulement* – the forced repatriation of refugees[1] to a place where they have a reasonable fear of persecution. Yet the Government's campaign of harassment and intimidation, expressly designed to make the lives of the residents of Ashraf intolerable, has as its objective the very *refoulement* that international law forbids.

To this end, the Government in Baghdad has begun a de facto siege on the Camp, imposing a complete ban on family visits and access to lawyers, and restricting the entry of medicines, specialist doctors, and other essential needs. In addition, reports from inside Ashraf say that since 8 February 2010, the Iraqi authorities have allowed individuals posing as family members to assemble outside the Camp's gates. These individuals have been using loudspeakers, provided to them by Iraqi security forces, to call for the destruction of Camp Ashraf, and to threaten residents in the Camp with death. Muwaffaq al-Rubaie, former National Security Advisor to Prime Minister Nouri al-Maliki, is on record as saying that the Iraqi Government want to make life unbearable for the People of Ashraf, so that they will leave Iraqi soil.

[1] Here, and throughout this paper, the word "refugees" is used in its international sense, without regard to whether an individual has or has not applied for or been granted the status of a "refugee" under the municipal legal system of the state of current domicile. International obligations of states with respect to refugees do not depend upon the outcome of those domestic procedures.

This analysis demonstrates that what the Iraqi Government is aiming at is the "constructive *refoulement*" of the People of Ashraf, which would be every bit as illegal under governing international law as would be the physical expulsion of those individuals to Iran, where they face the threat of persecution.

The Fourth Geneva Convention imposes requirements on the United States to intervene to prevent such an outcome, since it was the United States that transferred control of these internationally protected persons to another state. Yet the existence of U.S. obligations does not relieve the United Nations of its own duties toward the People of Ashraf. Their rights guaranteed under international human rights law and international humanitarian law must be respected. In this regard, the United Nations Assistance Mission for Iraq – UNAMI – is called upon to play this critical and life-saving role of confirming the legal status of the People of Ashraf, preventing their repatriation or forced relocation within Iraq, and lifting the restrictions placed upon them by the Iraqi Government in violation of international legal norms.

The critical role of UNAMI is not dependent, logically or legally, on the United States resolving to honor its own obligations in the premises. Nor is it to be taken for granted that the United States will not change its position, especially in light of legal arguments to the effect that its current stance is untenable. But the situation of the People of Ashraf is time-sensitive, and could become critical. There may not be time to await a change of Washington's attitude, and irrespective of the views of the United States, the United Nations has its own mandate and its own mission, which encompass the protection of Ashraf residents whatever the United States decides to do or not to do.

I. ***Refoulement* Violates International Law, and Even *Jus Cogens.***

A. Treaty origins of the doctrine.

The principle of *non-refoulement* dictates that individuals have the right not to be returned to a country where they are at serious risk of persecution. It has been described as "the undisputed cornerstone of refugee law."[2] Enshrined in numerous treaties, *non-refoulement* has become accepted not only as customary law, but as *jus cogens*.

Non-refoulement first gained international recognition over 60 years ago, in the period immediately following World War II. The 1951 United Nations Convention Relating to the Status of Refugees ("the 1951 Convention") is the first significant treaty expressly stating the principle.[3] This Convention declares that:

> No Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.[4]

[2] John C. Hathaway & John A. Dent, *Refugee Rights: Report on a Comparative Survey* 5 (1995).
[3] United Nations Convention relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 137.
[4] *See id.*, art. 33(1).

The 1967 U.N. Protocol Relating to the Status of Refugees expanded the 1951 Convention beyond its original narrow temporal and geographic limitations. According to its terms, the obligation of *non-refoulement* binds contracting States regardless of which country refugees are fleeing, and when the events arose that caused them to leave their homelands.[5]

One hundred forty-seven U.N. member states are parties to the 1951 Convention, its 1967 Protocol, or both. As a matter of international law treaties bind only their signatories.[6] This does not mean, however, that non-signatory states like Iraq are not bound by the principle of *non-refoulement* articulated in the Convention and the Protocol, for these are not the only international instruments codifying the obligation.

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

> States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion, *or refoulement*.[8]

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

B. The principle of *non-refoulement* in customary international law.

The principle of *non-refoulement* is broader than a mere treaty obligation binding only on consenting parties. It is customary international law. That is, it is law that "results from a general and consistent practice of States followed by them from a sense of legal obligation."[9]

The principle *of non-refoulement* meets the three-part test laid down by the International Court of Justice ("ICJ") for determining whether conventional rules can be regarded as "reflecting, or as crystallizing, received or at least emergent rules of customary international law":[10]

a) First, the conventional rule "should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law."[11]

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[5] United Nations Protocol to the Status of Refugees, 31 Jan. 1967, 606 U.N.T.S. 267.
[6] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S 331, 8 I.L.M. 679, art. 26.
[7] International Covenant on Civil and Political Rights, 16 Dec. 1966, 999 U.N.T.S. 171, 6 I.L.M. 368
[8] U.N. Human Rights Committee, General Comment 20 (replaces General Comment 7), concerning Prohibition of Torture and Cruel Treatment or Punishment (art. 7), ¶ 9, U.N. Doc. HRI\GEN\1\Rev. 1 (10 Mar. 1992).
[9] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §102(2) (1987).
[10] *North Sea Continental Shelf*, [1969] I.C.J. 3, at para. 63 (Judgment of 20 Feb.).
[11] *Id*. at para. 72.

b) Second, "even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected."[12]
c) Third, "state practice, including that of states whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked – and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved."[13]

1. Fundamentally norm-creating character

Rather than being only contractual obligations amongst signatories, the conventional expressions of the principle of *non-refoulement* in instruments such as the 1951 Convention, the Organization of African Unity Refugee Convention, the Inter-American Convention on Human Rights, and the United Nations Convention Against Torture were intended to create mandatory rules for states' conduct.[14] In 1977, the Executive Committee of the United Nations High Commissioner for Refugees Programme ("ExCom") expressed this view, stating that "the fundamental humanitarian principle of *non-refoulement* has found expression in various international instruments adopted at the universal and regional levels and is generally accepted by States".[15] Just three years later, ExCom "[r]eaffirmed the fundamental character of the generally recognized principle of *non-refoulement*".[16]

The principle of *non-refoulement* is treated as normative in character not only in treaties, but also in the writings and teachings of the most highly qualified publicists in international law.[17] Lauterpacht and Bethlehem point out its incorporation into numerous instruments, of which "a particularly important example is the Declaration on Territorial Asylum adopted by the [General Assembly] unanimously on 14 December 1967." Other instruments of a similar character include the Asian-African Refugee Principles, the Cartagena Declaration, the Banjul Charter,[18] and the European Convention on Human Rights.[19] This view has been endorsed in numerous

[12] *Id*. at para. 73.
[13] *Id*. at para. 74.
[14] UNHCR, The Scope and Content of the Principle of *Non-Refoulement* (Opinion) [Global Consultations on International Protection/Second Track], 20 June 2001, available at: http://www.unhcr.org/refworld/docid/3b3702b15.html [accessed 7 May 2010].
[15] UNHCR, Executive Committee Conclusion No. 6, *Non-Refoulement*, U.N. GAOR, 28th Sess. (1977).
[16] UNHCR, Executive Committee Conclusion No. 17, *Problems of Extradition Affecting Refugees*, U.N. GAOR, 31st Sess. (1980).
[17] Such writings are "a subsidiary means for the determination of the rules of law," according to art. 38(1)(d) of the Statute of the ICJ.
[18] African [Banjul] Charter on Human and Peoples' Rights, 27 June 1981, 1520 U.N.T.S. 217, 21 I.L.M. 58.
[17] *Soering v. United Kingdom*, 98 I.L.R. 270 (1989); *Cruz Varas v. Sweden*, 108 I.L.R. 283, at para. 69 (1990); *Vilvarajah v. United Kingdom*, 108 I.L.R. 321, at paras. 102–3 (1991); *Chahal v. United Kingdom*, 108 I.L.R. 385, at paras. 73–4 and 79–81 (1996); *T.I. v. United Kingdom*, Application No. 43844/98, Decision as to Admissibility, 7 March 2000, [2000] I.N.L.R. 211 at 228.

statements by the Council of Europe,[20] the European Court of Human Rights, and the African Commission on Human Rights.

Thus the conventional rule of *non-refoulement* is fundamentally norm-creating in character, satisfying the first prong of inquiry into whether it has achieved the status of customary international law.

2. Widespread and representative state support, including by those whose interests are specially affected

The near universal acceptance of the principle of *non-refoulement* is indicated in the extent of state participation in the conventions which embody it. Of the 192 member states of the United Nations, 147 are parties to the 1951 Convention, the 1967 Protocol, or both; 146 are parties to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[21]; and 165 are parties to the ICCPR. Many of these nations are or have been hosts to significant numbers of refugees, and therefore they may be counted among those states whose interests are specially affected by the principle of *non-refoulement*. The second prong of inquiry is easily satisfied.

3. Consistent practice and general recognition of the rule

The near-universal participation in one or more treaty regimes embodying *non-refoulement* also serves to demonstrate consistent practice and general acceptance, the third criterion for the qualification of the *non-refoulement* principle as customary international law.[22] This is reinforced by the frequent recognition of the principle in non-binding instruments,[23] and its widespread incorporation into states' internal legal systems.[24] Such instances "can be taken as evidence of state practice and *opinio juris* in support of a customary principle of *non-refoulement.*"[25]

The fundamental norm-creating character of the conventional rule of *non-refoulement*, the widespread support for the principle, *inter alia* by States which have been particularly affected by refugee migration, and the consistent practice and general recognition of the rule collectively

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[20] *See, e.g.*, Recommendation No. R (1984) 1 of 25 Jan. 1984 on "the Protection of Persons Satisfying the Criteria in the Geneva Convention Who are Not Formally Recognised as Refugees," adopted by the Committee of Ministers of the Council of Europe, noting that "the principle of *non-refoulement* has been recognised as a general principle applicable to all persons"; Article 3 of the European Convention on Human Rights.

[21] Like the ICCPR, Article 3 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment forbids the *refoulement* of an individual to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46 [annex, 39 U.N. GAOR Supp. (No. 51), at 197, U.N. Doc. A/39/51 (1984)].

[22] *See Military and Paramilitary Activities (Nicar. v. U.S.)*, [1984] I.C.J. Reports 392 (Jurisdiction of the Court and Admissibility of the Application, Judgment of 26 Nov.).

[23] Examples include the Declaration on Territorial Asylum, the Asian-African Refugee Principles, and the Cartagena Declaration.

[24] As of 2003, around 80 states either had enacted specific legislation on *non-refoulement* or had expressly incorporated the 1951 Convention or 1967 Protocol into their municipal law.

[25] *The Scope and Content of the Principle of Non-Refoulement, supra* note 14, ¶ 148.

demonstrate that the principle has taken its place as a matter of customary international law, according to the test established by the International Court of Justice.

C. The metamorphosis of the doctrine into a *jus cogens* norm.

The norm prohibiting *refoulement* goes beyond customary international law, however. It has become established as a principle of *jus cogens*: a mandatory and fundamental norm, accepted by the international community as permitting no derogation irrespective of cause or provocation. "In no circumstance may a State legally transgress the norms of *jus cogens*, for they are considered norms so essential to the international system that their breach places the very existence of that system into question".[26]

The notion of *jus cogens* finds expression in the 1969 Vienna Convention of the Law of Treaties ("Vienna Convention"), which declares as void any treaty that conflicts with a "peremptory norm of general international law."[27] Nor is the concept of *jus cogens* limited to the Vienna Convention or to the interpretation of treaties. The International Court of Justice has endorsed the notion that some obligations are owed to all members of the international community at all times.[28] If *non-refoulement* is *jus cogens*, then no state may legally violate its strictures, regardless of the presence or absence of any specific treaty that may be applicable.

Two lines of inquiry must be pursued to determine whether the norm prohibiting *refoulement* is *jus cogens*:[29]

a) whether it has been accepted by the international community of states as a whole (a "state practice" test); and
b) whether States are undertaking not to *refouler* because they believe the norm has the status of *jus cogens* (*i.e*., whether it reflects *opinio juris*).

That is, we must look at both words and actions of states in assessing whether *non-refoulement* has achieved the status of a non-derogable norm universally and always binding.

1. Acceptance by the international community

The same evidence that demonstrates the customary international law status of *non-refoulement*, in and of itself, is sufficient to meet the first *jus cogens* requirement. Such additional evidence as statements by ExCom add great weight to the assertion that the community of states as a whole has accepted *non-refoulement* as *jus cogens*.

ExCom is composed of representatives of 78 member states of the United Nations "with a demonstrated interest in, and devotion to, the solution of the refugee problem."[30] The specialist

[26] Jean Allain, *The Jus Cogens Nature of Non-Refoulement*, 13 Int'l J. Refugee L. 533, 535 (2001).
[27] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S 331, 8 I.L.M. 679.
[28] *Barcelona Traction Case*, Second Phase, [1970] I.C.J. Reports 3, 32.
[29] Allain, *supra* note 26, at 538.
[30] G.A. Res. 428 (V), annex, U.N. GAOR, 5th Sess., Supp. No. 20, U.N. Doc. A/1775 (Dec. 14, 1950).

interest and knowledge of the Committee, and the fact that its decisions are taken by consensus, add weight to its conclusions.

As mentioned above, ExCom's 1977 and 1980 conclusions demonstrate the customary law nature of the principle.[31] But subsequent statements and decisions of ExCom indicate a clear understanding of *non-refoulement* as not only custom but *jus cogens*.

As early as 1982, ExCom determined that the "principle of *non-refoulement* was progressively acquiring the character of a peremptory rule of international law."[32] By 1992, ExCom was asserting that "all states" were bound to refrain from *refoulement* on the basis that such acts were "contrary to fundamental prohibitions against these practices."[33] In 1996, ExCom made its boldest assertion regarding the *jus cogens* nature of *non-refoulement*, stating that the "principle of *non-refoulement* is not subject to derogation."[34]

Overwhelming support by individual states and by ExCom, the specialized expert body representative of the most affected states, lends credence to the claim that "today the principle forms part of general international law. There is substantial, if not conclusive, authority that the principle is binding in all states, independently of specific assent."[35]

2. States undertake not to *refouler*
because they believe the norm has the status of *jus cogens*

Consistent practice by states, reflecting acceptance of the notion of *non-refoulement*, is critical to a claim that it is *jus cogens*. Obviously, there have been recent examples of states engaging in exclusion of refugees at their borders, or *refoulement* of those already inside. For example, some 500,000 refugees were reportedly returned to Rwanda from Zaire in 1996, prompting Tanzania also to repatriate hundreds of thousands of refugees.[36] Member States of the European Union, the United States, Australia, and other countries have been tightening their borders against an influx of immigrants from neighboring territories.[37]

Yet these acts are not inconsistent with the notion of *non-refoulement* as *jus cogens*. In no instance has a state contended that it has no duty to allow those with legitimate claims to be refugees to remain within its borders. Instead, states have offered various justifications for their actions, usually arguing at the outset that the affected persons have no true fear of persecution if returned to the country whence they came. This position is entirely compatible with acceptance of the principle of *non-refoulement* with respect to people who do have such fear.

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[31] *See supra* p.4.
[32] UNHCR, Executive Committee Conclusion No. 25, *General Conclusion on International Protection*, U.N. GAOR, 33rd Sess. (1982).
[33] G.A. Res. 44/105, 47 GAOR Supp. (No. 49) at 186 U.N. Doc. A/47/49 (Dec. 16. 1992).
[34] UNHCR, Executive Committee Conclusion No. 79, *General Conclusion on International Protection*, U.N. GAOR 47th Sess. (1996).
[35] Guy S. Goodwin-Gill, *The Refugee in International Law*, 97 (1983).
[36] Jessica Rodger, *Defining the Parameters of the Non-Refoulement Principle*, Ll.M. Research Paper in International Law (LAWS 509),Victoria University of Wellington (2001), http://www.refugee.org.nz/JessicaR.htm.
[37] *See id*.

In any event, adherence to a norm need not be universal in practice for the norm to be recognized as customary law, or even the special category of customary law that permits no derogation. The International Court of Justice explained in the *Nicaragua* case that:

> The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. … [In fact,] if a state acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justification contained within the rule itself, then whether or not the state's conduct is in fact justifiable on that basis, the significance of that attitude is to conform rather than to weaken the rule.[38]

II. Constructive *Refoulement* is a Violation of International Law

Iraq may claim that it has done and is doing nothing to force the People of Ashraf to return to Iran, and is therefore in compliance with the *jus cogens* principle of *non-refoulement*. Such a claim ignores the reality that **constructive** *refoulement* is prohibited by international law just as much as the act of transporting individuals to territories where their lives will be threatened. A "constructive" wrong is a wrong committed not directly or expressly, but by circumspection. Constructive *refoulement* can be understood by drawing analogy to domestic law constructs. Assume that a landlord wants his tenant to depart from the premises during the term of the lease, or an employer wishes to terminate the services of his employee during the term of the employment contract. Actively evicting the tenant, or firing the employee, would breach their respective contracts. The legal bar to breaching the agreements also prohibit the landlord or employer from contriving a situation in which the conditions of the tenancy or of the employment will be so unacceptable that the tenant or employee has no choice but "voluntarily" to end the relationship.

In a constructive eviction, the tenant is not physically ousted from the leased premises, but the wrongful acts or omissions of the lessor substantially interfere with the lessee's use and enjoyment of the premises.[39] The caselaw is full of examples: landlords who fail to abate, or actively encourage, health hazards, who create or continue patterns of harassment, or who in other ways do not permit the tenant to enjoy the benefits of his bargain. Similarly, in a constructive discharge, the employee is not actively terminated by her employer, who instead creates an "abusive working environment . . . so intolerable that her resignation qualified as a fitting response."[40] The notion of constructive action, that is, action where "the plaintiff, rather than the defendant … formally puts an end to the particular legal relationship,"[41] can be found also in contract law, the law of takings, and other contexts. The notion is anchored in the idea that an involuntary termination, effectively brought about by the wrongful conduct of the other party to the contract, is for all practical purposes as much a breach as that party's unilateral act would have been.

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[38] *Military and Paramilitary Activities* (*Nicar. v. U.S.*), [1986] I.C.J. Reports 98.
[39] 5 *Thompson on Real Property*, 2d Thomas Edition, § 41.03 (David A. Thomas, ed.; LexisNexis 2009).
[40] *Pennsylvania State Police v. Suders*, 542 U. S. 129, 129 (2004).
[41] *Mac's Shell Service, Inc. v. Shell Oil Products Co. LLC.* 559 U.S. __ (2010).

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

Amnesty International has described constructive refoulement as occurring "where economic, social and cultural rights are deliberately denied and have the indirect effect of forcing people to return to their country of origin where they face serious risk of human rights abuses."[42] Similarly, in a statement to ExCom, the representative of the World Council of Churches stated that:

> For return [to one's home territory] to be voluntary, the following conditions should be met: The rights, including social, economic and cultural rights, of refugees, particularly as they relate to material conditions in the host country, are not reduced or otherwise changed in order to encourage returns by making it difficult for people to remain in the host country. Such measures would amount to 'constructive' *refoulement* and would be in violation of customary international law.[43]

More specifically, Amnesty International USA has pointed to detention conditions having "the indirect effect of forcing people to return to a situation where they risk facing serious human rights abuses" as constituting constructive *refoulement*, which it concludes is "prohibited by customary international law".[44] That is, *refoulement* is illegal, and the illegality is not mitigated by hiding behind the fiction that the refugees "freely chose" to return to their place of origin because to do so was preferable to continuing to suffer the deprivations and harassment visited upon them by the host state.

The principle of *non-refoulement* is a *jus cogens* norm of customary international law. It is not subject to derogation by any state, regardless of whether that state is under a conventional obligation to adhere to it. To permit a country to bring about the constructive *refoulement* of refugees would be to allow a derogation from the *jus cogens* principle, which is impossible as a matter of law. Iraq cannot circumvent its obligations of *non-refoulement* by creating an environment for the People of Ashraf so hostile as to constitute constructive *refoulement*.

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[42] Amnesty International, *Rhetoric and Reality: the Iraqi Refugee Crisis* (June 2008), http://www.amnesty.org/en/library/info/MDE14/011/2008/en.
[43] NGO Statement from Elizabeth Ferris, World Council of Churches, to Executive Committee of the High Commissioner's Programme, (May 2002), *available at* http://www.icva.ch/doc00000868.html.
[44] Amnesty International, *Malaysia: Human rights at risk: Migrants*, http://www.amnestyusa.org/document.php?lang=e&id=CAD44D07A1F9083380256F5F003F4C50

III. The Iraqis' Plans for Camp Ashraf Violate the Prohibition against Constructive *Refoulement*

A. The Iraqi Government has made no secret of its intention to expel the People of Ashraf.

Leading spokesmen for the Government of Nouri al-Maliki – including the Prime Minister himself – have repeatedly insisted on their intention to expel the People of Ashraf from Iraqi soil. There is no rational basis for such a policy other than the desire to appease the ruling mullahs in Tehran, and the Government has done little to rebut that inference. Regardless of the rationale, however, the Government's commitment to a policy of involuntary repatriation has been loud, consistent, and inflammatory.

Literally dozens of statements by officials of the Iraqi Government reinforce this view. On 17 June 2008, half a year before the Multi-National Force-Iraq formally handed sovereignty over Diyala Province back to Iraq, the Council of Ministers adopted a "Directive" (No. 216) providing, *inter alia*, that the PMOI "must be expelled as a terrorist organization from Iraq." That decision was reiterated by Iraq's Foreign Minister, Hoshyar Zebari, who is quoted by the Mehr News Agency as declaring on 9 July 2008: "The Government of Iraq has decided to expel the terrorist Mojahedin e-Khalq (*Monafeqin*) grouplet[45] from Iraqi soil. . . . The file on the terrorist Monafeqin grouplet will soon be in its final stage, *i.e.*, expulsion from Iraq."

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

Even more ominously, Rubaie told Al-Forat Television on 1 April 2009, that the People of Ashraf "do not have legal status. They are neither political refugees nor humanitarian refugees." This very point was reiterated by Ali Dabbagh, spokesman for the Government, who said on July 29 (according to the BBC Arabic section), "[T]hey do not have any legal status. ICRC and other human rights organizations have acknowledged this fact."[46]

Prime Minister Maliki insists that the commitment to the expulsion of the PMOI from Iraq is not a result of pressure from Tehran. "Even if Iran stays silent before this organization and compromises with it," he told Al-Iraqiya television on 31 July, "we won't compromise and will not accept it in our land."

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[45] "*Monafeqin*" – "hypocrites" – is the derogatory term ritualistically used by the Iranian regime when referring to the PMOI. "Grouplet" is a word that does not exist in standard English, but is used by the mullahs in their English-language pronouncements to suggest that the PMOI is a tiny fringe organization. The identity of the puppet-master is revealed by the Iraqi Foreign Minister's deployment of these words.

[46] I am aware of no "acknowledgment" of this "fact" by the ICRC or by any other human rights group.

Amnesty International issued a Public Statement on Ashraf on 20 April 20. It cited with particular alarm an interview given by National Security Adviser Rubaie to al-Forat television, "in which he said that the authorities intend to make gradually the continued presence of the Camp Ashraf residents 'intolerable.'" Presumably, this *modus operandi* was proposed because even the Iraqi Government understands that the forcible repatriation of the People of Ashraf to Iran would be a gross violation of the principle of *non-refoulement*.

It does not follow, however, that because *refoulement* is forbidden in international law, making lives "intolerable" as a means of fostering and accelerating a "voluntary" decision to leave is acceptable. In fact, the contrary is true. Constructive *refoulement*, as has been seen, is just as violative of international legal norms as would be the direct, forced repatriation of the People of Ashraf to Iran.

B. The actual conduct of the Iraqi Government
<u>has been entirely consistent with its announced plans.</u>

1. The invasion of July 2009.

In mid-2008, the Iraqi Government created a "Committee to Close Camp Ashraf." According to UNAMI's Human Rights Report for the second half of that year, this Committee was formed "under the leadership of the National Security Council Director-General for Internal Security with representatives from the Ministries of Human Rights, Displacement and Migration, Foreign Affairs, Interior, Defense, and Justice and from the Iraqi National Intelligence Service."[47] The Committee was tasked with ending the presence of the People of Ashraf on Iraqi soil.

The harassment of the People of Ashraf in order to bring about their removal from Iraq has been constant since early 2009, and has several times crossed the line into serious unprovoked violence. On 28 and 29 July of last year, for instance, Iraqi security forces invaded Ashraf, confronting the unarmed residents, who offered no physical resistance. The excuse for the incursion was the intent to establish a permanent police presence inside the Camp. Of course, this was a transparent pretext: in the entire history of Ashraf, there has been no reliable report of a crime ever having been committed there.

In the ensuing melee, some 11 Ashraf residents were killed (several by gunfire, others run over by heavy vehicles), and hundreds were injured. In addition, 36 residents were taken into custody. Although they were never charged with offenses under Iraqi law (and although judges assigned to the case three times ordered their release), they remained in detention for over two months, and report having been tortured and abused. The security forces established a permanent presence in the Camp, from which it would be (and in fact has been) much easier to keep up and to increase the constant pressure on the residents to leave Ashraf, and to leave Iraq.

The circumstances surrounding the violence at Ashraf last July have been amply documented and widely reported, including in the mainstream media. It is beyond question that far more force was used than was appropriate; that the People of Ashraf did nothing more provocative than chanting their intention to resist the invaders; and that U.S. military personnel in the area

[47] United Nations Assistance Mission for Iraq, Human Rights Report (1 July – 31 December 2008), ¶ 56.

observed what was happening and did not intervene to stop it. But it is also clear that the real objective of the invasion was to create a climate of fear and uncertainty among the residents: a feeling that they are not safe, and will no longer ever be safe, in the only home that they have known for years, in some cases for decades.

2. The plan to relocate the People of Ashraf within Iraq.

Later in 2009, the Maliki Government announced its plan to move the People of Ashraf to Neqrat al-Salman, an abandoned military prison in the desert, near Basra. Again, no credible explanation was offered as to why this drastic step was necessary, appropriate, or legal.

The site to which the Iraqi Government proposed to transfer the Ashraf residents had been used as a warehouse for political opponents of the Saddam Hussein regime. It is remote and barren, far outside the geographical reach of anyone interested in the fate of whoever might be so unfortunate as to be confined there, or concerned about monitoring the protection of their human rights. Neqrat al-Salman is a forlorn and outdated complex, too small to accommodate 3,500 individuals, and without any of the infrastructure that the People of Ashraf have spent two and a half decades of toil and treasure building from nothing. It is subject to unimaginable heat and disruptive sandstorms through half of the year, to the point that it is devoid of vegetation.

In a letter regarding this issue, the International Committee of the Red Cross advised the Iraqi authorities that "[t]he residents of Camp Ashraf must not be deported, expelled or repatriated in violation of the principle of *non-refoulement* **or displaced inside Iraq in violation of the relevant provisions of International Humanitarian Law** ['IHL']." While recognizing that under certain conditions displacement of civilian populations may be permissible, the ICRC stressed that "the legality under IHL of a possible displacement of the residents of Ashraf depends upon the reasons for which this displacement would be ordered and upon the modalities of its implementation."

According to the ICRC, if a displacement is to take place for reasons related to an armed conflict (as is the case here), it must be **necessary** for the "security of the civilians or imperative military reasons." Even then, the move would require Iraq to take "all possible measures in order that the civilians concerned are received under satisfactory conditions of shelter, hygiene, health, safety and nutrition." And even if the displacement were adjudged to be for reasons not related to armed conflict, the ICRC reminded the Iraqis that they would be required to honor provisions of the international law of human rights, including the right "to choose one's residence," which may be abridged only "to protect national security, public order, public health or morals, or the rights and freedom of others."

International law, in other words, imposes on the Iraqi authorities the burden of justifying the extraordinary measure that they plan to carry out at Ashraf, whether or not it can be seen as related to the armed conflict from which Iraq is in the process of emerging. There is no doubt that the reasons proffered by the Government for the proposed move – supposed involvement by the PMOI with "remnants of the previous regime," and even collaboration with Al Qaeda – are absurd on their face. The contemplated displacement was nothing more or less than a craven

capitulation to the Teheran regime, which considers the PMOI to be its mortal enemy, and which is very anxious to distract attention from its own internal troubles.

Again, though, regardless of its provenance, the idea of moving the PMOI was a thinly-veiled pretext for exactly what National Security Adviser Rubaie promised to do last April: "to make gradually the continued presence of the Camp Ashraf residents 'intolerable.'" The Prime Minister himself admitted this, telling the National Media Center on 7 December that "[t]he decision is to expel [the PMOI] from Iraq. We will not allow these people to remain in Iraq. We will take the necessary action when the time is up and **their transfer to Neqrat al-Salman is a step towards their expulsion**."

Later in December 2009, Iraqi security forces drove minivans through Camp Ashraf, announcing through bullhorns that residents could not remain there, but were welcome to come with the Government personnel to a safe and comfortable place of relocation. Not a single member of the PMOI accepted the invitation. The minivans withdrew, and since that time the Maliki Government has taken no additional overt steps to carry out its plan.

3. The increasing pattern of harassment and interruption.

Although the plan for the forced relocation was not carried out at the time it was first threatened, neither has it been abandoned as a statement of the Government's policy toward the People of Ashraf. In the meantime, since the beginning of this year, the security forces at Ashraf have begun, and have even ratcheted up, a crude program of intimidation, using such techniques as restricting access to the Camp by service providers (including needed medical personnel).

There have thus been limitations on the availability of basic necessities, as well as such items as medicine. The gainful activities of the People of Ashraf – constructing modular trailers, which permitted them to earn some income – have been interrupted because supplies are not being delivered. As was true of the July invasion and the relocation plan, there is no rational justification for this kind of treatment. Yet all of these are of a piece: they are all intended to make it "intolerable" to remain at Camp Ashraf.

4. The events of April 2010.

There was another confrontation between armed Iraqi soldiers and unarmed residents on 15 April. The incident involved Iranians, purportedly claiming to be family members of the People of Ashraf, who have been camping out at the main gate of Ashraf since February 2010. These individuals have been using as many as 30 loudspeakers round-the-clock, constantly threatening the People of Ashraf with physical harm. The noise and threats have turned into virtual psychological torture of the Ashraf residents. They include relentless, repeated chants: "The time for the PMOI members in Ashraf ended a long time ago"; "Be smart and surrender yourselves to the Iraqi forces"; "Those who remain here are sentenced to death"; "Tonight Ashraf will fall, we will destroy Ashraf"; "The countdown for attacking Ashraf has begun."

The purpose of this campaign has clearly been to provoke a confrontation and justification to us force against the People of Ashraf. In this way, virtually no aspect of daily life at Ashraf has been left untouched.

On 15 April, Iraqi forces demanded that the People of Ashraf turn off loudspeakers that they were using to air music to counteract the chants and threats coming from outside the gates. The Iraqis warned that if these loudspeakers were not disabled, buildings inside Ashraf would be taken over. In response to peaceful resistance, the soldiers turned violent. Five residents were injured, although fortunately none seriously.

It is clear that the deliberate pattern of intimidation, in order to make conditions at Ashraf "intolerable," is increasing and not abating. Obviously, the fact that the residents of Ashraf are still in place, and have not succumbed to the pressure, is a challenge to the Iraqi forces to devise new schemes to achieve their goals. There has been no assurance that even the plan of forced relocation has been abandoned, and there is no military force in the region with the physical presence and moral authority to call the Iraqis to account.

The situation is dire. The distance between "intolerable" living conditions – the announced goal of the Maliki Government – and inhumane ones with potentially mortal consequences is small, and it is unlikely to draw the respect of those who want to force the People of Ashraf to return to Iran. It is more than likely that the next incremental increase in pressure on Ashraf will also involve bloodshed, and that such violent outrages will increase until the goal is achieved. That is why it is critical that a third party intervene to stop this before it spirals even further out of control.

C. Given the circumstances of the PMOI,
<u>constructive expulsion is the logical equivalent of constructive *refoulement.*</u>

1. The Ashraf residents' "reasonable fear of persecution" in Iran

Although it regularly denounces the PMOI in the strongest terms, the Iranian regime periodically announces that rank-and-file members of the PMOI are welcome to return without penalty; assuring that only the leadership might be subject to criminal investigation and trial. Such an "assurance" is worth exactly as much as other assurances from the regime, such as those offered regarding the scope and purpose of its nuclear program: precisely nothing. Moreover, such a claim by the Iranian regime is belied by its actual practice. It is reported that the regime has arrested several dozen people for having visited family members in Camp Ashraf, sentencing some to long term imprisonment and others even to death.

In fact, well over 100,000 members and supporters of the PMOI have been executed by the regime since the inception of the resistance 30 years ago. The founder of the mullahs' theocracy, the Ayatollah Khomeini, stated simply and repeatedly that PMOI members "have no right to life." Even in this year 2010, individual defendants in Tehran who were alleged to have been members of the PMOI were for that reason remanded to stand trial on the charge that they are "*Moharabeh*," waging war on God. The punishment upon conviction for *Moharabeh* is death. On 15 May 2010, Tehran Prosecutor General Abbas Jafari Dolatabadi is reported to have

announced that the death sentences for "six opposition activists… accused of belonging to the exiled and outlawed People's Mujahedeen . . . had been confirmed."[48] Several of them had visited Ashraf to see their children, and appear to have been condemned for that reason alone.

It may well be that the regime can point to defectors from the PMOI who have renounced their former beliefs and who have been welcomed in Iran and have gone about normal lives. But for two reasons, this is scarcely reassuring. First, tolerance is entirely dependent upon repudiation of the PMOI and its cause, and despite the regime's wishes, there are many loyal members of the Organization who remain firm in their commitment to it. Those who have repudiated the PMOI seem to do so using the same terminology and the same propaganda that the regime has disseminated over the last two decades. And second, any promise of equitable treatment can be undone by a simple and unreviewable act of discretion: the declaration that an individual occupied a leadership position, or the charge that her or his renunciation of the PMOI was insufficiently fervid.

For all of these reasons, it is clear beyond dispute that the members of the PMOI at Camp Ashraf in Iraq have a legitimate fear that, were they to return to their homeland, they would be persecuted on account of their political beliefs. Whether or not they have satisfied Iraqi domestic legal requirements for refugee status, the simple fact is that they meet the internationally accepted definition of such status. In any event, they may not be forcibly repatriated to Iran against their will.

2. The People of Ashraf are safest if they stay where they are.

There is no doubt that the Iraqi Government has undertaken a concerted effort to force the People of Ashraf to leave the Camp where they have lived peacefully for decades. The Maliki Administration appears to recognize that international law forbids their outright *refoulement* to Iran. Some Iraqi Government officials have stated that evicting them from Ashraf is not the same as *refoulement*, because although the residents are no longer welcome to remain there, they have other options, including resettlement in third countries.

The People of Ashraf have repeatedly stated their desire to resettle in the United States or EU Member States, where they would not face the prospects of harassment, persecution, or forced repatriation to Iran. However, this appears not to be an option, even for those terminally ill. Lawyers for the People of Ashraf have approached UNAMI and representatives of numerous countries regarding resettlement, all to no avail.

In the case of the EU, the designation of the PMOI as a terrorist organization can no longer be invoked as an excuse. After protracted judicial review, the European Union (and the United Kingdom, acting separately) has vacated the banning of the PMOI. Proceedings to accomplish

[48] Agence France Presse, "Iran confirms death sentence for opposition activists," 15 May 2010. http://www.google.com/hostednews/afp/article/ALeqM5g-xd7dAjCO2GC2fP7WpCWYaMrdDA

the same objective are pending in the United States, with a judicial decision expected imminently.[49]

So, as a practical matter, the 3,400 men and women who reside at Ashraf have no choice but to stay where they are, and this they are willing (indeed, they are anxious) to do. They have lived in Iraq legally for more than a quarter of a century. They have paid and are paying their own way, not requiring any kind of material support from the Iraqi Government. What they seek is simply to be allowed to do so in peace, without interference or harassment.

If the People of Ashraf are chased from Iraq they will have nowhere to go, except Iran. And that is why their expulsion, or their constructive eviction, is tantamount to *refoulement*.

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

A. Under Article 45 of the Fourth Geneva Convention.

There is no doubt that the United States was responsible for the protection of Ashraf until early 2009. Accordingly, the United States still has obligations under the Fourth Geneva Convention for actions it took (or failed to take) prior to that date. Article 45 of the Convention provides that "protected persons," as the People of Ashraf were designated in 2004, may be transferred only to a state party to the Convention (Iraq qualifies), which provides assurances to the transferring state that it will extend the protections of the Convention to the individuals concerned.

In this particular case, United States officials repeatedly reported that they were assured in writing by Iraq, prior to the transfer, that the People of Ashraf would be treated "humane[ly, and] in accordance with Iraq's international . . . obligations." Those assurances were, apparently, regularly reiterated by Iraqi authorities, according to statements made by State Department and U.S. military spokesmen. Assuming that this includes a commitment to honor the Convention, it seems beyond dispute that armed assaults on the Camp, the deaths, the injuries, and the taking of hostages (whether or not under the pretext of law enforcement), as well as the pattern of increasing pressure to make conditions at Camp Ashraf "intolerable," are inconsistent with that commitment.

Article 45 specifically provides that if a transferee state fails to honor its obligations to protected individuals, the transferring party – here the United States – must "take effective measures to correct the situation, or shall request the return of the protected persons." To underscore the seriousness of this requirement, it adds, "Such request must be complied with."

The U.S. is aware of these breaches of the Iraqi promise (formally made to this country and therefore binding as a matter of treaty law) since American observers witnessed the raid on Ashraf and its aftermath. Yet it has neither taken "effective measures" nor requested the return of the People of Ashraf to U.S. control.

[49] The case of *PMOI v. Clinton*, No. 09-1059 (D.C. Cir.) was argued in January 2010. It is the first case ever presented to a U.S. court in which a Designated Terrorist Organization has protested the decision of the Secretary of State to keep it on the list despite overwhelming evidence suggesting that it does not belong there.

B. According to the express agreements signed in July, 2004

In July, 2004, each person at Ashraf was required to sign a document headed "Agreement for the Individuals of the PMOI." That document reflects assent on the part of each such person to repudiate terrorism, not to possess weapons, to reject violence, and to obey the laws of Iraq. The Agreements also state that each person shall, until "viable disposition options" become available, "remain under the protection of Multi-National Forces-Iraq at Camp Ashraf."

At least implicit in this undertaking – which was signed on behalf of the MNF-I at the level of battalion commander – is a correlative commitment of the Multi-National Forces to provide the level of protection that the individuals were required to accept. The Agreement was intended, after all, to reflect a bilateral meeting of the minds, imposing obligations and conferring rights on both parties: the individual signers, and the United States military.

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

C. Nevertheless, the United States has thus far declined to intervene.

Despite the fact that the United States has obligations to the People of Ashraf under both the Fourth Geneva Convention and the individual agreements it entered with each of them, it has refrained from intervening with the Iraqi authorities, at least as a matter of public record. Up to and including the level of Secretary of State Clinton, the United States has affirmed its commitment to Iraqi sovereignty, deferring to Iraqi authorities all issues concerning how that sovereignty should be exercised.

The position of the United States is disappointing. U.S. action in this case to honor its obligations under international law would by no means undermine the sovereignty of Iraq. Indeed, the argument can be made that the United States is in breach of binding norms of international law, and will bear legal responsibility for any catastrophe that might result from the implementation of the Iraqi plan for constructive *refoulement* of the People of Ashraf. This conclusion is supported by analogy to the decision of the International Court of Justice in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos. and Herz. v. Serb. and Mont.)*, which concluded that the failure to take actions to prevent a crime may be sufficient to impute liability when the crime is foreseeably committed.

The objective of this analysis, however, is not to debate the liability of the former occupying power after a disaster that may occur; it is to urge that affirmative steps be taken to avert just such an eventuality. Even if the United States is acting in violation of international law in leaving the People of Ashraf to their plight, the question presented is whether that plight could be ameliorated by the intervention of someone else.

And the answer to that question is that there is such an actor, legally and practically capable of ensuring that the constructive *refoulement* of the PMOI to Iran does not take place. That is the United Nations Assistance Mission for Iraq, UNAMI.

D. Recent developments suggest that the United States is preparing to withdraw even further, causing even greater concerns about what the Iraqis might do.

Reportedly, the 1st Battalion of the 3rd Stryker Brigade Combat team, 2nd Infantry Division – the U.S. Army detachment currently in Camp Ashraf – is planning to leave shortly, perhaps handing its facilities inside the Camp (called "Forward Operating Base Grizzly") to an Iraqi army battalion. The departure of the last U.S. forces from Ashraf would for all practical purposes mean the end to the presence of the UNAMI monitoring team as well, since that team has been relying on U.S. military personnel for protection and for transportation to and from the area.

The presence of an Iraqi army battalion inside Ashraf would exacerbate the pressures by the Iranian regime on the Iraqi Government, facilitating its schemes against the residents of the Camp. If such a transfer is made, it would deprive them of any reliable security, and could well be a prelude to another humanitarian catastrophe.

Nor is it even obvious that the U.S. has the legal right to transfer these facilities. The buildings at FOB Grizzly, where U.S. forces have been based since April 2003, were erected with the resources of Ashraf residents, and have been their property since they were built. U.S. forces did not take them from hostile Iraqi elements during the invasion; they were invited to stay there as guests by the People of Ashraf. For this reason transferring those facilities to an Iraqi army battalion would be illegal. It would also prepare the grounds for carnage, perhaps worse than what occurred on 28 and 29 July 2009.

There is no question but that the presence of U.S. forces has acted as a deterrent against further violence against the People of Ashraf. Because of this, and in view of the political uncertainty in Iraq in the aftermath of the parliamentary elections, it would be prudent for the United States to maintain a military presence of some meaningful kind at Ashraf at least until a new Government is installed in Baghdad.

V. Only the United Nations Can Prevent the Iraqis from Carrying Out Their Illegal Plan

A. The United Nations mandate to UNAMI is broad enough to encompass this role.

The mission of UNAMI is set out in a series of Security Council Resolutions, most recently S.C. Res. 1883 (7 August 2009), which will remain in force until August 2010 (it is widely anticipated that the mandate will be renewed for at least an additional year). It includes a general commitment to Iraq's re-emergence into the community of nations, with support and assistance for various efforts to overcome the years of dictatorship and oppression. The mandate also includes assisting Iraq in compliance with its own ongoing obligations under international law, including, in particular, the following: "promote, support, and facilitate, in coordination with the Government of Iraq . . . the coordination and delivery of humanitarian assistance and the safe,

orderly, and voluntary return, as appropriate, of refugees and displaced persons." U.N.S.C. Resolution 1770 (10 August 2007), § 2(b)(i).

This language is certainly expansive enough to permit – indeed to require – UNAMI to engage in dialogue with an Iraqi Government apparently determined to violate its international legal obligations to individuals who are refugees and/or displaced persons. But a polite request for information will not be enough. UNAMI must monitor the activities of Iraqi security forces at Ashraf; it must insist that conflict and provocation there be avoided; and it must require that the rights of the People of Ashraf under international humanitarian law and the international law of human rights be respected. In short, it must demand that the Government of Iraq abandon its policy aimed at the constructive *refoulement* of the People of Ashraf to Iran.

UNAMI seems to have acknowledged this. In October 2009, an UNAMI press release proclaimed that it "continues to advocate that Camp Ashraf residents be protected from forcible deportation, expulsion, or repatriation contrary to the non-refoulement principle."[50] And in his May 2010 report to the Security Council, U.N. Secretary-General Ban Ki Moon noted that UNAMI "continues to monitor the situation in Camp Ashraf," and

> has continued to advocate for the residents' unhindered access to goods and services of a humanitarian nature, as well as for their right to be protected from arbitrary mass displacement or forced repatriation against their will in violation of the universally accepted principle of non-*refoulement*. UNAMI remains committed to assisting both parties find an acceptable resolution to this problem.[51]

These very positive statements demonstrate that the situation of the People of Camp Ashraf is very much within the mandate of UNAMI. These statements, now, must be followed with more than words.

B. There is no one else with the moral heft and the physical presence to defend the rule of law.

There is no other international agency with sufficient moral stature and physical resources on the ground in Iraq to accomplish the essential task of defending the People of Ashraf from the fate that would befall them were the Iraqi plan brought to fruition. While both UNHCR and the International Committee of the Red Cross have at times been willing to reiterate the status of the Ashraf residents, neither seems willing or able to engage the Iraqi Government in any kind of effective discussion of its compliance with binding rules of law.

Again, diplomacy has its place in such matters, but more than talk is required now. The constructive *refoulement* planned by the Maliki Government would be a gross violation of international law, and might have catastrophic consequences. It must be prevented. Only UNAMI can carry out such a mission.

[50] http://www.uniraq.org/newsroom/getarticle.asp?ArticleID=1162.
[51] Report of the Secretary-General pursuant to paragraph 6 of resolution 1883 (2009), S/2010/2040 (14 May 2010), ¶¶ 53, 54.

Conclusion

This analysis has demonstrated that the *refoulement* of the People of Ashraf to Iran would be illegal, and that this result – openly desired by the Government of Iraq – may not be brought about indirectly by implementing a plan to make their lives intolerable. The prohibition of *refoulement* embraces the illegality of constructive *refoulement*, in which conditions of life are rendered so unacceptable that refugees have no choice but to accept whatever fate awaits them upon return to their homeland.

Given that membership in the PMOI is an offense punishable by death in Iran, the prospect of their involuntary repatriation there raises the specter of a major humanitarian catastrophe. The United States has obligations in this regard, including obligations under the Fourth Geneva Convention, which constrains the actions of a state transferring control over protected persons to another state. Yet the United States has announced its intention to abdicate those responsibilities, and obviously the Government of Iraq cannot be trusted to assume them.

It therefore falls to UNAMI – the United Nations Mission charged with assisting Iraq in the long climb back to reassume full membership in the international community – to step in to prevent the *refoulement* of the People of Ashraf. UNAMI is the only entity with the physical presence, the legal mandate, and the moral stature to do so.