

FROM INTERNMENT TO RESETTLEMENT OF REFUGEES: ON US OBLIGATIONS TOWARDS MEK DEFECTORS IN IRAQ

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This article focuses on the plight of defectors from the Mujahedin-e Khalq ('MeK'), an Iranian opposition group hosted by Saddam Hussein in Iraq until the United States took control of their main camp, Camp Ashraf, in April 2003. In the period of US control, nearly 600 persons defected from the MeK. The US Army housed the defectors in what was known as the Temporary Internment and Protection Facility ('TIPF'). It was contractually agreed upon that the voluntary internment of the TIPF residents, who were granted refugee status by the United Nations High Commissioner for Refugees in 2006, would end as soon a viable disposition option was available: either voluntary repatriation to Iran, local integration in Iraq or resettlement in a third state. For a group of approximately 200 refugees, none of these options were available when the US closed the TIPF in April 2008. These refugees were advised to make their way to Europe via Iraqi Kurdistan and Turkey. Most of them suffered extreme hardship along the way in the form of detention, refoulement and sometimes torture and death. The plight of the defectors raises a number of legal questions regarding the basis of their internment; the conformity with international humanitarian law in respect of their living conditions and treatment in the TIPF; and the lawfulness of their rather sudden release. The fact that, from the possible dispositions, only resettlement turned out to be appropriate raises the question of whether the US had, under these specific circumstances, an obligation to ensure the continued protection of those under its control by means of resettlement in the US or elsewhere, despite the fact that resettlement is, as a rule, a discretionary act.

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I INTRODUCTION

During the war in Iraq, which started in 2003, the United States Army controlled and protected a group of some 4000 members of the Mujahedin-e Khalq (‘MeK’ or ‘Mujahedin’),¹ an Iranian opposition movement that had resided in Iraq since 1986. Due to the MeK’s alliance with President Saddam Hussein and its status as a Foreign Terrorist Organization (‘FTO’), the US-led Multi-National Force — Iraq (‘MNF-I’) attacked the military bases of the

¹ The Mujahedin-e Khalq (‘MeK’ or ‘Mujahedin’) is also known as the ‘People’s Mujahedin of Iran’ and as ‘Mujahedin-e Khalq Organisation’. By former members of the MeK it is simply referred to as ‘the organisation’. The name can be translated as People’s Holy Warriors or, rather, ‘freedom fighters’: see Ervand Abrahamian, *The Iranian Mojahedin* (Yale University Press, 1989) 5.

organisation at the beginning of the war.² Nonetheless, shortly after the attack the MeK handed over its weapons to MNF-I or, rather, the US Army, in exchange for its protection.³ About a year later, in June 2004, US Secretary of Defense Donald Rumsfeld designated the members of the MeK as ‘protected persons’ under the 1949 *Geneva Convention relative to the Protection of Civilian Persons in Time of War* (‘*Geneva Convention IV*’).⁴

During the period that it protected the MeK in Iraq — from April 2003 until January 2009 — the US Army was confronted with almost 600 disillusioned members who wanted to leave the organisation. In order to house the defectors, the US Army built a separate camp adjacent to Camp Ashraf, where the MeK was concentrated, known as the Temporary Internment and Protection Facility (‘TIPF’).⁵ In 2004, the residents of the TIPF and Camp Ashraf signed the *Agreement for the Individuals of the People’s Mujahedin Organization of Iran (PMOI)* (‘*Release Agreement*’)⁶ with MNF-I, which conditioned their release from control and protection on the availability of a viable disposition option: either voluntary repatriation to Iran, local integration in Iraq or resettlement in a third state.⁷ The United Nations High Commissioner for Refugees (‘UNHCR’) only became involved with the residents of the TIPF after a large number of defectors had returned to Iran in 2004 and 2005. It was then that UNHCR recognised the approximately 200 remaining internees as refugees.⁸ Despite the *Release Agreement* and the absence of any disposition option for these refugees, the US started to release the internees from November 2007 onwards. Those who

² The Coalition forces were named ‘Coalition Forces Land Component Command — Operation Iraqi Freedom and Combined Joint Task Force 7’ before the name was changed into ‘Multi-National Force — Iraq’ (‘MNF-I’) in May 2004. For reasons of clarity, MNF-I is used throughout this article to designate the Coalition forces.

³ The sequence of these events is set out in greater detail in Part II.

⁴ *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (‘*Geneva Convention IV*’); Jean S Pictet (ed), *The Geneva Conventions of 12 August 1949: Commentary — IV Geneva Convention relative to the Protection of Civilian Persons in Time of War* (International Committee of the Red Cross, 1958).

⁵ The camp has also been referred to as the ‘Temporary Internment Facility’, ‘Temporary Interview and Protection Facility’, ‘Temporary International Presence Facility’ and ‘Temporary Interviewing and Processing Facility’. However, ‘Temporary Internment and Protection Facility’ (‘TIPF’) was used by the United States Army itself and is therefore used by the authors. That title has also been used in other academic works: see, eg, Jeremiah Goulka et al, *The Mujahedin-e Khalq in Iraq: A Policy Conundrum* (RAND Corporation, 2009) xxvi. In October 2006, the residents were moved to a new camp that was built adjacent to the TIPF, the Ashraf Refugee Camp (‘ARC’). For reasons of clarity the ARC will be referred to as TIPF throughout the article.

⁶ *Agreement for the Individuals of the People’s Mujahedin Organization of Iran (PMOI)* (‘*Release Agreement*’) (copy on file with authors).

⁷ A fourth disposition option in the contract — ‘application to international organisations such as the United Nations High Commissioner for Refugees’ — was presumably realised in 2006 with the refugee status determination by UNHCR, but was not considered to be a sufficient condition to release the TIPF residents. However, see below Part IV(D)(3).

⁸ See generally United Nations High Commissioner for Refugees, ‘Information regarding Iranian Refugees in the Temporary Interview Protection Facility (ex-TIPF/ARC) at Al-Ashraf, Iraq’ (Report, February 2008) (‘*UNHCR Report 2008*’); United Nations High Commissioner for Refugees, ‘Information regarding Protection of Iranian Refugees, Former PMOI Members Who Resided in Al-Ashraf in Iraq’ (Report, February 2009) (‘*UNHCR Report 2009*’). See also below Part IV.

refused to leave were transported to Iraqi Kurdistan and the TIPF was closed in April 2008.

Upon their release, the residents were essentially left to their own devices and advised to make their way to Europe via Iraqi Kurdistan and Turkey. While most of the refugees would eventually reach Europe and secure asylum there, the journey would take some of them more than two years. On their way to Europe, many refugees were imprisoned and some were even tortured in Iraqi and Turkish prisons.⁹ At least two of the refugees died.¹⁰ In addition, some 15 refugees are still stuck in Iraqi Kurdistan.¹¹ It is not clear whether there are still persons awaiting resettlement from Turkey.¹²

A Aims, Questions and Structure

The internment of the MeK defectors in and the circumstances of their release from a closed facility under permanent surveillance give rise to questions regarding the legal obligations of the US vis-a-vis these defectors. This article aims, first, to determine what legal obligations the US owed to the TIPF residents during their internment and upon their release; secondly, to examine whether the US complied with these obligations; and if not, thirdly, to identify possible and appropriate legal remedies for the individuals concerned. A significant part of the article is devoted to describing living conditions in the TIPF and the events after the closure of the facility with a view to determining the facts on which the legal analysis is based. In addition, the narrative serves to illuminate a virtually unknown chapter of the war in Iraq.

It will be argued that the US had effective control over the TIPF residents until they were released from the TIPF.¹³ Actual control was governed by the terms of the *Release Agreement* and international law, in particular international

⁹ See below Part V.

¹⁰ *Ibid.*

¹¹ Interview with Johannes van der Klaauw, Senior Resettlement Coordinator, United Nations High Commissioner for Refugees (UNHCR Headquarters, Geneva, 1 March 2013). The 15 refugees in northern Iraq were re-interviewed by UNHCR Erbil. Three others decided to stay in northern Iraq and one committed suicide in 2012. See also Eddy van Wessel, Judit Neurink and Paulien Bakker, *Lost in Limbo* (Aras, 2009). In a leaked cable of 18 September 2009, the US Embassy in Baghdad speaks of 22 MeK defectors 'in Erbil awaiting UNHCR resettlement': US Embassy Baghdad, 'MeK Defectors on Life in Ashraf and Resettlement' (Confidential Diplomatic Cable, Reference ID 09BAGHDAD2521, 18 September 2009) para 2 <<http://wikileaks.org/cable/2009/09/09BAGHDAD2521.html>>. For a personal account of one of the persons concerned, see Letter from Shahab Ekhtiari to Federal Officece [sic] of Migration in Switzeland [sic] (ODM), 1 January 2014 <<http://www.namnlista.se/federal-officece-of-migration-in-switzeland-3/>>.

¹² In 2013 there were still an estimated 10 refugees awaiting resettlement: Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013); Interview with Refugee 16 (Teleconference Interview, Afshin Afkari trans, 23 May 2013); Baharak Bashar and Pieter-Jan De Pue, 'Internationale impasse: asiel verlenen aan (ex-)MKO-leden in en uit Irak? [International Impasse: Granting Asylum to ex-MEK Members In and Out of Iraq?]', *DeWereldMorgen.be* (online), 17 December 2011 <<http://www.dewereldmorgen.be/artikels/2011/12/17/internationale-impasse-asiel-verlenen-aan-ex-mko-leden-in-en-uit-irak>>.

¹³ As will be set out in greater detail below in Parts III and V, the detaining powers consisted arguably of (the collective) MNF-I, but it was the US Army who had de facto control over Camp Ashraf and the TIPF rather than others making up this collective. Even when a Bulgarian contingent was involved in guarding the TIPF, it did so under the command of the US Army.

humanitarian law, by virtue of the fact that both the MeK and its defectors had been designated as ‘protected persons’ under *Geneva Convention IV*. Their status as protected persons entitled them to a number of procedural and substantive rights regarding their internment, as well as protection against forced return to a country where they may have reason to fear persecution — refoulement.¹⁴ The question is whether these rights were observed by the US.

With regard to the (forced) release of the residents from the TIFP in 2007 and 2008, this article examines whether this was in accordance with the *Release Agreement* and international humanitarian law. It will be argued that the US knew or ought to have known that, from the disposition options enumerated in the *Release Agreement*, only resettlement was viable. Local integration in Iraq was impossible due to the hostile attitude of the Iraqi people towards the MeK as a result of its past alliance with Saddam Hussein.¹⁵ Repatriation was not an option either since the remaining TIFP residents had all been recognised as refugees by UNHCR on account of a well-founded fear of persecution in Iran. Knowing that resettlement in a third state was the only available option, the US nonetheless released the 200 refugees into a hostile environment, against which it had contractually pledged to protect them.¹⁶

That the US did not resettle the refugees is not in itself surprising considering the fact that offering resettlement places is, as a rule, a discretionary act. The resettlement of refugees, one of the durable solutions UNHCR has been charged with pursuing,¹⁷ is consequently wholly dependent on resettlement offers by states and, in practice, less than one per cent of the refugees in the world are submitted by UNHCR to be considered for resettlement.¹⁸ Most of these refugees are resettled in the US, the world’s major resettlement state (annually accepting about 70 000 refugees).¹⁹ In light of this generous practice, the US could easily have resettled the 200 remaining TIFP residents itself, instead of sending

¹⁴ *Geneva Convention IV* art 45: ‘In 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 opinions or religious beliefs’. See also below Part V.

¹⁵ In particular, for their alleged involvement in the suppression of the Kurdish and Shi’ite uprisings in 1991: see below Part II(B)(2).

¹⁶ On the hostile environment of Iraq: see, eg, *UNHCR Report 2008*, above n 8, [17]–[23], [31]–[34]; *UNHCR Report 2009*, above n 8, [6]. See also below Parts II, IV(A)(1), V.

¹⁷ *Statute of the Office of the United Nations High Commissioner for Refugees*, GA Res 428 (V), UN GAOR, 5th sess, 325th plen mtg, Agenda Item 32, UN Doc A/RES/428 (V) (14 December 1950) annex (‘*Statute of the Office of the United Nations High Commissioner for Refugees*’) (‘*UNHCR Statute*’). Paragraph 1 of the *UNHCR Statute* does not explicitly refer to ‘resettlement’, but to the assimilation of refugees within new national communities, which may signify either local integration or resettlement in third states. The other and generally preferred solution is that of voluntary repatriation to the country of origin.

¹⁸ United Nations High Commissioner for Refugees, *Resettlement: A New Beginning in a Third Country* 2011–14 <<http://www.unhcr.org/pages/4a16b1676.html>>.

¹⁹ The refugees accepted into the US Refugee Admissions Program (‘USRAP’) are mostly referred to the US by UNHCR: see United States Department of State, United States Department of Homeland Security and United States Department of Health and Human Services, ‘Proposed Refugee Admissions for Fiscal Year 2014: Report to the Congress’ (Report, 17 September 2013) <<http://www.state.gov/documents/organization/219137.pdf>>.

them — against the advice of the UNHCR²⁰ — on a perilous journey to Western Europe. The question is whether the US could, in this case, rely on the discretionary nature of resettlement and, more generally, whether there are instances where resettlement ceases to be discretionary and becomes a legally binding obligation. Two instances in which resettlement may become a legally binding obligation are examined: resettlement to prevent a breach of contract and a primary norm of international law; and resettlement as a legal remedy to such breaches.

The article is structured chronologically and focuses on the period of American control over the MeK defectors, starting with the bombing of Camp Ashraf in March 2003, and ending with the closure of the TIPF in April 2008 and its aftermath. Part II starts with a brief historical overview of the MeK with a view to providing some background on the refugees and their reasons for leaving the MeK. It places the MeK and its (former) designation as a terrorist organisation in a larger geopolitical context and describes how and why the TIPF was established. Part III analyses the legal status of the TIPF residents, the nature of their stay in the TIPF and goes on to measure the living conditions in the TIPF against the standards laid down in *Geneva Convention IV*. Part IV addresses the repatriation of approximately 350 TIPF residents to Iran in 2004 and 2005, UNHCR refugee status determinations of those who refused to return to Iran in 2006 and the durable solutions that were available to them. It also examines the potential legal ramifications of the refugee status granted in 2006 and the problems UNHCR encountered in finding resettlement places. Part V focuses on the closure of the TIPF, particularly the fate of the refugees upon departure from the facility, in order to determine whether the US complied with its contractual obligations and the prohibition of refoulement. In addition, Part V considers whether the US had, under these specific circumstances, an obligation to ensure the continued protection of those under its control by means of resettlement in the US or elsewhere. In Part VI, possible and appropriate legal remedies are discussed, including the possibility of resettlement in the US or elsewhere as a form of reparation. Part VII contains a conclusion and some final observations regarding the solution of resettlement of refugees.

B *The MeK in Camp Ashraf and Camp Liberty*

This article focuses exclusively on MeK defectors in Iraq, yet some observations regarding the approximately 3300 non-defecting members of the MeK, who remained in Camp Ashraf while under US control, are pertinent. The fate of the MeK in Camp Ashraf took an unfortunate turn after the US transferred power over Camp Ashraf to the Iraqi Government in January 2009 on the basis of a status of forces agreement it had concluded with Iraq.²¹ Raids by Iraqi police

²⁰ *UNHCR Report 2008*, above n 8, [31]–[32]. See also United Nations High Commissioner for Refugees, ‘Turkey: Expulsion of Iranians Confirmed, UNHCR Raises Concerns with Government’ (21 September 2007) <<http://www.unhcr.org/46f3b3452.html>>. See below Part V.

²¹ *Agreement between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq*, signed 17 November 2008 (entered into force 1 January 2009). See also Tahar Boumedra, *The United Nations and Human Rights in Iraq: The Untold Story of Camp Ashraf* (New Generation, 2013).

and security forces on Camp Ashraf in 2009 and 2011 led to the deaths of about 50 Ashraf residents.²² In December 2011, the UN and the Iraqi Government signed a memorandum of understanding that secured the safe transfer of the Ashraf residents to Camp Liberty (or 'Hurriya'), a 'temporary transitional location' elsewhere in Iraq, to await their departure from Iraqi territory.²³ Despite the coordinating role of the United Nations Assistance Mission for Iraq ('UNAMI'),²⁴ Camp Hurriya was hit 4 times by rocket attacks, killing at least 10 residents and wounding dozens more.²⁵ On 1 September 2013, the 101 persons who had remained in Camp Ashraf to resolve property issues were attacked by unidentified armed forces: 52 were found dead and 7 are still missing.²⁶ While

²² United Nations Assistance Mission for Iraq, 'Human Rights Report: 1 July – 31 December 2009' (Report, 22 June 2010) 16–17 <http://www.ohchr.org/Documents/Countries/IQ/UNAMI_Human_Rights_Report16_July_December_2009_EN.pdf>; Human Rights Office, United Nations Assistance Mission for Iraq and Office of the High Commissioner for Human Rights, 'Report on Human Rights in Iraq: 2011' (Report, May 2012) 33–4 <http://www.ohchr.org/Documents/Countries/IQ/IraqUNAMI-OHCHR_HR_Report2011_en.pdf>; Working Group on Arbitrary Detention, *Opinion No 11/2010 (Iraq)*, UN Doc A/HRC/16/47/Add.1 (7 May 2010); David Jolly, 'Iranian Group Seeks US Shield after Iraqi Raid', *The New York Times* (online), 13 April 2011 <http://www.nytimes.com/2011/04/14/world/middleeast/14iht-iran14.html?_r=0>.

²³ *Memorandum of Understanding between the Government of the Republic of Iraq and the United Nations*, signed 25 December 2011, as contained in [2011] *United Nations Juridical Yearbook* 70. The conditions in Camp Liberty have been called 'inhumane and appalling': Working Group on Arbitrary Detention, *Opinion No 16/2012 (Iraq)*, UN Doc A/HRC/WGAD/2012/16 (17 July 2012) [7]. The MeK's consent to the relocation was a precondition to it being removed from the terror blacklist (on which, see below): see Agence France-Presse, 'US Welcomes Resumed Relocation of Camp Ashraf', *The Daily Star* (online), 29 August 2012 <<http://www.dailystar.com.lb/News/Middle-East/2012/Aug-29/186065-us-welcomes-resumed-relocation-of-camp-ashraf.ashx#axzz31vxO0MD5>>.

²⁴ See SC Res 1500, UN SCOR, 58th sess, 4808th mtg, UN Doc S/RES/1500 (14 August 2003) ('*Resolution 1500*'). Although established on 14 August 2003 by *Resolution 1500*, the United Nations Assistance Mission for Iraq ('UNAMI') only became directly involved with the MeK in 2011, when the Iraqi Government announced its intention to close Camp Ashraf by the end of the year. UNAMI's role with regard to the MeK is, inter alia, to coordinate the relocation of the Mujahedin from Camp Ashraf to Camp Liberty and contribute to their security through 'preventive diplomacy': United Nations Department of Political Affairs, *Camp Ashraf: Promoting a Peaceful Resolution* (July 2012) United Nations <http://www.un.org/wcm/content/site/undpa/main/enewsletter/news0612_ashraf>. In addition, this source indicates that UNAMI also assists UNHCR in its efforts to find resettlement places for the Camp Liberty residents.

²⁵ Rocket attacks occurred on 9 February, 29 April, 15 June and 26 December 2013: see, eg, *Third Report of the Secretary-General pursuant to Paragraph 6 of Resolution 2061 (2012) (S/2013/408)*, UN SCOR, 68th sess, 7002nd mtg, UN Doc S/PV.7002 (16 July 2013) 5 ('*Third Report*'). On the latest attack, see United States Department of State, 'Terrorist Attack on Camp Hurriya in Iraq' (Press Release, 2013/1626, 26 December 2013) <<http://www.state.gov/r/pa/prs/ps/2013/219123.htm>>.

²⁶ United Nations High Commissioner for Refugees, 'UNHCR Urges States to Relocate Former Residents of Camp Ashraf' (Press Release, 19 November 2013) <<http://www.unhcr.org/528b72259.html>>; United Nations Iraq, 'UNAMI Delegation Visits Camp Ashraf to Assess the Situation Following Reports of Massacre' (Press Release, 3 September 2013) <http://www.uniraq.org/index.php?option=com_k2&view=item&id=1112:unam-i-delegation-visits-camp-ashraf-to-assess-the-situation-following-reports-of-massacre&Itemid=605&lang=en>. On the alleged involvement of Iranian forces assisted by the Iraqi Government, see Yochi Dreazen, 'Exclusive: US Fingers Iranian Commandos for Kidnapping Raid inside Iraq', *Foreign Policy* (online), 17 December 2013 <http://thecable.foreignpolicy.com/posts/2013/12/17/exclusive_us_fingers_iranian_commandos_for_kidnapping_raid_inside_iraq>. Shocking footage can be found on YouTube: 'Warning — Footage of Attack to Camp Ashraf in Iraq — The Massacre by Iranian Regime & Maleki' (2 September 2013) <http://youtu.be/VaM_x6cWWsE>.

not included in the present research, these events are tangible evidence of the continuing danger to which (former) members of the MeK are exposed in Iraq and the consequent need for their resettlement in third states.²⁷

C Method and Sources

This article applies a multi-method (triangulation) approach. Primary sources were used, such as case law of the European Court of Human Rights ('ECtHR'), leaked US embassy cables, UN and UNHCR documents as well as letters addressed by the US military forces and UNHCR to residents of the TIPF, press releases and videos hosted on YouTube. This material also comprises photographs, including photographs with captions added by US military personnel, given to the authors by former TIPF residents. In addition, UNHCR and the International Committee of the Red Cross ('ICRC') were consulted.²⁸ Moreover, secondary sources were drawn upon, such as reports by Human Rights Watch and Amnesty International, books, articles, documentaries and websites (including sites in Persian that were translated into Dutch). Note that throughout this article, where quotes from Persian-language documents appear in English, these have been translated from Dutch into English by the authors.

The most important primary source of information was former inhabitants of Camp Ashraf and, in particular, the TIPF who were interviewed by the authors. At its peak, the TIPF housed 520 residents, and in total between 550 and 600 defectors have stayed in the facility.²⁹ A large number of the residents, some 350 persons, were repatriated to Iran³⁰ and a few refugees were able to, and did,

²⁷ To date, only 310 of the approximately 3000 MeK members in Iraq have been selected for resettlement (210 to Albania and 100 to Germany): see *Third Report*, UN Doc S/PV.7002, 5; United Nations High Commissioner for Refugees, 'UNHCR Urges States to Relocate Former Residents of Camp Ashraf' (Press Release, 19 November 2013) <<http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=528b72259&query=c&%20ashraf>>.

²⁸ One of the authors, Marjoleine Zieck, met with UNHCR officials (Resettlement and Policy Development and Evaluation Service units) at UNHCR's headquarters in Geneva on 1 March 2013. Subsequently, specific questions were posed in writing to both UNHCR and the International Committee of the Red Cross ('ICRC'). As to the ICRC, the authors tried to get more information about the ICRC-organised repatriation of TIPF residents to Iran. The ICRC wanted to know why the information was needed and the authors explained their research and submitted the questions they had. Notwithstanding several reminders, the ICRC never responded.

²⁹ Numbers vary in practically every publication. On arriving at this figure, see below Part IV.

³⁰ In addition, 18 Iranian Baluchi with Pakistani nationality returned to Pakistan and an Afghan national returned to Afghanistan: Interview with Refugee 5 (Teleconference Interview, Afshin Afkari trans, 19 April 2013); Esmail Hoshyar, *Diary* (Afshin Afkari trans) <www.tipf.info> ('*Hoshyar Diary*'). Hoshyar is a former resident of the TIPF. His diary was recommended by several interviewed refugees, who described it as detailed and reliable, which was confirmed by information gathered by the authors. For more information on the mode of reference to the interviews, see below Part I(D).

leave for other countries before the TIPF was closed.³¹ One refugee was interviewed from each of these groups. The other interviews were conducted with former TIPF residents who stayed at least until November 2007, when the US announced it would close the facility. At that time, there were about 200 residents in the TIPF: all of them refused to return to Iran and all had meanwhile been recognised as refugees by UNHCR and were awaiting resettlement in third countries.³² The authors interviewed 10 per cent of this population (in other words, 20 refugees). These interviews lasted, on average, five hours per refugee.³³ In addition, two of the interviewees were persons who had left Camp Ashraf and the MeK long before the TIPF was established.³⁴ Thus, there were 24 interviewees in total.

In Figure 1, an overview is given of the interviews that were conducted. For each of the interviewed refugees the date of the interview(s) and the period of stay in the TIPF are indicated. The interviews with the refugees who stayed at least until November 2007 are numbered 1–20; the interviews with former members of the Mujahedin who left the organisation a long time ago as well as the two TIPF residents who left the TIPF before November 2007 are given an x. The reference codes are used to refer to the interviews and emails with the respective refugees in the footnotes.

³¹ For example, one of the interviewed refugees was able to leave the TIPF by virtue of an intervention by the Swedish embassy in October 2005, which had been contacted by the refugee concerned using the internet connection of an American dentist in the TIPF: Interview with Refugee x2 (Teleconference Interview, 9 May 2013). Another was able to leave for Denmark (where he had earlier enjoyed asylum) and yet another went to Canada or the US in exchange for identifying caches of weapons in Camp Ashraf: Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 30 June 2013); Interview with Refugee 17 (University of Amsterdam, 29 May 2013); Email from Refugee 17 to Tom de Boer, 3 June 2013; Email from Refugee x1 to Tom de Boer, 23 June 2013 (apparently this refugee was threatened by the MeK on account of ‘espionage’ for the Americans). One refugee was resettled: Interview with Mr Johannes van der Klaauw, Senior Resettlement Coordinator, United Nations High Commissioner for Refugees (UNHCR Headquarters, 1 March 2013). On resettlement, see below Part IV. Five others returned to Camp Ashraf: *Hoshiyar Diary*, above n 30; Interview with Refugee 20 (Teleconference Interview, Afshin Afkari trans, 26 June 2013) (five persons, two of whom returned to the TIPF).

³² The authors proceed from the figure of 200 refugees as the mean between different figures that are mentioned, for example: US Embassy Baghdad, ‘UNHCR and ICRC on MeK: You Took Them, You Own Them’ (Confidential Diplomatic Cable, Reference ID 07BAGHDAD1839, 3 June 2007) para 10 <<http://wikileaks.org/cable/2007/06/07BAGHDAD1839.html>> (204 refugees); *UNHCR Report 2008*, above n 8, [9] (188 refugees); Interview with Refugee 16 (Teleconference Interview, Afshin Afkari trans, 23 May 2013) (209 refugees).

³³ To be precise: 4 hours, 51 minutes (97 hours in total). When the other (four) interviews (mentioned earlier and below) are added, the total interview time is 110 hours for 24 interviews (an average of 4 hours, 35 minutes per refugee).

³⁴ These interviews took place at the beginning of the research and served to give the authors an overall picture of the MeK.

Figure 1: Refugee Interviews

Refugee No	Interview Date/s	Time in the TIPF	Refugee No	Interview Date/s	Time in the TIPF
1	21/03/2013	2003–08	13	08/05/2013 15/05/2013	2003–07
2	22/03/2013 25/04/2013 27/05/2013 18/06/2013	2004–07	14	27/06/2013	2004–07
3	22/03/2013	2004–07	15	20/05/2013	2003–08
4	28/03/2013 11/04/2013 17/04/2013	2006–08	16	23/05/2013	2003–08
5	05/04/2013 14/04/2013 19/04/2013 30/06/2013	2004–07	17	29/05/2013	2005–07
6	12/04/2013 17/04/2013 18/04/2013 30/06/2013	2004–08	18	31/05/2013	2003–08
7	15/04/2013 12/06/2013	2003–07	19	18/06/2013	2004–08
8	18/04/2013 24/04/2013	2004–07	20	26/06/2013	2004–07
9	19/04/2013	2006–07	x1	13/03/2013	2003–05
10	24/04/2013	2004–07	x2	09/05/2013	2004–05
11	25/04/2013 26/04/2013 15/05/2013	2004–08	x3	01/04/2013	N/A
12	03/05/2013	2004–07	x4	01/04/2013	N/A

In order to locate former TIPF residents, now living as refugees scattered across Western Europe and northern Iraq, three sources were used: the internet, a legal counsel and a journalist. The contacts given by those sources snowballed and the direction of these referrals was controlled by the authors on the basis of what they learned — both from interviews and secondary sources — about the composition of the Mujahedin in Iraq, thereby maximising the heterogeneity within the sample.

The composition of the Mujahedin was rather varied as a result of numerous recruitment drives over the years. In the early years, new members came straight from Iran. Other members were recruited, with the consent of Saddam Hussein,

from among Iranian prisoners of war ('POWs') held captive in Iraq.³⁵ Still others were recruited from various other countries including Canada, France, Italy, the Netherlands, Pakistan, the Scandinavian countries, Turkey and the US.³⁶ The recruitment efforts in those states focused on people of Iranian descent who did not have much to lose and often needed help. They were, for instance, failed asylum seekers, criminals, drug addicts and alcoholics. Many were lured to Iraq under false pretences, such as the prospect of employment, study or resettlement.³⁷ A special source of new members were the children of MeK members who had — when they were younger than 15 years old — been sent abroad to live with foster parents, invariably staunch MeK supporters, and were returned to Iraq when they were considered to be old enough.³⁸

The controlled selection of refugees aimed at finding refugees from all the groups referred to, and the 24 refugees who were interviewed represent each of the abovementioned categories except former POWs.³⁹ A large number of refugees who were interviewed had joined the MeK in Iran, including long-time members.⁴⁰ The refugees do not otherwise form a homogeneous group in the sense that they served quite disparate functions in the MeK, ranging from leadership positions to teachers and carpenters.

The population of the TIPF consisted almost entirely of men; only 5 of the 200 refugees in the TIPF were women.⁴¹ Since only one of those women was interviewed, no conclusions can be drawn about the life of women in the TIPF. Otherwise, the number of 20 male refugees signifies that theoretical saturation was reached regarding life of the male population in the TIPF.

The interviews were in most cases conducted via Skype, a few in person and two by telephone in a conference call setting. All the interviews were recorded

³⁵ See below Part II(B)(4) and n 109. See also Farah Karimi and Chris Keulemans, *Het geheim van het vuur, het indrukwekkende verhaal van een Iraans-Nederlandse vrouw die vecht voor vrijheid en democratie* [The Secret of Fire: The Impressive Story of an Iranian-Dutch Woman Who Fights for Freedom and Democracy] (Arena, 2005) 112.

³⁶ Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 17 April 2013); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 25 April 2013); Interview with Refugee 14 (Teleconference Interview, Afshin Afkari trans, 27 June 2013); Interview with Refugee 17 (University of Amsterdam, 29 May 2013); Interview with Refugee x2 (Teleconference Interview, 9 May 2013). See also Part II(B)(4).

³⁷ See, eg, US Embassy Baghdad, 'MeK Defectors on Life in Ashraf and Resettlement', above n 11, para 9. See also below n 109.

³⁸ Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 17 April 2013); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 25 April 2013); Interview with Refugee 14 (Teleconference Interview, Afshin Afkari trans, 27 June 2013); Interview with Refugee 17 (University of Amsterdam, 29 May 2013); Interview with Refugee x2 (Teleconference Interview, 9 May 2013). See also Part II(B)(4).

³⁹ Not everyone who was contacted wanted to be interviewed either on account of bad memories they preferred to bury or owing to fear (see also Part II): five refugees refused and two could not speak to the authors because they had been hospitalised.

⁴⁰ Twelve out of 20, or 60 per cent (and 40 per cent recruited in other states such as France, Pakistan and Turkey). This percentage appears to match the composition of Camp Ashraf: one of the interviewed refugees observed that 50 per cent or more of its inhabitants did not come directly from Iran but were recruited elsewhere: Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 8 May 2013).

⁴¹ Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 27 May 2013) (five or six); Interview with Refugee 4 (Teleconference Interview, Afshin Afkari trans, 17 April 2013); Interview with Refugee 5 (Teleconference Interview, Mary Mehrian trans, 5 April 2013).

with the permission of the refugees and notes were simultaneously taken by the two authors. The transcripts of these notes were subsequently compared and, in cases of inconsistency, the point at issue was resolved either by means of the recorded interview or by raising it in the next interview session or email with the refugee concerned. Most of the interviews were translated from Persian by a professional and independent interpreter who was present at the interviews. Some interviews were conducted in English and one in Dutch. Although most of the interviewees consented to the use of their names, some gave information on a non-attribution basis, resulting in a decision not to mention any names at all in this article.

The interviews were all structured similarly in an attempt to obtain information about a set number of issues — particularly why and when the refugee had joined the Mujahedin; why, when and how he or she had left the Mujahedin; the living conditions in the TIPF; the closure of the TIPF; and his or her departure from Iraq. Whilst retaining this structure to enable the authors to compare the answers and to cross-check and corroborate the information given, the authors intentionally went beyond the preset questions whenever information was given that triggered further questions. The interviews were thus of a topical nature.

II ORIGIN, STATUS AND GEOPOLITICAL POSITION OF THE MEK

A Introduction

The presence of the MeK in Iraq presented the US with a delicate dilemma. Although the MeK had been designated as a FTO by the Department of State in 1997, it enjoyed strong support among conservative politicians for its opposition to the Iranian Government.⁴² When the US took control of Camp Ashraf, the situation was complicated further when an unexpectedly large number of dissatisfied MeK members requested US assistance to leave the organisation, with some claiming human rights violations by its leaders.⁴³ In this section the predicament of the US is illustrated by providing an account of the history of the MeK, its legal status and the events preceding the establishment of the TIPF. This section simultaneously sets out the background of the MeK defectors with a view to elucidating their motives for leaving the MeK and their vulnerable position in Iraq.

It must be emphasised from the outset that information about the MeK is politically highly charged and commonly provokes a reaction by either the organisation or the Iranian Government. Virtually every publication about the

⁴² For an illustration of this dichotomy, see Douglas Jehl, 'A Nation at War: Oil Supply; US Bombs Iranian Guerrilla Forces Based in Iraq', *The New York Times* (New York), 17 April 2004 <<http://www.nytimes.com/2003/04/17/world/a-nation-at-war-oil-supply-u-s-bombs-iranian-guerrilla-forces-based-in-iraq.html>>. See also Gawdat Bahgat, 'United States–Iranian Relations: The Terrorism Challenge' (2008) 38(4) *Parameters* 95, 104; Part II(C) below.

⁴³ See below Part II(E).

MeK is followed by a counter-publication⁴⁴ and anything that is critical of the MeK is immediately classified as Iran-sponsored and thus neutralised. Defectors, especially when they are vocal about their disapproval of the organisation, are easily put in the camp of the Iranian Government. For the purpose of naming and shaming, websites are launched⁴⁵ and pseudo-objective reports by ‘organisations’ such as the Association for Defending Victims of Fundamentalism and the Iranian Refugees Organisation in Germany are published.⁴⁶ Even ostensibly objective information may turn out to be false or, at least, unverifiable⁴⁷ and, while some of the sources are open about their affiliations,⁴⁸ others are not. The same holds true for the other side of the political spectrum, where strong anti-MeK sentiment can be found on several active and up-to-date websites,⁴⁹ which profess ‘to inform as widely as possible about the real nature of the Iranian Mojahedin Khalq cult’.⁵⁰ On these websites,

⁴⁴ Often ad hominem discrediting their authors: see, eg, the RAND Corporation report (Goulka et al, above n 5), which was followed by a counter-report: Neil Livingstone, *Courting Disaster: How a Biased, Inaccurate RAND Corporation Report Imperils Lives, Flouts International Law and Betrays Its Own Standards* (Executive Action, 2010). Anne Singleton, *Saddam’s Private Army: How Rajavi Changed Iran’s Mojahedin from Armed Revolutionaries to an Armed Cult* (Iran-Peyvand, 2003) provoked a reaction in: Abbas Davari, ‘About Mullahs’ Intelligence Ministry Publication: “Saddam’s Private Army” — Psychological Warfare and Misinformation Campaign against People’s Mujahedin Organization of Iran’ (Report, Amirkhiz Publications, July 2005). Human Rights Watch, ‘No Exit: Human Rights Abuses inside the MKO Camps’ (Report, 18 May 2005) is criticised in: André Brie and Paulo Casaca, “‘People’s Mojahedin of Iran’: Mission Report’ (Report, Friends of a Free Iran, 21 September 2005) 99–128 <http://www.mojahedin.org/links/books/881219_epreport-withcover.pdf>; Lincoln P Bloomfield Jr, *The Mujahedin-e Khalq (MEK): Shackled by a Twisted History* (University of Baltimore Press, 2013) 33–43. Abrahamian, above n 1, was followed by a critique by the MeK-affiliated Association of Committed Professors of Iranian Universities: Association of Committed Professors of Iranian Universities, *Facts and Myths on the People’s Mojahedin of Iran: Examples of the Lies, Distortions and Fabrications in Ervand Abrahamian’s The Iranian Mojahedin* (Association of Committed Professors of Iranian Universities, 1990).

⁴⁵ See, eg, *Youheadline* (2014) <<http://pasargadcity.net/>> (showing a carousel of pictures from alleged collaborators with the Iranian Government).

⁴⁶ Cf The Association in Defense of Victims of Fundamentalism, ‘The Iranian Regime’s Agents in France: Behzad Alishahi’ (2007) <<http://www.scribd.com/doc/98905952/Iranian-Agents-Behzad-ALISHAHI>>; The Iranian Refugees Organisation in Germany, ‘The Iranian Regime’s Agents in Germany: Mohammad-Hossein Sobhani’ (2007) <<http://www.scribd.com/doc/98908790/Sobhani-Iranian-Agent-in-Germany-Report>>. Curiously, the two reports are allegedly published by different organisations, but have exactly the same font and layout.

⁴⁷ For instance, the official MeK website has published a declaration from the ‘Members of the consultative committee of Human Rights Council’, which could not be retrieved from any of the official UN databases or channels. For the declaration, see People’s Mojahedin Organization of Iran, *UN Human Rights Council Members Warn of Massacre in Camp Ashraf* (15 August 2012) <<http://www.mojahedin.org/newsen/19524>>.

⁴⁸ See, eg, Islamic Republic News Agency (2014) <www.irna.ir> (the official website of the News Agency of the Iranian Government); People’s Mojahedin Organization of Iran, *Home Page* (2014) <<http://www.mojahedin.org/pagesen/index.aspx>> (the official website of the MeK); Foreign Affairs Committee of the National Council of Resistance of Iran, *Iran News — Latest Updates and Breaking News from Iran* (2014) <<http://www.ncr-iran.org/>> (the website of the MeK’s political wing); *Camp Ashraf, Home of the Iranian Opposition* <www.campashraf.org>.

⁴⁹ The three most prominent websites in this regard are: Iran Interlink (2014) <<http://iran-interlink.org/wordpress/>>; Nejat Society (2012) <<http://www.nejatngo.org/en/>>; Habiliaan Association (2014) <<http://www.habiliaan.ir/en/>>.

⁵⁰ See Iran Interlink, *About Us* (2014) <http://iran-interlink.org/wordpress/?page_id=17>.

the MeK is consistently referred to as a ‘religious/personality cult’⁵¹ or ‘terrorist cult’⁵² and any value of the MeK as a political opposition group is denied.⁵³

For these reasons, researching the MeK requires circumspection regarding the use of sources. Therefore, this Part of the article — which, unlike the other Parts, is largely dependent on secondary sources — relies only on information from seemingly independent authors, institutions and organisations,⁵⁴ corroborated wherever possible by the interviews. Furthermore, some contentious issues that are not relevant to this article have been avoided, while noteworthy criticism of any sources has been included in the footnotes.

B Short History of the MeK

Given that the history of the MeK offers such an abundance of fascinating events, plots, shifting alliances and dramatic twists, it is remarkable that it has not yet found its way into Hollywood.⁵⁵ The organisation was founded in 1965 by a group of students from the University of Tehran with the aim of toppling the regime of Shah Mohammed Reza Pahlavi. It developed a modern revolutionary interpretation of Shi’a Islam coupled with socialism, which distinguished the

⁵¹ Ibid. Iran Interlink publishes reports and books on the MeK and Ashraf. On Ashraf: see especially Anne Singleton and Massoud Khodabandeh, *The Life of Camp Ashraf: Mujahedin-e Khalq — Victims of Many Masters* (Iran Interlink, 2011).

⁵² Nejat Society, *Nejat Missions* (2012) <<http://www.nejatngo.org/en/mission.aspx>>.

⁵³ It is hard to judge the impartiality of these websites, which are often run by former members of the MeK, and yet all interviewed refugees maintain that at least some former Mujahedin are working for, or with, the Iranian Government. The Nejat Society seems to be closely related to the Iranian Government since its headquarters are based in Tehran and the organisation is partly financed by the Government, as acknowledged by some of its members: see Judit Neurink, *Misleide Martelaren: Over de Iraanse Mujahedin of Hoe verzetsstrijders terroristen worden* [Misguided Martyrs: On the Iranian Mujahedin, or How Resistance Fighters Turn into Terrorists] (Contact, 2005) 223. A report asserting affiliations between the executives of Iran Interlink, Massoud Khodabandeh and Anne Singleton and the Iranian Intelligence Service was published by the American Library of Congress in December 2012: Federal Research Division, Library of Congress, ‘Iran’s Ministry of Intelligence and Security: A Profile’ (Report, December 2012). However, the report was withdrawn after extensive criticism of its methods and because it was ‘poorly sourced’: Justin Elliott, ‘Widely Cited Government Study on Iranian Spies “Pulled for Revisions”’, *ProPublica* (online), 22 January 2013 <<http://www.propublica.org/article/widely-cited-government-study-on-iranian-spies-pulled-for-revisions>>. See also Federal Research Division, Library of Congress, ‘Iran’s Ministry of Intelligence and Security: A Profile’ (Report, December 2012) 27–8.

⁵⁴ We have scrutinised — to the extent possible — the reliability, independence and objectivity of the author(s), publisher and content of the sources. If affiliation to one of the involved parties — that is, the Iranian Government or the MeK — became apparent, we have only included the source as possible criticism on the ostensibly reliable sources.

⁵⁵ The most influential, although quite old, monograph on the MeK is Abrahamian, above n 1. For criticism of this book by MeK-associated professors, see Association of Committed Professor of Iranian Universities, above n 44. For other accounts of the history of the MeK, see generally Bloomfield, above n 44 (aiming to counterbalance the negative image of the MeK); Human Rights Watch, above n 44; Goulka et al, above n 5, app A, B; Nigel Brew, ‘Behind the Mujahideen-e-Khalq (MeK)’ (Research Note No 43, Parliamentary Library, Parliament of Australia, 2003) 43; Country of Origin Research and Information, ‘Iran: Information on the People’s Mujahedin of Iran (PMOI)’ (Report No HCR00008E, 21 September 2009); Nicole Cafarella, ‘Mujahideen-e Khalq (MEK) Dossier’ (Report, Center for Policing Terrorism, 15 March 2005). Note that Cafarella’s report cannot be retrieved at the website of the Manhattan Institute’s Center for Policing Terrorism. However, despite its uncertain origin, most of the report’s information seems to be relatively objective and accurate.

organisation from the more conservative Islamic opposition groups that would later merge into Ayatollah Khomeini's Islamic Republican Party.⁵⁶ During the 1970s, the MeK took a militarist direction, which led to assassinations and bombings of (alleged) pro-Shah targets and caused at least six American casualties.⁵⁷

Partly due to the imprisonment and execution of the majority of the founding fathers of the MeK, Massoud Rajavi emerged as the main leader of the organisation after the Islamic Revolution of 1979. Although the MeK had entered into an alliance with the Islamic Republican Party during the Revolution, Khomeini banned Rajavi from the ensuing presidential elections.⁵⁸ This ban marked the beginning of a second period of armed revolt. Mass protests and attacks by the MeK, which included the killing of 71 high-ranking members of Khomeini's party in 1981,⁵⁹ were followed by the brutal repression of the MeK.⁶⁰ Rajavi fled Iran in 1981 and moved the organisation's headquarters to Paris, where he and some other MeK leaders were given political asylum.⁶¹ In Paris, the organisation adjusted its political message to suit Western ears, and founded the National Council of Resistance of Iran ('NCRI'), which was presented as a secularist democratic alternative to Khomeini's regime.⁶² The NCRI is still the political wing of the MeK.

Due to diplomatic rapprochement with Iran, France expelled the MeK in 1986.⁶³ The organisation was welcomed by President Saddam Hussein who offered it several military compounds — of which Camp Ashraf, or Ashraf City, located in Iraq's Diyala province about 65 kilometres north of Baghdad, would become the main one — and deployed the MeK in his war against Iran.⁶⁴ Rajavi's goal to end Khomeini's regime was reinforced by the formation of the National Liberation Army, which basically consisted of MeK members in Iraq. Its largest mission, Operation Eternal Light ('*Forough-e Jaavedan*'), was

⁵⁶ See Country of Origin Research and Information, above n 55, 2.

⁵⁷ Goulka et al, above n 5, 55–6; Bahgat, above n 42, 99. See also Abrahamian, above n 1, 126–85. According to Bloomfield, these attacks were performed by a radical leftist section of the MeK that would later secede from the main organisation: Bloomfield, above n 44, 15–20.

⁵⁸ Annabelle Sreberny-Mohammadi and Ali Mohammadi, 'Post-Revolutionary Iranian Exiles: A Study in Impotence' (1987) 9 *Third World Quarterly* 108, 111. See also Abrahamian, above n 1, 186–205.

⁵⁹ Sreberny-Mohammadi and Mohammadi, above n 58, 112–14; Goulka et al, above n 5, 57–8; Country of Origin Research and Information, above n 55, 2 (mentioning as most prominent victims Chief Justice Ayatollah Mohammad Beheshti, President Mohammad-Ali Rajaei and Prime Minister Mohammad-Javad Bahonar); Abrahamian, above n 1, 219–20. But see Bloomfield, above n 44, 22–7 (noting that the MeK was blamed by the Iranian Government, but never claimed responsibility for the attack itself).

⁶⁰ During the 1980s thousands of Mujahedin were executed by the Iranian authorities: Goulka et al, above n 5, 58; Bahgat, above n 42, 99.

⁶¹ Rajavi fled by plane to Paris together with then Iranian President Abolhassan Banisadr, who was impeached by the Khomeini-dominated Parliament.

⁶² See generally Abrahamian, above n 1, 243–58.

⁶³ Ibid 258. See also Sreberny-Mohammadi and Mohammadi, above n 58, 114–15. There is some disagreement on whether France expelled the MeK as an organisation — as the MeK claims — or just its leadership: see Goulka et al, above n 5, 60 n 17.

⁶⁴ Goulka et al, above n 5, 60–1; Human Rights Watch, above n 44, 10–11. On the role of the MeK in the Iran–Iraq War, see *The MEK and US–Iran Relations* (Directed by James Longley, 2008).

crushed by the Iranian Revolutionary Guard, resulting in the deaths of roughly 1500 MeK members.⁶⁵ This was followed by mass executions of imprisoned MeK supporters in Iran.⁶⁶ Since this setback and despite a series of assaults, bombings and assassinations on Iranian territory between 1988 and 2001, the MeK has not been able to destabilise the Iranian Government.⁶⁷ Although discontent grew within the MeK in the wake of this lack of military success,⁶⁸ there were still about 3800 Mujahedin living in Iraq when the war in Iraq began in 2003.⁶⁹

A contentious issue in the history of the MeK is the extent to which the organisation was involved in Saddam Hussein's domestic wars, especially the suppression of the Kurds during the Gulf War in 1991.⁷⁰ Although the MeK denies any involvement in the suppression of the Kurdish uprising ('*Safar Intifada*'),⁷¹ several authors refer in this respect to a special mission, called 'Operation Pearl' ('*Morvarid*').⁷² Seven of the interviewed refugees who were in Iraq in 1991 were asked about Operation Pearl. While they confirmed that an armed operation against the Kurds took place during that time,⁷³ most of them

⁶⁵ Goulka et al, above n 5, 61; Human Rights Watch, above n 44, 10–11.

⁶⁶ Goulka et al, above n 5, 61; Human Rights Watch, above n 44, 7.

⁶⁷ Goulka et al, above n 5, 62–6.

⁶⁸ Human Rights Watch, above n 44, 11; Elizabeth Rubin, 'The Cult of Rajavi', *The New York Times* (New York), 13 July 2003 <<http://www.nytimes.com/2003/07/13/magazine/13MUJAHADEEN.html>>.

⁶⁹ United States Department of State, 'Patterns of Global Terrorism 2003' (Report, April 2004) app B 129.

⁷⁰ Brew, above n 55, 1; Goulka et al, above n 5, 62–3. See also Marjoleine Zieck, *UNHCR and Voluntary Repatriation of Refugees: A Legal Analysis* (Martinus Nijhoff, 1997) 171–88.

⁷¹ Brew, above n 55, 1; Goulka et al, above n 5, 62.

⁷² See Scott Ritter, *Target Iran: The Truth about the White House's Plans for Regime Change* (Nation Books, 2006) xx:

In March 1991 ... the MEK was called upon by Saddam Hussein to help suppress the revolt of the Kurds in northern Iraq. The MEK planned and executed Operation Morvarid, or Pearl, in which its forces allegedly killed hundreds of Kurdish civilians, including women and children.

See also Bahgat, above n 42, 98 ('[i]n the 1980s the group allied itself with Saddam Hussein and served as his private army in repressing the Shia and Kurdish rebellions'); Country of Origin Research and Information, above n 55, 8–10; United States Department of State, 'Patterns of Global Terrorism 2003', above n 69, 128–9; Neurink, *Misleide Martelaren* above n 53, 53–9 (noting, at 53, that the Kurdish rebellion could not have been crushed without the help of the MeK).

⁷³ Interview with Refugee 2 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 27 May 2013); Interview with Refugee 3 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 4 (Teleconference Interview, Anonymous trans, 28 March 2013); Interview with Refugee 5 (Teleconference Interview, Mary Mehrian trans, 5 April 2013); Interview with Refugee 14 (Teleconference Interview, Afshin Afkari trans, 27 June 2013); Interview with Refugee x1 (University of Amsterdam, 13 March 2013); Email from Refugee 17 to Tom de Boer, 25 June 2013.

opposed the description of this operation as ‘suppression’.⁷⁴ They instead referred to it in terms of self-defence and denied that troops had been sent to northern Iraq to kill or suppress the Kurds. Pointing to the strategic position of Camp Ashraf between the Kurdish region and Baghdad, they nonetheless acknowledged that the MeK had assisted Saddam Hussein in preventing the Kurds from reaching Baghdad. Despite these nuances, and the official position of the MeK in support of autonomy for the Iranian Kurds,⁷⁵ the affiliation with Saddam Hussein has significantly tarnished the image of the MeK in the eyes of the Kurdish population in Iraq. This would become a major issue following the closure of the TIPF, when its residents were expected to travel through, and even reside in, Iraqi Kurdistan.⁷⁶

C Legal Status of the MeK

The attitude of Western states towards the MeK has been, and still is, ambiguous. The organisation — or at least the NCRI — is heralded by some conservative politicians as the legitimate Iranian Government in exile,⁷⁷ despite the fact that it was listed as a FTO by the US as early as 1997.⁷⁸ The United Kingdom blacklisted the MeK in March 2001 and, although the MeK had renounced the use of violence in June 2001, so did the Council of the European Union in May 2002.⁷⁹ Following the EU blacklisting, the police raided MeK and NCRI offices in Paris and more than 100 members, including NCRI’s official leader Maryam Rajavi,⁸⁰ were arrested.⁸¹

⁷⁴ Interview with Refugee 2 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 27 May 2013); Interview with Refugee 5 (Teleconference Interview, Mary Mehrian trans, 5 April 2013); Interview with Refugee 14 (Teleconference Interview, Afshin Afkari trans, 27 June 2013); Email from Refugee 17 to Tom de Boer, 25 June 2013. According to Refugees 2 and 14, one operation took place in the Morvarid mountain area, 100 kilometres north of Camp Ashraf, and a second one in Kifri, around 65 kilometres north of the camp. In the ensuing battle, soldiers from both sides were killed: Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 27 May 2013); Interview with Refugee 14 (Teleconference Interview, Afshin Afkari trans, 27 June 2013).

⁷⁵ Bahgat, above n 42, 99.

⁷⁶ See below Part V.

⁷⁷ See below n 82.

⁷⁸ The US Department of State declared in 1997 that the MeK’s ‘history is studded with anti-Western activity ... [T]he group killed several US military personnel and civilians working on defense projects in Tehran. The group also supported the takeover in 1979 of the US Embassy in Tehran’: United States Department of State, ‘Patterns of Global Terrorism: 1997’ (Report, April 1998) 87. The National Council of Resistance of Iran (‘NCRI’) was added to the American Foreign Terrorist Organization (‘FTO’) list as a MeK alias in 1999: Cafarella, above n 55, 15; United States Department of State, ‘Patterns of Global Terrorism 2001’ (Report, May 2002) app B 101. Bloomfield suggests that the MeK’s ‘designation as a FTO ... was intended as a goodwill gesture to the newly-elected government of Mohammed Khatami, with the hope of encouraging moderation by Iran’: Bloomfield, above n 44, 31.

⁷⁹ *Lord Alton of Liverpool (In the Matter of the People’s Mohahadeen Organisation of Iran) v Secretary of State for the Home Department* (Proscribed Organisations Appeal Commission, Appeal No PC/02/2006, 30 November 2007) [1]; *Organisation des Modjahedines du Peuple d’Iran v Council of the European Union* (Court of First Instance of the European Communities, T-228/02, 12 December 2006) [2].

⁸⁰ On the leadership of Massoud and Rajavi, see below Part II(B).

A powerful and, as it turned out, fruitful lobbying campaign with the goal of delisting the MeK was started during this period.⁸² On 14 August 2002, the MeK gained some credibility in the international community when it revealed accurate details of Iran's nuclear programme.⁸³ In the same year, 150 members of the US House of Representatives filed a petition with the aim of delisting the MeK.⁸⁴ The ambiguous Western attitude towards the MeK was further illustrated when Maryam Rajavi — who had meanwhile been released by the French police — was invited to speak before the European Parliament⁸⁵ and American Members of Congress⁸⁶ about democracy and women's rights. In addition, the organisation brought lawsuits in respect of its inclusion on various terrorist lists.⁸⁷ This proved effective: the UK delisted the MeK in 2008 and, later that year, the Court of First Instance of the EU decided that the MeK should be removed from the EU terrorist blacklist.⁸⁸ As a result of vehement support from

⁸¹ 'Paris Police Target Iranian Groups', *BBC News* (online), 17 June 2003 <<http://news.bbc.co.uk/2/hi/europe/2996132.stm>>. The arrest attracted a lot of attention due to self-immolations carried out by protesting MeK-supporters: see, eg, 'Iranian Fire Protests at Paris Arrests', *BBC News* (online), 18 June 2003 <<http://news.bbc.co.uk/2/hi/europe/299652.stm>>.

⁸² The MeK runs a strong lobby campaign in both the US and Europe and has been able to mobilise several influential figures for its cause. The extensive influence of the MeK on Members of Congress in the US was documented by James Longley: see *The MEK and US-Iran Relations*, above n 64. See also Seymour M Hersh, 'Our Men in Iran?', *News Desk, The New Yorker* (online), 6 April 2012 <<http://www.newyorker.com/online/blogs/newsdesk/2012/04/mek.html>>; Bahgat, above n 42, 104 ('the MEK has cultivated supporters among a network of US politicians, journalists, and academics advocating for "regime change" in Tehran'); Owen Bennett Jones, 'An Iranian Mystery: Just Who Are the MEK?', *BBC News Magazine* (online), 15 April 2012 <<http://www.bbc.co.uk/news/magazine-17615065>>. Footage of NCRI conferences can be found in abundance on YouTube: see, eg, 'Rudy Giuliani, Ex-New York Mayor on Camp Ashraf — Paris 20 Jan 2012' (21 January 2012) <<http://youtu.be/di8KCWDXQiI>>; 'Amb John Bolton on Camp Ashraf — Paris Conference 6 January 2012' (7 January 2012) <<http://youtu.be/-pSugFGdgNU>>. One of the most remarkable and vocal supporters of the MeK is retired Brigadier General David Phillips, who was responsible for the safety and security of the Ashraf residents from 2003 until 2005 and again in 2008. Several of his speeches can be viewed on YouTube: see, eg, 'Speech by Brig Gen David Phillips on Camp Ashraf' (11 December 2011) <<http://youtu.be/3eUdAr2KKYM>>.

⁸³ Bahgat, above n 42, 104. Ritter quite convincingly argues that the detailed information was gathered by Mossad and passed on to the NCRI/MeK: Ritter, above n 72, 25–34, 125–6.

⁸⁴ Bahgat, above n 42, 104.

⁸⁵ As early as 2004: see 'Maryam Rajavi at European Parliament 15 12 2004' (7 January 2013) <http://www.youtu.be/Luq_bHu-6qs>.

⁸⁶ Guy Dinmore, 'Iran Opposition Group Seeks US Legitimacy', *Financial Times* (online), 26 October 2005 <<http://www.ft.com/cms/s/0/5f91ebd4-45be-11da-981b-00000e2511c8.html#axzz31weeY8WA>>.

⁸⁷ See below nn 88, 89.

⁸⁸ This series of judgments often referred to as OMPI I, II and III: *Organisation des Modjahedines du Peuple d'Iran v Council of the European Union* (Court of First Instance of the European Communities, T-228/02, 12 December 2006); *People's Mojahedin Organization of Iran v Council of the European Union* (Court of First Instance of the European Communities, T-256/07, 23 October 2008); *People's Mojahedin Organization of Iran v Council of the European Union* (Court of First Instance of the European Communities, T-284/08, 17 December 2008). The MeK was delisted in the EU on 26 January 2009.

influential public figures⁸⁹ and a favourable court order, the MeK was also delisted in the US on 28 September 2012.⁹⁰ However, the MeK was a blacklisted organisation during the occupation of Iraq and this seriously influenced the treatment of the TIPF residents, regardless of their defection from the MeK.

D Life in Camp Ashraf — Growing Discontent

At its peak in the late 1980s, the MeK housed around 7000 members in several camps in Iraq.⁹¹ Between 1986 and 2003, new and existing members would come to Iraq from numerous countries and for different reasons. As described in Part I, the composition of the MeK in Iraq consisted of four groups: veteran members; former prisoners of war; recruits from Iran and other countries; and children of first generation Mujahedin.⁹² For a significant number of these persons, their experience with the MeK in Iraq proved — for various reasons — to be disappointing and would lead to their eventual defection from the organisation.

Life in Camp Ashraf, where most members of the MeK lived, is surrounded by mystery and speculation. The well-equipped camp,⁹³ measuring 36 square kilometres,⁹⁴ was practically isolated from the outside world until 2003. As a result, accounts of life in Camp Ashraf are only provided by defected members, who are subsequently linked to the Iranian Government by the MeK and thus discredited.⁹⁵ Nonetheless, it is clear that the history of the MeK took an intriguing turn in 1985 when Massoud Rajavi announced his marriage to Maryam Azodanlu,⁹⁶ which marked the starting point of the so-called

⁸⁹ See, eg, *DeList MeK* (2014) <<http://www.delistmek.com>>. See also Amici Curiae, ‘Brief of Amici Curiae Michael B Mukasey, Thomas J Ridge, Louis Freeh, Frances Townsend, R James Woolsey, Robert G Joseph, Rudolph W Giuliani, John R Bolton, John Sano, Glenn L Carle, Hugh Shelton, David Phillips, Leo McCloskey, Wesley Martin, Gary Morsch, James Conway, Dell Dailey, Thomas G McInerney, Paul E Valley, David A Deptula and James A Lyons, Jr, in Support of the Petitioner’, Submission in *In re People’s Mojahedin Organization of Iran*, Case No 12-1118, 29 February 2012. Amici curiae included ‘senior former public officials and former US military and intelligence officers who have devoted substantial portions of their careers to understanding terrorism, to fighting terrorism, and to protecting the national security of the United States’: at 5. Among them were Giuliani and Bolton, but also former Camp Ashraf commanders David Phillips and Leo McCloskey.

⁹⁰ See Tom Syring, ‘US Court Issues Writ of Mandamus, Effectively Removing Organization from Terror List: *In Re People’s Mojahedin Organization of Iran*’ (2012) 16(34) *ASIL Insights* <<http://www.asil.org/insights/volume/16/issue/34/us-court-issues-writ-mandamus-effectively-removing-organization-terror>>.

⁹¹ Goulka et al, above n 5, 60–1, 73.

⁹² See Part I(D), confirmed by Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 17 April 2013); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 25 April 2013); Interview with Refugee 14 (Teleconference Interview, Afshin Afkari trans, 27 June 2013); Interview with Refugee 17 (University of Amsterdam, 29 May 2013); Interview with Refugee x2 (Teleconference Interview, 9 May 2013).

⁹³ Camp Ashraf ‘has a convention centre, two museums, a pool, park, garden, hospital and university ... and has its own electrical substation’: quoted in Anthony Flott, ‘In Command’, *UnoAlum* (Fall 2004) 28, 30 <<http://unoalumni.org/document.doc?id=338>>.

⁹⁴ US Mission Brief, 530th Military Police Battalion (I/R), Omaha, Nebraska, Camp Ashraf Mission Brief for MG Antonio Taguba, 11 February 2004, 3 (‘530th Military Police Briefing’).

⁹⁵ See above Part II(A).

⁹⁶ Maryam Azodanlu (now Rajavi) was the wife of one of Massoud Rajavi’s most loyal party members, Mehdi Abrishamchi, who is still a high-level member of the MeK.

'Ideological Revolution'.⁹⁷ This revolution would change the nature of the MeK from a political mass movement to a more insular organisation, described as a 'cult' or 'sect' by some.⁹⁸ In 2005, Human Rights Watch published a report, entitled 'No Exit: Human Rights Abuses inside the MKO Camps', in which former members of the MeK painted a grim picture of the Rajavi leadership, providing accounts of compulsory divorce, separation of parents and children, forced public confessions, mass self-criticism sessions and harsh punishment for dissidents in the form of solitary — incommunicado — confinement and torture.⁹⁹ These assertions are the subject of sharp debates between the pro- and anti-MeK channels mentioned earlier in Part II(A).

The interviewed refugees were asked about their reasons for leaving the MeK and, from their answers, the following picture emerges: although the MeK became increasingly isolated and inward-looking from 1985 onwards, it appears that the Gulf War of 1991 was a turning point. Until that moment, divorce had only taken place within the higher ranks of the organisation and members had been free to leave the organisation.¹⁰⁰ The interviewed refugees who lived in Camp Ashraf at that time confirm that divorce became compulsory from 1990 onwards when the Gulf War seemed imminent and that children under 15 were separated from their parents in 1991.¹⁰¹ It should be added that some of the

⁹⁷ See, eg, Goulka et al, above n 5, 60–1; Human Rights Watch, above n 44, 3; Abrahamian, above n 1, 251–2.

⁹⁸ In addition to the anti-MeK websites mentioned in above n 49: see also Abrahamian, above n 1, 258–61; Goulka et al, above n 5, 67–77; Cafarella, above n 55, 12 ('bears some resemblance to a cult'); Rubin, above n 68. See also above Part II(A).

⁹⁹ Human Rights Watch, above n 44. For criticism of this report, see Brie and Casaca, above n 44; Bloomfield, above n 44. For a personal account of the human rights violations within the MeK ranks: see, eg, Masoud Banisadr, *Masoud: Memoirs of an Iranian Rebel* (Saqi Books, 2004). Two of the interviewed refugees stated that most of the former Mujahedin interviewed in the Human Rights Watch report had links with the Iranian Government, but that the information they had provided was correct: Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 17 April 2013); Interview with Refugee 17 (University of Amsterdam, 29 May 2013). Note also a number of MeK defectors who are quoted in a leaked US Embassy cable: US Embassy Baghdad, 'MeK Defectors on Life in Ashraf and Resettlement', above n 11, para 5: 'In explaining their motivations for leaving Ashraf, nearly all the defectors felt betrayed by the [MeK] and dismayed by their psychological and physical degradation at the hands of the organization'.

¹⁰⁰ Interview with Refugee x3 (University of Amsterdam, 1 April 2013); Interview with Refugee x4 (University of Amsterdam, 1 April 2013) (Refugee x3 and Refugee x4 left Camp Ashraf in 1991); Interview with Refugee 10 (Telephone Interview, Afshin Afkari trans, 24 April 2013) ('until the first Gulf War people were free to come and go to Ashraf'); Interview with Refugee 5 (Teleconference Interview, Mary Mehrian trans, 5 April 2013) ('[o]riginally, people were always free to leave Ashraf').

¹⁰¹ Interview with Refugee 1 (University of Amsterdam, 21 March 2013); Interview with Refugee 4 (Teleconference Interview, Afshin Afkari trans, 28 March 2013); Interview with Refugee 4 (Teleconference Interview, Anonymous trans, 11 April 2013); Interview with Refugee 5 (Teleconference Interview, Anonymous trans, 14 April 2013); Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 17 April 2013); Interview with Refugee 14 (Teleconference Interview, Afshin Afkari trans, 27 June 2013); Interview with Refugee 17 (University of Amsterdam, 29 May 2013); Interview with Refugee 19 (Teleconference Interview, Afshin Afkari trans, 18 June 2013); Interview with Refugee x1 (University of Amsterdam, 13 March 2013); Interview with Refugee x2 (Teleconference Interview, 9 May 2013); Interview with Refugee x3 (University of Amsterdam, 1 April 2013); Interview with Refugee x4 (University of Amsterdam, 1 April 2013).

interviewed refugees defend the policy of forced separation and divorce as necessary for military and security reasons.¹⁰²

Leaving the MeK became increasingly difficult after 1991 and nearly impossible after 1994. All but five of the interviewed refugees communicated their desire to leave the organisation before the arrival of the American Army. They all received the same response: leaving was possible but only after a stay of one or two years in an exit facility in Camp Ashraf,¹⁰³ followed by six or eight years in Abu Ghraib prison as a punishment for illegal residence in Iraq.¹⁰⁴ According to some of the interviewed refugees, the 'no exit' policy was Rajavi's response to the Iranian Government's attempts at espionage (ie, sending spies to Iraq to 'reinforce' the ranks of the MeK).¹⁰⁵ MeK supporters who joined the organisation from abroad were, therefore, first thoroughly screened by the Iraqi security forces and, subsequently, by the MeK in a special section within Camp

¹⁰² Interview with Refugee 5 (Teleconference Interview, Anonymous trans, 14 April 2013) (noting that it was a solution of the organisation to solve the problem of a 3:1 men-women ratio in the MeK ranks); Interview with Refugee 4 (Teleconference Interview, Anonymous trans, 11 April 2013); Interview with Refugee 14 (Teleconference Interview, Afshin Afkari trans, 27 June 2013); Interview with Refugee 18 (Teleconference Interview, Afshin Afkari trans, 31 May 2013); Interview with Refugee x3 (University of Amsterdam, 1 April 2013); Interview with Refugee x4 (University of Amsterdam, 1 April 2013) (noting that it was logical that men and women were separated in a military camp).

¹⁰³ This was the former compound where families resided on weekends until 1991.

¹⁰⁴ After serving their sentence in Abu Ghraib they would be handed over to the Iranian Government in exchange for Iraqi POWs. This was consistently mentioned in interviews: Interview with Refugee 3 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 5 (Teleconference Interview, Mary Mehrian trans, 5 April 2013); Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 17 April 2013); Interview with Refugee 9 (Telephone Interview, Afshin Afkari trans, 19 April 2013); Interview with Refugee 10 (Telephone Interview, Afshin Afkari trans, 24 April 2013); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 25 April 2013); Interview with Refugee 12 (Teleconference Interview, Afshin Afkari trans, 3 May 2013); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 8 May 2013); Interview with Refugee 15 (Teleconference Interview, Afshin Afkari trans, 20 May 2013); Interview with Refugee 17 (University of Amsterdam, 29 May 2013). Only Refugees 1 and x2 mentioned other exit procedures: Interview with Refugee 1 (University of Amsterdam, 21 March 2013) ('half a year MeK prison, twelve years Abu Ghraib'); Interview with Refugee x2 (Teleconference Interview, 9 May 2013) ('two years MeK prison, five years Abu Ghraib'). See also *UNHCR Report 2008*, above n 8, [6]. The 'no exit' policy is captured in: National Public Radio, 'US-Protected Iranian Exiles in Limbo in Iraq', *Morning Edition*, 28 April 2008 (Anne Garrels) <<http://www.npr.org/templates/story/story.php?storyId=89990559>>.

¹⁰⁵ Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 15 April 2013); Interview with Refugee 15 (Teleconference Interview, Afshin Afkari trans, 20 May 2013); Interview with Refugee 17 (University of Amsterdam, 29 May 2013). According to one refugee, eight Mujahedin were killed after they walked into an ambush set up by a spy for the Iranian regime in 1997: Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 15 April 2013). This was, according to this refugee, a reason for the MeK to start purging its ranks.

Ashraf named ‘Admission’.¹⁰⁶ For new members in particular, expressing the desire to leave the MeK — or simply disagreeing with its policies — was considered to be an indication of collaboration with the Iranian Government.¹⁰⁷ Persons believed to be spies for the Iranian Government were imprisoned, sometimes for years.¹⁰⁸ The de facto prohibition on leaving Camp Ashraf was

¹⁰⁶ Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 15 April 2013); Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 18 April 2013); Interview with Refugee 9 (Telephone Interview, Afshin Afkari trans, 19 April 2013); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 25 April 2013); Interview with Refugee 12 (Teleconference Interview, Afshin Afkari trans, 3 May 2013); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 8 May 2013); Interview with Refugee 14 (Teleconference Interview, Afshin Afkari trans, 27 June 2013); Interview with Refugee 15 (Teleconference Interview, Afshin Afkari trans, 20 May 2013); Interview with Refugee 18 (Teleconference Interview, Afshin Afkari trans, 31 May 2013); Interview with Refugee 20 (Teleconference Interview, Afshin Afkari trans, 26 June 2013). Some refugees mention two sections: ‘Admission’ followed by ‘Acceptance’. The screening of recruits in Admission was conducted mostly through interviews and by an assessment of the responses on ideological classroom lessons. The time in ‘Admission’ varied per person, and ranged from two weeks (Interview with Refugee 14 (Teleconference Interview, Afshin Afkari trans, 27 June 2013)) to more than a year (Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 8 May 2013), who commented: ‘You can compare the MeK with a funnel, it has a broad entry, but the more involved you become, the smaller it gets, and the same is true for your freedom’). Another former member compared the MeK with a lock: every time you reached a new section in Camp Ashraf, you were not able to go back or forth until a new section was opened: Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 15 April 2013).

¹⁰⁷ Interview with Refugee 5 (Teleconference Interview, Mary Mehran trans, 5 April 2013); Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 15 April 2013); Interview with Refugee 9 (Telephone Interview, Afshin Afkari trans, 19 April 2013); Interview with Refugee 15 (Teleconference Interview, Afshin Afkari trans, 20 May 2013); Interview with Refugee 17 (University of Amsterdam, 29 May 2013).

¹⁰⁸ Interview with Refugee 5 (Teleconference Interview, Mary Mehran trans, 5 April 2013); Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 15 April 2013); Interview with Refugee 12 (Teleconference Interview, Afshin Afkari trans, 3 May 2013); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 8 May 2013); Interview with Refugee 15 (Teleconference Interview, Afshin Afkari trans, 20 May 2013); Interview with Refugee 17 (University of Amsterdam, 29 May 2013); Interview with Refugee x1 (University of Amsterdam, 13 March 2013). The duration of the imprisonment of the interviewed refugees ranged from two months (Interview with Refugee 5 (Teleconference Interview, Mary Mehran trans, 5 April 2013)) to three years (Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 8 May 2013)). According to Refugee 15, the set sentence for espionage on behalf of Iran was two years in a MeK prison, followed by 18 years in Abu Ghraib: Interview with Refugee 15 (Teleconference Interview, Afshin Afkari trans, 20 May 2013). Refugee 7 made reference to an edition of *Mojahed*, the official magazine of the MeK, containing photos of 150 alleged collaborators, including himself: Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 15 April 2013).

particularly unsettling for those who had been lured into the organisation under false pretences or had joined it directly from Iraqi prisons.¹⁰⁹

E Defection and the Establishment of the TIPF

The ‘no exit’ policy served as an effective barrier to defection, but that would change with the US-led invasion of Iraq (‘Operation Iraqi Freedom’) that commenced in March 2003. The MeK was designated a hostile military target and its camps were bombed in the early weeks of the invasion.¹¹⁰ However, the

¹⁰⁹ The practice of recruitment in Iraqi prisons, and of persons on their beam-end due to drug addiction or rejected asylum applications, is overwhelmingly confirmed: Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 18 June 2013); Interview with Refugee 3 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 5 (Teleconference Interview, Mary Mehrian trans, 5 April 2013); Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 17 April 2013); Interview with Refugee 9 (Telephone Interview, Afshin Afkari trans, 19 April 2013); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 25 April 2013); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 8 May 2013); Interview with Refugee 14 (Teleconference Interview, Afshin Afkari trans, 27 June 2013); Interview with Refugee 16 (Teleconference Interview, Afshin Afkari trans, 23 May 2013); Interview with Refugee 17 (University of Amsterdam, 29 May 2013); Interview with Refugee x1 (University of Amsterdam, 13 March 2013). According to Goulka et al,

[a] full quarter (approximately 1500 to 1800) had been POWs, and 45 [per cent] had arrived at Camp Ashraf after the 1988 move to Iraq. Thus, it is possible that nearly 70 [per cent] of the MeK population may have been recruited through deception and kept at Camp Ashraf against their will.

Goulka et al, above n 5, 74. See also United Nations Assistance Mission for Iraq, ‘Human Rights Report: 1 January — 20 June 2009’ (Report, 2009) [52] <http://www.ohchr.org/Documents/Countries/IQ/UNAMI_Human_Rights_Report15_January_June_2009_EN.pdf> (noting that former residents of Camp Ashraf ‘confirmed some of the previous findings that some residents may have been brought into the Camp on false pretenses, while trying to leave Iran for western Europe or the United States of America, and once there, were denied the right to leave’). See also US Embassy Baghdad, ‘UNHCR and ICRC on MeK: You Took Them, You Own Them’, above n 32, para 9.

¹¹⁰ Siobhán Wills, ‘The Obligations Due to Former “Protected Persons” in Conflicts that Have Ceased to be International: The People’s Mujahedin Organization of Iran’ (2010) 15 *Journal of Conflict & Security Law* 117, 123; Jehl, above n 42; Goulka et al, above n 5, 9. This was confirmed in: Interview with Refugee 1 (University of Amsterdam, 21 March 2013); Interview with Refugee 2 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 3 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 5 (Teleconference Interview, Mary Mehrian trans, 5 April 2013); Interview with Refugee 9 (Telephone Interview, Afshin Afkari trans, 19 April 2013); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 8 May 2013); Interview with Refugee 14 (Teleconference Interview, Afshin Afkari trans, 27 June 2013); Interview with Refugee 20 (Teleconference Interview, Afshin Afkari trans, 26 June 2013). The camps were relatively empty at the time, since most members of the MeK were holding camp near the Iranian border or were otherwise spread over Diyala province: Interview with Refugee 3 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 5 (Teleconference Interview, Mary Mehrian trans, 5 April 2013); Interview with Refugee 9 (Telephone Interview, Afshin Afkari trans, 19 April 2013); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 8 May 2013); Interview with Refugee 14 (Teleconference Interview, Afshin Afkari trans, 27 June 2013). According to Wright, MeK leaders were tipped off by US military commanders so that they would be safe from bombing and targeting by Coalition warplanes: Darron L Wright, *Iraq Full Circle: From Shock and Awe to the Last Combat Patrol in Baghdad and Beyond* (Osprey, 2012) 61. Goulka et al note that the bombing was the result of negotiations between the US and Iran: ‘the United States agreed to bomb MeK bases in return for Iranian support for subsequent reconstruction efforts and cooperation in rescuing downed pilots’: Goulka et al, above n 5, 9–10. Jehl also suggests that the US and Iran held negotiations, but in exchange for Iranian neutrality during the war: Jehl, above n 42.

US military¹¹¹ was soon convinced by the MeK leaders — claiming they were a neutral party — to sign a ceasefire agreement on 15 April 2003.¹¹² Curiously,¹¹³ the Americans left the MeK in possession of its weapons, consisting of ‘2,139 tanks, armoured personnel carriers, artillery pieces, air defense artillery pieces, and miscellaneous vehicles’.¹¹⁴ On 10 May, a new agreement was signed that effectively disarmed the MeK and concentrated all 3855 MeK members¹¹⁵ in Camp Ashraf.¹¹⁶ A forward operating base was constructed adjacent to Camp Ashraf to house American military personnel.¹¹⁷

In the course of the following months, identification interviews were conducted with all the residents¹¹⁸ by the Joint Interagency Task Force at Camp Ashraf (‘JIATF’), consisting of administrators from several US Government departments and officials from the Central Intelligence Agency and Federal Bureau of Investigation.¹¹⁹ Every resident was issued an identification card with a photo and the emblem of the MeK (these were, however, immediately confiscated by the MeK leadership).¹²⁰

¹¹¹ The US military was principally responsible for the MeK and Camp Ashraf: see below Parts III, V and VI.

¹¹² The *Local Ceasefire Agreement of Mutual Understanding and Co-Ordination* is reproduced in Livingstone, above n 44, 107–10. For a more detailed account of the negotiations that led to a ceasefire, see Goulka et al, above n 5, 10–11.

¹¹³ The MeK was still listed by the US as a FTO at the time.

¹¹⁴ Wright, above n 110, 360.

¹¹⁵ *530th Military Police Briefing*, above n 94, 5; Wills, above n 110, 123.

¹¹⁶ Wright, above n 110, 360. Goulka et al note that the Ashraf residents were required to sign a document renouncing terrorism and the use of violence as part of this agreement: Goulka et al, above n 5, 12. Goulka et al refer to the *Release Agreement*, which would be presented to the Ashraf and TIPF residents in the summer of 2004: see above Part III.

¹¹⁷ Goulka et al, above n 5, 12–13. The Forward Operating Base (‘FOB’) was named Spartan, Red Lion, Barbarian and Grizzly consecutively.

¹¹⁸ Interview with Refugee 1 (University of Amsterdam, 21 March 2013); Interview with Refugee 2 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 3 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 5 (Teleconference Interview, Mary Mehrian trans, 5 April 2013); Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013); Interview with Refugee 9 (Telephone Interview, Afshin Afkari trans, 19 April 2013); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 25 April 2013); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 15 May 2013); Interview with Refugee 14 (Teleconference Interview, Afshin Afkari trans, 27 June 2013); Interview with Refugee 15 (Teleconference Interview, Afshin Afkari trans, 20 May 2013); Interview with Refugee 16 (Teleconference Interview, Afshin Afkari trans, 23 May 2013); Interview with Refugee 17 (University of Amsterdam, 29 May 2013).

¹¹⁹ Goulka et al, above n 5, 16. The interviews included questions regarding personal details and reasons for joining the MeK: Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 25 April 2013); Interview with Refugee 12 (Teleconference Interview, Afshin Afkari trans, 3 May 2013); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 8 May 2013); Interview with Refugee 15 (Teleconference Interview, Afshin Afkari trans, 20 May 2013); Interview with Refugee 17 (University of Amsterdam, 29 May 2013).

¹²⁰ Interview with Refugee 5 (Teleconference Interview, Afshin Afkari trans, 19 April 2013); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 25 April 2013); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 15 May 2013); Interview with Refugee 14 (Teleconference Interview, Afshin Afkari trans, 27 June 2013); Interview with Refugee 15 (Teleconference Interview, Afshin Afkari trans, 20 May 2013); Interview with Refugee 17 (University of Amsterdam, 29 May 2013); Interview with Refugee 19 (Teleconference Interview, Afshin Afkari trans, 18 June 2013). A copy of an identification card belonging to one of the interviewed refugees is on file with the authors.

Although some of the dissatisfied Ashraf residents knew they wanted to leave the organisation, they refrained from disclosing this in their interviews with American officials.¹²¹ The MeK strongly discouraged its members from availing themselves of the protection of the US Army in order to leave Camp Ashraf: stories of rape and violence were spread, which kept the female members of the MeK, in particular, from leaving Camp Ashraf.¹²² Even so, several residents made it clear during the interviews with the JIATF that they wanted to leave the organisation whilst others simply tried to escape from the camp.¹²³

Although many residents just wanted to leave Camp Ashraf and find their own way to Europe, they were told that they either had to stay with the MeK or avail themselves of US protection.¹²⁴ The US Army — apparently unaware of the level of discontent among the Mujahedin¹²⁵ — found an ad hoc solution for the first wave of defectors by using an enclosed area in the northern part of Camp Ashraf, consisting of 10 to 15 bungalows, which was called ‘the

¹²¹ Goulka et al state that no translators were assigned to the Joint Interagency Task Force (‘JIATF’) at Camp Ashraf: Goulka et al, above n 5, 37. From this it can be inferred that members of the MeK must have acted as interpreters. This is confirmed in: Interview with Refugee 3 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 25 April 2013); Interview with Refugee 14 (Teleconference Interview, Afshin Afkari trans, 27 June 2013). However, this was denied in: Interview with Refugee 5 (Teleconference Interview, Mary Mehrrian trans, 5 April 2013); Interview with Refugee 15 (Teleconference Interview, Afshin Afkari trans, 20 May 2013); Interview with Refugee 20 (Teleconference Interview, Afshin Afkari trans, 26 June 2013); Email from Refugee 17 to Tom de Boer, 25 June 2013.

¹²² Interview with Refugee 3 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 4 (Teleconference Interview, Afshin Afkari trans, 17 April 2013); Interview with Refugee 5 (Teleconference Interview, Mary Mehrrian trans, 5 April 2013); Interview with Refugee 9 (Telephone Interview, Afshin Afkari trans, 19 April 2013); Interview with Refugee 14 (Teleconference Interview, Afshin Afkari trans, 27 June 2013); Interview with Refugee 16 (Teleconference Interview, Afshin Afkari trans, 23 May 2013); Interview with Refugee 20 (Teleconference Interview, Afshin Afkari trans, 26 June 2013); Interview with Refugee x1 (University of Amsterdam, 13 March 2013).

¹²³ Interview with Refugee 1 (University of Amsterdam, 21 March 2013); Interview with Refugee 5 (Teleconference Interview, Mary Mehrrian trans, 5 April 2013); Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 15 April 2013); Interview with Refugee 10 (Telephone Interview, Afshin Afkari trans, 24 April 2013); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 8 May 2013); Interview with Refugee x1 (University of Amsterdam, 13 March 2013).

¹²⁴ Interview with Refugee 2 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 12 April 2013); Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 18 April 2013); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 8 May 2013); Interview with Refugee 17 (University of Amsterdam, 29 May 2013); Interview with Refugee 19 (Teleconference Interview, Afshin Afkari trans, 18 June 2013). It is clear from the interviews that release was never considered by either the MeK or the US Army. Individuals who asked the MeK — instead of the US Army — if they could leave were imprisoned (sometimes for several days, sometimes for up to a year) and subsequently handed over to the US Army.

¹²⁵ The US Army did not have a standard procedure in place for the defectors: Goulka et al, above n 5, 44–8. This was also the impression of most of the interviewed refugees.

Guesthouse' ('*mehman sara*') by the MeK.¹²⁶ The Americans called it the 'Exit Facility'.¹²⁷ The interviewed refugees who were part of this first wave describe the initial American attitude as friendly and supportive; the defectors were praised for turning their backs on a terrorist organisation and were informed that a final disposition in the form of resettlement to a third country would be found before the end of 2004.¹²⁸

However, the American attitude appears to have changed dramatically in early 2004: virtually overnight, the internees were no longer called guests, but terrorists.¹²⁹ Water, food and cigarette rations were rapidly cut, which provoked a protest among the residents that was broken up by a special US Army force in a violent early morning raid.¹³⁰ During this intervention, 42 persons were placed, hand- and foot-cuffed and with burlap sacks over their heads, in a completely dark ammunition storehouse for two weeks, during which time they were reportedly mistreated.¹³¹

On 14 February 2004, the MeK's composition was, according to a US Army brief, 3704 in the main camp, 109 in the Exit Facility and 42 in the Temporary Internment Facility ('TIF').¹³² Thus, at that point in time, 151 persons had left

¹²⁶ Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 15 April 2013); Interview with Refugee 10 (Telephone Interview, Afshin Afkari trans, 24 April 2013); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 26 April 2013); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 8 May 2013); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 15 May 2013); Email from Refugee 17 to Tom de Boer, 25 June 2013; Email from Refugee x1 to Tom de Boer, 23 June 2013. See also *Hoshyar Diary*, above n 30, ch 2.

¹²⁷ *530th Military Police Briefing*, above n 94, 5.

¹²⁸ Interview with Refugee 10 (Telephone Interview, Afshin Afkari trans, 24 April 2013); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 8 May 2013); *Hoshyar Diary*, above n 30, ch 2.

¹²⁹ Interview with Refugee 10 (Telephone Interview, Afshin Afkari trans, 24 April 2013); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 8 May 2013); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 15 May 2013). See also *Hoshyar Diary*, above n 30, ch 2. According to Hoshyar, one of the soldiers screamed: 'You are members of a terrorist organization in Iraq, and you will stay here as long as this organization!' Two more interviewed refugees also remember being called a terrorist: Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 24 April 2013); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 26 April 2013). See below Part III.

¹³⁰ Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 8 May 2013); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 15 May 2013); Email from Refugee 13 to Tom de Boer, 23 June 2013; *Hoshyar Diary*, above n 30, ch 3. The story is confirmed by another refugee, who was not a witness: Interview with Refugee 5 (Teleconference Interview, Afshin Afkari trans, 19 April 2013). One of the alleged mistreatments (members of the US armed forces taking pictures while putting a foot on the face of an internee) is confirmed in: Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 24 April 2013). For an account of this event by the US commander leading the raid, see Flott, above n 93, 32:

The 530th also had to deal with a group of about 150 defectors from the main [MeK] body, some of whom were causing dissension in the camp. Novotny responded with a predawn raid on [MeK] quarters during which about 40 of the defectors were bagged and separated from the main group.

¹³¹ Recounted in: Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 8 May 2013); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 15 May 2013); Email from Refugee 13 to Tom de Boer, 23 June 2013; *Hoshyar Diary*, above n 30, ch 3. Also noted by another refugee, who was not an eye witness: Interview with Refugee 5 (Teleconference Interview, Afshin Afkari trans, 19 April 2013).

¹³² *530th Military Police Briefing*, above n 94, 5.

the MeK, 42 of whom were held in the ammunition storehouse, apparently called the TIF by the US Army.¹³³ On 18 February 2004, the residents of the Exit Facility in Camp Ashraf were moved to a new camp, the TIFP.¹³⁴ They were joined, 2 days later, by the 42 detainees from the TIF.¹³⁵ In the following year, the number of defectors would increase to more than 500.¹³⁶

III THE TIFP: INTERNMENT OF PROTECTED PERSONS

The TIFP would exist for more than four years. Based on the interviews, a distinction can be made between the period running from the establishment of the TIFP in February 2004 until the autumn¹³⁷ of 2006 and from that time until its closure in 2008. In the first period, the residents of the TIFP were regarded and treated as enemies, possibly on account of the designation of the MeK as a FTO, regardless of the fact that they were defectors who had been given the status of protected persons under *Geneva Convention IV*. In this period, the majority of the TIFP residents returned to Iran, partly to escape the dire conditions of internment.¹³⁸ In the second period, the remaining residents were recognised as refugees by UNHCR and received better treatment. This Part aims to explain the basis on which the TIFP residents were interned and describes the living conditions during the first period, particularly the extent to which they were in violation of the applicable international humanitarian law.

As far as the applicable legal framework is concerned, the focus throughout the article will be on international humanitarian law. Although human rights and refugee law are arguably applicable as well, addressing the American presumption against the extraterritorial application of those particular fields of law would detract from the argument. Even if the US position in this respect can be held to be at variance with international law,¹³⁹ the scope of the current article

¹³³ Ibid 19.

¹³⁴ *Hoshyar Diary*, above n 30, ch 3.

¹³⁵ Ibid. Confirmed by one of the persons detained in the storehouse: Email from Refugee 13 to Tom de Boer, Afshin Afkari trans, 24 June 2013.

¹³⁶ See below Parts III and IV.

¹³⁷ Whenever seasons are mentioned, these are referring to Iraqi seasons.

¹³⁸ See below Part IV.

¹³⁹ It seems to be generally accepted that ‘effective control’ serves as an exception to the territorial application of human rights and refugee law: see, eg, *Haitian Center for Human Rights v United States* (Inter-American Commission on Human Rights, Report No 51/96, Case 10.675, 13 March 1997) [156]–[158]; United Nations High Commissioner for Refugees, ‘Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 *Convention relating to the Status of Refugees* and its 1967 *Protocol*’ (Advisory Opinion, 26 January 2007); Guy S Goodwin-Gill, ‘The Haitian Refoulement Case: A Comment’ (1994) 6 *International Journal of Refugee Law* 103. See also the European Court of Human Rights (‘ECtHR’) in the cases of: *Al Jedda v United Kingdom* (2011) 53 EHRR 23 (‘*Al Jedda*’); *Al Skeini v United Kingdom* (2011) 53 EHRR 567 (‘*Al Skeini*’) (involving human rights violations by the UK during the war in Iraq). The US also holds a minority position on the issue of dual applicability of international humanitarian and human rights law and deems these legal regimes to be mutually exclusive: see, eg, Michael J Dennis, ‘Application of Human Rights Treaties Extraterritorially to Detention of Combatants and Security Internees: Fuzzy Thinking All Around?’ (2006) 12 *ILSA Journal of International & Comparative Law* 459. Contrary to the US position, the International Court of Justice has decided that ‘the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation’: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, 46 [106].

does not extend to advocating the doctrine of extraterritorial jurisdiction in the sense indicated.

Besides obligations under international humanitarian law, the US — albeit formally part of MNF-I — voluntarily incurred contractual obligations vis-a-vis the residents of the TIPF by means of the *Release Agreement* it concluded with each individual resident. As far as the US acting as part of the collective MNF-I is concerned, it will be argued that the US had effective control over the TIPF residents and, accordingly, was legally responsible for them.

A *The Legal Status of the TIPF Residents and Their Internment*

1 *Protected Persons under Geneva Convention IV*

The legal status of the TIPF residents — and the same applies to the residents of Camp Ashraf — was that of protected persons under *Geneva Convention IV*, which meant that the residents were considered to be civilians rather than (enemy) prisoners of war.¹⁴⁰ This determination had been made by US Secretary of Defense Donald Rumsfeld,¹⁴¹ against the advice of the ICRC,¹⁴² three days before the establishment of the Iraqi Interim Government on 28 June 2004. According to, among others, the ICRC and the UN this changed the (legal) character of the armed conflict from an international to an internal one.¹⁴³ Alongside this change, the applicability of any one of the *Geneva Conventions* would have given way to the much less specific protection afforded by Common

¹⁴⁰ Before June 2004, the inhabitants of Camp Ashraf had been referred to as (enemy) prisoners of war: Goulka et al, above n 5, xiv, 5. This was confirmed by a number of refugees: Interview with Refugee 3 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 4 (Teleconference Interview, Anonymous trans, 28 March 2013); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 26 April 2013); Interview with Refugee 15 (Teleconference Interview, Afshin Afkari trans, 20 May 2013); Interview with Refugee 18 (Teleconference Interview, Afshin Afkari trans, 31 May 2013). The Camp Ashraf Mission Brief for Major General Antonio Taguba tellingly contains key provisions of *Geneva Convention (III) on Prisoners of War* and not any of *Geneva Convention IV: 530th Military Police Briefing*, above n 94.

¹⁴¹ Apparently following the advice given to him by Professor Bassiouni: M Cherif Bassiouni, 'Legal Status of US Forces in Iraq from 2003–2008' (2010) 11 *Chicago Journal of International Law* 1, 31 n 160.

¹⁴² Goulka et al add that it was considered to be a controversial decision since the MeK members would likely have qualified as combatants: Goulka et al, above n 5, xiv, 19–21. It is not clear why this determination was made when it was known that the MNF-I's occupation of Iraq would terminate at the end of June, but it was apparently to facilitate collaboration with UNHCR and the ICRC (Goulka et al, above n 5, 19) (possibly to secure control over the MeK based on political motives vis-a-vis Iran).

¹⁴³ See SC Res 1546, UN SCOR, 59th sess, 4987th mtg, UN Doc S/RES/1546 (8 June 2004) para 2 (emphasis in original) ('*Resolution 1546*'): 'Welcomes that, also by 30 June 2004, the occupation will end'; Daniel Thürer, 'Current Challenges to the Law of Occupation' (Speech delivered at the 6th Bruges Colloquium, 21 October 2005) <<http://www.icrc.org/eng/resources/documents/statement/occupation-statement-211105.htm>> (referring to the ensuing conflict as an 'internationalised internal armed conflict'). See also Wills, above n 110, 119; International Committee of the Red Cross, *Iraq Post 28 June 2004: Protecting Persons Deprived of Freedom Remains a Priority* (5 August 2004) <<http://www.icrc.org/eng/resources/documents/misc/63kkj8.htm>>.

Article 3 and the customary rules applicable to non-international armed conflicts.¹⁴⁴

The decision of US Secretary of Defense Rumsfeld had far-reaching consequences. Quite some time had elapsed since the US invasion of Iraq and the status of the inhabitants of Camp Ashraf had hung in the balance ever since. As indicated above, the timing of his decision pre-empted some of the legal consequences resulting from the establishment of the Iraqi Interim Government. The decision ensured that the TIPF residents would be protected by *Geneva Convention IV* and, by virtue of art 6 of that *Convention*,¹⁴⁵ continue to be protected until they were released, repatriated or resettled.¹⁴⁶ For about 100 residents of the TIPF, this would mean until the end of 2007 when they could leave the TIPF; and for another 100, early 2008, when they were forced to leave the TIPF.¹⁴⁷

The collective designation of the TIPF residents as protected persons was announced after they had gone through two phases of processing: an identification process (fingerprinting, DNA collection and retinal or iris

¹⁴⁴ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention IV* (collectively 'Geneva Conventions'). See International Committee of the Red Cross, *Iraq Post 28 June 2004*, above n 143.

¹⁴⁵ Article 6 provides that protected persons whose release, repatriation or re-establishment may take place after the date *Geneva Convention IV* ceases to apply (one year after the general close of military operations in occupied territory) shall continue to benefit by the *Convention*. See also International Committee of the Red Cross, *Iraq Post 28 June 2004*, above n 143.

¹⁴⁶ Article 6 appears to give two distinct possibilities: a set period of time in case of an end to occupation, and an open one that is related to release, repatriation or re-establishment. As to the former possibility, it is a moot point whether the establishment of the Iraqi Interim Government signified an end to the occupation: see SC Res 1483, UN SCOR, 58th sess, 4761st mtg, UN Doc S/RES/1483 (22 May 2003); Zouhair Al Hassani, 'International Humanitarian Law and Its Implementation in Iraq' (2008) 90 *International Review of the Red Cross* 51, 52–4. See also Wills, above n 110, 132–3, citing *Prosecutor v Naletilić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-34-T, 31 March 2003). If not, *Geneva Convention IV* would continue to apply until the moment of release, repatriation or re-establishment. If so, other arguments would presumably entail continued applicability, such as the fact that the US retained effective control over the TIPF (and Camp Ashraf) residents: cf Pictet, above n 4, 64 (discussing in relation to art 6 merely falling into the hands of a party to the conflict). The commentary is very clear: 'in occupied territories, where an Occupying Power considers it necessary to prolong the internment of certain persons after the time limit of one year has expired, the persons concerned will continue to enjoy all their rights under the *Convention*'. Interestingly, the commentary also refers to resettlement as a solution for protected persons who cannot be repatriated or locally integrated: see Part V(D)(3). For additional legal bases for continued protection obligations, see Wills, above n 110, 134–7 (referring to arts 45, 47 and 49 of *Geneva Convention IV*).

¹⁴⁷ See below Part V.

scans);¹⁴⁸ and a screening process with a view to determining their involvement in past criminal or terrorist acts in Iraq, Iran or elsewhere.¹⁴⁹ On 2 July 2004, the former and current MeK members were notified about their status as ‘protected persons’ under *Geneva Convention IV* and were informed that this status had been communicated to the ICRC.¹⁵⁰ Since then, this particular status was ‘repeatedly confirmed by US officials in Iraq’.¹⁵¹ For instance, the commander of MNF-I, General David Petraeus, repeated in September 2008 that the MeK enjoyed protected persons status.¹⁵² In short, the US considered the residents of the TIPF to be protected persons under *Geneva Convention IV* throughout their internment.¹⁵³

2 The Release Agreement

On 21 July 2004, the residents of Camp Ashraf were sent a letter by Major General Geoffrey D Miller, then-deputy commander of MNF-I:

I am writing to congratulate each individual living in Camp Ashraf on their recognition as protected persons under the Fourth *Geneva Convention*. This determination will assist in expediting the efforts of international organizations in your disposition as individuals in accordance with applicable international law.

You have signed an *Agreement* rejecting violence and terrorism. This sends a strong signal and is a powerful first step on the road to your final individual disposition.

In our efforts to reach a peaceful future for the people of Camp Ashraf, we will continue to seek the best disposition for each individual and commend you all for your patience and cooperation during this lengthy process.¹⁵⁴

On 6 August 2004, Major General Miller informed the residents of the TIPF that:

The road to determining your individual disposition has gone well. Virtually all of you have signed the *Release Agreement* and your legal status as protected persons under the 4th *Geneva Convention* has been resolved.

¹⁴⁸ Interview with Refugee 1 (University of Amsterdam, 21 March 2013); Interview with Refugee 3 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 5 (Teleconference Interview, Mary Mehrian trans, 5 April 2013); Interview with Refugee 9 (Telephone Interview, Afshin Afkari trans, 19 April 2013); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 25 April 2013); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 15 May 2013).

¹⁴⁹ *UNHCR Report 2008*, above n 8, [4]. See also *530th Military Police Briefing*, above n 94, 8.

¹⁵⁰ ‘Proclamation by the Commander, Multi-National Forces–Iraq, on the Signing of the *Agreement for the Individuals of the People’s Mujahedin Organization of Iran (PMOI)* at Ashraf, Iraq, 2 July 2004’ reproduced in Livingstone, above n 44, 119. According to UNHCR, the residents of the TIPF acquired the status of protected person on account of their defection from the MeK: ‘As a result of their decision to disassociate from the [MeK], the US deemed them to be civilians, protected under the *Geneva Conventions*’: *UNHCR Report 2008*, above n 8, [8]. However, since many of them had already been given the status of protected person when they were still in Camp Ashraf, the decisive criterion was not their dissociation from the MeK.

¹⁵¹ *UNHCR Report 2008*, above n 8, 2 n 3.

¹⁵² Wills, above n 110, 125.

¹⁵³ The same was true of the residents of Camp Ashraf.

¹⁵⁴ Letter from Major General Geoffrey D Miller to People of Ashraf, 21 July 2004 (copy on file with authors). Note that, where a document is referred to in a quote, the title of the document is italicised to comply with the *Australian Guide to Legal Citation* and not because the title was emphasised in the original text.

I must tell you that in this ongoing process, each individual's case is different. We will ensure that you will have the opportunity to discuss your individual case with the international agencies such as the ICRC and the UNHCR as a part of the decision on your final disposition.

You have shown great courage in asking for US protection and leaving your former life to come to the TIPF.¹⁵⁵

Major General Miller refers in both letters to the *Release Agreement*, which was signed by virtually all TIPF and Camp Ashraf residents in the months following their designation as protected persons.¹⁵⁶ The *Release Agreement* was introduced by the following text:

You are being offered your release from control and protection in exchange for your promise to comply with certain conditions. In exchange for your promises, you will be released from Multi-National Forces — Iraq control and protection as soon as reasonably practicable.

The text of the agreement itself is as follows:

I, [name], knowingly, willingly, and voluntarily enter into this *Agreement* with Multi-National Forces — Iraq. I agree to the following:

- (a) I reject participation in, or support for terrorism.
- (b) I have delivered all military equipment and weapons under my control or responsibility.
- (c) I reject violence and I will not unlawfully take up arms or engage in any hostile act. I will obey the laws of Iraq and relevant United Nations mandates while residing in this country.

I understand that I will be free to leave and to return home when viable disposition options become available. I understand that some of these disposition options include: return to my nation of origin; admission to a third country; application to the Ministry of Displacement and Migration for continued residency in Iraq, or application to international organizations such as the United Nations High Commissioner for Refugees. I agree to cooperate with Multi-National Forces — Iraq while these disposition options are pursued. I agree to remain under the protection of Multi-National Forces — Iraq at Camp Ashraf until these options are completed. If I violate any terms of this *Agreement*, I may be subject to prosecution or internment, and administrative sanctions. I promise to scrupulously comply with my *Agreement*.

¹⁵⁵ Letter from Major General Geoffrey D Miller to TIPF Residents, 6 August 2004 (copy on file with authors). 'Virtually all', as: one of the interviewed refugees never signed the agreement: Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 18 April 2013). Refugee 8 later added that he was threatened and pressured until the last day in the TIPF to sign the agreement: Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 24 April 2013).

¹⁵⁶ For those who had left Camp Ashraf before July 2004, or had not signed the *Release Agreement* when still in Camp Ashraf, signing the *Release Agreement* took place in the TIPF: Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013). Apparently the MeK cautioned its members that only those who wanted to stay with the MeK should sign the agreement: Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013); Interview with Refugee 19 (Teleconference Interview, Afshin Afkari trans, 18 June 2013). Those who did not sign were, later in the TIPF, considered to be terrorists on account of the fact that they had not signed the agreement: Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013).

It is a moot point whether the signing of this agreement was voluntary, since the residents were not given the option not to sign and a few of the interviewed refugees indicated that their signature had been obtained by duress.¹⁵⁷

In any case, the *Release Agreement* formed a contract which laid down mutual obligations: the US undertook the responsibility to protect the TIPF residents until a viable disposition option became available and, until that time, the TIPF residents agreed to remain under US control and protection. The *Release Agreement* also enjoined the US to pursue viable disposition options: return to Iran, resettlement in a third state, settlement in Iraq or application to international organisations such as UNHCR. The release of the TIPF residents from US control and protection was thus made dependent on the realisation of viable disposition options.

3 *Freedom Village: Internment or Detention?*

After their designation as protected persons, the TIPF residents were issued with an identification card marked 'FREEDOM VILLAGE', on which the following text was printed: 'The card holder is a PROTECTED PERSON under the terms of the 4th Geneva Convention. Furthermore the card holder has voluntarily left the [MeK] Organization and is awaiting repatriation or resettlement'.¹⁵⁸

The epithet 'Freedom Village' is difficult to reconcile with the facts on the ground: the US Army described the TIPF as 'a completely enclosed and locked facility surrounded by a barbed wire fence, guard towers, HESCO barriers [an earth-filled defensive barrier], and concertina wire'¹⁵⁹ and as 'a military prison. without any outer connection [sic]'.¹⁶⁰ When asked whether they could leave the TIPF, the interviewed refugees answered that they could not: they were deprived of the freedom to leave throughout their stay in the camp. While attempts to escape the TIPF were numerous¹⁶¹ — one of the interviewed refugees tried to

¹⁵⁷ That is, they were pressured by either the MeK (Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 30 June 2013) (it was a MeK order); Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 18 April 2013); Interview with Refugee 17 (University of Amsterdam, 29 May 2013)) or by the US military (Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013)). Refugee 8 indicated that he never signed it: see above n 155. Another stated that he did not understand what he signed since the text of the agreement was in English: see *Hoshyar Diary*, above n 30. One refugee refused to sign when in Camp Ashraf in the hope the refusal would make him stand out and bring him quicker under the protection of the US; he signed when he arrived in the TIPF: Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 25 April 2013).

¹⁵⁸ Capital letters in original. One such card is on file with the authors.

¹⁵⁹ T J Welsh, Memorandum for Commander, Joint Interagency Task Force, Iraq, Task Force 134, 382nd MP BN, APO AE 09391, 4 March 2007.

¹⁶⁰ The description was printed on a photograph (copy on file with the authors) of the TIPF made by the US military. The photograph is dated 15 May 2005 and was part of the series 'Spartans', presumably named after the FOB at the time that was named 'Spartan': see above n 117.

¹⁶¹ Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 12 April 2013) ('thirty persons managed to escape the TIPF'); Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013); Interview with Refugee 12 (Teleconference Interview, Afshin Afkari trans, 3 May 2013); Interview with Refugee 18 (Teleconference Interview, Afshin Afkari trans, 31 May 2013). See also *Hoshyar Diary*, above n 30.

escape with a friend by hiding under the garbage in a refuse-lorry¹⁶² — they were rarely successful. Moreover, escape attempts had repercussions as may be inferred from the following announcement: ‘Due to the unauthorized exit of the [facility] by two members of the TIPF, routine (day/night) head counts will be conducted’.¹⁶³

Considering the fact that the residents had been designated as protected persons, the question is what the nature of the deprivation of their freedom was in the sense of *Geneva Convention IV*. *Geneva Convention IV* allows taking recourse to internment and assigned residence, both exceptionally severe measures of control.¹⁶⁴ Article 78 states that ‘[i]f the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment’. Internment or assigned residence is warranted in cases where the security of the detaining power makes it absolutely necessary¹⁶⁵ or if the protected person voluntarily demands internment.¹⁶⁶ With regard to the MeK and its defectors, the security of the detaining power was not an issue¹⁶⁷ and the question is, therefore, whether the internment of the TIPF residents was an instance of voluntary internment — that is, internment at the request of the protected persons concerned. The *Release Agreement* contains the phrase: ‘I understand that I will be free to leave and to return home when viable disposition options become available’. Consequently, it is likely that the American perspective was that the TIPF residents were indeed voluntarily interned.¹⁶⁸ The reason why they were assumed to have requested internment can be inferred from the *Release Agreement* since it exchanges freedom for protection. A letter

¹⁶² Interview with Refugee 12 (Teleconference Interview, Afshin Afkari trans, 3 May 2013); Interview with Refugee 17 (University of Amsterdam, 29 May 2013).

¹⁶³ Lieutenant-Colonel Anthony L Palumbo II, ‘Memorandum for Residents of the Temporary Interview and Protection Facility’ (Memorandum, 14 September 2006). On the head counts, see above Part III(B)(1)(a).

¹⁶⁴ *Geneva Convention IV* art 41. ‘Internment’ is a form of ‘assigned residence’, internment being more severe as it generally implies an obligation to live in a camp with other internees: Pictet, above n 4, 255, 259 (arts 41 and 43).

¹⁶⁵ *Geneva Convention IV* art 42. As far as one would argue that the mandate given to MNF-I by the UN Security Council served as a legal basis for the internment of the MeK defectors, reference should be made to the fact that the MeK had already been interned before the presence of MNF-I in Iraq was — ex Chapter VII of the *UN Charter* — authorised by the Council and its mandate defined in: SC Res 1511, UN SCOR, 57th sess, 4844th mtg, UN Doc S/RES/1511 (16 October 2003) (*Resolution 1511*). In addition, the US Army never related the internment to any Security Council resolution. Furthermore, internment was only allowed ‘for imperative reasons of security’: *Resolution 1546*, UN Doc S/RES/1546, annex. The fact that the US considered the internment to be of a voluntary nature (see below) already demonstrates that this was not the case. See also Francesco Messineo, ‘The House of Lords in *Al-Jedda* and Public International Law: Attribution of Conduct to UN-Authorized Forces and the Power of the Security Council to Displace Human Rights’ (2009) 56 *Netherlands International Law Review* 35, 53–6 (arguing that although the resolutions of the Security Council changed the legal basis of MNF-I’s presence in Iraq, it did not alter its obligations under international humanitarian law); Laurent Collassis, ‘The Role of the International Committee of the Red Cross in Stability Operations’ in Raul A Pedrozo (ed), *The War in Iraq: A Legal Analysis* (US Naval War College, 2010) 457, 460–1.

¹⁶⁶ *Geneva Convention IV* art 42.

¹⁶⁷ Cf Goulka et al, above n 5, xi, 8. See also at 17 n 28: ‘Former MeK members were housed at the TIPF according to the voluntary internment provision of the Fourth *Geneva Convention*, not as security threats’.

¹⁶⁸ Cf *ibid* 5 n 14.

by Major General Miller addressed to the TIPF residents explicitly acknowledged this: ‘You have shown great courage in asking for US protection’ and ‘[y]our safety is our primary concern and Iraq is not yet a safe place due to the attacks of anti-democratic forces’.¹⁶⁹ Wholly in conformity with this concern, the US Chief, Detainee, Judicial and Legal Policy, T J Welsh, observed that the Iraqi Government had not officially authorised members of the MeK or defectors from the MeK to reside in Iraq or to travel in Iraq unescorted:

As such, MNF-I, in coordination with the US Embassy, has imposed travel restrictions upon all the protected persons living in Ashraf *as a security measure for their protection*. Furthermore, the individuals residing in the TIPF are maintained under guard as protection against the residents of the Ashraf [sic] in addition to threats external to the town.¹⁷⁰

UNHCR, for its part, observed that the TIPF residents ‘are currently under the protection of the US-led MNF-I’ and that ‘their physical security seems to be only possible through their confinement’,¹⁷¹ that is, ‘a detention-like situation’ where the inhabitants are ‘only allowed to exit the facility in case of life threatening medical conditions’¹⁷² or if they decided to return to Iran.¹⁷³

This impression of detention is reinforced by a memorandum of US Chief, Detainee, Judicial and Legal Policy Welsh, which was addressed at the Commander of the JIATF and drawn up in response to a request of one of the TIPF residents to leave the TIPF.¹⁷⁴ The memorandum simply proceeds from the applicability of *Geneva Convention IV*, wholly focuses on the meaning and purport of art 8 thereof (‘[p]rotected persons may in no circumstances renounce in part or in entirety the rights secured to them by the present *Convention*’) and concludes that ‘you do not have the authority to allow any of the protected persons at Ashraf, including the TIPF, to renounce their status as protected persons’.¹⁷⁵ The status quo was maintained and that meant that the residents of the TIPF remained protected persons, but particularly also that they continued to be deprived of their freedom. In the absence of a viable disposition option, there was no way the TIPF residents could leave the facility. It was therefore ironic that the identity cards they had been issued were marked with the words ‘freedom village’.

B *Life in the TIPF*

1 *Procedural Entitlements*

A key obligation under international humanitarian law is the periodic review of internment, at least twice yearly, by an appropriate court or administrative

¹⁶⁹ Letter from Major General Geoffrey D Miller to TIPF Residents, 6 August 2004. See also Welsh, above n 159.

¹⁷⁰ Welsh, above n 159 (emphasis in original).

¹⁷¹ *UNHCR Report 2008*, above n 8, [20].

¹⁷² *Ibid* [10].

¹⁷³ Repatriation was encouraged by the US and favoured by the MeK: see below Part IV.

¹⁷⁴ Welsh, above n 159.

¹⁷⁵ *Ibid*. The validity of this legal argument would be challenged later by, among others, UNHCR, see Part V. For a different view, see Goulka et al, above n 5, 30 n 11: ‘At any time, the JIATF could have allowed individuals to leave voluntarily if they accepted the risks’. See also Part VII.

board designated by the detaining power for that purpose.¹⁷⁶ It would seem that this obligation — arguably intended for involuntary internees — also applies to voluntary internees if only to ascertain that ongoing internment is justified.¹⁷⁷ Apart from the abovementioned formal answer of the US Chief, Detainee, Judicial and Legal Policy, which was erroneously based on art 8 of *Geneva Convention IV*, any questions regarding the internment posed by the internees were often met by disciplinary measures such as ‘isolation’. Even a sit-in protest against the enforced confinement, over several months in late 2006,¹⁷⁸ and accompanying hunger strikes did not induce the requisite reconsideration.

Whether interned on an involuntary or voluntary basis, internees are entitled to the treatment laid down in pt III, s IV of *Geneva Convention IV*.¹⁷⁹ This includes the right of internees to freely elect by secret ballot every six months the members of a committee empowered to represent them before the detaining and the protecting powers, the ICRC and any other organisation which may assist them.¹⁸⁰ This right was not known to the internees and, more generally, their entitlements under *Geneva Convention IV* were not made known by the US military in the TIPF.¹⁸¹ Consequently, no such elections took place and, in

¹⁷⁶ *Geneva Convention IV* art 43. See also *Geneva Convention IV* art 78; Pictet, above n 4, 259.

¹⁷⁷ While art 43 of *Geneva Convention IV* was possibly written for those who are interned on a non-voluntary basis (as may be inferred from: Pictet, above n 4, 259) it explicitly refers to ‘[a]ny protected person who has been interned or placed in assigned residence’.

¹⁷⁸ Footage of the protest and a collective hunger strike can be viewed on YouTube: ‘camp tipf ashraf iraq - tazahorat va etesab [Camp TIPF Ashraf Iraq – Protest and Strikes]’ (15 February 2009) <<http://youtu.be/L6t9ZC0SxdA>>.

¹⁷⁹ See also Pictet, above n 4, 257 (art 42). The *Commentary* adds that it is reasonable to assume, in view of the essentially different character of voluntary internment, that persons interned at their own request will as far as possible be given more favourable conditions than those who have been interned by force.

¹⁸⁰ *Geneva Convention IV* art 102.

¹⁸¹ Only the MeK in Camp Ashraf had briefly explained the contents of *Geneva Convention IV* when the US forces started interviewing the Ashraf residents: Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 25 April 2013); Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 18 April 2013); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 26 April 2013); Interview with Refugee 12 (Teleconference Interview, Afshin Afkari trans, 3 May 2013); Interview with Refugee 19 (Teleconference Interview, Afshin Afkari trans, 18 June 2013); Interview with Refugee 20 (Teleconference Interview, Afshin Afkari trans, 26 June 2013). The inhabitants of Camp Ashraf had received the following: Letter from Major General William H Brandenburg to Sedigheh Hoseini and the Residents of Camp Ashraf, 7 October 2005. In this letter the ‘important rights and protections under international law’ that the determination of ‘protected person’ entails are enumerated, including the right to seek assistance from the ICRC, the UNHCR and from other international humanitarian organisations; the right to freedom of thought, religion, expression, intra-community association and political opinion; the right to freedom from persecution and forced unpaid labour; the right to food, health care and a quality of living which meets the standards of local residents of the territory in which they are protected; the right to fair treatment under the law in accordance with Iraqi domestic law and international standards; the right to pursue employment opportunities and profit-making activities which are consistent with local laws and can be taken without compromising the overriding right to personal safety; the right to speak with representatives of the Coalition Protecting Power, privately and with confidence in the Coalition’s humanitarian interest in their situation; the right to refuse to return to their country of nationality; the right to depart the territory of conflict at any time for their country of nationality or for any other country for which they possess valid travel documentation, etc. It appears that no such letter was sent to the inhabitants of the TIPF: Email from Refugee 2 to Marjoleine Zieck, 28 May 2013; Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013); *Hoshyar Diary*, above n 30.

practice, the TIPF residents simply identified a few persons from among them who could represent them, either because they spoke English or because they had long experience in the MeK, supplemented by one or two who themselves thought they could best be entrusted with representative functions.¹⁸² As to the entitlement to represent the TIPF residents before the ICRC in particular: the ICRC never set foot in the TIPF¹⁸³ and UNHCR only became involved in the TIPF in 2005,¹⁸⁴ when many of the residents had already returned to Iran and the remaining ones had been interned for years.

When the MeK defectors first arrived at the TIPF, it appears that the American forces expected that their stay would only last a few weeks and that they would soon leave for Europe or the US.¹⁸⁵ Their internment would, however, last for many years. In the absence of any institutionalised procedural means to have their stay, at the least, subjected to periodic review, the residents of the TIPF had no clue as to when it would end and consequently found themselves in a situation of indefinite internment.¹⁸⁶ Obviously, the intention had been for internment to end as soon as a suitable final disposition option could be found but, apart from repatriation, no suitable alternative dispositions were ever realised. Instead, the refugees — some of whom had by then been interned for more than four years — were merely informed in 2007 that the TIPF would be closed. In view of this sudden release, which will be discussed in greater detail in Part V, the years of internment do not appear to have served any particular purpose in the sense that they did not bridge the time between defection from the MeK and a viable disposition option. Apart from repatriation, none of the options mentioned in the *Release Agreement* were made available to the TIPF residents. At the same time, the circumstances that had induced internment — the perceived need for protection of the defectors — had not changed either.¹⁸⁷ Perhaps the detention had been a mistake, just like one colonel appears to have told the residents:¹⁸⁸ ‘after five years we found out that we don’t

¹⁸² Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 27 May 2013) (stating that the Americans did not want representatives); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 15 May 2013); Interview with Refugee 14 (Teleconference Interview, Afshin Afkari trans, 27 June 2013); Interview with Refugee 15 (Teleconference Interview, Afshin Afkari trans, 20 May 2013); Interview with Refugee 16 (Teleconference Interview, Afshin Afkari trans, 23 May 2013).

¹⁸³ According to all interviewed refugees. This is remarkable since the ICRC focused on persons detained or interned by MNF-I: Colassis, above n 165. The ICRC did, however, visit Camp Ashraf, but because of security constraints could no longer do so after July 2003: International Committee of the Red Cross, *Iraq: ICRC Activities in [sic] behalf of Iranian Nationals Living in Ashraf* (26 November 2008) <<http://www.icrc.org/eng/resources/documents/interview/irak-interview-261108.htm>>.

¹⁸⁴ On the reason for this delay, see Part IV.

¹⁸⁵ Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 27 May 2013); Interview with Refugee 16 (Teleconference Interview, Afshin Afkari trans, 23 May 2013); Email from Refugee 13 to Tom de Boer, 23 June 2013; *Hoshiyar Diary*, above n 30, ch 2.

¹⁸⁶ The pain of infinity, of having no future was considered to be the worst of the stay in the TIPF: Interview with Refugee 9 (Telephone Interview, Afshin Afkari trans, 19 April 2013); Interview with Refugee 12 (Teleconference Interview, Afshin Afkari trans, 3 May 2013); Interview with Refugee x2 (Teleconference Interview, 9 May 2013). That, arguably, constituted the main reason why several refugees attempted to commit suicide, and others mutilated themselves or simply lost their minds: see, eg, *Hoshiyar Diary*, above n 30.

¹⁸⁷ This is further discussed in Part V.

¹⁸⁸ Interview with Refugee 2 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 25 April 2013).

know on what grounds we detained you, I see no reason why we should detain you, that is why the doors of the camp are open now. Go.’¹⁸⁹

2 Substantive Entitlements

In August 2004, Major General Miller addressed the residents of the TIPF in a letter as follows: ‘We know that your living conditions are austere, but we are working hard to improve the quality of your life here and we are committed to work with you to make things better’.¹⁹⁰

The image that presents itself on the basis of the interviews with the inhabitants of the TIPF confirms the austerity of the living conditions. Having originated from a military organisation, most of the interviewed refugees recognised that some extent of austerity was to be expected under the circumstances.¹⁹¹ The living conditions were, however, worse than austere and arguably did not meet the standards of *Geneva Convention IV*. It is not clear what exactly induced that harsh treatment.¹⁹² In any case, the prospect of

¹⁸⁹ Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 25 April 2013). Another refugee was told by Lieutenant-Colonel Turluck that running the TIPF was politically not a good thing for the US especially since clandestinely made footage about the TIPF had been made public (see ‘camp tipf ashraf iraq - tazahorat va etesab’, above n 178) Interview with Refugee 4 (Teleconference Interview, Afshin Afkari trans, 17 April 2013).

¹⁹⁰ Letter from Major General Geoffrey D Miller to ‘TIPF Residents, Ashraf, Iraq’, 6 August 2004. US soldiers had admitted that the sheer number of defectors had caught the US military by surprise and initially they were therefore not in a position to cater for their needs: Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 26 April 2013); Interview with Refugee 19 (Teleconference Interview, Afshin Afkari trans, 18 June 2013). In the first weeks, this affected the availability of sufficient water, food and tents: Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 26 April 2013).

¹⁹¹ Interview with Refugee 12 (Teleconference Interview, Afshin Afkari trans, 3 May 2013): ‘The TIPF was a prison: one does not expect to get sufficient food and drink. With “prison” I mean that one stays there for years within barbed wire, heat, sand and cockroaches’.

¹⁹² Some inferences can be drawn from the interviews. One of the refugees stated: ‘We were treated by the Americans as prisoners. That was also what we were told: you are prisoners of war. ... We were really treated as prisoners’: Interview with Refugee 3 (Teleconference Interview, Anonymous trans, 22 March 2013). This was confirmed by: Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 26 April 2013); Interview with Refugee 18 (Teleconference Interview, Afshin Afkari trans, 31 May 2013); Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 18 April 2013) ([t]he first two, three years they said we were terrorists’. One refugee explained that the American soldiers served for six months in the TIPF (‘our prison’) and that the first two groups considered them to be arrested terrorists and treated them accordingly: Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 26 April 2013). Thus, the reason for the harsh treatment could be the fact that soldiers had been informed by their commanders that the TIPF residents were (detained) terrorists: Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 18 April 2013); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 26 April 2013). Another reason could be misinformation given by the MeK to the US forces (that the TIPF residents were dangerous, terrorists and believing in the use of violence): Interview with Refugee 1 (University of Amsterdam, 21 March 2013) (told by an American colonel); Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 25 April 2013). Another, perhaps complementary, explanation is that the treatment that befell the TIPF residents may have been caused by the desire of the MeK and the US for the TIPF residents to return to Iran, also in view of the fact that the MeK in Camp Ashraf were treated better than the TIPF residents: see Part IV(B). See also Part II(F).

improvement announced by Major General Miller in 2004 only materialised in 2006.¹⁹³

To substantiate the argument that the conditions in the TIPF were, until mid-2006, worse than merely austere, some of those conditions will be described in the following paragraphs — specifically, the practice of head counts, food, ‘isolation’ and ‘segregation’ following infraction of camp rules, physical assault and the lack of any meaningful contact with the outside world — and measured against the standards laid down in *Geneva Convention IV*.¹⁹⁴

(a) *Formation: Head Counts*

‘Prolonged standing and roll-calls ... are prohibited’.¹⁹⁵

Formation, or ‘counting’, was mentioned by all the refugees who were interviewed.¹⁹⁶ Counting was done day and night. On what were designated by the interviewees as ‘normal’ days and nights — that is, when there was no reason for additional head counts or need for collective punishment¹⁹⁷ — the internees were counted three times per day and again when they were in bed at night.¹⁹⁸ On days that were not normal — when someone had escaped or attempted to escape or a fight had taken place — the residents were counted as many as 5, 6, 7 or 8 times in 24 hours.¹⁹⁹ The residents were required to come out of their tents, stand outside in the hot desert sun in daytime and the very cold desert at night, in order to be counted. A normal headcount took about 45 minutes, but often — if a mistake was made in the counting²⁰⁰ or if someone was absent — the internees

¹⁹³ See below Part III(C)(2)(f).

¹⁹⁴ For an overall view of what they would have been entitled to, see above n 181.

¹⁹⁵ *Geneva Convention IV* art 100.

¹⁹⁶ Qualified as ‘(psychological) torture’: Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 24 April 2013); Interview with Refugee 16 (Teleconference Interview, Afshin Afkari trans, 23 May 2013); *Hoshyar Diary*, above n 30.

¹⁹⁷ On collective punishment, see below Part III(B)(2)(d).

¹⁹⁸ Interview with Refugee 3 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 15 May 2013); Interview with Refugee 15 (Teleconference Interview, Afshin Afkari trans, 20 May 2013).

¹⁹⁹ Interview with Refugee 1 (University of Amsterdam, 21 March 2013); Interview with Refugee 5 (Teleconference Interview, Mary Mehrian trans, 5 April 2013) (three to four times per night); Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 12 April 2013); Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 18 April 2013); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 26 April 2013); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 15 May 2013); Interview with Refugee 14 (Teleconference Interview, Afshin Afkari trans, 27 June 2013); Interview with Refugee 17 (University of Amsterdam, 29 May 2013).

²⁰⁰ Some of the refugees explained that many soldiers were illiterate — originating from Korea, Latin America and the Philippines with a view to securing a Green Card — and were not able to count in English after a certain number and had to start again: Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 27 May 2013); Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 18 April 2013); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 15 May 2013) (illiteracy and low IQ); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 15 May 2013). As to illiteracy, one of the refugees observed that no one knew where Iraq was located or had heard about the MeK, let alone MeK defectors, and thus thought that Mujahedin — defectors or not — were terrorists: Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 26 April 2013).

were left outside for hours.²⁰¹ The conclusion is that art 100 of *Geneva Convention IV* was breached.

(b) *Food*

‘Daily food rations for internees shall be sufficient in quantity, quality and variety to keep internees in a good state of health and prevent the development of nutritional deficiencies’.²⁰²

During the first years of the TIPF — that is, from its inception until the autumn of 2006²⁰³ — food consisted of so-called ‘Meals Ready-to-Eat’ (‘MREs’).²⁰⁴ MREs are individual operational rations for the US military, self-contained meals for use in combat or other field conditions.²⁰⁵ They are intended to be eaten for a maximum of 10 days, after which time field kitchens or other facilities need to be made available.²⁰⁶ This food was considered to be

²⁰¹ Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 24 April 2013); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 26 April 2013); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 15 May 2013); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 15 May 2013); Interview with Refugee 16 (Teleconference Interview, Afshin Afkari trans, 23 May 2013); Interview with Refugee 20 (Teleconference Interview, Afshin Afkari trans, 26 June 2013). Only after — and arguably as a result of — a sit-in strike (see above Part III(C)(2)(f)), this practice gave way to signing attendance lists.

²⁰² *Geneva Convention IV* art 89.

²⁰³ From mid-2003 until the end of 2004: Interview with Refugee 15 (Teleconference Interview, Afshin Afkari trans, 20 May 2013); until the end of 2006: Interview with Refugee 5 (Teleconference Interview, Afshin Afkari trans, 19 April 2013); Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 18 April 2013); Interview with Refugee 9 (Telephone Interview, Afshin Afkari trans, 19 April 2013); Interview with Refugee 10 (Telephone Interview, Afshin Afkari trans, 24 April 2013); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 26 April 2013); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 15 May 2013); Interview with Refugee 12 (Teleconference Interview, Afshin Afkari trans, 3 May 2013).

²⁰⁴ Interview with Refugee 2 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 3 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 5 (Teleconference Interview, Mary Mehrian trans, 5 April 2013); Interview with Refugee 5 (Teleconference Interview, Afshin Afkari trans, 19 April 2013); Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 12 April 2013); Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 18 April 2013); Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013); Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 18 April 2013); Interview with Refugee 10 (Telephone Interview, Afshin Afkari trans, 24 April 2013); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 26 April 2013); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 15 May 2013); Interview with Refugee 12 (Teleconference Interview, Afshin Afkari trans, 3 May 2013); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 15 May 2013); Interview with Refugee 14 (Teleconference Interview, Afshin Afkari trans, 27 June 2013); Interview with Refugee 16 (Teleconference Interview, Afshin Afkari trans, 23 May 2013); Interview with Refugee 17 (University of Amsterdam, 29 May 2013); Interview with Refugee 18 (Teleconference Interview, Afshin Afkari trans, 31 May 2013); Interview with Refugee 19 (Teleconference Interview, Afshin Afkari trans, 18 June 2013); Interview with Refugee 20 (Teleconference Interview, Afshin Afkari trans, 26 June 2013); Interview with Refugee x1 (University of Amsterdam, 13 March 2013).

²⁰⁵ See Jacob M Feagans, Darius A Jahann and Jamie S Barkin, ‘Meals Ready to Eat: A Brief History and Clinical Vignette with Discussion on Civilian Applications’ (2010) 175 *Military Medicine* 194, 194–6.

²⁰⁶ Institute of Medicine of the National Academies, *Nutrient Composition of Rations for Short-Term, High-Intensity Combat Operations* (National Academies Press, 2005) 26.

inedible²⁰⁷ and some of the residents preferred to eat dry bread instead.²⁰⁸ In view of the extended period of time during which the main staple consisted of MREs, it can be concluded that the daily food rations were not in conformity with what *Geneva Convention IV* prescribes in this respect.

(c) *Infraction of Camp Rules: 'Isolation' and 'Segregation'*

Upon arrival in the TIPF, the camp rules were made known.²⁰⁹ These rules included prohibitions on using indecent language; having a threatening and offensive attitude; engaging in fights; using physical violence against the soldiers and protected persons; possessing and producing arms; throwing objects at soldiers and protected persons; engaging in verbal abuse; (attempting) self-mutilation; smoking in tents; collecting and storing food and drinks; producing, storing and using alcoholic drinks. Violating these rules would have the following consequences: a warning, detention (upon order of the camp commandant), 24 hours to 30 days of isolation,²¹⁰ heavy work without pay (not exceeding 2 hours and benefiting the improvement of the camp) and/or the denial of privileges such as telephone calls or work (or both)²¹¹ for a period of 30 days.²¹² Serious infractions would be reported to a local Iraqi court.²¹³

Geneva Convention IV enumerates a number of disciplinary punishments, such as fines, fatigue duties and confinement.²¹⁴ It prescribes that in no case

²⁰⁷ Interview with Refugee 15 (Teleconference Interview, Afshin Afkari trans, 20 May 2013); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 15 May 2013). It was even said that it created allergies: Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 26 April 2013). It is most likely not without reason that 'MREs' are also 'translated' as 'Meals Rejected by Everyone', 'Meals Rejected by the Enemy' and 'Meals Resembling Edibles': see Sarah Murray, *Moveable Feasts: From Ancient Rome to the 21st Century, the Incredible Journeys of the Food We Eat* (St Martin's Press, 2007) 53.

²⁰⁸ Interview with Refugee 10 (Telephone Interview, Afshin Afkari trans, 24 April 2013); Interview with Refugee 15 (Teleconference Interview, Afshin Afkari trans, 20 May 2013). The way the food was distributed — often just thrown — was considered to be humiliating by many: Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 26 April 2013) (mentioning the habit of throwing everything, including bottles of water); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 15 May 2013); Interview with Refugee 12 (Teleconference Interview, Afshin Afkari trans, 3 May 2013); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 15 May 2013); Interview with Refugee 15 (Teleconference Interview, Afshin Afkari trans, 20 May 2013).

²⁰⁹ Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 18 June 2013); Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 30 June 2013) (given a document); Interview with Refugee 14 (Teleconference Interview, Afshin Afkari trans, 27 June 2013) (given a document); Interview with Refugee 20 (Teleconference Interview, Afshin Afkari trans, 26 June 2013) (informed orally); Email from Refugee 5 to Marjoleine Zieck, 10 June 2013. On the other hand, no camp rules were told to Refugee 7: Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013).

²¹⁰ This temporal limitation of a maximum of 30 consecutive days is in conformity with art 119 of *Geneva Convention IV*.

²¹¹ With respect to work in the TIPF, the internees could earn USD1 per hour, which was paid to them when they left the TIPF. The money earned enabled many refugees to buy the services of 'travel agents', on which, see Part V below.

²¹² Notes made of the camp rules (in Persian) were given to the authors by one of the refugees: Email from Refugee 5 to Marjoleine Zieck, Afshin Afkari trans, 10 June 2013.

²¹³ *Ibid.*

²¹⁴ *Geneva Convention IV* art 119.

should such disciplinary penalties be inhuman, brutal or dangerous to the health of internees.²¹⁵

Geneva Convention IV only refers to ‘confinement’ and that would seem to come closest to what was known to the TIPF residents as ‘isolation’ and ‘segregation’. ‘Isolation’ was the punishment awarded for quite a number of offences — that is, many more than are enumerated in the camp rules. In fact, any form of protest was met by ‘isolation’²¹⁶ and the same applied to any form of complaint²¹⁷ — for instance, about a leaking tent, food, lack of (or state of existing) showers, head counts, extreme body searches — attempted suicide, being caught with a mobile phone or camera, refusing to work,²¹⁸ forming an association²¹⁹ and other indiscretions.²²⁰

‘Isolation’ meant confinement in a cell in the desert made up of barbed or concertina wire:

Imagine a circle of c-wire with a diameter of 1.5 to 2 meters. The c-wire went above your head, about two meters high. ... In the middle of the c-wire cells there

²¹⁵ Ibid.

²¹⁶ Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 18 April 2013); Interview with Refugee 9 (Telephone Interview, Afshin Afkari trans, 19 April 2013). Even such a trivial incident as being angry when the water source was shut off after two minutes of showering when the internee had just put shampoo in his hair was sufficient for ‘isolation’: Interview with Refugee 1 (University of Amsterdam, 21 March 2013); Interview with Refugee 10 (Telephone Interview, Afshin Afkari trans, 24 April 2013).

²¹⁷ Despite *Geneva Convention IV* art 101, which provides that internees shall have the right to present to the authorities in whose power they are any petition with regard to the conditions of internment to which they are subjected.

²¹⁸ A few refugees stated they were forced to work; refusal to work was considered to be tantamount to protest and punished with ‘isolation’: Interview with Refugee 3 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 4 (Teleconference Interview, Afshin Afkari trans, 17 April 2013); Interview with Refugee 12 (Teleconference Interview, Afshin Afkari trans, 3 May 2013) (not mentioning the penalty).

²¹⁹ About 20 refugees founded ‘Etehad Meli’ — national unity — which aimed at, inter alia, reducing the repression exerted by the US and staying in touch with the outside world to seek help. When the Americans discovered this, the refugees were put in isolation where they started a hunger strike, which was ended in the hospital of Abu Ghraib: Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 12 April 2013).

²²⁰ Interview with Refugee 3 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 4 (Teleconference Interview, Afshin Afkari trans, 17 April 2013); Interview with Refugee 5 (Teleconference Interview, Anonymous trans, 14 April 2013); Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013); Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 24 April 2013); Interview with Refugee 9 (Telephone Interview, Afshin Afkari trans, 19 April 2013); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 26 April 2013); Interview with Refugee 12 (Teleconference Interview, Afshin Afkari trans, 3 May 2013); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 15 May 2013); Interview with Refugee 15 (Teleconference Interview, Afshin Afkari trans, 20 May 2013); Interview with Refugee 16 (Teleconference Interview, Afshin Afkari trans, 23 May 2013).

was a military bed. ... There is no roof, you only have a blanket for shelter from the sun.²²¹

A (later) indoor variant of isolation²²² was called a ‘henhouse’ by the refugees since its doors were made of wire gauze:²²³ ‘These ... new isolation cells ... were built at the limits of what is human. The cells were made from wood, each cell was 2 square metres, or maybe three. A bed just fit in. There was no space to stand up and walk’.²²⁴ Isolation could last a day, a week, a month (in case of attempted escape)²²⁵ or even longer.²²⁶ In addition, internees in isolation were often not treated humanely.²²⁷

‘Segregation’, another penalty that was meted out, can be compared with what the refugees called ‘isolation’: a tent — there were four altogether — surrounded by barbed wire, located outside of the TIPF proper.²²⁸ One of the refugees explained that segregation was worse than isolation since in segregation one

²²¹ Interview with Refugee x2 (Teleconference Interview, 9 May 2013) (‘I had to stay in the c-wire, I thought I was gonna melt, and I was wondering how long they would do this’). This was confirmed in other interviews: Interview with Refugee 1 (University of Amsterdam, 21 March 2013) (no blanket); Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 18 June 2013) (a roof made from a piece of cloth, adding that little food and water was part of this form of punishment); Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 18 April 2013) (no protection against the sun and adding that during the first days in isolation no water was given); Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013); Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 18 April 2013); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 26 April 2013); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 15 May 2013) (no protection against the sun).

²²² Apparently, the in-door variant was built in 2004 or 2005. Previously only the outdoor variant appears to have existed: Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 18 April 2013); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 15 May 2013). ‘The Americans loved prisons within the prison’: Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 18 June 2013).

²²³ Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 12 April 2013); Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 18 April 2013); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 15 May 2013).

²²⁴ Interview with Refugee x2 (Teleconference Interview, 9 May 2013) (this refugee spent a year in segregation). Apparently, a third variant of ‘isolation’ was built later on, this time a big hall with various cells: Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 18 June 2013).

²²⁵ Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 18 June 2013); Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 24 April 2013) (adding the very restricted use that could be made of the bathroom when in isolation); Interview with Refugee 12 (Teleconference Interview, Afshin Afkari trans, 3 May 2013); Interview with Refugee 15 (Teleconference Interview, Afshin Afkari trans, 20 May 2013).

²²⁶ One refugee told us that he was placed in isolation for one and a half months: Interview with Refugee 5 (Teleconference Interview, Anonymous trans, 14 April 2013).

²²⁷ ‘In isolation they were treating you like an animal. I saw a scene with a prisoner who was begging for some water, and a guard that was pouring the water on the floor before his eyes’: Interview with Refugee x2 (Teleconference Interview, 9 May 2013).

²²⁸ Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 22 March 2013); Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 18 June 2013); Interview with Refugee 5 (Teleconference Interview, Afshin Afkari trans, 19 April 2013); Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013); Interview with Refugee 16 (Teleconference Interview, Afshin Afkari trans, 23 May 2013).

could only speak with American soldiers.²²⁹ Segregation could last from several months to two years.²³⁰ Six refugees were kept apart from the others in a separate camp, called ‘Athen’, located 150 metres from the TIPF.²³¹ Their one-and-a-half year stay in Athen was interrupted by times of ‘isolation’.²³²

Geneva Convention IV provides that before any disciplinary punishment is meted out, the accused internee shall be given precise information regarding the offences of which he is accused.²³³ This appears to have been the exception rather than the rule; only one refugee maintains that on four occasions some kind of vague procedure was followed, which consisted in essence, and merely, of telling the refugee concerned that he would be put in isolation for a month.²³⁴ In summary, it would seem that the disciplinary penalties were often inhuman and, moreover, meted out without applying any of the requisite procedural safeguards.²³⁵

(d) *Collective Penalties and Physical Assault*

‘No protected person may be punished for an offence he or she has not personally committed. Collective penalties ... are prohibited’.²³⁶

‘Reprisals against protected persons and their property are prohibited’.²³⁷

‘[A]ll forms of cruelty without exception are forbidden’.²³⁸

²²⁹ Interview with Refugee 5 (Teleconference Interview, Afshin Afkari trans, 19 April 2013). One of the photographs taken by the ‘Spartans’, that is, the soldiers staying in FOB Spartan, pictures one of the TIPF residents clad in a bright yellow overall, returning from Abu Ghraib with the following captions printed on it: ‘The tyrant is back’ and ‘[h]e was cuffed and escorted into segregation’. The photograph is dated 13 September 2005 and is on file with the authors.

²³⁰ Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013).

²³¹ Interview with Refugee 2 (Teleconference Interview, Anonymous trans, 22 March 2013). Those refugees were the perceived ring-leaders of a sit-in strike (on which, see above Part III(C)(2)(f)). They were joined by a seventh refugee — punished for illegal possession of a mobile phone — a few months later: Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 18 June 2013); Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013).

²³² Interview with Refugee 2 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013).

²³³ *Geneva Convention IV* art 123 (which contains more procedural requirements).

²³⁴ Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013): the refugee concerned was punished on account of the fact that he had assaulted a soldier who had pushed another refugee against a wall. When he explained that he had tried to protect his friend, the response was, ‘nonsense, you attacked our lieutenant, and you remain one month in isolation’. Another refugee told that he had been subjected to this kind of procedure twice (that is, only twice), yet he was punished countless times: Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 18 June 2013). Yet others had been punished with isolation without any form of explanation (let alone procedure): Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 30 June 2013); Interview with Refugee 20 (Teleconference Interview, Afshin Afkari trans, 26 June 2013). Another refugee responded as follows: ‘Where do you think we were? This was a place where laws and rules did not apply’: Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 18 June 2013).

²³⁵ According to one interviewed refugee, protests against the rough treatment that was meted out were met with the following response of an American general: ‘We do what we think is required. We treat you the way we want to, and if we have to pay for that, we will’: Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 25 April 2013).

²³⁶ *Geneva Convention IV* art 33.

²³⁷ *Ibid.*

‘In no case shall disciplinary penalties be inhuman, brutal or dangerous for the health of the internees’.²³⁹

Collective forms of punishment — described as the standard practice by one of the refugees²⁴⁰ — are prohibited by *Geneva Convention IV* and may result in degrading treatment. The many protracted nightly head counts in the cold desert nights that were conducted whenever someone had transgressed some norm were invariably mentioned by the refugees.²⁴¹ Another collective form of harassment was the unannounced entry into tents by soldiers who would demolish and trample their contents.²⁴²

In addition, many incidents of physical assault were recounted by those who either suffered or witnessed them: manhandling,²⁴³ beating,²⁴⁴ kicking,²⁴⁵ throwing people on the ground²⁴⁶ and kicking them (and taking photographs),²⁴⁷

²³⁸ *Geneva Convention IV* art 118.

²³⁹ *Geneva Convention IV* art 119. See also at art 32.

²⁴⁰ *Hoshyar Diary*, above n 30.

²⁴¹ Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 27 May 2013); Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 15 May 2013); Interview with Refugee 16 (Teleconference Interview, Afshin Afkari trans, 23 May 2013). One refugee mentioned prohibition from showering as a collective punishment following a fight or attempted suicide in his block and a month without sport if one or two persons continued to sleep during nightly head counts: Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013) (no sport); Interview with Refugee 16 (Teleconference Interview, Afshin Afkari trans, 23 May 2013). See also Part III(C)(2)(a) above.

²⁴² Interview with Refugee 16 (Teleconference Interview, Afshin Afkari trans, 23 May 2013); Interview with Refugee 17 (University of Amsterdam, 29 May 2013); Interview with Refugee 20 (Teleconference Interview, Afshin Afkari trans, 26 June 2013) (once per month).

²⁴³ Interview with Refugee 4 (Teleconference Interview, Afshin Afkari trans, 17 April 2013); Interview with Refugee 5 (Teleconference Interview, Anonymous trans, 14 April 2014); Interview with Refugee 5 (Teleconference Interview, Afshin Afkari trans, 19 April 2013); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 26 April 2013). By way of illustration: one of the refugees was transported to a hospital in Anaconda for surgery on his back. Regardless of his medical complaints that required surgery, both his hands and feet were chained and once in the car he was also chained to the car: Email from Refugee 13 to Tom de Boer, 23 June 2013.

²⁴⁴ Interview with Refugee 2 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 25 April 2013); Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 18 June 2013); Interview with Refugee 5 (Teleconference Interview, Afshin Afkari trans, 19 April 2013); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 25 April 2013); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 26 April 2013); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 15 May 2013); Interview with Refugee 16 (Teleconference Interview, Afshin Afkari trans, 23 May 2013).

²⁴⁵ Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 12 April 2013); Interview with Refugee 12 (Teleconference Interview, Afshin Afkari trans, 3 May 2013); Interview with Refugee x2 (Teleconference Interview, 9 May 2013); Email from Refugee 13 to Tom de Boer, 23 June 2013.

²⁴⁶ Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 18 April 2013) (cuffing them, and dragging them to isolation); Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 24 April 2013).

²⁴⁷ Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 24 April 2013); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 15 May 2013); Interview with Refugee 16 (Teleconference Interview, Afshin Afkari trans, 23 May 2013); Email from Refugee 13 to Tom de Boer, 23 June 2013.

urinating on people,²⁴⁸ breaking arms,²⁴⁹ breaking hands,²⁵⁰ using pepper spray,²⁵¹ sticks²⁵² and stun guns,²⁵³ firing plastic bullets at legs²⁵⁴ and leaving people hand- and foot-cuffed in isolation.²⁵⁵ Furthermore, refugees mentioned the withholding of proper medical care,²⁵⁶ food and water.²⁵⁷ In summary, these events would appear to constitute a breach of arts 32, 33, 118 and 119 of *Geneva Convention IV*.

(e) *Cut Off from the World*

Relations with the exterior are addressed in pt III s IV ch VIII of *Geneva Convention IV*, a chapter that in some respects betrays the time when the *Convention* was drafted — that is, a time without modern communication technology such as personal mobile telephones and the internet. The *Convention* contemplates correspondence by means of internment cards and letters,²⁵⁸ a

²⁴⁸ Interview with Refugee 5 (Teleconference Interview, Afshin Afkari trans, 19 April 2013).

²⁴⁹ Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013); Interview with Refugee 10 (Telephone Interview, Afshin Afkari trans, 24 April 2013); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 25 April 2013); Interview with Refugee 12 (Teleconference Interview, Afshin Afkari trans, 3 May 2013); Interview with Refugee 20 (Teleconference Interview, Afshin Afkari trans, 26 June 2013); Interview with Refugee x2 (Teleconference Interview, 9 May 2013).

²⁵⁰ Interview with Refugee 5 (Teleconference Interview, Afshin Afkari trans, 19 April 2013).

²⁵¹ Interview with Refugee 1 (University of Amsterdam, 21 March 2013); Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 18 June 2013) (could have been tear gas); Interview with Refugee 5 (Teleconference Interview, Afshin Afkari trans, 19 April 2013); Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013); Interview with Refugee 12 (Teleconference Interview, Afshin Afkari trans, 3 May 2013); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 15 May 2013); Interview with Refugee 14 (Teleconference Interview, Afshin Afkari trans, 27 June 2013); Interview with Refugee 20 (Teleconference Interview, Afshin Afkari trans, 26 June 2013); Interview with Refugee x1 (University of Amsterdam, 13 March 2013). The most extreme use of pepper spray that was mentioned was the so-called ‘spicy sandwich’ in which an internee’s genitals were sprayed after which he was tied up in between two stretchers: Interview with Refugee 12 (Teleconference Interview, Afshin Afkari trans, 3 May 2013) (this treatment befell him three times). This was partly confirmed by Refugee 7 (not a firsthand account and not mentioning the pepper spray): Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013). A variant was being strapped and tied to a chair, thus exposed to mosquitoes: Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 18 June 2013); Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013).

²⁵² Interview with Refugee 1 (University of Amsterdam, 21 March 2013).

²⁵³ Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013); Interview with Refugee 3; Interview with Refugee 14 (Teleconference Interview, Afshin Afkari trans, 27 June 2013); Interview with Refugee x1 (University of Amsterdam, 13 March 2013); Interview with Refugee x2 (Teleconference Interview, 9 May 2013).

²⁵⁴ Interview with Refugee 5 (Teleconference Interview, Afshin Afkari trans, 19 April 2013).

²⁵⁵ Ibid; Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013).

²⁵⁶ Interview with Refugee 17 (University of Amsterdam, 29 May 2013); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 26 April 2013); Email from Refugee 13 to Tom de Boer, 23 June 2013.

²⁵⁷ Interview with Refugee 4 (Teleconference Interview, Afshin Afkari trans, 17 April 2013); Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 18 April 2013); Interview with Refugee 12 (Teleconference Interview, Afshin Afkari trans, 3 May 2013); Email from Refugee 13 to Tom de Boer, 23 June 2013.

²⁵⁸ *Geneva Convention IV* arts 106, 107.

minimalist albeit essential gateway to the outside world. It also allows for censoring.

The internees in the TIPF had very restricted access to the outside world during the many years of their internment.²⁵⁹ They were not allowed to contact international organisations.²⁶⁰ They were allowed a monthly telephone call in the presence of an interpreter and American soldiers²⁶¹ and possession of a mobile phone was prohibited.²⁶² Any telephone call in which the detention and living conditions in the TIPF were mentioned was interrupted and ended by the American guards²⁶³ and punished with ‘isolation’:²⁶⁴

Once I called my brother and at the moment I told him how I ended up in isolation, that I wanted to commit suicide on account of the treatment in the camp, and asked him to relay my complaints to international organisations, the line was cut off.²⁶⁵

When it was eventually allowed,²⁶⁶ correspondence that touched upon ‘political issues’ got lost.²⁶⁷ One of the refugees sent his first and only authorised letter after he had been advised to write about simple daily affairs:²⁶⁸

²⁵⁹ In conformity with *Geneva Convention IV* arts 107 and 108, the refugees were allowed to receive letters and boxes (that would be inspected prior to going to the refugee camp), and they were provided an address in Kuwait that could be used for this purpose. The address was given to the refugees in 2005, but until 8 June 2007 no one received any letters or boxes from that address and it was believed the postal box was closed: Lieutenant-Colonel Amy Turluck, Memorandum for Record, Joint Inter-Agency Task Force, 8 June 2007.

²⁶⁰ Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 27 May 2013); Interview with Refugee 5 (Teleconference Interview, Mary Mehrian trans, 5 April 2013). This is quite puzzling in view of the *Release Agreement*, which explicitly mentions application to international organisations as one of the disposition options, but less so, of course, if one does not want the facts of life in the TIPF to be exposed to the outside world. See Part IV(D)(3) on the involvement of UNHCR with the TIPF.

²⁶¹ Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 25 April 2013) (10 minutes per fortnight, but with the qualification that the telephone was sometimes out of order); Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013) (5 to 10 minutes per fortnight); Interview with Refugee 9 (Telephone Interview, Afshin Afkari trans, 19 April 2013) (the frequency had by then been improved but the remark was made that the telephone was very often out of order, sometimes for weeks); Interview with Refugee 14 (Teleconference Interview, Afshin Afkari trans, 27 June 2013); Interview with Refugee 16 (Teleconference Interview, Afshin Afkari trans, 23 May 2013); Interview with Refugee 17 (University of Amsterdam, 29 May 2013) (15 minutes per month); Interview with Refugee 20 (Teleconference Interview, Afshin Afkari trans, 26 June 2013).

²⁶² Interview with Refugee 4 (Teleconference Interview, Afshin Afkari trans, 17 April 2013). See also above n 231 (stay in Athen as punishment for illicit possession of a mobile phone).

²⁶³ Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 12 April 2013); Interview with Refugee 14 (Teleconference Interview, Afshin Afkari trans, 27 June 2013); Interview with Refugee 20 (Teleconference Interview, Afshin Afkari trans, 26 June 2013).

²⁶⁴ Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 25 April 2013) (first beaten up); Interview with Refugee 16 (Teleconference Interview, Afshin Afkari trans, 23 May 2013).

²⁶⁵ Interview with Refugee 4 (Teleconference Interview, Afshin Afkari trans, 17 April 2013). The refugee concerned did try to commit suicide when in isolation; one of the other refugees kept in isolation thereupon started a hunger strike and sent a petition to secure the release of the suicidal refugee: Interview with Refugee 5 (Teleconference Interview, Anonymous trans, 14 April 2013).

²⁶⁶ Two of the refugees mentioned that emails could be sent through Lieutenant-Colonel Turluck, via the email address tipfashraf@yahoo.com: Interview with Refugee 4 (Teleconference Interview, Afshin Afkari trans, 17 April 2013); Interview with Refugee 17 (University of Amsterdam, 29 May 2013).

This is the umpteenth time I write you in the hope you receive it this time. On Monday 12 December 2005 at 6 o'clock in the morning I woke up and left my tent. I listened to the morning news on the radio, did some physical exercises and had breakfast. I cleared the tent and suddenly I felt sad and I did not know why. Such a sad mood one gets on Sunday afternoon and/or Friday.²⁶⁹

(f) *Improvement*

The conditions in the TIPF improved to some degree after the residents had been granted refugee status by UNHCR in 2006 and had engaged in a prolonged sit-in strike.²⁷⁰ The strike had been triggered by the American forces preventing the TIPF residents from talking to a visiting Bulgarian journalist and cameraman.²⁷¹ That denial was the proverbial last straw²⁷² and about 80 per cent of the TIPF residents started a sit-in strike against their internment on 10 August 2006. It would last for several months until it was forcefully broken up by a large number of American and Bulgarian soldiers — on 18 December 2006 — who took six of the perceived ring-leaders to 'isolation' followed by a prolonged stay in Athen.²⁷³ The sit-in strike was accompanied by a fortnight-long hunger-strike by 20 or 30 residents.²⁷⁴ Those who refused to end their hunger strike would eventually be transferred to Abu Ghraib hospital where

²⁶⁷ Interview with Refugee 10 (Telephone Interview, Afshin Afkari trans, 24 April 2013).

²⁶⁸ *Hoshyar Diary*, above n 30.

²⁶⁹ *Ibid.*

²⁷⁰ On refugee status determinations by UNHCR, see Part IV(D)(3).

²⁷¹ Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 27 May 2013); Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 15 May 2013); Interview with Refugee 17 (University of Amsterdam, 29 May 2013); Interview with Refugee 20 (Teleconference Interview, Afshin Afkari trans, 26 June 2013). The American forces could prevent the TIPF residents from doing so, but not the journalist who was addressed in Bulgarian by one of the TIPF residents who happened to speak Bulgarian: Interview with Refugee 16 (Teleconference Interview, Afshin Afkari trans, 23 May 2013). The visit of the Bulgarian journalist was most likely triggered by the fact that a Bulgarian contingent had just been deployed, charged with providing security in the TIPF: see 'Bulgarian Contingent Officially Joins Forces with Americans', *American Forces Press Service* (online), 23 June 2006 <<http://www.defense.gov/news/newsarticle.aspx?id=15962>>. See also Hoseini, above n 181.

²⁷² Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 27 May 2013).

²⁷³ *Ibid.*; Interview with Refugee 3 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013); Interview with Refugee 17 (University of Amsterdam, 29 May 2013); *Hoshyar Diary*, above n 30. Footage of the strike is available on the internet: see above n 178; 'Hadi Afshar Camp TIPF' (5 February 2009) <<http://www.iran-ghalam.de/2Haupt/3509-Ariya%20Iran%2005.02.09.HTM>>; (4 February 2009) <http://youtu.be/omzLYF_gNZ8> (this footage was made by two TIPF residents who escaped from the TIPF to give it to the press; their plan did not succeed for they were arrested by the Iraqi police and returned to the TIPF: Email from Refugee 2 to Tom de Boer, 29 May 2013). The strikers wrote petitions to various organisations asking for their rights as refugees and protesting against their 'imprisonment', referring to the fact that no international organisation or agency ever paid a visit to the TIPF and asking them to visit 'our prison'. The petitions are on file with the authors. One of the refugees wrote more than 50 letters.

²⁷⁴ Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 27 May 2013) (30 participants); Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013) (20 participants).

they were shackled to hospital beds for more than two weeks and forced to end their strike.²⁷⁵

As to the improvements, these included, inter alia, better food and no more head counts.²⁷⁶ The TIPF — or Ashraf Refugee Camp (‘ARC’) as it was called in 2006 — nonetheless remained a prison.²⁷⁷

C Legal Responsibility for the Internees

The actual conditions during internment warrant the inference that both substantive and procedural rights accorded to protected persons under *Geneva Convention IV* were breached. Leaving substantive rights aside, the breach of procedural rights stands out since their observance would have affected the substantive rights positively, for instance, by providing effective remedies against the frequently-resorted-to disciplinary measures of ‘isolation’ and ‘segregation’. The overall picture that emerges is of a structural lack of what may be summarised as ‘the rule of law’ in the TIPF as defined particularly in *Geneva Convention IV*.²⁷⁸

The TIPF residents were not provided with any opportunity to divest themselves from American control until November 2007, when the US unilaterally decided to close the TIPF. As a result, the internment lost its token voluntary character and turned into involuntary detention. Since involuntary internment is subject to procedural constraints the fact that these were wholly lacking signifies that the internees were unlawfully deprived of their freedom, in

²⁷⁵ Firsthand accounts in Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 25 April 2013); Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 27 May 2013); Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 18 June 2013); Interview with Refugee 5 (Teleconference Interview, Mary Mehrian trans, 5 April 2013); Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 12 April 2013); Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013). One of the strikers asserts that he was held in Abu Ghraib prison three times, including one time for six to seven weeks after being released from the hospital as a form of punishment; he added that he was horrendously abused by the Americans: Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 18 June 2013); Email from Refugee 2 to Tom de Boer, 29 August 2013. His stay in Abu Ghraib prison was confirmed by Interview with Refugee 5 (Teleconference Interview, Mary Mehrian trans, 5 April 2013); Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 24 April 2013); Interview with Refugee 9 (Telephone Interview, Afshin Afkari trans, 19 April 2013); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 15 May 2013) (‘he was horribly mistreated by the Americans, tortured’); Interview with Refugee 20 (Teleconference Interview, Afshin Afkari trans, 26 June 2013). See also above n 229 (in which a photo of the return of one of the refugees from Abu Ghraib to the TIPF is mentioned).

²⁷⁶ These improvements are mentioned by all interviewed refugees then present in the TIPF.

²⁷⁷ Explicitly mentioned in: Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013); Interview with Refugee 9 (Telephone Interview, Afshin Afkari trans, 19 April 2013); Interview with Refugee 10 (Telephone Interview, Afshin Afkari trans, 24 April 2013).

²⁷⁸ The fact that improvements were made after UNHCR had become involved and several residents had been able to inform family and press about their predicament, highlights the importance of publicity to secure the international rule of law. The fact that there was a TIPF was not known for a long time, and as Brigadier General Phillips observed, albeit not with respect to the TIPF, ‘evil thrives in darkness’: ‘Speech by Brigadier General David Phillips on Camp Ashraf’ (11 December 2011) <<http://youtu.be/3eUdAr2KKYM>>. On Brigadier General Phillips, see above n 82.

contravention of art 147 of *Geneva Convention IV*, which is tantamount to a so-called ‘grave breach’.²⁷⁹

The question is whether the *Release Agreement* affects this conclusion. It would seem not. The *Release Agreement* arguably secured internment in the sense of art 41 of *Geneva Convention IV*: the MeK defectors agreed to be interned voluntarily in exchange for the protection of MNF-I — or, rather, the US — until such time as a final disposition option could be realised that would warrant their release. *Geneva Convention IV* aims at a comparable outcome, such as repatriation or resettlement. The *Convention* even continues to apply after it formally ceases to be applicable in order to ensure the ongoing protection of the protected persons concerned. Unlike the *Release Agreement*, *Geneva Convention IV* also includes ‘release’ and the procedural rights that could have affected such a release. Without applying any procedure to ensure the safety of the residents, the US decided to release the residents of the TIPF in 2007. Whether this release contravened the *Release Agreement* and the prohibition of refoulement laid down in art 45 of *Geneva Convention IV* will be examined in Part V.

An important preliminary question is whether the US can be held responsible for any of the related violations of international humanitarian law considering the fact that it formally acted under the banner of MNF-I²⁸⁰ and — after 16 October 2003 — arguably under the authority of the UN Security Council.²⁸¹ As far as the resolutions of the Security Council are concerned, these merely authorised the MNF-I presence on Iraqi soil and determined its mandate. The question hence becomes one of effective control. The ECtHR has attributed human rights violations to the UK even though it had acted as part of MNF-I and with the authority of the Security Council: the fact that the UK had effective control — in this case over parts of the city of Basrah — was decisive.²⁸² In regard to ‘effective control’, the preceding sections demonstrate that the TIPF

²⁷⁹ *Geneva Convention IV* art 147:

Grave breaches ... shall be those involving any of the following acts, if committed against persons or property protected by the present *Convention*: ... unlawful confinement of a protected person ... or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present *Convention*.

²⁸⁰ On the sequence of names for the coalition forces, see above n 2.

²⁸¹ The presence of the Coalition forces in Iraq was authorised, and its mandate determined, by: *Resolution 1511*, UN Doc S/RES/1511. The mandate was then extended by: *Resolution 1546*, UN Doc S/RES/1546; SC Res 1637, UN SCOR, 60th sess, 5300th mtg, UN Doc S/RES/1637 (11 November 2005); SC Res 1723, UN SCOR, 61st sess, 5574th mtg, UN Doc S/RES/1723 (28 November 2006); SC Res 1790, UN SCOR, 62nd sess, 5808th mtg, UN Doc S/RES/1790 (18 December 2007). On the question of whether these resolutions could have served as a legal basis for the internment of the MeK defectors, see above n 165.

²⁸² *Al Jeddah* (2011) 53 EHRR 23, [85]: ‘The internment took place within a detention facility in Basrah City, controlled exclusively by British forces, and the applicant was therefore within the authority and control of the United Kingdom throughout’. See also Christian Tomuschat, ‘*R (on the Application of Al-Jeddah) v Secretary of State for Defence: Human Rights in a Multi-Level System of Governance and the Internment of Suspected Terrorists*’ (2008) 9 *Melbourne Journal of International Law* 391, 399: ‘there are few, if any, elements that might be deemed to indicate that the UN ever held “effective control” over the multinational force deployed in Iraq’. Cf International Law Commission, *Report of the International Law Commission on the Work of Its Sixty-Third Session*, UN GAOR, 66th sess, Supp No 10, UN Doc A/66/10 (2011) ch V(E) (‘Draft Articles on the Responsibility of International Organizations’) arts 4, 6–9.

was under the permanent (internal and external) control of the US military. During the first three years, Americans were solely responsible for the protection of the TIPF residents. From March 2006 onwards, the US Army was assisted by a contingent of 154 Bulgarian soldiers, yet the interviewed refugees describe them as ‘guards’, ‘subordinate’, ‘not responsible’ and ‘under control of the Americans’.²⁸³ This subordinate role is confirmed by a cable of the US Ambassador in Sofia of 24 January 2008:

Bulgaria currently has 154 soldiers serving in Iraq at Camp Ashraf. Since March 2006 these forces have been responsible for overseeing [MeK] defectors within the camp’s Temporary Interview and Protection Facility ... as a subordinate unit to a US Military Police battalion.²⁸⁴

In short, the US forces exclusively — and effectively — controlled the TIPF.²⁸⁵ The US was, consequently, obliged to observe the rights of the residents of the TIPF under *Geneva Convention IV* until a final disposition option became available.²⁸⁶ The preceding discussion demonstrates that it failed to do so in many respects.

IV REPATRIATION, REFUGEE STATUS AND RESETTLEMENT

In 2003, the MeK defectors were informed that a stay of several weeks or months in a separate camp outside Camp Ashraf was expected before viable disposition would be available (hence the name ‘Temporary Internment and Protection Facility’).²⁸⁷ As indicated in Part III, the *Release Agreement* identified four possible disposition options: return to the country of origin, resettlement in a third country, local integration or application to international organisations such as UNHCR.²⁸⁸ The viability of these options and the manner in which they were made available to the internees — whose stay in the TIPF turned out to be considerably longer than initially expected — are analysed in this Part.

Local integration in Iraq was never considered to be a viable disposition option: current and former members of the MeK were — and still are — at risk in Iraq due to their affiliation with the Ba’ath regime and their alleged

²⁸³ Interview with Refugee 2 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 3 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 5 (Teleconference Interview, Afshin Afkari trans, 19 April 2013); Interview with Refugee 12 (Teleconference Interview, Afshin Afkari trans, 3 May 2013).

²⁸⁴ US Embassy Sofia, ‘Bulgarian Engagement in Iraq in 2008 and Beyond’ (Confidential Diplomatic Cable, Reference ID 08SOFIA59, 24 January 2008) <<http://wikileaks.org/cable/2008/01/08SOFIA59.html>>.

²⁸⁵ Regarding role of the Bulgarian soldiers, see International Law Commission, *Report of the International Law Commission on the Work of Its Fifty-Third Session*, UN GAOR, 56th sess, Supp No 10, UN Doc A/56/10 (2001) ch IV(E) (‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’) arts 6, 8.

²⁸⁶ The fact that the US Army — and not MNF-I — would sign a status of forces agreement with the Iraqi Government in November 2007 is another indication of its independent role.

²⁸⁷ Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 27 May 2013); Interview with Refugee 10 (Telephone Interview, Afshin Afkari trans, 24 April 2013); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 8 May 2013); Interview with Refugee 16 (Teleconference Interview, Afshin Afkari trans, 23 May 2013); Interview with Refugee 17 (University of Amsterdam, 29 May 2013). The refugees state that US officials referred to resettlement in a third country. See also *Hoshyar Diary*, above n 30, ch 2; Part II(B)(5).

²⁸⁸ For the text of the *Release Agreement*, see above Part III(C)(2)(ii).

participation in the suppression of the Kurdish uprising,²⁸⁹ a fact that had induced their internment in the first place. The new Iraqi rulers, who were re-establishing diplomatic relations with Iran,²⁹⁰ clearly had no interest in continuing to allow former allies of Saddam Hussein to remain in their territory and called for the expulsion of the MeK from Iraq.²⁹¹ Since the presence of the Mujahedin in Iraq had merely been based on the informal acquiescence of the Ba'ath regime,²⁹² expulsion of the organisation and its members was considered to be legally possible.

The remaining three options were pursued by the US with varying degrees of success. Before 2006, repatriation was the sole disposition option presented to the TIPF residents and, although the efforts of the US and the ICRC to return the TIPF residents to Iran were successful from a logistical point of view — in the sense that they significantly reduced the number of residents in the TIPF — the question is whether the repatriation was voluntary and safe. The second option, application to international organisations such as UNHCR, would only materialise in 2006 but did not induce the release of the TIPF residents. The legal consequences of refugee status determination by UNHCR are analysed below. The last disposition option, resettlement, was presumably the most appropriate solution for the TIPF residents. However, resettlement requests made by UNHCR fell on deaf ears, not least because the US itself refused to offer any resettlement places to the refugees concerned.

²⁸⁹ Bahgat, above n 42, 105. See above Part I (also on the current treatment of the MeK in Iraq); Part II(B) (for a historical explanation of the predicament of the MeK in Iraq); Part V (on the fate of the TIPF residents who were released from the TIPF in Iraq). See also *UNHCR Report 2008*, above n 8, 5; Marjoleine Zieck, 'UNHCR and Turkey, and Beyond: Of Parallel Tracks and Symptomatic Cracks' (2010) 22 *International Journal of Refugee Law* 593, 596.

²⁹⁰ See, eg, Babak Rahimi, 'Iran's Declining Influence in Iraq' (2012) 35(1) *Washington Quarterly* 25, 34: 'The mutual enmity for the [MeK] ... served as a common cause for the two governments to come together'.

²⁹¹ The Iraqi Government Council represented Iraqi national authority before the Iraqi Interim Government was installed in 2004: Al Hassani, above n 146, 56. See also Goulka et al, above n 5, 18 n 30: 'The resolution did not have the force of law because it was not signed by CPA administrator Bremer'.

²⁹² The exit procedure of the MeK was based on this understanding: see Part II(B)(4).

A Repatriation to Iran: Voluntary and Safe?

1 Repatriation from the TIPF

At its peak, in late 2004, the TIPF housed some 500 MeK defectors.²⁹³ However, just a year later only about 170 internees remained, a number that would increase to 200 in 2006. The explanation for this reduction is the repatriation of some 320 residents to Iran.²⁹⁴ The possibility of return had been announced by Major General Miller in a letter of 14 November 2004:

Dear Protected People of the TIPF,

With great pleasure, I am writing to inform you that Multi-National Forces — Iraq have recently facilitated a visit between the ICRC and 45 residents of the TIPF at Baghdad International Airport. Members of the ICRC delegation met with me following the interviews and have agreed to intercede with the Government of Iran on behalf of those wishing to return home.

Once permission is received from the Commanding General, MNF-I, the Interim Iraqi Government, and the Government of Iran, those protected people wishing to be repatriated will fly out for a brief meeting with ICRC delegates to confirm that they wish to voluntarily return to Iran before boarding an aircraft to Tehran and their families. ...

This is a great step forward for those residing in the TIPF. The ICRC has assured me that following this initial repatriation, they are willing to interview any other residents wishing to return to Iran. In addition, they will forward the names of those wishing to apply for refugee status to the UNHCR. I commend you for your continued patience as together we seek a safe and voluntary disposition for you all.²⁹⁵

The repatriation of TIPF residents started in the winter of 2004. On 20 December 2004, the ICRC reported the repatriation of 28 Iranians from Iraq, noting that '[p]rior to the operation, ICRC delegates had held private interviews with the 28 men to make sure that they were returning home of their own free

²⁹³ This is more than the number of 450 mentioned by both the RAND Corporation and UNHCR; Goulka et al, above n 5, xv n 6; *UNHCR Report 2008*, above n 8, [9]. Both erroneously state that only 250 residents returned to Iran. According to the US itself more than 400 MeK defectors returned to Iran under ICRC supervision over the years, either from Camp Ashraf or from the TIPF: US Embassy Baghdad, 'Action Request: Policy Guidance for MeK' (Confidential Diplomatic Cable, Reference ID 07BAGHDAD2082, 25 June 2007) <<http://wikileaks.org/cable/2007/06/07BAGHDAD2082.html>>. See also below n 294. Estimates of the TIPF population by the interviewed refugees before the repatriation to Iran vary from 600 to 900 and the number of returnees is estimated to number between 400 and 600 persons. However, the interviewed refugees consistently refer to a population of roughly 200 persons after the repatriation. Since the ICRC did not respond to the specific questions regarding the numbers involved (see above n 28), no final answer can be given on the exact number of repatriated TIPF residents.

²⁹⁴ The number of 320 is based on the number of returnees departing from the TIPF between December 2004 and October 2005: *Hoshyar Diary*, above n 30. See also below n 298 and the number of 316 mentioned by the ICRC in a confidential cable: US Embassy Baghdad, 'Status Update on Camp Ashraf Repatriations' (Confidential Diplomatic Cable, Reference ID 05BAGHDAD4154, 9 October 2005) <<http://wikileaks.org/cable/2005/10/05BAGHDAD4154.html>>. The ICRC mentions 15 more repatriations to other countries.

²⁹⁵ Letter from Major General Geoffrey D Miller to TIPF Residents, 14 November 2004.

will'.²⁹⁶ From this moment on, no public ICRC documents can be found concerning the repatriation operation.²⁹⁷ However, according to the detailed diary of former TIPF resident Esmail Hoshyar,²⁹⁸ another 14 persons returned to Iran in mid-January 2005, followed by a large group of 230 individuals who left the TIPF between January and March that year,²⁹⁹ then 14 in June, 10 on 2 August, 12 on 21 September, 13 on 13 October and 8 more over the course of 2006 and 2007.³⁰⁰

2 Voluntary Repatriation?

The repatriation of MeK defectors to Iran raises several questions. First and foremost: why would former Mujahedin want to return to Iran? Secondly, why would the Government of Iran welcome former members of its most radical opposition movement that had carried out armed attacks on its territory? Thirdly, what was the role of the US Army and the ICRC?

A partial answer to the first question can be derived from the composition of the group of returnees. According to the interviewed refugees, a large number of returnees belonged to the lower echelons of the MeK and were not regarded as particularly 'ideological' members; they belonged to the recruited and misled

²⁹⁶ International Committee of the Red Cross, '28 Iranians Repatriated from Iraq under ICRC Auspices' (News Release, No 04/74, 20 December 2004) <<http://www.icrc.org/eng/resources/documents/misc/67uj3j.htm#UY4tRedguAl.email>> (noting that '[f]ollowing a request by all the parties concerned, an ICRC aircraft flew them from the Iraqi capital, Baghdad, to the Iranian capital, Teheran, where they were handed over to the Iranian authorities'). The number and date are confirmed in: *Hoshyar Diary*, above n 30, ch 5; Interview with Refugee 5 (Teleconference Interview, Mary Mehrian trans, 5 April 2013).

²⁹⁷ It is interesting that the ICRC refers to 'Camp Ashraf' and not to the TIPF in the press release of 20 December 2004 (see above n 296). This seems typical for all public ICRC documents, in which no references are made to the TIPF.

²⁹⁸ Most of the numbers and dates mentioned by Hoshyar also come up in the press releases from the ICRC and the Iranian Government: see above n 296 and below n 326.

²⁹⁹ *Hoshyar Diary*, above n 30, ch 5.

³⁰⁰ Thus, according to Hoshyar, 329 persons returned to Iran directly from the TIPF: see *ibid*. According to one of the interviewed refugees, people with a desire to leave the MeK and prepared to return to Iran were, during the last years of American control, no longer brought first to the TIPF, but left directly from Camp Ashraf: Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 15 April 2013). The possibility to return to Iran from either the TIPF or Camp Ashraf would end in April 2008, presumably because the Iranian Government did not want to accept MeK defectors anymore: US Embassy Baghdad, 'MeK Defectors to be Resettled in Turkey' (Confidential Diplomatic Cable, Reference ID 09BAGHDAD405, 16 February 2009) <<http://wikileaks.org/cable/2009/02/09BAGHDAD405.html>> (in which reference is made to Iran being prepared to instead issue passports to MeK defectors and buy them tickets to Istanbul).

part of the Mujahedin, which also included former POWs.³⁰¹ Upon returning to Iran, this group faced no, or only minor, problems. Disappointment in the MeK as a serious opposition group and the opportunity of reunification with family and friends presumably played a role as well.³⁰²

Although the majority of the returnees belonged to the abovementioned group, former high-level Mujahedin and other ideologically-engaged defectors also returned.³⁰³ In order to explain the unexpected return of this group, the interviewed refugees consistently provided a second reason: a propaganda campaign by the US to stimulate interest in repatriation combined with the austere and harsh camp regime in the TIPF.³⁰⁴ The refugees explained that several strategies were used by the American Army to encourage repatriation,

³⁰¹ Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 18 June 2013); Interview with Refugee 3 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 17 April 2013); Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 15 May 2013); Interview with Refugee 14 (Teleconference Interview, Afshin Afkari trans, 27 June 2013); Interview with Refugee 15 (Teleconference Interview, Afshin Afkari trans, 20 May 2013); Interview with Refugee 18 (Teleconference Interview, Afshin Afkari trans, 31 May 2013) ('they were not politically engaged, and most of them were recruited in Turkey'); Email from Refugee x1 to Tom de Boer, 18 June 2013; Email from Refugee 17 to Tom de Boer, 25 June 2013; Interview with Refugee 20 (Teleconference Interview, Afshin Afkari trans, 26 June 2013). One of the interviewed refugees explained that one block in the TIPF, Block 6, mainly consisted of former POWs, criminals and former drug addicts who had been lured into the MeK under false pretences: Interview with Refugee x2 (Teleconference Interview, 9 May 2013). On the composition of the MeK and its recruitment techniques, see above Parts I(D) and II(B)(4).

³⁰² One of the interviewed refugees explained that he was enabled by the US Army to speak to his fiancée by telephone for the first time in 20 years; the opportunity to reunite with her was an important reason to return to Iran: Email from Refugee x1 to Tom de Boer, 19 June 2013.

³⁰³ Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 18 June 2013); Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 30 June 2013); Interview with Refugee 20 (Teleconference Interview, Afshin Afkari trans, 26 June 2013); Interview with Refugee x1 (University of Amsterdam, 13 March 2013).

³⁰⁴ Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 18 June 2013); Interview with Refugee 3 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 5 (Teleconference Interview, Afshin Afkari trans, 19 April 2013); Interview with Refugee 5 (Teleconference Interview, Afshin Afkari trans, 30 June 2013); Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 12 April 2013); Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 18 April 2013); Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 30 June 2013); Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013); Interview with Refugee 9 (Telephone Interview, Afshin Afkari trans, 19 April 2013); Interview with Refugee 10 (Telephone Interview, Afshin Afkari trans, 24 April 2013); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 15 May 2013); Interview with Refugee 12 (Teleconference Interview, Afshin Afkari trans, 3 May 2013) (noting that the psychological torture was so severe that many chose to return to Iran as the lesser of two evils); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 15 May 2013); Interview with Refugee 15 (Teleconference Interview, Afshin Afkari trans, 20 May 2013); Interview with Refugee 16 (Teleconference Interview, Afshin Afkari trans, 23 May 2013); Interview with Refugee 18 (Teleconference Interview, Afshin Afkari trans, 31 May 2013); Interview with Refugee 20 (Teleconference Interview, Afshin Afkari trans, 26 June 2013); Email from Refugee x1 to Tom de Boer, 18 June 2013; Email from Refugee x1 to Tom de Boer, 19 June 2013; Email from Refugee 17 to Tom de Boer, 25 June 2013.

such as reducing food quality and water rations,³⁰⁵ diminishing — sometimes to zero — telephone and shower time,³⁰⁶ discontinuing the supply of cigarettes,³⁰⁷ raising the number of head counts³⁰⁸ and increasing the severity and frequency of punishments.³⁰⁹ In addition, some TIPF residents were recruited to promote return to Iran:³¹⁰ pictures and videos of returnees and their families were shown³¹¹ and promises were made about life waiting in Iran.³¹² This was

³⁰⁵ Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 18 June 2013); Interview with Refugee 5 (Teleconference Interview, Afshin Afkari trans, 30 June 2013); Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 18 April 2013); Interview with Refugee 10 (Telephone Interview, Afshin Afkari trans, 24 April 2013); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 15 May 2013); Interview with Refugee 15 (Teleconference Interview, Afshin Afkari trans, 20 May 2013); Interview with Refugee 20 (Teleconference Interview, Afshin Afkari trans, 26 June 2013). As was set out in Part III above, the TIPF residents received MREs as the main form of nutrition for a sustained period of time.

³⁰⁶ Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 18 June 2013); Interview with Refugee 5 (Teleconference Interview, Afshin Afkari trans, 30 June 2013); Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 12 April 2013); Interview with Refugee 9 (Telephone Interview, Afshin Afkari trans, 19 April 2013); Interview with Refugee 10 (Telephone Interview, Afshin Afkari trans, 24 April 2013) (also noting that toilets were not emptied).

³⁰⁷ Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 18 April 2013); Interview with Refugee 16 (Teleconference Interview, Afshin Afkari trans, 23 May 2013) ('[t]here was a period of two, three months in which we did not receive cigarettes. Smokers dried used tea and rolled it in regular paper to smoke'). The result boiled down to a de facto prohibition of smoking at variance with art 89 of *Geneva Convention IV*, which provides that '[t]he use of tobacco shall be permitted'.

³⁰⁸ Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 18 June 2013); Interview with Refugee 5 (Teleconference Interview, Afshin Afkari trans, 30 June 2013); Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 18 April 2013); Interview with Refugee 9 (Telephone Interview, Afshin Afkari trans, 19 April 2013); Interview with Refugee 10 (Telephone Interview, Afshin Afkari trans, 24 April 2013); Interview with Refugee 19 (Teleconference Interview, Afshin Afkari trans, 18 June 2013).

³⁰⁹ In particular isolation: Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 18 April 2013); Interview with Refugee 15 (Teleconference Interview, Afshin Afkari trans, 20 May 2013).

³¹⁰ Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 18 April 2013); Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013); Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 18 April 2013) ('they were given privileges in exchange'); Interview with Refugee 18 (Teleconference Interview, Afshin Afkari trans, 31 May 2013). One refugee added that a US General told him that Iran is a good country. He responded by asking why the US had so many problems with Iran if it was such a good country: Interview with Refugee 10 (Telephone Interview, Afshin Afkari trans, 24 April 2013). Another refugee noted that the general US policy was to pressure the residents to return into Iran, but that some commanders did not pressure them: Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 15 May 2013).

³¹¹ Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 18 June 2013); Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013); Email from Refugee x1 to Tom de Boer, 19 June 2013.

³¹² Such as a new car, money, a wedding and a house: Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013); Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 18 April 2013); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 15 May 2013); Interview with Refugee 14 (Teleconference Interview, Afshin Afkari trans, 27 June 2013); Interview with Refugee 20 (Teleconference Interview, Afshin Afkari trans, 26 June 2013).

contrasted with the improbability of release and resettlement.³¹³ Several refugees therefore described the return to Iran as ‘involuntary’³¹⁴ and all described the repatriation as having been pressured. In the words of one refugee: ‘Yes, they were put under pressure. I spoke to two residents who did not want to be forced to return to Iran, but felt they had to. One of them was crying. They said: we were in a hell for 1.5 years and we [couldn’t] take it anymore’.³¹⁵

Some refugees added that return to Iran was also in the interest of the MeK, since former members who criticised the MeK after having returned could be considered to be in league with the Iranian Government and their criticisms could thus be dismissed.³¹⁶

3 *The Fate of the Returnees*

Although the Iranian Government had announced an amnesty for rank-and-file members of the MeK in 2003,³¹⁷ the fate of the repatriated defectors is unclear. In February 2008, UNHCR — noting that it neither facilitated nor promoted voluntary repatriation of refugees from Iraq to Iran — stated that:

Very little independent information is available as to what happened to these individuals, as neither ICRC nor UNHCR is able to monitor the situation of returnees. UNHCR has received, however, credible reports that some of the

³¹³ Interview with Refugee 5 (Teleconference Interview, Afshin Afkari trans, 30 June 2013); Interview with Refugee 9 (Telephone Interview, Afshin Afkari trans, 19 April 2013); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 15 May 2013); Interview with Refugee 16 (Teleconference Interview, Afshin Afkari trans, 23 May 2013); Interview with Refugee 18 (Teleconference Interview, Afshin Afkari trans, 31 May 2013); Email from Refugee x1 to Tom de Boer, 18 June 2013; Email from Refugee x1 to Tom de Boer, 19 June 2013.

³¹⁴ Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 18 June 2013); Interview with Refugee 5 (Teleconference Interview, Afshin Afkari trans, 19 April 2013); Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 18 April 2013); Interview with Refugee 9 (Telephone Interview, Afshin Afkari trans, 19 April 2013); Interview with Refugee 10 (Telephone Interview, Afshin Afkari trans, 24 April 2013) (noting that 80 per cent returned involuntarily, because life in the TIPF was unbearable for them and, furthermore, that three people tried to run away in Baghdad and were brought back to the TIPF and put in isolation); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 15 May 2013); *Hoshyar Diary*, above n 30, chs 4–5.

³¹⁵ Interview with Refugee 5 (Teleconference Interview, Afshin Afkari trans, 19 April 2013).

³¹⁶ Interview with Refugee 5 (Teleconference Interview, Afshin Afkari trans, 30 June 2013); Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 12 April 2013); Interview with Refugee 10 (Telephone Interview, Afshin Afkari trans, 24 April 2013); Interview with Refugee 16 (Teleconference Interview, Afshin Afkari trans, 23 May 2013); Interview with Refugee 17 (University of Amsterdam, 29 May 2013); *Hoshyar Diary*, above n 30, ch 4. Some refugees hint at a contract between the MeK and the US military regarding repatriation to Iran: Interview with Refugee 3 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 9 (Telephone Interview, Afshin Afkari trans, 19 April 2013); Interview with Refugee 10 (Telephone Interview, Afshin Afkari trans, 24 April 2013); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 15 May 2013).

³¹⁷ In the words of then-President Mohammad Khatami: ‘The majority who did not commit a crime and do not have blood on their hands are like our children and we must act with leniency towards them, but those who committed crimes will be tried with fairness’: quoted in Bahgat, above n 42, 106.

returnees were forced/‘invited’ to make public confessions and accusations against the [MeK] on television after their return.³¹⁸

UNHCR added that the Iranian Government never officially confirmed the amnesty, notwithstanding several UNHCR requests to that effect.³¹⁹ In contrast, the ICRC appears to have consistently informed the US that the returnees were not ‘bothered by the Iranian government’,³²⁰ even though it had to admit that it did ‘not visit former MeK returnees in Iran’³²¹ and ‘that many returnees prefer not to have contact with the ICRC’.³²² The conclusion of the ICRC that its ‘office in Tehran ... would have received information about harassment if it were taking place’³²³ is rather naïve and hard to reconcile with the fact that the returnees — consistently referred to in Iran as ‘*monafeghin*’ (‘hypocrites’)³²⁴ — were deployed by the Iranian Government in media campaigns demonising the MeK.³²⁵ By way of illustration: on 20 December 2004, the Iranian Students’ News Agency (‘ISNA’) published an interview with a number of returnees in which they explained why they left the MeK, blaming its repression, lack of freedom and sudden cooperation with the US.³²⁶ Another press release by ISNA, dated 11 March 2005, reports how a large group of returnees was welcomed by a provincial Chief Justice:

You have been released from Satan and are back in Iran. It is now time to serve your own country. If you have not committed crimes, you will be able to live as a normal citizen. ... According to the Holy Quran no Muslim has to remain in despair, since repentance is always possible. All members of the Satanic

³¹⁸ UNHCR Report 2008, above n 8, [24].

³¹⁹ Ibid [25]:

In 2004, in a letter from UNHCR to the Government of the Islamic Republic of Iran, UNHCR asked the Iranian authorities to confirm [the] verbally-declared amnesty ... No reply was ever received. UNHCR has reiterated this request without success ... on various occasions in 2006, 2007 and most recently on 24 January 2008.

³²⁰ US Embassy Baghdad, ‘ICRC Continues to Provide Humanitarian Assistance, Visit Detainees and Facilitate Repatriations’ (Confidential Diplomatic Cable, Reference ID 07BAGHDAD901, 14 March 2007) <<http://wikileaks.org/cable/2007/03/07BAGHDAD901.html>>.

³²¹ Ibid.

³²² US Embassy Baghdad, ‘Ambassador Discusses Way Ahead on Mujahedin E-Khalq (MeK) with ICRC Iraq Head’ (Confidential Diplomatic Cable, Reference ID 08BAGHDAD2234, 18 July 2008) <<https://wikileaks.org/cable/2008/07/08BAGHDAD2234.html>>. This was confirmed by one of the refugees, who added that returnees who had contacted the ICRC encountered more problems than those who did not: Interview with Refugee 5 (Teleconference Interview, Afshin Afkari trans, 19 April 2013).

³²³ US Embassy Baghdad, ‘ICRC Continues to Provide Humanitarian Assistance, Visit Detainees and Facilitate Repatriations’, above n 320.

³²⁴ See Iranian Students’ News Agency (20 December 2004) <<http://www.isna.ir/fa/news/8309-12649/روهن-ي-مود>> (reporting the return of 14 ex-Mujahedin on 20 November 2004). The use of the term ‘hypocrites’ in the Iranian press was also noted in: UNHCR Report 2008, above n 8, [24]. On the use of this term in relation to the MeK, see Abrahamian, above n 1, 2, 67, 143, 151.

³²⁵ See above n 318 and accompanying text. See also below n 326 and 329.

³²⁶ Iranian Students’ News Agency (10 December 2004) <<http://www.isna.ir/fa/news/8309-12717/و-ستفگ>> In the interview, one of the returnees states that he now realises that the Iranian Government is more democratic than the MeK.

organisation of the Mujahedin-e Khalq who show remorse, will be forgiven by the Islamic Republic.³²⁷

Very few of the interviewed refugees were able to contact returnees,³²⁸ but those who did stated that the price of return to Iran was working with the regime or, at least, publicly denouncing their former activities for the MeK.³²⁹ One of the refugees recounted that two returnees disappeared after they had refused to cooperate with the Iranian regime³³⁰ and that others eventually fled to Turkey where they were granted refugee status by UNHCR Ankara on account of a well-founded fear of persecution in Iran.³³¹

4 Legal Implications

Whether repatriation to Iran was safe is a moot point. In the case of *Abdolkhani v Turkey* ('*Abdolkhani and Karimnia*'), which concerned a complaint by two former TIPF residents who had been imprisoned in Turkey after leaving the TIPF, the ECtHR notes the execution of a MeK member in 2006 and the suspicious deaths of two MeK-affiliated political prisoners in 2006 and 2009.³³²

³²⁷ Iranian Students' News Agency (21 March 2005) <<http://www.isna.ir/fa/news/8312-08690/7-جهانی-سرخ-صدای-حمایت-توانندگان-از-امنیت-لاش-ا-2>>

³²⁸ According to one of the refugees because they 'don't want to be in even deeper trouble': Interview with Refugee 5 (Teleconference Interview, Afshin Afkari trans, 19 April 2013).

³²⁹ Ibid:

After two months of quarantine they could visit their family, but only under the condition that they attend anti-MeK conferences of the Iranian Republic. ... Treatment upon return depended on the extent of cooperation with the Iranian Government, and also on the importance of the family, age, time with the MeK, and rank within the MeK. These characteristics were emphasized in the media.

See also Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 18 April 2013). Another refugee notes that the more ideological returnees were forced to collaborate and declare that they agreed with the Iranian Government, and in general live under certain constraints: Email from Refugee 17 to Tom de Boer, 25 June 2013. This is confirmed by the one interviewed refugee who returned to Iran under the auspices of the ICRC: Interview with Refugee x1 (University of Amsterdam, 13 March 2013). Refugee x1 stated that the returnees were held in quarantine in a camp near Tehran, where they were interviewed by government officials about their past with the MeK and asked about the extent to which they were prepared to work with the government. This is confirmed by: Iranian Students' News Agency (28 December 2004) <<http://www.isna.ir/fa/news/8310-03463/28-آزاد-شدند-از-ن-ا-از-ن-آغوش-ک-نار-ه-ت-ا-ت-س-ن-1-x-ee-gu-f-e>>. and-file members were able to leave the camp relatively quickly, while higher-ranking members, including himself, had to stay longer. His eventual flight from Iran came at a price: his brother was fired from his government job and prevented from inheriting their deceased father's house. The brother could only inherit if his brother, the interviewed refugee, would return to Iran to sign the relevant documents. Another refugee noted that he knew of returnees who, after refusing to cooperate with the Iranian Government, encountered administrative problems when, for example, buying or selling a house, working and marrying: Interview with Refugee 5 (Teleconference Interview, Afshin Afkari trans, 19 April 2013). One refugee said his family was pressured by the Iranian regime to have him return to Iran, and that his brother's shop was closed after he refused to do so: Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 18 April 2013).

³³⁰ Interview with Refugee 5 (Teleconference Interview, Afshin Afkari trans, 30 June 2013).

³³¹ Email from Deljou Abadi to Marjoleine Zieck, 25 July 2013. The authors tried to verify with UNHCR Ankara whether some repatriated defectors indeed fled to Turkey from Iran and were granted refugee status there by UNHCR. However, despite several reminders, no answer was given.

³³² *Abdolkhani v Turkey* (European Court of Human Rights, Second Section, Application No 30471/08, 22 September 2009) [48]–[49] ('*Abdolkhani and Karimnia*').

This, in addition to the fact that the ICRC could not provide any reliable information about the fate of the returnees, led the ECtHR to conclude that ‘there are serious reasons to believe that former or current [MeK] members and sympathisers could be killed and ill-treated in Iran’.³³³

Taking into consideration the survey of Iranian press releases and the information provided by the interviewed refugees regarding the fate of the returnees, it would seem that the incapacity to effectively monitor the returnees was not given appropriate weight by the ICRC. The ICRC too easily inferred from the absence of information about the returnees that they were not harmed by the Iranian authorities. In reality, the opportunity to return turned out to be conditional on cooperation with the Iranian Government, which meant, at a minimum, paying lip service to its anti-MeK propaganda. It cannot be ruled out that those who refused to cooperate with the Iranian authorities upon return encountered considerable problems and even persecution. Without sufficient and reliable information about the fate of the returnees in Iran, it cannot be concluded that the repatriation of the TIPF residents was safe.³³⁴ This, in turn, renders the ICRC’s suggestion to proceed with involuntary repatriation rather incomprehensible,³³⁵ particularly since it simultaneously acknowledged that it could not guarantee the safety of the returnees.³³⁶

As far as the voluntariness of return is concerned, the rather assertive promotion of repatriation in the TIPF coupled with the austere camp regime gives the impression of a deliberate strategy to pressure the residents into returning to Iran. A significant number of the 320 persons who returned to Iran between December 2004 and October 2005 may therefore not have returned on a strictly voluntary basis,³³⁷ which raises legal issues both under the *Release Agreement* and *Geneva Convention IV*, particularly the prohibition of refoulement and forced deportation.³³⁸ These issues become more pressing in

³³³ Ibid [83].

³³⁴ The RAND Corporation considered return safe and, in addition, it qualified voluntary repatriation as ‘the only successful long-term disposition option’ for both members and defectors of the MeK: Goulka et al, above n 5, 32. For criticism of this report, see above n 44.

³³⁵ The ICRC suggested that the US Government form a panel that would determine whether those without a well-founded fear of persecution could be involuntarily repatriated: US Embassy Baghdad, ‘UNHCR and ICRC on MeK: You Took Them, You Own Them’, above n 32, para 7. Involuntary repatriation of ‘members who do not face substantial risk of persecution’ was also suggested by the RAND Corporation: Goulka et al, above n 5, 50.

³³⁶ See US Embassy Baghdad, ‘MeK Defectors to be Resettled in Turkey’, above n 300, para 6.

³³⁷ One can only guess why the US encouraged repatriation to Iran. Perhaps it wanted to solve a logistical problem, also because it foresaw problems in finding sufficient resettlement places in third countries and was apparently not prepared to offer such places itself. Repatriation to Iran was a relatively easy option that could furthermore lead to rapprochement between Tehran — not amused by the US designation of the MeK as protected persons — and Washington. On the latter subject, see *The MEK and US–Iran Relations*, above n 64.

³³⁸ *Geneva Convention IV* arts 45, 49.

light of the fact that all those who remained in the TIPF were granted refugee status on account of a well-founded fear of persecution in Iran.³³⁹

B *Refugee Status Determination by UNHCR*

UNHCR was aware of the TIPF from its inception³⁴⁰ but it would take years before this knowledge would become apparent to the residents of the TIPF. In fact, for a long time they thought that the outside world was not aware of the existence of the TIPF³⁴¹ and there were ingenious attempts to make its presence known, such as emails sent out of the hospital of Abu Ghraib,³⁴² a telephone call in a language the interpreter would not understand,³⁴³ covert interviews via mobile phone with radio and television stations³⁴⁴ and a letter addressed to UNHCR that was smuggled out of the TIPF by means of bribing an Iraqi mechanic who came to repair the air conditioning.³⁴⁵

UNHCR only became involved in the TIPF in the summer of 2005, when the US authorities formally requested UNHCR's assistance in addressing the protection needs of those residing in the TIPF.³⁴⁶ This request was based on the remaining residents' fear of return to Iran and a heightened level of tension in the

³³⁹ The approximately 200 residents who remained in the TIPF had various reasons for not returning to Iran. Most refused to go back because they still opposed the Iranian Government. Many had been imprisoned and tortured in Iranian prisons and some had friends and families who had been executed. They foresaw that they would have to cooperate with the Iranian Government to at least some extent, which would contravene their ideals and political convictions. Distrust of the declared amnesty and fear of persecution formed an additional reason not to return to Iran: Interview with Refugee 1 (University of Amsterdam, 21 March 2013); Interview with Refugee 5 (Teleconference Interview, Mary Mehrian trans, 5 April 2013); Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 30 June 2013); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 15 May 2013); Interview with Refugee 18 (Teleconference Interview, Afshin Afkari trans, 31 May 2013); Interview with Refugee 20 (Teleconference Interview, Afshin Afkari trans, 26 June 2013); Email from Refugee 14 to Tom de Boer, 29 June 2013; Email from Refugee 17 to Tom de Boer, 25 June 2013.

³⁴⁰ Email from Resettlement Service, Division of International Protection, United Nations High Commissioner for Refugees, Geneva to Marjoleine Zieck, 17 May 2013.

³⁴¹ Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 17 April 2013).

³⁴² Interview with Refugee 5 (Teleconference Interview, Afshin Afkari trans, 19 April 2013); Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 12 April 2013) (it was sent to a relative of one of the refugees in Europe).

³⁴³ Such as Swedish: Interview with Refugee x2 (Teleconference Interview, 9 May 2013).

³⁴⁴ For example Radio Farda in Prague and TISHK TV in Paris: Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 18 April 2013).

³⁴⁵ Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 26 April 2013).

³⁴⁶ *UNHCR Report 2008*, above n 8, [11]; Email from Resettlement Service, Division of International Protection, United Nations High Commissioner for Refugees, Geneva to Marjoleine Zieck, 17 May 2013.

camp due to persistent uncertainty about the future.³⁴⁷ UNHCR appears to have deliberately delayed its involvement with the TIPF residents. The main reason for this delay was its decision to ensure the civilian character of each of the TIPF residents by means of a ‘cooling-off’ period of two years (and for many even longer):

Before undertaking refugee status determination activities for the caseload, UNHCR first sought to confirm the civilian character of each of the residents ... The vast majority of them were interviewed after a ‘cooling-off’ period of two years after their arrival at the [TIPF] to ascertain the civilian character of those applying for refugee status.³⁴⁸

This decision was induced by a conclusion of UNHCR’s Executive Committee (‘ExCom’) on the civilian and humanitarian character of asylum.³⁴⁹ The relevant passage of this conclusion is as follows:

Combatants should not be considered as asylum-seekers until the authorities have established within a reasonable timeframe that they have genuinely and permanently renounced military activities, once this has been established, special procedures should be put in place for individual refugee status determination, to ensure that those seeking asylum fulfil the criteria for the recognition of refugee status, during the refugee status determination process, utmost attention should be paid to article 1F of the 1951 *Convention [relating to the Status of Refugees]*, in order to avoid abuse of the asylum system by those who do not deserve international protection.³⁵⁰

In this case, the relevant authorities are MNF-I or, rather, the US. The US determined in June 2004, after it had interviewed and screened the inhabitants of Camp Ashraf, that all qualified as protected civilians under *Geneva Convention IV*. In July 2004, virtually every individual, whether MeK or former MeK, had signed the *Release Agreement*. The substantive core of that *Agreement* is the renunciation of military activities and the rejection of terrorism. Once this was established — again, in July 2004 — UNHCR could have proceeded with refugee status determination procedures. In other words, the ExCom conclusion to which UNHCR refers does not justify, let alone legitimate, any kind of

³⁴⁷ In a leaked cable of 14 July 2005, the US Embassy in Baghdad suggested that the US mission in Geneva approach the UNHCR to determine whether the UNHCR would be willing to undertake a visit to conduct refugee status determination (‘RSD’) in the TIPF (or an alternative location), referring to the fact that many have been awaiting RSD interviews for two years or more, and the growing tension in the TIPF as residents voiced their resentment that ICRC-assisted repatriation is ongoing for those who want to return to Iran but that no corresponding arrangement has been made for those fearing for their safety upon repatriation. To which is added: ‘Several recent unexpected runaways into the desert and isolated occurrences of self-harm attest to the rising stress levels’ and ‘MNF-I believes that an expression on UNHCR’s part of willingness to engage on humanitarian grounds would greatly reduce tension in the TIPF, and have a positive effect on morale’: US Embassy Baghdad, ‘Proposals for Possible UNHCR Ashraf Engagement’ (Unclassified/For Official Use Only Diplomatic Cable, Reference ID 05BAGHDAD2946, 14 July 2005) <<https://wikileaks.org/cable/2005/07/05BAGHDAD2946.html>>.

³⁴⁸ *UNHCR Report 2008*, above n 8, [12].

³⁴⁹ *Ibid.*

³⁵⁰ Executive Committee of the High Commissioner’s Programme, *Conclusions Adopted by the Executive Committee on International Protection of Refugees: No 94 (LIII) — Conclusions on the Civilian and Humanitarian Character of Asylum* (2002), 53rd sess (8 October 2002) [c(vii)].

cooling off time after July 2004. This means that UNHCR could have started the refugee status determination procedures in the summer of 2004, before the majority of TIPF residents had returned to Iran.

It was only on 30 September 2005 that UNHCR informed the residents of the TIPF that it was preparing the logistics for the refugee status determination interviews.³⁵¹ It also explained that the interview would be ‘an in-depth and extensive procedure’ expected to last at least four hours per person³⁵² and that it would assess eligibility on the basis of the criteria of the 1951 *Convention relating to the Status of Refugees* (‘*Refugee Convention*’)³⁵³ definition rather than its own extended mandate.³⁵⁴ In a letter of 1 December 2005, the UNHCR informed the TIPF residents that, owing to security limitations, it would start its refugee status determination activities from Geneva.³⁵⁵ Possibly on account of the fact that UNHCR had no access to the TIPF, it requested Lieutenant-Colonel Julie Norman (US Military Police) as the local official to travel to Geneva for a personal meeting with UNHCR officials.³⁵⁶ The text of the relevant letter is ambiguous in the sense that Lieutenant-Colonel Norman may have been considered to be the representative of the TIPF residents or, alternatively, the local UNHCR representative. According to some of the interviewed refugees, Lieutenant-Colonel Norman actually presented herself as the local UNHCR representative.³⁵⁷

Due to a prohibition regarding its staff presence in Iraq,³⁵⁸ UNHCR was not able to conduct interviews in person at the TIPF, so it resorted to using a video-conference system with technical support provided by US authorities³⁵⁹ and specially trained protection staff located in Geneva.³⁶⁰ It was the first time UNHCR engaged in this form of refugee status determination.³⁶¹ UNHCR

³⁵¹ Letter from Ekber Menemencioglu, Director, Regional Bureau for Central Asia, South West Asia, North Africa and the Middle East, United Nations High Commissioner for Refugees Headquarters to the Residents of the TIPF, 30 September 2005 (copy on file with authors).

³⁵² Ibid.

³⁵³ *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) (‘*Refugee Convention*’).

³⁵⁴ Ibid. The decision to base the refugee status determination on the basis of the *Refugee Convention* can be explained by the need to find resettlement places and the fact that resettlement states adhere to the *Refugee Convention* rather than any extended definition: see United Nations High Commissioner for Refugees, ‘UNHCR Resettlement Handbook’ (2011) 80–1, 88–9 <<http://www.unhcr.org/46f7c0ee2.pdf>>.

³⁵⁵ Letter from CASWANAME TIPF RSD Operation, United Nations High Commissioner for Refugees to the Residents of the TIPF, Afshin Afkari trans, 1 December 2005 (copy on file with authors).

³⁵⁶ Letter from Lieutenant-Colonel Julie S Norman to the Residents of the TIPF, Afshin Afkari trans, 8 January 2006.

³⁵⁷ Interview with Refugee 17 (University of Amsterdam, 29 May 2013) (responding to Lieutenant-Colonel Norman that such was not possible since she represented the US Army); Interview with Refugee 20 (Teleconference Interview, Afshin Afkari trans, 26 June 2013) (‘she told me that she was the representative of UNHCR Switzerland’). See also *Hoshyar Diary*, above n 30.

³⁵⁸ Letter from Hy Shelow, United Nations High Commissioner for Refugees Team Leader, Al-Ashraf Temporary Internment Protection Facility, Refugee Status Determination Operation to the Residents of the TIPF, 9 February 2006.

³⁵⁹ *UNHCR Report 2008*, above n 8, [11].

³⁶⁰ Ibid [13].

³⁶¹ Interview with Johannes van der Klaauw, Senior Resettlement Coordinator, United Nations High Commissioner for Refugees (UNHCR Headquarters, Geneva, 1 March 2013).

explained to the residents of the TIPF that it did not consider this situation ideal and expressed its concern that it could not assure the confidentiality of interviews in a manner it normally seeks to achieve.³⁶² While only one of the interviewed refugees indicated that he had not been able to speak freely on account of the presence of American military personnel in an adjacent space during the interview,³⁶³ this presence was later confirmed by UNHCR on the basis of interviews with former TIPF residents in northern Iraq.³⁶⁴

UNHCR initially examined the cases of 188 TIPF residents according to a two-tiered process.³⁶⁵ The status determination procedure explicitly included possible exclusion under art 1F of the *Refugee Convention*.³⁶⁶ The residents were informed that they would receive a letter regarding eligibility³⁶⁷ and that those not found to be refugees would have the right to appeal.³⁶⁸ First instance determinations were completed by the end of May 2006 and appeals by the end of July in the same year.³⁶⁹ Of the 21 applications that were initially denied, 15 were recognised on appeal and 6 were denied once more.³⁷⁰ The 6 persons whose claims were refused were informed by UNHCR in writing. In an annex to the letter,³⁷¹ the reasons for the refusal were set out:

It has been determined that you are not a refugee because you continue to assert a commitment to engage in violence which is incompatible with the civilian character of asylum.

³⁶² Letter from Hy Shelow, United Nations High Commissioner for Refugees Team Leader, Al-Ashraf Temporary Internment Protection Facility, Refugee Status Determination Operation to the Residents of the TIPF, 9 February 2006.

³⁶³ Interview with Refugee 1 (University of Amsterdam, 21 March 2013). However, two other refugees indicated they were convinced the interview was being monitored or tapped by American military personnel: Interview with Refugee 16 (Teleconference Interview, Afshin Afkari trans, 23 May 2013); Interview with Refugee 20 (Teleconference Interview, Afshin Afkari trans, 26 June 2013).

³⁶⁴ Interview with Johannes van der Klaauw, Senior Resettlement Coordinator, United Nations High Commissioner for Refugees (UNHCR Headquarters, Geneva, 1 March 2013).

³⁶⁵ In 2009, the UNHCR reported that it determined 215 persons to be refugees: *UNHCR Report 2009*, above n 8, [3].

³⁶⁶ *UNHCR Report 2008*, above n 8, [35] ('a thorough exclusion review'); *UNHCR Report 2009*, above n 8, [4].

³⁶⁷ Those whose applications were accepted were informed as follows (the letter included a Persian translation):

Reference is made to your application for refugee status assessed by the UNHCR, [Central Asia, South West Asia, North Africa and the Middle East] Bureau.

We are pleased to inform you that after assessment of your claim and careful consideration of all available information, you have been recognized as a refugee under the UNHCR Mandate.

Letter from Ekber Menemencioglu, Director, Regional Bureau for Central Asia, South West Asia, North Africa and the Middle East, United Nations High Commissioner for Refugees to Anonymous, 5 May 2006 (copy on file with authors).

³⁶⁸ United Nations High Commissioner for Refugees, 'Notice: Asylum Seekers Residing in the Temporary Interview Protection Facility (TIPF)' (Notice, undated).

³⁶⁹ Email from Resettlement Service, Division of International Protection, United Nations High Commissioner for Refugees, Geneva to Marjoleine Zieck, 17 May 2013; *UNHCR Report 2008*, above n 8, [13].

³⁷⁰ Interview with Refugee 5 (Teleconference Interview, Anonymous trans, 14 April 2013); Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 17 April 2013); Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 18 April 2013).

³⁷¹ On the basis of the interviews with three of them, the impression is that all six received the same letter.

In arriving at this conclusion, the following information available to UNHCR has been taken into account.

- You continue to believe that armed struggle is the only way the Regime will change;
- You were not believed that you would not participate in an armed struggle because of your solid conviction that the Regime must be changed and your long career in the struggle as a combat soldier;
- Your motivation for leaving the [MeK was] strictly personal and had nothing to do with disagreeing with the use of force; and
- Your insistence [on] characterizing the use of armed struggle as a ‘legitimate struggle against the Regime’.³⁷²

These arguments are hard to reconcile with the eligibility criteria laid down in the *Refugee Convention*. In fact, only art 1F could possibly have been applicable. However, art 1F includes neither political conviction nor the anticipated commission of violence and crime as grounds for exclusion³⁷³ — it is confined to excluding those with respect to whom there are serious reasons for considering that he or she has committed particular crimes or has been guilty of particular acts.

The initial rejection was revised following a second appeal and the six persons concerned were all recognised as refugees within UNHCR’s mandate.³⁷⁴ They were given — like the other refugees — a UNHCR identity card.³⁷⁵ They were also provided with a new camp identity card by the US Army, this time marked ‘Camp Serenity’, which confirmed the protection of the refugees ‘under the Authority of the Geneva Convention/UNHCR’ and stated that the ‘[i]ndividual is afforded all rights and privileges granted under articles of these agreements’.³⁷⁶

It is not clear what the newly-acquired status entitled the refugees to over and above their protection under international humanitarian law. The TIPF refugees could not invoke their refugee status vis-a-vis Iraq, which is not a party to the

³⁷² Letter from Ekber Menemencioglu, Director, Regional Bureau for Central Asia, South West Asia, North Africa and the Middle East, United Nations High Commissioner for Refugees to Anonymous, 5 May 2006, annex A (copy on file with authors).

³⁷³ The rejected TIPF residents themselves connected the refusal to their defiant role in the TIPF, in particular their participation in the sit-in strike: Interview with Refugee 5 (Teleconference Interview, Afshin Afkari trans, 19 April 2013); Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 17 April 2013). One of those whose claim was rejected stated that responsible Colonel Woodside told him he would not get refugee status on account of his role in the sit-in strike and the fact that he had sent an email out of Abu Ghraib regarding the living conditions in the TIPF: Interview with Refugee 5 (Teleconference Interview, Afshin Afkari trans, 19 April 2013) (adding that Colonel Woodside later apologised for this). It is not likely that the UNHCR would have been influenced by such considerations, but this story is illustrative for the little extent to which freedom of expression was granted.

³⁷⁴ *UNHCR Report 2008*, above n 8, [12].

³⁷⁵ The card had the following text: ‘This is to certify that the bearer of this ID card has been recognized as a refugee under the mandate of the United Nations High Commissioner for Refugees’ (copy on file with authors).

³⁷⁶ The epithet ‘Camp Serenity’ thus replaced ‘Freedom Village’ (see Part III(A)(3)) and the refugees were moved to another camp, the ARC. A copy of the card is on file with the authors.

Refugee Convention,³⁷⁷ and the US — just like any other state — also does not give extraterritorial effect to recognition of refugee status by UNHCR, even when the determination has been made on the basis of the *Refugee Convention* definition rather than UNHCR's extended mandate.³⁷⁸ Even if the US were bound to observe the *Refugee Convention* or, rather, the 1967 *Protocol relating to the Status of Refugees* to which it is a party,³⁷⁹ it would not have made much difference since most of the rights it comprises require a territorial foothold in the country of refuge, a certain level of attachment. The main exception is the prohibition of refoulement that was also binding on the US by virtue of *Geneva Convention IV*.³⁸⁰

The refugee status granted by UNHCR nevertheless confirmed the TIPF residents' well-founded fear of persecution in Iran and probably discouraged the US from continuing to promote return to Iran. In addition, UNHCR's involvement arguably induced the improvement of living conditions in the TIPF in 2006³⁸¹ and the relocation of the residents to a new camp adjacent to the TIPF, the ARC.³⁸²

Although UNHCR's involvement could be viewed as a 'viable disposition option' under the *Release Agreement*, which included application to international organisations such as UNHCR among the disposition options, actual UNHCR involvement was apparently not considered to justify release of the refugees, arguably because they would neither be safe in Iraq nor could be returned to Iran. The tacit decision not to release the refugees when this particular option was fulfilled makes sense. After all, UNHCR is a non-territorial entity, which is wholly dependent on states to provide protection to those within its mandate,³⁸³ as may be illustrated by the following statement in a notice UNHCR addressed to the TIPF refugees: 'UNHCR cannot provide physical protection. UNHCR has received assurances and concurs that your current protected status at TIPF will be maintained pending the successful implementation of a durable solution'.³⁸⁴

³⁷⁷ In fact, Iraq was not primarily responsible for the TIPF residents, who were under the effective control of the US. Had Iraq been responsible, it would have been obliged to abide by the principle of non-refoulement by virtue of customary international law: Guy S Goodwin-Gill, 'Asylum: The Law and Politics of Change' (1995) 7 *International Journal of Refugee Law* 1, 4. But see James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005) 363–70.

³⁷⁸ See Marjoleine Zieck, *UNHCR's Parallel Universe: Marking the Contours of a Problem* (Vossiuspers, 2010) 11–12.

³⁷⁹ *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967). Cf the American position on international human rights and refugee law: see above Part III.

³⁸⁰ *Geneva Convention IV* art 45. On non-refoulement, see below Part V.

³⁸¹ See above Part III(B)(2)(f).

³⁸² For reasons of clarity the ARC will still be referred to as TIPF in the rest of the article, see also above n 5.

³⁸³ Even if it has a territorial foothold in a state. In that respect it is worth adding that UNHCR only secured access to the TIPF in late June/early July 2007 at which time interviews with new TIPF residents were conducted and certain applications re-examined: *UNHCR Report 2008*, above n 8, [11].

³⁸⁴ United Nations High Commissioner for Refugees, 'Notice: Refugees residing in the Temporary Interview Protection Facility (TIPF) — Durable Solutions for Recognized Refugees' (Notice, undated).

UNHCR consequently tried to ensure that the US retain responsibility for the security of the refugees while they were residing in the TIPF.³⁸⁵ The acquisition of refugee status was in that sense merely instrumental,³⁸⁶ yet an essential step to securing an actual viable disposition, of which only one option remained: resettlement in a third state.

C Resettlement

The only viable disposition option left was resettlement. In the words of UNHCR: 'given the lack of any other durable solution for this group, UNHCR considers that those recognized as refugees should be resettled, primarily on the basis of legal and physical protection needs'.³⁸⁷

The acquisition of refugee status under UNHCR's mandate had the important consequence of continued UNHCR involvement. It also changed the denomination of the solutions for the residents from 'viable disposition options' to 'durable solutions', although the options remained essentially the same: 'At this point in time, Voluntary Repatriation and Local Integration are unlikely to be durable solutions in your case. UNHCR will present your case [for resettlement] to a third country'.³⁸⁸

UNHCR informed the refugees that the information that had been provided during the refugee status determination procedure would be used to submit requests for their resettlement to third countries. However, already prior to the refugee status determination procedure, UNHCR had cautioned that states could be reluctant to accept refugees who had been associated with the MeK for resettlement.³⁸⁹ The predicted reluctance was borne out by leaked cables from the US Embassy in Baghdad, which furthermore show that that reluctance can partly be attributed to the American refusal to offer resettlement places itself:

The US spearheads efforts to find third countries for refugees. MNF-I [Major General] Stone and the Ambassador believe the best way forward with the 203 former MeK members with refugee status is to make appeals at the highest levels to countries that accept refugees. ... They also suggest the US consider admitting a limited number of them. ICRC has stressed that if the US would take some of the refugees, other countries would be more willing to agree to resettle some.³⁹⁰

Be that as it may, the US would not resettle any of the refugees,³⁹¹ on account of the fact that its Department of Homeland Security 'had ruled that the refugees

³⁸⁵ Email from Resettlement Service, Division of International Protection, United Nations High Commissioner for Refugees, Geneva to Marjoleine Zieck, 17 May 2013.

³⁸⁶ Cf Letter from Major General Geoffrey D Miller to TIPF Residents, 6 August 2004 (which refers to contacts with the ICRC and UNHCR as part of the decision on the final disposition).

³⁸⁷ *UNHCR Report 2008*, above n 8, [37].

³⁸⁸ United Nations High Commissioner for Refugees, 'Notice: Durable Solutions', above n 384.

³⁸⁹ Letter from Ekber Menemencioglu, Director, Regional Bureau for Central Asia, South West Asia, North Africa and the Middle East, United Nations High Commissioner for Refugees, to the Residents of the TIPF, 30 September 2005.

³⁹⁰ US Embassy Baghdad, 'Action Request: Policy Guidance for MeK', above n 293, para 8. See also above n 32, para 9; Goulka et al, above n 5, 29: 'UNHCR indicated that a few countries might consider [resettlement] but only if the United States would accept a token number'.

³⁹¹ Instead, the American Embassy in Baghdad suggested that the US should make it clear to UNHCR that the refugees be resettled in other states:

were ineligible to enter the US due to their former association with a listed [FTO]'.³⁹² In December 2006, UNHCR reported that 75 cases had formally been submitted to resettlement countries and that 9 had been rejected by 1 resettlement country.³⁹³ Resettlement offers were not forthcoming — as predicted by UNHCR — due to the past association with a 'terrorist organization'.³⁹⁴ Yet, all the refugees had been screened and none of them had been excluded from refugee status on account of any of the crimes enumerated in art 1F of the *Refugee Convention* (including terrorism). Only one female refugee was resettled from among the TIPF residents.³⁹⁵

The frustration among the TIPF refugees increased. The US Embassy in Baghdad reported:

None of the refugee-defectors ... have been offered resettlement, and their morale is currently very low because their expectation to be resettled promptly has not been met. ... The defectors do not have freedom of movement, and have complained to the TIPF guards and to the US Embassy about their overall plight.³⁹⁶

Moreover, 'the lack of progress in finding third countries to resettle the [defected] MeK members', the Embassy added, was 'acting as a disincentive to further defections'.³⁹⁷ Neither this observation nor the knowledge that other

underlining the importance that the [US Government] attaches to this caseload and offering [US Government] assistance in leaning on countries that may accept taking some or all of the refugee-defectors. Embassy Baghdad also asks the Department to identify and demarche foreign governments to encourage them to accept some or all of the refugee defectors, either permanently or temporarily ...

US Embassy Baghdad, 'Finding Third Country Resettlement for MeK Defectors' (Confidential Diplomatic Cable, Reference ID 06BAGHDAD3788, 11 October 2006) para 4 <<https://wikileaks.org/cable/2006/10/06BAGHDAD3788.html>>.

³⁹² US Embassy Baghdad, 'UNHCR and ICRC on MeK: You Took Them, You Own Them', above n 32, para 9.

³⁹³ Email from Resettlement Services, United Nations High Commissioner for Refugees, Geneva to Lieutenant-Colonel Turluck, 6 December 2006 (in response to a petition addressed to UNHCR signed by 157 residents of the TIPF).

³⁹⁴ *UNHCR Report 2008*, above n 8, [26]–[27]. A UNHCR referral for resettlement in the United Kingdom regarding a refugee who had earlier been granted asylum in that state was, however, rejected on account of a lack of close links with the UK: Letter from Case Resolution Directorate, Home Office, Border and Immigration Agency, United Kingdom, 3 May 2007. See also US Embassy Baghdad, 'MeK Defectors on Life in Ashraf and Resettlement', above n 11, para 10:

EU officials, when pressed about their lack of interest, cite domestic legal restrictions against resettlement of former members of a FTO (although the EU has delisted the [MeK] as a FTO, many individual EU member-states have separate legal and policy restrictions prohibiting resettlement of former FTO members.).

³⁹⁵ Interview with Johannes van der Klaauw, Senior Resettlement Coordinator, United Nations High Commissioner for Refugees (UNHCR Headquarters, Geneva, 1 March 2013).

³⁹⁶ US Embassy Baghdad, 'Finding Third Country Resettlement for MeK Defectors', above n 391, para 4.

³⁹⁷ *Ibid* para 3.

states could be persuaded to offer resettlement places if the US would take the lead³⁹⁸ induced the US to offer resettlement places.

Since offering resettlement places is a discretionary act, the American refusal to offer those places can consequently only be criticised from a moral perspective. The question is, however, whether morality gives way to legal obligation when protection is terminated despite the fact that the need for it has not ended and without meeting that need in an alternative manner, as was the case when the US closed the TIPF and left the refugees to fend for themselves.

V THE CLOSURE OF THE TIPF

A 'The Gates Are Open'

The 'practice of disallowing unaccompanied departures'³⁹⁹ from the TIPF was abandoned by the US Army in the autumn of 2007, when the refugees were told that the gates would open and that they could leave the camp.⁴⁰⁰ The announcement was accompanied by explicit advice to travel to Turkey⁴⁰¹ through Iraqi Kurdistan⁴⁰² and it divided the approximately 200 residents: a group of about 100 refugees decided to seize the opportunity and leave the camp but a second group of the same size refused to leave.⁴⁰³ The latter group deemed the suggested trip to northern Iraq to be unsafe and considered release without a

³⁹⁸ See US Embassy Baghdad, 'MeK Defectors on Life in Ashraf and Resettlement', above n 11, para 10: 'According to UNHCR, some EU states are looking to the US to initiate the resettlement process. SRSV Melkert also believes admissions of some [MeK] refugees will be necessary in order to prod reluctant EU member states'. See also US Embassy Baghdad, 'UNHCR and ICRC on MeK: You Took Them, You Own Them', above n 32, para 9; US Embassy Baghdad, 'Action Request: Policy Guidance for MeK', above n 293, para 8.

³⁹⁹ US Embassy Baghdad, 'UNHCR and ICRC on MeK: You Took Them, You Own Them', above n 32, para 15. The cable adds that this policy was 'instituted in order to protect refugees from the various threats they face'.

⁴⁰⁰ This occurred on 13 October 2007 according to Hoshyar's diary: *Hoshyar Diary*, above n 30, ch 5. No exact date was mentioned by the other refugees, but they all spoke of late 2007. Hoshyar adds that the refugees were informed that a direct transfer to Turkey turned out to be impossible and that they would be released in Iraq within two weeks. This was confirmed in: Interview with Refugee 3 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 16 (Teleconference Interview, Afshin Afkari trans, 23 May 2013); Interview with Refugee 17 (University of Amsterdam, 29 May 2013).

⁴⁰¹ See US Embassy Ankara, 'Turkey: MeK Iranian Refugees Still Not Welcome' (Confidential Diplomatic Cable, Reference ID 08ANKARA1270, 15 July 2008) <<https://wikileaks.org/cable/2008/07/08ANKARA1270.html>>.

⁴⁰² Interview with Refugee 3 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 12 April 2013); Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 24 April 2013); Interview with Refugee 12 (Teleconference Interview, Afshin Afkari trans, 3 May 2013).

⁴⁰³ *UNHCR Report 2008*, above n 8, [28]–[30]. The numbers mentioned were consistently confirmed in the refugee interviews.

‘viable disposition option’ a violation of the *Release Agreement*.⁴⁰⁴ This group would stay in the TIPF until the end of April 2008 when the US Army closed the facility and transported the refugees to Iraqi Kurdistan.⁴⁰⁵ Since the US dismantled the TIPF about eight months before it transferred power over the MeK in Camp Ashraf to the Iraqi Government,⁴⁰⁶ it was consequently still in charge of the TIPF residents when it closed the camp and was, therefore, bound to observe its obligations under international humanitarian law — particularly the prohibition of refoulement — and the *Release Agreement*. This Part describes the fate of the refugees upon departure from the TIPF in order to determine whether the US complied with these obligations and whether it was legally bound to resettle the TIPF residents instead of releasing them without any form of protection.

B Release

1 *The First Group: Mere Release from the TIPF*

From mid-November onwards, the refugees who wanted to leave the TIPF — some of whom had by then been interned for more than four years — were offered the opportunity to form small groups and be released in stages.⁴⁰⁷ Before the refugees could leave, however, they had to sign a document drawn up by the US Army, which aimed to release the US from liability (*‘Release from Liability Agreement’*)⁴⁰⁸ for a list of incidences the refugees could encounter upon release, such as arrest by the Iraqi, Kurdish or Iranian authorities

⁴⁰⁴ Interview with Refugee 3 (Teleconference Interview, Anonymous trans, 22 March 2013) (‘I was surprised and afraid when I heard that we would have to go to Kurdistan, since I was aware of the suppression of the Kurds, and of how they thought about the MeK’); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 25 April 2013); Interview with Refugee 15 (Teleconference Interview, Afshin Afkari trans, 20 May 2013); Interview with Refugee 16 (Teleconference Interview, Afshin Afkari trans, 23 May 2013); Interview with Refugee 18 (Teleconference Interview, Afshin Afkari trans, 31 May 2013). In addition, some of them had refused to work in the TIPF and consequently had no money to pay any travel expenses: Interview with Refugee 3 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 12 April 2013).

⁴⁰⁵ *UNHCR Report 2009*, above n 8, [5] (stating that the TIPF was emptied by April 2008). However, two refugees mention May as the month in which they left the TIPF: Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 12 April 2013); Interview with Refugee 15 (Teleconference Interview, Afshin Afkari trans, 20 May 2013).

⁴⁰⁶ On 1 January 2009, by virtue of the status of forces agreement it had concluded with Iraq: see, eg, Wills, above n 110, 121 n 21.

⁴⁰⁷ Interview with Refugee 1 (University of Amsterdam, 21 March 2013); Interview with Refugee 2 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 3 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 24 April 2013); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 15 May 2013); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 15 May 2013); Interview with Refugee 17 (University of Amsterdam, 29 May 2013); *Hoshyar Diary*, above n 30, ch 5. See also *UNHCR Report 2009*, above n 8, [5]: ‘in November 2007 MNF-I began the release of those who wished to make their own way out of Iraq’.

⁴⁰⁸ The authors have not been able to obtain a copy of this agreement: see below n 409.

and attacks by terrorists or smugglers.⁴⁰⁹ The legal value of the agreement is questionable, considering the circumstances under which the refugees had to sign (tantamount to duress). Moreover, in view of the earlier decision of the US Chief, Detainee, Judicial and Legal Policy that protected persons cannot renounce their protected person status,⁴¹⁰ the *Release from Liability Agreement* is useless since it cannot divest the US from ongoing responsibilities under *Geneva Convention IV*.⁴¹¹ In that respect it is worth adding that the decision referred to explains that the categorical wording of art 8 of *Geneva Convention IV* was meant to intimate ‘to States [parties] to the *Convention* that they could not release themselves from their obligations towards protected persons, even if the latter showed expressly and of their own free will that that was what they desired’.⁴¹²

To facilitate their travel, the TIPF refugees were issued a one-way *laissez passer*,⁴¹³ a UNHCR identification card⁴¹⁴ and the money they had earned with their work in the TIPF.⁴¹⁵ Not all the refugees had worked in the TIPF, but those who had, earned between USD1200 and USD12 000.⁴¹⁶ The *laissez passers*, issued by officials of the Iraqi Ministry of Home Affairs at the request of the American military,⁴¹⁷ indicated it would give the holder access to Turkey, Iran,

⁴⁰⁹ The *Release from Liability Agreement* comprised about 10 points. All the refugees had to return the document, signed or not, to the US: Interview with Refugee 17 (University of Amsterdam, 29 May 2013); Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013); Interview with Refugee 11 (Teleconference Interview, Afshin Afkari trans, 15 May 2013); Email from Refugee 14 to Tom de Boer, 29 June 2013 (‘[t]he Americans said: if you want to be free, you have to sign the paper’); *Hoshyar Diary*, above n 30, ch 5. One of the interviewed refugees, who was able to read English, noticed that an extra bullet point was added to the agreement at a later point in time — when a large number of refugees had already left — to the effect that the US would not be responsible if Turkey deported the refugee concerned to Iraq or Iran: Interview with Refugee 17 (University of Amsterdam, 29 May 2013). Apparently, video recordings were made of some of the residents when they left: Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 18 June 2013); Email from Refugee 14 to Tom de Boer, 29 June 2013; *Hoshyar Diary*, above n 30, ch 5.

⁴¹⁰ Welsh, above n 159. See above Part III(C)(3).

⁴¹¹ On these ongoing obligations, see below Part V(D).

⁴¹² Welsh, above n 159.

⁴¹³ According to Hoshyar’s diary, the *laissez passers* were issued on 12 July: *Hoshyar Diary*, above n 30, ch 5.

⁴¹⁴ See Part IV(B). The refugees only received the card when they left the TIPF.

⁴¹⁵ On work in the TIPF, see above n 211 and accompanying text.

⁴¹⁶ Interview with Refugee 4 (Teleconference Interview, Afshin Afkari trans, 17 April 2013); Email from Refugee 14 to Tom de Boer, 29 June 2013.

⁴¹⁷ It appears that the issuance of the *laissez passers* had not been centrally coordinated within the Iraqi Ministry of Home Affairs. Three of the interviewed refugees state that two persons who presented themselves as officials of the Iraqi Ministry of Home Affairs came to the camp to hand out the *laissez passers*: Interview with Refugee 5 (Teleconference Interview, Mary Mehrian trans, 5 April 2013); Interview with Refugee 5 (Teleconference Interview, Afshin Afkari trans, 19 April 2013); Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 12 April 2013). This was recounted somewhat differently by Refugee 8: Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 24 April 2013):

We were released from prison in Mosul because the authorities found out that the *laissez passers* had been invented and created by two officials of the Ministry of Home Affairs with the help of the Americans. The rest of the Iraqi Government did not know the document.

The visit of the two Iraqi officials is also mentioned in *Hoshyar Diary*, above n 30, ch 5. On the problems with the *laissez passers*, see below n 425.

Syria, Jordan and Kuwait.⁴¹⁸ Some refugees were also provided with the following letter:

Memorandum for Personnel Concerned

(Name) has been under United States protection. She is recognized as a refugee under the UNHCR mandate.

(Name) will be traveling out of the country of Iraq with her Government of Iraq issued *Laissez Passer* and is authorized to do so. It is her intent to obtain a visa at the border and cross into Turkey. This action has been approved by MNF-I and the US Embassy, Baghdad, in conjunction with the Government of Iraq.

Sincerely,

(Signature)

Colonel, US Army.⁴¹⁹

After they had received the documents and signed the *Release from Liability Agreement*, the refugees could leave the TIPF. Leaving meant that they had to walk a few kilometres through the desert to reach the highway between Baghdad and Kirkuk⁴²⁰ and, from there, try to leave Iraq.⁴²¹ On 31 December 2007, 94 refugees had left the TIPF in this manner.⁴²² In February 2008, UNHCR expressed its dismay about this release:

the existence of the [TIPF] is strictly tied to the presence of MNF-I. Once these forces depart Iraq, the refugees' physical protection will be at serious risk. While the [US Government] stated a year ago that it would not transfer responsibility for these refugees to the Iraqi authorities, since June 2007, the MNF-I has begun to discuss the departure of the refugees from the [TIPF] and has requested the Iraqi Ministry of Interior to provide the refugees with one-way travel documents so they could depart Iraq. These developments have further placed the refugees at risk ...⁴²³

UNHCR does not support the issuance of these documents [the *laissez passers* and the letter from the US Colonel mentioned above] and is concerned that refugees are leaving the [TIPF] based on inaccurate information that they will be accommodated by UNHCR in northern Iraq or that they will be able to acquire visas to and enter Turkey. This is not the case. Refugees who leave the [TIPF] are

⁴¹⁸ Scans of *laissez passers* are on file with the authors and have been translated by Afshin Afkari.

⁴¹⁹ US Embassy Ankara, 'Turkey: MeK Iranian Refugees Still Not Welcome', above n 401. See also *UNHCR Report 2008*, above n 8, [31].

⁴²⁰ A distance of two to four kilometres from the main road was consistently mentioned in the refugee interviews: Interview with Refugee 1 (University of Amsterdam, 21 March 2013); Interview with Refugee 5 (Teleconference Interview, Mary Mehrian trans, 5 April 2013); Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 24 April 2013); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 15 May 2013). See also *Hoshyar Diary*, above n 30, ch 5. Other interviewed refugees stated that they were released 'in the middle of the desert' or 'just had to walk outside the gate': Interview with Refugee 2 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 5 (Teleconference Interview, Mary Mehrian trans, 5 April 2013); Interview with Refugee 10 (Telephone Interview, Afshin Afkari trans, 24 April 2013).

⁴²¹ All the refugees concerned declared this.

⁴²² *UNHCR Report 2008*, above n 8, [29].

⁴²³ *Ibid* [20].

at risk of being stranded in northern Iraq or subject to detention and deportation from another country, most notably Turkey.⁴²⁴

Indeed, the *laissez passers* turned out to lack any legal and practical value: neither the Iraqi nor the Kurdish or Turkish authorities recognised the documents. In a number of instances these documents even led to the arrest and imprisonment of the refugees who used them.⁴²⁵

2 *The Second Group: Transportation to Iraqi Kurdistan*

The refugees who had so far refused to leave the TIPF were informed by UNHCR about the MNF-I plan to transfer them to northern Iraq:

UNHCR has been informed of the details of the MNF plan to transfer the ex-[MeK] refugees to Dohuk Governorate, first to a transfer facility, the Muzzi Complex on 26 April 2008 and thereafter, once its construction, connection to basic services and other support arrangements are complete, to a tented facility in Domiz area south of Dohuk.

It is understood that the Kurdistan Regional Government will be responsible for the security and management of both facilities (to which UNHCR will have access). Former occupants of [the TIPF] with refugee status or registered asylum-seeker status will continue to be persons of concern to UNHCR. UNHCR, under its mandate to provide international protection, aims to safeguard the rights and well being of refugees and asylum-seekers in close coordination with the relevant authorities and continues to seek durable solutions to their cases through the efforts of UNHCR.⁴²⁶

Despite the protest of some of the refugees,⁴²⁷ the remaining TIPF residents were transported to Iraqi Kurdistan by US Army helicopters.⁴²⁸ They were not,

⁴²⁴ Ibid [32].

⁴²⁵ Interview with Refugee 1 (University of Amsterdam, 22 March 2013); Interview with Refugee 2 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 5 (Teleconference Interview, Mary Mehrian trans, 5 April 2013) ('[t]he *laissez passers* were a disaster: wherever you showed them, you were arrested'); Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013) ('[t]he *laissez passer* was worthless, we were still arrested in Mosul by soldiers of the Iraqi Government'); Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 24 April 2013) ('[t]he *laissez passer* was a big problem. Iraqis did not know the document and we had to bribe them to get away. ... In Mosul we were arrested because of the *laissez passer*. They told us that we were imprisoned because the documents were forged'); Interview with Refugee 17 (University of Amsterdam, 29 May 2013). See also *UNHCR Report 2009*, above n 8, [31]–[32].

⁴²⁶ Letter from Daniel Endres, Representative, United Nations High Commissioner for Refugees Iraq Operation to the Group of Refugees and Asylum-Seekers in the Ashraf Camp or Who Left the Camp, 20 April 2008 (copy on file with authors).

⁴²⁷ Interview with Refugee 16 (Teleconference Interview, Afshin Afkari trans, 23 May 2013) ('I did not agree with the arrangement, and I was the last to leave. They cuffed my hands and feet, and I was thrown out of the TIPF and into the helicopter like a bag of rice').

⁴²⁸ Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 25 April 2013); Interview with Refugee 3 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 4 (Teleconference Interview, Anonymous trans, 28 March 2013); Interview with Refugee 4 (Teleconference Interview, Afshin Afkari trans, 17 April 2013); Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 12 April 2013); Interview with Refugee 15 (Teleconference Interview, Afshin Afkari trans, 20 May 2013); Interview with Refugee 16 (Teleconference Interview, Afshin Afkari trans, 23 May 2013); Interview with Refugee 18 (Teleconference Interview, Afshin Afkari trans, 31 May 2013).

however, housed in a camp but in a hotel in Dohuk for a few weeks, after which they were brought to Erbil where they were placed in an assigned house.⁴²⁹ In Erbil they were joined by refugees of the first group who had left the TIPF on their own and who had succeeded in reaching Kurdistan.⁴³⁰ The US Army informed the refugees that it would support them financially for three months, during which time they were expected to contact UNHCR⁴³¹ — which was neither in a position to secure the safety of the refugees nor to assist them in a substantial manner⁴³² — and preferably leave Iraq.⁴³³ During these months, the regional Kurdish Government encouraged the refugees to contact travel agents

⁴²⁹ Interview with Refugee 4 (Teleconference Interview, Anonymous trans, 28 March 2013); Interview with Refugee 4 (Teleconference Interview, Afshin Afkari trans, 17 April 2013); Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 12 April 2013); Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 30 June 2013); Interview with Refugee 15 (Teleconference Interview, Afshin Afkari trans, 20 May 2013); Interview with Refugee 16 (Teleconference Interview, Afshin Afkari trans, 23 May 2013); Interview with Refugee 18 (Teleconference Interview, Afshin Afkari trans, 31 May 2013).

⁴³⁰ Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 24 April 2013); Interview with Refugee 17 (University of Amsterdam, 29 May 2013).

⁴³¹ Goulka et al state that the US made an agreement with the Kurdish Regional Government ‘to take responsibility for refugees within its territory’: Goulka et al, above n 5, 30.

⁴³² UNHCR’s assistance was confined to alleviating some urgent needs including intervention to secure release from imprisonment (Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 15 May 2013)), providing money for food and housing (Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 15 May 2013)) or arranging a temporary residence permit with the Kurdish authorities (Interview with Refugee 17 (University of Amsterdam, 29 May 2013)). One Kurdish temporary residence permit is on file with the authors. Several refugees contacted UNHCR Erbil, where the only refugee-accessible office in Iraq was located at the time: *UNHCR Report 2008*, above n 8, [21]. A number of refugees claim to have received no help from UNHCR Erbil: Interview with Refugee 4 (Teleconference Interview, Afshin Afkari trans, 17 April 2013); Interview with Refugee 10 (Telephone Interview, Afshin Afkari trans, 24 April 2013); Interview with Refugee 15 (Teleconference Interview, Afshin Afkari trans, 20 May 2013) (‘UNHCR promised us USD100 pocket money per month, but I never received that’); Email from Refugee 8 to Tom de Boer, 23 June 2013.

⁴³³ Interview with Refugee 4 (Teleconference Interview, Anonymous trans, 28 March 2013) (‘[w]e support you for three months and then you are on your own’); Interview with Refugee 18 (Teleconference Interview, Afshin Afkari trans, 31 May 2013) (‘[t]he Americans brought us by helicopter to a hotel that was paid by them for three months’).

and leave for Turkey as soon as possible,⁴³⁴ which was the avenue that practically all former TIPF residents eventually took.⁴³⁵

C *The Fate of the Residents*

Although all the interviewed refugees now enjoy asylum in a member state of the EU, it took most of them years to actually reach the EU. Some refugees did not survive the attempt to reach Europe,⁴³⁶ while others got stuck in either Iraqi Kurdistan or Turkey. This fate was known to the US Army even before it had cleared the TIPF of its residents. In February 2008, when there were still about 100 refugees in the TIPF, UNHCR reported that:

More than 35 ex-[MeK] refugees have been detained in Turkey after leaving the [TIPF] and entering Turkey illegally. Nineteen (19) of them were deported to northern Iraq where many were then detained in Mosul. Ten remain in detention in Turkey in precarious circumstances. Some former [TIPF] refugees are reportedly missing and UNHCR fears that they may have been deported to their country of origin.⁴³⁷

This information is confirmed by the interviewed refugees, 15 of whom were imprisoned at some point during their journey to Europe, in either Iraq,⁴³⁸ Iraqi

⁴³⁴ Interview with Refugee 15 (Teleconference Interview, Afshin Afkari trans, 20 May 2013) ('[t]he Kurdish Government encouraged us to get into contact with one of their travel agents, and provided us with information about trafficking routes to Turkey and a cell phone'); Interview with Refugee 16 (Teleconference Interview, Afshin Afkari trans, 23 May 2013):

The Kurdish Government told us that they would consider us as their guests for one or two months. ... We were told to make sure that we would continue our travel, and that we were able to use the help of a travel agent. There was a travel agent from the Kurdish Government.

See also Interview with Refugee 17 (University of Amsterdam, 29 May 2013) ('[t]he Kurdish Government pushed us to leave and brought us a smuggler'); Interview with Refugee 18 (Teleconference Interview, Afshin Afkari trans, 31 May 2013) ('[a]n American general told us that there were a lot of human traffickers in Kurdistan, and that we — if we would ask money from our family — could travel to another country with Kurdish assistance').

⁴³⁵ Four of the interviewed refugees asserted that a group of former TIPF residents returned to Iran from Erbil: Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 24 April 2013); Interview with Refugee 16 (Teleconference Interview, Afshin Afkari trans, 23 May 2013); Interview with Refugee 17 (University of Amsterdam, 29 May 2013); Interview with Refugee 18 (Teleconference Interview, Afshin Afkari trans, 31 May 2013). Indeed, several refugees noted that they had been approached by agents of the Iranian Government, and also of the MeK, in Iraqi Kurdistan and Turkey: Interview with Refugee 2 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 4 (Teleconference Interview, Afshin Afkari trans, 17 April 2013); Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 24 April 2013); Interview with Refugee 17 (University of Amsterdam, 29 May 2013).

⁴³⁶ As was confirmed by the interviewed refugees, Mr Hassan Mirzai drowned while being refouled to Iraq through a river crossing by the Turkish authorities in April 2008 and Mr Hassan Nematı drowned when he attempted to cross the border into Greece in May 2008.

⁴³⁷ *UNHCR Report 2008*, above n 8, [32].

⁴³⁸ Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013); Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 24 April 2013).

Kurdistan⁴³⁹ or Turkey⁴⁴⁰ and, once there, also in Europe.⁴⁴¹ Those detained in Kurdistan were detained by the Kurdish authorities and interrogated about their past with the MeK and involvement in the 1991 suppression of the Kurdish uprising.⁴⁴² They were only released after interventions by UNHCR, the US or the Democratic Party of Iranian Kurdistan.⁴⁴³ As discussed above, the refugees who had been transported by helicopter to Kurdistan were not imprisoned by the Kurdish authorities but were instead pressed to travel to Turkey.⁴⁴⁴

Since the *laissez passers* proved to be useless, the refugees had to spend the money they had earned in the TIPF or, if they had not earned a sufficient amount money, call upon family and friends for financial assistance in order to pay travel agents to aide them in ‘cross[ing] illegally into and through Turkey making their way to Europe’.⁴⁴⁵ The trip to Europe would cost some refugees as much as USD16 000.⁴⁴⁶ Approximately 15 refugees remained stuck in Iraqi Kurdistan: they either had not been able to collect the requisite amount of money or were forcibly sent back to Iraq by the Turkish authorities.⁴⁴⁷

The fate of those who were not forcibly returned to Iraq was not much better. Clearly, the Turkish Government had not been consulted by the US when it suggested the refugees travel to Europe via Turkey, as can be inferred from the following cable from the US Embassy in Ankara:

⁴³⁹ Interview with Refugee 1 (University of Amsterdam, 21 March 2013); Interview with Refugee 3 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 24 April 2013); Interview with Refugee 10 (Telephone Interview, Afshin Afkari trans, 24 April 2013); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 15 May 2013); Interview with Refugee 20 (Teleconference Interview, Afshin Afkari trans, 26 June 2013).

⁴⁴⁰ Interview with Refugee 2 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 5 (Teleconference Interview, Mary Mehrrian trans, 5 April 2013); Interview with Refugee 9 (Telephone Interview, Afshin Afkari trans, 19 April 2013); Interview with Refugee 10 (Telephone Interview, Afshin Afkari trans, 24 April 2013); Interview with Refugee 12 (Teleconference Interview, Afshin Afkari trans, 3 May 2013); Interview with Refugee 17 (University of Amsterdam, 29 May 2013); Email from Refugee 14 to Tom de Boer, 29 June 2013.

⁴⁴¹ Interview with Refugee 2 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 5 (Teleconference Interview, Mary Mehrrian trans, 5 April 2013); Interview with Refugee 15 (Teleconference Interview, Afshin Afkari trans, 20 May 2013); Interview with Refugee 16 (Teleconference Interview, Afshin Afkari trans, 23 May 2013); Interview with Refugee 20 (Teleconference Interview, Afshin Afkari trans, 26 June 2013); Email from Refugee 8 to Tom de Boer, 23 June 2013.

⁴⁴² Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 15 May 2013):

The Kurdish security service interrogated us about 1990 [sic]. They asked me whether I had killed Kurds. ... In Erbil I was arrested once more, and imprisoned for three weeks. ... They cuffed my hands and feet, pushed me around, and kept telling me that I had killed Kurds.

⁴⁴³ Interview with Refugee 7 (Teleconference Interview, Afshin Afkari trans, 12 June 2013); Interview with Refugee 8 (Teleconference Interview, Afshin Afkari trans, 24 April 2013); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 15 May 2013). That some of the refugees were Kurdish themselves made their release easier.

⁴⁴⁴ According to *UNHCR Report 2009*, above n 8, [5]: ‘Some ... were threatened with expulsion from the Kurdistan Region’.

⁴⁴⁵ *Ibid.*

⁴⁴⁶ Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 15 May 2013).

⁴⁴⁷ A portrait of these refugees is contained in: van Wessel, Neurink and Bakker, *Lost in Limbo*, above n 11.

At least 45 MEK Iranians are currently known to have entered Turkish territory from Iraq, nearly all having entered illegally. [Government of Turkey] officials are angered by what they perceive as active US encouragement of illegal entry into Turkey by political migrants who are not welcome here.⁴⁴⁸

As a result, many of the refugees were arrested and imprisoned by the Turkish authorities for illegal entry or the absence of identity documents.⁴⁴⁹ Some of the refugees who were imprisoned in Turkey managed to seize the ECtHR⁴⁵⁰ and, in January 2008, the ECtHR issued the first interim measures to prevent the deportation of the refugees from Turkey to Iran or Iraq.⁴⁵¹ Despite those interim measures, the Turkish authorities continued with their practice of refoulement and, on 25 April 2008, UNHCR reported the deaths of four persons, including a former TIPF resident,⁴⁵² during a Turkish expulsion operation:

the Turkish authorities ... attempted to forcibly deport 60 people of various nationalities to Iraq through the official border crossing. The Iraqi border authorities allowed 42 Iraqis to enter the country, but refused to admit 18 Iranian and Syrian nationals. The Turkish police then took the 18, which included five Iranian refugees recognised by UNHCR, to a place where a river separates the two countries, and forced them to swim across.

⁴⁴⁸ US Embassy Ankara, 'Turkey: MeK Iranian Refugees Still Not Welcome', above n 401.

⁴⁴⁹ See above n 425. See also *Mehrdad v Turkey* (European Court of Human Rights, Second Section, Application Nos 1157/08, 1165/08, 1174/08, 1175/08 and 21383/08, 9 February 2010).

⁴⁵⁰ See the following judgments of the ECtHR: *Keshmiri v Turkey* (European Court of Human Rights, Second Section, Application No 36370/08, 13 April 2010); *Keshmiri v Turkey [No 2]* (European Court of Human Rights, Second Section, Application No 22426/10, 17 January 2012); *Abdolkhani and Karimnia* (European Court of Human Rights, Second Section, Application No 30471/08, 22 September 2009); *Abdolkhani v Turkey [No 2]* (European Court of Human Rights, Second Section, Application No 50213/08, 27 July 2010); *Tehrani v Turkey* (European Court of Human Rights, Second Section, Application Nos 32940/08, 41626/08 and 43616/08, 13 April 2010); *Moghaddas v Turkey* (European Court of Human Rights, Second Section, Application No 46134/08, 15 February 2011); *Mehrdad v Turkey* (European Court of Human Rights, Second Section, Application Nos 1157/08, 1165/08, 1174/08, 1175/08 and 21383/08, 9 February 2010). In most cases, the complaints related to expulsion to either Iraq or Iran (or both) in violation of art 3 of the *European Convention on Human Rights*, unlawful deprivation of liberty in contravention of art 5, inhuman and degrading conditions of detention in violation of art 3 and the lack of legal remedies in violation of art 13: *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953), as amended by *Protocol No 14bis to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 27 May 2009, CETS No 204 (entered into force 1 September 2009) ('*European Convention on Human Rights*').

⁴⁵¹ *UNHCR Report 2008*, above n 8, [33]. See also *Mehrdad v Turkey* (European Court of Human Rights, Second Section, Application Nos 1157/08, 1165/08, 1174/08, 1175/08 and 21383/08, 9 February 2010). Note that one of the refugees reported that the US added an extra point to the *Release from Liability Agreement* which involved probable deportation by Turkey (described above Part V(B)(1)).

⁴⁵² See above n 436.

According to the witnesses interviewed by UNHCR, four persons, including a refugee from Iran, were swept away by the strong river current and drowned. Their bodies could not be recovered.⁴⁵³

This story was confirmed by one of the interviewed refugees:

At one evening, the Turkish police came to our cells and told us that we would be brought to UNHCR. We were brought to the Iraqi border, but the Iraqi border guard did not let us pass. Subsequently, the Turks took us to a river and forced us to cross it. Later, one of our companions, Hassan Mirzai, would drown during such a crossing. They shot in the air and forced us to cross. ... I was wet and frozen after crossing the river, and I had a problem with my kidney.⁴⁵⁴

The issue of forcible return to Iraq — and Iran — was addressed by the ECtHR in *Abdolkhani and Karimnia*.⁴⁵⁵ Two former TIPF residents who were detained in Turkey had been subjected to several attempts at refoulement by the Turkish authorities. The ECtHR found that return to Iraq or Iran would contravene art 3 of the *European Convention on Human Rights*, since ‘former ... [MeK] members ... could be killed and ill-treated in Iran’⁴⁵⁶ and ‘deportation to Iraq would be carried out in the absence of a legal framework providing adequate safeguards against risks of death or ill-treatment in Iraq and against the applicants’ removal to Iran by the Iraqi authorities’.⁴⁵⁷ This judgment would serve as a blueprint for other cases involving former TIPF residents

⁴⁵³ United Nations High Commissioner for Refugees, ‘UNHCR Deplores Refugee Expulsion by Turkey which Resulted in Four Deaths’ (Press Release, 25 April 2008) <<http://www.unhcr.org/4811e23c4.html>>. UNHCR attributed deteriorating relations with the Government of Turkey to this press release: ‘Because the [Government of Turkey] does not recognize the MEK Iranians as refugees, authorities assert UNHCR has no right to publicly condemn their deportation from Turkey, a country they entered illegally’ and, when three former MeK refugees were refouled to Iran from Turkey in June 2008, it refrained from issuing another press release: US Embassy Ankara, ‘Turkey: MeK Iranian Refugees Still Not Welcome’, above n 401. See also at para 4: ‘UNHCR–GOT relations took a sharp downturn following a UNHCR press release in April regarding the alleged deaths of UNHCR-recognized refugees, one of whom was an MEK Iranian, during their deportation from Turkey to Iraq’. Some refugees stated that they did not trust UNHCR Ankara: Interview with Refugee 2 (Teleconference Interview, Afshin Afkari trans, 25 April 2013); Interview with Refugee 10 (Telephone Interview, Afshin Afkari trans, 24 April 2013) (‘I did not trust UNHCR in Turkey. A number of companions had contact with UNHCR. UNHCR had contact with the police and a year later they were arrested and deported to Iraq’). On Turkish law and practice with regard to non-European refugees and the role of UNHCR, see Zieck, ‘UNHCR and Turkey, and Beyond’, above n 289.

⁴⁵⁴ Interview with Refugee 17 (University of Amsterdam, 29 May 2013). This story is confirmed by: Mohammad Torabi, *A Letter from Dr Torabi on behalf of 8 UNHCR Refugees* (24 January 2008) <<http://iran-interlink.org/?mod=view&id=3909>> (‘I’m writing to you on behalf of ... 8 UNHCR recognized refugees who have been forced by the Turkish Security and Political Police under gun fire to leave Turkey and cross the border back into Iraq’). See also above n 436; *UNHCR Report 2009*, above n 8, [5]; United Nations High Commissioner for Refugees, ‘UNHCR Deplores Refugee Expulsion’, above n 453; the ECtHR cases cited in above n 450; Interview with Refugee 10 (Telephone Interview, Afshin Afkari trans, 24 April 2013); Interview with Refugee 17 (University of Amsterdam, 29 May 2013).

⁴⁵⁵ *Abdolkhani and Karimnia* (European Court of Human Rights, Second Section, Application No 30471/08, 22 September 2009).

⁴⁵⁶ *Ibid* [83]. See also *European Convention on Human Rights* art 3: ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’.

⁴⁵⁷ *Abdolkhani and Karimnia* (European Court of Human Rights, Second Section, Application No 30471/08, 22 September 2009) [89].

stranded in Turkey.⁴⁵⁸ Those who were able to leave Turkey⁴⁵⁹ reached the EU via Greece, a dangerous journey that led to the death of one of the refugees⁴⁶⁰ and in many cases included detention.⁴⁶¹ Due to difficulties such as these it would take the majority of the former TIPF residents several years before they would be granted asylum in a European country.⁴⁶²

D Legal Implications

1 Violation of the Release Agreement

The sudden release in 2007 and 2008 — when some of the refugees had been interned by the US Army for more than five years⁴⁶³ — was at odds with the *Release Agreement*,⁴⁶⁴ which contained the reciprocal arrangement of (voluntary) submission to protection against the local population and the Iraqi authorities pending a final disposition. It is not clear what instigated the decision to close the TIPF, the timing of which was incomprehensible since Camp Ashraf was not closed at the same time. UNHCR and the ICRC had observed that the internment of the TIPF residents contravened their right to freedom of

⁴⁵⁸ *Keshmiri v Turkey* (European Court of Human Rights, Second Section, Application No 36370/08, 13 April 2010) [21]–[28]; *Tehrani v Turkey* (European Court of Human Rights, Second Section, Application Nos 32940/08, 41626/08 and 43616/08, 13 April 2010) [64]–[67]. See also *Mehrdad v Turkey* (European Court of Human Rights, Second Section, Application Nos 1157/08, 1165/08, 1174/08, 1175/08 and 21383/08, 9 February 2010) (this case would not be taken up by the Court, since all applicants had meanwhile been granted asylum in other European countries, as a result of which the applicants were no longer at risk of being deported to Iran or Iraq by the Turkish authorities).

⁴⁵⁹ See above n 12.

⁴⁶⁰ See, eg, *Moghaddas v Turkey* (European Court of Human Rights, Second Section, Application No 46134/08, 15 February 2011) [9]:

On 14 September 2008 the applicant attempted to escape to Greece from Turkey by boat together with a friend, but they were stranded in the water for approximately eighteen hours when their inflatable boat capsized. On 15 September 2008 at approximately 11.00 am they were rescued and arrested by Turkish coastguards.

On the death of one of the refugees, see above n 436.

⁴⁶¹ All of the refugees mentioned in above n 441.

⁴⁶² In Part I above, reference was made to an estimated 10 persons who still reside in Turkey (in a state of legal limbo) and an estimated 15 refugees who are still stuck in northern Iraq: Interview with Johannes van der Klaauw, Senior Resettlement Coordinator, United Nations High Commissioner for Refugees (UNHCR Headquarters, Geneva, 1 March 2013). That there are still people residing in Erbil is confirmed in: Interview with Refugee 3 (Teleconference Interview, Anonymous trans, 22 March 2013); Interview with Refugee 6 (Teleconference Interview, Afshin Afkari trans, 18 April 2013) (mentioning the number 15 as well); Interview with Refugee 13 (Teleconference Interview, Afshin Afkari trans, 15 May 2013); Interview with Refugee 15 (Teleconference Interview, Afshin Afkari trans, 20 May 2013); Interview with Refugee 16 (University of Amsterdam, 23 May 2013) ('10 to 12 persons in North Iraq'); Interview with Refugee 17 (University of Amsterdam, 19 May 2013).

⁴⁶³ On 18 December 2007, Hoshyar noted in his diary (emphasis in original):

FINALLY ... me and two other prisoners were released in the desert on 2 kilometres distance from the main road and close to Camp Ashraf. They said: 'You are free!'. My imprisonment in the TIPF took slightly longer than the Second World War, and three times longer than the hostage-taking of American Embassy personnel in Tehran.

Hoshyar Diary, above n 30, ch 1. During the Iran Hostage Crisis, 52 American Embassy officials were held hostage from 4 November 1979 to 20 January 1981 by Islamist students and militants. According to Abrahamian, the MeK supported the hostage-taking: Abrahamian, above n 1, 196.

⁴⁶⁴ For the full text of the agreement, see above Part III(A)(2).

movement,⁴⁶⁵ but a cable from the US Embassy in Baghdad suggests that the TIPF may have been closed for an altogether different reason, to wit: ‘slow defection rates’.⁴⁶⁶ Be that as it may, the reasons that had induced internment had not disappeared and the need for a viable disposition was therefore as pressing as it had earlier been. Consequently, closure of the TIPF did not make sense.⁴⁶⁷

In the absence of a final disposition, the closure of the TIPF violated the terms of the *Release Agreement*, which had made release dependent on the availability of a viable disposition option. As set out in Part IV, of all the options enumerated in the *Release Agreement*, only that of resettlement remained and the TIPF residents had a contractual claim to US protection until they could be resettled. By withdrawing its protection in the absence of resettlement, the US acted in contravention of the *Release Agreement* and, moreover, retroactively affected the legitimacy of the many years of internment beyond a mere denial of freedom of movement.⁴⁶⁸

2 Violation of the Prohibition of Refoulement

When the US informed the ICRC and UNHCR of its plan to close the TIPF, the two agencies emphasised the ongoing responsibility of the US Government in relation to the TIPF residents.⁴⁶⁹ In a leaked US Embassy cable of 3 June 2007, the position of the ICRC was set out:

The ICRC said that because the MEK, as well as the defectors, are currently under MNF-I’s ‘effective control’ the US has an obligation to protect them from certain types of risks. ...

When asked if the [US Government] could end our Article III obligation [sic] by transferring the MEK to the government of Iraq, the ICRC said that the US could not do so en masse without violating the principle of non-refoulement which, according to the ICRC, precludes a State from transferring persons within its control to another State if a real risk exists that they may face arbitrary deprivation of life, torture or other form [sic] of ill-treatment. ...

The ICRC said the [Government of Iraq] is neither capable nor willing to take on the responsibility of ensuring the population is physically protected and treated humanely. ...

The ICRC said any such transfer would be a violation of the principle of non-refoulement — even if the [Government of Iraq] provided diplomatic

⁴⁶⁵ US Embassy Baghdad, ‘UNHCR and ICRC on MeK: You Took Them, You Own Them’, above n 32, para 15.

⁴⁶⁶ US Embassy Baghdad, ‘MeK Defectors on Life in Ashraf and Resettlement’, above n 11, para 9.

⁴⁶⁷ See above Part III(B)(1).

⁴⁶⁸ As set out in Part III, the internees were denied many of the procedural and substantive rights that accrue to internees under *Geneva Convention IV*, which already undermines the legitimacy and legality of the internment.

⁴⁶⁹ See US Embassy Baghdad, ‘UNHCR and ICRC on MeK: You Took Them, You Own Them’, above n 32. See also *UNHCR Report 2008*, above n 8, [29]; Judit Neurink, ‘Gehate ex-Moedjahidien overal uitgekotst [Hated Ex-Mujahedin Chewed up and Spat Out Everywhere]’, *Trouw* (online), 28 July 2008 <<http://www.trouw.nl/tr/nl/4324/Nieuws/article/detail/1263973/2008/07/28/Gehate-ex-Moedjahidien-overal-uitgekotst.dhtml>>.

assurances that it would protect and uphold the human rights of the [MeK] and would comply with the international policy of non-refoulement.⁴⁷⁰

The principle of non-refoulement is part of international refugee law, international humanitarian law and international human rights law.⁴⁷¹ The US explicitly accepted the application of *Geneva Convention IV* and was therefore bound to observe the prohibition of refoulement laid down in art 45 para 4 thereof: ‘In 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 opinions or religious beliefs’.⁴⁷²

The MeK defectors had reason to fear persecution in both Iraq and Iran for reasons of (imputed) political opinion.⁴⁷³ Release (or transfer) to these countries would thus result in a violation of the prohibition of refoulement. The release of the TIPF refugees would only have been in accordance with *Geneva Convention IV* if proper arrangements had been made with the Iraqi Government regarding their protection.⁴⁷⁴ However, against the explicit advice of UNHCR, the US tried to divest itself of its obligations by issuing *laissez passers* and accompanying letters to the TIPF residents in a vain attempt to enable their passage to Europe. As had been predicted by UNHCR, these documents merely gave the TIPF

⁴⁷⁰ US Embassy Baghdad, ‘UNHCR and ICRC on MeK: You Took Them, You Own Them’, above n 32, paras 2–4. The US added that the ‘[US Government] does not believe that it has legal non-refoulement obligations with regard to the [MeK], although as a policy matter the [US Government] would obtain diplomatic assurances of humane treatment prior to transferring the [MeK] to another State’: at para 3. This is remarkable since the US considered itself bound by *Geneva Convention IV* with regard to the Ashraf and TIPF residents (see above Part III), which includes the principle of non-refoulement. It is, therefore, conspicuous that reference is made to Common Article 3 whilst the US had secured the ongoing applicability of *Geneva Convention IV* by its designation of the TIPF residents as protected persons: see above Part III. It is also remarkable that the ICRC refers to Common Article 3 in light of the ongoing applicability of *Geneva Convention IV* by virtue of art 6: see above Part III(A)(1).

⁴⁷¹ For a comparison between the three regimes in the situation of transfer of persons from one regime to another, see Emanuela-Chiara Gillard, ‘There’s No Place Like Home: States’ Obligations in relation to Transfers of Persons’ (2008) 90 *International Review of the Red Cross* 703. On non-refoulement, see Francesco Messineo, ‘Non-Refoulement Obligations in Public International Law: Towards a New Protection Status?’ in Satvinder S Juss (ed), *The Ashgate Research Companion to Migration Law, Theory and Policy* (Ashgate, 2013) 129. The three non-refoulement principles differ in scope *ratione personae, materiae* and *loci*. Put generally, and with regard to states that have signed the relevant treaties, in international refugee law, the principle applies to (potential) refugees where the state exercises jurisdiction, in human rights law to any person over whom (an agent of) the state exercises jurisdiction, and in international humanitarian law to protected persons during and under specific circumstances for a sustained period after an international armed conflict.

⁴⁷² This principle is of an absolute nature and entails ‘that the Detaining Power cannot transfer protected persons unless it is absolutely certain that they will not be subject to discriminatory treatment or, worse still, persecution’ and ‘cover[s] all cases of transfer, whatever the country of destination may be and whatever the date’: Pictet, above n 4, 269 (Article 45, Paragraph 4). The protection against refoulement also applies ‘where persons are transferred from the authority of one state to that of another within the territory of a single state’ since ‘[w]hat matters is the change in effective control over a person from one state to another’: Gillard, ‘There’s No Place Like Home’, above n 471, 705, 713.

⁴⁷³ See above Part V(C) on the judgment of the ECtHR regarding refoulement to Iraq and Iran in *Abdolkhani and Karimnia* (European Court of Human Rights, Second Section, Application No 30471/08, 22 September 2009).

⁴⁷⁴ By virtue of art 45 of *Geneva Convention IV*. But see above n 472 and accompanying text: the ICRC denied that arrangements with Iraq could be sufficient to overcome the prohibition of refoulement.

residents the false impression that they could safely travel to Turkey via northern Iraq and present themselves to the authorities there.⁴⁷⁵ By telling the refugees that the TIPF would close, and that there was no other option than leaving the facility, the US knew — or ought to have known — that there was a real risk that they would be exposed to threats to their lives and freedom.

In Turkey, former TIPF residents ran the risk of being deported to either Iraq or Iran, which would prove to be fatal for some. It is particularly disturbing that the US was aware of the Turkish expulsion policy when the ECtHR issued its first interim measure to prevent the refoulement of former TIPF residents from Turkey to Iraq or Iran in January 2008, yet chose to relocate the remaining TIPF residents to Kurdistan, where they were pressured to travel, without further US assistance, to Turkey.⁴⁷⁶ Even during the lengthy procedures of some former TIPF residents before the ECtHR, sometimes lasting up to two years,⁴⁷⁷ the US would not offer any assistance, even though it had the power to honour its contractual obligations by resettling the refugees in the US or elsewhere.⁴⁷⁸ Consequently, the US knowingly imperilled the lives and freedom of these refugees while it still exercised effective control over them and consequently breached its obligation to observe the prohibition of refoulement by exposing them to direct and indirect refoulement.

To the extent that the (forced) release of the TIPF residents is considered to be a transfer from the effective control of the US to that of Iraq, or Iraqi Kurdistan, the US incurred additional obligations towards the refugees by virtue of art 45 para 3 of *Geneva Convention IV*:⁴⁷⁹

if [the receiving] Power fails to carry out the provisions of the present *Convention* in any important respect, the Power by which the protected persons were transferred shall, upon being so notified by the [receiving] Power, take effective measures to correct the situation or shall request the return of the protected persons. Such request must be complied with.⁴⁸⁰

If a lawful transfer gives rise to ongoing obligations, an unlawful transfer or release — ie, refoulement — must have the same consequences.⁴⁸¹ The US

⁴⁷⁵ No agreement with Turkey was reached: see above Part V(C).

⁴⁷⁶ That the US was actually aware of the lack of cooperation of the Turkish Government when it decided to relocate the 100 remaining TIPF residents to Iraqi Kurdistan follows from a leaked US diplomatic cable: US Embassy Ankara, ‘Turkey: MeK Iranian Refugees Still Not Welcome’, above n 401.

⁴⁷⁷ Interview with Refugee 14 (Teleconference Interview, Afshin Afkari trans, 27 June 2013).

⁴⁷⁸ The US knew exactly how many people were stuck in Erbil: US Embassy Baghdad, ‘MeK Defectors on Life in Ashraf and Resettlement’, above n 11, para 2 (‘[a]nother 22 are in Erbil awaiting UNHCR resettlement’).

⁴⁷⁹ See, eg, Gillard, ‘There’s No Place Like Home’, above n 471, 738–41; Colassis, above n 165, 466–8.

⁴⁸⁰ See Pictet, above n 4, 267–9 (Article 45, Paragraph 3).

⁴⁸¹ Cf Gillard, ‘There’s No Place Like Home’, above n 471, 741 (emphasis added):

The approach under international humanitarian law is thus significantly broader than that under human rights law. Not only does it impose residual responsibilities on sending states *even* in relation to transfers of persons that did not violate the principle of non-refoulement, but the remedial action that may be required is far more onerous and can include demanding the return of the persons concerned. An essential prerequisite for the sending state to discharge its ongoing obligations is the establishment of a system that enables it to monitor the situation of the persons transferred.

accordingly had ongoing obligations towards the released/transferred refugees under *Geneva Convention IV* after it closed the TIPF.

3 *An Obligation to Resettle?*

When the US decided to close the TIPF, it had, from a legal point of view, no other option than securing the one viable disposition that was left: resettlement. This, in turn, means that offering resettlement places may in certain circumstances turn into a legal obligation: either when contractually bound to do so and/or when bound to observe a primary norm of international law, *in casu*, the prohibition of refoulement. This is particularly relevant when a state, by military intervention and/or occupation, creates a situation in which a particular group of protected persons under the 1949 *Geneva Conventions* — for instance immigrants, a group of refugees or a discriminated minority — is imperilled by the regime change caused by the intervention and/or occupation and relies on the protection of the intervening or occupying state by means of internment. If, in such a situation of effective control, local integration and repatriation are not viable options, a legal argument can be made that the intervening state has an obligation to secure the rights of the people concerned by resettling them either in its own territory or in a third state. This argument is supported by the ICRC's commentary to art 6 of *Geneva Convention IV*:

The word 'resettlement' is used in regard to protected persons who cannot be repatriated for one reason or another and are not allowed to settle permanently in the country where they are living. In such cases another country must be found where they will be received and allowed to settle.⁴⁸²

Such an obligation would arise at the moment of withdrawal of the state's forces from foreign territory, but only if the withdrawal would result in a threat to the life and freedom of the members of the group it was protecting. The closure of the TIPF was such a situation.

The US referred to domestic legal restrictions to explain its refusal to resettle the TIPF residents in the US.⁴⁸³ While national restrictions can indeed serve as a valid barrier to the usual resettlement scheme — when resettlement is of a discretionary nature — they cannot in cases where discretion has been replaced by an obligation such as in the present case.⁴⁸⁴ Unlike other states that invoked national laws that precluded them from offering resettlement places to the TIPF residents, the US was legally responsible for their fate and thus precluded from invoking domestic restrictions. After all, the only way to observe its contractual and international legal obligations to protect the TIPF residents was by resettling them, either in a third state, which had turned out to be impossible, or in its own territory.

⁴⁸² See Pictet, above n 4, 64.

⁴⁸³ US Embassy Baghdad, 'UNHCR and ICRC on MeK: You Took Them, You Own Them', above n 32.

⁴⁸⁴ Cf *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) arts 26, 27.

VI REMEDIES

A Breach of Contract

Assuming that the *Release Agreement* qualifies as a contract under the common law, as it would in the civil law tradition,⁴⁸⁵ its breach⁴⁸⁶ carries legal consequences, namely damages: general damages — in particular, reliance damages — and arguably also consequential damages.⁴⁸⁷ These damages involve the award of monetary damages, and would be appropriate for the TIPF residents who found asylum in Western Europe, as well as the relatives of those refugees who died in the course of their flight to Europe. For those who have not received asylum, who are either stuck in northern Iraq or find themselves in legal limbo in Turkey, another remedy would — alongside consequential damages — be appropriate: specific enforcement of the *Release Agreement*. In view of the fact that only one of the viable disposition options remained, specific enforcement would boil down to resettlement of the refugees concerned. Specific enforcement requires an order of the court to compel the breaching party to complete performance of the contract.⁴⁸⁸

B Breach of Primary Norms

Violation of a primary norm of international law is an internationally wrongful act by a state provided that it can be attributed to that state.⁴⁸⁹ The US violated the rights of the TIPF residents under *Geneva Convention IV* both during internment and upon release. These breaches can be attributed to the US as has been demonstrated in Parts III and V. The responsibility of a state that is engaged in an internationally wrongful act entails legal consequences, specifically a continued duty of performance, cessation and non-repetition and reparation.⁴⁹⁰

Although the *Articles on the Responsibility of States for Internationally Wrongful Acts* ('*Articles on State Responsibility*') acknowledge that in some cases 'individuals concerned should be regarded ... as the holders of the relevant rights' and 'reparation does not necessarily accrue to that State's benefit',⁴⁹¹ traditional public international law confines the right to invoke these rights to

⁴⁸⁵ Jan H Dalhuisen, *Dalhuisen on Transnational and Comparative Commercial, Financial and Trade Law* (Hart, 3rd ed, 2007) 255 et seq; K Zweigert and H Kötz, *An Introduction to Comparative Law* (Oxford University Press, 3rd ed, 1998) 523 et seq.

⁴⁸⁶ See above Part V(D)(1).

⁴⁸⁷ 'Consequential damages' are damages that occur as a consequence of facts and circumstances that were known at the time the contract was concluded; they may be recovered if it is established that they were foreseeable to the breaching party at the time the contract was made. That was arguably the case since the facts and circumstances that could result in various forms of damage were the reason to control and protect the MeK defectors.

⁴⁸⁸ See George P Fletcher and Steve Sheppard, *American Law in a Global Context: The Basics* (Oxford University Press, 2005); *Restatement (Second) of Contracts* (1981) §§ 317, 347, 359.

⁴⁸⁹ *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, UN Doc A/56/10 (2001), ch IV(E) art 2.

⁴⁹⁰ See *ibid* ch V(E) pt II.

⁴⁹¹ See James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002) 209–10 (on art 33).

(injured) states.⁴⁹² Admittedly, this particular limitation is gradually being eroded by the increasing possibility of individual complaints procedures under mostly regional human rights regimes,⁴⁹³ the gradual development of an individual right to reparation outside the ambit of special human rights regimes⁴⁹⁴ and national tort procedures.⁴⁹⁵ However, the *locus standi* of former TIPF residents under international law would depend largely on the (hypothetical) willingness of the Iranian Government to exercise diplomatic protection. In addition, third states may have *locus standi*, regardless of the fact that the principally injured party consists of (foreign) individuals if the relevant obligations — *in casu*, those pertaining to internment, treatment of protected persons and non-refoulement — can be considered to be owed to the international community under art 48 of the *Articles on State Responsibility*.⁴⁹⁶ The latter option would obviously be of interest to the TIPF refugees but it

⁴⁹² Ibid 210:

The articles do not deal with the possibility of the invocation of responsibility by persons or entities other than States, and [art 33] paragraph 2 makes this clear. It will be a matter for the particular primary rule to determine whether and to what extent persons or entities other than States are entitled to invoke responsibility on their own account.

⁴⁹³ The cases regarding the expulsion of TIPF refugees by Turkey before the ECtHR are a case in point: see above Part V(C).

⁴⁹⁴ On this development: see, eg, Emanuela-Chiara Gillard, ‘Reparation for Violations of International Humanitarian Law’ (2003) 85 *International Review of the Red Cross* 529; Marco Sassòli, ‘State Responsibility for Violations of International Humanitarian Law’ (2002) 84 *International Review of the Red Cross* 401; Riccardo Pisillo Mazzeschi, ‘Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview’ (2003) 1 *Journal of International Criminal Justice* 339; M Cherif Bassiouni, ‘International Recognition of Victims’ Rights’ (2006) 6 *Human Rights Law Review* 203. The emergence of an individual right to reparation under international law is accompanied by initiatives to accommodate the ability to actually bring a claim: see, eg, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res 60/147, UN GAOR, 60th sess, 64th plen mtg, Agenda Item 71(a), Supp No 49, UN Doc A/RES/147 (21 March 2006).

⁴⁹⁵ See, for example, the Dutch Rawagadeh case, in which the Netherlands was held responsible for the killing of nearly the entire male population of the Indonesian village Rawagadeh in 1947. Accordingly, financial compensation was offered to the widows by the Netherlands: *Silan v The Netherlands* (The Hague District Court, 14 September 2011). In a recent judgment of the Dutch Supreme Court a similar verdict was reached with regard to the responsibility of the state of the Netherlands for the death of three Muslim men in Srebrenica, Bosnia-Herzegovina during a UN peacekeeping operation: *Netherlands v Nuhanović* (Supreme Court of the Netherlands, 6 September 2013). As for the US, the *Alien Torts Claims Act*, 28 USC § 1350 (2006) appears to be limited: the US Supreme Court recently made clear in *Kiobel v Royal Dutch Petroleum Company*, 569 US 1 (2013) that the presumption against extraterritoriality also applies to claims under the *Alien Torts Claims Act*.

⁴⁹⁶ See, eg, Sassòli, above n 494, 426–7. Article 48 of the *Articles on State Responsibility* provides that any state is entitled to invoke the responsibility of the responsible state where the obligation breached is owed to either a group of states (‘obligations *erga omnes partes*’) or the international community as a whole (‘obligations *erga omnes*’) in its capacity as a member of the group of states or the international community at large to whom this particular obligation is owed. If such is the case, any state may claim cessation of the internationally wrongful act, and performance of the obligation of reparation in the interest of the injured state or of the beneficiaries of the obligation breached.

should be added that it is not a very realistic one considering the fact that art 48 is an instance of progressive development of the law.⁴⁹⁷

Cessation would not be an option since the US is no longer present in Iraq.⁴⁹⁸ Thus reparation is left. Reparation can take various forms such as restitution — restoring the situation which existed before the wrongful act was committed if this is materially possible — compensation and satisfaction. In view of the fact that restitution would, when taken literally, entail a return to internment in the TIPF and the time when the US was contractually bound to extend protection pending the realisation of a viable final disposition, restitution is obviously not possible. However, when the plight of the few who could not bribe themselves out of Iraq and into the EU and are stuck in northern Iraq is entered into the equation, the notion of restitution would in essence point to the situation when finding a viable final disposition (and there was only one option left, namely, that of resettlement) was still outstanding and thus would imply securing resettlement for them, in the US or elsewhere.⁴⁹⁹ The overwhelming majority of the refugees fortunately found asylum outside Iraq and, for them, compensation would be the appropriate form of reparation. The same applies to the relatives of those who died on their way to Europe.⁵⁰⁰ That would certainly also be the most appropriate remedy for the injury caused by violations of other primary norms — specifically, the procedural and substantive norms of *Geneva Convention IV* during the time of internment.

VII CONCLUDING OBSERVATIONS

A Conclusion

One of the puzzling questions that will remain unanswered is why the US decided to protect the MeK defectors by means of internment. The US was under no obligation to do so when it was confronted with the MeK defectors in 2003 and there was also no need to protect itself from the MeK defectors by means of their internment. The MeK defectors themselves simply wanted to leave the

⁴⁹⁷ See, eg, Crawford, *The International Law Commission's Articles on State Responsibility*, above n 491, 279; Anne-Laure Vauris-Chaumette, 'The International Community as a Whole' in James Crawford et al (eds), *The Law of International Responsibility* (Oxford University Press, 2010) 1023, 1027. For a successful complaint filed by a third state (although on the basis of a treaty provision and not the *Articles on State Responsibility*), see *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (Judgment)* [2012] ICJ Rep 422. If the prohibition of refolement is considered a peremptory norm of international law — as the UNHCR's Executive Committee qualifies the prohibition — it would also come within the purview of arts 40 and 41 of the *Articles on State Responsibility*: see Executive Committee of the High Commissioner's Programme, *General Conclusion on International Protection: No 25 (XXXIII)*, 33rd sess (20 October 1982) [b]; Executive Committee of the High Commissioner's Programme, *Conclusions Adopted by the Executive Committee on International Protection of Refugees: No 79 (XLVII) General*, 47th sess (11 October 1996) [i].

⁴⁹⁸ Cf *Articles on State Responsibility*, UN Doc A/RES/56/83, annex art 30 ('Cessation and non-repetition'). If applied to the present case, it would presume a presence in Iraq: 'The State responsible for the internationally wrongful act is under an obligation: (a) To cease that act, if it is continuing; (b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require'.

⁴⁹⁹ Which state is not relevant provided minimum requirements including particularly observing the prohibition of refolement are met.

⁵⁰⁰ *Articles on State Responsibility*, UN Doc A/RES/56/83, annex art 36.

MeK and Camp Ashraf. Instead, they were put under the control and protection of MNF-I or, rather, the US, in an enclosed and guarded camp. In exchange for this control and protection — which turned out to be nothing other than indefinite detention — the US would pursue viable disposition options for them. For many, this meant return to Iran; for about 200 others, it meant prolonged detention and sudden release in a hostile environment that had initially been the formal reason why the US proceeded to intern the MeK defectors.

Once the US interned the MeK defectors and sealed their detention by means of a contract it concluded with each individual defector, it incurred legal obligations towards the internees. It could not simply divest itself of those obligations when, after a number of years had passed, it reconsidered the detention and concluded that there was no reason for it, let alone for its continuation.

Even if the *Release Agreement* served to uphold the voluntary nature of the internment from a formal point of view, the systematic and persistent denial of — if not downright refusal to provide — any procedural rights to address the legality of the internees' ongoing internment turned it into unlawful detention. In addition, the treatment that befell the residents was often inhumane and degrading, which caused many residents to return to Iran rather than endure the austere conditions in detention. The unprotected release and the forced transfer to Iraqi Kurdistan of the 200 remaining TIPF residents, all of whom had meanwhile been recognised as refugees within UNHCR's mandate, constituted another flagrant breach of their rights. Particularly disconcerting in this respect is the failure of the US to intervene when it knew from very reliable sources, such as UNHCR and the ECtHR, that the former TIPF residents suffered extreme hardship upon release for a considerable period of time. This omission flies in the face of the treatment and entitlements of protected persons envisaged by *Geneva Convention IV*.

The presence of the MeK in Iraq no doubt constituted a policy conundrum for the US and the same applies to its defectors, the number of whom took the US by surprise. It first induced the bombardment of the camps of the Mujahedin in Iraq and, shortly thereafter — against the advice of the ICRC — their designation as protected persons under *Geneva Convention IV* and internment in a closed facility. Perhaps their vulnerability in a hostile environment played a role, and possibly the initial expectation that viable options could soon be realised too. Good intentions, however, do not justify treatment contrary to voluntarily incurred contractual obligations let alone obligations under international humanitarian law.

B *Reconsidering Resettlement*

The research for this article is part of long-term research into the law governing the durable solution of resettlement. Characteristic of 'resettlement' is that states are not obliged to offer resettlement places, rather they *may* do so. This article originated with the question of whether the case of the TIPF could be the exception that proves the rule. By virtue of the *Release Agreement*, the US committed itself contractually to actually securing a viable disposition option and, ultimately, there was only one option left — that of resettlement. This does not, however, mean that the US was obliged to offer resettlement places itself,

but merely that it should have secured such places. In that respect it is worth adding that UNHCR and the ICRC had explicitly indicated that states would be prepared to offer resettlement places if the US had taken the lead and had offered at least a few places itself.⁵⁰¹ It refused to do so and the result was that no other state — with one exception — offered resettlement places. As to the original question, the answer can be provided in the affirmative: the case of the TIPF refugees can be considered to be the exception that proves the rule. More generally, it would seem that — leaving the highly specific contractual obligations of this case aside — a breach of primary norms of international law, particularly that of non-refoulement, may trigger an obligation to resettle refugees.⁵⁰²

Beyond the question that inspired this article, the dire straits in which the TIPF refugees found themselves once released from the TIPF warrants a final observation about resettlement. As set out in Part V, the refugees were literally left to their own devices, either in the Iraqi desert or Iraqi Kurdistan, with the advice to seek asylum in Western Europe via Turkey. For a large majority of the refugees it meant that shortly after they had, at long last, been released from internment, they were again detained and, more often than not, in horrible circumstances — incidentally even including torture. At least two of the refugees did not survive the journey. Another of the refugees made a veritable European tour that included Austria, Bulgaria, France, Germany, Greece, Hungary, the Netherlands, Romania, Switzerland and Turkey.⁵⁰³ It would not be an overstatement to say that the plight of the refugees upon departure from the TIPF was horrifying. Eventually, all were granted asylum — with the exception of a few who did not have the means or opportunity to leave Iraqi Kurdistan or Turkey — in states that had earlier been asked to offer them resettlement places. The request to offer the TIPF refugees resettlement places had fallen on deaf ears: ‘EU officials, when pressed about their lack of interest, cite domestic legal restrictions against resettlement of former members of a FTO’ even if that organisation had meanwhile been delisted as a FTO.⁵⁰⁴ As UNHCR had observed earlier:

It should be noted that the individual profile of these refugees and their underlying claims are essentially the same as that of hundreds of asylum applicants who had defected from the [MeK] base prior to 2003. Such cases have been interviewed and recognized as refugees with few exceptions by both State adjudicators and UNHCR offices determining refugee status under the Office’s mandate.⁵⁰⁵

Put differently, there had not been barriers to granting asylum in the past and there turned out to be no barriers when the former TIPF refugees presented themselves spontaneously in various states. Considering the fact that they had

⁵⁰¹ US Embassy Baghdad, ‘Action Request: Policy Guidance for MeK’, above n 293, para 8. See also Goulka et al, above n 5, 29.

⁵⁰² It is a moot point whether such an obligation also exists with regard to the former residents of Camp Ashraf, see above Part I(B).

⁵⁰³ Interview with Refugee 16 (Teleconference Interview, Afshin Afkari trans, 23 May 2013).

⁵⁰⁴ US Embassy Baghdad, ‘MeK Defectors on Life in Ashraf and Resettlement’, above n 11, para 10.

⁵⁰⁵ *UNHCR Report 2008*, above n 8, [35].

been awaiting resettlement — asylum essentially — in a third state during their years of internment and suffered a great deal in the process, it seems the discretionary nature of resettlement should be reconsidered. After all, if the refugees concerned are granted asylum eventually anyway, why not prevent the ordeals the TIPF refugees suffered and offer those who need it — as identified by UNHCR — timely resettlement places in a safe way?