



## Statement relating to Appeal Case UM 12033-09 before the Stockholm Migration Court (Availability of State protection in Iraq)

### 1. Introduction

1.1 On 29 September 2009, the Swedish Migration Board (SMB) issued a legal position on the availability of State protection in Iraq.<sup>1</sup> This position was used in the case of XXXXX, now pending before this Court.<sup>2</sup> The Office of the United Nations High Commissioner for Refugees (“UNHCR”) would like to take this opportunity to outline a number of legal issues relating to the availability of State protection in Iraq when the agents of persecution are non-State actors.

1.2 UNHCR has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek permanent solutions to the problems of refugees.<sup>3</sup> Paragraph 8 of its Statute<sup>4</sup> gives UNHCR the responsibility for supervising international conventions for the protection for refugees, and Article 35 of the 1951 Convention relating to the Status of Refugees (“the 1951 Convention”), to which Sweden became a party on 26 October 1954, obliges Contracting States to cooperate with UNHCR in the exercise of its mandate. UNHCR’s supervisory responsibility has also been acknowledged in legal instruments adopted in accordance with Article 63 of the Treaty establishing the European Community (new Article 78 of the Treaty on the Functioning of the European Union).<sup>5</sup>

1.3 Part 2 of this Statement addresses the issue of non-State actors/agents of persecution under the 1951 Convention. Part 3 deals with the question of availability and effectiveness of State protection. Part 4 considers the burden of proof regarding the availability and effectiveness of State protection, and Part 5 outlines UNHCR’s position on the availability and effectiveness of State protection in Iraq. This Statement is based on the UNHCR *Handbook on*

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<sup>1</sup> ”Rättsligt ställningstagande i fråga om myndighetsskydd i Irak”, Migrationsverket, 29 September 2009, Lifos 21535 (hereinafter, Rättsligt ställningstagande).

<sup>2</sup> SMB Case 09100161b issued 30 September 2009.

<sup>3</sup> Statute of the Office of the United Nations High Commissioner for Refugees, UN General Assembly Resolution 428(V), Annex, U.N. Doc. A/1775, 1950, para. 1, available at: <http://www.unhcr.org/refworld/docid/3ae6b3628.html>.

<sup>4</sup> *Ibid.*, para. 8 (a).

<sup>5</sup> See, for example, Article 21 of *EC Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status*, OJ L 326/13, 13 December 2005 (“Procedures Directive”), and Recital 15 of the *EC Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, OJ L 304/12, 30 September 2004 (“Qualification Directive”).

*Procedures and Criteria for Determining Refugee Status* (“UNHCR Handbook”) <sup>6</sup> and on previous UNHCR position papers.

## **2. Non-State actors of persecution**

2.1 Article 1A (2) of the 1951 Convention provides, *inter alia*, that the term “refugee” shall apply to any person who: “... owing to a well-founded fear of being persecuted ... is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country ...”.

2.2 As outlined in paragraph 65 of the UNHCR Handbook, persecution may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. Persecution then comes within the scope of the 1951 Convention when it is “knowingly tolerated by the [State] authorities, or if the authorities refuse, or prove unable, to offer effective protection”.<sup>7</sup> In certain political contexts, e.g. where the situation is characterized by civil war, anarchy or breakdown of law and order in the whole or parts of the territory, the constituted State authority may have little control over the agents of persecution. The need for protection that individuals may require against the serious violation of their human rights in such a context is, nonetheless, consistent with the terms of the 1951 Convention.<sup>8</sup>

## **3. Availability and effectiveness of State protection**

### *3.1 The 1951 Convention relating to the Status of Refugees*

3.1.1 The phrase “protection of that country” in Article 1A (2) of the 1951 Convention refers to protection of the country of nationality or habitual residence and includes protection by the State inside the country of origin.<sup>9</sup>

3.1.2 According to the UNHCR Handbook, being unable to avail oneself of protection of the country of origin “implies circumstances that are beyond the will of the person concerned. There may, for example, be a state of war, civil war or other grave disturbances, which prevents the country of nationality from extending protection or makes such protection ineffective”.<sup>10</sup>

3.1.3 The issue of State protection in the country of origin has also been considered in relation to the potential availability of an internal flight alternative for persons who have a well-founded fear of persecution from a non-State actor. According to UNHCR Guidelines on

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<sup>6</sup> UN High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, January 1992 (“UNHCR Handbook”), available at: <http://www.unhcr.org/refworld/docid/3ae6b3314.html>.

<sup>7</sup> UNHCR Handbook, para. 65.

<sup>8</sup> UN High Commissioner for Refugees, *Agents of Persecution - UNHCR Position*, 14 March 1995, para. 6, available at: <http://www.unhcr.org/refworld/docid/3ae6b31da3.html>.

<sup>9</sup> UN High Commissioner for Refugees, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, April 2001, paras. 35-37, available at: <http://www.unhcr.org/refworld/docid/3b20a3914.html>.

<sup>10</sup> UNHCR Handbook, para. 98.

Internal Flight Alternative, the assessment of available State protection “involves an evaluation of the ability and willingness of the State to protect the claimant from the harm feared. A State may, for instance, have lost effective control over its territory and thus not be able to protect. Laws and mechanisms for the claimant to obtain protection from the State may reflect the State’s willingness, but, unless they are given effect in practice, are not of themselves indicative of the availability of protection”.<sup>11</sup>

3.1.4 The availability of protection requires an assessment of the effectiveness, accessibility and adequacy of protection in the individual case. When applying the criteria of Article 1A (2) of the 1951 Convention the decision-makers should have regard to all the relevant circumstances of the case.<sup>12</sup> The assessment to be made is whether the applicant’s fear of persecution continues to be well-founded, regardless of the steps taken to prevent persecution or serious harm.<sup>13</sup> The effectiveness of the protection available depends on the *de jure* and *de facto* capability and willingness of the State authorities to provide protection. The mere existence of a law prohibiting certain persecutory acts will not of itself be sufficient.

3.2 *The EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted (“Qualification Directive”)*

3.2.1 The provisions of the Directive need to be interpreted in a manner consistent with the 1951 Convention and the Protocol relating to the Status of Refugees, New York 31 January 1967 (“the 1967 Protocol”). Recital 2 of the Preamble to the Qualification Directive provides that the Common European Asylum System should be based on the full and inclusive application of the 1951 Convention. The Preamble further states, in Recital 3, that the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, provide the cornerstone of the international legal regime for the protection of refugees.

3.2.2. Article 7 (2) of the Qualification Directive states that “protection is generally provided when actors take reasonable steps to prevent the persecution or suffering of serious harm, *inter alia*, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection”. It follows that Member States need to consider whether steps are taken to prevent persecution or suffering of serious harm; and, in line with the position set out in paragraph 3.1.4 above,

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<sup>11</sup> UN High Commissioner for Refugees, *Guidelines on International Protection No. 4: “Internal Flight or Relocation Alternative” Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, HCR/GIP/03/04, para. 15, available at: <http://www.unhcr.org/refworld/docid/3f2791a44.html>.

<sup>12</sup> UN High Commissioner for Refugees, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, April 2001, para. 8, available at: <http://www.unhcr.org/refworld/docid/3b20a3914.html>.

<sup>13</sup> UN High Commissioner for Refugees, *UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted (OJ L 304/12 of 30.9.2004)*, 28 January 2005, available at: <http://www.unhcr.org/refworld/docid/4200d8354.html>.

whether the legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm is effective in preventing persecution or suffering of serious harm.

3.2.3 The Qualification Directive Article 4 (3) stipulates that the assessment of an application for international protection is to be carried out on an individual basis, and includes taking into account all relevant facts as they relate to the country of origin at the time of taking a decision on the application, including laws and regulations of the country of origin and the manner in which they are applied. In UNHCR's view, this means that an assessment of protection in relation to Article 7 (2) must take into consideration not only the applicable legal framework and legislation for providing protection in the country of origin, but also the manner in which they are applied.

#### **4. Burden of proof**

4.1 In applying for international protection, an applicant must provide a truthful account of all relevant facts or elements needed to furnish or substantiate the claim.<sup>14</sup> The burden of proof is discharged by the applicant rendering a truthful account of facts relevant to the claim so that, based on the facts, a proper decision may be reached.<sup>15</sup> It is then up to the authorities charged with determining the person's status to assess the claim.<sup>16</sup> The State authorities share the duty to ascertain and evaluate all the relevant facts.<sup>17</sup> The authorities need to be familiar with the objective situation in the country of origin concerned, be aware of relevant matters of common knowledge, guiding the applicant in providing the relevant information and adequately verifying facts alleged which can be substantiated.<sup>18</sup> The principle of the benefit of the doubt should be applied in favour of the applicant once general credibility can be established.<sup>19</sup>

4.2 The assessment of the availability and effectiveness of national protection is part of determining refugee status, which is the responsibility of the State. Consideration of national protection is one of a number of elements concomitant to determining refugee status involving a fear of persecution emanating from non-State agents. The question is whether the risk giving rise to the fear is negated by available and effective national protection. Where such an assessment is necessary, it requires an examination of a number of factors, including the general state of law, order and justice in the country, and its effectiveness, which encompasses the resources available and the ability and willingness to use them properly and effectively to protect residents.<sup>20</sup>

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<sup>14</sup> Article 4 (1) of the Qualification Directive. See also, UNHCR Handbook para. 195, UN High Commissioner for Refugees, *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, para. 6, available at: <http://www.unhcr.org/refworld/docid/3ae6b3338.html> and UN High Commissioner for Refugees, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, April 2001, para. 10, available at: <http://www.unhcr.org/refworld/docid/3b20a3914.html>.

<sup>15</sup> UN High Commissioner for Refugees, *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, para. 6, available at: <http://www.unhcr.org/refworld/docid/3ae6b3338.html>.

<sup>16</sup> UNHCR Handbook, para. 195.

<sup>17</sup> *Ibid.*, para. 196.

<sup>18</sup> UN High Commissioner for Refugees, *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, para. 6, available at: <http://www.unhcr.org/refworld/docid/3ae6b3338.html>.

<sup>19</sup> *Ibid.*

<sup>20</sup> UN High Commissioner for Refugees, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, April 2001, para. 15, available at: <http://www.unhcr.org/refworld/docid/3b20a3914.html>.

4.3 This position is supported by Article 4 (1) of the Qualification Directive which specifies that it is the duty of the Member State, in cooperation with the applicant, to assess the relevant elements of the application. According to Article 4 (1) of the Qualification Directive the Member State may consider it the duty of the applicant to submit all elements needed to substantiate the application for international protection. The elements covered by this duty, where the Member State applies Article 4 (1), are outlined in Article 4 (2). The enumeration in Article 4 (2) does not mention State protection.

## **5. Availability and effectiveness of State protection in Iraq**

5.1 Although a number of steps have been taken by the Government of Iraq to increase overall security and implement the rule of law, the situation in the country remains very mixed. While there have been significant improvements in the security environment in the country, a level of instability, violence and human rights violations by various actors remains, and the overall situation is such that there is a likelihood of the population being subjected to serious harm.

5.2 UNHCR's *"Eligibility Guidelines for Assessing the International Protection needs of Iraqi asylum seekers"* ("UNHCR's Eligibility Guidelines")<sup>21</sup> state that persecution emanates mainly from a range of non-State actors. Generally, protection by national authorities will not be available given that those authorities have yet limited capacity to enforce law and order, the Iraqi security forces may be infiltrated by radical elements, and the judiciary is susceptible to intimidation and corruption.

5.3 Although recent security improvements have weakened armed groups which no longer have the capacity to pose an immediate threat to the Iraqi Government's survival, such groups nevertheless remain able to launch indiscriminate and targeted attacks in key urban centres. Relevant to this is the level of competence of Iraqi security forces. Those vary greatly across the country as many units still do not have the necessary logistic, transport or intelligence and coordination capabilities to independently plan, execute and sustain counterinsurgency operations.<sup>22</sup> Moreover, members of the security forces remain a major target for various armed groups and have been singled out for mass-casualty attacks, assassinations, and kidnappings.<sup>23</sup>

5.4 UNHCR's Eligibility Guidelines report that Iraqi courts are seriously failing to meet international standards of due process and fair trials.<sup>24</sup> The Guidelines state that despite some progress in expanding and reforming Iraq's judiciary and law enforcement agencies, Iraq continues to suffer from significant deficiencies in the application of the rule of law, with the result that most human rights violations are committed with impunity.<sup>25</sup>

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<sup>21</sup> UN High Commissioner for Refugees, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers*, April 2009, available at: <http://www.unhcr.org/refworld/docid/49f569cf2.html>.

<sup>22</sup> *Ibid.*, para. 170.

<sup>23</sup> *Ibid.*, para. 283.

<sup>24</sup> *Ibid.*, para. 240.

<sup>25</sup> *Ibid.*, para. 274.

5.5 The Guidelines further elaborate on the criminal justice and courts system's inability to support the police, provide defendants the procedural and substantive due process provided for by law, and provide for suitable jails and detainment facilities.<sup>26</sup> The same situation is presented by the Center for Strategic and International Studies' report of April 2009, which noted: "[t]he establishment of reliable and impartial courts has been extremely slow, which has seriously harmed the development of effective MoI forces at the local level. The same is true of detention facilities and basic legal services. There is little official reporting on Iraq's jails, the availability of defendants to find counsel, the status of due process, and the role of religious and tribal courts".<sup>27</sup>

5.6 Furthermore, the UN Assistance Mission for Iraq (UNAMI), in its 15<sup>th</sup> Human Rights Report, published on 15 December 2009, concludes that significant progress remains to be achieved to fully restore the rule of law and to systematically address the issue of impunity, and states that security in Iraq may not be sustainable unless significant steps are taken to uphold the rule of law and human rights.<sup>28</sup>

5.7 As a result of these institutional weaknesses, most human rights violations are, to a large extent, committed with impunity. Protection is therefore considered to be generally unavailable from national law enforcement, security bodies or the judiciary.<sup>29</sup>

## 6. Conclusion

6.1 Persecution emanating from non-State actors may come within the scope of the 1951 Convention when such persecution is knowingly tolerated by the State authorities or when the authorities refuse, or prove unable to offer, effective protection.

6.2 Where the feared persecution or harm emanates from a non-State actor of persecution, the State's willingness and ability to provide protection need to be considered.

6.3 UNHCR is of the opinion that the situation in Iraq cannot at present be considered to be one where the authorities are able to exercise a full level of control. It is therefore not appropriate to establish a presumption that the authorities are able to offer protection from persecution or harm emanating from non-State actors.

UNHCR, January 2010.

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<sup>26</sup>Anthony H. Cordesman and Adam Mausner, *How Soon Is Safe?*, [http://www.csis.org/media/csis/pubs/090217\\_isf.no.graph.pdf](http://www.csis.org/media/csis/pubs/090217_isf.no.graph.pdf), "Due process of law" and "Detention conditions".

<sup>27</sup> Ibid.

<sup>28</sup> UN Assistance Mission for Iraq (UNAMI), 15th report, available at: [http://www.uniraq.org/documents/UNAMI\\_Human\\_Rights\\_Report15\\_January\\_June\\_2009\\_EN.pdf](http://www.uniraq.org/documents/UNAMI_Human_Rights_Report15_January_June_2009_EN.pdf)

<sup>29</sup> UN High Commissioner for Refugees, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers*, April 2009, para. 274.