

***Amicus curiae* submissions of
the United Nations High Commissioner for Refugees (UNHCR)
in case number 12-306487/UM3940-14**

I. UNHCR's mandate and role

1. The Office of the United Nations High Commissioner for Refugees (hereafter “UNHCR”) has been entrusted by the United Nations General Assembly with a mandate to provide international protection to refugees and, together with Governments, seek permanent solutions to the problems of refugees.¹ According to its Statute, UNHCR fulfils its mandate *inter alia* by “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto[.]”² This supervisory responsibility is reiterated in Article 35 of the 1951 Convention and Article II of the 1967 Protocol relating to the Status of Refugees (hereafter collectively referred to as “1951 Convention”).³
2. UNHCR's supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention. Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and complementary Guidelines on International Protection.⁴ UNHCR also provides information on a regular basis to decision makers and courts of law concerning the proper interpretation and application of provisions of the 1951 Convention.
3. UNHCR has a direct interest in ensuring a proper and consistent interpretation of the 1951 Convention as part of its supervisory responsibility and makes these submissions as an *amicus curiae* in order to assist the Swedish authorities in their interpretation and application of refugee law concepts in the context of applications for international protection.
4. These submissions are made in respect of case number 12-306487 / UM3940-14, concerning a single male asylum-seeker of Masalit ethnic background originating from Darfur, Sudan. The applicant's original claim was rejected in 2014. Pursuant to a decision of the Migration Court, his application has been reopened and is currently before the Swedish Migration Agency.

¹ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950 A/RES/428(V), (hereafter “UNHCR Statute”), <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b3628>.

² UNHCR Statute, para. 8(a).

³ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations Treaty Series, No. 2545, vol. 189, <http://www.unhcr.org/refworld/docid/3be01b964.html> According to Article 35 (1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of the Convention” (hereafter “1951 Convention”).

⁴ UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/IP/4/ENG/REV. 3, <http://www.unhcr.org/refworld/docid/4f33c8d92.html> (hereafter “UNHCR Handbook”).

5. In these submissions, UNHCR will address four issues relevant to this case:
 1. the application of the Convention grounds political opinion and race, and the causal link to persecution;
 2. the requirement of demonstrating an individualized risk in situations of conflict and violence;
 3. the assessment of *sur place* elements of a refugee claim, and
 4. the use of up-to-date and relevant country of origin information.
6. UNHCR will only seek to address issues of legal principle arising from these points and will not address or comment on the applicant's eligibility for international protection. These submissions do not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoys under applicable international legal instruments and recognized principles of international law.⁵

II. The Convention grounds political opinion and race, and the causal link to persecution

7. The criteria for refugee status are set out in Article 1A(2) of the 1951 Convention and are to be interpreted in accordance with their ordinary meaning, and in light of the object and purpose of the 1951 Convention. The preamble of the 1951 Convention contains strong human rights language, and indicates that the intention of the drafters was to incorporate human rights values in the application and interpretation of the Convention.⁶
8. In all claims to refugee status, the well-founded fear of persecution needs to be related to one or more of the grounds specified in the refugee definition in Article 1A (2) of the 1951 Convention; that is, it must be for reasons of race, religion, nationality, membership of a particular social group or political opinion. However, the Convention ground needs only to be a contributing factor to the well-founded fear of persecution; it need not be shown to be the sole or even the dominant cause. Further, one or more of the Convention grounds may be relevant; they are not mutually exclusive and may overlap.⁷
9. The UNHCR Handbook establishes with respect to the Convention ground of political opinion that applicants must show that they have a well-founded fear of persecution for holding a political opinion different from those of the Government, or the non-state agents of persecution, and which have come to the

⁵ UN General Assembly, *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, <http://www.refworld.org/docid/3ae6b3902.html>.

⁶ See UNHCR, *Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees*, April 2001 (hereafter "UNHCR Interpreting Article 1"), <http://www.unhcr.org/refworld/docid/3b20a3914.html>, paras. 2–5.

⁷ See, for example, UNHCR, *Guidelines on International Protection No. 10: Claims to Refugee Status related to Military Service within the context of Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees* (hereafter "UNHCR GIP no. 10"), 3 December 2013, HCR/GIP/13/10/Corr. 1, <http://www.refworld.org/docid/529ee33b4.html>, para. 47; and UNHCR Handbook, para. 67.

notice of the agents of persecution or are attributed by them to the applicants.⁸ The political opinion ground covers both the holding of an actual political opinion and its expression, political neutrality, as well as cases where a political opinion is imputed to the applicant, even if they do not hold that view.⁹

10. That the protection afforded by the 1951 Convention to political opinion extends to imputed political opinion is expressly confirmed by Article 10(2) of Directive 2011/95/EU (“the Qualification Directive”)¹⁰ which provides:

When assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution.

11. In such cases, the imputed political opinion is enough to fulfil the requirement that the feared persecution is attributable to one or more of the Convention grounds, as it is the perspective of the persecutor which is determinative in this respect.¹¹ In other words, if the persecutor imputes a Convention ground to the applicant, it is sufficient to establish the causal link.¹² It is thus not required that the applicant actually holds or expresses a political opinion; for example, by participating in political activity.¹³
12. UNHCR is of the view that “many conflicts take place against a political background which may involve serious violations of human rights, including the targeting of particular ethnic or religious groups perceived as not sharing the political interests of their protagonists.”¹⁴ The agent of persecution could target particular groups of civilians or the areas where they reside or gather, because of

⁸ UNHCR Handbook, paras. 80-81. For further on who may be an agent of persecution and the significance of State protection, see UNHCR, *Agents of Persecution - UNHCR Position*, 14 March 1995, (hereafter “UNHCR Agents of Persecution”), <http://www.refworld.org/docid/3ae6b31da3.html> “[T]he essential issue in establishing the basis and justification for the extension of international protection is the fact of an absence of national protection against persecution, whether or not this deficiency can be attributed to an affirmative intention to harm on the part of the state.” para 3.

⁹ See, for example, UNHCR GIP no. 10, para. 51.

¹⁰ European Union: Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU, <http://www.refworld.org/docid/4f197df02.html>.

¹¹ See UNHCR Interpreting Article 1, para. 25.

¹² See UNHCR GIP no. 10 para. 48.

¹³ This position has also been confirmed in case law of different jurisdictions, see for example, UK Supreme Court in *RT (Zimbabwe) and others v Secretary of State for the Home Department*, [2012] UKSC 38, 25 July 2012, at para. 53, <http://www.refworld.org/docid/500fdacb2.html> where the Court noted: “[t]he principle is not in doubt that an individual may be at risk of persecution on grounds of imputed opinion and that it is nothing to the point that he does not in fact hold that opinion”. See also, *Ward v. Attorney General of Canada*, [1993], 2 S.C.R. 689 at pages 746-747, <http://scc-csc.lexum.com/scc-csc/scc-csc/en/1023/1/document.do>.

¹⁴ UNHCR Agents of Persecution, para. 8. See also, UNHCR, *Summary Conclusions on International Protection of Persons Fleeing Armed Conflict and Other Situations of Violence; Roundtable 13 and 14 September 2012, Cape Town, South Africa*, (hereafter “UNHCR Cape Town Conclusions”), 20 December 2012, <http://www.refworld.org/docid/50d32e5e2.html>, para. 17

their real or perceived ethnic, religious, political, or social profiles. Where this is the case, these acts may be persecutory and linked to a 1951 Convention ground.¹⁵

III. Establishing the causal link for individuals fleeing situations of armed conflict or violence, and the requirement of an individualized risk

13. The 1951 Convention requires only that asylum applicants establish that they have a well-founded fear of being persecuted for a Convention reason. In identifying the proscribed grounds of persecution – race, religion, nationality, membership of a particular social group, or political opinion – the 1951 Convention recognizes that discrimination based on membership in such “groups” is at the heart of the refugee definition.¹⁶
14. In armed conflict and other situations of violence, whole communities may suffer or be at risk of persecution. However, the fact that many or all members of particular communities may be equally at risk does not undermine the validity of any particular claim. There is nothing in the text of the 1951 Convention to suggest that a refugee has to show that the harm suffered is particularized to that individual. A person may have a well-founded fear of persecution that is shared by many others.¹⁷
15. The UNCHR Handbook also confirms this in stating that in addition to the personal experiences of the applicant, it is important to take into account the experiences of others similarly situated. “What, for example, happened to his friends and relatives and other members of the same racial or social group may well show that his fear that sooner or later he also will become a victim of persecution is well-founded.”¹⁸
16. As stated above, many conflicts today are deeply rooted in differences in ethnic, religious and political affiliations. Even if the harm would appear to be indiscriminate, an analysis of the underlying cause, character and impact of the violence causing the harm may reveal that it is in fact discriminatory. War and violence are frequently used as means of persecution.¹⁹
17. In conclusion, there is no basis in the 1951 Convention for holding that in armed conflict or other situations of violence, an applicant needs to establish a risk of harm over and above that of others caught up in such situations (sometimes called a ‘differentiated risk’).²⁰ Further, there is nothing in the text of the 1951

¹⁵ See UNHCR, *Symposium on the Protection of Persons Fleeing Armed Conflict and Other Situations of Violence*, (hereafter “UNHCR Armed Conflict Symposium”), 20 October 2014, <http://www.refworld.org/docid/545b43884.html>.

¹⁶ *Ibid.*

¹⁷ *Ibid.* Also, see UNHCR Handbook at paras. 41 and 43.

¹⁸ UNHCR Handbook, para. 43.

¹⁹ UNHCR Armed Conflict Symposium.

²⁰ The Australian High Court has found that “It is not the degree or differentiation of risk that determines whether a person caught in a civil war is a refugee... It is a complex of factors that is determinative – the motivation of the oppressor; the degree and repetition of harm to the rights, interests or dignity of the individual; the justification if any, for the infliction of that harm and the proportionality of the

Convention to suggest that a refugee has to be singled out for persecution, either generally or over and above other persons at risk of being persecuted. A person may have a well-founded fear of persecution that is shared by many others.²¹

18. The European Court of Human Rights (hereafter “ECtHR”) has also come to the same conclusion. For example, in the case of *Salah Sheekh v. the Netherlands*,²² which concerned a Somali national from Mogadishu, the ECtHR found that the applicant’s membership of the Ashraf minority was sufficient in and of itself for him to be at risk of treatment in breach of Article 3 of the European Convention of Human Rights,²³ and that the applicant was therefore not required to show the existence of further special distinguishing features in his case in order to show a real risk of ill-treatment in the receiving State.²⁴

IV. The assessment of *sur place* elements of a refugee claim

19. In the present case, the applicant, following the rejection of his claim, made further submissions regarding recent events, which may give rise to a “*sur place*” claim. The UNHCR Handbook states that “[a] person becomes a refugee “*sur place*” due to circumstances arising in his [or her] country of origin during his [or her] absence.”²⁵ And further:

A person may become a refugee “*sur place*” as a result of her/his own actions, such as associating with refugees already recognized, or expressing his political views in his country of residence. Whether such actions are sufficient to justify a well-founded fear of persecution must be determined by a careful examination of the circumstances. Regard should be had in particular to whether such actions may have come to the notice of the authorities of the person’s country of origin and how they are likely to be viewed by those authorities.²⁶

V. The use of relevant and up-to-date country of origin information

21. The UNHCR Handbook addresses the need for decision makers to consult up-to-date and relevant country of origin information stating that an applicant’s claim “[m]ust be viewed in the context of the relevant background situation. A

means used to achieve the justification. See, *Minister for Immigration and Multicultural Affairs v. Haji Ibrahim*, [2000] HCA 55, para. 50, cited in UNHCR Armed Conflict Symposium.

²¹ UNHCR Cape Town Conclusions, para. 9.

²² *Salah Sheekh v. The Netherlands*, Application no. 1948/04, European Court of Human Rights, 11 January 2007, <http://www.refworld.org/docid/45cb3dfd2.html>.

²³ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, <http://www.refworld.org/docid/3ae6b3b04.html>.

²⁴ See also the following ECtHR cases concerning applicants from Darfur, Sudan: *A.A. c. France*, Application no 18039/11, European Court of Human Rights, 15 January 2015, <http://www.refworld.org/docid/54b93a154.html>; *A.F. c. France*, Application no 80086/13, European Court of Human Rights, 15 January 2015, <http://www.refworld.org/docid/54b93b014.html>

²⁵ UNHCR Handbook, para. 95.

²⁶ *Ibid.* para. 96.

knowledge of conditions in the applicant's country of origin - while not a primary objective - is an important element in assessing the applicant's credibility."²⁷

22. UNHCR's *Note on Burden and Standard of Proof*, states that:

While by nature, an evaluation of risk of persecution is forward-looking and therefore inherently somewhat speculative, such an evaluation should be made based on factual considerations which take into account the personal circumstances of the applicant as well as the elements relating to the situation in the country of origin.²⁸

23. The Qualification Directive also addresses the value of country of origin information in the decision-making, stating in Article 4 (3) (a) that the assessment of an individual case has to take 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.²⁹

24. When assessing the asylum claim in respect of persons who have fled armed conflict or other situations of violence, an "analysis of the causes, character and impact of the conflict and/or violence is necessary to determine the relevant Convention ground(s) and the causal link with the well-founded fear of persecution."³⁰ The assessment of what amounts to a well-founded fear of being persecuted depends on the particular circumstances of the case, including the applicant's background, profile and experiences considered in light of up-to-date country of origin information.³¹

25. However, the changing character of contemporary armed conflict and other situations of violence, notably the increase in internal armed conflicts, poses a challenge for decision makers in this regard. The problem arises because of the fluidity of the situations, and where there is a lack of up-to-date information. Even an applicant may not be able to articulate the exact reason they were targeted and forced to flee. Decision makers thus need to be willing to understand the situation fully, and see how the Convention may apply in such situations.³²

26. In order to apply the Convention correctly, a decision maker may need to consult independent and reliable sources of the most recent country of origin information

²⁷ *Ibid.* para. 42. Indeed, "access to accurate, impartial, and up-to-date country of origin information from a variety of sources" is key. UNHCR, *Country of Origin Information: Towards Enhanced International Cooperation*, February 2004, at para. 4, <http://www.refworld.org/docid/403b2522a.html>

²⁸ See UNHCR, *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, available at: <http://www.refworld.org/docid/3ae6b3338.html>, para. 18.

²⁹ European Union: Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, OJ L 337/9-337/26; 20.12.2011, 2011/95/EU, <http://www.refworld.org/docid/4f197df02.html>.

³⁰ UNHCR Cape Town Conclusions, para. 15.

³¹ UNHCR Handbook, paras. 51-52.

³² See UNHCR Armed Conflict Symposium.

available at the time of the decision, even by searching beyond what is made available by the decision-making authority. As the UNHCR Handbook states:

[w]hile the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application.³³

27. Similarly, in the context of Dublin returns, the ECtHR expects States to undertake a rigorous scrutiny of claims for international protection, and not require applicants to bear the entire burden of proof, particularly in situations when the State itself ought to know about the relevant risks in the receiving State.³⁴ The ECtHR has also held that when assessing the risk of ill-treatment faced by applicants upon return, States are expected to take into account not only domestic materials, but also materials originating from other reliable and objective sources.³⁵
28. UNHCR notes that the security situation in the applicant's region of origin has continued to deteriorate since his application for asylum was adjudicated and thus reiterates and emphasizes the need for accurate, impartial and up-to-date country of origin information.

UNHCR Regional Representation for Northern Europe
30 December 2015

³³ UNHCR Handbook, para. 196. See also, *R.C. v. Sweden*, Application no. 41827/07, European Court of Human Rights, 9 March 2010, <http://www.refworld.org/docid/4b98e11f2.html>, para. 50.

³⁴ See, for example, *M.S.S. v. Belgium and Greece*, Application no. 30696/09, European Court of Human Rights, 21 January 2011, <http://www.refworld.org/docid/4d39bc7f2.html>, paras. 344-359; and *Tarakhel v. Switzerland*, Application no. 29217/12, Council of Europe: European Court of Human Rights, 4 November 2014, <http://www.refworld.org/docid/5458abfd4.html>, para 126.

³⁵ See, for example, *Salah Sheekh v. the Netherlands*, Application no. 1948/04, European Court of Human Rights, 11 January 2007, <http://www.refworld.org/docid/45cb3dfd2.html>, para. 136 and *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, European Court of Human Rights, 23 February 2012, <http://www.refworld.org/docid/4f4507942.html>, paras. 122–158.