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Re: Your inquiry concerning Iraq as first country of asylum

Dear Mr. [REDACTED]

Further to our letter dated 6 December 2011, below is a revised statement which clarifies your inquiries concerning the penalties for illegal entrance and exit of foreigners including refugees and asylum seekers.

This letter provides some of UNHCR's observations on the situation in Iraq for returned refugees, and more particularly on the situation in the Kurdistan Region (KR) of Iraq for returned Iranian refugees of Kurdish ethnicity. UNHCR notes that these responses are provided without prejudice to UNHCR's position under the Convention on the Privileges and Immunities of the United Nations.

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[.]"¹ 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 relating to the Status of Refugees ("1951 Convention").² Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status ("UNHCR Handbook")³ and subsequent Guidelines on International Protection⁴. 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 ("1967 Protocol").⁵

UNHCR, in exercising its mandate and supervisory responsibility, provides information on a regular basis to decision-makers and courts of law in cases

¹ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b3628> ("UNHCR Statute"), paragraph 8(a).

² UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations Treaty Series No. 2545, vol. 189, p. 137, available at: <http://www.unhcr.org/refworld/docid/3be01b964.html>.

³ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1 January 1992, available at: <http://www.unhcr.org/refworld/docid/3ae6b3314.html>.

⁴ UNHCR issues "Guidelines on International Protection" pursuant to its mandate, as contained in the Statute of the Office of the United Nations High Commissioner for Refugees, in conjunction with Article 35 of the 1951 Convention. The Guidelines complement the UNHCR Handbook (see above footnote 2) and are intended to provide guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff.

⁵ According to Article 35 (1) of the 1951 Convention, UNHCR has the "duty of supervising the application of the provisions of th[e 1951] Convention".

concerning the proper interpretation and application of provisions of the 1951 Convention and the 1967 Protocol. UNHCR's expertise on asylum issues has been acknowledged in the context of the European Union's asylum *acquis* and beyond, including in the pronouncements of the European Court of Human Rights, which has highlighted the reliability and objectivity of UNHCR in this field.

The situation in Iraq for returned refugees

UNHCR produced *Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers* in April 2009.⁶ The validity of these Guidelines was confirmed by the *Note on the Continued Applicability of the April 2009 UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers* issued on 28 July 2010.⁷ The issuance of revised guidance, which will supersede the above guidance and may contain further detail or updates of the information and positions contained in this document, is pending further developments in Iraq. As noted below, any assessment of whether persons recognised as refugees in another country may be returned to this country (i.e. whether a third country constitutes a "first country of asylum") requires a careful and individualised case-by-case examination of the conditions in that country, and as such, the above-mentioned documents should form part of the assessment of whether Iraq may constitute a first country of asylum for a particular applicant.

1. The concept of "first country of asylum"

UNHCR notes that the causes of secondary movements of refugees are manifold and include, among other things, a lack of durable solutions, limited capacity to host refugees and a failure to provide protection in some third countries. The concept of first country of asylum is only relevant where a refugee has sought and received protection. Any assessment of whether a third country constitutes a first country of asylum requires a careful and individualised case-by-case examination of the conditions in that country and the individual circumstances of the refugee. This careful and individualised examination is even more important when the potential first country of asylum is one where UNHCR considers that substantial numbers of persons are at risk of persecution and where protection needs arise in some areas due to the existence of high levels of violence or where there is a high intensity of violence.

In order to apply the concept of first country of asylum, states must ensure that the designated first country of asylum will (i) re-admit the person, and (ii) that the person can re-avail him/herself of protection in the designated country.⁸

⁶ Available at: <http://www.unhcr.org/refworld/docid/49f569cf2.html>

⁷ Available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4c4fed282>

⁸ For more information on the concept of first country of asylum, please refer to: UNHCR, *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers* (Lisbon Expert Roundtable, 9-10 December 2002), February 2003, available at: <http://www.unhcr.org/3e5f323d7.html>; UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/14, available at: <http://www.unhcr.org/refworld/docid/3b36f2fca.html>; UNHCR, *Global Consultations on International Protection/Regional Meetings: Conclusions (Regional Meeting in Budapest, 6-7 June 2001)*, 15 June 2001, EC/GC/01/14, available at: <http://www.unhcr.org/refworld/docid/3b36f29b1.html>; ExCom Conclusion No. 58 (XL) – 1989 - *Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection*, available at: <http://www.unhcr.org/3ae68c4380.html>; ExCom Conclusion No. 87 (L) – 1999, available at: <http://www.unhcr.org/3ae68c6ec.html>.

UNHCR recommends that states wishing to apply the first country of asylum concept also take into consideration the importance of preserving family unity and consider the applicant's family links as part of the assessment.⁹ In UNHCR's view, family unity is an important consideration that should take precedence in the assessment of whether the person should be returned to a country considered to be a first country of asylum.¹⁰

Where UNHCR is engaged in refugee status determination under its mandate there is a presumption that the country is not to be considered as "first countries of asylum".¹¹ UNHCR often undertakes such functions because the state has no capacity to conduct refugee status determination or to provide protection. The return of persons in need of international protection to such countries should therefore not be envisaged. In Iraq, UNHCR conducts refugee status determination under its mandate on behalf of the Iraqi Government in the absence of a functional national asylum system.

2. Re-admission to Iraq

2.1. Admission of Foreigners to Iraq including asylum seekers and refugees

Pursuant to Article 3 of the *Foreigners Residency Law No.118 of 1978*, foreigners cannot enter or exit Iraqi territory without a valid passport or travel document from an authorized source, including an ICRC Travel Document. Entry must be based on a valid visa and be through an official border entry/exit point. All foreigners must complete and sign an entry form at the border.

There are a number of provisions penalising persons for illegal entry and exit into Iraq. Article 24(1) of the *Foreigners Residency Law* stipulates that persons found to be in breach of Article 3 are to receive a prison sentence of either life imprisonment (20 years) or for a term of 5 to 10 years in addition to the confiscation of the property in their possession. Article 24(5) further provides for the expulsion or deportation of persons convicted of illegal entry or exit. Article 10(1/A) of the *Passports Law No. 32 of 1999* provides that persons who exit or try to exit, or enter or try to enter Iraq without a valid passport or travel document will be sentenced to 5 to 15 years imprisonment and confiscation of their movable and immovable properties. Article 10(1/C) of the same law states that persons who exit or try to exit, enter or try to enter Iraq through unofficial border points and/or points where there is no document checking, will be sentenced to temporary imprisonment and confiscation of their movable and immovable properties. On an ad hoc basis, some cases may receive a waiver from the Government, and are therefore not referred to Court in connection with illegal entry/exit offences.

2.2. Re-admission to Iraq of Refugees and Asylum-seekers (previously recognised or registered in Iraq)

⁹ UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, 25 July 1951, A/CONF.2/108/Rev.1, Point IV, B, available at:

<http://www.unhcr.org/refworld/docid/40a8a7394.html>; ExCom Conclusion No. 9 (XXVIII) – 1977 – Family Reunion, ExCom Conclusion No. 24 (XXXII)– 1981 – *Family Reunification*, ExCom Conclusion No. 85 (XLIX) – 1998, and ExCom Conclusion No. 88 (L) – 1999 – *Conclusion on the Protection of the Refugee's Family*, UNHCR, *Thematic Compilation of Executive Committee Conclusions*, January 2010 (for family reunification, see pages 208 - 213), available at:

<http://www.unhcr.org/refworld/docid/4bace8f62.html>

¹⁰ UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice*, March 2010, p. 283, available at: <http://www.unhcr.org/refworld/docid/4bab55752.html>

¹¹ *Ibid.*, at p. 282.

Refugees and asylum-seekers, of any nationality or ethnicity, who were previously recognized or registered in Iraq will not be re-admitted to Iraq solely on the basis of possession of a refugee or asylum-seeker certificate issued by UNHCR Iraq. Refugees and registered asylum-seekers who are returned or return voluntarily to Iraq are considered to be foreigners seeking admission to Iraq, and as such, they must comply with the documentary and other requirements set out in the *Foreigners Residency Law* cited above. They are similarly subject to the penalties for violation of the entry requirements as stipulated in the *Foreigners Residency Law* and the *Passports Law*.

The Ministry of Interior has however continued to respect refugee status determination decisions made by the Iraqi authorities prior to March 2003. As such, if an individual was registered with the former regime as a refugee prior to March 2003, they may be permitted to re-enter the country if they can provide their refugee identity card, or at least a copy thereof. For persons wishing to return to the KR, they must be able to prove links with family members residing in the KR in addition to the documentary requirements mentioned above. These criteria may apply to persons formerly residing in Al Tash camp, as well as Palestinians and Syrians registered as refugees by the Iraqi Government prior to March 2003, and who still possess a copy of their refugee card. However, even if all of the conditions above are met, the person wishing to return to the KR is likely to be detained at the entry point until a full investigation is completed by the Kurdistan Regional Government (KRG) to confirm the person's identity and previous residence in the KR.

If the refugee or asylum seeker was not from the above-mentioned groups or previously registered by the former regime as a refugee, but was previously residing in the KR and held a valid residence permit, which they can provide to the authorities upon their re-entry, either in the original or copy form, then they may be re-admitted to the KR as long as they hold a valid passport and can secure an Iraqi sponsor from the KR. Again, such individuals are likely to be held in detention at the entry point (airport or road check point) until the KRG is able to confirm their relationship with their sponsor and their security check is complete.

In situations where the individual does not possess the necessary documentation upon arrival, such as a valid entry visa, they may be returned to the sending country on the flight they arrived on. For those who are found to have entered illegally or with forged documents, or for whom the security check and family links cannot be verified, the individual will be accused of illegal entry into Iraq in accordance with the *Foreigners Residency Law*. After completion of the prison sentence, the individual will be referred to the Deportation Department/Residency Affairs Directorate for deportation in accordance with Article 298 of the *Iraqi Penal Law*. In general, deportation is to the country of origin, but if it is not possible to expel or deport the individual to their country of origin due to concerns about the protection situation in that country, they will be deported to a country of their choice (if they do not require a visa or can obtain a visa) or to a country where they do not require a visa for entry.

2.3. Additional Penal Provisions Which May Apply to Refugees and Asylum-seekers (previously recognised or registered in Iraq) Seeking Re-admittance to Iraq

In order for any refugees or asylum-seekers previously recognised or registered in Iraq to be able to re-enter Iraq, in addition to fulfilling the documentary and other requirements listed above, they must have obtained the approval of the Minister of the Interior prior to their exit by providing the reason for their exit from Iraq and the length of their absence from Iraq. Articles 17 and 18 of the *Political Refugee Law*

penalise all refugees exiting Iraq illegally and without prior consent of the Minister of Interior. Article 17 specifies that refugees may only leave Iraq with the consent of the Minister of Interior, whereas Article 18 provides that where a refugee exits without the consent of the Minister, all of the refugee's movable and immovable property shall be confiscated by the authorities, on the basis of a decision of the Minister of Interior, ratified by the President.

Some refugees claim they are Iraqis when they seek asylum outside of Iraq or use forged Iraqi documents when leaving Iraq or claiming asylum abroad. This is considered a crime under Articles 292 and 298 of the *Iraqi Penal Law*. Upon return to Iraq, if the Iraqi authorities discover that they had obtained and/or used forged Iraqi documents, they may be subject to trial and sentenced to imprisonment for a maximum of 15 years imprisonment under Article 298. Under Article 292, persons found guilty of creating forged official Iraqi documents may also be subject to a period of imprisonment between 3 months and 5 years and a fine of IQD 300.

As a result of the above considerations, UNHCR considers that readmission of refugees to Iraq must be verified in advance in order to determine whether the individual(s) meet Iraqi entry requirements, including documentary, security and family link or sponsorship criteria. UNHCR further notes that where readmission is possible under the national legal framework, individuals may nevertheless be subject to prolonged detention upon arrival and/or serious penalties in cases where illegal exit from Iraq and/or the use of forged documents may be an issue.

UNHCR acknowledge that Denmark has opted out from the EU *acquis* on asylum, however UNHCR would like to note that according to the Asylum Procedures Directive both criteria in Article 26 (a) and (b) APD are subject to the proviso that the designated first country of asylum will re-admit the applicant. This is an important safeguard which ensures that the application of the first country of asylum concept will not result in refugees who are denied admission by the designated first country of asylum and subsequently shuttled from one country to another. If admission to the designated first country of asylum cannot be assured, then the application should be substantively examined by the Member State where the application has been made.¹² As such, the application of the first country of asylum concept without ensuring that the individual would be re-admitted to Iraq would constitute a violation of Article 26 APD.

3. The Availability of Protection in Iraq

3.1. Legal Framework for the Protection of Refugees and Asylum-Seekers, Including Protection from *Refoulement*

While Iraq has long been host to refugees, including Palestinian, Turkish, Iranian and Syrian refugee populations, the Government of Iraq is not a signatory to the 1951 Convention relating to the Status of Refugees or its 1967 Protocol. The protection of refugees is governed by the *Political Refugee Law No. 51 of 1971*, which stipulates that refugee status falls under the responsibility of the Permanent Committee of the Ministry of Interior. Article 1(3) of the *Political Refugee Law* defines a refugee as '[e]very person who seeks asylum in Iraq for political or military reasons'. In general, the Government of Iraq respects the principle of non-*refoulement*, although access to border areas and detention facilities remain challenging.

¹² UNHCR, *Improving Asylum Procedures*, *supra* Footnote 12, p. 281.

A new refugee law has been drafted, but has not yet been adopted by the Iraq Parliament. Moreover, as noted above, UNHCR conducts refugee status determination in Iraq under its mandate as the Government of Iraq has not yet developed a system for the determination of refugee status.

Iraq's Constitution, adopted in 2005, incorporates specific guarantees for the rights of minorities, and enshrines the principle of equality before the law. However, refugees with special needs, particularly the elderly, persons with disabilities, LGBTI persons, women, youth and other groups face many protection challenges similar to those faced by other population groups amongst the host population.¹³

3.2. The Security Situation in Iraq and whether Refugees Face a Risk of Serious Harm or Risk to their Life

Refugees in Iraq face the same difficulties as the host community in relation to their personal security, including continued heightened levels and intensity of violence and the gaps in the application of the rule of law or, for persons with certain profiles, the continued fear of targeted attacks. While the overall security situation in Iraq has improved since the 2006-2008 period, the situation remains very volatile, amongst other, in Baghdad as well as in Ninewa and Kirkuk, the disputed internal boundary region. During 2010 the number of security incidents recorded in the capital, as well as country-wide, was higher than 2009. Throughout 2010 and 2011, serious security incidents continued to be reported, including Improvised Explosive Devices (IEDs), Vehicle Borne Explosive Devices (VBIEDs), roadside bombs and an increasing number of targeted attacks. Whilst increasingly security incidents are targeted at security personnel and political figures, the highest numbers of deaths and injuries are amongst bystanders, including family members of persons targeted, who are caught up in the violence. Many attacks seem to stem from a sectarian motivation, but a significant number throughout 2010 also appeared to be random, aimed at creating terror amongst the population, and destabilizing the fragile situation in the country. The State will remain unable to protect the general population, including refugees, from the impact of such violence.

The security situation in the northern Kurdish Regional Government Area is relatively stable in comparison with the rest of Iraq. Unless the KRG has specific reasons to believe that an individual is a threat to the security and/or stability of the region and/or has engaged in terrorist, political, or criminal activities, the KRG generally respects the rights of Kurdish refugees from Iran, Turkey and Syria. This is primarily due to the shared ethnicity, language and political affiliation of the refugees and the majority of the population.

Some reports appear to suggest that Iranian Kurd refugees or Iraqis of Kurdish ethnicity may face greater risk if returned to areas outside the KR. This is primarily due to ongoing sectarian and ethnic violence. It is also important to note the dangers, threats and risks that will be faced by persons from religious minorities, including the Chaldeans, Assyrians and other Christians, and the Yazidi.

3.3. Access to Sufficient Means of Subsistence to Maintain an Adequate Standard of Living for Refugees

¹³ Please see UNHCR's *Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers* cited in Footnotes 9 and 10 above for more information about the availability of state protection for certain groups at risk.

The protection environment remains challenging in the KR with refugees facing the same difficulties as Iraqis in terms of security, poor infrastructure and unemployment; however these challenges are exacerbated for refugees and asylum-seekers as they have limited access to employment and other services, and do not usually have a support network.

Pursuant to the *Political Refugee Act*, recognised refugees are granted employment rights largely equal to those of Iraqi citizens. One important distinction in respect of employment rights is that asylum-seekers and refugees are unable to become Government employees, which requires possession of an Iraqi ID card. However, despite having permission to work, refugees are negatively affected by the prevailing economic situation. With unemployment levels high across the country in general, refugees often face additional challenges to find work, which may be due to hostility and discrimination. Consequently, many are obliged to accept low skilled and poorly paid jobs. Women are particularly vulnerable to exploitation.

Access to basic needs and essential services for refugees in Iraq is frequently inadequate as is the case for the host community. Refugees are not included in any of the Government's Social welfare programs, but may benefit from UNHCR programmes. Access to adequate shelter is a concern for refugee populations living in urban and rural areas across the country. Given the lack of regular income, refugees have difficulty meeting living expenses in housing that is often overcrowded and in poor condition. Furthermore, refugees are not entitled to register movable and immovable property and the Iraqi Government currently does not provide them with any kind of travel document, further restricting their mobility. In fact, refugees and asylum-seekers are not allowed to travel or choose their place of residence freely amongst the different Governorates.

Refugees and asylum-seekers generally have free access to all levels of education on par with the Iraqi population and receive UNHCR support according to the needs of the group. Urban refugee children are provided with access to education in Iraqi schools while refugee children residing in camps such as Kawa and Makhmour are provided with education through projects supported by UNHCR focusing primarily on primary education. Overcrowded schools and language barriers limit full access to education for refugee children.

The influx of refugees and IDPs from the Central Governorates to the KR in light of its relative stability has placed severe strain on the region's resources. The influx of IDPs and refugees has had a significant impact on the host communities, and has resulted in increased housing and rental prices, thereby placing additional pressure on already strained public services and adding to concerns about security and demographic shifts. There is often little or no work available and there is resentment against refugees working in jobs when a significant proportion of the local population is unable to find employment.

Conclusion

In conclusion, UNHCR recalls the general principle that an assessment of the applicability of the first country of asylum concept requires a careful and individualised case-by-case examination of the conditions in the country and the individual circumstances of the refugee.

When considering whether Iraq may constitute a first country of asylum for any applicant, UNHCR notes that any such assessment must first take note of the fact that Iraq is not a party to the 1951 Convention or its 1967 Protocol, and is a country where UNHCR conducts refugee status determination under its mandate on behalf of the Iraqi Government in the absence of a functioning national asylum system in place.

A consideration of whether Iraq (and the northern part of the KR in particular) may constitute a first country of asylum for Iranian refugees of Kurdish ethnicity requires a careful assessment of (i) whether the applicant in question can meet the requirements for admission to Iraq, and to the KR in particular, including whether the person will be subjected to detention or severe penalties upon their return and whether they will be able to travel to their place of residence in a safe and dignified manner, and (ii) whether the applicant will have access to protection in the KR.

In respect of this second requirement, UNHCR notes that all persons in Iraq continue to face challenges due to the unstable security environment, political situation and serious gaps in the application of the rule of law. While the overall security situation in Iraq has improved since 2006-2008, the situation remains volatile. Large groups of refugees who had received asylum in Iraq have fled to neighbouring countries in search of protection. Although the security situation in the northern KR is relatively stable, the overall vulnerability of refugees in Iraq and the KR is such that even an adequate level of security does not mitigate completely the considerable risk factors associated with living in a volatile country affected by conflict. This continuing security risk is combined with a lack of access to basic services and high levels of unemployment. While all of these protection issues affect much of the population in Iraq, refugees are among the persons mostly exposed to this risk.

UNHCR therefore reiterates that in assessing the applicability of the first country of asylum concept, each case should be studied on a case-by-case basis, taking into account the ethnic, political, religious, and other relevant considerations, especially sexual orientation, age and gender. Persons in need of ongoing special medical treatment or psychological support (i.e. victims of torture, PTSD, SGBV, serious disabilities, etc.) will face challenges in obtaining necessary services and treatment in Iraq. This is especially true since the security situation in Baghdad continues to be very volatile, restricting people's movements and access to services.

We hope this information can be of use to you and stand ready to assist you or the Appeal Board further.

Yours sincerely,



Cecilie Becker-Chr. Sanz Guerrero
Acting Senior Regional Legal Officer