

***Amicus curiae* of the United Nations High Commissioner for Refugees (UNHCR)¹ on the interpretation and application of ‘sur place’ claims within the meaning of Article 1A(2) of the 1951 Convention Relating to the Status of Refugees**

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 for refugees.² 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 [...]’³ 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’).⁴
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.⁵ UNHCR also provides information on a regular basis to decision-makers and courts of law concerning the proper interpretation and application of the provisions within the 1951 Convention.
3. UNHCR submits this *amicus curiae* in order to assist the Supreme Court of Norway. According to Section 15-8 of the ‘Tvisteloven’ - the Norwegian Dispute Act⁶- written submissions may be made in court proceedings by ‘organisations and associations within the purpose and normal scope of the organisation’ in order to shed light on matters of public interest. UNHCR has a direct interest in ensuring a proper and consistent interpretation of the 1951 Convention as part of its supervisory responsibility, including in the context of the present case at bar, which concerns applications for refugee status based on the political activities in the country of asylum, which are defined conceptually as *sur place* refugee claims.

¹ This *amicus curiae* does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoy under applicable international legal instruments and recognized principles of international law. See, UN General Assembly, *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, <http://www.refworld.org/docid/3ae6b3902.html>.

² UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), <http://www.refworld.org/docid/3ae6b3628.html> (hereafter ‘UNHCR Statute’).

³ *Ibid.*, para. 8(a).

⁴ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, <http://www.refworld.org/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’.

⁵ Such guidelines are included in the 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*, and complementary Guidelines on International Protection, December 2011, HCR/1P/4/ENG/REV. 3, <http://www.unhcr.org/refworld/docid/4f33c8d92.html> (hereafter ‘UNHCR Handbook’).

⁶ *Lov 17. juni 2005 nr. 90 om mekling og rettergang i sivile tvister (Tvisteloven)*, unofficial English translation, <http://app.uio.no/ub/ujur/oversatte-lover/data/lov-20050617-090-eng.pdf>.

4. The Norwegian Supreme Court has previously accepted UNHCR's written submissions.⁷
5. The Norwegian Supreme Court is asked to interpret Section 28, paragraph 4 (Residence permit for foreign nationals in need of protection (asylum)), cf. Section 74 (Residence permit for a foreign national whose protection against *refoulement* under Section 73⁸ is his or her sole basis for residence) of 'Utlendingsloven'⁹ – the Norwegian Immigration Act of 2008 (hereafter 'Immigration Act'), and to determine whether those provisions are in accordance with Norway's international obligations.
6. UNHCR has a direct interest in the resolution of the question at bar of whether the provisions of the Immigration Act are contrary to international refugee law, and presents in this *amicus curiae* its views on the international law principles governing the recognition of asylum-seekers *sur place* as refugees. UNHCR underlines in this respect that the Immigration Act serves to bring Norway into compliance with its international obligations under the 1951 Convention, and thus, should be interpreted and applied in a manner consistent with the Convention.
7. UNHCR submits this amicus brief to provide neutral and expert information on international refugee and human rights law as a guide to the Court in assessing the issues before it. It does not constitute a recommendation on the merits of the case in question.

II. Refugee Status Determination Procedure in Norway

8. The Refugee Status Determination (hereafter 'RSD') process in Norway is governed by the Immigration Act and 'Utlendingsforskriften' – the Norwegian Immigration Regulations.¹⁰ According to Section 3 of the Immigration Act, 'the Act shall be applied in accordance with the international rules by which Norway is bound, when these are intended to strengthen the position of a foreign national.'¹¹
9. Applications for international protection may be made at airports; seaports; the border; or, in-country at a police station. Applications at these locations are sent to the National Police Immigration Service in Oslo for registration. Norwegian Police will inform the applicant about his or her rights and duties, the asylum process and his or her obligation to cooperate with the Norwegian immigration authorities during the procedure.¹²

⁷ *HR-2015-02524-P*, Case no. 2015/203, Norway: Supreme Court, 18 December 2015, <http://www.refworld.org/docid/56cc6e2c4.html>, at para. 35.

⁸ Section 73 of the Immigration Act sets out an 'absolute' protection against *refoulement*.

⁹ Act of 15 May 2008 on the entry of foreign nationals into the Kingdom of Norway and their stay in the realm (Immigration Act), <https://udiregelverk.no/PageFiles/1720/Immigration%20act%20-%20updated%20as%20of%201%20april%202014%20.pdf>.

¹⁰ National Legislative Bodies, Norway: Regulations of 15 October 2009 on the Entry of Foreign Nationals into the Kingdom of Norway and their Stay in the Realm (Immigration Regulations), 15 October 2009, <http://www.refworld.org/docid/5850069a7.html>.

¹¹ Intergovernmental Consultations on Migration, *Asylum and Refugees, Asylum Procedures: Report on Policies and Practices in IGC Participating States 2015*, September 2015, p. 312, Section 2.1, http://www.igc-publications.ch/upload/Asylum_Procedures_Report_2015.pdf.

¹² *Ibid.*, at p. 313, Section 5.1.

10. The Norwegian Directorate of Immigration (hereafter 'UDI') conducts a short arrival interview regarding the reasons for seeking international protection and schedules the RSD interview. After having considered all the information pertinent to an application, a UDI caseworker presents a proposal for a decision on the application to a senior caseworker. If accepted, both caseworkers sign the decision and the applicant is informed of the outcome. Decisions are always given in writing and negative decisions are reasoned.
11. According to Section 28 paragraph 1, letter (a) of the Immigration Act, refugee status is granted if the following conditions are met:
 - The persecution is connected to one of the grounds set out in Article 1A(2) of the 1951 Convention;
 - The persecution is of an individual nature;
 - Fear of persecution is the reason the applicant does not wish to return to his or her country of origin.¹³
12. According to Section 28, paragraph 4, of the Immigration Act, an applicant shall normally also be recognised as a refugee under paragraph 1 when his or her need for protection has arisen since the applicant left his or her country of origin, and is a result of the applicant's own acts. However, Section 28, paragraph 4, contains an important exception clause and states that when considering such claims 'particular importance shall be attached to whether the need for protection is due to acts that are punishable under Norwegian law, or *whether it seems most likely that the main purpose of the acts was to obtain a residence permit.*' [emphasis added].
13. Section 74 of the Immigration Act provides that a foreign national whose protection against *refoulement* under Section 73 is his or her sole basis for residence in the realm may be granted a temporary residence permit until the impediment to his or her return no longer applies. The provision includes a stipulation that a permit granted to a foreign national shall neither confer the right to take employment nor the right to visit other Schengen countries. The provision also allows the introduction of further restrictions concerning the duration and renewal of residence permits granted under this section of the Immigration Act.

III. Key question addressed in this submission

14. UNHCR will address in the present *amicus curiae* the following question:
 - Do Contracting States have an obligation to grant refugee status to an asylum-seeker who can establish that he/she has a well-founded fear of persecution for reasons of one or more of the Convention grounds of the 1951 Convention [thus falling under the scope of the inclusion clauses] where the risk of persecution is based on circumstances created by the applicant's 'own acts', including those created for the main purpose of obtaining a residence permit?

¹³ *Ibid.*, p. 312, Section 2.1.

IV. Principles of international refugee and human rights law regarding the determination of sur place claims

(1) *The principles of treaty interpretation*

15. The starting point for determining the obligations under Article 1A of the 1951 Convention is the *Vienna Convention on the Law of Treaties*¹⁴ (hereafter 'Vienna Convention'), which confirms that a treaty shall be 'interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in the context and in the light of its object and purpose.'¹⁵ The Vienna Convention permits recourse to supplementary means of interpretation, including the *travaux préparatoires*, only where the meaning of the treaty language is 'ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable.'¹⁶
16. In relation to the 1951 Convention, this means interpretation by reference to the object and purpose of extending the protection of the international community to refugees, and assuring to 'refugees the widest possible exercise of fundamental rights and freedoms.'¹⁷
17. UNHCR further recalls that 'it is a fundamental principle of international law that international law prevails over domestic law.'¹⁸ It is also a fundamental rule of international law that every treaty in force is binding upon the Contracting States and must be performed in good faith (the principle of *pacta sunt servanda*).¹⁹ In addition, a Contracting State is bound to make modifications to its national legislation as may be necessary to ensure the fulfilment of its international obligations.²⁰ The duty of a Contracting State to ensure that its domestic law is in conformity with its international obligations is well established. A Contracting State may not invoke provisions of its domestic legislation as justification for a failure to perform a treaty obligation.²¹ In implementing the treaty, the Contracting State must attain the international standard of reasonable efficacy and efficient implementation of the treaty provisions concerned.²²

¹⁴ United Nations, *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, 12 March 1986, <http://www.refworld.org/docid/3ae6b3924.html>.

¹⁵ *Ibid.*, Article 31(1).

¹⁶ *Ibid.*, Article 32.

¹⁷ 1951 Convention, Preamble, paras. 1-3.

¹⁸ *Opinion: The 1951 Convention relating to the Status of Refugees and the Obligations of States under Articles 25, 27 and 28, with particular reference to refugees without identity or travel documents*, by Prof. Guy S. Goodwin-Gill for UNHCR, May 2000, <http://www.refworld.org/docid/51af00184.html>, at para. 11, citing International Court of Justice, *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, [1988] ICJ Reports 12, 31-2, para. 47.

¹⁹ Brownlie, I., 1969 *Vienna Convention on the Law of Treaties*, Article 26; *Principles of Public International Law*, Oxford: Clarendon Press, 5th ed., 1998, 620, quoted in *Opinion: The 1951 Convention relating to the Status of Refugees and the Obligations of States under Articles 25, 27 and 28, with particular reference to refugees without identity or travel documents*, by Prof. Guy S. Goodwin-Gill for UNHCR, May 2000, <http://www.refworld.org/docid/51af00184.html>, at para. 20.

²⁰ Permanent Court of International Justice, *Exchange of Greek and Turkish Populations*, (1925) PCIJ, Ser. B, No. 10, 20., cited in *Opinion* by Prof. Guy S. Goodwin-Gill for UNHCR, May 2000, <http://www.refworld.org/docid/51af00184.html>, para. 21.

²¹ Vienna Convention, Article 27.

²² *Opinion: The 1951 Convention relating to the Status of Refugees and the Obligations of States under Articles 25, 27 and 28, with particular reference to refugees without identity or travel documents*, by Prof. Guy S. Goodwin-Gill for UNHCR, May 2000, <http://www.refworld.org/docid/51af00184.html>, para. 14.

(2) *Interpretation of Article 1A (2) of the 1951 Refugee Convention: definition of the term 'refugee' and 'sur place' claims*

18. The Norwegian Supreme Court is asked to determine whether Section 28, paragraph 4 of the Immigration Act providing that an asylum-seeker may be refused refugee status when the actions giving rise to such fear of persecution *seem most likely* to have been carried out and/or expressed post-flight *for the main purpose* of obtaining a residence permit is contrary to Norway's obligations under international law [emphasis added]. Thus, the central issue posed in the case at bar is whether post-flight acts or activities undertaken by an applicant for international protection for the main purpose of obtaining residence can justify the need for international protection in accordance with the 1951 Convention.

19. Article 1A(2) of the 1951 Convention defines a refugee as a person who:

[O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, 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; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it.

20. To be a refugee, a person must satisfy the above noted definition, which forms the positive basis upon which the determination of refugee status is made. UNHCR notes that the Convention affords equal protection to all Convention grounds as they reflect characteristics which the person cannot be expected to change since such characteristics are an expression of fundamental rights.²³ A similar view was endorsed by the CJEU in *X, Y and Z v. Minister voor Immigratie en Asiel*²⁴ where the Court considered that individuals should not be required to exercise restraint about their protected characteristics, be it, for example, one's religious beliefs, or, *mutatis mutandis*, their sexual orientation.²⁵

21. Thus, a person who was not a refugee when he or she left their country, but who becomes a refugee at a later date, is called a refugee 'sur place'.²⁶ UNHCR highlights that nowhere in the Convention is it limited to actions or persecution that took place prior to flight. In fact, the wording of the Convention suggests the exact opposite; that it can and does apply to all persons who are 'outside the country of nationality'. This interpretation is

²³ UNHCR, *Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/02, <http://www.refworld.org/docid/3d36f23f4.html>, para. 12.

²⁴ *X, Y, Z v Minister voor Immigratie en Asiel*, C-199/12 - C-201/12, European Union: Court of Justice of the European Union, 7 November 2013, http://www.refworld.org/cases_ECJ_527b94b14.html.

²⁵ See *HJ(Iran) and HT(Cameroon) v. Secretary of State for the Home Department*, [2010] UKSC 31, United Kingdom Supreme Court, 7 July 2010, http://www.refworld.org/cases_UK_SC_4c3456752.html. See also, *Bundesrepublik Deutschland v. Y, Z*, C-71/11 and C-99/11, European Union: Court of Justice of the European Union, 5 September 2012, http://www.refworld.org/cases_ECJ_505ace862.html where the CJEU established that interferences with religious freedom can amount to acts of persecution. The Court further established that States cannot require applicants to refrain from religious practices in order to minimise their risk of persecution.

²⁶ UNHCR Handbook, para 94.

further confirmed by the wording and content of Article 1C(4), which states that the 1951 Convention ceases to apply to a person who has ‘voluntarily re-established himself [or herself] in the country which he [or she] left or outside which he [or she] remained owing to fear of persecution’. [emphasis added] By explicitly referring to a country where the person has ‘remained’, it is clear that one’s fear of persecution is not dependent on, and need not have arisen prior to, leaving or fleeing their country.²⁷

22. The issue of *sur place* claims is further addressed in UNHCR’s *Handbook on Procedures and Criteria for Determining Refugee Status* (hereafter ‘UNHCR Handbook’). We would highlight that the UNHCR Handbook is internationally recognized as an important source of interpretation of international refugee law, and although not legally binding, it nevertheless provides ‘significant guidance’ in construing the 1951 Convention and in giving content to the obligations established therein.²⁸

23. According to paragraphs 95 and 96 of the UNHCR Handbook, a person may become a refugee *sur place* in two distinctive sets of circumstances:

1) [A]s a result of events occurring in the home country since the applicant’s departure;

95. A person becomes a refugee "*sur place*" due to circumstances arising in his country of origin during his absence. Diplomats and other officials serving abroad, prisoners of war, students, migrant workers and others have applied for refugee status during their residence abroad and have been recognized as refugees.

2) [A]s a result of the applicant’s activities, acts, or behaviour in the country of asylum:

96. A person may become a refugee "*sur place*" as a result of 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

²⁷ A. Zimmermann and C. Mahler, ‘Article 1A, para. 2, Definition of the term ‘Refugee’, in *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, edited by A. Zimmermann, p. 325, para. 132. Furthermore, ‘[t]he requirement that a person must be outside his country to be a refugee does not mean that he must necessarily have left that country illegally, or even that he must have left it on account of well-founded fear.’ UNHCR Handbook, para. 94.

²⁸ See *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421; 107 S. Ct. 1207; 94 L. Ed. 2d 434; 55 U.S.L.W. 4313, United States Supreme Court, 9 March 1987, <http://www.refworld.org/cases,USSCT,3ae6b68d10.html>. The Supreme Court of Canada has also stated that the UNHCR Handbook is a ‘highly relevant authority’: *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593, 19 October 1995, http://www.refworld.org/cases,CAN_SC,3ae6b68b4.html at para. 46. In fact, many high courts internationally have endorsed UNHCR’s views as persuasive authority in interpreting the 1951 Convention, its 1967 Protocol, and related international law. See *Ward v. Canada (Minister of Employment & Immigration)*, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993, http://www.refworld.org/cases,CAN_SC,3ae6b673c.html, *R v. Secretary of State for the Home Department (SSHD), Ex parte Adan and Others*, United Kingdom: Court of Appeal (England and Wales), 23 July 1999, http://www.refworld.org/cases,GBR_CA_CIV,3ae6b6ad14.html, *Al-Sirri (FC) (Appellant) v Secretary of State for the Home Department (Respondent) and DD (Afghanistan) (FC) (Appellant) v Secretary of State for the Home Department (Respondent)*, [2012] UKSC 54, United Kingdom: Supreme Court, 21 November 2012, http://www.refworld.org/cases,UK_SC,50b89fd62.html, para. 36.

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."

24. The same view was endorsed by Grahl-Madsen in *The Status of Refugees in International Law Vol 1*,²⁹ where a refugee *sur place* is defined in the following terms: 'A person who claims to be a refugee as a result of political events in his home country or because of his own actions that have taken place after his departure from said country ...'.
25. Accordingly, even if the applicant has created a claim for refugee status by resorting to opportunistic post-flight activities, it would be contrary to the 1951 Convention to deprive him/her of international protection and return him/her to his/her country of origin if it is established that the return may result in persecution for one of the Convention reasons. This argument finds further support in paragraph 202 of the UNHCR Handbook which underlines that an examiner's conclusion on the facts of the case and personal impression of the applicant should not lead to a judgment being influenced by personal considerations that the applicant may be an 'undeserving case'.³⁰
26. UNHCR underlines the importance of undertaking a rigorous and in-depth examination of *sur place* claims. Where the fear of persecution arises as a result of the refugee's own behaviour, the issue of credibility arises, as it may be thought that the activities are self-serving. It is particularly important in such cases that the full details are examined and analysed carefully in light of the likelihood of a risk of persecution actually arising in consequence.³¹
27. Although UNHCR points out in its Guidelines on Religion-Based Refugee Claims that so-called 'self-serving' activities do not create a well-founded fear of persecution for reasons of a Convention ground, it does specify that this is only applicable in situations where:

*the opportunistic nature of such activities will be apparent to all, including the authorities there, and serious adverse consequences would not result if the person were returned. Under all circumstances, however, consideration must be given as to the consequences of return to the country of origin and any potential harm that might justify refugee status...*³²

²⁹ Atle Grahl-Madsen, *The Status of Refugees in International Law: Refugee character, Volume 1*; (1966) 94.

³⁰ Professor Guy Goodwin-Gill has stated that 'there is no rational basis for distinguishing in the matter of refugee status between the innocent bystander to whom political opinions are imputed by the persecutor, and the less than innocent bystander whose self-interested actions lead the persecutor also to impute political opinions to the person concerned. The so-called good faith requirement seems to offer an attractive and self-justifying response to the asylum seeker who is trying to manipulate the process. However, it has no legal authority. It cannot be read into the ordinary meaning of article 1A(2).' See, 'Danian v. Secretary of State for the Home Department, Comment: Refugee Status and "Good Faith"', 12 *International Journal of Refugee Law*, 2000, 663 at 670.

³¹ UNHCR, Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees, April 2001, <http://www.refworld.org/docid/3b20a3914.html>.

³² UNHCR, *Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, 28 April 2004, HCR/GIP/04/06, <http://www.refworld.org/docid/4090f9794.html>, para. 36.

28. UNHCR submits that the test above applies *mutatis mutandis* not only to refugee claims based on religion, but also to refugee claims based on political opinion.³³ It must be noted that some applicants may have consciously decided not to act on their political opinion, religion or sexual orientation while in the country of origin out of fear of the consequences of openly expressing themselves. Their fear of persecution may thus arise or find expression whilst they are in the country of asylum, giving rise to a refugee claim *sur place*.³⁴
29. Against this background, UNHCR emphasises that the decision-maker's critical focus in the context of *sur place* refugee claims must be on the persecution or risk faced by the applicant and not on whether the activities of the applicant were self-serving. UNHCR thus submits that, as in any asylum claim, the determination to be made under the 1951 Convention is whether there is a fear of persecution and whether that fear is well-founded.³⁵

The 1951 Convention exhaustively enumerates the acts which may give rise to exclusion

30. The 1951 Convention clearly and exhaustively outlines under what circumstances a person, who would otherwise qualify as a refugee, can be excluded from refugee status, that is, where the applicant was:
- a) *not in need of international protection*, because he or she was receiving protection from organs or agencies of the United Nations other than UNHCR (Article 1D of the 1951 Convention)³⁶, or because he or she was recognised by the competent authorities of another country in which he or she has taken residence as having the rights and obligations attached to the possession of the nationality of that country (Article 1E of the 1951 Convention)³⁷; or
 - b) *not deserving of international protection*, because there were serious reasons for considering that he or she had committed

³³ UNHCR intervention before the Supreme Court of the United Kingdom in the case of RT (Zimbabwe) and others (Respondents) v Secretary of State for the Home Department, 25 May 2012, 2011/0011, <http://www.refworld.org/docid/4fc369022.html>. See also the judgment, RT (Zimbabwe) and others v Secretary of State for the Home Department, [2012] UKSC 38, United Kingdom: Supreme Court, 25 July 2012, http://www.refworld.org/cases,UK_SC,500fdacb2.html.

³⁴ UNHCR, Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 23 October 2012, HCR/GIP/12/01, <http://www.refworld.org/docid/50348afc2.html>, para. 57.

³⁵ 'There is no logical or empirical connection between the well-foundedness of the fear of being persecuted or of suffering serious harm, and the fact that the person may have acted in a manner designed to create a refugee claim. The 1951 Convention does not, either explicitly or implicitly, contain a provision according to which its protection cannot be afforded to persons whose claims for asylum are the result of actions abroad.' *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 (OJ L 304/12 of 30.9.2004)*, 28 January 2005, <http://www.refworld.org/docid/4200d8354.html>, p. 17.

³⁶ Although Article 1D is often characterized as an 'exclusion' clause, it is more accurately described as a 'deferred inclusion' clause, as it contains both exclusionary and inclusionary aspects. See Lex Takkenberg, *The Status of Palestinian Refugees in International Law*, (Oxford: Oxford University Press, 1998), p. 66.

³⁷ See 1E of the 1951 Convention, <http://www.refworld.org/docid/4ec4a7f02.html>.

certain serious acts or heinous crimes and thus fall within the scope of Article 1F³⁸ of the 1951 Convention.³⁹

31. That the exclusion clauses are exhaustively enumerated means that no additional grounds would justify a conclusion that international protection is not required. Moreover, given the serious consequences that flow from exclusion, they should be interpreted restrictively.⁴⁰ UNHCR thus submits that the 1951 Convention does not contain any basis for excluding from refugee status applicants whose post-flight acts and activities have been carried out and/or expressed in the country of asylum primarily for the purpose of obtaining a residence permit, however non genuine the acts may be if those acts give rise to a well-founded fear of persecution for a Convention ground.
32. Considering that the 1951 Convention neither in its inclusion clauses nor in its exclusion clauses make any mention of an applicant's possible opportunistic motives to obtain refugee status and the exclusion clauses are exhaustively enumerated, UNHCR submits that the Convention prevents Norway from introducing additional inclusion criteria or grounds of exclusion to the 1951 Convention.
33. The text of the 1951 Convention is clear on who may be included or excluded from refugee status. There is therefore no need to resort to the *travaux préparatoires* in the context, as referred to under paragraph 15 above.⁴¹ Therefore, UNHCR submits that Section 28, paragraph 4, of the Immigration Act is not in line with established treaty interpretation.

V. Comparative jurisprudence regarding *sur place* refugee claims

34. Several civil and common law jurisdictions have dealt with cases pertaining to *sur place* claims where the courts had to address the question of whether applicants with self-serving actions are to be automatically disqualified from protection under the 1951 Convention.
35. In light of the Ministry of Justice's instruction to the Directorate of Immigration (Internal Practices Note 2010-061),⁴² to take into consideration the jurisprudence of the United Kingdom (among other States),⁴³ it is important to bring the Court's attention to the seminal decision by the

³⁸ For acts committed after the admission to the country of asylum, it should be noted that only the exclusion clauses contained in Article 1F(a) and (c) are applicable. See 1F of the 1951 Convention, <http://www.refworld.org/docid/4ec4a7f02.html>.

³⁹ It should also be noted that Article 1C allows for the cessation of refugee status for persons who cease to be in need of international protection. See Article 1C of the 1951 Convention, <http://www.refworld.org/docid/4ec4a7f02.html>

⁴⁰ UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, HCR/GIP/03/05, available at: <http://www.refworld.org/docid/3f5857684.html>.

⁴¹ Nonetheless, UNHCR notes that *sur place* claims were contemplated by the drafters of the Convention. See, J. Hathaway J. and M. Foster, *The Law of Refugee Status*, (Cambridge University Press, second edition, 2014) 76, footnote 357 and A. Zimmermann and C. Mahler, 'Article 1 A, para. 2, Definition of the term 'Refugee'', in *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, edited by A. Zimmermann, p. 325-6, para. 133-136.

⁴² Internal Practices Note 2010-061 regarding asylum practices in other countries, <https://udiregelverk.no/en/documents/udi-internal-practices/im-2010-061/>.

⁴³ *Ibid.* The Internal Practices Note names the following countries: the United Kingdom, the Netherlands, Sweden, Finland, and Denmark.

English Court of Appeal in *Danian v Secretary for the Home Department*.⁴⁴ The Court of Appeal held that there was no basis for applying the principle of good faith in asylum claims under the 1951 Convention. The Court made *inter alia* reference to the express limitations in the Convention under Article 1F, and disagreed with the arguments put forward by the Secretary for the Home Department. The Court concluded that although the applicant's credibility was damaged and his claim would be examined closely, he would nevertheless be entitled to protection against *refoulement* if he could establish a genuine and well-founded fear of persecution if returned to his country of origin. The Appeal Court clarified in addition that an asylum-seeker, who in bad faith took part in activities solely to enhance his asylum claim, could not have his asylum claim rejected on that basis.⁴⁵ The Court justified its conclusion in the following terms:

[I] do not accept the Tribunal's conclusion that a refugee *sur place* who had acted in bad faith falls out with the Geneva Convention and can be deported to his home country notwithstanding that he has a genuine and well-founded fear of persecution for a Convention reason and that there is a real risk that such persecution may take place. Although his credibility is likely to be low and his claim must be rigorously scrutinised, he is still entitled to the protection of the Convention, and this country is not entitled to disregard the provisions of the Convention by which it is bound, if it should turn out that he does indeed qualify for protection against *refoulement* at the time his application is considered.⁴⁶

36. The same view was endorsed by the English Court of Appeal in *YB (Eritrea) v Secretary of State for the Home Department*.⁴⁷ In light of the principle established in *Danian* and the changes in the national Immigration Rules due to the transposition of the EU Qualification Directive 2004/83/EC⁴⁸ at domestic level, the Court of Appeal held that there was no principle or legal basis establishing that an applicant was not entitled to asylum if he or she had manufactured their claim by reason of their activities in the UK. The Court clarified anew that opportunistic activities *sur place* were not an automatic bar to asylum. The Court also held in light of the purpose of Article 4(3)(d) of the Qualification Directive that whether consequent fear of persecution or ill-treatment was well-founded was an objective question, since the said article required Member States to assess whether such activities would expose the claimant to persecution or serious harm if returned.

⁴⁴ *Danian v. Secretary of State for the Home Department (Appeal)*, [2000] Imm AR 96, United Kingdom: Court of Appeal (England and Wales), 28 October 1999, <http://www.refworld.org/docid/3e71dd564.html>.

⁴⁵ *Ibid.*, See Judgment of Buxton LJ, which states: 'I am of opinion that the Secretary of State is wrong to contend for any 'bad faith' term or limitation in the application of the Convention'.

⁴⁶ *Ibid.*, See Judgment of Brooke LJ.

⁴⁷ *YB (Eritrea) v. Secretary of State for the Home Department*, [2008] EWCA Civ 360, United Kingdom: Court of Appeal (England and Wales), 15 April 2008, <http://www.refworld.org/docid/4805f3312.html>.

⁴⁸ 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. 37/9-337/26; 20.12.2011, 2011/95/EU, <http://www.refworld.org/docid/4f197df02.html>.

37. A similar approach was adopted by the High Court of Ireland in *FV v. Refugee Appeals Tribunal*, where the Court held:

[T]he court is conscious that there is scope for asylum seekers to abuse the statutory asylum process by making an initial unfounded application for asylum and subsequently claiming a fear of persecution as a failed asylum seeker. The making of a self-serving, unfounded initial claim must, of course, not exclude any person from the protection of the Refugee Act 1996, but it seems reasonable that it be taken into account and accorded some weight by the decision-makers when credibility is being assessed. Indeed such a person might properly be called upon to explain why they deliberately exposed themselves to a risk of persecution by creating the conditions that would make them a failed asylum seeker.⁴⁹

38. The High Court took a similar stance in *H.M v Minister for Justice and Law Reform*, where it accepted:

that while an applicant may have contrived to stage his ‘conversion’ and be the architect of his own misfortune, it does not necessarily detract from the fact that he may indeed be misfortunate. The essential question remains - whether the applicant had a well founded fear of persecution, even if he had acted in bad faith. (...) The key point remains, however, whether the applicant has a well founded fear.’⁵⁰

39. The Conseil du Contentieux des Etrangers (Council for Alien Law Litigation, hereafter ‘CALL’) also held that in light of Belgium’s obligations under the 1951 Convention, paragraphs 95-96 of the UNHCR Handbook and Article 5(2) of the Directive 2011/95/EU (recast) of the European Parliament and of the Council of 13 December 2011 (hereafter ‘recast Qualification Directive’),⁵¹ that the authorities were obliged to assess whether elements of the applicant’s account were sufficiently well-founded to establish a real risk of serious harm.⁵² The CALL concluded that the applicant’s fear of persecution was plausible and fell within the refugee definition. The CALL reached this conclusion irrespective of the fact that the applicant had previously submitted a fraudulent claim which called into question his good faith.

VI. Relevant European law standards

40. While acknowledging that Norway does not have obligations under EU’s primary and secondary law, in particular the EU asylum *acquis*, EU legislation and jurisprudence sheds light on the way in which Article 1A of the 1951 Convention has been construed and implemented by other State

⁴⁹ *F. V. and applicant, Refugee Appeals Tribunal (Ricardo Dourado) and Minister for Justice, Equality and Law Reform*, 28 May 2009, <http://www.bailii.org/ie/cases/IEHC/2009/H268.html>, para. 37.

⁵⁰ *H.M v. Minister for Justice and Law Reform*, 27 April 2012, <http://www.bailii.org/ie/cases/IEHC/2012/H176.html>, para. 35.

⁵¹ 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>.

⁵² *Arrêt n° 150 548*, Belgium: Conseil du Contentieux des Etrangers, 10 August 2015, <http://www.refworld.org/docid/55cdf11a4.html>.

parties. UNHCR stresses in this regard that several pieces of EU secondary legislation, including the recast Qualification Directive, are referred to extensively in the preparatory works to the Immigration Act, and one could argue that Norway's domestic legislation has been to a fairly great extent harmonised with Community Standards.⁵³

41. UNHCR underlines in this respect that recitals 3, 16 and 17 in the preamble to recast Qualification Directive clearly state that the 1951 Convention constitutes the 'cornerstone of the international legal regime for the protection of refugees', and this has been confirmed by the Court of Justice of the European Union (hereafter 'CJEU').⁵⁴
42. The recast Qualification Directive contains in Article 5 an express provision which provides for the inclusion of *sur place* refugee claims in the scope of the Directive. The wording of Article 5(2) encompasses actions of asylum-seekers who started their activities in the country of origin and continue their engagement in the host State. It expressly states that other types of conduct, not only those related to political activities, undertaken by an applicant in the host State are also capable of creating refugee *sur place* claims. However, Article 5(3) of the recast Qualification Directive gives Member States discretion to reject *sur place* claims where the risk of persecution is based on circumstances created by the applicant's 'own decision'.
43. Notwithstanding article 5(3) of the recast Qualification Directive, UNHCR has repeatedly emphasized that what is required under refugee law is that the elements of the refugee definition are in fact fulfilled. UNHCR firmly believes that a person who is objectively at risk in his or her country of origin is entitled to protection notwithstanding his or her motivations, intentions, conduct or other surrounding circumstances. This conclusion is drawn on the basis that the 1951 Convention does not, either explicitly or implicitly, contain a provision according to which its protection is unavailable to persons whose claims for asylum are the result of actions abroad, having regard to the phrase 'without prejudice to the 1951 Convention' in Article 5(3).⁵⁵
44. Recital 16 of the recast Qualification Directive highlights the importance of human rights by clearly stating:

This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular this Directive seeks to ensure full respect for human dignity and the right to asylum of

⁵³ NOU, Norges offentlige utredninger 2004:20, *Ny utlendingslov*, <https://www.regjeringen.no/contentassets/eadd02d12e6340a581c1a85ab738e987/no/pdfs/nou200420040020000dddpdfs.pdf>.

⁵⁴ See, for example, *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, C-175/08; C-176/08; C-178/08 & C-179/08, European Union: Court of Justice of the European Union, 2 March 2010, <http://www.refworld.org/docid/4b8e6ea22.html>, para. 52 and *Bolbol v. Bevándorlási és Állampolgársági Hivatal*, C-31/09, European Union: Court of Justice of the European Union, 17 June 2010, http://www.refworld.org/cases_E CJ_4c1f62d42.html, para. 37.

⁵⁵ *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted* (COM(2009)551, 21 October 2009), 29 July 2010, <http://www.refworld.org/docid/4c503db52.html>, p. 16.

applicants for asylum and their accompanying family members.⁵⁶

45. This was also emphasised by the CJEU in *Salahadin Abdulla and Others*⁵⁷ which held that the provisions of the Directive must respect the 1951 Convention and other relevant treaties as provided by Article 79 of the Treaty of the Functioning of the European Union,⁵⁸ and must be interpreted in a manner which respects the fundamental rights and the principles recognised in particular by the Charter of Fundamental Rights of the European Union.⁵⁹
46. In light of the recital of the Directive and the CJEU jurisprudence presented above, UNHCR is of the opinion that even where it cannot be established that the applicant has already held the relevant convictions or orientations in the country of origin, the asylum-seeker is entitled to freedom of expression, freedom of religion and freedom of association, within the limits defined in Article 2 of the 1951 Convention and other human rights instruments, including the International Covenant on Civil and Political Rights.⁶⁰ Such freedoms include the right to change one's religion or convictions, which could occur subsequent to departure, for example, due to disaffection with the religion or policies of the country of origin, or greater awareness of the impact of certain policies (see also above at paragraph 27 of these submissions).⁶¹
47. Furthermore, UNHCR is of the view that the domestic provisions in discussion, which allow Norway to restrict the residence permits of applicants with self-serving *sur place* activities by refusing such applicants a right to take employment or to visit other Schengen countries, raise serious issues under both the 1951 Convention and international human rights law. UNHCR limits itself in this respect to underline that the earlier Qualification Directive 2004/83⁶² included similar provisions as the Norwegian ones in relation to protection standards for 'undeserving' persons, however, those provisions were later removed by the EU legislator.

⁵⁶ 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>, recital 16.

⁵⁷ *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, footnote 47 above, para. 39.

⁵⁸ See Article 79 (ex Article 63 TEC) European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 26 October 2012, OJ L. 326/47-326/390; 26 October 2012, <http://www.refworld.org/docid/52303e8d4.html>.

⁵⁹ European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, <http://www.refworld.org/docid/3ae6b3b70.html>.

⁶⁰ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, <http://www.refworld.org/docid/3ae6b3aa0.html>. See also, UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), <http://www.refworld.org/docid/3ae6b3712c.html>.

⁶¹ *UNHCR comments on the European Commission's proposal for a Directive on minimum standards*, footnote 54 above, pages 15-16.

⁶² European Union: Council of the European Union, *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*, 30 September 2004, OJ L. 304/12-304/23; 30.9.2004, 2004/83/EC, <http://www.refworld.org/docid/4157e75e4.html>.

48. The previous Qualification Directive allowed *inter alia* for the reduction of standards for those refugees whose need of protection was the result of activities ‘engaged in for the sole or main purpose of creating the necessary conditions for being recognized’, and access to employment and social benefits were among the rights affected by the proposed provisions. However, during the revision process of the Qualification Directive, the European Commission clearly stated that the provisions ‘are not conducive to integration and raise concerns from the perspective of the principle of non-discrimination’. Both Article 20(6) and 20(7) of the previous Directive were thus removed by the EU legislator as they were deemed of limited value.⁶³ This prompted the European Council to insert an express reference in Recital 16 of the recast Qualification Directive’s preamble to Article 11 of the Charter on Fundamental Rights which guarantees the right to freedom of expression and opinion.

*The European Convention on Human Rights (‘ECHR’)*⁶⁴

49. According to the preamble of the 1951 Convention, one fundamental purpose of the 1951 Convention is to assure protection of basic human rights of persons fleeing persecution.⁶⁵

Considering that the Charter of the United Nations⁶⁶ and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination, Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms...

UNHCR submits thus that the 1951 Convention must be read in light of international human rights law, and in particular with Norway’s obligations under the ECHR.

50. The prohibition on *refoulement*, contained in Article 33 of the 1951 Convention, is a cardinal protection principle and recognized as a norm of customary international law.⁶⁷ It is also enshrined in Article 3 of the

⁶³ European Union: European Commission, *Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted*, 21 October 2009, COM(2009) 551 final; 2009/0164 (COD), <http://www.refworld.org/docid/4ae95f222.html>.

⁶⁴ 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.htm>.

⁶⁵ It should be noted that Article 31(2) of the Vienna Convention expressly recognises the preamble as part of the context for the purpose of the interpretation of a treaty.

⁶⁶ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, <http://www.refworld.org/docid/3ae6b3930.html>.

⁶⁷ Article 33.1 of the 1951 Convention, entitled ‘Prohibition of Expulsion or Return (‘Refoulement’),’ provides that: ‘No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.’ See also, UNHCR, *Note on the Principle of Non-Refoulement*, November 1997, <http://www.unhcr.org/refworld/docid/438c6d972.html>; UNHCR, *The Scope and Content of the Principle of Non-Refoulement (Opinion)* [Global Consultations on International Protection/Second Track], 20 June 2001, paras. 193-253, <http://www.unhcr.org/refworld/docid/3b3702b15.html>; and

ECHR⁶⁸, and similarly to the refugee definition, is forward looking. Thus, UNHCR considers that the case-law of the European Court of Human Rights (hereafter ‘ECtHR’) may cast light on the issue at bar. As mentioned above, UNHCR is of the view that an individual who is objectively at risk in his or her country of origin is entitled to protection notwithstanding his or her motivations. This approach is consistent with the jurisprudence of the ECtHR.

51. To illustrate, the ECtHR acknowledged in its Grand Chamber judgment in *F.G. v Sweden*,⁶⁹ in respect of *sur place* activities, ‘that it is generally very difficult to assess whether a person is genuinely interested in the activity in question, be it a political cause or a religion, or whether the person has only become involved in it in order to create post-flight grounds’. Referring to its previous jurisprudence in *A.A. v. Switzerland*,⁷⁰ the ECtHR also endorsed UNHCR’s statements regarding *sur place* refugee claims by considering that its reasoning was in line with the UNHCR Guidelines on Religion (see above at paragraph 26). The Court afforded great weight to the general human rights situation in Sudan, and paid particular attention to the fact that all persons merely suspected by the Sudanese authorities for supporting opposition movements were at risk of ill-treatment upon return, rather than attempting to establish the genuineness of the applicant’s political activities.
52. In *S.F. v. Sweden*⁷¹ the ECtHR found, when assessing the *sur place* elements, that the applicants had been involved in extensive and genuine political and human rights activities of relevance for the determination of the risk on return to Iran. The Court assessed the extent of the applicants’ political engagement post-flight and the risk they faced, rather than focusing on whether the applicants’ main purpose with their activities and media exposure was to strengthen their claims of risk of ill-treatment under Article 3 or secure asylum in Sweden.

VII. Conclusions

53. UNHCR submits that Contracting States are obliged under the 1951 Convention to recognise asylum-seekers who can establish that they have a well-founded fear of persecution for reason of a Convention ground, irrespective of whether the act or actions giving rise to such fear have been carried out and/or have been expressed for the main purpose of obtaining a residence permit.

ExCom Conclusions No. 15(XXX) – 1979, (b); 17 (XXXI) – 1980 (b); 25 (XXXIII) – 1982, (b); 68 (XLIII) – 1992, (f), <http://www.refworld.org/docid/4b28bf1f2.html>.

⁶⁸ Non-refoulement principles are also contained in other international instruments, such as Article 3 of the 1984 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, <http://www.refworld.org/docid/3ae6b3a94.html> and Article 7 of *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, <http://www.refworld.org/docid/3ae6b3aa0.html>.

⁶⁹ *F.G. v. Sweden*, Application no. 43611/11, Council of Europe: European Court of Human Rights, 23 March 2016, <http://www.refworld.org/docid/56fd485a4.html>.

⁷⁰ *A.A.v.Switzerland*, no. 58802/12, § 41, 7 January 2014 <http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/CASE%20OF%20A.A.%20v.%20SWITZERLAND.pdf>.

⁷¹ *S.F. and Others v. Sweden*, Application no. 52077/10, Council of Europe: European Court of Human Rights, 15 May 2012, <http://www.refworld.org/docid/5034e2162.html>.

54. UNHCR also submits that the 1951 Convention offers no legal basis for excluding refugees *sur place* from the protection afforded by the Convention. The critical question to be determined by the decision-maker is whether the asylum-seeker has a well-founded fear of persecution on a Convention ground if returned. UNHCR is of the view that in the event that the asylum claim is found to be self-serving but the claimant nonetheless has a well-founded fear of persecution on return, Norway is under the obligation to grant international protection.
55. Lastly, UNHCR submits that Section 28, paragraph 4 of the Immigration Act, setting out the basis of the exception from the obligation to grant refugee status to third country nationals in need of protection is at variance with the 1951 Convention. The provision exceeds a reasonable interpretation of the refugee definition and should thus not be a basis for denying refugee status. The exception is an additional requirement to the criteria and grounds in Article 1 of the 1951 Convention and thus contrary to its object and purpose.

United Nations High Commissioner for Refugees

14 February 2017