

**THE MEANINGFUL PARTICIPATION OF REFUGEES
IN DECISION MAKING PROCESSES:
QUESTIONS OF LAW AND POLICY**

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Abstract

There has been a significant push for greater and more meaningful participation of refugees in decision making processes that affect them in recent years. This push is identifiable in a range of international instruments, including the 2016 New York Declaration for Refugees and Migrants and the 2018 Global Compact on Refugees, as well as numerous initiatives developed by refugees, civil society organisations and international organisations at the local, national and international level. This article considers the emergent drive for refugee participation from the perspective of both law and policy. It examines the evolution of the international legal framework, analysing the extent to which international refugee and human rights law mandates the inclusion of refugees in decisions that affect them. The article also explores the notion of participation in detail, teasing out several key challenges to consider in the development of inclusive participatory processes. Drawing this material together, the article explores two options that could further promote the moral, political, and ultimately legal authority for meaningfully including refugees in the design and implementation of policy. These options are indicators that establish baselines and track refugee participation in decision making processes, and a new non-binding United Nations declaration that clearly details the right of refugees to have some authority in decision making processes that affect them.

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1. INTRODUCTION

A prominent trend in global discussions on forced migration in recent years has been the push for greater and more meaningful participation of refugees in decision making processes.¹ This trend can be seen not only in the adoption of the 2016 New York Declaration for Refugees and Migrants, which calls for a ‘multi-stakeholder approach’ to refugee protection that includes the input of refugees themselves,² but also in a variety of other initiatives developed and led by refugees to exert their political agency and voice in various local, national, regional, and international forums. In July 2017, for example, a coalition of refugees and refugee-led non-governmental organisations (NGOs), under the newly established Network for Refugee Voices, put forward a declaration that calls for the inclusion of refugees ‘at every level of design and implementation of refugee-response programs’.³ Similarly, in June 2018, refugees from all over the world convened the inaugural Global Summit of Refugees, with the aim of collaborating on advocacy at the international level and creating a space for states, international organisations, civil society, and others, to engage directly with refugees in international policymaking.⁴

The push for meaningful participation is underlined by both normative and instrumental justifications. Human beings possess an inherent equal dignity by virtue of their status as persons.⁵ This entitlement disregards formal legal categories of alienage and citizenship, and encompasses a right of everyone to ‘have his or her voice reckoned with and counted’.⁶ Instrumental arguments buttress these philosophical accounts by emphasising the practical advantages of inclusion. As these accounts demonstrate, the participation of refugees in the design and delivery of programs can empower individuals, as well as enhancing the effectiveness of those programs, leading to better outcomes.⁷

¹ This article adopts the international definition of a refugee as a person who satisfies the criteria under art 1A of the 1951 Refugee Convention, as well as other regional definitions where appropriate. See Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention), read in conjunction with the Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (Refugee Protocol).

² New York Declaration for Refugees and Migrants, UNGA doc A/RES/71/1 (3 October 2016) (New York Declaration) para 69.

³ Network for Refugee Voices, *Declaration for Effective and Sustainable Refugee Policy* (10 July 2017) para 13.

⁴ Global Summit of Refugees, *Policy Discussion and Outcomes Paper* (August 2018) 1, 5.

⁵ For example, James Griffin grounds the right to dignity in our status as ‘normative agents’: *On Human Rights* (Oxford University Press 2008) 152.

⁶ Jeremy Waldron, *Dignity, Rank and Rights* (Oxford University Press 2012) 35. See further David Owen, ‘Refugees and Responsibilities of Justice’ (2018) 11 *Global Justice: Theory, Practice, Rhetoric* 23, 41; Serena Parekh, ‘Beyond the Ethics of Admission: Stateless People, Refugee Camps and Moral Obligations’ (2014) 40 *Philosophy and Social Criticism* 645.

⁷ Network for Refugee Voices (n 3); UNHCR, *The UNHCR Tool for Participatory Assessment in Operations* (UNHCR, 2006) 16; Will Jones, ‘Refugee Voices’ (World Refugee Council Research Paper No. 8, February 2019) 3-5; Roger Zetter, ‘Refugees and Refugee Studies—A Label and an Agenda’ (1988) 1 *Journal of Refugee Studies* 1, 6.

However, despite widespread acceptance of these justifications, questions remain as to how this should best be accomplished in policy and practice. This article seeks to consider these questions and explore whether and how the existing international legal framework for the protection of refugees can facilitate their meaningful participation. We begin in Part 2 by examining the legal requirements (or absence thereof) on states and international organisations to consult with or include refugees in decisions that directly affect them. In Part 3, we identify the emerging push to include refugee voices in the design and delivery of policies and programs that affect them. Led by refugees themselves, the United Nations High Commissioner for Refugees (UNHCR), civil society organisations, and states have begun to take this issue more seriously. These efforts highlight opportunities for further development and learning, but challenges persist. In Part 4, we draw on research from political science and development studies to consider more comprehensively several of the key issues surrounding refugee participation.

We conclude in Part 5 by reflecting on several approaches aimed at enhancing further the participatory legal framework for refugees. We first identify six broad points that should guide the design of any meaningful consultative mechanism. We then explore two potential reform options, namely indicators that establish baselines and track refugee participation in decision making processes, and a new non-binding United Nations declaration that clearly details both the right of refugees to be heard and the right of refugees to have some authority in decision making processes that affect them. These proposals respect refugees' rights to autonomy and dignity. They both accommodate the diversity of refugee experiences and provide space for refugees to make their own decisions. While developing the political will for these proposals is likely to take time, both proposals could also promote the moral, political, and ultimately legal authority for meaningfully including refugees in the design and implementation of policy that affects them.

2. THE EVOLUTION OF REFUGEE PARTICIPATION IN INTERNATIONAL REFUGEE AND HUMAN RIGHTS LAW

Legal recognition of the need to include refugees in decision making processes has evolved significantly since the formation of the modern refugee regime in the twentieth century. Although no legal requirement mandating the participation of refugees in decision making processes currently exists in international law, several non-binding international legal instruments recognise the normative value of refugee participation and articulate associated non-binding principles and commitments. A more nuanced understanding of the web of civil and political rights that relate to participation is also beginning to emerge. This evolution can be seen through an analysis of the primary international legal instruments relating to refugees, namely the 1951 Convention Relating to the Status of Refugees (Refugee Convention), the 1950 Statute for the Office of the United Nations High Commissioner for Refugees (UNHCR

Statute),⁸ and the 1967 Protocol Relating to the Status of Refugees (the Protocol). That evolution is also identifiable in the development of the non-binding New York Declaration and the Global Compact on Refugees (GCR),⁹ as well as the advance of international human rights law more broadly.

A. *The 1951 Refugee Convention*

In the post-World War II period of international lawmaking, states gave little consideration to the role that international law could play in establishing obligations to consult refugees on decisions that affect them. Some implicit recognition of the value and significance of refugee participation can be inferred by the fact that several drafters of the Refugee Convention, as well as the first United Nations High Commissioner for Refugees—Dr Gerrit Jan van Heuven Goedhart—had lived experience of being displaced as a consequence of World War II.¹⁰ Nonetheless, states largely perceived the widespread displacement of refugees in Europe at the time as essentially a finite problem to be resolved among states and the newly established UNHCR. When the Refugee Convention entered into force in 1954, it was temporally limited to persons found to be refugees as a result of events occurring before 1 January 1951, while States parties could opt to further limit their obligations geographically to refugees fleeing events in Europe. These temporal and geographical restrictions were not removed until the Protocol relating to the Status of Refugees entered into force in 1967.

The principal objective of the 1951 Refugee Convention, as the full title suggests, related to codifying the status of refugees. The Convention established grounds for eligibility for protection by creating a new definition of a ‘refugee’, and then set out a broad range of social, economic and civil rights and responsibilities for persons who fall within this definition. Among these rights are freedom from discrimination (article 3), the right to education (article 22), the right to work (articles 17, 18 and 19), access to the courts (article 16) and protection from *refoulement* (article 33). However, despite the broad range of rights set out, in no part of the Convention does the text specifically address the participation of refugees in decision making processes. The Convention is also largely silent on the political rights of refugees in countries of asylum, other than stating generally under article 2 that refugees are required to respect the laws of the country in which they find themselves. Further, although the Convention

⁸ Statute of the Office of the United Nations High Commissioner for Refugee, UNGA doc A/RES/428(V) (14 December 1950) (UNHCR Statute).

⁹ *Report of the United Nations High Commissioner for Refugees: Part II, Global Compact on Refugees*, UN doc A/73/12 (Part II) (2 August 2018) (GCR).

¹⁰ On Dr Goedhart see Guy Goodwin-Gill, ‘Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection’ in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press, 2003) 185, 192. Dr Goedhart discussed his own refugee experiences during the drafting of the Convention: See UN doc A/CONF.2/SR.14 (10 July 1951) 5. On Dr Paul Weis (who was also involved in the drafting process and had lived refugee experience) see Barbara Harrell-Bond and Eftihia Voutira, ‘In Search of “Invisible” Actors: Barriers to Access in Refugee Research’ (2007) 20 *Journal of Refugee Studies* 281, 282.

recognises refugees' right of association, similar rights such as the right to political expression, and the electoral franchise, are not explicitly canvassed.¹¹

In fact, the *travaux préparatoires* reveal that states disagreed whether and to what extent 'political' rights should be addressed. For instance, during debate on the draft right of association, some delegates expressed concern that restrictive provisions relating to political activities may deprive refugees of rights provided in other international documents.¹² Other delegates expressed concern over potential adverse consequences if provisions recognising political rights were formulated too broadly, for it could allow refugees or other non-citizens to interfere in the politics of the host state.¹³ In the emerging Cold War context, this anxiety was particularly directed towards ensuring that trade unions would not fall under foreign control and that refugees would not be serving 'the interests of some other country'.¹⁴

Ultimately, the right to association adopted in the Convention does not address refugee involvement in political associations. Article 15 provides that

As regards *non-political* and non-profit-making associations and trade unions the Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country, in the same circumstances.¹⁵

This provision has a narrower scope than the right to association found in the UDHR,¹⁶ and the 1966 International Covenant on Civil and Political Rights (ICCPR).¹⁷ The desire among drafters not to address the political dimensions of refugee protection is also reflected in the Preamble to the Refugee Convention, which focuses on 'the social and humanitarian nature of the problem of refugees'.

¹¹ See Ruvi Ziegler, *Voting Rights of Refugees* (Cambridge University Press 2017) 3.

¹² UN Ad Hoc Committee on Refugees and Stateless Persons, 'Ad Hoc Committee on Statelessness and Related Problems, First Session: Summary Record of the Tenth Meeting Held at Lake Success, New York, on Tuesday, 24 January 1950, at 2:30 p.m.', UN doc E/AC.32/SR.10 (1 February 1950) para 40.

¹³ *ibid*, paras 40, 48.

¹⁴ *ibid*, para 47.

¹⁵ Emphasis added. The drafting history does not provide any further clarification as to how the term 'non-political' should be interpreted. The term was added near the end of the drafting process: See Michael Tiechmann, 'Article 15', in Andreas Zimmermann, Jonas Dörschner and Felix Machts (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) 909, 929.

¹⁶ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA res 217 A(III) (UDHR) art 20.

¹⁷ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 22.

B. *The 1950 UNHCR Statute*

Like the Refugee Convention, the 1950 UNHCR Statute also makes no direct mention as to whether refugees should or need to be included in the design and implementation of refugee responses. Nonetheless, UNHCR and refugee scholars have read into the Statute an implied consultative obligation in relation to the specific issue of repatriation.¹⁸ This obligation emerges because UNHCR can only facilitate and promote repatriation under the Statute in situations when such repatriation is ‘voluntary’.¹⁹ Beyond this, however, there is no broader consultative obligation found in the UNHCR Statute concerning refugees.

Under the Statute, UNHCR is mandated to consult with multiple actors. Paragraph 1, for instance, obligates the High Commissioner to seek the approval of States in relation to several matters, such as when seeking out private organisations to facilitate the repatriation of refugees. The Statute further provides that the High Commissioner shall also request the opinion of an advisory committee on refugees ‘when difficulties arise, and for instance with regard to any controversy concerning the international status of these persons’.²⁰ However, this advisory committee consists of ‘representatives of States Members and States non-members of the United Nations, to be selected by the Council on the basis of their demonstrated interest in and devotion to the solution of the refugee problem’.²¹ There is no legal requirement that this advisory committee (since 1958, known as the Executive Committee of the High Commissioner’s Programme (ExCom)) include refugees, nor has there been any normative practice of including refugees in this committee—though of course the first High Commissioner had lived refugee experience.²²

C. *The 2016 New York Declaration and the 2018 Global Compact on Refugees*

¹⁸ See UNHCR, *Handbook: Voluntary Repatriation: International Protection* (UNHCR, 1996); also, Guy Goodwin-Gill, ‘Voluntary Repatriation: Legal and Policy Issues’, in Gil Loescher and Laila Monahan (eds.) *Refugees and International Relations* (Oxford University Press 1989) 255.

¹⁹ UNHCR Statute, Chapter 1, para 1, Chapter 2, para 8(c). In its 1996 Handbook on Voluntary Repatriation, UNHCR has indicated that the principle of ‘voluntariness’ requires UNHCR to verify both the subjective will of the individual, as well as an objective analysis of the conditions in the country of origin and the country of asylum. This objective examination is necessary to ensure that the decision of a refugee to repatriate is based on a free choice, and to ensure states do not breach the Refugee Convention’s *non-refoulement* obligation:

UNHCR, *Handbook: Voluntary Repatriation* (n 18) 10. UNHCR has also stressed that the voluntary character of refugee repatriation ‘involves the individual making a free and informed choice through, inter alia, the availability of complete, accurate and objective information on the situation in the country of origin’: UNHCR Executive Committee Conclusion No 101, ‘Conclusion on Legal Safety Issues in the Context of Voluntary Repatriation of Refugees’ (2004). Nonetheless, UNHCR’s experience, and indeed that of others, in voluntary repatriation operations over the years might require further research with specific reference to ‘voluntariness’.

²⁰ UNHCR Statute, Chapter 1, para 1.

²¹ *ibid*, Chapter 1, para 4.

²² The committee was initially established in 1951. For more on the history of this committee, including its transition to ExCom, see Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007) 429.

Since the adoption of the Refugee Convention, Refugee Protocol, and the UNHCR Statute, no further binding international instruments on refugees have emerged. Consequently, there is no current legal requirement mandating the participation of refugees in decision making processes in international law. Nevertheless, several non-binding, soft law instruments that make clearer commitments on the need to include refugees in policy responses have been developed. Significantly, however, these commitments did not develop specifically to address refugees' right to participate. Rather, they were adopted in the context of broader discussions as to how the international refugee regime can develop 'a more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees, while taking account of existing contributions and the differing capacities and resources among States'.²³

As discussed above, the 2016 New York Declaration calls for a 'multi-stakeholder approach' to refugee protection, as part of its comprehensive refugee response framework.²⁴ This approach, which was unanimously adopted in September 2016 by all 193 Member States of the United Nations General Assembly, seeks to include a wide variety of actors in policy responses, including states, international organisations, international financial institutions, local organisations, civil society, academia, the private sector, and the media.²⁵ Refugees are identified as a relevant actor, but their participation is given no greater priority or importance than the others identified in the New York Declaration.

One of the only provisions that elaborates more fully on the importance of refugee participation in the New York Declaration pertains to women refugee and migrant communities specifically. Under paragraph 31, Member States expressed their commitment to ensuring 'the full, equal and meaningful participation' of women refugee and migrant communities 'in the development of local solutions and opportunities'. This commitment builds on other non-binding statements regarding the importance of the need to enhance the participation of women refugees, such as the 2003 ExCom Conclusion on Protection from Sexual Abuse and Exploitation.²⁶ It is unclear, however, whether the 'full, equal and meaningful participation' of women refugee and migrant communities refers to equal participation with men, or with institutions and states at large.

The 2018 Global Compact on Refugees (GCR) also contains provisions regarding the participation of refugees in decision making processes. Adopted by an overwhelming majority of UN Member States at the United Nations General Assembly on 17 December 2018,²⁷ the GCR extends and develops this concept by setting out pathways to or examples of best practice. Like the New York Declaration, there are some commitments made in relation to particular

²³ New York Declaration, (n 2), para 68. See also GCR (n 9).

²⁴ *ibid*, para 69.

²⁵ *ibid*.

²⁶ UNHCR Executive Committee Conclusion No 98 (LIV), 'Protection from Sexual Abuse and Exploitation' (2003).

²⁷ The GCR was adopted by a recorded vote of 181 Member States in favour, two against (Hungary and the USA) and three abstentions (Dominican Republic, Eritrea and Libya). See UN General Assembly, *Reports of the Third Committee*, UN doc A/73/PV.55 (17 December 2018) 10.

groups, such as refugee women, children, adolescents, youth, persons with disabilities and older persons.²⁸ However, more broadly, paragraph 34 of the GCR states that:

Responses are most effective when they actively and meaningfully engage those they are intended to protect and assist. Relevant actors will, wherever possible, continue to develop and support consultative processes that enable refugees and host community members to assist in designing appropriate, accessible and inclusive responses. States and relevant stakeholders will explore how best to include refugees and members of host communities, particularly women, youth, and persons with disabilities, in key forums and processes, as well as diaspora, where relevant.

Paragraph 34 makes a clear statement on the instrumental value of refugee participation, recognising the relationship between participation and effective policy responses. The paragraph also reflects a commitment from states, albeit non-binding, to consult with refugees when designing responses to refugee displacement, including for particular groups of refugees that are often marginalized from such processes.

These are positive, if only initial, steps. Indeed, the paragraph provides very little guidance as to how states should implement these normative commitments in practice. Even in a non-binding instrument, states and other actors only commit to ‘explore’ how best to include refugees in relevant fora, and consultative processes are only proposed, ‘wherever possible’. Members of host communities are also placed on equal footing with refugees in paragraph 34, yet there is no clear definition in the GCR or international refugee law more broadly as to who these host community members are, or how they will be constituted and involved.

When comparing these documents to other non-binding international law instruments, it is clear that such provisions could go further to build moral, political, and ultimately legal authority for the participation of refugees in the design and implementation of policy. Consider for instance the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).²⁹ Although Indigenous peoples are normatively distinct from refugees,³⁰ and their aspirations and entitlements at international law differ,³¹ several articles of the UNDRIP highlight a more

²⁸ GCR (n 9), paras 13, 74-77.

²⁹ United Nations Declaration on the Rights of Indigenous Peoples, UN doc A/RES/61/295 (13 September 2007) (UNDRIP).

³⁰ For the normative justification underpinning Indigenous rights, see Benedict Kingsbury, ‘Reconciling Five Competing Conceptual Structures of Indigenous Peoples’ Claims in International and Comparative Law’ (2001) 34 *New York University Journal of International Law and Politics* 189.

³¹ For some consideration of the interplay between Indigenous rights and refugee rights see Birgit Bräuchler, *The Cultural Dimension of Peace: Decentralisation and Reconciliation in Indonesia* (Springer 2015) 147-177.

inclusive or substantive approach towards participatory rights.³² For instance, article 18 provides that

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

This provision is complemented by article 19, which requires that states

shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Putting to one side the specific wording and the distinct conceptual justifications, articles 18 and 19 strengthen and affirm the Declaration's underlying principles of 'participation, engagement and consultation'.³³ Refugees desire these same goals.

D. International human rights law

A holistic understanding of participation requires consideration not only of direct references to the participation of refugees in decision making processes, but also consideration as to the application of other civil and political rights that enable or facilitate refugees to participate in decision making processes that affect them. This approach is consistent with the methodological approach that international refugee law should be interpreted and applied dynamically, taking into account the application of other human rights instruments.³⁴ It is also consistent with approaches that have been undertaken in relation to the participation of other affected communities under international law.

As the Special Rapporteur on the Rights of Persons with Disabilities indicates, participation is a 'cross-cutting issue' that is 'firmly rooted in international law'.³⁵ It includes a web of

³² Note however that Indigenous peoples can become refugees: Tanya Basok, 'Repatriation of Nicaraguan Refugees from Honduras and Costa Rica' (1990) 3 *Journal of Refugee Studies* 281.

³³ Megan Davis, 'Indigenous Struggles in Standard-Setting: The *United Nations Declaration on the Rights of Indigenous Peoples*' (2008) 9 *Melbourne Journal of International Law* 439, 470.

³⁴ See James C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press 2005) 9; Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press 2007) 10-11; Guy S. Goodwin-Gill, 'The search for the one, true meaning ...' in Guy S. Goodwin-Gill and Hélène Lambert (eds), *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (Cambridge University Press, 2010) 204, 207.

³⁵ Human Rights Council, *Report of the Special Rapporteur on the rights of persons with disabilities*, 31st sess, UN doc A/HRC/31/62 (12 January 2016) 5 paras 14-15.

interconnected rights, such as freedom of expression, freedom of association and peaceful assembly, as well as the rights to vote and be elected, to access public services, to privacy, and to participate in the conduct of public affairs. These rights play an important role in enabling refugees to legitimately and safely participate in decision making forums. However, not all of these rights are guaranteed to non-citizens, including refugees. Ruma Mandal notes that refugees’ ‘political rights’ involve ‘a delicate balance between protecting the essential human dignity of such persons and the need for States to respect each other’s sovereignty and to protect their own community in general’.³⁶

The clearest source of international law in relation to the civil and political rights of all persons is the ICCPR. Articles 17, 19, 21 and 22 of the ICCPR recognise the rights of all persons to privacy, freedom of opinion, expression, association and peaceful assembly. These rights, as the Human Rights Committee has repeatedly stated, apply to all persons regardless of their citizenship or migratory status.³⁷ This interpretation is also consistent with the non-discrimination clause found in article 2 of the ICCPR, which commits every State party ‘to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind’.

However, these rights are subject to permissible limitations, which can affect the extent to which refugees may enjoy their protection. For instance, article 22(2) of the ICCPR permits States parties to restrict freedom of association through law to the extent ‘necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others’. Similarly, article 25, which guarantees ‘the right and the opportunity ... to take part in the conduct of public affairs, directly or through freely chosen representatives’ is expressly limited to ‘every citizen’ under the ICCPR. While Nahuel Maisley suggests that article 25 may provide non-citizens a right to participate in international law-making,³⁸ it certainly does not require states to facilitate non-citizens’ participation in domestic public affairs.³⁹

E. Participation for particular groups

In addition to the civil and political rights outlined above, particular groups of refugees also enjoy some additional protections and rights under international human rights law. These rights

³⁶ Ruma Mandal, ‘Political Rights of Refugees’ (UNHCR Legal and Protection Policy Research Series, November 2003), para 1.

³⁷ Human Rights Committee, ‘General Comment No 31: Article 2: The Nature of the General Legal Obligations Imposed on States Parties to the Covenant’, UN doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) para 10; also, Human Rights Committee, ‘General Comment No 15: The Position of Aliens under the Covenant’, UN doc HRI/GEN/1/Rev.7 (11 April 1986) para 1.

³⁸ Nahuel Maisley, ‘The International Right of Rights? Article 25(a) of the ICCPR as a Human Right to Take Part in International Law-Making’ (2017) 28 *European Journal of International Law* 89.

³⁹ Human Rights Committee, ‘General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service’, UN doc CCPR/C/21/Rev.1/Add.7 (12 July 1996).

have been codified since the formation of the 1951 Refugee Convention and 1950 UNHCR Statute, and reflect both the increasing recognition of the individual in international law and the corresponding (but not necessarily linear) growth in participatory rights. For example, article 12 of the 1989 Convention on the Rights of the Child (CRC) requires States parties to provide children who are capable of forming their own views the right to express those views freely in all matters affecting them, taking into account their age and maturity.⁴⁰ This provision reflects the importance of recognising the ‘needs of a child as a true legal person, and not just as an object of protection’.⁴¹ It ‘reflects and reinforces’, as Jason Pobjoy suggests, ‘the paradigm shift away from thinking about children as passive objects, and promotes the participation of children in decision making processes’.⁴²

The 2006 Convention of the Rights of Persons with Disabilities also imposes consultative obligations. Article 4(3) provides that states ‘shall closely consult with and actively involve persons with disabilities’ in any decision making process that concerns them ‘through their representative organizations’.⁴³ Drawing on the Convention, ExCom encourages states, UNHCR and all relevant partners to ‘ensure the participation of refugees and other persons with disabilities through appropriate consultation in the design and implementation of relevant services and programmes’,⁴⁴ and UNHCR has published a guidance manual that explicitly recognises participation and non-discrimination as integral to protection.⁴⁵

Participatory rights are also present in international human rights instruments relating to women. Under article 7 of the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), States parties have committed to take measures ‘to eliminate discrimination against women in the political and public life of the country’ and to ensure women political rights ‘on equal terms with men’.⁴⁶ Nonetheless, the extent to which this provision applies to non-citizens, such as women refugees, is unclear. The Committee on the Elimination of Discrimination against Women published a recommendation on the meaning and application of this provision in 1997, but little guidance was offered on its application to non-citizens.⁴⁷ However, some guidance does exist in the context of peace and security. UN Security Council Resolution 1325 urges Member States ‘to ensure increased representation of

⁴⁰ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

⁴¹ *Juridical Status and Human Rights of the Child*, Advisory Opinion OC-17/02, Inter-American Court of Human Rights (28 August 2002) para 28.

⁴² Jason M Pobjoy, *The Child in International Refugee Law* (Cambridge University Press 2017) 55.

⁴³ Convention on the Rights of Persons with Disabilities (adopted 30 March 2007, entered into force 3 May 2008) 2515 UNTS 3.

⁴⁴ UNHCR Executive Committee Conclusion No 110 (LXI), ‘Conclusion on Refugees with Disabilities and Other Persons with Disabilities’ (2010) para (e).

⁴⁵ UNHCR, *Working with Persons with Disabilities in Forced Displacement* (UNHCR 2011) 4. See also Mary Crock et al, *The Legal Protection of Refugees with Disabilities: Forgotten and Invisible?* (Edward Elgar 2017).

⁴⁶ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

⁴⁷ Committee on the Elimination of All Forms of Discrimination against Women, ‘General Recommendation No. 23: Political and Public Life’, UN doc A/52/38 (1997).

women at all decision making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict'.⁴⁸ Refugee and displaced women are specifically mentioned in Resolution 1325 and, as Elizabeth Ferris notes, were actively involved in the drafting process.⁴⁹

No explicit legal requirement mandating the participation of refugees in decision-making processes currently exists in international law. Nonetheless, several international legal instruments recognise the normative value of participation and mandate the inclusion of certain groups of refugees in the design and implementation of policy, particularly for women, children and persons with disabilities. More recently, soft law standards like the New York Declaration and the GCR, have developed non-binding principles of meaningful participation and articulate best practice. These developments represent an emerging shift in thinking about the inclusion and participation of refugees in policy-making and governance.

3. THE PUSH FOR REFUGEE VOICES

Given this international legal framework, it is not surprising that refugees have often been rendered speechless and excluded from the design and implementation of policy responses. As many scholars have noted, contemporary refugee discourses 'tend to privilege a one-dimensional representation of the refugee',⁵⁰ centring on notions of vulnerability and deservingness. As these scholars explain, these narratives abstract 'people's predicaments from specific political, historical, and cultural milieus',⁵¹ depriving them of 'subjectivity and agency',⁵² serving to depoliticise and disempower individuals, and ultimately acting to silence refugees.⁵³ As Shaza al Rihawi, a Syrian refugee in Germany has noted, 'We used to feel like the refugees are an infantilized community; they are not able to take decisions over their lives, and they are not able to even make development in their lives'.⁵⁴

⁴⁸ UNSC Resolution 1325, UN doc S/RES/1325 (31 October 2000).

⁴⁹ Elizabeth Ferris, 'Protecting Displaced Women and Girls: The Case of Syria', in Sara E. Davies and Jacqui True (eds), *The Oxford Handbook of Women, Peace, and Security* (Oxford University Press 2019) 501.

⁵⁰ Nando Sigona, 'The Politics of Refugee Voices: Representations, Narrative, and Memories' in Elena Fiddian-Qasmiyeh et al (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford University Press 2014) 369, 370; Marie Godin and Giorgia Dona, "'Refugee Voices'", *New Social Media and Politics of Representation: Young Congolese in the Diaspora and Beyond* (2016) 32 *Refuge* 60, 61.

⁵¹ Sigona (n 50) 370; Prem Kumar Rajaram, 'Humanitarianism and Representations of the Refugee' (2002) 15 *Journal of Refugee Studies* 247, 248.

⁵² Kate Smith and Louise Waite, 'New and Enduring Narratives of Vulnerability: Rethinking Stories about the Figure of the Refugee' (2019) 45(13) *Journal of Ethnic and Migration Studies* 2289, 2295.

⁵³ Lissa Malkki, 'Speechless Emissaries: Refugees, Humanitarianism, and Dehistoricization' (1996) 11 *Cultural Anthropology* 377, 378.

⁵⁴ Cited in Refugee Council of Australia, 'Nothing about us without us: Getting serious about refugee self-representation' (July 2017) 1-2.

In practice, states have implemented a vast array of policies to deny refugees' agency and voice,⁵⁵ with few legal repercussions. Some of the more egregious denials, such as the indefinite detention of refugees in offshore detention centres or the prohibition of refugees' freedom of speech, may breach states' international, regional and domestic legal obligations.⁵⁶ Other restrictions may be more indirect, and even legally permissible under existing frameworks. For example, states already curtail the capacity of refugees to choose where to seek asylum through non-entrée policy measures such as visa restrictions and airline carrier sanctions.⁵⁷ These policies substantially restrict refugees' capacity to seek protection by using airplanes, and play a large role in containing refugees in neighboring states, primarily in the Global South, or forcing them to undertake more perilous journeys to safety by either land or sea. The development of national, regional and international law relating to refugees also largely occurs without their consultation or participation.

To counter this exclusion, international organisations, civil society organisations and refugee-led organisations have taken numerous steps to develop participatory initiatives. For example, despite having no obligation under its statute to consult with or include refugees in its policymaking, UNHCR developed its own Tool for Participatory Assessment in Operations in 2006. This operational tool recognises that 'refugees, internally displaced persons and returnees must be at the centre of decision making concerning their protection and well-being'.⁵⁸ It further recognises that 'to gain a deeper understanding of the protection problems [refugees] face, it is essential to consult them directly and to listen to them'.⁵⁹ The tool establishes several methods and steps for conducting participatory assessments with refugees and other persons of concern at field level, and details ethical guidelines for this practice. The overarching objectives of the participatory assessments are to obtain baseline data and subsequently to develop appropriate protection strategies on the ground. However, UNHCR also suggests that the process itself builds a sense of shared responsibility and contributes towards refugees' empowerment,⁶⁰ although the emphasis on refugees as data collectors rather than problem solvers may limit this impact.⁶¹

⁵⁵ See, for instance, in Australia the history of mandatory immigration detention on Christmas Island, Nauru, and Manus Island: Jane McAdam, 'Australia and Asylum-Seekers' (2013) 25 *International Journal of Refugee Law* 435. For a discussion on political and legal barriers to refugees participating in debates directly concerning them see Laura Smith-Khan, 'Communicative Resources and Credibility in Public Discourse on Refugees' (2019) 48(3) *Language in Society* 403.

⁵⁶ Mandal (n 36) paras 72-76.

⁵⁷ Erika Feller, 'Carrier Sanctions and International Law' (1989) 1 *International Journal of Refugee Law* 48.

⁵⁸ UNHCR (n 7), 1.

⁵⁹ *ibid.*

⁶⁰ *ibid.*, 11-12.

⁶¹ In the field of development studies, there has been substantial debate as to whether participation actually leads to the empowerment of participants. For more, see Frances Cleaver, 'Institutions, Agency and the Limitations of Participatory Approaches to Development', in Bill Cooke and Uma Kothari (eds) *Participation: The New Tyranny?* (Zed Books 2001) 36.

Similarly, recognising the dynamics of unequal power relationships, UNHCR has promoted and advanced the participation of refugee women and girls specifically in several different policy instruments. In 2001, UNHCR committed, as part of its five Commitments to Refugee Women, to ‘encourage meaningful and active participation of women in all management and leadership committees of refugees in urban, rural and camp settings, including return areas’.⁶² Later, in 2008, UNHCR elaborated further on its approach to the participation of refugee women and girls in its Handbook for the Protection of Women and Girls. The handbook defines participation broadly as ‘the full and equal involvement of persons of concern in all decision making processes and activities in the public and private spheres that affect their lives and the life of their community’.⁶³ It proposes a number of actionable items to work towards this goal, which build on the commitment to ensuring women’s political rights under CEDAW and international human rights law more broadly. More recently, UNHCR has also facilitated participatory and inclusive dialogues with refugee women as part of its Age, Gender and Diversity (AGD) policy.⁶⁴

Peak national and regional civil-society networks have also at times played a central and critical role in facilitating the active participation of refugees and illuminating their voices in public discourses. Since 2007, for example, the Refugee Council of Australia has not only supported grass-roots refugee-led initiatives, but has also provided grants to advocates from refugee backgrounds to participate in international dialogues on refugee protection.⁶⁵ Many of these advocates have subsequently gone on to play formative roles in the development of international refugee-led initiatives, including the Global Summit of Refugees. Crucially, this approach has focused not only on providing financial assistance, but also on leadership training and other capacity-building activities. As Atem Atem has noted, NGOs can play an important enabling role in supporting refugee self-representation and ensuring refugees are heard.⁶⁶

At the regional level, the Asia Pacific Refugee Rights Network (APRRN) has also sought to strengthen the meaningful participation of refugees in decision making forums. As a network of more than 400 civil society organisations and individuals working on refugee rights in the Asia Pacific region, it has committed under its ‘Vision for Regional Protection’ to advocate for a region where

‘People in need of protection’ actively participate in all decisions affecting their lives, have access to accurate and up to date information about actions taken on their behalf, and explicit efforts are made to listen to, consult and engage

⁶² UNHCR, *UNHCR's Commitments to Refugee Women* (12 December 2001) para 1.

⁶³ UNHCR, *UNHCR Handbook for the Protection of Women and Girls* (UNHCR 2008) 40.

⁶⁴ UNHCR, *UNHCR Policy on Age, Gender and Diversity* (UNHCR 2018) 6.

⁶⁵ Refugee Council of Australia, ‘Supporting Refugee Community Advocacy on an International Stage’, 7 March 2018 <<https://www.refugeecouncil.org.au/supporting-refugee-community-advocacy-international-stage/%3E>>, accessed 29 November 2019.

⁶⁶ Cited in Refugee Council of Australia (n 54) 3-4.

affected communities in order to ensure continuous improvement in existing programs and ensure ongoing accountability to them.⁶⁷

In October 2018, APRRN supported the inaugural Asia Pacific Summit of Refugees, which was held alongside APRRN's Asia Pacific Consultation on Refugee Rights in Bangkok, Thailand. Organised by Global Summit of Refugees Steering Committee Members from the Asia Pacific region, the Summit was provided with logistical support by APRRN and the Refugee Council of Australia. Thirty refugee leaders from five refugee host countries attended the summit, while 74 others took part from virtual hubs in Malaysia, India, Iran, Australia and Indonesia.⁶⁸ During the summit, refugees agreed to establish an Asia Pacific branch of the Global Network of Refugees, now known as the Asia Pacific Network of Refugees. They also proposed establishing a working group on refugee leadership and self-representation within the APRRN structure to, among other things, build cooperation between refugee networks and NGOs, and inform APRRN of refugees' advocacy priorities.⁶⁹

Perhaps the most prominent call for the need to incorporate refugee voices has come from refugees themselves. Harnessing the mantra employed by disability advocates during the 1990s, 'Nothing about us without us!'⁷⁰ refugees have sought to challenge the pre-existing power relations embedded in the international refugee regime and have made strong moral demands for their inclusion in decision making forums. This push for inclusion has occurred both within existing institutions, as well as through the establishment of new mechanisms and more overt political protests. In relation to the latter, a simple media survey of refugee protests in 2018 reveals that refugees have exerted their political agency in a wide variety of protests across the globe. Examples include: ethnic Chin refugees in Malaysia protesting against UNHCR's determination that they are no longer in need of international protection;⁷¹ refugees in Nauru and Manus Island protesting against their indefinite detention by the Australian government;⁷² refugees in Greece protesting against delays in the issuing of cash cards for the

⁶⁷ Asia Pacific Refugee Rights Network, *Vision for Regional Protection* (June 2014) art 5. Please note that the first author, Tristan Harley, has previously worked as a consultant with APRRN, but not in relation to the initiatives discussed in this article.

⁶⁸ Asia Pacific Summit of Refugees, *Outcomes Report* (February 2019) 2.

⁶⁹ *ibid* 13.

⁷⁰ See, for example, Sana Mustafa, 'Nothing About Us Without Us: Why Refugee Inclusion is Long Overdue', *NewsDeeply*, 20 June 2018 <<https://www.newsdeeply.com/refugees/community/2018/06/20/nothing-about-us-without-us-why-refugee-inclusion-is-long-overdue>>, accessed 29 November 2019.

⁷¹ Rashvinjeet Bedi, Samantha Chow and Justine Yeap, 'Chin Refugees Protest at UNHCR Offices over UN Decision on Refugee Status', *The Star Online*, 29 June 2018 <<https://www.thestar.com.my/news/nation/2018/06/29/chin-refugees-protest-at-unhcr-offices-over-un-decision-on-refugee-status>>, accessed 29 November 2019.

⁷² Eric Tlozek, 'Manus Island protestors block access to refugee accommodation, supplies', *ABC News*, 19 December 2017 <<https://www.abc.net.au/news/2017-12-19/manus-island-protesters-block-access-to-refugee-accommodation/9271790>>, accessed 29 November 2019. See further Behrouz Booohani, *No Friend But the Mountains* (MacMillan 2018).

cash-based assistance scheme in place;⁷³ and, refugees from the Democratic Republic of Congo protesting against the reduction of food rations in refugee camps in Rwanda.⁷⁴

In relation to new mechanisms, refugees have also taken significant strides to counter ‘the processes which lead to the silencing and marginalization of their narratives and experiences’.⁷⁵ As we noted above, this has included the establishment of the Network for Refugee Voices in 2017 and the first-ever Global Summit of Refugees in June 2018.⁷⁶ Bringing together 72 refugee representatives from 27 host countries, the Summit marked the first time refugees from all over the globe could meet, discuss, and propose durable and effective solutions for sustainable global refugee policy.⁷⁷ Significantly, it also provided an opportunity for refugees to build networks and further develop participatory mechanisms. These developments have not arisen instantaneously, but have evolved through the nurturing of refugee voices, the development of representative processes, and the building of leadership capacity.

4. CHALLENGES TO MEANINGFUL PARTICIPATION

There is a growing appreciation and awareness that refugees should participate in the design and implementation of policies that affect them. Yet, a vague, non-specific commitment to enhancing refugee participation is unlikely to produce the perceived benefits of participation. Before legal norms governing participation can be further elaborated, the concept itself needs to be understood by legal scholars and policy makers. This is necessary because including refugees in decision making forums throws up complex and challenging issues surrounding the scope and extent of participation, as well as questions of representativeness and access. These challenges cannot be conclusively resolved, but in reflecting on insights from political science and development studies, policy makers and international actors may consider ways to more meaningfully engage with refugees.

- *Understanding Participation*

The first key challenge surrounds the meaning of participation. As political anthropologist Andrea Cornwall has noted, participation is ‘an infinitely malleable concept...[that] can be

⁷³ UNHCR, ‘UNHCR concerned after protesters occupy Athens cash assistance centre’, 8 August 2018 <<https://www.unhcr.org/gr/en/10460-unhcr-concerned-after-protesters-occupy-athens-cash-assistance-centre.html>>, accessed 29 November 2019.

⁷⁴ ‘Congolese refugees camp at UN refugee office in Rwanda, protest food cuts’, *Channel NewsAsia*, 21 February 2018 <<https://www.channelnewsasia.com/news/world/congolese-refugees-camp-at-un-refugee-office-in-rwanda--protest-food-cuts-9978834>>, accessed 29 November 2019.

⁷⁵ Sigona (n 50) 369.

⁷⁶ Global Summit of Refugees (n 4).

⁷⁷ This Summit was the result of efforts by two refugee-led organisations in particular; the Australian National Committee on Refugee Women, and the Network for Refugee Voices. Further support was provided by two NGOs: Independent Diplomat and the Refugee Council of Australia.

used to evoke – and to signify – almost anything that involves people’.⁷⁸ For this reason, while refugees, states and NGOs may speak in the same language, their intentions could differ widely. At times, opportunities for refugees to participate in the development and implementation of policies and programs may be far narrower than they expected. Where this occurs, participants may be reluctant to engage in future processes. It is therefore critical that all parties understand the form, extent, and purpose of any participatory process.

In considering the meaning and value of participation, scholars have developed a range of typologies.⁷⁹ These classifications highlight both the ambiguity of the concept and the different manner in which participation can occur. For instance, in examining participation in the context of agricultural development, Jules Pretty delineates between seven forms.⁸⁰ At the narrow end, Pretty identifies tokenistic accounts, including manipulative and passive participation, where unilateral decisions are adopted and ‘people participate by being told what has been decided or has already happened’.⁸¹ More substantive, though still limited, forms of participation include participation by consultation or material incentive, and functional participation. Under these accounts, people may participate to varying degrees but major decisions over the scope of any proposal have already been made and are not open for revision. Finally, at the broader end, Pretty places ‘interactive participation’ and ‘self-mobilisation’. At this level, people gain control over decisions either through, or independent of, external organisations.⁸² Here, ‘participation’ ultimately morphs into decision making.

Drawing on Pretty and others,⁸³ Cornwall has extended this approach by developing a ‘typology of interests’. This model explores what participation means to participants, as well as to implementing agencies. It does so by differentiating between four types of participation: nominal, instrumental, representative, and transformative. Nominal forms of participation account for circumstances where the implementing agency is more interested in legitimating its decisions by being seen to include community members in the process. For those community members, participation may largely be a display, but their inclusion does still allow them to retain some access to potential benefits. Instrumental forms are motivated by efficiency. Here, the implementing agency may be interested in drawing on community contributions to limit their own costs. For those involved on the receiving end, participation has a cost in terms of time spent in the process but may result in benefits in terms of improved outcomes. Representative participation is more enduring. It gives people a voice in determining their own development and is often promoted where an agency desires to avoid creating dependency.

⁷⁸ Andrea Cornwall, ‘Unpacking “Participation”: Models, Meanings and Practices’ (2008) 43 *Community Development Journal* 269, 269. See further Global Summit of Refugees (n 4) 4, 6-7.

⁷⁹ For an overview of these models see Tone Bratteteig and Ina Wagner, *Disentangling Participation: Power and Decision-Making in Participatory Design* (Springer 2014) ch 7.

⁸⁰ Jules Pretty, ‘Participatory Learning for Sustainable Agriculture’ (1995) 23 *World Development* 1247, 1251.

⁸¹ *ibid*, 1252.

⁸² *ibid*, 1253.

⁸³ Sarah White, ‘Depoliticising Development: The Uses and Abuses of Participation’ (1996) 6 *Development in Practice* 6, 7-9.

Finally, transformative participation is concerned with empowerment. It enables people to make their own decisions, to work out what to do and how to take action.⁸⁴

Pretty and Cornwall's analysis is helpful in identifying key forms of participation, but others also exist. One valuable approach has been developed by two political scientists to examine institutions aimed at empowering minority groups with the capacity to be heard in decisions that affect them at the state level. Helena Catt and Michael Murphy conceive 'participation' as analogous to the notion of 'political voice', and delineate this concept into twin categories of 'type' and 'extent'.⁸⁵ For our purposes, type refers to the numbers and selection process of refugees in any participatory sphere. This includes questions as to whether an NGO or state selects the participants or whether refugees themselves can select their preferred candidate(s), as well as the number and proportion of refugees at any meeting.

Extent is also useful in understanding dimensions of participation. As Catt and Murphy explain, the extent of political voice identifies the stage in the policy development process that refugee participants have the capacity to influence decisions.⁸⁶ Four categories are relevant.⁸⁷ Chronologically, these commence with 'agenda-setting', under which refugees are able to put forward issues for consideration. Next, is 'propose solutions', where refugees may not be able to shift the agenda but can still influence the process by raising alternative solutions. The third stage is described as 'making decisions and refining details'. At this point, a proposal has been clarified and potential solutions identified, leaving participants able only to refine minor points. The final stage is 'implementation and delivery'. Although many larger decisions have already been taken, refugees operating within this sphere may still be able to vary minor elements so that policy implementation pays closer attention to their specific needs.

Drawing these explorations together paints a richer picture of participation. For example, passive or nominal participation might involve a situation where a state or NGO invites only one or two refugees to provide input into decisions or to legitimate existing processes. This could also involve inviting people with lived refugee experiences simply to give voice to their personal experiences. Refugees at the 2018 Global Summit criticised types of participation where refugees are considered 'merely subjects of intervention or tutelage'.⁸⁸ Conversely, interactive or transformational forms of participation may involve enabling refugees to be present and fulfil determinative roles at the agenda-setting stage of policy development.

⁸⁴ Cornwall (n 78) 273.

⁸⁵ Helena Catt and Michael Murphy, *Sub-State Nationalism: A Comparative Analysis of Institutional Design* (Routledge 2002) chs 2, 3.

⁸⁶ *ibid* 49.

⁸⁷ *ibid* 50.

⁸⁸ Global Summit of Refugees (n 4) 7. See also Rifaie Tammas, 'Refugee stories could do more harm than good', *OpenDemocracy*, 1 November 2019 <<https://www.opendemocracy.net/en/refugee-stories-could-do-more-harm-good/>>, accessed 12 December 2019.

However, while these accounts divide participation into narrower and broader forms, they are not hierarchical. What is important is that refugees are empowered with choices and with real opportunities to influence decisions previously adopted without their presence. In some cases, in some situations, this will not require integrating refugees at the earliest stages, but will necessitate meaningful prospects of influence at the delivery stage. Indeed, as the UNHCR Participatory Assessment Tool recognises, refugees desire to be heard on all aspects of policy that affects them—from design to implementation.⁸⁹

F. Representativeness

A second challenge to embedding meaningful refugee participation mechanisms involves identifying who should participate. As Cornwall notes, ‘[t]he question of who participates – as well as who is excluded and who exclude themselves – is a crucial one’.⁹⁰ Conceptually, this question has two parts. It requires consideration as to which groups of affected communities should be included, as well as how the diversity of persons within these groups can be represented.

On the former point, states have made commitments specifically in relation to refugees and host communities in the GCR. However, there are no consultative commitments in the Compact in relation to other categories of forced migrants, such as internally displaced persons, persons forcibly displaced by the adverse impacts of climate change, victims of human trafficking, and stateless people. These categories are similarly not canvassed in the Global Compact for Safe, Orderly and Regular Migration.⁹¹ Further, while refugees are clearly defined under international law, ‘host communities’ are not; and no instrument outlines how they may be constituted or involved in processes that affect them.⁹²

On the latter point, it is important to note that participatory processes should aim at enabling the diversity of refugee voices to be heard.⁹³ Essentially, mechanisms, processes, or institutions should be genuinely representative; all refugees, be they women, men, children and young people, in developed or developing countries, should have the opportunity to participate and speak openly. However, this goal gives rise to several complications in practice, as refugees form a substantial and diverse population group. UNHCR estimates that there are approximately 25.9 million refugees,⁹⁴ located in a variety of different contexts and experiencing distinct structural challenges. Refugees also have different needs, depending on their gender, age, sexuality, or personal circumstances, among other attributes. Indeed, 85 per

⁸⁹ UNHCR (n 7).

⁹⁰ Cornwall (n 78) 275.

⁹¹ Global Compact for Safe, Orderly and Regular Migration. UN doc. A/RES/73/195 (19 December 2018) Annex.

⁹² See section 2.3 above. Note also that as host communities have not left their country of origin they retain the right to participate in public affairs provided that they are citizens: ICCPR, art 25.

⁹³ Global Summit of Refugees (n 4) 2.

⁹⁴ UNHCR, *Global Trends: Forced Displacement in 2018* (UNHCR 2019), 2-3.

cent of the global refugee population are hosted in developing countries, while 51 per cent are younger than 18 years of age, and some 138,600 are unaccompanied or separated children.⁹⁵ The needs, aspirations, and concerns of this population group are complex and multi-faceted. Several issues can be considered.

Imbalances within the international refugee regime need to be recognised and ameliorated. Generally speaking, practitioners, academics, and (where present), refugees living in the Global North are overrepresented in deliberative and decision making forums, leaving a corresponding underrepresentation of persons from locations where most refugees live. Incipient refugee-led forums, such as the Global Summit, have experienced similar problems, though they are committed to responding to these challenges.⁹⁶ UNHCR has also recognised the need to engage and listen to women and children and other underrepresented refugee populations. UNHCR's AGD policy, for example, promotes gender equality by mainstreaming 'the inclusion of women and girls in decision making processes'.⁹⁷ These efforts are critical because imbalanced representation can lead to ineffective policy responses.⁹⁸

Additionally, it is not possible for all refugees to be present in decision making forums, but those selected to represent diverse communities must genuinely *be* representative. This point has an internal and external lens. Internally, refugees have often raised concern over self-appointed or externally-selected individuals that fail to reflect the diversity of refugee experiences or transmit those interests to relevant decision makers. The Global Summit sought to respond to this challenge by undertaking due diligence to ensure participants were 'active leaders in their communities',⁹⁹ but this approach does not always resolve tensions between how contrasting or dissenting voices may be heard. Externally, states should commit to dealing with leaders chosen by refugees, rather than select their own preferred candidates, though this can of course be challenging for transient or isolated groups. Similarly, attention must be paid to ensure that marginalised groups within refugee communities are also able to have their say. At the same time, there is also the question as to what expectation of representation is reasonable and appropriate, as even among states there are very few examples of governance models that perfectly reflect the diversity of all their constituents.

Furthermore, the quest for plurality can sometimes weaken effectiveness. If agencies or states are not committed to an inclusive approach, they may feel threatened by the diverse and divergent priorities that emerge from truly participatory encounters. Refugee institutions or networks mandated to transmit those interests and concerns to decision makers may likewise feel pressured to speak in a single voice to be heard most effectively. In some circumstances, however, the very act of encouraging marginalised voices to speak may not permit a clear

⁹⁵ *ibid.*

⁹⁶ Global Summit of Refugees (n 4) 2.

⁹⁷ UNHCR (n 64) 6.

⁹⁸ Cornwall (n 78) 278.

⁹⁹ Global Summit of Refugees (n 4) 3; See further discussion on 'ownership' in Jones (n 7) 8, 10.

consensus on the ordinal value of competing priorities. In other situations, the representation of a single voice may be inappropriate, or undermine the deliberative process. Unfortunately, in these cases the institution with ultimate decision making power, most often the state, may find it difficult – or choose to find it difficult – to engage with the refugee institution or network. It may select voices to confirm its preferred courses of action, marginalising other refugee voices, or simply ignore the process entirely.

G. Access

A third fundamental challenge that arises in relation to refugee participation is access. Refugees desire to be heard by all relevant actors in all stages of the policy development cycle at local, national, regional, and international forums.¹⁰⁰ This is impossible if significant barriers to accessing those forums exist. Obstacles may be both individual and structural. As the Global Summit of Refugees discussed, they include language barriers, visa and mobility constraints, security fears over visibility, funding issues, and even the absence of an invitation to contribute.¹⁰¹ Addressing these challenges requires several different approaches. In all cases, however, their resolution is predicated on a commitment to meeting fundamental international human rights principles concerning dignity.

Solutions must be focused on the sphere in which decisions are made. For example, the difficulty and cost of ensuring a representative group of refugees is able to securely travel to international and regional forums will be substantially greater than smaller-scale meetings with local or municipal authorities. This is particularly so if Geneva and New York maintain their monopolies as preferred sites of deliberation on global policy—regardless of the fact that most refugee populations are situated in the Global South. Nonetheless, as participants at the Global Summit recognised, refugees will likely face similar difficulties irrespective of the location or scale of any meeting.¹⁰²

Assuming refugees are invited, advances in technology may assist them in attending or presenting. In particular, cloud-based technology may be able to facilitate some of the financial and mobility barriers to participation that refugees face. This was demonstrated in the virtual sub-regional hubs used in the Asia Pacific Summit of Refugees in October 2018. However, more is needed to ensure refugees are provided with the financial and technical capacity to meet, organise, and consider their own interests before engaging with other stakeholders. Refugees also need to be provided with sufficient time to consider their interests and decisions. Often, decision making processes occur in timeframes where engaging a broad range of constituents is simply not feasible.

¹⁰⁰ Global Summit of Refugees (n 4) 4.

¹⁰¹ *ibid* 5-6. See further Eve Lester, 'A Place at the Table: The Role of NGOs in Refugee Protection: International Advocacy and Policy-Making' (2005) 24 *Refugee Survey Quarterly* 125, 127.

¹⁰² Global Summit of Refugees (n 4) 15.

Efforts to enhance the participation of refugees should also preserve their digital and physical security. The push for refugee voices is not without risks. In promoting their interests, refugees may experience verbal and written threats, surveillance, harassment, stigmatisation, criminalisation, arbitrary arrest and detention, deportation, kidnapping, torture, ill-treatment and murder.¹⁰³ For some refugees, appropriate training on digital and physical security protections may enable them to express their views in distinct forums. In other contexts, however, refugees may not be able to participate until some or all of these risks are removed.

The emerging human rights defender protection regime may offer some guidance as to how to best approach this issue. As individuals contributing to ‘the effective elimination of all violations of human rights and fundamental freedoms of peoples and individuals’, refugees involved in participatory initiatives are human rights defenders.¹⁰⁴ Under the 1998 United Nations Declaration on the Rights of Human Rights Defenders and international human rights law more broadly, states bear primary responsibility for protecting human rights defenders,¹⁰⁵ but non-state actors, including UNHCR and civil society, can also facilitate enabling environments for refugees to participate in decision making processes. Importantly, as Karen Bennett et al document, the human rights defender regime indicates concrete steps that states and non-state actors can undertake. This includes recognising local actors as key agents of change; tailoring protection interventions to meet the unique and specific needs of individuals, groups and communities; and complementing reactive measures with efforts to build a ‘safe and enabling environment’ for the defence of human rights.¹⁰⁶ Following these principles will help ameliorate both digital and physical security risks.

Notwithstanding the fact that refugees should be present in relevant forums, some barriers will prove insurmountable. For instance, policies and legal frameworks are often developed prior to persons becoming refugees, as not all programs are developed in reaction to the particular circumstances of each conflict or displacement. Similarly, in the early stages of displacement, the structural conditions (including the fear of persecution) that cause refugees to move may limit their capacity to have their voices heard. In these cases, it is likely not possible for refugees to contribute initially to broader policy design, though this does not prevent them from later modifying or amending those frameworks. Nonetheless, in these circumstances, the initial development of programs and policies would benefit from including people who understand vulnerability because they have experienced it, even if they are no longer vulnerable. As Dr Goedhart’s tenure as High Commissioner demonstrates, this has been at least implicitly recognised from the beginning of the international refugee regime.

¹⁰³ Karen Bennett and others, ‘Critical Perspectives on the Security and Protection of Human Rights Defenders’ (2015) 19 *The International Journal of Human Rights* 883, 884.

¹⁰⁴ United Nations Declaration on the Rights of Human Rights Defenders, UNGA doc A/RES/53/144 (9 December 1998) Annex, preambular para 4.

¹⁰⁵ *ibid* arts 2, 9, 12, 14 and 15.

¹⁰⁶ Bennett and others (n 103) 884.

5. ENHANCING THE PARTICIPATORY LEGAL FRAMEWORK FOR REFUGEES

Refugees, civil society and UNHCR have developed initiatives to centre refugee experiences in decision making, but states and international agencies remain under no clear legal obligation to ascertain and consider the interests of refugees when designing or implementing policies that affect them. The absence of clear international legal standards for participation is problematic, for law guides and channels action. International law is ‘just one institution among others which we can use for the building of a better international order’,¹⁰⁷ but it can play important roles. International law can set benchmarks for states and other actors, shift decision making authority from some actors to others, shape behaviours and ways of understanding, identify and record best practices and influence the interpretation and development of domestic law.¹⁰⁸ In this part, we identify six key points drawn from our discussion in Part 4 that should form the basis of any participatory mechanism. We then explore two options aimed at enhancing the existing legal framework to embed participatory processes. The first builds on the GCR by developing indicators, the second complements the GCR by drafting a non-binding international declaration on refugee participation.

A. On Participation

First, given the diversity of refugee experiences, institutional mechanisms or processes need to be flexible and accommodative. It is very likely that participatory processes will differ considerably according to location and the needs and interests of the target group. Any international or regional arrangement must therefore leave space for diverse and innovative smaller-scale measures. Second, space also needs to be left to allow refugees to make their own decisions as to the type and extent of participation they desire. In some cases, some refugees will prefer to be included at earlier stages of decision making. This could include the drafting of international instruments, which typically focus on articulating broad underlying norms and principles. In other circumstances, such as in local or state projects, some refugees may consider it more valuable if they participate at later stages where they can refine and implement programs.

Third, the right to participate includes the right *not* to participate. Refugees must be properly informed on the type and extent of the participatory process offered or envisaged in order to make an informed choice as to whether they become involved. This also means that, as UNHCR’s Participatory Assessment Tool states, refugees should ‘not be prompted to give information in public which embarrasses them, makes them feel uncomfortable or makes them

¹⁰⁷ J.L. Brierly (ed) *The Law of Nations: An Introduction to the International Law of Peace* (5th edn, Oxford University Press 1955) v, cited in Andrew Clapham, *Brierly’s Law of Nations: An Introduction to the Role of International Law in International Relations* (7th edn, Oxford University Press 2012) vii.

¹⁰⁸ See Robert Howse and Ruti Teitel, ‘Beyond Compliance: Rethinking Why International Law Really Matters’ (2010) 1 *Global Policy* 2.

relieve traumatic experiences'.¹⁰⁹ Fourth, while the empowering of refugees in decision making processes highlights their agency in the structures that shape refugee policy, it is important to note this agency is not unfettered. We need to be careful, as Oliver Bakewell has reflected, not to overplay the room for refugees to manoeuvre and suggest that refugees may have more autonomy than they really have.¹¹⁰ For instance, the participation of refugees in decision making processes relating to durable solutions will mean little if no solutions are on the table from which refugees can choose, or if only one solution is on the table, as is often the case.

Fifth, states and international agencies should adopt a human-rights based approach when designing participatory programs.¹¹¹ As we have noted, this involves upholding the web of interconnected human rights that relate to participation, as well as the particular rights that apply to specific refugee groups, such as women, children, persons with disabilities and Indigenous peoples. It also involves efforts to support and build safe and enabling environments that uphold refugees' human dignity and minimise risks to their security and well-being.

Finally, the success of any proposal and the embedding of processes enabling refugees to meaningfully participate in decision making processes will not be simple. Participation is political, and it is rarely a seamless process; 'it constitutes a terrain of contestation, in which relations of power between different actors, each with their own "projects", shape and reshape the boundaries of action'.¹¹² Many states are intimately concerned over the potential politicisation of refugees in public and international discourses and often act to curtail refugee decision making in policy and practice. Even instruments like the New York Declaration and the GCR, which contain positive commitments to the inclusion of refugees in policy responses, reiterate the 'primary responsibility and sovereignty of States' when it comes to implementing a multi-stakeholder approach.¹¹³ Evidence suggests that UNHCR and civil society are likely to be more supportive in the renegotiation of power relations, but at times refugees are still likely to question whether these actors are supporting the fulfilment of their human rights and interests or whether they are acting as an unnecessary intermediary, or even acting as a barrier.

B. Participatory Indicators

One approach to enhance the legal and normative framework involves developing indicators relating to refugee participation in decision making processes. These indicators could be developed as part of the GCR's monitoring, follow-up and review framework, but there is also opportunity for indicators on refugee participation to be monitored more broadly, including in

¹⁰⁹ UNHCR (n 7) 13.

¹¹⁰ Oliver Bakewell, 'Some Reflections on Structure and Agency in Migration Theory' (2010) 36 *Journal of Ethnic and Migration Studies* 1689.

¹¹¹ As noted by the UNHCR's Participatory Assessment Tool: UNHCR (n 7) 12-13.

¹¹² Cornwall (n 78) 276.

¹¹³ GCR (n 9) para 33.

other processes. Although the commitment to refugee participation in the GCR is imperfect, there is nothing to prohibit this commitment from being further developed through more detailed indicators that establish baselines, request state and international organisation commitments and evaluate progress on the type and extent of participation. This proposal could be accomplished reasonably quickly as a concrete step towards the participation of refugees in decision making in the short-term.

The GCR establishes a variety of arrangements for monitoring and evaluating progress towards the implementation of the compact. Most notably, commencing in 2019, a Global Refugee Forum will take place every four years at the ministerial level with UN Member States and other stakeholders to announce concrete pledges and contributions to the compact and review progress. Paragraph 102 of the GCR calls for the development of indicators in relation to the four overarching objectives of the Compact in time for the first Global Refugee Forum in 2019. These four objectives are to:

- (i) ease pressures on host countries;
- (ii) enhance refugee self-reliance;
- (iii) expand access to third country solutions; and
- (iv) support conditions in countries of origin for return in safety and dignity.¹¹⁴

Given the GCR's recognition of the relationship between refugee participation and effective policy, the involvement of refugees in approaches taken to each of these four objectives is essential. Indicators may be an appropriate way to ensure this occurs. Importantly, should the development of indicators on refugee participation be pursued, refugees should be involved at all stages of design and review. The typologies of participation discussed above may offer some insights into the scope and extent of participation refugees may seek, but it is for refugees to consider, in relation with other stakeholders, the specifics of such yardsticks.

Nonetheless, some types of indicators that refugees and others may consider can be suggested. These could include: those related to efforts to overcome barriers to participation (such as training and technical support, and the provision of physical and digital security protections); legitimacy indicators (such as those that examine the issues of representativeness, or the extent to which refugees believe that their voice is being heard); and, indicators related to the financial support provided to refugee participants and groups. Indicators could also address the different stages and types of participation. Ultimately, it will likely be preferable, as Emma Dunlop notes, that any indicators avoid making binary judgements on complex questions and refrain from requiring data collectors to make judgement on vague standards.¹¹⁵ At the same time, overly complicated indicators, or indicators that are difficult to measure, may become a barrier

¹¹⁴ GCR (n 9) para 7.

¹¹⁵ Emma Dunlop, 'Indications of Progress? Assessing the Use of Indicators in UNHCR Operations' (UNHCR, Research Paper No. 214 July 2011) 17.

to effective monitoring and review. The GCR already calls for states and relevant stakeholders ‘to facilitate meaningful participation of refugees, including women, persons with disabilities, and youth, in Global Refugee Forums, ensuring the inclusion of their perspectives on progress’, so there is opportunity for concrete commitments to be realised in this regard.¹¹⁶

C. *A Non-Binding Declaration*

A second option for enhancing refugee participation involves negotiating a United Nations Declaration on the Participation of Refugees in Decision Making. A Declaration along these lines could build on the protections in the Refugee Convention and the normative commitments in the New York Declaration and the Global Compact on Refugees by establishing clear principles and promoting best practice for actors to engage with and listen to refugees when developing policy or making determinations that affects them. Other articles could emphasise the importance of including refugees at an early stage in decision making forums, highlight the heterogeneity of refugees as a class of persons, commit states and other actors to develop representative processes when engaging with refugees, as well as considering the scope and extent of decision making capacity open to refugees in different contexts. Refugees themselves will identify further protections.

Several reasons suggest that this option carries significant advantages. First, a declaration that specifically deals with the participation of refugees could lay the groundwork for future legal evolution without threatening the existing apparatus. It has long been accepted that any attempt to revise the Refugee Convention to update its provisions for the contemporary international refugee regime would likely weaken existing protections.¹¹⁷ It is for this reason that recent multilateral efforts to respond to large movements of refugees and migrants, including the New York Declaration and the GCR, have taken non-binding forms. However, although a declaration does not impose legal obligations on states, it can engender considerable moral authority and political force and contribute to the development and expansion of international law on refugee protection. Indeed, the United Nations Office of Legal Affairs has noted that in practice, declarations are considered ‘formal and solemn’ instruments, ‘suitable for rare occasions when principles of great and lasting importance are being enunciated’.¹¹⁸ As such, there is ‘a strong expectation that Members of the international community will abide by’ them.¹¹⁹ Certainly, the experience of the UNDRIP suggests that ‘soft law’ instruments can influence legislative and constitutional drafting as well as judicial decisions across the globe.¹²⁰

¹¹⁶ GCR (n 9) para 106.

¹¹⁷ See eg UNHCR, ‘Protection of Persons of Concern to UNHCR Who Fall Outside the 1951 Convention: A Discussion Note’, UN doc EC/1992/SCP/CRP.5 (2 April 1992) para 7

¹¹⁸ Commission on Human Rights, Report of the Eighteenth Session, UN ESCOR, UN doc E/CN.4/L.610 (2 April 1962) 1 para 3.

¹¹⁹ *ibid* para 4.

¹²⁰ Expert Mechanism on the Rights of Indigenous Peoples, *Ten Years of the Implementation of the United Nations Declaration on the Rights of Indigenous Peoples: Good Practices and Lessons Learned: 2007–2017*, UN doc A/HRC/EMRIP/2017/CRP.2 (10–14 July 2017) 3, para 4. See further Harry Hobbs, ‘Treaty Making

A declaration on refugee participation may similarly influence international, regional, and state actors.

Second, the development of a United Nations declaration offers a valuable forum for refugees themselves to take a leading role in international standard-setting. The Refugee Convention and 1967 Protocol, along with the New York Declaration and the Global Compact on Refugees, were largely developed without the formal participation of refugees in consultations. Although these international instruments are valuable for numerous reasons, the key objectives and motivations for these instruments were not to meet the interests or aspirations of refugees more generally with regards to voice and participation.

This presents a striking contrast with the development of the UNDRIP. As Megan Davis, an Indigenous academic lawyer involved in the development of the UNDRIP notes, it was ‘the first time that states had drafted a human rights instrument directly with the rights-holders empowered by the instrument’.¹²¹ Indigenous peoples were ‘deeply involved in discussions and negotiations’ at ‘every step’,¹²² and their involvement clearly influenced the final text, which ‘substantially reflect[s] indigenous peoples’ own aspirations’.¹²³ Significantly, the Declaration enshrines key guarantees desired by Indigenous peoples, including the right to self-determination, as well as the right to participate in decision making in matters that would affect their rights.¹²⁴ The development of the UNDRIP should represent best practice in the drafting of international instruments.

Third, more than simply identifying distinct aspirations, the close involvement of refugees in the development of a declaration will enhance its normative legitimacy. Consider the UNDRIP again. As we noted, declarations are not legally binding; although they are intended to be respected, only moral and political pressure can persuade states to adhere to their commitments. In this light, the presence of Indigenous leaders, lawyers, and activists around the drafting table has enhanced the instrument’s normative weight and grounded the document in a ‘high degree of legitimacy’.¹²⁵ As James Anaya, the Special Rapporteur on the Rights of Indigenous Peoples, explains:

This legitimacy is a function not only of the fact that it has been formally endorsed by an overwhelming majority of United Nations Member States, but

and the UN Declaration on the Rights of Indigenous Peoples: Lessons from Emerging Negotiations in Australia’ (2019) 23(1-2) *International Journal of Human Rights* 174.

¹²¹ Davis (n 33) 440.

¹²² Lilian Aponte Miranda, ‘Indigenous Peoples as International Lawmakers’ (2010) 32 *University of Pennsylvania Journal of International Law* 203, 242.

¹²³ *Interim Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN doc A/65/264 (9 August 2010) 17 para 60.

¹²⁴ UNDRIP, arts 3-5, 18.

¹²⁵ *Interim Report of the Special Rapporteur* (n 123) para 60.

also the fact that it is the product of years of advocacy and struggle by indigenous peoples themselves.¹²⁶

The Declaration has not resolved all of the challenges faced by Indigenous peoples. Indigenous rights remain tenuous, and some advocates have suggested the time is right to develop a binding Convention on the Rights of Indigenous Peoples.¹²⁷ Nonetheless, the UNDRIP is increasingly valuable as a political and legal instrument that protects and promotes the rights of Indigenous peoples.¹²⁸ As this suggests, the potential value of a Declaration on the Participation of Refugees in Decision Making is directly related to the extent to which refugees themselves will be able to participate in its development and drafting.

Not all is simple, however. The extensive negotiations that preceded the GCR's adoption and, most prominently, the US and Hungary's vote against the instrument, reveal that developing even soft-law instruments in this area remains difficult. These difficulties may be amplified by the inclusion of refugees in the formal drafting process, which will throw up similar practical challenges as those canvassed in Part 4. It is likely that questions over who is entitled to participate and how a representative group can be assembled will persist. Further complexities will also arise. Drafting an instrument directly with the beneficiaries will starkly reveal 'divergent expectations' and result in a 'drawn-out and often tense process'.¹²⁹ Uneasy compromises may need to be struck. A declaration will be difficult and it will not solve every challenge, but it offers key advantages.

6. CONCLUSION

In recent years, refugees have asserted their political agency by contesting their position within the international regime that governs their lives. Challenging existing norms and structures, refugees have called for 'direct refugee input'¹³⁰ in all refugee policy and sought to be included as 'equal partners'¹³¹ in forums where decisions about them are made. Realising some successes, their actions have exposed the inadequacies of the current legal framework. Notwithstanding some recent promising steps, no hard or soft law instrument obligates states or international agencies at the international or regional level to consult with and listen to refugees when designing programs and policies that concern refugees.

This article has reflected on the push for refugee voice and considered several complications and challenges that arise when establishing truly participatory processes in practice. Recognising that refugees themselves must determine appropriate solutions, we have identified

¹²⁶ *ibid.*

¹²⁷ Julian Burger, 'After the Declaration: Next Steps for the Protection of Indigenous Rights' (2019) 23(1-2) *International Journal of Human Rights* 22.

¹²⁸ Expert Mechanism on the Rights of Indigenous Peoples (n 120) para 4.

¹²⁹ Davis (n 33) 440.

¹³⁰ Network for Refugee Voices (n 3) para 11 (emphasis added).

¹³¹ Global Summit of Refugees (n 4) 15.

six key points that should guide states and other actors in the design of processes that seek the meaningful participation of refugees. Bearing these points in mind, we have also explored two potential reform options: trackable indicators measuring meaningful participation, and a new non-binding United Nations declaration. Each option could promote the moral, political, and ultimately legal authority for meaningfully including refugees in the design and implementation of policy that affects them. Although states may resist the renegotiation of power relations that this entails, it is always important, as BS Chimni reminds us, to envision ‘a different political and social imagination’, one where refugees are a central agent in a just global order and their right to be heard is respected.¹³²

¹³² BS Chimni, ‘Global Compact on Refugees: One Step Forward, Two Steps Back’ (2018) 30(4) *International Journal of Refugee Law* 630, 634.